



**COLORADO COALITION OF LAND TRUSTS
ANNUAL CONFERENCE – DENVER, COLORADO
MARCH 8 CONSERVATION LAW FORUM**

National Trends and Cases Update

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Agenda

1. Brief Introductions and expectations
2. Discussion of recent cases nationwide
 - a. Zagrans v. Elek (Neighbor Standing)
 - b. In Re Jurgielewicz (Bankruptcy)
 - c. Berman v. Sitrin
 - d. Stonegate Family Holdings v. Boy Scouts of America (Road Issue)
 - e. Stitzel v. State of Maryland (Subdivision)
3. Data Trends
4. Conservation Defense Insurance
 - a. Uphold conservation, create favorable and avoid unfavorable case law
 - b. Provide early free assistance and prevent unnecessary litigation
 - c. Proposed insurance is a safety net not a substitute for sufficient endowments
 - d. Covers legal costs for *both* enforcement and defense
 - e. Legal Structure
5. Resources

LAND CONSERVATION CASE LAW SUMMARY EXCERPTS

- Berman v. Sitrin, 991 A.2d 1038 (R.I. 2010)
 - State: Rhode Island
 - Procedural Status: Case closed.
 - Date: 2010
 - Keyword(s): Liability; negligence; private fee land; public access; recreational use statute; trespass.
 - Summary of Facts and Issues: In 2000, 23-year-old newlywed Simcha Berman and his wife paid an admission fee to visit the Breakers, an historic mansion in the City of Newport (City) owned and operated by the Preservation Society of Newport (Society), a nonprofit corporation. Their tour guide encouraged them to visit the nearby Cliff Walk, a famous tourist attraction, after the tour of the Breakers. The Cliff Walk is a footpath that runs across several private properties, including the Society's. The City was responsible for maintaining the Cliff Walk, and it is a public easement, much like a municipal street. Tragically, Berman fell from the Cliff Walk and suffered severe and permanent injuries, rendering him a quadriplegic. Berman fell after stepping onto what appeared to be a side footpath but in fact was an erosion washout. When Berman fell, he was on a section of the Cliff Walk that was owned by the Society. Rhode Island has a recreational use statute that provides immunity for landowners or land managers who do not charge the public to use their property for recreational purposes. Although the statute originally applied only to private landowners, it was amended in 1996 to extend to public landowners such as the City. Like many recreational use statutes, Rhode Island's statute includes an exception for the "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity..." Prior to 2000, there had been several other serious accidents leading to death or severe injuries on the Cliff Walk, and numerous documents published by national or state agencies recognized its hazards. Berman sued both the City and the Society. The trial court granted summary judgment in favor of the City and the Society, finding the recreational use statute fully effective in shielding them from tort liability. Berman appealed, raising several issues. He contended that the Society's tour guide had invited him onto the Cliff Walk, thus invoking an "invitee" exception to the recreational use statute. He also claimed that the Society and the City were engaged in joint management of the Cliff Walk, rendering them both liable under the "malicious and willful" exception. Finally, he argued that the Society's charge for admission to the Breakers also included admission to the Cliff Walk.
 - Holding: First, the Supreme Court held that the Society cannot be liable under the recreational use statute, rejecting each of the arguments put forth by Berman. Second, the Court found that even without the application of the recreational use statute, under basic negligence common law the Society owed no duty of care because the Cliff Walk is a public easement, much like a street, for which it bears no responsibility. Finally, the Court reversed the trial court and held that the suit against the City could proceed because the City's knowledge of previous accidents on the Cliff Walk were substantial enough to invoke the "willful or malicious failure to guard or warn" standard. In particular, the Court held that "malicious" in the

context of the statute means “[s]ubstantially certain to cause injury,” and was not akin to the criminal common law definition connoting evil intent.

- Analysis and Notes: This is an interesting case that bears reading for all land trusts and their risk management teams. The opinion is instructive in discussing both why the Society was not held liable and why the City could indeed be held liable. On a basic level, the case is a reminder that even strongly worded recreational use statutes do not guarantee immunity. The Court’s broad interpretation of the word “malicious” is especially noteworthy, and could have widespread implications for landowners if adopted in other jurisdictions.
- In re Jurgielewicz Duck Farm, 2010 Bankr. LEXIS 1507, 2010 WL 2025503, No. 8-10-70231-478 (Bankr. E.D. N.Y. May 20, 2010)
 - State: New York
 - Procedural Status: Case active.
 - Date: 2010
 - Keywords: Agricultural conservation easement; bankruptcy; municipal conservation easement; public conservation easement; termination.
 - Summary of Facts and Issues: The Jurgielewicz Duck Farm (Farm) was one of two remaining duck farms in Suffolk County, Long Island. The farm operated on approximately 45 acres and had been in operation since 1919. In 2007, the Farm sold development rights on the property to the County and the Town of Brookhaven for \$5.6 million. In January 2010, the Farm filed for Chapter 11 bankruptcy. As part of the bankruptcy proceedings, the Farm’s debtor-in-possession lender, Couack Capital Corp. (“Couack”), sought to sell the property free and clear of any restrictions, and with its full development rights. The County and Town objected. Couack contended that the development rights could be terminated under a section of the federal bankruptcy statute (11 U.S.C. § 363(f)) that allows the termination of a restrictive covenant under certain conditions. One of these conditions is that “applicable non-bankruptcy law permits sale of such property free and clear of such interest.” Another is that the holder of the restrictive covenant “could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.” Couack cited a particular state real property statute allowing for the termination of restrictive covenants as evidence of applicable non-bankruptcy law. Meanwhile, it also claimed that the County or Town could be compelled to accept a money satisfaction for the development rights, citing various examples of easement holders being compensated in an eminent domain context.
 - Holding: The bankruptcy court rejected both of the lender’s arguments, holding that: (a) a more particular statute addressing restrictive covenants held for charitable purposes by governmental entities applied instead of the more general statute invoked the lender; and (b) monetary damages would not adequately protect the Town’s and County’s interest in protecting the farm property.
 - Analysis and Notes: This is an important case that could serve as useful precedent in a variety of contexts in which a party seeks to terminate a conservation easement, in bankruptcy or otherwise. The opinion includes a few pro-conservation passages, including a conclusion that the purpose of an agricultural restriction “is not defeated even though years may pass before another farmer takes over the land.” However,

the County's and Town's interest was styled as a purchase of development rights, not as a conservation easement, even though both tools are functional equivalents. Thus, the Town and County apparently never sought to avail themselves of the additional protections afforded conservation easements under New York's conservation easement enabling statute. This is unfortunate, because although the outcome here was felicitous from a land conservation perspective, the court's analysis turned in part on a statute that might not apply to protect conservation easements held by a nonprofit entity as opposed to a government entity.

- Further Commentary from the Second Symposium: Bankruptcy code § 363(f) must conform with state law, so if state law provides that conservation easements are perpetual and cannot be purchased back or development rights restored, then the bankruptcy court has to abide by that. The bankruptcy court cannot manufacture a law or policy that does not exist in state law for purposes of this code section. For example, even though a land trust could be compelled to accept a money satisfaction to terminate conservation restrictions in a condemnation case, for that to take effect in bankruptcy court under 363(f) there would have to be a condemnation in progress, not just a hypothetical possibility. Creative creditors' counsel will attempt to use this code section to terminate easements, although experts anticipate that the chance of success is low. In the event a state routinely starts allowing buy-backs for any minor reason, bankruptcies could then capitalize on that per 363(f) – but then conservation easements would be at-risk in that state anyway regardless of bankruptcies. The experts suggested that conservation easements should **not** include language stating an intent to survive bankruptcy proceedings. Nobody can contractually eliminate their transaction from bankruptcy rules of law (otherwise every credit card application/contract would do so). It's more useful for the conservation easement to demonstrate that it is perpetual as provided by its state enabling statute.
- Practice Point: All this is separate from the 'look-back' provisions of bankruptcy law. Land trusts should assess their risks of dealing with any donor who might be in bankruptcy or likely to file for bankruptcy (or Medicaid) within the ensuing 3-4 years. A routine check of the PACER system (database with current bankruptcy and other federal court filings) as part of any title search is critical. Land trusts may also wish to check state attorney general and federal SEC filings to ensure that an action for fraud is not pending that could also result in the 'claw-back' of the conservation easement.
- Stitzel v. State of Maryland, ___ A.2d ___, 2010 Md. App. LEXIS 154 (Md. Ct. Sp. App. 2010)
 - State: Maryland
 - Procedural Status: Case active. Period for appeal still open.
 - Date: 2010
 - Keyword(s): Agricultural conservation easement; contract law; public benefit; public conservation easement; purchase and sale agreement; rescission; state conservation easement; subdivision; title; violation.
 - Summary of Facts and Issues: In 2002, Paul and Helen Stitzel sold an agricultural conservation easement to the Maryland Agricultural Land Preservation Foundation (MALPF), a quasi-public agency, on 264 acres of land for \$570,000. The easement prohibited any "subdivision" without the prior written consent of MALPF. The

easement was granted pursuant to a statutory program, and MALPF adopted regulations to implement the program. These regulations define “subdivision” broadly as “the division of land into two or more parts or parcels.” In 2005, Stitzel sold a 16-acre lot (Lot 14) that was part of the easement-protected land to Donald and Virginia Bowers for \$370,000.00. Lot 14 was already a separate parcel when Stitzel granted the conservation easement. Due to what the opinion calls “an unfortunate series of errors,” Stitzel did not inform Bowers of the easement and did not seek MALPF’s approval of the sale. Moreover, the easement was not discovered by Bowers’ title search because MALPF’s title company had erroneously recorded the Easement in the wrong county. Furthermore, Bowers’ title company did not inform Bowers of an earlier 5-year term preservation agreement that had been properly recorded and that might have apprised them of the later conservation easement. MALPF filed suit against Stitzel and Bowers, seeking to rescind the conveyance as a violation of the easement. Initially, Bowers sought a declaratory decree that they took Lot 14 free and clear of the agricultural preservation restrictions, but they later sided with MALPF and sought a declaratory judgment declaring the conveyance null and void. Among other things, Stitzel contended that the conveyance of Lot 14 was not a “subdivision,” pointing to a separate land use statute’s definition of this term, and reasoning that the lot had already been subdivided years before the easement’s execution. The trial court ruled for MALPF, finding that MALPF’s regulatory definition of “subdivision” prevailed over the land use statute’s definition. The trial court also declared the conveyance of Lot 14 null and void, after balancing the interests for and against enforcement of the conveyancing contract.

- Holding: The Court of Special Appeals affirmed the trial court in all respects. In particular, the appellate court found that MALPF’s broad definition of “subdivision” is consistent with the easement program statute’s express policy in favor of agricultural preservation, as smaller tracts are not economically viable as farms. The appellate court also upheld the trial court’s balancing decision, finding that MALPF’s interest in preserving large blocks of agricultural land outweighed any harm to Stitzel.
 - Analysis and Notes: This case is an important precedent from a land conservation perspective, because it is quite common for a conservation easement to be placed on contiguous but distinct legal parcels. In most cases, the easement prohibits subdivision or division, without expressly stating that the previously distinct parcels can no longer be conveyed separately. So this opinion is reassuring for easement holders, although of course it is based on the specific regulatory language behind the easement. Meanwhile, in a cross-claim action, Stitzel also was found liable for damages to Bowers for transaction costs, property taxes paid, maintenance costs, interest, etc. The trial court also found for Bowers in their claims against the title search company, for not catching the earlier 5-year term preservation agreement, a decision that the title search company did not appeal.
- Stonegate Family Holdings, Inc. v. Revolutionary Trails, Inc., Boy Scouts of America, 73 A.D. 3d 1257, 900 N.Y.S.2d 494 (N.Y. App. Div. 2010)
 - State: New York

- Procedural Status: Case closed.
- Date: 2010
- Keyword(s): Access; public access; public conservation easement; recreation; road; state conservation easement.
- Summary of Facts and Issues: In 1959, Amandus Watts (Watts) entered into an agreement with abutting landowners to create a right-of-way over lands then owned by Watts. The agreement provided that "until the said roadway over which the easements are hereby granted shall become a public, state, county or town road, the same shall be and remain a private road for the exclusive use . . . of the parties hereto and their grantees of the premises and property to which said easements are appurtenant." The agreement further provided that, until the actual dedication of the road to a proper public authority, "no member of the general public shall have any right to use the lands of the parties hereto or any part thereof." In 1963, Watts donated 5,500 acres of his property to the local Boy Scouts chapter, and included a right-of-way over the road that was subject to the 1959 road agreement. By a separate contemporaneous agreement, the Boy Scouts and Watts agreed that these conveyances had been made "upon the express condition that the lands thereby conveyed shall be used and utilized as an outdoor camp and recreation park for members of [the Boy Scouts] and organizations allied or affiliated therewith ... and in default thereof or upon breach of the condition aforesaid the lands so conveyed shall revert to [Watts], his assigns and legal representatives, provided however, that this condition shall . . . in no event [] extend beyond thirty-five years from the date hereof." In 2002, the Boy Scouts sold a conservation easement in perpetuity to the State of New York, which permits public use and recreation on the Boy Scouts' property for 10 months of the year and allows the public to access the property via a portion of the right-of-way subject to the 1959 road agreement. In 2005, Stonegate Family Holdings, Inc. (Stonegate), a neighboring landowner that had rights in the road, filed suit to block the public from using the road, claiming that such use violated the 1959 road agreement. Stonegate also claimed a violation of the 1963 agreement establishing the use limitations on the 5,500 acres. The trial court dismissed all of Stonegate's claims on summary judgment, and Stonegate appealed.
- Holding: The appellate court affirmed in all respects, holding that: (a) the 1963 agreement had expired by its own terms; (b) even if a pre-1988 violation had occurred, the 1963 agreement was a condition subsequent and not a covenant, and therefore could not be enforced by Stonegate; (c) because the conservation easement grants the State extensive affirmative rights to use the property, the State is a ""grantee of the premises and property" within the meaning of the 1959 road agreement; and (d) the conservation easement's grant to the public to traverse the road did not convert the road from a private road to a public road in violation of the 1959 road agreement, especially because the State was permitting access not in its governmental capacity, but as the private holder of the right-of-way and an interest in the land.
- Analysis and Notes: Access by the general public over private roads to reach land trust- or government-owned conservation easement or conservation fee lands is a sleeper issue in many transactions. This opinion could serve as a useful precedent

for land trusts in a variety of contexts. Although the facts here are unique, the issues are fairly common.

- Zagrans v. Elek, 2009 Ohio 2942 (Ohio Ct. App. 2009)
 - State: Ohio
 - Procedural Status: Case active. Period for appeal still open.
 - Date: 2009
 - Keywords: Amendment; enabling statute; county conservation easement; neighbors; public conservation easement; standing.
 - Summary of Facts and Issues: In 1992, several neighboring landowners granted separate conservation easements to a county parks district. In 2003, the Eleks purchased one of the protected properties from the original grantor of the easement. In 2004, the Eleks and the parks district executed an amendment of the easement, removing one area of the property from the easement and adding another. The opinion does not mention the respective sizes of the removed and the added areas. A handful of neighbors, including both contemporaneous grantors of similar conservation easements as well as successor landowners to original grantors, filed suit against the Eleks and the parks district. These neighbors challenged the amendment as invalid. The parks district was dismissed from the action. The trial court ruled that the neighbors lacked standing to enforce the easement, and that even if standing were granted, the amendment was valid. The neighbors appealed.
 - Holding: The appellate court affirmed, holding that the neighbors lacked standing under both traditional common law of easements and the Ohio conservation easement enabling statute, as they were not parties to the easement that protected the Eleks' property. Having ruled on standing, the Court did not address the validity of the amendment.
 - Analysis and Notes: This case is important because it is the clearest and highest-level instance of a court holding that neighbors of conservation easement-encumbered properties do not have standing to enforce those easements. Note that the neighbors here were able to present an additional argument for standing than a typical neighbor, because their own properties were encumbered by similar easements granted contemporaneously with the Eleks' easement. Thus, they argued, the easements established "one cohesive, protected area." The Court was not persuaded, noting that the Eleks' easement made no mention of other protected properties, nor did it allow any public access. The Court also interpreted the Ohio conservation easement enabling statute, which provides that an easement "may be enforced by injunction or in any other civil action by the holder of the easement," to mean that only a holder could enforce an easement. Several state enabling statutes have similar language, so this opinion could serve as guidance for courts in these other states. Finally, the Court rejected the neighbors' claims that they had standing as taxpaying citizens of the county or as third-party beneficiaries of the easement.

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Conservation Defense and Enforcement Data

Definitions. Conservation “enforcement” involves discovering and resolving easement violation and preserve trespass. If the land trust and landowner cannot resolve the dispute, then as a last resort the land trust may initiate litigation. Land trusts use a variety of techniques before seeking remedies in court. Conservation “defense” means that the land trust responds to a legal action or challenge brought against the land trust by another person or entity, including a landowner, neighbor or another third party.

Data and trends. First, the 2003 Alliance national land trust census data¹ indicated that when *all* violations were considered, the violation rate as of the end of 2003 was about 5 percent, that is, about one violation had occurred for every 20 easements. This rate represents the total number of violations as a percentage of the total number of easements held by land trusts through 2003. It includes minor and technical violations as well as major violations – that is, the entire spectrum of violations from those that were easily resolved through discussion with the landowner to those that required litigation.

Second, the 2004 CEVAS² survey, which gathered further information from some of the land trusts identified in the 2003 census that had experienced easement violations, determined that 75 out of the 980 easement violations identified in the survey were “major violations.” In this study “major violations” were characterized as construction of prohibited structures or destruction of conservation attributes protected under the easement, and costing in excess of \$1,000 of out-of-pocket expenses to correct. The balance were “minor violations,” those that impacted conservation attributes but cost less than \$1,000 to resolve. Thus major violations in this study comprised about 8 percent of the total number of major and minor violations combined.

Third, a University of Wisconsin survey conducted for the Land Trust Alliance in the summer of 2008 found a “claims” rate of 0.043 percent, that is, one claim for every 2,333 easements. In this study, a “claim” was defined as a violation costing in excess of \$5,000 that would have been covered by the proposed Conservation Defense Insurance program. Claims, then, represented the violation types that are the most challenging and costly to resolve. Comparing the 0.043 percent claims rate to the 5 percent overall violation rate as determined by the 2003 census data, one may infer that the most challenging and costly violations comprise less than 1 percent of the total number of violations.

The University of Wisconsin survey also confirmed that land trusts generally are seeing both an increase in the severity and the frequency of violations. Finally, additional evidence suggests possible future trends. Many land trusts have observed that as easement portfolios age, the rate of violations increases. This seems to be due in part to an increased rate of violations by successor landowners. This trend was confirmed by the 2004 CEVAS

¹ vanDoren, Jason B., 2004 Conservation Easement Violation & Amendment Study, Detailed Analysis, January 2005.

² vanDoren, Jason, Summary of the 2004 Conservation Easement Violations & Amendments Study, *Exchange* Summer 2005 (Vol. 24 No. 2)

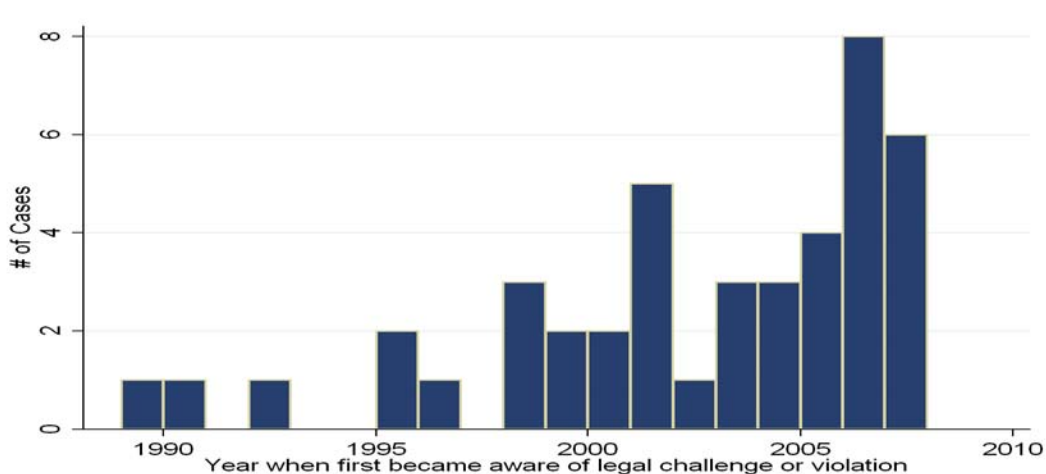
survey,³ which indicated that subsequent landowners were the most common easement violators. Furthermore, anecdotal evidence suggests that as easement portfolios grow, the rate of violations increases – that is, land trusts that hold larger portfolios, for example more than 100 easements, have a higher percentage of violations than land trusts with smaller portfolios. This may be due in part to easement aging as well as increased detection of violations as land trusts grow in size and gain experience.

Lastly, land trust practitioners have noted that the severity of challenges is increasing, as is the frequency of the larger claims. While the violation percentage rate may be relatively stable, the difficulty level appears to be increasing.

On the positive side, land trusts with large reserves have observed that having sufficient legal defense funding available has been extremely effective in discouraging challenges by successor landowners that wish to break an easement. Perhaps a well-funded legal defense fund may decrease the frequency of legal challenges.

Framework for planning for defense. These data, gathered under different assumptions, definitions and objectives, cannot precisely forecast exact legal defense funding requirements, but when considered together provide a framework for planning:

- An average land trust can expect violations, technical, minor and major, at a rate of around one easement violation per 20 easements held. (This rate is the total number of easements violated compared to the total number of easements held over the lifetime of the easement portfolio; not an annual rate of new violations.)
- Roughly one-tenth of the violations may require an investment of \$1,000 or more.
- Around one-hundredth of the violations may result in a major expense (costing more than \$5,000 to resolve).
- The trends suggest that frequency and severity of violations will increase over time.



Case law trends in summary. Of a total of 28 cases involving private land trusts (not any government entity) and excluding historic preservation, we count 5 losses for land trusts

³ Van Doren, Jason, “Summary of the 2004 Conservation Easement Violations & Amendments Study,” *Exchange*, Summer 2005 (Vol. 24 No. 2)

none of which were precedent setting. These cases exclude eminent domain, tax, business disputes, standing and other matters not directly conservation easement or preserve defense or enforcement.

At least two cases created strong conservation precedent with published decisions. Cullen v. Western New York Land Conservancy, Inc., 2009 NY Slip Op 7036; 886 N.Y.S.2d 303 (N.Y. App. Div. 2009). This case is especially significant because a punitive damage award for trespass against land trust-owned fee property appears to be without precedent. But the jury, the trial court, and the appellate court found Cullen's actions to be sufficiently egregious to justify such damages. Evidence was presented indicating that the trespass was intentional, as he had boasted to a contractor that his attorney "loved to fight" and could "drag this out for a while." The appellate court noted the irrelevance of the fact that the total acreage damaged by Cullen was small in relation to the total amount of land held by WNYLC.

Weston Forest & Trail Assn v. Fishman, 849 N.E.2d 916 (Mass. App. Ct. 2006), affirming Misc. Case No. 301928, *Decision Granting Summary Judgment*, June 3, 2005 (Mass. Land Court 2005). A very convincing victory for the land trust. The court rejected the landowner's arguments based on laches, estoppel, and waiver. The court also held the easement was unambiguous in prohibiting the barn. The trial court and appellate court noted the public benefit resulting from the easement, and presented one of the most thorough analyses of laches and estoppel issues of any conservation-easement-related case to date.

With thanks to Rob Levin, Law Office of Robert H. Levin, 94 Beckett St 2nd Floor, Portland, ME 04101-4473, (www.roblevin.net).

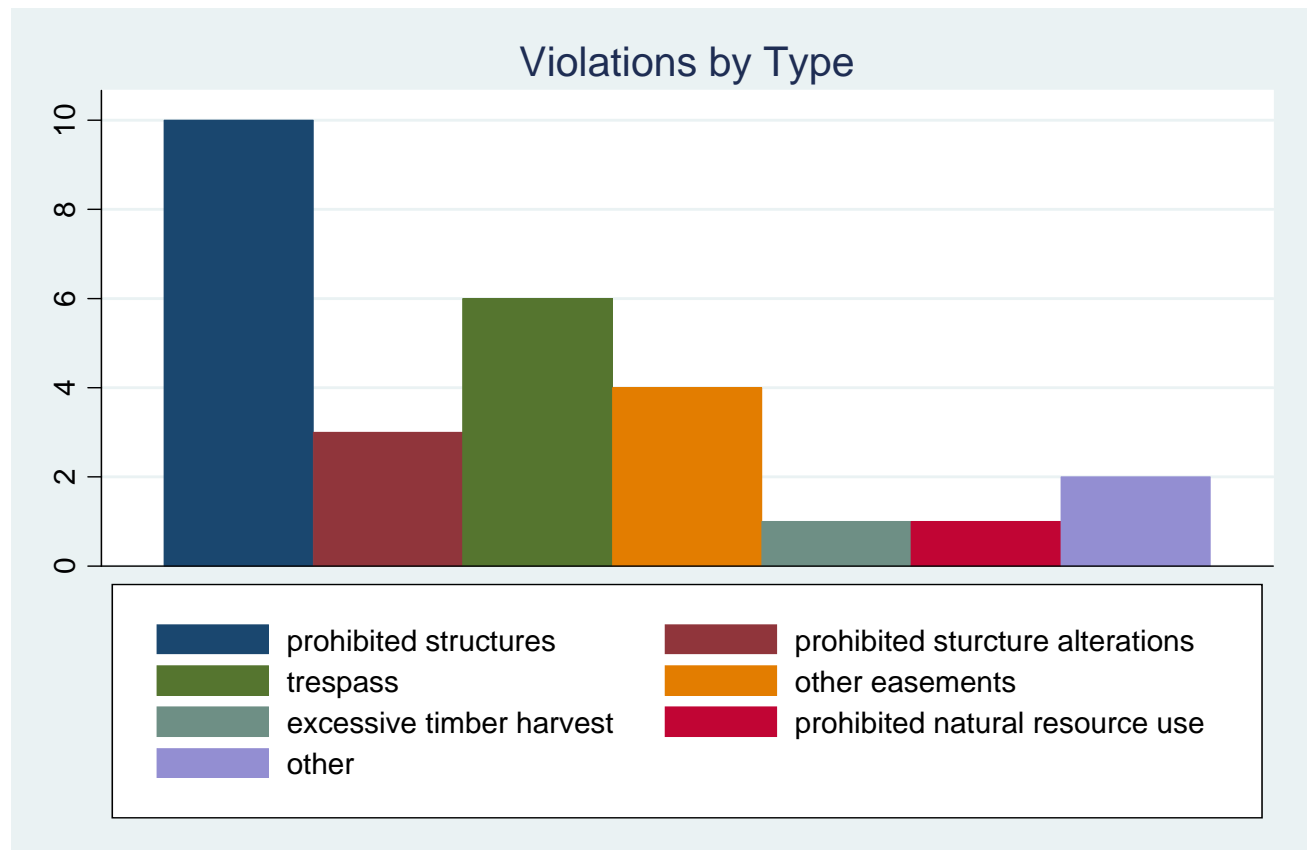
Data collection. Anecdotal information on major challenges that settled after litigation commenced indicates that land trusts are upholding conservation in settlements as well with ten cases settled favorable to conservation and none settled unfavorably to conservation. This anecdotal information is self reported and is not consistently collected, analyzed or stored.

The implications of limited data for conservation are that we are uncertain about the frequency and severity of conservation losses both in unpublished decisions and in settlements. We also do not know the extent that lack of resources results in a land trust failing to pursue a major challenge. We do not have central data of all litigation or all legal challenges, The Alliance usually hears about good results but not bad due to self reporting. Costs of challenges are not annualized so that we can better predict annual expenses of projected challenges with any confidence. The Alliance and conservationists are working to improve data collection and analysis.

- CD insurance program
- Census
- Voluntary reporting to central database

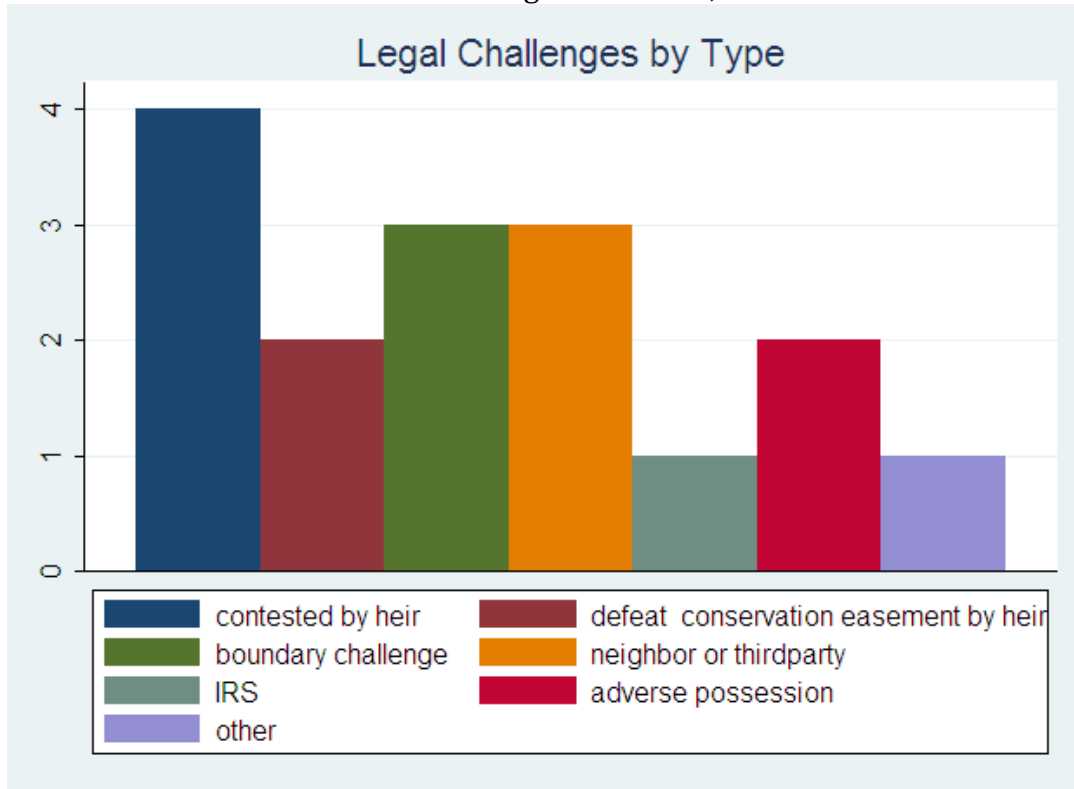
Summary of National Data. Most land trusts have not experienced a **major** legal challenge or violation yet but half of land trusts have had 50% of land trusts experienced some type of a legal challenge or violation. With thanks to Dr. Adena Rissman and Van Butsic of the University of Wisconsin-Madison, arissman@wisc.edu and butsic@wisc.edu 608-345-7201.

- ▶ Fee simple and easement properties are equally as likely to be involved in a dispute.
- ▶ The number of disputes is increasing.
- ▶ Disputes by heirs and successor generation land owners are common- and this type of owner will be more common in the future.
- ▶ Trespass is increasing rapidly.
- ▶ 27% of the land trusts might have pursued legal challenge with additional funding
- ▶ Statistically there is no difference in costs between different types of legal challenges and violations (i.e. heir, timber harvest, resource use, IRS audit)
- ▶ Capacity, community support and political will are critical
- ▶ Relationship management not legal challenges one of the largest issues to most

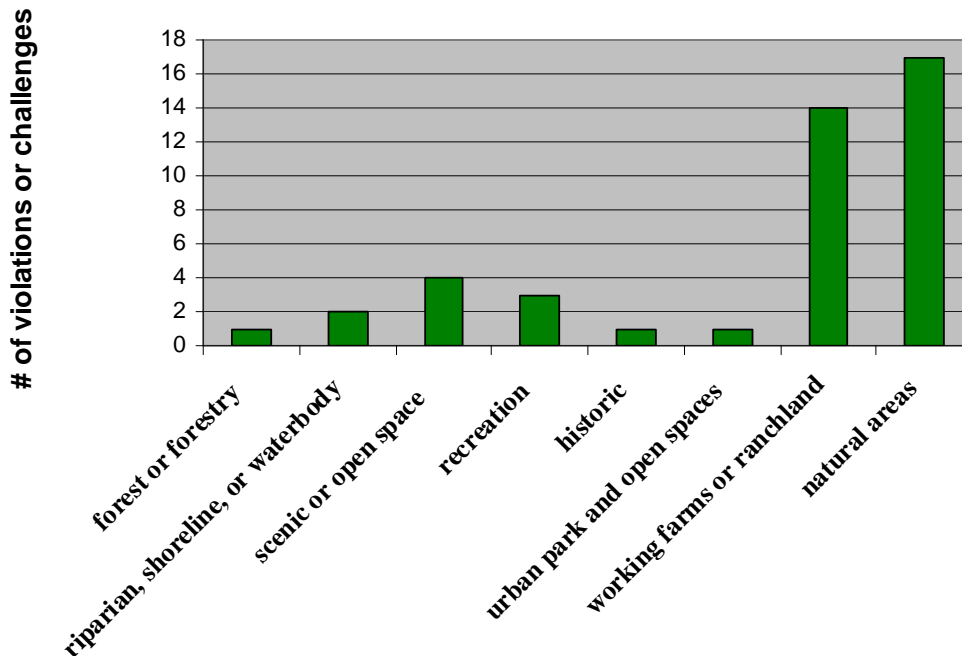


- ▶ Easements and fee owned properties cost the same to defend.
- ▶ Legal challenges and violations cost the same.
- ▶ The total cost is made up only partially of attorney cost: 37% attorney fees, 38% other legal cost, 25% other costs (restoration, boundary surveys, monitoring, etc)
- ▶ 11% of land trusts spent more than \$5,000 in outside expenses on a single challenge
- ▶ 58% of legal issues involved conservation easements at average cost of \$14,500

- ▶ 42% involved fee land at average cost of \$25,300



- ▶ 7 years between conservation and major legal challenges
- ▶ 53% of cases resolved within two years
- ▶ There is no obvious driver
 - When it will happen
 - What type of action will occur
 - What type of property it will occur on
 - How much it will cost to resolve



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monitor and enforce all their conservation easements, and have the commitment, capacity and capability to uphold their conservation easements forever. Most attorneys interpret this requirement to mean that all violations, even technical ones, must be addressed in a manner *proportional* to the severity of damage to the conserved resources. Failure by a land trust to resolve even a single conservation easement violation can cause the land trust to be disqualified from accepting tax-deductible conservation easements, fined, or have its charitable status revoked.

Internal Revenue Service Treasury Regulations Section 1.170A-14 requires that qualified conservation easements (easements that qualify for federal tax benefits) must be granted exclusively for conservation purposes. To be eligible for a federal income tax deduction, the conservation organization must protect the purposes of the conservation easement forever. This requirement means that a land trust must address every violation; however, *how* to address those violations is left to the land trust's best judgment and discretion.

The IRS is now scrutinizing land trusts to ensure adherence to these regulations. In December 2008, the IRS finalized a new Form 990 and instructions. These documents ask land trusts to demonstrate that they are committed to, capable of and do, in fact, uphold their conservation easements. To maintain a land trust's tax exempt status, the land trust needs to demonstrate that it keeps adequate records, amends conservation easements only in an appropriate manner and appropriately enforces all conservation easements.

IRS Challenges to Land Trust Capacity. In deduction challenges the IRS is challenging every issue to see what sticks. This includes challenges to the land trust as a qualifying organization usually on the basis of lack of capacity to uphold the easement forever. Documentation of the public benefit of the easement is critical in the audit. Tax Courts are upholding broad purposes of the Code despite the IRS attempts to limit to narrow purposes.

The IRS filed a motion for partial summary judgment in *Getshcer v. Commissioner* in U.S. Tax Court against a Harford County couple who claimed a federal income tax deduction for a conservation easement to the Maryland Agricultural Land Preservation Foundation (MALPF). The IRS didn't dispute the value, but claimed the easement was not perpetual because it allowed the landowner to *request* termination of the easement if profitable farming is no longer feasible. The IRS claims that the possibility of termination fails to meet the Code requirements that easements be perpetual. MALPF has not used these clauses since 2005. The taxpayer attorney defended the clause as not affecting perpetuity.

Another *Maryland* tax dispute settled days before trial. The IRS again claimed that an easement was not qualified due to inconsistent uses (undefined residence location), lack of perpetuity (amendment clause), and non-qualified holder (Maryland Environmental Trust). The parties settled for 70% of the claimed deduction.

In a *Texas* audit, the field agent challenged the land trust capacity and capability to enforce its easements as a means to disqualify the landowner deduction. Fortunately both the land trust and its attorney were well prepared to defend and document the land trust's ability to uphold conservation permanence. After exchange of correspondence over several months, the IRS withdrew the claim. Conservation attorneys and practitioners should be aware

that the IRS is regularly challenging both the qualifications of the easement *and* the easement holder, and be prepared to counter those attacks in audits of landowners.

Conservation Defense Insurance Structure Proposal

At the Rally 2010 board meeting the Land Trust Alliance board voted to proceed with raising the necessary capital for the proposed insurance program and to evaluate the legal structure for the insurance entity. Leslie convened a team of prominent attorneys including Philip Tabas (TNC), Andy Dana (MT), Jessica Jay (CO), Fred Rich and Ted Holt (both of Sullivan & Cromwell) to evaluate alternative legal structures and make a recommendation to the Alliance board. We are grateful for Sullivan & Cromwell's pro bono services to create the conservation defense insurance program legal structure.

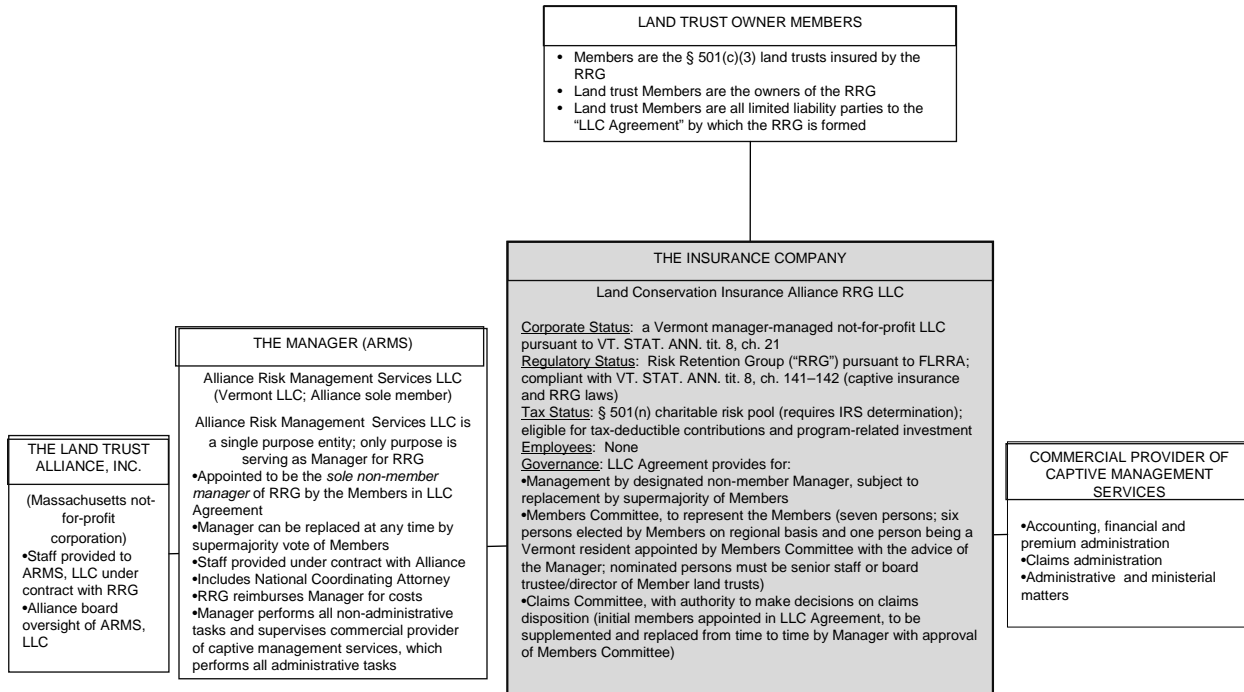
Our goals were to devise a structure for the risk retention group (RRG) that:

- Manages the insurance services simply and effectively
- Protects land trusts from legal and financial liability
- Integrates the Alliance's prevention and risk management services
- Attracts funders (including those who may wish to make program-related investments)
- Protects Alliance from legal and financial liability
- Ensures stability through quality control and guidance by the Alliance subsidiary and
- Complies with all laws and regulations as well as all accounting rules and regulations.

As you review the legal structure, it may be helpful to make a distinction between the tax status and the governance structure. We have confirmed that qualifying as a "charitable risk pool" within the meaning of § 501(n) and a tax-exempt organization under § 501(c)(3) is the best available tax status to achieve our fundraising and other objectives for the proposed program. While § 501(c)(3) organizations are generally prohibited from engaging in commercial-type insurance, the IRS excepts an organization that is a "qualified charitable risk pool" within the meaning of § 501(n). A § 501(c)(3) organization that meets all the requirements of § 501(n) will be able to receive tax-deductible charitable gifts. We would like to seek informal advice from the IRS whether a qualified charitable risk pool controlled by a manager selected by its members will meet the § 501(n) requirement that such organization be controlled by a "board of directors" elected by its members.

The limited liability company has an Alliance subsidiary as the non-member manager and a Members Committee elected by the member land trusts with the power to hire and fire the manager and direct the program, approve budgets, and other specified oversight roles. The regulators indicated that the structure would be acceptable.

Legal Structure Schematic



**LAND TRUST ALLIANCE ON LINE LIBRARY
CONSERVATION DEFENSE CLEARINGHOUSE**

Please note that all cases referenced in this session are available to Land Trust Alliance members through its on line library in the Conservation Defense Clearinghouse and on The Learning Center. Case summaries appear in the latest edition of **Conservation Case Law Summaries** from Attorney Rob Levin on line in The Learning Center at <http://learningcenter.lta.org>. This home page asks you for a log in name and password.

Copies of judicial opinions, and also many case pleadings, briefs, professional commentary, analysis and journal articles are in the **Conservation Defense Clearinghouse** at <http://clearinghouse.lta.org>. This home page asks you for a log in name and password.

If you are not a professional partner or member of the Alliance already, then the first step is to become an Alliance professional partner at the \$250 or more level. Go to <http://www.landtrustalliance.org/get-involved/membership/professional/professional> to join. Professional partners of the Alliance have a password for The Learning Center. Use the same one to log onto the Conservation Defense Clearinghouse (or request a new one) at <http://clearinghouse.lta.org>.

The Conservation Defense Clearinghouse uses an intuitive faceted search function that allows *anyone* to quickly locate a wide variety of conservation defense related material. A fast and easy feature of the Clearinghouse is the *Collections* page where a variety of resources are gathered together by topic. Open a topic area and browse all related material on one screen. The Clearinghouse also features *Top Cases* and the faceted search function by subject, content, author, name or year, or any layered combination of those facets.

The Clearinghouse includes published and unpublished judicial opinions, trial and appellate decisions, attorneys' briefs, case studies, litigants' and *amicus* briefs, enabling acts, law review and other articles, mediation accounts and secondary resource materials. The Clearinghouse also has information on drafting conservation easements, best practices for stewardship and monitoring easements, federal and state tax issues and tax incentives, and enabling statutes.

Give it a try! Please direct any comments or questions to Leslie Ratley-Beach at lrbeach@lta.org or Katie Chang at kchang@lta.org.

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