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SENATE COMMITTEE REPORT

FURTHER

3/1

DATE TURNED INTO OFFICE

3/29/89

Mr. President:

RES

Committee considered

SB 123

adopting the Uniform Conservation Easement Act; efd

and recommended

[] replace with
 or adopt

CS
CS

SB 123 (Jud)

same title
[] new title
[] technical title change (HB only)

[] attached amendment(s) and

[] _____ letter of intent adopted

do pass *majority*

[] do not pass

[] no recommendation

[] individual recommendations

[] further referral to _____

FISCAL NOTE(S) [] zero [] fiscal impact [] appropriation no FN
[] new [] updated [] previous
[] same as previous fiscal note(s) published _____

MEMBERS SIGNING DO PASS

Carlisle Sturgis
Rick Halford

OTHER RECOMMENDATIONS

no rec.
no rec.

[Signature]
Chairman signature and recommendation

[] Committee Backup attached

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: CSSB 123(JUD) (b)
PUBLISH DATE: 3/17/89

FISCAL NOTE

REQUEST:

Revision Date: <u>14-Mar-89</u>	Agency Affected: <u>Natural Resources</u>
Title: <u>An Act adopting the Uniform Conservation Easement Act</u>	BRU: <u>Parks Management</u> <u>Land & Water Mgmt</u>
Sponsor: <u>Sturgulewski</u>	Components: <u>Parks Management</u> <u>Land & Water Mgmt</u>
Requestor: <u>Senate Judiciary</u>	

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						
---------	--	--	--	--	--	--

REVENUE						
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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)

[Empty box for analysis]

Prepared by: Larry Ostrovsky Phone: 465-2400
 Division: Commissioner's Office Date: 14-Mar-89
 Approved by Commissioner: Lennie Gorsuch Date: 14-Mar-89
 Agency: Department of Natural Resources

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

Alaska State Legislature



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ANCHORAGE, ALASKA 99508

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

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

Senate

M E M O R A N D U M

15 Wednesday 1989

TO: Senator Bettye Fahrenkamp
Chairman, Senate Resources Committee

FROM: Senator Arliss Sturgulewski *AS*

Senate Bill 123 "An Act adopting the Uniform Conservation Easement Act; and providing for an effective date" has been referred to the Senate Resources Committee. I respectfully request that you schedule this bill to be heard as soon as is practicable.

The purpose of this legislation is to change the rules of common law about the enforceability, by a third party, of a use of land. That third party, the holder of a conservation easement, need not have a right to use the land for any purpose, it has only the right to ensure the land is used for the purposes stated in the easement by the grantor.

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.

Attached is a copy of the Uniform Act commentary which I am sure you will find helpful, a memo from Dick Bradley of Legal Services which summarizes the Act, a question - and - answer sheet prepared by Anchorage Historic Properties Corporation, and an article about a conservation easement grant occurring in Anchorage.

In addition, I have attached a memorandum from John Reese, an attorney and the Chairman of the Anchorage Historic Properties Commission regarding certain implications of this act on concerns raised by a member of the Senate Judiciary Committee. The Judiciary committee made two changes to this bill:

The first change 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 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. This change was suggested by Dick Bradley of Legislative Services; his memo is attached.

Please call me or Melissa Fouse of my staff at 465-3818 if you have any questions.

STEVE COWPER, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

400 WILLOUGHBY AVE.
JUNEAU, ALASKA 99801-1798
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.

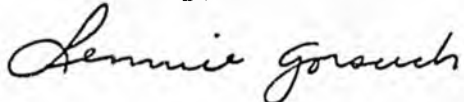
Senator Faiks

- 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,

A handwritten signature in cursive script that reads "Lennie Gorsuch".

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						
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)

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

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

By RON ZELLAR
Times Staff 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 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.

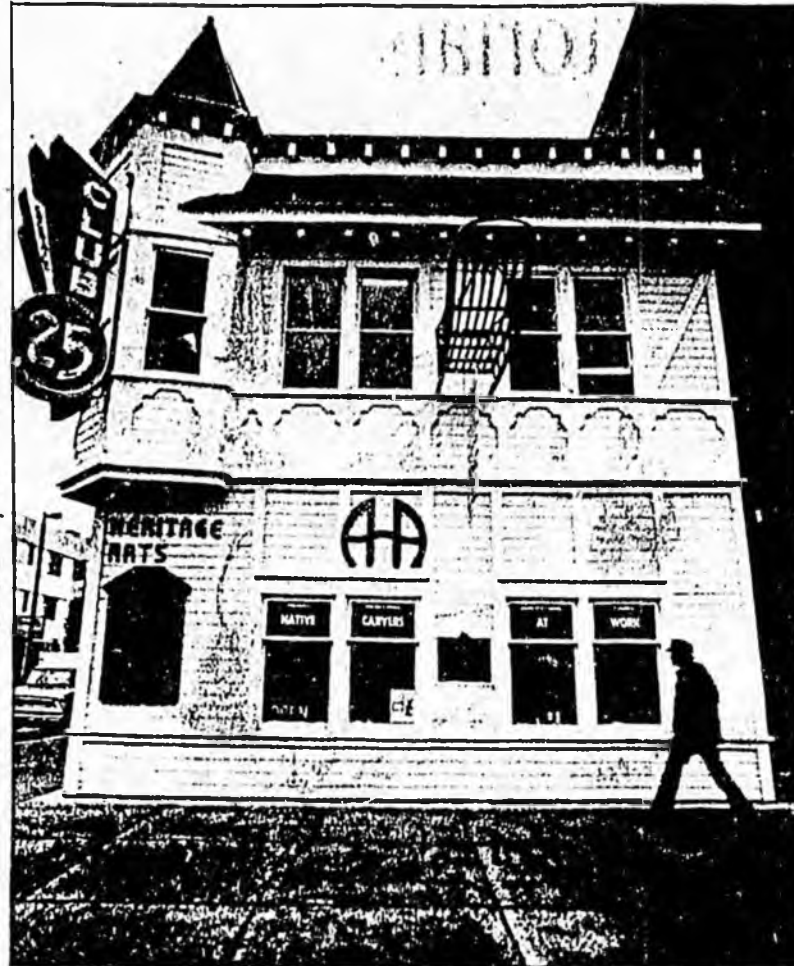
Donation of the air rights means no structure taller than the existing buildings can be built on the site.

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

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 de-

clared 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 80 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 At.

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

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

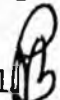
LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

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.

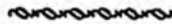
If I may be of further assistance, please advise.

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.

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

20

MAR 08 1988

LEGISLATIVE AFFAIRS
Reference Library

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.

The easement al most comfortable equitable servitude fourth interest restrictive covenar outdated, limitation of covenant requirements as "e instruments drafted true.

In assimilating t parties to the form from some existing nature are subject

There are both p public ordering sy common law imper those held in gros: conservation and h layer of complexity be reluctant to bec agency participatio enacting it for the responsibilities of s

In addition, contr that the Act will se legislature facilitat types of easement myriads of purpose Section 1(2) of the to governmental ag an indiscriminate b easements provide tions, for example, favorable tax treat properties have bee potential loss of l taxation of these pr of property relatio requirements, conv norm, rather than i impediments which England centuries e

The Act does not extraneous to its pr with charitable org encumbrance of ce exception of the re formalities and effe wish to establish sp

Similarly unadrea of conservation ea duration unless the between this provis property of unlimit

The relationship l dealt with; for exa presents issues wh structuring of trans Revenue Code, but income, estate and g power of eminent d

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 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 conservator 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.

6 to 479-B.

1 to 84C.05.

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

111.400.

Resources Code §§ 183.001

ments are set forth in this suppl-

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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 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.

ents held by a fall within th ments. Such e In real propert must serve on poses: Protect sources; protea ervation of the other similar of (1).

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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.

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Mississippi. Sec "For purposes o have the meaning i wise requires:

§ 1. [Definitions]

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

"(1) 'Conserva ry interest of a l tions or affirmat include retaining or open-space va ability for agricul open-space use, p maintaining or e serving the natur cal or cultural as

(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:

"(2) 'Holder' s "(a) A gover this state or the property; or "(b) A privi corporation, as ers of which in- scenic, historic.

(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.

Health and Envir C.J.S. Health an

(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.

§ 2. [Creatio

(a) Except a conveyed, rec affected in th

(b) No right having a third- acceptance by

COMMENT

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

by the adopting state's

fund or the General Fund, improvements on any real estate. If the conservation easement has been created by a deed, the easement is perpetual, a term of the easement and the purpose for the use and benefit of

substantial adoption of the Act, but contains numerous provisions of a non-substantial matter which cannot be created.

Section 1 to 49-0311 of the New York Law do not constitute a uniform Act, although they are intended to have the same general

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of a holder in real estate of which include interests in real property, assuring its protection of natural resources, maintaining or enhancing the historical,

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trust, the purposes of scenic, or open-space use, maintaining or enhancing or cultural, archaeological,

in a conservation easement, a governmental body, charitable or other eligible to be a

can possess a "third-party right." 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.

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,

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.

(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

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Subsec. (c) reads:

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"A. The instrument cre

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§ 3. [Judicial Acti

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(b) This Act does : easement in accorda

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duty in favor of or against conservation easement unless it is 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 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.

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

served only a limited number of purposes. The reluctance to approve so-called "negative" easements serving the conservation ends enumerated in the Act is a result of enforcement under the traditional common law. Accordingly, subsection (3) provides that a conservation or preservation easement is enforceable solely because it is enforceable under the law of the state in which it is created or falls within the category of easements traditionally recognized in that state.

Subsection (4) deals with the problem of the going concern. The Act provides that only a limited number of easements—those preventing the land from performing a use that would be privileged to perform. Because a far wider range of burdens than those recognized by common law might be imposed by conservation easements, subsection (4) provides that common law by eliminating conservation or preservation easements that impose a "novel" negative burden.

Subsection (5) addresses the unenforceability of an easement that imposes a burden upon either the owner or upon the holder. The Act was viewed by the courts as a means to eliminate "spurious" easements at all. The first, "spurious" easement be created by the owner of the burdened property; firmative acts. (The statute distinguished from an affirmative act by a right of way

Variations from Official Text:

District of Columbia. Omit

Maine. In subsec. (1), insert following "to".

Adds a subsec. (8) which requires a successor and assigns of the holder

Health and Environment ⇐
C.J.S. Health and Environment

§ 5. [Applicability]

(a) This Act applies to this Act, whether described as a servitude, restriction,

(b) This Act applies to an easement that has been enforceable had it been created by the donor; it contravenes the constitution.

(c) This Act does not apply to a conservation easement that is enforceable otherwise, that is enforceable under the law of the state in which it is created or falls within the category of easements traditionally recognized in that state.

There are four classes:

provisions of the trust. here a charitable trustee not carry out its responsibility and will not allow the

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may deny equitable enforcement of when it finds that change of circumstance that easement no longer in the court so finds, the court may allow equity in an action to enforce the

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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 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

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STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800


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.

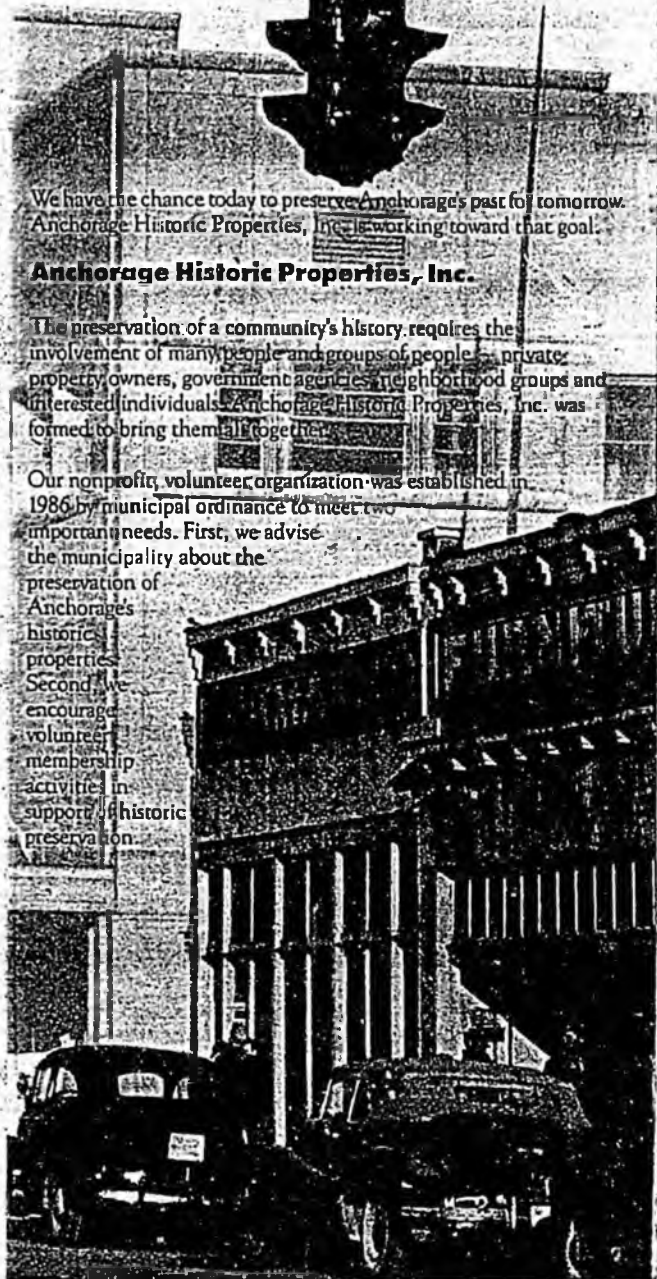


Photo: Homer Dismore
From Anchorage Museum of History and Art

We have the chance today to preserve Anchorage's past for tomorrow. Anchorage Historic Properties, Inc. is working toward that goal.

Anchorage Historic Properties, Inc.

The preservation of a community's history requires the involvement of many people and groups of people — private property owners, government agencies, neighborhood groups and interested individuals. Anchorage Historic Properties, Inc. was formed to bring them all together.

Our nonprofit, volunteer organization was established in 1986 by municipal ordinance to meet two important needs. First, we advise the municipality about the preservation of Anchorage's historic properties. Second, we encourage volunteer membership activities in support of historic preservation.

514 WEST FOURTH AVENUE • ANCHORAGE, ALASKA 99501
 Anchorage Historic Properties, Inc. is dedicated to the preservation of the Municipality of Anchorage's heritage through the promotion of public awareness and education with respect to historic properties and the preservation of significant properties which contribute to our history, aesthetics, and sense of place.
 MEMBER NATIONAL TRUST FOR HISTORIC PRESERVATION



What If Part Of Our Historic Heritage...

Just Disappeared?



Programs for Preservation

Anchorage Historic Properties, Inc. accomplishes its goals through a variety of programs:

Revolving Loan Fund Anchorage Historic Properties, Inc. makes short-term loans available for the acquisition, study, rehabilitation or repair of qualifying properties within the municipality. As loans are repaid or money is raised from the sale of properties, it goes back into the revolving loan fund for use on other properties.

Easement Program Historic preservation easements have become an important tool for protecting significant properties. Property owners may receive valuable tax advantages when they give Anchorage Historic Properties, Inc. the right to approve any changes to a building's interior or exterior.

Property Management Anchorage Historic Properties, Inc. provides management for such properties as the popular Oscar Anderson House, which is open to visitors for tours and special events.

Fourth Avenue at E Street in 1931, looking west.

Education Education is an important aspect of preservation. Anchorage Historic Properties, Inc. has been instrumental in the placement of interpretive historic kiosks at important sites in the downtown area. These kiosks and a guided walking tour, offered in the summer months, help bring to life the events, people and places of Anchorage's colorful past.

Advocacy Anchorage Historic Properties, Inc. acts as a leader in encouraging the preservation and appreciation of historic properties.

Funding

Anchorage Historic Properties, Inc. received funding of \$1.7 million from a voter initiative that was approved by the public, as part of the Project '80 program. These funds serve as an endowment to protect our historic properties.

Anchorage Historic Properties, Inc. is working to make the organization self-supporting through earned revenues, memberships, contributions and project grants.

You Can Help

Please join us in helping to protect and preserve Anchorage's heritage.

Become a member You can join Anchorage Historic Properties, Inc. for only \$10 a year. When you do, you will receive our quarterly newsletter and invitations to special happenings — and you will be part of a network of dedicated citizens who believe in historic preservation.

Make a contribution Your additional contribution will help us to continue the important work we now do and it will allow us to do more.

Volunteer Anchorage Historic Properties, Inc. relies upon a small staff and a volunteer board to carry out its programs for preservation. You can help by volunteering your time to lead a tour, staff the Oscar Anderson House, or work on a special event or project.

For more information, contact Anchorage Historic Properties, Inc. 524 West Fourth Avenue, Anchorage, Alaska 99501; (907) 274-3600.

Member National Trust for Historic Preservation

I Want To Help

Yes! I want to help Anchorage Historic Properties, Inc. preserve our city's heritage.

Sign me up as a member. My \$10 check is enclosed.

Please accept my contribution for \$ _____

Name _____

Address _____

City _____ State _____ Zip _____

Please indicate areas in which you would be able to assist Anchorage Historic Properties, Inc.

- | | |
|---|--|
| <input type="checkbox"/> Membership Development | <input type="checkbox"/> Old City Hall |
| <input type="checkbox"/> Office Support | <input type="checkbox"/> Fourth Avenue Theatre |
| <input type="checkbox"/> Fundraising | <input type="checkbox"/> Oscar Anderson House |
| <input type="checkbox"/> Newsletter | <input type="checkbox"/> Downtown Preservation |
| <input type="checkbox"/> Special Events | <input type="checkbox"/> Bootlegger Cove Cabin |
| <input type="checkbox"/> Public Relations | <input type="checkbox"/> Other: _____ |

Please make your check payable to Anchorage Historic Properties, Inc. and mail it to 524 West Fourth Avenue, Anchorage, Alaska 99501, (907) 274-3600.



Informational kiosk, one of 12 placed in downtown Anchorage by Anchorage Historic Properties, Inc.



Preservation Easements Can They Work for You?

Many nonprofits find preservation easement programs ideal for fulfilling their missions, achieving conservation and historic goals, and offering tax advantages to their donors—all at the same time. How does such a program work, and does it make sense for your organization?

By Anne M. Nation

What do an old Victorian mansion, a picnic area, and a swamp have in common? If you answered "a summer retreat for the Munsters," read on. You may be pleasantly surprised. To a nonprofit, the above properties should appear as potential sources of preservation easements, many of which qualify for conservation contributions under IRS charitable donation guidelines. Such contributions not only help a nonprofit to carry out its organizational purpose, but can assist the donor by providing a multi-year charitable tax deduction while reducing property, estate, and gift taxes.

Sound interesting? Nation-wide, hundreds of nonprofits have answered "yes." For most, easements have insured a means of preserving this country's heritage and beauty. These nonprofits have been able to secure, for themselves, control over those aspects of private properties which are of natural or historic importance. The controlling nonprofit can then require property owners to maintain wildlife habitats or make repairs to historic houses and can even prevent new construction on open space. Best of all, these costs are borne by the property owner, not the nonprofit. And by obtaining separate cash donations from the

Anne M. Nation is presently working as a freelance writer and consultant in conjunction with nonprofit organizations. Recent community development efforts include grant preparation, involvement with comprehensive plan review process, and readying program promotional materials. Previous experience includes six years as the CEO of a private, nonprofit human service organization. Ms. Nation may be reached at RR 2, Box 18, Friend, Nebraska 68359 (402-947-6791).

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The Historic Preservation Commission uses easements to guarantee the perpetual maintenance of landmarks without the cost and responsibility of holding an entire property.

original donors, nonprofits can establish stewardship funds as a means of ongoing program support.

This is the closest some nonprofits will come to "eating their cake and having it too."

WHAT IS A PRESERVATION EASEMENT?

A preservation easement, also referred to as a conservation easement, is a legal appendage to a land deed that transfers a qualified interest in the property to a nonprofit or governmental unit for the purposes of preserving, in perpetuity, specific features of the property.

In Nebraska, for example, the Historic Preservation Commission of Lincoln/Lancaster County is presently working in conjunction with a city landmark ordinance to receive donations of facade easements on designated historic structures. Although the Commission is interested in insuring that buildings determined to be landmarks are preserved as part of the area's heritage, it is neither practical nor cost effective for the Commission to attempt actually to own and maintain designated structures. By holding an easement, the Commission will be able to guarantee the perpetual maintenance

of the landmarks in a historic manner without the cost and responsibility of holding an entire property.

Upriver, in Grand Island, Nebraska, the Platte River Whooping Crane Trust (the Trust) is using conservation easements for the protection of threatened and endangered species. Focusing on the need to act quickly to preserve critical wildlife habitats for the whooping crane, sandhills crane, and other migratory birds, the Trust was authorized to acquire land to secure the ecosystem. Recognizing that it lacked the funds to purchase all the land along an 80-mile stretch of river, the Trust concentrated on buying only key roost sites. It then used conservation easements to purchase management rights on surrounding land that could serve as a buffer and protect wetland and grassland feeding sites. Thus, the Trust has been able to spread its limited funds across a large geographic area to rapidly develop critical roost site complexes.

In addition to achieving immediate conservation goals, if the easement results in a reduction in the ability of present and future owners to use a property according to its "highest and best use value," it can result in present and future tax advantages to a donor. The classic example is an old home in the middle of an area ripe for development. The assessed

value of the property at its highest and best use is \$500,000. This usage, however, requires that the home be razed in favor of a high-rise apartment complex. The owners of the home do not wish to have the building destroyed. They want it to remain a classic, single-family unit. By attaching a preservation easement to the deed and transferring the right of the easement to a qualified nonprofit, the owners can effectively block the destruction of the house for development purposes. They continue as the legal owners of the structure, while the easement ensures that the building remains in its present state and that future owners maintain the house in its historic form. By blocking the possibility for develop-

ment, the owners reduce the "highest and best use" of the property to that of a single-family dwelling. The appraised value of the house drops to that of similar homes—say, \$120,000. This revised valuation becomes the standard used for determining property taxes, as well as any estate and gift taxes connected with the transfer of the property.

To determine the value of such a charitable donation, the formula, at its simplest, is to subtract the value of the property before the preservation easement from the value of the property after the easement. In this case, \$500,000 - \$120,000 = \$380,000. This donor value of the gift would be deductible to the full extent allowed by the law.

Not all properties qualify for charitable contributions. Table 1 outlines those properties which meet IRS guidelines. In the case of Harris House and the Phi Delta Theta House in Lincoln, Nebraska, both donors had their buildings placed on the National Register of Historic Places prior to making any donation. This process, which took approximately three months, served to confirm that the properties met the test of being certified historic structures.

It is worth noting that the IRS has recently published rules and regulations specifically relating to the donation of easements. Such action is an indicator that an area is demonstrating a potential for abuse. It also indicates that a claim in this area may serve to flag a return for an audit. To avoid problems with future revenue rulings, a donor may want to review existing revenue rulings or request a private ruling. (See "First Alert" in the November-December 1986 *Nonprofit World* for a relevant revenue ruling citation).

A private ruling is an advance agreement by the IRS that a deduction is acceptable. A private ruling may be obtained by writing the IRS district director, outlining the proposed conservation contribution and stating all pertinent facts in a fair and accurate manner. If a ruling favoring the contribution is received, the donor will be protected, even in the event of future, retroactive revenue rulings against preservation easements. The only exception would be if fraudulent or misleading statements were made by the petitioner.

In general, the test used in determining a qualified contribution is whether or not the owner is giving up something of value. If it cannot be demonstrated that the property value decreases, or worse yet if the easement actually increases the value of the property, do not expect it to qualify as a tax deduction.

However, the transfer of an easement is not contingent upon it being tax deductible. Easements may still be transferred by owners interested in perpetual maintenance or may be purchased by an organization intent on ensuring property preservation.

WHY A PRESERVATION EASEMENT?

The advantage most commonly cited by organizations using easements is that they allow for the best use of limited resources when working to preserve land or buildings. Often the cost of owning and maintaining a property is expensive and time consuming. By using easements, nonprofits can acquire only those property rights that are of interest to

Table 1
Qualified Properties

Type of Property	Requirements	Definitions
Land areas for outdoor recreation by or education of the general public.	Substantial and regular use of the general public.	This would include boating and fishing areas open to the public. Access: Restrictions in the case of inhabited property can apply, provided they are not overly prohibitive.
A relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.	Protects a significant relatively natural habitat.	Includes habitats for rare, threatened, or endangered species; habitats that are high-quality examples of ecosystems; and habitats that are in or adjoin parks, preserves, or wilderness areas and would contribute to the area. Access: Public access may be restricted if it is necessary to the conservation of the area; however, the donor must be allowed access for the purpose of study and preservation.
Certain open space (including farmland and forest land).	Pursuant to a clearly delineated governmental policy and will yield significant public benefit; or For the scenic enjoyment of the public and will yield a significant public benefit.	Government policy: Requires a specific conservation project, e.g., flood prevention or control, outdoor recreation, irrigation or water supply protection, erosion control, land management plans, and land abutting or part of existing conservation sites. Government policy must demonstrate that it is a clearly thought out and instituted effort. County boards cannot simply pass individual resolutions accepting properties. There must be criteria in existence that are reviewed and applied on a case-by-case basis. Scenic enjoyment: Visual, not physical, access would be impaired by development of the land. What makes a site scenic is determined case-by-case in consideration of the particular view and its impact on the area. Check on local or regional scenic inventories which might be relevant. Significant public benefit: On a case-by-case basis, includes uniqueness of land, its suitability to proposed use of open space by government policies, scenic value, accessibility to the public, and the importance of the particular piece of property in conservation over others. Significant public benefit must apply in conjunction with either government policy or scenic enjoyment. Access: Can be restricted if necessary to conservation.
Historically important land area or a certified historic structure.	Must be a historically important land area or a certified historic structure.	Historically important land area: Any independently significant land that meets National Register criteria for evaluation; any land area within a registered historic district; or any land area adjacent to a property listed in the National Register of Historic Places (but not within a registered historic district). Certified historic structure: Property listed in the National Register or located in a registered historic district. Access: The property should generally be visible to the public. Restrictions may be applied in cases of private properties currently being utilized for personal purposes, e.g., residences. Then reasonable viewing, including tours, may be used to fulfill the requirement. Access by the donor for photographic or research purposes is generally required. Health and safety concerns about the physical condition of the building may restrict or prohibit public access.

Conservation easements allow the Platte River Whooping Crane Trust to spread its limited funds across a large geographic area.

them. This provides control without the problems of ownership and allows an organization to accomplish a limited organizational purpose without taking on added extraneous responsibilities. And by developing a stewardship fund, the nonprofit can establish a financial means of caring for the property in perpetuity.

When Nebraska's Lower Platte South Natural Resources District (NRD) faced a decrease in state support, its executive staff looked at acquiring easements on wetlands as a means of habitat preservation. Under the existing program, they now purchase limited management rights in lieu of acquiring entire properties. It is, however, the current landowners who actually implement the land management program. The farmers are still able to obtain income from the property while the controlled management enhances the land as a wildlife habitat.

The preservation easement provides one of the most stringent and comprehensive means of conserving privately held property. Since many historic, recreational, and natural habitat properties are privately owned, the preservation easement provides an irrevocable means of ensuring that conservation and preservation are continued in perpetuity. The commitment does not die with the owner,

nor is it threatened by the prospect of a forced sale due to owner relocation, cash flow problems, or estate taxes.

Holders of preservation easements retain control over those aspects of the property deeded to them. They have the authority to require that properties be maintained by the present owner in compliance with the conditions of the easement. This means that the holder can force property repairs and block construction that would be counter to the purposes of the easement. The Society for the Preservation of New England Antiquities (SPNEA) has even exercised this right by threatening litigation against reluctant home owners.

Note, however, that repair and maintenance costs are the responsibility of the owner, not the nonprofit holding the easement. It is the responsibility of the nonprofit to supervise the easement and to assure administratively that the terms of the deed are being met. The nonprofit thus becomes the legal overseer of the property.

In order to cover administrative costs, some nonprofits (such as the SPNEA discussed above) now request that donors make a specific cash contribution to a stewardship fund. These monies, which are also tax deductible, are used as an en-

dowment fund for expenses associated with the regular review of the property. They may also be necessary in the event that the holder must take legal action against an owner to force home repairs or other routine maintenance required by the easement deed. With declining public support, such funds may become increasingly necessary to easement programs. When accurately assessed and managed, a stewardship fund can help a program to become self-supporting.

STEPS IN CREATING A PRESERVATION EASEMENT PROGRAM

If the concept of a preservation easement program appeals to you, and if it is philosophically compatible with the purposes of your organization, there are several steps to follow in setting up such a program. The first step is to research the program fully to be certain that it is feasible for your organization. The second step is to design the program—to develop a strategy for finding a donor and working with that donor to create a mutually agreeable program. We shall look at the essential components involved in both these steps.

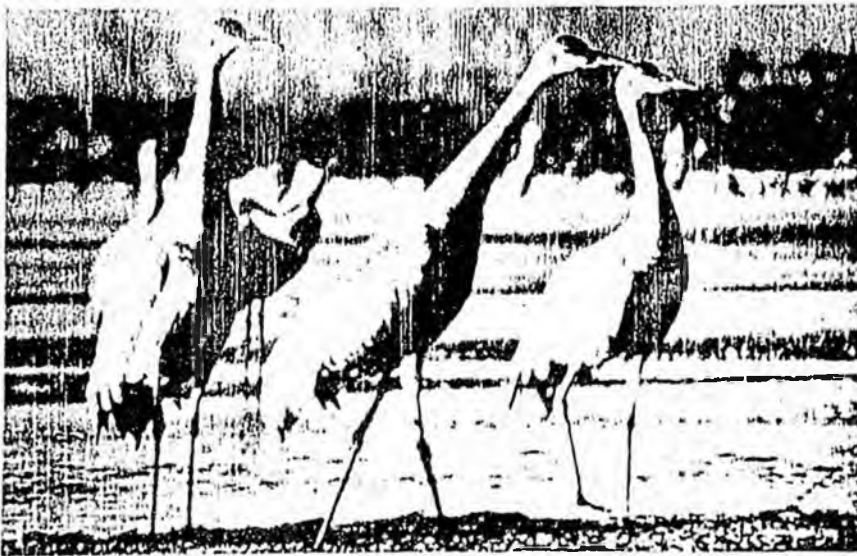
Program Research

Accurate research at the local level is essential to provide you with realistic expectations of the time, effort, and costs involved in operating an easement program. Such research will allow you to make an informed decision about becoming involved in an easement program. At a minimum, your research should include the following moves.

Assign a coordinator to take primary responsibility for program research and design. Although a committee or team may work with this person, it is important to have one individual in charge.

Review qualifying properties to determine what types of eligible structures or open spaces are available and of interest to your organization. Your organizational purpose will direct this decision. (In the examples discussed earlier, for instance, the Historic Commission of Lincoln/Lancaster County is looking at landmark facades, while the local NRD is seeking out wetlands).

Examine preservation easement programs that exist or have existed in your geographic area. This information is generally available from your state historical society or game and parks commission. Meet with the organizations involved to gain an understanding of their program operations. Request samples of their easement deeds. Talk with property



Courtesy Platte River Whooping Crane Trust, easement holder.

The Platte River Whooping Crane Trust is using conservation easements to protect endangered species, such as these sandhills cranes.

owners who have placed easements on deeds. Assess any problems they have encountered, and identify ways to avoid the same pitfalls. Determine how to develop a program that will complement efforts already existing in your area.

Identify resource people to assist your organization and potential donors in the actual giving process. These people might include: attorneys familiar with the preservation easement concept and process, appraisers who can accurately assess the value of the easement in conjunction with the restricted use of the property, auditors or CPAs with knowledge of current tax advantages available to the donor, architects able to verify the historic nature of a particular property, wildlife specialists able to verify the need to preserve a particular habitat, and extension agents capable of identifying government conservation programs that would support open space or farmland easements. Do not be surprised if qualified resource people are not locally available. (A potential donor to Landmarks, Inc., of Omaha, brought in an appraiser from Kansas City, while the one used by the Phi Delta House in Lincoln came from Sioux City).

Determine expenditures that the organization and donor can expect to incur. Although actual costs will vary with the property involved, a checklist of cost factors should be developed. For the organization, cost factors to consider include the annual inspection, maintenance reviews, property remodeling or rehabilitation reviews, cost of initiating repairs if an owner refuses to comply with the easement, and cost of initiating legal action against a recalcitrant owner. Donor costs will include attorney and appraiser fees, certification costs to verify that the easement is for a qualifying property, and filing fees, as well as any separate donation to a stewardship fund. Do not overlook estimating these costs to the donor. They are a necessary part of the solicitation and intake components of the program design (which we will discuss in the next section).

Review the research to determine if your organization is capable of operating a viable preservation easement program. If the review is positive, the next step is to develop a program design that includes solicitation, intake, processing, and follow-up components.

Program Design

Solicitation. This program component targets potential donors for your easement program. Begin by delineating the types of qualifying properties that you will be pursuing as possibilities for obtaining preservation easements. Should your organization decide not to accept certain types of easements, try to

The preservation easement provides an irrevocable means of ensuring that conservation is continued in perpetuity.

identify other nonprofits or units of government that will accept such contributions. Arrange to make referrals to these entities when appropriate.

Next, define the geographic area from which donors will be solicited. This area might be as small as a neighborhood or as large as a state.

Finally, develop a promotional campaign that includes press releases and a brochure or flier providing details about the program. Identify key groups to contact. Include relevant public and private advocacy groups such as state and local historical societies, state park and wildlife agencies, private conservation clubs, and neighborhood associations.

Remember to consider the motivation of your audience when planning. Although the concept of a tax deduction can help to sell the program, most participants donate easements because they wish to ensure the perpetual preservation of their property. (In the examples cited previously, both the Trust and the NRD recognized that their target groups were unlikely to be interested in tax deductions and some would be reluctant to limit land use without compensation). Keep the potential for such differences in mind when planning and implementing the solicitation and intake components.

Intake. This component will be instrumental once you have identified a potential donor. Plan how to explain the program in detail and review the owner's expectations of what the preservation easement will accomplish. It is important that these expectations be realistic and that the parties involved understand the commitment required of both, especially the irrevocable nature of the action.

Provide for a tour of the property to note what features the owner plans to include in the easement. The property and easement description can then be reviewed to determine if the gift meets corporate and IRS contribution guidelines.

Remember that for donations, the IRS will require professional documentation to verify that the gift is a qualifying property. To determine the amount of the donation, an appraiser will need to inspect the site to establish "before" and "after" valuations. This information can then be used by a CPA or accountant to recommend to the owner how best to use the contribution for tax purposes. Although the costs and responsibilities associated with this property review fall to the owner, not the nonprofit, it is a good idea for the nonprofit's contact person to be involved and informed about the process, as there are certain factors which



Placing the Harris House of Lincoln, Nebraska, on the National Register of Historic Places has helped assure its qualification for charitable contributions.

Courtesy, Lincoln, Lancaster County Planning Dept., easement recipient.

(continued from page 23)

could affect the donation of an easement. These factors include: possible problems with a building's structural integrity; previously unidentified aspects of the property that should also be included with the easement; and city, county, and state planning or zoning ordinances.

If you have decided that you will require a separate donation to a stewardship fund, you will need to determine the amount of that donation. Advise the owner of this separate cost, and arrange a payment schedule.

Once you and the property owner have an idea of the costs and deductions involved, meet again to review the initial easement specifications and decide if either party would like to amend the original proposal. Once the parties are in agreement, and all donation criteria have been met, processing of the preservation easement can begin.

Processing. The landowner's attorney should draft a deed of easement, and you should have your attorney review it. Although such deeds may vary, certain components should be included. The donor and donee must be clearly named. The extent and nature of the easement should also be detailed. (The Trust

found that this section, especially, differed from deed to deed).

The deed must also clearly state that this is a perpetual easement. An exact legal description of the property and statements regarding the rights of the donee and the public to access the property will also need to be included. Photographs of the property documenting the condition at the time of the easement will need to be taken. Although such photos are not actually attached to the deed, they are important in case of future legal action surrounding the gift and to verify the condition of the property at the time of donation. If there is any doubt that the donation will qualify as a charitable deduction, the owner might wish to request a private ruling of the IRS at this point.

After your attorney has approved the deed, you should then present it to your board of directors for their review and approval. Finally, the easement deed should be signed, notarized, and filed.

Follow-up. With the signing of the deed, your involvement is just beginning. You will need to determine arrangements for public access and publicize any access guidelines. You will also need to establish procedures for periodic property reviews. The SPNEA provides for annual inspections, but this requirement may

vary with the nature and location of the property.

Regardless of the frequency, it is important to develop a set of review criteria for the inspection. Include a review of owner compliance with property maintenance and preservation restrictions. (In case of noncompliance, you will need to send the owner a letter indicating the problem, outlining a remedy, supplying a corrective time line, and explaining what legal remedies will be pursued if action is not taken in the time frame allowed). The property review should also identify any rehabilitation or remodeling being proposed by the owner and indicate if such changes would be in compliance. If not, corrective action must be taken.

You should also develop provisions for handling property which is destroyed. As easement holder, you may have extensive say over any rebuilding plans. If you should, however, determine that the property is not repairable, you will need to institute steps to terminate the easement. Any income realized from such an action must be redistributed to similar purposes.

IMPLEMENTATION

Should you decide to pursue an easement program, remember that a thorough research and development effort will take time. And once you have established a framework, additional time will be required to solicit and negotiate the transfer of an easement. However, by establishing time frames for each of the components discussed in this article, having periodic staff reviews of progress and problems, and keeping the easement program as a priority, 12 months should see you ready to embark on a new and exciting program—one that not only allows for the protection of the nation's historic and natural resources but that can ultimately pay for itself.

Resource List

- Coughlin, Thomas A., "Easements and Other Legal Techniques to Protect Historic Houses in Private Ownership," *Historic House Association of America*, Washington, D.C. 1981.
- Historic Preservation Commission, Lincoln/Lancaster County Planning Department, 555 South 10th, Lincoln, Nebraska 68508.
- Platte River Whooping Crane Trust, 2550 North Diers Avenue, Suite 11, Grand Island, Nebraska 68803.
- Society for the Preservation of New England Antiquities, Harrison Gray Otis House, 141 Cambridge Street, Boston, Massachusetts 02114.
- U.S. *Federal Register*, Vol. 51, No. 9, "Income Taxes; Qualified Conservation Contributions," January 14, 1986.

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March 23, 1989

A Perspective On: 6(I) Legislation

In the question of rent or royalty, we believe the majority of legitimate prospectors and miners favor no royalty and higher rents.

Under State law, there is already a royalty on mineral production of 7% of net profits. What is needed is a rent on land being held for mining purposes.

The mining laws are being used by largely out-of-state companies to tie up vast acreages for their private exploration use. The State mining law that requires a valid discovery of mineral is being utterly ignored. This situation is due largely to inflation.

The federal "Law of 1872" is the cornerstone of the great success of mining in the United States. It set the amount of assessment work at \$100 per twenty acre claim per year. In 1872 that meant about twenty man-days of labor. Inflation eroded the effect of this requirement by a factor of 20, to one man day per claim per year. The same is true for state claims; they can be held free for up to two years, after that, they can be held at nearly no cost.

A rent approach, by making it more expensive to hold ground for long periods, will encourage the development of claims or let them revert back into the public domain, for others to develop the minerals. If 20,000 claims are dropped due to a rent being imposed, that means 800,000 acres of land will be returned to the public domain; revitalizing mineral exploration in Alaska, also reducing state administrative costs. Conversely, a royalty penalizes mineral production.

We recommend \$50 per claim rent. No royalty. Even if half the claims are dropped, this proposal will generate over \$1,000,000 in revenue at almost no cost to the State.

The choice in 6(I) legislation is clear...Do you want to raise revenue from legitimate prospectors and miners with a royalty...OR...From out-of-state land speculators with rent? Do you want to spend more collecting a royalty than it generates in revenue, or collecting rents at nearly no cost?

By, Robert Craig,
Mining Engineer
President,
Giant-Alaska Mining Co

E. Neil Mackinnon,
Mining Engineer
President,
Hyak Mining Co

SB 123 -- 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 1380s. 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.