

BY Debbie Leonard

# Mediating Conservation Disputes

**Y**ou are president of the board of an established land trust that has held a conservation easement for many years. A new owner of the property encumbered by the easement is threatening to make changes that violate the easement's terms. Notwithstanding numerous discussions between the land trust's staff and the new owner, the parties have reached an impasse.

You cannot allow the conservation purposes and values to be damaged when you have prior knowledge of an imminent threat, so you take all prudent action to address the issue. You call your local attorney to explore the land trust's immediate and long-term options.

After you have secured the property from damage, whether by an injunction against the landowner's planned changes or some other equally effective means, as determined in consultation with the land trust's counsel, you can focus on more comprehensive problem-solving with the landowner.

Are there other options to litigation? Yes, and one of those options is mediation.

Mediation is an alternative dispute resolution technique that is sometimes court-ordered

in the course of litigation but is also a tool that parties can use independently to avoid *unnecessary* legal proceedings. Sometimes a land trust has no alternative and must use the judicial system, but in many circumstances, mediation can be used to resolve all or part of a dispute. In mediation, a neutral third party facilitates negotiations between disputing parties to help them reach a resolution. The mediator does not act as a judge or arbitrator to render a decision; rather, the mediator actively makes controlled interventions in the negotiation process to help the parties resolve their differences. Whether or not the parties reach a resolution is entirely voluntary.

## The Drawbacks

A land trust cannot always get the other party to negotiate without the leverage of an injunction or court-ordered settlement conference. Mediation does not stop the bulldozers from rolling or the chainsaws from cutting if the landowner is unwilling to talk. In other words, some litigation may be necessary just to initiate meaningful discussions.

Even if a land trust can bring the other side to the table, parties renege on agreements or simply do not follow through. If that occurs, the land trust must again face the prospect of litigation, even after spending the time and money to engage in negotiations. Indeed, mediation promises are often used by intransigent parties as delaying tactics.

Finally, the land trust must have the professional capacity and capability to ensure a positive conservation result in mediation; without it, the land trust runs the risk of agreeing to an unnecessarily bad result. So, while mediation can be less expensive than litigation, it does have costs, often significant ones.



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# EXPERTS PERSUADE THE VIOLATOR

## The Benefits

Mediation has flexibility and provides a forum for collaboration as opposed to the rigid and adversarial nature of litigation. The parties control the outcome and are free to structure a resolution that has mutual gains (i.e., “win-win”). In contrast, when parties proceed in court, they risk what is generally a win-lose, all-or-nothing result that is, for the most part, out of their control. In mediation, the parties have the freedom to create non-traditional terms that are outside the ambit of remedies that the law might provide. They can focus not only on the past actions leading up to the current dispute but also on conditions that might arise in the future. Mediation can empower parties to create their own destiny.

Because of these characteristics, conservation disputes lend themselves well to mediation. The term “perpetuity” means that land trusts and the landowners who are subject to their conservation easements are wedded for the long haul. In contrast to litigation, which tends to leave parties bitter and divided, mediation preserves, and in many cases enhances, long-term relationships.

Perhaps the conservation goals of the organization can be satisfied even with the proposed activities of the landowner if those activities can be moved to a different part of the property. Perhaps the landowner simply wants to increase the ability to generate income from the property, which can be achieved in other ways consistent with the conservation easement. Perhaps the proposed activities could be done seasonally rather than year-round to satisfy the landowner if consistent with the easement terms and conservation purposes.

**T**he Vermont Land Trust holds a conservation easement on approximately 16,000 acres of forestland on both sides of a mile-long stretch of river running through seven contiguous towns. A large hydroelectric company owns the land. Many vacation-homeowners border the conserved land. The public has recreational access to both the land and the water and, in fact, public access is one of the primary purposes of the easement.

One vacation-homeowner (“Mr. Smith”) instructed his landscape contractor to cut a 300-foot by 50-foot wide swath of trees on the neighboring conserved land to provide him with a view of the river and direct access to it. He also had a structure installed partly on the conserved land, and his landscaper habitually pushed debris onto the conserved land in such a way as to jeopardize the health of the remaining trees.

After the trespass, the vacation home became visible to the public from the river and significantly marred the public vistas.

The trespasses continued even after the land trust’s attempts to contact Mr. Smith and after it formally notified him of the boundary encroachment. The utility company and VLT decided that no options remained but to file suit and to file notices against trespass. The land trust had discovered that Mr. Smith’s wife held a professional license that might be jeopardized by a trespass charge and hoped this risk might inspire a willingness to discuss the matter. It did.

After a flurry of court filings and the beginnings of some limited discovery, the land trust suggested mediation. All the parties agreed and located a neutral, experienced mediator who was also a former judge with a no-nonsense reputation. VLT and the utility company collaborated on mediation strategy and roles.

VLT’s lawyer explained the purpose of a conservation easement and, more important, its public purpose and benefits that were destroyed by Mr. Smith’s trespass. Then, halfway through the mediation, which was taking place at the vacation home, Mr. Smith’s landscapers showed up on the easement property, removed a fence the land trust had erected to mark the boundary and pushed more debris over the line! VLT’s attorney walked all the parties to the window to view the trespass in progress. Mr. Smith immediately told the landscapers to leave.

Mr. Smith agreed to accept responsibility and repair the damage to the land and the losses to the land trust and the landowner. The VLT forester’s expertise about trees, timber values, long-term care of the resource and other related matters was critical in structuring the settlement agreement, as well as in determining damages and how remediation would be handled.

TEXT EXCERPTED AND EDITED FROM *MANAGING CONSERVATION EASEMENTS IN PERPETUITY*, LESLIE RATLEY-BEACH, LAND TRUST ALLIANCE, 2009, PGS. 337-339.

During the course of mediation, the underlying interests that are driving the dispute can be more readily identified and discussed. Then, through brainstorming by the parties and the mediator, potential solutions can be introduced into the dialogue to determine their feasibility. Litigation simply does not provide these types of collaborative opportunities.

## Find the Right Mediator

So if your land trust and the landowner decide to pursue mediation to resolve your disagreement, how do you find a skilled mediator? Choosing the right mediator for your dispute is important. Foremost, you must find someone with whom both parties are comfortable. Without buy-in from both sides, the mediation is unlikely to succeed.

Second, find someone who understands the issues. Conservation law and practice is complex, and a mediator who does not understand it can force the parties into a serious misstep. It can be quite frustrating when the parties feel they must bring the mediator up to speed on the background legal framework before diving into the mediation itself. You do not want to spend precious mediation time (or money!) educating a mediator on the requirements for a qualified conservation contribution or the importance of invasive species management. While there are many good mediators out there, someone who primarily assists with, for example, divorce settlements will not be the right choice for a conservation dispute.

Many communities have dispute resolution clinics that provide free or low-cost mediation services by trained mediators. There are also professional mediators who can be retained for a fee. Many of these mediators are lawyers, so they understand the legal framework in which the parties would litigate their dispute should negotiations fail. This perspective can be very helpful in providing a “reality check” during the course of mediation to a party who has lost sight of the risks going forward should no resolution be reached.

## Across the Board *Your Peers in Action*

Anne Murphy, conservation stewardship director at the Minnesota Land Trust, accreditation commissioner and one of the “Ask an Expert” experts on The Learning Center, was recently asked about how to find litigators. She responded: “We also were recently looking for a litigator and we put the word out among current board members (both attorneys and non-attorneys) as well as a couple of people close to our organization to ask for recommendations. We were surprised at the number of litigators who came up through word of

mouth. In the end, we had three or four names of people with whom we could then have a conversation to determine the best fit. The other surprising thing for us, thanks to a couple of board members, was the number of pro-bono litigators that came forward once we had made contact with a few law firms.”

Anne also reminded people about a great resource, the attorney locator (<http://tlc.lta.org/clearinghouse/attorneys>) on the Conservation Defense Clearinghouse. You can search by zip code, attorney name, state and specialty.



THE ALLIANCE HAS TAILORED A SUITE OF SERVICES FOR BOARD MEMBERS TO SUPPORT STRONG GOVERNANCE IN LAND TRUSTS AND ENSURE OUR COLLECTIVE SUSTAINABILITY. TO LEARN MORE AND TO SIGN UP TO RECEIVE **FIELD GUIDE**, A FREE QUARTERLY NEWSLETTER DESIGNED FOR LAND TRUST BOARD MEMBERS, VISIT [WWW.LTA.ORG/BOARDSERVICES](http://WWW.LTA.ORG/BOARDSERVICES).

## Check Resentment at the Door

When participating in mediation, remember that both parties will need to lower their hackles in order to achieve a resolution. Harboring animosity is unlikely to create a framework for fruitful negotiations. Instead, try to listen and pay attention to the other side’s perspective. If the other side appears to be posturing, consider what might be driving that conduct: what does the other party really want and why? Even if you think you are right and the other side is wrong, try to set that aside. Emotion can often impede a successful negotiation. Ultimately, who is “right” and who is “wrong” does not really matter. What is important is finding a solution that both parties can live with.

Hopefully, during your tenure as a board member, your organization is not faced with

a recalcitrant landowner who is threatening the purposes underlying a conservation easement. If the situation does arise, however, consider mediation as a tool to help resolve the dispute. To the extent a resolution can be reached without the headache and heartache of litigation, your organization will be financially healthier and better able to focus its attention on its conservation goals. 🍌

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### MEDIATION RESOURCES

THE LAND TRUST ALLIANCE’S EXPERT LINK LISTS ATTORNEYS AND CONSULTANTS WHO PROVIDE MEDIATION SERVICES: [WWW.LTA.ORG/ABOUT/PARTNERSHIPS/EXPERT-LINK](http://WWW.LTA.ORG/ABOUT/PARTNERSHIPS/EXPERT-LINK)

ENVIRONMENTAL MEDIATION CENTER: [WWW.EMCENTER.ORG](http://WWW.EMCENTER.ORG) (FOCUSING ON HELPING PARTIES RESOLVE ENVIRONMENTAL, LAND USE AND AGRICULTURAL DISPUTES)

NATIONAL CONFLICT RESOLUTION CENTER’S LAND USE & ENVIRONMENTAL MEDIATION GROUP: [WWW.NCRCONLINE.COM/Mediation/EnvironmentalLandUse.php](http://WWW.NCRCONLINE.COM/Mediation/EnvironmentalLandUse.php)