Committee to Review ULC Acts
Committee on Scope and Program
Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602

Re: Recommendation on Status of Uniform Conservation Easement Act (UCEA) and Recommendation for Study Committee on UCEA Amendments

Members of the Committee to Review ULC Acts and the Scope and Program Committee:

As discussed below, the Committee to Review ULC Acts referred UCEA to the Joint Editorial Board for Uniform Real Property Acts (JEBURPA) for its consideration and recommendation regarding its status as a Uniform Act. For the reasons discussed below, the JEBURPA believes that UCEA retains significant utility and remains a useful source of law for states without adequate conservation easements enabling statutes. We further recommend that the ULC appoint a study committee to study the issue of whether it is advisable to make limited amendments to UCEA as part of an effort to promote further adoption of UCEA in states without adequate or effective enabling statutes.

Background. The ULC enacted UCEA in 1981. The objective of UCEA was to provide the legal infrastructure needed to create durable easements for conservation or historic preservation purposes, in particular to facilitate the ability of donors to obtain tax benefits under applicable tax laws for imposing such easements.

Prior to the enactment of UCEA or, in some cases, some non-uniform state enabling acts, this legal infrastructure did not exist. Easements for historic preservation or conservation protection are typically easements in gross — i.e., they do not benefit or serve another parcel of land — and the common law typically viewed such easements to be “personal” easements that would not bind the land indefinitely (as would an appurtenant easement). Further, easements for historic preservation or conservation protection are “negative” easements — i.e., they allow the holder to prevent certain conduct on the burdened land as contrasted with an “affirmative” easement that allows an affirmative use/entry onto the burdened land. The common law favored the continuity and permanence of affirmative easements, but traditionally disfavored negative easements, with many courts refusing to recognize negative easements beyond the limited catalog of rights recognized in English law.
UCEA’s Prefatory Note essentially states the purpose of UCEA:

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.

UCEA has been one of the more successful uniform laws in the area of real estate, with enactments in 23 jurisdictions. The text of UCEA has not been amended since its 1981 promulgation, although the ULC approved changes to the comments in 2007 to clarify that the text of UCEA text leaves intact the existing case and statutory law of adopting states as it relates to the enforcement of charitable trusts. Thus, in appropriate cases, the adopting state’s laws governing charitable assets will apply to an easement in addition to the provisions of UCEA, leaving these issues to state common law. This clarification was considered important to another of UCEA’s stated goals—allowing landowners to satisfy the requirements for the federal charitable income tax deduction available with regard to charitable gifts of easements. To be eligible for the deduction, the conservation easement, among other things, must be “a restriction (granted in perpetuity) on the use which may be made of the real property,” its conservation purpose must be “protected in perpetuity,” and it can be subject to extinguishment only in a judicial proceeding upon a finding that continuing to use the property for conservation purposes has become impossible or impractical. IRC § 170(h)(2)(C), (h)(5)(A); Treas. Reg. § 1.170A-14(g)(6).

Impetus for JEB Review. Prior to its Fall 2013 meeting, the JEBURPA received a request from the Committee to Review ULC Acts to review the UCEA, following a reference of the issue from Tennessee Commissioner Charles Trost regarding whether the UCEA should explicitly address the application of charitable trust principles to conservation easements. The JEBURPA placed the issue on the agenda for its Fall 2013 meeting, and contacted Professor Nancy McLaughlin of the University of Utah College of Law, a prolific scholar who has published extensively on the subject of conservation easements.

At the time, Prof. McLaughlin expressed the view that there was not a pressing need to amend UCEA, but that UCEA could benefit from minor changes — both (1) to clarify in the text the intended effect of the 2007 comment changes, and (2) to address some issues that UCEA did not address, but were increasingly being addressed in state-by-state efforts of various constituencies to amend existing state enabling acts.

Initially, the JEBURPA tentatively decided to recommend the appointment of a study committee to study the desirability of UCEA amendments. At its Spring 2014 meeting, however, in deference to strong objections from Maryland Commissioner King Burnett (a member of the UCEA Drafting Committee), the JEBURPA decided that such a recommendation was premature, and that instead the JEBURPA should continue (with input from Professor McLaughlin as requested) to monitor state legislative developments.
In June 2016, however, the Committee to Review ULC Acts again referred UCEA to the JEBURPA for its review and consideration, as well as the JEBURPA’s recommendation regarding the status of the UCEA. The JEBURPA’s Executive Director placed the items on the Board’s Fall 2016 agenda, and invited Professor McLaughlin to provide an update on the materials she had provided in 2013, including an outline of the most recent legislative developments in conservation easements and state enabling statutes. Professor McLaughlin participated in the JEBURPA’s consideration by conference call; Commissioner Burnett appeared in person to express his concerns.

Professor McLaughlin advised that the Treasury Department has placed conservation easements on its 2016-2017 Priority Guidance List, and that the IRS has announced a proposed rulemaking project regarding conservation easement amendments. She recommended that any possible changes to UCEA should await the completion of federal rulemaking (the timetable of which is not entirely certain). Further, while Professor McLaughlin does not believe it is necessary for the ULC to amend UCEA at this time, she did suggest that if the ULC wished to consider amendments to UCEA, the following changes might be considered helpful:

- a mandate that a conservation easement be interpreted in light of its conservation purpose, rather than in favor of free use of the encumbered land;
- provisions to address the “orphan easement” problem where the original grantee has become defunct;
- provisions addressing the compensation of the easement holder when a conservation easement is taken by eminent domain (as land affected by a conservation easement is often an attractive eminent domain target);
- a provision exempting conservation easements from marketable title acts;
- consideration of tracking systems for extant conservation easements; and
- statutory text confirming the authority of state Attorneys General to exercise oversight over easement creation and enforcement (not just leaving the issue to the comments, as is done presently in UCEA).

Professor McLaughlin did note that some of these issues may be addressed in other parts of a state’s code, such as in the eminent domain or marketable title sections of the code (as they have been in some states). She also noted that some of the issues are addressed in modern conservation easement deeds, such as the mandate that an easement be interpreted in light of its conservation purpose. She further noted that, if a study committee were formed, she would not recommend that the committee address the issue of the modification or termination of conservation easements given the federal rulemaking process, the varying ways in which easements are acquired (purchase, bargain purchase, exaction, and donation), and the likelihood that achieving consensus on those issues would be very difficult.
Commissioner Burnett renewed his recommendation that the UCEA should not be amended. In his view, UCEA’s primary function was to establish the enforceability of a perpetual conservation easement in light of the questionable common law legal foundation for perpetual negative easements. On that ground, he argued, the UCEA has been a success and no amendments were needed or justified.

After a thorough discussion, the JEBURPA members are of the unanimous view that:

1. The UCEA continues to serve a useful purpose, and the ULC should maintain it as a uniform act, promote its continued virtues, and attempt to encourage new enactments in any jurisdictions that lack a sufficient enabling statute.

2. While UCEA has been relatively successful, it may be possible that future efforts to promote adoption of UCEA as an effective enabling statute could benefit from amendments such as the ones described above.

For this reason, the JEBURPA unanimously recommends the appointment of a study committee to explore whether there is a need for, and the appropriate scope and breadth of, potential amendments to UCEA. A study committee should also explore the extent to which suitable non-uniform enabling acts exist in the remaining jurisdictions that have not enacted UCEA, and whether amendments to UCEA (to address issues such as those identified above) could or would prove more useful in an effort to expand UCEA’s enactment footprint, as compared to UCEA in its current form.

The members of the JEBURPA are of the view that it makes sense to proceed with study while the IRS rulemaking process moves ahead. If the study process results in a conclusion that amendments would be useful, the ULC will be better positioned to proceed quickly as federal rulemaking takes shape.


First, there is an “obvious reason” to consider UCEA amendments. For example, an amendment to UCEA to clarify that a conservation easement be interpreted in light of the conservation purpose (rather than free use) could provide “a practical step toward uniformity of state law or at least minimizing its diversity.” Compare Wetlands America Trust v. White Cloud Nine Ventures, 291 Va. 153 (2016) (conservation easement, like other restrictions, must be interpreted in favor of free use) with 2 Pa. Cons. Stat. Ann. § 5055(c)(2) (West 2012); W. Va. Code § 20-12-5(b) (1995) (conservation easements shall be liberally construed to effect the purposes of the easements and the purpose of the enabling statute).
Committee to Review ULC Acts  
Committee on Scope and Program  
December 13, 2016  
Page 5

Second, as the original promulgation of UCEA and its enactment in 23 jurisdictions demonstrates, issues relating to the creation, durability, interpretation, and enforcement of conservation easements are appropriate for state legislation. Amendment of UCEA to address some of the issues discussed above would be consistent with the ULC’s objective of promoting uniformity among the states “where uniformity is desirable and practicable.” Further, the relatively widespread adoption of the UCEA suggests that there is a “reasonable probability” that amendments would be “accepted and enacted into law by a substantial number of jurisdictions.”

Finally, amendments to UCEA would “avoid significant disadvantages likely to arise from diversity of state law.” Given the significant federal investment (through tax benefits) in encouraging the creation of conservation easements via charitable gifting, variation in state law with respect to the creation, durability, interpretation, and enforcement of conservation easements becomes harder to justify in terms of fairness.

**Potential Stakeholders/Observers.** The ULC should include an observer from the American Bar Association Section on Real Property, Trust and Estate Law as well as the ABA Section of Taxation. The ULC should also invite an observer from the National Association of State Charity Officials (NASCO)\(^1\), the American College of Real Estate Lawyers (ACREL), and the American College of Trust and Estate Counsel (ACTEC).

Professor McLaughlin indicated that if the ULC decides to appoint a study committee, she would very much appreciate the opportunity to participate as an Observer, and the JEBURPA would support her appointment.

Other stakeholders/participants should include the Advisory Council on Historic Preservation, the National Association of Realtors, and the National Park Service. Each of these groups had representatives listed as “Advisers to Special Committee on Uniform Conservation Easement Act” (as UCEA appears on the ULC website).

Other sources include the Nature Conservancy and the U.S. Forest Service, which funds easement acquisitions through its Forest Legacy Program.

Additional potential stakeholders would include national and state-level land trust councils (including The Land Trust Alliance) and state Attorneys General. The JEBURPA invited Professor McLaughlin to identify specific persons as potential observers, and she provided the following names:

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\(^1\) Professor McLaughlin indicated that Karen Gano, Assistant Attorney General in the Connecticut Office of the Attorney General, has been active in the enforcement of conservation easements in Connecticut and would be an excellent choice for a NASCO representative.
Committee to Review ULC Acts
Committee on Scope and Program
December 13, 2016
Page 6

- Terry Knowles, Assistant Attorney General in the New Hampshire Office of the Attorney General
- Professors Janet Milne and John Echeverria (Vermont Law School), who have extensive experience with proposed changes to Vermont’s enabling statute.
- Jeff Pidot, former Chief of the Natural Resources Division of the Maine Attorney General’s Office, who was responsible for Maine’s 2007 reforms to its enabling statute.
- Julie Turrini, an attorney with Resources Legacy Fund, which funds land conservation transactions including conservation easement acquisitions.
- Michael Murphy, program manager for the Forest Legacy Program of the U.S. Forest Service.
- Philip Tabas, who oversees easement acquisitions at The Nature Conservancy.
- Ann Taylor-Schwing, who served as an Observer to the Uniform Trust Decanting Act, and who has served on the Land Trust of Napa County board of trustees for over 15 years, and on the Land Trust Accreditation Commission for 11 years.

Members of the JEBURPA stand ready to assist any study committee in identifying further observers.

Respectfully submitted,

R. Wilson Freyermuth

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