
SENATE BILL 5692

State of Washington

60th Legislature

2007 Regular Session

By Senators Rasmussen and Morton

Read first time 01/29/2007. Referred to Committee on Agriculture & Rural Economic Development.

1 AN ACT Relating to the use of conservation easements; amending RCW
2 36.70A.060 and 36.70A.070; adding a new chapter to Title 64 RCW; and
3 creating new sections.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** (1) The legislature finds that it is in the
6 best interest of the state to find innovative and economically
7 sustainable ways to conserve and protect productive agricultural lands,
8 critical wildlife habitat, and other natural resources.

9 (2) The legislature further finds that the diminishing stock of
10 productive agricultural lands can be preserved through the creation of
11 conservation easements that limit the amount of land available for
12 intensive development.

13 (3) The legislative further finds that working natural resources
14 and wildlife habitat areas can be protected by the same conservation
15 easements that protect existing agricultural lands.

16 (4) The legislature recognizes the unique interests and knowledge
17 that private property owners have about their land and about the most
18 effective means available to protect the wildlife habitat and natural
19 resources on that land.

1 (5) The legislature intends to protect the use and value of
2 productive agricultural property and the wildlife habitat and other
3 natural resources on that property by encouraging voluntary,
4 cooperative farmland preservation and environmental enhancement
5 programs with willing property owners.

6 NEW SECTION. **Sec. 2.** The definitions in this section apply
7 throughout this chapter unless the context clearly requires otherwise.

8 (1) "Conservation easement" or "easement" means an interest in real
9 property acquired and held by someone other than the owner of that
10 property that imposes affirmative obligations or limitations on the
11 parties including:

- 12 (a) Retaining or protecting natural resources;
- 13 (b) Assuring the availability of the property for agricultural,
14 forest, recreational, or open-space use;
- 15 (c) Protecting the natural, scenic, or open-space values of the
16 real property; or
- 17 (d) Maintaining or enhancing the air or water quality on or around
18 the property.

19 (2) "Contract" or "agreement" means a written contract or agreement
20 containing the terms and conditions of a conservation easement
21 affecting real property that has been executed by the owner of the real
22 property and the holder of the easement and recorded in the same manner
23 that conveyances of real property are recorded under RCW 65.08.070.

- 24 (3) "Holder" means:
- 25 (a) A governmental body empowered to hold an interest in real
26 property under the laws of this state or the United States; or
 - 27 (b) A charitable corporation, charitable association, or charitable
28 trust, the purposes or powers of which include assuring the
29 availability of real property for agricultural, forest, recreational,
30 or open-space use, retaining or protecting natural resources,
31 protecting the natural, scenic, or open-space values of real property,
32 or maintaining or enhancing air or water quality on or around the real
33 property.

34 (4) "Third-party right of enforcement" means a right provided in an
35 easement agreement to enforce any of its terms granted to a
36 governmental body, charitable corporation, charitable association, or

1 charitable trust that is not a holder of the interests governed by the
2 agreement.

3 NEW SECTION. **Sec. 3.** (1) Except as otherwise provided in this
4 chapter, a conservation easement may be created, conveyed, recorded,
5 assigned, released, modified, terminated, or otherwise altered or
6 affected in the same manner as other easements affecting real property.

7 (2) No right or duty in favor of or against a holder and no right
8 in favor of a person having a third-party right of enforcement arises
9 under an easement agreement before it is accepted by the holder and
10 recorded in the same manner that conveyances of real property are
11 recorded under RCW 65.08.070.

12 (3) Except as provided in section 4(2) of this act, an easement is
13 unlimited in duration unless the agreement creating it provides
14 otherwise.

15 (4) An interest in real property that exists at the time an
16 easement is created is not impaired by the easement agreement unless
17 the owner of that interest is a party to the easement and specifically
18 consents to it.

19 NEW SECTION. **Sec. 4.** (1) An action affecting a conservation
20 easement may be brought by:

21 (a) An owner of an interest in the real property burdened by the
22 easement;

23 (b) A holder of the easement;

24 (c) A person who has a third-party right of enforcement in the
25 easement agreement; or

26 (d) Any other person specifically authorized by law.

27 (2) This chapter does not affect the power of a court of competent
28 jurisdiction to modify or terminate a conservation easement in
29 accordance with the principles of law and equity.

30 NEW SECTION. **Sec. 5.** A conservation easement is valid even
31 though:

32 (1) It is not an inheritable interest in the real property;

33 (2) It can be or has been assigned to another holder under the
34 terms of the easement agreement;

1 (3) It contains provisions that have not been recognized
2 traditionally at common law;

3 (4) It imposes a negative burden on either party;

4 (5) It imposes affirmative obligations upon the owner of an
5 interest in the burdened property or upon the holder;

6 (6) The benefit does not touch or concern real property.

7 NEW SECTION. **Sec. 6.** (1) This chapter applies to any interest
8 that complies with this chapter and was created after the effective
9 date of this section, whether designated as a conservation easement,
10 covenant, equitable servitude, restriction, easement, or otherwise.

11 (2) This chapter applies to any interest created before the
12 effective date of this section if it would have been enforceable had it
13 been created after the effective date of this section, unless
14 retroactive application contravenes the Constitution or laws of this
15 state or the United States.

16 (3) This chapter does not invalidate any interest that is
17 enforceable under another law of this state, whether designated as a
18 conservation easement, covenant, equitable servitude, restriction,
19 easement, or otherwise.

20 NEW SECTION. **Sec. 7.** (1) An easement may provide that development
21 rights acquired by a holder through a conservation easement may be
22 transferred to another party under any applicable state law or local
23 ordinance that provides for the transfer of development rights.

24 (2) Unless or until development rights or other interests acquired
25 by a holder through a conservation easement are transferred under
26 subsection (1) of this section, payments for those rights or interests
27 may be amortized over a period and under such terms as the parties to
28 that agreement provide.

29 **Sec. 8.** RCW 36.70A.060 and 2005 c 423 s 3 are each amended to read
30 as follows:

31 (1)(a) (~~Except as provided in RCW 36.70A.1701,~~) Each county that
32 is required or chooses to plan under RCW 36.70A.040, and each city
33 within such county, shall adopt development regulations on or before
34 September 1, 1991, to assure the conservation of agricultural, forest,
35 and mineral resource lands designated under RCW 36.70A.170.

1 Regulations adopted under this subsection may not prohibit uses legally
2 existing on any parcel prior to their adoption and shall remain in
3 effect until the county or city adopts development regulations pursuant
4 to RCW 36.70A.040. Such regulations shall assure that the use of lands
5 adjacent to agricultural, forest, or mineral resource lands shall not
6 interfere with the continued use, in the accustomed manner and in
7 accordance with best management practices, of these designated lands
8 for the production of food, agricultural products, or timber, or for
9 the extraction of minerals.

10 (b) Counties and cities shall require that all plats, short plats,
11 development permits, and building permits issued for development
12 activities on, or within five hundred feet of, lands designated as
13 agricultural lands, forest lands, or mineral resource lands, contain a
14 notice that the subject property is within or near designated
15 agricultural lands, forest lands, or mineral resource lands on which a
16 variety of commercial activities may occur that are not compatible with
17 residential development for certain periods of limited duration. The
18 notice for mineral resource lands shall also inform that an application
19 might be made for mining-related activities, including mining,
20 extraction, washing, crushing, stockpiling, blasting, transporting, and
21 recycling of minerals.

22 (2) Each county and city shall adopt development regulations that
23 protect critical areas that are required to be designated under RCW
24 36.70A.170. For counties and cities that are required or choose to
25 plan under RCW 36.70A.040, such development regulations shall be
26 adopted on or before September 1, 1991. For the remainder of the
27 counties and cities, such development regulations shall be adopted on
28 or before March 1, 1992. If critical areas designated under RCW
29 36.70A.170 are subject to a conservation easement agreement under
30 chapter 64.-- RCW (sections 2 through 7 of this act) and the agreement
31 contains provisions for habitat protection, restoration, or
32 maintenance, the provisions of that agreement are presumed to satisfy
33 the requirements of state law for the protection of critical areas if:

34 (a) The agreement contains a conservation plan that has been
35 reviewed by a conservation district and the district has determined
36 that the applicable provisions of that plan, if implemented, meet or
37 exceed the standards for conservation contained in the current

1 applicable field office technical guides of the natural resources
2 conservation service; or

3 (b) The applicable provisions of the agreement meet or exceed the
4 requirements for alternate conservation planning and habitat protection
5 as provided in or required by local critical areas ordinances.

6 (3) A county shall not adopt development regulations under this
7 chapter that directly or indirectly preclude a property owner from
8 being able to establish a conservation easement on a parcel or portion
9 of a parcel of land, enter into an agreement to sell or transfer the
10 development rights associated with a parcel or portion of a parcel of
11 land, or qualify for or enroll a parcel or a portion of a parcel of
12 land in any conservation reserve enhancement program or equivalent
13 program that protects the natural resources and habitat areas and the
14 future agricultural uses of that parcel.

15 (4) Such counties and cities shall review these designations and
16 development regulations when adopting their comprehensive plans under
17 RCW 36.70A.040 and implementing development regulations under RCW
18 36.70A.120 and may alter such designations and development regulations
19 to insure consistency.

20 ~~((+4))~~ (5) Forest land and agricultural land located within urban
21 growth areas shall not be designated by a county or city as forest land
22 or agricultural land of long-term commercial significance under RCW
23 36.70A.170 unless the city or county has enacted a program authorizing
24 transfer or purchase of development rights.

25 **Sec. 9.** RCW 36.70A.070 and 2005 c 360 s 2 are each amended to read
26 as follows:

27 The comprehensive plan of a county or city that is required or
28 chooses to plan under RCW 36.70A.040 shall consist of a map or maps,
29 and descriptive text covering objectives, principles, and standards
30 used to develop the comprehensive plan. The plan shall be an
31 internally consistent document and all elements shall be consistent
32 with the future land use map. A comprehensive plan shall be adopted
33 and amended with public participation as provided in RCW 36.70A.140.

34 Each comprehensive plan shall include a plan, scheme, or design for
35 each of the following:

36 (1) A land use element designating the proposed general
37 distribution and general location and extent of the uses of land, where

1 appropriate, for agriculture, timber production, housing, commerce,
2 industry, recreation, open spaces, general aviation airports, public
3 utilities, public facilities, and other land uses. The land use
4 element shall include population densities, building intensities, and
5 estimates of future population growth. The land use element shall
6 provide for protection of the quality and quantity of ground water used
7 for public water supplies. Wherever possible, the land use element
8 should consider utilizing urban planning approaches that promote
9 physical activity. Where applicable, the land use element shall review
10 drainage, flooding, and storm water run-off in the area and nearby
11 jurisdictions and provide guidance for corrective actions to mitigate
12 or cleanse those discharges that pollute waters of the state, including
13 Puget Sound or waters entering Puget Sound.

14 (2) A housing element ensuring the vitality and character of
15 established residential neighborhoods that: (a) Includes an inventory
16 and analysis of existing and projected housing needs that identifies
17 the number of housing units necessary to manage projected growth; (b)
18 includes a statement of goals, policies, objectives, and mandatory
19 provisions for the preservation, improvement, and development of
20 housing, including single-family residences; (c) identifies sufficient
21 land for housing, including, but not limited to, government-assisted
22 housing, housing for low-income families, manufactured housing,
23 multifamily housing, and group homes and foster care facilities; and
24 (d) makes adequate provisions for existing and projected needs of all
25 economic segments of the community.

26 (3) A capital facilities plan element consisting of: (a) An
27 inventory of existing capital facilities owned by public entities,
28 showing the locations and capacities of the capital facilities; (b) a
29 forecast of the future needs for such capital facilities; (c) the
30 proposed locations and capacities of expanded or new capital
31 facilities; (d) at least a six-year plan that will finance such capital
32 facilities within projected funding capacities and clearly identifies
33 sources of public money for such purposes; and (e) a requirement to
34 reassess the land use element if probable funding falls short of
35 meeting existing needs and to ensure that the land use element, capital
36 facilities plan element, and financing plan within the capital
37 facilities plan element are coordinated and consistent. Park and

1 recreation facilities shall be included in the capital facilities plan
2 element.

3 (4) A utilities element consisting of the general location,
4 proposed location, and capacity of all existing and proposed utilities,
5 including, but not limited to, electrical lines, telecommunication
6 lines, and natural gas lines.

7 (5) Rural element. Counties shall include a rural element
8 including lands that are not designated for urban growth, agriculture,
9 forest, or mineral resources. The following provisions shall apply to
10 the rural element:

11 (a) Growth management act goals and local circumstances. Because
12 circumstances vary from county to county, in establishing patterns of
13 rural densities and uses, a county may consider local circumstances,
14 but shall develop a written record explaining how the rural element
15 harmonizes the planning goals in RCW 36.70A.020 and meets the
16 requirements of this chapter.

17 (b) Rural development. The rural element shall permit rural
18 development, forestry, and agriculture in rural areas. The rural
19 element shall provide for a variety of rural densities, uses, essential
20 public facilities, and rural governmental services needed to serve the
21 permitted densities and uses. To achieve a variety of rural densities
22 and uses, counties may provide for clustering, density transfer, design
23 guidelines, conservation easements, and other innovative techniques
24 that will accommodate appropriate rural densities and uses that are not
25 characterized by urban growth and that are consistent with rural
26 character.

27 (c) Measures governing rural development. The rural element shall
28 include measures that apply to rural development and protect the rural
29 character of the area, as established by the county, by:

30 (i) Containing or otherwise controlling rural development;

31 (ii) Assuring visual compatibility of rural development with the
32 surrounding rural area;

33 (iii) Reducing the inappropriate conversion of undeveloped land
34 into sprawling, low-density development in the rural area;

35 (iv) Protecting critical areas, as provided in RCW 36.70A.060, and
36 surface water and ground water resources through programs that
37 encourage and facilitate the voluntary use of conservation easements by

1 property owners and state, county, or other agencies of local
2 government for the preservation of existing agricultural lands and the
3 protection of habitat and other natural resources on those lands; and

4 (v) Protecting against conflicts with the use of agricultural,
5 forest, and mineral resource lands designated under RCW 36.70A.170.

6 (d) Limited areas of more intensive rural development. Subject to
7 the requirements of this subsection and except as otherwise
8 specifically provided in this subsection (5)(d), the rural element may
9 allow for limited areas of more intensive rural development, including
10 necessary public facilities and public services to serve the limited
11 area as follows:

12 (i) Rural development consisting of the infill, development, or
13 redevelopment of existing commercial, industrial, residential, or
14 mixed-use areas, whether characterized as shoreline development,
15 villages, hamlets, rural activity centers, or crossroads developments.

16 (A) A commercial, industrial, residential, shoreline, or mixed-use
17 area shall be subject to the requirements of (d)(iv) of this
18 subsection, but shall not be subject to the requirements of (c)(ii) and
19 (iii) of this subsection.

20 (B) Any development or redevelopment other than an industrial area
21 or an industrial use within a mixed-use area or an industrial area
22 under this subsection (5)(d)(i) must be principally designed to serve
23 the existing and projected rural population.

24 (C) Any development or redevelopment in terms of building size,
25 scale, use, or intensity shall be consistent with the character of the
26 existing areas. Development and redevelopment may include changes in
27 use from vacant land or a previously existing use so long as the new
28 use conforms to the requirements of this subsection (5);

29 (ii) The intensification of development on lots containing, or new
30 development of, small-scale recreational or tourist uses, including
31 commercial facilities to serve those recreational or tourist uses, that
32 rely on a rural location and setting, but that do not include new
33 residential development. A small-scale recreation or tourist use is
34 not required to be principally designed to serve the existing and
35 projected rural population. Public services and public facilities
36 shall be limited to those necessary to serve the recreation or tourist
37 use and shall be provided in a manner that does not permit low-density
38 sprawl;

1 (iii) The intensification of development on lots containing
2 isolated nonresidential uses or new development of isolated cottage
3 industries and isolated small-scale businesses that are not principally
4 designed to serve the existing and projected rural population and
5 nonresidential uses, but do provide job opportunities for rural
6 residents. Rural counties may allow the expansion of small-scale
7 businesses as long as those small-scale businesses conform with the
8 rural character of the area as defined by the local government
9 according to RCW 36.70A.030(~~((+14))~~) (15). Rural counties may also
10 allow new small-scale businesses to utilize a site previously occupied
11 by an existing business as long as the new small-scale business
12 conforms to the rural character of the area as defined by the local
13 government according to RCW 36.70A.030(~~((+14))~~) (15). Public services
14 and public facilities shall be limited to those necessary to serve the
15 isolated nonresidential use and shall be provided in a manner that does
16 not permit low-density sprawl;

17 (iv) A county shall adopt measures to minimize and contain the
18 existing areas or uses of more intensive rural development, as
19 appropriate, authorized under this subsection. Lands included in such
20 existing areas or uses shall not extend beyond the logical outer
21 boundary of the existing area or use, thereby allowing a new pattern of
22 low-density sprawl. Existing areas are those that are clearly
23 identifiable and contained and where there is a logical boundary
24 delineated predominately by the built environment, but that may also
25 include undeveloped lands if limited as provided in this subsection.
26 The county shall establish the logical outer boundary of an area of
27 more intensive rural development. In establishing the logical outer
28 boundary the county shall address (A) the need to preserve the
29 character of existing natural neighborhoods and communities, (B)
30 physical boundaries such as bodies of water, streets and highways, and
31 land forms and contours, (C) the prevention of abnormally irregular
32 boundaries, and (D) the ability to provide public facilities and public
33 services in a manner that does not permit low-density sprawl;

34 (v) For purposes of (d) of this subsection, an existing area or
35 existing use is one that was in existence:

36 (A) On July 1, 1990, in a county that was initially required to
37 plan under all of the provisions of this chapter;

1 (B) On the date the county adopted a resolution under RCW
2 36.70A.040(2), in a county that is planning under all of the provisions
3 of this chapter under RCW 36.70A.040(2); or

4 (C) On the date the office of financial management certifies the
5 county's population as provided in RCW 36.70A.040(5), in a county that
6 is planning under all of the provisions of this chapter pursuant to RCW
7 36.70A.040(5).

8 (e) Exception. This subsection shall not be interpreted to permit
9 in the rural area a major industrial development or a master planned
10 resort unless otherwise specifically permitted under RCW 36.70A.360 and
11 36.70A.365.

12 (6) A transportation element that implements, and is consistent
13 with, the land use element.

14 (a) The transportation element shall include the following
15 subelements:

16 (i) Land use assumptions used in estimating travel;

17 (ii) Estimated traffic impacts to state-owned transportation
18 facilities resulting from land use assumptions to assist the department
19 of transportation in monitoring the performance of state facilities, to
20 plan improvements for the facilities, and to assess the impact of land-
21 use decisions on state-owned transportation facilities;

22 (iii) Facilities and services needs, including:

23 (A) An inventory of air, water, and ground transportation
24 facilities and services, including transit alignments and general
25 aviation airport facilities, to define existing capital facilities and
26 travel levels as a basis for future planning. This inventory must
27 include state-owned transportation facilities within the city or
28 county's jurisdictional boundaries;

29 (B) Level of service standards for all locally owned arterials and
30 transit routes to serve as a gauge to judge performance of the system.
31 These standards should be regionally coordinated;

32 (C) For state-owned transportation facilities, level of service
33 standards for highways, as prescribed in chapters 47.06 and 47.80 RCW,
34 to gauge the performance of the system. The purposes of reflecting
35 level of service standards for state highways in the local
36 comprehensive plan are to monitor the performance of the system, to
37 evaluate improvement strategies, and to facilitate coordination between
38 the county's or city's six-year street, road, or transit program and

1 the department of transportation's six-year investment program. The
2 concurrency requirements of (b) of this subsection do not apply to
3 transportation facilities and services of statewide significance except
4 for counties consisting of islands whose only connection to the
5 mainland are state highways or ferry routes. In these island counties,
6 state highways and ferry route capacity must be a factor in meeting the
7 concurrency requirements in (b) of this subsection;

8 (D) Specific actions and requirements for bringing into compliance
9 locally owned transportation facilities or services that are below an
10 established level of service standard;

11 (E) Forecasts of traffic for at least ten years based on the
12 adopted land use plan to provide information on the location, timing,
13 and capacity needs of future growth;

14 (F) Identification of state and local system needs to meet current
15 and future demands. Identified needs on state-owned transportation
16 facilities must be consistent with the statewide multimodal
17 transportation plan required under chapter 47.06 RCW;

18 (iv) Finance, including:

19 (A) An analysis of funding capability to judge needs against
20 probable funding resources;

21 (B) A multiyear financing plan based on the needs identified in the
22 comprehensive plan, the appropriate parts of which shall serve as the
23 basis for the six-year street, road, or transit program required by RCW
24 35.77.010 for cities, RCW 36.81.121 for counties, and RCW 35.58.2795
25 for public transportation systems. The multiyear financing plan should
26 be coordinated with the ((~~six-year~~)) ten-year improvement program
27 developed by the department of transportation as required by RCW
28 47.05.030;

29 (C) If probable funding falls short of meeting identified needs, a
30 discussion of how additional funding will be raised, or how land use
31 assumptions will be reassessed to ensure that level of service
32 standards will be met;

33 (v) Intergovernmental coordination efforts, including an assessment
34 of the impacts of the transportation plan and land use assumptions on
35 the transportation systems of adjacent jurisdictions;

36 (vi) Demand-management strategies;

37 (vii) Pedestrian and bicycle component to include collaborative

1 efforts to identify and designate planned improvements for pedestrian
2 and bicycle facilities and corridors that address and encourage
3 enhanced community access and promote healthy lifestyles.

4 (b) After adoption of the comprehensive plan by jurisdictions
5 required to plan or who choose to plan under RCW 36.70A.040, local
6 jurisdictions must adopt and enforce ordinances which prohibit
7 development approval if the development causes the level of service on
8 a locally owned transportation facility to decline below the standards
9 adopted in the transportation element of the comprehensive plan, unless
10 transportation improvements or strategies to accommodate the impacts of
11 development are made concurrent with the development. These strategies
12 may include increased public transportation service, ride sharing
13 programs, demand management, and other transportation systems
14 management strategies. For the purposes of this subsection (6)
15 "concurrent with the development" shall mean that improvements or
16 strategies are in place at the time of development, or that a financial
17 commitment is in place to complete the improvements or strategies
18 within six years.

19 (c) The transportation element described in this subsection (6),
20 and the six-year plans required by RCW 35.77.010 for cities, RCW
21 36.81.121 for counties, and RCW 35.58.2795 for public transportation
22 systems, and the ten-year plans required by RCW 47.05.030 for the
23 state, must be consistent.

24 (7) An economic development element establishing local goals,
25 policies, objectives, and provisions for economic growth and vitality
26 and a high quality of life. The element shall include: (a) A summary
27 of the local economy such as population, employment, payroll, sectors,
28 businesses, sales, and other information as appropriate; (b) a summary
29 of the strengths and weaknesses of the local economy defined as the
30 commercial and industrial sectors and supporting factors such as land
31 use, transportation, utilities, education, work force, housing, and
32 natural/cultural resources; and (c) an identification of policies,
33 programs, and projects to foster economic growth and development and to
34 address future needs. A city that has chosen to be a residential
35 community is exempt from the economic development element requirement
36 of this subsection.

37 (8) A park and recreation element that implements, and is
38 consistent with, the capital facilities plan element as it relates to

1 park and recreation facilities. The element shall include: (a)
2 Estimates of park and recreation demand for at least a ten-year period;
3 (b) an evaluation of facilities and service needs; and (c) an
4 evaluation of intergovernmental coordination opportunities to provide
5 regional approaches for meeting park and recreational demand.

6 (9) It is the intent that new or amended elements required after
7 January 1, 2002, be adopted concurrent with the scheduled update
8 provided in RCW 36.70A.130. Requirements to incorporate any such new
9 or amended elements shall be null and void until funds sufficient to
10 cover applicable local government costs are appropriated and
11 distributed by the state at least two years before local government
12 must update comprehensive plans as required in RCW 36.70A.130.

13 NEW SECTION. **Sec. 10.** Sections 8 and 9 of this act may not be
14 construed to diminish, modify, or replace any other remedy provided
15 under the United States or Washington state Constitutions, or federal
16 or state law.

17 NEW SECTION. **Sec. 11.** Sections 2 through 7 of this act constitute
18 a new chapter in Title 64 RCW.

--- END ---