Issues Memorandum

To: **Easement Relocation Act Drafting Committee**

From: **John A. Lovett, Reporter**

Re: **New Draft for Scottsdale, Arizona, Nov. 1-2, 2019 Meeting**

Date: **Oct. 8, 2019**

The latest draft of the Easement Relocation Act circulated for the Scottsdale, Arizona meeting taking place on November 1-2, 2019 responds to the general comments and specific suggestions received at the First Reading of the Act in Anchorage, Alaska in July 2019 and discussions with our chair. Thanks to the superb collaborative work of the drafting committee last year, the act generally received a favorable response at the First Reading. When you review the latest draft in advance of the Scottsdale meeting, please pay particular attention to and reflect on the following issues.

Section 2 – Definitions of Appurtenant Easement and Easement in Gross: At the suggestion of several Commissioners, the new draft contains stand-alone definitions of "appurtenant easement" and "easement in gross" in subsections 2(1) and (4). The content of the definitions is not changed from previous drafts.

Section 3 - Definition of Conservation Easement: The definitions of "conservation easement," "conservation organization" and "conservation purposes" in the latest draft remain unchanged from previous drafts. However, I note that the three definitions are somewhat cumbersome especially given that they define an exclusion from the act. Therefore, I offer a simpler, unified definition of conservation easement that tracks the language of the Uniform Conservation Easement Act (1981, amended 1987). Please consider the following alternative definition of "conservation easement."

> (1) "Conservation easement" [has the meaning provided in [cite to applicable law of this state]] [means an easement that is created for conservation purposes, including retaining or protecting the natural, scenic, or open spaces values of real property, assuring the availability of real property for agricultural, forest, recreational, or open space uses, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archeological, or cultural aspects of real property, and whose holder is a charitable organization, entity, corporation, or trust or government entity, jurisdiction, or agency organized for or whose powers or purposes include conservation purposes.

The advantage of a definition like this is that it would be a single, stand-alone term, but the content would still mirror almost verbatim, the language of UCEA. We would then be able to eliminate the definitions of "conservation organization" and "conservation purpose" now found in Section 3.

Section 3 - Environmental Covenants: Two Commissioners suggested that the Act contain a specific carve-out for environmental covenants as that term is defined and used in the Environmental Covenants Act (2003). I did not include an express exclusion for this kind of land use restriction because environmental covenants are already covered by our exclusion for negative easements. In addition, including an express carve-out for environmental covenants would make the definitions in this Section even longer by requiring yet another definition. Accordingly, in the latest draft, environmental covenants are addressed only in the comments. *See* Section 3, comment 4, page 7. Nevertheless, please give this issue some additional consideration.

Section 3 - Retroactivity: There were a few general comments in Anchorage asking about whether the act should have retroactive effect or whether there should be a specific "Transitions" section dealing with or presumably limiting retroactive effect. As with previous drafts, the current draft addresses this issue in Section 3(b)(2). Is the Drafting Committee still comfortable with this approach? We have discussed this general issue and the related trade-offs before in some detail. Please give this issue some additional consideration.

Section 4 – Criteria Court Must Consider for Non-Consensual Relocation: An easement may be relocated only if the relocation does not materially affect any of the six crucial criteria found in Section 4. Please give these six criteria a close read once again. Does the current draft capture the right factors? Is the intent clearly expressed? Is there something we have missed?

The only new language in this section appears in Section (4)(a)(4), which contains an additional reference to "the value of the collateral." Please give this some attention. Also note that I tweaked the wording of section 4(a)(5) slightly, at the suggestion of a few Commissioners, to make the language consistent with other references to mitigation of temporary disruption elsewhere in the act, specifically in Sections 7(2) and 8(b).

As you know, the six criteria are all easement related. A few Commissioners made comments about non-easement related criteria that arguably could change the value of the dominant estate. For example, there could be negative tax consequences resulting from an easement relocation. Or the dominant estate might in some way be harmed if the relocation of the improvements on the servient estate were abandoned prior to completion. S*ee* discussion

below under Section 5. Should we attempt to deal with these types of concerns in this section of the act?

Section 5 – **Notice to Lessees of Record:** Prior to our meeting in Alaska, we discussed adding a lessee of record with an interest in the dominant estate as a person entitled to notice under Section 5. Thus, the latest version of Section 5(a) requires such notice. This change also necessitated a definition of "lessee of record," which is now found in Section 2(6). Please give this change some thought? For example, should all lessees of record having an interest in the dominant estate get notice or should the notice be limited to only lessees of record under long-term leases?

Section 5 – Statement of Estimated Costs and Demonstration of Ability to Complete Relocation: The other major change in Section 5 concerns the content of the notice document. At least one Commissioner raised the concern that a servient estate owner could obtain approval to relocate an easement, start the project and not finish it and this could somehow harm the easement holder. The Commissioner then asked that the notice include the estimated cost of the proposed relocation and demonstration of the servient estate owner's ability to pay those costs and complete the relocation. I have responded to that request in new subsection 5(a)(5). However, on further reflection, I am not convinced this additional subsection is necessary because we have made it so abundantly clear elsewhere in the act that a servient estate owner must mitigate temporary disruption to the easement holder during the process of relocation. See Sections 4(a)(5), 7(2), and 8(b).

To give an example, assume servient estate owner A obtains judicial approval or consent from easement holder B to relocate an easement. During the process of relocation, A must keep the original easement open and available until the newly relocated easement is ready to use. If A starts the relocation project and, for any reason, stops work before completing the relocation, B still has the right and ability to use the original easement in its original location. Arguably, the only person who would really suffer any harm here is A, who might now have a mess on the servient estate due to the interruption in construction. This is a mess, of course, that A would have had the right to make anyway because A is the owner of the servient estate, and B probably would have to live with it unless it interferes with use of the easement. Because such harm to the dominant estate, *e.g.*, aesthetic harm, is not easement related, it is not included in the six criteria listed in Section 4. Do you agree? Does this make sense? In any event, please give subsection 5(a)(5) some consideration.

Section 7 – Costs of Title Evidence and Professionals Needed to Review Plans and Specs and Confirm Compliance: I have added new subsections 7(5) and 7(7) to address two other potential costs that could arise in connection with a proposed relocation: first, the cost of procuring title evidence required under Section 5(a)(2); and, second, the costs of professionals

necessary to review the plans and specifications for the improvements to be constructed in the relocated easement and to confirm compliance with the plans and specifications.

Please give these new subsections some consideration and please ask yourself whether there are any other costs that should be included in Section 7.

Section 9 - Relocation by Conditional Consent after Notice: As you may recall, a number of Commissioners asked why the act included the statement that an easement holder and servient estate owner can agree to relocate an easement by consent when this has always been possible as a matter of contractual freedom. Recognizing the validity of these comments and because including this statement has the possibility of bringing all relocations into the act, and, thereby, *e.g.,* circumventing lender safeguards, as suggested by another Commission in Alaska, I have revised Section 9 to omit a direct statement that an easement holder and servient estate owner can agree to relocate an easement. Instead, the new draft includes several comments that point out the freedom of the easement holder and servient estate owner to agree to a relocation outside the scope of the act. See Section 4, comment 12; Section 6, comment 8; and Section 9, comment 1.

As a result of this change, the scope of Section 9 has now been considerably narrowed. Section 9(a) recognizes that an easement holder can grant consent to relocation after receiving notice under the act and then condition that consent on compliance with all or some of the terms of the act. Section 9(b) requires execution and recordation of a document confirming this arrangement and specifying the preceding and new location of the easement.

That said, the act must still deal with the problem of a security interest holder or lessee of record who has been given notice in this situation. Section 9(b) addresses this issue through inclusion of the phrase "without opposition to the relocation from any security interest holder or lessee of record." Presumably, if either a security-interest holder or lessee of record receives notice of a proposed relocation under Section 5 and objects under Section 5 and 6, the relocation could not go forward unless a court determines that the relocation does not harm their respective interests as listed under Section 4. If a security-interest holder or lessee of record that receives notice does not oppose relocation, then the relocation proceeds subject to the rest of Section 9(b). Please take a look at 9(b) and consider whether the new language is sufficient.

Section 10 – Limited Effect of Relocation: After concern from the floor in Anchorage that this Section was incorrectly named, I changed the title of Section 10 to "Limited Effect of Relocation" to more accurately reflect the work that this section of the act performs. The goal of this section is to limit the effect of relocation, not to characterize or re-characterize the relocation. Do you agree with this change?

Also, please note the slight modification to Section 10(3), which now includes the language "except as otherwise determined by a court or as provided under federal law." I have added this phrase to respond to comments from Commissioners. The general idea here is to

acknowledge two possibilities. First, that a court could, in theory, find that a proposed easement relocation does trigger a default or due-on-sale clause under general terms of a security instrument, in which case, the court would reject the proposed relocation under Section 4(a)(4). Second, under some unusually specific provision of a security instrument that addresses easement relocation, a proposed easement relocation would automatically trigger a default or due-on-sale clause, in which case the applicable terms of the instrument would be enforceable under the Garn Act, 12 U.S.C.A. § 1701j-3(b). With respect to this second possibility, do we need the phrase "as provided under federal law" because of Federal preemption?

Thank you in advance for your thoughtful review of this memorandum and the latest draft of the act.