

Yikes !

Conservation Easement amendments, breaches and dispositions

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Recently Witnessed Developments affecting Conservation Easement Agreements

- Changes to land ownership: New owners and new issues
- CE amendments (to accommodate new owners)
- Breaches of CE restrictions
- Municipal planning and building approvals contrary to terms of CE
- Remedy Agreements
- Expropriation of conservation lands

Additional Recent Issues

- Original baseline condition is unknown or uncertain
- Disagreements over CE interpretation
- CE terms are silent or contradictory
- Third party trespassers on the land cause breach of CE
- Change to conditions: protected biodiversity no longer present

Bedrock Principles

- All Land Trust assets are to be used exclusively to advance the Land Trust charitable purposes.
- Conservation Easements and Restrictions in the CE are land trust assets
- Land Trusts have an obligation to monitor, defend and enforce CE's

Changes to land ownership: New owners and new issues

- Note that the new owners:
 - did not sign the CE
 - will not receive cash payment
 - and will not receive tax deduction arising from original gift
- Even if new owners are aware of CE –
- They may not understand it or may misinterpret the Restrictions
- Some new landowners will resist compliance with CE terms; and
- Occasionally new owners are determined to ignore the CE.

CE amendments - to accommodate new owners

- Owner wants new building site
- New site offers a potential for a win / win for Owner and for conservation
- It is an ecogift
- Do you make the amendment ? How and on what terms ?

CE INTERPRETATION & DISAGREEMENT

- Now 20-30 years old, Ontario's first generation of Conservation easements are often owned and managed by second (or third) generation landowners, and Land Trust staff which did not draft and create them.
- Language and terms that seemed clear to the original signatories, may now appear ambiguous and may even create disagreements and disputes.

Lessons From The US & Canadian Courts

- There have been few Canadian cases challenging or contesting CE's.
- There have been several such cases in the US, from which we can derive some lessons when drafting CE's.
- Most cases are fought because there is opposing interpretation of a clause or term that isn't defined, or is poorly defined/ ambiguous.
- The Court will generally interpret the language as it is written, in it's plain interpretation, as would be understood by a "reasonable person".

Example Case - Wyoming

- CE permitted a residence and “associated improvements”
- What does that mean? Does it include another residence?
- Definition was permissive (said what *was* included, but didn’t say what *wasn’t*)
- Takeaways:
 - Ensure terms are defined and not open ended/don’ invite speculation.
 - Ensure terms don’t conflict, Courts may look at other parts of CE to interpret vague/ambiguous sections.

Example Case - Prairies

- If a CE says a fence can be replaced with *another fence of similar size and nature* (paraphrasing), what does that mean?
- What if the fence is higher but still supports the conservation values (in this case, wildlife movement?)
- Takeaways:
 - If you can be specific, more detail is generally better: rather than saying “the fence may be replaced by a fence of a similar nature”, include specific language and terms which stipulate what can/cannot be done.
 - Document the process: the Court relied heavily on the parties ability to recollect their negotiations and what was/was not agreed upon; the Court ultimately sided with the party who had the better documented, and therefore, more credible, position.

Drafting CE's For The Next 100 Years

Remember that while you are immersed in the land and nuance of the CE today, someone 30 years from now will only have documents to refer too; what seems crystal clear to you, may not to them, unless it's written down.

Use language that is clear, simple, unambiguous.

Document the process and negotiation.

Potential breaches of CE restrictions

- Detecting violation
 - communications with landowner
 - site visit
- Responsibility to uphold CE restrictions
- Threatened tree removal
- Cooperation with Municipality
- Record-keeping
 - phone calls, letters, notes
- Notifying EcoGifts Program
- Timber valuation by 3rd party Registered Professional Forester
- Next Steps

When Municipal Planning and Building Conflict With a CE

1. Building Permits & “Applicable Law” - What can a Building Official Do?
2. Will a Municipality consider a CE when reviewing a Zoning Change?
3. Staying Attuned to Public Notices
 - a. For zoning
 - b. For Building Permits
4. How can Municipalities be Partners?
 - a. Education
 - b. Awareness
 - c. Notice

Limitations – on time to act !

- Generally, Limitations Act will require the Land Trust to commence legal proceedings within 2 years from the time you knew, *or ought to have known*, that there has been a breach.
- Need to act expeditiously
- Consult lawyer soon after discovering breach that cannot be easily remedied.
- Need early assessment of strength, weakness and legal advice on strategy for enforcement action.
- If engage in mediation or settlement discussions – need standstill agreement so that limitation period is not running against you while you mediate or negotiate.

Remedy Agreements

- Just as you need a purchase agreement to secure acquisition of land or CE you need an agreement to guide the amendment or CE remedy process
- Basics - Who does What ? When ? and Who pays ? How much ?
- Include a stand-still provision so limitation period does not continue to run against you while you try to correct the situation

Expropriation – Standards and Practices

- Standard 11 Conservation Agreement Stewardship
- I. Expropriation 1. If a conservation agreement is threatened with expropriation:
 - a) Work diligently to avoid a net loss to conservation values and document the actions taken
 - b) Have or obtain appropriate documentation of the percentage of the full value of the property represented by the conservation agreement
 - c) In circumstances where a net loss of conservation values cannot be avoided, document the land trust's attempts to receive its proportional share of the proceeds and use any proceeds in a manner consistent with the conservation agreement deed
 - d) Provide prompt notification to relevant parties, including the expropriating authority and Environment and Climate Change Canada, if the conservation agreement is certified as an ecological gift

Expropriation of conservation lands

- Land Trust must be involved as early as possible.
- Property owners should be your eyes and ears on the protection of their property.
- LT responsibility is to uphold the CEA restrictions and ensure that the expropriation body is aware of the federal Ecological Gift program and the CEA on the property.
- Contact appropriate organization or government to be included in the working group and mailing list about potential infrastructure projects. Involve local officials to assist with communication and importance of the CEA.
- Reinforcement of the CEA restrictions on the annual monitoring report.
- Importance of ongoing education and communication of current and/or new property owners on the restrictions on their property.

FUNDAMENTAL ELEMENTS OF CE AMENDMENT POLICY # 1

- Categories of amendment – technical correction or substantive
- Information required (include financial)
- Amendment consistent with original CE intent
- Land Trust approvals required

Fundamental Elements of CE Amendment Policy # 2

- Other approvals required from funders, government (Ecogift change in use or disposition, Ontario provincial approval)
- Seek neutral or net positive outcome for conservation values / protection
- Identify conditions which justify amendment
- Procedural requirements

Land Trust Policy on CE Enforcement

- Categories of Breach – technical and minor vs substantive
- Timelines for response and for professional / legal advice
- Procedures for remedy of technical breach
- Procedures for remedy of substantive issues
- Remedy Plans / Remedy Agreements
- Litigation / enforcement decision process
- Funding CE enforcement