

S B

123

HOUSE COMMITTEE REPORT

(9)

Date Referred: April 19, 1989

FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 4-19-89

The RESOURCES Committee considered:

CSSB 123 (JUDICIARY)

CS FOR SENATE BILL NO. 123 (Judiciary)

[UNIFORM CONSERVATION EASEMENT ACT]

"An Act adopting the Uniform Conservation Easement Act; and providing for an effective date."

RECOMMENDATIONS:

- [] be replaced with _____ [] the same title
[] have attached amendment(s) [] a new title
[] do pass
[] do not pass
[] no recommendation
[] individual recommendations
[] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

- [] fiscal impact _____
[] zero fiscal note HRC
[] zero with analysis _____

- [] fiscal note(s) _____
[] zero fiscal note(s) _____
[] zero fn/analysis _____

SIGNING DO PASS:

[Handwritten signatures]

SIGNING:

(Check approp. column)

	Do Not Pass	No Rec	Amend
<i>[Signature]</i>			<input checked="" type="checkbox"/>

[Handwritten signature]
Chairman's Signature

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: DNR
 Title: Act adopting the Uniform Conservation Easement Act; e.d. BRU: _____
 Sponsor: Senator Sturgulewski Components: _____
 Requestor: House Resources Committee

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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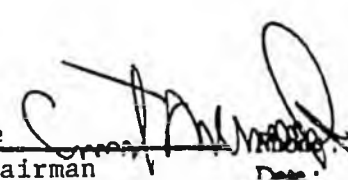
FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS : (Attach a separate page if necessary)

Prepared by: House Resources Committee  465-4944
 Division: Representative Curt Menard, Chairman Date: 4/19/89

Approved by Commissioner: _____ Date: _____
 Agency: _____

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

HOFSTRA UNIVERSITY

HEMPSTEAD · NEW YORK 11550

SCHOOL OF LAW

FACULTY

March 9, 1989

Ms. Kerry Hoffman
Anchorage Historic Properties, Inc.
524 West 4th Avenue
Anchorage, Alaska 99501

Re: Conservation/Preservation Easement Legislation

Dear Ms. Hoffman:

As we discussed on the telephone yesterday, I have been involved with legislation of the above nature for over 10 years and have written substantially in the field (see Chapter 34A, Volume III of Powell on Real Property). Frequently, concern is expressed with respect to the impact of such legislation on the real property tax base. Such fears have proven to be groundless. Perhaps the best proof is the experience of the 45 states that have some form of conservation easement legislation. In New York, the statute has been in effect for five years and no problem has arisen in this respect. Many states have had conservation easement statutes for between 10 and 20 years, and I know of none in which diminution of the tax base has proven to be a problem.

The reasons are varied why conservation easements do not present a substantial fiscal problem for local governments. They include:

a) As a general proposition, a limited number of property owners are willing to make the substantial economic sacrifice which results from restricting the use of their land or structures on the land. Visions of property owners lining up for the privilege of terminating or limiting their development rights are unrealistic.

b) To the extent that conservation easements limit the use or development of real property, they also limit the financial demands for services from local government. Property that is not developed sends no children to school, creates no sewage or garbage, and requires little police protection. Historic structures protected by preservation easements cannot be replaced with more intensive development that would make greater demands on the community.

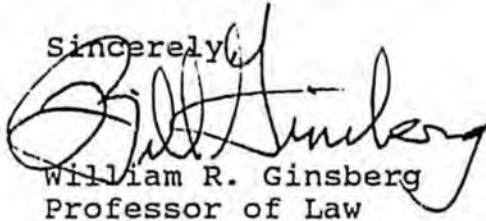
c) Overall, conservation and preservation easements tend to enhance the attractiveness of a community and the real property

within a community. They create offsetting values and economic benefits that compensate for the loss of any real property taxes from the specific parcels that are burdened by the restrictions.

The question of the impact of conservation easements came up in New York State prior to the passage of our conservation easement statute (Article 49 of the New York Environmental Conservation Law). I enclose a copy of a letter that I wrote in 1982 when the legislature was considering enactment. While the letter is addressed mainly toward open space uses, it also applies to easements which protect historic structures.

Please let me know if I can be of any further assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill Ginsberg".

William R. Ginsberg
Professor of Law

WRG:mkh
Enc.

HOFSTRA UNIVERSITY
HEMPSTEAD · NEW YORK 11550

SCHOOL OF LAW

FACULTY

March 18, 1982

Senator John Dunne
Room 711
Legislative Office Building
Albany, New York 12247

Attention: Thomas Faist, Esq.

Re: Conservation Easement Legislation S. 6753-A

Dear Mr. Faist:

I appreciate your taking the time to discuss this matter with me on the telephone the other day. As I indicated to you, I believe that the legislation will be useful in providing an additional tool to the private sector for the preservation of open space. Such private sector activity complements state and local expenditures for such purposes and will be of substantial economic benefit. The advantages of the legislation are, I believe, easy to appreciate and I will not dwell on them further. Instead, I will address myself to the major issue raised in opposition, namely the fear of erosion of the local tax base.

During my professional career in the practice of law, in government, and as a law professor, a major aspect of my work has been in the field of land use, real property, and real property taxation. I am, therefore, fully aware of the ramifications of the proposed legislation. Realistically, it is extremely unlikely that it will result in a rush of private property owners to give up their development rights. Federal tax benefits will result only if such rights are given up in perpetuity. Few property owners will be willing to make the substantial long-term economic sacrifice which would result from restricting the use of their land. In addition, in most of the taxing jurisdictions in the State, the major portion of the tax base is improvements rather than land. Use of the mechanism provided for in the statute may result in a minor diminution of a small portion of a community's tax base.

Thomas Faist, Esq.

March 18, 1982

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This minor loss should, in the normal course of events, be offset by increased values resulting from open space preservation. Also, reduction in revenue would be offset in the long run by decreased pressure on community expenditures. Open space sends few children to school, and reduces the cost of police and fire protection.

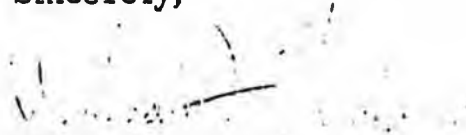
A community amenity, such as open space, has ripple effects in terms of its benefits. It can maintain and enhance the value of properties a considerable distance away. Thus, over a period of time, property values in any area will reflect the desirability of the area which will be based upon many factors, one of which is open space preservation.

It would, of course, be nonsensical to tax the non-profit organizations which are receiving the restrictive covenants. They are not receiving anything of economic value to them. On the contrary, they may be incurring some expense in order to administer and monitor the covenants. They will be performing a public service, benefiting the state and the community, and it would strike at the heart of the legislative purpose to penalize them for doing so.

While it is not determinative, it is also comforting to know that other states have adopted similar legislation. These include Colorado, Connecticut, Delaware, Florida, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Oregon, Rhode Island and Utah. A useful list with citations is at pages 567-577 of the Fall, 1979 issue of the Real Property, Probate and Trust Journal, at the end of an excellent article on the subject.

Please feel free to call if you have any questions or if I may be of further assistance.

Sincerely,


William R. Ginsberg
Professor of Law

WRG/gms

Alaska State Legislature



SENATOR
ARLISS STURGULEWSKI
Senate President Pro Tempore
Chairman, Senate Rules Committee

2957 SHELDON JACKSON STREET
ANCHORAGE, ALASKA 99508

While in Juneau
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3818

Senate

M E M O R A N D U M

07 April 1989

TO: Representative Curt Menard
Chair, House Resources Committee

FROM: Senator Arliss Sturgulewski *AS*

I respectfully request that you schedule a hearing in your committee as soon as is practicable (pending referral from the House C&RA Committee) on Senate Bill 123 "An Act adopting the Uniform Conservation Easement Act; and providing for an effective date"

A conservation easement is a voluntary legal agreement made by a private property owner. The agreement limits, for the benefit of the public, the type or amount of use of a property. It is a restriction on the use of real estate.

This act is necessary because common law does not allow such a restriction on the use of land to be a perpetual restriction unless the recipient of the easement owns an adjoining piece of land.

This act, adopted by 46 states, is a Uniform act. Two changes to the Uniform Act were made in the Senate Judiciary Committee.

The first change to the original bill was the addition of (e) to Sec. 34.17.010 stating that neither the state nor a municipality may establish a conservation easement by eminent domain.

The second change was the addition of a provision to Title 29 which requires land upon which there is a conservation easement to be assessed by a municipality both as though there were no easement and as though there were. In

addition, the owner of property on which there is a conservation easement is subject to pay any tax liability that was abated because of the easement if the property should be used contrary to the easement.

The Act itself does not impose restrictions or affirmative duties; it allows the private parties to enter into consensual arrangements with a charitable organization or a governmental body to protect land and buildings without the encumbrance of certain potential common law impediments.

I will appreciate your hearing this bill soon. Please call me or Melissa Fouse of my staff if you have any questions.

STEVE COWPER, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

400 WILLOUGHBY AVE.
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400

March 6, 1989

The Honorable Jan Faiks
Chair, Senate Judiciary Committee
P.O. Box V
Juneau, AK 99811

Dear Senator Faiks:

Subject: Senate Bill 123, Uniform Conservation Easement Act.

Position: The department does not object to this bill and at the present time has no plans or funding to purchase conservation easements. The bill allows for the preservation and conservation of natural and historic resources for the public benefit while maintaining private ownership of the property.

Background: SB 123 has support from historic preservation and natural history conservation groups. The bill provides a process which allows conservation easements to be donated or sold to a governmental or charitable non-profit organization.

Common land law does not allow a conservation easement restriction to attach to land in perpetuity. It is based on model legislation drafted by the National Conference of Commissioners on Uniform State Laws. Alaska is one of four states without a conservation easement law.

Conservation easements will provide public land managers with an alternate acquisition method to employ in appropriate circumstances so as to benefit both the private and public sectors. It is a cost-effective way to protect historic and natural values on private lands without the cost of fee simple purchase of the land. The owner is compensated through purchase of the easement or the ability to deduct the value of the easement from federal income taxes as a charitable gift. Because the property remains in private ownership, it remains on local tax rolls, and the public does not take on the responsibility of maintenance and operation of the property.

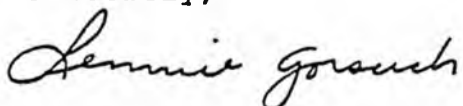
Senator Faiks

- 2 -

March 6, 1989

Conservation easements can be used to protect public values in historic structures and archaeological sites, natural, scenic and open spaces, fishing streams or watershed or critical waterfowl nesting areas.

Sincerely,



Lennie Gorsuch
Commissioner

cc: Bill Sponsor
Committee Members
Bob Evans
Denby Lloyd
Gary Gustafson
Neil Johannsen
Judith Bittner

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 123
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: 6-Mar-89
Title: An Act adopting the Uniform Conservation Easement Act
Sponsor: Sturgulewski
Requestor: Senate Judiciary

Agency Affected: Natural Resources
BRU: Parks Management
Land & Water Mgmt
Components: Parks Management
Land & Water Mgmt

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0					

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

LO

Prepared by: Larry Ostrovsky Phone: 465-2400
Division: Commissioner's Office Date: 6-Mar-89

Approved by Commissioner: Lennie Gorsuch Date: 6-Mar-89
Agency: Department of Natural Resources

- Distribution (by preparer) :
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Uniform Conservation
Easement Act
Sponsor: Sturgulewski
Requestor: Senate Judiciary

Agency Affected: Fish and Game
BRU: Habitat
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Roland Shanks
Division: Commissioner's Office

Phone: 465-4100
Date: 3/15/89

Approved by Commissioner: *Donna Pallinworth*
Agency: Fish and Game

Date: 3.15.89

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

SB _____ -- ALASKA CONSERVATION EASEMENT BILL

WHAT WOULD THE
BILL DO?

SB _____ would provide the legal process to create conservation easements on private property in Alaska.

WHAT IS A
CONSERVATION
EASEMENT?

A conservation easement is a legal agreement made voluntarily by a private property owner to limit, for the benefit of the public, the type or amount of use of a property. The easement may be donated or it may be sold. An easement is created to protect natural, scenic, open space, historical or cultural values. The easement is accepted, held and monitored by a governmental agency or an appropriate nonprofit corporation. Simply put, the easement is a restriction on the use of real estate.

WHAT KIND OF
EASEMENTS ARE
WE TALKING
ABOUT?

Two types of easements which would be frequently used are Historic Easements and Wildlife Conservation Easements. A typical Historic Easement would be the voluntary written agreement of the owner of a historic building to preserve the historic character of the building and not to replace it with any other structure. A Wildlife Conservation Easement might provide for the perpetual preservation of the watershed of a particularly unique fishing stream or a critical waterfowl nesting area.

IS THIS A
NEW IDEA?

No, conservation easements were first used in the 1880s. Alaska is one of four states without a conservation easement law to take advantage of the land management tool which has been called a "terrific alternative to fee acquisition."

WHY DO WE NEED
A LAW TO DO
THIS?

An Alaska conservation easement law is necessary because the common laws that govern land do not allow such a restriction to attach to the land in perpetuity in those instances where the Grantee of The Easement does not own an adjoining parcel of land. The new law would remove that restriction to allow certain charitable and governmental organizations to have enforceable easements without owning the adjoining land.

SB ¹⁸ is essentially verbatim from the Uniform Conservation Act which was drafted as a model law by the National Conference of Commissioners on Uniform State Laws.

WHAT ARE THE
PUBLIC
ADVANTAGES?

A conservation easement provides a cost-effective way to protect public values of private land. These values may be natural, historic, scenic or cultural. It allows such values to be protected without the cost of fee simple purchase of land. The land stays in private ownership.

Because the land stays in private hands, it also stays on the local tax rolls. The assessed valuation may increase or decrease depending on the nature of the easement. For example a historic easement may make the property more valuable for tourist related use while a critical habitat easement would probably reduce value because development would be prohibited.

Furthermore, since the property stays in private ownership the public does not incur the management costs that would come if the lands or buildings were publicly owned. While the public holder of the easement must monitor the agreement this would be an extremely modest cost.

WHY WOULD A PRIVATE
LANDOWNER WANT
TO CREATE AN
EASEMENT?

The landowner who donates a conservation easement, to a public agency or qualified charity, can claim federal income tax deductions for the charitable gift. In the alternative the landowner may sell the easement for what he considers a fair price. All such transactions * would be voluntary. No governmental taking through eminent domain would be involved.

Estate taxes can also be reduced through the donation of an easement. Property restricted by a perpetual conservation easement either before the landowner's death or executed as an element of his/her will, must be valued in the estate at its restricted value, resulting in lower taxes.

HOW LONG DOES
AN EASEMENT LAST?

A conservation easement would restrict the land for only as long as agreed to by the owner.

WHAT ABOUT
PUBLIC ACCESS?

Understandably, most landowners want to retain an ability to control access to land that is still theirs. The landowner and the grantee of the easement may, however, provide for public access if the landowner so agrees.

IN SUMMARY: Conservation easements are flexible, adaptable agreements tailored to the needs of the property owner and the character of the property. Specific public benefits are provided -- without the expense of purchase and while maintaining the land in private ownership.

Keeping downtown in shape

deal insures facade of Wendler Building

RONZELLAR
see Business Writer

The owner of a downtown landmark acquired from the Municipality of Anchorage in 1984 donated the building's exterior and air rights to a city-ated, non-profit corporation. Bill Mundy, owner of the Landmark Building at 400 D St., said terms of the agreement with Anchorage Historic Properties require him to maintain the facade and to insure the building's replacement, among other conditions. In return, he will receive a tax credit for the donation, known as a "historic preservation and easement," and retain ownership of the building's interior.

Mundy made the donation just before the end of the 1985 tax year. The size of the tax benefit will not be known until an appraisal is done within the next few months to see how the donation affects the property's value, he said.

Barry Hoffman, executive director of Anchorage Historic Properties, said the potential tax benefit is sizable, and the corporation hopes the transaction will interest in easements to preserve the city's historic buildings.

The Wendler Building was owned by merchant A.J. Wendler in 1915 as a grocery store with its quarters on the second floor. The grocery, situated at 1st Avenue and 3 Streets, See Building, page B-1

Building

Continued from page B-1

was one of 82 businesses that opened on the city's main street the same year.

The business was converted to a restaurant and bar by Wendler's daughter and was renamed Club 25. In 1983, the property was sold and the building donated to the city on the condition that it be moved. A renovation plan by a partnership that included Mundy was accepted by the city, which spent \$47,000 to move the building to its present location.

Another structure, called the Landmark Building, was built behind the historic building to boost its available space. Mundy said a portion of the Landmark's second floor was designed to be used with the Wendler Building as a restaurant — a plan he still hopes to pursue when the Anchorage economy improves.

Donation of the air rights means no structure taller than the existing buildings can be built on the site.

The insurance provision requires that if the Wendler Building burns or is destroyed by an earthquake or some other disaster, proceeds must be used to build a replica, or to situate and restore another historic building on the site.

For example, he said, Anchorage Historic Properties might want to move one of several other buildings now in storage at the Cook Inlet Pretrial Facility if the Wendler Building were destroyed.

Mundy said tax incentives for historic buildings changed along with other tax laws in 1986, and it is doubtful the renovation project could have been done under current rules, which limit an individual's use of rehabilitation investment credits.

Hoffman said changes to restore some of the tax benefits are scheduled for consideration by Congress, but sizable benefits remain under present laws for businesses owning historic structures.



Bill Mundy will get a tax benefit for donating the Wendler Building's exterior to a non-profit.

To be eligible for tax benefits, landmark buildings must be listed on the National Register of Historic Places. About a dozen Anchorage buildings are on the registry, she said.

Anchorage Historic Properties plans an effort this year to see more buildings listed on the

registry and eligible for listing if owners decide to pursue the designation.

Anchorage Historic Properties Inc. was formed by a \$1.7 million voter initiative as part of the city's Project 33 program that also led to the construction of parks and public buildings.

The corporation uses the money as an endowment to protect historic properties and to operate a revolving loan fund. Hoffman said the organization is working to be self-supporting through earned revenues, memberships, contributions and project grants.

Introduced by: Anchorage Municipal Assembly

Date: November 16, 1988

RESOLUTION OF THE ALASKA MUNICIPAL LEAGUE

RESOLUTION NO. _____

A RESOLUTION REGARDING THE HISTORIC EASEMENT
ENABLING ACT AND UNIFORM CONSERVATION EASEMENT
ACT

WHEREAS, historic preservation has many benefits to a community both tangible and intangible, and

WHEREAS, historic preservation easements are one tangible historic preservation strategy, and

WHEREAS, the proposed Uniform Conservation Easement Act will enable governments and qualified nonprofit organizations to acquire/receive easements on real property that are of unlimited duration, and

WHEREAS, the inherited English common law of real property leaves doubt about the enforceability of historic easements which are not tied to an adjoining property, and

WHEREAS, the proposed Uniform Conservation Easement Act removes that doubt.

NOW, THEREFORE, BE IT RESOLVED that the Alaska Municipal League supports the enactment of the Uniform Conservation Easement Act.

This resolution was passed by the governing body of Municipality of Anchorage on November 15, 1988.

STATE OF ALASKA
THE LEGISLATURE

HOUSE STATE CAPITOL
JUNEAU ALASKA 99801
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

January 24, 1989

SUBJECT: Uniform Conservation Easement Act
(SB 123)

TO: Senator Arliss Sturgulewski

FROM: Richard A. Bradley
Legislative Counsel

Melissa has asked that I comment on the purposes behind this uniform act-- that is, what are those restrictions that the uniform act seeks to address?

I have copied the material from the Uniform Laws Annotated that addresses these questions; see particularly the "prefatory note." But because this uniform act seems to contain an unusual amount of esoteric lawyer-talk, I will attempt a brief user's guide to the Uniform Conservation Easement Act.

The title explains part of what is being attempted; the idea is that valuable natural or historic property now in private hands might be protected for future generations by granting a "conservation easement" in the property to a third party, either a nonprofit corporation dedicated to the protection of that kind of property or government. See sec. 34.17.060(2). The holder of the easement can then sue, if necessary, to see that the property is maintained according to the terms of the easement.

But it has been necessary to change the rules of the common law to accomplish this purpose.

The usual understanding of an easement is that it relates to "an interest in land." The problem with conservation easements is that the interest held does not relate to any such "interest in land." The holder of the easement has no right to use the land for any purpose; it merely seeks to regulate the use by others.

The prefatory note states that these kinds of controls over land are typically cast in the suggested three common law forms: easements, covenants real, and equitable servitudes.

Senator Arliss Sturgulewski
Page 2
January 24, 1989

The note suggests that easements are generally well understood by courts but covenants and servitudes less so. And the note suggests that the solution to these understandings (or possible misunderstandings) would not be the creation of a fourth and new form of interest, by whatever name.

The suggested solution is to take the easement, the well-understood mechanism, and remove the common law limitations on its use to solve the problem of conservation easements. These common law problems are stated in Sec. 34.17.030.

If I may be of further assistance, please advise.

RAB:kb
wkk1/071

Enclosure

UNIFORM LAWS ANNOTATED

Volume 12
Civil Procedural and Remedial Laws

1988
Cumulative Annual Pocket Part

Replacing 1987 pocket part in back of volume

DIRECTORY OF UNIFORM ACTS AND CODES
with
TABLES AND INDEX

See special pamphlet
which accompanies these Pocket Parts

ST. PAUL, MINN.
WEST PUBLISHING CO.

RECEIVED

12 U.L.A.—Civil Proc. & Rem. Laws—1
1988 P.P.

MAR 08 1988

LEGISLATIVE AFFAIRS
Reference Library

20

UNIFORM CONSERVATION EASEMENT ACT

Table of Jurisdictions Wherein Act Has Been Adopted

Jurisdiction	Laws	Effective Date	Statutory Citation
Arizona	1985, c. 171	4-18-1985*	A.R.S. §§ 33-271 to 33-276.
District of Columbia	D.C.Law 6-113	5-16-1986	D.C.Code 1981, §§ 45-2601 to 45-2605.
Indiana	1984, H.1074	9-1-1984	West's A.I.C. 32-5-2.6-1 to 32-5-2.6-7.
Maine	1985, c. 395	6-21-1985*	33 MRSA §§ 476 to 479-B.
Minnesota	1985, c. 232	5-24-1985*	M.S.A. §§ 84C.01 to 84C.05.
Mississippi	1986, c. 404	3-27-1986	Code 1972, §§ 89-19-1 to 89-19-13.
Nevada	1983, c. 291	5-13-1983*	N.R.S.111.390 to 111.400.
Texas	1983, c. 434	9-1-1983	V.T.C.A., Natural Resources Code §§ 183.001 to 183.005.
Wisconsin	1981, c. 261	4-27-1982	W.S.A. 700.40.

* Date of approval.

Historical Note

The Uniform Conservation Easement Act was approved by the National Conference of Commissioners on Uniform State Laws in 1981. The complete text of the act, the

prefatory note and comments are set forth in this supplement.

PREFATORY NOTE

The Act enables durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources. Under the conditions spelled out in the Act, the restrictions and obligations are immune from certain common law impediments which might otherwise be raised. The Act maximizes the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes. In each instance, if the requirements of the Act are satisfied, the restrictions or affirmative duties are binding upon the successors and assigns of the original parties.

The Act thus makes it possible for Owner to transfer a restriction upon the use of Blackacre to Conservation, Inc., which will be enforceable by Conservation and its successors whether or not Conservation has an interest in land benefitted by the restriction, which is assignable although unattached to any such interest in fact, and which has not arisen under circumstances where the traditional conditions of privity of estate and "touch and concern" applicable to covenants real are present. So, also, the Act enables the Owner of Heritage Home to obligate himself and future owners of Heritage to maintain certain aspects of the house and to have that obligation enforceable by Preservation, Inc., even though Preservation has no interest in property benefitted by the obligation. Further, Preservation may obligate itself to take certain affirmative actions to preserve the property. In each case, under the Act, the restrictions and obligations bind successors. The Act does not itself impose restrictions or affirmative duties. It merely allows the parties to do so within a consensual arrangement freed from common law impediments, if the conditions of the Act are complied with.

These conditions are designed to assure that protected transactions serve defined protective purposes (Section 1(1)) and that the protected interest is in a "holder" which is either a governmental body or a charitable organization having an interest in the subject matter (Section 1(2)). The interest may be created in the same manner as other easements in land (Section 2(a)). The Act also enables the parties to establish a right in a third party to enforce the terms of the transaction (Section 3(a)(3)) if the possessor of the right is also a governmental unit or charity (Section 1(3)).

The interests protected by the Act are termed "easements." The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory conservation and preservation interests. The first removes the common law disabilities associated with covenants real and equitable servitudes in addition to those associated with easements. As statutorily modified, these three common law interests retain their separate existence as instruments employable for conservation and preservation ends. The second approach seeks to create a novel additional interest which, although unknown to the common law, is, in some ill-defined sense, a statutorily modified amalgam of the three traditional common law interests.

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CONSERVATION EASEMENT ACT

The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as "easements." Hence, the Act's easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, although the converse would not be true.

In assimilating these easements to conventional easements, the Act allows great latitude to the parties to the former to arrange their relationship as they see fit. The Act differs in this respect from some existing statutes, such as that in effect in Massachusetts, under which interests of this nature are subject to public planning agency review.

There are both practical and philosophical reasons for not subjecting conservation easements to a public ordering system. The Act has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements' validity, particularly those held in gross. It is the intention to facilitate private grants that serve the ends of land conservation and historic preservation, moreover, the requirement of public agency approval adds a layer of complexity which may discourage private actions. Organizations and property owners may be reluctant to become involved in the bureaucratic, and sometimes political, process which public agency participation entails. Placing such a requirement in the Act may dissuade a state from enacting it for the reason that the state does not wish to accept the administrative and fiscal responsibilities of such a program.

In addition, controls in the Act and in other state and federal legislation afford further assurance that the Act will serve the public interest. To begin with, the very adoption of the Act by a state legislature facilitates the enforcement of conservation easement serving the public interest. Other types of easements, real covenants and equitable servitudes are enforceable, even though their myriads of purposes have seldom been expressly scrutinized by state legislative bodies. Moreover, Section 1(2) of the Act restricts the entities that may hold conservation and preservation easements to governmental agencies and charitable organizations, neither of which is likely to accept them on an indiscriminate basis. Governmental programs that extend benefits to private donors of these easements provide additional controls against potential abuses. Federal tax statutes and regulations, for example, rigorously define the circumstances under which easement donations qualify for favorable tax treatment. Controls relating to real estate assessment and taxation of restricted property have been, or can be, imposed by state legislatures to prevent easement abuses or to limit potential loss of local property tax revenues resulting from unduly favorable assessment and taxation of these properties. Finally, the American legal system generally regards private ordering of property relationships as sound public policy. Absent conflict with constitutional or statutory requirements, conveyances of fee or non-possessory interests by and among private entities is the norm, rather than the exception, in the United States. By eliminating certain outmoded easement impediments which are largely attributable to the absence of a land title recordation system in England centuries earlier, the Act advances the values implicit in this norm.

The Act does not address a number of issues which, though of conceded importance, are considered extraneous to its primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments (Section 4). For example, with the exception of the requirement of Section 2(b) that the acceptance of the holder be recorded, the formalities and effects of recordation are left to the state's registry system; an adopting state may wish to establish special indices for these interests, as has been done in Massachusetts.

Similarly unaddressed are the potential impacts of a state's marketable title laws upon the duration of conservation easements. The Act provides that conservation easements have an unlimited duration unless the instruments creating them provide otherwise (Section 2(c)). The relationship between this provision and the marketable title act or other statutes addressing restrictions on real property of unlimited duration should be considered by the adopting state.

The relationship between the Act and local real property assessment and taxation practices is not dealt with; for example, the effect of an easement upon the valuation of burdened real property presents issues which are left to the state and local taxation system. The Act enables the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code, but parties intending to attain them must be mindful of the specific provisions of the income, estate and gift tax laws which are applicable. Finally, the Act neither limits nor enlarges the power of eminent domain; such matters as the scope of that power and the entitlement of property

ENT ACT

Adopted

Statutory Citation

1 to 33-276.

§ 45-2601 to 45-2605.

5-2.6-1 to 32-5-2.6-7.

5 to 479-B.

1 to 84C.05.

7-19-1 to 89-19-13.

111.400.

Resources Code §§ 183.001

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§ 1

CONSERVATION EASEMENT ACT

owners to compensation upon its exercise are determined not by this Act but by the adopting state's eminent domain code and related statutes.

General Statutory Notes

Arizona. The Arizona act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

Indiana. Adds section as follows:

"32-3-26-7 Taxation

"For the purposes of IC 6-1.1, real property subject to a conservation easement shall be assessed and taxed on a basis that reflects the easement."

Mississippi. Adds a section as follows:

"§ 89-19-11. Capital improvements on property upon which easements have been granted.

"With the exception of 'Mississippi Landmarks,' as defined by the Antiquities Law of Mississippi (Section 39-7-1 et seq., Mississippi Code of 1972) and of properties entered in the National Register of Historic Places, no public mon-

ey, derived either from a special fund or the General Fund, shall be expended for capital improvements on any real property upon which a conservation easement has been granted unless the conservation easement is perpetual, a governmental body is the holder of the easement and the capital improvements are solely for the use and benefit of such holder."

Nevada. The Nevada act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

New York. Sections 49-0301 to 49-0311 of the New York Environmental Conservation Law do not constitute a substantial adoption of the Uniform Act, although they contain some similar provisions and have the same general purpose.

UNIFORM CONSERVATION EASEMENT ACT

1981 ACT

An Act to be known as the Uniform Conservation Easement Act, relating to (here insert the subject matter requirements of the various states).

Section

- 1. Definitions.
- 2. Creation, Conveyance, Acceptance and Duration.
- 3. Judicial Actions.

Section

- 4. Validity.
- 5. Applicability.
- 6. Uniformity of Application and Construction.

§ 1. [Definitions]

As used in this Act, unless the context otherwise requires:

(1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(2) "Holder" means:

(i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or

(ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(3) "Third-party right of enforcement" means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder.

COMMENT

Section 1 defines three central elements: What is meant by a conservation easement; who can be a holder; and who can possess a "third-party right of enforcement." Only those inter-

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CONSERVATION EASEMENT ACT

ests held by a "holder," as defined by the Act, fall within the definitions of protected easements. Such easements are defined as interests in real property. Even if so held, the easement must serve one or more of the following purposes: Protection of natural or open-space resources; protection of air or water quality; preservation of the historical aspects of property; or other similar objectives spelled out in subsection (1).

A "holder" may be a governmental unit having specified powers (subsection (2)(i)) or certain types of charitable corporations, associations, and trusts, provided that the purposes of the holder include those same purposes for which the conservation easement could have been created in the first place (subsection (2)(ii)). The word "charitable", in Section 1(2) and (3), describes organizations that are charities according to the common law definition regardless of their status as exempt organizations under any tax law.

Action in Adopting Jurisdictions

Variations from Official Text:

District of Columbia. Introductory material reads: "For the purposes of this act, the term:"

Malta. In subsec. (1), omits "or preserving the historical, architectural, archaeological, or cultural aspects".

In subsecs. (2)(ii) and (3), substitutes "nonprofit corporation" for "charitable corporation, charitable association".

Additionally, defines "real property" to include surface waters.

Mississippi. Section reads:

"For purposes of this chapter, the following words shall have the meaning ascribed herein unless the context otherwise requires:

"(1) 'Conservation easement' shall mean a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, historical or open-space values of real property, assuring its availability for agricultural, forest, recreational, educational or open-space use, protecting natural features and resources, maintaining or enhancing air and water quality or preserving the natural, historical, architectural, archaeological or cultural aspects of real property.

"(2) 'Holder' shall mean either:

"(a) A governmental body empowered by the law of this state or the United States to hold an interest in real property; or

"(b) A private, nonprofit, charitable or educational corporation, association or trust, the purposes or powers of which include retaining or protecting the natural, scenic, historical or open-space values of real property,

Recognition of a "third-party right of enforcement" enables the parties to structure into the transaction a party that is not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement (Sections 1(3), 3(a)(3)). But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust. Thus, if Owner transfers a conservation easement on Blackacre to Conservation, Inc., he could grant to Preservation, Inc., a charitable corporation, the right to enforce the terms of the easement, even though Preservation was not the holder, and Preservation would be free of the common law impediments eliminated by the Act (Section 4). Under this Act, however, Owner could not grant a similar right to Neighbor, a private person. But whether such a grant might be valid under other applicable law of the adopting state is left to the law of that state. (Section 5(c).)

assuring the availability of real property for agricultural, forest, recreational, educational or open-space use, protecting natural features and resources, maintaining or enhancing air or water quality or preserving the natural, historical, architectural, archaeological or cultural aspects of real property which is the recipient or grantee of a conservation easement.

"(3) 'Third-party right of enforcement' shall mean a right granted in a conservation easement to a governmental body or private, nonprofit charitable corporation, association or trust, which is not a holder but which is eligible to be a holder, to enforce any of the terms of the conservation easement.

"(4) 'Person' shall mean any natural person or legal entity."

Texas. In subsec. (1), substitutes "designed to" for "the purposes of which include" (with conforming grammatical variations not affecting substance, e.g., "retain" for "retaining").

In subsec. (2)(ii), substitutes "created or empowered to" for "the purposes or powers of which include" (with conforming grammatical variations not affecting substance, e.g., "retain" for "retaining").

In subsec. (3), substitutes "that is eligible to be a holder but is not a holder" for "which, although eligible to be a holder, is not a holder".

Adds subsec. (4) as follows: "'Servient estate' means the real property burdened by the conservation easement."

Wisconsin. In subsec. (1), inserts "preserving a burial site, as defined in s. 157.70(1)(b)," following "water quality,".

Library References

Health and Environment ¶25.5(4).

C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 2. [Creation, Conveyance, Acceptance and Duration]

(a) Except as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

EASEMENT ACT

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CONSERVATION EASEMENT ACT

§ 3

having a 3rd-party right of enforcement arises under a conservation easement unless it is accepted by any person having a 3rd-party right of enforcement."

Subsec. (c) reads:

"Except as provided in this subchapter, a conservation easement is unlimited in duration unless:

"A. The instrument creating it otherwise provides; or

"B. Change of circumstances renders the easement no longer in the public interest as determined in an action under section 47B."

Adds a subsection which reads: "The instrument creating a conservation easement must provide in what manner and at what times representatives of the holder of a conservation easement or of any person having a 3rd-party right of enforcement shall be entitled to enter the land to assure compliance."

Minnesota. In subsec. (a), substitutes "affected in the same method and manner as other easements" for "affected in the same manner as other easements".

In subsec. (b), substitutes "no right of a person having a third-party right" for "no right in favor of a person having a third-party right".

In subsec. (c), inserts "its" following "unlimited in".

In subsec. (d), substitutes "the conservation easement" for "it" following "is not impaired by".

Texas. Subsec. (c) reads as follows: "A right or duty in favor of or against a holder and a right in favor of a person having a third-party right of enforcement does not arise under a conservation easement before its acceptance by the holder and the recordation of the acceptance."

In subsec. (c), substitutes "makes some other provision" for "otherwise provides".

In subsec. (d), substitutes "that exists in real property" for "in real property in existence" and omits "by it" following "impaired".

Adds subsections as follows:

"(e) A conservation easement must be created in writing, acknowledged and recorded in the deed records of the county in which the servient estate is located, and must include a legal description of the real property which constitutes the servient estate.

"(f) If land that has been subject to a conservation easement is no longer subject to such easement, an additional tax is imposed on the land equal to the difference, if any, between the taxes imposed on the land for each of the five years preceding the year in which the easement terminates and the taxes that would have been imposed had the land not been subject to a conservation easement in each of those years, plus interest at an annual rate of seven percent calculated from the dates on which the differences would have become due."

Wisconsin. Makes minor language changes not affecting substance.

Library References

Health and Environment § 25.5(4).

C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 3. [Judicial Actions]

(a) An action affecting a conservation easement may be brought by:

- (1) an owner of an interest in the real property burdened by the easement;
- (2) a holder of the easement;
- (3) a person having a third-party right of enforcement; or
- (4) a person authorized by other law.

(b) This Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

COMMENT

Section 3 identifies four categories of persons who may bring actions to enforce, modify or terminate conservation easements, quiet title to parcels burdened by conservation easements, or otherwise affect conservation easements. Owners of interests in real property burdened by easements might wish to sue in cases where the easements also impose duties upon holders and these duties are breached by the holders. Holders and persons having third-party rights of enforcement might obviously wish to bring suit to enforce restrictions on the owners' use of the burdened properties. In addition to these three categories of persons who derive their standing from the explicit terms of the easement itself, the Act also recognizes that the state's other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.

A restriction burdening real property in perpetuity or for long periods can fail of its purposes because of changed conditions affecting the property or its environs, because the holder of the conservation easement may cease to exist, or for other reasons not anticipated at the time of its creation. A variety of doctrines, including the doctrines of changed conditions and *cy pres*, have been judicially developed and, in many states, legislatively sanctioned as a basis for responding to these vagaries. Under the changed conditions doctrine, privately created restrictions on land use may be terminated or modified if they no longer substantially achieve their purpose due to the changed conditions. Under the statute or case law of some states, the court's order limiting or terminating the restriction may include such terms and conditions, including monetary adjustments, as it deems necessary to protect the public interest and to assure an equitable resolution of the problem.

§ 3

The doctrine is applicable to real covenants and equitable servitudes in all states, but its application to easements is problematic in many states.

Under the doctrine of *cy pres*, if the purposes of a charitable trust cannot be carried out because circumstances have changed after the trust came into being or, for any other reason, the settlor's charitable intentions cannot be effectuated, courts under their equitable powers may prescribe terms and conditions that may best enable the general charitable objective to be achieved

CONSERVATION EASEMENT ACT

CONSERVATION

while altering specific provisions of the trust. So, also, in cases where a charitable trustee ceases to exist or cannot carry out its responsibilities, the court will appoint a substitute trustee upon proper application and will not allow the trust to fail.

The Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts.

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Action in Adopting Jurisdictions

Variations from Official Text:

Indiana. In subsec. (b), adds the following at the end thereof: ", or the termination of a conservation easement by agreement of the grantor and grantee."

Maine. Section reads:

"1. Action or intervention. An action affecting a conservation easement may be brought or intervened in by:

"A. An owner of an interest in the real property burdened by the easement;

"B. A holder of the easement; or

"C. A person having a 3rd-party right of enforcement.

"2. Intervention only. An action affecting a conservation easement may be intervened in by the State or a political subdivision of the State in which the real property burdened by the easement is located.

"3. Power of court. This subchapter does not affect the power of a court to enforce a conservation easement by injunction or proceeding in equity or to modify or terminate a conservation easement in accordance with principles of

law and equity. A court may deny equitable enforcement of a conservation easement when it finds that change of circumstances has rendered that easement no longer in the public interest. If the court so finds, the court may allow damages as the only remedy in an action to enforce the easement.

No comparative economic test may be used to determine under this subsection if a conservation easement is in the public interest."

Mississippi. In subsec. (a), substitutes "Any action" for "An action".

Subsec. (a)(4) reads: "A person otherwise authorized and empowered by law."

In subsec. (b), inserts ", and shall not be construed to," following "This Act does not".

Texas. In subsec. (a)(4), inserts "some" following "authorized by".

Wisconsin. Makes minor language changes not affecting substance.

Library References

Health and Environment §§25.5(4).

C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 4. [Validity]

A conservation easement is valid even though:

- (1) it is not appurtenant to an interest in real property;
- (2) it can be or has been assigned to another holder;
- (3) it is not of a character that has been recognized traditionally at common law;
- (4) it imposes a negative burden;
- (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
- (6) the benefit does not touch or concern real property; or
- (7) there is no privity of estate or of contract.

COMMENT

One of the Act's basic goals is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends. Section 4 addresses this goal by comprehensively identifying these defenses and negating their use in actions to enforce conservation or preservation easements.

Subsection (1) indicates that easements, the benefit of which is held in gross, may be enforced against the grantor or his successors or assigns. By stating that the easement need not

be appurtenant to an interest in real property, it eliminates the requirement in force in some states that the holder of the easement must own an interest in real property (the "dominant estate") benefitted by the easement.

Subsection (2) also clarifies common law by providing that an easement may be enforced by an assignee of the holder.

Subsection (3) addresses the problem posed by the common law's recognition of easements that

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§ 5. [Applicability]

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CONSERVATION EASEMENT ACT

served only a limited number of purposes and its reluctance to approve so-called "novel incidents." Easements serving the conservation and preservation ends enumerated in Section 1(1) might fail of enforcement under this restrictive view. Accordingly, subsection (3) establishes that conservation or preservation easements are not unenforceable solely because they do not serve purposes or fall within the categories of easements traditionally recognized at common law.

Subsection (4) deals with a variant of the foregoing problem. The common law recognized only a limited number of "negative easements"—those preventing the owner of the burdened land from performing acts on his land that he would be privileged to perform absent the easement. Because a far wider range of negative burdens than those recognized at common law might be imposed by conservation or preservation easements, subsection (4) modifies the common law by eliminating the defense that a conservation or preservation easement imposes a "novel" negative burden.

Subsection (5) addresses the opposite problem—the unenforceability at common law of an easement that imposes affirmative obligations upon either the owner of the burdened property or upon the holder. Neither of those interests was viewed by the common law as true easements at all. The first, in fact, was labelled a "spurious" easement because it obligated the owner of the burdened property to perform affirmative acts. (The spurious easement was distinguished from an affirmative easement, illustrated by a right of way, which empowered the

easement's holder to perform acts on the burdened property that the holder would not have been privileged to perform absent the easement.)

Achievement of conservation or preservation goals may require that affirmative obligations be incurred by the burdened property owner or by the easement holder or both. For example, the donor of a facade easement, one type of preservation easement, may agree to restore the facade to its original state; conversely, the holder of a facade easement may agree to undertake restoration. In either case, the preservation easement would impose affirmative obligations. Subsection (5) treats both interests as easements and establishes that neither would be unenforceable solely because it is affirmative in nature.

Subsections (6) and (7) preclude the touch and concern and privity of estate or contract defenses, respectively. Strictly speaking, they do not belong in the Act because they have traditionally been asserted as defenses against the enforcement not of easements but of real covenants and of equitable servitudes. The case law dealing with these three classes of interests, however, had become so confused and arcane over the centuries that defenses appropriate to one of these classes may incorrectly be deemed applicable to another. The inclusion of the touch and concern and privity defenses in Section 4 is a cautionary measure, intended to safeguard conservation and preservation easements from invalidation by courts that might inadvertently confuse them with real covenants or equitable servitudes.

Action in Adopting Jurisdictions

Variations from Official Text:

District of Columbia. Omits this section.

Maine. In subsec. (1), inserts "or does not run with" following "to".

Adds a subsec. (8) which reads: "It does not run to the successor and assigns of the holder."

Mississippi. Introductory material reads: "A conservation easement shall be valid despite the following".

In subsec. (2), substitutes "It may be" for "It can be".

Texas. In subsec. (5), substitutes "on" for "upon" in both instances.

Wisconsin. Makes minor language changes not affecting substance.

Library References

Health and Environment §25.5(4).

C.J.S. Health and Environment §§ 91 et seq., 130, 132.

§ 5. [Applicability]

(a) This Act applies to any interest created after its effective date which complies with this Act, whether designated as a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise.

(b) This Act applies to any interest created before its effective date if it would have been enforceable had it been created after its effective date unless retroactive application contravenes the constitution or laws of this State or the United States.

(c) This Act does not invalidate any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this State.

COMMENT

There are four classes of interests to which 65

STATE OF ALASKA
THE LEGISLATURE

POUCH V STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 1800


LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 9, 1989

SUBJECT: Conservation easements and their
abuse: SB 123

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel 

Chris Christensen has asked that I suggest a solution to the concern that there will be efforts to evade municipal ad valorem property taxation by the use of conservation easements.

The use of the conservation easement should result in a decrease in the value of the property since some of the rights to the use of the property have been transferred to a municipality or a nonprofit corporation.

The easy answer is to provide for some penalty on an inconsistent use or the transfer of the easement to the owner of the property that is the subject of the easement; such a transfer would result in the merger of the two estates and the elimination of the conservation easement.

While there are undoubtedly myriad ways of achieving this goal, I note the existence in state law of a similar provision that applies a sanction on the transfer of property receiving the beneficial farm use assessment. I refer to AS 29.45.060, primarily subsections (a) and (b); those subsections provide:

Sec. 29.45.060. FARM OR AGRICULTURAL LAND. (a) Farm use land included in a farm unit and not dedicated or being used for nonfarm purposes shall be assessed on the basis of full and true value for farm use and may not be assessed as if subdivided or used for some other nonfarm purpose. The assessor shall maintain records valuing the land for both full and true value and farm

Senator Jan Faiks
Page 3
March 9, 1989

is conveyed to the owner of the property, the owner shall pay to the municipality an amount equal to the additional tax at the current mill levy together with eight percent interest for the preceding 10 years, as though the land had not been assessed subject to the conservation easement.

(b) To secure the assessment under this section, an owner of land subject to a conservation easement must apply to the assessor before May 15 of each year in which the assessment is desired. The application shall be made upon forms prescribed by the assessor and shall include information that may reasonably be required to determine the entitlement of the applicant.

Note some changes suggested.

Since there is no reimbursement to the municipality from the state, I have eliminated the participation by the state assessor and the references to the state.

I have suggested a ten year payback period, in place of the seven year in AS 29.45.060.

If I may be of further assistance, please advise.

RAB:gc
WKG7/122

M E M O R A N D U M

TO: Senator Jan Faiks
FROM: John Reese
DATE: March 9, 1989
RE: S.B. 123

S.B. 123. Implications of conservation easement on:

1. Elimination of properties from tax base, and
2. Ability of owner of property to control use of easement or even obtain return of easement by donation to a sham non-profit organization.

* * *

1. Tax Base. Obviously, donation of the easement removes the segment of the property from the tax base. Property taxes are a function of market value, and the limitation of the easement may frequently reduce the market value of a property. In some situations, the nature of a particular easement may virtually eliminate the marketability of a property and, therefore, its contribution to the general tax base.

On the other hand, this is not really a change in the law. Presently, any owner of a property can donate the property to a qualified non-profit group, church, charity, etc., and thereby remove it from the tax base. The question is whether there are any controls on the process.

The controls are simple economics.

What the person gives up by donating the easement is valued according to the market. If it is insignificant (e.g. cannot change the facade of a building for five years), the market value will change little. If it is substantial (e.g. donation of prime development acreage to be used as park land), the loss to the tax rolls would be huge. But the donator loses the value of what is donated -- very little in the first example and a lot in the second. The tax loss is a small part of the loss in either case. The willingness of the contributor is tempered by his or her own personal financial well being, possibly the most effective control in our society.

But, is it subject to abuse? This brings us to the second issue.

2. Use of Easement as a Ruse to Avoid Taxes. First, it is important to note that the basic motivation control, self-interest, is at play here. If someone is going to donate an easement, the maximum financial benefit of doing so requires that the recipient be organized as a non-profit group, meeting the state and federal requirements for deductibility of contributions, tax credits, etc. Under federal law, any organization receiving tax deductible gifts must have provisions in its articles of incorporation and by-laws which require assets to be used solely for the non-profit purpose, and if dissolved, the assets (including conservation easements) must be contributed to a similar tax qualified non-profit group. State law is similar, although not quite as specific. See AS 10.20. It cannot be given back (unless the easement itself requires it).

If the contributor did receive it back, this would bring due recapture rules of the Internal Revenue Service, which would make it a very expensive choice. On the other hand, if the easement provided for return after a period, the tax implications would be very small, as the market value effect would be very small from the beginning.

I doubt if there are local property tax recapture rules designed for this, but even without that, the federal income tax deductions and tax credits are the big items for the contributor.

* * *

In summary, a conservation easement allows contribution of part of an asset, while leaving it partially on the tax rolls, rather than removing it completely. It cannot be used to avoid taxes because the substantial Internal Revenue Service benefits are reversed if that is tried. Federal and state law restrict it as well.



ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

8

P. O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

February 19, 1988

MEMORANDUM

TO: Representative Sam Cotten
ATTN: Ned Farquhar
FROM: Karen Oakley *ko*
Legislative Analyst
RE: Conservation Easements
Research Request 88.138

You asked for information on conservation easement statutes in other states. You also asked what federal and local tax benefits a landowner achieves by granting a conservation easement and how conservation easements affect federal and local government revenues.

In this memorandum, we present background information on easements in general and on conservation easements in particular, and discuss the conservation easement statutes of other states; the tax and revenue consequences of conservation easements; and the applicability of conservation easements to the Alaska situation.

The primary source of information presented in this memorandum is Powell on Real Property, Vol. 3, Chapter 34A entitled "Conservation Easements," by William R. Ginsberg, published by Matthew Bender and Co. This article provides a definitive and very readable review of the topic and is attached (Attachment A).

In summary, we found:

- The conservation easement is a well-established legal concept and is widely used throughout the United States as a means to protect scenic or other natural values of private land and to preserve historic structures.

- Because a conservation easement is held by a person, rather than by an adjacent parcel, the easement is considered to be held in gross. Under common law, an easement in gross cannot run with the land. To ensure that a conservation easement is enforceable in perpetuity, this common law deficiency must be corrected by statute.

- Alaska is one of only four states that does not have a conservation easement statute.

- State statutes typically specify: the purposes for which easements may be made; the types of organizations that are eligible to receive an easement; the duration of an easement; and the parties that are empowered to enforce the terms of an easement. In specifying the purposes, holders and enforcers of conservation easements, states vary considerably.

- Landowners that donate a conservation easement to a charitable organization are eligible for a federal income tax deduction. Landowners granting a conservation easement may also pay less local property tax due to decreased value of the parcel.

- Governments are the most common holders of conservation easements, and easements represent a cost-effective way for governments to protect the public value of private land. The revenue foregone by allowing conservation easements is considerably less than the cost of fee simple purchase of land.

- Native corporations are the major private landowners in Alaska. Conservation easements may provide a way to protect portions of these lands from development while still allowing subsistence use.

BACKGROUND

Easements in General

An easement is a legal agreement between a property owner and the holder of the easement that affects the present owner's and all future owners' use of the property. An easement is a limitation on the possessory rights of an owner in the form of an enforceable property right.

Easements may be negative or affirmative. A negative easement restricts the use to which land subject to the easement may be put. An affirmative easement grants the right to perform certain activities on the property, such as the right to cross the land or to erect powerlines.

An easement may also be either "appurtenant" or "in gross." An easement appurtenant is the most familiar form of easement and refers to the situation where two parcels of land, usually adjacent, are held by different owners, and one parcel is benefitted and the other parcel burdened by the grant of certain rights, for example, the right to cross. If the owner of Parcel A grants a right-of-way to the owner of Parcel B, the right of the owner of Parcel B to cross Parcel A becomes one of the property rights that comes with ownership of Parcel B. A right-of-way is an affirmative appurtenant easement that lasts in perpetuity and runs with the land.

In contrast to the easement appurtenant which transfers property rights from one parcel to another, the easement in gross transfers property rights from one parcel to a person, corporate or natural, that owns no land at all. Under common law, the easement in gross is not assignable and cannot run with the land.

The Conservation Easement

The conservation easement is a restriction on the use of real estate. The easement is usually held by a nonprofit or governmental entity and is a negative easement in gross. A conservation easement has specific purposes commonly including the protection of natural, scenic or open space values or preserving the historical or cultural aspects of real property.

Conservation easements were first employed in the late 1880s in Boston to protect parkways. During the 1930s, the U.S. Fish and Wildlife Service began to obtain easements as a means to preserve wetlands for migratory waterfowl. The National Park Service also began the practice of purchasing scenic easements along highways. In the 1960s, many states authorized the acquisition of scenic easements along highways to take advantage of federal funds made available for that purpose by the Federal Highway Beautification Act.

As the use of scenic highway easements developed, the applicability of the easement to other objectives, such as preservation of open space or historic preservation, was noted. Beginning with California in 1959 and New York in 1960, many states passed legislation authorizing government or nonprofit organizations to acquire conservation easements. The laws removed the common law impediment to holding an easement in gross in perpetuity. By 1975, 28 states had conservation easement statutes; by 1984, 44 states had conservation easement statutes (see following section for a discussion of state statutes).

Although the highway beautification act had an important influence on the development of the conservation easement, the 1964 determination by the Internal Revenue Service that the value of a conservation easement donated to a charitable organization is deductible for federal income tax purposes probably had an even greater effect.

In 1985, the Land Trust Exchange, a national association of land trusts, published a study of the use of conservation easements throughout the United States (Attachment B). They found that over 1.7 million acres were protected by conservation easements. Of these easements, 1.2 million acres were held by the federal government, 200,000 by state and local governments and 350,000 acres by nonprofit organizations.

CONSERVATION EASEMENT STATUTES IN OTHER STATES

The primary purpose of a state conservation easement law is to overcome the short term nature of an easement in gross under the common law. Because an easement in gross, under the common law, does not run with the land and therefore does not last in perpetuity, the conservation easement must be created in statute.

Almost all states have adopted some type of conservation easement statute during the past 30 years.¹ In 1981, the National Conference of Commissioners on Uniform State Laws approved a Uniform Conservation Easement Act (Attachment C). Many of the states that adopted a conservation easement statute during the 1980s fashioned their statutes after this uniform act.

In establishing the conservation easement, state statutes typically address four topics:

- 1) Purpose. Some states may allow conservation easements to be used to achieve a broad range of objectives, while other states restrict the use of conservation easements to a few specifically defined purposes.
- 2) Duration. State statutes generally provide that conservation easements shall be in perpetuity or of unlimited duration, unless the parties provide otherwise in the document creating the restrictions. Some states set a minimum term of 10 to 15 years.²

¹The only states that have not adopted a conservation easement statute are Alaska, Hawaii, Kansas and Wyoming.

²Under the IRS code, the tax benefits from donating a conservation easement accrue only if the easement runs in perpetuity.

- (3) Holders. State statutes fall into two categories with respect to the parties that are permitted to hold a conservation easement: those which allow only a government agency to receive an easement and those which also allow private nonprofit organizations to receive easements. Within these categories, there are many variations. For example, Mississippi allows only the Mississippi Commission on Wildlife Conservation to hold conservation easements. South Carolina allows a variety of governmental agencies to hold easements, but allows only one nonprofit organization, the Nature Conservancy, to hold conservation easements. In contrast, Utah allows any party entitled to own real property interests to hold a conservation easement.
- (4) Enforcement. The success of a conservation easement in achieving its objective depends in part on enforcement of the terms of the agreement, and enforcement depends on having standing (and resources) to sue. Few state statutes clearly specify the categories of persons that have standing to enforce an agreement. The Uniform act recommends that four classes, including third parties, be granted standing.

Copies of conservation easement statutes from Oregon (1983), which is patterned after the uniform act, Washington (1979), Connecticut (1971) and Minnesota (1985) are attached as examples (Attachment D).

TAX AND REVENUE CONSEQUENCES OF CONSERVATION EASEMENTS

For the property owner that grants a conservation easement, both federal income taxes and local property taxes may be reduced. Conservation easements therefore may act to reduce the tax revenues of the federal government and of the local governments in which the conservation easements lie. In this section, the tax consequences (for the individual) and the revenue consequences (for governments) are discussed.

Federal Income Tax Consequences

Under the Internal Revenue Service (IRS) Code, the donation of a conservation easement to a qualified charitable organization qualifies as a tax-deductible charitable contribution. The IRS statute and implementing regulations are attached in Attachment E, and a recent tax journal article on obtaining the deduction for contribution of a conservation easement is attached in Attachment F.

The federal tax law on conservation easements is, as you might expect, complex.³ In brief, to qualify for a charitable donation deduction, a conservation easement must meet three tests: it must consist of a qualified real property interest, be given to a qualified organization and be used, in perpetuity, exclusively for conservation purposes. Qualified organizations must have both a commitment to protect the conservation purposes of the donation and the resources to enforce the restrictions.

Qualified conservation purposes are defined as:

- the preservation of land areas for outdoor recreation by, or the education of, the general public;
- the protection of relatively natural habitat of fish, wildlife or plants or similar ecosystem;
- the preservation of open space (including farmland and forest land) where such preservation is: 1) for the scenic enjoyment of the general public; or 2) pursuant to a clearly defined federal, state or local governmental conservation policy, and will yield a significant public benefit; or
- the preservation of an historically important land area or a certified historic structure.

Real Property Tax Consequences

Because a conservation easement severely limits the uses to which a property may be put, the market value of the property should be reduced. Since real property taxes are based on assessed valuation, conservation easements should reduce property value and, thereby, local tax liability. However, some local governments may fail to recognize a conservation easement as a factor in the assessment of property burdened by a conservation easement. To ensure that the effect of a conservation easement is considered in the determination of assessed value, some state statutes specifically address this topic (see the Oregon statute at 271.785).

³A former IRS attorney, Stephen J. Small, who helped write the current conservation easement regulations, is now in private practice and has recently written a book entitled The Federal Tax Law of Conservation Easements. This book, as well as other memos on conservation easement tax topics, are available from the Land Trust Exchange.

Valuation of Conservation Easements

The primary issue that arises with both the deductibility of a conservation easement donation and local property tax assessment is the valuation of a conservation easement. Under the IRS code and under most local tax assessment codes, the value of an easement is its fair market value. As a practical matter, however, there is no market for conservation easements. They are not ordinarily bought and sold, thus there is no direct method to determine their market value.

The traditional method of valuing a conservation easement is the "before and after" approach where the value of the easement is equal to the difference between the fair market value of the total property before granting of the easement and the fair market value of the property after the easement. Since there have been very few sales of properties encumbered by conservation easements, the "after" valuation is difficult to determine. ①

Another method of valuing conservation easements for IRS purposes has been used: the comparable sales method. The comparable sales method suffers from the same drawback as the "before and after" method; sales data on which to base an appraisal are sparse. ②

Issues of conservation easement valuation are discussed in greater detail in Attachment A, pp. 55-63, and in Attachment F.

Effect on Federal and Local Government Revenues

Obviously, conservation easements cause a decrease in federal income tax revenues and in local property tax revenues, but as yet, no one has attempted to quantify these decreases.

The Land Trust Exchange (in their 1985 survey) found that some local governments were opposed to conservation easements because they feared erosion of their tax bases. However, only 21 percent of the respondents to the survey indicated that any of their easements had reduced property taxes. Mr. Ginsberg in (his article at pp. 53 - 54) noted that fears of erosion of the tax base have little basis in fact:

. . . Any meaningful diminution in the tax base as a result of conservation easements is highly unlikely in most jurisdictions where the major portion of assessed value is based on improvements, not land. If a reduction in assessed value occurs as a result of conservation easements, there would be countervailing economic and environmental benefits. These would include a reduction in the demand for (and costs of) public services, and enhanced values of other property in the area.

For both the federal and local governments, conservation easements represent a cost-effective way to secure open space or to protect other conservation values. As the Land Trust Exchange found, the vast majority of conservation easements are held by federal, state and local governments. Had these governments been required to purchase these properties in fee simple to protect the desired values, the costs would be considerably greater than the foregone tax revenues

APPLICATION TO ALASKA

Although Alaska does not have a conservation easement statute, Title 29 (Municipal Code) recognizes the possibility of such easements. Alaska Statute 29.45.050, which specifies the optional exemptions and exclusions that a local government may include in its property tax code, allows a local government to exempt from taxation a conservation easement that is granted to a governmental body in perpetuity [As 29.45.050(e)]. Since Alaska statutes do not currently provide for conservation easements, this section of the Municipal Code presumably has not yet had any practical effect.

In Alaska, the majority of land is owned by federal, state and local governments, and some persons might question the need for a conservation easement statute. In this regard, it is important to remember that a conservation easement is an agreement entered into voluntarily by a property owner. For some persons, the federal and local tax benefits may be the primary reason that they wish to enter into such an agreement, although the Land Trust Exchange found that most landowners granting conservation easements were motivated by a desire to preserve unique characteristics of their land. A conservation easement statute merely provides private landowners with an option for protecting their land.

Representative Cotten
February 19, 1988
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A conservation easement statute may be of particular interest to native landowners concerned with protecting lands used for subsistence. Native corporations are major private landowners in Alaska. In theory, there is no reason that a native corporation could not grant a conservation easement to a governmental or nonprofit organization for the purposes of protecting its land.⁴ The conservation easement is a voluntary agreement made by a private landowner, and the agreement can include any variety of terms and conditions. Such an agreement would presumably preclude all future development (negative easement) but allow an affirmative easement allowing the landowners to enter the property to pursue subsistence activities. Conservation easement agreements commonly include such affirmative easements for the purposes of inspection and enforcement.

I hope you find this information useful. If we can provide any additional information, please let me know.

Attachments

⁴We have not attempted to research the Alaska Native Claims Settlement Act, the Alaska National Interest Lands Conservation Act, or the recent 1991 amendments to see whether these statutes contain any provisions that would preclude a native corporation from entering into a conservation easement agreement; nor have we attempted to ascertain whether any federal income tax benefits would accrue to a native corporation granting a conservation easement for subsistence. You may wish to have an attorney undertake these analyses.

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: "An Act adopting the Uniform
 Conservation Easement Act;.."
 Sponsor: Senate Judiciary Committee
 Requestor: _____

Agency Affected: Community & Regional Affairs
 BRU: _____
 Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDEPAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Jim Plasman

Prepared: Jim Plasman, Deputy Director Phone: 465-4750
 Divis: Municipal & Regional Assistance Date: 4/14/89
 Approved by Commissioner: Richard Henderson for David H. Jensen Date: 4/14/89
 Agency: Community & Regional Affairs

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Uniform Conservation Easement Act

National Conference of Commissioners on Uniform State Laws

Historical Note

The Uniform Conservation Easement Act was approved by the National Conference of Commissioners on Uniform State Laws in 1981. The complete text of the act, the prefatory note, and comments are set forth here.

Commissioners' Prefatory Note

The Act enables durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources. Under the conditions spelled out in the Act, the restrictions and obligations are immune from certain common law impediments which might otherwise be raised. The Act maximizes the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes. In each instance, if the requirements of the Act are satisfied, the restrictions or affirmative duties are binding upon the successors and assigns of the original parties.

The Act thus makes it possible for Owner to transfer a restriction upon the use of Blackacre to Conservation, Inc., which will be enforceable by Conservation and its successors whether or not Conservation has an interest in land benefited by the restriction, which is assignable although unattached to any such interest in fact, and which has not arisen under circumstances where the traditional conditions of privity of estate and "touch and concern" applicable to covenants real are present. So, also, the Act enables the Owner of Heritage Home to obligate himself and future owners of Heritage to maintain certain aspects of the house and to have that obligation enforceable by Preservation, Inc., even though Preservation has no interest in property benefited by the obligation. Further, Preservation may obligate itself to take certain affirmative

actions to preserve the property. In each case, under the Act, the restrictions and obligations bind successors. The Act does not itself impose restrictions or affirmative duties. It merely allows the parties to do so within a consensual arrangement freed from common law impediments, if the conditions of the Act are complied with.

These conditions are designed to assure that protected transactions serve defined protective purposes (Section 1(1)) and that the protected interest is in a "holder" which is either a governmental body or a charitable organization having an interest in the subject matter (Section 1(2)). The interest may be created in the same manner as other easements in land (Section 2(a)). The Act also enables the parties to establish a right in a third party to enforce the terms of the transaction (Section 3(a)(3)) if the possessor of that right is also a governmental unit or charity (Section 1(3)).

The interests protected by the Act are termed "easements." The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory conservation and preservation interests. The first removes the common law disabilities associated with covenants real and equitable servitudes in addition to those associated with easements. As statutorily modified, these three common law interests retain their separate existence as instruments employable for conservation and preservation ends. The second approach seeks to create a novel additional interest which, although unknown to the common law, is, in some ill-defined sense, a statutorily modified amalgam of the three traditional common law interests.

The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid

fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, nonpossessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as "easements." Hence, the Act's easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, although the converse would not be true.

In assimilating these easements to conventional easements, the Act allows great latitude to the parties to the former to arrange their relationship as they see fit. The Act differs in this respect from some existing statutes, such as that in effect in Massachusetts, under which interests of this nature are subject to public planning agency review.

There are both practical and philosophical reasons for not subjecting conservation easements to a public ordering system. The Act has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements' validity, particularly those held in gross. If it is the intention to facilitate private grants that serve the ends of land conservation and historic preservation, moreover, the requirement of public agency approval adds a layer of complexity which may discourage private actions. Organizations and property owners may be reluctant to become involved in the bureaucratic, and sometimes political, process which public agency participation entails. Placing such a requirement in the Act may dissuade a state from enacting it for the reason that the state does not wish to accept the administrative and fiscal responsibilities of such a program.

In addition, controls in the Act and in other state and federal legislation afford further assurance that the Act will serve the public interest. To begin with, the very adoption of the Act by a state legislature facilitates the enforcement of conservation easements serving the public interest. Other types of easements, real covenants, and equitable servitudes are enforceable, even though their myriad purposes have seldom been expressly scrutinized by state legislative bodies. Moreover, Section 1(2) of the Act restricts the entities that may hold conservation and preservation easements to governmental agencies and charitable organizations, neither of which is likely to accept them on an indiscriminate basis. Governmental programs that extend benefits to private donors of these easements provide additional controls against potential abuses. Federal tax statutes and regulations, for example, rigorously define the circumstances under which easement donations qualify for favorable tax treatment. Controls relating to real estate assessment and taxation of restricted properties have been, or can be, imposed by state legislatures to prevent easement abuses or to limit potential loss of local property tax revenues resulting from unduly favorable assessment and taxation of these properties. Finally, the

American legal system generally regards private ordering of property relationships as sound public policy. Absent conflict with constitutional or statutory requirements, conveyances of fee or nonpossessory interests by and among private entities are the norm, rather than the exception, in the United States. By eliminating certain outmoded easement impediments which are largely attributable to the absence of a land-title recordation system in England centuries earlier, the Act advances the values implicit in this norm.

The Act does not address a number of issues which, though of conceded importance, are considered extraneous to its primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments (Section 4). For example, with the exception of the requirement of Section 2(b) that the acceptance of the holder be recorded, the formalities and effects of recordation are left to the state's registry system; an adopting state may wish to establish special indices for these interests, as has been done in Massachusetts.

Similarly unaddressed are the potential impacts of a state's marketable title laws upon the duration of conservation easements. The Act provides that conservation easements have an unlimited duration unless the instruments creating them provide otherwise (Section 2(c)). The relationship between this provision and the marketable title act or other statutes addressing restrictions on real property of unlimited duration should be considered by the adopting state.

The relationship between the Act and the local real property assessment and taxation practices is not dealt with; for example, the effect of an easement upon the valuation of burdened real property presents issues which are left to the state and local taxation system. The Act enables the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code, but parties intending to attain them must be mindful of the specific provisions of the income, estate, and gift tax laws which are applicable. Finally, the Act neither limits nor enlarges the power of eminent domain; such matters as the scope of that power and the entitlement of property owners to compensation upon its exercise are determined not by this Act but by the adopting state's eminent domain code and related statutes.

Uniform Conservation Easement Act, 1981 Act

An Act to be known as the Uniform Conservation Easement Act, relating to (here insert the subject matter requirements of the various states).

Sec. 1. Definitions.

Sec. 2. Creation, Conveyance, Acceptance, and Duration.

- Sec. 3. Judicial Actions.
- Sec. 4. Validity.
- Sec. 5. Applicability.
- Sec. 6. Uniformity of Application and Construction.

§1. [Definitions]

As used in this Act, unless the context otherwise requires:

(1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(2) "Holder" means:

(i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or

(ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(3) "Third-party right of enforcement" means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder.

Commissioners' Comment

Section 1 defines three central elements: What is meant by a conservation easement; who can be a holder; and who can possess a "third-party right of enforcement." Only those interests held by a "holder," as defined by the Act, fall within the definitions of protected easements. Such easements are defined as interests in real property. Even if so held, the easement must serve one or more of the following purposes: protection of natural or open-space resources; protection of air or water quality; preservation of the historical aspects of property; or other similar objectives spelled out in subsection (1).

A "holder" may be a governmental unit having specified powers (subsection (2)(i)) or certain types of charitable corporations, associations, and trusts, provided that the purposes of the holder include those same purposes for which the conservation easement could have been created in the first place (subsection (2)(ii)). The word "charitable," in subsections 1(2) and (3), describes organizations that are charities according to the common law definition

regardless of their status as exempt organizations under any tax law.

Recognition of a "third-party right of enforcement" enables the parties to structure into the transaction a party that is not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement (Sections 1(3), 3(a)(3)). But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust. Thus, if Owner transfers a conservation easement on Blackacre to Conservation, Inc., he could grant to Preservation, Inc., a charitable corporation, the right to enforce the terms of the easement, even though Preservation was not the holder, and Preservation would be free of the common law impediments eliminated by the Act (Section 4). Under this Act, however, Owner could not grant a similar right to Neighbor, a private person. But whether such a grant might be valid under other applicable law of the adopting state is left to the law of that state (Section 5(c)).

Library References

Health and Environment ⇒ 25.5(4).

C.J.S. Health and Environment §§91 et seq., 130, 132.

§2. [Creation, Conveyance, Acceptance, and Duration]

(a) Except as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

(c) Except as provided in Section 3(b), a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

Commissioners' Comment

Section 2(a) provides that, except to the extent otherwise indicated in the Act, conservation easements are indistinguishable from easements recognized under the pre-Act law of the state in terms of their creation, conveyance, recordation, assignment, release, modification, termination, or alteration. In this regard, subsection (a) reflects the Act's overall philosophy of bringing less-than-fee conservation interests under the formal easement rubric and of extending that rubric to the extent necessary to effectuate the Act's purposes given the adopting state's existing

common law and statutory framework. For example, the state's requirements concerning release of conventional easements apply as well to conservation easements because nothing in the Act provides otherwise. On the other hand, if the state's existing law does not permit easements in gross to be assigned, it will not be applicable to conservation easements because Section 4(2) effectively authorizes their assignment.

Conservation and preservation organizations using easement programs have indicated a concern that instruments purporting to impose affirmative obligations on the holder may be unilaterally executed by grantors and recorded without notice to or acceptance by the holder ostensibly responsible for the performance of the affirmative obligations. Subsection (b) makes clear that neither a holder nor a person having a third-party enforcement right has any rights or duties under the easement prior to the recording of the holder's acceptance of it.

The Act enables parties to create a conservation easement of unlimited duration subject to the power of a court to modify or terminate it in states whose case or statute law accords their courts that power in the case of easement. See Section 3(b). The latitude given the parties is consistent with the philosophical premise of the Act. However, there are additional safeguards; for example, easements may be created only for certain purposes and may be held only by certain "holders." These limitations find their place comfortably within similar limitations applicable to charitable trusts, whose duration may also have no limit. Allowing the parties to create such easements also enables them to fit within federal tax law requirements that the interest be "in perpetuity" if certain tax benefits are to be derived.

Obviously, an easement cannot impair prior rights of owners of interests in the burdened property existing when the easement comes into being unless those owners join in the easement or consent to it. The easement property thus would be subject to existing liens, encumbrances and other property rights (such as subsurface mineral rights) which pre-exist the easement, unless the owners of those rights release them or subordinate them to the easement. (Section 2(d).)

Library References

Health and Environment § 25.5(4).
C.J.S. Health and Environment §§91 et seq., 130, 132.

§3. [Judicial Actions]

(a) An action affecting a conservation easement may be brought by:

- (1) an owner of an interest in the real property burdened by the easement;
- (2) a holder of the easement;
- (3) a person having a third-party right of enforcement; or

(4) a person authorized by other law.

(b) This Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

Commissioners' Comment

Section 3 identifies four categories of persons who may bring actions to enforce, modify, or terminate conservation easements, quiet title to parcels burdened by conservation easements, or otherwise affect conservation easements. Owners of interests in real property burdened by easements might wish to sue in cases where the easements also impose duties upon holders and these duties are breached by the holders. Holders and persons having third-party rights of enforcement might obviously wish to bring suit to enforce restrictions on the owners' use of the burdened properties. In addition to these three categories of persons who derive their standing from the explicit terms of the easement itself, the Act also recognizes that the state's other applicable law may create standing in other persons. For example, independently of the Act, the attorney general could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.

A restriction burdening real property in perpetuity or for long periods can fail of its purposes because of changed conditions affecting the property or its environs, because the holder of the conservation easement may cease to exist, or for other reasons not anticipated at the time of its creation. A variety of doctrines, including the doctrines of changed conditions and *cy pres*, have been judicially developed and, in many states, legislatively sanctioned as a basis for responding to these vagaries. Under the changed conditions doctrine, privately created restrictions on land use may be terminated or modified if they no longer substantially achieve their purpose due to the changed conditions. Under the statute or case law of some states, the court's order limiting or terminating the restriction may include such terms and conditions, including monetary adjustments, as it deems necessary to protect the public interest and to assure an equitable resolution of the problem. The doctrine is applicable to real covenants and equitable servitudes in all states, but its application to easements is problematic in many states.

Under the doctrine of *cy pres*, if the purposes of a charitable trust cannot be carried out because circumstances have changed after the trust came into being or, for any other reason, the settlor's charitable intentions cannot be effectuated, courts under their equitable powers may prescribe terms and conditions that may best enable the general charitable objective to be achieved while altering specific provisions of the trust. So, also, in cases where a charitable trustee ceases to exist or cannot carry out its responsibilities, the court will appoint a substitute trustee upon proper application and will not allow the trust to fail.

The Act leaves intact the existing case and statute law

of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts.

Library References

Health and Environment ⇨ 25.5(4).
C.J.S. Health and Environment §§91 et seq., 130, 132.

§4. [Validity]

A conservation easement is valid even though:

- (1) it is not appurtenant to an interest in real property;
- (2) it can be or has been assigned to another holder;
- (3) it is not of a character that has been recognized traditionally at common law;
- (4) it imposes a negative burden;
- (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
- (6) the benefit does not touch or concern real property;
- or (7) there is no privity of estate or of contract.

Commissioners' Comment

One of the Act's basic goals is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends. Section 4 addresses this goal by comprehensively identifying these defenses and negating their use in actions to enforce conservation or preservation easements.

Subsection (1) indicates that easements, the benefit of which is held in gross, may be enforced against the grantor or his successors or assigns. By stating that the easement need not be appurtenant to an interest in real property, it eliminates the requirement in force in some states that the holder of the easement must own an interest in real property (the "dominant estate") benefited by the easement.

Subsection (2) also clarifies common law by providing that an easement may be enforced by an assignee of the holder.

Subsection (3) addresses the problem posed by the common law's recognition of easements that served only a limited number of purposes and its reluctance to approve so-called "novel incidents." Easements serving the conservation and preservation ends enumerated in Section 1(1) might fail of enforcement under this restrictive view. Accordingly, subsection (3) establishes that conservation or preservation easements are not enforceable solely because they do not serve purposes or fall within the categories of easements traditionally recognized at common law.

Subsection (4) deals with a variant of the foregoing problem. The common law recognized only a limited number of "negative easements"—those preventing the owner of the burdened land from performing acts on his land that he would be privileged to perform absent the easement. Because a far wider range of negative burdens than those recognized at common law might be imposed by conservation or preservation easements, subsection (4) modifies

the common law by eliminating the defense that a conservation or preservation easement imposes a "novel" negative burden.

Subsection (5) addresses the opposite problem—the unenforceability at common law of an easement that imposes affirmative obligations upon either the owner of the burdened property or upon the holder. Neither of those interests was viewed by the common law as true easements at all. The first, in fact, was labeled a "spurious" easement because it obligated the owner of the burdened property to perform affirmative acts. (The spurious easement was distinguished from an affirmative easement, illustrated by a right-of-way, which empowered the easement's holder to perform acts on the burdened property that the holder would not have been privileged to perform absent the easement.)

Achievement of conservation or preservation goals may require that affirmative obligations be incurred by the burdened property owner or by the easement holder or both. For example, the donor of a facade easement, one type of preservation easement, may agree to restore the facade to its original state; conversely, the holder of a facade easement may agree to undertake restoration. In either case, the preservation easement would impose affirmative obligations. Subsection (5) treats both interests as easements and establishes that neither would be unenforceable solely because it is affirmative in nature.

Subsections (6) and (7) preclude the touch and concern and privity of estate or contract defenses, respectively. Strictly speaking, they do not belong in the Act because they have traditionally been asserted as defenses against the enforcement not of easements but of real covenants and of equitable servitudes. The case law dealing with these three classes of interests, however, had become so confused and arcane over the centuries that defenses appropriate to one of these classes may incorrectly be deemed applicable to another. The inclusion of the touch and concern and privity defenses in Section 4 is a cautionary measure, intended to safeguard conservation and preservation easements from invalidation by courts that might inadvertently confuse them with real covenants or equitable servitudes.

Library References

Health and Environment ⇨ 25.5(4).
C.J.S. Health and Environment §§91 et seq., 130, 132.

§5. [Applicability]

(a) This Act applies to any interest created after its effective date which complies with this Act, whether designated as a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise.

(b) This Act applies to any interest created before its effective date if it would have been enforceable had it been

created after its effective date unless retroactive application contravenes the constitution or laws of this state or the United States.

(c) This Act does not invalidate any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this state.

Commissioners' Comment

There are four classes of interest to which the Act might be made applicable: (1) those created after its passage which comply with it in form and purpose; (2) those created before the Act's passage which comply with the Act and which would not have been invalid under the pertinent pre-Act statutory or case law either because the latter explicitly validated interests of the kind recognized by the Act or, at least, was silent on the issue; (3) those created either before or after the Act which do not comply with the Act but which are valid under the state's statute or case law; and (4) those created before the Act's passage which comply with the Act but which would have been invalid under the pertinent pre-Act statutory or case law.

It is the purpose of Section 5 to establish or confirm the validity of the first three classes of interests. Subsection (a) establishes the validity of the first class of interests, whether or not they are designated as conservation or preservation easements. Subsection (b) establishes the validity under the Act of the second class. Subsection (c) confirms the validity of the third class independently of

the Act by disavowing the intent to invalidate any interest that does comply with other applicable law.

Constitutional difficulties could arise, however, if the Act sought retroactively to confer blanket validity upon the fourth class of interests. The owner of the land ostensibly burdened by the formerly invalid interest might well succeed in arguing that his property would be "taken" without just compensation were that interest subsequently validated by the Act. Subsection (b) addresses this difficulty by precluding retroactive application of the Act if such application "contravenes the constitution or laws of this state or the United States." That determination, of course, would have to be made by a court.

Library References

Health and Environment \S 25.5(4).

C.J.S. Health and Environment $\S\S$ 91 *et seq.*, 130, 132.

\S 6. [Uniformity of Application and Construction]

This Act shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it.

Library References

Health and Environment \S 25.5(2).

C.J.S. Health and Environment $\S\S$ 61 *et seq.*, 91 *et seq.*, 106 *et seq.*, 115 *et seq.*, 125 *et seq.*, 133 *et seq.*

Introduced by: Mullen,
Keene, McGahan, Crawford,
Walli, Phillips & McLane
Date: February 2, 1988
Vote: Unanimous
Action: Adopted

KENAI PENINSULA BOROUGH

RESOLUTION 88-10

OPPOSING FINFISH MARICULTURE IN ALASKA.

WHEREAS, there is a proposal before the Alaska legislature that would allow finfish mariculture in Alaska, and

WHEREAS, commercial and sport fishing organizations on the Kenai Peninsula and in Alaska are opposed to the idea of fish farming for a variety of biological and economical reasons, and

WHEREAS, it remains unclear how Alaska would benefit from a salmon farming industry, and

WHEREAS, it is possible that money needed to launch a fish farming program in Alaska would come out of already reduced sportfish and commercial fish budgets to the detriment of existing users of fisheries resources in Alaska;

NOW THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

Section 1. That the Kenai Peninsula Borough encourages the legislature of the State of Alaska to exclude salmon farming from any proposed mariculture legislation and to extend the current moratorium on the issuance of salmon farm permits indefinitely.

Section 2. That the Kenai Peninsula Borough encourages the legislature of the State of Alaska to carefully regulate mariculture programs related to shellfish, crustaceans, aquatic farming and other non-finfish mariculture projects in order to avoid conflict with other user groups.

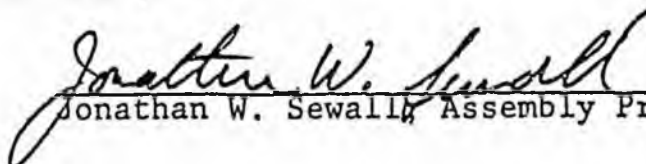
Section 3. That the Kenai Peninsula Borough asks the legislature of the State of Alaska to be certain that funding for any type of mariculture industry in Alaska comes from budget areas other than already depleted commercial and sportfish budgets.

Section 4. That copies of this resolution be sent to Governor Cowper and all legislators.

ADOPTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH ON THIS 2nd DAY OF February, 1988.

ATTEST:


Borough Clerk


Jonathan W. Sewall, Assembly President