

# AMENDMENTS TO UNIFORM CONSERVATION EASEMENT ACT

Approved by the Executive Committee of the  
National Conference of Commissioners on Uniform State Laws, February 3, 2007

## AMENDMENT 1

Commissioners' Prefatory Note is amended to read:

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 that right is also a governmental unit or charity (Section 1(3)).

The interests protected by the Act are termed "easements." The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory

conservation and preservation interests. The first removes the common law disabilities associated with covenants real and equitable servitudes in addition to those associated with easements. As statutorily modified, these three common law interests retain their separate existence as instruments employable for conservation and preservation ends. The second approach seeks to create a novel additional interest which, although unknown to the common law, is, in some ill-defined sense, a statutorily modified amalgam of the three traditional common law interests.

The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, 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. If it is the intention to facilitate private grants that serve the ends of land conservation and historic preservation, moreover, the requirement of public agency approval adds a layer of complexity which may discourage private actions. Organizations and property owners may be reluctant to become involved in the bureaucratic, and sometimes political, process which public agency participation entails. Placing such a requirement in the Act may dissuade a state from enacting it for the reason that the state does not wish to accept the administrative and fiscal responsibilities of such a program.

In addition, controls in the Act and in other state and federal legislation afford further assurance that the Act will serve the public interest. To begin with, the very adoption of the Act by a state legislature facilitates the enforcement of conservation easements serving the public interest. Other types of easements, real covenants and equitable servitudes are enforceable, even though their 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 organization, neither of which is likely to accept them on an indiscriminate basis. Governmental programs that extend benefits to

private donors of these easements provide additional controls against potential abuses. Federal tax statutes and regulations, for example, rigorously define the circumstances under which easement donations qualify for favorable tax treatment. Controls relating to real estate assessment and taxation of restricted properties have been, or can be, imposed by state legislatures to prevent easement abuses or to limit potential loss of local property tax revenues resulting from unduly favorable assessment and taxation of these properties. Finally, the American legal system generally regards private ordering of property relationships as sound public policy. Absent conflict with constitutional or statutory requirements, conveyances of fee or non-possessory interests by and among private entities is the norm, rather than the exception, in the United States. By eliminating certain outmoded easement impediments which are largely attributable to the absence of a land title recordation system in England centuries earlier, the Act advances the values implicit in this norm.

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

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

The relationship between the Act and local real property assessment and taxation practices is not dealt with; for example, the effect of an easement upon the valuation of burdened real property presents issues which are left to the state and local taxation system. The Act enables the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code, but parties intending to attain them must be mindful of the specific provisions of the income, estate and gift tax laws which are applicable.

Finally, the The Act neither limits nor enlarges the power of eminent domain; such matters as the scope of that power and the entitlement of property owners to compensation upon its exercise are determined not by this Act but by the adopting state's eminent domain code and related statutes. For the reasons noted in the comment to Section 3, the Act does not directly address the application of charitable trust principles to conservation easements. The Act leaves intact the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts. Such law may create standing to enforce a conservation easement in the Attorney General or other person empowered to supervise charitable trusts (Section 3(4)).

## AMENDMENT 2

Section 2 Comment is amended to read:

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~~ the easement in accordance with the principles of law and equity. 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 intended to serve the public interest and may be held only by certain "holders." These limitations find their place comfortably within ~~similar~~ the limitations applicable to charitable trusts, ~~whose duration may also have no limit~~ which may be created to last in perpetuity, subject to the power of a court to modify or terminate the trust pursuant to the doctrine of *cy pres*. See comment to Section 3. 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).)

### AMENDMENT 3

Section 3 Comment is amended to read:

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.

In 2000, the American Law Institute published the Restatement (Third) Property: Servitudes, which recommends that, in lieu of the traditional real property law doctrine of changed conditions, the modification and termination of conservation easements held by governmental bodies or charitable organizations be governed by a special set of rules modeled on the charitable trust doctrine of *cy pres*. In their commentary, the drafters of the Restatement explained that:

*“[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes...”*

The Act does not directly address the application of charitable trust principles to conservation easements because: (i) the Act has the relatively narrow purpose of sweeping away

certain common law impediments that might otherwise undermine a conservation easement's validity, and researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was beyond the scope of the drafting committee's charge, and (ii) the Act is intended to be placed in the real property law of adopting states and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes. However, because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements. This was recognized by the drafters of the Uniform Trust Code, approved by the National Conference of Commissioners on Uniform State Laws in 2000, who explained in their comment to §414:

*Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust.*

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. Thus, while Section 2(a) provides that a conservation easement may be modified or terminated "in the same manner as other easements," the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding.

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For a discussion of the application of charitable trust principles to conservation easements, see Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U RICH. L. REV. 1031 (2006); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005).