A LEGACY OF LAND: CONSERVATION EASEMENTS AND LAND STEWARDSHIP

CONFERENCE PROCEEDINGS

Environmental Law Centre

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Environmental Law Centre

The Environmental Law Centre (Alberta) Society is a non-profit charitable organization operating in Alberta since 1982. The Society believes in making the law work to protect the environment and in support of this objective provides services in environmental law education, information and referral, environmental law reform and environmental law research. The Society operates the Environmental Law Centre which is staffed by four full-time lawyers.

Funding is provided to the Society in part by the Alberta Law Foundation and through the generous support of the public. The Environmental Law Centre also accepts private and government research contracts for work relevant to and consistent with the Society's objectives.

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INTRODUCTION TO CONFERENCE PROCEEDINGS

Private conservancy involves landowners using law to protect the natural values of land from development. The Environmental Law Centre (ELC) held its first conference on private conservancy in January of 1994. Participants in that event focussed on how the law at that time made private conservancy objectives difficult to attain and offered views on how law could be changed to facilitate private conservancy. The conference proceedings were aptly titled Private Conservancy: The Path to Law Reform. Two years later the Alberta Government reformed private conservancy law through amendments to the Environmental Protection and Enhancement Act[1] (EPEA). These amendments created conservation easements. Conservation easements are statutory based voluntary legal agreements registered against title that a landowner may enter into to protect natural values of land, for a term of time or forever. Conservation easements work by prohibiting land uses inconsistent with protection.

The ELC welcomed the amendments. To assist those who wished to use this new legal tool, shortly after the EPEA amendments, the ELC published Arlene Kwasniak's *Conservation Easement Guide for Alberta*. This Guide offers a step by step description of the conservation easement process, answers simple to technical questions about conservation easements and provides an example conservation easement agreement.

Since publication of the Guide, the ELC has received numerous requests from private individuals, all levels of government as well as non-governmental organizations, for further legal information relating to conservation easements. In addition, the ELC has received many requests for help in obtaining non-legal information relating to land preservation and stewardship. Legal related questions included questions on conservation easements and legal processes, Land Titles practices, tax consequences, estate planning, appraisals, subdivision and development and enforcement. Non-legal related questions included conservation easements and land stewardship, finding the right people to carry out conservancy objectives, monitoring compliance, dealing with landowners, and determining, assessing and communicating wildlife and other natural values of land.

It became clear to the ELC that it was time for another conference. However, in view of the range of information needed, the ELC determined that conference should provide information on both legal and non-legal matters. In planning the second conference the ELC joined forces with the Land Stewardship Centre of Canada (LSCC). The ELC oversaw the entire event and co-ordinated and administered the legal related aspects. The LSCC co-ordinated and administered the non-legal related aspects. [For more information on the ELC visit <www.elc.ab.ca>. For more information on the LSCC visit <www.landstewardship.org>]. The conference was held on June 18 and 19, 1998, at Lister Conference Centre, University of Alberta, in Edmonton, Alberta. This conference presented a mosaic celebrating the interaction between legal and practical aspects of natural land conservancy. Informative presentations on topics based

in law, ecology, planning, tax, assessment and stewardship were interlaced with thoughtful landowner accounts of their own conservancy experiences. A major highlight was Peter Lee's, (Regional Director Alberta, World Wildlife Fund) inspiring and informative keynote address.

CONFERENCE FUNDING

This conference was made possible by generous grants from the EJLB Foundation, Ducks Unlimited Canada, Shell Environmental Fund, Canadian Bar Association, Environmental Law Subsection, Southern Alberta, Charitable Donors of the ELC, Canadian Occidental Petroleum Ltd. and, Wildlife Habitat Canada. The ELC and LSCC are deeply grateful to these funders.

THE PROCEEDINGS MATERIALS IN THIS VOLUME

These Conference Proceedings contain the written materials that were provided by the conference speakers. The ELC took care to engage in only the lightest editing, mostly to ensure consistent format. Needless to say, all views expressed in the papers are those of the authors and not necessarily of the ELC or the LSCC.

Many Environmental Law Centre staff contributed to the completion of this publication: Mike Callihoo, a summer law student in 1998 assisted with the conference and collected the essays; Tammy Allsup, Office Manager, designed the proceedings; Debbie Lindskoog, Secretary, inputted the contributions; and Seanna Rohatyn, one of our 1999 summer law students assisted with editing. Many thanks!

The Proceedings contain the following papers.

PART I - OVERVIEW OF CONSERVATION EASEMENTS & LAND STEWARDSHIP

Conservation Easements – Arlene J. Kwasniak, *Staff Counsel, Environmental Law Centre, Edmonton, Alberta*

This paper provides a backdrop for the legal material presented at the conference. It outlines the main features of conservation easements, addresses how they interact with other legal processes, describes the common steps involved in granting a conservation easement, outlines potential benefits of granting a conservation easement (including tax benefits) and makes suggestions on how to facilitate the conservation easement process.

Practicalities of Obtaining Conservation Easements in Alberta – Sue Michalsky, *Project Manager, Nature Conservancy Canada, Calgary, Alberta*

This paper provides practical information for those who are on the ground trying to secure land for conservation purposes. It begins with a brief description of inventoried significant natural areas in the province. It then indicates potential fragmentation pressure points in rural areas and stresses the need for a change in landowners' attitudes if land conservation is to succeed. The paper provides information that should help conservation agencies when approaching landowners and negotiating agreements.

Benefits and Values of Land Stewardship in Relation to Agricultural Landscapes and Conservation Easements – Gaylen Armstrong, *Environmental and Agriculture Consultant, Pincher Creek, Alberta*

This paper sets the background for the material presented on land stewardship. It begins by describing concepts relevant to rural land stewardship, including "sustainable land management" and "environmentally sustainable agricultural production". It sets out many benefits and values of land stewardship. It also identifies and discusses factors relevant to facilitating long term protection of biodiversity values in an agricultural setting.

A Personal Land Legacy: The Forest, My Neighbours and My Family – Gordon Kerr, *Kerr & Associates, Edmonton, Alberta*

Gordon Kerr's personal story begins "Our family bought land in 1951. It was 160 acres in the forest. Our family now owns land in 1998. It is 160 acres of forest – surrounded by land clearing. What has happened in 47 years?" His account shows how economic objectives can transform the diversity of a landscape, and how carrying out these objectives can fail to produce the desired economic benefit.

PART II – USING CONSERVATION EASEMENTS

Back From Chaos – Peter G. Lee, *Regional Director Alberta, World Wildlife Fund, Edmonton, Alberta*

This paper is the text of Peter's fascinating and inspirational keynote address. It's far-reaching yet connected themes include: Thinking big; The 'Age of Reason' and the 'Madness of Crowds'; The pace and scale of landscape disturbances in Alberta; Reasons for conservation; The importance of conservation rhetoric as contested political terrain; Conservation strategies; A paradigm shift; Conservation in the year 2025 and World Wildlife Fund Canada and Endangered Spaces.

Easement Sites: Protection and Use are not Mutually Exclusive – Glenn H. Pauly, *Southern Alberta Land Trust Society, Pincher Creek, Alberta*

This paper describes research results regarding landowner's attitudes towards conservation through conservation easements. It also provides information that should be useful to land conservation agencies when dealing with landowners.

Using Conservation Easements in Protected Areas and Public Lands – Peter G. Lee, *Regional Director Alberta, World Wildlife Fund, Edmonton, Alberta*

This paper presents a science-based approach for prioritizing the high priority conservation areas for the application of conservation easements. The paper begins by noting that 60% of Alberta land is publicly owned and 40% is privately owned. It points out the key role that conservation biology plays in identifying and carrying out for protection priorities. It discusses how the province already has identified numerous environmentally sensitive areas within the province on public or private lands, and foresees an important role for conservation easements in securing protection of some of these areas.

PART III - LEGAL & ECONOMIC CONCERNS

Wills and Estate Planning Issues Surrounding Conservation Easements – Philip J. Renaud, *Barrister & Solicitor, Duncan & Craig, Edmonton, Alberta*

This paper discusses a number of issues in planning for the gift of a conservation easement through a will. It touches on tax planning, and details many estate planning opportunities and potential pitfalls through the use of conservation easements. The paper stresses the importance of a will and careful estate planning if a person's intentions to grant a conservation easement by will are to be successfully carried out. It also describes the costs likely to be incurred to effect a conservation easement through estate planning.

Tax Consequences of Lifetime Dispositions of Conservation Easements – Garnet T. Matsuba, *Barrister & Solicitor, Trevoy Simpson*

This outline, in bullet format, indicates tax consequences of a lifetime of dispositions of conservation easements. The outline includes points on the tax picture prior to 1995 and identifies changes and potential tax benefits resulting from the 1995 and 1997 federal budgets.

Appraising the Value of a Conservation Easement – Don Hoover, *AACE, P. Ag. Serecon Valuation & Agricultural Consulting Inc., Edmonton, Alberta*

This paper describes the valuation process that Serecon uses to assess the value of a conservation easement. It takes the reader through many stages of evaluating conservation easements, including: an overview of the appraisal process; the importance of concepts of property ownership; valuation of partial interests; and determining and applying an appropriate valuation framework.

Conservation Easements and Financial Incentives and Disincentives to Sustainable Woodlot Management – Gordon Kerr, *Kerr and Associates, Edmonton, Alberta*

Gordon Kerr outlines the mandate and activities of the Woodlot Association of Alberta. The outline highlights many of the conservation and social values of sustainable woodlots. It also describes financial disincentives to woodlot sustainability resulting from current property taxation of woodlots, in comparison to taxation of land used for food crop or livestock agriculture.

PART IV - ISSUES FOR MUNICIPALITIES

Conservation Easements and Municipal Planning – Bill Symonds, *Coordinator, Planning Advisory, Alberta Municipal Affairs, Edmonton, Alberta*

This paper begins with an overview of the planning provisions of the Municipal Government Act[2] (MGA) as it relates to environmental issues. It describes the MGA's legislative framework, focussing on its relevance to municipalities setting and implementing environmental objectives. It then offers comments on potentially appropriate and inappropriate uses of conservation easements in the carrying out of municipal planning provisions. It also remarks on the concept of transfer of development rights and its applicability in Alberta.

Municipal Ecological Planning – Leon Marciak, *P. Ag. Soils/Resource Data Management, Alberta Agriculture, Food & Rural Development*

This outline identifies how municipal ecological planning has proven to be an effective tool for resource management within a municipality.

Conservation Easements and Subdivision – A Legal Perspective – William W. Shores, *Barrister & Solicitor, Shores Belzil, Edmonton, Alberta*

This paper begins noting that "although conservation easements and the subdivision approval process in the MGA are both intended to plan for and regulate the use of land over the long term, there is no clear integration of the two concepts". The author then presents his views on how a court might find that these processes relate. The author's analysis includes an interesting discussion on when the MGA might authorize more municipal involvement in the conservation easement process than does EPEA.

Canmore and Wildlife Corridor Protection: Taking the Path Less Travelled – Frank Lisczak, *Planning Consultant, Canmore, Alberta*

This paper relates the difficult task from a municipal planning perspective of achieving wildlife corridor protection in the Canmore Bow Valley area in the face of immense development pressure, and approved development projects.

Municipal Development and Environmental Planning: Strathcona County – Your Natural Location – Locke Girvan, *Planner, Strathcona County, Alberta*

This paper offers insight into how municipalities " ... can balance land-use planning with environmental enhancement, conservation and protection as a means of sustainability and to preserve the quality of life ... ". It lays out the ecological values inherent in Strathcona County, and explains how the County uses its land use control authority to maintain values, including by use of conservation easements in the subdivision process.

Conservation Easements: A Developer's Perspective – John Brownlee, *Developer, Haverhill Estates*

The author, a self-proclaimed "reluctant developer" describes his fascinating subdivision development in Strathcona County. The paper states that the development is designed to retain special environmental features and country amenities through the use of restrictive convenants and environmental easements.

PART V - CONSERVATION EASEMENTS AND ENFORCEMENT

Monitoring Compliance with a Conservation Easement – Sue Michalsky, *Project Manager, Nature Conservancy Canada, Calgary, Alberta*

This discussion begins with a quote of Paul Hartman, U.S, Fish and Wildlife Service: "from a practical point of view, there is no such thing as a perpetual easement if there is not a

commitment to enforce the terms of the easement.... I spent the first ten years of my career acquiring easements and the last ten years administering and defending the same type of easements. Believe me, acquiring the easements is the easy part." The paper then offers valuable advice gained from the Nature Conservancy's long history in the U.S. on ways to ease monitoring and enforcement, including through having gathered reliable baseline data and making genuine efforts to facilitate landowner compliance.

Enforcement of Conservation Easements – Jennifer Klimek, *Barrister & Solicitor, Edmonton, Alberta*

This paper addresses many enforcement issues including: who can enforce a conservation easement; the importance of an enforcement policy; why enforcement is important; approaches to enforcement; and the distinctions between mediation, arbitration and court proceedings.

Arlene J. Kwasniak
Staff Counsel
ELC Co-ordinator of Conference

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[1] S.A. 1992, c. E-13.3.
[2] S.A. 1994, c. M-26.1.

PART I

Overview of Conservation Easements & Land Stewardship

THE CONSERVATION EASEMENT

Arlene J. Kwasniak

A. INTRODUCTION

In 1996 the Alberta *Environmental Protection and Enhancement Act*[1] ("EPEA") was amended to increase landowners property rights. The amendments give landowners a new tool so that they can choose -- forever or for a term -- not to develop land in order to preserve land's natural values. The tool allows landowners, in effect, to cancel some development rights to land while retaining ownership and other land use rights.

A conservation easement is a voluntary legal agreement landowners may enter into to protect the natural values of all or a part of their land for any of the purposes set out in EPEA. A conservation easement agreement registered on title at Land Titles binds not only the owner who originally granted the easement, but also future landowners. While the conservation easement is in effect, no one may exercise the development rights transferred with the easement. The beauty of a conservation easement is that even though a landowner transfers some development rights, he or she doe not lose full control of the land. Title to the land covered by the conservation easement does not change and the owner may retain rights to the land, as set out in the conservation easement agreement.

Part B of this paper outlines numerous core features of conservation easements. Part C addresses how conservation easements interact with other legal processes. Part D describes the common steps involved in granting a conservation easement. Part D also outlines potential municipal and federal tax consequences of granting conservation easements (including potential tax benefits). Part E makes suggestions for help on carrying out the conservation easement process.

B. CORE FEATURES OF A CONSERVATION EASEMENT

1. Historical Background

Prior to the EPEA amendments, there were no conservation easements in Alberta. If Alberta landowners wished to restrict forever the use of their land, they had to rely on other legal tools, mainly common law restrictive covenants. Unfortunately, the legal rules for creating a valid restrictive covenant were complex and burdensome. Only in rare circumstances could a landowner fit under these narrow rules. Even if a landowner could fit under them, restrictive covenants could prove a precarious way to try to preserve land.[2]

Many people, organizations, and agencies (both governmental and non-governmental) recommended to the Alberta government that it pass conservation easement legislation. They pointed out how nearly all of the states in the U.S. had conservation easement legislation, and how many Canadian provinces either had conservation easement legislation or were in the process of getting it. The Alberta government followed these recommendations by amending EPEA to create conservation easement provisions.

Conservation easements only may exist in Alberta because of the EPEA provisions. This means that in order to create a valid, binding conservation easement, EPEA must be followed carefully. If the EPEA provisions are not complied with, even though the parties to an agreement may think they are creating a conservation easement, they will fail. A later landowner might successfully ask a court to remove the conservation easement. The landowner could then develop the property free of it.

2. Parties To A Conservation Easement

A conservation easement is between two parties, the *grantor* and the *grantee*. The person who grants a conservation easement is called the grantor. Any *registered owner* of land many grant a conservation easement. *Registered owner* means the person or persons shown on the title to the land at the appropriate Land Titles Office to be the registered owner. Provided that a title has been issued for the land, the land may be either privately owned or Crown land. The *grantee* is the party that is granted the conservation easement. Sometimes the grantee is also called the *holder* of a conservation easement. Not every person or organization may be the grantee of a conservation easement. The grantee must be a *qualified organization* as defined in EPEA.

EPEA defines a *qualified organization* to be:

- The provincial government, or a provincial government agency
- a local authority (including a municipality)[3]
- non-profit, bodies corporate having charitable status with Revenue Canada which are organized to hold conservation easements and are required to transfer their conservation easement holdings to other qualified organizations upon winding up.[4]

3. Limited Purposes For A Conservation Easement

A conservation easement only may be granted for one or more of the specific purposes EPEA sets out. These purposes are:

(a) the protection, conservation and enhancement of the environment including, without limitation, the protection, conservation and enhancement of biological diversity;
(b) the protection, conservation and enhancement of natural scenic or aesthetic values;

(c) providing for any or all of the following uses of land that are consistent with purposes set out in clause (a) or (b):
  (i) recreational uses;
  (ii) open space use;
  (iii) environmental education use;
  (iv) use for research and scientific studies of natural ecosystems.[5]

4. A Conservation Easement's Restrictions, Obligations and Permissions

A conservation easement will place restrictions on the owner's use of the land in the area covered by it (the *conservation easement area*). The point of the restrictions is to prohibit the landowner from doing anything which will erode or destroy the values for which the area is conserved. For example, a conservation easement meant to protect forest habitat might state that the owner shall not cut any vegetation within the conservation easement area. However, it might also qualify restrictions to allow the owner to remove some vegetation, provided that the qualification does not detract from the easement fulfilling its purposes. For example, the easement might allow the grantor to pick a limited amount of berries for personal use.

In addition to restricting use, a conservation easement may place obligations on the owner to do things, such as maintain wildlife fences. Or it may place obligations on the grantee, such as to maintain a weir. Finally, a conservation easement may be permissive in that it allows the grantee to do certain things on the land. For example, "the grantee may enhance nesting sites as follows …".

5. Identifying the Conservation Easement Area

There are two main reasons why it is important to identify the area subject to the conservation easement. The first has to do with *certainty of contract* between the grantor and grantee. Law requires that for a contract to be valid and binding, its terms must be clear and certain enough so that the parties agree on their respective rights and obligations. So, for example, if a conservation easement prohibits the grantor from cutting down trees in the conservation easement area, the agreement must identify the area with enough precision so that the grantor and grantee agree on which trees the grantor may cut down, and which trees must remain standing. Where absolute certainty regarding every tree is not feasible, the contract should set out an agreed upon method to resolve grey areas. Law does not require any particular method (such as a survey) to achieve precision for certainty of contract.[6]

The second reason has to do with registration of the conservation easement at the Land Titles Office. The Registrar of Land Titles must be satisfied that any document presented for registration complies with statutory requirements, and will enable him or her to fulfil the Registrar's functions under the *Land Titles Act* and other governing legislation. For example, with conservation easements, the Registrar will want to be assured that if the land is subdivided he or she will register notice of the

conservation easement on only the correct resulting titles. In order to do this, the Registrar wants the area to be described to achieve *legal certainty.*

In some cases, achieving legal certainty will be simple and should require no survey or other plan. These are cases where the conservation easement covers either (a) the entire area described in a titled parcel of land, or (b) the entire area of parcels of land which legislation allows the Registrar to issue title to without prior subdivision approval. Regarding (b) under the Alberta *Municipal Government Act* such areas would be:

- a quarter section;
- a river lot, lake lot or settlement shown on an official plan as defined in the *Surveys Act*[7] that is filed or lodged in a Land Titles Office;
- a part of a parcel of land described in a title if the boundaries are shown and delineated in a plan of subdivision.[8]

In other cases, achieving legal certainty will not be so simple. Where a landowner wishes to transfer an interest in land – including by way of conservation easement – the *Land Titles Act* gives the Registrar the right to require the owner to have it surveyed by an Alberta land surveyor.[9] A survey plan is based on actual monuments placed on the ground and must be prepared to strictly comply with the detailed requirements of *Surveys Act* and regulations[10]. Needless to say, surveys can get quite pricey and may act as a disincentive to conserving the land by way of conservation easement.

Fortunately, the *Land Titles Act* gives the Registrar discretion, where appropriate, to accept a descriptive plan, instead of a survey plan. A descriptive plan is not based on an actual survey of the land. Instead it graphically represents the area in question and describes its boundaries by reference either to sections in the Alberta Township System or to registered surveyed subdivisions.[11] Parties to a conservation easement likely will prefer a descriptive plan to a survey plan since it typically will be less expensive.

It is up to the Registrar whether or not to accept a descriptive plan instead of a survey plan. To get the Registrar's consent, the owner must obtain written approval from the Surveys section at Land Titles Office. According to the *Alberta Attorney General Land Titles Manual*, the Surveys section will take into consideration the following (among other matters) when deciding whether a descriptive plan is appropriate:

- the location of the land;
- the cost of a survey;
- the intended use of the land;
- the value of the land;

- the complexity of the description.[12]

The owner may need other approvals while having the plan prepared. For example, with a descriptive plan, parcel boundaries must be parallel or at right angels to existing surveyed boundaries unless the Surveys section otherwise approves. As well, where a natural boundary (such as a lake) forms part of a descriptive plan, the plan must reflect the current location of the boundary and be approved by the Alberta Government Department administering the natural boundary.[13] An Alberta Land Surveyor must sign a descriptive plan, just like a survey plan.

6. Registration at Land Titles and Deemed Notice

Under EPEA, a conservation easement does not come into existence until it is registered against title at the appropriate Land Titles Office.[14] Under Alberta law, absent fraud, registration gives anyone who deals with the property, including future owners, deemed notice of the conservation easement. The conservation easement, as lawyers say, "runs with the land". This means until terminated (if ever) the grantee may enforce the conservation easement against future owners of the property even though they did not sign the original conservation easement agreement.[15]

7. Term of a Conservation Easement, Modification and Termination

EPEA recognises that sometimes it might be necessary to change the terms of a conservation easement, or even terminate it. EPEA allows a conservation easement to be modified in three ways. The first is by agreement between the grantor and grantee. EPEA requires that amendments to the conservation easement reflecting the changes be registered at the Land Titles Office. The second way a conservation easement may be modified or terminated is by the Minister of Environmental Protection in the "public interest". EPEA does not require the Minister to follow any specific process if he or she proposes to modify or terminate a conservation easement. Nevertheless, our system of law imposes duties on the Minister to carry out processes prior to making a decision. These duties arise from two sources. One is from a duty at law that administrators act fairly, especially when rights may be affected. This "duty to be fair" would require the Minister to give the grantee and grantor the right to effectively participate in any decision to terminate or modify since their rights will be affected by the decision. The other source is from legal cases interpreting what a government official must do when determining what is in the "public interest". These cases suggest that the official must give notice to those who might be affected and give them an opportunity to give evidence.[16] The cases also impose other limitations on decisions in the public interest.[17]

The third way a conservation easement may be modified or terminated is by court order. The person requesting the change must prove that the modification will be beneficial to the persons principally interested in its enforcement, or that the conservation easement conflicts with a land use by-law or statutory plan under Part 17 of the *Municipal Government Act.* Courts have interpreted the latter with respect to restrictive covenants, which are similar in relevant ways to conservation easements. They have found that courts have no authority to modify or terminate a restrictive covenant simply because a land use by-law or statutory plan

is more permissive than the covenant. For example a court cannot modify or terminate a restrictive covenant limiting building height to two stories where a by-law would allow three stories. In order for a court to have the right to modify or terminate, the covenant must *directly conflict* with the land use by-law or statutory plan.[18] For example, a court would have authority to modify or terminate a covenant restricting building height to no less than three stories, where the by-law restricts building height to two stories.

8. Notice of Intent to Register a Conservation Easement

Subject to certain exceptions, EPEA and its regulations require a 60-day notice of intention to register a conservation easement to be given to the following:

- the Minister of Municipal Affairs, where the land that is subject of the conservation easement is located in an improvement district;
- the Special Areas Board, where the land that is subject of the conservation easement is a special area[19]
- in any other case, the local authority of the municipality in which the land that is subject of the conservation easement is located.

Notice must be in the form prescribed by and attached to the *Conservation Easement Registration Regulation.*[20]

The first exception to the 60 day notice rule is, no notice must be formally given if the grantee or the grantor is the local authority of the municipality where the land subject to the conservation easement is located.[21] For example, if the County of Camrose is the grantee of a conservation easement, then it does not need to be formally notified. The second exception is, the person or body entitled to receive notice may shorten the notice period.[22] Although not required by the regulation, prudent parties would ensure that any agreement to shorten the period is made in writing. Note that EPEA does not give persons or bodies receiving notice the right to challenge or prohibit the granting of the conservation easement. Their right is only to be notified. If persons or bodies have any concerns, presumably they will contact the parties to the conservation easement agreement.

9. Enforcement of a Conservation Easement

Jennifer Klimek will be addressing enforcement of conservation easements. Suffice it here to say that the conservation easement agreement should contain enforcement provisions spelling out enforcement rights. For example, an agreement might give the grantee many enforcement rights including (among others):

- the right to access the conservation easement area or monitor compliance with the agreement at any time with the grantor's persmission, or otherwise, at reasonable times, upon specified written notice to the grantor;
- the right to go to a court for an injunction to stop or to prevent a violation of the agreement;

- the right to sue on the agreement, or in nuisance, or on any other grounds which a court will allow for damages or other relief.

10. An Additional Qualified Organization to Enforce a Conservation Easement

EPEA allows a grantor to designate in writing one qualified organization in addition to the grantee to enforce the agreement. A grantor may not designate more than one qualified organization as the supplementary enforcer at one time.[23] The statute does not prescribe any particular form of designation.

11. Assigning a Conservation Easement

Circumstances may arise so that it might be appropriate for a grantee to transfer and assign a conservation easement holding. Perhaps a different qualified organization is better suited to hold the conservation easement. Or, maybe because of financial constraints or change of policy a grantee cannot continue to hold, monitor and enforce a conservation easement. EPEA allows the grantee to assign a conservation easement to another qualified organization.[24] Although EPEA requires the grantee to give the grantor written notice of an assignment, it does not require the grantee to otherwise involve the grantor. Given how important the identity of the grantee is to the grantor, the grantee would be wise to involve the grantor in the choice of assignee qualified organizations.

C. THE CONSERVATION EASEMENT PROCESS

Several steps are involved in placing a conservation easement and so the parties should allot ample time. Although particular circumstances may give rise to others, here are the essential steps.

1. Matching The Landowner With the Right Qualifying Organizatin

Whether a landowner first approaches a qualifying organization or a qualifying organization first approaches a landowner, it is of utmost importance that each is satisfied with the arrangement.

2. Search Title to the Property

Prior to agreeing to act as grantee, the qualifying organization will want to search title to the property. The search should provide much information relevant to the proposed acquisition. It should confirm ownership, reveal what encumbrances or other interests are registered against title, and disclose some information relevant to whether or not the owner must obtain a survey or descriptive plan prior to registration of the conservation easement.

3. Consulting and Paying For Legal and Tax Advisors

Landowners should consult legal and tax advisors regarding granting a conservation easement, especially if they intend it to be a donation giving rise to tax benefits. There are no rules regarding who should pay legal and other professional fees related to granting of a conservation easement. The parties should work out these details prior to incurring any such expenses.

4. Compiling Baseline Data

The qualifying organization will want to see that a baseline ecological inventory of the proposed conservation easement area is compiled. Purposes for this include:

- to provide data for drafting restrictions and permissives in the conservation easement agreement;
- to gather data for the purpose of appraising the conservation easement;
- to get an ecological snapshot at the commencement of the agreement to assist the grantee in monitoring and enforcing the agreement; and
- to give clarity to the grantor as to what the agreement permits and forbids.

5. Negotiate an Agreement

The parties and legal counsel should agree on the terms and wording of the conservation easement agreement.

6. Notify as EPEA Requires

Even though this step is listed as "six", it should be carried out as soon as the parties are sure they will enter into a conservation easement agreement and have settled its major terms. Notification requirements are noted earlier in this paper.

7. Find Out Land Titles Office's Requirements

Even though this step is listed as "seven", it should be carried out early. As mentioned earlier, in some cases the Land Titles Office will require no survey or other way of identifying the conservation easement area. In other cases it will be necessary to engage the services of an Alberta surveyor to describe the area as required by Land Titles.

8. Obtain An Appraisal

As Don Hoover will explain, both the grantor and the grantee will want an accurate appraisal of the conservation easement. Whether the grantor is paid for the conservation easement or whether the grantor donates it, he or she will need to know its value for income tax purposes. If the grantor sells the interest the grantor will need to know the value both to be assured that he or she is being paid fair value as well as to calculate any taxable capital gain for income tax purposes. The grantee, on the other hand, likely will want to be assured that it paid only fair value for it. If the grantor donates the interest, the parties will need an appraisal to be assured that the tax receipt reflects the fair value of the gift. As well, the grantor will need an appraisal to calculate any deemed capital gain.

9. If Desired, Obtain an Advance Ruling From Revenue Canada

Even though this step is listed as "nine", if knowing the tax consequences is crucial to the transaction, it should be carried out as soon as feasible. For a fee, Revenue Canada Rulings Directorate Service will provide a binding advance ruling on how it will treat the proposed conservation easement transaction for federal income tax purposes. The ruling will be based on the facts presented to Revenue Canada and will apply to the proposed transaction only. Revenue Canada's publication T4122(E) provides detailed information on this service. With internet access, a copy may be downloaded through accessing http://www.revcan.ca. Otherwise the publication should be available at Revenue Canada's publication offices, or through the Rulings Directorate Service office at: Revenue Canada, 875 Heron Road, Ottawa, Ontario K1A 0L8.

10. If Meant To Be An "Ecological Gift" Apply For Certification

Carry out this step as soon as the conservation easement area is identified and baseline data are compiled. As Garnet Matsuba will explain, and as outlined later in this paper, in order to receive tax benefits for a donation of an ecological gift, the Minister of Environment or the designated federal authority must certify that the gift of land is *ecologically sensitive land*. Currently Gerald McKeating, Regional Director of the Canadian Wildlife Services, is the designated federal authority for the Prairies and Northern Region. His Edmonton number is (780) 951-8700.

11. If Desired, The Grantor Should Appoint an Alternate Enforcer

EPEA allows a grantor to designate in writing one qualified organization in addition to the grantee to enforce the agreement. A grantor may not designate more than one qualified organization as the supplementary enforcer at one time.[25] EPEA does not prescribe any particular form of designation.

12. If Appropriate And Desired, Obtain Postponement From Mortgagee

Although this step is listed as "twelve" is should be carried out early in the conservation easement process since it might take time for the parties to carry it out. If the land containing the conservation easement area is subject to a prior registered mortgage, the easement could be wiped out on a foreclosure. This result may be avoided if the mortgagee (the bank or other lending institution) registers a postponement of its interest to the conservation easement in accordance with the *Land Titles Act.*[26]

13. Finalize and Execute Documents

When the conservation easement agreement has been finalised, approved and agreed to by the grantor and grantee, it is time to sign it. Make sure that all formal legal requirements are met, including any required *Dower Act* consent, acknowledgement or affidavit.[27]

14. Complete Regulatory Requirements and Register Conservation Easement

One regulatory requirement is the grantee's completing and swearing the declaration attached to the *Conservation Easement Registration Regulation.*[28] There may be other regulatory requirements arising under the Land Titles system, such as signing and filing of a survey or other plan. The Land Titles Office should be contacted prior to filing to ascertain filing fees, required number of copies and so on. The conservation easement takes effect only on registration at Land Titles.

D. CONSERVATION EASEMENTS AND OTHER LEGAL PROCESSES

Tax Recovery Proceedings

Although a conservation easement will not survive a foreclosure of a mortgage registered earlier in time (unless postponed), it will survive a sale in tax recovery proceedings. In other words the title issued after the proceedings will be subject to the conservation easement.[29]

Conservation Easements and Expropriation

Conservation easements, like other interests in real property are subject to expropriation in accordance with Alberta law.

Mineral Exploration

The Alberta *Exploration Regulation*[30] prohibits surface entry to explore for minerals without the consent of the person having lawful possession of the land or that person's agent. As well, the regulation requires the consent of any other person who has the right to authorise exploration activities or the right to "commit waste". The parties to a conservation easement should consider the potential for seismic or other related activity at the time of negotiating the conservation easement agreement. The agreement should state who has the right to give or withhold consent. Another important issue to grantors and grantees is that of compensation for surface disturbances caused by exploration operations. Neither the *Exploration Regulation*, nor other legislation or legal constraints limit or govern compensation payable for surface damage caused by exploration operations. In practice, the holder of the mineral rights pays the surface interest holders compensation in return for the required consent or consents to surface entry. No government agency need be involved with negotiations between the parties.[31]

Mineral Development

The placement of a conservation easement will not stop drilling operations for the purpose of the production. However, prior to production a company will need to get a license to operate a well from the Energy and Utilities Board ("EUB").[32] The EUB is required to give notice of any well license application to anyone whose rights may be directly or adversely affected by its decisions.[33] Although the EUB might be required by legislation to notify both the grantor and the grantee of a well application, a well crafted conservation easement agreement will direct the grantor to notify the grantee of any license applications that concern the conservation easement area. Then both parties will have an opportunity to make representations to the EUB on need for the well and the route chosen for it.

In addition to a well license, in order to develop its mineral interest, a company needs the right to enter the land surface to drill the well. The *Surface Rights Act* requires the person requiring the use of the surface, (the "operator"), to obtain the consent of the owner and occupant. Under the Act, the operator should have to get the consent of both the grantor and the grantee. However the conservation easement agreement should require the grantor to involve the grantee in decisions concerning consent for surface access to the conservation easement area. Consent typically will take the form of a lease.

Occupier's Liability

In Alberta, the *Occupiers' Liability Act* sets out the rules for determining liability when a person is injured on property. The Act defines "occupier" in a broad enough way so that in most cases it would include both the landowner -- the grantor -- and the qualified organization holding the conservation easement -- the grantee.[34] The *Occupier's Liability Act* replaced common law rules on occupier's liability. So, for example, though relevant while the common law rules applied, it is now irrelevant whether or not the visitor paid to enter the premises. The Act states that every occupier of land "owes a duty to every *visitor* on his premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably

safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there or is permitted by law to be there."[35] A visitor may be contrasted with a trespasser. With certain exceptions, under the Act an occupier owes no duty of care to a trespasser. The exceptions are that an occupier is liable to a trespasser where: the trespasser is injured because of the occupier's wilful or reckless conduct, or the trespasser was a child whom the occupier knew or ought to have known was on potentially dangerous premises.[36]

The Environmental Law Centre currently is carrying out a research project on occupier's liability, especially as it relates to occupiers who allow access onto land for trail and other recreational purposes. The project, funded by the Alberta Sports, Recreation, Parks and Wildlife Foundation and the Canada Trust Friends of the Environment Fund, will make law reform recommendations, as appropriate, for occupier's liability laws that will not act as a disincentive to occupiers allowing causal recreational access.

Wills and Estate Planning

Phil Renaud will give a detailed presentation on this topic. Suffice it to say here that landowners may use conservation easements in estate planning. For example, a donation of a conservation easement may be made by will. Doing so might reduce the value of the estate for tax purposes or provide tax relief.

Conservation Easements and Property Taxes

Whether or not the granting of a conservation easement will affect property taxes is a difficult issue. The *Municipal Government Act*[37] and regulations govern property taxation in Alberta. This 1994 Act changes the way municipalities determine property taxes. Municipalities must implement the new assessment methods at the time of the next general assessment, which should be completed by most municipalities by 1998. Under the new rules, every municipality must classify all taxable property in its boundaries for assessment purposes into classes. The classes for land are:

(a) class 1 – *residential (municipalities may divide into subclasses)*
(b) class 2 – *non-residential (municipalities may divide into vacant non-residential and improved non-residential)*
(c) class 3 – *farm land.*

A tax assessor determines the amount of tax payable for a property. To do this, the assessor first classifies the property into one or more classes or sub-classes.[38] The assessor then assesses the value of the property. The Act requires that class 1 and class 2 properties (and any subclasses) be assessed at market value. "Market value" means the amount of money that a parcel might be expected to realise if sold on the open market by a willing seller to a willing buyer.[39] The Act requires that class 3 properties – farm land – be assessed at their agricultural use value in accordance with prescribed guidelines.[40] After determining an assessment amount for a property, the assessor consults the bylaw the municipality passed setting tax rates for

each class and sub-class.[41] The assessor then calculates the property tax by multiplying the tax rate times the assessment amount for the property.

Whether granting a conservation easement affects property taxes depends on two things: whether granting the easement leads the municipality to reclassify the property, and whether granting the easement affects the assessment value for the property. For example, suppose a property assessment is based on market value, (classes 1 or 2 and sub-classes) and a conservation easement lowers its market value. In this case, provided that following the placement of the easement the class and rate stay the same, property taxes should fall. Consider an example where property is class 3 -- farm land -- and remains class 3 following the placement of the easement. In this case, it is not likely that property taxes will be affected. For example, rangeland assessed as farm land for its productivity for grazing is not likely to undergo a change in agricultural value if it is made subject to a conservation easement which requires protection of wetlands, and more ecologically friendly grazing techniques. Both before and after the conservation easement the land remains farm land assessable for its productivity for grazing. By contrast, property taxes could change if the property is class 3 and the municipality changes it to another class following the placement of the easement. For example, suppose land is used for growing grain and is taxed as class 3 farm land. The owner wishes to grant a conservation easement on the land that prohibits all agricultural activities with the intention that it reverts back to a natural forest. A municipality might contend that since the conservation easement prohibits farming, the land can no longer be classed as farm land. It might then re-classify the land to class 1 or 2 (or a sub-class). Depending on the tax rate for the class or sub-class and the market value of the land, the property taxes could go up or down.[42]

Conservation Easement and Federal Income Taxes

Garnet Matsuba will cover this area in detail. This paper offers the following brief outline of potential tax consequences and benefits:

- If a conservation easement is granted for consideration and is not a gift, then the ordinary capital gains (or losses) and exemptions (if any) rules apply.

- If a conservation easement is a gift to the Crown or Crown agent, or a gift to a municipality or a registered charity, then the recipient may issue a tax receipt in the value of the gift. The donor may then claim a non-refundable tax credit (individuals) or a deduction from income (corporations). Under new rules (not yet declared law, though applicable in practice), the annual deduction limit on the gift is up to 75% of net income. Capital gains (and losses) rules apply, though new rules (not yet declared law, though applicable in practice) would negate any capital gains tax liability for donations of capital property. If the entire value of the gift is not usable, any unused amounts may be carried forward to offset tax payable for five further years.

- For gifts of conservation easements which qualify as "ecological gifts", the rules are the same as above, except that the annual deduction limit is up to 100% of net income. Under the *Income Tax Act*, an *ecological gift* means "... a gift of land ... including a covenant or an easement, that is certified by the Minister of the Environment to be ecologically sensitive land, the conservation and protection of which is, in the opinion of the Minister, important to the preservation of Canada's environmental heritage".

Ecological gifts must be made to a *qualified* organization. A *qualified organization* means a "Canadian municipality, or ... a registered charity one of the main purposes of which is, in the opinion of the Minister of the Environment, the conservation and protection of Canada's environmental heritage, and that is approved by that Minister in respect of that gift...". The Minister has entered into agreements with several provinces to enable them to *certify* whether a gift meets the definition of "ecological gift" and whether the recipient is a "qualified organization." Alberta, however, has not entered into such agreement and accordingly, Alberta landowners donating conservation easements or other interests in land with ecological values, must obtain *certification* from the appropriate *designated federal authority*. Gerald McKeating, Regional Director of the Canadian Wildlife Services, currently is the designated federal authority for the prairies and northern region.[43] Understandably, the federal government is concerned that the ecological values of gifted lands are maintained -- especially where it allowed a tax benefit for the gift. To this end, the amendments provide that the Minister or designate must pre-approve any disposition of title to or change of land use of an ecological sensitive property. The amendments permit tax penalties for non-approved land-use changes or dispositions of title equal to 50% of the fair market value of the land at the time of non-approved disposition or land use change.[44]

E. FOR FURTHER HELP

If you need further information on legal aspects on conservation you might begin by looking at A. Kwasniak's *A Conservation Easement Guide for Alberta* (Environmental Law Centre: 1997). You also are welcome to call the Centre for general information. If you wish to place a conservation easement, there are a number of lawyers in Alberta who can assist you on a fee for service basis, including lawyers at the Environmental Law Centre. The Land Stewardship Centre can provide, or steer you in the right direction for you to acquire a variety of practical skills and information on conservation easements and land stewardship. Finally, it is hoped that this conference will provide not only answers, but also inspiration, to meet your private conservancy needs.

[1] *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13, [*hereinafter* "EPEA"].
[2] To constitute a valid common law restrictive covenant, the owner of one parcel of land, the "dominant tenement" places restrictions on the uses of another parcel, the "servient tenement". To be valid, the restrictions on the servient tenement must in some demonstrable way benefit the use and enjoyment of the dominant tenement. A restrictive covenant may only *restrict* use; a court may find any positive rights to be invalid and their presence could invalidate the entire restrictive covenant. Changes of use or circumstances could also invalidate the restrictive covenant. As well, common law requires that the dominant and servient tenements be owned and occupied by separate persons, although in Alberta the *Land Titles Act* (R.S.A. 1980, c. L-5, s.71) allows the separate titled parcels to be owned by the same person. For further information on common law restrictive covenants, *see* A. Kwasniak, "Legal Mechanisms for Private Land Conservancy in Alberta: A Call for Law Reform" in *Private Conservancy: The Path to Law Reform* (Edmonton: Environmental Law Centre, 1994) and "Facilitating Conservation: Private Conservancy Law Reform", (1993) 31 Alta.L.R. 4 at 607.
[3] Under EPEA a "local authority" means: the corporation of a city, town, village, summer village, municipal district or specialized municipality; in the case of an improvement district or special area, the Minister of Municipal Affairs; a settlement under the *Metis Settlements Act* (S.A. 1990, c. M-14,3); a regional services commission established under Part 15.1 of the *Municipal Government Act* (S.A. 1994, c. M-26.1) and a regional health authority under the *Regional Health Authorities Act* (S.A. 1994, c. R-9.07).
[4] EPEA, s.22.1(e).
[5] EPEA, s.22.1(2).
[6] The parties might consider using novel ways to achieve contractual certainty such as through geographic information systems (GIS) modelling. See text.
[7] *Surveys Act*, R.S.A. 1987, c.S-29.1.
[8] *Municipal Government Act*, S.A. 1994, Ch. M-26.1, parts of s.652(2).
[9] *Land Titles Act*, R.S.A. 1980, c.L-5, s.81.
[10] *Ibid.* s.78.
[11] *Alberta Attorney General Land Titles Procedures Manual*, Procedure Number SUR-3, (7-15-1991) at 1 and *Land Titles Act, supra*, note 9, s.89.
[12] *Ibid. Procedures Manual* at 1.
[13] *Ibid.*, at 2,, and *Land Titles Act*, *ibid.* s.90.
[14] If a conservation easement pertains to patented land within the meaning of the *Metis Settlement Act, supra,* note 3, then the agreement is to be registered with the Registrar of the Metis Settlements Land Registry. *See* EPEA, s.22.2(1)(b).
[15] In legal terms, the "grantor" in the conservation easement agreement includes the original grantor (you) and anyone you assign or transfer the property to. Likewise, the grantee includes the original grantee, as well as the valid assignee of the original grantee.
[16] *See*, for example, *In Re Hodgins and the Corporation of the City of Toronto* (1895), 26 O.R. 480.
[17] For example one case holds that "public interest" means the interest of the public being served by the matter being determined. (*See Re Town of Summerside and Maritime Electric Company Ltd.* (1983), 1 D.L.R. (4th) 551; 44 Nfld. & P.E.I.R. 128; 130 A.P.R. 128 (C.A.)). Another states that in determining the "public interest" the official must not consider indirect advantages expected from the person who wants the official to determine that an action is in the public.
[18] *Seiffeddine* v. *Adventurers of England* (1978), 8 Alta. L.R.(2d) 253, aff'd (1980), 11 Alta. L.R.(2d) 229 (C.A.). *Also see* J.A. Smith, "Planning Act and Restrictive Covenant" in *Private Conservancy: The Path to Law Reform* (Edmonton: Environmental Law Centre, 1994).
[19] A *special area* is an area of land designated as a special area under the *Special Areas Act*, R.S.A. 1980, c.S-20.
[20] *Conservation Easement Registration Regulation*, Alta. Reg. 215/96.
[21] *Ibid.*, s.2(2).
[22] *Ibid.*, s.2(3).
[23] EPEA, ss 22.1(3) and (4).
[24] EPEA, s.22.1(5).
[25] EPEA, ss 1(3) and (4).

[26] *Land Titles Act*, R.S.A., *supra*, note 9. It is interesting to note that in the United States, no charitable donation tax benefit is possible for granting a conservation easement registered after a mortgage unless the mortgagee subordinates its interest to the easement. *See* U.S. Treas. Reg. § 1.17A-14(g)(2).

[27] The Alberta *Dower Act* (R.S.A., 1980, c.D-38) applies to any disposition of an interest in a homestead where title to the land is in the name of a married person. The Alberta *Dower Act* gives the spouse of the married person certain rights to homestead, even though that spouse's name is not on title. Unless the spouse officially releases dower rights, the Act forbids the married person from disposing of any interest in a homestead (which would include a conservation easement) unless his or her spouse consents to the disposition in writing and separately, formally acknowledges consent in accordance with rules set out in the Act. It is in the interests of both the grantee and the grantor of a conservation easement to be satisfied that the *Dower Act* is strictly complied with.

[28] *Conservation Easement Registration Regulation, supra*, note 20, Form 2.

[29] *See* EPEA, s.22.3(3) and the *Land Titles Act, supra*, note 9, c.52(5)

[30] *Forests Act*, 1971, *Mines and Minerals Act, Public Highways development Act, Public lands Act, Exploration Regulation,* Alta. Reg. 93/78.

[31] *Seismic Operations & Farmers' Rights*, #2, AGDEX 878-2 (1983) at 4.

[32] Energy statutes authorize the EUB to grant licenses in accordance with the procedures set out in the *Energy Resources Conservation Act*, R.S.A. 1980.

[33] *Energy Resources Conservation Act, ibid.* s.29.

[34] *The Occupiers' Liability Act* defines "occupier" to mean "...a person who is in physical possession of premises, or a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises." "Premises" includes land and structures on land. *Occupiers' Liability Act*, R.S.A. 1980, c.0-3, s.1.0.

[35] *Occupiers' Liability Act, ibid.*, s.5.

[36] *Ibid.* ss 12 and 13.

[37] *Municipal Government Act, supra*, note 3.

[38] *Ibid., s. 297.*

[39] *Ibid.*, s.1(1)(n).

[40] *Standards of Assessment Regulation,* Alta. Reg. 365/94, s.2. Section 2(2) of this regulation states that the Alberta Farm Land Assessment Minister's Guidelines are established and maintained by the Department of Municipal Affairs.

[41] The Act requires each council to pass a property tax bylaw annually. The bylaw must set out the tax rate for each assessment class and sub-class. *Municipal Government Act, supra,* note 3, ss 353 and 354.

[42] From my discussions, most people assume that in such situations property taxes would go up. Accordingly, the spectre of a municipality actually so re-classifying property could prove to be a disincentive to granting conservation easements prohibiting or severely curtailing agricultural activities. Woodlot owners interested in sustaining the forest resources have the same concern. Alberta woodlots currently are taxed at market value since the *Standards of Assessment Regulation's* definition of "farming operations" does not include timber operations or the operation of woodlots. To be taxed as class 3 farm land, the woodlot owner has to exploit timber resources to convert the land to, for example, unimproved pasture. By contrast, the laws of other jurisdictions in Canada and some U.S. states recognize the benefits to society of sustained woodlot management. These laws require favourable tax assessments to sustainably managed woodlots. *See* M. Good and P.E. Gervais, *Woodlot Taxation in Alberta*, at 24-26 (Edmonton: 1996, unpublished. Mr. Good and Mr. Gervais are with the Government of Alberta, Farm Business Management Branch, Economics Services Division, Alberta Agriculture, Food and Rural Development.)

[43] In Alberta, information regarding certification may be obtained from Gerald McKeating or Trevor Swerdfager, Resource Conservation, Canadian Wildlife Service, Edmonton, at (780) 951-8700.

[44] The author has been advised by Revenue Canada that its current policy is that the penalty provisions will not be applied to conservation easements. However, this policy may change.

PRACTICALITIES OF OBTAINING CONSERVATION EASEMENTS IN ALBERTA

Sue Michalsky

BACKGROUND

Conservation easements are very young in Alberta. Although we have spent considerable time and effort in creating a process that works for both conservation and the landowner, conservation easements are a tool that have greatly enhanced the opportunities for conservation on privately owned land.

The Nature Conservancy of Canada (NCC) is one of the conservation organizations that concentrates on obtaining conservation easements on deeded land. NCC focuses on land that has an environmental designation as provincially, nationally or internationally significant. Fortunately, in Alberta, we have the benefit of a decade or more of research by various departments of the Alberta government in cooperation with municipalities which resulted in an inventory of significant natural features throughout much of the province. The Alberta Natural History Information Centre has collated that inventory into a map of significant natural areas ranging from regionally to internationally significant.

Much of the privately owned land base that is provincially, nationally, or internationally significant is in the prairies. Over 70% of imperiled species in Canada are associated with prairie ecosystems. On private land in Alberta, the remaining habitat for these species is productive rangeland. As a result, NCC's target landowners are ranchers or farmers who have uncultivated rangelands as part of their agricultural operation.

All of the productive rangeland and farmland in Canada equals an area only slightly larger than Montana. Most of Canada's 27 million people live within that land base, whereas Montana's population is about 800,000. The result of this population pressure is that rangeland and farmland in aesthetic areas, such as along the eastern slopes of the Rockies, are being fragmented into more intensive land uses very quickly. We cannot wait for landowners to approach us. Conservation organizations must be out in the rural communities informing and educating landowners, and targeting specific landscapes for conservation purposes. Changing landowners' attitudes is our biggest challenge.

APPROACHING THE LANDOWNER

Many of NCC's conservation easements are with landowners who have initiated the discussion with respect to conserving their lands. However, in other cases, we choose target areas to conserve and must approach landowners who had never before considered a conservation easement. The legislation is so

new in Alberta, many have no prior knowledge of it. Negotiation with these landowners can be a long process consisting primarily of educating the landowner and building a relationship based on trust.

It is important to know something of the background of a landowner prior to initial contact in order to develop a strategy for approaching the landowner. Even general information on the type of landowner can be very useful. For example, a recent M.Sc. Thesis[1] examined the attitudes of farmers in central Alberta toward conservation and private stewardship. The results of that study are important and are at least partially transferable to other rural areas of the province. Relevant conclusions from the study include:

- Profit loss, risk and the relative advantage of habitat conservation were found to most affect landowners' willingness to adopt conservation practices.
- Although more than half of the landowners surveyed were involved in conservation projects, the majority did not believe that the clearing and breaking of land was affecting wildlife. However, the majority did feel that preserving wildlife was important.
- Awareness and/or recognition were not found to be great motivators for habitat preservation. On the other hand, monetary compensation was thought to be a primary motivator.
- Landowners were found to be most influenced by local opinion leaders and neighbors.
- Landowners may be confused or overwhelmed by the number of agencies that are focused on conserving habitat.[2]

Specific information about the individual landowner and the property is also useful. Answers to the following questions can be very helpful:

- Are there potential complications that can be determined from the land title such as problematic caveats or numerous landowners?
- Has the landowner been involved in any other conservation projects?
- Will the landowner need to do some planning in order to create estate equity?
- What level of education does the landowner have?
- How many generations of the landowner's family have owned the property, or lived in the local area?
- How long has the current landowner held the property?

With this information, an easement negotiator should be able to approach the landowner armed with the correct information.

NEGOTIATING THE EASEMENT

The goal of negotiating a conservation easement is to ensure that the landowner is comfortable with the terms, while also ensuring that the important conservation values of the property will be protected and/or maintained in perpetuity. This can sometimes be difficult. Most conservation agencies find a direct correlation between simplicity of the easement documentation and the number of landowners willing to sign a conservation easement.

If obtaining conservation easements were the only concern, an easement document would be very short. However, remember that the easement must be enforced. There may also be a direct correlation between the simplicity of the document and the degradation of conservation values over time. The conservation easement must allow for enforcement of the terms of the easement, and for a dispute resolution mechanism.

A number of problems may present themselves during the negotiation process. Often, much of the negotiation process is taken up with trying to solve indirectly related problems. Some of the more common problems include:

- creating estate equity
- tax planning
- dependence on Crown grazing lease

In the United States, estate taxes encourage the donation of conservation easements. If the easement is gifted before death, the value of property in the estate declines. If gifted through a will, the value of the easement is deducted from the value of the estate. In Canada, estate taxes do not encourage the donation of conservation easements for two reasons. Firstly, agricultural land can still, at this time, be passed down from parents to children without incurring estate or inheritance tax. Secondly, the income tax laws associated with donations of conservation easements in Canada are much more restrictive than in the United States.

A landowner who places an easement on agricultural land in Alberta is ensuring that the land use will not change. For example, a ranch with a conservation easement will continue to be used for ranching. Normally, a ranch can only support one family. Therefore, a landowner with more than one child is usually concerned about estate equity between the child who takes over the ranch and the "non-ranch" children.

Tax planning may also be an issue that must be considered. Long-time landowners may find themselves dealing with capital gains when donating a conservation easement. Landowners who have recently purchased the property on which they are donating an easement receive a much greater tax benefit. However, even these landowners may need to consider what benefit a large tax receipt will provide if their

income base is small. Consultation between the landowner and a tax planner prior to finalizing a conservation easement is essential.

In Alberta, landowners may often be dependent on Crown grazing to supplement their private land. If the lease constitutes more than about 20% of their land base, its tenure is a serious consideration. Leaseholders with leases than run 10 years or less are less likely to enter into a conservation agreement. They require the flexibility of selling their property quickly and profitably in the event that their grazing lease is terminated.

MONITORING AND STEWARDSHIP

Many conservation agencies are based out of an urban centre and may be a great distance from some of the properties that require stewardship and monitoring. Before entering into a conservation easement agreement with a remote landowner, the conservation agency must consider the cost of stewardship or arrange for local stewardship. This, currently, is one of the primary aspects of conservation easements that has encouraged conservation agencies to collaborate.

TIMING

The first conservation easement negotiated by NCC in Alberta took over two years to complete. The length of negotiation was partially due to the need to design a document which would satisfy NCC's requirements, the requirements of the landowner, and the legal aspects of an easement that attempts to deal with potential pitfalls. NCC conservation easements still take between six months to one year to finalize depending on the complexity of the negotiations.

COSTS

NCC budgets approximately $15,000 per donated conservation easement. That budget is broken down roughly as follows:

- Legal fees: $2000
- Appraisal: $2000 - $3000
- Staff time & expenses: $5000 - $6000
- Monitoring: $5000

The monitoring budget will likely not provide for perpetual monitoring and a monitoring fund will need to be established in the future. In addition, any conservation agency that holds conservation easements should have a legal defense fund for that inevitable future event.

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[1] M. Fisher. 1997. An examination of attitudes toward conservation and private stewardship practices on farms in central Alberta. M.Sc. Thesis. Conservation Biology. University of Alberta. Edmonton, AB.

[2] *Ibid.*

BENEFITS AND VALUES OF LAND STEWARDSHIP IN RELATION TO AGRICULTURAL LANDSCAPES AND CONSERVATION EASEMENTS

Gaylen Armstrong

INTRODUCTION

In an article presented to the Alberta Conservation Tillage Society a few years ago entitled "Biodiversity on the Farm" (Armstrong, 1995), biodiversity was described as the variety of life which includes all our ecosystems, the species within, and their genetic makeup. It is the environment in which we live. The agricultural landscape is, therefore, a significant part of biodiversity with its open fields, woodlots, wetlands, native and tame pasture, croplands, livestock, and wildlife.

In the context of farm management, biodiversity is maintained or enhanced through management of native and non-native habitat within the confines of sustainable agricultural production. For example, within the same agricultural landscape, farm A, with a mixture of bush, pasture, and cropland would receive a higher biodiversity value than nearby farm B with its neat square fields of cropland habitat only. Both of these farms are considered economically viable, in fact, farm B would be given strong approval in farm management circles for its tidy fields and clean borders.

People with no business association with the land, might select farm A because of the accrued ecological and other societal benefits of a diverse agricultural landscape, namely: more wildlife habitat; clean water; and aesthetic scenery. People in the business of farming would probably select Farm B because of the greater amount of arable land for increased crop production.

The application of land stewardship is to try and retain an element of biodiversity on farm A and improve biodiversity on farm B, and with some permanency.

Also, consider the following two definitions that will help clarify my comments:

- Sustainable land management, environmentally sustainable agricultural (ESA) production, and sustainable development, mean ensuring that our agri- food systems are economically viable and provide for basic human food and fibre needs, while conserving or enhancing the resource base and the quality of the environment for future generations (from Alberta Agriculture Food and Rural Development).

- Soil and water conservation practices are actions carried out in order to maintain the quality of the environment and the agricultural productivity of the land.

BROAD BENEFITS AND VALUES OF LAND STEWARDSHIP

The goal of applying land stewardship is to assure lasting ESA practices for the following broad benefits and values:

a) Maintenance of plant species (domestic and wild) which maintain the capability to produce new disease resistant varieties of crops.
b) Maintenance of animal species (domestic and wild) which maintain the capability to improve animal production.
c) Maintains opportunity in applying biotechnology for advancement of crop production.
d) Maintains jobs in industries that rely on the existence of a biodiverse landscape that provides food, wood, recreation tourism, medicines, water, and as yet unknown products.
e) Improves the relationship between the agricultural sector and the non-farm rural and urban communities.
f) Maintains environmental stability.
g) Enhances the quality of life via aesthetic surroundings, and sustainability of those environments for future generations.

SPECIFIC BENEFITS AND VALUES OF LAND STEWARDSHIP

For a few examples of specific benefits and values through the application of land stewardship, I refer you to a recent land stewardship project that involved integrated farm conservation planning.

Integrated Farm Conservation Planning (IFCP) Projects from 1993 to 1995 were used to promote land stewardship through recommended ESA practices on private land in Alberta (Armstrong, 1995a). In the context of farm management, these practices maintained or enhanced biodiversity through management of native and non-native habitat within the confines of sustainable agricultural development. In the IFCP process, farmers were provided with technical, and sometimes financial support, associated with a list of ESA practices, to solve soil and water conservation problems.

Completing an IFCP with a farmer is simply sitting at the kitchen table with aerial photos of the farm, after three or four trips to the field with agricultural field staff and the farmer, and discussing the farm operation as to where improvements (soil and water conservation practices) could be made to make the farm more economically viable.

Several sources were used for recommending improvements. For example, the manual entitled *Integrated Soil, Water and Wildlife Conservation Manual for Field Staff* (Alberta Agriculture, Food and Rural Development, 1994), contains six major soil and conservation problems and remedies and benefits from the application thereof. In each problem area, all practical agricultural remedies that are wildlife habitat compatible are listed; the wildlife habitat planning options from most to least preferred for each

remedy are given; the farm and wildlife benefits are listed per remedy; and farm management considerations, prior to application, are listed.

Most farmers agreed that the practices are ecologically sound, sustainable, and contribute to biodiversity, but they were reluctant to apply some of the practices that contribute significantly to biodiversity. For example, the reluctance to retain existing native habitats of wetlands and woodlands was because of:

a) questionable economic benefits.
b) the conservation practice was perceived to be more of a societal benefit and, therefore, incentives were required.
c) reluctant to apply unfamiliar conservation practices.
d) the economic benefits were long-term, not immediate.
e) not convinced that a problem existed.

Those conservation practices receiving high levels of acceptance were clearly profitable such as no till/limited till, some rangeland management options, grassing waterways, and improved water impoundments.

PERMANENCY OF LAND STEWARDSHIP

There was no contractual obligation by farmers in completing an Integrated Farm Conservation Plan. In the 3 year Landowner Habitat Project of the Fish and Wildlife Division (Armstrong, 1988), contractual agreements of 5, 10, 15, and 20 years, were signed. Long term agreements such as easements were unacceptable by the majority of farmers, mainly because of future economic uncertainty.

FACTORS TO FACILITATE THE CONSERVATION EASEMENT PROCESS:

a) We need policies and legislation that clearly define how our agricultural landscapes should be managed on a sustained basis.
b) We need supportive programs accessible to all farmers that promote sustainable agriculture and biodiversity.
c) Interagency cooperation at the field level to provide advice on integrated farm conservation management is needed to demonstrate to farmers that agencies are not acting on conservation issues in a piecemeal fashion.
d) We need a continuation and expansion of projects that promote sustainable agriculture with biodiversity.

e) There is a proliferation of extension material on the market that fails to reflect an integrated approach to farm conservation planning that is clear, concise, and endorsed by the producer.

f) An all encompassing producer lobby group is needed to: encourage programs that support sustainable practices and biodiversity commensurate with the socioeconomic well being of the farm unit; and lobby for a restructuring of policies that are in conflict with ESA.

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A PERSONAL LAND LEGACY: THE FOREST, MY NEIGHBORS, AND MY FAMILY

Gordon Kerr

Our family bought land in 1951. It was 160 acres in the forest. Our family still owns land in 1998. It is 160 acres of forest – surrounded by land clearing.

What has happened in 47 years?

The first 10 years – nothing!

About 30 years ago Neighbour "A" cleared part of a quarter and seeded it to grass. Five years later he cleared the balance of two quarters. Timber values were low, the market poor and the clearing costs all his.

25 years ago Neighbour "B" cleared parts of half a section and put it into grass. Timber values weren't much better but market was available so the sale paid part of costs. (But he hasn't touched it since – guess why?).

15 years ago Neighbour "D" cleared some land and put it into hay and pasture. With timber sales he probably broke even. (We will return to him later.)

10 years ago Neighbour "C" cleared all commercial trees from 3 quarter sections. He took $600,000 net profit to the bank. He then had all but the steep slopes cleared and is today still doing some reseeding and has yet to burn the windrows. He has an intensive rest rotation grazing system. How much of the $600,000 has he put back into the land? What is his net return per quarter today?

5 years ago Neighbour "E" selectively harvested 10 inch and larger trees from two 40 acre parts of a half section. He took $86,000 net to the bank, still has a forest, has nice hiking trails, riding trails, ski trails, a cabin and bar-b-que he rents for recreational use. He can also keep doing this every 10 years forever and not do a single thing except collect the cheques each year.

Neighbour "D" cleared the remainder of his half section 5 years ago, has put one quarter into grass and the balance looks like nuclear logging. This last quarter will take a lot of money to put into grass or reforest. The future???

Neighbour "B" hasn't harvested any more forest since 25 years ago. He owns a sawmill. Do you think he knows something the rest of us don't?

Me? We? Have harvested a collective 12 acres over a period of 15 to 4 years ago. Timber values have increased from $5.00/tonne to $65.00/tonne. (And subsequently dropped some.)

Who has been the smartest private forest manager? My neighbours or my family? Are we any more right that the others? It all depends on your objectives I guess.

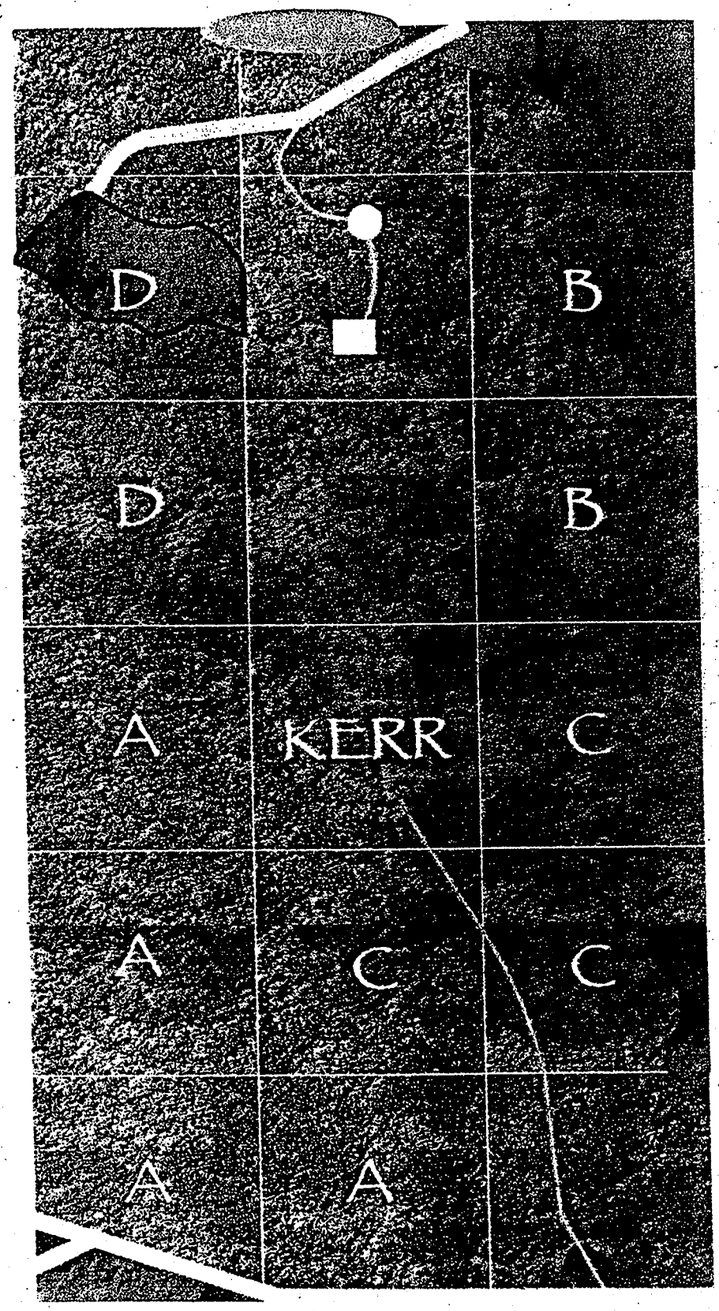
What are our options for the future?

I have discarded my first forest (woodlot) management plan. Actions of my neighbours have greatly changed my situation. I haven't seen my fisher for ten years, my goshawk for five. I still have moose, elk, mule and white-tailed deer, great grey owls and an occasional pileated woodpecker. I can't let the forest "rot on the stump" and expect it to be sustainable. So what should a good steward do?

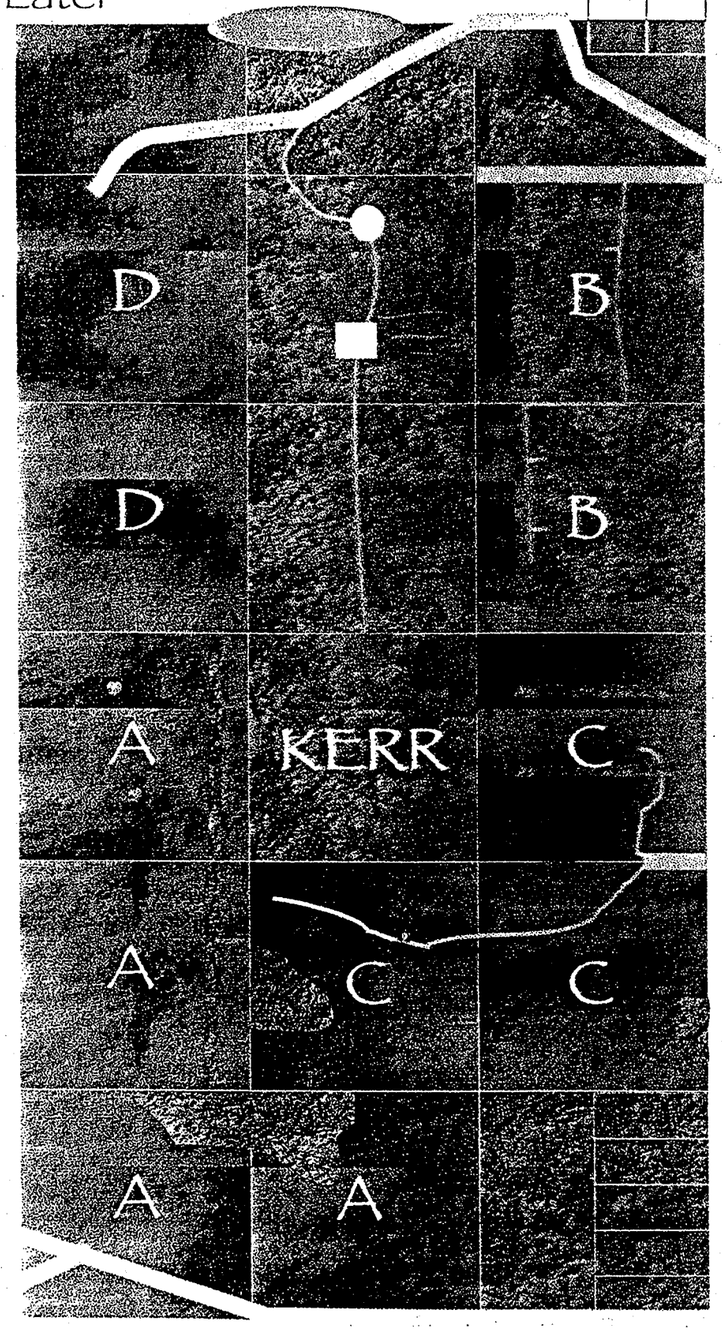
We have decided what we want for an end result, (what the forest should look like in 50 years from now.) We are seeking advice on how to make it happen, and will do it with our family so we all gain an appreciation of what is there and see the value in carrying on.

(Some literary licence has been taken with the detail of the facts in this story, but with exception of the actual $$ and precise dates it is a reasonable representation of reality.)

Before



20 Years Later



PART II

Using Conservation Easements

BACK FROM CHAOS

Peter G. Lee

It's funny how you remember those little things that later become big things! At my farewell lunch last September, after leaving my job of 18 years with the provincial civil service, one of my going-away-joke-gifts was a pair of ripped-up underwear. They were a cute reminder of a field trip Sandra Myers and I took 15 years ago to the Whitemud Falls area east of Ft. McMurray. We were there to do a quick inventory of the Whitemud Falls area because the geology maps had indicated there was an unusual exposure of Devonian bedrock and we wondered if there were any interesting species associated with this feature. The event that lead to the underwear being returned to me involved a black bear and a cliff. But the detail in this story of startling recollection to me involves my first encounter with that bear.

I was exploring some of the Devonian bedrock stacks, sometimes called flowerpots, and was in a deep, moist, cave-like recess. I was bagging different mosses that I would eventually turn over to a bryologist for identification. There were all kinds of mosses growing on the rock faces, and I bagged a range of types. As I walked out of the small cave, I felt a weird sensation up my spine, like one feels walking down a dark street at night. I looked around and there was a black bear immediately above and behind me – we were face to face! Well, I backed up and high-tailed it out of the cave, then ran up one of the cliff-type bedrock stacks and there we stayed until the helicopter came the next day. The bryologist, Dr. Dale Vitt, later identified the mosses and 'lo and behold', one of them was a very rare moss, called *Anamodon minor*, new to Alberta, and far away from its normal distribution. Dale examined theories about why that moss might be way up north in a very remote area, so very far away from its normal range in southeastern North America, which lead to his speculations involving glacial events.

Edward O. Wilson, the internationally renowned biologist, in the recent March issue of *Atlantic Monthly*, said there have always been two kinds of original thinkers – those who upon viewing disorder try to create order, and those who upon viewing order try to create disorder. Dale Vitt is definitely an original thinker because upon viewing disorder, a tiny moss far from its normal range, tries to create order, the sequence of glacial events thousands of year ago. Just like Arlene Kwasniuk and others in the Environmental Law Center, who can take an idea like Conservation Easements and start thinking about using them in the context of leaving a *Legacy of Land* for future generations – big thinking!

The Whitemud Falls incident was a memorable one for me and memorable perhaps for the black bear. But there is no particular moral to this incident. I suppose I could say that little moss and the eventual protection of the bedrock stacks at Whitemud Falls is an illustration of the potential relationship between the tiniest natural thing and 'everything else'. The incident also encompasses the rare, the unusual, the seemingly insignificant and the incredible pulsating quest for life – the diversity of species all struggling to find their place. I suppose I could personalize the thrill of discovery with the adventure of the bear. I suppose I could relate the discovery of a new species to Alberta to explain glacial events

1000s of years ago or I could put it in the context of all the other rare and neat things at Whitemud Falls area that make the whole area a biological hotspot as a basis for protection. But I mentioned this incident as an illustration of the chaos, the unpredictable sequences of events, which we often find ourselves in in this most unreasonable world and that is why I decided to call this short talk, *Back from Chaos*, after Edward O. Wilson's article of the same name.

How can we possibly talk about chaos when we live in the Age of Reason? Besides, people do not like talking about chaos, let alone thinking that is what we are living in. After all, we survived the Dark and Middle Ages, then exploded into and through the Renaissance, Age of Enlightenment and the Industrial Age and now we live in the Age of Reason. We have reached the 'pinnacle-of-arrogant-knowingness' – we are supposed to be a rationale, above-it-all, science-driven species, who just need to be constantly reminded of the need for balance between environmental protection and development.

We can have our postcard-pretty little areas and save our cute little species. We can have conservation easement legislation that will assist private landowners who are voluntarily interested in doing their thing for conservation. We can have these things as long as we balance these and other conservation efforts with intensive and extensive landscape altering and ecosystem destructive resource extraction activities. Because we must, above all, be reasonable!

One of my favorite authors, John Ralston Saul, has a view on the Age of Reason in which we live. In his book, *Voltaire's Bastards: The Dictatorship of Reason in the West*, he says that:

> reason is a narrow system swollen into an ideology. With time and power it has become a dogma, devoid of direction and disguised as disinterested inquiry. Like most religions, reason presents itself as the solution to the problems it has created.

What are some of the problems that 'reason' has created? In Alberta's Foothills, for example, an examination of fragmentation of this diverse Natural Region reveals that less than 1% of the townships remain as 'wilderness', after eliminating those townships containing well-sites, cut-over and significant linear disturbances. When this scale of disturbance is combined with the pace of disturbance (e.g., in the space of only 40 years, Swan Hills, in the Foothills, has passed from a genuine, roadless wilderness to an intensively industrialized and fragmented landscape), the results are dramatic and frightening. This intensity of landscape altering, ecosystem destructive behavior is common throughout the forested regions of Alberta. Is this the reasonable balance that we are told is necessary? In our prairies, the 1994 Science Assessment for Biodiversity in Canada stated that the loss of native habitat because of agricultural conversion has been significant: we have less than 13% of shortgrass prairie left, there is only 19% of mixed-grass prairie, 16% of aspen parkland and almost none of the tall grass prairie remaining in a native state. That report also states that the loss of habitat to agriculture accounts for the endangerment of a disproportionately high number of species in Canada.

Some think the cause for even more pessimism is the very short space of time over which these major changes have occurred – only during the last century. Our parents and grandparents started all these changes to prairie ecosystem dynamics. Our children, when they reach your age, will have witnessed many tens of thousands of Alberta's forests cut down. In some regions of Alberta, the rate of forest landscape destruction is disturbing. A recent analysis concluded that the rate of deforestation in Alberta's southern Dry Mixedwood Boreal Forest is greater than that in Amazonia! The world-renowned Killam Professor, Dr. David Schindler at the University of Alberta, in last March's issue of Bioscience, published an article titled *A Dim Future for Boreal Waters and Landscapes*. In his article, Dr. Schindler documents some of the changes that have occurred and discusses how these changes may cause severe malfunctioning of boreal communities and ecosystems. He states the following:

> in the last 30 years, a combination of human activity and natural events has resulted in both dramatic and subtle changes to forests, wetlands, lakes, and streams in the boreal regions of North America. Consequently, future generations will not see natural boreal assemblages of plants, animals, and landscapes.

Until recently, with the exception of buffalo and passenger pigeon and a few other species, Canadians were untroubled by such questions as rare species or decline of wilderness because the nation was still scarcely populated. The dream of Canada, as a nation, is that *The Wild is Always There* (i.e., book title by Gregory Gatenby). As reported in that book, Susan Buchan, wife of the Governor General of Canada in the early 1930s, said of Canada the following:

> it is the variety of landscape, weather and occupation that is to me her greatest charm. It is possible to live a civilized life and to forget how near the wild country is to your home. I remember that we once went to a skiing camp, and, as we walked through the trees onto the snow, I heard someone say, 'there are no houses between us and the North Pole'. The wild is always there, somewhere near…

It did not ever seem possible that preserving a few animals or a few natural areas could impose real hardship. There seemed no need to choose between nature and economic growth. But our country's empty corners are filling up and the early warnings are there. In the next decade or two the fate of many species, separate populations of species, and wild spaces will be decided. In making those decisions, ordinary notions of balancing the benefits against the costs may seem inappropriate, inapplicable or even immoral. But those decisions will be made.

People think that endangered species laws or protected areas laws such as conservation easements are about saving the big stuff, like grizzlies and elk – the 'charismatic megafauna'. But according to Edward O. Wilson, there are only about 1.4 million species that have been named, out of the perhaps 100 million species that exist. Creatures such as fungi, insects (i.e., asked what research had taught him about God, J. Haldane, one of the founders of evolutionary biology, replied that the Creator has an "inordinate fondness for beetles") and bacteria form the vast majority of this unnamed horde: mammals, birds and other vertebrates are few but colorful.

Most Canadians would be appalled if a shopping center or other specific development wiped out the last grizzly bear, or might be dismayed to learn the fate of the obscure *Anamodon minor*, if it disappeared due to construction of a well-site. They might even be appalled at the destruction of a pretty orchid population that occurred on your private land that has a conservation easement. However, sentiment waivers when it comes to canceling access to an economic dream of a $2-10B gas deposit in Whaleback to save a bug, an obscure moss, or even a herd of elk and a few grizzlies. On the other hand, reasonable people ponder, how can anyone sanction the elimination of a species from this earth to profit a few people? What if chemicals within a rare moss or lichen or fungi turn out to have medical benefits, whereas grizzlies are useful only as a romantic symbol of wilderness? Many question whether we want to reduce the economic flexibility of future generations. How could we agree with hauling good citizens before the courts over an obscure moss that is protected under a conservation easement?

All of sudden, when we go beyond the superficial concept of conservation, we get bogged down by the ideology of the Age of Reason. My only conclusion about where we are, as a society, is best reflected in this 1841 quote from Charles MacKay from his book *Extraordinary Popular Delusions and the Madness of Crowds*:

> Every age has its peculiar folly; some scheme, project, or phantasy into which it plunges, spurred on either by the love of gain, the necessity of excitement, or the mere force of imitation.

The 'madness of crowds' aside, let us examine the reasons for conservation and conservation strategies in the past, present and in the future. The reasons for conservation centre in recent years around a particular concept, biodiveristy; we, as human species, worry about the other species with whom we share this planet for only two reasons:

- Firstly, the impact of biodiversity on our survival or the 'utilitarian' reasons. In other words, biodiversity's significance to human life support systems, including food supply and our health. Living creatures are the source of all foods and many medicines: wiping out even the humblest mold might deprive humanity of the genes for a future penicillin. The web of species help generate soil, regulate freshwater supplies, dispose of waste and maintain the quality of the atmosphere.

- Secondly, biodiversity is important for human quality of life in a broader sense, because it encompasses emotional and spiritual values. This quality of life issue includes aesthetic qualities such as the beauty and integrity of nature and includes emotional relationships to animals such as the Panda bear for example, the symbol of my organisation, World Wildlife Fund Canada. Panda bears and other such creatures are probably not essential for the survival of the human species but still matter to people. This emotional relationship to animals also includes the religious belief that that our fellow passengers on Spaceship earth have a right to exist – the Noah Principle.

The first aspect, concerning the importance of biodiversity to survival and health, is likely shared by people across all cultures and value systems. The second aspect, of aesthetics and ecosystem integrity, is entirely determined by individual and social values. These values vary significantly across the world's population but even within regions, even within Canada, even within Alberta, they vary.

Despite these powerful reasons for conservation, on a global basis, there are a lot of reasons why wilderness, natural areas and species are lost and conservation is under constant threat. The reasons range from the following:

- governance problems like lack of political will;
- traditions and lifestyle;
- poverty and economic standing;
- demographic reasons such as population density and population growth; and,
- in democratic countries, individual rights usually win out over social values, especially when those social values are long term and more nebulous, as in the case of conservation. And when the concept of an individual is extended to individual industries and individual local communities – conservation loses almost every time!

Despite all these threats to conservation, conservation is highly supported, as a 'motherhood' issue. Everybody loves conservation and everybody is a conservationist! The word itself, like so many other environmental words, has become so prostituted as to become meaningless, until all that seems to be left is the rhetoric. So what's wrong with rhetoric? Rhetoric is just the art or science of using words that are frequently over-ornate, or rhetoric is ostentatious language intended to attract attention. The point is that rhetoric is contested political terrain. Who can use words and what they are taken to mean is contested political terrain. Some words and phrases, like sustainable development, ecosystem management, conservation, gain acceptance as 'good' in the public arena, so all sides want to appropriate the words to their causes. With all the rhetoric over sustainable development, I still don't know if it is sustainable development OR sustainable development. Is ecosystem management managing for ecosystems OR is it managing ecosystems for the needs of humans. The words are the same, the meanings are completely different because we all have different visions, different philosophies and different worldviews. Another of my favourite rhetorical words is 'preservation.' A word that was seared out of the citizenry's vocabulary over the last twenty years – a bad word, a no-no, an unmentionable. Now, because of the Premier's state-of-the union address a few years ago, the word is in vogue. You are seeing it in almost every government publication. It is one of the three "P" words used by Mr. Klein - people, prosperity and preservation - with preservation now defined as "a more streamlined and responsive system of land use planning, maintaining the strong pioneer traditions and lots of green spaces and recreational opportunities." So if rhetoric is most often interpreted in two totally opposite ways, what is its value? What do we do with it? Well, first we must continually question the rhetoric. We must recognise that most of it is just rhetoric and not sacred truths. We must question rhetoric, like the following:

- nature is infinite;
- science and technology will solve all our problems;
- all of nature is at our disposal;
- we can manage the planet
- pollution is the price of progress; and
- ecosystem management solves all our land management problems.

Then we must recognise that rhetoric is a political tool that is neither inherently good nor bad, just a tool that we, as conservationists, need to recognise (i.e., read *Winning Back the Words* by Mary Richardson et al.).

We are in a major rhetorical phase here in Alberta with the hot political potato of protected areas and endangered species. On the one hand, the rhetoric says that Alberta exceeds all other Canadian jurisdictions and ranks fairly high with the rest of the world, in terms of total and proportional areas dedicated as protected areas. On the other hand, it's only because of National Parks that the figure is high and not because the province has done much. In fact, 80% of our present protected areas in Alberta were established before 1930, before Alberta gained control of natural resources from the federal government. And when you take a closer look at the distribution of protected areas, Alberta has an inequitable distribution and representation of protected areas, with most areas being in the Rocky Mountains and northern boreal forest. Less than 1% of the grassland and parkland natural regions are in protected areas, whether on public land or on private land. And it is these two regions, the grasslands and parkland, that have the majority of private lands. The opportunities for using conservation easements are enormous in Alberta's grasslands and parkland because there is so much to do and because of the extent of private ownership.

Those who have cared about conservation have been involved in a number of conservation movements. Conservation movements in North America since European settlement can be grouped into three broad categories (i.e., read *Saving Nature's Legacy* by Reed F. Noss and Allen Y. Copperider):

1) species protection – This has been the traditional focus of wildlife management, with attempts made to protect certain desirable species, while other undesirable species are eliminated and the vast majority of species ignored;
2) land preservation – This has included the interest in wilderness and park preservation; and
3) natural resource management – This strategy is contained within the over-riding principle of resource development and use.

These approaches have proven of limited value to an overall conservation strategy for a large number of reasons.

Today's emerging, somewhat overlapping, broad conservation movements include:

1) environmentalism – Beginning in the early 1970s, this strategy is marked by the realization that resources are limited and that new technologies are causing massive environmental problems;
2) conservation by legislation and lawsuits – An explosion of environmental legislation, such as Conservation Easements, and subsequent legal actions against agencies and industries began in the 1970s and continues today; and
3) conservation biology – is rapidly growing in popularity and now has more public appeal than any biological science except health and medicine. Conservation biology is an emerging synthetic discipline that deals with the basic issue of eroding biological diversity.

Michael Soulee, who is the editor of the Journal of Conservation Biology and founder of the Wildlands League of North America, said that successful conservation strategies will depend on the sensitive application of rigorous science and the articulation of a compelling vision that inspires peoples to protect ecological diversity and species richness even if it means upsetting some powerful interests. This reinforces two seemingly separate things, science and a vision. Protected areas, whether on public land established through provincial park-type legislation, or on private land and secured through conservation easements, are extraordinarily important. As Stan Rowe (i.e., *Home Place: Essays on Ecology*) said:

> Protected areas pose a challenge to conventional thinking. To champion the protection of wild lands and all that is in them on the grounds of inherent worth, of no necessary utility, is to dispute those people-first values that are degrading the world and ourselves. To work for preservation is to throw up a barricade in the fight to defend planetary life, and to fly a banner symbolic of the way all humanity should be protecting the earth.

Of course, the accusation is made that this is just another ideology and those who promote protected areas and conservation are just ideologues. Such accusations are challenged effectively by the renowned geneticist, Dr. R. C. Lewontin, in his book *Biology as Ideology: The Doctrine of DNA*.

If you think these are unusual perspectives so far – chaos theory, Age of Reason, rhetoric and ideologues - 'you ain't seen nothing yet'! Let us take a more provocative perspective. We must not be mistaken with what we are dealing, if we are truly interested in conservation. The task is changing, even if in a small way, today's dominant social paradigms.

The **dominant social paradigm** today is:

- Lower valuation on nature;
- Compassion only for those near and dear;
- Risk acceptable in order to maximize wealth;
- No limits to growth;
- Present society OK;
- Old politics.

The **new conservation paradigm** should be:

- High valuation on nature;
- Generalized compassion;
- Careful plans and actions to avoid risk;
- Limits to growth;
- New society;
- New politics.

What is wrong with the dominant social paradigm? Dr. Jeff McNeely, Chief Scientist for the International Union for the Conservation of Nature, wrote an interesting paper a couple of years ago titled *Conservation and the Future: Trends and Options Toward the Year 2025.* Based on current trends, Dr. McNeely examines the major conservation challenges in less than 30 years from now. For example, he finds:

Changes in Population

- World population will continue to grow and by 2030 increase by 50% - 100%;
- Most increases will be in developing nations;
- All populations will become older;
- Will be a decline in rural populations;
- Water scarcity rather than shortage of land will be a bigger problem resulting in mega-diversion projects and intense impacts on riparian areas.

Changes in Climate

- Mean sea level will rise by 30-50 cm;
- Increased world temperatures of 2C;
- Overall forest area will shrink;
- Grasslands and deserts expand;

- Increased frequency and destructiveness of hurricanes; more protracted droughts, longer and hotter heat-waves, and more severe rainy periods.

Changes in Economics (i.e., given: non-deteriorating security conditions)

- Central governments grow smaller;
- World economy will be international;
- Multinationals will be far more powerful;
- Balance of economic power shift to Asia;
- Tourism will become dominant economic sector, doubling in next ten years.

Changes in Institutions

- Governments increasingly decentralized + institutional strengthening at level of communities and local authorities possibly result in disintegration of public authority;
- Revolutionary changes in international institutions (i.e., United Nations, World Trade Organization);
- New religions and charismatic religious leaders;
- Not-for-profit environmental organizations shift focus to incentive/disincentive based approach from command and control regulatory approach;
- Economic and market instruments will control policies and regulations.

Changes in Biodiversity

- Pressure on wild resources increase dramatically;
- Tropical rainforests will lose about 5-10% of their species to extinction;
- Global database development on biodiversity;
- Protected areas under accelerating threat to development and multiple-use management;

Dr. McNeely also discusses the problems of modern fortune-telling which, perhaps to a great extent, boil down to whether you are an optimist or a pessimist. If you are a 'neo-Malthusian pessimist,' you tend to believe that human civilization will collapse under the weight of growing consumption of resources and increased pollution, and human life will be "solitary, poor, nasty, brutish and short." 'Neo-Malthusian pessimists' are often biologists (e.g. Club of Rome, Paul Erhlich, Edward. O. Wilson). At the other end of the spectrum are the 'technological optimists.' These are people who believe that technological advance and continuing new sources of raw materials will rescue us, and the resulting increasing material well-being will increase human freedom, justice and understanding (e.g., these are often economists).

There are, however, many problems with modern forecasting that make certainty in predictions impossible. Some of these problems, or unpredictable wildcards, according to Dr. McNeely, include:

Wildcards in the Futures' Game (i.e., chaos and complexity)

- collapse of the global monetary system;
- major war involving nuclear weapons;
- global disease epidemic;
- collapse of major grain crops;
- contact with extra-terrestrial life;
- rapid acceleration of global warming;
- fundamentalist religious movements.

There are forecasts of many problems, from global to local, and many uncertainties. At the same time, we've got positive, inspiring occurrences, such as the availability of the legislative tool, Conservation Easements. And there are the trendsetters such as: Carol Smith; Nature Conservancy of Canada, and Environmental Law Centre, all of whom are breaking the ground for others to follow.

Robert Frost has a great little poem titled *Stopping by the Woods on a Snowy Evening*. One stanza is this:

> The woods are lovely, dark and deep,
> But I have promises to keep,
> And miles to go before I sleep,
> And miles to go before I sleep.

This poem reminds me of my organization's, World Wildlife Fund Canada, Endangered Spaces Campaign, that will be drawing to a close in two years. That campaign, like Robert Frost's poem, deals with promises.

In 1989, WWF drew on recommendations from a landmark United Nations Report, *Our Common Future*, in launching the Endangered Spaces program with a mission statement, The Canadian Wilderness Charter. The Charter calls on Canadians to complete an ecologically representative protected areas system by the year 2000. More than 600,000 individual Canadians and 300 conservation and community organizations from every corner of our society quickly responded by signing onto the Charter. Since then, the federal, provincial and territorial governments, as well as forestry and mining sectors and other business interests have indicated their support for the goals of Endangered Spaces.

The commitments to the Endangered Spaces program are not written in legislation and are unlikely to be tested in the courts. Instead, as public policy they are simply declarations of intent - a handshake agreement between present leaders and future citizens of our country – a promise we have

made to ourselves. Therefore, how we act is nothing more or less than a test of our characters: are we good as our word? For instance, when we proclaim our leadership to the world, as we do regarding meeting the goals of the Endangered Spaces program, are we really keeping our word when industry and governments here at home loudly protest the designation of new protected areas and seek industrial access to existing protected areas? Some promises are harder to evade than others because the consequences are so evident and lasting. This is especially true for promises we make regarding the homeplace on which we all depend for survival as individuals and as a nation. There will never be any more wild country than we have now. What we fail to protect will always remain lost. And we can see those losses steadily mounting across the land as the millenium clock winds down. Whatever the conservation interest or conservation pursuit, whether advocating for protected areas on public or private lands, the question is now:

Who will be the promise keepers?

I know one promise-keeper. Sharon Butala and her husband donated a large area of their ranch in southern Saskatchewan as a Conservation Easement to the Nature Conservancy of Canada. Sharon wrote a wonderful book titled *The Perfection of the Morning: An Apprenticeship in Nature* that was nominated for the Governor General's Award. She concludes her book with this:

> This morning I went out to walk along the winding dirt road that stretches by the river... I thought about the perfection, tried to name what it is about the morning that is different from the rest of the day... This morning I bent to smell a yellow clover bloom and a drop of cool, translucent dew touched and clung to the end of my nose. I stood on the bank and looked across the river at the grasses and the yellow and white blooms of cinquefoil and wild aster, at the shiny blue-gray leaves of the wolf-willow lining the bank where white-taileds had made trails coming down to water every morning and evening, and where, picking chokecherries, I'd once heard a doe talking to her fawn. In the purity of the morning, I understood how much more there is to the world than meets the eye, I see that the world fails to dissolve at the edges between myth and dream only because one wills it not to. Now I begin to understand the meaning of that vision. Now I see the truth of it.

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EASEMENT SITES: PROTECTION AND USE ARE NOT MUTUALLY EXCLUSIVE

Glenn H. Pauley

Research is revealing that the size of most existing protected areas is too small to preserve functioning ecosystems and associated biodiversity. Enlarging these areas to incorporate sufficient amounts of land to accomplish these objectives is often not economically or politically feasible given growing human populations and the associated demands upon the land base. Conservation easements are legal tools which support a landscape approach to maintaining natural ecosystems through the integration of biodiversity conservation with environmentally compatible land uses.

Both wildlife and agricultural producers are dependent upon large, unbroken landscapes and a healthy, productive environment. Research into Alberta landowners' attitudes toward conservation easements reveals considerable interest in agricultural land and wildlife habitat conservation. Landowners are attracted to the flexibility of conservation easement terms and the ability to maintain private ownership and traditional land uses. The self-satisfaction of protecting their land from subdivision and contributing to conservation efforts are important motivations for landowners to enter into easement agreements. Financial compensation is also an important incentive for signing a conservation easement, although tax benefits may be preferred to direct monetary payments. Landowners express concern about increased trespass and associated liability issues resulting from both placing an easement on their property as well as a conservation easement existing on neighboring lands. Agricultural land preservation appears to be more important than natural area preservation for landowners when considering placing a conservation easement on their property. Easements will be more attractive to landowners if efforts are made to coordinate these conservation objectives.

A conservation easement document represents an unending contract between the easement holder and the landowner to retain and enhance specific property features and land management practices. Easements should be as concise as possible while retaining their legal strength in anticipation of future court challenges. The intent of the easement should be specifically stated and the document's language should convey an attitude of mutual cooperation and understanding. The easement should contain provisions to accommodate unforeseen circumstances and to adjust land use restrictions to better support the objectives of the agreement. Involving landowners in easement design and monitoring will improve landowner relations and easement administration.

To avoid future conflicts, land use restrictions should be clear and enforceable. Too few conservation restrictions can leave the property vulnerable to environmental abuse. Too many restrictions can be costly, difficult to enforce, provide little environmental return, and cause community relations

problems in the case of wildlife damage and weed infestation. Organizations dealing with conservation easements must be aware that easement acquisition in areas adjoining rapidly expanding cities or towns may promote improper land development. Easements in these areas could direct development away from the city's peripheries and into more pristine areas of the surrounding countryside. Ideally, each conservation easement acquisition should contribute to maintaining a minimum viable unit to sustain local wildlife populations and rural land uses.

Conservation easement acquisition does not solve the problems of rapid population growth and associated resource consumption which are driving the fragmentation and loss of natural areas. Long-term ecosystem conservation will only be successful if habitat protection measures are accompanied by the development of a land stewardship ethic. Conservation easements aid in improving public understanding and appreciation for the contributions of natural areas to the health and quality of life for surrounding residents by providing working examples of environmentally compatible land uses.

USING CONSERVATION EASEMENTS IN PROTECTED AREAS AND PUBLIC LANDS

Peter G. Lee

INTRODUCTION

This paper presents a science-based approach for prioritizing the high priority conservation areas for the application of conservation easements. Much of the information is taken directly from the references listed at the end of this paper.

Private lands are an essential component of any strategy for biodiversity conservation. Approximately 40% of the land in Alberta is privately owned. More importantly, those private lands, particularly in the prairie and parkland natural regions, comprise some of the most productive and biologically diverse habitats and contain rare and threatened species. Private incentives for conservation fall into two general categories: financial and regulatory. Conservation easement legislation is one 'tool' that combines both a regulatory and financial incentive, providing there are municipal, estate or income tax benefits. Application of conservation easements in any situation requires a substantial commitment of both the private landowner and government agencies and private organizations.

The remaining 60% of the land in Alberta is publicly owned. Often, private and public lands are in close proximity to, or intermingled with, one another. An efficient and effective provincial conservation strategy must involve a mutually compatible approach that involves both private and public land.

There are two major premises that must be understood in order to move forward with meaningful conservation efforts, including the application of conservation easements. These premises are:

1. Conservation consists of research and action, and;
2. Conservation must be priority-driven.

The **action** side of conservation is probably quite familiar to most. It involves lobbying for, drafting and applying legislative tools, such as conservation easements and the *Natural Heritage Act*; advocating for the protection of a specific site; gathering support for your cause; raising funding; feeding information to the media, etc. The **research** or science side is much less understood and appreciated. However, credible science can help to create a more 'level playing field' when land allocation and land use decisions are made. More importantly, good science can help answer key questions and solve real problems.

Conservation must be **priority-driven** because of the combination of extremely limited resources, both financial and expertise, of conservation proponents and the pace and scale of landscape disturbances. Applying the science of conservation biology in Alberta resulted in the identification of the province's environmentally significant areas. The future refinement of this information can assist in setting priorities for conservation.

Integrated biodiveristy inventories combined with the application of advanced Geographic Information System technologies can assist in identifying priorities for conservation actions, such as through the application of conservation easements.

CONSERVATION BIOLOGY

Conservation biology, a relatively new and emerging science, can provide much of the guidance in setting priorities for conservation research and actions. Like medical science, which has a goal of human health, conservation biology is a mission-oriented science, which has a goal of ecological health or integrity. Some of the specific goals that conservation biology is oriented toward include:

1. representing all kinds of ecosystems, across their natural range of variation, in protected areas;
2. maintaining viable populations of all native species in natural patterns of abundance and distribution;
3. sustaining ecological and evolutionary processes within their natural ranges of variability;
4. building a conservation network that is adaptable to environmental change.

Some general philosophical principles of conservation biology that can provide a backdrop for more detailed conservation planning include:

- ecosystems are not only more complex than we think, but more complex than we can think;
- nature is full of surprises;
- the fewer data or more uncertainty, the more conservative a conservation plan should be;
- biodiversity conservation must be concerned with many different spatial and temporal scales.

Conservation biology presently focuses on a three-pronged but parallel approach to selecting and designing a network of protected areas, that include where and when to use conservation easements:

1. Special elements
2. Representation
3. Focal species.

Special elements are 'mappable' entities of high conservation interest. Perhaps the best known elements are the 'elements of diversity' ranked and tracked by the Alberta Natural Heritage Information Center. The elements of greatest concern are those species and plant communities ranked as 'critically imperiled globally' (G1) and 'imperiled globally' (G2 – e.g. Mountain Plover), based on their rarity and threats. 'Element occurrences' are mapped locations of these elements. Conservationists look generally, not for individual occurrences, but for geographic clusters of occurrences. The relevant principle here is that biodiversity is not distributed randomly or uniformly across the landscape. In establishing conservation priorities it is important to consider 'hot spots', which can include:

- rare species and plant communities
- roadless and other pristine areas
- unique geologic sites
- streams, lakes and watersheds of high value for native fisheries or aquatic biodiversity
- ice-free bays, artesian springs and mineral licks
- sites adjacent to existing protected areas

Protection of special elements does not assume that all species and habitats in a region will be adequately protected. In particular, species groups that are poorly known or inventoried may be missed. Hence, the 'coarse filter' or **representation** strategy, which seeks to secure intact examples of each vegetation or habitat type in a region, is complementary to special element conservation. The assumption is that conservation of examples of all habitat types will capture occurrences of a vast majority of species. This representation strategy assumes that maintaining viable ecosystems is usually more efficient, economical and effective than a species-by-species approach.

A broad suite of **focal species**, each of which is used to define different landscape attributes, is required to help design and select a network of protected areas. Focal species include the following:

- area-limited species – e.g., grizzly bear
- dispersal-limited species – e.g., flightless insects, lungless salamanders, large mammals subject to roadkill
- resource-limited species – e.g., hummingbirds, cavity-nesting birds
- process-limited species – e.g., riparian cottonwoods
- keystone species – e.g., cavity-excavating birds
- narrow endemic species – e.g., some rare plants
- special cases – e.g., disjunct or peripheral populations that are genetically distinct and 'flagship' species that promote public support.

Because species biology is more advanced than most areas of conservation biology, we have lots of principles to guide protected areas design based on the needs of species. They include such well-accepted rules as:

1. Species well distributed across their native range are less susceptible to extinction than species confined to small portions of their range.
2. Large blocks of habitat, containing large populations, are better than small blocks with small populations
3. Blocks of habitat close together are better than blocks far apart.
4. Habitat in contiguous blocks is better than fragmented habitat.
5. Interconnected blocks of habitat are better than isolated blocks.
6. Blocks of habitat that are roadless or otherwise inaccessible to humans are better than roaded and accessible habitat blocks.

ENVIRONMENTALLY SIGNIFICANT AREAS (ESA)

Over the last fifteen years, the provincial government, in cooperation with local authorities, have conducted ESA inventories for the majority of Alberta. These inventories have applied conservation biology to generally define landscape elements or places which are vital to the long-term maintenance of biological diversity, soil, water, or other natural process, both on-site and in a regional context.

ESA Classification Criteria

There is a need to have a standardized set of criteria for evaluating ESAs. These criteria fulfill several functions:

1. they allow a relatively systematic comparison of different sites and allow ranking schemes to be developed;
2. they help to outline the importance of sites to decision makers;
3. they stimulate research efforts towards refinement of definitions and concepts of significance;
4. they help to ensure similar approaches in other jurisdictions; and
5. they aid in the process of boundary delineation as only those features that fulfill the criteria are included.

ESAs include areas that meet the following criteria:

1. areas which provide an important linking function and permit the movement of wildlife over considerable distances, including migration corridors and migratory stopover points.
2. areas which perform a vital environmental, ecological or hydrological function such as aquifer recharge;
3. areas which contain rare or unique geological or physiographic features;
4. areas which contain significant, rare or endangered plant or animal species;
5. areas which are unique habitats with limited representation in the region or are a small remnant of once large habitats which have virtually disappeared;

6. areas which contain an unusual diversity of plant and/or animal communities due to a variety of geomorphological features and microclimatic effects;
7. areas which contain large and relatively undisturbed habitats and provide sheltered habitat for species which are intolerant of human disturbance;
8. areas that are excellent representatives of one or more ecosystems or landscapes that characterize a natural region;
9. areas with intrinsic appeal due to widespread community interest or the presence of highly valued features or species such as game species or sport fish; and
10. areas with lengthy histories of scientific research.

ESAs occur in all landscapes but are relative to surrounding land-uses. Site-specific biophysical conditions influence and are influenced by land-uses which may degrade a valued ecosystem process, for example. As a result, four factors regarding the physical state of the site must be considered when assessing the overall level of significance of any given potential ESA: representativeness, diversity, naturalness, and ecological integrity.

Levels of Significance

The environmental significance of each potential ESA site is assessed with reference to several criteria—endangered threatened, rare, limited, disjunct, or relict populations or features at three levels: international, national, and provincial. The following categories were used:

international - features which are unique in the world
national - features which are limited in distribution at a national level or which are the best and only representatives in Canada
provincial - features which are of limited distribution in Alberta or are the best examples of a particular feature in Alberta

Areas of provincial significance include relatively undisturbed and sizable remnants of undisturbed upland and valley habitats; important waterfowl production and shorebird staging areas; and some of the most critical wildlife ranges (e.g. Deer, Pronghorn, Caribou, Moose, Grizzly Bear) in Alberta.

Areas of national significance include staging habitats with nationally high concentrations of waterfowl and shorebirds, national parks, habitats for endangered species and concentrations of nationally rare plant and animal species. "Significant populations" of rare plants or animals generally refers to populations, which are self-sustaining. Occurrences of individuals or single nest sites are not considered significant unless they are one of very few localities for the species.

Areas of international significance include sites of globally endangered species (e.g. Whooping Crane), RAMSAR wetlands; geological type localities; and extremely diverse grassland-valley complexes on international waterways (e.g. Writing-on-Stone).

APPLYING CONSERVATION BIOLOGY AND ESAs TO THE USE OF CONSERVATION EASEMENTS

A number of recent studies have been published by Alberta Environmental Protection. These are a first step to identifying the conservation priorities for Alberta (see the Alberta Environmental Protection reports listed in References), whether on public or on private land.

In summary, Alberta's environmental diversity can be described as a hierarchy, from the six broad natural regions (see Figure 1) to the twenty natural subregions to the diversity of landscapes, species and habitats within these regions and subregions. All the ESAs of provincial, national and international significance are shown on Figure 2. The aerial extent of these ESAs is as follows:

Grassland Natural Region	**2,038,709 ha**
Dry Mixedgrass	1,319,626
Mixedgrass	268,578
Northern Fescue	301,482
Foothills Fescue	149,023
Parkland Natural Region	**411,854**
Central Parkland	351,283
Foothills Parkland	38,080
Peace River Parkland	22,491
Foothills Natural Region	**1,617,341**
Lower Foothills	1,093,795
Upper Foothills	523,546
Rocky Mountain Natural Region	**246,824**
Montane	147,318
Subalpine	79,400
Alpine	20,106
Boreal Forest Natural Region	**6,643,993**
Dry Mixedwood	1,156,733
Central Mixedwood	3,028,910
Wetland Mixedwood	476,488

Boreal Highlands	655,936
Peace River Lowlands	858,559
Subarctic	467,367
Canadian Shield	**324,417**
Athabasca Plain	139,583
Kazan Upland	184,834
Total	**11,283,138**

The total area identified as provincially, nationally and internationally significant ESAs is 112,831 km2 or about 17% of Alberta. These areas are a first-cut, reconnaissance identification of areas of the highest environmental significance. Although not all areas require a protected areas approach in order to ensure their long term maintenance, they do provide a focus for the selection of core protected areas.

The identification of the best areas of public land for protected areas status has been completed by World Wildlife Fund Canada and is shown on Figure 3. These mostly public lands are the 'Top 50' areas in Alberta that deserve legislated protected areas status. They were identified by assessing the environmental diversity of the province, then applying some practical considerations such as:

- How much disturbance/degradation has the site undergone?
- Does the site benefit from the presence of adjacent sympathetically-managed lands?
- Is the site under threat?
- How proximal is the site to existing protected areas?

The securement of the public land portions of these Top 50 sites, through protected areas legislation, would provide the large core protected areas for Alberta. Conservation easements could then be used, with landowner consent, on those portions that are within or adjacent to these core areas. Figure 4 shows where the private land occurs in Alberta.

Figures 5, 6 and 7 are a close-up of southeastern Alberta. The area is referenced by the location of cities, towns and hamlets in Figure 5. Figure 6 shows the overlay of ESAs of provincial, national and international significance and Figure 7 adds the public/private land data layers. Those areas that are in black are the areas that are environmentally significant on private land.

An example of the specific application, the Onefour area, is shown in Figures 8, 9 and10. The Onefour area is in the extreme southeastern corner of Alberta, with Saskatchewan to the east and Montana to the south. The northern boundary is the private lands that border the north side of Cypress Hills Provincial Park. Figure 8 shows the ESAs for the Onefour area, Figure 9 shows the private/public lands

(public is hatched while private is clear) and Figure 10 combines the data layers and highlights those portions of ESAs that are on private lands. It is these highlighted lands that could be considered as high priorities for the application of conservation easements, with landowner consent.

CONCLUSION

In the face of accelerating land allocation and land use commitments and the resulting impacts on landscape and biodiversity conservation, the application of conservation easements must be integrated into a comprehensive provincial conservation strategy that maximizes the limited resources and expertise of landowners and conservation interests.

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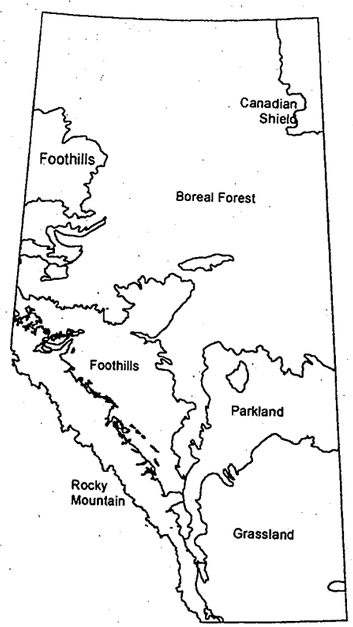

Figure 1. Natural Regions of Alberta.

Figure 2. Environmentally Significant Areas of Alberta (includes sites of provincial, national and international significance).

Figure 3. World Wildlife Fund Canada's Top 50 areas for core protected area status.

Figure 4. Private and Public Land in Alberta.

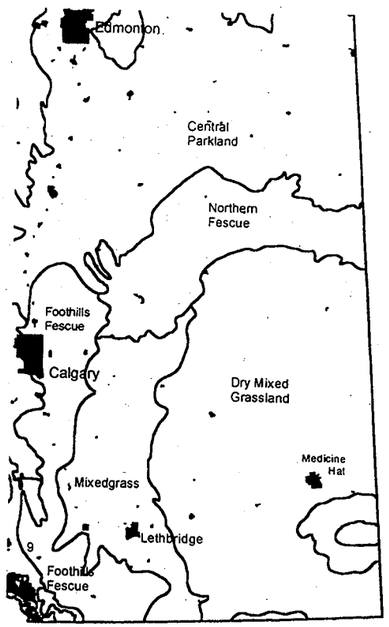

Figure 5. Natural Subregions and Cities, Hamlets of Southeastern Alberta

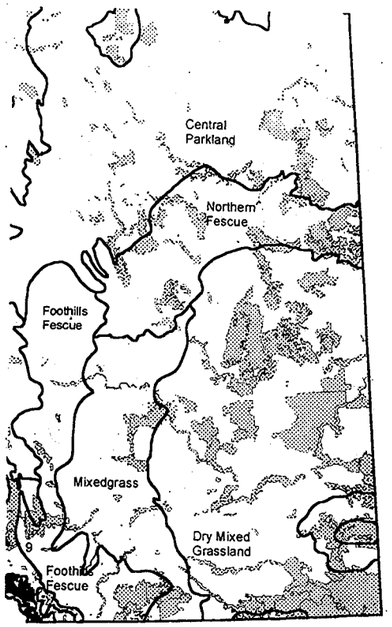

Figure 6. Environmentally Significant Town and Areas of Southeastern Alberta

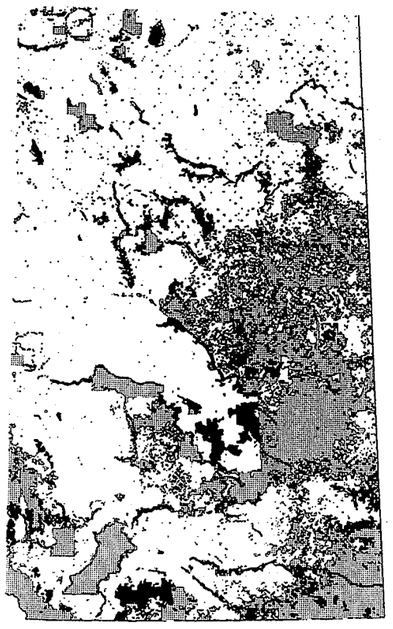

Figure 7. Areas of Environmental Significance on Private Land in Southeastern Alberta.

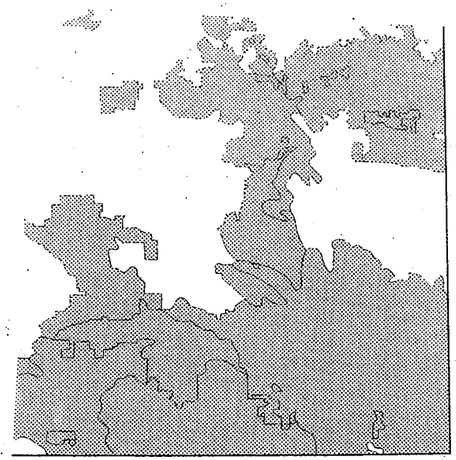

Figure 8. Onefour – Environmentally Significant Areas of Provincial, National and International Significance.

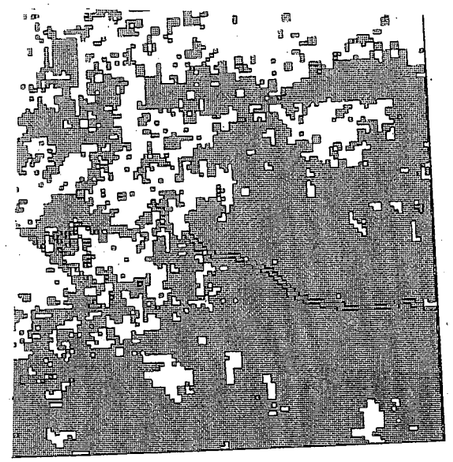

Figure 9. Onefour – Private (clear) and Public (hatched) Land.

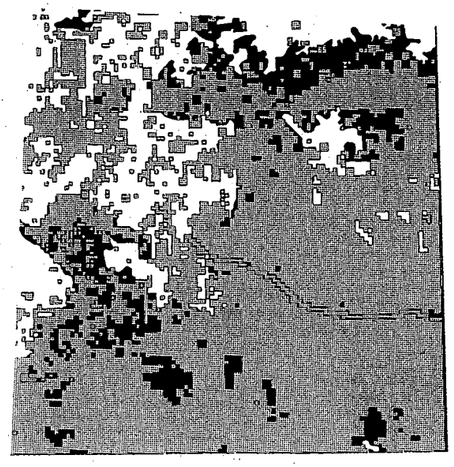

Figure 10. Onefour – Private Land (black) of Environmental Significance.

PART

III

Legal & Economic Concerns

WILLS AND ESTATE PLANNING ISSUES SURROUNDING CONSERVATION EASEMENTS

Philip J. Renaud

INTRODUCTION

The purpose of this paper is to discuss a number of issues in planning for the gift of a conservation easement through a will. This paper will not provide a detailed review of how to establish a conservation easement as that will be dealt with in other papers. The reader is also referred to the *Conservation Easement Guide for Alberta,* by Arlene Kwasniak published by the Environmental Law Centre for a detailed review of the topic.[1] This paper will not provide a detailed analysis of the tax consequences of granting a conservation easement in a will. That will be dealt with in other papers presented at this conference.

An initial reading of this paper might give the impression that the author is discouraging a landowner from gifting a conservation easement through a will. That is certainly not the case. While the author would encourage a landowner to grant a conservation easement during their lifetime in order to take advantage of the tax benefits and achieve certainty, it is certainly possible to make a gift of a conservation easement through a will. The message should be that it is sometimes preferable to complete the gift during one's lifetime but that if this is not possible, making the gift through the will is a viable alternative. In fact, a will is an excellent starting point for planning the gift of a conservation easement.

TAX PLANNING

Tax planning with conservation easements will not be dealt with in this paper other than to mention that on death the charitable tax credit from the gift of a conservation easement to a registered charity can be applied against 100% of income in the year of death. This is compared to 75% of income during one's life. There is also a carry back against 100% percent of the income in the year prior to death. The other tax advantages of making a gift of a conservation easement during one's life apply similarly on death. This will be dealt with in more detail in another paper presented at this conference.

On death there is a deemed disposition of all of the deceased's assets at fair market value which may give rise to tax on an accrued capital gains. Also, the fair market value of all registered retirement savings plans and registered retirement income funds is taxed as income in the deceased's terminal income tax return if there is no rollover available to a surviving spouse or handicapped child. This tax burden can be reduced by a gift to a registered charity in the will, including a gift of a conservation easement.

DEFINITIONS

The following terms may be used in this paper:

- "Conservation easement": A conservation easement granted in accordance with the *Environmental Protection and Enhancement Act*.[2]
- "Testator": The person who signs a will.
- "Probate": The process of proving a will in the court after the testator has died. If the testator owns land, the will must be probated in order to give the executor the ability to complete the grant of the conservation easement. The "grant of probate" is the document issued by the court certifying that the will is the deceased's last will and testament. The grant of probate is registered at Land Titles in order to register the property in the name of the executor. The executor then grants the conservation easement.
- "Executor": The person (or trust company) named in the will who administers the testator's estate.

EXAMPLE

The following example illustrates the types of planning possibilities with conservation easements.

Kathleen and George live in Central Alberta. Both are now aged 69 and they have farmed a section and a half of land for about 45 years. All their land is owned by them as joint tenants.

A half section of their land borders a wetlands area with a beautiful view of the mountains. About 75 acres of this half section have been left in its natural state. It is mostly wooded with an abundance of wildlife. They use it primarily for cross country skiing, walking and riding on trails through the woodland.

The half section is in a very desirable area of the province. There is a great deal of acreage development in the area. The value of the half section is currently one million dollars.

Kathleen and George live in a ranch-style home on one of these two quarter sections and they wish to live there for the remainder of their lives. They have two children. Their son, Frank, is a geologist in Calgary and he has two minor children. Their daughter, Linda, is a lawyer in Edmonton and she has two minor children. Neither Frank nor Linda are interested in carrying on the farming operation. Kathleen and George are already making arrangements to sell the remainder of their farmland but they want to preserve this half section to live on for the remainder of their lives.

When Kathleen and George sell the remainder of their farm land, they will use the enhanced capital gains exemption for farmers. Upon their deaths therefore, there will be capital gains tax payable on this half section of land.

Kathleen and George are now planning their wills. Their objectives include the following:

a. They wish to leave a portion of their estate to charity.

b. They wish to leave the remainder of their assets to their two children but if one of them were to predecease, the deceased child's share would pass to his or her minor children (Kathleen and George's grandchildren).

c. They wish to minimize tax payable on their deaths.

d. They wish to allow their children to use their half section of land as a recreational property or home. The family home could be used by the children and they would not object to having one or both of them construct another home on the other quarter section of land if each of them wanted their own house on the lands.

e. They wish to impose an absolute obligation on their children to keep the 75 acres in a natural condition.

f. It would be acceptable if their children wish to sell the land so long as the 75 acres is preserved in perpetuity.

A conservation easement will assist Kathleen and George in carrying out their intentions. It will ensure that the 75 acres is preserved in the manner that they wish and allow a charitable tax credit in the year that they make the grant of the easement. The land can still be given to their children subject to the conservation easement. Hopefully they will use it as a family retreat. The children could decide to own the whole of the half section as to each an undivided one half interest, or each of them could own one of the quarter sections. If either of the children wished to sell their land, that would be acceptable to the parents but the easement would protect the 75 acres in its natural state.

Income tax would not have to be paid on the death of one of Kathleen and George. On the death of one of them, the surviving spouse would become the sole owner of the land as the surviving joint tenant. When one spouse dies, the survivor will receive the land on a tax deferred basis. At that time the land is rolled over to the surviving spouse at the owner's cost base. Under the *Income Tax Act*, when one spouse dies and leaves property to the surviving spouse, no tax is paid until the surviving spouse dies or sells the land.

On the death of the surviving spouse or if both George and Kathleen die at the same time, there will be a deemed disposition of the property at fair market value at the date of death. The increase in value is a capital gain and three quarters of the gain will be taxable as income. In this example we will assume that the land has been owned since before 1972 and has a cost of $50,000. The following is an estimate of the tax payable:

Fair market value at death	$1,000,000
Adjusted cost base	50,000
Capital gain	$950,000
Taxable capital gain (3/4)	$712,500
Tax payable (assume highest marginal tax rate (45%))	$320,625

Since Kathleen and George have been farming this land for many years, it may qualify for the enhanced capital gains exemption of $500,000 for each of them (for a total exemption of $1,000,000) which might totally eliminate the tax. As indicated in the example however, they are in the process of selling their other farmland and will most likely use the entirety of this exemption on the other land. They will therefore have a capital gain on their death as indicated.

There is another tax advantage available to Kathleen and George. Because they have farmed the land for so many years, the land can rollover to their children on a tax deferred basis. This means that their children will acquire the lands at their parents' cost base with no tax payable at the death of the parents. The children will be subject to the tax on the capital gain when they sell it in future years, or upon their deaths. The farm rollover rules require that the land be used principally in the farming business. Since Kathleen and George are retiring from farming, the land will no longer be used in the farming business. While it will continue to qualify for the farm rollover for a number of years, there will come a time when it will no longer qualify, particularly if they live for many more years. Further, tax laws are constantly changing and the farm rollover rules may change in future years.

It would therefore be advisable for Kathleen and George to undertake some estate planning to see if they can reduce the potential tax upon their death. While farm estate planning is not the subject of this paper, there are some tax planning alternatives available to them that they should investigate. Granting a conservation easement during their lifetime or in their wills provides one method of reducing the amount of tax payable on death.

BEGIN WITH A WILL

Landowners motivated enough to grant a conservation easement are usually going to complete the project during their lifetime. This gives landowners the certainty that it has been completed to their satisfaction and allows them to monitor the easement during their lifetime. The charitable receipt can also be applied against 75% of current income, thereby reducing taxes during their lifetime.

It is, however, generally advisable to include a provision for the establishment of a conservation easement in a will for a number of reasons. If a person is just beginning their plans for a conservation easement, all of the issues might not be answered in their own mind. The planning process can become overwhelming and frustrating if the landowner tries to do everything at once. By starting with a will, it can be used as an outline to start a discussion with family members. As the plan develops, the will can be reviewed and updated to ensure it fits within the plan to gift the conservation easement.

If the landowner dies before the plan is completed, the will takes over upon death. The executor must then complete the gift outlined in the will. If the gift has been completed, the provision for the conservation easement will already have been completed and can be ignored by the executor.

If the landowner dies before the conservation easement is granted and there is no direction in the will to grant the conservation easement, the beneficiaries might not be as motivated as the testator in carrying out the testator's wishes. In the example above, if either of the children of Kathleen and George predecease them, the deceased child's share will be divided among their minor children (the grandchildren). The executor will be under a duty to distribute one half of the estate to the minor grandchildren and cannot diminish the value of the land by granting the conservation easement. The Public Trustee (as Guardian of the estates of the minor grandchildren) will insist upon the full one half value of the estate for the minor beneficiaries. It is therefore advisable for Kathleen and George to include a provision in their wills for the conservation easement until the process is completed. This can be added by a codicil (an amendment to a will) which can later be revoked if the conservation easement is completed during their lives.

WILL PLANNING

The will does not contain the conservation easement itself. Rather, the will contains instructions to the executor to carry out the wishes of the testator. It is the executor that actually signs the documents that grant the easement to the charity. This works in the same manner as when an executor is instructed to transfer a parcel of land to a beneficiary. The executor probates the will. The grant of probate is then registered at Land Titles which transmits the title into the name of the executor. The executor then transfers the title to the beneficiary.

With a conservation easement, the title to the land is transmitted into the name of the executor once the grant of probate issues. The executor then grants the conservation easement to the charity. The title to the land is then transferred to the beneficiary subject to the conservation easement.

The will should give clear instruction to the executor on how to complete the conservation easement. These instructions can be very general or very specific. Too much detail in the will may not always be advisable because it might unduly restrict the executor. If the grantee of the conservation easement refuses to accept the terms of the grant as attached to the will, then the executor may have a problem. If the executor cannot carry out the terms of the will exactly as instructed, the executor could potentially be personally liable to the beneficiaries. The executor might have to apply to the court for advice and directions as to how to proceed in order to avoid personal liability. This adds to the cost of the administration of the estate. If the instructions are so detailed that they are impossible to carry out, the gift might totally fail.

On the other hand, if the instructions to the executor are too general, the gift of the conservation easement might not be enforceable. If a will fails to identify the property or the donee of the property then the gift is void for uncertainty. If the donee is a charity, the courts might enforce the gift under a doctrine known as *cy pres*, if it can be shown that there is a general charitable intent. One should not however, rely upon this principal of law to carry out the terms of a badly drafted will. If there is any concern about whether the grant of the conservation easement is enforceable, the ambiguity may give fuel to any beneficiary wanting to challenge the will.

The following example clause in a will might be held to be void for uncertainty. It is unclear as to what kind of conservation easement should be granted, over what portion of the property and for what purposes:

"To grant a conservation easement on my quarter section to XYZ Charity".

The following example is also uncertain because it does not clarify the kind of conservation easement and because it leaves the donee of the gift unnamed.

"To grant a conservation easement to a charity on the most southerly fifty metres of my land bordering Pretty Lake."

Although the courts might have jurisdiction to enforce such a gift under the *cy pres* doctrine, interpreting such a clause would require an application to the court for advice and directions. This would further add to the cost of the administration of the estate.

The instructions to the executor should be designed to give sufficient certainty of the intentions of the testator but include enough flexibility to allow the executor to negotiate the terms of the conservation easement with the charity. The will should therefore tell the executor that the testator wants to grant a

conservation easement to a charity to protect the land for a certain purpose. The name of the grantee charity should be given with enough flexibility to the executor to negotiate the terms of the conservation easement. These might include powers:

- To negotiate the terms of the easement;
- To determine the exact boundaries of the conservation easement;
- To change the charity beneficiary if the executor is unable to negotiate a satisfactory agreement with the charity, or if the charity simply does not wish to accept the conservation easement;
- To give sufficient access on the conserved lands to the beneficiaries of the balance of the land (perhaps the children or a subsequent purchaser);
- To negotiate with the municipality and any other government body which is required to be notified;
- To survey and perhaps sub-divide the land;
- To set aside a portion of the estate for payment of the costs of establishing the conservation easement;
- To enable the executor to pre-take compensation for acting as an executor ;
- To appoint an enforcer of the conservation easement and give directions for the appointment of an alternate enforcer.

In giving such directions, a testator should not be too general. For example, if the executor is instructed "to negotiate with my children the terms of access across the land," a child who does not agree with the easement might hold up the administration of the estate. It may be more appropriate to include a non-binding wish that the executor discuss the terms of the easement with the children and be sensitive to their wishes but, in the event of a dispute, the decision of the executor will be final and binding upon all the beneficiaries of the estate.

COSTS OF THE ESTABLISHING THE CONSERVATION EASEMENT

The testator should include a provision in the will for the payment of the costs of establishing the conservation easement. The process can be costly and the owner should investigate the cost before finalizing the will to ensure that there are sufficient resources in his or her estate to complete the process.

The general rules of estate administration law require that all debts and estate expenses be paid out of the residue of the estate unless otherwise specified. The residue is what is left over after payment of all specific gifts in the will. For example, if a testator makes a gift of a conservation easement in the will and then leaves the residue of the estate to the children, all of the expenses will be paid out of the residue and there will be less for the residuary beneficiaries.

A will planned in this manner could be a potential source of friction between the executors, the charity and the beneficiaries. The executor would not want to make a final distribution of the estate until all of the costs of establishing the conservation easement are paid. If an executor distributes the estate to the beneficiaries without paying all of the estate's debts and taxes, the executor is personally liable for the payment of those debts. If the executor distributes the residue of the estate to the beneficiaries, and then does not have sufficient funds in the estate to complete the process, the executor may have difficulty recovering some of these funds from the beneficiaries. It is therefore appropriate for an executor not to make a final distribution of the estate until he or she is certain that all expenses have been paid and that there are sufficient funds reserved in the estate for the payment of any final expenses.

The children might be impatient for a final distribution of the estate while the executor may have many more months to complete the conservation easement. The mounting costs of granting the conservation easement could also be a source of friction between the children and the executor.

One solution is to establish a fund through the will for payment of the costs of establishing the conservation easement. If any money is left in the fund after completing the process, the funds might then be paid to the charity to assist it in monitoring the conservation easement.

Establishing the amount of the fund for these costs should be carefully considered. The testator should investigate all of the types of costs that might be incurred and then, to be safe, the testator might want to double that amount to be established as the conservation easement fund. For example, if after investigation it is determined that it may cost $15,000 to complete the conservation easement, the testator could establish a $30,000 fund.

To ensure that the executor has sufficient costs set aside in the will, the testator should consider the following:

- **Legal costs**
  These would include legal costs of drafting the conservation easement and perhaps involving the lawyer in the negotiation of the terms of the easement with the charity.

- **Tax advice**
  It is important that the executor seeks competent income tax advice on the effect of granting the conservation easement. If there is a disagreement with Revenue Canada concerning the value of the conservation easement and the charitable tax credit, additional costs may be incurred.

- **Survey costs**

- **Land use planner or consultant**

- **Appraisal costs**
  This would include the cost of appraising the whole of the land as well as determining the value of the conservation easement.

- **Registration costs at Land Titles**

- **Costs of the Charity**
  The testator should recognize that the chosen charity may not have sufficient resources available to complete the conservation easement or to monitor the easement in the future. Perhaps some of the costs of the charity should be paid out of this fund. On the other hand, perhaps it is more appropriate to have the remainder of the fund paid to the charity after payment of all of the estate's cost. Consideration might be given to requiring the charity to segregate these funds for this purpose.

  If the easement is completed during the landowner's lifetime, and the will is being amended to delete the directions to the executor to establish the easement, the testator may wish to include a bequest to the charity or the enforcer, or both to assist them in the expenses of monitoring the conservation easement. This type of bequest to a charity also gives a charitable tax credit for the estate.

- **Executor fees**
  As explained later in this paper, an executor is entitled to be paid a fee for his or her time and effort in the administration of the estate. The testator should understand that the completion of a conservation easement can be very time consuming and it is appropriate that the executor might be entitled to an additional or a greater executor's fee if it is necessary for the executor to take all the steps to implement the conservation easement. It may be advisable to have these additional executor fees payable out of this fund so that the residual beneficiaries do not complain about this additional cost coming out of their share of the residue of the estate.

- **Other consultants and costs**
  This would be a general provision that any other unforeseen costs of establishing the conservation easement be paid out of this fund in the discretion of the executor.

  While such a fund might not allow the executor the ability to totally distribute the residue of the estate shortly after death, it will add a lot more certainty and restrict the amount of the residue of the estate that has to be held back pending completion of the project.

EXECUTOR'S FEES

An executor may receive fair and reasonable compensation for their responsibility in administering an estate. The Surrogate Rules of Court include the following factors in determining the executor's compensation:

The following factors are relevant when determining the compensation charged by or allowed to personal representatives:[3]

(a) the complexity of the work involved and whether any difficult or unusual questions were raised;
(b) the amount of skill, labour, responsibility, technological support and specialized knowledge required;
(c) the time expended;

The Rules further provide that:

Additional compensation may be allowed when personal representatives

(a) are called upon to perform additional roles in order to administer the estate, such as exercising the powers of a manager or director of a company or business,
(b) encounter unusual difficulties or situations, or
(c) must instruct on litigation.[4]

Negotiating and granting a conservation easement can be a complex process which should be allowed for in planning the will. The amount of executor's compensation is usually best left to be determined after the easement is completed. If an exact dollar amount is set in the will, this might be too much or too little depending on the circumstances. For example, if the executor provides for the establishment of a conservation easement through the will, but then completes the easement in his or her lifetime, it is not appropriate to pay an additional executor's fee. Secondly, if too low a fee is specified in the will and the executor spends a great deal of time in implementing the easement, the amount specified in the will might be too little for the amount of time expended. As indicated above, perhaps this additional fee should be paid out of a special fund established in the will for conservation easement costs.

CHOOSING AN EXECUTOR

The duties of the executor can simply be described as gathering in all of the assets of the estate, paying the deceased's debts, including income taxes, and then distributing the assets to the beneficiaries. In a relatively simple estate it is often appropriate to appoint a family member such as a spouse or an adult child to be the executor. But when a testator's will includes a gift of a conservation easement to a charity, the duties of an executor can be very time consuming and may require a special level of skill. Accordingly, the choice of an executor should be carefully considered.

One should consider the possibility that a family member may not agree with the gift of the conservation easement. Sometimes the thought that a valuable parcel of land is not going to pass to the family may be objected to by a disgruntled beneficiary. While they may not be able to stop the gift, they may be able to present enough obstacles to make the executor's job very difficult. It is therefore advisable for the testator to discuss the concept of the conservation easement with members of the family to see if they share the testator's commitment to the project. The testator should choose an executor who is clearly committed to carrying out the wishes of the testator and discuss all of these issues in advance.

An executor who is also a beneficiary may be in a conflict of interest in concluding the conservation easement. This is particularly so if that beneficiary receives the remainder of the land that will be subject to the easement. This may be an advantage or a disadvantage depending upon the circumstances.

Perhaps one of the key factors in the choice of an executor is business acumen. This does not necessarily require that the executor be an entrepreneur with years of experience in running a business, or that the executor need have any particular experience in conservation easements. What is needed is simply a sound business sense with a commitment to get the job done right. Expert advice is essential and the appreciation of when to seek advice and deal with experts is critical.

Time is a major factor when granting a conservation easement. Often it may not be appropriate to appoint a person who has a full time job and a young active family. Consideration should be given to the appointment of a trust company. They are professional executors and have the fortitude to see that the job is done correctly, even over the objections of disgruntled beneficiaries.

CONSTRAINTS ON A GIFT OF A CONSERVATION EASEMENT IN A WILL

There are a number of reasons why a person may prefer to make a gift of a conservation easement during his or her lifetime. There may be legal reasons why it is not possible to complete the gift through the will.

Sale of the land prior to death

The ability of the testator to change his or her mind is one of the advantages of making a gift of a conservation easement through a will. If the testator needs the money for other reasons such as health care in later years, he or she retains the flexibility to sell the land.

But what if it is not the testator, but another person who decides to sell the property? For example, if the owner of the land becomes incapacitated, then someone else will have to manage his or her property. Whether that person is the attorney appointed pursuant to an enduring power of attorney or a trustee appointed by the court under the *Dependent Adults Act*, this legal representative has the power to sell real property. The attorney or trustee may not be aware of the gift of the conservation easement in the will.

The property might have to be sold to provide liquidity for providing health care. If the land is sold, the gift in the will adeems (lapses). The net sale proceeds of the land will then form part of the residue of the estate and pass to the residuary beneficiaries under the will.

The land might also have to be sold during the testator's lifetime in order to pay creditors. This could be beyond the control of the landowner or his attorney or trustee.

Where there's a will, there's a relative

A will can always be changed so long as the testator has capacity and is not unduly influenced in making the will. A husband and wife who own property in joint tenancy may be very committed to make the gift of the conservation easement. When one owner dies, the survivor will become the sole owner of the property. The survivor is free to sell the land or simply change his or her will deleting the provision for the conservation easement.

Family Relief Act

In Alberta, as long as a person has testamentary capacity to make a will and is not unduly influenced by any person, a testator may leave his or her property to whomever they wish. There are, however, some constraints upon this principle.

The *Family Relief Act*[5] of Alberta provides that if a person fails to make adequate provision in his or her will for the proper maintenance and support of his or her dependents, the dependent can bring an application to the court for a greater share of the estate. The term "dependent" in the act is defined as follows:

1) the spouse of the deceased,

2) a child of the deceased who is under the age of 18 years at the time of the deceased's death, and

3) a child of the deceased who is 18 years of age or over at the time of the deceased's death and unable by reason of mental or physical disability to earn a livelihood.[6]

Pursuant to the *Family Relief Act*, the court would have the power to change the will which might include an order that the entire estate is to be transferred to a dependent. For example, if a landowner makes a gift of a conservation easement in the will and if the court decides that there are insufficient assets in the estate for the proper maintenance and support for the surviving spouse, the court can order that the land be sold, with or without the conservation easement. The funds would then either be paid to the spouse or perhaps held on trust for the remainder of the spouse's life.

Matrimonial Property Act

The *Matrimonial Property Act*[7] of Alberta is designed to bring about division of matrimonial property after marriage breakdown. The condition precedent to making a matrimonial property order is a marriage breakdown usually on divorce or separation. Upon the death of one of the spouses, the surviving spouse only has an action under this Act if the spouse had a right to commence an action before the date of death, or to continue an action that was started before death.

In such an action, the court has the discretion to divide the matrimonial property between the spouses. Although there are number of factors in section 8 of the *Matrimonial Property Act* which are to be taken into consideration in making an award, there is a presumption of equal sharing between husband and wife.

Matrimonial property includes all property owned by the spouses, whether owned by one spouse or owned by both spouses together. The following property is exempt from distribution:[8]

a) property acquired by a spouse by gift from a third party;
b) property acquired by a spouse by inheritance;
c) property acquired by a spouse before the marriage;
d) an award or settlement of damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses;
e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses.

These five types of property are exempt from distribution if at the time of trial the property still exists or can be traced into existing property, and the market value of that property can be determined at the

relevant time. The increase in the value of exempt property is, however, divisible under the Act. For example, if a person owns a quarter section of land valued at $10,000 in 1972 and marries that year, the value of the land at that time will be exempt from division, but the increase in the value of the land will be matrimonial property. If the value of the land at the date of divorce is $500,000, then $490,000 is considered matrimonial property and is divisible.

Section 37 of the *Matrimonial Property Act* allows spouses to enter into a written agreement to provide for the distribution of property between them at any time, including the separation of the spouses or the dissolution of the marriage. A typical form of pre-nuptial agreement provides that upon a breakdown of the marriage, each party will keep their exempt property and any increase in the value of that exempt property.

An action under the *Matrimonial Property Act* is really only a concern if the spouses are separated or divorced at the date of death. The court can however apply the principles under this Act in an action under the *Family Relief Act*.[9]

Claims of common-law spouses

A common-law spouse (or a legal spouse) could bring a claim against the estate of a deceased person for unjust enrichment. The basis of the claim is that the landowner was unjustly enriched by the contribution of the spouse during the relationship, thereby allowing the landowner to increase the value of his or her assets. The courts can award the claimant a share of the estate. If the award requires the land to be sold or the conservation easement not to be granted, this can frustrate the wishes of the testator. Unlike the *Matrimonial Property Act*, separation or divorce is not a precondition for bringing an action after the date of death.

Joint tenancy

Property registered in the names of more than one person can be owned as joint tenants or as tenants-in-common. The distinguishing characteristic of property owned in joint tenancy is survivorship by which the title to the property on the death of any joint tenant passes to the surviving joint tenants. The legal interest of the deceased joint tenant will not form part of the deceased's estate. On the other hand, the interest of a person who owns property as a tenant-in-common does form part of that person's estate upon his or her death.

The advantage of owning property in joint tenancy is that it passes to the survivor and does not form part of the deceased's estate. It avoids the necessity of probating that asset. The title to the property passes to the survivors and is not subject to the claims of creditors of the deceased. It is a simple method of estate planning, particularly between spouses who have acquired all of their assets throughout their marriage and wish the entirety of their estate to pass to the survivor upon the death of one of them. Landowners should

understand that if property is owned in joint tenancy with their spouse, the surviving spouse becomes the sole owner and is free to change his or her will, and is free to delete the conservation easement provisions.

Many people are now being panicked into avoiding the probate process by transferring land into joint tenancy with their children. This can be a taxable disposition under the *Income Tax Act* which would result in an immediate capital gain. Upon the death of the parent, the children become the sole owners of the land by virtue of being the surviving joint tenants. The land will not form part of the parent's estate. The will therefore has no application to the land. As a result, the gift of the conservation easement in the will fails because the land is not part of the estate.

There are other tools that can be used in conjunction with the will such as a protective trust to ensure that the testators's intentions are carried out.

Dower Act[10]

In Alberta, a landowner is prevented from disposing his or her "homestead" without the consent of their spouse. Homestead is defined as:

(i) a parcel of land on which the dwelling house occupied by the owner of the parcel as his residence is situated, and
(ii) that consists of

(A) not more than four adjoining lots in a city, town or village as shown on a plan registered in the proper land titles office, or
(B) not more than one quarter section of land other than land in a city, town or village.[11]

If a married person is the sole owner of a quarter section of land upon which the husband and wife reside, that landowner may not make any disposition of that land without the consent of his or her spouse. Disposition includes a transfer, agreement for sale, lease for more than three years, mortgage and any other disposition. This would include the granting of a conservation easement. As a result, a conservation easement may not be granted by a landowner without the consent of his or her spouse.

Upon the death of the landowner, the surviving spouse is entitled to a life estate in the homestead. As a result, the person cannot grant the conservation easement through his or her will unless that spouse consents. If the spouse consents, the conservation easement may be granted and that spouse can enjoy a life estate on the balance of the quarter section. If the spouse does not consent, the easement cannot be granted until the death of the surviving spouse.

Spousal trust

One way to plan around dower and other issues is to direct in the will that the land be held on trust by the executor of the estate for the life of the surviving spouse. The spouse would have the right to the full use of the land and be entitled to receive all of the income from the land during his or her lifetime. Upon the death of the second spouse, the executor would then be instructed to grant the conservation easement.

Further limits may have to be placed on the use of the land in the spousal trust to prevent the spouse from destroying the very land that is intended to be protected pursuant to the conservation easement. For example, if the landowner wishes to protect a natural area on the quarter section by granting a conservation easement, consideration should be given to prevent the spouse from cutting down all of the trees on the quarter section. This type of restriction may or may not be possible in the will and should be carefully examined by the lawyer drafting the will.

PLANNING FOR INCAPACITY: ENDURING POWERS OF ATTORNEY

Until the conservation easement is completed, the landowner should provide for the completion of the project in the event of his or her incapacity. If a person has not signed an enduring power of attorney, someone must apply to the court under the *Dependent Adults Act*[12] for the appointment of a trustee to manage the property of the incapacitated landowner. The trustee would not have the power to grant the conservation easement without a further court order, and it is questionable whether the court would allow the gift because this would involve giving away some of the dependent adult's property which might be required for the care of the dependent adult.

An alternative to this costly procedure is an enduring power of attorney. There are two types of enduring powers of attorney. An "immediate" enduring power of attorney gives the attorney the power to manage the estate as soon as it is signed and continues should the person lose capacity. A "springing" enduring power of attorney has no effect until the person loses capacity. With this type, the person can name someone to decide when the person has become incapacitated (perhaps a doctor or one or more members of the family). The power of attorney springs into effect when that person decides that the person is no longer capable of managing their property.

With a general power of attorney, the property must be used only for the benefit of the owner and the maintenance, education, benefit and advancement of the donor's spouse and dependent children. Property cannot be gifted to any other person, including charities, unless allowed in the enduring power of attorney. Additional powers are needed in the document if the person wishes the attorney to complete the grant of the conservation easement. Specific direction should therefore be given to the attorney in the power of attorney to enable the attorney to grant the gift.

CONCLUSION

It is not the purpose of this paper to discourage a person from making a gift of a conservation easement through a will. On the contrary, a will is sometimes the best tool to use and, at the very least, is an excellent starting point. The testator should however be aware of the constraints of making the gift through a will during one's life and choose the best tools to give effect to these wishes.

The gift of a conservation easement should not be approached in a vacuum. It is only one part of estate planning. Many factors must be taken into consideration including the effect on the overall estate plan and taxation issues. A thorough discussion of all estate planning issues is essential.

It is usually preferable for a landowner to complete the granting of a conservation easement during his or her lifetime. The landowner can be satisfied that the easement has been granted and registered against the title without the possibility of it being changed (other than through the provisions of the *Environmental Protection and Enhancement Act*). It is not always possible, however, to complete a conservation easement during one's lifetime. The granting of an easement through a well planned will can usually ensure that the landowner's wishes will be carried out following his or her death. When a landowner concludes that he or she wishes to grant the conservation easement but still wants to investigate the details, an excellent starting point is a will.

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[1] A. Kwasniak, *Conservation Easement Guide for Alberta* (Edmonton: Environmental Law Centre) 1997.

[2] *Environmental Protection and Enhancement* Act, R.S.A. 1980, c. E-13.3, ss.22.1 to 22.3.

[3] *Alberta Surrogate Rules of Court* Schedule 1, Part 1, Personal Representative's Compensation Rule 2.

[4] *Ibid.* Rule 3.

[5] *Family Relief Act*, R.S.A. 1980, c. D-38.

[6] *Ibid.* s. 1(d).

[7] *Matrimonial Property Act*, R.S.A. 1980 c. M-9, as amended.

[8] *Ibid*, s. 7(2).

[9] *Tataryn* v. *Tataryn*, [1994] 7 WWR 609 (SCC).

[10] *Dower Act*, R.S.A. 1980 c. D-38.

[11] *Ibid.*, s.1(e).

[12] *Dependent Adults Act*, R.S.A. 1980, c. D-32.

TAX CONSEQUENCES OF LIFETIME DISPOSITIONS OF CONSERVATON EASEMENTS

Garnet T. Matsuba

BEFORE 1995 BUDGET

Gifts of conservation easement to registered charity:

- Capital gains tax (3/4 of capital gain included in income)
  - could elect tax sale price to be less than fair market value (but also reduced value of gift)
- Possible capital gains exemption (non-qualifying real property; qualified farm property)
- Qualified as charitable donation – tax credit restricted to 20% of net income (5 year carry forward)

Problems

- Donations of "Canadian cultural property" treated more favourably
  - no capital gain
  - no limitation on tax credit
- Difficult to determine value of conservation easement
- Concern that value of easement is minimal (no established market)

BUDGETARY CHANGES – 1995 AND 1997

1995 Budget

- Qualified donations exempt from 20% limit on use of tax credit
- Conditions
  - must be certified to be "ecologically sensitve"
  - must be donated to the federal or provincial government, a Canadian municipality or a "designated charity"

1997 Budget

- Value deemed to be the greater of:
  (a) fair market value otherwise determined; and
  (b) amount by which fair market value of affected land is reduced

RESULT

- Still have capital gain, unless elect at lower value (potentially exempt if qualified farm property)
- All net income (including capital gain) can be eliminated by credit
- Value of donation for computing tax credit based on new 1997 formula

EXAMPLE

- Value of conservation easement - $250,000

Tax cost (ACB)	$ 50,000
Capital Gain	$200,000
Income –3/4 x $200,000 =	$150,000

- Tax credit – based on full $250,000
- Tax credit should eliminate tax on capital gain, as well as on other net income (roughly another $100,000 of income); 5 year carry forward

APPRAISING THE VALUE OF A CONSERVATION EASEMENT

Don L. Hoover

I am pleased to be part of your conference on Conservation Easements and Land Stewardship. My presentation on appraising a conservation easement is a condensed version of how we in our firm, Serecon, value conservation easements. My presentation will be based on rural or farm land. Conservation easement valuation is a new field to us, so we have a number of questions too.

TOPICS TO DISCUSS

The topics we will discuss include all of the following:

- the appraisal process;
- property ownership;
- partial interests; and,
- valuation framework.

First, let's look at the appraisal process, then get into the heart of the matter – ownership; interests taken; etc.

APPRAISAL DEFINED

An appraisal is *"a statement of value as described by the appraiser of an adequately described property as of a specific date"*. The definition of value is ultimately important. The typical value required is market value, which is further defined later in this paper.

Typically, an appraisal deals with market value, but in the case of a conservation easement, it will be:

- market value;
- productive value; and,
- intangible rights, etc.

APPRAISAL GUIDELINE – GENERAL

- introduction - letter of transmittal; summary of salient facts & conclusions;
- purpose of appraisal;
- statement of limiting conditions – scope of appraisal;
- area or neighbourhood description;
- description of the subject property – legal description; site description; description of site improvements; taxes; land use and zoning;
- Highest and Best Use;
- approaches to value - Fee Simple interest:
  - Cost Approach,
  - Direct Comparison Approach, and
  - Income Approach; and,
- market value conclusion.

HIGHEST AND BEST USE

The Highest and Best Use is defined as "that use which, at the time of appraisal, is most likely to produce the greatest net return to the property over a given period of time". The concept of "Highest and Best Use" is the foundation for any attempt to estimate the market value of a property and it is therefore the essential first step in the valuation process.

The purpose of the Highest and Best Use concept is to analyze these factors, emphasizing the fact that it is the market that determines the ultimate use of the property. The fact that the property is improved or unimproved impacts on the current use which may or may not have any bearing on the Highest and Best Use. This leads to another factor that must be considered; the most probable use for the property.

MARKET VALUE DEFINED

"Market value" is defined as the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus.

APPROACHES TO VALUE

In estimating the market value of real property, there are three standard approaches utilized:

- The Cost Approach arrives at a value estimate of land, treated as though vacant, and adds to this the depreciated value of the improvements. The value of the land is ascertained by the Comparative Method, that is comparing the subject property to other properties of the same type and class which have sold, which have been offered for sale, or on which offers have been made in the same or competing areas, at or about the same time as the effective date of the appraisal.
- The Direct Comparison Approach arrives at a value estimate of the subject property as a unit. The unit, a combination of land and buildings, is compared to similar properties of the same type and class which have sold, which have been offered for sale, or on which offers have been made in the same or competing areas at or about the same effective date. In the case of bareland, the Cost Approach and the Direct Comparison Approach are considered equivalent and may simply be referred to as the Comparable Method.
- The Income Approach arrives at an estimate of value by determining the present value of expected future returns to the subject property. It is therefore the capitalization of the expected net returns over a given period of time.

PROPERTY OWNERSHIP

Property rights:

- Bundle of Rights: Real property includes the interests, benefits, and rights inherent in the ownership of physical real estate (including tangible and intangible rights). The rights inherent in ownership are often referred to as the "bundle of rights". The bundle of rights theory compares ownership rights with a bundle of sticks. Each stick represents a distinct and separate right. Each right in the bundle, subject to government and private restrictions, can be sold, leased, or transferred individually.

  Included in this bundle of rights are the right to use the property, to sell it, to lease it, to enter it, to give it away, or the right to refuse to do any of these. When a person owns all of the bundle of rights, he or she is said to have a Fee Simple interest in the title. This title is regarded as an estate without limitations or restrictions with the exception of the following powers of government.

- Restrictions Imposed:

  - the power of taxation
  - the power of eminent domain.* This is the right reserved by government and some quasi-public bodies to take by expropriation private property for public benefit.

  * Editor's note: This is an American term; in Canada it is called "expropriation".

- police power. This includes zoning, building codes, sanitary regulations, and the like in order to ensure the general welfare of the public.
- escheat. This is the right to have titular ownership of a property returned to the Crown if an owner does not pay his taxes or if he dies and leaves no Will and no known heirs.

In addition to the restrictions which may be imposed by government, legal private restrictions may also be imposed by certain easements or rights-of-way, etc. In setting out to value a property, the appraiser must know what rights of ownership are to be considered and must be aware of the effect that any of these rights, or lack of them, will have on the final estimate of value of the property.

Within the rights of ownership there are many intangible items. The "pride of ownership" and the passing of land between generations are significant factors in ownership of rural land. As the weighting or importance of these and other intangible factors are of greater significance in rural Canada, it is therefore a factor to consider in appraising partial interests. The importance lies in the fact it is difficult to assess that portion of the bundle of rights that may be attached to the "pride of ownership" and the rights or privileges attached to this term.

PARTIAL INTERESTS

Fee Simple Acquisitions

Many partial interests are acquired in Fee Simple. An example of a Fee Simple partial taking is a provincial highway right-of-way, which is considered a relatively permanent taking with no residual rights to the title holder. Therefore, it is purchased in Fee Simple at market value by statute.

Easements

Easements generally give the easement holder, the owner of one parcel of land (the grantee), a right to use the land of another (the grantor) for a specific purpose. Easements remain with the land and bind subsequent owners in perpetuity.

There are three basic types of easements:

- Surface Easements – access, irrigation canals, drainage ditches, railway rights-of-way, fences.
- Subsurface Easements – pipelines, under-ground storage.
- Overhead Easements – electric transmission lines, cable lines, telephone lines, right-of-light, air rights.

CONSERVATION EASEMENTS

A conservation easement is a legal agreement a property owner makes to restrict the type and amount of development or use that may take place on his or her property. Each easement's restrictions are tailored to the particular property, the conservation recipient, and to the interests of the individual owner.

The specific rights a property owner forgoes when granting a conservation easement are spelled out in each specific easement document. The owner and the prospective easement holder identify the rights and restrictions that are necessary to protect the property - what can and cannot be done to it. The owner then coveys the right to enforce those restrictions to a qualified conservation recipient, such as a public agency, a land trust, or a historic preservation organization.

VALUATION – CONSERVATION EASEMENT

The valuation of a conservation easement has to consider:

- a careful definition of the rights being acquired;
- the description of the area acquired – is it a part of the parcel for water retention or is it the whole parcel for wildlife habitat;
- quantification of the impact on remaining value - net income analysis: cash rental approach; build-up approach – for example, the productivity of the land is all removed, or is partially removed by controlling the crops to be grown; and,
- impact on remaining value – determine the value on the remaining rights, usually the intangible parts of ownership. Utilize the impact matrix as a method to assist in calculating the further impact on value (described later).

CONSERVATION EASEMENT – IMPACT ON VALUE

The value of a property with a conservation easement can be offered in the following fashions:

- Loss of all Productivity: The landowner cannot take crops or hay off the land and cannot graze cattle (use the pasture) on the land. He or she has the right of possession; to walk, to look, to enjoy, but not to profit. So to determine the value of this type of conservation easement, one must estimate the loss of productive value and the impact the easement has on the intangible portion.
- Loss of Some Productivity: The landowner can only graze the property for a predetermined time period, and cannot take off hay, cannot crop the land, except during the year of rejuvenation. So again, the productive value needs to be determined as well as what has been taken away, plus the intangibles.

- Loss of all Future Development: The productivity is unaffected, but the land cannot be subdivided or utilized for any development, recreational, residential, industrial uses. So what part of the total bundle of sticks has been taken and how do you value that portion?

LOSS OF ALL PRODUCTIVITY IMPACT ASSESSMENT

The valuation of the productive portion of the value of a parcel can be completed by:

- Cash Rental Approach: Cash rental rates paid for comparable land.
- Build-up Approach: Impact on gross income, expenses, and net income. The net income analysis through either approach will determine the income or productive value of the property; the tangible component of the market value of the property.
- Property taxes also have to be considered. If you take away the income producing potential of an income property, you also take away the base the municipality uses to set its tax assessment. It is assumed that the municipality will not adjust or alter their assessment once the easement has been acquired. Therefore, there will remain with the landowner an obligation to continue to pay the taxes on the land.

LOSS OF SOME PRODUCTIVITY OR DEVELOPMENT POTENTIAL – IMPACT ASSESSMENT

- Before and After – the value of the subject property is estimated before and after the conservation easement is in place.
- Residual/Reversionary Interests – the appraiser arrives at the before market value of the land without the conservation easement being imposed on the bundle of rights, then values the easement as a percent of the total value.

The "Before and After" approach is best used when the impact from an easement is significant and can be measured in the marketplace.

The Residual/Reversionary Interests, the preferred method, can be broken down into more calculable and tangible components and is considered the method of choice.

APPRAISAL TECHNIQUES AND CONSIDERATIONS IN PARTIAL TAKING

Before and After Approach

- The method involves determining the market value of the entire parcel prior to the partial taking and of the remaining parcel after the partial taking. The difference is obviously the measure of the value of the partial taking.

This is a method which is employed to determine compensation where there has been a partial taking of land.

If this partial taking is an easement, you are then measuring the degree to which an easement impacts on the bundle of rights and changes the property's use and value.

The Before and After Method is an appropriate approach in some jurisdictions in Canada to measure the market value of the interests acquired in partial takings. In Alberta though, compensation for partial takings has not traditionally been based on this method.

Residual/Reversionary Interests:

- This method of valuing the rights (interests) taken by the grantee acquiring an easement utilizes an appraisal residual technique. The residual and reversionary interests to the landowner are estimated and subtracted from the estimated Fee Simple market value of the property which is encumbered by the easement.

Fee Simple Market Value ($) (100% ownership rights)	-	Value of Residual/ Reversion Interests Remaining with the landowner ($) (% of total rights)	=	Rights Acquired by the Grantee ($) (% of total rights)

IMPACT ON REMAINING VALUE

Rights that remain after taking away the productive capacity or profit portion are:

- right of ownership;
- right to sell, lease, trade, or give away the land;
- right to mortgage the property;
- right of enjoyment; and,
- right of any capital gain on the non-productive portion of the market value.

INTANGIBLE RIGHTS

The intangible rights remaining after the granting of an easement, for example, pride of ownership, are difficult to quantify monetarily.

WHAT IMPACT DO THE RIGHTS TAKEN HAVE?

A rating process has been developed to help determine the impact imposed by the requirements of a conservation easement agreement. It is relatively easy to determine the tangible or productive portion of a property – but the intangible portion is not nearly as easy to determine. To assist in determining the impact, a matrix has been developed.

Subjective Rating Process

This rating process can best be accomplished through what is called an impact matrix, which provides a rating of the impact a specific conservation easement has on the remaining bundle of rights.

Impact Matrix

Rating Process									
Factor	Rating								
	-4	-3	-2	-1	0	+1	+2	+3	+4
1. Allow access to land – with 24 hour notice			✓						
2. Allow monitoring the use of the land.					✓				
8. Grantor continues to pay property taxes.	✓								

This is the format, with a +4 to –4 rating for each factor. In the example used today, we have 16 factors. You then determine a percent impact on the remaining non-productive, or intangible portion of the value of the property. The 16 factors within this example are as follows:

1. Allow access to land and over land with 24-hour notice to the landowner.
2. Allow monitoring of the use of the land.
3. The grantor may not establish or conduct any commercial or industrial facilities or activities.
4. The grantor will not construct or erect any aircraft facilities or aircraft landing facilities on the property.
5. Public snowmobiling or off-road vehicle use is prohibited. Harassment of wildlife by people or domestic animals is also prohibited.

6. The grantor will not introduce any non-native plant or animal species (except as otherwise expressly allowed by this Easement).
7. Grantor is responsible for stewardship over remaining rights.
8. Grantor continues to pay for property taxes and levies.
9. Grantor will not, without Conservation Agency approval, alter the drainage patterns.
10. Grantor reserves the right to continue to use the property for all purposes not inconsistent with this Agreement.
11. Grantor will not construct or maintain any commercial signs or billboards on the property. Small signage may be displayed to state the name of the owner and property, and that the area is protected by this conservation easement.
12. Restriction notice shall be inserted by the Grantor in any deed, lease, or other legal instrument by which he or she transfers either the Fee Simple title or a possessory interest in the property.
13. Grantor shall immediately notify the Conservation Agency of any change of ownership or of its possessory interests.
14. Any utility structures and systems must be buried, unless prior approval is obtained by the Grantee.
15. Exploration or extraction of oil, gas, and other minerals, rock, gravel, or sand found in, on, or under the property is prohibited by open-pit or surface mining methods. No sub-surface or other exploration or extraction of oil, gas, rock, gravel, sand, or other minerals, including the lease, sale, or other disposition of the rights to such materials, is allowed, which may impair or result in the destruction of the Conservation Values.
16. The restrictions set out in the Agreement shall remain with the property and shall inure to the benefit of and be binding upon the parties hereto (a caveat on the title).

FINAL VALUATION – CONSERVANCY EASEMENT

A conservation easement restricts the type and amount of development on a property or its income potential. It is tailored to the particular property and the interests of the owner and the easement holder.

An assessment of the impact on the tangible components is completed first. Then an impact matrix is completed for an assessment of the impact on intangible factors.

This two phased process provides a net impact of the conservation easement and therefore, a value of the rights acquired through the conservation easement.

Example A

Conservation Easement - takes all the productivity

Land Value	$500.00/acre
Productive Value	$350.00/acre
Intangible	$150.00/acre
Impact Matrix (55/100)	$ 82.50/acre
Value Left to Owner	$ 67.50/acre

Example B

Conservation Easement - takes part of the productivity

Land Value	$500.00/acre
Productive Value	$350.00/acre
Portion Taken (60%)	$210.00/acre
Portion Left	$290.00/acre
Intangible	$150.00/acre
Impact Matrix (55/100)	$ 82.50/acre
Value Left to Owner	$207.50/acre

Comments

- The rights granted with an easement are not always tangible.
- Intangible rights remaining with the landowner are difficult to quantify monetarily on an individual basis.
- A slight variance in the capitalization (discount) rate has a significant effect on the present value of the potential income stream and thus the residual value.
- The valuation of conservation easements is a complex, and very interesting challenge.

CONSERVATION EASEMENTS AND FINANCIAL INCENTIVES AND DISINCENTIVES TO SUSTAINABLE WOODLOT MANAGEMENT

Gordon Kerr

WOODLOT ASSOCIATION OF ALBERTA

Mission

- To promote leadership in sustainable forest management by encouraging the development of private and public forests by increasing awareness of their inherent social, economic and environmental values.

Goals

- To educate the public about the inherent value of Alberta's private forest
- To promote private forest management in an environmentally friendly way
- To facilitate education and training of members in woodlot-related activities
- To help members to make informed decisions about their woodlots
- To represent members and liaise as a body with industry, governments and other like-minded organizations

Alberta Projects

- Quarterly Newsletter
- Woodlot Management Guide for the Prairie Provinces
- Alberta Woodlot Directory
- Promoter and partner in Woodlot Workshops and Seminars
- Partner in Conferences
- Library Assistance

- Woodlot Management Video
- Partner in White Zone Forest Inventory

ISSUES AND OPPORTUNITIES

- Current levels of timber harvesting on private land may not be sustainable.
- Marketing of private timber could be improved.
- Current tax policies (property, fuel, income) act as a disincentive to woodlot management.
- Government and industry support for woodlot management still lags behind other provinces.

WOODLOT ECONOMIC/MARKET VALUES

- Logs
  - Rough Sawn Lumber
  - Planed Lumber
  - Pulp and Oriented Strand Board
- Posts and Rails
- Firewood
- Florals and other Ornamental Products
- Foods – Berries, Mushrooms, etc.
- Recreation/Eco-Tourism

TAXATION OF WOODLOTS

- Principle 1
  - All levels of taxation systems should encourage woodlot management for the long term.

- Principle 2
  - The taxation system should not encourage liquidation of standing timber, but should make allowance for the long term planning horizons and risk associated with woodlot management.
- Principle 3
  - Woodlot management has much in common with agricultural production and should be afforded similar tax treatment.

WOODLOT SOCIAL BENEFITS

- Water Conservation
- Soil Conservation
- Upland Wildlife Habitat
- Riparian Zone Protection
  - Water Quality
  - Fish Habitat
- Carbon Sequestering
- Landscape Beautification

CONSERVATION EASEMENTS

Alberta Environmental Protection And Enhancement Act **(Epea) Fall 1996**

How do I obtain economic return from easements on my land?

- Donations of ecological gifts to qualified organizations are granted tax receipts at 100% of value of the donated land or easement, which can be carried forward five years.
- In order for land or conservation easements to be recognized as ecological gifts they must be certified as having ecological value. Revenue Canada accepts certification in Alberta as provided by the Canadian Wildlife Service.

Taxes owing but returned through tax credits = money returned. You can thus be paid for protecting your land.

Class 1 – Residential (can be divided into subclasses)

Class 2 – Non-residential (may be divided into vacant non-residential and improved non-residential)

Class 3 – Farmland

- Class 1 and 2 must be assessed on market value
- Class 3 is assessed on agricultural use values

Land is assessed on agricultural use value if classed as farmland. Farming operations include:

i) horticulture, aviculture, apiculture and aquiculture,
ii) the production of livestock, and
iii) the planting, growing and sale of seed.

The definition does not include woodlot operations or timber production.

Sustainable agriculture will succeed only if biological diversity is maintained. What diversity is there in a cultivated field, in tame pasture, in forage crops? Biological diversity can only be attained at a landscape level, and only if the land form and vegetation are diversified.

Social and environmental benefits are the greatest values realized from private forest land and should receive tax relief equal to farmland. Land is assessed as farmland only if actively farmed.

Forested land should require the same active management. Active management should include sustainable forest management goals, including wildlife, water and other conservation commitments, i.e. conservation easements.

Tax relief for sustainable land management = privatization of environmental services.

PART IV

Issues For Municipalities

CONSERVATION EASEMENTS AND MUNICIPAL PLANNING

Bill Symonds

INTRODUCTION

This paper is divided into three sections. Part one gives an overview of the planning provisions of the *Municipal Government Act* as it relates to environmental issues. This will be familiar territory to Alberta professionals active in this field but will hopefully be a useful background to the discussion that follows.

Part two of the paper comments on the relationship between the planning provisions and conservation easements. Because of the newness of conservation easements, this is somewhat uncharted waters and there is room to learn and adjust.

Finally, this presenter was asked to give some remarks on the concept of transfer of development rights and its applicability in Alberta. There are more questions than answers on this one.

This presenter would be pleased to discuss the contents of the paper or other related matters and can be reached directly at (780) 422-8355.

This paper is a revised version of that presented at the *Legacy of Land Conference*. The views expressed in this paper are solely those of the author and not Alberta Municipal Affairs.

1.0 PLANNING LEGISLATION AND THE ENVIRONMENT

1.1 THE LEGISLATIVE FRAMEWORK

The scope for municipalities to address environmental concerns through the planning process is recognized in the very purpose of the planning part of the *Municipal Government Act* (MGA). Section 617 of the MGA provides that:

> The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted
>
> (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and

(b) **to maintain and improve the quality of the physical environment** within which patterns of human settlement are situated in Alberta,

without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest. [emphasis added]

While planning for environmental matters is recognized in the purpose, the greater public interest must be balanced against the rights of the individual.

Further elaboration on the municipal role in environmental matters is given in the Land Use Policies, adopted by Cabinet in November 1996. Section 5 of the Land Use Policies contains six policy statements aimed at encouraging municipalities to identify and protect, within the scope of their jurisdiction, significant natural features. The policies are broad in nature, aimed at encouraging rather than directing municipalities to undertake specific actions. This approach allows for flexibility in interpretation and application. Nonetheless, section 622(3) of the MGA does provide that:

> Every statutory plan, land use bylaw and action undertaken pursuant to this Part by a municipality, municipal planning commission, subdivision authority, development authority or subdivision and development appeal board or the Municipal Government Board must be consistent with the land use policies.

Municipalities are expected to give careful consideration to these policies both in the development of planning policy and the making of planning decisions.

Municipalities may then elaborate on their environmental objectives through the municipal development plan. Section 632(3)(b)(iii) of the Act provides that a municipal development plan may address environmental matters within the municipality. Implementation of environmental objectives may then be pursued through the land use bylaw, subdivision and development permit approval processes.

Section 640 of the Act allows municipalities to adopt a land use bylaw which divides the municipality into districts and prescribes the permitted and discretionary uses within each district. Compensation for planning actions is limited by section 621 of the Act:

> Except as provided in this Part and in section 24 of the *Historical Resources Act*, nothing in this Part or the regulations or bylaws under this Part gives a person a right to compensation.

However, careful consideration must be given to section 644 of the Act which provides that:

> If land is designated under a land use bylaw for use or intended use as a municipal public building, school facility, park or recreation facility and the municipality does not own the

> land, the municipality must within 6 months from the date the land is designated [acquire the land or amend the bylaw to designate the land for another use].

The provisions regarding land use bylaws also allow the municipality to establish subdivision design standards and to, amongst other matters, regulate the location, size and other aspects of development including development on land subject to flooding or subsidence or within specified distances of water bodies.

A further implementation tool available to municipalities is subdivision approval. All municipalities are required to establish a subdivision approving authority. Under section 654 of the Act the authority must not approve an application for subdivision unless the land is suitable for the purpose intended and the subdivision conforms to the provisions of any statutory plan and the use provisions of the land use bylaw. Section 655 of the Act provides that a subdivision authority may attach conditions to a subdivision to ensure that this Part, the plans and land use bylaws and the regulations under this Part affecting the land proposed to be subdivided are complied with.

The MGA provides that a subdivision authority may require an applicant to provide land for environmental, municipal and school reserves at the time of subdivision. Section 664 states that:

> Subject to section 663, a subdivision authority may require the owner of a parcel of land that is the subject of a proposed subdivision application to provide part of that parcel of land as environmental reserve if it consists of
>
> (a) a swamp, gully, ravine, coulee or natural drainage course,
> (b) land that is subject to flooding or is, in the opinion of the subdivision authority, unstable, or
> (c) a strip of land not less than 6 metres in width, abutting the bed and shore of any lake, river, stream or other body of water for the purpose of
> (i) preventing pollution, or
> (ii) providing public access to and beside the bed and shore.

Section 663 does not allow the taking of reserves where the application is for one lot from a quarter section, the parcel is over 16 ha. or under 0.8 ha. in size or reserves have already been taken. Section 666 of the Act provides that the subdivision authority may require an applicant to provide up to 10% of the land that is proposed for subdivision, less any amount taken for environmental reserve or environmental reserve easement, for municipal reserve, school reserve or municipal and school reserve. Municipal and school reserve lands are to be used only for a public park, public recreation area, school authority purposes or to separate areas of land that are used for different purposes (MGA section 671).

1.2 IMPLEMENTATION OF ENVIRONMENTAL OBJECTIVES

This legislative framework provides scope for municipal initiatives but may be less thorough in the provision of tools for implementation than desired. Policies established in statutory plans rely on four principle means of implementation.

Municipal councils have authority to approve or refuse applications for statutory plan amendment and land use bylaw reclassification. Developments which do not meet the environmental objectives of the municipality can be refused. Subdivision and development permits which do not meet the statutory plans can also be refused. This, of course, is a rather negative strategy.

Environmentally sensitive lands may be taken as environmental or municipal reserve within the reserve provisions of the Act. As noted previously, the limitations on definition or the amount that may be taken leave little scope to address large scale environmental conservation needs.

The use of subdivision design standards, lot size and building siting provisions allow the delineation of sensitive areas within a site. Direct control creates the potential for bonusing, that is, the allowance of increased densities in exchange for the delineation of sensitive areas within a parcel where development is not permitted. Similarly, condominium plans may allow greater flexibility in the preservation of sensitive areas within the site.

Finally, there is the potential to establish a standard of development which becomes the minimum acceptable from a market point of view in the community. Open planning processes that involve the general public, developers, environmentalists and other interested stakeholders can result in a high standard of development that is integral to the very functioning of the community and the market. This approach should not be dismissed too lightly since it addresses square on the fundamental principal of the planning part - the balancing of the private and public good - in an open consensus building way.

2.0 CONSERVATION EASEMENTS IN PLANNING

Conservation easements allow a landowner who wishes to preserve the natural values of the land to make long term legal arrangements to do so. By entering into a conservation easement agreement with an approved organization, a landowner can provide for restrictions on land use which run with the title and can be binding on future owners of the land.

Conservation easements, authorized under the *Environmental Protection and Enhancement Act*, are a means of land use control which, under the MGA, is the normal prerogative of municipalities. The MGA makes no reference to conservation easements. A landowner proposing to establish a conservation

easement is required to give notice to the municipality but municipal approval is not required. Because conservation easements arise at the discretion of individual property owners without reference to municipal statutory plans and bylaws, there is the potential for confusion, frustration and conflict among municipalities, landowners and the general public.

2.1 RELATIONSHIP TO STATUTORY PLANS AND LAND USE BYLAWS

Through statutory plans municipalities can identify environmentally significant areas and appropriate policies to accomplish these ends. For example, a municipality might require an applicant for development to show how the proposal will address the conservation objectives of the municipality. The voluntary placement of conservation easements on lands identified as environmentally significant would be a very valuable tool in accomplishing municipal conservation objectives. The fact that a statutory plan does not accord particular environmental significance to an area or that a municipality does not approve of a particular conservation easement does not preclude individuals from establishing an easement on their land. Individuals considering establishing a conservation easement are encouraged to consult with their municipality.

Since the placement of a conservation easement is not linked to a particular land use classification, it is possible, perhaps even likely, that the land use bylaw will provide for permitted or discretionary uses that are not compatible with the conservation easement. This may be of little consequence while the person who placed the easement retains title. It could be a source of conflict if the owner changes his or her view or subsequent purchasers take a different view of the matter. Thus, an owner might apply for development, notwithstanding that it is contrary to the conservation easement, and a municipality might approve such a development. It would be the responsibility of the holder of the conservation easement to seek remedies to enforce the easement.

Clearly it would be less confusing for the public if statutory plans and land use bylaws recognized the limitations to development resulting from a conservation easement. It may be appropriate to request a person proposing to establish a conservation easement to make application to amend the land use bylaw to ensure conformity with the conservation easement. A proponent cannot be required to make application and may well feel it is an unnecessary delay and an added and unnecessary expense. This step however would further confirm the conservation status of the parcel for the municipality, the public and future purchasers.

An alternative approach might be to adopt a simple statement in the municipal development plan and land use bylaw that nothing in a statutory plan or land use bylaw permits development that is inconsistent with a conservation easement. Such a statement however would in effect give a prior municipal blessing to any conservation easement that persons may chose to establish. The legal

implications of such an approach should be discussed with the municipal solicitor. While a municipality does not have the authority to prevent the placing of an easement, the municipality should be comfortable with both the legal and policy implications of such a broad statement of approval before proceeding.

2.2 RELATIONSHIP TO ENVIRONMENTAL AND MUNICIPAL RESERVES

At first glance, conservation easements and the environmental reserve provisions of the MGA appear to be similar in purpose and outcome. While the outcome may be similar, the purpose and scope are quite different.

Under the MGA, a subdivision applicant may be required to dedicate qualified land as environmental reserve. Environmental reserve must be left in its natural state or used as a public park (section 671) and may not be sold (section 671). Where the applicant and municipality agree, an environmental reserve easement may be used. This latter approach allows the land to remain in the hands of the applicant with restrictions on its use and development.

Environmental reserve is intended to meet one of two primary concerns: preventing development of unsafe lands or preventing pollution and providing access to water bodies. The environmental sensitivity of the land is not a primary factor in its designation as environmental reserve. Conservation easements, on the other hand, are intended to conserve lands which are environmentally sensitive and which may or may not be developable in the conventional sense. Environmental reserve land as defined in the MGA would likely meet the requirements of land for designation under a conservation easement. Land that is suitable for a conservation easement however does not necessarily meet the definition of environmental reserve.

A municipality is not required to take environmental reserve. Despite the differences in purpose, there may be instances where a conservation easement offers a more appropriate mechanism to achieve a desired end result than either environmental reserves or an environmental reserve easement. In particular, the conservation easement appears to offer greater flexibility in the use and management of affected lands while achieving the same objectives as environmental reserves.

Municipalities may also take up to 10% of the area proposed for subdivision, less any area taken as environmental reserve or environmental reserve easement, for park, recreation or school purposes. Often the total amount of the dedication is required to meet the active recreation or school needs of the community. These lands tend to be readily developable areas and may not ordinarily qualify for designation under a conservation easement. While conservation easements may be used for recreation purposes, such lands are more likely to be for passive recreation purposes because of the environmental sensitivity of such lands. Municipalities may use municipal reserves for the preservation of environmentally sensitive lands but the 10% limitation is often not sufficient for both purposes.

A key question arises when land is proposed for subdivision, a portion of which is covered by a conservation easement: is the applicant required to provide reserves based on the total area of the land or should the land that is the subject of the conservation easement be deducted? Section 666 of the MGA provides that a subdivision authority may require an applicant to provide 10% of the parcel less any amount taken as environmental reserve or environmental reserve easement. As already noted, conservation easements are similar in effect to environmental reserves. While the Act does not require a subdivision authority to give credit for a conservation easement, the Act also provides that a municipality **may** take reserves. A landowner can make a strong argument that a subdivision authority should not take reserves from land that is the subject of a conservation easement.

2.3 RELATIONSHIP TO THE DEVELOPMENT APPROVAL PROCESS

The question that comes to most people's minds is this: can a municipality require a developer, when applying for land use reclassification, subdivision or development permit approval, to register a conservation easement against that portion of the lands which the municipality has identified as environmentally sensitive?

It is clear that addressing environmental issues is within the scope of the planning provisions of the MGA. It is also clear that a Council may approve or refuse applications to reclassify land and that subdivision and development authorities may approve subdivision and development permit applications subject to conditions. I am uncomfortable however advising municipalities to require applicants for development to register conservation easements in furtherance of municipal conservation objectives for two reasons:

1. requiring the registration of conservation easements is inconsistent with the voluntary nature of the enabling legislation; and,
2. the purpose section of the planning part proposes a balance of public and private interests inherent in the tools and procedures established in that part of the Act. The compulsory registration of conservation easements represents a significant adjustment to this balance.

It is my view however that a municipality is entitled to consider the steps an applicant will take to address the conservation objectives of the municipality in deciding whether to grant approvals at all. Conservation easements are a significant tool available **to the landowner** to assist in addressing these needs.

3.0 CONSERVATION BY OTHER MEANS - TRANSFER OF DEVELOPMENT RIGHTS

3.1 CONCEPT AND EXPERIENCE

Transfer of development rights (TDR) arose out of the earliest U.S. zoning experience, the first application occurring in New York City in 1916. As U.S. courts become more skeptical of land use regulations that lower land values, TDR becomes a more acceptable means of compensating for such losses.

The central concept of TDR is based on the severability of development potential from the land. A municipality establishes a sending zone where property is down zoned to restrict development and a receiving zone where development is encouraged. A method of assigning credits to parcels in the sending zone and establishing their development value in the receiving zone must be devised. A developer wishing to develop in the receiving zone then purchases development rights from the sending zone. The transfer may be on a parcel to parcel basis or though a "bank". Various permutations and combinations of the above elements are possible.

The successful operation of a TDR program is premised on several key assumptions:

1. compensation is required for down zoning or restricting development;
2. there is a means of ensuring that land from which development rights have been purchased cannot be subsequently developed (usually in the form of a restriction on title); and,
3. there is a secure market for the development rights.

TDR has seen considerable application in the United States with at least fifty examples in operation as of 1991. The concept has been used to protect prime agricultural land, significant habitat and important cultural and historic buildings and areas. Some of the more widely known examples include the Pinelands in New Jersey, the Lake Tahoe Basin in California/Nevada, and urban programs in New York, San Francisco and Seattle. Some of these programs have been in operation for a number of years and have seen the successful transfer of several thousand credits.

3.2 APPLICABILITY TO ALBERTA

The MGA is silent on the matter of TDR. There are a number of features of Alberta legislation however, which could be problematic to the successful operation of a TDR program. Principal concerns are:

1. compensation is not owing as a result of down zoning or other planning actions (unless the land is zoned for a public park);

2. there is no effective means of restricting further development of land from which the development rights have been severed. A land owner has a right to apply for an amendment to the land use bylaw and the authority of the municipal council on the matter is final; and,
3. there may be difficulty establishing security of the market for credits given the role and authority of Council in the development process.

One approach might be to use a conservation easement to limit further development of land from which the potential for development has been removed. The land would have to qualify for designation under a conservation easement. The difficulties arise however in establishing the manner in which the conservation easement is purchased by a developer and the credit applied to a development parcel. What is the role of the public in the application of this development right? Is there market confidence in the value assigned to the development right? Is there authority to make development subject to the purchase of a conservation easement?

A TDR program may be within the scope of a municipal authority to establish but there are a number of limitations and unanswered questions which make this approach operationally difficult, if not impossible.

SOME USEFUL REFERENCES

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MUNICIPAL ECOLOGICAL PLANNING

Leon Marciak

Municipal Ecological Planning has proven to be an effective tool for resource management within a municipality. This activity has been known as Municipal Soil and Water Conservation Planning. The specific benefits of planning with a natural resource focus are many. The benefits realized to date are:

1. Use of local information for targeting resource issues,
2. Developing program requirements and funding needs,
3. Environmental impact assessment,
4. Growth and infrastructure models, and
5. Improved information management.

This presentation will present examples from recent experiences in Alberta of the benefits of adopting an integrated approach to resource management and development. A number of key factors will be addressed for the development of a successful plan. The factors all relate to acceptance and adoption of the planning process by the Municipal Council, the Agricultural Service Board and municipal staff.

The availability of resource information specifically related to wildlife and biodiversity is a limitation to the development of a comprehensive conservation plan. Given the relative ease in applying Geographic Information Systems and the advances in providing digital information to support resource planning at the municipal level there is an opportunity to build, develop and maintain a series of ecological data products to support local information needs.

Once the information is referenced to legal location and integrated with other data sets, a synergy is developed to address a wide range of questions related to municipal management. The development of the municipal information incorporating a wide range of resource information combined with a spatial reference over a number of time periods allows significant flexibility to provide information on many local issues within a municipality. With high quality resource information and a consistent approach to data collection the author proposes that municipalities will be well served to address resource issues into the new millennium.

CONSERVATION EASEMENTS AND SUBDIVISION -- A LEGAL PERSPECTIVE

William W. Shores

Although conservation easements and the subdivision approval process in the M*unicipal Government Act*[1] are both intended to plan for and regulate the use of land over the long term, there is no clear integration of the two concepts. The sections of the *Environmental Protection and Enhancement Act*[2] (EPEA) that provide for conservation easements make no mention of the subdivision provisions set out in Part 17 of the *Municipal Government Act*. There is a reciprocal silence in Part 17 of the *Municipal Government Act*. Further as conservation easements are new statutory developments, there is no case law available to meld the two concepts into a cohesive whole.

Two substantial issues arise out of the lack of statutory coordination between conservation easements and the subdivision approval process.

The first issue relates to the validity of conservation easements when adopted without the approval of municipal subdivision and development authorities. Can one adopt a conservation easement heedless of the regulatory hurdles on subdivision and development established under Part 17 of the *Municipal Government Act*? Ultimately this question looks to whether municipal planning authorities can block a conservation easement.

The second issue arises on the other side of the ledger. Can a municipal subdivision authority impose a conservation easement on a landowner, as a condition of subdivision approval? Ultimately this question looks to whether a municipality can advance environmental goals on private land through the imposition of a conservation easement as a condition in the subdivision approval process.

In the final analysis conservation easements are likely to be most effective in the subdivision approval process when they result from cooperative efforts by the landowner and municipality. When used in this manner conservation easements are a tool that can be used to the advantage of both the landowner and the municipality to design innovative subdivisions, while meeting the broader goal of the protection, conservation and enhancement of the environment.

THE PROVISIONS FOR CONSERVATION EASEMENTS IN THE EPEA DO NOT OUST THE PROVISIONS FOR THE REGULATION OF THE SUBDIVISION AND DEVELOPMENT IN THE MUNICIPAL GOVERNMENT ACT

Section 22.2(2)(c) of the EPEA requires a person intending to register a conservation easement to give notice to "the local authority of the municipality where the land is located." The *Act* does not specify why notice must be given. In her *Conservation Easement Guide For Alberta*, Arlene Kwasniak considered the rationale underlying the requirement of notice and concluded that it did not give a municipality a veto over the granting of a conservation easement:

> The municipality or other authority requiring notice of intent to register a conservation easement will have short and long term land use plans and policies for areas under its jurisdiction. It is possible that the placement of a conservation easement could be relevant to these plans and policies. Giving the authority notice of intent to register a conservation easement extends an opportunity to the authority to air any of its concerns with the parties to the proposed agreement.
>
> ...
>
> Note, however, that the EPEA does not give persons or bodies receiving notice the right to challenge or prohibit the granting of a conservation easement. It only gives them the right to be notified.[3]

However, this analysis does not address the power of a municipality to control development and subdivision under Part 17 of the *Municipal Government Act*. Nothing in the EPEA exempts conservation easements from Part 17 of the *Municipal Government Act*. Thus if a conservation easement has the effect of subdividing a parcel of land or of changing the use of land, municipal planning authorities do ultimately have control over the validity and efficacy of the easement.

Not every conservation easement will trigger the need to obtain subdivision approval or a development permit. Some may simply use an existing parcel of land or encapsulate an existing use. But it is important to remember that some conservation easements may trigger municipal planning approval processes. Therefore in developing a conservation easement, particularly if the grantee is not the municipality, one should always work with the applicable planning authority to ensure that no unexpected hurdles arise from the subdivision or development approval perspective.

DOES THE GRANTING OF A CONSERVATION EASEMENT ON PART OF A PARCEL OF LAND AMOUNT TO A SUBDIVISION OF LAND THAT REQUIRES THE APPROVAL OF A SUBDIVISION APPROVING AUTHORITY?

In an appropriate case, a conservation easement may have the effect of subdividing a parcel of land, thus triggering the rules relating to subdivision in the *Municipal Government Act*. Naturally if the conservation easement is applicable to the whole parcel, this is not a concern. However, if the conservation easement is applicable to only part of a parcel, it may be necessary to obtain approval from the subdivision approving authority.

As one approaches this question, it is important to remember that the scope of the rules relating to subdivision in Part 17 of the *Municipal Government Act* are extremely broad. Under s. 652 of the *Municipal Government Act*, the Registrar of Land Titles "may not accept for registration an instrument that has the effect of subdividing a parcel of land, unless the subdivision has been approved by a subdivision authority." While the classic instrument used for subdividing land is the Plan of Subdivision, the *Land Titles Act* contemplates a far wider range of instruments.[4]

In his text *Planning Law and Practice in Alberta*, Professor Laux comments on the applicability of s. 652 to other instruments:

> Instruments that convey, relate to or otherwise deal with lesser interests in part of a parcel in land such as easements, rights-of-way mortgages and leases may also amount to a subdivision within the meaning of the Act[5]. [emphasis added]

He goes on to note that as a matter of practice the Registrars will only require subdivision approval for an easement if the easement confers an exclusive right of use and enjoyment to the grantee.[6] In doing so the Registrars do not follow a strict interpretation of the obligation to obtain subdivision approval if the effect is to subdivide a parcel, regardless of whether exclusive use and enjoyment is granted. Nonetheless, at a minimum one must assess whether the form of conservation easement that is granted confers an exclusive right of use and enjoyment to the grantee. If it does, subdivision approval should be obtained before registration.

While the Registrar may be willing to accept a conservation easement for filing without subdivision approval where there is no grant of exclusive use and enjoyment, this alone is not determinative of the easement's validity. If the conservation easement requires subdivision approval and is registered without obtaining that approval, it remains subject to attack and the risk of being set aside by a Court.[7]

A significant goal of the subdivision planning process is to ensure that "the land is not dealt with in such away as to impede its future comprehensive planning and development." In this context, Professor Laux notes:

> Arguably then, an instrument granting a right of way or easement that might have a long term impact on the future use and development of that parcel ought to be treated as an instrument that has "the effect of subdividing the parcel." That being so, the instrument requires subdivision approval as a condition precedent to its registration.[8]

Clearly a conservation easement is intended to have a long-term impact on the future use and development of a parcel and is likely to have significant land use planning consequences. Even if a conservation easement does not grant exclusive use and enjoyment to the grantee, there is a strong argument that it may still constitute a subdivision within the meaning of s. 653 of the *Municipal Government Act*, and therefore require subdivision approval. Consequently the municipal subdivision authority may well be the final arbiter of the validity of a conservation easement.[9]

One can imagine a circumstance where a municipality adopts a Municipal Development Plan, Area Structure Plan and Land Use Bylaw that each demarcate an area for intensive industrial use. A landowner who is unhappy with the zoning grants a conservation easement over a significant part of a parcel limiting uses to nature conservancy. The municipality may well take the position that the effect of the conservation easement is to subdivide the parcel and that the subdivision does not conform with the statutory plans[10] and land use bylaw. Under the power granted by s. 654(b) of the *Municipal Government Act* the subdivision approving authority could refuse to approve the easement.[11]

CAN THE USE OF LAND UNDER A CONSERVATION EASEMENT OF LAND TRIGGER THE REQUIREMENT OF A DEVELOPMENT PERMIT?

Although the focus of this paper is not the development approval process, one must also consider whether the effect of a conservation easement may trigger the need for a development permit. Section 683 of the *Municipal Government Act* provides that one cannot commence a development in respect of land, unless one has been granted a development permit.[12] "Development" is defined extremely broadly to include a change in use or change in the intensity of use or something that is likely to change the use or intensity of use of land.[13]

A conservation easement itself cannot trigger the need for a development permit but a change in use following the execution of the easement may require a development permit. If as a result of a conservation easement the use of land is likely to change, a development permit will have to be obtained (unless an exemption in the land use bylaw applies.) In many cases the use of land under a conservation easement will simply be a continuation of an existing use and therefore not trigger the need for a permit, but one must always consider the particular circumstances of the use of land contemplated by an easement to determine whether a change in use or intensity of use is contemplated.

For example consider a parcel of land that is used as a range for cattle, in an area that is zoned agricultural. The agricultural zoning allows intensive livestock operations; it does not contemplate nature conservancy, which is included in another specific zoning. The owner now wants to grant a conservation easement to an environmental organization to allow the land to be used for a breeding habitat for foxes or wolves. The easement clearly contemplates a change in the use of the land. The change in use is not innocuous from a planning perspective as it is likely to result in a conflicting use with neighbouring properties. The development authority would be within its jurisdiction to refuse the application for a development permit for the nature conservancy use because the Land Use Bylaw does not allow it in the zone.

CAN A MUNICIPAL SUBDIVISION APPROVING AUTHORITY IMPOSE A CONSERVATION EASEMENT ON A LANDOWNER AS A CONDITION OF SUBDIVISION APPROVAL?

The focus of this portion of the discussion is whether a subdivision authority that is conservation minded can compel a landowner to grant a conservation easement over a portion of the land proposed to be subdivided.

The subdivision authority can require an owner who is seeking to subdivide land to provide land to the municipality without compensation for roads, public utilities, municipal reserve, school reserve and environmental reserve.[14] Instead of a municipality taking environmental reserve, an owner and the municipality can enter into an environmental reserve easement, which can be protected by a caveat.[15]

Environmental reserve or land covered by an environmental easement must be left in its natural state or used as a park.[16] This limitation plus the name "environmental reserve" may conjure up visions of a tool for the municipality to take sweeping steps to protect, conserve and enhance the environment. However in reality the scope of environmental reserve and environmental reserve easements is far more limited. Environmental reserve is restricted principally to land surrounding water courses and water bodies. A municipality is only entitled to land as environmental reserve if it consists of:

(a) a swamp, gully, ravine, coullee or natural drainage course,
(b) land that is subject to flooding or is in the opinion of the subdivision authority, unstable, or
(c) a strip of land, not less than 6 metres in width, abutting the bed and shore of any lake, river, stream or other body of water for the purpose of

    (i) preventing pollution, or
    (ii) providing public access to and beside the bed and shore.[17]

An environmental reserve easement can have no greater effect than the taking of environmental reserve. It can only cover land that is to be taken as environmental reserve and is thus subject to the same limitations on the taking of environmental reserve.[18] Indeed, an environmental easement is likely to give the municipality less control over the use of land than the taking of environmental reserve.

While the types of land that may be taken for environmental reserve do include environmentally sensitive lands, they are certainly not comprehensive. The environmental reserve provisions are not directed at the protection of flora, fauna or eco-systems when these fall outside one of the specified geographic forms. As these are limited essentially to waterbodies and waterways, the power to require environmental reserves does not extend to many geographic features that are significant for conservation and aesthetic purposes, let alone to areas of land that have an important role in conservation regardless of their geographic features. For example the right to require environmental reserves does not extend to prairies, hills or mountains, old growth forests, breeding habitats, migration routes, winter feeding grounds, bird habitats and shelter belts. Simply put, the environmental reserve provisions of the *Municipal Government Act* do not provide a subdivision authority with an ability to take land for the protection, conservation and enhancement of the environment or natural scenic or aesthetic value as those terms are used in s. 22.1 of EPEA.

Section 655 of the *Municipal Government Act* allows a subdivision authority the right to impose specific conditions on a subdivision approval:

1. to ensure compliance with Part 17 of the *Municipal Government Act* and the statutory plans, land use bylaw and subdivision regulations, and
2. to require a subdivision agreement for the construction of access roads, walkway systems, public utilities, parking facilities, loading facilities, payment of off-site levies and provision of security.

Notable by its absence is any reference to the right to require the granting of a conservation easement on any or all of the land to be subdivided.

Does this mean that a subdivision approving authority is strictly limited to the conditions specified in s. 655 and that it can impose no other conditions? One must of course bear in mind that that the decision on whether to grant subdivision approval is discretionary.[19] Where there is the power to refuse to do something, there is an argument that there is an implicit power to impose a condition that will ameliorate the problem that would otherwise lead to a refusal. Arlene Kwasniak cautiously suggests that:

> Applying this statement, we may say that a subdivision authority has the right to impose a conservation easement as a condition of subdivision, where the authority had a valid legal right to refuse the application and where imposing the condition would ameliorate the concerns that would have based the refusal. Expert legal advice should be sought if there

> is a question as to whether a subdivision authority had a valid legal right to refuse the application and whether the conservation easement would ameliorate the concern. [20]

Her caution is appropriate. Although there are no express limitations on the scope of discretion allowed to a subdivision approving authority, the law recognizes that no statutory delegate can have an untrammeled discretion. Thus a subdivision authority can only exercise its discretion for purposes consistent with its duties under Part 17 of the *Municipal Government Act*. Its primary task is to determine whether the criteria set out in s. 654 are met:

- is the land suitable for the purpose for which the subdivision is intended?
- does the proposed subdivision conform to the provisions of any statutory plan or land use bylaw[21] that affects the land?
- does the proposed subdivision comply with Part 17 and the Subdivision Regulations established under Part 17?
- have all outstanding property taxes on the land been paid?

Where an application meets all the criteria set out in section 654, the ability of the subdivision authority to refuse it or to impose conditions is narrowly circumscribed. One must remember that a subdivision approving authority is not a general environmental or conservation authority. It operates within a context of plans established under Part 17.

The first constraint on a subdivision authority is the explicit recognition in the *Municipal Government Act* that land use planning, including the subdivision approval process, is an infringement on the rights of the property owner. The *Act* imposes a requirement that this infringement be limited to the extent possible. Section 617 provides:

> **Purposes of this Part**
> **617** The purpose of this part and the regulations and bylaws under this part is to provide a means whereby plans and related matters may be prepared and adopted
>
> (a) to achieve orderly, economical and beneficial development, use of land and patterns of human settlement, and
> (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,
>
> without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest. [Emphasis added]

The imposition of a conservation easement as a condition of subdivision approval is a clear derogation of the rights of the individual landowner. Where it is done in circumstances of an application that is in compliance with all the criteria of s. 654, its validity is certainly open to question.

Secondly, a subdivision authority is not an authority generally empowered to advance the protection, conservation and enhancement of the environment, natural scenic or aesthetic values, which are the focus of environmental easements.[22] That surely is the purview of the authorities empowered under EPEA. A subdivision authority is an authority whose attention is statutorily directed at advancing the orderly planning of human settlement. Where a planning authority uses its power to advance a purpose, even a purpose that is intrinsically meritorious, that falls outside its statutory mandate, its actions will be struck down. This is particularly so if it claims a right to a person's property without specific authorization. For example a condition requiring the dedication of land without compensation to accommodate a road widening was struck down.[23] Similarly a condition in a development permit requiring the installation of sprinklers in a seniors complex was struck down because it related to building standards rather than planning purposes.[24]

Therefore unless there is a specific environmental component reflected in the statutory plans or land use bylaw in issue in a subdivision application[25], a subdivision authority should be extremely hesitant to consider imposing a condition of a conservation easement, which is a mechanism that is essentially voluntary in nature and which exists to achieve the purposes of a different statute.

COOPERATIVE USE OF CONSERVATION EASEMENTS IN THE SUBDIVISION APPROVAL PROCESS

While environmental easements may have limited utility as coercive instruments in the subdivision approval process, they do add a useful tool for developers and municipalities looking for innovative mechanisms to solve subdivision problems cooperatively. Most subdivision planning, especially large scale planning, is a cooperative process between a developer and a municipality's planning department. Conservation easements can be used to replace or augment municipal reserve or environmental reserve in a cooperatively planned subdivision. Municipal reserve is used amongst other things for parks and public recreation spaces. There is no requirement in the *Municipal Government Act* that a municipality take its maximum entitlement to municipal reserve.[26] Similarly there is no obligation for a municipality to take environmental reserve even though it falls into the category of land that may be taken as environmental reserve.

Where a municipality takes its maximum municipal reserve[27] and environmental reserve it can fundamentally affect the economic viability of a subdivision. Thus, there is an incentive for a developer to consider the use of a conservation easement to address the objectives of municipal reserve and environmental reserve, without actually giving up title to and all control over the land. Concurrently, the municipality stands to benefit from the use of conservation easements in the subdivision process because it may be able to meet its public policy objectives for municipal reserve and environmental reserve without having to take title and the associated obligations and liabilities.

Conservation easements will work well as a component of cooperative subdivision planning where a municipality is willing to forego its maximum claim for municipal reserve and environmental reserve and a developer is prepared to give up rights through a conservation easement that it would otherwise not be compelled to do in the subdivision approval process. In cases where environmental and municipal reserve requirements might otherwise render a subdivision uneconomic, carefully designed conservation easements may allow the project to proceed while serving the greater public good of conserving an important environmental feature. If one considers a lakeside development, a conservation easement could be used to reduce the amount of environmental reserve that a municipality could take, thus leaving land in the developer's titles for such important things as set back requirements. Similarly a municipality could trade off its right to environmental reserve on an area that falls within the criteria set out in s. 664(1) of the *Municipal Government Act*, but has little conservation value for a conservation easement on other land that does not fall within the criteria but has significant value as a nature preserve (e.g. a stand of trees that contains an important nesting site.)

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[1] S.A. 1994, c. M-26.1, Part 17, Division 7 and 8.
[2] S.A. 1992, c. E-13.3.
[3] A. Kwasniak, *Conservation Easement Guide For Alberta* (Edmonton: Environmental Law Centre, 1997) at 22, 23.
[4] R.S.A 1980, c. L-5, s. 1(l).
[5] F. Laux, *Planning Law and Practice in Alberta,* 2nd ed. (Toronto: Carswell, 1996) at 11-2.
[6] *Ibid.*, p. 11-11.
[7] Laux, *supra,* note 5 at 11-3 -11-5.
[8] *Ibid.* at 11-12.
[9] Subject of course to the right of appeal to the Subdivision and Development Appeal Board and then to the Court of Appeal. The latter appeal requires that the Court give leave to hear the appeal and is restricted to issues of law and jurisdiction.
[10] A statutory plan is an intermunicipal development plan, municipal development plan, area structure plan and area redevelopment plan (*Municipal Government Act*, s. 616(d)).
[11] Section 654(1)(b) provides that a subdivision approving authority must not approve an application for subdivision unless the proposed subdivision conforms to the provisions of any statutory plan and land use bylaw.
[12] Unless the land use bylaw specifically exempts that form of development from the requirement of a permit.
[13] See *Municipal Government Act*, s. 616(b).
[14] *Municipal Government Act,* s. 661.
[15] Recent amendments to the *Municipal Government Act* have endeavoured to overcome some of the defects that undermined the efficacy of environmental easements. See Bill 34 adopted during the Second Session of the 24th Alberta Legislature.
[16] *Municipal Government Act*, s. 671(1) However if a municipality gives notice and holds a public hearing it can use environmental reserve for other purposes. See *Act*, s. 676(1).
[17] *Municipal Government Act,* s. 664(1).
[18] *Ibid.* s. 664(2).
[19] *Ibid.* s.654(3).
[20] Kwasniak, *supra,* note 3 at 34.
[21] There is a variance power in s. 654(2) that allows a subdivision approving authority to approve an application even if it does not comply with the land use bylaw if it conforms with the use prescribed in the land use bylaw and would not unduly interfere with the amenities of the neighbourhood or materially interfere with the use, enjoyment or value of neighbouring parcels of land.

[22] A municipality can provide something of a foundation for environmental considerations in the subdivision approval process if it adopts a municipal development plan that addresses environmental matters, as it is allowed, but is not required, to do under s.632(b)(iii) of the *Municipal Government Act.* This foundation is stronger if the more specific area structure plans or area redevelopment plans and land use bylaw reflect environmental policies adopted in the MDP.

[23] *Re David Everett Holdings* v. *Red Deer City,* [1975] 3 W.W.R. 333 (Alta. C.A.).

[24] *Alberta Housing Corporation* v. *Lethbridge* (1981) Calgary #13188 (Alta. C.A.) as cited in Laux, *supra,* note 5. Laux discusses the vexing problem of the validity of conditions in his text at pp. 9-25, 10-50 and 12-25. See also *Re Tegon Developments Ltd And City of Edmonton* (1997), 81 DLR (3d) 543.

[25] An occurrence which would be rare given the tendency of most municipalities' bylaws towards encouraging development.

[26] The maximum amount of land a subdivision authority can require for municipal and school reserve is 10% of the parcel that remains after environmental reserve has been removed. See *Municipal Government Act*, s. 666(2).

[27] Note a municipality can take money in lieu of environmental and school reserve, which many Alberta municipalities do.

CANMORE AND WILDLIFE CORRIDOR PROTECTION: TAKING THE PATH LESS TRAVELLED

Frank Liszczak

ABSTRACT

The Town of Canmore, Alberta (pop. 10,000) has been under accelerated development pressure since the 1988 Olympics. With a projected construction of 5000 dwellings and 3600 hotel rooms, remaining wildlife corridors and habitat patches require security of protection that, short of outright land purchase, only conservation easements could provide. The Town is moving ahead to surround Canmore with a "donut " of protected habitat and corridors using land use designations and conservation easements. Some progress has been made. Much is left to do.

THE SETTING

The Bow Valley around Canmore has always been an important wildlife corridor and habitat patch especially for ungulates and large carnivores. Canmore is surrounded by three areas where wildlife is protected under legislation. The benchlands of the Fairholme range on the north side of Canmore's stretch of the Bow valley is recognized by Parks Canada as a key corridor. The Yukon to Yellowstone Movement (Y2Y) identifies this part of the Bow Corridor as a key pinch point for wildlife. **Map 1** identifies known important habitat and corridors in the Canmore area.

A 1991 annexation expanded the Town boundaries to 66 sq.km. of benchland and mountainside. In 1992, the Natural Resources Conservation Board approved the Three Sisters Resort on one side of the Bow valley and Town Council approved a 1993 Master Plan for Silvertip Resort and the 1996 Eagle Terrace residential subdivision on the other side. These three will eventually develop 3,600 hotel rooms, 4 golf courses and 5500 dwelling units over the next 15 - 20 years. **Map 2** shows the limits of growth and surrounding Conservation areas.

THE ISSUES

Disruption or loss of the traditional wildlife movement patterns will obviously occur as development proceeds. To reduce the effects, developers have identified land use arrangements that theoretically act as multi-species corridors (eg. golf course fairways) but have yet to be proven effective. Remaining land above or next to the approved developments has been identified as valued corridor or

habitat patch in need of perpetual protection from further development. Residents and environmental activists have long struggled for such protection out of concern that otherwise, there is no end in sight to development up the valley sides. Much of the remaining land is Crown-owned and some is encumbered with leases and options to lease.

Moreover, the state of wildlife research in this part of the Bow Corridor is uncoordinated. Three major developers, the Province, Parks Canada, the Municipal District of Bighorn and Canmore each have their own biologists who have alternately agreed and disagreed on habitat dynamics, animal behaviour and tracking methodology as it applies to the inexact science (art?) of predicting wildlife habits in a fast changing landscape. Therefore, the land development process from a wildlife viewpoint can get a little confusing for developers and land use planners used to the relative black and white of subdivision and development.

A RECIPE FOR PROTECTION

One tablespoon of land use control - It is against the backdrop of high volume development that Canmore Town Council addressed the question of how to protect the remaining land from further encroachment. A first step was to amend the Town's General Municipal Plan in order to signal Council's intent to move on to the next step. That next step was to create and apply a *Town of Canmore Wildland Conservation zoning (W/C)* to limit the land uses for which the remaining land could be used (eg. non-motorized trails, habitat management, etc). When fully implemented in 1998, the zoning districts will complete a donut surrounding the existing and developable urban area of Canmore. This donut is also reflected in the Town's draft Municipal Development Plan mapping **(Map 2)** expected to be adopted in 1998.

A pinch of landowner cooperation - In 1996, the developer of the Eagle Terrace residential subdivision agreed to enter into the Town's first substantive conservation easement. The arrangement would protect 55 hectares of land (half of the developer's land) near Cougar Creek under a conservation easement in return for Council's approval of his Area Structure Plan **(Map 3)**. While the developer chose to donate the land to the Rocky Mountain Elk Foundation, the Council subdivision approval still required a conservation easement to the Town's satisfaction. Since the developer did not trust the municipality to be the grantee (not an uncommon landowner sentiment), the final negotiation resulted in the Nature Conservancy of Canada agreeing to serve as the grantee with the Elk Foundation as the grantor. For its part, the Town prepared a land management plan for this ungulate corridor and it is this document that serves as the focus of the conservation easement.

An ounce of moral high ground - The next step is for the Town to place its own environmentally sensitive land into conservation easements. To that end, the Rocky Mountain Elk Foundation (grantee) will complete a conservation easement with the Town (grantor) before the end of 1998. Thereafter, the Town hopes to convince the Province, Crown lease holders and other landowners that the remaining land in the protected "donut" is best left in a conservation easement and an associated management plan. It is interesting to note that walking the talk for locals will mean eliminating human use in its entirety from the Cougar Creek easement lands with the exception of one trail skirting the easement perimeter.

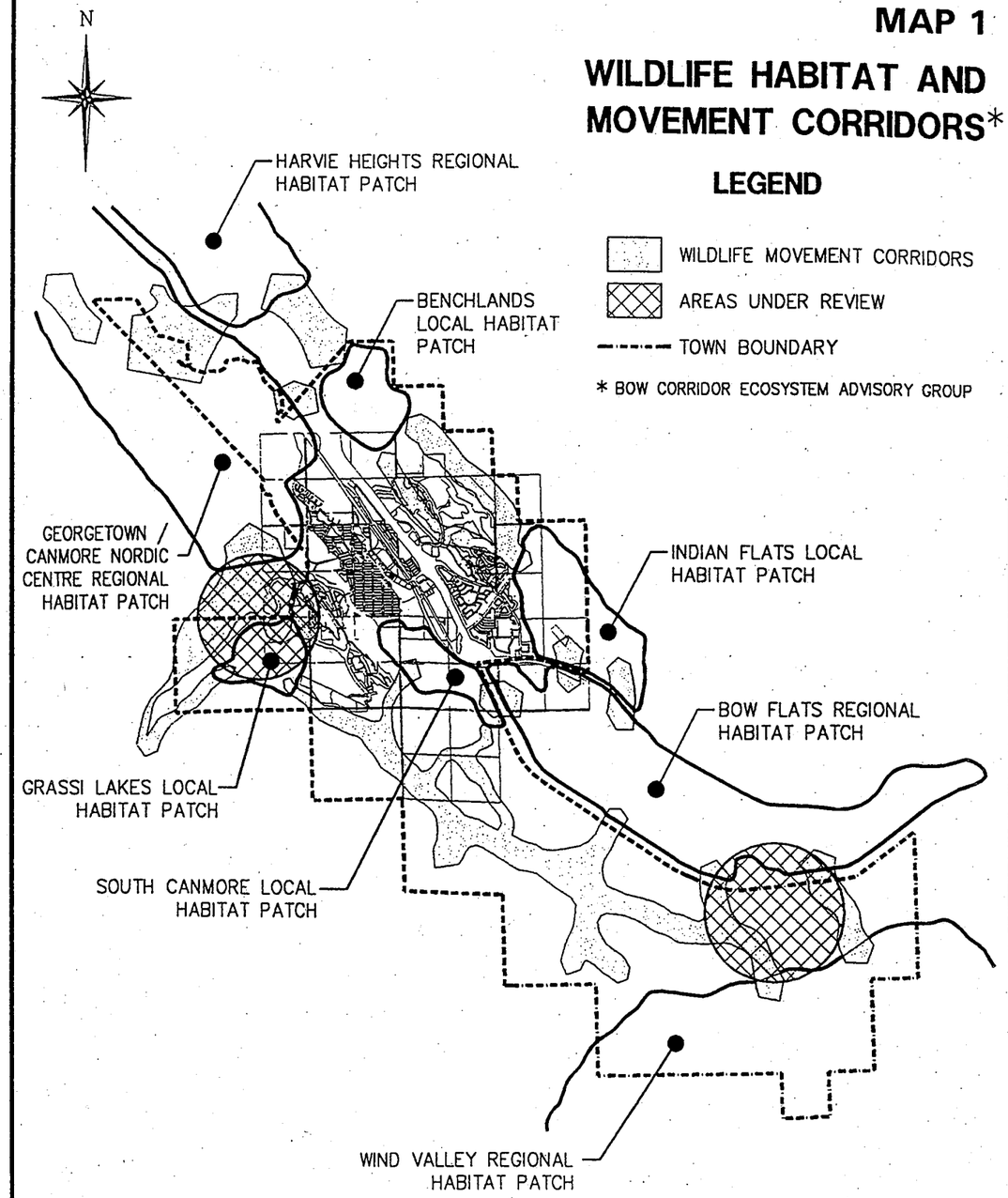
Whether the local populace is willing to forego the past pleasures of a walk with their unleashed dogs (a no no) at dawn and dusk (another no no) in the protected area (a third no no) is yet to be determined. However, informal research by the Canmore planning and development department has determined that the degree of "behaviour plasticity" (ie. propensity to go where one is told to go) of Canmore residents is similar to that of ungulates.

A cup of optimism - The local advisory committee of Special Places 2000 endorses land protection inside the Town of Canmore and in the Municipal District of Bighorn surrounding Canmore. Beyond that, opportunities for conservation easements or integrated wildlife management in the entirety of the Bow Corridor has not been seriously discussed with the other jurisdictions in the valley (Kananaskis Country, Municipal District of Bighorn, Alberta Public lands division). Long term interests of the rock industry and the numerous leases already on the landscape reduce the likelihood of continuous, protected easements along the Bow corridor from Banff to Kananaskis Country.

Nonetheless, those in industry, government and landowners may start to realize that coming to the conservation easement table brings with it the goodwill of the local populace, environmental organizations and those animals which, without opposing thumbs, find it a challenge to write letters of concern to their Provincial government stewards. The value of that goodwill could translate into local support for development scenarios involving conservation easements thereby potentially expediting the development approval process for some.

MAP 1

WILDLIFE HABITAT AND MOVEMENT CORRIDORS*



LEGEND

- WILDLIFE MOVEMENT CORRIDORS
- AREAS UNDER REVIEW
- TOWN BOUNDARY

* BOW CORRIDOR ECOSYSTEM ADVISORY GROUP

DRAFT

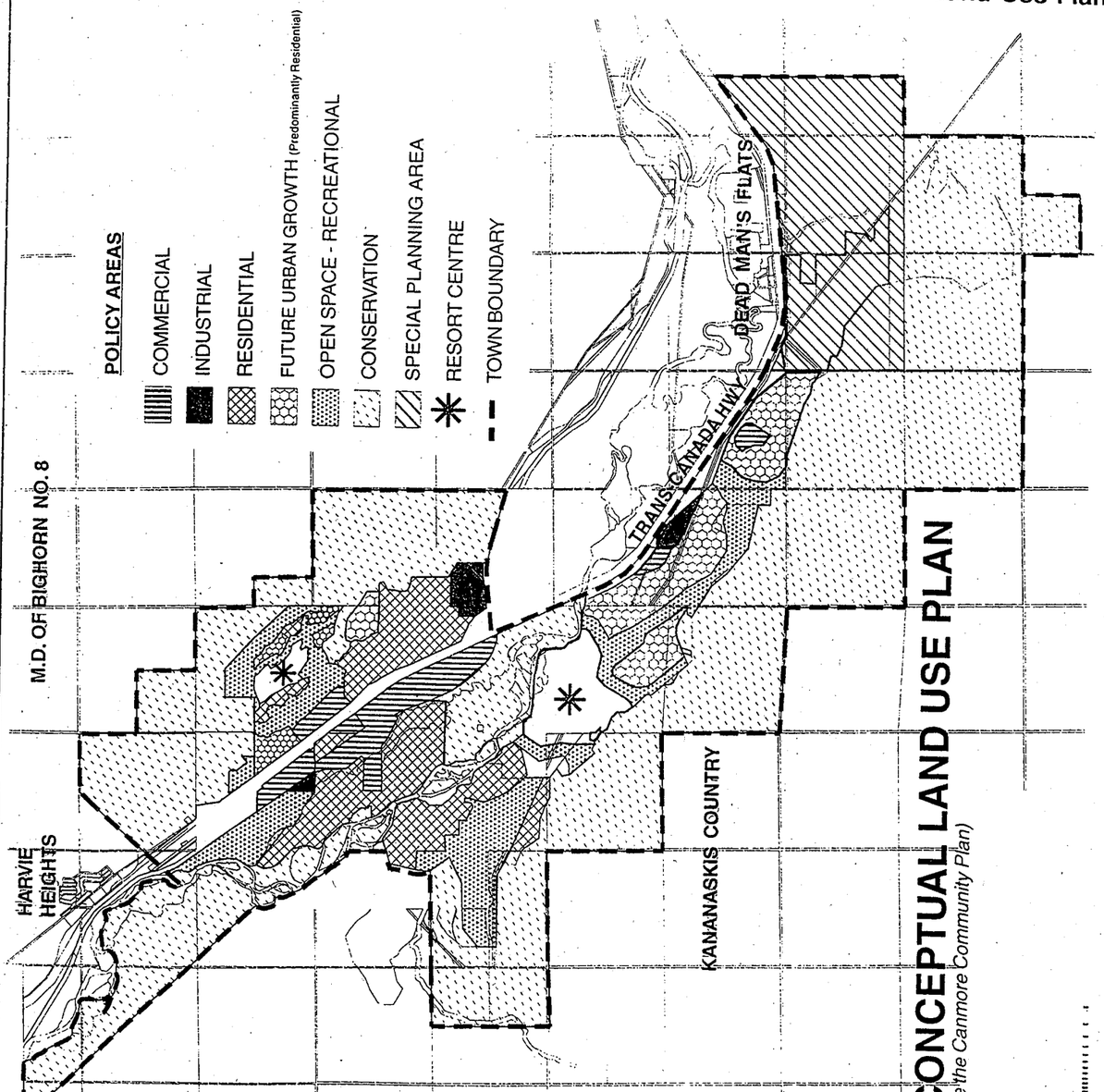
WALKER BROWN
URBAN CONSULTANTS LTD.

CANMORE

D:\400\OLDMAPS

MAP 2

Conceptual Land Use Plan



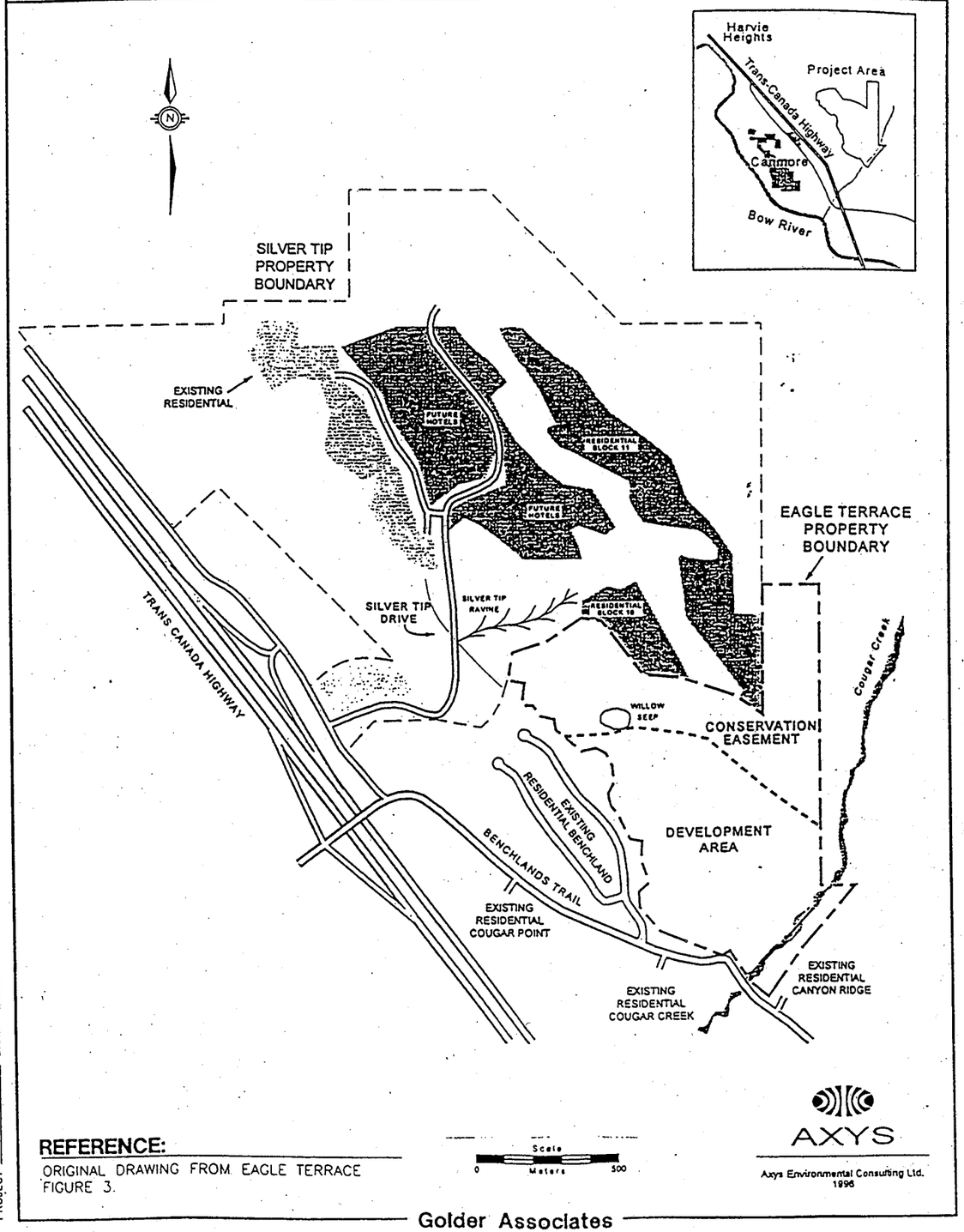
CANMORE CONCEPTUAL LAND USE PLAN

(For further information, see the Canmore Community Plan)

BROWN & ASSOCIATES

THE DEVELOPMENT AREA AND THE CONSERVATION EASEMENT ON THE EAGLE TERRACE PROPERTY

MAP 3



REFERENCE:
ORIGINAL DRAWING FROM EAGLE TERRACE FIGURE 3.

Scale 0 Meters 500

AXYS
Axys Environmental Consulting Ltd. 1996

PROJECT 982-2204 DRAWN DC REVIEWED DATE 16 MAR 98 J:\1998\2200\982-2204\DEVELOP.DWG

Golder Associates

MUNICIPAL DEVELOPMENT AND ENVIRONMENTAL PLANNING: STRATHCONA COUNTY – YOUR NATURAL LOCATION

Locke Girvan

STRATHCONA COUNTY PROFILE

Location, Location, Location

Strathcona County is located adjacent to the east boundary of the City of Edmonton and encompasses an area of 1,182 square kilometers (480 square miles). It is bound by the City of Fort Saskatchewan and the Municipal District of Sturgeon on the north, the County of Lamont, Elk Island National Park and the County of Beaver on the east, and the County of Leduc on the south. Strathcona County has a population of 64,157 and due to its blend of both urban and rural characteristics is one of two Specialized Municipalities in Alberta. This results in a broad spectrum of residential, industrial, commercial and agricultural land uses.

Transportation

- six primary Provincial Highways: 14, 14X, 15, 16, 16A and 21,
- direct connection to Highway 2 South via Whitemud Freeway,
- two railways, Canadian National and Canadian Pacific, provide east-west transcontinental service (main lines of both),
- served by four airports, Strathcona (Josephburg) and Cooking Lake Airports for small craft and Edmonton International and Edmonton City Centre for large craft and charter flights.

Industry

- region is recognized as a leading global petrochemical centre due to the convergence of pipelines and their associated industries,
- recently announced Alberta Industrial Heartland Project, a cooperative initiative between four adjacent Municipalities and the Fort Saskatchewan Regional Industrial Association, will attract world class manufacturing and processing facilities,
- industrial growth promotes growth in secondary industries, and service and supply businesses.

Agribusiness

- contains some of the most productive agricultural land in the world for grain crops,
- highly attractive for intensive livestock operations, game farming, market gardens, tree farms and other related businesses with proximity to processing facilities, access to transportation network and large urban consumer base.

Recreation and Tourism

- includes or is bordered by more than 111,000 acres (44,900 hectares) of protected habitat and recreational land in Elk Island Park, Cooking Lake/Blackfoot Recreation Area, Ministik Lake Game Bird Sanctuary, seven provincial natural areas, lakes and municipal owned lands,
- presence of the Cooking Lake Moraine, North Saskatchewan river, scenic value, geologic interest, etc.,
- public and private recreational facilities and services which provide a wide spectrum of structured and unstructured recreational opportunities.

Residential Subdivision

- full range of residential options for both urban and rural lifestyles,
- close proximity to Edmonton provides easy access to services related to a large urban centre and the Provincial Capital, i.e. Hospital, post secondary institutions and cultural centres, that cannot be supported in areas of low population.

NATURAL ENVIRONMENT

Six Natural Regions and 20 Natural Subregions have been recognized in Alberta. Strathcona County is located at the gradation between two Natural Regions, the Boreal Forest and the Parkland Regions.

The Boreal Dry Mixedwood Subregion represents the Boreal Forest Natural Region in Strathcona County and is a transition zone between the coniferous dominated boreal mixedwood to the north and the aspen parkland to the south. It is comprised of three distinct ecodistricts including the Cooking Lake Upland Ecodistrict – a hummocky morainal plain, the Redwater Plain Ecodistrict – a leveloutwash and undulating morainal plain, and the North Saskatchewan River Valley Ecodistrict – an incised river valley with terraces. Boreal mixedwood forest ecosystems are profoundly influenced by disturbance processes

which affect ecosystem structure, composition, and function at a range of scales. This produces a mosaic of deciduous and coniferous communities.

The Central Parkland Subregion represents the Parkland Natural Region in Strathcona County which is the transition between the Grassland Natural Region and Boreal Forest Natural Regions. It is comprised of two ecodistricts including: the Leduc Plain Ecodistrict – an undulating lacustrine and morainal plain and the North Saskatchewan River Valley Ecodistrict.

Generally soils in the Parkland Region are Chernozems and in the Boreal Forest Region are Luvisols.

Strathcona County has seven permanent creeks (Oldman, Irvine, Fulton, Point-aux-Pins, Ross, Hastings, and Astotin), fifteen named lakes (Cooking, Hastings, Ministik, Antler, Wanisan, Trappers, Twin Island, Big Island, Boag, Bennett, Woodenpan, Coleman, McFadden, Halfmoon, and Sisib) and one river, that being the North Saskatchewan River, which forms part of the County's northern boundary. The knob and kettle topography typical of moraines create conditions for a large number of seasonal and permanent wetlands.

SUBDIVISION AND CONSERVATION

The desirability of location and the benefits associated with Strathcona County leads to intense development pressure including land subdivision. It is generally recognized that environmental protection and development activities are in conflict with each other to varying degrees. Economics and material culture motivate development often at the expense of the environment, individuals and the community where it is located.

Subdivision is a part of the development process and in many cases is one of the initial steps required in development. All subdivisions require an application. Within the Strathcona County system, applications are subject to a multidisciplinary review within the administration, by adjacent landowners and external agencies which are directly affected (i.e. Alberta Environmental Protection – watercourses, Elk Island National Park – 1.6 km of Park Boundary). Comments and recommendations received from this review are used to approve or refuse the subdivision by the approval authority. The decision of the approval authority can be appealed through an Appeal Board, which after considering arguments from both sides, has the jurisdiction to uphold, reverse or modify the original decision. Further appeal is available through the provincial courts.

During the review process, Strathcona County's Engineering and Environmental Planning Department has the mandate to identify potential environmental and community needs and provide information to the approving authority on how these needs can be met. Generally, more attention is focused on the conservation of natural features in the rural environment than on the urban environment in

recognition of the barriers to sustaining biodiversity in a highly altered landscape. Several tools are employed in the review process:

Outdoor Master Plan (OMP) – community needs for recreation and environmental protection.

Strathcona Tommorrow – long range community vision.

Lakes Management Plan – area specific planning document.

Prioritized Landscape Ecology Assessment (PLEA) – 1997 – landscape ecology and conservation biology based habitat assessment

Municipal Government Act (MGA) – legislated framework under which Municipalities operate.

Municipal Development Plan (MDP) – policy document on how land will be used, recognizing the unique characteristics and needs of the community within a municipality.

Environmental Protection and Enhancement Act (EPEA) – legislated framework for environmental protection.

Misc. – biophysical reports, related Environmental Impact Assessment (EIA) documents.

A primary consideration of this review is the dedication of reserves and the conditions under which they are to be applied. Under the *MGA*, municipalities have the right to require a landowner to dedicate municipal and environmental reserves during the subdivision process. This dedication is without compensation and is taken within a framework of conditions outlined in the *MGA* and *MDP* based on community needs and environmental factors. Limited opportunities are provided by legislation for land dedication to protect environmentally important elements of the landscape in this manner and it is not without strengths and weaknesses.

Strengths

- provides land for Municipal purposes, including open space in which the community can pursue recreation opportunities,
- maintains watercourses and their function within the environment,
- prevents development in hazard land,
- can be used to preserve wildlife habitat.

Weaknesses

- Municipal reserve dedication is limited to maximum of 10% of the net developable land being subdivided,
- Viewed by individual landowners as being a land grab by government,
- Loss of municipal tax revenue,
- Burden to the municipality for maintenance, enforcement and liability,
- Source of conflict between different interest groups,
- Increases public access therefore risk of negative impacts to the reserve or adjacent private property.

Strathcona County's *OMP (1987)* and *Strathcona Tomorrow (1992),* are significant planning documents for the Municipality in that they involved extensive public input and can be considered to reflect the community sentiment. Both documents express recommendations to balance land-use planning with environmental enhancement, conservation and protection as a means of sustainability and to preserve the quality of life within the municipality.

In 1992 Strathcona County accepted the use of a restrictive covenant as an alternative to a landowner giving up municipal and environmental reserves and set a precedent for applying alternative means and progressive planning techniques to secure municipal and public interest through the subdivision process. Between 1992 and 1997 a total of four restrictive covenants were signed securing 50.5 hectares of habitat within a combined area of 129.5 hectares representing a dedication of 39%.

The requirements of a restrictive covenant had many drawbacks and it was a giant leap forward when the EPEA was amended in September 1996 to allow the use of conservation easements for environmental enhancement, conservation and protection. With the requirement of the act that the dedication be voluntary, Strathcona County offers landowners wishing to subdivide lands containing environmentally sensitive areas or important wildlife habitat the option of dedicating a conservation easement in lieu of a reserve. Since conservation easement legislation has been in place, 11 conservation agreements have been registered securing 162.35 hectares of habitat; in most instances landowners' needs have been met and all stakeholders have been winners through the conservation easement process.

Strengths

- the right of land ownership is not given up, only certain rights as to how the land is used by committing to and applying good stewardship practices,

- a landowner has direct input into how land under a conservation easement will be used in the future when their interest in the land is passed on to subsequent landowners,
- a landowner, as a member of a larger community, has an opportunity to help maintain the rural landscape characteristics including vegetation, wildlife, aesthetics, and other features which add to the quality of life and attract people to live in a rural environment,
- can be applied in perpetuity affording a level of permanence similar to that of reserves,
- a landowner choosing this alternative does so on a voluntary basis in lieu of reserve dedication and may be eligible for a tax credit as a gift to the Crown,
- the amount of land can exceed that taken under reserve dedication,
- the municipality retains the land related tax base,
- the municipality does not incur the cost of maintenance and enforcement,
- agreements can be designed on a site specific basis to address landowner needs and can be applied to all levels of subdivision.

Weaknesses

- voluntary dedication does not allow approval authorities to impose conservation easement as a condition of subdivision,
- percentage of the community will not be satisfied with any mechanism which takes away or restricts "their" land and how they use it,
- inconsistency between *MGA* and *EPEA* easement provisions,
- landowner lack of understanding and distrust of government processes,
- lack of understanding within legal and real estate sector.

Strathcona County sees conservation easements as a tool and a positive step forward in addressing some problems encountered with land use planning. Flaws will be encountered in any process; it is by taking a risk in trying a different approach, working through it and looking for a better way that conflict can be resolved.

Strathcona County is in the process of developing a Green Plan to guide future environmental direction for Strathcona County, and set out the County's long-term environmental mandate. It will contain a statement of goals, strategies, action plans and indicators with priority actions highlighted. It will coordinate and build on the County's current environmental plans, policies and initiatives. It will draw on information in the resource guide to ensure that actions are compatible with identified roles and responsibilities, and will address both current and emerging environmental issues of concern to Strathcona County.

CONSERVATION EASEMENTS – A DEVELOPER'S PERSPECTIVE

John Brownlee

INTRODUCTION

- Haverhill Estates – geographic location, proximity to Sherwood Park
- Brief history
- Special environmental features, relative location – slide of satellite image – slides of foliage - reference to old growth, habitat
- Long-term objectives of development with respect to preservation of habitat, quality of life, enhanced marketability

THE DEVELOPMENT PROCESS

Specific objectives/vision with respect to Haverhill Estates:

- maintaining existing contiguous connections with adjacent undeveloped lands
- utilization of existing road system
- minimizing road encroachment through bare-land condominium concept
- fostering sense of community through common area, looping trail system
- concept of Landowners Association
- lot configurations, building site selection, utilization of "footprint" concept
- specific restrictions re: livestock, fencing, clearing of trees/vegetation

Reference Documents/Source Material

- Alexander, Christopher., Ishikawa, Sara., and Silverstein, Murray. A Pattern Language. Oxford University Press, New York, 1977.

IMPLEMENTATION

- restrictive covenants versus environmental easements

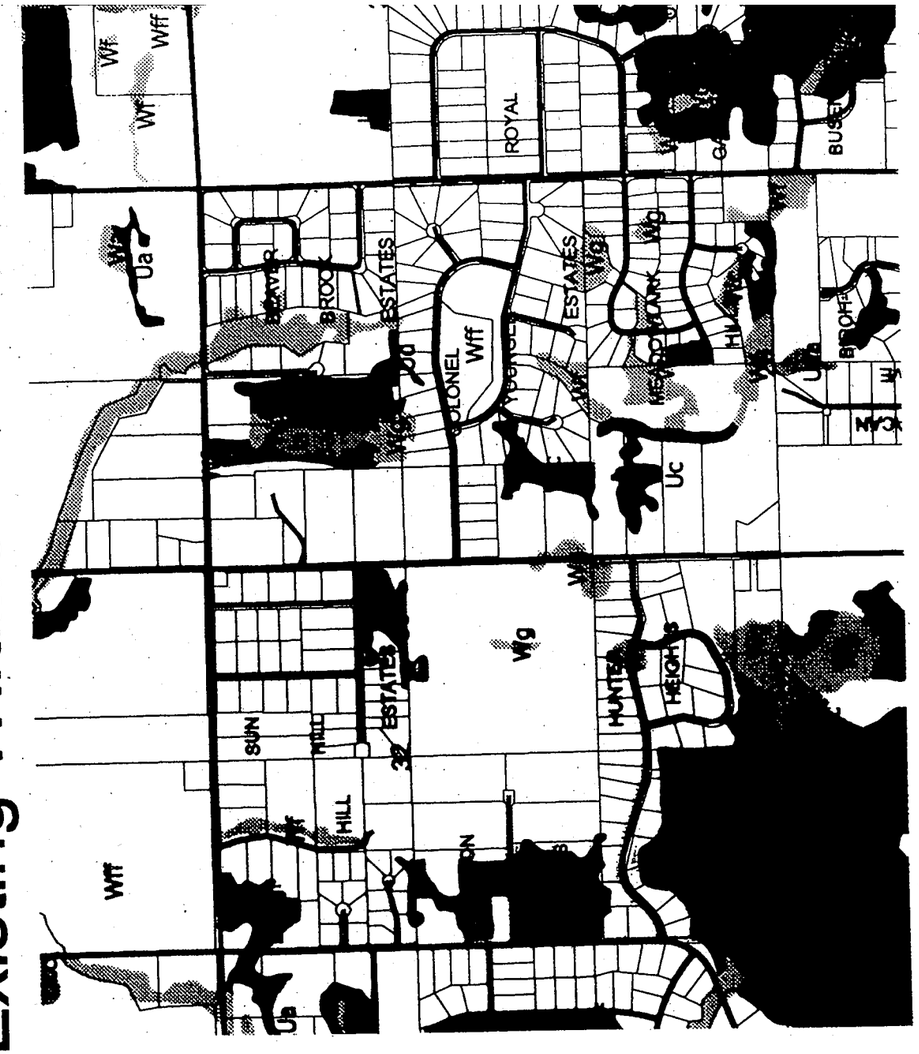
Reference Documents/Source Material

- Current Environmental Easement Agreement Document re: Haverhill Estates
- Tibb's Landing Lot Owner's Association Easement Documents, San Juan County, Washington State
- State of Washington Shoreline Master Program

CHALLENGES AND SOLUTIONS

- status quo, considerations of realtors, surveyors, bureaucracy
- establishment and publicizing of clear precedent
- targeting specific market of academia, the environmentally aware
- actual value versus expected/acceptable return

Existing Categories of Wildlife Habitat Units



UPLAND WILDLIFE HABITAT UNITS
- Ua - Upland Poplar
- Ub - Upland Mixedwood
- Uc - Upland Forest with Small Wetlands
- Ud - Corridor
- Ue - Upland Conifer

UPLAND RESTORATION WILDLIFE HABITAT UNITS
- Uaa - Upland Poplar
- Ubb - Upland Mixedwood
- Ucc - Upland Forest with Small Wetlands
- Udd - Corridor
- Uee - Upland Conifer

WETLAND WILDLIFE HABITAT UNITS
- Wa - Marsh
- Wb - Bog
- Wc - Slough
- Wd - Wetland Complex without Open Water
- We - Wetland Complex with Open Water
- Wf - Drainage Course
- Wg - Swamp

WETLAND RESTORATION WILDLIFE HABITAT UNITS
- Waa - Marsh
- Wbb - Bog
- Wcc - Slough
- Wdd - Wetland Complex without Open Water
- Wee - Wetland Complex with Open Water
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- Wgg - Swamp

LAKE WILDLIFE HABITAT UNITS
- La - Lake - emergent zone
- Lb - Lake - emergent zone
- Lc - Lake - Free floating/leaved zone
- Ld - Lake -submergent/open water
- Le - Lake - emergent zone

LAKE RESTORATION WILDLIFE HABITAT UNITS
- Laa - Lake - emergent zone
- Lbb - Lake - emergent zone
- Lcc - Lake - free floating/leaved zone
- Ldd - Lake submergent/open water
- Lee - Lake - emergent zone

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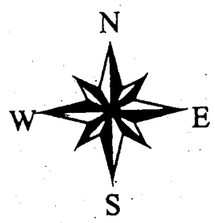

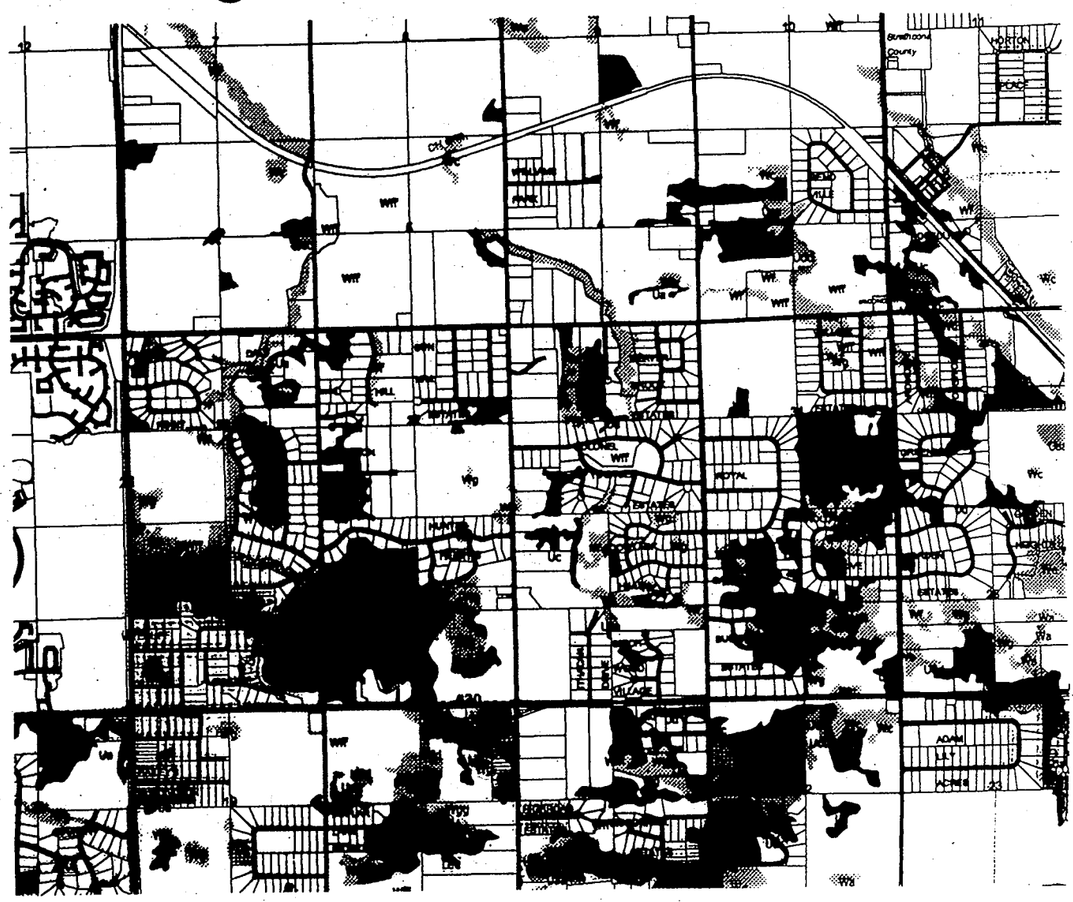

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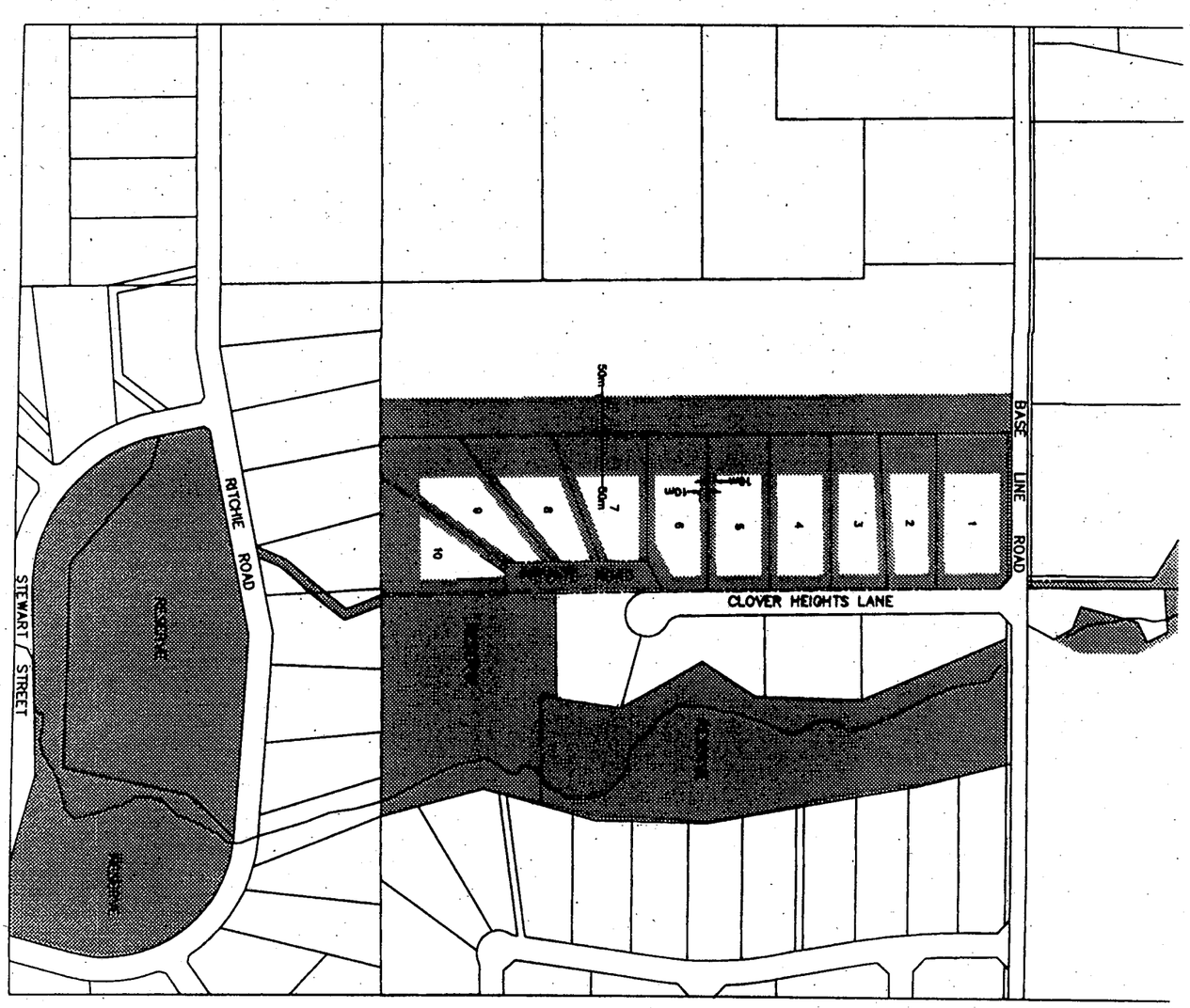

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PLAN SHOWING CONTEXT OF LOCAL EVIRONMENTALLY PROTECTED AREAS

PART V

Conservation Easements and Enforcement

MONITORING COMPLIANCE WITH A CONSERVATION EASEMENT

Sue Michalsky

Conservation easement legislation is very new in Alberta. Therefore, conservation agencies have little experience monitoring easements. There is also no precedent for easement violation. There is no doubt, however, that organizations holding easements will be required to deal with violations in the future. Though the process is new in Alberta, some areas of the United States have two decades or more of experience. That experience is very relevant to easement-holding agencies in Alberta.

The importance of conservation easement monitoring is best illustrated with a quote from Paul Hartmann who has over 20 years of experience with conservation easements as a Realty Officer with the U.S. Fish and Wildlife Service:

> From a practical point of view, there is no such thing as a perpetual easement if there is not a commitment to enforce the terms of the easement....I spent the first ten years of my career acquiring easements and the last ten years administering and defending the same type of easements. Believe me, acquiring the easements is the easy part.

COMPLIANCE STATISTICS FROM THE NATURE CONSERVANCY - MONTANA

Relevant statistics from The Nature Conservancy (TNC) Montana include:

- Number of easements held - 56 plus 6 restrictive covenants
- Easement legislation since - 1978
- % of easements on recreational property - ~ 65%
- % of easements on agricultural or timber land - ~ 35%
- % of easement acreage in recreational use - ~ 15%
- % of easement acreage in agriculture/forestry - ~ 85%
- Number of violations - 1

Although the number of unresolved violations over two decades is quite low, TNC Montana has dealt with numerous issues. Grey areas in the easement restrictions are the most common reasons for issues. They are issues that must be resolved in consultation with the landowner. Some of the more common issues to date include:

- timber harvesting
- overgrazing
- livestock damage to riparian areas
- dumping of garbage

Most of the issues arise on the recreational properties rather than the properties in agricultural or forestry use. Recreational properties tend to have a higher landowner turnover. Ranching, farming and woodlot owners tend to stay longer term and to understand conservation of the property to a greater extent than recreational landowners.

The most common situations which result in issues include:

- landowner did not understand the terms of the conservation easement
- landowner is testing to determine how far they can push the limits of the terms of the easement
- land is leased to a third party who is not managing the property to meet the terms of the easement

PREVENTING VIOLATIONS

The best defense against violations and the resulting enforcement actions is a good offense. Critical tools to provide a good defense include:

- a good baseline report
- an easement document with clear, enforceable restrictions
- a good relationship with the landowner
- a program of regular, systematic and well documented monitoring

Regular, open communication with the landowner is the most effective tool in preventing violations. Land trusts in the United States recommend personal contact at least annually. Personal contact provides an opportunity for education of the landowner. It also provides a reminder of the restrictions associated with the conservation easement. This is especially important if the current landowner is not the original grantor of the conservation easement.

Other reminders of the existence of the conservation easement are also recommended. Those successfully used in the United States include newsletters from the conservation agency, and the provision

of extension services from specialists in the fields of timber management, range management, road engineering, landscape architecture, etc.

MONITORING A CONSERVATION EASEMENT

The foundation of the monitoring process is the baseline information gathered when the easement is first acquired.

> A baseline data inventory is complete when it contains enough information to define each right and restriction written into the easement.

The quote above provides an excellent definition of the requirements of a baseline report. If the only restriction placed on a landowner is a subdivision restriction, there would be very little need to provide any information in the baseline report other than a map of the various existing parcels. However, if the easement includes restrictions which are designed to conserve natural values such as range condition, then the baseline report should include much more information and should be prepared by a professional with an appropriate biological or natural resource background.

Agencies holding conservation easements should develop monitoring protocols and inspection report forms. Monitoring protocols often include:

- notify the landowner of a monitoring visit in writing well in advance
- follow-up with a phone call at least 48 hours prior to the visit
- review the baseline information and the easement restrictions

The landowner should be present during the visit. This provides an opportunity to build a relationship with the landowner as well as an opportunity to educate the landowner regarding stewardship.

Protocols differ between agencies on whether or not potential or actual violations should be discussed with the landowner during the monitoring visit. On one hand, interpretation of easement restrictions involves a lot of grey area, and it is important to determine the landowner's side of the story. On the other hand, monitors can sometimes be overzealous in their desire to protect conservation values and can force their interpretation of the restrictions on the landowner. The result can be poor relations between the landowner and the conservation agency and a poor reputation for the agency in the local community.

Results of the monitoring visit should be well documented. At minimum, the monitoring report should include the following:

- a map of the monitoring route
- land management issues
- changes in surrounding land use
- natural events causing change
- photographs

Remember that both monitors and landowners will change over time. Photographs and a detailed monitoring report are vital in documenting trends over time. They also provide the best evidence in the event of a violation.

ENFORCEMENT OF CONSERVATION EASEMENTS

Jennifer J. Klimek

WHO CAN ENFORCE A CONSERVATION EASEMENT

Section 22.1 of the *Environmental Protection and Enhancement Act* provides that a conservation easement can be enforced by:

- The Grantee

  The Grantee is the recipient of the conservation easement

- A qualified organization who has been designated in writing by the grantor as having the power to enforce the easement

  A qualified organization is

  Government or governmental agency

  A local authority including municipality; or

  A non-profit body corporate that has charitable status with Revenue Canada and has as one of its objects the acquisition of land for conservation easements and is required to transfer conservation easements to another qualified organization upon winding up

- A second qualified organization designated by the Grantor. The Grantor may designate one additional qualified organization in addition to the organization who is a party to the agreement

WHY ENFORCEMENT IS IMPORTANT

Enforcement engenders public confidence in the conservation easement program.

It assists in maintaining your legal authority to enforce.

Enforcement helps to maintain your organization's capacity to accept tax benefits of such easements.

HOW TO ENFORCE

Enforcement Policy

Review the document creating the easement – it may provide the mechanism for enforcement such as arbitration, mediation and court processes.

Once the mechanism is determined set up an enforcement policy that guides your organization in the enforcement of the easement. This policy should be consistent with the easement.

An enforcement policy should include the following items:

- What is a violation and how is it to be characterized i.e. what constitutes a minor or major violation and how each will be dealt with
- Monitoring of the easement – who, when and how
- Documentation procedures for inspections
- Contact with property owner – who, in what circumstances and how
- How to determine what needs to be done to remedy the violation, i.e. who you contact to determine
- When to consult legal advisors
- Negotiation process for resolution of problem – who, how and ratification of agreement by the organization
- Who and how will the organization pay for enforcement

APPROACH TO ENFORCEMENT

Meet with owner

- Meet as soon as possible
- The approach is to remedy the problem
- If a serious violation, may want to consult with a lawyer or have one present

Third Parties

- If caused by third party, consult with owner and if possible work together on negotiations and solution to problem

Consult with regulatory authorities if the violation is a breach of a regulation such as those regulating the dumping of toxic substances.

Endeavor to achieve voluntary remediation.

Points to Remember

- Document all meetings
- Once you agree to a resolution, document what each party will do
- Set a deadline
- Inspect after the deadline to ensure damage is properly remedied

If you are unable to reach a satisfactory resolution then you must use a more coercive enforcement mechanism.

What mechanisms are available will depend on the terms of the easement, the nature of the violation and the tenor of the dispute.

The possibilities are:

- Mediation
- Arbitration
- Court process

The best solution is one to which the parties agree rather than one that is imposed on them. However, if an agreement cannot be reached, it is necessary to have a third party decide the dispute and impose the decision on the parties.

Mediation

- A process whereby a third party, the mediator, attempts to facilitate a settlement of the dispute
- The mediator cannot impose a solution on the parties
- A mediator is trained to assist the parties in coming to an agreement
- This is an acceptable route if both parties are prepared to discuss, compromise on the matter and work to come to a solution

Arbitration

- A process whereby a third party, who is not a judge, imposes a solution on the parties
- The arbitrator gets his power from the easement or a subsequent agreement between the parties where they agree to be bound by an arbitrator's decision
- The parties agree on the arbitrator or have established a process by which the arbitrator is to be selected
- The arbitrator hears the evidence, submissions and arguments of all parties and then imposes a solution
- Arbitration is less expensive and less formal than going to court. The arbitrator is not bound by the rules of evidence to the same degree as a court

Court

- A judge hears the evidence and imposes a solution
- A court has more remedies available to it than does either an arbitrator or mediator
- The possible results:

Injunction

Mandatory injunction – An order directing a party to do a certain activity

Prohibitory injunction – An order directing a party to stop a certain activity

Can get interim injunctions that prohibit the activity while the court case is being prosecuted and the decision made

A party who does not obey an injunction can be held in contempt of court

Damages

Cost of repairing the damage

The qualified organization can be awarded damages equal to the cost of repairing or restoring the area.

Loss of value

In ordinary commercial litigation, the party is awarded the loss of value in the property where the cost of repairing is greater than the loss of value.

However this is not an appropriate remedy as the purpose of a conservation easement is to protect wilderness values and not to compensate for the loss of them. Therefore there is a strong argument that the damages should be the cost of restoring the area.

Punitive damages

Damages awarded to punish a party for malicious or highhanded conduct

- The court process is much more formal and expensive than either mediation or arbitration
- The usual steps are:
  - the plaintiff issues a statement of claim
  - the defendant files a statement of defence
  - all parties disclose their documents to the other parties

- all parties are examined under oath by the other parties
- a trial or hearing is held into the merits of the matter
- appeal

The Mediation and Arbitration processes are less expensive and faster. A result that is obtained through less adversity is more likely to make the ongoing relationship easier to maintain.

However, where the parties cannot agree to a solution or an injunction is necessary to protect the area from harmful activity, the court may be the only recourse.