

THE UNIFORM CONSERVATION EASEMENT ACT:
REFLECTIONS OF A MEMBER OF THE DRAFTING COMMITTEE

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I. THE UNIFORM LAW COMMISSION

The Uniform Law Commission (ULC), formerly known as the National Conference of Commissioners on Uniform State Laws, was established in 1892 by a group of state governments with support from the American Bar Association.¹ The ULC improves the law by providing states with “non-partisan, well-conceived, and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.”² The purpose of the ULC is to “promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable.”³ The ULC can only propose laws—“no uniform law is effective unless and until a state legislature adopts it.”⁴

Uniform Law Commissioners “must be lawyers, qualified to practice law.”⁵ They include “practicing lawyers, judges, legislators and legislative staff and law professors.”⁶ Commissioners are appointed by their respective state governments “to research, draft, and promote the enactment of uniform state laws in areas where uniformity is desirable and practical.”⁷ Commissioners are not compensated for their work—they “donate thousands of hours of their time and legal and drafting expertise every year as a public service”⁸ The primary funding for the ULC comes from dues voluntarily paid by the states, and all states participate in the ULC.⁹

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¹ *About the ULC*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title>About%20the%20ULC> (last visited May. 26, 2013).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*; see *Financial Support for the ULC*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=Financial%20Support%20for%20the%20ULC> (last visited May 26, 2013).

The “ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that reflect the diverse experience of the states.”¹⁰ The ULC also helps to keep “state law up-to-date by addressing important and timely legal issues,” and it reduces “the need for individuals and businesses to deal with different laws as they move and do business in different states.”¹¹

ULC procedures “insure meticulous consideration of each Uniform or Model Act.”¹² “When the ULC decides to draft an act, a drafting committee is appointed” from its membership.¹³ “Each draft receives a minimum of two years consideration, sometimes much longer,” and “[d]rafting committees meet throughout the year.”¹⁴ “The open drafting process draws on the expertise” of not only the commissioners, but also “legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.”¹⁵

Draft uniform acts “are submitted for initial debate to the entire [ULC] at an annual meeting.”¹⁶ “Each act is considered section by section, at no less than two annual meetings, by all commissioners sitting as a Committee of the Whole.”¹⁷ “Once the Committee of the Whole approves an act, the final step is a vote by states—one vote per state.”¹⁸ “A majority of the states present, and no less than 20 states, must approve an act before it can be officially adopted” by the ULC “for consideration by the states.”¹⁹

The Drafting Committee for the Uniform Conservation Easement Act (UCEA, or the Act) was appointed in 1978 and completed its work in 1981.²⁰ After at least six day-and-a-half long meetings of the Drafting Committee, the entire draft uniform act was read before the ULC and debated at two separate annual meetings. One reporter for the UCEA, since deceased, was Russell Brennemen, an attorney in private practice in Connecticut and one of the leading practitioners involved with land trusts at that time.²¹ The other reporter was John Costonis, a

¹⁰ *About the ULC*, *supra* note 1.

¹¹ *Id.*

¹² *Frequently Asked Questions*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions> (last visited May 26, 2013).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Legislative Fact Sheet - Conservation Easement Act*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation%20Easement%20Act> (last visited May 26, 2013).

²¹ See UNIF. CONSERVATION EASEMENT ACT (amended 2007), available at http://www.uniformlaws.org/shared/docs/conservation_easement/ucea_final_81%20with%2007amends.pdf.

distinguished scholar in the fields of land use, environmental, and real estate law, and now Chancellor Emeritus at Louisiana State Law School.²² I was appointed to the UCEA Drafting Committee because of my experience in Maryland, which had adopted a conservation easement enabling statute, and my work as a member of the Board of Trustees of the Maryland Environmental Trust, a statewide land trust that was actively soliciting donated conservation easements. The Drafting Committee was aided in its work by experts and advisors with a diverse range of experience and expertise, and by previously enacted conservation easement enabling statutes in Maryland, Virginia, and Massachusetts, among other states.²³

II. THE UNIFORM CONSERVATION EASEMENT ACT

The UCEA, which the ULC adopted in 1981, has since been adopted in whole or substantial part by almost half of the states.²⁴ Other states already had or have adopted alternative acts that similarly enable the creation of easements for conservation and historic preservation purposes (the UCEA and these other acts are often referred to as conservation easement “enabling statutes”).²⁵

The Commissioners’ Prefatory Note explains that the UCEA “has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements’ validity, particularly those held in gross.”²⁶ Traditionally, flowing from English common law, easement restrictions on property use could be created in perpetuity only if they benefited neighboring property.²⁷ In most American jurisdictions, there were no cases indicating that the courts would not follow this English common law rule. Nonprofits wishing to acquire donated conservation easements in conformity with the requirements for the federal charitable income tax deduction under Internal Revenue Code section 170(h) (§ 170(h)) and state governments interested in purchasing perpetual conservation easements were essentially stymied without a statute like the UCEA.²⁸ The key requirements for the federal charitable income tax deduction for the donation of a conservation easement are that the easement be “granted in perpetuity” and its conservation purpose be “protected in perpetuity.”²⁹ The perpetual nature of a conservation easement was also central to the investment of money and effort by many state governments interested in purchasing

²² *Id.*

²³ *Id.*

²⁴ *Legislative Fact Sheet - Conservation Easement Act*, *supra* note 20.

²⁵ PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 382 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

²⁶ UNIF. CONSERVATION EASEMENT ACT, *supra* note 21, at 1.

²⁷ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 cmt. a (2000).

²⁸ I.R.C. § 170(h)(2)(C), (h)(5)(A) (2006).

²⁹ *Id.*

conservation easements.³⁰ Accordingly, there had to be no doubt that conservation easements, whether purchased or donated, could be established and validly bind future owners in perpetuity. The Act accomplished this by “eliminating certain outmoded easement impediments which [were] largely attributable to the absence of a land title recordation system in England centuries earlier.”³¹

The Act was designed to provide the flexibility to create easements of various durations (term, perpetual, and terminable under specified conditions other than frustration of their conservation purposes) and in a variety of circumstances (purchase, bargain purchase, donation, exaction, mitigation, etc.). The Act’s default rule, however, is for easements of perpetual duration.³² Also, the Act validates only those conservation easements that comply with the conditions in the Act, which were designed to ensure that the easements serve the public interest.³³

The Act does not address a number of issues that, though of conceded importance, the drafters considered to be extraneous to the Act’s primary objective of sweeping away the common law impediments that might otherwise undermine the validity of conservation easements.³⁴ The issues specifically not addressed are (i) whether to subject conservation easements to public planning agency review,³⁵ (ii) the formalities and effects of recordation,³⁶ (iii) the potential impact of a state’s marketable title laws upon the duration of conservation easements,³⁷ (iv) the

³⁰ States often purchase conservation easements in “bargain purchase” programs where a portion of the easement is purchased with cash and the remaining portion of the easement is donated as a charitable gift to the government or nonprofit holder. To be eligible for a federal charitable income tax deduction for the gift portion of such a transaction, the easement must satisfy the requirements of § 170(h), including the perpetuity requirements. *See id.*; *see also* *Browning v. Comm’r*, 109 T.C. 303 (1997) (holding gift portion of bargain sale of conservation easement to a county deductible as a charitable contribution).

³¹ UNIF. CONSERVATION EASEMENT ACT, *supra* note 21, at 2.

³² *Id.* § 2(c) (“[A] conservation easement is unlimited in duration unless the instrument creating it otherwise provides.”).

³³ *Id.* at 2–3.

³⁴ *Id.*

³⁵ The drafters believed that a “requirement of public agency approval” would “add[] a layer of complexity which might discourage private actions” because charitable “[o]rganizations and property owners may be reluctant to become involved in the bureaucratic, and sometimes political, process which public agency participation entails.” *Id.* at 2. They also were concerned that “such a requirement in the Act may dissuade a state from enacting it” because of the consequent “administrative and fiscal responsibilities of such a program.” *Id.*

³⁶ The drafters noted that these issues were left to the adopting “state’s registry system,” and that “an adopting state may wish to establish special indices for these interests, as had been done in Massachusetts.” *Id.* at 3.

³⁷ The Act provides that conservation easements have an unlimited duration unless the instruments creating them provide otherwise. *Id.* § 2(c). The drafters cautioned that an adopting state consider the relationship between that provision and the marketable title act

relationship between the Act and local real property assessment and taxation practices,³⁸ and (v) the scope of the power of eminent domain and the entitlement of property owners to compensation upon its exercise.³⁹ The Act also left intact the existing case and statutory law of adopting states as it relates to the enforcement of charitable trusts (referred to in some jurisdictions as “restricted gifts”),⁴⁰ which can create standing to enforce a conservation easement in the Attorney General or other person empowered to supervise charitable gifts or trusts.⁴¹

A. Section 1—Definitions

The definitions of a conservation easement and of a qualified holder were, of course, critical to the Act. A conservation easement is defined as

a non-possessory interest of a holder in real property imposing limitations or affirmative obligations the purpose of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological or cultural aspects of real property.⁴²

The Act thus requires that a conservation easement be created for a conservation or historic purpose that is intended to benefit the public. The Act also limits qualified holders of a conservation easement to governmental bodies empowered to hold real property, and charitable entities the purposes or powers of which include

or other statutes in the state addressing restrictions on real property of unlimited duration. *Id.* at 3.

³⁸ The drafters believed the effect of an easement upon the valuation of burdened real property presented issues that are best left to the state and local taxation system. *Id.* They also noted that “[c]ontrols relating to real estate assessment and taxation of restricted properties have been, or can be, imposed by state legislatures to prevent easement abuses or to limit potential loss of local property tax revenues resulting from unduly favorable assessment and taxation of these properties.” *Id.* at 2.

³⁹ The drafters indicated that these issues should be determined, not by the Act, but by the adopting state’s eminent domain code and related statutes. *Id.* at 3.

⁴⁰ See Nancy A. McLaughlin, *Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment After Carpenter, Simmons, and Kaufman*, 13 FLA. TAX REV. 217, 231–36 (discussing the history behind the use of “restricted gift” versus “charitable trust” terminology to describe charitable gifts made for specific purposes in some states, and explaining that, regardless of the label, donees must administer such gifts in accordance with the terms and purpose specified by the donors and the state attorney general has the power to enforce such gifts).

⁴¹ UNIF. CONSERVATION EASEMENT ACT, *supra* note 21, at 3, § 3 cmt.

⁴² *Id.* § 1(1).

protecting real property for conservation or historic purposes.⁴³ The Act does not validate easements conveyed to private entities—it sweeps away the common law impediments to in gross land use restrictions *only* if the easement has a public conservation purpose and is conveyed to and held by an entity that operates for the benefit of the public.

B. Section 2—Creation, Conveyance, Acceptance, and Duration

Section 2(b) of the Act requires acceptance of a conservation easement by the holder and official recordation of the acceptance.⁴⁴ The Drafting Committee did not want holders to be burdened by easements they had not accepted and of which they might not even be aware.⁴⁵

Section 2(d) provides that an interest in real property in existence at the time a conservation easement is recorded is not impaired by the easement unless the owner of the interest is a party to the easement or consents to it.⁴⁶ The drafters explained,

Obviously, an easement cannot impair prior rights of owners of interests in the burdened property existing when the easement comes into being unless those owners join in the easement or consent to it. The easement property thus would be subject to existing liens, encumbrances and other property rights (such as subsurface mineral rights) . . . , unless the owners of those rights release them or subordinate them to the easement.⁴⁷

Section 2(d) similarly applies to recorded severed mineral interests, utility rights of way, and other interests that may have been earlier created and recorded.⁴⁸ The Treasury Regulations interpreting the perpetuity requirements of § 170(h) require that, for the donor of a conservation easement to be eligible for a federal charitable income tax deduction, any lender holding an outstanding mortgage on the subject property must subordinate its rights in the property to the rights of the holder of the easement.⁴⁹ Severed mineral interests must also be

⁴³ *Id.* § 1(2).

⁴⁴ *Id.* § 2(b).

⁴⁵ *Id.* § 2 cmt. (“Conservation and preservation organizations using easement programs have indicated a concern that instruments purporting to impose affirmative obligations on the holder may be unilaterally executed by grantors and recorded without notice to or acceptance by the holder ostensibly responsible for the performance of the affirmative obligations.”).

⁴⁶ *Id.* § 2(d).

⁴⁷ *Id.* § 2 cmt.

⁴⁸ *Id.*

⁴⁹ Treas. Reg. § 1.170A-14(g)(2) (2012).

addressed for § 170(h) deduction purposes.⁵⁰ Whether and how remaining pre-existing interests must be addressed depends on the nature of the easement and the circumstances.⁵¹

Section 2(c) provides that, except as provided in section 3(b), “a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.”⁵² The Act thus provides the flexibility to create easements of various durations, including term easements, which automatically expire after a specified period of time, such as twenty or thirty years; easements that are terminable upon the satisfaction of certain conditions set forth in the easement deed, such as a finding by the holder that profitable farming is no longer feasible; and perpetual conservation easements, which should be terminable only if it can be shown that their conservation purposes have become impossible or impractical due to changed conditions. The default rule in section 2(c), however, is for conservation easements of unlimited or perpetual duration, and the drafters specifically intended for the Act to allow the creation of perpetual conservation easements that would satisfy the federal tax law “perpetuity” requirements.⁵³

With regard to perpetual conservation easements, the comments to section 2 of the Act explain,

The Act enables parties to create a conservation easement of unlimited duration subject to the power of a court to modify or terminate the easement in accordance with the principles of law and equity. . . . The latitude given the parties is consistent with the philosophical premise of the Act. However, there are additional safeguards; for example, easements may be created only for certain purposes intended to serve the public interest and may be held only by certain “holders.” These limitations find their place comfortably within the limitations applicable

⁵⁰ I.R.C. § 170(h)(5)(B), (h)(6) (2006); Treas. Reg. § 1.170A-14(g)(4).

⁵¹ See I.R.C. § 170(h); Treas. Reg. § 1.170A-14.

⁵² UNIF. CONSERVATION EASEMENT ACT, *supra* note 21, § 2(c).

⁵³ See, e.g., I.R.C. § 170(h)(2)(C) (establishing that a deductible easement must be “a restriction (granted in perpetuity) on the use which may be made of the real property”); *id.* § 170(h)(5)(A) (providing that the conservation purpose must be protected in perpetuity); Treas. Reg. § 1.170A-14(c)(2) (instructing that the holder must be prohibited from transferring the easement except to another eligible donee that agrees to continue to enforce the easement); Treas. Reg. § 1.170A-14(g)(6)(i) (“If a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation . . . can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee’s proceeds (determined under [Treasury Regulation § 1.170A-14(g)(6)(ii)]) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.”). For a detailed discussion of the perpetuity requirements of § 170(h) and the Treasury Regulations, see 4-34A POWELL ON REAL PROPERTY § 34A.04[4][b], [c], and [f].

to charitable trusts, which may be created to last in perpetuity, subject to the power of a court to modify or terminate the trust pursuant to the doctrine of *cy pres*. . . . Allowing the parties to create such easements also enables them to fit within federal tax law requirements that the interest be “in perpetuity” if certain tax benefits are to be derived.⁵⁴

Lastly, section 2(a) notes that “a conservation easement may be created, conveyed, recorded, assigned, released, modified, [or] terminated . . . in the same manner as other easements.”⁵⁵ This refers to the formalities and requirements applicable to these actions, such as the size of the paper, notarization, and witness requirements. The phrase “in the same manner” refers to the “mode of procedure, a way of acting.”⁵⁶ The Act was not intended to affect other laws that might condition or limit a holder’s ability to release, or to agree to modify or terminate a conservation easement, including the laws applicable to purchased easements and to organizations soliciting and accepting charitable gifts for specific purposes (in some jurisdictions referred to as “charitable trusts”). In fact, the comments to the Act specifically provide that “[t]he Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements *and* the enforcement of charitable trusts” and “independently of the Act, the Attorney General could have standing [to bring an action affecting a conservation easement] in his capacity as supervisor of charitable trusts, either by statute or at common law.”⁵⁷

Of course, 1981 was during the pioneer phase of the conservation easement movement.⁵⁸ We have come a long way from the reported 128,000 acres protected by conservation easements in 1980 to the estimated 40 million acres today.⁵⁹ Since 1980, both the American Law Institute and the ULC have completed other projects that referenced conservation easements.⁶⁰

In 2000, the American Law Institute published the *Restatement (Third) Property: Servitudes*, which, among other things, recommends that, in lieu of the traditional real property law doctrine of changed conditions, the modification and termination of perpetual conservation easements held by governmental bodies or charitable organizations should be governed by a special set of rules modeled on

⁵⁴ UNIF. CONSERVATION EASEMENT ACT, *supra* note 21, § 2 cmt.

⁵⁵ *Id.* § 2(a).

⁵⁶ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 756 (11th ed. 2008).

⁵⁷ UNIF. CONSERVATION EASEMENT ACT, *supra* note 21, § 3 cmt. (emphasis added).

⁵⁸ See Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 2013 UTAH L. REV. 687, 33 UTAH ENVTL. L. REV. 1 (2013).

⁵⁹ *Id.*

⁶⁰ UNIF. TRUST CODE § 414(d), cmt. (2006); RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 1.6, 3.1, 4.3, 4.6(1)(b), 4.9, 7.11, 7.16(5), 8.5 (2000); RESTATEMENT (THIRD) OF TRUSTS § 94 (2012).

the charitable trust doctrine of *cy pres*.⁶¹ In their commentary, the drafters of the Restatement explained that “[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes”⁶²

The Uniform Trust Code, approved by the National Conference of Commissioners on Uniform State Laws in 2000, specifically exempts conservation easements from a provision authorizing the termination of “uneconomic” trusts.⁶³ The drafters of the Uniform Trust Code explained,

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the “trustee” could constitute a breach of trust.⁶⁴

The comments to the UCEA were amended in 2007 to both (i) update the UCEA to reflect the above works and (ii) prevent section 2(a) from being erroneously interpreted as authorizing holders and property owners to mutually agree to substantially modify and terminate conservation easements, regardless of the express terms of the easements or the circumstances of their creation.⁶⁵ The ULC and its Executive Committee went through a formal process and amended the comments to confirm the intention that the Act leaves intact existing case and statutory law as it relates to the enforcement of charitable gifts and trusts, as well as the attorney general’s rights with regard to enforcement on behalf of the public.

In a recent tax court opinion, the court held that the federally deductible conservation easements at issue were restricted charitable gifts and explained that a restricted gift is a “contribution[] conditioned on the use of the gift in accordance with the donor’s precise directions and limitations.”⁶⁶ This means that the holder

⁶¹ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11.

⁶² See *id.* § 7.11, cmt. a.

⁶³ See UNIF. TRUST CODE § 414(d).

⁶⁴ *Id.* § 414 cmt.

⁶⁵ See UNIF. CONSERVATION EASEMENT ACT, *supra* note 21, § 3 cmt.

⁶⁶ *Carpenter v. Comm’r*, 103 T.C.M. (CCH) 1001, 1004 (2012) (quoting Michael M. Schmidt & Taylor T. Polluck, *Modern Tomb Raiders: Nonprofit Organizations’ Impermissible Use of Restricted Funds*, 31 COLO. LAW. 57, 58 (2002)), *reconsideration denied and opinion supplemented in* 106 T.C.M. (CCH) 62 (2013); see also *supra* note 40 and accompanying text (explaining the use in some states of “restricted gift” versus “charitable trust” terminology to describe charitable gifts made for specific purposes and that, regardless of the label, donees must administer such gifts in accordance with the terms and purpose specified by the donors and the state attorney general has the power to enforce such gifts).

(and the property owner) must abide by provisions of the conservation easement deed, including the restrictions on development and use, the restriction on transfer, the extinguishment and division of proceeds, and other provisions included in the deed to satisfy federal tax law requirements.

The tax court also held that conservation easements that are extinguishable by mutual agreement of the parties are not eligible for the federal deduction under § 170(h).⁶⁷ If section 2(a) of the UCEA were interpreted to authorize holders and property owners to mutually agree to modify and terminate conservation easements regardless of the terms of the easements or the manner of their creation, section 2(a) would preclude the creation of tax-deductible easements. That would be directly contrary to the intent of the Drafting Committee, which intended to both (i) leave intact the existing case and statute law of adopting states as it relates to restricted gifts and charitable trusts⁶⁸ and (ii) “enable[] the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code.”⁶⁹

The principles that govern the administration of charitable gifts and charitable trusts are also based on the common sense concept of “trust”—trust by the donor that the government entity or charitable organization will do what it agreed to do when it accepted the gift of a perpetual conservation easement. Such gifts have become a central component of land protection efforts in the United States, as evidenced by the growth in the number of acres encumbered by easements and the generous federal and state tax incentives offered to easement donors.⁷⁰ Failure of government and nonprofit holders to honor their promises to protect land in perpetuity would discourage future donations and threaten continued federal and state support for tax incentive programs.

Lastly, for those who would ignore the Drafting Committee’s direction that the Act leaves intact the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts and attorney general standing, it is well-settled that “it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.”⁷¹ Thus, one cannot reasonably or validly imply an intent in the

⁶⁷ *Carpenter*, 103 T.C.M. (CCH) at 1005. In supplementing its opinion in *Carpenter*, the tax court held that tax-deductible easements must be extinguishable only in accordance with the requirements of Treasury Regulation § 1.170A-14(g)(6)(i) (i.e., in a judicial proceeding upon a finding that continued use of the property for conservation purposes has become impossible or impractical). *Carpenter*, 106 T.C.M. (CCH) at 62.

⁶⁸ See UNIF. CONSERVATION EASEMENT ACT, *supra* note 21, at 3, § 3 cmt.

⁶⁹ *Id.* at 3; see also *id.* § 2 cmt. (“Allowing parties to create [easements of unlimited duration] enables them to fit within federal tax law requirements that the interest be ‘in perpetuity’ if certain tax benefits are to be derived.”).

⁷⁰ See Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 9–11 (2012); McLaughlin, *supra* note 58.

⁷¹ *Los Angeles v. Frisbie*, 122 P.2d 526, 532 (Cal. 1942); see also *Lewis v. Marriott Int’l, Inc.*, 527 F. Supp. 2d 422, 429 (E.D. Pa. 2007) (“[S]tatutes are not presumed to make

UCEA to overthrow long-established principles of law as they relate to charitable gifts made for specific purposes in the conservation easement context.

C. Section 3—Judicial Actions

Section 3(a) addresses standing to bring judicial actions affecting a conservation easement.⁷² Those granted standing include the owner of an interest in the real property burdened by the easement, the holder of the easement, persons granted a third-party right of enforcement, and any other person authorized by other laws of the state.⁷³ With regard to the last category, the Drafting Committee explained,

In addition to [the first] three categories of persons who derive their standing from the explicit terms of the easement itself, the Act also recognizes that the state's other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.⁷⁴

Section 3(b) affirmatively states that the Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.⁷⁵ In their comments, the Drafting Committee acknowledged that “[a] restriction burdening real property in perpetuity or for long periods can fail of its purposes because of changed conditions affecting the

changes in the rules and principles of the common law or prior existing law beyond what is expressly declared in their provisions.” (quoting *Commonwealth v. Miller*, 364 A.2d 886, 887 (Pa. 1976)); *Ware v. Timmons*, 954 So. 2d 545, 556 (Ala. 2006) (“[W]e presume ‘that the legislature does not intend to make any alteration in the law beyond what it explicitly declares.’” (quoting *Duncan v. Rudolph*, 16 So. 2d 313, 314 (Ala. 1944))); *Wilson v. Iowa City*, 165 N.W.2d 813, 822 (Iowa 1969) (“[T]he legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed, unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication, and the language employed admits of no other reasonable construction.” (quoting *Ritter v. Dagel*, 156 N.W.2d 318, 323 (Iowa 1968))); *Boyd v. Commonwealth*, 374 S.E.2d 301, 302 (Va. 1988) (“A statutory change in the common law is limited to that which is expressly stated or necessarily implied because the presumption is that no change was intended.”); *Green Mountain Sch. Dist. No. 103 v. Durkee*, 351 P.2d 525, 530 (Wash. 1960) (“[T]he common law must be allowed to stand unaltered as far as is consistent with the reasonable interpretation of the new law’ . . . for it must not be presumed that the legislature intended to make any innovation on the common law without clearly manifesting such intent.” (quoting *Marble v. Clein*, 347 P.2d 830, 832 (Wash. 1959))).

⁷² UNIF. CONSERVATION EASEMENT ACT, *supra* note 21, § 3(a).

⁷³ *Id.*

⁷⁴ *Id.* § 3 cmt.

⁷⁵ *Id.* § 3(b).

property or its environs, because the holder of the conservation easement may cease to exist, or for other reasons not anticipated at the time of its creation,” and that “[a] variety of doctrines, including the doctrines of changed conditions and *cy pres*, have been judicially developed and, in many states, legislatively sanctioned as a basis for responding to these vagaries.”⁷⁶ The drafters noted that application of the doctrine of changed conditions to easements is “problematic in many states,” and further noted the following with regard to the doctrine of *cy pres*:

Under the doctrine of *cy pres*, if the purposes of a charitable trust cannot [be] carried out because circumstances have changed after the trust came into being or, for any other reason, the settlor’s charitable intentions cannot be effectuated, courts under their equitable powers may prescribe terms and conditions that may best enable the general charitable objective to be achieved while altering specific provisions of the trust. So, also, in cases where a charitable trustee ceases to exist or cannot carry out its responsibilities, the court will appoint a substitute trustee upon proper application and will not allow the trust to fail.⁷⁷

From 1981 to 1985, without guidance from the IRS regarding the meaning of the perpetuity requirements in § 170(h), it is likely that many tax-deductible perpetual conservation easements were drafted to be silent on the issue of termination. Courts interpreting these early easements should look to the doctrine of *cy pres* as a means by which to allow for the modification of these restricted gifts if, at some point, the property can no longer be used for the conservation purposes specified by the donor.⁷⁸ After the issuance of the Treasury Regulations interpreting § 170(h) in 1986, many conservation easements were drafted to include a provision specifying that the easement could be extinguished only as provided in Treasury Regulation section 1.170A-14(g)(6)(i) and (ii),⁷⁹ which the tax court noted “appears to be a regulatory version of [the doctrine of] *cy pres*.”⁸⁰

⁷⁶ *Id.* § 3 cmt.

⁷⁷ *Id.*

⁷⁸ See Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006).

⁷⁹ See JANET DIEHL & THOMAS S. BARRETT, *THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS* 155 (1988) (providing a checklist of “Provisions Relating to IRS Requirements”); THOMAS S. BARRETT & STEFAN NAGEL, *MODEL CONSERVATION EASEMENT AND HISTORIC PRESERVATION EASEMENT, 1996: REVISED EASEMENT AND COMMENTARY FROM THE CONSERVATION EASEMENT HANDBOOK* 11 (1996) (same); ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 313–14 (2d ed. 2005) (providing a checklist of “Internal Revenue Service Requirements for Conservation Easements and Potential Tax Incentives”).

⁸⁰ See *Kaufman v. Comm’r*, 136 T.C. 294, 306–07 (2011), *vacated and remanded in part on other grounds sub nom. Kaufman v. Shulman*, 687 F.3d 21 (1st Cir. 2012). The Tax Court explained,

Holders of these post-Treasury Regulation tax-deductible conservation easements should be required to abide by the terms of such gifts, including the provisions requiring a judicial proceeding and imposing other conditions on extinguishment.

D. Section 4—Validity

Section 4 addresses the potential common law problems associated with land use restrictions held in gross.⁸¹ This area of real property law is arcane and tangled, and section 4 is designed to sweep away any possible common law impediments to the long term validity of conservation easements.⁸²

E. Section 5—Applicability

Section 5 provides that the Act applies to any interest created after adoption of the Act, regardless of how the interest is denominated (i.e., as a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise), provided the interest complies with the terms of the Act.⁸³ The Act also applies to any interest created before adoption of the Act if the interest would have been enforceable had it been created after the Act's adoption, unless retroactive application would contravene the constitution or laws of the adopting state or the United States.⁸⁴ Finally, the Act declares that it does not invalidate any interest that is enforceable under other laws of the adopting state.⁸⁵

The Drafting Committee recognized that constitutional difficulties could arise if the Act sought to confer blanket validity on interests created before the Act's adoption that happen to comply with the Act, but that would have been invalid under the pertinent pre-Act statutory or case law of the adopting state.⁸⁶ In such cases, the owner of the land ostensibly burdened by the formerly invalid interest might well succeed in arguing that his property would be "taken" without just

The drafters of section 1.170A-14, Income Tax Regs., undoubtedly understood the difficulties (if not impossibility) under State common or statutory law of making a conservation restriction perpetual They understood that forever is a long time and provided what appears to be a regulatory version of *cy pres* to deal with unexpected changes that make the continued use of the property for conservation purposes impossible or impractical.

Id. See also *supra* note 67 and accompanying text.

⁸¹ See UNIF. CONSERVATION EASEMENT ACT, *supra* note 21, § 4 cmt. ("One of the Act's basic goals is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends.")

⁸² *Id.* § 4(1)–(7) cmt.

⁸³ *Id.* § 5(a).

⁸⁴ *Id.* § 5(b).

⁸⁵ *Id.* § 5(c).

⁸⁶ *Id.* § 5 cmt.

compensation if the interest were subsequently validated by the Act.⁸⁷ Section 5(b) addresses this difficulty by precluding retroactive application of the Act if such application “would contravene the constitution or laws of (the) State or of the United States.”⁸⁸ The drafters recognized that such a determination would have to be made by a court.⁸⁹

F. Section 6—Uniformity of Application and Construction

Section 6 provides that the Act “shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it.”⁹⁰ This provision is consistent with the purpose of a uniform act—to promote uniformity among the adopting states with regard to the subject matter of the Act.

Courts generally, and appropriately, rely on the comments to a uniform act as a guide in interpreting its provisions. As explained by the Connecticut Supreme Court when it was interpreting a provision of the Uniform Management of Institutional Funds Act,

A court can “properly consider the official comments as well as the published comments of the drafters as a source for determining the meaning of an ambiguous provision [of a uniform act].” . . . Only if the intent of the drafters of a uniform act becomes the intent of the legislature in adopting it can uniformity be achieved. Otherwise, there would be as many variations of a uniform act as there are legislatures that adopt it. Such a situation would completely thwart the purpose of uniform laws.⁹¹

III. CONCLUSION

The UCEA has a relatively narrow purpose—to sweep away common law impediments to the validity of conservation easements—and it has very successfully accomplished that goal. It also provides parties with the flexibility to create easements of various durations and in a variety of circumstances. The Act’s simplicity may be both its strength and its weakness, depending upon how the courts interpret its provisions. Hopefully courts will look to the comments of the Drafting Committee as a useful guide.

⁸⁷ *Id.*

⁸⁸ *Id.* § 5(b).

⁸⁹ *Id.* § 5 cmt.

⁹⁰ *Id.* § 6.

⁹¹ *Yale Univ. v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (citations omitted) (quoting 2B J. SUTHERLAND, *STATUTORY CONSTRUCTION* (5th ed. 1992)).