

To: The Conference of the Uniform Law Commission
From: John Lovett, Reporter, Drafting Committee, Easement Relocation Act
Date: May 31, 2019, as revised June 20, 2019
Re: Issues for First Reading – ULC Annual Meeting, Anchorage, Alaska, July 17, 2019

A. Introduction

The purpose of this memorandum is to frame several of the major issues that face the Drafting Committee of the Easement Relocation Act (the act) in advance of the first reading of the act at the 2019 Annual Meeting of the Uniform Law Commission (ULC) on July 17, 2019. The project to draft a uniform act addressing the subject of easement relocation began almost ten years ago, in October 2011, when the author of this memorandum first submitted a report to the ULC Scope and Program Committee on the subject. That report drew on two articles previously published in the *Connecticut Law Review* and the *Edinburgh Law Review*.¹

After meetings in May and June 2012, and after indications of support from both the Real Property, Trust and Estate Section (RPT&E) of the American Bar Association and from the Joint Editorial Board for Uniform Real Property Acts (JEBURPA), the ULC Scope and Program Committee voted to recommend the formation of a drafting committee to prepare a uniform easement relocation act. A Study Committee on the Relocation of Easements, reporting to the Scope and Program Committee, initially recommended that utilities or other entities with the power of eminent domain should be excluded from the act. When the actual drafting committee was constituted in March 2018, the committee was therefore named the “Drafting Committee on Relocation of Non-Utility Easements Act.” However, as the Drafting Committee soon realized that other categories of easements should be excluded from the act (most notably conservation easements), the Drafting Committee requested to change the name of the act to the Easement Relocation Act. That request was recently granted by the Executive Committee of the ULC.

B. The State of the Law

A brief synopsis of developments in U.S. law will help readers understand the purpose of the proposed Easement Relocation Act. Under the traditional common law “mutual consent” rule, neither a servient estate owner nor a dominant estate owner can relocate or modify an easement unless the other party consents to the relocation or modification or such a right has been specifically reserved in the instrument creating the easement.² Although most states followed this

¹ John A. Lovett, *A Bend in the Road, Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1 (2005); John A. Lovett, *A New Way: Servitude Relocation in Scotland and Louisiana*, 9 EDINBURGH L. REV. 352 (2005).

² JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 7.13 (2019 edition).

approach,³ decisions in a handful of states muddled the waters by adopting a “balancing of the equities” approach in limited circumstances, particularly where the extent of the relocation was modest and there was evidence of acquiescence by the dominant estate owner.⁴

In 2000, the Restatement (Third) of Property: Servitudes (hereafter “Restatement”) proposed a new approach to the subject of easement relocation by borrowing from and adapting what had long been the civil law approach to servitude relocation used in Louisiana.⁵

Under section 4.8(3) of the Restatement, a servient estate owner may, under certain circumstances, unilaterally relocate an easement:

Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner’s expense, to permit normal use or development of the servient estate, but only if the changes do not:

³ See, e.g., *Stamatis v. Johnson*, 224 P.2d 201, 202-03 (Ariz. 1950); *Davis v. Bruk*, 411 A.2d 660, 665 (Me. 1980); *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 588 (Wyo. 1999). *But see Wells v. Sanor*, 151 S.W.3d 819, 823 (Ky. Ct. App. 2005) (“Kentucky follows a minority position that in addition to mutual consent also allows the owner of a servient estate to unilaterally modify or alter the location of a roadway easement so long as it does not change the beginning and ending points and does not result in material inconvenience to the rights of the dominant estate.”). See also *Stewart v. Compton*, 549 S.W.2d 832, 833 (Ky. Ct. App. 1977); *Terry v. Boston*, 54 S.W.2d 909, 909-910 (Ky. 1932).

⁴ *Enos v. Casey Mountain, Inc.*, 532 So.2d 703, 706 (Fla. Dist. Ct. App. 1988) (denying injunctive relief and allowing temporary relocation of an implied beach access easement when enforcement of the easement in its original location “would have a severe adverse effect upon the [servient owners’] beneficial enjoyment of their property” and this adverse effect “substantially outweighs the inconvenience to plaintiffs” in being required to walk an additional distance to gain access to the beach and ocean via another route or a substitute easement); *Kline v. Bernardsville Ass’n, Inc.* 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993) (compelling relocation of an easement “to advance the interests of justice where the modification is minor and parties’ essential rights are fully preserved,” but cautioning that relocation should be “an extraordinary remedy and should be grounded in a strong showing of necessity”); *Vossen v. Forrester*, 963 P.2d 157, 161-62 (Or. Ct. App. 1998) (allowing relocation of a beach access easement when the servient owner mistakenly built a house that minimally encroached on the easement, the cost of removing the house would have been substantial, and the easement holders knew of the encroachment at the time construction began); *Southern Star Central Gas Pipeline, Inc. v. Murray*, 190 S.W.3d 423, 430 (Mo. Ct. App. 2006) (denying injunction sought by dominant estate, a pipeline company, several years after it received notice of servient estate owners’ expansion of home and encroachment on easement, and noting that the conveyance granting the easement did not definitely fix the location); *Umprhes v. J.R. Mayer Enters., Inc.*, 889 S.W.2d 86, 90 (Mo. Ct. App. 1994) (denying dominant estate owner’s request for injunction to restore a prescriptive roadway easement to its original position and relegating dominant owner to monetary damages, even though servient owner unilaterally relocated roadway 10-12 feet from its original location; stressing minor injury to dominant estate, original location’s lack of uniqueness, and new roadway’s close fit to description in original deed on which dominant owners based their interest).

⁵ Louisiana has long allowed relocation, at the expense of the owner of the servient estate, of both conventional servitudes and servitudes of passage established by law to provide access to enclosed estates. See LA. CIVIL CODE art. 748 (1977) (“If the original location [of a servitude] has become more burdensome for the owner of the servient estate, or if it prevents him from making useful improvements on his estate, he may provide another equally convenient location for the exercise of the servitude which the owner of the dominate estate is bound to accept.”); LA. CIV. CODE art. 695 (1977) (providing servient owner the right to “demand relocation” of a servitude of passage [*i.e.*, an easement of necessity] to “a more convenient place at his own expense” in situations equivalent to those giving rise of easements of necessity at common law, provided the relocated servitude “affords the same facility to the owner of the enclosed estate”).

- (a) significantly lessen the utility of the easement,
- (b) increase the burdens on the owner of the easement in its use and enjoyment, or
- (c) frustrate the purpose for which the easement was created.⁶

The Restatement proposes a utilitarian solution to the situation that can result when an easement holder (either the owner of a dominant estate or a person entitled to enjoy an easement in gross) rejects a servient estate owner's request to change the location of an easement to facilitate development or enjoyment of the servient estate.

Judicial reactions to the Restatement approach to easement relocation have varied widely. Several state courts, most notably in Colorado, Massachusetts and Nebraska, adopted a strong version of section 4.8(3).⁷ Other state courts adopted the new rule but circumscribed its application in some way, either by limiting its application to undefined easements,⁸ sub-surface easements,⁹ or non-express easements such as easements by necessity,¹⁰ or prescriptive easements.¹¹ Earlier, a handful of courts had also rejected the mutual consent rule in the context of easements created by

⁶ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8(3) (2000).

⁷ See, e.g., *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1237-39 (Colo. 2001) (adopting section 4.8(3) to govern applications for relocation of irrigation ditch easements); *Clinger v. Hartshorn*, 89 P.3d 462, 469 (Colo. Ct. App. 2003) (affirming *Roaring Fork* and holding that trial court did not abuse its discretion in concluding that relocation of prescriptive access easement used for guiding and outfitting purposes was improper due to increased burden it imposed on the dominant tenement); *MPM Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1057-59 (Mass. 2004) (adopting section 4.8(3)); *Carlin v. Cohen*, 895 N.E. 793, 796-799 (Mass. App. Ct. 2008) (applying *MPM Builders* to hold that servient owner was entitled to relocate specifically defined pedestrian beach access easement on Martha's Vineyard); *R & S Investments v. Auto Auctions, Ltd.*, 725 N.W.2d 871, 879-881 (Neb. 2006) (adopting section 4.8(3) to approve the unilateral relocation of a sanitary sewer lagoon easement in light of the fact that the creating instrument did not expressly deny the servient owner the power to relocate *and* despite the fact the new lagoon was further away from the dominant estate than called for in the creating instrument).

⁸ *Lewis v. Young*, 705 N.E.2d 649, 653-54 (N.Y. 1998) (relying on tentative draft of Section 4.8(3) and holding that a servient estate owner may unilaterally relocate an easement that lacks a metes and bounds description or other indication of the easement's location); *Stanga v. Husman*, 694 N.W.2d 716, 718-720 (S.D. 2005) (approving modification of an express ingress and egress easement whose location was not specified in the creating instrument); *St. James Village, Inc. v. Cunningham*, 210 P.3d 190, 193-196 (Nev. 2009) (adopting section 4.8(3), but limiting its scope to situations when the creating instrument does not define the easement through specific reference to its location or dimensions).

⁹ *Roy v. Woodstock Community Trust, Inc.* 94 A.3d 530, 537-40 (Vt. 2014).

¹⁰ *Goodwin v. Johnson*, 591 S.E.2d 34, 37-39 (S.C. Ct. App. 2003) (applying Restatement § 4.8(3) to approve unilateral relocation of easement of necessity). See also *Bode v. Bode*, 494 N.W.2d 301, 302 (Minn. Ct. App. 1992) (relying on equitable principles to hold that where the location of an easement by necessity has not been established by agreement of the parties, trial court has power to establish the location in a place desired by the owner of the servient estate); *Huggins v. Wright*, 774 So.2d 408, 412 (Miss. 2000) (not citing Restatement but holding that servient tenant could be granted the option of relocating easement by necessity for utilities and ingress/egress, at its expense, in part because old, existing roadway in which original easement of necessity was located divided property in half).

¹¹ *McNaughton Properties, LP v. Barr*, 981 A.2d 222, 225-229 (Penn. Sup. Ct. 2009) (rejecting Restatement approach as applied to express easements as a question of first impression and limiting *Soderberg v. Weisel*, 687 A.2d 839, 842 (Pa. Sup. Ct. 1997), which recognized possibility of unilateral relocation of a prescriptive easement if new easement location is as safe as the original, the relocation is a *relatively minor change* and the reasons for relocation are substantial, to prescriptive easements).

implication, that is, easements established by reliance on recorded subdivision plats¹² or based on prior use.¹³

Courts in some states, however, have explicitly rejected the Restatement rule.¹⁴ In other states, courts have resolved easement relocation disputes without explicitly addressing or adopting the Restatement,¹⁵ or easement relocation disputes have simply not resulted in reported decisions since the advent of the new Restatement approach. Accordingly, in these states the common law mutual consent rule presumably still governs. In Illinois, the law is in flux but seems to be moving in the direction of the Restatement approach.¹⁶ Finally, several states other than Louisiana have

¹² *Enos v. Casey Mountain, Inc.*, 532 So.2d 703, 706 (Fla. Dist. Ct. App. 1988).

¹³ *Millison v. Laughlin*, 142 A.2d 810, 813-816 (Md. 1958) (holding that servient estate owner could relocate utility pole easement to reduce danger and annoyance and given that termini would remain unchanged).

¹⁴ *Stowell v. Andrews*, 194 A.3d 953, 964-66 (N.H. 2018); *Alligood v. LaSaracina*, 999 A.2d 836, 839 (Conn. App. Ct. t2010); *AKG Real Estate, LLC v. Kosterman*, 717 N.W.2d 835, 842-847 (Wisc. 2006) (rejecting proposed relocation of right of way easement under, *inter alia*, the unilateral relocation rule found in §4.8(3)); *MacMeekin v. Low Income Housing Institute*, 45 P.3d 570, 578 (Wash. Ct. App. 2002); *Herrin v. Pettergill*, 538 S.E.2d 735, 736 (Ga. 2000). *See also* *Sweezy v. Neal*, 904 A.2d 1050, 1057-58 (Vt. 2006) (rejecting Restatement approach as applied to surface easement but allowing servient estate owner to “bend the easement” around a new addition to his house).

¹⁵ *See, e.g., City of Arkansas City v. Bruton*, 137 P.3d 508, 514 (Kan. Ct. App. 2006) (citing Restatement § 4.8, but observing that “an easement with a fixed location cannot be substantially changed or relocated without the express or implied consent of the owners of both the servient and dominant estate”), *rev’d on other grounds*, 166 P.3d 992 (Kan. 2007); *Rogers v. P-M Hunter’s Ridge*, 967 A.2d 807, 822-826 (Md. 2009) (rejecting proposed relocation based on interpretation of deeds, subsequent agreements and actions of parties and quoting statement of traditional common law majority rule in *Sibbel v. Fitch*, 34 A.2d 773, 774-75 (Md. 1943)); *Gibson v. Paramount Homes, LLC*, 254 P.3d 903, 908-09 (Mont. 2011) (adhering to traditional mutual consent rule and affirming trial court order commanding servient estate owner to rebuild two new right angle turns so that larger vehicles could use road easement safely but allowing other “improvements” and minor modifications to location to remain); *D’Abbracci v. Shaw-Bastian*, 117 P.3d 1032, 1040-1043 (Or. Ct. App. 2004) (servient estate owner’s right to relocate a road is subordinate to terms of the instrument granting the easement; but where road did not occupy the entire easement, servient estate owner may unilaterally relocate road within boundaries of easement if the change does not unreasonably interfere with the dominant estate holder’s use; concluding that safe and stable road was built in new location within easement’s boundaries); *Shooting Point, LLC, v. Wescoat*, 576 S.E.2d 497, 502 (Va. 2003) (upholding *Buxton v. Murch*, 457 S.E.2d 81, 84 (Va. 1995), and observing that generally when a fixed location of a granted easement is established, that location may be changed only with the express or implied consent of the persons interested); *Chapman v. Catron*, 647 S.E.2d 829, 833 (W.V. 2007) (owner of servient estate burdened with access easement created by private dedication required to restore easement to prior location, even though that location was not where roadway was originally platted, so long as any benefitted landowners feel “as though their complete enjoyment of their land had been impeded”). The situation in the District of Columbia is complicated. *See Carrollsburg v. Anderson*, 791 A.2d 54, 61-64 (D.C. 2002) (rejecting proposed relocation of easement allowing condominium owners access to underground garage under traditional common law majority rule because (1) location of access route had been fixed for 30 years and condominium owners did not consent to relocation *and* (2), under § 4.8(3) approach, servient owner failed to demonstrate that requiring use of alternative entrance would not burden easement holders and there was no showing that change was necessary “to permit normal use or development of the servient estate”). *See also* *Washington Metropolitan Area Transit Authority v. Georgetown University*, 347 F.3d 941, 946-47 (D.C. Cir. 2003) (applying *Carrollsburg*, pointing out that *Carrollsburg* relies on the common-law majority mutual consent rule, and rejecting dominant estate’s proposal to widen already existing easement).

¹⁶ *See McGoey v. Brace*, 918 N.E.2d 559, 563-567, 569 (Ill. Ct. App. 2009) (holding that the approach of section 4.8(3) comports with prior Illinois precedent allowing either the dominant or servient estate owner to make changes to an easement as long as the changes are not “substantial” and indicating that when evaluating the “substantiality” of a proposed relocation, courts should examine the burden and harm to the dominant estate owner resulting from the relocation in light of the policy factors set forth in the Restatement); *527 S. Clinton, LLC, v. Westloop Equities, LLC.*, 932 N.E.2d 1127, 1138 (Ill. Ct. App. 2010) (citing *McGoey* and the Restatement and holding that a servient estate owner may modify or relocate an easement “so long as the changes would not cause substantial harm to the dominant

enacted statutes that allow for unilateral easement relocation in specific situations, particularly for irrigation easements,¹⁷ or ingress and egress easements.¹⁸

It is not the purpose of this memorandum to address the policy debate among academic property lawyers and courts on the merits of the Restatement approach.¹⁹ The Drafting Committee has attempted to create a uniform act that broadly embraces the utilitarian approach to easement relocation proposed by the Restatement. At the same time, the Drafting Committee has sought to prepare a draft uniform act that clarifies the scope of easements eligible for relocation, gives courts guidance in resolving disputes about when an eligible easement should be relocated, provides for adequate notice of potential relocation to easement holders and other interested parties, establishes sound procedural safeguards, details the costs chargeable to the servient estate owner in the event of a successful easement relocation, and addresses other ancillary issues such as the effect of an easement relocation on mortgage holders. This memorandum thus focuses on the technical drafting issues that have faced the Drafting Committee.

C. Drafting Issues

After working for more than a year, the Drafting Committee has now completed a draft Easement Relocation Act that contains 14 sections, including Section 1, establishing the title of the act, and nine substantive sections (Sections 2-10). This portion of the memorandum draws attention to the primary drafting questions facing the committee at this time regarding those sections.

estate”); 527 S. Clinton, LLC. v. Westloop Equities, LLC., 7 N.E.3d 756, 768 (Ill. Ct. App. 2014) (citing and discussing the “substantiality of the change” analysis stated in *McGoey* approvingly).

¹⁷ IDAHO CODE § 18-4308 (Michie Supp. 2010) (allowing owner of a servient estate burdened by an irrigation ditch easement to relocate ditch at its own expense if relocation is achieved without impeding water flow or injuring any water user); IDAHO CODE § 42-1207 (Michie Supp. 2010) (same); N.M. STAT. § 73-2-5 (allowing for relocation of irrigation ditches “so long as such alteration or change of location does not interfere with the use or access to such ditch by the owner of the dominant estate”).

¹⁸ IDAHO CODE § 55-313 (Michie Supp. 2010) (“Where, for motor vehicle travel, any access which is less than a public dedication, has heretofore been or may hereafter be, constructed across private lands, the person or persons owning or controlling the private lands shall have the right at their own expense to change such access to any other part of the private lands, but such change must be made in such a manner as not to obstruct motor vehicle travel or to otherwise injure any person or persons using or interested in such access.”); VA. CODE § 55-50 (LexisNexis 2007) (authorizing relocating of an easement of “ingress and egress” that has been “in existence for not less than ten years” as long as the servient owner provides notice to all parties in interest, obtains court approval, and the relocation will not cause “economic damage to the parties in interest” or “undue hardship”).

¹⁹ Compare JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7.17 (2019 edition) (criticizing Restatement approach); John V. Orth, *Relocating Easements, A Response to Professor French*, 38 REAL PROP. PROB. & TR. J. 643 (2004) (same), with John A. Lovett, *A Bend in the Road, Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1 (2005) (supporting Restatement approach but offering suggestions for improvement); Susan French, *Relocating Easements: Restatement (Third) Servitudes § 4.8(3)*, 38 REAL PROP. PROB. & TR. J. 1 (2003) (explaining rationales for Restatement approach).

Section 1. Short Title.

This section reflects the new, updated title of the act. Because other kinds of easements, besides public utility easements, are now excluded from the scope of the act in section 3, the Drafting Committee decided that the act should have a broader title and the specific exclusions should be detailed in Section 3.

Section 2. Definitions

The Drafting Committee has focussed extensively on the general definitions used in the act and seeks to make the general definitions as inclusive as possible. Many of the key terms, including the definition of an easement and of a dominant estate and servient estate, are based on definitions used in the Restatement. For terms that are more incidental to the act, particularly terms such as “real property,” “security instrument,” “security-interest holder,” “title evidence” and “unit,” the Drafting Committee has drawn upon definitions used and approved in other ULC acts, such as the Uniform Non-Judicial Foreclosure Act (2002) and the Uniform Common Interest Ownership Act (2008).

Section 3. Scope, Applicability, and Exclusion

Several major issues confronted the Drafting Committee when it turned to questions of scope, applicability and exclusions addressed in Section 3 of the act. First, the Drafting Committee made the strategic decision to create specific definitions in this section for the three categories of easements that are currently excluded from the act: (1) conservation easements, (2) public utility easements, and (3) negative easements. *See* Section 3(a). The committee welcomes feedback on these crucial definitions.

The Drafting Committee acknowledges the valuable feedback it received from official observers appointed to the Drafting Committee by the Land Trust Alliance. The default definitions of “conservation easement,” “conservation organization;” and “conservation purposes” all track the Uniform Conservation Easement Act (1981, amended 1987). However, at the urging of the Land Trust Alliance, the Drafting Committee chose to allow states to adopt their own definitions of these terms if a state has adopted newer, broader, or, for that matter, more narrowly tailored, definitions of these terms. *See* Section 3(a)(1)-(3). The Drafting Committee firmly intends that conservation easements will not be subject to relocation under the act. *See* Section 3(c)(2).

The Drafting Committee approached the definition of public utility easement in a similar fashion by giving states the option of choosing a simple but broadly stated definition or supplying a definition based on existing law in the state. *See* Section 3(a)(5). Again, the Drafting Committee clearly intends that public utility easements will not be subject to relocation under the act. *See* Section 3(c)(1). Although a purely private utility easement could be subject to relocation, the owner of the servient estate would need to prove that the easement meets all of substantive criteria for relocation under Section 4.

The Drafting Committee considered whether railroad easements should be expressly excluded from the act but decided that it was not necessary to create a specific exclusion. The

Drafting Committee concluded that the substantive criteria for relocation found in Section 4 and the requirement of paying for all costs of relocation detailed in Section 7 would likely discourage most servient-estate owners from seeking relocation of a railroad easement. However, in the unlikely event that the owner of a servient estate does seek to relocate a railroad easement, the Drafting Committee believes the act would provide sufficient protection for the easement holder. The Drafting Committee welcomes feedback on whether there might be other specific categories of easements that should also be excluded from the scope of the act.

Section 3(b) clarifies the nature of the easements that fall *within* the scope of the act. This section first specifies that the act applies to non-exempt affirmative easements, regardless of whether they are created by express grant or reservation, or by prescription, implication, necessity or estoppel. *See* Section 3(b)(1).

Section 3(b) also declares that the act applies not only to easements created *after* the effective date of the act but also to easements created *before or on* the effective date of the act. *See* Section 3(b)(2). Following the recommendation of the Study Committee on Relocation of Easements, and with the concurrence of the ABA's advisor to the Drafting Committee, the Drafting Committee resolved that the act should have both *prospective and retroactive* effect because if the act were given prospective effect only it would not address the problem of old, or even ancient, easements, whose current location prevents reasonable development of servient estates. The Drafting Committee welcomes feedback on the question of whether this crucial feature of the act should be included in Section 3, as it now stands, or should be inserted in a separate, stand-alone transitional section towards the end of the act.

The Drafting Committee chose to include negative easements in the list of specifically excluded easements found in Section 3(c) because it seeks to clarify that other kinds of negative easements (also known as restrictive covenants), besides conservation easements, will not be subject to relocation under the act. This drafting decision reflects the Drafting Committee's policy conclusion that only affirmative easements will be subject to relocation under the act.

Section 4. Right of Owner of Servient Estate to Relocate Easement

Section 4 is the heart of the act. It provides the general test that a court will employ to determine whether an owner of a servient estate can relocate an easement in the face of an objection to relocation by an easement holder (or a security-interest holder). To obtain judicial approval of a request to relocate an easement, the owner of the servient estate must satisfy the court that all six of the criteria articulated in Section 4(a) have been satisfied.

The Drafting Committee chose to expand upon and refine the three-part test found in Section 4.8(3) of Restatement. Sections 4(a)(1) and (2) of this act directly mirror the Restatement and, in particular, subsections (a) and (c) of Section 4.8(3) of the Restatement. Section 4(a)(3) of this act, addressing safety of the easement holder or others entitled to use the easement, builds upon a common theme in the case law addressing servitude relocation. Section 4(a)(4) of this act, addressing impairment of the interest of a security-interest holder entitled to notice, is an innovation. It provides a court the opportunity to address whether a security-interest holder's interest in collateral is actually affected by a proposed relocation. Likewise, Section 4(a)(5) is an

innovation. It focuses a court's attention on whether, and the degree to which, an easement holder's enjoyment of the easement is disrupted during the process of relocation. This section gives a court the chance to consider the temporary impact of relocation and also gives the owner of the servient estate an opportunity to demonstrate that it can mitigate any temporary disruption to enjoyment of the easement during the process of relocation. Section 4(a)(6) of this act builds upon Section 4.8(3)(b) of the Restatement but refines the inquiry by focussing the court's attention on whether the proposed relocation will increase the burden on the easement holder's use and enjoyment of the easement "after the relocation is completed." The Drafting Committee welcomes comments about these important provisions.

The Drafting Committee also wishes to draw attention to Section 4(b) of the act which contains the rule that the right to relocate an easement under this act may not be restricted or excluded by agreement; *i.e.*, that the right to relocate cannot be waived in future easement agreements. The Drafting Committee carefully considered this subject and concluded that if the act allowed parties to opt-out by waiver, many, if not most, future easement agreements would include waiver clauses and the act would therefore have little practical impact.

Finally, the Drafting Committee wishes to highlight that the owner of the servient estate does not need to make a threshold showing of "strong necessity" to justify a request for relocation. Indeed, the owner of the servient estate is entitled to seek relocation "to permit use, enjoyment, or development of the servient estate" under Section 4(a) of the act. After considerable deliberation, the Drafting Committee concluded that the focus of the judicial inquiry in a contested easement relocation dispute should be on whether the relocation will harm the easement holder. If a court concludes that the proposed relocation does not harm the easement holder, the owner of the servient estate should be entitled to relocate the easement. The Drafting Committee reasoned that, given the now quite considerable notice requirements, procedural requirements, and costs chargeable to the owner of the servient estate under Sections 5, 6, and 7 of the act, a servient owner will not seek to relocate an easement unless the proposed relocation will likely lead to significantly more enjoyment or increased value for the servient estate.

Section 5. Notice of Intent to Relocate Easement

Early in its deliberations, the Drafting Committee decided that easement holders should be entitled to advance notice of a servient estate owner's intention to seek relocation of an easement. *See* Section 5(a). The Drafting Committee soon decided that persons holding security interests in the servient estate or dominant estate should also receive notice of the servient estate owner's intention to seek relocation. *See* Section 5(b). The Drafting Committee welcomes comments on whether there are other interested parties, such as leaseholders of record, who should also receive notice.

The Drafting Committee chose to provide two alternatives for the methods of notice in this section. Alternative A utilizes methods of notice employed under other uniform acts such as the Uniform Home Foreclosures Procedures Act §§ 202, 204 (2015) and the Uniform Partition of Heirs Property Act § 4 (2010). Alternative B allows states to require methods of service of process utilized for a declaratory judgment action in the state.

Section 6. Procedure for Non-Consensual Relocation

Section 6 details the procedure to be used for a non-consensual easement relocation. The Drafting Committee chose to use a sixty (60) day notice period in Section 6(a)(2) and (c) as the time within which an easement holder or security-interest holder can indicate whether it consents or objects to a request for an easement relocation. The Drafting Committee welcomes comments on whether this is an appropriate notice period.

The Drafting Committee opted to require a court to make a threshold finding that an easement is eligible for relocation in cases in which the easement holder's identity is unknown or not reasonably ascertainable or when the easement holder fails to respond to a notice of an intention to relocate within the sixty (60) day notice period. *See* Section 6(b). The Drafting Committee's primary goal here is make sure that, even when there may be a failure to achieve actual notice of an intent to relocate, a court will determine that the easement at issue is actually eligible for relocation and does not fall into one of the excluded categories, such as a conservation easement or public utility easement.

The Drafting Committee decided that in the case of a non-consensual easement relocation, the owner of the servient estate should be required to record or register a document providing the details of the relocation so that the new easement relocation will be a matter of record in the relevant land records of the state. *See* Section 3(d). Finally, the last subsection gives a court broad equitable powers to make other orders not inconsistent with this act. *See* Section 3(e). The Drafting Committee included this provision primarily so that courts could address issues raised by security-interest holders if necessary. *See* Section 10 and the comments to that section.

Section 7. Costs and Expenses of Relocation Chargeable to Owner of Servient Estate

In this section, the Drafting Committee follows the lead of the Restatement in requiring the cost of relocating an easement to be borne by the owner of the servient estate but specifies costs potentially chargeable to the owner of the servient estate. The Drafting Committee specifically draws attention to Section 7(1), which requires the owner of the servient estate to pay for "constructing all works or improvements necessary for the use and preservation of the easement in its new location, repairing any physical damage to the dominant estate caused by the relocation, and relocating improvements on the dominant estate affected by the relocation." This section is one of the provisions of the act that demonstrates a guiding principle behind permitting the relocation of an easement without the consent of the easement holder; namely, that there is no reason why the relocation should not take place as long as the relocation does not result in any harm to the easement holder.

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

The duty imposed on the owner of the servient estate and easement holder to act in good faith throughout the easement relocation process and the duty of the owner of the servient estate owner to mitigate disruption found in Section 8 are largely self-explanatory. Nevertheless, the Drafting Committee welcomes comments on these duties.

Section 9. Relocation of Easement by Consent

The Drafting Committee decided that the act should affirmatively state that the owner of the servient estate and the easement holder may agree to relocate an easement by mutual consent without regard to any provisions of the act or may agree that a proposed relocation will take place but that certain provisions of the act will still be followed. Although these propositions may have been implied in any event, Sections 9(a) and (b) makes them explicit.

Section 9(c) reflects the Drafting Committee's decision that even in the event of a consensual easement relocation, the owner of the servient estate and easement holder should be required to execute and record a document reflecting the new location of the easement. The Drafting Committee seeks feedback as to whether this execution and recordation step specified in Section 9(c) should be required for consensual relocations or merely be optional.

Finally, the Drafting Committee seeks guidance as to whether comment 2 to this section, stating that parties may not exclude or restrict application of the act to a new location agreed to pursuant to Section 9(a) or (b), should be included as a substantive section of the act. The Drafting Committee concluded such a statement need not be included in the act itself because the basic relocation right provision in Section 4 of the act, which prohibits the exclusion from or restriction of the act by agreement, encompasses comment 2.

Section 10. Characterization of Relocation of Easement

This section addresses the potential (but probably unlikely) situation that could arise if a security instrument affecting the servient or dominant estate characterizes an easement relocation as an event triggering a default or due-on-sale clause. If an easement relocation occurs within the parameters of the act, the relocation of the easement will not negatively affect a security-interest holder's collateral (assuming the collateral is the dominant estate) because the newly relocated easement cannot lessen the utility of the easement, frustrate the purpose for which the easement was created, or increase the long-term burden on the easement holder in its reasonable use and enjoyment of the easement. *See* Section 4(a). Furthermore, when the collateral of the security-interest holder is the servient estate, presumably a relocation will increase the value of that collateral. In any event, Section 10 clarifies that, in the normal case, an easement relocation cannot be characterized as an event triggering a default or a due-on-sale clause. *See* Section 9, cmt. 1.