Protection of Land with Agricultural Uses

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Introduction

Two of the most popular methods of conserving land are the conservation easement (covenant in BC) and outright purchase. For many small land trusts who cannot afford purchase, the easement has become throughout North America a very popular way of obtaining an interest in land without having to pay an enormous amount for it. In BC, the ALR protects agricultural land from development. Unfortunately, this protection has only extended to agricultural use. The Land Reserve Commission has shown a reluctance to grant covenants that have as their aim the protection of non-agricultural features of agricultural land. This leaves British Columbians with a particular difficulty: what tools should be used to conserve these non-agricultural features if the conservation covenant is unavailable?

Conservation Methods

Conservation Covenants

The conservation covenant could still be a viable option in some circumstances. The Land Reserve Commission is likely to approve a covenant that still allows for agricultural use of the land to be conserved. However, the LRC will base its decisions on agricultural considerations and not on environmental ones. The District Agriculturalist can be a useful person to discuss conservation issues with; his or her comments will likely carry a lot of weight with the LRC. Also, if the area to be protected can be shown not to be agriculturally productive this could also be helpful in assuring the covenant is granted.

As well, it may be possible, if a covenant is granted on a piece of ALR land, to include a reference to a stewardship agreement within the conservation covenant. It is not entirely clear what the legal consequences of this would be. However, the

stewardship agreement would probably only be considered enforceable between the current owner and the organization holding the covenant. It is unlikely to bind any future owner unless he or she has agreed.

Purchase of Development Rights

This has been a popular mechanism for land conservation in the United States, but has seen little use in Canada. PDR programs are developed and run in the US by public agencies. These agencies purchase conservation easements from landowners in order to save the land from development. PDR keeps the land in private ownership, safeguards its agricultural and conservation values and provides financial compensation for extinguishing the development rights.

One example of a PDR program is the one operated in Montana by the Department of Fish, Wildlife and Parks. It uses PDR to supplement fee simple acquisitions. They have even transferred state-owned land to ranchers in exchange for relinquishing their development rights.

PDR programs are costly and rather narrow in focus. They are best used to protect special agricultural lands from imminent development. In BC, the main problem is that in order to purchase development rights, the land must have the ability to be subject to a conservation covenant. If it is land in the ALR, then it will be difficult to purchase development rights if the covenant is not going to protect agricultural features of the land. Since the ALR is in place to protect agricultural use in the first place, it renders PDR programs aimed at agricultural land in BC somewhat redundant. The only way PDR may be of some use in BC is if it were possible to get a covenant granted on ALR land to protect a non-agricultural part of the property. As mentioned above, this can be extremely difficult to do. In order to conserve these areas of ALR land, it is probably best to consider other alternatives.

Common Law Tools: The Profit a Prendre and the Easement

The profit a prendre is a common law tool, which literally means 'to take a profit.' It can be contrasted from an easement, which is known as a privilege without profit. This has generally meant that a person with this right (profit a prendre) can go

onto the property of another and take something from it while an easement owner has the right to compel the landowner to do or refrain from doing something. Both of these rights run with the land rather than terminating with the sale of the property.

The profit a prendre is a property right which in effect is a grant of a part of the land itself. For example, a landowner may grant a profit a prendre to a forestry company, which gives it a right to remove trees from a part of his or her land. This has been the traditional way in which the profit a prendre has been used. The question is can this right extend to a right to protect a particular resource rather than the removal of it? The case of *Cherry* v. *Patch*, [1948] O.W.N. 378, gives a definition of a profit a prendre:

> 'It has been said that a profit à prendre is a right to take something off the land of another person. It may be more fully defined as a right to enter on the land of another person and take some profit of the soil such as minerals, oil, stones, trees, turf, fish or game, for the use of the owner of the right. It is an incorporeal hereditament, and unlike an easement it is not necessarily appurtenant to a dominant tenement but may be held as a right in gross, and as such may be assigned and dealt with as a valuable interest according to the ordinary rules of property.

And from *R & R Ginseng v Layton Bryson* [1997] BCJ No. 1011, a profit a prendre is described as:

> an equitable interest in the land greater than a personal license, which could be recognized in circumstances where the subsequent purchaser had full knowledge of the outstanding agreement and could be thereby stopped from prevailing over the tenant's interest.

What is defined as a profit is probably the key element here. Must a profit be something tangible that can be sold or can it be a something that is of general benefit such as preserving the environment? In the case of *Malamute Recreations Ltd. v. Outdoor Adventures @ Whistler Ltd* [1999] BCJ No. 2026, the grant of a license to conduct wilderness tours was found not to constitute an interest equivalent to a profit a prendre. This case shows that a benefit of a more general and intangible nature is unlikely to be characterized as a profit a prendre.

Historically, easements and profits a prendre were established as complementary tools to protecting interests in land. An easement dealt with interests that were more of the intangible variety while profits a prendre were meant to protect those taking

something from the land in order to make a profit. Traditionally, an easement has been the best legal tool to protect land from having anything done to it. A profit a prendre on the other hand, has been the best way to enforce the right to take resources away and to continue altering the land in some way.

To use a profit a prendre for conservation purposes would be going against the general law from both the past and the present, which only characterizes a profit a prendre in terms of a right to take a particular resource away from the land. If the conservation interest could be somehow tied to the right to use (or not use in the case of conservation) a particular resource from the land, it might be possible to for an organization to be granted a profit a prendre as was done for the Islands Trust Fund with regard to a right to harvest timber. However, no Canadian court has spoken on this issue as yet and unless the right somehow involves taking something from the land, it is unlikely that a Court would uphold it as a profit a prendre.

The other alternative, the conservation easement is better designed for land conservation. Unfortunately, the requirements for a common law easement are quite strict: there must be a dominant and a servient tenement; the common law easement over one of the pieces (the servient tenement) must benefit the other piece of land (the dominant tenement); and the right which is embodied in a common law easement must be capable of forming the subject matter of a grant of land.

As with profits a prendre, there has been no court case in Canada to show whether or not an easement could be used for conservation purposes. However, with the advent of the statutory easement/covenant, it seems unlikely that a court would recognize a new category of common law easement. It has proved reluctant to do so in the past and would probably consider the statutory easement a preferable way to achieve conservation objectives.

Right of First Refusal

This is an agreement between a landowner and a prospective buyer whereby the landowner agrees to allow that buyer the first opportunity to purchase his or her property. This means that if the landowner receives an offer, the holder of the right of first refusal has a specified amount of time (usually 30 to 120 days) to match that offer in order to

acquire the property. Rights of first refusal do not usually diminish property values. This may be a good option for neighbouring landowners who want to exchange rights in order to give each party added certainty. As well, landowners who want to make sure that their land continues to be used in the same way they have used it may simply convey the right of first refusal for a negligible amount to a 'friendly' buyer.

This can be a useful tool in providing continuity between landowners. If a new owner is unwilling to continue the conservation practices instituted by the current owner, it gives the holder of the right an opportunity to purchase the property and continue the conservation practices already in place. Of course this ultimately means that money for the purchase would have to be raised if no suitable owner could be found in time.

Option to Purchase

This is a temporary right to buy property at a pre-determined price. The holder of the option is not obligated to buy and the option exists until the specified time period has expired. In the meantime, the owner cannot sell to another buyer. An option generally costs more than a right of first refusal and usually lasts no longer than six months.

This can be a good option for land trusts because it provides them with time to find a conservation buyer or raise the money to buy the land in fee simple.

Purchase and Leaseback

This may be the most significant alternative to the conservation covenant in conserving land in the ALR. This involves the outright purchase of the land and then the leasing of it to whoever wants to live on or use the land.

The UK National Trust is the largest example of this kind of operation. The trust owns the land and leases it back to the farmers. The trust and the farmers develop a plan for the whole farm that will allow for agricultural use, but in an environmentally responsible way. The trust cannot influence farming practices as of right so conservation depends on the discussion between the trust and the farmer. Two examples of this in BC are the Ducks Unlimited purchase of Farquharson Farms in the Comox Valley and The Land Conservancy's purchase of Reynolds Ranch in the interior.

This can be quite a flexible tool. For instance, the purchaser would not have to lease the entire property. It may just decide to lease particular parcels and keep the areas marked for conservation. An example of this is the partial sale of Black Creek Ranch in BC to The Land Conservancy and the subsequent leaseback of some parts of the property for ranching purposes.

Outright purchase may be expensive for many organizations. Another option is to buy the land in installments. In Maryland, the National Capital Park and Planning Commission developed an 'option-agreement plan' whereby the Commission took title at the beginning and paid the landowner in installments over a ten-year period. This in turn meant that the landowner did not have to pay local property tax because title was transferred from the outset.

Pre-emptive Buying

If purchasing the parcel of land marked for conservation is impossible, another consideration is pre-emptive buying. This will only be possible in a limited number of cases, but could be a useful way of delaying the purchase of the main piece of land. This technique involves purchasing strategic parcels of land around the property to inhibit surrounding development.

This has been found particularly suitable for preserving wetlands. However, its applicability to land in the ALR seems fairly unlikely in most cases. Again, the ALR is already land protected from development and so a technique that focuses on inhibiting development is probably not of much use. Pre-emptive buying is simply an option to keep in mind for use in unique circumstances.

Contracts and Stewardship Agreements

These will only be enforceable between the parties to the agreements: most likely the landowner and a conservation organization. They cannot run with the land and be enforced against future owners. However, as a temporary measure to at least conserve land in the immediate future until something more lasting can be put in place, these agreements can be a useful tool.

The freedom to contract is one of the basic and underlying ideas of the common law legal system. This generally means that an agreement between a conservation organization and a landowner can contain just about anything as parties are free to choose their own terms and are generally not limited by the law.

An example of the kind of agreement that can be reached between an organization and farmers is the incentive program operated by the Delta Farmland and Wildlife Trust. The Greenfields Project is a cost-share program that reimburses farmers up to $45/acre when they plant cover crops over the winter. There is no limit on the number of acres for which a farmer can apply. The DF&WT offers similar incentives for in programs involving grassland set-asides, grass margins and various other environmentally beneficial practices. In order to overcome the difficulties with the tools mentioned above, those dedicated to conservation will probably have to employ a fair amount of ingenuity and creativity to protect the lands of BC.

Conclusion

The immense growth in popularity of the statutory easement/covenant over the last decade or so has left very little in the way of viable conservation alternatives with the exceptions of gifts and outright purchases. For those looking for alternatives because of the ALR, there is not a lot out there to go on. Researching alternatives throughout North America, the prevalence of the conservation easement has become apparent. This leaves a definite lack of alternatives when it comes to conservation tools that run with the land. This means that purchase is probably the best option because the fee simple interest means that the land can be controlled by the conservation organization itself. Aside from this, permanency in conservation is hard to come by. Hopefully, over time the legislation will be changed as politicians and people of the province see the need to protect the non-agricultural features of land in the ALR. In the meantime, projects like those established by the Delta Farmland and Wildlife Trust provide useful alternatives and ideas for ways in which wildlife and other kinds of conservation do not have to significantly inhibit agricultural use and can even contribute to its sustainability.