Current Issues in Legal Defense and Enforcement of Conservation Covenants

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The law of defense and enforcement of conservation covenants is still in its infancy. The land trust movement, even in the United States, is barely 30 years old. In British Columbia, the relevant history is even shorter, of course. As a result, relatively few covenant defense and enforcement cases have reached the courts. Accordingly, one can only guess at how the conservation covenants, which are granted or acquired in perpetuity, will be construed and enforced one hundred years from now.

Yet, our short experience with holding and administering conservation easements in the U.S. may point to legal issues that are likely to arise in B.C. in the future. Cases that have been litigated in the U.S., for example, reveal some common trends.[1] The purpose of this article is to identify in broad terms the *parties* who are most likely to challenge conservation covenants, and the *legal issues* that are most likely to arise. With such basic information, land trusts in B.C. may be able to identify aspects of their conservation covenant programs that may warrant change to minimize successful legal challenges.

Conservation covenant documents and overall land protection programs may be strengthened if potential challenges are anticipated and addressed.

A few words of explanation at the outset: just as every property that is protected by covenant is unique, the legal issues and challenges to *specific* conservation covenants will defy easy prediction. Furthermore, my views and analyses are colored by my experiences as an attorney who is versed generally in the real property law of the U.S., and more specifically in the property law of the State of Montana. I claim no knowledge of B.C. Provincial law. Accordingly, this article is necessarily general in focus, and my ability to universalize my experiences to situations in B.C. is therefore limited.

Who will challenge conservation covenants?

Conservation covenants are typically granted in perpetuity. Change is inevitable; yet, conservation covenants are designed to be immutable. As a result, every conservation covenant incorporates a tension between the land conservation goals of the original grantor and the land trust at the time of the grant, and the land-use goals of future landowners. The vast majority of future legal challenges to conservation covenants will almost certainly arise from this tension.

Second generation landowners. The conventional wisdom is that landowners who inherit or purchase properties that are protected by a conservation covenant will comprise the greatest enforcement challenge. Original covenant grantors tend to share a common land conservation goal with land trusts, and they are very often gratified to share property management and stewardship responsibilities with the professional land stewards who work for land trusts. As property ownership changes, however, this shared commitment to common conservation goals becomes tenuous. New owners may have their own opinions about how to care for the land, or, worse, they may resent any perceived "interference" with their property rights by land trusts.

[1] For a general discussion of conservation easement enforcement cases that have been litigated in the United States, see M. Thompson & J. Jay, "An Examination of Court Opinions on Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date," 78 *Denver Univ. Law Review* 373 (2001).

Easement violations and challenges from second generation landowners are likely to arise in two ways. First, those landowners who profess to share the conservation objectives of a land trust may inadvertently violate easements by taking actions that they believe to be in compliance, but which the land trust does not. Such violations can lead to very difficult enforcement cases in the courts because a judge often will be asked to decide between two legitimate but competing interpretations of the underlying conservation covenant, all the time weighing the relative rights of the landowner's interest in using her property as she sees fit, and the land trust's interest in achieving its preferred conservation outcome.

Second, some second generation landowners may simply choose to violate easements out of principle. They may conclude that the conservation covenant simply places too much restriction on what they want to do with their private property and may therefore ignore the covenant's restrictions. Although such flagrant abuses of conservation covenants may be very traumatic for land trusts when the violations are discovered, paradoxically the legal issues may be simpler. With such adversarial interpretations of the effect of conservation covenants on real property ownership, judges and magistrates are faced with easier legal decisions to make: either the conservation covenant prohibits such activity, or it does not. There are fewer "shades of gray" to decide about the alleged violation.

Original covenant grantors. On occasion, the original grantors of conservation covenants may have changes of heart. Their goals and objectives for the use and management of their properties may have changed. For example, they may now need income from a timber stand, although they never believed that they would when they granted the covenant. Or, their estate planning goals may change how they view the property, especially if much of the grantors' wealth is wrapped up in covenant-protected property and the covenants reduce the value of that property. In such circumstances, land trusts may have to deliver tough, consistent messages to these landowners: They granted away their rights by covenant, the land trusts have a duty to protect and enforce those rights in perpetuity, and it would be a violation of public policy to give back the rights to the original grantor without some compensation to the public for the loss.

Looking up PLI from above Chatterbox Falls, K. Dunster

Third-party violations. Conservation covenants are often violated by third parties. A neighbour may accidentally harvest protected trees across a common boundary. Local teenagers may develop ATV trails without the landowner's permission or knowledge, thereby causing soil erosion and damage to sensitive plants. Fishermen may introduce a desired sportfish into waters protected for native species.

Such third-party violations may pose difficult enforcement problems. Because conservation covenants typically represent agreements exclusively between land trusts and landowners, most covenants do not specifically grant land trusts rights to enforce easements against third parties. Land trusts may therefore have to seek recompense through the innocent landowner for the objectionable acts of third parties. In other words, land trusts may have to initiate covenant enforcement actions against landowners for failure of the landowners to patrol their properties to ensure compliance *by all parties* with the terms of the conservation covenants.

There is some public policy justification for this arrangement: Unlike the land trust, the argument goes, landowners are in a far better position to control the risk of third-party violations because they are presumably on the property every day. From a policy standpoint, landowners should therefore bear the primary cost of third-party violations.[2] Such an arrangement can lead to awkward landowner-land trust relationships, however, if the landowner was also victimized by a third party. If a land trust sues the landowner to force compliance with a conservation covenant for acts of third parties, the landowner may feel doubly mistreated and hugely resentful of the land trust for bringing legal action against him. Conservation covenants should therefore allow landowners and land trusts either to join together in an action against third-party violators, or should allow a land trust to seek remedies against third parties without a landowner's participation.

Systematic challenges. As the land trust

movement grows, and becomes entrenched in the local and provincial social and legal spheres, organized opposition to conservation covenants is emerging. Eventually, such opposition may lead to challenges of the legal underpinnings of conservation covenant law. In particular, such opponents of conservation covenants are likely to cite common law doctrines against perpetual land-use restrictions. Property law has a long tradition of discouraging "dead hand" control of property by one generation, thereby curtailing the choices of future generations about the use property and its full complement of resources. To date, I am aware of no such broad based challenges arising in the U.S., but vocal groups are forming across the country to question the social legitimacy of conservation covenants and land trusts.[3] B.C. land trusts should be attuned to and prepare for similar developments in Canada.

Theories behind the legal challenges. As noted above, the types of challenges to conservation covenants will be as varied and subtle as the lands and resources protected. Except for the systematic challenges to the protection of lands in perpetuity, the outcome of most covenant enforcement cases will be heavily dependent on the particularized facts of each situation: What does that land-use restriction really mean? How strictly should it be interpreted? Who is entitled to more sympathy from the courts under the circumstances?

Despite the impossibility of identifying the specific challenges that will arise, it is possible to generalize about the types of probable conservation covenant challenges. These include assertions of:

Changed circumstances

- and economic hardship that allegedly justify modifying or weakening covenant restrictions;
- Ambiguous restrictions or restrictions that are impossible to apply fairly or coherently;
- Technical defects in conservation covenants that warrant revision or rejection of covenants; and
- Inefficiency of requiring injunctive, restorative relief instead of monetary damages as a remedy for violations of covenants.

Changed Circumstances. Landowners who feel that conservation covenants unduly burden their free use of their own property frequently claim that the original purposes of the covenants no

[2] See T. Barrett & S. Nagel, *Model Conservation Easement and Historic Preservation Easement, 1996*, Commentary ¶22, pp. 63-64 (Land Trust Alliance 1996).

[3] See, for example, the websites of the Property Rights Foundation of America at http://prfamerica.org/index.html and The Paragon Foundation at www.paragonpowerhouse.org/conservation_easements1htm

longer serve important public policy goals and should therefore be changed or terminated. Alternatively, landowners whose economic situations have changed may cite the economic hardship caused to them by the conservation covenants and thereby plead with a judge or magistrate for relief from the covenants' burdens.

U.S. courts are generally unsympathetic to landowner claims of changed circumstances and economic hardship as a justification for dispensing with or weakening real property covenants, including conservation restrictions. As long as the legislative body has passed covenant enabling legislation and as long as property owners have either constructive or actual notice of the conservation covenants through a public recording system for land titles, courts have generally upheld the validity of conservation covenants. But, this is not always true: Land trusts should be aware that "relative hardship" theories may appeal to some judges who are pre-disposed to relieve landowners from onerous costs associated with land restoration after a covenant violation. In Washington State several years ago, for example, a court found that a landowner had violated a conservation easement by building a corner of a new house so that it encroached on the land trust's easement. Instead of forcing removal of the house, the court concluded, in part, that the cost to the landowner of moving the house far outweighed the damage to the land trust and the public. The house and encroachment were allowed to stay by judicial fiat.[4]

Perhaps the most common conservation covenant enforcement cases will involve conflicting interpretations of ambiguous language and purposes within the covenants themselves.

Ambiguity in covenant language Because of the complexity of the resource protection goals that are common in conservation covenant transactions, the covenant instruments themselves are often lengthy and complicated. Covenants may contain several land protection purposes, nominally protecting, for example, wildlife habitat, native plants, and historic agriculture. In most cases, these goals may be complementary. Yet, land trusts must recognize that different goals in one covenant eventually may be viewed as inconsistent by landowners. Can a traditional farmer, for example, protect native plants *and* raise non-native cash crops and still remain in compliance with a conservation covenant? Are protection of native plants and protection of farming fundamentally inconsistent? Unless the covenant explicitly sets forth a hierarchy of protected conservation values, a nasty legal battle may arise between parties with conflicting interpretations of the meaning and purposes of the covenant.

Landowners who are hostile toward conservation covenants may cite this ambiguity in trying to defeat the validity of the covenants in court.[5] The more complicated a conservation covenant, the more probable the covenant will include problems of ambiguity. It is very hard to draft conservation restrictions to anticipate all future activities that may threaten the conservation values that are protected by the covenants. Among other land trusts in the U.S., the Montana Land Reliance, which now holds nearly 500 conservation easements on half a million acres of land, has therefore moved toward accepting simple, single-purpose conservation easements with clearly measurable performance standards, when possible, to allow it to determine compliance or non-compliance relatively simply and clearly. Such clear standards enhance the defensibility of covenants because proving violations is more easily accomplished.

Moreover, the more complicated a conservation covenant, the more likely it is that a land trust will have a hard time enforcing the covenant in court. For example, communicating to a court the subtleties of a landowner's lack of respect of scientific range management practices required by a covenant, which will lead to eventual degradation of long-term agricultural resources,

[4] B. Biondo, "Dealing with Conservation Easement Violations," *Land Trust Alliance Exchange*, p. 207 (Winter, 1997).

[5] A. Dana, "The Silent Partner in Conservation Easements: Drafting for the Courts," 8 *The Back Forty* 320 (January/February, 1999).

is an extraordinarily difficult task in an adversarial, trial setting. Moreover, proving in court that the landowner has actually managed land in a substandard way, and thereby violated a conservation covenant, raises substantial challenges for the land trust's legal team. I and another attorney and our a raft of experts, for example, once spent three days before a judge trying (unsuccessfully) to convince him that "high-grading" old-growth Ponderosa Pine in a logging operation – taking only the largest, oldest, most valuable yellow pine on the property – violated a land trust's conservation covenant which required that all timber harvests must comport the "sound forest husbandry practices." This courtroom experience highlighted the excruciating difficulty of (a) educating the judge about the subtleties of balanced forest management practices, and (b) proving that the landowner actually violated those practices.

In short, land trusts need to realize that conservation covenants are ill-suited to meet many complex land conservation goals. Conservation covenants are limited interests in property that can effectively serve only limited land protection goals.

Single purpose covenants or multi-purpose covenants with quantifiable, measurable standards to document compliance with covenant terms will minimize ambiguity and enhance land trusts' ability to defend and enforce covenants in the future.

Technical defects. Landowners who are determined to defeat conservation covenants will search for technical defects in conservation covenant language. Were all statutory requirements met when the covenant was drafted? Are other laws, rules or regulations violated by the covenant, and if so, can that conflict of laws be elevated to challenge the validity of the covenant in general? Did the new owner of the property have knowledge of the covenant or was such knowledge readily available from a public source?

Such challenges to the technical adequacy of conservation covenants may be easiest for land trusts to anticipate and address. Sound covenant documentation policies and procedures and first-rate legal representation in the covenant creation process will solve most of these potential problems. On the other hand, the experiences of U.S. land trusts reveals some fairly shoddy (by today's standards) conservation easement documentation and drafting practices, especially among public agencies, small land trusts, and older land trusts when they first began accepting conservation easement grants.[6] Therefore, B.C. land trusts may be well-advised to review their earliest conservation covenants to ensure that they reflect current drafting practices and legal standards.

Efficient breach. As property values soar in areas surrounding covenant-protected property, it is probable that certain landowners, or potential landowners, will weigh the potential gains to be made from violating the covenant – and effectively destroying the conservation restrictions – versus the cost of leaving the property alone. Consider the example of a real-estate of developer who covets a tract of land protected by a covenant in an area of rapid suburbinization. With a conservation covenant, the land may be worth $1.0 Million. Without the covenant, a developer may make $25 Million by subdividing and selling tract homes. The developer may decide to acquire the property and violate the covenant, as long as she is reasonably sure that (a) a court would not completely forestall his development, and (b) the cost of the fines imposed if a violation of the covenant is found would not undermine her profit.

In jurisdictions where a legislature, court or magistrate prefers to award damages rather than to award injunctive or preventative relief to land trusts for covenant violations, such "efficient breach" calculations may become common – and may severely undercut the expectation that conservation covenants protect property in

[6] D. Guenzler, *Ensuring the Promise of Conservation Easements: Report on the Use and Management of Conservation Easements by San Francisco Bay Area Organizations* (1999), cited in D. Guenzler, *Creating Collective Easement Defense Resources: Option and Recommendations* (Bay Area Open Space Council, 2002) available at www.openspacecouncil.org.

perpetuity. The solution is to provide in covenants, whenever possible, that the legal remedy for violation must be restoration of property and damaged conservation resources, not monetary damages or fines.

As the land trust movement in B.C. matures and as more land is placed under conservation covenant, legal challenges to the propriety of such covenants are bound to increase. By anticipating some of the parties who may lead these challenges and by identifying the legal theories and facts that may give rise to the challenges, B.C. land trusts may be able to prepare for the inevitable rising tide of violations. Measures taken today to strengthen covenants, to remove ambiguities from covenant documents, to educate landowners and the public about the nature of the conservation restrictions contained in covenants, and to build legal defense resources will provide immeasurable benefits to the long-term interests of the greater conservation community and the public at large.

LTABC Covenant Monitoring Workshops

The LTABC has now completed three regional Covenant Monitoring Workshops. The first was reported on in the last issue of the Kingfisher. Since then, we have held two more sessions, one in Kelowna and Penticton and the other on Saltspring Island. Each had a classroom session and a visit to a covenanted site. All were led by Chris Ferris, the Islands Trust Fund Monitor, who fine-tuned the workshops as they progressed. Many thanks to Lucy Reiss of Discovery Coast Greenways Land Trust, Shawn Black of The Land Conservancy and Karen Hudson of Saltspring Island Conservancy for coordinating these regional workshops. Many thanks to our funders, The Vancouver Foundation and the Public Conservation Assistance Fund. **Here are some tips from the workshop for your reference (thanks to Nigel Dwyer)**.

- Use the manual: ***On the Ground, Monitoring Stewardship Agreements.***
- The covenant might include right of access more frequently than annual, if required by special event.
- Make distinction between Ecological Monitoring and Compliance Monitoring. (No point in wasting time on Ecological Monitoring such as vegetation overgrowth if there's nothing you can do about it. However, try to anticipate remedial action in management plan)
- Importance of consistency in monitoring.
- Importance of showing that covenant holder is active and monitored regularly.
- Consider carefully whether ecological integrity is even possible before taking on marginal properties.
- Absentee owners: need clause to appeal to court if landowner not contactable.
- Think about clause permitting changes resulting from approved government Fisheries or Environment projects.
- Site visit: start with review of proper maps.
- Consider aerial photos, stereo pairs.
- Talk to adjacent property owners to verify boundaries and to tell them what you are doing.
- Management plan should define map of monitoring route and photo points for repeatability (Moss uses coloured 10in nails for photo markers, then notes azimuth and elevation photos. Also try GPS)
- Monitor for public safety and note concerns.
- Try video camera.
- Legal considerations:
  - ➢Digital photos not acceptable.
  - ➢Optical photos must have date and signature on back
  - ➢Make up at least two binders for each property, not loose folders.
  - ➢Each binder to be complete with original documents, plus signed monitoring reports- one to be stored in locked fireproof vault, one to be working copy to be kept in office.
  - ➢Provide copy of monitoring report to co-covenantor. (This means three good copies of monitoring report)