

Please note, items with a * next to them are posted in [the Learning Center](#). If you're having problems accessing them, log into the Learning Center first and then click on the link.

LESSONS LEARNED AND NATIONAL PERSPECTIVE:

1. Be prepared to lose at the trial court.

- a. In general, very few people understand conservation easements and the protection of conservation preserves. Judges do what they think is right from their perspective.
- b. Even carefully worded documents can and will be ignored.
- c. It's not what we think an easement says that counts. It is how the courts interpret it.
- d. Our job is to make it clear to the court what that interpretation should be.
- e. Ohio case on a family dispute by the original donors requiring a partition action where land division was prohibited by the CE. See [summary](#). It went all the way to an [appeal](#).
- f. Make a good *CONSERVATION* case for why land should not be divided (in defense of a no-division clause in a conservation easement), that is, why we (people) should care about whether land under easement is divided, e.g.,:
 - Avoid fragmentation of farmland and habitat
 - Keep housing with the land
 - When divided there tend to be multiple ancillary structures, utilities and roads (relates to fragmentation, above)
 - This can also affect scenic values
 - It leads to conflicting land management practices
- g. Do an online database search to see if there have been any sales or subdivisions of properties you hold an interest in.

2. Because of #1, we need to do better when drafting conservation easement clauses so they are clear, enforceable, can be monitored easily.

- a. See, [Conservation Easement Drafting: Pointers for Balancing Risk*](#), with suggested no-division clause and a suggested cost and fees recovery clause based on what judges have said.
- b. See [June 2020 Wyoming Supreme Court](#) case where too limited clause barred cost and fee recovery even though the land trust and TerraFirma won twice on the substantive dispute of when is a driveway a driveway.
- c. See, the tax case pointers affecting easement drafting linked at the end.

3. Most of the time -- **you will not recoup any costs or fees**. If you have board members who think they will recover legal expenses from the opposing party, they should know that recovery rate is less than 10%-- a good reason to invest in TerraFirma.

4. We might ask specific questions when we are monitoring.

- a. Instead of "do you have plans to subdivide" ask, "have you signed any papers . . . "

- b. Be inquisitive, conversational. Listen for clues that something might happen in the future – such as estate planning, a mortgage, a boundary adjustment, a lease, an adult child returning home and so forth.
5. **Take action immediately when you find a trespass.**
 - a. [Action Steps Land Trusts Can Take When Faced with an Encroachment*](#)
 6. **Not everyone is rational**, and certainly are not all cooperative.
 - a. The most expensive cases are driven by well-funded successor owners of CEs or neighbors to preserves who are determined to have their own way regardless of cost.
 7. **Be strong.** Look at all the alternatives and options, be professional, and stand strong. Believe in the intrinsic value of land conservation to everyone.
 - a. Knowing when to shift gears is critical and it is MUCH earlier than most people think.
 - b. Remember good relationships go both ways; they are not one-sided.
 - c. Terrafirma can help you assess the best course of action.
 - d. Chart on costs of long term disputes.
 8. **Trespass** occurs on both conservation easements and fee lands.
 - a. Chart on fee land claims.
 - b. Chart of types of CE violations.
 9. We are seeing **more violations with ORIGINAL** Landowners!
 - a. No one planned for that, but now we should.
 - b. Chart on costs of disputes with various challengers.
 10. **Learn to love [risk management*](#)**
 - a. Procedures: how to get hard questions right
 - Think through hard questions before crisis hits, staff turns over, or both.
 - Provide a map for how to handle the unexpected well, without harming a future case or creating new risk
 - [Enforcement*](#)—when and how to “go legal”
 - File management—essential as staff turns over and for admissibility in litigation
 - Document retention—know how to get key documents, and what else you have
 - b. Attorneys on boards
 - Role Confusion – the organization is the client (not the board)
 - A board member is not a disinterested legal advisor even if she is smart and right
 - Conflicts of Interest and Conflicting Duties of Loyalty
 - Attorney board members are ideal to be the liaison with the outside paid attorney

- c. Privilege at Risk
 - [Privilege protects confidential communication between client and client’s lawyer*](#)
 - Regardless of representation status, board members ask legal questions of lawyers
 - Risk that communications are discoverable if you use a board member
 - Professional Ethics_– analysis required at every step of relationship
 - Preparation – in communications regarding role and with staff
 - Procedures – for Conflicts & Privacy; for Staff and Volunteers; to protect Privilege
 - *File a claim early with insurers but keep the communication factual until you have coverage confirmation; then information necessary to coverage or defense is generally privileged*
 - d. On the Terrafirma website there is a [reserve calculator and a risk management course](#) to help customize a plan for your land trust.
 - e. Land Trust Alliance and Terrafirma members also have **free access** to the Nonprofit Risk Management Center from this [page](#). Use this great resource!
 - f. Get a \$1/property discount if your organization takes the risk management webinar every year. Watch for announcements for November – January.
 - Announced in TerraBite – sign up here: <https://terrafirma.org/>.
 - A list will be sent the contacts listed in Terrafirma (you can add your name by going to your land trusts page – there is no limit).
 - We will post a list on the [Conservation Defense page](#) at the Land Trust Alliance site.
 - g. Get the free risk tip of the month from Terrafirma. Sign up for TerraBite on the landing page. They are short and simple
11. Please **file Terrafirma claims** the first instant you see any hint that there might be any potential problem even before you are positive there is actually a problem. If you don’t, you jeopardize the potential for coverage.
- a. The claim year is March 1 to March 1; all claims must be made within the year with 60 day grace period. Call or write to [Leslie](#) (802-262-6051) or [Hannah](#) (202-800-2248) with Terrafirma at first indication of a potential problem.
 - b. Filing a claim does not penalize the land trust in any way ever.
12. **What kinds of insurance** do you need? See [Assessing Insurance Needs*](#).
- a. Note, that Directors and Officers insurance includes employment practices and covers claims by volunteers. Make sure the definition of covered persons covers everyone you want it to, e.g., employees who aren’t directors.
 - b. General liability is required to participate in Terrafirma.
 - c. *Land Trust Standards and Practices* [Practice Element 6E1*](#) and [6E2*](#)
 - d. [A Guide to Risk Management for Land Trusts*](#)
13. Terrafirma insures over **9.8 million acres of land** conserved with land trusts
- a. See land trusts, acres, premium, parcels chart
 - b. Terrafirma Risk Retention Group LLC now has 541 land trust members, operates in 48 states plus D.C., and insures over 9.8 million acres with gross written premium paid of over 1.8 million.

- c. [Information](#) on costs, coverage, discounts and claims
- d. See [2020 Annual Report](#)
- e. In 2021 conservation easements comprise the most insured rights with 29,664 (86%) of the enrolled 34,788 parcels from 48 states and D.C. The remainder are land owned (4,830), access easements (63), and trail easements (143) and deed restrictions (88).
- f. Extrapolating the 2015 census data for the current Terrafirma member land trusts shows that their portfolios plus those of self-insured organizations constitutes 83% of all conservation easements and 91% of all easement acres. They also own 50% of fee parcels and 86% of fee acres.
- g. Terrafirma paid over \$3.4 million dollars in costs and fees on behalf of land trusts in over 1160 claims over eight policy years.
- h. Get your [questions answered](#) on the Terrafirma website at the INFO link in the nav bar.

14. Tax stuff you really need to know:

- i. [Pointers For Balancing Risk When Permitting Structures On Deductible Conservation Easements*](#)
- ii. [Pointers for Drafting the Proceeds Clause in Conservation Easements*](#)
- iii. [Pointers for Balancing Risk on Conservation Easement Modification Eight Elements to Consider Following the Full Tax Court Decision*](#)
- iv. [What you need to know from tax cases shorn of nuances*](#)
- v. [Pointers for Balancing IRS Audit Risk When Permitting Commercial Forestry on Tax-Deductible Conservation Easements*](#)

15. More resources.

- a. [Land Trust Standards and Practices](#), 2017
- b. The Learning Center <https://tlc.lta.org>
 - i. Check out the Elements Descriptions for detailed information on each Standard.
 - ii. Online and on-demand coursework
 - iii. Forums including Ask An Expert, stewardship and communications
- c. See also, the Land Trust Accreditation Commission's [Requirements Manual](#)
- d. Land Trust Alliance Staff:

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In [*Sonoma Land Trust v. Thompson*](#) (Sonoma County, Super. Ct. No. SCV-258010), the 1st District Court of Appeal of the State of California affirmed the trial court in all respects finding the landowners' arguments unavailing concerning the destruction of three mature oak trees on conserved land and other severe damage done to the land. The California Council of Land Trusts, the Land Trust Alliance, Save the Redwoods League, Sierra Foothill Conservancy and the Trust for Public Land filed a joint amicus brief in this case. The state attorney general also filed an amicus brief on behalf of several state agencies.

You may recall that, in 2009, the Sonoma Land Trust accepted a donated conservation easement on a 34-acre parcel. Toni and Peter Thompson purchased the property in 2013, and they contracted with a landscaping company one year later to relocate three mature rare heritage oak trees from the protected property to an adjacent parcel that they owned through an LLC, where they were building a house. Two trees died after crews uprooted, dragged and transplanted them. Another tree died because of an attempted transplant — crews could not move it because of large boulders entangled in its root system. To facilitate the tree relocations, the landscaper established a one-third-mile haul road that required the removal of 12 smaller trees and other vegetation. The Thompsons also directed a contractor to dump four-foot-thick dredged pond sediments from their abutting LLC parcel onto the protected property. The Thompsons failed to obtain required grading permits or stormwater pollution prevention plans for any of these activities. They neither requested nor received permission from the land trust, as required by the conservation easement.

When a neighbor informed SLT of suspicious activities, SLT arranged for a site visit. The Thompsons scrambled to finish the relocation project before the visit, but they could only move one of the three trees by the time SLT staff arrived. During and after the visit, the court affirmed the trial court finding that the Thompsons actively concealed evidence about the land damage, and in fact SLT did not learn about work on two of the mature trees until after the litigation had commenced. The Thompsons also lied repeatedly about their reasons for relocating the one known tree, claiming that they were saving the tree from pruning by the utility company, which held a senior easement across a portion of the protected property. Following the site visit, the Thompsons engaged in a variety of other dilatory, threatening and mendacious behaviors toward SLT. The Thompsons attempted to conduct their own restoration to minimize the impacts of their work but only made matters worse by hydro seeding a grass mix that included non-native seeds and failing to address erosion.

After the Thompsons refused to carry out an appropriate, professional restoration, SLT filed [suit](#) in 2015, backed by Terrafirma Risk Retention Group LLC. The court conducted a bench trial in 2018 and ruled that the Thompsons, as well as the LLC of which they were the sole members, were jointly and severally liable for numerous, extensive and "truly extraordinary" violations of the conservation easement. With respect to the LLC, the court pointed to the California conservation easement enabling statute and longstanding common law in determining that third parties could be liable for easement violations. Moreover, the court rejected the Thompsons' claims that SLT staff had acquiesced, tacitly approved or waived any of the easement's provisions, quoting provision of the easement that precluded any such oral approvals or any waivers. Nor did the court credit the Thompsons' arguments that SLT failed to mitigate its damages.

As the court order meticulously documented, SLT responded promptly and diligently to the violations they observed. Any alleged hesitation in enforcing the easement more promptly and vigorously after the site visit was due to the Thompsons' numerous lies of commission and omission. The court awarded SLT injunctive relief to implement its proposed restoration plan, as well as the full damage amounts requested: restoration costs of \$318,870, \$73,800 for destruction of the three oaks, staff costs of \$92,286 and expert costs of \$90,943, for a total of \$575,899.

Pointing to the easement itself, the enabling statute, relevant case law and the Restatement (Third) of Property, Servitudes, the court found that the appropriate measure of damages was the cost to restore the property and not, as the Thompsons claimed, the loss to the fair market value of the easement. The high restoration costs reflected the extensive steps required to bring back the native plants that had been replaced by invasive species across the haul road area. In addition, because the land trust could not restore the three mature oaks at the heart of the dispute, a professional arborist used a trunk formula method to value the damage attributable to their removal. The court awarded staff and expert costs because of the broad wording of the easement's violation provision and the express provision for their reimbursement.

In December 2019, the trial court awarded SLT attorneys' fees and costs of \$2.96 million, applying Bay Area market rates to the attorneys' hours as well as a fee enhancement, or multiplier, of 1.4x to account for the contingent nature of the work, the risk undertaken by counsel, and land trust's resounding success in the case. And in December 2020, the appellate court affirmed the trial court's judgment on the merits in all respects. The hearing and opinion on the attorneys' fees award is not set yet and that division isn't following its published calendar. Counsel expects it will be set soon, but it is difficult to predict. *Source: Rob Levin, Leslie Ratley-Beach, Bob Neale, Sarah Sigman*