

## Trespass Part I: Acquisition and Early Detection, Prevention and Intervention

Trespass is the wrongful entry onto the real property of another. Encroachment is a form of trespass that occurs when a neighboring property owner interferes with or intrudes onto a portion of the property of another. Common encroachments include lawns, driveways, landscaping, utilities, dumping, trails and structures. The longer a trespass occurs, the harder and more costly it is to untangle. In extreme instances, delay can result in court ordered transfer of ownership due to the open and hostile continuous use of land owned by another, also known as adverse possession. The following considerations for early trespass detection, prevention and intervention are informed by hard learned stewardship lessons and seek to lessen future stewardship burdens, legal costs and stress levels.

### Identify and Address Pre-Existing Encroachments

Early identification and analysis of potential trespass can be uncovered through preliminary interviews with landowners and field work to identify the physical property boundaries. A survey might be necessary if the physical inspection cannot precisely locate the boundary or if the neighbor disputes your location of the boundary. These considerations may assist you to determine if a survey is needed:

- Boundary lines are poorly marked and difficult to discern in the field;
- The legal description uses references that are ambiguous or no longer exist;
- Multiple landowner abutters;
- Use(s) on adjacent property potentially extend near or across boundary line;
- The presence of third-party rights-of-way, such as access roads. A steadily rising Terrafirma trend is enforcement for unauthorized expansions of the size and scope of rights-of-way; and
- The land trust's risk tolerance.
- Dispute by a neighbor regarding the boundary.
- An obvious existing trespass.

Land trusts can reduce their risk by requiring the landowner to resolve any ongoing trespasses prior to closing. Closing knowingly with a continuing trespass is high risk because:

- Doing nothing only delays having to address the trespass to a later date.
- The extent of the trespass might not be fully known.
- The longer a trespass is allowed the harder it is to litigate and to prevail. Even when land trusts are successful in litigating old trespass claims, the final compensation for losses and restoration is typically much lower than for timely trespass dispute resolution.
- The landowner conveying the property or easement should bear all or some of the financial responsibility for the costly survey and legal work required to resolve an encroachment.
- As nonprofit entities, allowing for an ongoing trespass of conserved lands could raise impermissible private benefit concerns resulting in a fine or in severe cases threaten a land trusts tax exempt status. See the Alliance's practical pointer on [Private Inurement and Impermissible Private Benefit Prohibitions](#).
- The clock continues to run on adverse possession, threatening the land trust's interest in that land.
- Pre-existing trespasses are excluded from coverage under the Terrafirma policy.

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Mitigate risk by requiring the grantor to resolve the trespass prior to closing:

- Remove the trespass;
- A boundary line agreement recorded on the land records prior to closing that establishes a boundary that terminates the trespass;
- If a conservation easement is being acquired, and the encroachment is nominal, meaning zero adverse conservation impact and a very small on the ground impact, consider requiring the landowner to enter into a revocable license agreement with the trespassing abutter for the use in question subject to the new conservation easement and with restrictions against any expansion or change of use. In many states, this will stop the adverse possession clock.
  - Note that this pre-closing strategy won't work for fee land acquisitions as revocable licenses don't run with the land, meaning it won't automatically transfer to the subsequent landowner.
  - Also note that the challenge of using a license is defining what is "small" and what is "zero" conservation adverse impact. Documentation will be critical. *Please consult with your attorney on how best to accomplish stopping the adverse possession clock, limiting the encroachment and positioning the land trust in the future if the use expands in an unacceptable manner.*
  - Be sure to file a Terrafirma claim and document all of the foregoing in writing for the claim file.
- If all else fails, legal action to eject the trespasser or quiet title.

Title insurance can also mitigate risk, but most title insurance won't provide coverage for boundary disputes in the absence of a survey. If there is a survey, your land trust still has to explicitly negotiate the removal of the survey exception with the title insurer. And remember that sometimes a deal just shouldn't go forward because the risks are too great. Project abandonment might be necessary in the face of unusually difficult trespass concerns.

### Conservation Easements: Defensive Drafting in Anticipation of Future Trespass

Prepare in advance for dealing with trespass at some point as that is a likely event. The baseline documentation report should include well-documented property boundaries and conditions as this can help resolve a trespass dispute. Easement drafting should be particularly thoughtful around landowner and land trust rights and roles to pursue trespassers. Do not exculpate landowners from any obligation to address trespass. Litigation experience nationwide has demonstrated that defendant trespassers will invoke incorrect claims that a land trust lacks the right to be a party to the trespass litigation. Land trusts can increase their chances of success and save on litigation costs through thoughtful drafting to:

- Include explicit rights of entry to enforce restrictions against third-parties.
- Include land trust rights, without having to join the landowner, to prevent, stop through court order or otherwise enforce against third parties whose trespass violates the easement.
- Require the grantor to assign its right to pursue litigation against the trespasser if so requested by the land trust.
- Require the landowner to pursue and correct trespass.
- Require the landowner to cooperate with the land trust to correct trespass.
- See the sample language below for ideas.

## Sample Conservation Easement Language

The Alliance does not recommend language that fully excuses the Grantor from correcting acts of any third party. Acts of nature where the damage results *entirely* from the act of nature generally are excluded. Here are two examples of enforcement language. The first places full responsibility on the Grantor. The second example is a hybrid that may be more palatable but still places the land trust in a position to require Grantor's cooperation and signing of legal documents.

### Full Responsibility

*Acts Beyond Grantor's Control. Grantor shall not be responsible for any injury or change in the Property resulting exclusively from natural events beyond the control of the Grantor. Such natural events include fire, flood, storm, earthquake, tornado, landslide or Acts of God, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. This paragraph shall not be construed to relieve the Grantor of the obligation to address all third party encroachment, trespass, damage or other incursions by any third-parties or to otherwise maintain the Property in a condition consistent with the purposes of this Easement as determined by Grantee in its sole discretion.*

### Split Responsibility

*7.3. Right to Recover Damages. In addition to the other remedies provided for in this paragraph 7, and any other remedies available in law or equity, the Grantee shall also be entitled to recover all damages necessary to place the Grantee in the same position that it would have been in but for the violation. The Parties agree that in determining such damages the following factors, among others, may be considered (i) the costs of restoration of the Property as provided in subparagraph 7.2 above, and (ii) the full market cost of purchasing a conservation easement ...*

*7.5. Right to Proceed Against Third Parties. The Grantee has the right to proceed against any third party or parties whose actions threaten or damage the Conservation Values, including the right to pursue all remedies and damages provided in this paragraph 7. The Grantor shall cooperate with the Grantee in such proceeding.*

*7.6. Right to Require Assignment of Trespass Claims. If requested by the Grantee, the Grantor shall assign to the Grantee any cause of action for trespass resulting in damage to the Conservation Values that may be available to such Grantor.*

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