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## PROPERTY Historic Preservation: Prohibit Power of Eminent Domain from Creating, Altering, or Affecting Conservation Easements

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## PROPERTY

### *Historic Preservation: Prohibit Power of Eminent Domain from Creating, Altering, or Affecting Conservation Easements*

CODE SECTION: O.C.G.A. § 44-10-3 (amended)  
BILL NUMBER: HB 751  
ACT NUMBER: 451  
SUMMARY: The Act changes how conservation easements may be created, altered or affected. Under the Act, conservation easements may not be created or expanded, but may be otherwise altered or affected by exercise of the power of eminent domain.  
EFFECTIVE DATE: July 1, 1993

#### *History*

The Georgia Uniform Conservation Easement Act<sup>1</sup> (UCEA) was enacted by the General Assembly in 1992.<sup>2</sup> It replaced the Facade and Conservation Easements Act of 1976,<sup>3</sup> which was enacted to “encourage and promote the protection, enhancement, perpetuation, and use of places, districts, sites, buildings, structures, and works of art having a special historical, cultural, and aesthetic interest or value.”<sup>4</sup> The 1992 law that replaced the 1976 law was based on a model statute that has been adopted by most other states.<sup>5</sup>

A conservation easement was defined in the UCEA as:

[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, archeological, or cultural aspects of real property.<sup>6</sup>

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1. O.C.G.A. §§ 44-10-1 to -8 (Supp. 1993).
  2. 1992 Ga. Laws 2227.
  3. 1976 Ga. Laws 1181 (formerly found at O.C.G.A. §§ 44-10-1 to -5 (1991)). Minor wording and punctuation changes were made to the Act in 1979 and 1982. 1979 Ga. Laws 638; 1982 Ga. Laws 108.
  4. 1976 Ga. Laws 1181 (formerly found at O.C.G.A. § 44-10-3 (1991)).
  5. Telephone Interview with Neill Herring, Member and Contract Lobbyist, Sierra Club, Georgia Chapter (Apr. 4, 1993) [hereinafter Herring Interview].
  6. O.C.G.A. § 44-10-2(1) (Supp. 1993).

A conservation easement is intended to preserve the historical or environmental attributes of property in that future owners of the property are prevented from altering that aspect of the property that is the subject of the easement.<sup>7</sup> A "holder" of such an easement may be either a governmental body empowered to hold an interest in real property, or a charitable corporation, association or trust whose purposes include those for which a conservation easement is intended.<sup>8</sup>

The UCEA described how a conservation easement could be created or altered:

[A] conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements, *except that a conservation easement may not be created, altered, or affected by condemnation.*<sup>9</sup>

The exception clause was not part of the model ordinance on which the bill was based, but was added as a Senate floor amendment because of a concern that too many entities with eminent domain would have the power to create conservation easements.<sup>10</sup> Some time after the law was enacted, it was noticed that the exception language would not only prevent municipalities from creating conservation easements by condemnation, but would also prevent other entities with eminent domain from removing a conservation easement through condemnation.<sup>11</sup> The Georgia Department of Transportation (DOT), for instance, could not condemn conservation easements for a right-of-way.<sup>12</sup> This prohibition was perceived as an unconstitutional

7. Telephone Interview with Jeffrey L. Durbin, Review and Compliance Coordinator, Office of Historic Preservation, Parks, Recreation and Historic Sites Division, Georgia Department of Natural Resources (Mar. 31, 1993) [hereinafter Durbin Interview].

8. O.C.G.A. § 44-10-2(2) (Supp. 1993).

9. *Id.* § 44-10-3(a) (emphasis added). Usually a conservation easement, for instance a facade easement on a building, is created at the initiative of the property owner. Durbin Interview, *supra* note 7; see 1976 Ga. Laws 1182 (formerly found at O.C.G.A. § 44-10-2(3) (1991)) (defines "facade easement").

10. Interview with Rep. Denmark Groover, House District No. 125 (Apr. 5, 1993) [hereinafter Groover Interview]; see HB 1388 (SFA), 1992 Ga. Gen. Assem. Rep. Groover also provided much of the impetus for the passage of HB 751 in 1993. Herring Interview, *supra* note 5.

11. Among the affected entities would be utilities and the Department of Transportation (DOT), each of which has eminent domain. Groover Interview, *supra* note 10. The concern was that a road or utility right-of-way could be blocked simply by creating a conservation easement in its path which could not be condemned by the utility. *Id.*

12. Telephone Interview with Steve Parks, Director of Operations, Georgia Department of Transportation (Apr. 2, 1993) [hereinafter Parks Interview].

limitation on the DOT's power of eminent domain.<sup>13</sup> Thus, HB 751 was introduced in the Georgia General Assembly to remove this limitation.<sup>14</sup> As passed, HB 751 provides that a conservation easement may not be created or expanded by the power of eminent domain, but removes any prohibition on the easement being altered or affected by eminent domain or condemnation.<sup>15</sup>

### HB 751

The Act amends Code section 44-10-3, relating to the creation or alteration of conservation easements.<sup>16</sup> In the original version of the bill the offending last clause, "except that a conservation easement may not be created, altered or affected by condemnation," was simply deleted.<sup>17</sup> However, the House Transportation Committee decided that such a change made it too easy to create conservation easements.<sup>18</sup> Without the last clause, the definition of "conservation easement" would be where it was in the original version of the UCEA: too many entities would have the power to create or enlarge conservation easements.<sup>19</sup> As a result, the exemption clause, rather than being simply removed, was replaced by the following: "except that a conservation easement may not be created or expanded by the exercise of the power of eminent domain."<sup>20</sup> The House Committee substitute version was passed by the General Assembly.<sup>21</sup>

As a result of this Act, entities with eminent domain may eliminate conservation easements by condemnation. At the same time, the Act prevents eminent domain from being used to create or expand conservation easements. The Act will benefit mainly the DOT and utilities, by restoring powers inadvertently taken away by the passage of the original Uniform Conservation Easement Act.<sup>22</sup>

It is uncertain whether the change will have major impact. It has been called a "technical" correction that was only necessary because of an oversight by the authors of the original legislation.<sup>23</sup> One

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13. *Id.*; see GA. CONST. art. I, § 3, ¶ 1 (1983).

14. Parks Interview, *supra* note 12.

15. O.C.G.A. § 44-10-3(a) (Supp. 1993).

16. *Id.*

17. HB 751, as introduced, 1993 Ga. Gen. Assem.

18. Groover Interview, *supra* note 10; Herring Interview, *supra* note 5.

19. O.C.G.A. §§ 44-10-1 to -8 (Supp. 1993); see *supra* note 9 and accompanying text.

20. HB 751 (HCS), 1993 Ga. Gen. Assem. (emphasis in original). Rep. Groover would have preferred to limit the condemnation power even further, so that only utilities could condemn conservation easements. Groover Interview, *supra* note 10.

21. O.C.G.A. § 44-10-3(a) (Supp. 1993).

22. See *supra* notes 11-14 and accompanying text.

23. Parks Interview, *supra* note 12.

commentator maintains that a conservation easement is not likely to be created by condemnation, and a municipality could prevent a road from being built without resort to a conservation easement.<sup>24</sup> On the other hand, the Act can be seen as preventing problems for a utility or the DOT. An opponent of some future Presidential Parkway or Plant Vogtle could have happened upon the original definition before the DOT did and created an "un-condemnable" conservation easement.<sup>25</sup> Although the original definition eventually might have been held unconstitutional, the inconvenience of a court fight was averted by the passage of HB 751.

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24. Herring Interview, *supra* note 5; *see, e.g.*, DOT v. City of Atlanta, 337 S.E.2d 327 (Ga. 1985) (holding that DOT may not exercise eminent domain powers over municipally-owned property since the General Assembly has not clearly granted such authority or created a procedure therefor).

25. Groover Interview, *supra* note 10. Under 1992 changes to UCEA, a highway could be blocked by creating a conservation easement across it. *Id.*