Memo

To: Ellen F. Dyke and John A. Lovett

From: K. King Burnett and Nancy A. McLaughlin

Date: June 3, 2020

Re: Easement Relocation Act, June 4, 2020 Draft

This memo suggests revisions to the June 4, 2020, draft of the Easement Relocation Act that pertain to conservation easements and changes to the dominant estate. Commissioner Burnett's separate memorandum of today's date addresses title issues and issues regarding the parties to the civil action. We both agree that limiting the parties to an action would be desirable and simplify the act.

1) Section 4

(i) Given the importance of Section 4, it might be useful to clarify the opening language by adding an "only" so that it reads: "A servient estate owner may relocate an easement **only** if the relocation does not …"

(ii) The opening language of Section 4 requires that all of the subsections are subject to a "materially" requirement, while Restatement §4.8(3) similarly qualifies only subsection 3(a) ("*significantly* lessen the utility of the easement"). In addition, Section 4(2) of the Act adds "reasonable" to Restatement §4.8(3)(b)'s "use and enjoyment" standard. These changes increase the burden on the dominant estate owner as well as security-interest holders, lessees, and any other persons whose real-property interests are affected by a relocation. This seems inconsistent with Comment 1 to Section 4, which states that the Act's criteria for relocation are more "rigorous" than the Restatement's criteria.

The standards in the Restatement and in Section 4 of the Act seem to inherently require consideration of the significance of the effect of their application, and the cases referred to in the Restatement seem to support this. Thus, it may be preferable to remove the "materially" standard (which is not defined or explained).

(iii) The Section 4 standards relate to utility, use and enjoyment, purpose, safety, and disruption with respect to "the easement" that is being relocated. Except for Section 4(6), which is discussed below, the Section 4 standards do not appear to address the effects a relocation may have on the easement holder's use, value, and enjoyment of the dominant estate if a relocation would necessitate changes to that estate (for example, if the relocation would require construction of a new access road or other improvements on the dominant estate).

While Comment 6 to Section 4 states that other factors a court could consider in determining whether a relocation satisfies Sections 4(1)-(3) include "any physical damage to the dominant estate that would be caused by the relocation," this may not provide sufficient protection to the owner of the dominant estate for a number of reasons: (i) Sections 4(1)-(3) do not on their face relate to the dominant estate, (ii) Section 4(2) modifies the standard in Restatement § 4.8(3)(b) to provide that a relocation may not increase the burden on the easement holder in its use and enjoyment "*of the easement*," which could be interpreted to exclude effects on the dominant estate, (iii) the Act, unlike the Restatement, does not include an Illustration specifically involving and limiting changes to the dominant estate (see Illustration 4), (iv) courts do not always read comments or find them persuasive, and (v) "physical damage" does not capture all of the burdens that a relocation may impose on the owner of the dominant estate in its use and enjoyment of that estate.

Furthermore, while all expenses of constructing improvements on and obtaining government approvals or permits with respect to the dominant estate are to be borne by the servient owner pursuant to Section 7, there are other burdens that could be imposed on the owner of the dominant estate as a result of a relocation. For example, the new roads on the dominant estate may be more expensive to maintain, more difficult to use, not as safe, or not as pleasant to transverse, and they may destroy natural attributes important to the dominant owner, like woods, wildlife habitat, viewsheds, etc. There are inevitably choices to be made as to alternate routes for the new intersecting improvements on the dominant estate, each with its own costs, safety, maintenance, aesthetic, and practical advantages. The variations in location and physical situations involved in these cases makes it difficult to foresee all problems, so a general standard addressing all potential issues would be best.

Finally, to the extent that the Act could be interpreted to allow changes to the dominant estate that would interfere with the dominant estate owner's use and enjoyment of that estate, constitutional issues may arise. While the Comment to Section 14 states that "retroactive application of the act will not deprive the easement holder of any of the functional benefits of the easement…and will not cause the holder to suffer any other easement-related harm," it is not clear (as noted above) that the Act provides sufficient protection of the dominant estate owner's interest in the dominant estate.

We suggest that Section 4 be revised to include a clear standard that ensures that any changes necessitated to the dominant estate as a result of a relocation do not increase the burden on the easement holder in its use and enjoyment of the dominant estate.

(iv) The Act does not address the fact that improvements constructed on and other changes to the dominant estate as a result of a relocation could impair or damage the property rights of holders of public-utility easements, conservation easements, and other negative easements on the dominant estate. For example, if the relocation of an easement on the servient estate requires construction of a new road on the dominant estate, such a change might be in violation of an existing conservation easement on the dominant estate.

It does not appear to be the intent of the Act to authorize damage to the property rights of owners of interests in the dominant estate and such authorization would raise

constitutional issues. It also would jeopardize the deductibility of conservation easements donated in adopting states under federal tax statutes and regulations.

Accordingly, we suggest that the Act prohibit relocation of an easement if any required change to the dominant estate would encroach on an area of the dominant estate burdened by a public-utility easement, conservation easement, or negative easement. While this might be added to Section 4, the materiality standard (if it is retained) would be troublesome (it would require the holder of an easement on the dominant estate to expend resources proving that changes would "materially" impair or encroach upon its interest). It would be better to include this prohibition as an additional exception in Section 3(b) addressing the scope of the Act.

We note that similar issues may arise with regard to the property rights of owners of other types of partial interests in the dominant estate.

(v) Section 4(6) could be interpreted to mean that the word "value" qualifies both "the collateral" and "other real-property interest," and it is not clear that is intended. Switching the order in which those terms appear – i.e., "(6) impair the real-property interest or the value of the collateral of …" may reduce confusion.

(vi) Since Section 3(b)(2) explicitly provides that a relocation cannot occur if the new location of the easement would encroach on an area of the servient estate burdened by a public-utility easement, conservation easement, or negative easement, is it necessary to reference impairment of the real-property interest of an "easement holder of another easement on the servient estate…" in Section 4(6)? Is the intent to allow the holder of a public-utility, conservation, or negative easement to argue that a relocation impairs the easement even if it does not encroach on an area of the servient estate burdened by the easement?

2) <u>Section 5(2)</u>

(i) The Prefatory Note on page 5 provides (emphasis added):

> subsection 3(b)(2) provides that an easement cannot be relocated if "the proposed relocation would encroach on an area of the servient estate burdened by a public-utility easement, conservation easement, or negative easement." This exclusion protects the holder of a public-utility easement, conservation easement or negative easement *from having to address the merits of a proposed easement relocation under the act* if the relocated easement would encroach on an area already burdened by one of those kinds of easements.

Section 5(2) of the Act requires that a summons and complaint be served on "the holder of a public-utility easement, conservation easement, or negative easement." Contrary to the Comment quoted above, by being served, the holders of such easements will generally have to address the merits of the proposed relocation because, having been served, they generally will be bound by the court order whether they participate in the action or not

(that is, they will have to expend resources to ensure that there would be no encroachment upon the area of the servient estate burdened by their easements). We suggest that requiring nonprofit and government holders of conservation easements, who generally have very limited resources, to address the merits of a proposed easement relocation would be unduly burdensome, and that it would be better for the Act not to require that they be served. If they are not served, they would not be bound by any encroachment in violation of Section 3(b) of the Act.

(ii) Rather than requiring that a summons and complaint be served on the holders of easements excluded from the Act, the Act could be modified to require that such holders be notified of the commencement of the civil action. The Act could provide that failure to give notice would not affect the validity of the proceeding and, to avoid any possible confusion, that those notified will not be bound by the result because the Act excludes them from its scope and they are not parties to the proceeding.

(iii) We suggest that the second sentence of the Comment quoted in (i) above, which we found a bit confusing, be revised to read:

> This exclusion protects the holder of a public-utility easement, conservation easement, or negative easement from having its easement impaired by a relocation under the Act or having to address the merits of a proposed easement relocation under the Act.

3) <u>Section 6</u>

The servient estate owner and the holder of a perpetual conservation easement generally are not entitled to just agree to relocate the easement. In the case of a federally-deductible conservation easement, any relocation of the easement would require compliance with the judicial proceeding and other requirements of Treasury Regulation § 1.170A-14(g)(6). See Belk v. Comm'r, 774 F.3d 221 (4th Cir. 2014). Accordingly, we suggest Comment 7 of Section 6 be revised to read: "Implicit in both Section 5 and Section 6 is the understanding that a servient estate owner and an easement holder generally may agree to the relocation of an easement (other than a conservation easement) under any terms they find mutually acceptable."

4) <u>Section 7</u>

Section 7(1) appears to be the only place where changes to the dominant estate are separately referenced in the statute, and Section 7 addresses only the expenses associated with a relocation. We suggest that limits on the changes that can be required to the dominant estate as a result of a relocation be placed elsewhere – i.e., Section 3(b) could prohibit a relocation requiring a change to the dominant estate that would encroach on an area of the dominant estate burdened by a public-utility easement, conservation easement,

or negative easement, and Section 4 could prohibit a relocation if it would impair the easement holder's use and enjoyment of the dominant estate.

Thank you for the opportunity to comment on the Act, and for your consideration of these comments.