

OLTA GATHERING 2015

Conservation Agreement (CA) Panel

TIPS AND SUGGESTIONS FOR SUCCESSFUL CA ACQUISITIONS

1. Writing defensible CA's.

A. Is a Conservation Agreement the Right or Suitable Tool?

- (a) avoid small parcels with multiple uses/retained rights.
- (b) avoid parcels where legal access is problematic or limited -- may negatively impact upon CA enforceability.

B. Defined Terms

- (a) define important terms – particularly ones capable of different interpretations.
- (b) locate all definitions in one section of the CA.
- (c) ensure defined terms don't create new ambiguity requiring more definitions.
- (d) use accurate, legible mapping readily understandable by third parties to define property areas, trails etc. (related to section 6 below)
- (c) use definitions based in legislation/Regulations when available e.g. definition of volume of wood under Weights and Measures Act R.S.C., 1985, c. W-6 (see also Firewood Measurements – section 8)

C. Purpose and Intent

- (a) CA restrictions should relate to protection of the conservation targets.
- (b) consider general purpose statement combined with more specific property-related objectives.
- (c) include a reference to there being a public interest in protecting the property.
- (d) include a reference to the parties' intention that the CA be interpreted to achieve the purpose.

D. Consistency in Terminology

- (a) call something by the same name throughout the CA, BDR, MP, Monitoring Reports etc.
- (b) e.g. trail, lane, path, road

E. Buildings/Structures

- (a) exclude residential areas or other significantly "improved" areas from the CA
- (b) when excluding residential zones – be sure to adequately delineate zones with different uses – i.e. residential uses vs. conservation uses vs agricultural uses (see tips in section 6 below)

F. Jurisdictional Issues

- (a) stay within the confines of the enabling legislation e.g. *Conservation Land Act*.
- (b) stay within the boundaries of the property e.g. don't include restrictions that would need to be enforced on an abutting body of water – avoid CA protection of water lots
- (c) avoid restrictions related to aesthetics.

G. Priority of CA on Title in relation any to other title interests

- (a) ensure no other party has priority over the CA (be aware of parcels that are subject to right of way interests from utility companies or neighbours)
- (b) register Notice of Agreement plus registrations for each component, e.g. Transfer of Easement, Application to Annex Restrictive Covenants, Option to Purchase/Right of First Refusal

H. Enforcement Provision

- (a) make sure there is one.
- (b) make sure it's practical. e.g. does it allow the conservation body to take action on its own?
- (c) cost recovery including court costs and legal fees.
- (d) ensure enforceability is not impeded by any access restrictions or other interests.

I. Change of Ownership

- (a) define owner's responsibility when title changes hands (issue an "owner transition information package" to new owner – arrange meeting in person, if possible, to solidify new relationship or alternatively communicate directly with new owner through email and/or phone – obtain new owner's contact information)
- (b) have simple templates for owner to provide the required information.
- (c) keep responsibility on current owner until new owner acknowledges CA/agrees to comply (establish a CA owner transition protocol policy; share with current CA owners; include Assumption and Acknowledgment Agreement)

J. Review of Draft CA

- (a) ensure several sets of eyes review the CA including legal review

2. Preventing/Addressing CA Issues/Violations

- (a) establish/maintain best possible professional relationship with owner.
- (b) at least annual site visits/inspections with notice/follow-up.
- (c) don't let issues "fester" -- work out a plan (hopefully with the owner) to address even minor issues (make sure everything is confirmed in writing)
- (d) be sure of the facts (support evidence is crucial! – don't rely on your or the owner's verbal communications – see (e) below).
- (e) document the facts. e.g. BDR, photos, notes, correspondence as part of normal business practice.
- (f) provide fullest possible explanation for the CA's position in first instance. i.e. avoid incremental reasoning unless new facts are discovered that could not have been discovered earlier.
- (g) act promptly (courts often interpret delays against the party responsible for the delay).
- (h) review specific wording in CA in light of the particular incident(s)
- (i) beware measurement issues, i.e. is the issue within the "margin of error" of your measuring capabilities. e.g. location of a structure.
- (j) courts often interpret ambiguities in the CA or other evidence against the "draftsperson"
- (k) be sure owner doesn't forget EC's role/oversight.
 - (a) don't start a fight you can't finish.

- (b) consider direct action (with owner's permission/cooperation) e.g. volunteer day to clean up garbage site.

3. Expropriation

- (a) referred to in USA as "eminent domain" see LTA information/cases.
- (b) is there any Canadian experience?
- (c) nothing in a CA can prevent expropriation.
- (d) consider addressing "sharing the spoils" in the CA. Is that risky??
- (e) "ears to the ground"/local vigilance may provide opportunity to influence the expropriating authority prior to issuing public notices re expropriation.
- (f) work with the expropriating authority to influence the outcome.
- (g) participate in public forums at earliest opportunity to influence outcome.
- (h) Is the expropriating authority required to off-set?
- (i) raise political awareness.
- (j) was public money used/credited in acquiring the CA?
- (k) keep EC informed if an Eco-gift involved.
- (l) try to have a united front with owner.

4. Severance Proposals

- (a) ensure CA prohibits severances, subdivision, condominium development.
- (b) multiple ownership of CA property complicates administration and record-keeping and may impact monitoring/enforcement. E.g. maintaining consistency, owner involvement in neighbour's issues.
- (c) watch for public notices e.g. signage, newspaper articles/ads.
- (d) without specific wording a CA cannot prevent an application for severance being processed but typical wording can prevent implementation of a consent to sever.
- (e) receive formal notice as registered interested party on title.
- (f) attend public meeting, inform planning officials re CA.
- (g) when reviewing the options, consider applying for injunction to restrain a planning application
- (h) be aware of possibility of applying for severance consent for long term lease.
- (i) if CA covers multiple separate legal parcels in common ownership when CA created, review restriction wording to ensure it's clear the separate parcels cannot be separately conveyed to different owners.

5. Planning Act/Official Plan Changes

- (a) current Planning Act permits CA's to affect part of a property without consent.
- (b) changes not controllable by a CA.
- (c) OP/zoning changes should not affect ability to enforce existing CA's.
- (d) influence government policy with current science.

6. Identifying Boundaries

- (a) K.I.S.S. principle applies ... create as few boundaries as possible (every angle change creates a new monument to find in the future).
- (b) important boundaries should be surveyed (where there is significant risk of significant damage if encroachment occurs) -- see section 1 (b) for an example.

- (c) if internal boundaries are not surveyed use best (most precise) available GIS equipment available with frequent readings, document the result in the BDR and illustrate with maps and photos.
- (d) if CA permits or owner consents, erect flags, T-bars or other forms of monuments to locate GIS data points on the ground.
- (e) use "immutable" natural features where practical as part of a boundary, e.g. centerline of a ridge, deepest inland point of a bay.

7. Managing Invasive Species

- (a) review existing CA wording.
- (b) for new CA's consider right of direct action.
- (c) be sure as possible of source of invasives.
- (d) cooperate with owner re use of "waivers" to allow spraying.
- (e) consider direct action with owner's consent e.g. volunteer day.
- (f) educate adjoining owners and public at large.
- (g) be aware of safety issues, e.g. toxicity.
- (h) discuss "change of use" issues with EC if applicable.

8. Firewood Measurement terms

The following are examples of legal units of measurement for use when selling bulk firewood in Canada:

- (a) The **stacked cubic metre** (stacked m³), which is 1 cubic metre (about 35.3 cubic feet) of neatly stacked firewood, including wood, bark and airspace.
 - (b) The **cubic foot**.
 - (c) The **cord**, which is 128 cubic feet or about 3.6 stacked cubic metres of firewood, including wood, bark and airspace.
 - (d) '**Cord**' means 128 cubic feet of stacked roundwood (whole or split, with or without bark) containing wood and airspace with all bolts of similar length piled in a regular manner with their longitudinal axes approximately parallel."
-