SB

123

6-0350E
Bradley
3/9/89

Original sponsor: Sturgulewski

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 123 (Judiciary) AS AMENDED

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

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

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 34 is amended by adding a new chapter to read:

CHAPTER 17. UNIFORM CONSERVATION EASEMENT ACT.

Sec. 34.17.010. CREATION, CONVEYANCE, ACCEPTANCE AND DURATION. (a) Except as otherwise provided in this chapter, 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) 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 may not arise under a conservation easement before the conservation easement is accepted by the holder and the acceptance is recorded.

(c) Except as provided in AS 34.17.020(b), a conservation easement is unlimited in duration unless the instrument creating the conservation easement provides a limitation on duration.

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

(e) The state or a municipality may not establish a conservation easement on property by eminent domain.

Sec. 34.17.020. 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 chapter does not affect the power of a court to modify or terminate a conservation easement under the principles of law and equity.

Sec. 34.17.030. 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.

Sec. 34.17.040. APPLICABILITY. (a) This chapter applies to an interest created on or after the effective date of this Act that complies with this chapter, whether designated as a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise.

(b) This chapter applies to an interest created before the effective date of this Act if the interest would have been enforceable if it had been created after the effective date of this Act unless the retroactive application contravenes the constitution or laws of the

state or the United States.

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

Sec. 34.17.050. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This chapter shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the chapter among states enacting it.

Sec. 34.17.060 DEFINITIONS. In this chapter,

(1) "conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations to retain or protect natural, scenic, or open space values of real property, ensure its availability for agricultural, forest, recreational, or open space use, protect natural resources, maintain or enhance air or water quality, or preserve the historical, architectural, archaeological, or cultural aspects of real property;

(2) "holder" means

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

(B) a nonprofit corporation, a charitable corporation, charitable association, or charitable trust empowered to retain or protect the natural, scenic, or open space values of real property, ensure the availability of real property for agricultural, forest, recreational, or open space use, protect natural resources, maintain or enhance air or water quality, or preserve 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, nonprofit corporation, charitable corporation, charitable association, or charitable trust that is not a holder.

* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

Introduced: 1/17/89
Referred: Judiciary and Resources

IN THE SENATE BY STURGULEWSKI

SENATE BILL NO. 123

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to a governmental body, nonprofit corporation, charitable corporation, charitable association, or charitable trust that is not a holder.

* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

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.

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 At.

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

alaska federation of natives, inc.

411 W. 4th Avenue, Suite 301 • Anchorage, Alaska 99501 • Phone (907) 274-3611

February 21, 1989

Ms. Melissa Fouse
Office of Senator Arliss Sturgulewski
Alaska Senate
P. O. Box V
Juneau, Alaska 99811

Dear Melissa:

Enclosed is a copy of Senate Bill 123 that contains the Federations suggested changes. I have discussed our suggested changes with Kerry Hoffman, Executive Director of the Anchorage Historic Properties. She indicated I should submit them to you. She did not appear to have a problem with them.

Our reasoning for the changes is as follows:

Page 1, Line 15 - Add the sentence as shown. This further clarifies that conservation easements may not be acquired through the exercise of eminent domain, ie condemnation. The Anchorage Historic Properties (Hoffman) agrees that condemnation does not apply to conservation easements.

Page 2, Line 4 - Omit line 4 as shown. Line 4 is not necessary in that it opens the door for judicial action from unknown sources. If a person is entitled to bring judicial action under another law omitting this line does not eliminate that right.

Page 2, Lines 20 and 21 - The affect of adding "under this Chapter" and omitting "that complies with this Chapter" does not change the intent of this section, but rather clarifies it. The suggested changes make it clear that said Chapter only applies to an interested created under this Chapter.

Page 3, Line 28 - Adding the word "expressly" where suggested has the effect of requiring that a third-party right of enforcement is a right expressly identified in a conservation easement. It does not leave it open to interpretation.

These suggested changes should not be controversial in nature. They are intended to clarify issues that could be viewed as causing problems. The changes should gain support for the bill.

Please provide me with a copy of a rewrite if, in fact, one is done.

Thank you.

Best regards,

Larry

Lawrence H. Kimball, Jr.
Land Manager

cc: Kerry Hoffman, AHP
Don Marx, CIRI

enclosure

Introduced: 1/17/
Referred: Judiciary and Resources

IN THE SENATE BY STURGULEWSKI

SENATE BILL NO. 123

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

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to a governmental body, nonprofit corporation, charitable corporation, charitable association, or charitable trust that is not a holder.

* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M March 7, 1989

SUBJECT: Uniform Conservation Easement Act (SB 123)

TO: Senator Arliss Sturgulewski

FROM: Richard A. Bradley
Legislative Counsel

Melissa Fouse asked that I comment on several issues raised by AFN.

Let me preface my comments by noting that SB 123 adopts the Uniform Conservation Easement Act. The purposes of the so-called "Uniform Acts" is to "make uniform the laws of the states" that adopt the provisions. While we have sought to put the language of the bill into the style used for bills in Alaska, deviations from the format of the Uniform Laws should be made only for substantial issues. In my view, the suggestions from the AFN are uniformly not of a substantial nature.

(1) They suggest that a sentence be added at the end of existing text on page 1, line 15:

> Power as to the exercise of eminent domain is not applicable to conservation easements.

I believe that their suggestion might be simplified as "Conservation easements are not subject to eminent domain." If that is their goal, then I must ask whether property that is the subject of the conservation easement itself subject to eminent domain? It is clear that it is; if the property that is the subject of the conservation easement is taken by eminent domain, the conservation easement is extinguished.

And while I have some difficulty understanding why a state or municipality would wish to condemn only the conservation easement, the general thrust of Sec. 10(a) should be fol-

lowed, that general law generally applies except as modified, and the amendment not adopted.

(2) They suggest the deletion of Sec. 20(a)(4); they fear that it opens the door for judicial action from "unknown sources." Since they agree that, even with the deletion, the person could still sue if the "person [was] authorized by other law", the change is not substantive but does depart from the language of the uniform law. Since there appears to be no substantive reason for the suggestion, I suggest that the material not be deleted.

(3) AFN suggests that the phrase "under this chapter" be added after "interest created" on page 2, line 20; they also suggest the deletion of "that complies with this chapter" on lines 20 - 21. To some extent they are incorrect in suggesting that there is no difference between the two phrases; a document can be drafted that "complies with the chapter" even though the drafters never knew about the chapter; such a document is not fairly described as drafted "under the chapter".

I do not believe that the arguments for the change from the uniform language justify the change.

(4) Finally, they suggest the addition of "expressly" in the phrase ". . . a right <u>expressly</u> provided in a conservation easement . . . ." Since we are contemplating a written document, a right is either provided for or is not provided for; nothing is added by the word "expressly."

Let me say finally that the reasons urged for the amendments are tersely stated. There may be substantive reasons for the changes that were not articulated in your letter. But to the extent that the amendments rely on the reasons stated in the letter, I believe that the case has not been made for a departure from uniform act language.

If I may be of further assistance, please advise.

RAB:gc
WKG7/111

ANCHORAGE HISTORIC PROPERTIES INCORPORATED

February 23, 1989

Senator Arliss Sturgulewski
P.O. Box V
(Capitol Bldg., Rm. 427)
Juneau, Alaska 99811

Tel.: 465-3818

FAX: c/o Legislative Affairs: 465-3700

FAX c/o Senate Finance Comm.:465-3841

Dear Senator:

This letter is to comment on the revisions suggested by Larry Kimball on behalf of the Alaska Federation of Natives per telecon 2/16/89.

PAGE 1, LINE 15

We have no objection to the insertion of appropriate words which reflect that the act does not grant to anyone the power to acquire conservation easements by eminent domain.

PAGE 2, LINE 4

The request made is to omit the language:

"(4) a person authorized by other law."

We assume that this was merely a catch-all to leave a door open in case the legislature authorized other persons or organizations to enforce the easements. We note that most of the other states which have adopted this model law have retained this phrase. This is not a particularly important point with us and we leave it to your judgment.

PAGE 2, LINE 20

The proposed change would seem to require that any easement created after the effective date of this act must refer specifically to this chapter in order for the easement to be effective. The wording suggested in the model law would allow an easement to be effective if it complied with the chapter but

524 WEST FOURTH AVENUE • ANCHORAGE, ALASKA 99501 • (907) 274-1600
MEMBER NATIONAL TRUST FOR HISTORIC PRESERVATION

without mentioning it. This is not a highly significant point and we leave it to your discretion.

PAGE 3, LINE 28

It is proposed to add the word "expressly". The addition of this word would make the enforcement more difficult since it would be argued by lawyers resisting the enforcement that the given enforcement power was not "expressly" granted. We do not think it is wise to include this extra word "expressly" in the legislation.

Thank you for your consideration in this matter.

Sincerely yours,

ANCHORAGE HISTORIC PROPERTIES, INC.

BY: Kerry D. Hoffman
KERRY I. HOFFMAN
Executive Director

AHP\lt.str

Keeping downtown in shape

Deal insures facade of Wendler Building

By RON ZELLAR
Times Business Writer

The owner of a downtown landmark acquired from the Municipality of Anchorage in 1984 has donated the building's exterior and air rights to a city-created, non-profit corporation.

Bill Mundy, owner of the Wendler Building at 400 D St., said terms of the agreement with Anchorage Historic Properties Inc. require him to maintain the facade and to insure the building for replacement, among other conditions.

In return, he will receive a tax benefit for the donation, known as a "historic preservation and conservation easement," and retain ownership of the building's interior.

Mundy made the donation just before the end of the 1988 tax year. The size of the tax benefit will not be known until an appraisal is done within the next three months to see how the donation affects the property's value, he said.

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

The Wendler Building was built by merchant A.J. Wendler in 1915 as a grocery store with living quarters on the second floor. The grocery, situated at Fourth Avenue and I Streets,

See Building, page B-3

Building

Continued from page B-1

was one of 92 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 1982, 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.

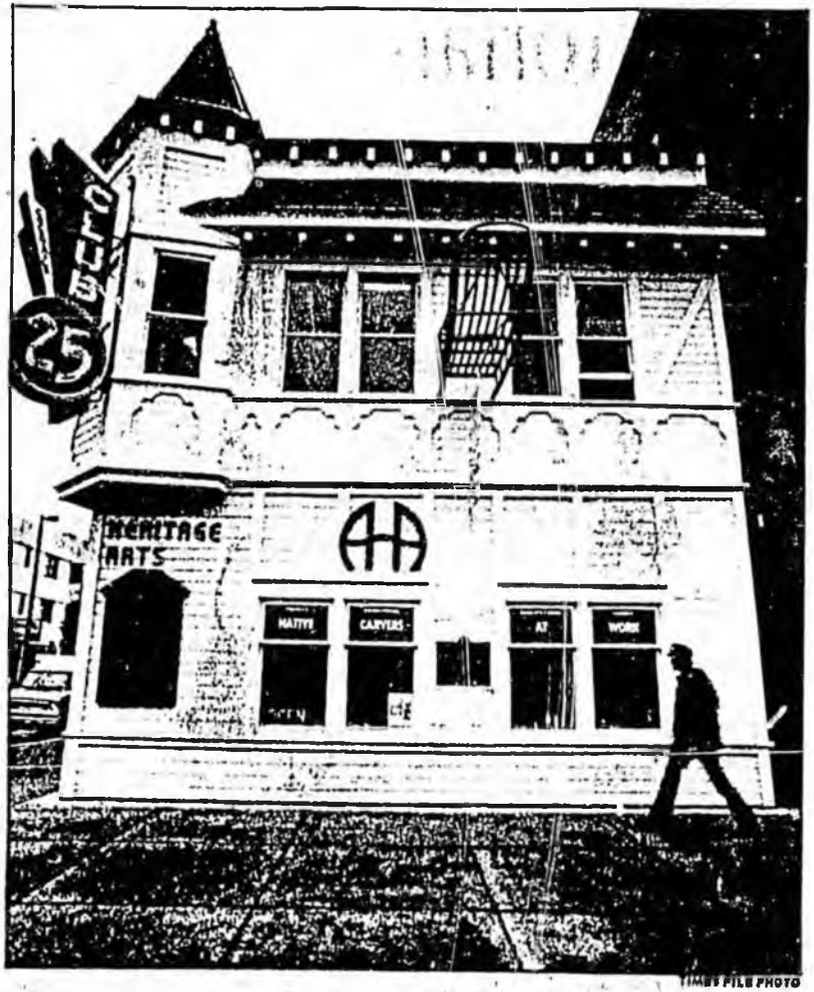
Donation of the air rights means no structure taller than the existing buildings can be built on the site.

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.



TIMES FILE PHOTO

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 get more buildings listed or declared 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 80s 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.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

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.

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

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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 19[illegible], §§ 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.

ENT ACT

Adopted

itutory 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.
9–19–1 to 89–19–13.
111.400.
Resources Code §§ 183.001

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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 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 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 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

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:

"32-5-2.6-7 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 money, 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).

§ 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-

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.

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).)

Action in Adopting Jurisdictions

Variations from Official Text:

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

Maine. 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, 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.

(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.

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 recordation 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).)

Action in Adopting Jurisdictions

Variations from Official Text:

District of Columbia. Section reads:

"(a)(1) 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, provided that the recordation of any conservation easement as defined in section 2, or of any assignment, release, modification, termination, or other alteration of a conservation easement shall be exempt from the recordation tax imposed by section 303 of the District of Columbia Real Estate Deed Recordation Tax Act, approved March 2, 1962 (76 Stat. 12; D.C.Code, sec. 45-923), and from the transfer tax imposed by section 403 of the District of Columbia Revenue Act of 1980, effective September 13, 1980 (D.C.Law 3-92; D.C. Code, sec. 47-903).

"(2) The exemption provided for in subsection (2) of this section shall not apply if the consideration for the conservation easement exceeds $100 in value.

"(b) No right or duty in favor of or against 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 4(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.

"(e) A conservation easement is valid even under the following circumstances:

"(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."

Maine. In subsec. (a), adds "created by written instrument" at the end thereof.

Subsec. (b) reads: "No right or duty in favor of or against a holder arises under a conservation easement unless it is accepted by the holder and no right in favor of a person

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 478."

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."

Mississippi. 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. (b) 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.

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 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.

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 langunge 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 a 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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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 law 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

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 "would contravene the constitution or laws of (the) State or of the United States." That determination, of course, would have to be made by a court.

Action in Adopting Jurisdictions

Variations from Official Text:

Maine. Subsec. (b) reads: "This subchapter applies to any conservation easement created before the effective date of this subchapter if the conservation easement would have been enforceable had it been created after the effective date of this subchapter, unless retroactive application contravenes the Constitution of Maine or the United States Constitution."

Mississippi. Section reads:

"(1) This chapter shall apply to an interest created after the effective date of this chapter, whether the interest is designated as a conservation easement or as a covenant, equitable servitude, restriction, easement or otherwise, as long as such interest complies with the provisions of this chapter.

"(2) This chapter shall apply to any interest created prior to the effective date of this chapter if the interest would have been enforceable had it been created after the effective date of this chapter unless retroactive application would contravene the Constitution or laws of this state or the United States.

"(3) This chapter shall 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 any other law of this state.

"(4) The provisions of this chapter are cumulative and supplemental to any other provision of law."

Texas. In subsec. (a), substitutes "on or after September 1, 1983, that" for "after its effective date which".

In subsec. (b), substitutes "September 1, 1983" for "effective date" where first appearing and "on or after September 1, 1983" for "after its effective date".

Wisconsin. Omits subsec. (a) and (b).

In subsec. (c), omits reference to preservation easement and 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.

§ 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 ⇐25.5(2).
C.J.S. Health and Environment §§ 61 et seq., 91 et seq., 106 et seq., 115 et seq., 125 et seq., 133 et seq.

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Colorado	1*
Delaware	1*
Florida	1*
Hawaii	1*
Maryland	1*
Massachusetts	1*
Nevada	1*
New Mexico	1*
North Carolina	1*
North Dakota	1*
Ohio	1*
Pennsylvania	1*
Rhode Island	1*
South Dakota	1*
Tennessee	1*

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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 __ 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.