WHAT IS A CONSERVATION EASEMENT?

A GENERAL DESCRIPTION

Introduction

While many people have heard of the 'conservation easement' tool, only a small subset of those would feel they could capably and comprehensively explain what conservation easements are. Even people who have granted a conservation easement on their property and organizations that accept conservation easements can struggle because each easement is different and each organization's conservation easement template and organizational goals are different.

So – in general – what is a conservation easement?

THE CONSERVATION EASEMENT EXPLAINER SERIES

This document is part of a series of 'Explainer' documents describing various aspects of the conservation easement tool in plain language.

To see other Conservation Easement Explainers, as well as much more information, go to the: Alberta Conservation Easement Resource Centre

THE CORVUS CENTRE FOR CONSERVATION POLICY

The **Corvus Centre for Conservation Policy** is a Canadian nature-conservation charity based in Calgary, Alberta, Canada

Corvus works with government, NGOs, and others to develop and implement nature-positive policy

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A brief history

Prior to the 1990s, landowners in Canada wishing to conserve the natural values of their property in perpetuity had two choices: they could donate the property outright to one of a few land conservation charities, or they could donate their land to the government to become a park. Many did donate to the government, and formal programs were established to receive those gifts.

However, two challenges remained. First, many landowners relied on their land for their livelihood, and could not afford to simply give up that asset. Second, the available options passed the land into someone else's hands, and the landowner would have to move off of their property. The popularity of the conservation easement tool was its ability to address both of these issues, allowing landowners to sell only the 'speculative' value of the property, and remain on and work the property subject to the easement's restrictions.

In the late 1990s, most every province in Canada enacted some form of 'conservation easement' legislation.

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A private contract for conservation

A conservation easement is a private contract between the owner of parcel of land and an entity 'qualified' to hold such easements. The agreement contains a suite of specific land use restrictions and requirements which are designed to protect the identified conservation values of that property. The agreement runs with the land, and applies to all future landowners.

Most conservation easements are granted to a 'land trust' – a not-for-profit, charitable organization established to protect the conservation values of private land for future generations. Conservation easements may also be granted to municipal (local) governments) and provincial agencies, provided they have an active conservation easement program.

Not all parcels are suitable for the investment of resources a conservation easement agreement requires, and each land trust has its own priorities and geographic focus areas. Every conservation easement agreement has the same basic structure, but each one starts with a qualified organization's template, and is then negotiated based on the specific needs of the landowner and the character of the parcel.

The landowner (and all future landowners) retain ownership, and are free to use and manage the land as they will, subject to the restrictions. For most landowners granting an easement, this represents forgoing a series of land use activities they never intended to pursue. The landowner is also free to sell, Will, or gift the property without restriction.

The legal foundation

A *conservation* easement follows the common-law traditions of easements in general in that it is a 'non-possessory right' to use or restrict another person's land – i.e., the holder of the easement does not *own* the land, but does hold a *legal interest* in the land. Unlike covenants and other servitudes, easements allow for restrictions that are both negative ('you *can't* do this') and positive ('you *must* do this'). Conservation easement legislation takes this broad tool, and refines if for conservation purposes.

In Canada, 'conservation easements' are legally enabled at the provincial or territorial level. In Alberta, these enabling clauses are contained within the *Alberta Land Stewardship Act* (ALSA). The Act enables the tool, and sets basic guidelines around how they can be created and used.

The Act identified a list of 'qualified organization' types that are legally allowed to hold conservation easements, including provincial government agencies, local government bodies, and land trusts. It also states that a conservation easement can only be for the following purposes:

- the protection, conservation and enhancement of the environment;
- the protection, conservation and enhancement of natural scenic or aesthetic values;
- the protection, conservation and enhancement of agricultural land or land for agricultural purposes;

Which purpose (or mix of purposes) a given conservation easement is established for is based on the mandate and goals of the qualified organization, which means landowners must choose a conservation easement holder that matches their goals.

Ultimately, a conservation easement comes into effect when it is registered at the Land Titles office, and attached to the title of the property.

The conservation easement agreement

While the conservation easement tool is enabled in provincial legislation, each agreement is a private contract, relating to a private land parcel, and agreed to by two parties: the landowner and the qualified organization.

While the legislation identifies a number of required items, there is no required template for a conservation easement agreement. However, most agreements contain the following:

- *Conservation purpose / values* – A statement at the outset that identifies the conservation purpose of the agreement, potentially referencing the identified conservation values.
- *Rights reserved by the grantor* – A section that makes it clear that any rights not referenced by the agreement are retained by the landowner
- *Management plans* – Potentially a reference to specific or general management plans, that may have been created
- *Restrictions* – A list of specific land use restrictions and obligations, and – if applicable – where on the property they apply
- *Dispute resolution* – A description of the mechanisms that either party can use to resolve disputes, usually going from 'bargaining in good faith' to the courts
- *Back-up easement holder* - To which qualified organization the easement would transfer if the current holder were to dissolve
- *Rights of entry* – The rights the easement holder has to enter onto the land for inspection and enforcement
- *The conservation easement area* – A description, survey information, or map of the area of the parcel to which the conservation easement applies (may or may not be the entire parcel)

Restrictions in the agreement

Every person who owns a parcel of land in fee-simple has a set of guaranteed land use opportunities. For example, a the owner of an agricultural parcel may choose to grow different crops, graze livestock, etc. That landowner may apply to the local municipality for the right to construct buildings, or to the province for the right to drain water basins on the property.

The basic structure of a conservation easement is to

- Identify the **conservation values** associated with the property which the two parties wish to protect;
- Identify the **land use activities** that may impair those conservation values;
- **Restrict those land use activities** in a way or to the degree needed to maintain the identified conservation values.

The contractual agreement that defines the conservation easement will then list the land use opportunities that are prohibited or restricted, as well any practices that would be required for the same reason.

While every organization, landowner, parcel, and agreement is different, some common restrictions include:

- Prohibited or limited subdivision;
- Prohibited or limited construction of buildings;
- Prohibited or limited timber harvest / tree removal
- Vegetation management guidelines on grazing, cropping, and/or invasive species;
- Prohibitions on mining or excavations;
- Prohibitions on drainage of water, and or protections for water bodies;
- Specifications for future fencing and other wildlife movement factors; and
- Prohibitions on dumping, water pollution, and waste storage.

Again, every agreement is different, and any given restriction can vary geographically and temporally across the parcel, be contained in a management plan or not, and have more or less detail.

Baseline reports and monitoring

What values are being conserved, and how they are faring, is established by an initial baseline report, and subsequent monitoring.

The baseline report will catalogue all the environmental, agricultural, or scenic values (depending on the purpose of the easement) on the property at the time the easement is signed, as well as the anthropogenic (human-built) features. This would include an inventory and status of wildlife and vegetation species, current management practices, and physical features such as fences, buildings, and dugouts. Generally, photos are taken at key 'photo points'.

The monitoring will occur on a regular basis for the life of the conservation easement. This may be annually, biannually, or some other frequency. Monitor reports are made based on the current status relative to the baseline report, and photos are usually retaken at the original photo points. This is also an opportunity for the landowner and easement holder to reconnect and discuss any major changes in the property. The easement holder also has the option to require changes if there is evidence the requirements of the easement are not being adhered to.

After the agreement is signed

While the time spent negotiating and signing the conservation easement attracts a lot of attention, that is a tiny speck on the timeline of the easement's life. The most common questions relate to the following dynamics:

- *Using the land* – The landowner is free to use the land in whatever way they choose, so long as they do not contravene the requirements of the easement. Generally, the existing management regime is what led to the property being worth conserving, meaning there is often little change here.
- *Selling the land* – There are no restrictions for the landowner in terms of selling, Willing, gifting or otherwise disposing of the property
- *Public access* – A conservation easement in and of itself does not require nor forbid public access; that remains the choice of the landowner. However, the parties to the agreement may choose to add such requirements.
- *Enforcement* – The easement holder has the right to enforce the terms of the agreement at any time, and must be given access to the property to assess or oversee remediation of any infractions. Well over 90% of infractions are minor, the result of a misunderstanding on the part of the landowner, and easily remedied.

Compensation for the grant of a conservation easement

Every grant of a conservation easement is eligible for full compensation, via either a tax receipt, cash payment, or combination of the two. Many landowners are not interested in compensation, but for many it means the difference between being able to achieve their conservation goals or not. Full-cash compensation is essentially unheard of, with the most common case being the provision of a charitable tax receipt. If a land trust has access to a funding source, they may be able to provide some portion of the compensation in cash, but rarely more than 20% of the value.

The basis of this compensation is arguably the most misunderstand element of the entire conservation easement grant process. Conservation easements do not represent an incentive program, a tax break, a market-based instrument, a payment for ecosystem services, nor any other type of environmental conservation program. It is unique in that it is a 'disposition' of 'an interest in land.'

In short, this real property interest is assessed for its fair market value by a qualified appraiser, and is then 'disposed of' (essentially sold) by the landowner. This happens once, in the same way a 10-acre parcel may be valued and disposed of by a landowner in exchange for fair market value compensation. And in the same way one would not expect to be paid multiple times for the sale of that 10-acre parcel, a landowner is compensated once for the full fair market value of the conservation easement.

To be perfectly clear, granting a conservation easement is not a way to maximize the land's value nor the landowner's compensation. Selling the property for intensive development is the best option if that is the goal. Rather, the conservation easement compensation model seeks to mitigate the financial impact that a landowner might otherwise face while trying to achieve their conservation goals.

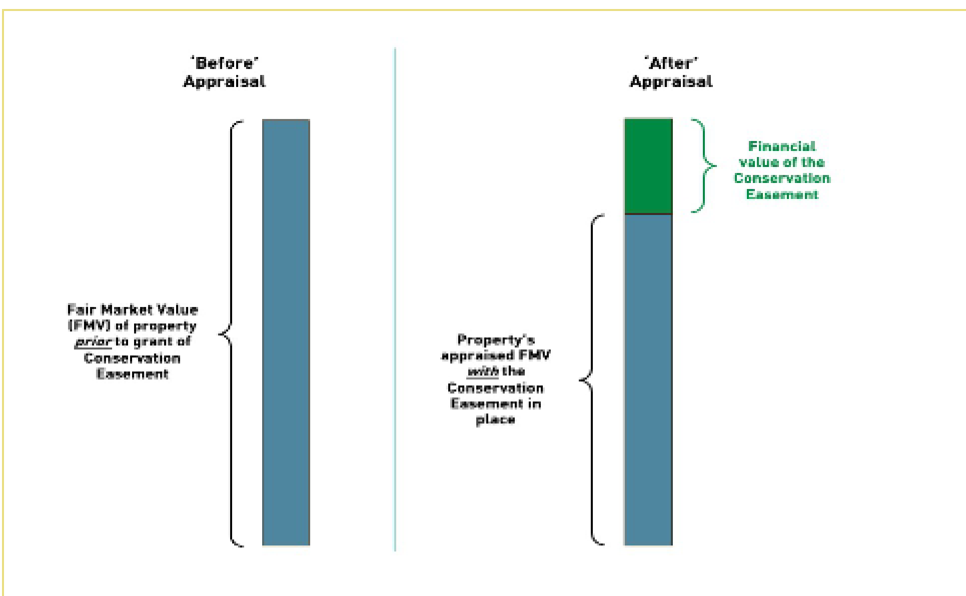
Valuation of a conservation easement

Contrary to what might be expected, the financial value of a conservation easement is not in any way linked to its 'conservation' value. Instead, it is based on the amount of fair market value that is lost via the grant of the easement. In other words, if one were to try and sell the property after placing a conservation easement, how much less would it go for?

This speaks to the entire premise behind the conservation easement tool as a viable mechanism. In essence, the speculative value is calculated (i.e., the portion of the land's value attributable to development pressure), then severed from the property and converted to financial compensation, after which the landowner continues to live on and use the land subject to the restrictions.

The most common valuation mechanism is called the "before-and-after" method. A certified real property appraiser conducts two complete property appraisals: one assuming there is no conservation easement in place, and one assuming there is. The difference in those two fair market valuations is deemed to be the financial value of the conservation easement. This is the basis for determining the compensation.

The valuation (and compensation) calculation of a conservation easement differs markedly from environmental incentive programs. The amounts offered in



an incentive program are generally arbitrary, not market-based, and primarily based on the amount of money a given grant program has over a given time period.

Because compensation for a conservation easement is payment in exchange for the disposition of an interest in land, there is no arbitrariness in the valuation and compensation; it is a real property fair-market-value calculation.

Temporary conservation easements

At various times over the history of the conservation easement tool (it was first formally proposed in 1959), there has been discussion of 'temporary' conservation easements. This arises from a misinterpretation of the concept of 'conservation', assuming that because 'use' can be temporary in other types of easements then 'conservation' can be temporary (which is more akin to 'temporary' death).

From a valuation perspective, temporary terms cast the conservation easement tool into the same arbitrary realm as environmental incentive programs. Valuation methodologies must adapt some variation of a lease model or a fund-limited grant model in order to assign a dollar value. From a compensation perspective, the charitable tax receipt is removed from equation because the Canada Revenue Agency requires a gift to be 'irrevocable.' Even for perpetual conservation easements, cash payments are challenging and rarely exceed 20% of the value. Philanthropic and government grants usually stipulate that the conservation be more than temporary.

The role of government

For the most part, various levels of government have no more regulatory involvement in conservation easement agreements than they do in any other private contract between two parties and relating to a privately-owned parcel. However, they may take a more active role where the placement of conservation easements supports their land conservation goals.

Provincial government

Beyond enabling the conservation easement legislation, the provincial government has little governance role to play specific to a conservation easement, but does offer some practical roles.

- *Funding* – The provincial government has offered grant funding for conservation easement projects that align with their conservation priorities
- *Notification* – Prior to the registration of a conservation easement at the Land Titles office, three different provincial Ministries must be notified, but they hold no approval authority.
- *Land Titles* – For a conservation easement to come into effect, it must be registered at the provincial Land Titles office, but again, they hold no approval authority
- *Holding easements* – Though rare, there are a couple of instances where the provincial government has opted to be the holder of a conservation easement
- *Termination power* – The enabling legislation for conservation easements allows the Minister responsible to change or terminate the conservation easement if it is in the public interest to do so, which simply mirrors their existing expropriation powers

Municipal government

Similarly, local governments have no formal role regarding the conservation easement tool, but they play complementary roles.

- *Holding easements* – Some municipalities have established conservation easement programs, and do hold easements. In some municipalities, the planning authority may require a conservation easement as part of an approval
- *Notification* – Local governments must also be given notice prior to the registration of a conservation easement, but (similar to the provincial government) have no approval authority
- *Supporting local land trusts* – Several municipalities actively support local land trusts and their use of conservation easements by providing financial support, offering office space, or even sitting on their boards
- *Land use planning* – Numerous municipalities around the province reference conservation easements in their Municipal Development Plan or Area Structure Plans as a way to support their conservation goals

Federal government

The role of the federal government is largely indirect and financial, providing both grants and tax relief for land conservation projects, including conservation easements.

- *Charitable tax receipts* – The primary role the federal government plays is through the Canada Revenue Agency (CRA) allowing charitable tax receipts to be provided in exchange for a conservation easement
- *Funding* – The federal government has maintained programs over the years that provide grant funding for land conservation, including for conservation easements
- *EcoGifts program* – If the donation of a conservation easement is certified by the federal government as a 'gift of ecologically sensitive property', the landowner is eligible for considerable tax breaks in exchange for additional land use limitations and liabilities for the land trust

Summary

So, that – in general – is what a conservation easement is. In summary:

- First formally proposed in 1959, conservation easement legislation was enacted across Canada in the late 1990's
- A private contract between a landowner and a 'qualified organization'
- Allows conservation-minded landowners to perpetually maintain the conservation values of their property while continuing to live on and use the property
- Provides a mechanism to offset the financial burden perpetual conservation might otherwise entail
- Is registered on title and runs with the property regardless of future ownership
- Restricts certain land use practices in favour of maintaining the identified conservation values
- Entails an initial 'baseline' report, regular monitoring against that report, and the ability for the easement holder to enforce the terms of the agreement
- Has no inherent limits/requirements for the disposition of the property, public access, nor land use beyond the identified restrictions
- Landowners can receive full compensation for the financial value of a conservation easement through a tax receipt, partial cash payment, or combination of the two
- The grant of a conservation easement is the 'disposition of an interest in land' whose value is determined by a qualified appraiser
- Governments have limited regulatory roles, but often provide funding and financial incentives where conservation easement projects align with their goals

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