

2011 SENATE EDUCATION

SB 2092

2011 SENATE STANDING COMMITTEE MINUTES

Senate Education Committee
Missouri River Room, State Capitol

SB 2092
January 10, 2011
12686

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the execution of easements to state-owned land.

Minutes:

See attached testimony.

Chair Senator Freborg called the hearing to order on SB 2092; no fiscal note attached.

Pat Seaworth, General Counsel for the North Dakota University System, testified in favor of the bill. (See testimony #1) Obtaining the signature of the governor's office or secretary of state does not appear to serve a purpose. The office usually signs off on the easements without knowing the circumstances. It is usually not a problem unless a situation comes up that is an emergency. The turnaround is usually only a day or two. The University System officials are authorized to enter into these agreements and negotiate the terms.

Senator Flakoll: Was there a situation that prompted the request. Is there some pending use that prompted this?

Pat Seaworth: Nothing specifically; change was requested by institution officers. The governor's office signs the forms without knowledge of the easement and never asks. Just a formality that takes time and doesn't appear to serve a purpose. Only a couple of instances occurred where it was needed right away, but could potentially delay the process.

Senator Flakoll: How many of these have been requested in the last two years or other specific period of time?

Pat Seaworth: Can estimate for the 9 campuses that he handles, there may be 5-6 in a year or 8-10 in a year. Probably quite a lot more at UND and NDSU, particularly NDSU with the experiment station scattered around the state. He does not see those forms. Was the NDSU officer that suggested and asked for this.

Senator Flakoll: Are these not just limited highways, transmission, utilities and the like? Could be a variety of other things; something beyond infrastructure easements?

Pat Seaworth: One type that comes to mind could be a conservation easement, but has never dealt with any. The only ones he has seen are for infrastructure; cities or state doing highway or road work, city and public utilities.

Senator Flakoll: Not limited in the scope of common easements; could be for anything.

Pat Seaworth: That is correct; this is the statute that deals with the process for executing easements to state lands, so assumption would be that the other types of easements would also be covered by this statute.

Senator Flakoll: Page 1, line 14 references “authority of the board or president” – refers to the president of the board of education, I would guess? Is this the president of the Board of Education or president of the campus?

Pat Seaworth: Actually, the intent was that reference would be to the institution president, and probably should say that in line 14. That was the intent; under current board policy the authority is delegated to institution presidents or another officer delegated by the institution president.

Senator Flakoll: Then they are given authority without specific case by case authority—is that correct? You can request an easement without approval of the board, so they’ve delegated their authority on all cases, or does the campus have to come before the board on each request for easement?

Pat Seaworth: It is delegated in all cases. Policy change was made many years ago at the suggestion of the board members as much as 20 years ago. The board questioned why they were even looking at them when they know nothing about the easement. This was just a pro forma process, so may as well delegate to institution officers, and they did. These documents do not come to the board—they never see them, the Chancellor never sees them, the form is reviewed and approved by legal counsel.

Senator Flakoll: Lines 18-24, references Century Code 1-08-02 and 1-08-04; what are the provisions of those sections that were and were not subject to, depending on which sections we are looking at?

Pat Seaworth: Offhand, I don’t know and don’t recall. Would have to look them up.

Senator Heckaman: Are all the campuses aware and on-board with this change?

Pat Seaworth: Yes, the process that the board has established is reviewed and discussed at a meeting of the chancellors cabinet that includes all of the campus presidents. The chancellor presented it to the board, the board discussed it and voted to approve it at a public meeting.

Senator Heckaman: If an easement is approved and one of my constituents wanted to review it, where could they find it; is it on-line or would they have to request it?

Pat Seaworth: Documents are not on-line; they must contact the institution to request a copy. The easement papers would also be available in county offices.

Senator Flakoll: If someone obtained a piece of property, they could have given someone perpetual easements, keep the mineral rights for themselves and sell off the land. Is that a possible scenario?

Pat Seaworth: The term of an easement is limited to no more than 99 years, so are limited in that sense. Many are for much shorter terms.

Senator Flakoll: And I know there have been attempts to change that in the past; so it is possible to have those easements perpetual.

Pat Seaworth: The easement would run with the land; if the land is transferred—which rarely happens with state land, rarely sold and transferred—the easement would still be in place.

Senator Heckaman: Have any of the university presidents or their officials had to sign easements, or have they all gone to the governor.

Pat Seaworth: All of the easements are signed by an institution officer; that signature is on the form to approve. First approved and signed by the institution office (president or vice president); then they are sent to the governor's office for signature of Governor and Secretary of State. This amendment would only eliminate the signature of the Governor and Secretary of State.

Senator Gary Lee: Line 10 says any property rights transferred. Could there be other things associated with this kind of transfer as it is related in this section other than just simple easements?

Pat Seaworth: The first sentence references only easements; this section would not permit transfer of title to the state land (separate statutes that deal with that that require legislative approval). Those requirements are not affected by this. Not sure why there is reference to quit claims in line 11, except the easement form itself has this in its language. Doesn't have an explanation to why there is reference to quit claim deed. This section deals only with easements.

Senator Gary Lee: In your mind, all you are asking for is for the simple easements of power lines, utilities, or those kinds of easements to cross the institutions land and allow access to do those specific things mentioned.

Pat Seaworth: That is the intent; that's the request. Some of these easements can be for a long term of time—up to 99 years.

Senator Flakoll: NDSU has a fair amount of agriculture land on the west side of I-29 that could have some interest; could the campus president put a 99 year easement on it which would restrict the available usage of the land, and in that case where does the buck stop in

terms of accountability. People that are not in agreement with the proposal would have what type of recourse if higher ed does something they find egregious?

Pat Seaworth: Good question; and don't have a good answer. That was not the intent and if a concern there should be a way to address it with an amendment to make it clear that this change would only be limited to the normal easement for right away, utilities, and so on. Make it clear of your intent so presidents would not have authority to, for example, grant a conservation easement for a period of 99 years without a review of the Governor or the legislature.

Senator Heckaman: Most easements are planned well ahead of time; can you give an example of something where immediate approval would be needed (hours or a day)?

Pat Seaworth: Two actual examples: a city was making emergency repairs, and once into the job ran into additional problems. It made sense to make more extensive repairs that involved a need to access some campus land. A second was a utility company that got into a project, had the contractor on-site and someone doing last minute reviews discovered that they had overlooked a need to get an easement because a small part of the project crossed campus land. This is not a big problem or major issue; occurs in rare instances—more a minor nuisance.

Senator Flakoll: In the case of some type of utility easement, would that also include wind farms. Would this supersede the ability to have a siting hearing on any wind farms by the PSC or others?

Pat Seaworth: Not sure; don't want to say no without researching it. Siting of those is governed by state law and/or local zoning ordinances. However, local zoning ordinances don't apply to state land. If the authority for regulation of siting wind farms is local, city or county, they can't enforce that against state land. Would have to be state law or legislation that would govern that. Not familiar with those state laws. Don't want to suggest that those types of decisions be left to institution presidents without review or approval by other state and local authority.

Senator Freborg: In regards to conservation easements, could there be an easement on a full section of land or would that be a lease?

Pat Seaworth: Not familiar with conservation easements; heard about them. As he understands that it is possible to have an easement to a tract of land, section or number of acres. He's never dealt with that type of easement; can't understand why NDSU would be involved in negotiating that type of easement and is not our intent to ask for that authority.

Senator Freborg: Are you aware of any easement where the payment is so much per acre, or are most easements paid by foot or mile?

Pat Seaworth: Most of the easements that he reviews provide payment of \$1; mainly because the majority of the easements are related to service to the campus or work on city streets that run through or are adjacent to the campus. The work is to the benefit of the

campus and so minimal cost of \$1. Do know that experiment station land, there have been transmission lines or pipelines that cross and payment has been negotiated.

Senator Gary Lee: if this is simply a minor nuisance, are you aware that the governor's office has denied or chosen not to sign any easements presented to them?

Pat Seaworth: Never happened as far as he knows; did contact the affected offices to alert them that the board was considering this bill and sent them a draft of the bill. Inquired as to their concerns or objections and did not receive any.

Senator Flakoll: Could a donor, as a condition of the donation, require an easement of some type such as a conservation easement?

Pat Seaworth: Yes, that should be possible of an individual donating land to an institution. Question would be if it is in the interest of the institution to accept the donation with those conditions. Most donations made now are made to the university foundation not the institution itself. Foundations are a private entity, and terms are negotiated between the foundation and the donor. Once in awhile there is a will where the land is donated to the institution itself. Suppose it would be possible for a donor to attach those types of restrictions.

Senator Freborg: In regards to the price of easements being \$1; are most of the easements just \$1?

Pat Seaworth: Since most of the easement requests directly benefit the institutions, there is no point in asking for a large sum, and funds are just transferred from one government entity to another. Most utility easements are transmission lines that service the campus or burying a line in a corner of a campus so no concern for loss of funds. Any damages or items to be moved are at the expense of the utility or city.

No other testimony in favor of SB 2092.

Opposition:

Sandy Clark, North Dakota Farm Bureau testified in opposition of the bill because they are concerned with perpetual easements. If someone donates farm land or ag land to the institution and the land is resold, the institution could put an easement on the land and sell it. Then have issues for following owners with restricted use of lands. Conservation easements have always been a concern for Farm Bureau.

Also believe this would set a bad precedence, bad policy for the state. If the universities can begin to sign the easements, other agencies will want to do the same thing. The top administrators of this state are the ones that should sign the easements. The board presidents are not elected officials, and it should remain with signing by the Governor and Secretary of State.

Julie Ellingson, North Dakota Stockmen's Association testified in opposition to the bill. There appears to be a system of checks and balances in place with the Governor's office

signature. There was testimony about some minor cases with minor implications like basic utilities, however, there was also discussion about other easements that would have more serious implications including the 99 year time frame. It doesn't appear to be a real struggle to comply at this time. Respectfully request a Do Not Pass at this time.

Senator Flakoll: Would your opinion change if the wording were changed and more specific?

Julie Ellingson: More specificity would help understand the intent and getting to the intent of the bill sponsors. A good point was made that it would set bad precedence and maybe used as a model for other agencies; maybe best left as is.

Senator Gary Lee: If nuisance or emergent issues were recognized in this bill, how would that affect your position on the bill?

Julie Ellingson: Would like to see the language before giving an endorsement or understanding of that language before making a determination.

Richard Schlosser, North Dakota Farmers Union: Have concerns regarding the permanent easements and conservation easements. Issues in code with regard to easements (conservation easements) providing for an advisory committee, which consists of a lot of the ag organizations and conservation groups that make recommendations of some permanent easements or sales of such lands. Have concerns about easements that may be placed on large amounts of lands. NDFU opposed to the bill as written.

Senator Flakoll: Mr. Seaworth referenced some experiment station lands; could an easement help protect some agriculture properties so they could be used for grazing lands as opposed to any kinds of development if they were to have some protection mechanisms put into place?

Richard Schlosser: Have dealt with these and had policy discussion and policy debate on those permanent land preservation and farming practice preservation easements; as of yet the membership is not in support of this. Still have maintained a blanket opposition to all permanent easements. Preservation from development of some lands may preserve land for ag lands such as those you mentioned west of Fargo.

Senator Flakoll: What about partial (40 or 50 years) easements?

Richard Schlosser: Very specifically the policy states that NDFU is opposed to permanent easements. Parcels divided out have no exemption in policies.

Senator Flakoll: Would your opinion change if the wording were changed and more specific? Certain transmissions or emergency needs be acceptable?

Richard Schlosser: Policy would not be in conflict with that; specifically utility easements are included in specific language. They don't necessarily name an acreage or swath, but may entail a legal description of that land, so that they have no problem with.

No opposition to SB 2092; hearing closed.

COMMITTEE WORK ON SB 2092:

Senator Heckaman: Would like to see some amendments to make this more specific. Maybe narrow down to utilities and road projects, and a specific time line as far as number of years. I understand that this could encourage other agencies to ask for similar requests.

Senator Flakoll: Even if the recommendation is a Do Not Pass, may want to write amendments before sending it out of committee.

Senator Freborg: Thinking about the institutions; are most or all of them within the incorporated city limits or limits of the city?

Senator Flakoll: No, their holdings would extend outside the city limits, per say. In certain cases, the experiment stations would be outside the limits. A significant land mass would be involved, so not just about the main campus but experiment stations or donated land.

Senator Freborg: Do you believe that under this bill, because they don't come under the zoning requirements, they could allow an easement for a cattle or hog feeding operation?

Senator Flakoll: Not sure that they could; have heard that in one case a family donated land to NDSU with the stipulation it only be used for agriculture. If it is not, it would be turned back to the family. Not sure there could be an easement for animal feeding? County zoning, etc. should be accounted for there.

Senator Freborg: Was it not stated that they do not have to abide by zoning regulations?

Senator Flakoll: that is correct.

Senator Freborg: Anyone getting some amendments could do some research and find out what could happen. Pat testified mainly about the campus within the city limits; more about easements from the city. Thinks most senators were thinking about in rural areas where they own property. Easements within the city limits may not be a problem, but the problem could be out in the country. It is tough to do anything about a 99 year lease afterward.

Senator Flakoll: If a family donates land to an institution and it already has easements, how does that play in?

Senator Freborg: Transmission lines usually don't operate with negotiated easements; usually pay a flat rate per tower. Need some research done and amendments brought to the committee by Wed.

Senator Flakoll: Will visit with Senator Heckaman regarding amendments. Will do some research on the issues discussed.

Senator Luick: What would happen if a proposed utility or pipeline were to request passage across the experiment station land, and the university president were opposed. Can they deny that? Would it make more sense to take it to a higher level at the state?

Senator Freborg: Not sure; could go to court maybe. Things to consider and find out—game and fish leasing property, giving other easements. Will hold the bill until amendments are prepared—hopefully Wed.

Senator Flakoll: I believe so; could be a lot of potential hurdles to fix. Lot of concern about taking it out of the hands of the elected officials.

Amendment suggestions--Limit the time of the easement, change the language so that someone is overseeing easements, length of easement could be the length of a bond on an issue.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Education Committee
Missouri River Room, State Capitol

Committee Work SB 2092
January 12, 2011
12794

Conference Committee

Committee Clerk Signature

Teresa Gorgenson

Minutes:

See attached amendment

Senator Flakoll presented proposed amendments to SB 2092, version 1001. Will provide more finite details on those easements. Intent to improve the bill.

Motion by **Senator Flakoll** to approve amendment 11.8042.01001 to SB 2092; second by **Senator Heckaman**.

Senator Flakoll: what it does is narrow the scope of allowable easements that can be requested to things such as utility & transmission, road transportation easements, and waterway easements. May not be used for conservation easements under this section. (See attachment #1)

No discussion on the amendment motion. Motion carried 7-0.

Senator Flakoll moved for a Do Not Pass as amended to SB 2092; second by **Senator G. Lee**.

Discussion on SB 2092 as amended:

Senator Flakoll: Certainly have made it more palatable on a go forward basis, but there are a number of concerns that he has for the need for the bill. Should we take this away from the elected officials? Are there really cases that propagate the need for this? Only a few cases noted from recent memory. The signatures do not appear to be a real problem. The University system did not really make a case that this bill is necessary.

Senator Heckaman: Agree with Senator Flakoll's comments. Instances they cited seemed very minute, and think there is a need for some accountability and this is a good chain of command.

Motion for a Do Not Pass carried 7-0 on SB 2092 as amended. **Senator Flakoll** will carry the bill.

JCB
1-13-11

PROPOSED AMENDMENTS TO SENATE BILL NO. 2092

Page 1, line 7, after "grant" insert "utility and transmission"

Page 1, line 8, after "easements" insert ", road and transportation easements, and waterway easements"

Page 1, line 9, after the period insert "A state agency may not grant a conservation easement under this section. The duration of an easement granted under this section may not exceed forty years."

Page 1, line 14, after "or" insert "institution"

Re-number accordingly

REPORT OF STANDING COMMITTEE

SB 2092: Education Committee (Sen. Freborg, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO NOT PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2092 was placed on the Sixth order on the calendar.

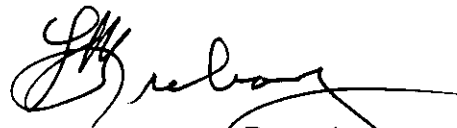
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Renumber accordingly



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2011 TESTIMONY

SB 2092



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Senate Education Committee SB 2092 Testimony

**Pat Seaworth, General Counsel
North Dakota University System
January 10, 2011**

Chairman Freborg and members of the Senate Education Committee:

I appear in support of SB 2092 on behalf of the State Board of Higher Education. This bill amends N.D.C.C. section 54-01-17.1, which governs easements to state-owned land. Easements are used to grant access to or use of land for highway or road construction, water and sewer, transmission lines, etc. For state-owned land, section 54-01-17.1 requires that the governor sign and the secretary of state attest to the easements. For easements on university system land, the Board has delegated to institution officers authority to sign easements according to standard terms set out in Board policy on a form approved by legal counsel. However, before the easement is finalized, institution officers must send it to the capitol to get the governor's and secretary of state's signatures.

The governor (or lieutenant governor, to whom a governor may delegate this task) typically doesn't have any information regarding why an easement is needed and getting the signatures adds nothing to the process except additional time required to obtain them. Usually, this is not a concern but once in a while a city or utility is making emergency repairs or extending or re-routing a utility line and a last-minute discovery is made that an easement is needed on NDUS land. In these cases, getting the signatures can be a nuisance and potentially may hold up a project for a day or two or longer, if the governor (or lieutenant governor) or secretary of state is out of the office. Because this requirement adds nothing to the process except a few days to the time required to finalize an easement, the Board supports an amendment removing the requirement.

I don't mean to leave an impression that the signature requirement is a significant problem. In most cases, there is not a rush to get easements signed and the secretary of state and governor's office are very good about getting the documents signed and returned without delay. However, getting these signatures for routine campus documents (that the Board and chancellor haven't even seen) does not serve any real purpose and the Board respectfully asks that it be removed.

Contact: Pat Seaworth (224-2583 or pat.seaworth@ndus.edu)
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The North Dakota University System is governed by the State Board of Higher Education and includes:

Bismarck State College • Dakota College at Bottineau • Dickinson State University • Lake Region State College • Mayville State University • Minot State University
North Dakota State College of Science • North Dakota State University • University of North Dakota • Valley City State University • Williston State College

TO: CHAIRMAN FREBORG AND COMMITTEE MEMBERS
FROM: INTERN3- IKE UMUNNAH
SUBJECT: EASEMENTS
DATE: JANUARY 10, 2011
CC: FILE

Mr. Chairman, **24-01-01.1 of the North Dakota Century Code defines** easement as: A right acquired by public authority to use or control property for a designated highway purpose. The following will provide you general, non-specific information, relating to easements. The information below is a legal definition only, and not a part of the NDCC.

¹An easement is the right to use the real property of another for a specific purpose. The easement is itself a real property interest, but legal title to the underlying land is retained by the original owner for all other purposes. Typical easements are for access to another property (often redundantly stated "access and egress," since entry and exit are over the same path), for utility or sewer lines both under and above ground, use of spring water, entry to make repairs on a fence or slide area, drive cattle across and other uses.

Easements can be created by a deed to be recorded just like any real property interest, by continuous and open use by the non-owner against the rights of the property owner for a statutory number of years, typically five ("prescriptive easement"), or to do equity (fairness), including giving access to a "land-locked" piece of property (sometimes called an "easement of necessity"). Easements may be specifically described by boundaries ("24 feet wide along the northern line for a distance of 180 feet"), somewhat indefinite ("along

¹ 2004 - 2007 Legal-Explanations

the trail to the northern boundary") or just for a purpose ("to provide access to the Jones property" or "access to the spring") sometimes called a "floating easement." There is also a "negative easement" such as a prohibition against building a structure which blocks a view. Title reports and title abstracts will usually describe all existing easements upon a parcel of real property. Issues of maintenance, joint use, locking gates, damage to easement and other conflicts clog the judicial system, mostly due to misunderstandings at the time of creation.

Types of easements:

Access easement is a very common kind of easement by necessity. An access easement allows one or more persons to access or use or travel across another's land to reach a nearby location, such as a road.

Affirmative easement is an easement which entitles the servient land owner to do or allow certain actions by the easement holder. Such types of easement may include discharging water onto the servient land, using a kitchen situated on another's land for washing and drying clothes, or using a toilet situated on another's land. These rights, if not for the easement, would constitute trespass or nuisance. Affirmative easements give rights of entry upon the land of another, not for profits but for permitting to do something on that land.

Apparent easement is an easement that is self-continuing and independent of human intervention. It means an easement which can be enjoyed without an act on the part of the person entitled thereto. For instance, a paved trail, a sidewalk, and a flow of a stream are examples of apparent easement.

Appurtenant easement is a right to use adjoining property that transfers with the land. The parcel of land that benefits from the easement is the dominant tenement. The servient tenement is the parcel of land that provides the easement. The appurtenant easement always transfers with the land unless the owner of the dominant tenement releases it. The land subject to the easement appurtenant is the servient estate; the land benefited the dominant estate. However, if the easement is held incident to ownership of some land, it is an easement appurtenant.

Avigational easements are easements that allow unimpeded or unrestricted aircraft flights over the servant land. This easement is also known by other terms such as aviation easement, flight easement, avigation easement and navigation easement.

Conservation easement means "a binding contractual agreement between the Secretary and a landowner in the Cooperative Management and Protection Area under which the landowner, permanently or during a time period specified in the agreement, agrees to conserve or restore habitat, open space, scenic, or other ecological resource values on the land covered by the easement."

Continuous easements are those kinds of easements that can be enjoyed without a purposeful or deliberate act by an individual who claims it. Continuous easements include easements for sewer pipes, drains, light and air, or lateral support of a wall.

Question: What is the difference between an easement and a lease?

Answer: An easement is a grant of a right to use part of the property for the specified purpose a typical easement is for highway purposes. Whereas A lease is essentially a contract to "rent" property according to its terms (usually including a specific length of time).