

## LEGAL TOOLS FOR MUNICIPALITIES TO CONSERVE ENVIRONMENTALLY SENSITIVE AREAS

(Adapted from the Environmental Law Centre's (Arlene Kwasniak) contribution to *Conserving Edmonton's Natural Areas: A Framework for Conservation Planning in an Urban Landscape* (Alberta Environmental Network and City of Edmonton 2001) (by Westworth Associates Environmental Ltd., The Dagny Partnership, the Land Stewardship Centre of Canada and the Environmental Law Centre)

### CATEGORY 1: DESIGNATION TOOLS

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Sale to and establishment by the federal government as a national park, park reserve, national historic site, migratory bird sanctuary or national wildlife area	<ul style="list-style-type: none"> <li>• High degree of protection</li> <li>• Difficult to undo</li> <li>• Flexible protection</li> <li>• Federal government carries out monitoring, upkeep and enforcement, less costly to City and developer</li> </ul>	<ul style="list-style-type: none"> <li>• Dependent on action from the federal government</li> <li>• Provincial government must agree</li> <li>• Costly to the federal government</li> <li>• Difficult to meet criteria</li> </ul>	<ul style="list-style-type: none"> <li>• See the <i>Canada National Parks Act</i>, the <i>Migratory Birds Convention Act</i>, the <i>Canada Wildlife Act</i></li> </ul>
Gift to and establishment by the federal government as a national park, park reserve, national historic site, migratory bird sanctuary or national wildlife area	<ul style="list-style-type: none"> <li>• High degree of protection</li> <li>• Difficult to undo</li> <li>• Flexible protection</li> <li>• Federal government carries out monitoring, upkeep and enforcement; less costly to City and developer</li> <li>• Tax advantages if a gift of capital property</li> <li>• Could be an ecological gift</li> </ul>	<ul style="list-style-type: none"> <li>• Dependent on action from the federal government</li> <li>• Provincial government must agree</li> <li>• For best tax benefits must qualify as an ecological gift</li> <li>• Costly to the land owner</li> <li>• Difficult to meet criteria</li> </ul>	<ul style="list-style-type: none"> <li>• See the <i>Canada National Parks Act</i>, the <i>Migratory Birds Convention Act</i>, the <i>Canada Wildlife Act</i></li> </ul>

<p>Sale to and designation by the provincial government as a provincial park, wildlands park, recreation area, ecological reserve, natural area, wilderness area or wildlife sanctuary</p>	<ul style="list-style-type: none"> <li>• Varying degrees of protection depending on designation</li> <li>• Some designations are difficult to undo</li> <li>• Flexible protection</li> <li>• Provincial government carries out monitoring, upkeep and enforcement; less costly to City and developer</li> </ul>	<ul style="list-style-type: none"> <li>• Dependent on action from the provincial government</li> <li>• Costly to the provincial government</li> <li>• Difficult to meet criteria</li> </ul>	<p>See the <i>Wilderness Areas, Ecological Reserves and Natural Areas Act</i>, the <i>Provincial Parks Act</i> and the <i>Wildlife Act</i></p>
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## CATEGORY 2: SALES AND PURCHASE TRANSACTIONS

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
<p>Sale to the City</p>	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible protection</li> <li>• High degree of protection if City agrees</li> </ul>	<ul style="list-style-type: none"> <li>• Costly for the City</li> <li>• Land owner must be willing to sell the land</li> <li>• City free to develop land in future</li> <li>• Does not bind future owners</li> </ul>	
<p>Sale of Conservation Easement to City or other Government Body</p>	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible protection</li> <li>• High degree of protection</li> <li>• Binds future owners</li> <li>• Less costly than sale of land itself</li> </ul>	<ul style="list-style-type: none"> <li>• Costly to the City or other government recipient</li> <li>• Easement must fit within purpose set out in s. 22.1(2) of EPEA</li> <li>• Easement can be terminated by agreement or by the Minister of Environment</li> </ul>	<p>The City, Alberta or government agencies qualify to accept a grant of a conservation easement.</p>
<p>Sale to an ENGO</p>	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible</li> <li>• Unlikely to be undone</li> <li>• ENGO carries out monitoring, upkeep and enforcement; less costly to City and developer</li> </ul>	<ul style="list-style-type: none"> <li>• Costly to the ENGO</li> <li>• Land owner must be willing to sell the land</li> </ul>	
<p>Sale of Conservation Easement to ENGO</p>	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Terms of the agreement can be modified by agreement</li> </ul>	<ul style="list-style-type: none"> <li>• Costly to the ENGO who must pay market value for the easement</li> <li>• Easement must fit within a purpose</li> </ul>	<p>The ENGO must be a "qualified organization" as set out in s. 22.1(1)(e)(iv) of EPEA.</p>

	<ul style="list-style-type: none"> <li>• Binds future owners</li> <li>• ENGO carries out monitoring, upkeep and enforcement; less costly to City and developer</li> </ul>	<ul style="list-style-type: none"> <li>• set out in s. 22.1(2) of EPEA</li> <li>• Easement can be terminated by agreement or by the Minister of Environment</li> </ul>	
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### CATEGORY 3: GIFTS

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Gift to City	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible protection</li> <li>• Tax benefits if a gift of capital property</li> <li>• Could be an ecological gift</li> <li>• High degree of protection if City agrees</li> </ul>	<ul style="list-style-type: none"> <li>• Costly to Owner</li> <li>• Land owner must be willing to give the land</li> <li>• For best tax benefits must qualify as an ecological gift</li> <li>• City free to develop land in future if not an ecological gift</li> <li>• Does not bind future owners if not an ecological gift</li> </ul>	<ul style="list-style-type: none"> <li>• An ecological gift must be land that is certified by the federal Minister of the Environment to be ecologically sensitive land.</li> <li>• A sale, transfer or land use change of land donated as an ecological gift without the approval of the federal Minister of Environment will give rise to a tax penalty</li> </ul>
Gift of Conservation Easement to City or other Government Body	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible protection</li> <li>• High degree of protection</li> <li>• Binds future owners</li> <li>• May be tax deductible if capital property</li> <li>• Could be an ecological gift</li> <li>• Less costly than sale of land itself</li> </ul>	<ul style="list-style-type: none"> <li>• Easement must fit within a purpose set out in s. 22.1(2) of EPEA</li> <li>• For best tax benefits must qualify as an ecological gift</li> <li>• Costly to land owner</li> </ul>	An ecological gift can be an easement if certified by the Minister of the Environment to be ecologically sensitive land the conservation and protection of which is important to the preservation of Canada's environmental heritage.
Gift to an ENGO	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Certain</li> <li>• May be tax deductible if capital property</li> <li>• Could be an ecological gift</li> </ul>	<ul style="list-style-type: none"> <li>• Costly to Owner who gives up the difference between market value of the land and the value of any tax deduction for a gift to charity</li> <li>• For best tax treatment must</li> </ul>	An ecological gift must be land that is certified by the Minister of the Environment to be ecologically sensitive land. The beneficiary of the gift must be a registered charity

	<ul style="list-style-type: none"> <li>• ENGO carries out monitoring, upkeep and enforcement; less costly to City and developer</li> <li>• High degree of protection</li> </ul>	<ul style="list-style-type: none"> <li>• qualify as an ecological gift</li> <li>• Land owner must be willing to give the land</li> </ul>	one of the main purposes of which is the conservation and protection of Canada's environmental heritage.
Gift of Conservation Easement to ENGO	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Terms of the agreement can be modified by agreement</li> <li>• May be tax deductible if capital property</li> <li>• Could be an ecological gift</li> <li>• High degree of protection</li> <li>• ENGO carries out monitoring, upkeep and enforcement; less costly to City and developer</li> <li>• Binds future owners</li> </ul>	<ul style="list-style-type: none"> <li>• Easement must fit within a purpose set out in s. 22.1(2) of EPEA</li> <li>• For best tax treatment must qualify as an ecological gift</li> </ul>	The ENGO must be a "qualified organization" as set out in s. 22.1(1)(e)(iv) of EPEA.

#### **CATEGORY 4: PERSONAL, TERM AND COMMON LAW PARTIAL INTERESTS**

<b>TOOL</b>	<b>ADVANTAGES AND BENEFITS</b>	<b>DISADVANTAGES AND COSTS</b>	<b>COMMENTS</b>
Voluntary action by owner to refrain from or limit development	<ul style="list-style-type: none"> <li>• Simple</li> </ul>	<ul style="list-style-type: none"> <li>• Easy to undo</li> <li>• Expensive to land owner</li> <li>• Does not bind future owners</li> <li>• Limited protection</li> </ul>	
Lease to City	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible</li> <li>• Unlikely to be undone during term of lease</li> <li>• City carries out monitoring, upkeep and enforcement</li> </ul>	<ul style="list-style-type: none"> <li>• Could be costly to City</li> <li>• Leases usually must be of an entire parcel and not to part of a parcel</li> <li>• Land owner must be willing to lease land</li> <li>• No protection after term expires</li> </ul>	Must be registered at Land Titles if for over three years in order to bind future purchasers
Lease to ENGO	<ul style="list-style-type: none"> <li>• Simple</li> <li>• Flexible</li> <li>• Unlikely to be undone during term of lease</li> </ul>	<ul style="list-style-type: none"> <li>• Could be costly to ENGO</li> <li>• Leases usually must be of an entire parcel and not to part of a parcel</li> </ul>	Must be registered at Land Titles if for over three years in order to bind future purchasers

	<ul style="list-style-type: none"> <li>• ENGO carries out monitoring, upkeep and enforcement; less costly to City</li> </ul>	<ul style="list-style-type: none"> <li>• Land owner must be willing to lease the land</li> <li>• No protection after term expires</li> </ul>	
License to City or ENGO	<ul style="list-style-type: none"> <li>• Owner could give a license to enter onto land to carry out a conservation program</li> </ul>	<ul style="list-style-type: none"> <li>• Is not an interest in land, so does not bind future purchasers</li> <li>• Could be costly to City or ENGO</li> <li>• No protection after term expires</li> </ul>	
Profit a Prendre to City <i>(right to enter onto land and take some "profit" of the soil)</i>	<ul style="list-style-type: none"> <li>• Owner could give City exclusive right to trees or other vegetation while City holds right, no one else may remove vegetation</li> <li>• City carries out monitoring, upkeep and enforcement</li> <li>• High degree of protection if rights not exercised</li> <li>• Could be for a term or be granted in perpetuity</li> </ul>	<ul style="list-style-type: none"> <li>• Could be costly to City to purchase right</li> <li>• Conservation goal only realized if City chooses not to exercise right</li> <li>• Land owner must be willing to sell a profit a prendre</li> </ul>	Profits a prendre are interests in land and bind subsequent purchasers if registered on title
Profit a Prendre to ENGO <i>(right to enter onto land and take some "profit" of the soil)</i>	<ul style="list-style-type: none"> <li>• Owner could give ENGO exclusive right to trees or other vegetation while ENGO holds right, no one else may remove vegetation</li> <li>• ENGO carries out monitoring, upkeep and enforcement so less costly to City</li> <li>• High degree of protection if rights not exercised</li> <li>• Could be for a term or be granted in perpetuity</li> </ul>	<ul style="list-style-type: none"> <li>• Could be costly to ENGO to purchase right</li> <li>• Conservation goal only realized if ENGO chooses not to exercise right</li> <li>• Land owner must be willing to sell a profit a prendre</li> </ul>	<ul style="list-style-type: none"> <li>• Profits a prendre are interests in land and bind subsequent purchasers if registered on title</li> <li>• May exist <i>in gross</i>, meaning, no need for a dominant tenement as in easements and restrictive covenants</li> </ul>
Common law Easement from owner regarding neighbouring land	<ul style="list-style-type: none"> <li>• Binds future owners</li> <li>• May contain positive or negative covenants</li> <li>• Less expensive than sale of land itself</li> <li>• Could be for a term or be granted in perpetuity</li> </ul>	<ul style="list-style-type: none"> <li>• Easement on a parcel (servient tenement) must benefit another land (dominant tenement)</li> <li>• Can be undone by owner of the dominant tenement</li> </ul>	See ss.71 & 72 of <i>Land Titles Act</i>

Restrictive Covenant regarding neighbouring land	<ul style="list-style-type: none"> <li>• Binds future owners</li> <li>• Less expensive than sale of land itself</li> <li>• Could be for a term or be granted in perpetuity</li> </ul>	<ul style="list-style-type: none"> <li>• Restriction on one parcel (servient tenement) must benefit another parcel (dominant tenement)</li> <li>• Covenants can only be negative and not positive</li> <li>• Can be undone by owner of dominant tenement</li> <li>• Can be removed by the Court in the public interest</li> </ul>	See s. 52 of <i>Land Titles Act</i>
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### **CATEGORY 5: ADMINSTRATIVE AND PLANNING TOOLS, TRADITIONAL**

<b>TOOL</b>	<b>ADVANTAGES AND BENEFITS</b>	<b>DISADVANTAGES AND COSTS</b>	<b>COMMENTS</b>
Municipal Reserve required by City	<ul style="list-style-type: none"> <li>• May be required by the subdivision authority as a condition for subdivision</li> <li>• Simple</li> <li>• Not costly to municipality</li> </ul>	<ul style="list-style-type: none"> <li>• Is only triggered by an application for subdivision</li> <li>• Amount of land is limited by ss 666 and 668 of <i>Municipal Government Act</i></li> </ul>	<ul style="list-style-type: none"> <li>• See ss. 661 - 670 of <i>Municipal Government Act</i></li> <li>• Municipal reserve is dedicated without compensation</li> </ul>
Environmental Reserve required by City	<ul style="list-style-type: none"> <li>• May be required by the subdivision authority as a condition for subdivision</li> <li>• High degree of protection</li> <li>• Simple</li> <li>• Difficult to undo</li> <li>• Not costly to municipality</li> </ul>	<ul style="list-style-type: none"> <li>• Is only triggered by an application for subdivision</li> <li>• Must comply with s. 664(1) of MGA so not apply to all environmentally sensitive land</li> </ul>	<ul style="list-style-type: none"> <li>• See s. 664 of <i>Municipal Government Act</i></li> <li>• Environmental reserve is dedicated without compensation</li> </ul>
Environmental Reserve Easement required by City	<ul style="list-style-type: none"> <li>• If the owner and city agree can replace the environmental reserve</li> <li>• High degree of protection</li> <li>• Simple</li> <li>• Flexible</li> <li>• Not costly to municipality</li> </ul>	<ul style="list-style-type: none"> <li>• Is only triggered by an application for subdivision</li> <li>• Costly to the developer as the easement is granted without compensation</li> <li>• Must comply with s. 664 of MGA so not apply to all environmentally sensitive land</li> </ul>	<ul style="list-style-type: none"> <li>• See s. 664(2) &amp; (3) of <i>Municipal Government Act</i></li> <li>• Environmental reserve easement is dedicated without compensation</li> <li>• Title stays in name of developer</li> </ul>

Natural Area Land Use Designation under Land Use Bylaw of City and other exercising of municipal authority involving downzoning to regulate land use	<ul style="list-style-type: none"> <li>• Uses the City Land Use Bylaw and zoning powers</li> <li>• Simple</li> <li>• Flexible</li> <li>• Binds future owners unless changed by City</li> <li>• If a legitimate use of zoning powers no compensation is payable</li> </ul>	<ul style="list-style-type: none"> <li>• May be politically difficult for the City</li> <li>• Requires the definition of new land use category</li> <li>• Can be changed by City</li> <li>• Downzoning must be in pursuit of long term planning objectives</li> </ul>	<ul style="list-style-type: none"> <li>• See s. 640 of <i>Municipal Government Act</i></li> <li>• Caselaw has shown that there is ample scope to downzone land for protection of environment without having to pay any compensation. See F. Laux, <i>Planning Law and Practice in Alberta</i>, Second Edition, Chapter 8.</li> </ul>
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### **CATEGORY 6: ADMINISTRATIVE/PLANNING NOVEL**

<b>TOOL</b>	<b>ADVANTAGES AND BENEFITS</b>	<b>DISADVANTAGES AND COSTS</b>	<b>COMMENTS</b>
Conservation easement instead of environmental or municipal reserve	<ul style="list-style-type: none"> <li>• Could be more flexible than municipal or environmental reserve</li> </ul>	<ul style="list-style-type: none"> <li>• Can be discharged by the Minister of Environment in the public interest</li> <li>•</li> </ul>	<ul style="list-style-type: none"> <li>• See <i>Environmental Protection and Enhancement Act</i>, s. 22.1</li> <li>• Title remains in the landowner</li> </ul>
Formal transfer of development potential by City to developer from one parcel to another	<ul style="list-style-type: none"> <li>• Equitable</li> <li>• Cost Effective</li> <li>• Complex if possible</li> <li>• Flexible</li> <li>• Could have high degree of protection</li> </ul>	Would require legislative changes	Is not specifically anticipated by existing legislation
Informal transfer of development potential by City to developer from one parcel to another	<ul style="list-style-type: none"> <li>• Equitable</li> <li>• Cost effective</li> <li>• Simple</li> <li>• Flexible</li> <li>• Could have high degree of protection</li> </ul>	<ul style="list-style-type: none"> <li>• May be legally challenged if part of process is City taking reserves in excess of those technically allowed by law in exchange for approval of other development</li> <li>• Is voluntary</li> <li>• Owing to novelty of tool, may be difficult to get City' staff and</li> </ul>	<ul style="list-style-type: none"> <li>• "Informal" means that current legislation does not specifically authorize transfers of development potential</li> <li>• "Potential" is used instead of "right" since all relevant development is subject to municipal regulatory approvals</li> </ul>

		Council "on-side"	
Bareland Condominium <i>(unit owners own a common interest in a portion of parcel)</i>	<ul style="list-style-type: none"> <li>• Flexible</li> <li>• Allowed by current legislation</li> <li>• Unit owners manage natural area for mutual benefit</li> <li>• Could use in conjunction with a conservation easement over common area to better protect natural values</li> </ul>	<ul style="list-style-type: none"> <li>•</li> </ul>	<i>See Land Titles Act and Condominium Properties Act</i>
Bonusing <i>(City approving authority provides added subdivision or development potential, for example, density, in return for protecting an area.)</i>	<ul style="list-style-type: none"> <li>• Flexible</li> <li>• Unlikely to be undone</li> </ul>	<ul style="list-style-type: none"> <li>• May be legally challenged if part of process is City taking reserves in excess of those technically allowed by law in exchange for approval of other development, e.g. greater density</li> <li>• Is voluntary</li> <li>• Owing to novelty of tool, may be difficult to get City' staff and Council "on-side"</li> </ul>	
Building scheme restrictive covenants	<ul style="list-style-type: none"> <li>• Binds future owners</li> </ul>	<ul style="list-style-type: none"> <li>• Covenants may only be negative and not positive</li> <li>• Can be removed by the Court in the public interest</li> </ul>	Has been used in Strathcona County in a subdivision to protect natural values in conjunction with conservation easements



## CATEGORY 7: REGULATORY AND ADMINISTRATIVE TOOLS

TOOL	ADVANTAGES AND BENEFITS	DISADVANTAGES AND COSTS	COMMENTS
Municipality's general bylaw making	<ul style="list-style-type: none"> <li>• Could regulate many aspects of land uses (e.g. Surrey BC has a tree cutting bylaw)</li> <li>• Can protect land before subdivision and development stage</li> <li>• Flexible protection</li> <li>• City must carry out monitoring, upkeep and enforcement</li> </ul>	<ul style="list-style-type: none"> <li>• Must have Council on side</li> <li>• Could be unpopular with landowners</li> <li>• Could be challenged if conflicts with Provincial regulation or goes beyond municipal jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>• See the Part I, Division 1, <i>Municipal Government Act</i></li> </ul>
Municipal taxation	In limited circumstances could be used to lower or exempt taxes where landowner helps realize natural area municipal policy	Exemption or reduction only allowed by <i>Municipal Government Act</i> in limited circumstances	