



# Uniform Law Commission

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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August 18, 2017

Andrew Bowman, President  
Land Trust Alliance  
1250 H Street NW, Suite 600  
Washington, DC 20005

Dear Mr. Bowman:

Thank you for contacting us regarding the Study Committee on possible updates to the Uniform Conservation Act (UCEA). We appreciate receiving your input. There appears, however, to be some misunderstanding about the Uniform Law Commission (ULC) and the Study Committee's charge.

The ULC, which was established in 1892, is a non-profit organization comprised of state commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. The ULC provides states with non-partisan, well-conceived, and well-drafted legislation that brings clarity and stability to critical areas of state statutory law. ULC members must be attorneys qualified to practice law and they include practicing lawyers, judges, legislators, legislative staff, and law professors who have been appointed by state governments to research, draft, and promote enactment of uniform state laws in areas where uniformity is desirable and practical.

The ULC drafted the original UCEA to facilitate the creation of conservation easements and enable donors to satisfy federal tax law requirements. As you note, the great number of easements that exist today is a testament to the UCEA's success. Since its approval in 1981, just over half the states have enacted a conservation easement enabling statute based on the UCEA, and the UCEA has influenced similar legislation in other states. Over the past thirty-six years, however, many state legislatures have enacted amendments to their enabling statutes that address topics not addressed in the UCEA.

The ULC regularly reviews and updates its uniform acts. When there is a question regarding whether a drafting effort is justified, the ULC forms a Study Committee and appoints Observers to provide Study Committee members with the perspectives of all stakeholders. Study Committees generally meet by telephone and Observers are invited to participate in the conference calls. To maximize productivity on the calls, there is a need to limit participation by organizations with an interest to only several representatives. That said, there is no limit on written comments and suggestions, and all members of organizations and the public are encouraged to offer their views to the Study Committee.

The Land Trust Alliance (LTA) was invited to and did name three Observers (now four at Ms. Ratley-Beach's request) to the UCEA Study Committee, along with one

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alternate. Through Ms. Ratley-Beach, we also invited LTA and any of its members to submit written comments. LTA is not, however, the only group with an interest in the Study Committee's work. Other stakeholders include government holders, institutional funders, tax experts, practitioners, easement donors, owners of land encumbered by easements, experts in charity law and fiduciary responsibilities of charities and their directors, and assistant state attorneys general who oversee and assist charitable organizations, including land trusts, in meeting their fiduciary obligations to donors and the public. The Nature Conservancy was invited to appoint an Observer given its national and international experience with conservation easements. Under a long extant agreement with the American Bar Association (ABA) their sections interested in the subject matter may each name an Observer and in this case three ABA sections have done so.

The work of the Study Committee is the first step in process that may or may not culminate in the formation of a Drafting Committee. A Study Committee's task generally is to evaluate whether a uniform law or model act is appropriate and feasible, or whether an existing act requires amendment or revision. In this case, since the UCEA is working as intended, the Study Committee is considering issues not covered in the UCEA, with a focus on provisions state legislatures have included in their conservation easement enabling statutes. The Study Committee is not empowered to draft amendments or to limit the work of a future Drafting Committee, should one be formed.

If the Study Committee were to recommend the formation of a Drafting Committee, and that recommendation was approved by two other bodies in the ULC, all Drafting Committee meetings would be public and adequate notice would be provided to all Observers so they could attend the meetings and provide input. In addition, it is only after two readings and debate by the entire ULC membership and approval by vote of the states that an act becomes available for consideration by state legislatures, and, even then, the ULC can only propose – no uniform law is effective until a state legislature adopts it.

To support the Study Committee's work, a detailed and up-to-date review of all state enabling statutes and other relevant statutes was needed. The Reporter for the Study Committee was tasked with gathering all of the statutes and producing a comprehensive report before our first telephone meeting. The result was a 56-page Background Report discussing the UCEA and state provisions that differ from the UCEA. The Background Report and the current text of the "enabling" statutes in all 50 states and the District of Columbia have been placed on a website that the ULC created to facilitate the Study Committee's work. A copy of the Background Report is attached for your easy reference.

In your letter, you address some issues central to the Study Committee, including whether there is a need for additional substantive provisions, adoptability, and other issues addressed in the ULC standards to which you refer. We welcome all comments, especially when accompanied by detailed rationale. These points are most relevant after a detailed review of the substantive areas of the law not covered in the original act by the Study Committee, with the advice and input of the Observers and other contributors.

There are some other substantive points of your letter that I want to address:

1. The ULC drafted the UCEA to sweep away the common law legal impediments to the creation and enforcement of conservation easements held by land trusts and government entities, generally in perpetuity. No one has proposed re-examining that premise or the provisions in the UCEA that were inserted to implement that policy. There is no factual

basis for the conclusion that the committee plans to recommend changes to the UCEA's purpose or to the provisions that negate the common-law impediments to conservation easement creation and enforcement.

2. The Study Committee is focused on whether a new UCEA should include provisions to implement ideas already adopted by one or more states on subjects not included in the UCEA. That is why the Background Report was requested, and why it was utilized as the basis for discussion in our first telephone conference call. Many if not most of these state actions were likely either proposed, supported, or not opposed by land trusts in the relevant states. This does not mean they necessarily would be included in a ULC project if a Drafting Committee were formed, but it does mean the Study Committee is required to do its due diligence in assessing the advantages and disadvantages of those provisions. It is even worth reviewing such legislative changes to UCEA which were enacted over the opposition of one or more land trusts. It is all part of effective due diligence to determine whether a further drafting effort is warranted.
3. The ULC came to this project with no pre-conceived outcome in mind. Although I personally recommended against the formation of a Study Committee, largely because I was skeptical of the viability of an enlarged UCEA, now that the committee has been appointed I am committed to carrying out my responsibility to facilitate consideration and discussion of the possible advantages and disadvantages of amending or adding provisions to the UCEA, and I am doing so with an open mind as to the outcome. No decisions regarding any new or changed provisions have been made. As you will see from the attached agenda from our first and only telephone meeting, no decisions were contemplated before the meeting and none were made at the meeting.
4. The Study Committee's work is being conducted with the participation of persons knowledgeable about conservation easements. A majority of the Study Committee members are very well-versed in the wide-ranging issues involved with regard to conservation easements, including contract interpretation, public policy, real estate law, tax law, and charity law, including the fiduciary obligations of charitable organizations and their officers and directors. A majority have significant experience serving on land trust boards and representing easement donors or land trusts. Two Study Committee members served on the original drafting committee for the UCEA and one is an experienced state legislator. As one would expect with any public or private organization, Study Committee members are selected from the membership of the ULC. In addition, the Observers to the Study Committee represent the interests of a wide variety of stakeholders in this context and your organization is prominent among them. The ULC is committed to producing high-quality products that have benefitted from input from all stakeholders. LTA has appointed four Observers to provide LTA's perspective to the Study Committee and there a number of additional land trust practitioners serving as Observers.
5. A guiding principle of this project is that we not adversely affect or undermine the public benefits of conservation easements that we enabled in the UCEA. It is important to maintain public confidence in the process and standards of land trusts, to which LTA has thankfully contributed with its standards and certification programs (documentation of which has been placed on our website for this project). Confidence in land trusts' processes and in conservation easement durability and enforceability is central to public support for federal and state enhanced tax benefits so important to the conservation easement

movement. LTA has taken numerous steps to oppose potential and actual abuses that inevitably occur when financial issues are involved. The work of the Study Committee is informed by these principles and is intended to reinforce them.

6. You also refer to three specific areas that you fear might be addressed by a drafting committee in ways you feel are detrimental to land trusts. Of course, the best course to follow is to participate in our project, which is just underway, and submit detailed papers or other materials that support your point of view as to each issue that may lead to a recommendation for a drafting committee. You specifically seem concerned about "regulations and burdens on land trusts, or government control," etc. We see few issues where such burdens relate to state law issues peculiar to land trusts, which is our focus, but you may rest assured that the committee will carefully examine any suggestion or issue you or others raise. Some of your concerns relate to issues beyond the scope of our committee review, or even that of any potential Drafting Committee, like the jurisdiction of courts and the Attorney General over activities of charitable organizations generally.

The Study Committee will schedule conference calls in the coming months and attempt to break the issues down into manageable groups for each call. Written views on the individual issues will be again solicited and the Chair and I will try to frame the points that need to be discussed. This important work would benefit from your participation. When we near the point of a final conclusion, your opinion as to the merits of a drafting project would be most welcome. I also would welcome the opportunity to discuss any of these issues with you by phone. My cell number is (410) 251-6387 and my email address is [kburnett@webbnetlaw.com](mailto:kburnett@webbnetlaw.com).

Sincerely yours,



K. King Burnett  
Vice Chairman, UCEA Study Committee

## Study Committee on ULC Uniform Conservation Easement Act

### Agenda for Conference Call

Tuesday, June 27, 2017

8:00-9:30am PT/ 9:00-10:30am MT/ 10:00-11:30am CT/ 11:00am-12:30pm ET

Dial in: 800-430-0714

Access code: 2629890

1. Introductions: Study Committee members, Reporter, ULC staff, and Observers;
2. Comments from Vice Chair KKB\*;
3. Brief review of the UCEA;
4. Review and discussion of state provisions that differ from the UCEA – following the order of issues set forth in Part VI of Reporter's Background Report;
5. Other issues or proposals from Study Committee members or Observers.
6. Concluding remarks from Vice Chair.

#### \*Partial list of considerations:

1. Is a proposed addition or change to the UCEA good public policy?
2. How necessary, useful, or likely is uniformity among the states?
3. Ability to obtain adoption: What stakeholders would be needed to support effective adoption efforts by a significant number of states? Is there risk that in the process of proposing a new or amended act the result might be more variations among the states?
4. Issues that can be addressed by the terms of the easement document: Given the sophistication of easement documents today, how important or useful are provisions mandating terms (e.g. presumptions, remedies, attorney fees, right of entry, duration, amendments, termination, etc.)?
5. Should federal, state, and local governments be free to set the terms of easements eligible for their easement purchase and tax incentive programs, as Congress and the Treasury have done for federal tax incentives? Should institutional funders be free to set the terms of easements eligible for funding?
6. What impact would any change have on the ability of easement grantors and grantees to qualify for existing or future federal, state, or local tax incentives, easement purchase programs, or other subsidies? A goal of the original UCEA was to enable grantors to qualify for such subsidies.
7. Constitutional and other concerns regarding retroactive application of new statutory provisions to existing easements.