Land Trust Alliance
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March 4, 2020

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 March 13-14, 2020 meeting draft of the Easement Relocation Act (the "ERA"). Some of our comments carry over from our October 24, 2019 comment letter. Once again you, the committee and, in particular, John Lovett, have done extensive thoughtful work to address the difficult issues facing the committee.

Our comments below are limited to two outstanding concerns that we expressed earlier and that we think you can easily accommodate in this draft that follows from the March 2020 meeting. We have one additional concern based on newly introduced language and a new concept in the March 2020 draft on "public purpose." We also have one observation regarding comment 2 section 7 on the likelihood of obtaining appropriate reimbursement of attorney's fees for a conservation easement holder.

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

The October 7 draft offered 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. We thought this approach was 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 it therefore might inadvertently disqualify a particular conservation easement from the all-important exclusion in the ERA. While the redraft of the UCEA definition in the February draft is fine with us otherwise, it does omit the essential element of allowing the adopting state to select its own conservation purposes.

We suggest keeping the October 7 draft language regarding state conservation purposes as a new Section 2(3)(F):

(F) any or all purposes as set forth in [cite to applicable state law].

To clarify this point further, we propose adding language to the comments on this section that would alert state drafters, thereby offering them a rationale for choosing their own state law over the UCEA definition. We propose adding to comment 4 to section 2, 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 ancillary 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 6 to section 3(b)(2) acknowledges the issue. 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.

If the adopting state may adopt its own definition of "conservation easement" and related terms, as proposed in the preceding Point 1, this option should solve the problem of ancillary easements. To alert the adopting state to the risk of a gap in its coverage, we suggest that the committee add the following sentence 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. New Concept Concern

The Alliance is concerned that the newly introduced concept of "public purpose" in the definition of conservation easement is ambiguous and likely to lead to unnecessary disputes. The Internal Revenue Code defines *public benefit* for purposes of tax-deductible easements, and state statutes assume that qualifying conservation easements are in the public interest. The UCEA discusses "public interest" in the commentaries. However, "public purpose" is not statutorily defined to our knowledge. Nor is there a definition of how much "public purpose" is enough. Usually the landowner receives some incidental benefit. Would that negate the qualifier of public purpose so that it would be impossible for *any* conservation easement to

meet the ERA definition? I am confident that the committee does not intend that nor does the accomplished drafter, but we offer it as an example of one of several potential ambiguities inherent in the introduction of this new, and unnecessary, test.

The Committee may be concerned that somehow a conservation easement meeting the ERA's stated purposes does not fulfill a "public purpose" or provide a "public benefit" or is not in the "public interest." If so, then to avoid ambiguity and unnecessary litigation over the meaning or scope of any of those phrases, perhaps a better approach might be to state that any conservation easement designed for any or all of the ERA's purposes and held by an entity qualified under any applicable state statute be deemed to be in the public interest to provide a public benefit or to serve a public purpose.

4. Attorney Fee Recovery Observation

Contrary to proposed comment 2 to section 7, we do not see how section 7 can be interpreted to provide for the reimbursement of a conservation easement holder's attorney's fees in successfully defending a conservation easement as a cost of obtaining a government approval or preparing a filing. We understand that the committee has elected to apply the American Rule to attorney's fees, which in most circumstances would be equitable. Most conservation easement holders however are private section 501(c)(3) entities, not government entities, and most are in no position to absorb the costs of litigating suits to relocate excluded easements. We suggest that the draft specifically list attorney's fees as among the costs covered in those circumstances where the servient owner incorrectly initiates litigation to relocate an excluded easement.

Again, thank you for the attention you have paid to our concerns. Unfortunately, Win Brown has a conflict with the March meeting so the Alliance will not be able to attend. We realize how difficult this is to find a path through this complex intersection of law and practice. Please let us know before or after if we can provide you any further assistance.

Best regards,

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.
Win Brown, Esq.