Enabling Statute Provision Examples

1. Construction in Favor of Conservation Purposes
Two enabling statutes (Pennsylvania and West Virginia) mandate that conservation easements be construed in favor of effecting their conservation purposes and the policy and purpose of the enabling statute. Both statutes also contain a “purpose” clause emphasizing the public benefits provided by conservation easements. California’s act also contains a direction for liberal construction but this is tempered by a separate direction for all rights not specifically granted to remain with the landowner.

- 32 PA. CONS. STAT. § 5052. “conservation or preservation easements shall be liberally construed in favor of the grants therein to effect the purposes of those easements and the policy and purpose of this act”
- W. VA. CODE § 20-12-2. “conservation and preservation easements shall be liberally construed in favor of the grants contained therein to effect the purposes of those easements and the policy and purpose of this article”
- CAL. CIV. CODE §§ 815-816. “provisions of this chapter shall be liberally construed in order to effectuate the policy and purpose of Section 815”

2. Right of Entry
Ten non-UCEA states (Arkansas, Florida, Maine, Massachusetts, Montana, New Jersey, New York, North Carolina, Ohio and Utah) expressly affirm that a holder has the right to enter the protected property, usually with the qualification that such entry be at a “reasonable time” and in a “reasonable manner.” Maine’s statute refers to a right of entry of both the holder and a third party with a right of enforcement. The Tennessee and New York statutes reference both entry and inspection, and provide a right of entry regardless of whether such right is set forth in the easement instrument.

- ARK. CODE ANN. § 15-20-409(c). “Conservation easements ... shall entitle representatives of the holder to enter the land in a reasonable manner and at reasonable times to assure compliance.”
- ME. REV. STAT. ANN. tit. 33, § 477.5. “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.”

3. Equitable Remedies
Just over one-third of the enabling states affirm that an easement holder can seek injunctive relief and damages (i.e., a proceeding in equity). See the Guided Tour for the many examples.

4. Damage Awards
A number of enabling statutes provide for damage awards as well as injunctive relief. California, Colorado and Hawaii specify that damage awards for violation of an easement may take into account the loss of scenic value. Illinois has a unique provision that allows for punitive damages against a person
who willfully violates a conservation easement on property he owns. Such damages are capped at the value of the land, although it is unclear whether this is the restricted value or the unrestricted value.

- CAL. CIV. CODE § 815.7(c). “...In assessing such damages there may be taken into account, in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, or environmental value to the real property subject to the easement.”

5. Attorney Fees
California, Hawaii and Rhode Island (via a 2010 amendment) include identical provisions stating that a court may (but is not required to) award litigation costs and attorney fees to the “prevailing party.” It is unclear if the easement itself can override this language. In the case of Rhode Island, the 2010 amendment was sought by the state’s land trust community and is generally considered pro-conservation, insofar as conservation easement holders are expected to be the prevailing party in most enforcement actions. However, in rare circumstances, this language could backfire against a land trust or government holder that mistakenly thinks it has a winning case, only to be disappointed by the court. Similarly, in 2006 Massachusetts amended its statute to allow for litigation costs and attorney fees. Compared to Hawaii, California and Rhode Island, the Massachusetts language is more favorable to easement holders in that costs and fees may be awarded only in the event of a violation of an easement.

- CAL. CIV. CODE § 815.7(d). “The court may award to the prevailing party in any action authorized by this section the costs of litigation, including reasonable attorney s fees.”
- MASS. GEN. LAWS CH. 184, § 32. “If the court in any judicial enforcement proceeding ... finds there has been a violation of the restriction ... then, in addition to any other relief ordered, the petitioner bringing the action or proceeding may be awarded reasonable attorneys' fees and costs incurred in the action proceeding.”

6. Encroachment Protection
In 2006, Connecticut enacted a law establishing stiff remedies (including damage awards of up to five times the cost of restoration) for encroachment and trespass on “open space land.” For the purposes of this statute, “open space land” includes both government and land trust owned conservation lands and easements.

- CT GEN. STAT. § 52-560(d). “In addition to any damages and relief ordered ... the court may award damages of up to five times the cost of restoration or statutory damages of up to five thousand dollars. In determining the amount of the award, the court shall consider the willfulness of the violation, the extent of damage done to natural resources, if any, the appraised value of any trees or shrubs cut, damaged, or carried away as determined in accordance with the latest revision of The Guide for Plant Appraisal, as published by the International Society of Arboriculture, Urbana, Illinois, or a succeeding publisher, any economic gain realized by the violator and any other relevant factors.”

7. Adverse Possession Protection
New York’s statute includes a provision that prevents adverse possession, laches, estoppel or waiver from defeating the enforcement of an easement.

- N.Y. ECL LAW § 49-0305(5). “enforcement shall not be defeated because of any subsequent adverse possession, laches, estoppel or waiver.”

8. Liability Protection
Two neighboring states, Florida and Georgia, include identical provisions that grant tort liability immunity to conservation easement holders for damage or injury to persons on the protected property.
Often an indemnification statement to this effect is included in the easement itself, but it certainly does not hurt to have statutory backing.

- **FLA. STAT. § 704.06(10).** “The ownership or attempted enforcement of rights held by the holder of an easement does not subject the holder to any liability for any damage or injury that may be suffered by any person on the property or as a result of the condition of the property encumbered by a conservation easement.”

9. **Eminent Domain Protection**

Two states, North Carolina and Florida, have laws providing some protection to conservation easements from eminent domain. The North Carolina statute requires city and county governments to determine that there is no “prudent and feasible alternative to condemnation” of any property encumbered by a conservation easement, and includes a provision that encourages the sharing of proceeds with the easement holder. The Florida statute instructs courts to consider the public benefit of conservation in any condemnation action.

- **FLA. STAT. § 704.06(11).** “In any legal proceeding to condemn land for the purpose of construction and operation of a linear facility as described above, the court shall consider the public benefit provided by the conservation easement and linear facilities in determining which lands may be taken and the compensation paid.”
- **N.C. GEN. STAT. §40A-80.** “If the holder of a conservation easement contests an action ...[of condemnation], the judge shall hear and determine whether or not a prudent and feasible alternative exists to condemnation of the property. The burden of persuasion on this issue is on the condemnor if the holder of the conservation easement, after discovery, has identified at least one alternative.”

10. **Merger, Marketable Title, and Tax Lien Exemptions**

Mississippi included a provision in its 1986 enabling statute that expressly prohibits the doctrine of merger applying to terminate a conservation easement. Three other states, Montana, Maine, and Rhode Island, have all amended their enabling statutes since 2007 to protect conservation easements from the doctrine of merger. Tennessee’s statute has a provision that arguably bars merger unless the easement is “returned by specific conveyance” to the fee owner. Florida, Maine, and Rhode Island are the only states that expressly provide in their enabling statutes that easements will survive property tax lien foreclosures. Colorado expressly permits merger in its enabling act; however, Illinois and Colorado in separate statutes expressly mandate that conservation easements survive tax lien foreclosure. Vermont in a separate statute expressly mandates that conservation easements are not subject to the marketable title act.

- **MISS. CODE § 89-19-5(5).** “A conservation easement shall continue to be effective and shall not be extinguished if the easement holder is or becomes the owner in fee of the subject property.”
- **FLA. STAT. § 704.06(4).** “...all provisions of a conservation easement shall survive and are enforceable after the issuance of a tax deed”
- Vermont Stat. 27 V.S.A. § 604. “This subchapter shall not bar or extinguish any of the following interests, by reason of failure to file the notice provided for in section 605 of this title: .... (8) any conservation rights or interests or preservation rights or interests created pursuant to 10 V.S.A. chapters 34 and 155.”
- C.R.S. 38-30.5-107. “Conservation easements in gross may, in whole or in part, be released, terminated, extinguished, or abandoned by merger with the underlying fee interest in the servient land or water rights or in any other manner in which easements may be lawfully terminated, released, extinguished, or abandoned.”