

## Trespass Part III: Preserve Trespass and Third-Party Conservation Easement Violations

Third parties, usually neighbors, cause many violations of conservation easements commonly called “third-party violations.” On owned land, third parties are exclusively the trespassers. In both cases, these often involve timber trespass or the encroachment of structures, landscaping or other improvements onto the protected property. TerraFirma has seen an increase in boundary-related claims such as encroachment, trespass, adverse possession and extinguishment claims and access demands.

For practical pointers on defensively drafting easements in anticipation of future third-party violations prevention in boundary marking and monitoring, see Parts I and II of this series.

### Stewardship Suggestions

1. Have a written policy and procedures for addressing third party violations and trespass informed by state law. For example, some states have very short legal deadlines of only a few years to start a legal action after a trespass occurs, this should be accounted for in policy/procedure making.
2. The first choice is always removal of encroachments. Alternatives such as boundary adjustments, licenses, leases and other documentation of permissive use might be considered in limited appropriate circumstances but require additional due diligence and compliance with *Land Trust Standards and Practices*.
3. Some states have imputed a permanent expanded right-of-way from a limited license so care in drafting is required if you go this route.
4. If considering dealing with nominal encroachments with a license then see sample below.
5. Work closely with the landowner to locate the trespasser and pursue a resolution or jointly correct the damage to the property.
6. Hold a meeting with all parties to discuss corrective measures.
7. If the third-party violator cannot be found, or can be found but is unwilling to cooperate, and if the violation also represents criminal trespass or otherwise is a violation of the law, it may be desirable to involve law enforcement officials to discuss resolution options or file a criminal trespass complaint.
8. Even if the language of the easement places the legal responsibility for the violation on the landowner, consider other possible methods to hold the third-party violator responsible for remediation of the violation.
9. If the owner is a violator or contributes in any way to the easement violation, then the land trust should pursue dispute resolution against the landowner and the trespasser and any contractors that participated.
10. If the landowner did not contribute to the easement violation, and wants to join the suit, in most cases the land trust would not be able to prevent that and would be more likely to welcome the landowner in the suit since it can be more persuasive to the court.
11. See *Land Trust Standards and Practices* [11E: Conservation Easement Enforcement](#).

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12. Make sure that timely notice is given to any insurance coverage that may be applicable.
13. Remember that Terrafirma excludes preexisting trespass and any expansion of a preexisting trespass from coverage.

### Easement Holder Standing

To determine how to legally hold third-party violators accountable, an easement holder must identify the legal interest or right represented by the conservation easement and held by the holder, as defined by state law. Then the holder can explore and evaluate its options available by law and articulated by the conservation easement in consultation with its outside trial attorney. Essentially, a land trust must demonstrate that it has a legally recognized interest in the land allowing it to contest the third-party violation in court. This is known as “standing.” Standing can be established in the easement itself (See Part I of this Trespass Series for more on this), by state statute or by common law. For a deeper dive, the Alliance has compiled [a list of cases](#) where standing was approved or denied. Below are some tips for analyzing and establishing standing:

- Check whether the [conservation easement enabling act](#) for your state treats conservation easements as a real property interest. If so, the land trust may succeed in a standing claim by arguing that it holds a property right, against which the violator trespassed and so the land trust is a directly aggrieved party which thus has standing to sue landowner for a violation, regardless of cause. Even if the enabling act is silent on establishment of a real property interest, a land trust could argue that the legislative intent of that enabling act allows standing and that the conveyance of rights, obligations and development rights conveys a property interest.
- In many states, the common law regarding negative easements, restrictive covenants and equitable servitudes give land trusts a right of enforcement.
- Obtain a legally valid and enforceable assignment from the landowner of its right of action against the third party. Many conservation easement templates and models require this upon the land trust’s request. For more on this see Part I of this Trespass Series.
- Land trusts may want to consult with their attorney to determine the law in their state regarding the standing of a land trust to enforce its property rights in the conservation easement against a third party.

### When faced with an encroachment, consider the following:

1. Take immediate proportional steps in response
2. Implement proactive mitigation according to your written policy and procedures for boundary issues
3. Have exceptional documentation
  - a. Photograph the encroachment
  - b. Map the encroachment in detail
  - c. Document the encroachment’s precise location and aerial extent
4. Attempt a neighborly chat first at the boundary line. See if this can be resolved cooperatively. Remember that encroachment removal and denial of access is always the preferred route.
5. If voluntary resolution fails, without any delay immediately send a certified letter to the encroaching party notifying it of the violation and the obligation to restore the property and

to inform their insurance carrier of the claim

- a. File a Terrafirma claim immediately upon discovery
  - b. Retain outside counsel immediately if the land trust does not receive a response to the letter or the response inadequately ensures the restoration of the property
  - c. Immediately have counsel send a demand letter
6. Hire a surveyor. Yep it costs money. Talk with Terrafirma if you are a member owner to see about a coverage determination for a timely filed claim.
  7. Post information signs about ownership and block entrances. Keep in mind that in many states the fact that you have signs or gates won't protect against a claim by a trespasser who takes possession of the land anyway. And be prepared for signs and gates to be ripped down or bullet ridden.
  8. Send a letter. Give *limited restricted revocable* written permission to someone to use your land, and get their written acknowledgement. This can defeat adverse possession claims, and claims to a prescriptive easement across your property, but you *must use great care in drafting these to avoid other problems later*. Ask us for limited license examples. *Condition:* the use or structure must not adversely affect conservation purposes or values. And you may have to record the document.
  9. Consider offering to rent the property to the trespasser. Some land trusts in CT do this if there is no adverse conservation purpose or value impact. It does add a significant stewardship burden and it still has all the documentation requirements.
  10. If you suspect that someone has a possible adverse possession claim, check property tax records to see if this person (or anyone else) has made tax payments on the property if required in your state to prove adverse possession.
  11. Call the police. You just crossed out of the friendly realm and this might help in some jurisdictions. Also consider asking government agencies, especially co-holders, to help.
  12. Hire a mediator. More money. Talk with Terrafirma if you are a member owner to see about a coverage determination for a timely filed claim.
  13. Continue to work closely with outside counsel. If friendly chats and letters and licenses don't work, you may need to file a lawsuit to eject the trespasser. Or you may want a court to order a structure removed. You must act before the trespasser has been on your land long enough, under your state's law, to make a successful adverse possession claim. Talk with Terrafirma if you are a member owner to see about a coverage determination for a timely filed claim.

## Lessons Learned

Land trusts involved in third party trespass violation cases report the following lessons learned:

1. **The same stewardship basics apply to third party.**
  - Evaluate the resource damage and damage to the purposes of the easement
  - Consider all the factors
  - Take immediate and appropriate action
  - Document everything
  - Immediately file a Terrafirma claim if your land trust has Terrafirma coverage

2. **Identifying unknown third party violators.**
  - Have to be creative
  - May need a survey or other technology
  - May need to back track ATVs or other marks
  - May need to involve government enforcement or criminal system
  
3. **Community involvement.**
  - Have one person manage communication
  - Consider the possible public perceptions of the various parties
  - Leverage public investments in conserving land
  - Make the landowners and the neighbors your allies
  
4. **Creative problem solving.**
  - Neighbors, developers and others are endlessly creative in justifying trespass
  - Set the tone of the dispute resolution; be a problem solver
  - Consider temporary uses that have no negative impact on resource values or conservation easement purposes in order to prevent further litigation and negative public perception
  - Consider criminal prosecution or government civil enforcement actions in appropriate circumstances
  
5. **Litigation may be needed to get action, but is costly.**
  - Have a solid damages theory and excellent experts
  - Have the attorneys visit the land before developing an approach
  - Trial preparation is time-consuming and expensive. Don't underestimate the time needed for a case. Assume that a case in litigation will go to trial
  - Be neutral, reasonable and above any petty fights; protect the land and help resolve the dispute
  - Don't settle prematurely
  
6. **Learning from problems.**
  - Review and revise easement template to address new situations and lessons learned.
  - Evaluate your experience, any systems changes suggested and things to do differently
  - Think about systems resiliency

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## Sample Language for Limited License:

### **REVOCABLE LICENSE AGREEMENT**

This Revocable License Agreement (“Revocable License Agreement”) is entered into as of December, \_\_, 2025, by and between (collectively “the x”), with a mailing address, The y (“y”), with a mailing address of and The Conservancy with a mailing address of (collectively the “Parties”).

### **RECITALS**

**WHEREAS**, the x own the home and property addressed as (the “x Property”).

**WHEREAS**, y (the “y”) owns land known as the Preserve (“Preserve”), which abuts the western edge of the x Property. The Preserve is covered by a “Conservation Easement” monitored and enforced by the Conservancy (“LC”).

**WHEREAS**, an inspection of the Preserve commissioned by the LC revealed that the x constructed a abcd on the edge of the x Property and into the Preserve.

**WHEREAS**, after the x reported the removal of the abcd and completion of related remediation, an inspection revealed that the efg (“efg”) had not been removed and remained. After discussions, a meeting was had on the properties during which property pins were located and a string was run between the pins to determine the property line. Through this method, it was agreed that approximately 10 square feet and two 4x4 posts, encroached on the Preserve. Attached and incorporated as Exhibit A is a photo of the pertinent portion of the Preserve and the property line.

**WHEREAS**, the Parties wish to resolve issues related to the abcdefg and the encroachment pursuant to the terms of this Revocable License Agreement.

Now, therefore, incorporating the Recitals herein by reference, the Parties agree as follows:

### **1. Grant of Revocable License – Rights/Responsibilities**

a. The y and the LC grant the x a Revocable License to allow the encroachment to remain where and as it currently exists. This Revocable License is permission only and not an easement, does not transfer interest in real property and may be revoked by the y and/or the LC with written notice to the x. This Revocable License, which is held by the x **personally** and not by the x Property, is automatically revoked upon any transfer or sale of the x Property.

b. The x agree that their use of the encroachment is permissive and does not constitute adverse possession, a prescriptive easement, boundary by acquiescence, boundary by agreement, or any similar claim to the real property of the Preserve. This Revocable License expressly interrupts and prevents all statutory doctrines or periods related to possession of real property. This Revocable License Agreement is binding only on the Parties and expressly does not run with the land and does not benefit successor owners of the x Property or any other third party.

c. The x shall maintain the encroachment in good condition and shall be entirely responsible for any damages, costs, claims, injuries, or liabilities arising from the encroachment. Neither the y nor LC assumes responsibility or liability for the encroachment. The x may not remove, expand, rebuild, modify, or replace the encroachment without y and the LC's prior written consent. Any unauthorized modification or construction shall be subject to removal and remediation under the y and/or the LC supervision. The y and the LC shall continue to monitor the Preserve and the encroachment and the x shall cooperate with the y and the LC.

d. The x fully and forever indemnify, defend, and hold harmless the y and the LC, including, but not limited to, their officers, directors, employees, members, contractors, agents, representatives and volunteers ("Releases"), from any and all real or threatened claims, demands, causes of action, damages, losses, or liabilities of any kind, whether arising from personal injury, loss of life, property damage or otherwise, known or unknown ("Claims") arising out of or related to this Revocable License Agreement, the encroachment, removal, remediation and any failure of the x to comply with this Revocable License Agreement or applicable laws. The x understand that this includes the payment of all fees and expenses, including attorneys' fees, incurred by Releases when due and owing and further hereby waive, release and discharge any and all Claims they may have against Releases of any nature whatsoever.

## **2. Transfer of the x Property/Removal and Restoration**

The x agree that if and when they sell, convey, or otherwise transfers any interest in the x Property they shall, at their sole cost and expense, remove the encroachment and restore the area before the transfer is completed. The x shall inform the y and the LC in writing of the intent to transfer the property and the removal and remediation and shall allow the y and/or the LC the opportunity to inspect and approve of the work performed. Failure to remove the encroachment prior to transfer of the x Property constitutes a breach of this Revocable License Agreement and, at the discretion of the y, termination of the Revocable License.

## **3. Revocation of Revocable License**

The y and LC may revoke this Revocable License at any time upon Ten (10) days' written notice to the x for any reason and for no reason. Upon revocation, the x shall remove the encroachment at the x sole liability, cost and expense, and restore that portion of the Preserve, all within Thirty (30) days after receiving notice.

## **4. Right to Record**

The y and the LC reserve the right to record this Revocable License Agreement. Recording does not convert the Revocable License into an easement or property right; it serves solely to give public notice of the temporary permission granter herein.

## **5. Miscellaneous**

a. Governing Law: This Revocable License Agreement shall be governed by and construed in accordance with the laws of the State of and any dispute related to same shall be exclusively heard in the Federal or State Courts located in.

b. Entire Agreement: This Revocable License Agreement contains the entire understanding between the Parties and supersedes any prior agreements, written or oral, with respect to the subject matter herein.

c. Amendments: Any amendments or modifications of this Revocable License Agreement must be in writing and signed by all Parties.

d. Association Rules/Regulations: The y and LC are unfamiliar with, take no position and make no representation related to property owner's association rules or regulations that may apply to the x Property and/or the encroachment.

e. Counsel Opportunity: The Parties have had the opportunity to obtain and receive the advice of counsel prior to the execution of this Revocable License Agreement and they have fully exercised that opportunity to the extent desired, understand the terms and conditions of this Revocable License Agreement as well as its legal nature and effect and have voluntarily elected to enter into this Revocable License Agreement.

f. Counterpart Signature: This Revocable License Agreement may be signed in counterparts and any and all facsimile and digital signatures shall be deemed the same as original signatures.

IN WITNESS WHEREOF, the Parties hereto have executed this Revocable License Agreement as of the dates set forth below, intending to be legally bound hereby.

[followed by signature block, attestations and acknowledgements as required by State law]