Practical Pointers Series
Assessing Insurance for Land Trusts

None of us knows exactly what tomorrow will bring but most of us — including most managers of nonprofit organizations — expect that tomorrow will be much like today. However, events that we cannot now fully foresee may, occasionally and with little warning, make a nonprofit’s tomorrow much different — much worse or much better — than it is today. Unpredictable events involving each of the four fundamental values of a land trust — its people, its property, its income, and, perhaps most importantly, its reputation — may bring near disaster or good fortune.

Unpredictable events involve risk, which is a measure of the possibility that the future may be surprisingly different from what we expect. To fulfill its public service mission, land trust boards, employees and volunteers must manage risks effectively by countering threats of loss and leveraging opportunities for gain. A correctly tailored insurance portfolio is effective way to help manage risk.

George Moore, president of Lyme Land Conservation Trust (CT) realized the importance of an insurance portfolio when a dispute over its very first easement brought the 44-year-old land trust to court for the first time. The land trust practices good stewardship of its 95 properties — including 64 easements and 400 acres of linked trails — and has the support of the community it serves. About half of the town’s 1,000 households are land trust members. With only a few staff, the organization’s 15 directors and about 40 additional volunteers do the work.

The organization tried engaging the new owner of a sensitive waterfront property to explain the conservation easement they held on the property—as they had two previous owners. The owner repeatedly rebuffed the land trust and continued to repeatedly violate the easement by altering the property in ways contrary to the restrictions, so the land trust finally filed suit. Concerned that the community might lose faith in the land trust, George reached out publicly and explained its fiduciary responsibility to protect conserved land in perpetuity. That’s when the landowner sued him personally. Luckily, the land trust had Directors and Officers insurance to cover the personal lawsuit. The case continues and costs are mounting. The land trust won decisively at the trial level but expects appeals.

Lyme Land Conservation Trust joined Terrafirma. “Because of our experience, we are more acutely aware of the need for this program than most land trusts might be,” says George. “We believe this isn’t unique to us and it won’t be going away.” You can be as prepared as Lyme Land Conservation Trust:

1. **General Liability Insurance.** Most experts recommend a minimum of $1 million in general liability, although $2 million or more may be better for most groups, depending on your exposure. Find a local insurance agent to advise you on the prevailing conditions in your area. Even in rural areas, you can be influenced by urban prices.

2. **Directors & Officers Insurance.** Experts are adamant that every nonprofit, regardless of size or location, must have directors & officers coverage. Land trust boards make judgment calls all the time and their liability is commonly not covered by general liability insurance. Another way for individuals to cover the cost of personal lawsuits is to purchase personal
liability insurance as an addendum to your homeowner’s policy. Personal Liability Umbrella Policies (PLUPs) can expand coverages, as well.

3. **Volunteer Coverage and the 1997 Federal Volunteer Protection Act.** Know your rights! If your volunteers act in accordance with an established policy, they may be protected by statute, but a volunteer insurance rider still helps. The Learning Center.

4. **Title Insurance.** We strongly recommend obtaining title insurance for all purchases of fee owned land and conservation easements.

5. **Terrafirma Risk Retention Group LLC.** The Land Trust Alliance formed Terrafirma Risk Retention Group LLC in 2011 to help land trusts defend their conserved lands from legal challenge. Terrafirma provides a significant protection from risk not covered by other insurance. Learn more at www.terrafirma.org.

6. **Risk Management.** Get an insurance coverage evaluation from your carrier, broker or a consultant. The Non-Profit Risk Management Center also offers this service. Ask for Melanie Herman. http://www.nonprofitrisk.org/consulting/insurance-reviews.shtml.

**RESOURCES**

- Terrafirma Risk Retention Group LLC, conservation defense liability insurance only for private land conservation organizations and solely owned by the 476 insured member land trusts from 46 states in America insuring over 7.2 million acres of conservation land. www.terrafirma.org
- **Conserv-A-Nation®:** Covers approximately 500 Land Trust Alliance members. Coverage includes a basic program – general liability, non-owned and hired auto liability, volunteer, crime and property. Offered by Alliant Insurance Services, Inc., the package is suited to land trusts at competitive prices to Land Trust Alliance members. http://www.alliantinsurance.com/services/specialty/MoreIndustries/nonprofit/conserveanation
- **Other** insurance companies serve the non-profit sector. You can find a list on the Conserve-A-Nation® page.
- The Land Trust Alliance’s *A Guide to Risk Management for Land Trusts* has many tips and lists that show how to manage risk. Click on the title to get to The Learning Center where you can download a free PDF.
- **A FREE affiliate membership with the Nonprofit Risk Management Center** for Alliance members. Log on as affiliates of the Land Trust Alliance. See directions »
- **Risk management collection on The Learning Center.** This site has a collection of resources specifically chosen to help you manage risk at your land trust. If you haven’t been there in a while, we have posted some new resources including an emergency succession-planning template.
- **Recordkeeping & Document Management is Key:** A successful non-profit is a well-managed organization. Learn how to manage risk through good records: Recordkeeping 101

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Last revised March 23, 2015
Evaluating Your Land Trust’s Insurance Needs and Obtaining Proper Coverage

It is well worth the time required to evaluate an organization’s insurance needs before purchasing coverage. The beginning of the chapter provides insight on key factors in this process, as well as the need to determine the goals of an insurance program at the outset. Examining the factors and establishing goals are important precursors to obtaining appropriate coverage.

The following checklists provide additional tips and suggestions for purchasing coverage and working with an insurance intermediary.

What to Do When Purchasing Insurance

- Find a competent insurance professional (broker or agent) whom you trust to advise you on insurance matters and act as your advocate in the insurance marketplace
- Do ask your insurance agent or broker to disclose how they are compensated and also the amount of compensation he or she receives for work on your behalf
- Take the time to read your insurance policies
- Investigate the financial stability of your insurers
- Ask your broker or agent to respond in writing to your questions
- Consider seeking multiple bids for your insurance coverage at least every four to five years
- Provide your board of directors with a copy of the actual policy wording for the land trust’s directors’ and officers’ liability policy
- Provide a periodic briefing on your insurance program to the land trust’s board of directors

What Not to Do When Purchasing Insurance

- Delegate responsibility for your insurance program to a junior staff member or new volunteer
- Simply renew your coverages each year without considering whether your coverage needs have changed
- Wait until the last minute to submit completed applications
- Be evasive about your operations and exposures on your application
- By shy about asking questions concerning your coverage or the process
- Regard your insurance coverage as the equivalent to a risk management program

Tips for Working with Your Insurance Professional

- Provide prompt, clear, concise answers to questions
- Expect your quote in a timely manner
- Ask questions and expect understandable answers
- Give your broker at least 30 days notice if possible regarding any and all policy changes
- Get important answers in writing
- Don’t withhold information from your broker
- Report claims to your broker immediately and be prepared to give detailed information regarding the claim
Insurance Professional Services/Responsibilities
The following list indicates some of the services an insurance professional might provide to a nonprofit client. The leaders of your land trust must decide which services it requires or views as desirable.

- Provide complete and accurate information to insurance carrier on behalf of the insured, including signed applications and updated information at renewal.
- Remit down payments and balance payments to insurance carrier in a timely fashion.
- Arrange financing if requested by insured member.
- Help insured with compliance with safety recommendations.
- Complete Certificates of Insurance and request Additional Insured endorsements as required by funding sources, landlords, and so forth.
- Review all contracts for the insured in respect to insurance requirements. Forward unusual contractual obligations to insurance carrier for review and comment.
- Be available to answer questions regarding the insurance contract.
- Report claims and coordinate claim adjusting with insurance carrier.
- Be available to participate in the land trust’s risk management committee, if requested.
- Be available to attend at least one of the land trust’s board meetings per year, if requested.
- Present an appropriate insurance package to the land trust for its review and decision.
- Serve as a source of information for his or her clients in regards to insurance questions.
- Maintain a complete insurance file for the insured nonprofit. As the insured, you should keep a copy as well.
- Maintain continuing education and proper licensing status at all times.

How to Save Money on Purchasing Insurance
1. Exercise caution in claims reporting. Your land trust’s premiums will increase and you will ultimately find it harder to obtain coverage if you have more claims or larger claims than similar organizations. Therefore, it pays to try to limit your claims and manage any claims you do file with care. Make certain you understand the process and requirements for claims reporting. The failure to report a claim or potential claim can put coverage in jeopardy. Speak with your agent or broker about whether an incident should be reported to one or more carriers. On one hand, reporting incidents ensures that you don’t violate the requirement for timely claims reporting. On the other hand, reporting too many incidents that never evolve into claims for damages could be interpreted as a red flag by your carriers and lead to a nonrenewal of coverage when the policy expires. Be sure you understand the consequences for reporting or failing to report potential claims.

2. Make a positive impression. Complete all applications in full. Ask your agent or broker for assistance, as needed. Be prepared to explain any discrepancies between your land trust website and information included on your applications for coverage. Answer follow-up questions from underwriters as promptly and completely as possible. If applicable, request the opportunity to review your claims history reports before submitting renewal applications. Finally, provide detailed information on loss control initiatives and risk management if your land trust has filed a claim during the five-year period prior to policy renewal. Be knowledgeable about your risks and management plan.

Know what amounts of coverage and deductible to obtain
It is essential to assess your organizational risks and get the proper insurance coverage. Selecting limits and deductibles begins with determining the risk appetite and tolerance of the organization. Each type of insurance has certain coverage amounts that affect your organization. Remember that if you do not have enough coverage then you will pay the balance of a loss out of the organizational operating funds or you will have to fundraise or (worse) be forced to sell unrestricted assets. The amount of coverage you require under general liability insurance depends on many factors. The most important factors that determine the amount of coverage you need to carry are:
• **Risk associated with your organization.** The higher the perceived risk, higher the coverage required to meet it.

• **The type of work your organization does.** If you have many volunteers, open your land to school groups, have many special events, and use lots of equipment for land management, then your organization may be exposed to more risk and require more and more varied coverage.

• **The state in which your organization is located.** Does the state in which you operate shows a history of awarding high damage amounts to complainants? If the answer is “yes,” then it makes sense for you to carry higher coverage limits. You might also look at current trends of awards in each of the insurance areas you are purchasing. Are most of the awards around a $1 million? Much more? Less? In current dollars, $1 million does not often cover both the legal and expert expenses and any damages award.

• **The value of your property.** For property, obtain a professional appraisal of any buildings, equipment and other inventory, then determine the replacement value to arrive at the needed coverage and remember the deductible as you will need that in cash. You should assess this information annually. Be sure to consider your intangibles as well such as software for computers, the data in the computers such as your donor database.

Deductibles are typically used to deter large number of trivial claims that an organization can be reasonably expected to bear the cost of. This is also often called the self-insured retention or retained risk. By restricting its coverage to events that are significant enough to incur large costs, the insurance firm expects to pay out slightly smaller amounts much less frequently, incurring much higher savings. Determining the right deductible for your organization requires a clear assessment of the likelihood of the occurrence of a loss plus the magnitude of the loss. Depending on the reason for the insurance, you will not want to pay more in the deductible than the property is worth, which is another reason to revisit coverage annually as you depreciate the value of equipment and vehicles.

**Ask for help**
You have a FREE affiliate membership with the Nonprofit Risk Management Center just for Alliance members. The free and discounted risk and insurance resources available to you are amazing. Take advantage of this Alliance member benefit funded just for **you**! Log on FREE to the Nonprofit Risk Management Center as affiliates of the Land Trust Alliance. [See directions »](#)

Leslie Ratley-Beach  Lorri Barrett  
Conservation Defense Director  Conservation Defense Coordinator  
Land Trust Alliance  Land Trust Alliance  
44 Deerfield Drive  1660 L Street NW #1100  
Montpelier, VT 05602  Washington, DC 20036  
802-262-6051  202-800-2219  
lrbeach@lta.org  lbarrett@lta.org  
www.lta.org

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Commonly-Purchased Insurance

There is no set formula for the amount of insurance coverage for a land trust or an actuarial table for appropriate limits of liability and deductibles. Land trusts frequently purchase these coverages:

- General liability or commercial general liability
- Directors and officers liability
- Fidelity or dishonesty coverage
- Employment practices liability
- Professional liability
- Non-owned automobile liability
- Property coverage
- Excess and umbrella liability
- Volunteer accident coverage
- Workers compensation
- Title insurance
- Terrafirma: Conservation Defense Insurance Service

How various insurance coverage fit together

General liability insurance covers claims alleging bodily injury or property damage. Directors and officers insurance covers claims alleging wrongful management decisions by board and staff. Unpaid directors of land trusts may have some coverage under individual homeowners or personal liability umbrella policies, but the protection is limited to the individual and offers no defense and indemnity for the land trust. General liability and D&O often will not cover for losses associated with embezzlement, fraud or other dishonesty. Title insurance generally excludes items on the ground, unless the survey exception is deleted, and landowner compliance with a conservation easement. Title insurance compensates the land trust if actual title to (ownership of) the conservation easement is challenged or if the legal description is disputed, subject to the survey exception. These insurances will not pay for a land trust to sue someone; traditional insurance only pays to defend the land trust if sued under certain circumstances. Terrafirma Risk Retention Group LLC provides coverage when a land trust must sue or is sued regarding conservation rights.

General Liability and Commercial General Liability

General liability insurance policies typically cover an organization’s exposure for bodily injury and property damage caused by an accident, except for specifically excluded liabilities.

Commercial general liability coverage is an expanded form of general liability that adds:

1. Personal and advertising injury liability (referred to as Section B) provides coverage for claims that do not involve bodily injury or property damage and are not the result of an accident. This category of coverage refers to claims alleging
   - False arrest, detention or imprisonment
   - Malicious prosecution
   - Wrongful eviction or entry by a landlord
   - Libel, slander or disparagement of an organization
   - Invasion of privacy through spoken or written statements
   - Unauthorized use of an idea in advertising
Infringement of copyright, product image or slogan in advertising
2. Medical expense coverage (referred to as Section C).

Regardless of the specific general liability policy, general liability won’t cover:
- Emotional distress, unless arising from bodily injury
- Financial loss, unless arising from bodily injury or property damage
- Property damage to intangible property (such as information stored on a computer network)

Common exclusions in Section B of the commercial general liability policy include:
- Liability of insureds in the business of advertising, broadcasting, publishing, website consulting or internet services. These entities purchase personal and advertising injury coverage in their professional liability coverage. Not an issue for most land trusts, but social media and smart phone applications may trigger a need to consider this coverage.
- Liability for employment practices (personal injury liability for employment practices is included under most nonprofit D&O liability policies)

### Typical Coverage Sections in a Commercial General Liability (CGL) Policy
- **Coverage A – General Liability** - “Bodily Injury and Property Damage.”
- **Coverage B – Personal and Advertising Injury Liability** - Expands CGL coverage beyond bodily injury and property damage, covering common liability exposures.
- **Coverage C – Medical Expense** - Covers accidents arising from the insured’s premises or operations, regardless of the liability. Coverage C reimburses expenses for minor injuries, reducing risk of a lawsuit. The standard limit is $5,000 per person.

### Commercial General Liability Policy Limits
- **General Aggregate Limit (Other than Products-Completed Operations)** – the maximum payable in the policy term for all claims other than Products Liability and Completed Operations Liability
- **Products Liability - Completed Operations Aggregate Limit** – the maximum payable for liability for products the organization manufactures or sells, or liability arising from construction or repair work the organization has completed
- **Personal and Advertising Injury Limit** – the maximum payable for Coverage B under the Commercial General Liability policy
- **Each Occurrence Limit** – the maximum payable for any one claim
- **Fire Damage Limit** – the maximum payable for fire damage to the portion of a landlord’s building that the insured organization occupies
- **Medical Expense Limit** — the maximum payable for Coverage C

All the limits described above are in addition to defense costs available under the policy.

### Directors and Officers (D&O) Liability
These policies cover economic damages resulting from errors or omissions in governance or management. A nonprofit D&O policy covers liability claims, unless specifically excluded. The two policies, therefore, are intended to be mutually exclusive — they do not cover the same liabilities.
### Similarities in Commercial General Liability and D&O Policies

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<tr>
<th>Commercial General Liability</th>
<th>Directors &amp; Officers Liability</th>
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<tr>
<td>Covers liabilities common to all nonprofits, including land trusts.</td>
<td>Covers claims alleging wrongful management acts that are common to all nonprofits.</td>
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<td>Provides broad catch-all or basic liability coverage. Other liability coverages are more</td>
<td>Provides broad coverage for wrongful management acts.</td>
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<td>specific and narrower in scope.</td>
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<tr>
<td>Includes all board members, employees and volunteers as insureds.</td>
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### Key Differences between Commercial General Liability and D&O Policies

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<th>Commercial General Liability</th>
<th>Directors &amp; Officers Liability</th>
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<tr>
<td>Covers bodily injury, property damage and personal and advertising injury.</td>
<td>Always excludes bodily injury and property damage.</td>
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<td>Covers accidents only. Claims usually arise directly from operations rather than governance</td>
<td>Covers wrongful acts. Claims usually arise from governance or management decisions. Board</td>
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<td>(management decisions).</td>
<td>members, management and the organization itself are often defendants and are listed under a broad</td>
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<td>definition of insured in the policy.</td>
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<td>Most often sold to nonprofits as an “occurrence” policy. The coverage trigger in this policy</td>
<td>Most often sold to nonprofits as a “claims-made” policy. In a claims-made policy, the coverage</td>
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<td>form is the date of the event, accident or occurrence.</td>
<td>trigger is the date the claim was made against the organization. A lawsuit is likely to be filed or</td>
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<td>“made” many months after the events occurred.</td>
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<td>Standard policy wording. Most insurance carriers use one of the forms issued by the</td>
<td>Nonstandard policy wording. Each insurer drafts or “manuscripts” its own D&amp;O policy forms.</td>
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<td>Insurance Services Offices (ISO). The form number and ISO reference appear at the bottom of</td>
<td>Differences in wording and policy structure make it difficult to undertake a side-by-side comparison</td>
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<td>each page of the policy.</td>
<td>of coverage, a key to determining which provides better or preferable protection for the insured.</td>
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### Crime Coverage or Fidelity Insurance

Fidelity insurance provide coverage for employee theft, forgery, fund transfer fraud, computer fraud, money order and counterfeit currency fraud, credit card fraud, as well as costs to investigate a loss. Fidelity Insurance protects organizations from loss of money, securities, or inventory resulting from crime. Common claims allege dishonesty, embezzlement, forgery, robbery, computer fraud, and wire transfer fraud. Crime-related losses are not typically covered by most property insurance policies, so crime protection insurance is an additional component for any business.

### Employment Practices Liability Insurance

Claims alleging wrongful employment practices may be explained by the Civil Rights Act of 1991 and Americans with Disabilities Act (ADA). Purchasing a D&O policy with coverage for employment-related claims makes sense because the claims risk is high. EPL coverage is available as a stand-alone policy but may not provide the depth of coverage that a nonprofit D&O with EPL coverage may include. Many stand-alone EPL policies do not include the...
organization, all employees or volunteers as insureds, and the definition of covered employment actions may be narrower. Finally, a stand-alone EPL policy may be more expensive and include a large retention or co-insurance provision in which the insured must pay a percentage of the loss.

**Professional Liability Insurance**
Professional liability insurance, also “errors and omissions liability insurance” or “malpractice insurance,” covers liability for the higher standard of care required of professionals providing services in their area of expertise. Professionals must possess and demonstrate the same expertise and competencies common to members in good standing of their profession. A professional liability policy may not cover all your land trust’s professional exposures. Professional liability formats have varying levels of coverage. The policy and its exclusions must be compared with the services provided. Read your policies and seek professional advice. This coverage often is very expensive.

**Non-Owned Automobile Liability**
Non-owned automobile liability insurance covers accidents caused by an employee or volunteer driving a personal vehicle for a nonprofit. Coverage protects the nonprofit—not the employee or volunteer. Coverage applies when liability limits of the owner’s personal auto policy are exhausted.

**Property Coverage**
Most land trusts purchase property insurance. The coverage depends on types of property that may be damaged and causes for the damage. To collect under a property policy, covered property must be damaged by certain causes of loss. Most policies cover all causes, except those specifically excluded (for example, nuclear war), but some policies only cover damage caused by specific causes, such as fire, lightning, wind, water or objects falling from the sky. Many policies do not cover significant catastrophes that affect a wide geographical area, such as floods or earthquakes.

**Excess and Umbrella Liability**
Liability insurance provides either primary or excess coverage. Primary coverage is the first to respond to covered claims. When primary policy limits are exhausted, the excess policy is triggered and provides additional coverage for defense, judgments and settlement expenses. Excess policies follow form, which means that they mirror terms and conditions in the underlying policy. They do not cover claims excluded by the primary policy. Some coverages, such as excess auto liability, include excess in their names and are easy to identify. Excess coverage is often inexpensive.

**Volunteer Accident Coverage**
Although permitted in some states, including volunteers in a land trust’s workers compensation coverage is expensive. Land trusts may purchase volunteer accident coverage, providing medical reimbursement up to a defined limit but not income replacement. A typical policy offers no-fault coverage if a covered individual suffers an injury while serving a nonprofit organization. Accident medical reimbursement coverage (also known simply as accident coverage) can also be written to cover volunteers and participants. A volunteer accident policy does not cover the
organization itself; however, coverage may dissuade an injured volunteer from suing the land trust.

**Workers Compensation**
Workers compensation covers employees, their survivors and organizations that purchase it for their workers. Coverage A (or Part One) eliminates the need for injured workers to sue their employers to obtain payment of medical costs associated with work-related injuries or illnesses. Coverage reduces, but does not eliminate the risk that the employer will face a liability claim from an injured worker. Coverage B (or Part Two) provides employers with liability protection for liability claims that are narrowly allowed by statute. Workers compensation laws vary widely between states.

**Title Insurance**
Title problems may occur that could not be found in public records or are inadvertently missed in the title search. An owner's policy of title insurance insures against the most unforeseen problems in acquiring conservation easements or fee-owned land. Owner's title insurance, called an owner's policy, is usually issued in the purchase amount (or value, if a donation). It is purchased for a one-time fee at closing and lasts as long as you or your successors have an interest in the property.

**Terrafirma: The Conservation Defense Liability Insurance Service**
The Land Trust Alliance formed Terrafirma Risk Retention Group LLC in 2011 to help land trusts defend their conserved lands from legal challenge. Terrafirma provides a significant protection from risk not covered by other insurance. Terrafirma is a charitable risk pool with tax-exempt status under the Internal Revenue Code. Learn more at [www.terrafirma.org](http://www.terrafirma.org).


See the helpful Annual Insurance Analysis Grid on the next page for you to complete with your agent and board.

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When someone sues a land trust, sometimes the challenger sues the land trust’s directors and officers too. Everyone may need legal defense even when no one did anything wrong. In most cases, the board will look to the land trust to protect them by paying for their legal defense and for any fines or judgments incurred in the course of serving the land trust.

Directors and officers (D&O) insurance covers liability for actions of the land trust board and staff and protects the land trust, something that an individual board member’s own homeowners insurance will not do even if it has some protection for volunteer service. A good policy covers the corporation and volunteers. Some board members will not serve without D&O insurance, and if a land trust indemnifies its board members from liability, it needs this insurance to cover its potential risk. On the positive side, having good D&O coverage is a great recruitment tool. Finally, many D&O policies may include Employment Practices Litigation (EPL) coverage, and that is an important reason for any land trust with employees to have the coverage.

D&O insurance covers liability for “wrongful acts,” such as:
- poor business judgments,
- errors, omissions, and misstatements,
- negligent acts,
- breaches of duty,
- interference with another’s business,
- conflicts of interest,
- fraudulent conduct,
- violations of statutes,
- failure to file statutorily mandated reports,
- financial mismanagement,
- misuse of donated funds,
- co-mingling of special funds,
- discrimination,
- sexual harassment,
- wrongful termination.

Coverage Under Homeowners Policies
Unpaid board members of land trusts may have some coverage available under their individual homeowners or personal liability umbrella policies. Personal Liability Umbrella Policies (PLUPs) can expand coverages, as well. These policies generally limit coverage to the individual board member (not the land trust) and are not a substitute for either general liability or directors and officers insurance for the land trust. Each board member should consult with his or her own insurance company to determine if there are situations in which their individual policies might provide coverage because not every homeowner policy has this coverage.

Insured Versus Insured Exclusions
D&O policies usually have some form of “insured versus insured” exclusion. This means that, with some exceptions, the policy does not cover claims by directors (even former directors) against other directors, or by the land trust against its directors (past or present). Since all present and former officers and directors are insureds, the “insured v. insured” exclusion can bar coverage of any claim by any former director against any other director, even if the claim has nothing to do with the former director’s period of service.

Technical Issues with D&O Policies
The language found in most D&O insurance policies explicitly states that:
- It is your responsibility, not the insurer’s responsibility, to defend the claim.
- You must still get approval from the carrier prior to incurring any costs.
- The carrier must approve of the law firm you intend to engage even though the insurer has no obligation to provide you a defense.

Reasonable and Necessary
Most policies define defense expenses as “reasonable and necessary legal fees and expenses.”
- Carriers will usually advise you of the maximum hourly rate they will pay.
- Many carriers also will give you guidelines on what they consider reasonable expenses.
- Failure to follow payment guidelines may automatically disqualify you from coverage.

Hint: You can use the insurance company’s payment guidelines when reviewing your attorney’s invoices so that you can challenge inappropriate charges.

Defense Within Limits
Unlike general liability policies, D&O insurance policies have “defense within limits provisions,” that reduce the policy’s coverage limits. This means that the payment of the lawyer’s fees and other costs reduces the amount available to pay any damages awarded if your land trust loses the case.

Do Your Homework!
D&O policies are very different from the standard general liability policy and can vary substantially among carriers. Be sure to understand and follow the policy terms.

RESOURCES


Nonprofit Risk Management Center, Affiliate membership through membership in The Land Trust Alliance. Click on the live link in the Conservation Defense Clearinghouse. The link is the Center’s logo:

DISCLAIMER

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Last revised March 25, 2015
Practical Pointers Series  
TITLE INSURANCE

Sometimes title problems surprise everyone. Perhaps a defect is not in the public records or maybe the title examiner accidentally missed a mortgage in the title search. Maybe everyone involved made a simple error with big consequences. Even a typo can do that. An owner’s title insurance policy helps your land trust respond to unforeseen problems and get the transaction details right at the start.

What it is
1. Fraud happens but the more common reason to get an owner’s policy is to catch the simple and normal errors, such as a recent new second mortgage or a line of credit that isn’t subordinated, or a new estate planning entity that changes the name of the legal owner.
2. A land trust holding a conservation easement or buying land can get an “owner’s policy” for its interest in that easement or the land.
3. Only an owner’s policy fully protects you for undiscovered title problems and other errors.
4. An abstract of title is not enough. A title update to cover the time between the last title report and the closing is essential. Title insurance covers that for you and alerts you to late changes.
5. The title company will help pay valid claims and may cover the costs of defense of the title.
6. Possible hidden title problems can include:
   a. Errors or omissions in deeds
   b. Mistakes in examining records during title search
   c. Forgery of a signature on a deed in the chain of title
   d. Mortgage holder fraud, forgery or false information
   e. Undisclosed heirs with a claim to the property
   f. Potential boundary issues, encroachments, adverse possession
   g. Fraud and bankruptcy claims that the deed defrauded creditors

What it costs
7. A one-time premium covers you for as long as you have an interest in the property.
8. Buying a nominal amount rather than the full property value may allow the carrier to pay the value of the policy releasing them from the obligation to defend an expensive dispute. You get money but lose your title. And the money may not be sufficient to offset the lost conservation values, time and costs and public perceptions of your competence.
9. Receiving an owner’s policy isn’t an automatic part of the closing process; you order and pay a premium for the policy as part of the closing, typically based on the fair market value of the interest insured. You can buy inflationary protection as well.

What it does
10. A standard owner’s policy normally insures the known title as it appears from the public records and such hidden defects as forged documents, conveyances by incompetent grantors, incorrect marital statements and improperly delivered deeds.
11. An owner’s policy will reveal any senior liens or encumbrances that if foreclosed upon, can eliminate your interest and will guarantee the effectiveness of subordinations.
12. The policy generally does not protect again certain, named “uninsurable” losses, listed as exclusions or exceptions.
13. Be sure that the carrier does not list your conservation easement or conservation restrictions on the exceptions to coverage usually called Schedule B.

14. For additional premium, title carriers offer hundreds of possible other coverages by endorsement to their policies, that can cover losses from zoning ordinances, restrictive covenants, easements, encroachments, setbacks, and other known existing problems. Most carriers exclude water and mineral rights.

15. Investigate what it might cost to buy an enhanced policy, usually an American Land Title Association (ALTA) policy, or even an Owner’s Extended coverage “Eagle” policy. It provides additional (although typically limited) coverages for post policy challenges to title that involve on the ground verification or fraud claims.

**Checklist for Selecting a Title Company**

1. The title company’s approach to insuring risk is reasonable and they understand conservation
2. References/referrals checked; Years in business; Fees and premiums
3. Enhanced coverage requirements
4. Ask what Title company services are included: Drafting deeds and other legal documents; Acting as escrow agents to hold money and documents pending closing; Acting as a closing agent; Ordering the Title Commitment or Title Report?

**What happened to one land trust**

A land trust accepted a conservation easement that the landowner mistakenly signed as an individual instead of as the owner of the limited liability company to which he previously conveyed the property. The landowner owned 99% of the limited liability company. His wife owned the other 1%. If the land trust had obtained a title insurance policy, the updated title review would have detected the mistake early and the parties could have corrected the mutual mistake immediately. Even if they missed it then, title insurance would have covered the costs to win the case to invalidate the easement by the successor owner. Fortunately, the court held that a conservation easement that mistakenly referenced an individual, as opposed to a limited liability company created by the individual, as the easement grantor is still valid but the land trust had to pay the costs to win.

**RESOURCES**


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Last revised March 31, 2015
Conservation Defense Insurance

Considerations for Board Members

Imagine if it were you: Board members at the Mesa Land Trust discovered that one never knows what is around the corner when it comes to protecting your land trust. Three overlapping violations put an amazing amount of stress on their organization. Board members reported that the challenges were time consuming and expensive. Fortunately, the Board had been preparing for years to meet these challenges and had the resolve and the resources to ensure conservation permanence. They were not lulled into complacency by decades with no problems.

Even so, according to Bill Prakken of the Mesa Land Trust board, they are looking forward to having a backstop through the possible conservation defense insurance program that the Land Trust Alliance is exploring. Bill says, “It gives us and landowners confidence that we have a safety net. Even if you don’t think you’ll ever have to defend land or that you have sufficient resources to effectively self-insure, you still have an interest in seeing Terrafirma flourish. It is a cost effective way to bring solid legal defense and enforcement to as many legal challenges as possible. And that benefits all of us.”

Terrafirma Conservation Defense Liability Insurance

♦ Protect the permanence of conserved land, create favorable and avoid unfavorable case law
♦ Cover legal related expenses for fee land and conservation easement challenges
♦ For all land trusts for both enforcement and defense which is not commercially available
♦ Encourage practices that will help to prevent violations and unnecessary litigation
♦ Provide early free assistance with challenges

Endowments for Defense and Stewardship

♦ Every Land Trust must continue to have endowments for defense and stewardship
♦ Terrafirma is a safety net not a substitute for sufficient endowments

Common Financial Questions

♦ Base premium of $60 per year per conservation easement or fee-owned land
♦ A maximum limit of $500,000 per claim (which includes defense costs) and aggregate
♦ A $5,000 deductible per claim regardless of policy limits
♦ Discounts available

Crunch the Numbers (Remember: Accreditation is not required)

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Terrafirma Member Owner Insured Land Trusts

♦ Owner-members consist of 476 land trusts in 46 states and DC
♦ Insured portfolios include over 7.2 million acres of conservation land
♦ 24,193 parcels of conserved land currently enrolled including fee land and easements
Some Examples of Legal Challenges

Midwest
♦ A Michigan land trust timber dispute with an original landowner cost that land trust more than $35,000 and 18 months of time. The trial judge forced a settlement.

West
♦ Mesa Land Trust (CO) had a triple whammy after 27 years without any significant violations or legal challenges. The three cases cost more than $150,000 over two years, and one case is still ongoing at a cost in excess of $100,000 and climbing.
♦ Nevada County Land Trust (CA) spent $150,000 defending against a neighbor demand to use ancient roads on the conserved property to serve an adjacent development.
♦ Colorado Open Lands staff defended against a neighbor trail construction on conserved land where it was not permitted. Its attorney waived the $125,000 in legal fees.
♦ Center for Natural Lands Management (CA) Form 8283 dispute cost $1,000,000.

East
♦ Society for the Protection of New Hampshire Forests experienced three simultaneous cases. The most costly was a neighbor challenging easement enforcement that cost in excess of $92,000.
♦ Vermont Land Trust neighbor negligence claim cost $45,000 to prevail at trial.
♦ French & Pickering Creek Conservation Trust (PA) enforced removal of a prohibited house cost them more than $500,000 and took them 12 years to prevail.
♦ Western New York Land Conservancy fee preserve multiple trespass case cost them more than $75,000. The neighbor lost one appeal but may pursue the case to higher courts.

Southeast
♦ Highlands-Cashiers Land Trust (NC) spent $63,000 to stop a land owner from blocking access to a mountain top trail. They lost in local court but won in the NC Supreme Court.

Comments from Land Trust Leaders
“This is a no-brainer. Having experienced the expensive, unpredictable costs of litigation, I feel defense insurance is an essential safety net for prudent land trusts committed to defending their easements.” Dan Pike, President, Colorado Open Lands

“This simply makes economic sense. We will take a very small percentage allocation from our existing Defense Fund and buy the insurance. The result will be to essentially triple our existing financial resources for conservation easement defense.” Jay Freedman, Treasurer, Coastal Mountains Land Trust (ME)

“Our board of directors is very supportive of joining the Conservation Defense Insurance program to help us manage the risk associated with our obligation to defend our conservation easements and lands in perpetuity.” Nicole Byrd, Executive Director, Solano Land Trust (CA)

“I am the sole staff person of a small land trust in Georgia. The conservation defense insurance program seems to be a very reasonable, balanced, targeted effort that I think would benefit us.” Steffney Thompson, Executive Director, Oconee River Land Trust (GA)

Learn more at www.terrafirma.org.

Leslie Ratley-Beach, Lorri Barrett and Hannah Flake, Alliance Risk Management Services are available to help with any questions. Write to help@terrafirma.org or call Hannah at 202-800-2248, Lorri at 202-800-2219 or Leslie at 802-262-6051.
3-16-15