

MEMORANDUM

To: Uniform Easement Relocation Act Drafting Committee
From: John Lovett, Reporter; Ellen Dyke, Chair
Re: Issues for June 22, 2020 Drafting Committee Conference Call via Zoom
Date: Friday, June 19, 2020

1. **Section 3(b)(4):** Should we keep this prohibition on using the act to relocate an easement to another estate besides the original servient estate? Commissioner Barry Hawkins, among others, have suggested we delete this exclusion. They believe it unduly restricts the utility of the act and the other safeguards in Section 4 provide enough protection for an easement holder.
2. **Section 3(c):** Due to concerns expressed at the meeting, Section 3(c) now states expressly that parties can agree to relocate an easement outside the act. We have gone back and forth on this issue since the beginning of our work on the act. Are you happy with this approach of including an express statement that parties can always relocate an easement outside the act?
3. **Section 4(7)** is the first section where the priority issue noted in the general information session arises. Several speakers commented on the fact that in what is now Section 10(5) we state that a relocation under the act does not affect the priority of the easement. However, there are situations where the priority of a recorded document could be adversely affected by the relocation. For example:
 - The easement to be relocated has burdened the servient estate from day one;
 - Another easement burdening the servient estate that will be encroached by the relocated easement has been on the servient estate from day three but has priority over all other recorded documents;
 - After the relocation, the encroached easement will be subordinate in priority to the relocated easement because of the operation of Section 10(5).
 - In this scenario, has the relocation affected the priority of the encroached easement?

It seems to us that there are three ways to handle this concern. First, we could revise Section 10(5) to carve out this possibly complicated scenario so that the encroached easement does not lose priority.

Second, we could add language to Section 3(b) that excludes from the scope of the act an easement if the relocation would encroach on the area of the servient estate already burdened by an easement. This is the easiest approach.

Third, we can make clear in Section 4(7) that if a person (not a lender or lessee) has a real property interest that is impaired by the relocation, that person has a right to stop the relocation as an impairment of that person's real property interest in the priority of its property right. This is the approach we decided to use and is specifically explained in the comments to Section 4(7) and 5(b)(4).

This way of handling the concern would allow a relocation if the encroached easement holder cannot prove an impairment of its property rights, such as a loss of priority position.

4. **Section 5.** Commissioner Barbara Atwood suggested we consider adding some language to this section indicating something about the nature of the civil action that will be filed to obtain an order approving a relocation. This could include a provision regarding the duty to answer or respond on the part of the easement holder, whether the proceeding is a bench trial or jury trial, and other procedural matters. Alternatively, we could just say something like "the court and the parties shall proceed under law of this state other than this act regarding an action for declaratory judgment" or some other category of civil act. What do you think?
5. **Section 7.** Expenses of Relocation. The comments from the general session suggest that some people are confused as to whether attorney fees for litigation are reimbursed as per the English Rule or not reimbursed as per the American Rule. (If attorney fees for litigation are to be reimbursed, Ellen believes that the English Rule must be stated explicitly.) We have previously voted that attorney fees for litigation should *not* be recoverable, but that professional fees for determining whether the relocation has been conducted in accordance with the plans and specifications and for obtaining permits, approvals and consents would be recoverable. (John believes it is self-evident that the party seeking to complete the relocation, the servient estate owner, will often need an attorney's help in doing all of this work but that is just part of the servient estate owner's obligation in even a consensual relocation unless the parties agreed otherwise.)

Is this still the view of the Drafting Committee? Would you like to add something in the text of Section 7 to address attorney fees? Would you like the Reporter to add a comment about attorney fees? The draft discussed at the General Information session had comments explaining that attorney fees associated with completing the relocation could be recoverable under Section 7(3) and (4) but this seemed to cause confusion, so we have removed those for now. Should we put those back in or do something else?

6. **Section 8:** We have removed Section 8(b) – the ongoing duty for the servient estate owner to mitigate during the process of relocating the easement – as this idea is specifically covered in other sections. *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 the expenses of mitigation to be paid by the servient estate owner. Do you agree? Do we need to put Section 8(b) back in the act?
7. **Section 11:** Should Section 11 addressing non-waiver include a subsection (1), which we have included for now? New section 11(1) states, in essence, that even if an easement has express language that the easement is not to be relocated and attempts to exclude or restrict application of the act, the easement can still be relocated if the relocation satisfies the act. In other words, this new Section 11(1) makes clear that as long as all of the conditions of the act are satisfied, the right of a servient estate owner to relocate an easement may not be waived, excluded or restricted by agreement even if the servient estate owner has explicitly agreed not to relocate the particular easement. Do you approve? Did you prefer the previous version? Do you want something else?