Land Trust Alliance
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October 24, 2019

Via Electronic Mail

Ellen Dyke, Esq., Chair
Drafting Committee on the Relocation of Non-Utility Easements Act
Uniform Law Commission
111 North Wabash Avenue, Suite 1010
Chicago, IL 60602

Re: Uniform Easement Relocation Act -- Exclusion of Conservation Easements

Dear Ellen:

This letter contains our comments on the October 7, 2019 draft of the Easement Relocation Act (the "ERA"). I want to start by thanking you, the committee and, in particular, John Lovett, for the clear effort you have made to address the important issues the land conservation community raised in reviewing the earlier drafts of the ERA and the consideration you have extended to us during your meetings and deliberations. The new draft goes a long way toward resolving our concerns, and we appreciate your efforts in this regard.

Our comments below are limited to two remaining concerns that we think you can easily accommodate.

1. Definition of "Conservation Easement," "Conservation Organization" and "Conservation Purposes."

The October 7 draft offers the adopting state the alternative of using the definition of the terms adapted from the comparable definitions in the Uniform Conservation Easement Act ("UCEA") or the definition of those terms as they appear in the relevant statute of the adopting state. This approach is an elegant solution to our concern that the UCEA definition does not reflect the wide variety of conservation purposes expressed in various state statutes and that therefore might inadvertently disqualify a particular conservation easement from the all-important exclusion in the ERA.

To add an extra layer of protection on this point, we propose adding language to the comments on this section that would alert the drafters of the ERA to our concern, thereby offering them a rationale for choosing their own state law over the UCEA definition. Specifically, we propose an addition to Comment 2 to Section 3, as follows:

> The alternative of adopting the definition of these terms as provided in the adopting state's existing law is intended to recognize that conservation easements are creatures

> of state law and to avoid the possibility that the UCEA's definitions are not sufficiently broad to include the wide variety of conservation purposes for which a particular state may have authorized conservation easements.

2. Ancillary Easements: Trail, Monitoring and Public Access Easements

The UCEA definition of "conservation easement" does not specifically include or refer to easements that are integral to a conservation easement, namely, the right of the dominant estate owner to enter the estate by means of a trail for purposes of monitoring compliance with the terms of the easement or by granting the public the right to enjoy access to the estate for recreational and other purposes consistent with the purposes of the easement. Comment 4 to Section 3 acknowledges the issue by referring to a monitoring easement. However, rather than taking the position that the definition somehow includes these ancillary easements, it suggests that an ancillary easement would not in practice ever be subject to a relocation covered by the Act because the servient landowner would have difficulty satisfying the requirements of the Act.

We remain concerned that circumstances could arise in which the servient estate owner might try to relocate, for example, a trail on a conserved property notwithstanding the terms of the governing conservation easement. In this eventuality, the conservation easement holder would be forced to oppose the relocation on the basis of the criteria in the ERA rather than on the basis of the threshold exclusion. Even if it is successful, the expense of defending the action would be significant.

Inasmuch as the adopting state may avoid this problem by adopting its own definition of "conservation easement" and related terms, this option ideally should solve the problem of ancillary easements. Again, however, to alert the adopting state to the risk of a gap in its coverage, we suggest that the following sentence be added at the end of the addition to the comment suggested above, as follows:

> It is also intended to allow an adopting state to ensure that ancillary easements, such as trail, monitoring and public access easements, contemplated by its state law be included within the scope of those easements excluded from the coverage of the Act.

3. Express Determinations of Coverage; Title Reports and Notice

We strongly support Sections 5(a)(3) and 6(b) of the October 7 draft, which, respectively, require the servient estate owner seeking to relocate an easement to provide in its notice an affirmative statement of the reasons the easement at issue is eligible for relocation, and to require a judge to make an affirmative determination to that effect. We think these provisions will provide conservation easement holders with an important layer of protection against unfounded attempts to relocate conservation easements. They should also discourage at the outset servient estate owners from bringing relocation actions that have not

been adequately researched and that could require under-resourced conservation organizations to assume the expense of defending these actions.

We also support the draft's provisions on notice and title. We wanted to be sure that a servient estate owner is required to make every effort to notify a conservation easement holder – often an all-volunteer organization with no fixed address – of its action, and to ensure that any title report was of sufficient quality to reveal a conservation easement on the estate.

Again, thank you for the attention you have paid to our concerns.[1] Feel free to call me if there is anything more we can provide in support of our positions.

Sincerely,

Leslie Ratley-Beach
Conservation Defense Director

cc: Molly Ackerly, Esq.
Andrew Bowman, Esq., President of the Land Trust Alliance
John A. Lovett, Esq.
Benjamin Orzeske, Esq.

[1] We note that the use of the term "the primary purpose" of an easement in section 4(a)(2) of the October 7 draft may prove problematic in relocating eligible easements. In our experience, even non-conservation easements often express a variety of purposes and do not rank those purposes in terms of priority. This fact may lead to confusion and prompt unnecessary litigation. The Committee may want to substitute a phrase such as "any stated purpose" to avoid this result.