Issues Memorandum

To: **Easement Relocation Act Drafting Committee**

From: **John Lovett, Reporter**

Re: **Issues for March 13-14, 2020 Drafting Committee Meeting**

Date: **Feb. 12, 2020**

The new draft of the act reflects the major structural changes that the committee decided to implement at the conclusion our fall 2019 meeting in Scottsdale. As you may recall, at the end of that meeting the committee decided to abandon the rather complicated two-step notice structure used in prior drafts (a pre-litigation notice followed by a second-stage notice for the actual lawsuit) and the rather complex process that followed with different tracks for consensual and non-consensual relocations. Instead, the committee decided that the servient estate owner should just be required to start a lawsuit and give all interested parties notice. The committee reasoned that, just as in any potential litigation setting, the servient estate owner will have plenty of incentive to contact the interested parties before any litigation begins and try to obtain consent to any proposed easement relocation. With that in mind, I reworked sections 5 through 7 of the act and submitted a new streamlined version to the Style Committee.

The Style Committee saw further ways to streamline the act by making section 5—the statement of the basic procedure—even simpler, by confining the details of notice to section 6, moving the material dealing with retroactivity to a new section 12 on transitions, and moving a few other pieces of the act around.

The other important development concerns how this draft addresses the types of easements excluded from the scope of the act and, in particular, conservation easements. I had lengthy and fruitful conversations with Nancy McLaughlin and King Burnett and gained a clear understanding of their concerns. The current version of the act contains a simplified definition of a conservation easement that Nancy and King support. In addition to the general exclusion in Section 3(a), the act also contains an additional exclusion in Section 3(b)(2) that addresses a major concern of the conservation easement community relating to situations that could arise when a conservation easement burdens another portion of the servient estate upon which an easement relocation is proposed. Their concern about encroachment on a conservation easement would apply to any other easement on the servient estate. As noted below, this version of the act also excludes condemnation easements, something that the Chair and I both feel is a useful clarification of the act and will improve the chances of the act being enacted in the states.

What follows is a short review of what is new in each section and the provisions that, even if not new, we would like you to reflect upon with particular attention in advance of our next meeting in Chicago.

Section 2. Definitions.

- Please note the definition of "condemnation easement" in subsection (2). This is new.
- Please note the slightly revised and simplified definition of "conservation easement" in subsection (3). In relation to this definition, note that there is no separate reference to conservation easement holder because subsection (7) now defines easement holder for all categories of easements, including conservation easements. This approach was suggested by Nancy McLaughlin and the chair and I both like this approach.
- Note that we do not currently have a definition of "lease," even though we do define "lessee of record" in subsection (8). Do you think we need a definition of "lease"? (I also removed reference to "landlord and tenant" in subsection 12 and replaced that phrase with "lessor and lessee" for the sake of consistency throughout the act.) If we do chose to include a definition of lease, we can look to other uniform acts, but some of these will have very specialized definitions that we would have to modify. *See, e.g.*, the Revised Uniform Residential Landlord and Tenant Act § 102(18) (2015) ("'Lease' means a contract, oral or in a record, between a landlord and tenant in which the landlord rents a dwelling unit to the tenancy for a fixed term or a periodic tenancy."). Interestingly, some uniform acts that one might expect to have a definition of lease do not have one. *See, e.g.*, Uniform Assignment of Rents Act § 2 (2005).
- Subsection (11) contains the new and improved definition of "public-utility easement" which gives states various options. But regardless of which option a state chooses, a public-utility easement includes an easement benefitting a utility cooperative. The term "utility cooperative" is now defined expansively in subsection (19).

Section 3. Scope; Exclusions.

- Please note the simplicity of this section now. Subsection (a) says what kinds of easements are included. Subsection (b) says what kinds of easements are excluded.
- Subsection (b)(2) dealing with encroachment of the relocated easement on other easements is very important because we do not want one easement relocation to lead to a cascading series of easement relocations. This subsection is also quite important to the conservation easement community for the reasons stated in comment (6).
- Please note that we also make use of the list of excluded easements from subsection 3(b)(1) in a few other places in the act, for instance in subsection 3(b)(2) and subsection 6(a)(2).

Section 4. Right of Servient Owner to Relocate Easement.

- There have been a number of very modest word order changes suggested by the Style Committee. See subsections (a)(2) and (a)(6).
- Please note that subsection (a)(3) uses the term "affirmative, easement-related purposes" rather than "primary purpose" or just "purpose" as in previous drafts. The chair and I think this is an improvement and more directly and forthrightly gets at what we mean. This is also the term used in many of the comments.
- Note that subsection (b) dealing with the no-waiver rule has been expanded. Subsection (b)(1) and (b)(2) deal with two important situations that were previously addressed in Section 3 on scope even though they were really non-waiver rules. The Style Committee suggested we move those provisions here. I agree that this change is an improvement and this material fits more logically in this section of the act. The only other alternative I can

think of for these two provisions is to put them in their own section called Non-Waiver. But I am happy to keep them here in section 4. Please give this some thought.

Section 5. Civil Action to Relocate Easement.

- This section is now quite simple. Subsection (a) says the servient estate owner must initiate a civil action to relocate an easement.
- Subsection (b) tells the court the three things it must determine or verify before issuing an order to relocate the easement: (1) the servient estate owner gave notice in compliance with Section 6; (2) the easement is eligible for relocation under section 3; and (3) the servient estate owner satisfied the conditions for relocation under Section 4.
- Subsections (c), (d), and (e) state, respectively, that the court must issue an order, the servient estate owner must record the order and an explanatory statement about the newly relocated easement, and that the order must address costs and other matters consistent with a fair and equitable relocation.

Section 6. Notice

- This material was all covered in the most recent previous draft in the section that dealt with the civil action. The Style Committee suggested pulling it out and putting all of this in its own section on notice. I think this makes good sense.
- Subsection (a) declares who are the interested parties that must receive notice.
- Subsection (b) details what goes in the notice document.
- Subsections (c) to (g) address the manner of notice. In these provisions, we continue to follow the same approach that we developed in previous drafts. If there is a relevant document that addresses notice, the servient estate owner must follow the notice procedures set forth in that document. *See* Subsections (c) to (e). In the absence of such a document, subsection (f) governs.
- Subsection (g) is new. It deals with a situation that we overlooked but should have been obvious—an easement that is not the subject of a recorded easement agreement (*e.g.*, an easement created by prescription, necessity, implication or estoppel or even perhaps by condemnation).

Section 7. Costs of Relocation

- This is largely unchanged. The only exception is subsection (8). This provision, which addresses a situation that was raised in drafting committee discussions, had previously been found in another section, but we moved it here because it seemed to fit better.

Section 8. Duty to Cooperate in Good Faith; Duty to Mitigate Disruption.

- This is unchanged.

Section 9. Limited Effect of Relocation

- This section is basically unchanged, with the exception of a minor wording change in subsection (2). See the proviso "except as otherwise determined by a court under law other than this act."
- I have worked hard on the comments for this section to explain the rationale for the rules here, particularly for subsection (2). See especially comment (2).

- Also please note that the chair and I considered adding some language to comment (3) about scriveners error statutes. I looked at one and drafted a comment, but upon further reflection, we realized that the scriveners error situation is really too different from easement relocation and users or readers of the act might think we were minimizing the significance of an easement relocation in terms of unchanged priority.

Section 12. Transitional Provision

- The content here dealing with retroactive application of the act was previously found in Section 4 but has been moved here to its own section at the suggestion of the Style Committee. I agree with this move. This change does not affect the meaning of the act but will perhaps minimize resistance to retroactive application of the act or suggest to states that are uncomfortable with retroactive application that they can amend this last section and leave the rest of the act untouched.