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Professor John A. Lovett
Reporter for Uniform Easement Relocation Act
Loyola University New Orleans, College of Law
Sent via email to jlovett@loyno.edu

Uniform Easement Relocation Act
Comments Regarding Conservation Easements

Dear Professor Lovett,

I am a professor of law at the University of Utah College of Law. My research focuses on conservation easement, tax incentive, and nonprofit governance issues and I write and lecture extensively on these issues. I recently served as Reporter for the Uniform Conservation Easement Act Study Committee and prepared an extensive background report for the Committee that I would be happy to share with you. I am a member of the Board of Directors of Utah Open Lands (a state-wide land trust), a member of the Habitat Protection Advisory Committee of the Humane Society's Wildlife Land Trust, and a member of the Lands Protection Committee of Vital Ground, a land trust that works to conserve and connect habitat for grizzly bears and other wildlife. I also consult with land trusts, landowners, government entities, federal and state regulators, and others regarding conservation easements and nonprofit governance issues. My articles on conservation easements can be found at: http://ssrn.com/author=95358.

My comments below relate to the Easement Relocation Act draft prepared for the Nov 1-2, 2019, Drafting Committee meeting. I offer these comments (i) with the understanding that "The Drafting Committee firmly intends that conservation easements will not be subject to relocation under the act," as noted in the memorandum you prepared for the July meeting in Anchorage, (ii) on the assumption that the Drafting Committee wishes to ensure that conservation easements will not be harmed by the relocation of other easements pursuant to the Act, and (iii) on the assumption that the Drafting Committee does not wish to inadvertently render conservation easements in adopting states ineligible for the federal charitable income tax deduction offered for conservation easement donations under Internal Revenue Code (IRC) § 170(h) and accompanying Treasury Regulations.

I am available and would be happy to assist you and the Drafting Committee with conservation easement-related issues at any time, including at future meetings.

Comments on the Nov 1-2, 2019, draft of the Uniform Easement Relocation Act

1) Proposed Defined Term for the Subcategory of Easements Subject to the Act

Use of the generic term "easement" to refer to easements subject to the Act may be confusing to laypeople, lawyers, state legislators, and the courts. Given that the Act expressly does not apply to specified categories of easements (public-utility, conservation, and negative easements), it might be helpful to refer to easements that are subject to the Act using a more precise and limited defined term, such as an "eligible easement" or a "relocation-eligible easement."

2) Definition of "Conservation Easement" Should Be Appropriately Broad

The proposed definitions of "conservation easement" in the draft Act and in your October 8, 2019, memorandum would not capture all conservation easements.

- Defining "conservation easement" by referring to "the applicable law" of an adopting state would not capture all conservation easements because a valid (and possibly deductible) conservation easement that does not meet state statutory requirements can nonetheless be created if the holder acquires fee title to an "anchor parcel" to which the conservation easement is appurtenant. Conservation easement enabling statutes like the Uniform Conservation Easement Act are designed to authorize the creation and enforcement of conservation easements held in gross. However, conservation easements that do not meet state enabling statute requirements but are held appurtenant to an anchor parcel are also valid.

- Defining "conservation organization" to mean an entity "organized for or whose powers or purposes include conservation purposes" would not capture all holders. Section 170(h) allows "qualified organizations" (defined broadly to mean publicly supported charities, their satellites, and government entities) to hold conservation easements.[1] In some cases, nonprofits like the Girl Scouts of America, a church, or a nonprofit hospital may hold a conservation easement.

- Defining "conservation organization" to mean "a charitable organization, entity, corporation, or trust or government entity, jurisdiction, or agency" would not capture all holders. For example, in some cases Native American tribes, trade associations, social clubs, and political organizations may hold conservation easements. In addition, in some cases, conservation easements may be held by private entities. For example, Coors

[1] While the Treasury Regulations provide that an "eligible donee" of a deductible easement must "have a commitment to protect the conservation purposes" and "resources to enforce the restrictions," in defining those requirements, the Treasury Regulations do not require that all holders have a conservation purpose or such resources. *See* Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 3 Utah L. Rev. 755, 759 (2013).

> Brewing Company reportedly acquired a number of conservation easements that limit the development and use of property in the watershed that produces the water it uses in its beer. Those conservation easements, which benefit not only the company but also the public, arguably should also not be subject to relocation by the servient owner under the Act.

A proposed solution would be to define "conservation easement" by reference only to the purposes of the easement. I have set forth a proposed definition below, which includes several purposes that were absent from the proposed definition in the draft Act. The goal is to make sure that the Act does not apply to conservation easements that protect conservation interests, broadly defined. The comments to the Act could also explain that the terms used in the definition are not meant to be exclusive, and easements created for additional conservation purposes that benefit the public should also be exempt from the Act.

> "Conservation easement" means an easement created for conservation purposes that benefit the public, including retaining or protecting the natural, scenic, wildlife, wildlife habitat, biological, ecological, or open spaces values of real property; assuring the availability of real property for agricultural, forest, outdoor recreational, or open space uses; protecting natural resources, such as wetlands, grasslands, or riparian areas; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, paleontological, or cultural aspects of real property.

3) <u>Application of the Act to "Eligible Easements" Encumbering Property that also is Encumbered by a Conservation Easement</u>

I am concerned about relocating "eligible" easements (such as motor-vehicle access, public access, pedestrian access, or ingress and egress easements) on a property that is also subject to a conservation easement. Conservation easements are carefully crafted to protect the specific conservation interests on the encumbered property (such as wildlife habitat, wildlife migration routes, ecosystems, riparian areas, prime soils, watersheds, viewsheds, and historic and cultural resources). Relocating other easements (such as a motor-vehicle access easement) on a conservation easement-encumbered property is likely to impair, injure, or destroy some of the conservation interests that were determined to be worthy of permanent protection at the time of the conservation easement's creation.

In addition, to the extent that the Act permits the holder of a conservation easement to unilaterally (without court supervision) consent to a relocation that may impair, injure, or destroy conservation interests on the encumbered property, it may render conservation easements in the adopting state ineligible for the deduction under IRC § 170(h). The IRS (and the courts, if eligibility for the deduction is litigated) must be able to assess whether, *at the time of a conservation easement's donation*, (i) the conservation purposes of the easement are protected in perpetuity and (ii) the easement does not permit "inconsistent uses" (i.e., uses that could impair, injure, or destroy the conservation interests that were the subject of the contribution or other

significant conservation interests). *See* IRC § 170(h)(5)(A); Treas. Reg. §§ 1.170A-14(e)(2)-(3) and -14(g)(1). Pursuant to the Treasury Regulations, a use that is destructive of (impairs, injures, or destroys) conservation interests on the subject property is permitted "only if such use is necessary for the protection of the conservation interests that are the subject of the contribution." Treas. Reg. § 1.170A-14(e)(3).[2]

The IRS has been aggressively auditing and litigating conservation easement donation transactions and continues to do so. Since 2005, there have been more than 70 cases and more than 100 opinions issued in cases challenging deductions claimed for easement donations, and the law is still developing.[3] I assume the Drafting Committee would like to avoid adopting an Act that would render conservation easements in adopting states ineligible for the federal deduction. Below are two possible solutions:

(i) provide in the Act that the Act does not apply to an otherwise "relocation-eligible easement" if the subject property is also subject to a conservation easement (that is, simply exclude property subject to a conservation easement from the Act), or

(ii) provide in the Act that, if a property that is the subject of a proposed relocation is also subject to a conservation easement, then:

(a) a court must approve the relocation (i.e., the holder of the conservation easement may not consent to the relocation without court approval) and

(b) in the action, the court must determine that the relocation (1) is not inconsistent with the conservation purposes of the conservation easement and (2) would not impair, injure, or destroy any of the conservation interests on the subject property.

4) Notice to Conservation Easement Holders

It is not clear that § 5(a) of the Act requires notice of a relocation to be given to the holder of a conservation easement. Section 5(a) provides that "[a]n owner of a servient estate may exercise the right under this [act] to relocate an easement only if the owner of the servient estate first gives notice in a record to:

(i) the easement holder,

(ii) each security-interest holder having an interest in the servient estate or dominant estate, and

(iii) each lessee of record having an interest in the dominant estate.

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[2] The Treasury Regulations provide, as an example, that "a deduction for the donation of an easement to preserve an archaeological site that is listed on the National Register of Historic Places will not be disallowed if site excavation consistent with sound archaeological practices may impair a scenic view of which the land is a part." Treas. Reg. § 1.170A-14(e)(3).

[3] For a comprehensive discussion of the case law in this context, see Nancy A. McLaughlin, *Trying Times: Conservation Easements and Federal Tax Law*, (Oct. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3384360.

The reference in § 5(a) to "the easement holder" appears to refer to the holder of the easement that is eligible for relocation under the Act, not the holder of a conservation easement. The definition of "security-interest holder" does not appear to encompasses the holder of a conservation easement. And the holder of a conservation easement does not appear to qualify as a "lessee of record having an interest in the dominant estate."

I hope you find these comments helpful. I would be happy to answer any questions you may have and otherwise assist the Drafting Committee as it addresses these important issues.

Best regards,

/s/ Nancy A. McLaughlin

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cc: Benjamin Orzeske