MEMORANDUM

To: **Uniform Law Commission**

From: **John Lovett, Reporter; Ellen Dyke, Chair**

Re: **Draft of the Uniform Easement Relocation Act (UERA) Presented for July 11-15 Annual Meeting - Second Reading**

Date: **July 29, 2020**

A Prefatory Note precedes the draft of the Uniform Easement Relocation (the act) that will be presented for a second reading at the annual meeting of the Uniform Law Commission taking place via Zoom on July 11-15, 2020. The Prefatory Note explains the state of the law in the United States that justified the ULC's decision to form a drafting committee on easement relocation in the first place and explains the overall structure of the act and its key provisions. This memorandum, therefore, will not repeat any of the information provided in the Prefatory Note.

This memorandum reports on both the major changes in the act that have been made since the July 2019 annual meeting of the Uniform Law Commission in Anchorage, Alaska and on the smaller-scale changes that have occurred since the June 15, 2020 General Information meeting that took place via Zoom.

A. Definitions – Section 2

Section 2 of the act has not changed radically since last summer. The most important changes occurred in the definitions of conservation easement and public-utility easement. See Sections 2(2) and 2(11).

The definition of conservation easement in Section 2(2) still largely tracks the definition of this term found in the Uniform Conservation Easement Act, but now contains an additional reference to "any other purpose under [cite to applicable state law]." The Drafting Committee made this change so that the exclusion for conservation easements would capture any new conservation purposes recognized by state law other than those initially recognized in UCEA.

The Drafting Committee included a definition of "order" in Section 2(9) as that term is important in several other sections. This final change occurred following the June 15, 2020 General Information Session.

The definition of public-utility easement in Section 2(11) has also been reworked, including some minor wording changes made since the June 15, 2020 General Information Session. The new definition of public-utility easement encompasses all easements benefiting "an intrastate utility, an interstate utility, or a utility cooperative." It also offers a broad and inclusive definition of a utility cooperative.

B. Scope; Exclusions – Section 3

The Drafting Committee substantially revised Section 3 since last summer. Many parts of this section were moved to other sections of the act. Section 3 now focuses exclusively on scope and exclusions. The three broad exclusions for a public-utility easement, a conservation easement and a negative easement remain unchanged. Section 3(b)(2) and Section 3(b)(3), both of which address situations that could arise when a relocated easement encroaches on a public-utility easement, a conservation easement, or negative easement on the servient or dominant estate, are new.

The basic concept found in Section 3(b)(4), which prohibits relocation of an easement under this act "to a location other than the servient estate," was previously stated in the introductory portion of Section 4 of the act. This particular exclusion, however, remains an issue. The Drafting Committee is divided as to whether this exclusion should remain in the act, be removed, or be revised to allow for relocation to another estate owned by the servient estate owner seeking the relocation.

Although it has always been the Drafting Committee's position that nothing in this prevents a consensual relocation outside of the act, the Drafting Committee added Section 3(c) to make this position express in response to comments made last summer and at the June 15, 2020 General Information Session.

C. Right of Servient Estate to Relocate Easement – Section 4

The core right of the servient estate owner to relocate an easement under the act has not changed dramatically since last summer. However, the Drafting Committee has added a new substantive condition in Section 4(b)(6) that is designed to give a dominant estate owner the opportunity to defeat a proposed relocation if it would materially "impair improvements on or the physical condition or use of the dominant estate." This substantive condition provides yet another safeguard for the dominant estate owner and responds to some concerns expressed last summer in Anchorage. After the June 15, 2020 meeting, the Drafting Committee modified Section 4(6) further by inserting the words "or use" into this substantive condition for relocation.

Current Section 4(7), formerly Section 4(6), has been reworked to provide greater clarity about the rights of other interested parties, including a security interest holder of record, a lessee of record in the dominant estate, and any other person who holds a real-property interest of record in the servient or dominant estate, to block a proposed relocation on the ground of a material impairment. Some changes took place earlier in the year and some after the June 15, 2020 General Information Session. None of these changes are intended to change the meaning of this condition but simply to clarify its purpose and effect.

D. Commencement of Civil Action; Required Findings; Order – Sections 5 and 6

The Drafting Committee has substantially revised these two sections. Last summer the act contained a pre-litigation notice phase and then required a separate civil action. The Drafting Committee simplified these two sections by deleting the complex pre-litigation notice phase and

simply requiring the servient estate to commence a civil action by serving a complaint and summons on relevant parties.

Section 5(a) now requires the servient estate owner seeking to relocate an easement under the act to file a civil action. Section 5(b) details the persons who must be served with a summons and complaint. (Section 5(b)(4) has been slightly modified to improve clarity after the June 15, 2020 General Information Session.) Section 5(c) specifies what information must be contained in or accompany the complaint. Section (5)(c)(6) deals with notice to the holders of the excluded categories of easements. Finally, Section 5(d) provides a mechanism for waivers and subordinations and is a response to a suggestion made at the June 15, 2020 General Information session.

Section 6(a) details the findings a court must make to approve the relocation of an easement under the act. Section 6(b) specifies what must be included in the court's order. Section 6(c) gives the court authority to include other provisions in the order "consistent with this [act] for the fair and equitable relocation of an easement." Section 6(d), which requires recordation of the order issued under subsection (b), is new.

E. Expenses – Section 7

This section of the act, which provides that the servient estate owner is responsible for all expenses associated with the relocation, still gathers in one place everything a user of the act needs to know about such expenses. The Drafting Committee has considered whether attorney fees should be reimbursed by the servient estate owner. It resolved that such fees should not be a reimbursable expense.

F. Duty to Cooperate in Good Faith – Section 8

The core of this section is essentially unchanged since last summer except that the duty of good faith now applies not just to the servient estate owner and the easement holder but to all other parties in the civil action.

After the June 15, 2020 General Information Session, the Drafting Committee removed any reference to the duty to mitigate disruption from this section because that concept is amply covered elsewhere in the act. *See, e.g.*, Section (6)(b)(5), which requires that the order describe all mitigation that must be performed by the servient estate owner, and Section 7(2), which requires that the expenses of mitigation be paid by the servient estate owner.

G. Relocation Affidavit – Section 9

This section is new. The Drafting Committee added this section to provide notice of substantial completion of the relocation in the land records and to the easement holder and other interested parties. Until the affidavit discussed in this section is recorded, the easement holder continues to have the right to enter, use, and enjoy the easement in its current location.

H. Limited Effect of Relocation – Section 10

The core idea of this section—that a relocation is not a new grant or transfer of a property interest and does not trigger a breach or default of a recorded document such as a lease or a security interest and does not affect priority—has always been part of the act. The Drafting Committee has made some minor word changes and added subsection 10(4) in an attempt to clarify the meaning of this section.

I. Non-Waiver – Section 11

Once again, the basic content of this section was present in the version of the act presented last summer but was then found in Section 4(b). On the advice of the Style Committee, the Drafting Committee moved this material to a stand-alone section.

Section 11 has been further modified since the June 15, 2020 Drafting Committee Meeting to include a new Section 11(1) that states, in essence, that even if an easement agreement contains express language that prohibits relocation or attempts to waive, exclude, or restrict application of the act, the easement can still be relocated if the relocation satisfies the act.

J. Transitional Provision – Section 14

Last summer the act's provisions addressing retroactivity were found in Section 3(b) of the act. Once again, on the advice of the Style Committee, this material was moved to a stand-alone section. The Drafting Committee's position that the act should have retroactive effect has remained constant from the inception of its work on the act.