

A Guided Tour of the Conservation Easement Enabling Statutes

by Robert H. Levin, Esq.
January 2010



A Guided Tour of the Conservation Easement Enabling Statutes

Table of Contents

Overview	Page 2
Acknowledgments	Page 2
I. Introduction	Page 4
II. Interface between Enabling Statutes and Other Laws	Page 5
III. Uniform Conservation Easement Act Overview	Page 6
IV. Qualified Easement Purposes	Page 8
V. Qualified Holders	Page 9
VI. Duration	Page 11
VII. Public Review or Approval of Easement Conveyance	Page 11
VIII. Registries	Page 13
IX. Amendment and Termination	Page 14
X. Standing	Page 28
XI. Merger and Property Tax Lien Foreclosure	Page 34
XII. Backup Holder	Page 36
XIII. Eminent Domain	Page 37
XIV. Property Taxation	Page 39
XV. Enforcement	Page 40
XVI. Miscellaneous Provisions	Page 42
XVII. Conclusion	Page 44

A Guided Tour of the Conservation Easement Enabling Statutes

Overview

This report presents a comprehensive overview of state conservation easement enabling statutes, understood in the context of other state and federal laws that may apply on any given issue. It does not attempt to explore all the laws that affect conservation easements, but rather serves as a guided tour of enabling statutes, with discussion about potential areas that individual states may want to consider for legislative clarification. Conservationists should be mindful of how enabling statutes interact with other laws as they evaluate whether to propose legislation to amend their enabling act. By looking at what other states include and omit, interested parties can evaluate the risks and benefits of various approaches to conservation easement enabling acts.

The main body of the text provides a discussion of the key issues addressed (or not addressed) by such statutes. This report gives particular attention to amendment, termination and legal standing to enforce. Most statutes are silent or refer to “other law” on these issues, creating the potential for ambiguity. A handful of states are discussed in detail as noteworthy exceptions.

No enabling statute purports to repeal or otherwise supplant other applicable state or federal law, such as the laws governing nonprofit management and the administration of charitable gifts and charitable trusts. To the extent that the enabling act and other applicable laws analyzed together do not provide complete or clear answers to the more sophisticated questions facing conservationists today, then land trusts and their advisors may wish to consider appropriate legislation addressing these issues.

Appendix A provides a chart for a quick comparison of the various statutes on a dozen key factors. Appendix B sets forth the highlights of each state’s statute. Appendix C enumerates several provisions that might be considered as part of any comprehensive amendment to an enabling statute. Appendix D is a copy of the Uniform Conservation Easement Act, along with the Official Comments.

This guided tour of conservation easement enabling statutes is not legal advice and is not intended to be used as legal advice.

Acknowledgments

I could not have undertaken this project on my own. Kinvin Wroth, Professor of Law and Director of the Land Use Institute at Vermont Law School, along with his stellar interns, James Garrett and Gina Pasquantonio, spent countless hours compiling links and citations to each of the enabling statutes and recent amendments. Their advance work made my job much easier. In addition, Leslie Ratley-Beach, Conservation Defense Director, Sylvia Bates, Director of Standards and Research and Renee Kivikko, Director of Education at the Land Trust Alliance, provided essential support at every step along the way. Ellen Fred, Larry Kueter, Tim Lindstrom, Jeff Pidot and W. William Weeks provided invaluable comments and have made the finished product much tighter. These experts may not agree with everything in this report, and it should be clearly noted that I and the Alliance are responsible for the final version of this report.

A Guided Tour of the Conservation Easement Enabling Statutes

Because this report attempts to articulate the various points of view without advocating any one, it does not represent the full views and opinions of any of those whose help I sincerely acknowledge. Finally, I would like to thank the following colleagues for their assistance in scrutinizing the oft-inscrutable statutes: Jennifer Cherry, Andrew C. Dana, William Flournoy, Burgess Jackson, Robert Levite, Rex Linville, Thomas Masland, Bernie McHugh, Matthew McQueen, Randy Renner, Dave Sands, Bill Silberstein, Scott Wilber and James Wyse.

The Alliance and I intend this report to be an overview of the UCEA and state enabling acts as well as cases, treatises and articles that address enabling act issues. We have attempted to fairly characterize various points of view as well as offer sound, sensible guidance to land trusts on evaluating the laws in their state and addressing areas of the law that might benefit from clarity.

Robert H. Levin, Esq.
94 Beckett St., 2nd Floor
Portland, Maine 04101
(207) 774-8026
rob@roblevin.net
www.roblevin.net

A Guided Tour of the Conservation Easement Enabling Statutes

I. Introduction

Conservation easement enabling statutes serve as the internal structural frame upon which thousands of easements¹ have been granted in recent decades. Prior to passage of the enabling statutes, the enforceability of conservation easements in their respective states was in doubt, because in common law, perpetual and negative easements in gross were frowned upon.

As the land conservation movement has matured in recent years, there has been a corresponding interest in amending enabling statutes. During the 2000s, in any given year, one or two state legislatures mustered the momentum to amend their enabling statutes. Since 2000, 12 states have enacted substantive amendments, with seven of those occurring from 2005 on.² Furthermore, since 1999, three states have passed easement enabling legislation for the very first time.³

The recent amendment activity surrounding enabling statutes is not surprising due to the fact that most of the original statutes were enacted before easements had become common. In this sense, legislatures were by necessity flying blind. Furthermore, there were very few land conservation professionals to participate in the legislative process, as the number of land trusts in any given state was a fraction of their current totals. Today, in contrast, with years of experience, land trusts and practitioners are better prepared to identify how the enabling statutes have served them well and where they have been found wanting.

Land trust staff and legal counsel are often intimately familiar with their own state's enabling statute, but know little about any other state's statute. As with every other area of policy and practice, however, we can learn much from each other's strengths and weaknesses. To date, there has been a dearth of published research on the various state enabling statutes. In particular, comprehensive comparative analyses and summaries are rare.⁴ The sole publication known to this author that comprehensively reviewed each state's enabling statute dates back to 2000.⁵

This report attempts to serve as a resource for those in the land conservation field, including land trust staff, government agencies that hold easements, attorneys and elected officials. In certain cases, these individuals might wish to amend their state statute to plug a gap or otherwise strengthen it. In other cases, they might be playing defense, fending off a bill that would be

¹ Unless otherwise specified, the term "easement" and "conservation easement" shall be used interchangeably throughout this report and also includes the term "restriction" and "conservation restriction" in states using such terminology. Likewise, the term "landowner" shall be used as shorthand for the landowner of the land subject to a conservation easement. Finally, the term "protected property" shall be used as shorthand for any property subject to a conservation easement.

² Hawaii (2007), Maine (2007), Maryland (2007)—not an amendment to enabling statute *per se*, but enactment of a new statute that applies specifically to conservation easements—Montana (2007), Massachusetts (2006), Connecticut (2005), Tennessee (2005), Virginia (2003), Colorado (2003), Iowa (2002), Oregon (2001) and Mississippi (2000).

³ Oklahoma (1999), Pennsylvania (2001) and Wyoming (2005).

⁴ 4-34A *Powell on Real Property* § 34A.03 (2009) does offer a limited comparative review of certain aspects of the enabling statutes, but it is far from comprehensive.

⁵ See Julie Ann Gustanski and Roderick H. Squires, *Protecting the Land: Conservation Easements Past, Present, and Future*, Island Press (2000). This book, although an exceedingly useful resource, is now dated due to all of the aforementioned legislative activity over the past decade.

A Guided Tour of the Conservation Easement Enabling Statutes

deleterious to sound easement practices. Finally, some might simply be curious as to how their state statute measures in comparison to others.

Above all, the purpose of this report is to offer useful information and to engender discussion among practitioners throughout the 51 jurisdictions.⁶ Bear in mind that there is no such thing as the perfect statute, and the aim of this report is not to establish any definitive conclusions as to which statutes need improvement or which ones deserve blue ribbons.⁷ Likewise, certain statutory provisions (Attorney General standing and amendment come to mind) entail a policy choice in one direction or another. Conservationists should be certain that they understand the policy choices inherent in their enabling act, as well as in the other laws that affect conservation easements. If analyzed together, then any inconsistencies or improvements can be more effectively identified so that the total body of conservation law can be more coherent.

A word of caution is in order before land trusts launch any legislative amendment efforts. Given the unpredictability of the legislative process, potential risks exist in attempting to amend an enabling statute. These might include the prospect that the changes ultimately made will be neither conservation easement- nor land trust-friendly nor exactly what the land trust wanted at the outset, negative media or public attention, or loss of support among state and federal policymakers. Furthermore, changes to a statute may apply prospectively only due to constitutional or other limitations⁸.

On the other hand, there are also difficulties in dealing with a lack of legal clarity through litigation. Litigation is likely when laws are unclear, as various parties struggle to interpret the ambiguities. Obtaining a positive result for conservation through the courts faces potential peril, including the unpredictability of judicial interpretation and biases, negative media or public attention, a messy fact pattern that muddies the key issues, as well as legislative turmoil in the wake of a contentious judicial decision.

Land trusts and their advisors should consider all such issues thoroughly before determining the best course for their state to provide suitable clarity and direction on conservation issues.

II. Interface between Enabling Statutes and Other Laws

This report focuses specifically on conservation easement enabling statutes; thus setting the context of this report is in order from the outset. It should be well understood that no enabling statute exists in a vacuum, and that the full treatment of conservation easements and their

⁶ For the purposes of this report, the District of Columbia is treated the same as any other state, thus the reference to 51 jurisdictions.

⁷ Readers may observe that I write at length about Maine's statute. I would like to believe that this is not because it is my state of practice, but because it has a top-notch statute as a result of a comprehensive amendment passed in 2007.

⁸ However, the sole court to rule on the retroactivity issue with respect to the amendment of an enabling statute provision held that an amendment to broaden the Attorney General's standing authority *did apply retroactively*, as the amendment was not fundamentally unfair to pre-amendment contracting parties and therefore did not violate the Contract Clauses of the Maine and United States Constitutions. Windham Land Trust v. Jeffords, 2009 ME 29 ¶ 16 (Me. 2009).

A Guided Tour of the Conservation Easement Enabling Statutes

nonprofit or government holders is spread across a constellation of federal and state statutes and the common law. To fully understand the enabling statutes, one must also understand these myriad other laws and their interrelationship.

For practical purposes, the Land Trust Alliance has had to draw a clear line around the scope of this project. As such, except where relevant information was incidentally acquired as part of researching the enabling statutes, this report does not focus on any of the following, each of which might affect the treatment of any given conservation easement:

- (1) Enabling legislation for particular easement funding programs
- (2) Enabling legislation for non-conservation easements, such as trail easements, solar easements and so forth
- (3) Any conservation easement-related statutes that are not expressly included or referenced in the easement enabling statutes, including tax provisions, eminent domain provisions, marketable title acts and so on
- (4) State and federal laws governing nonprofit management and the administration of restricted charitable gifts and charitable trusts
- (5) State laws on fraudulent solicitation, misrepresentation to donors, consumer protection and the like
- (6) State laws regulating the conduct of fiduciaries depending on the circumstances of easement creation, relationships with donors and obligations undertaken by the land trust
- (7) State and local laws governing land use, conveyances, real property and the like
- (8) Contractual and other obligations to easement donors, grantors, funders and others
- (9) A land trust's governance documents, including articles of incorporation, bylaws and IRS tax-exemption approval documents
- (10) Internal Revenue Code and Treasury Regulation requirements for perpetuity and prohibitions on private inurement and impermissible private benefit
- (11) Uniform Trust Code

The existence of these established bodies of law generally explains the omission of provisions governing these subjects from enabling statutes. An in-depth, state-by-state analysis of these and any other relevant laws, and how they might interface with the state enabling statutes, is beyond the scope of this report. An action that might appear to be permissible under an enabling statute could appear to be improper or unlawful under one or several of the above laws or factors. Land trusts are urged to consult with competent legal counsel regarding the impact of all these and other factors affecting easements in general and any specific easement in particular. This report is not and should not be used as specific legal advice.

III. Uniform Conservation Easement Act Overview

The Uniform Conservation Easement Act (UCEA) and the accompanying Comments were adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1981. Amendments to the Comments were enacted in 2007, mainly to confirm the application of charitable trust principles to conservation easements in accordance with any existing state laws.

A Guided Tour of the Conservation Easement Enabling Statutes

The UCEA, along with the Comments, is attached as Appendix D and is online at http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.htm.

The drafters of the UCEA declared a limited goal of abolishing traditional common law restraints on perpetual and negative easements in gross.⁹ Thus, the UCEA is quite intentionally confined in scope, remaining silent or neutral on issues such as amendment, termination, taxation and eminent domain. Furthermore, the UCEA reflects an acknowledgment on the part of the drafters that conservation easements can be conveyed in a variety of contexts—donated as charitable gifts, purchased for full value, acquired as part of development approval processes or created in mitigation. The drafters maintain that attempting to address the various state and federal laws that might apply in each of these circumstances would be inappropriate.

As will be discussed further in the sections on standing, amendment and termination, among others, one result of the UCEA's limited purpose is that most enabling statutes (even those that are not based on the UCEA) do not provide comprehensive answers to the array of easement issues presented in this report. As noted in Section II, one cannot look to the enabling statutes as the sole source of law on the treatment of conservation easements. Indeed, the Commissioners' Prefatory Note to the UCEA encourages states to address many of the issues not treated directly in the UCEA. However, as can happen with any model statute, various state legislatures have not always appreciated that the model is just a starting point and that additional policy choices are necessary to provide comprehensive treatment of conservation easements.¹⁰

As a model act, the UCEA, in and of itself, does not have the force of law in any state. Rather, it must be adopted by a state for it to have such force. As of January 2009, 27 states and the District of Columbia have adopted some version of the UCEA, as shown in Appendix A.¹¹ Through the legislative process, most states have modified the UCEA to one degree or another, although Delaware, Minnesota and Nevada stand out as having adopted nearly verbatim versions. Another 22 states have enacted easement enabling legislation that is not based on the UCEA. In most cases, these statutes pre-date the UCEA.

Only one state, North Dakota, has not adopted any conservation easement enabling legislation. There is an enabling statute for historic preservation easements, but even these are permitted solely for a term of years and not perpetually. Thus, only the federal government is entitled to hold perpetual easements in this state, and this right had to be affirmed by the Supreme Court's edict in *North Dakota v. United States*, 460 U.S. 300 (1982). All other entities are limited to easements of 99 years or less. Additional barriers prevent nonprofit corporations from owning

⁹ See UCEA, Commissioners' Prefatory Note at 3.

¹⁰ Alternatively, in certain states, some of these policy choices may have already been made at the time that particular enabling statute was adopted, and their application is crystal clear. Often, however, laws predating an enabling statute are ambiguous in how they affect conservation easements, precisely because they were enacted prior to the common usage of conservation easements and the passage of any enabling statute. See, e.g., 4-34A *Powell on Real Property*, §34A.07[1] (2009), discussing ambiguity as to how tax lien laws relate to conservation easements.

¹¹ The often-cited NCCUSL tally shows only 23 different states (and the Virgin Islands) as having adopted a version of the UCEA. See http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucea.asp. For unexplained reasons, the NCCUSL list leaves off Florida, Georgia, Louisiana, Oklahoma and Pennsylvania, all of which are quite clearly modeled after the UCEA.

A Guided Tour of the Conservation Easement Enabling Statutes

land outright.¹² Not surprisingly, there are no local, regional or state-specific land trusts in North Dakota. Only statewide chapters of nationwide organizations, such as Ducks Unlimited and The Nature Conservancy, maintain a presence in the state.

IV. Qualified Easement Purposes

The UCEA sets forth a comprehensive list of 12 different purposes for which a conservation easement may be created.¹³ More specifically, protection of the following types of attributes are identified in the UCEA as valid purposes of a conservation easement: (1) natural, (2) scenic, (3) open space, (4) agricultural, (5) forest, (6) recreational, (7) natural resources, (8) air or water quality, (9) historical, (10) architectural, (11) archaeological or (12) cultural.

Most UCEA-based states have not tinkered with the list of easement purposes. To the extent that there is variation, it has usually been to list additional purposes, so as to remove any doubts. Additional purposes in various statutes, UCEA-based and otherwise, include protecting the following resources or kinds of resources:

- Beaches (Missouri)
- Biological (Tennessee)
- Burial sites (Hawaii, Wisconsin)
- Educational (Mississippi, South Carolina)
- Geological (Tennessee)
- Horticultural (Colorado, Nebraska, North Carolina)
- Orderly urban or suburban development (Missouri, Montana)
- Paleontological (Alabama, South Dakota)
- Public recreation facilities (Iowa)
- Rare species and natural communities (Delaware)
- Riparian (Iowa)
- Silvicultural (Alabama)
- Wetlands (Colorado, Iowa, Missouri)
- Wildlife or wildlife habitat (Colorado, Delaware, Florida, Illinois, Iowa, Nebraska, New Jersey, Ohio, Pennsylvania, Utah, Vermont, West Virginia)

The UCEA provides that a conservation easement can restrict any “real property.” Such a broad definition presumably includes both land and water bodies. Nevertheless, a few states (Illinois, Maine, Maryland) expressly reference land and water areas. As further detailed in section XVI, Colorado also deserves mention as being the only state to expressly declare that a conservation easement can protect not only fee interests in land and water, but also airspace and water rights.

Several statutes have more abbreviated lists of purposes than the UCEA. California, for example, mentions only natural, scenic, historical, agricultural, forested or open space as qualified purposes. Washington wins an award for conciseness, simply referencing “open space purposes.”

¹² Telephone discussion with Randy Renner, Ducks Unlimited, January 22, 2009. See also http://www.citizenreviewonline.org/march_09/nonprofit.html (last visited June 30, 2009).

¹³ Curiously, “open-space” is listed twice in the UCEA, but is only counted once here.

A Guided Tour of the Conservation Easement Enabling Statutes

Four states (Illinois, Missouri, Montana and New Jersey) are silent on whether protecting agriculture is a qualified purpose for conservation easements, although they all do mention soil conservation as a valid easement restriction.¹⁴ In addition, several states (California, Connecticut, Illinois, Michigan, New Hampshire, Ohio and Rhode Island) fail to mention recreational purposes as a qualified purpose for conservation easements. Nevertheless, these less exhaustive purpose provisions have not made much difference in easement practice because most easements can be swept into the general category of protecting natural or open space land.

Several states provide separate definitions and treatment for historic preservation easements (Connecticut, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina and Rhode Island) and agricultural easements (Massachusetts, New Hampshire and Ohio). In some cases, this separate treatment results in no substantive distinctions from traditional conservation easements, while in a handful there are indeed separate substantive provisions that apply to each kind of easement.

Maryland's statute is unusual in that its list of qualified purposes is simply an enumeration of the kinds of restrictions that can be included in an easement. A few other states (Florida, Illinois and Massachusetts) have similar lists of possible restrictions, but usually only after a recitation of the more traditional purposes.

Note that under any state's statute, an easement only need include one or more of the listed purposes. It is arguable whether a conservation easement may have non-conservation purposes in addition to conservation purposes. There is precedent in Maine, for example, of protecting working waterfront property (a lobster pound) with a conservation easement, which was justified by allowing public recreational access on a portion of the protected property.¹⁵

V. Qualified Holders

A. Governmental Holders

Virtually every state permits governmental entities to hold easements. The one possible exception is New Mexico, where the enabling statute specifically identifies only nonprofit corporations, nonprofit associations and nonprofit trusts as "holders." Nevertheless, other state statutes¹⁶ and an Attorney General's opinion¹⁷ support the ability of governmental agencies to hold conservation easements and, as a result, state agencies, counties and municipalities commonly hold easements in New Mexico.¹⁸ In addition, it is likely that the federal government

¹⁴ Hawaii amended its statute in 2007 to add agriculture as a qualified purpose. See am L 2007, c 145, §2.

¹⁵ See *Exchange*, Journal of the Land Trust Alliance, Spring 2004 at 31. Incidentally, after the grant of this hybrid easement, the Maine Legislature did pass legislation that authorizes the conveyance of a perpetual "working waterfront covenant." See Title 33 M.R.S. §131 *et seq.*

¹⁶ See, e.g., the New Mexico Land Conservation Incentives Act, N.M. Stat. Ann. §75-9-3C ("public or private conservation agency means a governmental body or a private not-for-profit charitable corporation").

¹⁷ See New Mexico Attorney General Op. No. 01-02, 2001 N.M. AG Lexis 2 (Oct. 17, 2001) ("QUESTION: Can New Mexico counties hold valid conservation easements? ANSWER: Yes.").

¹⁸ Telephone discussion with Matthew McQueen, January 28, 2009.

A Guided Tour of the Conservation Easement Enabling Statutes

can hold easements in the state, as the doctrine of federal pre-emption would trump the state statute.¹⁹

The UCEA states, and most non-UCEA states, allow any federal, state, county or municipal body to hold easements. Iowa is a slight exception in that it limits state-level holders to specific agencies. Similarly, a recent amendment to Wyoming's statute prevents the Wyoming Board of Land Commissioners from being a qualified holder. Missouri is unique in excluding certain low population counties and cities from holding easements. Nebraska's statute requires that a government holder have among its purposes the subject matter of the easement. It is unknown whether this requirement was applied to limit holders to conservation or agricultural agencies. Meanwhile, Virginia has an entirely separate statute for government-held easements that provides additional protections from conversion (see section X below). California and Oregon identify certain Native American tribes as qualified holders.

B. Nongovernmental Holders

Nongovernmental entities can hold easements in every state, but there are some important differences in the details. One distinction is whether such entities must be classified under Internal Revenue Code section 501(c)(3). Ten states do require such status, mostly non-UCEA states. Somewhat more broadly, Hawaii, Montana and New Jersey require nongovernmental holders to be classified under any part of Internal Revenue Code section 501(c), not specifically section 501(c)(3). This language allows nongovernmental holders other than 501(c)(3) charitable organizations, such as trade associations [501(c)(6)], social clubs [501(c)(7)] and political organizations [501(c)(4)], among others. However, these non-501(c)(3) holders are not qualified to hold donated conservation easements for which the donor seeks a federal income tax charitable deduction.

Another distinction occurs as to the nongovernmental holder's purposes. Most states, including all UCEA states, require that a nongovernmental holder's purposes must merely include conservation among any number of other purposes. A handful of states (California, Illinois, Washington and Wyoming) go further and require that conservation purposes (or similar purposes, such as agricultural or historic preservation) be a "primary" or "principal" purpose of the holder. On the other end of the spectrum, a few states (Colorado, Iowa and Michigan) do not impose any purposes-based restrictions on which nongovernmental entities may hold easements. For donated easements, purpose-based restrictions are found in section 170(h) of the Internal Revenue Code.

Two different states require a certain maturity level for nongovernmental easement holders. Virginia has a five-year corporate existence requirement, while Colorado has a two-year requirement. Incidentally, both of these states have transferable state tax credits for easement donations. But these unique holder maturity provisions preceded the advent of the tax credits.

Three states stand out for unusually broad definitions of qualified holders. North Carolina stands alone in expressly permitting for-profit businesses to hold easements, so long as their purposes include conservation. New Hampshire's and Rhode Island's statutes are not quite so explicit, but

¹⁹ See North Dakota v. United States, 460 U.S. 300 (1982); United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973).

A Guided Tour of the Conservation Easement Enabling Statutes

they do seem to include for-profit entities, as they reference “charitable, educational or other corporation, association, trust or other entity whose purposes include conservation.” In any of these three states, it would not be difficult for an individual to form a business corporation (solely owned or otherwise) with a purpose statement that includes conservation. However, inquiries with practitioners in these states turned up no knowledge of any such for-profit-held easements.

VI. Duration

The differences in statutory treatment of the duration of easements are relatively minor. Except for North Dakota, which does not have a conservation easement enabling statute, every state allows for perpetual easements. In no small part this is because federal tax law requires perpetual easements in order for a donor to claim a charitable deduction.²⁰ Where states have diverged is in establishing the default duration of an easement. Nevertheless, because it is relatively simple to contract around the default, these variations have likely had little effect in practice.

The UCEA, after a reference to the possibility of amendment or termination, provides that “a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.” The vast majority of UCEA and non-UCEA statutes follow this approach.

A handful of states merit special mention. Pennsylvania and West Virginia both require a minimum of 25 years for an easement. Likewise, Montana sets a 15-year minimum. Alabama makes the default duration “the lesser of 30 years or the life of the grantor, or upon the sale of the property by the grantor.” Kansas has similar language.

Finally, California, Florida and Hawaii require perpetual conservation easements. These are the only three states in which statutory term easements are expressly prohibited, although they might be permitted as some form of common law, non-statutory conservation easement, with the possible exception of California. At least one expert says that “the California statute strongly suggests that it preempts the possibility of a common law, non-perpetual easement.”²¹

VII. Public Review or Approval of Easement Conveyance

In the vast majority of states, the process of planning, drafting and executing an easement is treated much like any other real property transaction.²² The parties can be as open or as private as they wish in their negotiations; however, various disclosure and open meeting requirements presumably apply if the landowner or the easement holder is a governmental entity. Although,

²⁰ I.R.C. § 170(h)(2)(C).

²¹ E-mail communication from Ann Schwing, May 12, 2009.

²² Of course, unlike any other real property transaction, the grantee must generally be either a government entity or a charitable organization, as discussed in Section V. In addition, federal tax law requirements influence or sometimes dictate many of the conservation easement’s terms for donated easements as well as enforcement. IRS oversight of the behavior of all land trust operations is an additional protection of the public interest.

A Guided Tour of the Conservation Easement Enabling Statutes

like other real property conveyances, the easement itself must be recorded and is thus a public document, in most states there is no requirement of public review or approval of an easement.

Five different enabling statutes (Massachusetts, Montana, Nebraska, Oregon and Virginia), however, do require some degree of public comment and/or approval for the creation of an easement.²³ Oregon requires notice and a public hearing before any governmental entity can acquire a conservation easement. Montana requires an advisory review of every easement by the local planning authority, in order to promote consistency with local comprehensive planning.

In Virginia, although there is no formal public review or approval in the easement drafting and creation process, there is a statutory requirement that conservation easements must conform to the local comprehensive plan at the time of conveyance so as to be valid and enforceable. According to one Virginia land trust employee, land trusts in the state are careful to include information in the easement and in the baseline documentation showing such conformity and, in many cases, will request a letter to this effect from a local planning official.²⁴ What is unclear from Virginia's provision is whether a local government or a subsequent landowner could challenge an easement several years after its creation by claiming a lack of conformity with the plan. To date, there have been no such challenges, but the statutory language is open ended in this respect.

Massachusetts, with its statute dating back to 1969, has perhaps the most rigorous easement approval process of any state in the land. Municipal- and county-held conservation easements must be approved by the Massachusetts Executive Office of Energy and Environmental Affairs (EOEEA). In turn, land trust held easements must be approved by both the local governing body and the EOEEA. The approving bodies are charged with determining if the easement is in the public interest and are instructed to consider any relevant conservation programs, as well as any public comprehensive land use or development plan affecting the land and any known proposal by a governmental body for use of the land. This public vetting process has been in place ever since the statute's initial passing and is overwhelmingly well regarded by those in the Massachusetts land trust community.²⁵ In the eyes of one land trust insider, having a review by the EOEEA is seen as adding a measure of discipline on land trusts that leads to more consistent and enforceable conservation easements.²⁶ Furthermore, approval at the local government level documents the community's support for any given easement, which can be a great benefit in the event of a violation or a challenge by the Internal Revenue Service. The system is not above criticism, as in recent years some have felt that the EOEEA's analysis takes too long, entailing

²³ In addition, although not required by statute, the vast majority of easements in Virginia are held by the Virginia Outdoors Foundation, a quasi-public agency, and the vast majority of easements in Maryland are held or co-held by the Maryland Environmental Trust, also a quasi-public entity. Moreover, the legal counsel for each is the state Attorney General. These arrangements lead to *de facto* public input at the easement creation stage.

²⁴ Telephone discussion with Rex Linville, Land Conservation Officer, Piedmont Environmental Council, February 2, 2009.

²⁵ Jeff Pidot, *Reinventing Conservation Easements (Policy Focus Report): A Critical Examination and Ideas for Reform*, Lincoln Institute of Land Policy (2005) at 11 (available at <http://learningcenter.lta.org>).

²⁶ Telephone discussion with Bernie McHugh, Director, Massachusetts Land Trust Coalition, April 10, 2009.

A Guided Tour of the Conservation Easement Enabling Statutes

potentially four different layers of review.²⁷ But on the whole, Bay Staters appear to be quite pleased with their public approval process.

Nebraska also requires municipal or county approval of all easements, except for state-held easements, which require planning commission review, but not approval. In language that appears to be based on Massachusetts' approval standards, the local government can deny an easement if inconsistent with any comprehensive plan, any national, state, regional or local conservation program or "any known proposal by a governmental body for use of the land." Because the permissible reasons for denying approval are relatively narrow, most easements are routinely approved, with only the occasional denial, according to one experienced Nebraska practitioner.²⁸

Three states coordinate the land use permit process with the existence of an easement. Connecticut, through a 2005 amendment, requires a landowner to provide 60 days prior written notice to an easement holder or, alternatively, obtain the holder's written approval, before applying for most land use permits. Upon receiving notice, the holder may submit documentation to the permitting agency showing that the proposed activity will violate the easement. If the permitting agency agrees, it must deny the permit. Similarly, in the District of Columbia, an easement holder can register its easement with the mayor, in which case the holder's approval is required for most land use permit applications. Finally, in Georgia, the holder must be made a party to any construction, alteration or demolition permit proceeding.

VIII. Registries

Although every statute requires easements to be recorded, very few states have any separate tracking, mapping or registering requirements for easements. Massachusetts' enabling statute authorizes towns to establish a public restriction tract index, which entails a map showing conservation easements and other kinds of restrictions. However, few towns have implemented the program to date.²⁹ Meanwhile, California law separate from the enabling statute requires that every conservation easement recorded since 2002 be included in a special conservation easement sub-index maintained by each county recorder.

Several states, although falling short of establishing a formal easement registry, do require easement copies to be sent to various state offices. Mississippi, for example, amended its statute in 2000 to extend easement enforcement standing to the Attorney General and the Department of Wildlife, Fisheries and Parks. A companion provision also requires that copies of every easement be sent to these two agencies. Illinois, New York and Virginia have similar provisions.

In 2007, Maine and Montana both amended their statutes to create formal easement registries. In Montana, at the time of recording, holders must send a copy of each easement to the Montana Department of Revenue, which shares them with the Montana Department of Administration for

²⁷ Telephone discussion with Bernie McHugh, Director, Massachusetts Land Trust Coalition, January 23, 2009. Telephone discussion with Robert Levite, attorney in private practice, January 23, 2009.

²⁸ Telephone discussion with Dave Sands, Executive Director, Nebraska Land Trust, January 23, 2009.

²⁹ McHugh, *supra* n. 26.

A Guided Tour of the Conservation Easement Enabling Statutes

“data collection and publication purposes.” Meanwhile, in Maine, a conservation easement registry is just getting off the ground in 2009. All holders of easements are required to file an annual statement with the State Planning Office (SPO) indicating the number of easements held, location and acreage protected, as well as other information that the SPO deems necessary. The SPO is required to report to the Attorney General any “failure” (presumably dissolution) of a holder disclosed by the filing or otherwise known by the SPO. Other than this specified purpose, it remains to be seen how the data will be used by the state and how much information will be shared with the general public, although presumably all registry records will be subject to a Maine Freedom of Access request. One of the key concerns leading to its creation was that the dissolution of small land trusts would produce “orphaned” easements that would fall through the cracks and effectively become abandoned (see section XII below).

IX. Amendment and Termination

A. Overview

The issue of amendment and termination is one of the most important and controversial topics in today’s land conservation legal community. Over the past several years, a stimulating and healthy debate has emerged over whether, when and how easements can and should be amended or terminated. This report is not intended to review or restate the comprehensive amendment discussion already existing from the 2007 Land Trust Alliance report *Amending Conservation Easements: Evolving Practices and Legal Principles* (the “Amendment Report” is available at <http://learningcenter.lta.org>). A brief discussion, however, is necessary to frame the review of the state enabling acts.

Some experts, attorneys and practitioners maintain that charitable trust principles apply or should apply to donated conservation easements.³⁰ Supporters of charitable trust principles contend that significant flexibility to modify conservation easements in manners consistent with their charitable conservation purposes can be (and often is) built into conservation easements in the form of an amendment provision.³¹ They further maintain that, as in other charitable contexts, neither the courts nor the Attorney General can second-guess a holder’s exercise of its amendment discretion unless there is clear abuse. Absent an amendment provision, the holder might be deemed to have the implied power to agree to certain amendments that are consistent with the purpose of the easement or could seek court approval of such “consistent” amendments in a more flexible administrative deviation proceeding. Supporters of charitable trust principles submit that it is only the outright termination of a conservation easement, or its modification in a manner clearly inconsistent with its stated purpose, that would require court approval in a *cy pres*

³⁰ See, e.g., Nancy A. McLaughlin, *Amending and Terminating Perpetual Conservation Easements*, 23 Probate & Property 52 (2009); *Legal Considerations Regarding Amendment to Conservation Easements*, Report Prepared by the Conservation Law Clinic, Indiana University School of Law, W. William Weeks, Director (2007) (available at <http://learningcenter.lta.org>); Nancy A. McLaughlin and W. William Weeks, *In Defense of Perpetuity: A Response to The End of Perpetuity*, 9 Wyo. L. Rev. 1 (2009); Alexander R. Arpad, *Private Transactions, Public Benefits, and Perpetual Control Over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 Real Prop. Prob. & Tr. J. 91 (2002).

³¹ For example, the typical amendment provision grants the holder the express power to agree to amendments that are consistent with or further the conservation purpose of the easement. Such conservation-friendly amendments would not require attorney general or court approval.

A Guided Tour of the Conservation Easement Enabling Statutes

or similar equitable proceeding—as is contemplated by federal tax law in any event. Proponents of charitable trust principles also caution that failure to honor the intent of conservation easement donors, or to provide an appropriate mechanism through which to call government and nonprofit holders to account for improper amendments or terminations, would jeopardize the federal tax incentives, chill future conservation easement donations and cause the public to lose confidence in land trusts and in conservation easements as long-term land protection tools.

Other experts, attorneys and practitioners maintain that conservation easements are based in property law and that charitable trust principles are not part of that law. They submit that to apply the charitable trust doctrine now would be changing the existing law and the precepts that land trusts and landowners have relied upon for decades in creating conservation easements. These experts further state that trust principles developed in response to a wholly different set of circumstances that are not applicable to conservation easements.³² They cite the fact that the doctrine has not been applied to conservation easements by any reported case anywhere in the United States.³³ These experts also point to the fact that to create a charitable trust, the grantor must indicate an intention to do so, and that the typical easement does not include such an intent. In fact, they maintain, charitable trust principles would substantially complicate a perpetual relationship and add nothing to the existing array of state and federal laws requiring land trusts to uphold the perpetuity and purposes of conservation easements.³⁴ Opponents of charitable trust application to easements fear that such application may unnecessarily add to landowners' and land trusts' expenses of managing easements and would chill landowners' interest in easements by raising the threat of excessive government intrusion and excessive oversight of legitimate easement modification consistent with easement purposes.³⁵ Finally, they posit that the already existing federal regulatory framework governing easement holders (prohibitions on excess benefit transactions, private inurement and impermissible private benefit, perpetuity requirements and, for government easement holders, the existing doctrine of public trust) provides a significant check on improper amendment and termination.³⁶

An in-depth analysis of this debate is well beyond the scope of this report, and readers are encouraged to read the cited materials listed in the footnotes in this report to learn more.

One conclusion that does emerge from the question of whether charitable trust principles apply to conservation easements is that it would be a mistake for easement holders to assume that the enabling statutes are the sole source of relevant authority on amendment and termination. As advised in section II, the enabling statutes must be considered in the context of other applicable laws and documents, and nowhere is this more crucial than in considering conservation easement amendment and termination. For example, while a particular amendment may appear to be permitted under an enabling statute, it could be prohibited by the applicable easement's amendment provision or by federal or state laws regulating charities. As noted above, the federal tax code also requires that land trusts uphold the purposes of donated conservation easements

³² C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 Wyo. L. Rev. 397 (2009).

³³ *Id.* at 401.

³⁴ C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 Wyo. L. Rev. 25 (2008).

³⁵ Andrew C. Dana, *Conservation Easement Amendments: A View From the Field*, Draft Prepared for The Back Forty (2006)(available at <http://learningcenter.lta.org>).

³⁶ Lindstrom, *supra* n. 34.

A Guided Tour of the Conservation Easement Enabling Statutes

forever and demands court action to extinguish a donated easement. In addition, a conservation easement might also be governed by the Uniform Trust Code (UTC), if adopted in that particular state and if that state's version of the UTC applies to conservation easements. Finally, *Land Trust Standards and Practices* recommends amendment and termination policies and practices that are much more detailed and rigorous than most of the enabling statute treatment discussed below.³⁷

One key compilation of information and views about amendments (and, by extension, termination) is the Amendment Report. It makes clear that amendment and termination are very complex issues, with many of the legal questions remaining unresolved. In the face of this uncertainty, the Amendment Report recommends that land trusts take a cautious approach.³⁸ At the same time, the Amendment Report queries whether land trusts might wish to seek changes to their respective enabling statutes in order to eliminate some of the uncertainty.³⁹ Others have also called for clarification of the laws around these issues,⁴⁰ while cautioning that changes in state law to make conservation easements more easily terminable (or more easily amendable in manners contrary to their purposes) might render easements in the state ineligible for federal tax incentives and chill future easement conveyances. To the extent such changes are intended to apply *retroactively* to existing conservation easements, they could be subject to challenge on constitutional or other grounds.⁴¹

Despite differing views and uncertainty as to what laws apply, academics and land conservation professionals do find common ground on the notion that improper amendments and terminations should be prevented. The Internal Revenue Services' increasing attention to this matter, as evidenced by several of the new questions on the Form 990, also provides an impetus. Furthermore, it is worth noting that the most direct and practical step that land trusts (and government holders) can take, prospectively, is to include well-drafted amendment and termination provisions in every easement they accept. Well-drafted amendment and termination provisions in the easement, together with written amendment and termination policies that support sensible and sound practices, will help prevent improper amendments and terminations, even in states where the statutory language is ambiguous.

In order to better frame the statutory analysis, it helps to begin with a brief overview of how amendments and terminations arise in practice, leaving aside for the moment any policy discussion of the propriety of these methods. Procedurally, the parties to a conservation easement amend or terminate it by three primary methods: (1) mutual agreement of the holder and landowner, (2) landowner-initiated court action or (3) holder-initiated court action. In addition, a holder's unilateral release of an easement can be conceptualized as a fourth termination method, although in practice it would be more akin to a form of mutual agreement or mutual abandonment. Although merger and condemnation are also forms of termination, they are treated separately for the purposes of this report because they are usually conceptually distinct from the

³⁷ *Land Trust Standards and Practices* 11I, 11K (2004).

³⁸ Amendment Report at 10.

³⁹ *Id.* at 10, 83.

⁴⁰ Nancy McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *Ecology L.Q.* 673, 712 (2007); Mary Ann King and Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 *Nat. Resources J.* 65 (2006).

⁴¹ McLaughlin and Weeks, *supra* n. 30 at 87-94.

A Guided Tour of the Conservation Easement Enabling Statutes

other four methods of termination outlined above.⁴² As we shall see, the statutory provisions on amendment and termination address none, some or (rarely) all of these methods. The enumeration of these methods is not to suggest that they are without nuances, difficulties and potential legal dangers to both land trusts and landowners, as discussed extensively in this report and in the cited material.

With this background in mind, let us turn to what the statutes do and do not include with respect to amendment and termination. One commentator writes, “[U]nder the laws of most states the standards and procedures for easement termination and amendment are unclear and potentially inconsistent with the public interest and the charitable character of a conservation easement.”⁴³ A clear majority of the state enabling statutes establishes no restrictions on amendment or termination. In fact, only 13 of the 50 statutes provide any procedural or substantive restrictions at all. And, as discussed below, of these 13, only four can arguably be said to provide any sort of comprehensive approach to the issue. Some experts believe that the charitable trust doctrine provides this clarity and so no adjustments to the enabling acts are necessary. Others believe that the laws from state to state are unclear and do need to be expressly adjusted and applied to the specific needs of conservation easements. And yet others believe that the existing framework of laws provides enough clarity without either the charitable trust doctrine or amendments to enabling acts.

B. UCEA on Amendment and Termination

The UCEA has two provisions concerning amendment and termination. Section 2(a) of the UCEA states that easements “may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.” Meanwhile, section 3(b) provides that “This 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.” Section 3(b) addresses amendment and termination in a court context, and the reference to “principles of law and equity” is an apparent allusion to charitable trust common law principles. The original Comments to Section 3 explain that “The 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.”⁴⁴

The language of UCEA section 2(a) deserves a closer look because it has been described as the “key operative provision” of the UCEA⁴⁵ and it is open to differing constructions, as

⁴² Along these lines, see Powell on Real Property, § 34A.03 (2009) for a discussion of the different means by which conservation easements may be terminated. See also Lindstrom, *supra* n. 34 at 39, for an in-depth discussion of the different means by which easements may be terminated.

⁴³ Pidot *supra* n. 25 at 22.

⁴⁴ There is much discussion in this section on the Comments to the UCEA. Courts have relied on the comments to uniform acts when interpreting such acts so as to achieve uniformity among the states that enact them. See, e.g., *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993 (“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.”))

⁴⁵ Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 Utah L. Rev. 1039, 1048 (2007). But see Nancy A. McLaughlin & Mark Benjamin Machlis, *Protecting the Public Interest and Investment in Conservation: A Response*

A Guided Tour of the Conservation Easement Enabling Statutes

demonstrated by the academic discussion in the materials cited in this report.⁴⁶ One interpretation is that the word “manner” refers to the basic property law formalities of creation, amendment and termination.⁴⁷ Under this analysis, section 2(a) is read narrowly to require that the procedural and technical aspects of an amendment or termination track the same as those for conventional easements, but not to abrogate any other potentially existing law, such as the charitable trust doctrine if applicable, as it relates to a holder’s ability to deviate from the terms or purposes of the charitable gifts it solicits and accepts. A second, much broader interpretation of section 2(a) is that it renders conservation easements subject to the same amendment and termination treatment as conventional easements. In other words, not only the mechanics, but all of the substantive common law doctrines and statutes justifying amendment and termination of conventional easements apply identically to conservation easements because easements arise from the tradition of property law and not from trust law. Taken to an extreme, this broader interpretation could render effectively inapplicable a host of other laws that may govern a holder’s ability to deviate from the terms and purposes of the charitable gifts it solicits and accepts. Although few advocate for the broader interpretation, it would not be surprising for a landowner’s attorney to make this argument in order to convince a court to approve a termination.

The danger of the broader interpretation is that the real property law doctrines and statutes applicable to conventional easements treat easements as ordinary contracts and provide few restrictions on amendment and termination where they occur by mutual agreement or by holder’s release. In a court setting, traditional common law rules disfavor perpetual real property restrictions. Furthermore, the most prevalent common law principles applied to the amendment or termination of conventional easements are the doctrine of changed conditions (also known as the doctrine of changed circumstances), frustration of purpose and relative hardship; all of these entail a rather permissive approach to amendment and termination and do not entail a consideration of the public interest in the land use restrictions.⁴⁸

In 2007, the NCCUSL issued revised comments to the UCEA. The text of the act was not changed, but the commissioners amended the comments to add language further supporting the application of charitable trust principles and the more narrow interpretation of section 2(a). The Comments state that sections 2(a) and 3(b) should not be interpreted to mean that easements should be treated just like conventional easements. In particular, one of the newly added sentences reads:

Thus, while Section 2(a) provides that a conservation easement may be modified or terminated “in the same manner as other easements,” the governmental body or charitable organization holding a conservation easement, in its capacity as trustee,

to Professor Korngold’s Critique of Conservation Easements, 4 Utah L. Rev. 1561 (2008) (disputing Professor Korngold’s analysis and conclusions).

⁴⁶ Pidot *supra* n. 25 at 22 (“The Uniform Conservation Easement Act (UCEA) is ambiguous on [amendment and termination] issues...”).

⁴⁷ *Legal Considerations Regarding Amendment to Conservation Easements*, Report Prepared by the Conservation Law Clinic, Indiana University School of Law, W. William Weeks, Director (2007) at 3 (available at <http://learningcenter.lta.org>).

⁴⁸ See Lindstrom *supra* n. 34; McLaughlin, *supra* n. 30 at 448 n. 92; Note, *Conservation Easements and the Doctrine of Changed Conditions*, 40 Hastings L.J. 1187 (1989).

A Guided Tour of the Conservation Easement Enabling Statutes

may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding.

In other words, state the UCEA commissioners, section 2(a) should not be interpreted to override any possible charitable trust principles. Furthermore, some experts posit that in light of the Comments and the possible application of other laws that restrict amendment and termination, it is much safer and more prudent for easement holders to adopt the narrow interpretation of section 2(a) and not to read section 2(a) as *carte blanche* for any amendment or termination.⁴⁹

Nevertheless, some professors, law students, attorneys and land trusts have read section 2(a) with the broader interpretation in mind. Several law review articles discuss section 2(a), either expressly or impliedly, in this broad context.⁵⁰ Moreover, section 2(a) played a part in the Myrtle Grove case, set in Maryland in the 1990s.⁵¹ Maryland's enabling statute tracks the UCEA section 2(a) when it comes to amendment and termination, stating that an easement may be "extinguished or released, in whole or in part, in the same manner as other easements."

Apparently, this language gave the National Trust for Historic Preservation (NTHP), the holder, enough comfort to proceed with an amendment that substantially weakened the easement.⁵² The Maryland Attorney General and various *amici* parties (including the Land Trust Alliance), in challenging the amendment, countered that this statutory language was to be interpreted more narrowly (technically and procedurally) and did not speak to any substantive standards or preclude the application of charitable trust principles.⁵³ In any event, NTHP eventually agreed to settle the case by revoking the amendment and paying a large sum (\$225,000) to the landowner. In other words, the organization paid dearly for initially construing the section 2(a) language to give them a free hand in amending the easement.

In a more recent case, Bjork v. Draper, 886 N.E.2^d 563 (Ill. App. Ct., 2008), a land trust similarly read the state easement enabling statute as allowing amendments to perpetual conservation easements that some would argue are contrary to the stated purposes of the easement, only to have amendments it agreed to at the request of a subsequent owner of the land invalidated by the Illinois Appellate Court. This case is discussed in more detail below in section IX(e).

One appellate court has interpreted UCEA section 3(b) broadly so as to support the theoretical termination of a conservation easement in dubious circumstances. In Turner v. Taylor, 673 N.W.2d 716 (Wisc. Ct. App. 2003), an appellate court noted in dicta that the conservation easement enabling statute's reference to termination by "any principle of law or equity," language virtually identical to UCEA section 3(b), encompassed a statutory provision that

⁴⁹ *Legal Considerations*, *supra* n. 47 at 3.

⁵⁰ Lindstrom, *supra* n. 32 at 404; Korngold, *supra* n. 45 at 1048; King and Fairfax, *supra* n. 40 at 104-105, 107; Adam E. Draper, *Conservation Easements: Now More Than Ever—Overcoming Obstacles to Protect Private Land*, 34 *Envtl. L.* 247, 264 (2004); Erin McDaniel, *Property Law: The Uniform Conservation Easements Act: An Attorney's Guide for the Oklahoma Landowner*, 55 *Okla. L. Rev.* 341, 346-347 (2002).

⁵¹ See Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 *U. Rich. L. Rev.* 1031 (2006).

⁵² *Id.* at 1049, 1056, 1060.

⁵³ *Id.* at 1056, 1060.

A Guided Tour of the Conservation Easement Enabling Statutes

protected a bona fide purchaser from the enforcement of a conventional easement that had not been recorded in the 30 years prior to the purchase. The court reached this conclusion even though Wisconsin is one of the few states to include an express exemption for conservation easements in its marketable title statute (§ 893.33(6)(m)). From a land conservation perspective, this is a troubling result, because applying the 30-year recording requirement for conventional easements to conservation easements arguably significantly undermines the conservation easement exemption from § 893.33(6)(m). As a result of this case, some Wisconsin attorneys recommend the recording of conservation easements every 29 years, despite the marketable title statutory exemption. If adopted by other courts, this interpretation of UCEA section 3(b) would be unfortunate, because the Comments to the UCEA make clear that the intent of section 3(b) is to discourage, rather than encourage, the termination of conservation easements.

Together, sections 2(a) and 3(b) can be interpreted to support many different points of view on amendment and termination. Although a generally cautious approach is encouraged for holders, it is not the aim of this report to declare what the UCEA does or does not represent. Rather, this report is a tool to assist attorneys and practitioners in evaluating whether these sections, read in the context of the various other state and federal laws that may apply, provide adequate guidance in their respective states. And if not, then to consider what, if any, are the appropriate next steps in considering any potential statutory improvements.

C. States without Explicit Amendment and Termination Restrictions

Most states follow the UCEA's approach to amendment and termination, either through silence or by adopting language similar to the UCEA. While generally adhering to the UCEA in other respects, Louisiana omits section 2(a), and Mississippi omits section 3(b) of the UCEA provisions on amendment and termination. The ultimate result of these state omissions is likely negligible, however, because both silence and the UCEA language point to the common law.

Maryland (discussed above) and Utah, meanwhile, include specific sections on termination, but no actual limitations are imposed, and conservation easements are expressly treated in the enabling statute just like any other easement. Rhode Island has a specific provision addressing the release of an easement, but the language is rather vague: government holders must follow certain procedural niceties, but private holders can release in accordance with the terms of the instrument or "applicable statutes and regulations."

A few statutes go beyond neutrality and almost seem to encourage termination and amendment. Typically, such provisions concern a holder's right to release an easement unilaterally or the holder's and landowner's right to freely amend or terminate. Florida's statute, for example, provides, "A conservation easement may be released by the holder of the easement to the holder of the fee even though the holder of the fee may not be a governmental body or a charitable corporation or trust." Illinois has almost identical language. Indiana states that easements may be terminated upon the mutual agreement of the holder and landowner. Alabama, in turn, expressly applies its common law doctrine of changed conditions (a generally permissive standard, as discussed above) to easement amendments and terminations. If, as some commentators urge, charitable trust principles act as an overlay on top of the enabling statutes, the provisions of these statutes can be misleading because they might lull a holder into thinking it can amend or terminate at will. And even if charitable trust principles never enter the picture, from a

A Guided Tour of the Conservation Easement Enabling Statutes

stewardship perspective, the language of these statutes is unfortunate, for they at the very least create a perception—if not the reality in the context of all other state and federal laws and regulations that prevent abuse of conservation easements—of permissiveness. Moreover, as discussed above, even in these states with neutral or permissive amendment and termination provisions, the Internal Revenue Code and accompanying regulations, *Land Trust Standards and Practices* and a holder’s written policies, among others, collectively establish a series of checks on a holder’s ability to execute certain amendments contrary to the express purposes of the conservation easement and on virtually all terminations.

D. States with Amendment and/or Termination Restrictions

As of January 2009, nine different statutes (Arizona, Maine, Massachusetts, Montana, Nebraska, New York, Pennsylvania, Virginia and West Virginia) provide both amendment and termination restrictions of one sort or another. Another three statutes (Iowa, Mississippi and New Jersey) provide restrictions only on termination, although in New Jersey, at least, the relevant governmental agency interprets the statutory language to also apply to amendments that are contrary to the easement’s purposes.⁵⁴ Some of these restrictions are substantive, insofar as they establish an approval and/or compensatory standard to which a court must adhere. Other restrictions are purely procedural in nature. Many combine both substance and procedure.

(i) Non-Comprehensive Restrictions—Of the 13 statutes with amendment or termination restrictions, nine can be said to be less than comprehensive. First, Mississippi and Virginia⁵⁵ do not set forth any substantive or procedural statutory process for termination, but simply require that a holder be compensated for the value of the easement. Although compensation is consistent with charitable trust principles, it alone does not offer any proactive protection of conservation values, substantive or procedural. Compensation is usually contracted for between the parties, as required for donated easements for which the grantor seeks a federal income tax deduction. Thus, Mississippi’s and Virginia’s statutory language requiring compensation, in and of itself, likely does not have much practical effect on preventing improper amendments and terminations.

Meanwhile, Arizona presents an interesting study. Although its statute mostly tracks the UCEA, it adds two extra sentences regarding amendment and termination, and they appear to head in two different directions. First, in its parallel provision to section 2(a) of the UCEA, Arizona’s statute includes the UCEA’s “same manner as other easements” language. But then it goes on to add that an amendment or termination only requires the approval of the holder, the servient landowner and any express third-party enforcer. In other words, looking only at this statutory language and not considering any possible charitable trust application, it appears that no outside third parties, including presumably the Attorney General, has any say in an amendment or termination executed by mutual agreement. In fact, such language might be interpreted as a disavowal of the application of charitable trust principles and as supporting the treatment of easements as conventional private contracts or real estate transactions.

⁵⁴ Telephone discussion with James Wyse, attorney in private practice in New Jersey, February 4, 2009.

⁵⁵ Virginia has separate statutes for government-held easements and privately held easements. The language discussed here applies to the latter. More substantive amendment and termination restrictions are in place for publicly held easements.

A Guided Tour of the Conservation Easement Enabling Statutes

On the other hand, in its parallel provision to section 3(b) of the UCEA, Arizona's statute includes the UCEA's "principles of law and equity" language, but then goes on to add a follow-up sentence: "In determining whether to modify or terminate a conservation easement a court shall consider the public interest to be served." Although untested, this sentence could steer a court toward the approach recommended by the drafters of the UCEA, as well as the drafters of the Restatement and the Uniform Trust Code or a similar protective approach.

Together, Arizona's two deviations from the UCEA might be interpreted as legislative intent to let the parties freely amend or terminate a conservation easement to the extent they mutually agree, but also to encourage a court to consider the public interest in the event an easement is challenged. Proponents of the applicability of the charitable trust doctrine are wary of any such "freely amend or terminate" interpretation, fearing that it might render donated conservation easements non-deductible, as it would undermine the Internal Revenue Code and Treasury Regulations requiring easements to be perpetual.⁵⁶ Those who believe that the existing framework of laws already more than adequately protects against unsound or abusive amendments or terminations are less concerned about bad results from that interpretation.

West Virginia and Pennsylvania are similar to Arizona in that they follow the UCEA in general, but add a public policy review to a court-based termination and amendment context. Both states' statutes include section 2(a) of the UCEA without alteration. But in their parallel to section 3(b) of the UCEA, after reciting the "principles of law and equity" language, they require that a court apply the principles of law and equity "consistent with the public policy" of the statute and that easements must be liberally construed in favor of the statute's and the easement's conservation purposes. These are subtle but potentially important distinctions from the UCEA's more general approach to termination and amendment.

Iowa is another state that sends potentially mixed messages with respect to termination and amendment. On the one hand, its statute is completely silent on amendment and also states in passing that a holder may unilaterally release an easement. However, its statute then goes on to provide that a court may terminate an easement if "a change of circumstances renders the easement no longer beneficial to the public." This standard appears to shift the relatively permissive doctrine of changed conditions, insofar as it recognizes the public interest as a valid factor in the court's balancing of the various interests. Furthermore, the statute adds the following sentence: "A comparative economic test shall not be used to determine whether a conservation easement is beneficial to the public." This stricture is based on Maine's pre-2007 statute (see below). Although the phrase "comparative economic test" has never been defined or considered by any court or legislature, it would appear to prevent a court from considering the disparity between a property's value with and without the easement as a "changed condition" that justifies termination. For example, a landowner could not successfully plead economic hardship as an excuse to amend or terminate an easement. The prohibition on a comparative economic test is consistent with §7.11(4) of the Restatement, discussed below, which recommends that appreciation in unrestricted land value not serve as a valid reason for amendment or termination. On its face, Iowa's statute applies this standard only in a termination context, although it is likely a court would also consider it in an amendment context.

⁵⁶ E-mail communication from Nancy A. McLaughlin, July 13, 2009.

A Guided Tour of the Conservation Easement Enabling Statutes

New York's statute includes a provision that addresses amendment and termination equally. First, the statute makes clear that the parties can contract in the easement itself for any amendment and termination procedures and standards that they deem appropriate. In addition, amendment or termination can occur by eminent domain or by a court proceeding. In particular, the statute references a separate New York statute that governs the enforceability of easements and restrictions in general. This separate statute appears to apply a modified version of the doctrine of changed conditions, one that is perhaps more favorable to easement holders, for it includes a determination that the easement provides "no actual and substantial benefit to the persons seeking its enforcement." An analysis of how New York's courts have interpreted such language, however, is beyond the scope of this report. Finally, additional restrictions apply to modification or termination of publicly held easements.

New Jersey's statute establishes a detailed procedural and substantive requirement in order for a holder to release an easement. A release is permitted only after public notice, a public hearing and approval of the Department of Environmental Protection (DEP). In determining whether to approve a release, the DEP must consider "the public interest in preserving these lands in their natural state, and any State, regional or local program in furtherance thereof, as well as any State, regional or local comprehensive land use or development plan affecting such property." Although New Jersey's statute is silent on amendment, the DEP has informally taken the position that the release of restrictions also applies to any amendment that weakens the easement.⁵⁷ However, while New Jersey's statute is proactive in terms of releases and terminations outside of court, it is silent as to what standard a court should apply in deciding on a disputed amendment or termination. Thus, it provides explicit protections against improper amendment and terminations by mutual agreement of the parties, but less certain assurances in a court context. In this sense, it is less than comprehensive.

(ii) Comprehensive Restrictions—In contrast with the incomplete restrictions noted directly above, four different states (Massachusetts, Montana, Nebraska and Maine) apply more comprehensive restrictions on amendment and termination.

Massachusetts' statute contains a comprehensive regulatory scheme for termination, consistent with its public approval process for all easements (see section VII above). A government holder must provide public notice and a public hearing before any termination. A nonprofit holder must obtain local government approval following public notice and a public hearing, as well as the approval of the Executive Office of Energy and Environmental Affairs. There is a substantive standard for approval of a termination, but it is rather open-ended. Any governmental body that is either seeking termination of one of its own easements or weighing approval of the termination of a privately held easement must consider four separate factors: (i) the public interest in the easement, (ii) any relevant governmental conservation program, (iii) any public land use comprehensive or development plan and (iv) any known proposal for a governmental body for use of the land. This is the same substantive standard for the government's initial approval of the easement upon creation (see Section VII, Public Review or Approval of Easement Conveyance); the language would seem to fit better in that context because the last two factors are rather permissive in a termination context. Moreover, easements purchased with state funds may not be released unless the landowner compensates the holder at the easement's then-current fair market

⁵⁷ See Wyse, *supra* n. 54.

A Guided Tour of the Conservation Easement Enabling Statutes

value. There are also special termination standards for agricultural easements and watershed preservation easements.

Montana's statute is interesting in that it restricts amendment and termination of easements, but in a rather roundabout way. As in a handful of other states, Montana's easement legislation is actually located in two separate statutes. One statute reads like a traditional easement enabling statute, while the other is, for the most part, a government parks law, with some easement language tucked in. Like many parkland statutes, Montana's has a restriction against the "conversion" or "diversion" of parkland for non-park uses, unless certain conditions are met. These conditions include a finding of necessity, the absence of any conflict with local planning and substitute conservation land with adequate fair market value and conservation value. The parkland statute also encompasses all conservation easements, privately or government-held; therefore, this conversion and diversion language applies as a limitation on termination and amendment of easements.⁵⁸ Because Montana has language that arguably prohibits Attorney General or any kind of standing by a non-party to the easement, it is unclear how these restrictions are enforced except through self-discipline by conservation easement holders.

Nebraska has one of the most lucid and comprehensive frameworks for amendment and termination. Like Massachusetts, Nebraska requires governmental approval on the front end of the easement process, and so it is not surprising that such approval is also necessary for termination and certain amendments. It is worth quoting the two relevant sections of the Nebraska statute in full:

§76-2,113 — Easement; release or transfer. (1) A conservation or preservation easement may be released by the holder of the easement to the owner of the servient estate, except that such release shall be approved by the governing body which approved the easement, or if the holder is the state, a state agency, or political subdivision other than a city, village, or county, the release shall be approved by the state or such state agency or political subdivision. The release of an easement may be approved upon a finding by such body that the easement no longer substantially achieves the conservation or preservation purpose for which it was created.

§76-2,114 — Easement; judicial modification or termination. Unless a conservation or preservation easement is otherwise modified or terminated according to the terms of the easement or the provisions of sections 76-2,111 to 76-2,118, the owner of the subject real property or the holder of the easement may petition the district court in which the greater part of the servient estate is located for modification or termination of the easement. The court may modify or terminate the easement pursuant to this section only if the petitioner establishes that it is no longer in the public interest to hold the easement or that the easement no longer substantially achieves the conservation or preservation purpose for which it was created. No comparative economic test shall be used to determine whether the public interest or the conservation or preservation purpose of the

⁵⁸ Telephone discussion with Andrew C. Dana, attorney in private practice in Montana, January 20, 2009.

A Guided Tour of the Conservation Easement Enabling Statutes

easement is still being served. No modification shall be permitted which is in excess of that reasonably necessary to remedy the deficiency of the easement.

Nebraska's statute is comprehensive in two different respects. First, it addresses all four of the aforementioned most common methods by which an amendment or termination might occur: mutual agreement, landowner-initiated court action, holder-initiated court action and, in the case of termination, unilateral release by a holder. Second, it provides both procedural and substantive guidance to the parties and to the governmental-approving bodies and courts. As in New York, however, Nebraska land trusts can provide for amendment within the easement instrument itself. Thus, these two statutes assume that such amendment provisions will be consistent with the overall purposes and public benefit of the easement. In this respect, sound drafting is essential to preventing improper amendments.

Maine enacted a thorough overhaul of its amendment and termination provisions in 2007. Like Nebraska, Maine now addresses all of the most common amendment and termination methods. In addition, Maine imposes a blanket minimum standard on non-court-approved amendments, namely that they do not "materially detract from the conservation values intended for protection." Thus, even if the holder and landowner agree on an amendment, they may not execute it without court approval if the amendment fails to meet this standard. However, as discussed below, to a great extent it is up to each easement holder to make a determination of whether an amendment "materially detracts." Meanwhile, terminations are strictly regulated and require court approval and full compensation to the holder. Maine's approach generally follows a charitable trust approach, while at the same time leaving the holder a considerable degree of discretion in deciding how to apply the standards. The relevant sections provide:

2. Amendment and termination. Amendments and termination of a conservation easement may occur only pursuant to this subsection.

A. A conservation easement executed on or after the effective date of this section must include a statement of the holder's power to agree to amendments to the terms of the conservation easement in a manner consistent with the limitations of paragraph B.

B. A conservation easement may not be terminated or amended in such a manner as to materially detract from the conservation values intended for protection without the prior approval of the court in an action in which the Attorney General is made a party. In making this determination, the court shall consider, among other relevant factors, the purposes expressed by the parties in the easement and the public interest. If the value of the landowner's estate is increased by reason of the amendment or termination of a conservation easement, that increase must be paid over to the holder or to such nonprofit or governmental entity as the court may designate, to be used for the protection of conservation lands consistent, as nearly as possible, with the stated publicly beneficial conservation purposes of the easement.

[...]

3. Power of court. The court may permit termination of a conservation easement or approve amendment to a conservation easement that materially detracts from

A Guided Tour of the Conservation Easement Enabling Statutes

the conservation values it serves, as provided in section 477-A, subsection 2, paragraph B, and may enforce a conservation easement by injunction or proceeding at law and in equity. A court may deny equitable enforcement of a conservation easement only when it finds that change of circumstances has rendered that easement no longer in the public interest or no longer serving the publicly beneficial conservation purposes identified in the conservation easement. If the court so finds, the court may allow damages as the only remedy in an action to enforce the easement.

[...]

No comparative economic test may be used to determine under this subchapter if a conservation easement is in the public interest or serves a publicly beneficial conservation purpose.

The “materially detract” amendment standard is inherently subjective, but it is practical. For amendment requests that are easily approvable, either because they improve the conservation values or are neutral or very minor, this standard does not require wasting any time or expense with court approvals. In fact, the “materially detract” standard is to a great degree prophylactic, because land trusts and government holders presumably will deliberate very carefully about any amendment that could reasonably be considered to approach this threshold. Hence, it is generally hoped and expected that the standard will be most applicable in preventing harmful amendments from ever being executed, rather than remedying them. In this vein, the “materially detract” standard, as well as the rest of the language in these sections, will affect amendment and terminations in at least two key ways. First, it will give holders significant negotiating leverage when handling amendment and termination requests by landowners. Second, it will discourage landowners from pressing ahead with court actions to amend or terminate easements without the holder’s consent.

Maine’s statute is not without its complexities. It has only been in place for two years, so it is too soon to evaluate its effect in practice. Nevertheless, based on the author’s direct and anecdotal experience,⁵⁹ the new statutory language has been well received and has had a useful role in guiding land trusts when faced with amendment requests.

E. Amendment and Termination Case Law and Secondary Authority

As with most areas of conservation easement law, there is not much case law on amendment or termination. One recent case comes from Illinois, where a neighboring landowner successfully sued to rescind a series of amendments agreed to between a land trust and successor landowner. *Bjork v. Draper*, 886 N.E.2^d 563 (Ill. App. Ct., 2008).⁶⁰ The crux of the case involved an amendment that removed 809 square feet from the original protected property in order to construct a driveway, in exchange for adding a new contiguous area of 809 square feet.⁶¹ The new area added to the easement was highly visible from the public road while the removed area was not, according to the trial judge’s view of the property. Among the neighbor’s claims was that the parties did not have the authority to amend the easement. The trial court ruled on

⁵⁹ The author has practiced law in Maine since 2002, specializing in land conservation.

⁶⁰ For more on how a neighbor would be able to bring such a suit, see section X(B), Neighbor or Citizen Standing.

⁶¹ Arguably, the amendment amounted to a termination of the easement on the original 809 square feet and thus triggered a court approval requirement in the easement.

A Guided Tour of the Conservation Easement Enabling Statutes

summary judgment that because the enabling statute allowed the holder to release an easement, such language also included the lesser right to amend. In addition, the trial court found that the easement included an amendment provision that authorized the land trust to amend the easement. The appellate court did not address the statutory issue, but did affirm the trial court's ruling that the easement did allow for amendments. In addition, the appellate court held that any amendments must be consistent with the terms of the original easement. Thus, the court found that because the original easement specifically prohibited any structures on the protected property—an amendment allowing a driveway to be built on 809 square feet of the original easement—even though replaced with an additional (and arguably of greater conservation value) 809 square feet, conflicted with the original terms and was therefore invalid. As noted above, the Illinois enabling statute is silent on amendment. It is certainly plausible to think that clearer statutory guidance might have prevented this litigation.

A well-known termination case is Hicks v. Dowd, 157 P.3d 914 (Wyo. 2007), in which the Wyoming Supreme Court dismissed for lack of standing a citizen's suit to rescind a county holder's release of a conservation easement. However, neither the trial court nor the Wyoming Supreme Court reached the underlying termination issues, and the case was ultimately dismissed for lack of standing. The case, and the subsequent new action by the Wyoming Attorney General (Salzburg v. Dowd, No. CV-2008-0079 (4th Jud. Dist., Johnson Cty., Wyo.)), is discussed in more detail in section X in the standing context. Finally, the Myrtle Grove case, discussed above, is another amendment dispute that did not result in any case law, but that nevertheless offers lessons for the land conservation community.⁶²

Notably, there has been some evolution toward more protective treatment of conservation easements in the secondary authorities. In 2000, the American Law Institute published the Restatement (Third) Property: Servitudes (“Restatement”) in which conservation easements were afforded stronger amendment and termination protections than conventional easements. With regard to amendment, §7.11(1) of the Restatement recommends first looking to the easement itself for amendment standards and methods; in the absence of any such language, it supports an “impracticability” standard and the application of the *cy pres* doctrine, based on charitable trust principles. In addition, §7.11(2) recommends termination only if the easement cannot accomplish “any conservation purpose” and, with compensation to the holder, §7.11(3) provides additional compensation recommendations; §7.11(4) excludes appreciation in land value as a valid reason for amendment or termination.⁶³ The drafters explain: “The rules stated in this section are designed to safeguard the public interest and investment in conservation servitudes to the extent possible, while assuring that the land may be released from the burden of the servitude if it becomes impossible for it to serve a conservation or preservation purpose.”⁶⁴

If a conservation easement is deemed a charitable trust, then the UTC, which has been adopted in twenty states and the District of Columbia, might come into play. In one section of its comments, the UTC contemplates the application of charitable trust principles to conservation easements.⁶⁵

⁶² See McLaughlin, *supra* n. 51.

⁶³ Although the Restatement doesn't go quite so far, the same rationale also supports compensation in the event of an amendment that increases the economic value of the property.

⁶⁴ Restatement § 7.11 cmt. a.

⁶⁵ Uniform Trust Code § 414 cmt. (2005).

A Guided Tour of the Conservation Easement Enabling Statutes

In addition, § 414 of the UTC, which allows for the modification or termination of certain “uneconomic” trusts, does not apply to conservation easements. At the same time, the Comment to § 413 of the UTC, which deals with the application of *cy pres* in order to modify or terminate charitable trusts, does not make any special mention of conservation easements.

Another secondary authority, Powell on Real Property (“Powell”), has an extensive section addressing the termination of conservation easements.⁶⁶ This section outlines the various means and doctrines that might apply in a termination context. Although Powell is cautious in offering conclusions as to how the enabling statutes and other laws come out on these issues, it does provide a fairly strong policy argument against the application of the doctrine of changed conditions.

As these case law examples and the secondary authorities show, the law on easement amendment and termination is unsettled. In fact, it is difficult to gauge any patterns in the treatment of amendment and termination of conservation easements because of the paucity of cases.⁶⁷

As the case law evolves, for the sake of clarity and consistency, one can hope for some of these patterns to emerge. However, insofar as one of the purposes of this report is to assist those in the land trust field in looking critically at their respective enabling statutes, one wonders whether clearer statutory guidance is called for with respect to amendment and termination. If practitioners in a particular state would like to affirm that charitable trust principles apply to conservation easements, trying to amend the enabling statute may be the most direct way to do so, rather than waiting for the right litigation case to come along. Likewise, if practitioners in another state seek to reject charitable trust principles or establish some middle ground approach, clarifying their enabling statute may also be the most efficacious way to proceed.⁶⁸

X. Standing

“Standing” is the legal term for the right to initiate or intervene in a lawsuit. Standing to bring an action affecting a conservation easement is another signal issue treated by the enabling statutes. Standing could be sought for any number of reasons. On the one hand, a party could seek to uphold the easement through an enforcement action. In contrast, someone (most likely the landowner) might wish to challenge an easement, seeking its amendment or termination. Every enabling statute expressly or impliedly states that an easement may be enforced or challenged by the holder and the landowner. Beyond this rather self-evident point, there are two key standing issues: (1) Does an Attorney General have standing to bring an action affecting a conservation easement? (2) Does any member of the public, or more narrowly a neighbor, have such standing?

⁶⁶ 4-34A *Powell on Real Property* § 34A.07 (2009).

⁶⁷ See, e.g., Lindstrom, *supra* n. 34 at 39 (“There is no developed body of law regarding the termination or modification of conservation easements.”)

⁶⁸ However, as noted elsewhere, proponents of charitable trust principles are concerned that the rejection of such principles, and that the embrace of a pure contract-based, amend-at-will approach, might render conservation easements in such a state non-deductible for federal tax purposes. On the other hand, proponents of the real property approach, limited by the existing laws regarding public benefit and perpetuity, are concerned that rejection of the laws that landowners and land trusts have relied upon as governing real estate transactions will result in legal challenges to perpetuity.

A Guided Tour of the Conservation Easement Enabling Statutes

A. Attorney General Standing

In most states, the enabling statute does not clearly state whether the Attorney General has the right to enforce (or challenge) a conservation easement. As stated by one commenter, “many state conservation easement laws fail to address [Attorney General standing] or do so ambiguously.”⁶⁹ Some maintain that, although the enabling statutes do not directly resolve the issue, charitable trust common law does extend standing to Attorneys General, at least for donated easements.⁷⁰ Despite such uncertainty, as explained in section IX(A)(v), land trusts and government holders have compelling reasons to operate as though an Attorney General who seeks such standing is likely to succeed. Along these lines, it is worth noting from the outset that an Attorney General may seek standing under two different legal theories: (1) direct standing to sue a violator of a conservation easement and (2) standing to oversee land trust activities through its official control over charities. As stated above, the omission of these standing rights in enabling acts does not diminish the Attorneys General’s supervisory role over charities.

(i) Section 3(a)(4) UCEA Standing States—The UCEA and 20 of the states that follow it contemplate the possibility of Attorney General standing by providing in section 3(a)(4) that an easement action may be brought by “a person authorized by other law.” The comments make clear that this language is intended to refer to Attorney General standing: “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.” Thus, section 3(a)(4) does not settle the matter because it necessitates an analysis of each state’s statutory and common law treating charitable trusts and related principles. A review of these “other laws” is beyond the scope of this report; they might be very clear in some states and much less so in others. Nevertheless, one law review article has criticized the UCEA for its lack of clarity on this issue.⁷¹

There are no court opinions that directly discuss Attorney General standing under UCEA section 3(a)(4). However, in City of Dallas, Texas v. Hall, 2007 U.S. Dist. LEXIS 78847 (N.D. Texas October 24, 2007) (UNPUBLISHED), aff’d 562 F.3d 712 (5th Cir. 2009), a federal district court did hold that the State of Texas lacked standing under the Texas Conservation Easement Act (with an identical provision to UCEA section 3(a)(4)) to challenge a conservation easement that had been granted to the federal government. The district court concluded that the State did not have any interest in the easement or in the property encumbered by the easement. The State argued that the federal Administrative Procedures Act was an “other law” contemplated by section 3(a)(4). The district court rejected this claim and noted the irony of the State’s attempting to apply the enabling statute to abolish the conservation easement. It appears that the State did not appeal the standing decision to the Fifth Circuit, because the appellate opinion does not address the issue at all. The factual context in this case does not translate well to that of an Attorney General trying to enforce an easement. However, the facts are roughly equivalent to an Attorney General seeking to defeat an easement, if that ever should happen, for political reasons or otherwise.

⁶⁹ Pidot, *supra* n. 25 at 23.

⁷⁰ See McLaughlin, *supra* n. 40.

⁷¹ King and Fairfax, *supra* n. 40, at 97-98.

A Guided Tour of the Conservation Easement Enabling Statutes

(ii) Omission of Section 3(a)(4) UCEA Standing States—Four UCEA states (Alabama, New Mexico, South Dakota and Wyoming) have chosen to omit UCEA section 3(a)(4) from their respective statutes. In addition, these four states add language affirming that any third party with a right of enforcement be expressly provided in the instrument. Without delving into the legislative history, it is impossible to know the legislature’s intent in deviating from the UCEA in these two respects. These changes may reflect a general unease with governmental interference in conservation easements, especially where many are held by non-governmental entities, such as land trusts. Under such an interpretation, these modifications of the UCEA preclude the right of an Attorney General to enforce or challenge an easement, provided that no other law to the contrary in that state exists. Alternatively, some maintain that unless a statute expressly prohibits Attorney General standing, such standing is preserved under already existing statutory or common law charitable trust principles.⁷² Again, practitioners are urged to understand the policy choices and cultural context of their entire state body of conservation law in considering refinements to their enabling act.

Two related Wyoming court cases, one resolved and one still current, directly call into question the implications of the absence of section 3(a)(4) from an otherwise UCEA-conforming statute. In Hicks v. Dowd, 157 P.3d 914 (Wyo. 2007), a private citizen challenged a county’s termination of a county-held conservation easement. The Wyoming Supreme Court upheld the trial court’s unchallenged finding that the holder, an agency of the county called the Scenic Preserve Trust, was a charitable trust. Relying on other Wyoming case law, the Court then held that private citizens lacked standing to enforce the easement because, ordinarily, only the Wyoming Attorney General, the settlor and certain special beneficiaries have standing to enforce a charitable trust.⁷³ The court thus dismissed the case. However, it also invited the Wyoming Attorney General to bring a new action to enforce the charitable trust, and the Wyoming Attorney General did precisely that, filing a new complaint in 2008 (Salzburg v. Dowd, No. CV-2008-0079 (4th Jud. Dist., Johnson Cty., Wyo.)).

One could read Hicks and Salzburg to stand for the court’s implicit holding that the Wyoming Attorney General does indeed have standing to enforce conservation easements. However, neither the trial court nor the Wyoming Supreme Court directly addressed the question of standing under the enabling statute (although the Supreme Court did reference the enabling statute in a footnote of its opinion and presumably understood that the statute applies retroactively to the easement at issue); also the issue is muddled somewhat by the fact that the court asserted, in dicta, that the holder is a charitable trust, but did not address the question of whether the easement itself is a charitable trust.⁷⁴ Salzburg is still pending, and settlement negotiations were underway as of December 1, 2009.

⁷² E-mail communication from W. William Weeks, May 18, 2009.

⁷³ For more on the case, see Lindstrom, *supra* n. 34; Nancy A. McLaughlin, *Could Coalbed Methane Be the Death of Conservation Easements?*, 29 Wyoming Lawyer 18 (2006); McLaughlin & Weeks, *supra* n. 30; Lindstrom, *supra* n. 32.

⁷⁴ For more on the distinction between enforcing a conservation easement directly, as opposed to bringing an action against the holder for violating its responsibilities as a charitable organization, see section X(A)(v).

A Guided Tour of the Conservation Easement Enabling Statutes

(iii) Silent or Otherwise Uncertain Standing States—There are 10 non-UCEA states that are completely silent on standing. Presumably, this outright silence leads one in a similar direction as the UCEA, deferring the issue to the state’s other applicable laws.

Likewise, there are another eight non-UCEA statutes that, while not silent on standing as a general matter, are silent on Attorney General standing. While not expressly prohibiting Attorney General enforcement, these states mention only the holder (North Carolina, Ohio and Vermont), holder and grantor (California, Colorado, Hawaii and Utah) or grantor, holder and express third-party enforcer (New York) or the owner of any estate in a dominant tenement, the occupant of such tenement or the public body holder (Montana) as the possible plaintiffs in an easement enforcement action. The phrasing of this language is usually included in a provision focusing on how easements can be enforced, and it is unknown whether particular attention was focused on whether to allow Attorney General standing. The one slight difference is that Montana’s language is found in a subsection with a heading “Who may enforce easement,” although this distinction is likely immaterial, because headings are generally not accorded any weight in statutory interpretation. New York also merits special mention here because the first version of its enabling statute, passed in 1983, explicitly granted standing authority to the Attorney General, but a 1984 amendment eliminated this language without any expression of legislative intent.⁷⁵

A very recent appellate court case in Ohio did interpret its provision to preclude neighbor standing⁷⁶, and presumably a similar analysis would apply to Attorney General Standing. Aside from this important exception, it remains to be seen whether courts in these eight states will interpret the omission of the Attorney General and other potential third parties as indicative of legislative intent to limit standing.

(iv) Express Attorney General Standing States—There is a small but noticeable trend of state legislatures amending their enabling statutes to include some form of Attorney General standing. The overall number of states that expressly provide for some form of Attorney General standing remains modest at seven, but four of these states joined the club in recent years: Mississippi in 2000, Connecticut and Tennessee in 2005 and Maine in 2007. Of the seven states, four allow virtually unfettered Attorney General standing (Connecticut, Illinois, Mississippi and Virginia), while three allow it under certain conditions (Arizona, Maine and Tennessee).

Of the states that allow unrestricted Attorney General standing, Connecticut’s language is the most straightforward in the form of a simple declarative sentence: “The Attorney General may bring an action in the Superior Court to enforce the public interest in such restrictions.” Mississippi goes a bit further, extending standing to both the Attorney General and the state Department of Wildlife, Fisheries and Parks. Virginia, meanwhile, allows the Attorney General, the Virginia Outdoors Foundation (a quasi-public agency that holds conservation easements), the local government in which the property is located and the Virginia Historic Landmarks Board to bring an action affecting an easement. Finally, Illinois has the widest open door policy, inviting all three levels of government—local, state and federal—to bring an easement action. To boot, Illinois also has a singular provision that allows easement enforcement by certain neighbors [see below, section X(B)].

⁷⁵ 4-34A *Powell on Real Property*, 34A.03[4] (2009).

⁷⁶ *Zagrans v. Elek*, 2009 Ohio 2942 (Ohio Ct. App. 2009). This case is discussed in more detail in section X(B).

A Guided Tour of the Conservation Easement Enabling Statutes

Arizona extends standing to any governmental body, but only if the original or successor holder is no longer in existence and there is no express third-party enforcer. In 2005, Tennessee adopted very similar language for easements granted on or after July 1 of that year. For earlier easements, a much wider form of standing, including citizen standing, is potentially recognized. In fact, Tennessee's standing provision was the subject of a state appellate court ruling in Tennessee Environmental Council, Inc. v. Bright Par 3 Associates, L.P., 2004 Tenn. App. LEXIS 155, 2004 WL 419720 (Tenn. Ct. App., 2004), in which the court held that an environmental organization had the right to enforce an easement that had been granted to a city. Unhappy with the result in this case, certain parties prevailed upon the legislature to tighten the standing language prospectively.

Maine's statute presents another interesting study with respect to Attorney General standing. Ever since the statute's initial enactment in 1985, the Attorney General has had the right under the statute to intervene in, but not to initiate, an easement-related lawsuit. The right to initiate such an action was subject to debate, and the Maine Office of the Attorney General claimed such a right existed under charitable trust principles.⁷⁷ In 2007, the Maine legislature granted the Attorney General the explicit statutory right to initiate an action affecting a conservation easement if any one of four conditions is met. In particular, these conditions are that the holder and any express third-party enforcer:

- (1) Are no longer in legal existence
- (2) Are bankrupt or insolvent
- (3) Cannot be contacted after reasonable diligence or
- (4) After 90 days' prior written notice by the Attorney General of the nature of the asserted failure, have failed to take reasonable actions to bring about compliance with the conservation easement

Although the statute is new, the Maine Attorney General has recently demonstrated its interest in easement enforcement, intervening to assist an insolvent land trust.⁷⁸

(v) Likelihood of Attorney General Standing—Nevertheless, in the face of enabling statute uncertainty, there is a strong case to be made that Attorneys General would likely prevail if they were to claim standing to enforce conservation easements under certain circumstances, suggesting egregious practices by holders. First, to the extent that easements in general or any one easement in particular might be characterized as a charitable trust, Attorneys General would have standing.⁷⁹ Second, Attorneys General usually have broad supervisory authority, either by statute or by common law, over charities and charitable assets. Thus, while they might not have express standing to directly enforce a conservation easement, whether by enabling act or other state statute, Attorneys General often can indirectly do so by virtue of this broader authority to

⁷⁷ Telephone discussion with Jeff Pidot, Former Deputy Attorney General, State of Maine, April 1, 2009.

⁷⁸ Windham Land Trust v. Jeffords, et. al, 2009 ME 29 (Me. 2009).

⁷⁹ Restatement (Second) of Trusts § 391. The comments explain: "Since the community is interested in the enforcement of charitable trusts, a suit to enforce a charitable trust can be maintained by the Attorney General of the State in which the charitable trust is to be administered. In some States the local district or county attorney can maintain such a suit." *Id.* at cmt. a. See also Uniform Trust Code, § 110(d).

A Guided Tour of the Conservation Easement Enabling Statutes

monitor charities. Indeed, this appears to be what happened in the Hicks case, discussed above in section IX(A)(ii).

Third, as a practical matter, the very act of an Attorney General asserting such standing presumably would carry much weight with the courts and with the litigants because Attorney General offices are often well-respected institutions in a state's legal system. Reportedly, most Attorneys General who have considered the matter do reach the conclusion that they enjoy such standing rights.⁸⁰ In fact, Attorneys General in several states have taken or threatened enforcement action, even where, as noted here, the enabling statute is not clear. Examples include Massachusetts,⁸¹ Maryland,⁸² California,⁸³ New Hampshire,⁸⁴ Pennsylvania⁸⁵ and Wyoming.⁸⁶ Finally, even if Attorneys General did not seek or were denied standing in any given case, they could always file an *amicus curiae* brief to make their views known if there is an already existing case. For all of these reasons, regardless of any ambiguity in the enabling statutes, the prudent easement holder should always consider Attorney General standing a strong possibility, if not a probability.

To reiterate comments made in the introduction, the purpose of this report is to engender discussion within the land trust community. Thus, land trust practitioners in each state may wish to consider whether the enabling statute and other laws are sufficiently clear with respect to Attorney General standing or whether clarifying legislation would be useful. The risks and benefits of clarifying legislation as compared to potential litigation on the issue should be part of any evaluation.

B. Neighbor or Public Citizen Standing

There has been an impressive amount of scholarship in recent years on the question of whether private citizens or organizations should have standing to enforce conservation easements.⁸⁷ For the most part, the analysis here follows the analysis of Attorney General standing. As noted above, section 3(a)(4) of the UCEA states that an easement action may be brought by "a person authorized by other law." This language does leave open the possibility that citizen standing would be recognized by a court, if such "other law" exists. Presumably, the same result (that is, looking to "other law") applies for statutes that are entirely silent on standing or do not expressly prohibit or authorize citizen standing.

⁸⁰ Pidot, *supra* n. 77.

⁸¹ Parkinson v. Board of Assessors of Medfield, 495 N.E.2d 294 (Mass. 1986)(Parkinson II).

⁸² McLaughlin, *supra* n. 51.

⁸³ McLaughlin and Weeks, *supra* n. 30, at 8 n. 19.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See Section VIII(A)(ii) for a discussion of Hicks v. Dowd and the ensuing case brought by Wyoming Attorney General.

⁸⁷ See Jessica E. Jay, *Third Party Enforcement of Conservation Easements*, 29 Vt. L. Rev. 757 (2005); Carol Necole Brown, *A Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements*, 40 Ga. L. Rev. 85 (2005); Sean P. Ociepka, *Casnote: Protecting the Public Benefit: Crafting Precedent for Citizen Enforcement of Conservation Easements*, 58 Me. L. Rev. 225 (2006).

A Guided Tour of the Conservation Easement Enabling Statutes

Only two of the enabling statutes expressly grant standing to neighbors or other members of the general public: Illinois and pre-2005 Tennessee easements, discussed above.⁸⁸ Illinois expressly grants standing to any “owner of any real property abutting or within 500 feet” of the protected property. Until recently, there were no known examples of a neighbor’s taking advantage of the Illinois statute’s liberal standing provision. But in Bjork v. Draper, 886 N.E. 2nd 563 (Ill. App. Ct., 2008), a neighbor sued and successfully rescinded two amendments and a correction that had been executed by the holder and the landowner.⁸⁹

To date, the courts that have addressed the subject have been fairly consistent in denying standing to neighbors and other citizens to enforce land-trust-held or local- or state-government-held easements.⁹⁰ The very recent case of Zagrans v. Elek is particularly interesting, because some of the neighbors who sought standing were contemporaneous grantors of virtually identical easements as the one at issue in the case. Thus, they had an even stronger argument to make than the typical neighbor. Nevertheless, both the trial court and the appellate court interpreted Ohio’s enabling statute, discussed above in section X(A)(iii), as precluding neighbor standing.

Friends of the Shawangunks, Inc. v. Clark, 585 F. Supp. 195 (N.D.N.Y. 1984), did grant standing to an environmental group to challenge an easement amendment, but the opinion followed federal standing jurisprudence because the easement originally had been purchased with federal funds. The other major instance in which a court granted standing to the public was the Tennessee Environmental Council case, discussed above. This result is perfectly understandable in light of Tennessee’s unique and very broad standing provisions for easements created prior to 2005.

XI. Merger and Property Tax Lien Foreclosure

Most enabling statutes are silent on whether or how the doctrine of merger or property tax liens might apply to terminate a conservation easement. This silence makes uncertain whether conservation easements receive any special treatment in these contexts. Similar to the standing, amendment and termination issues, the ultimate answer often lies in the common law or other

⁸⁸ A third limited exception exists in Pennsylvania, where, in an apparent concession to the coal lobby, standing is granted to adjacent coal interest owners. Such standing gives teeth to other substantive rights held by coal interest owners under a separate provision of Pennsylvania’s statute.

⁸⁹ For more on this case, see Amendment and Termination section.

⁹⁰ Zagrans v. Elek, 2009 Ohio 2942 (Ohio Ct. App. 2009); Wolf Creek Ski Corporation v. Board of County Commissioners of Mineral County, 170 P.3d 821 (Colo. App. Ct., September 20, 2007); Burgess v. Breakell, 14 Conn. L. Rptr. 610 (Conn. Super. Ct., Aug. 7, 1995); Bleier v. Board of Trustees of Village of East Hampton, 191 A.D.2d 552, 595 N.Y.S.2d 102 (2d Dept. 1993); Friends of Shawangunks v. Knowlton, 64 N.Y.2d 387 (N.Y. 1985). See also Spirit of the Sage Council v. City of Pasadena, 2006 Cal. App. Unpub. LEXIS 10132 (Cal. App., Nov. 7, 2006) (UNPUBLISHED); Cluff Miller v. Gallop, RE-03-022 (York County Superior Court, Maine, July 8, 2003) (order granting Rule 12(b)(6) dismissal) (UNPUBLISHED). Tallman v. Outhouse et al., Docket No. 08-E-0238 (Rockingham Cty. Super. Ct. Oct. 26, 2009) (Final Order). This report mentions both published and unpublished opinions. Unpublished opinions and orders often have little or no precedential effect in a court of law and in certain instances are prohibited from being cited (check rules of relevant jurisdiction to be certain). However, outside of a formal litigation context, attorneys commonly discuss and analyze unpublished opinions as examples of how courts have resolved legal issues. For these purposes, they are presented here so that the conservation community can have the benefit of a full discussion of the current issues and thinking..

A Guided Tour of the Conservation Easement Enabling Statutes

statutes. Some have argued that conservation easements are fundamentally different from traditional easements because they are conveyed to government entities and land trusts to be held and enforced for the benefit of the public for a particular purpose (unlike tradelands that are owned outright by their holders).⁹¹ As a result, merger may not occur because the unity of ownership required for merger may not be present if, for example, the easement is held in trust or some other representational capacity to be used for a particular purpose and the fee is not. Not all experts agree with that reading of the law, some reading the law as applying real property principles within a framework of state and federal laws requiring protection of the public interest. In any event, land trusts would be well advised to assume that their state common law of merger operates so as not to unnecessarily jeopardize easement permanence.

There are a few explicit exceptions to the general rule of statutory silence with respect to merger. Utah's statute, for instance, specifically includes merger in a list of ways that conservation easements could be terminated. Going in the opposite direction, Mississippi expressly prohibits the doctrine of merger applying to terminate a conservation easement. But the statute does not elaborate on how a holder's acquisition of the underlying fee simple interest in the protected property affects the easement. Montana, through a 2007 amendment, prohibited merger from terminating a conservation easement, although the provision was placed in the general servitudes section of the Montana Code, not in the conservation easement act. Maine, also through a 2007 amendment, joined Mississippi and Montana in addressing the merger issue and established the most sophisticated approach of any state to date. If a Maine easement holder acquires the fee simple interest in the protected property, the easement does not terminate through merger and remains a binding restriction against the holder. Alternatively, the original easement can be terminated if the holder conveys an equally restrictive easement to another qualified holder or if the holder implements a declaration of trust, presumably enforceable by the Maine Attorney General. Finally, Tennessee's statute has a provision that arguably bars merger unless the easement is "returned by specific conveyance" to the fee owner.

Montana, Maine and Mississippi's approach to merger raises the interesting theoretical and practical question of who could or would enforce an easement in which the holder and the servient landowner are the same entity. Fortunately, in both Maine and Mississippi, there appears to be a relatively simple answer because both states extend standing to their respective Attorneys General. For states in which Attorneys General and other forms of third party standing are uncertain, the answer is less clear. However, as discussed in section X(A)(v), an Attorney General who sought to enforce a conservation easement where the land trust is both holder and landowner would most likely prevail.

Meanwhile, Florida and Maine are the only two states that expressly provide in their enabling statutes that easements will survive property tax lien foreclosures. Maine's provision took effect only in 2007 because this possibility was a perceived gap in the statutory protection for conservation easements. Other states may provide such protection for easements in their property tax statutes. Although at least two states, Illinois and Colorado, have done so, a comprehensive analysis is beyond the scope of this report.

⁹¹ See Stephen J. Small, *The Federal Tax Law of Conservation Easements* E-5 ("Many states have statute of charitable uses, the effect of which might be to bar merger.").

A Guided Tour of the Conservation Easement Enabling Statutes

New York has a type of savings provision that likely protects easements from the doctrine of merger, marketable title act requirements, property tax lien foreclosures and even other “general laws” that could terminate an easement. The relevant section provides:

No general law of the state which operates to defeat the enforcement of any interest in real property shall operate to defeat the enforcement of any conservation easement unless such general law expressly states the intent to defeat the enforcement of such easement or provides for the exercise of the power of eminent domain.

This provision is unique among the enabling statutes. New York’s approach provides more certain protection for conservation easements than does the UCEA’s section 2(a) language that conservation easements can be modified and terminated “in the same manner as other easements” even with the additional weight of the comments.

A more nuanced question arises over whether general restrictions on termination in the statutes, discussed above in section IX, might also be interpreted to preclude merger or property tax lien foreclosures from terminating an easement. There is some case law to suggest that courts would at least consider the issue. In Parkinson v. Board of Assessors of Medfield, 495 N.E.2d 294, 295 n. 3 (Mass 1986)(Parkinson II), the Supreme Judicial Court of Massachusetts declined to apply the doctrine of merger. Although this conclusion was based on a technical reason unrelated to conservation easements, the court did note the enabling statute’s requirement of a public hearing and governmental approval for the termination of an easement.

XII. Backup Holder

One fear among some practitioners in the land conservation community is what will happen if an easement holder dissolves or otherwise becomes inactive and does not transfer its easements (not to mention its land and other assets) to another entity.⁹² Although most states have a dissolution provision in their nonprofit corporation action, and every 501(c)(3) organization is required to have dissolution provisions in its articles of incorporation and bylaws, in practice there is very little to prevent an organization from simply withering away through inaction. Most Attorneys General do not have the interest or the resources to keep track of foundering easement holders. This concern about “orphaned” easements was a principal rationale for the creation of an official statewide easement registry in Maine (see section VIII above).

In addition to Maine, two other states, Pennsylvania and Virginia, have directly addressed the problem of orphaned easements in their enabling statutes. Pennsylvania provides that, if the original holder dissolves or otherwise ceases to exist, the easement must be transferred to a willing successive holder. And if no willing successive holder can be found, the relevant municipality becomes the automatic successor holder. Virginia has similar language, except that the Virginia Outdoors Foundation, a quasi-public agency with a specific mission of holding easements, is the successor holder.

⁹² See Pidot, *supra* n. 25.

A Guided Tour of the Conservation Easement Enabling Statutes

The lack of enabling statute language on backup holders does not necessarily spell doom for orphaned easements. A conservation easement is a cloud on the title of the land to which it relates, and the Attorney General or other public official in charge of representing the public interest in public and charitable assets may learn of orphaned easements in the context of a proceeding to clear title. Moreover, adjacent landowners, aware of the conservation easement, may notify the Attorney General or take other actions to preserve the conservation values protected by an orphaned easement. Nevertheless, providing a clear statutory process would seem to reduce the chances of orphaned easements becoming effectively abandoned, especially where the Attorney General declines to become involved and where the general community does not insist on conservation permanence.

XIII. Eminent Domain

Prohibitions on Establishing Easements through Eminent Domain—Most states, UCEA-based or otherwise, are silent on the question of whether an easement may be established by eminent domain. Presumably, silence is tantamount to allowing such a taking. Nevertheless, outside of a scenic highway context, the taking of conservation easements to date has apparently been rare.

Fourteen states (Alabama, Alaska, Arizona, California, Florida, Georgia, Hawaii, Idaho, Iowa, Montana, Oklahoma, Oregon, Utah and Washington) flatly prohibit the creation of conservation easements through eminent domain. Another three states (Missouri, Oregon and Tennessee) put significant limitations on eminent-domain-established easements. Oregon prohibits the creation of a conservation easement by eminent domain unless specifically authorized by other law. Similarly, Tennessee allows a conservation easement to be established by eminent domain only if “necessary for the accomplishment of a specific public project which has been authorized by statute” and then only with the approval of the state building commission.

Going beyond the simple ban on creating an easement by eminent domain, California and Arizona also prohibit requiring an easement as part of a land use approval.

Eminent Domain Applied to Easement-Protected Properties—Most states are silent on whether the power of eminent domain may be applied against a property protected by an easement.⁹³ Where silent, the presumption is that easements do not trump or limit the power of eminent domain, except perhaps where the easement is held by the government itself.⁹⁴ Thirteen states (Alabama, Arizona, Hawaii, Idaho, Illinois, Kansas, Kentucky, Montana, New Jersey, New Mexico, New York, Utah and West Virginia) do not rely on such silence, however, and expressly affirm that conservation easements do not in any way limit or interfere with the power of eminent domain. Two of these states, Arizona and West Virginia, arguably prohibit treating a conservation easement as a compensable real property interest.⁹⁵

⁹³ For a very useful overview of the subject of eminent domain as applied to conservation easements, see Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. Davis L. Rev. 1897 (2008). See also Robert H. Levin, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land*, 9 N.Y.U. Env't'l L.J. 592 (2001).

⁹⁴ See McLaughlin, *supra* n. 91, at 1929.

⁹⁵ For particular criticism of this “no compensation” approach, see McLaughlin, *supra* n. 91 at 1964.

A Guided Tour of the Conservation Easement Enabling Statutes

A few states do not limit the power of eminent domain, but give some shape to how it may be exercised against protected properties. South Carolina's statute requires that the easement holder, not just the landowner, be made a party in any eminent domain action. Nebraska's statute provides that, for easements obtained by gift or devise, the holder is not entitled to any share of eminent domain proceeds. In contrast, if the easement was purchased or exchanged, the holder is entitled to just compensation. This distinction is often ignored by land trusts in the drafting of easements, however, as proceeds sharing is contracted for in either case⁹⁶ and would be required if the grantor seeks a federal income tax deduction. Moreover, the statute contains a provision that can be interpreted to limit the power of eminent domain on easement-protected properties for the purpose of providing utility services, for it seems to require the agreement of the holder and the servient landowner. This language has not been tested in court, however, and most Nebraska land trusts operate as if easements do not provide any such protection from eminent domain.⁹⁷

Florida's is the only enabling statute that provides any substantive protection from eminent domain to easement-encumbered properties.⁹⁸ The relevant language states:

In any legal proceeding to condemn land for the purpose of construction and operation of a linear facility as described above, the court shall consider the public benefit provided by the conservation easement and linear facilities in determining which lands may be taken and the compensation paid.

Of course this provision would only apply directly if the eminent domain process goes all the way to court. In practice, most eminent domain matters are handled outside of court, under so-called "friendly condemnation" procedures. However, the language in Florida's statute presumably has an effect on how condemning authorities approach the process from the outset and likewise strengthens landowners and easement holders' negotiating hand.

Four states, although not providing any substantive protections for protected properties, expressly require just compensation to the holder. To an extent, these provisions buttress the federal income tax law requirement of compensation provisions in donated easements.⁹⁹ Massachusetts and Virginia¹⁰⁰ have such provisions in their respective statutes, while Illinois has a similar provision in its eminent domain statute. Pennsylvania's statute, like many other states noted above, has a section that starts by affirming the right of government and other entities to

⁹⁶ Telephone discussion with Dave Sands, Executive Director, Nebraska Land Trust, January 23, 2009.

⁹⁷ *Id.*

⁹⁸ Certain states do include limitations on eminent domain as part of legislation that authorizes the purchase of agricultural conservation easements. For more on these limitations, see McLaughlin, *supra* n. 88, at 1930 n. 142. See also, Nancy A. McLaughlin, *Condemning Open Space: Making Way for National Interest Electric Transmission Corridors (Or Not)*, 26 Va. Env'tl L. J. 399 (2007) (discussing Virginia's unique Open Space Land Act, which arguably precludes condemnation of open space easements held by public bodies and includes the mechanism for extinguishing such easements to accommodate development and growth in the act itself, and which contains what may be the most progressive and protective compensation provision of all enabling statutes).

⁹⁹ Treas. Reg. §1.170A-14(h)(6)(ii).

¹⁰⁰ In addition to its generally applicable enabling statute, Virginia also has the Open Space Lands Act, which governs easements held by the Virginia Outdoors Foundation, a public agency. This separate statute offers stronger protection from condemnation for the publicly held conservation easements than for those held by nonprofit entities.

A Guided Tour of the Conservation Easement Enabling Statutes

exercise the power of eminent domain on conservation-easement-encumbered properties. However, it goes on to provide that the easement holder shall be entitled to just compensation and establishes some procedures for its determination. These subsections contain some of the most advanced and thoughtful treatment of just compensation of any enabling statute.

One author, after surveying the easement enabling statutes, recommends statutory revisions to increase the protection of the easement holders' interests.¹⁰¹ Two such legislative efforts attempted in 2009 in the North Carolina and California legislatures had varying success. The more modest legislation in North Carolina passed and was signed into law.¹⁰² The comprehensive and very conservation-friendly bill in California passed both houses, but the governor vetoed it.¹⁰³ The North Carolina statute requires city and county governments to determine that there is no "prudent and feasible alternative to condemnation" of any property encumbered by a conservation easement, and includes a provision that encourages the sharing of proceeds with the easement holder. The California bill would have: (1) required very early notice to the easement holder and any public agency that funded or required the easement as a permit condition, (2) allowed easement holders and public agencies to comment and required the condemning agency to respond in writing, (3) allowed the easement holder and public agencies to testify before any decision could be made, (4) afforded governmentally held, funded or required easements a heightened level of protection, and (5) required compensation for any taking of or damage to the easement based on standard appraisals. All provisions of the bill applied to all state, local and private entities with powers of condemnation in California.

XIV. Property Taxation

The UCEA is silent on how an easement affects property taxation, sticking to its chief purpose of abolishing the traditional common law constraints to perpetual easements in gross. Twenty-two of the enabling statutes, however, affirmatively deal with the issue. Only one state, Idaho, expressly prohibits any property tax reduction arising from an easement. The remaining 21 either require or allow for reduced property tax valuation.

Of non-UCEA states, Montana, like Idaho, does not allow property tax reductions solely as a result of a grant of a conservation easement. The Montana statute essentially treats conservation easements as having no effect on the taxable value of property for assessment purposes. Nevertheless, landowners may petition for a reduction in property taxes to reflect the actual restricted uses for which property may be used under the terms of conservation easements.

Many state statutes (California, Colorado, Georgia, Indiana, Missouri, Nebraska, New Jersey, North Carolina, Oregon, South Carolina, Texas and Virginia) expressly provide that an easement-encumbered property is entitled to a property tax valuation that reflects the existence of the easement. Florida appears to follow the same rule, although the statutory language is less clear. Texas merits special mention because its statute includes a section establishing a property tax recapture if a conservation easement is terminated. Curiously, no other provision of Texas'

¹⁰¹ See McLaughlin, *supra* n. 91, at 1965-1966.

¹⁰² Ch. SL 2009-439.

¹⁰³ S.B. No. 555 (2009).

A Guided Tour of the Conservation Easement Enabling Statutes

enabling statute establishes a reduced property taxation regime for conservation-easement-encumbered properties, but this section appears to accomplish as much in a somewhat roundabout way. Another noteworthy state is Oregon, which amended its easement statute in 2001 to allow a landowner to prospectively request that the assessor determine her property tax valuation reduction before granting an easement.

At least seven states (Illinois, Maine, Maryland, Massachusetts, New Hampshire, New York and Wisconsin) do not have any property tax reduction provision in the easement enabling statute, but do include one in the property tax code.¹⁰⁴ In some cases, these property tax code provisions simply affirm that easements must or may be accounted for in the valuation of a protected property. In other states, the existence of an easement may qualify a property for a special classification program, such as the “Open Space Program” in Maine and Virginia.

Of course simply requiring that easements be reflected in property tax valuations does not settle valuation questions. Local assessors often have a great deal of discretion in how they account for the reduction of value attributable to easements, which can lead to a tremendous amount of variation from municipality to municipality in how easements affect property taxation.

Furthermore, many states already allow “current use” or “production” (as opposed to highest and best use) valuation for properties under active agricultural or silvicultural use. Thus, any statutory language dealing with (or remaining silent about) whether a conservation easement should be reflected in the valuation of the protected property might have very little practical effect. Such is the case in Colorado, Maine, Montana, New Hampshire, Vermont and Virginia, to name a few.

XV. Enforcement

As a general matter, the state-by-state differences concerning conservation easement enforcement methods are not dramatic, and the important enforcement details are embedded in the easement document itself. The UCEA is silent on the methods of enforcement. Ten non-UCEA states (Arkansas, Florida, Maine, Massachusetts, Montana, New Jersey, New York, North Carolina, Ohio and Utah) expressly affirm that a holder has the right to enter the protected property, usually with the qualification that such entry be at a “reasonable time” and in a “reasonable manner.” Although the distinction likely is not significant, New York’s provision is slightly more expansive, allowing both entry *and inspection*. One potential weakness of the phrasing of these entry provisions is that they only mention the holder and not any express third-party enforcer, even when third-party enforcers are recognized in other sections of the statute. Maine is the only exception in this regard.

Numerous states (Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Montana, New Hampshire, New York, North Carolina, Rhode Island, Utah and Vermont) affirm that an easement holder can seek injunctive relief and damages (that

¹⁰⁴ Other states might also belong in this list, but a detailed review of each state’s property tax statutes is beyond the scope of this report.

A Guided Tour of the Conservation Easement Enabling Statutes

is, is enforceable at law and equity). Such language is likely extraneous because either of these remedies is generally available even in the absence of any express provision.

California, Colorado and Hawaii specify that damage awards for violation of an easement may take into account “the loss of scenic, aesthetic, or environmental value.” Illinois has a unique provision that allows for punitive damages against a person who willfully violates a conservation easement on property he owns. Such damages are capped at the value of the land, although it is unclear whether this is the restricted value or the unrestricted value. In 2006, Connecticut enacted a law establishing stiff remedies (including damage awards of up to five times the cost of restoration) for encroachment and trespass on “open space land.” For the purposes of this statute, “open space land” includes both government and land trust owned conservation lands and easements. Although the statute appears intended to apply only to third-party encroachments, the language is written broadly enough that it arguably could apply directly against a landowner who violates his own easement. In addition, Illinois’ statute has a provision allowing for punitive damages for easement violations.

California and Hawaii include a provision stating that a court may (but is not required to) award litigation costs and attorney fees to the “prevailing party.” It is unclear if the easement itself can override this language. Similarly, in 2006 Massachusetts amended its statute to allow for litigation costs and attorney fees. Compared to Hawaii and California, the Massachusetts language is more favorable to easement holders in that costs and fees may be awarded only in the event of a violation of an easement. Moreover, a violation can be resolved by a court or by an arbitrator or similar alternative dispute resolution neutral party.

New York’s statute includes a provision that prevents adverse possession, laches, estoppel or waiver from defeating the enforcement of an easement. The original version of the bill submitted in 2007 to amend Maine’s statute included similar language, but this section was eliminated during the legislative process.¹⁰⁵ As discussed above, New York also has a unique provision preventing any “general law” from defeating a conservation easement unless it “expressly states the intent to defeat the enforcement of such easement or provides for the exercise of the power of eminent domain.”

Maryland enacted a new statute in 2007 that seeks to encourage landowners to take easements more seriously when they buy and sell protected properties. In particular, it requires specific disclosures by both buyers and sellers. At or near the time of execution of a purchase and sale agreement, sellers must disclose a copy of any conservation easement to the buyer. Moreover, the purchase and sale agreement must contain a specific paragraph giving the prospective buyer notice of the conservation easement. In turn, a buyer must give notice of the sale to the easement holder within 30 days of closing. In theory, these notice requirements will reduce title disputes between buyers and sellers, as well as violations by buyers.

¹⁰⁵ Of course, as with much of the enforcement language discussed in this section, a well-drafted easement will include such language, barring these common law defenses from defeating the easement. That is, a statute’s silence in no way impairs a holder’s insistence on these terms.

A Guided Tour of the Conservation Easement Enabling Statutes

Maine is the only state that imposes monitoring duties upon easement holders.¹⁰⁶ As part of its 2007 amendment to the statute, the holder of a conservation easement is now required to monitor the protected property at least every three years and must prepare and permanently store a written monitoring report. Upon request, the report must be made available to the landowner. A holder's failure to comply with this section, however, does not render the easement invalid.

XVI. Miscellaneous Provisions

Contract or Real Estate Interest

Almost every state's enabling statute affirmatively states that a conservation easement is an interest in real property. The one possible exception is Illinois, but even here, case law has found conservation easements to be real property interests.¹⁰⁷ If easements were interpreted as a contract right, the exact ramifications are not clear, although perhaps such an interpretation may invite uncertainties in an eminent domain context. In any event, such contract-based language certainly does not preclude also treating easements as interests in real property, and the differences in this respect do not appear significant.

Common Law Restraints

The vast majority of state enabling statutes have express language that abolishes the traditional common law restraints on perpetual and negative easements in gross. In fact, this was the primary purpose behind the UCEA. The only states without such express language are Louisiana, Missouri and, of course, North Dakota, which does not have any enabling statute.

Express Third-Party Right of Enforcement

Thirty states, mostly UCEA-based, expressly allow for a third party to have a right of enforcement in the easement itself. In contrast, most of the non-UCEA states are silent on the matter, but such silence has not been interpreted as a prohibition. The one curious state is Oklahoma, which follows the UCEA in almost every respect, except that it omits any mention of a third-party right of enforcement.

Construction Provisions

A handful of states include a provision that requires a liberal construction of easements in order to accomplish their conservation purposes. Usually, a well-drafted easement will have similar language, but a statutory provision no doubt lends the principle even more weight in a court context. Often these liberal construction provisions are accompanied by a conservation purpose statement at the beginning of the statute. Examples include California, Pennsylvania and West Virginia. At the same time, California may weaken its liberal construction provision by including a separate provision establishing a presumption that if an activity is not expressly prohibited by the easement, it shall be permitted. Colorado has similar language.

¹⁰⁶ Monitoring is a subject on which, although the enabling acts do not have much to offer, other authorities are quite emphatic. For example, *Land Trust Standards and Practices* requires annual monitoring. In turn, the Internal Revenue Service has been paying increasing attention to monitoring practices, adding detailed questions to the new version of the Form 990.

¹⁰⁷ See, e.g., *Libertyville v. Connors*, 185 Ill. App. 3d 317, 330-31 (App. Ct. 1989).

A Guided Tour of the Conservation Easement Enabling Statutes

Liability Protection for Easement Holders

Two neighboring states, Florida and Georgia, include a provision that grants tort liability immunity to conservation easement holders for damage or injury to persons on the protected property. Often an indemnification statement to this effect is included in the easement itself, but it certainly does not hurt to have statutory backing.

Notice to Easement Grantor

Utah has a consumer protection provision of sorts in its enabling statute. In particular, the holder must disclose to a prospective grantor at least three days prior to receiving an easement, “the types of conservation easements available, the legal effect of each easement, and that the grantor should contact an attorney concerning any possible legal and tax implications of granting a conservation easement.”

Mining Interests

A variety of enabling statutes include various forms of statements that easements will not limit the rights of subsurface mineral interest owners. For the most part, these provisions are extraneous and were presumably added to the statute as the price to pay for getting past the mining lobby gauntlets. (See Alabama, Kentucky, New Mexico, Pennsylvania, West Virginia and Wyoming for examples.) The most far-reaching language by far exists in Pennsylvania, with even a special standing provision (presumably to challenge the easement’s potential impact on the abutting property) for abutting mineral interest owners.

Water Rights

At least one Western state, Colorado, amended its enabling statute in 2003 to specifically provide that water rights may be restricted by the terms of a conservation easement. Most Western states operate under the appropriation system of water rights, not the riparian system. Under appropriation systems, water rights are typically a separate property interest from the property interest in the land and need to be called out or identified separately. Colorado’s enabling statute change made clear that this separate real property interest in the water could also be restricted by a conservation easement.

Applicability of Enabling Act

The UCEA, as well as most of the states that follow it, provide that any instrument that complies with the statute “whether designated as a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise,” will fall under the statute’s reach. In contrast, a few states (Alabama, Idaho and Kansas) reverse this rule, stating that “an instrument intended to serve as a conservation easement must explicitly state a reference to this effect.”

Furthermore, most UCEA states include a provision that applies the statute retroactively to easements granted prior to the statute’s enactment. Alabama, again going against the grain, drops this provision from its statute.

A Guided Tour of the Conservation Easement Enabling Statutes

Easements and Marketable Title Acts

A thorough review of the state marketable title acts is beyond the scope of this report.¹⁰⁸ In at least California, Massachusetts and Wisconsin,¹⁰⁹ the marketable title acts provide an express exception for conservation easements. In addition, two enabling statutes (Illinois and Iowa) do expressly exempt conservation easements from the marketable title statutes. In contrast, Vermont's enabling statute expressly provides that easements are subject to its marketable title statute.

XVII. Conclusion

As this report demonstrates, there is considerable variation among the conservation easement enabling statutes. Some statutes are concise, sticking to the UCEA's sole purpose of abolishing traditional common law restraints on perpetual easements in gross. Others include an array of additional provisions treating all manner of issues.

Commentators have described certain statutory provisions as ambiguous, even when interpreted in the context of other potentially applicable laws. The Land Trust Alliance has commissioned and disseminated this report in the hopes that it will encourage conservationists to review their respective statutes with an eye towards the need for any revisions.

As discussed from the outset, conservationists should be mindful of the risks of opening a statute to change, because it may invite unwelcome modifications. At the same time, not addressing ambiguities bears risks. Litigation may erupt over such ambiguities, leading to unpredictable consequences and perhaps even less control over the result than in a legislative process. A careful risk-benefit analysis must be conducted for each state and adjusted for the relevant political context. Furthermore, because both conservation law and practice are continuously evolving, the Alliance and the author believe that such an evaluation is important for land trusts in every state to undertake as a group, along with legal counsel and legislative experts.

With regard to policy and legislation, the Alliance works closely with many partners to identify areas of collaboration and important trend-setting policy, legislative or regulatory needs, and to continue to serve as a source of national information, models and ideas. Comprehensive information on the state enabling statutes and model statutes is an important part of this effort. At the same time, the Alliance will continue to emphasize prevention as a tool to strengthen conservation efforts, as well as the fact that conservation defense begins with good drafting and conservation design, solid internal systems and sound governance for land trusts.

The Alliance provides quality assurance by soliciting comments from experts and every day users and by following up on those comments to improve the products and address concerns.

¹⁰⁸ Marketable title acts generally require re-recording of deeds every so many years (usually 40) in order for the interest in land to be enforceable. For a comprehensive analysis of how marketable title acts interact with conservation easements, see Jennifer Cohoon McStotts, *In Perpetuity or for Forty Years, Whichever Is Less: The Effect of Marketable Record Title Acts on Conservation and Preservation Easements*, 27 J. Land Resources & Envtl. L. 41 (2007).

¹⁰⁹ But see Turner v. Taylor, 673 N.W.2d 716 (Wisc. Ct. App. 2003), and related discussion in section IX(b) above.

A Guided Tour of the Conservation Easement Enabling Statutes

Numerous national experts reviewed and commented on this report. Their suggestions have expanded and strengthened it considerably.

The goals of making conservation legal expertise widely available across the country and giving land trusts ready access to conservation defense tools and resources inspired this report. The Alliance and the author share the desire to help build stronger land trusts and permanent conservation.