D R A F T

FOR DISCUSSION ONLY

EASEMENT RELOCATION ACT

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May 31, 2019

EASEMENT RELOCATION ACT

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SECTION 1. SHORT TITLE. This [act] may be cited as the Easement Relocation Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Dominant estate" means an estate or interest in real property that is benefitted by an easement.

(2) "Easement" means a nonpossessory right to enter and use real property owned by or in the possession of another and which obligates the owner or possessor not to interfere with the entry or use permitted by the instrument creating the easement or, in the case of a non-express easement, the entry or use authorized by law. The term includes:

(A) an irrevocable license to enter and use real property owned by or in the possession of another;

(B) an appurtenant easement that provides a right to enter and use a servient estate which is tied to or dependent on ownership or occupancy of a particular unit or parcel of real property; and

(C) an easement in gross that provides a right to enter and use a servient estate which is neither tied to nor dependent on ownership or occupancy of a particular unit or parcel of real property.

(3) "Easement holder" means:

(A) in the case of an appurtenant easement, the owner of the dominant estate; or

(B) in the case of an easement in gross or an irrevocable license, a person entitled to enjoy the benefit of the easement.

(4) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(5) “Real property” means an estate or interest in, over, or under land, including minerals, structures, fixtures, and other things that by custom, usage, or law pass with a conveyance of land whether or not described or mentioned in the contract of sale or instrument of conveyance. The term includes the interest of a landlord or tenant and, unless the interest is personal property under the law of the state in which the property is located, an interest in a common-interest community.

(6) “Record”, used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(7) “Security instrument” means a mortgage, deed of trust, security deed, contract for deed, lease, or other document that creates or provides for an interest in real property to secure payment or performance of an obligation, whether by acquisition or retention of a lien, a lessor’s interest under a lease, or title to the real property. A document is a security instrument even if it also creates or provides for a security interest in personal property. The term includes a modification or amendment of a security instrument and a document creating a lien on real property to secure an obligation owed by an owner of the real property to an association in a common-interest community or under covenants running with the real property.

(8) “Security-interest holder” means a person that holds an interest in real property established by a security instrument and whose interest is recorded in the applicable public records of the jurisdiction where the servient estate and dominant estate are located.

(9) “Servient estate” means an estate or interest in real property that is burdened by an easement.

(10) “Title evidence” means a title insurance policy, a preliminary title report or binder, a title insurance commitment, an attorney’s opinion of title based on examination of the public

records or an abstract, or any other means of reporting the state of title to real property which is customary in the locality.

(11) "Unit" means a physical portion of a common-interest community designated for separate ownership or occupancy, the boundaries of which are described in a declaration establishing a common-interest community.

Comment

1. The foundational definition of "easement" in Section 2(2) is based on the Restatement (Third) of Property: Servitudes § 1.2(1) (2000) (hereinafter "Restatement"). The definitions of "appurtenant easement" and "easement in gross" that are embedded in Section 2(2) are based on Restatement § 1.5(1)-(2). The definitions of "dominant estate" and "servient estate" used in Sections 2(1) and (9) are derived from Restatement § 1.1(1)(b)-(c).

2. The term "real property" is used in Section 2(2), instead of the term "land," as found throughout the Restatement, because an easement will sometimes benefit or burden real property interests other than ownership of land – for example, condominium units or parts of buildings owned by condominium associations. The definition of "real property" used in Section 2(5) is taken from the Uniform Nonjudicial Foreclosure Act § 102(13) (2002).

3. The definition of "easement holder" in Section 2(3) is derived from Restatement § 1.5 and includes, in the case of an appurtenant easement, the owner of the dominant estate, and, in the case of an easement in gross, the person entitled to entry and use.

4. The definition of "person" in Section 2(4) follows the standard definition of person used by the Uniform Law Commission and thus includes not only individuals and private entities but also governmental entities, as they can be holders of both conventional affirmative easements and conservation easements.

5. The definition of a "security instrument" in Section 2(7) is based on the Uniform Nonjudicial Foreclosure Act § 102(19) (2002). The definition of a "security-interest holder" used in Section 2(8) is derived from the Uniform Nonjudicial Foreclosure Act § 102(10) (2002).

6. The definition of "title evidence" in Section 2(10) is taken verbatim from the Uniform Nonjudicial Foreclosure Act § 102(22) (2002).

7. The definition of "unit" in Section 2(11) is based on the Uniform Common Interest Ownership Act (UCIOA) § 103(35) (2008). *See also* UCIOA § 2-105(a)(5) (specifying the contents of a declaration in the context of a condominium or planned community). The term "common-interest community" is defined in UCIOA § 103(9) (2008) as "real estate described in a declaration with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or

improvement of, or services or other expenses related to, common elements, other units, or other real estate described in the declaration."

SECTION 3. SCOPE, APPLICABILITY, AND EXCLUSIONS

(a) In this section:

(1) "Conservation easement" [has the meaning provided in [cite to applicable law of this state]] [means an easement that is created for conservation purposes and whose holder is a conservation organization].

(2) "Conservation organization" [has the meaning provided in [cite to applicable law of this state]] [means a charitable organization, entity, corporation, or trust or government entity, jurisdiction, or agency organized for or whose powers or purposes include conservation purposes].

(3) "Conservation purposes" [has the meaning provided in [cite to applicable law of this state]] [means:

(A) retaining or protecting the natural, scenic, or open-space values of real property;

(B) assuring the availability of real property for agricultural, forest, recreational, or open-space use;

(C) protecting natural resources;

(D) maintaining or enhancing air or water quality; or

(E) preserving the historical, architectural, archeological, or cultural aspects of real property].

(4) "Negative easement" means a nonpossessory property interest whose primary purpose is to impose on the owner of a servient estate a duty not to engage in specified uses of the estate.

(5) "Public-utility easement" [has the meaning provided in [cite to applicable law of this state]] [means an easement in gross in which the easement holder is a publicly regulated utility as that term is defined in [the laws of this state]].

(b) Except as otherwise provided in subsection (c), this [act] applies to an easement:

(1) established by express grant or reservation or by prescription, implication, necessity, or estoppel;

(2) created before, on, or after [the effective date of this [act]];

(3) eligible under Section 4 for relocation even if:

(A) the instrument creating the easement contains language requiring consent of the parties to amend the terms of the easement; or

(B) the location of the easement is fixed by the instrument creating the easement, another agreement, previous conduct, or acquiescence.

(c) This [act] does not apply to a:

(1) public-utility easement;

(2) conservation easement; or

(3) negative easement.

Legislative Note: *Subsection (a)(1),(2),(3), and (5) provide a state legislature the option of using definitions for these terms already used in statutes in the state or to use the default language provided in this act. The default definitions of conservation easement, conservation purposes and conservation organization are based on the Uniform Conservation Easement Act § 1 (1981, amended 1987). The default definition of negative easement is based on the Restatement (Third) of Property: Servitudes §§ 1.2, 1.3 (2000). For details see the comment below.*

Comment

1. Section 3 specifies the categories of easements *eligible* and *ineligible* for relocation under Section 4 of the act. The only kind of easement *eligible* for relocation is an affirmative easement other than a public utility easement or a conservation easement. Public utility easements, conservation easements and negative easements are specifically excluded under Section 3(c) and are thus *ineligible* for relocation under Section 4.

2. Section 3(a) provides definitions of relevant terms used in this section only. The bracketed language found in Sections 3(a)(1)-(3) gives a state the option of using its own definitions of a conservation easement, conservation organization or conservation purposes rather than the default definitions supplied by the act. Section 3(a)(5) provides a similar choice for a definition of a public utility easement.

The default definitions of "conservation easement," "conservation organization," and "conservation purposes" in Sections 3(a)(1-(3) generally mirror the Uniform Conservation Easement Act (UCEA) § 1 (1981, amended 1987), with minor modifications. In particular, the core definition of "conservation purposes" is taken almost word for word from the list of conservation purposes used in UCEA § 1(1). The phrase "assuring the availability of real property for," used in Section 3(a)(3)(B) of this act, has been slightly modified from both UCEA § 1(1), which states "assuring its availability for" various uses, and Restatement § 1.6, which similarly states "assuring the availability of land for" various uses. The touchstone of a conservation easement remains constant. It is an easement that primarily imposes limitations, and occasionally related affirmative obligations, on the burdened estate to serve an actual conservation purpose.

The term "negative easement" is generally synonymous with the term "restrictive covenant." Restatement § 1.3 cmt (c). For a discussion of the historical evolution of negative easements and restrictive covenants at common law, see Restatement § 1.2, cmt (h). Section 1.3(3) of the Restatement defines a "restrictive covenant" as a "negative covenant that limits permissible uses of land" and explains that a "'negative easement' is a restrictive covenant." Restatement § 1.3(3). As the Restatement comments further explain, "[t]he most common uses of negative easements in modern law have been to create conservation easements and easements for view." Restatement § 1.2, cmt (h). *See also* La. Civ. Code art. 706 (defining "[n]egative servitudes" as "those that impose on the owner of the servient estate the duty to abstain from doing something on his estate"); JOSEPH WILLIAM SINGER, PROPERTY 179 (4th ed. 2014) ("A right to do something on someone else's land is an affirmative easement. A right to prevent others from doing something on their own land is either a negative easement or restrictive covenant.").

3. Section 3(b)(1) underscores that all affirmative easements, other than the excluded categories, whether created by express grant or reservation or by prescription, implication, necessity, or estoppel, are eligible for relocation under Section 4 of the act.

4. Section 3(b)(2) clarifies that the act will have retroactive effect and thus will apply to all easements created prior to the effective date of the act as well as easements created on or after the effective date of the act. As an owner of a servient estate can only obtain judicial approval for a proposed relocation in the face of an easement holder objection by satisfying the criteria set out in Section 4, an owner of a servient estate must demonstrate that the relocated easement will continue to deliver to the easement holder the same affirmative, *easement-related* benefits that flowed to the easement holder at the easement's original location.

As the easement holder will not be deprived of any of the functional benefits of the easement upon relocation, the easement holder will suffer no loss, regardless of whether the act

applies to an easement created before, on, or after the effective date of the easement. Consequently, an easement holder will not suffer an uncompensated taking of a property interest upon a relocation undertaken pursuant to the act. *See Statewide Construction, Inc. v. Pietri*, 247 P.3d 650, 656-57 (Idaho 2011) (holding that application of an Idaho statute, I.C. § 55-313, giving servient estate owners the right to relocate a motor vehicle access easement on terms similar to those found in Restatement § 4.8(3), was not an unconstitutional taking of private property without just compensation under either the Fifth Amendment to the U.S. Constitution or the Idaho Constitution because the statute expressly requires that the change must be made in a way "as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access" and because any relocation authorized by the statue will "provide the dominant estate holders with the same beneficial interest they were entitled to under the easement by its original location"); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that an "easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose"). *See also* Susan French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 REAL PROP. PROB. & TR. J. 1, 5 and 9 (2003) (responding to critique that the Restatement approach to easement relocation could lead to windfall gains for owners of servient estates by observing that (i) in most easement negotiations parties give little, if any, attention to the future location of an easement or relocation rights, (ii) if requirements imposed by section 4.8(3) are satisfied, the relocated easement increases overall utility without decreasing the easement's utility to the easement holder, and (iii) if the easement holder has some non-access related interests in mind at the time of creation, those interests can be served by restrictive covenants).

5. Section 3(b)(3)(A) clarifies that even when an easement contains a general clause requiring mutual consent to amend an easement, the easement will be eligible for relocation under Section 4.

6. Section 3(b)(3)(B) specifies that even when an easement has been localized by a metes and bounds description in the instrument that creates the easement, by another agreement, by previous conduct of the parties, or by acquiescence, estoppel or implication, the easement remains subject to relocation under Section 4. Accordingly, Section 3(b)(3)(B) specifically rejects the narrow approach to easement relocation adopted by the New York Court of Appeal in *Lewis v. Young*, 705 N.E.2d 649 (N.Y. 1998), which limits application of section 4.8(3) of the Restatement to an undefined easement, *i.e.*, one that lacks a metes and bounds description or other indication of the easement's original location.

SECTION 4. RIGHT OF OWNER OF SERVIENT ESTATE TO RELOCATE EASEMENT.

(a) The owner of a servient estate may relocate an easement to another location on the servient estate to permit use, enjoyment, or development of the servient estate only if the relocation does not materially:

(1) lessen the utility of the easement;

(2) frustrate the purpose for which the easement was created;

(3) impair the safety of the easement holder or others entitled to use the easement;

(4) impair a real-property interest of a security-interest holder entitled to notice under Section 5 which objects to the relocation;

(5) disrupt, during the process of relocation, the enjoyment of the easement by the easement holder or others entitled to use the easement unless the disruption will be substantially mitigated; or

(6) increase, after the relocation is completed, the burden on the easement holder in its reasonable use and enjoyment of the easement.

(b) The right under subsection (a) to relocate an easement may not be excluded or restricted by agreement.

Comment

1. Section 4(a) sets forth the general rule for relocation of an easement under the act. It builds upon Restatement § 4.8(3) but creates a more rigorous set of criteria for relocation. This section seeks to permit development or improvement of the servient estate as long as the objectives set forth in the section can be accomplished without interfering with or harming the *affirmative, easement-related* interests of the easement holder. Restatement § 4.8(3), cmt (f), at 563. As the Supreme Judicial Court of Massachusetts explains, this rule "maximizes the over-all property utility by increasing the value of the servient estate without diminishing the value of the dominant estate" and provides the additional benefit of minimizing "the cost associated with an easement by reducing the risk that the easement will prevent future beneficial development of the servient estate." *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1057 (Mass. 2004). The Restatement rule thus, according to the Supreme Judicial Court of Massachusetts, "encourages the use of easements." *Id*. *See also Roaring Fork Club L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1236 (Colo. 2001) (emphasizing that the Restatement rule "maximizes the overall utility of the land" because the "burdened estate profits from an increase in value while the benefitted estate suffers no decrease") (citing to Restatement § 4.8(3), cmt (f), at 563).

2. As Sections 5 and 6 of of the act specify, a servient estate owner seeking to relocate an easement must comply with detailed notice and procedural requirements. In addition, subject to Section 7 of this act, all expenses of the relocation must be paid for by the owner of the servient estate. In this latter respect, the act is consistent with both Restatement § 4.8(3) and La. Civ.

Code art. 748.

3. The introductory portion of Section 4(a) indicates that the right to relocate an easement belongs *only* to the owner of a servient estate. The act, therefore, does not change the well-established common law rule that *an easement holder may not* unilaterally relocate an easement without the consent of the owner of the servient estater unless that right has been specifically reserved or granted in the creating instrument. *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1057 (Mass. 2004) (citing additional authority for rule that easement holder may not unilaterally relocate an easement); Restatement § 4.8(3), cmt (f), at 563. *But see McGoey v. Brace*, 918 N.E.2d 559, 563-567 (Ill. App. Ct. 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").

4. The introductory portion of Section 4(a) also makes clear that the relocation of an easement under this act will be to another location on the *same servient estate*, not to another estate, even if that other estate happens to be owned by the same person that owns the servient estate on which the easement is currently located.

5. Finally, the introductory portion of Section 4(a) clarifies that "a strong showing of necessity" is not a condition to relocate an easement. *Cf. Kline v. Bernardsville Ass'n Inc.*, 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993). Much like Restatement § 4.8(3), Section 4 states that an owner of a servient estate can seek relocation "to permit use or development of the servient estate," although it does not use the adjective "normal," as found in the Restatement.

6. Specific factors that courts have considered in determining whether to allow an easement relocation under the Restatement include the nature of the proposed new route for the easement in terms of its route, gradient, and width. *See,* e.g., *Carlin v. Cohen*, 895 N.E.2d 793, 798-99 (Mass. App. Ct. 2008) (affirming trial court ruling that the owner of a servient estate was entitled to relocate a pedestrian beach access easement because entry point of relocated easement was not more difficult to reach than under original easement, and, even though the owner of the dominant estate would have to walk over a knoll, there was no evidence original easement path was more level); *Belstler v. Sheller*, 264 P.3d 926, 933 (Idaho 2011) (affirming trial court refusal to approve relocation of express ingress and egress easement under Idaho Code § 55-313 because relocation would have rendered road grades on easement substantially steeper than in original location and would have created hazard for owners of dominant estate in using easement); *Welch v. Planning and Zoning Comm'n of E. Baton Rouge Par.*, 220 So. 3d 60, 65-68 (La. Ct. App. 2017) (holding that developer of new subdivision was not justified in unilaterally relocating a servitude under Article 748 of the Louisiana Civil Code because new rights-of-way provided over public roads were only 20 feet wide and thus diminished utility of servitude which provided for 30 foot wide right-of-way benefiting three enclosed lots).

7. Sections 4(a)(1),(2) and (6) require courts to consider whether a proposed new location of an easement will provide the same general utility to the easement holder without causing any material harm to the easement holder in connection with the express purpose of the easement. As section 4(a)(2) indicates by directing a court's attention to the "purpose for which the easement was created," a servient estate owner should be entitled to relocation as long as the

relocation does not materially impinge upon the *affirmative*, *easement-related benefits* of an easement, rather than any ancillary or incidental advantages that an easement holder might claim in connection with the easement such as preventing the servient estate owner from developing the servient estate. *Compare Manning v. Campbell*, 268 P.3d 1184, 1187-88 (Idaho 2012) (holding that servient owner was not entitled to relocate a driveway access easement under Idaho Code § 55-313 because the relocated easement would not have connected to any existing route for vehicular travel and would have required owners of the dominant estate to construct a new driveway on their property across their front lawn, and, thus, would injure the owners of the dominant estate and their property), and *City of Boulder v. Farm and Irrigation Co.*, 214 P.3d 563, 567-69 (Colo. App. 2009) (refusing to allow alteration of ditch irrigation easement under *Roaring Fork Club* so that city could build trail extension because alteration would materially and adversely affect the maintenance rights that irrigation company enjoyed by way of easement from state department of transportation), *with M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that an "easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose"). If an owner of a dominant estate actually wants to obtain a property interest in a servient estate that prevents development of that estate in some manner, the owner of the dominant estate can always negotiate for and acquire a restrictive covenant or negative easement.

8. Section 4(a)(3) refers to the safety of the easement holder or others entitled to use the easement. Courts have considered the safety of individuals using the easement and public health and safety more generally, including the potential for the improved effectiveness of an easement. *See R & S Inv's v. Auto Auctions Ltd.*, 725 N.W.2d 871, 876-78, 881 (Neb. Ct. App. 2006) (holding that servient owner could relocate an easement for a sanitary sewer lagoon, even though the new lagoon was located 500 feet farther away from dominant estate than the old one, because the servient owner constructed the new lagoon with greater wastewater capacity and all necessary piping and connections and alleviated serious environmental concerns related to age of old lagoon).

9. Section 4(a)(4) addresses the property interests of persons entitled to notice under Section 5 other than an easement holder, namely security interest holders having an interest in either the servient or dominant estate. This section provides that if such persons have objected to the relocation, *and if their actual real property interests are impaired*, then a relocation may not proceed.

10. Section (4)(a)(5) imposes an additional consideration, not found under Restatement § 4.8(3), by requiring courts to consider whether the process of relocating the easement will disrupt the easement holder's use and enjoyment of the easement *during the process of relocation* and the extent to which the owner of a servient estate can mitigate this disruption during the process of relocation. This subsection could thus lead a court to require an owner of a servient estate to complete construction of a new access road or driveway along the route of the relocated easement before diverting traffic away from the original easement location.

11. Section 4(b) provides, importantly, that the core relocation right established by the act is *not* subject to waiver by contracting parties. In other words, an owner of a servient estate

and an easement holder of an easement otherwise eligible for relocation under Section 4 cannot agree *ex ante* to exclude or restrict application of the act.

12. Parties can always agree, however, as Section 9(a) of the act specifically permits, to an easement relocation by mutual consent without regard to any provisions of the act. Parties can also agree, pursuant to Section 9(b), to take advantage of the process for compensating the easement holder and otherwise protecting the easement holder's rights in the easement after the new location has been agreed by the parties.

13. The relocation of an easement cannot proceed if it would violate some other applicable law or regulation such as a zoning or land use regulation. Thus, one of the expenses chargeable to a servient estate owner under Section 7(3) is the cost associated with obtaining any governmental approvals or permits required by other applicable law to relocate the easement, including attorney fees incurred in obtaining these approvals or permits.

SECTION 5. NOTICE OF INTENT TO RELOCATE EASEMENT.

(a) An owner of a servient estate may exercise the right under this [act] to relocate an easement only if the owner of the servient estate first gives notice in a record to the easement holder and each security-interest holder having an interest in the servient estate or dominant estate. The record must contain:

(1) a statement of the intention of the owner of the servient estate to seek relocation and the nature, extent, location, and anticipated dates of commencement and completion of the relocation;

(2) a report providing title evidence of the servient estate and dominant estate;

(3) a statement of the reason the easement is an easement to which this [act] applies; and

(4) a statement of the reasons the proposed relocation satisfies Section 4.

(b) Notice under subsection (a) to a security-interest holder must be given to the record owner of the security interest and in the manner and to the address provided in the recorded security instrument.

Alternative A

(c) This subsection applies if an easement holder's identity and address are known. Notice under subsection (a) to an easement holder must be by first-class mail addressed to the holder at the holder's last-known address. If the easement holder's representative has requested in a record notice by electronic mail and has provided the owner of the servient estate with an electronic-mail address, the notice also must be sent to the electronic-mail address.

(d) If the owner of a servient estate does not know the identity of the easement holder and the identity of the holder cannot be reasonably ascertained, the owner of the servient estate does not have a duty to notify the easement holder individually, but a notice must be sent, in the case of an appurtenant easement, to the address of the dominant estate, or, in the case of an easement in gross, to the last-known address of the easement holder.

(e) If an owner of a servient estate knows the identity of the easement holder but does not know that person's address, notice must be sent, in the case of an appurtenant easement, to the address of the dominant estate, or, in the case of an easement in gross, to the last-known address of the easement holder.

(f) In the case of an appurtenant easement, if a dominant estate lacks an address and notice must be sent to the dominant estate under subsections (d) and (e), the owner of the servient estate shall post a conspicuous sign on the dominant estate. The sign must state that the owner of the servient estate seeks to relocate an easement on the servient estate, identify the name and address of the owner of the servient estate, and state the nature, extent, location, and anticipated dates of commencement and completion of the relocation.

Alternative B

(c) Notice to a person under this section must be accomplished in a manner consistent with service of process in a declaratory judgment action in this state.

End of Alternatives

***Legislative Note*:** *Alternative A for Section 5(c)-(f) provides methods of notice based on the Uniform Home Foreclosures Procedures Act, Sections 202 and 204 (2015) and the Uniform Partition of Heirs Property Act, Section 4 (2010). Alternative B for Section 5(c) recognizes that a state may use methods of notice consistent with the rules for service of process for a declaratory judgment action in the state.*

Comment

1. Section 5 clarifies fundamentally that an owner of a servient estate may not engage in self-help if it desires to relocate an easement and, therefore, must provide notice to the easement holder. It codifies the rulings of the highest courts of several states that have adopted the Restatement approach to easement relocation. *See Roaring Fork Club L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1237-38 (Colo. 2001) (stating that a court is the appropriate forum to resolve disputes over easement relocation and advising that "to avoid an adverse ruling of trespass or restoration – the burdened owner should obtain a court declaration before commencing alterations"); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1059 (Mass. 2004) (commenting that "the servient estate owner should seek a declaration from the court that the proposed changes meet the criteria in [section] 4.8(3)" and "may not resort to self-help remedies").

2. The owner of a servient estate seeking to relocate an easement must give written notice of its intent to relocate the easement. As set forth in Section 6, the easement holder then has 60 days to reply to the request for relocation. When the easement holder timely consents to the relocation, the owner of the servient estate may proceed with the relocation. However, if consent is conditioned on the applicability of this act as provided under Section 9(b), the owner of the servient estate must still comply with the applicable provisions of this act.

3. Section 5(a)-(b) requires that the owner of the servient estate also give notice to a security-interest holder with an interest in either the servient estate or dominant estate affected by a proposed easement relocation. Section 10 clarifies that the relocation of an easement under the terms of the act will generally not constitute a transfer or grant of an interest in either the servient or dominant estate for purposes of triggering a default or a due-on-sale clause. The notice requirement under Section 5(a)-(b) will thus give affected security-interest holders, and especially first lien holders, an opportunity, in the unusual context of a specific loan document that characterizes relocation of an easement as a transfer of or grant of an interest in the relevant property, an opportunity to raise this issue in court.

4. Alternative A for Section 5(c)-(f), setting forth the methods of notice of an intent to

seek relocation of an easement under Section 4 that are applicable to an easement holder, is derived from Sections 202 and 204 of the Uniform Home Foreclosures Procedures Act (2015) and from Section 4 of the Uniform Partition of Heirs Property Act (2010). These provisions do not displace any other notices required by applicable state law for initiation of a judicial proceeding by personal service.

5. Alternative A, Section 5(c) applies to both appurtenant easements and easements in gross as long as the identity and address of the easement holder are known. Under Section 5(c), based on Sections 202 and 204 of the Uniform Home Foreclosures Procedures Act (2015), notice must be sent by first class mail, unless the easement holder's representative has requested service by electronic mail and provided an electronic mail address. First class mail has the characteristic that it will be delivered to the last-known address whether or not the recipient accepts delivery in person. The owner of the servient estate may supplement first class mail with certified mail or overnight delivery but may not rely solely on methods that require the recipient to accept delivery in person. Uniform Home Foreclosure Procedures Act § 202, cmt. 2 (2015).

6. Alternative A, Subsections 5(d)-(e) of this act address situations that may arise when an easement holder has sold a dominant estate to another person or, in the case of either an appurtenant easement or an easement in gross, when the easement holder has died and the interest in the easement has passed to an heir or devisee. In either case, it may be difficult or impossible to identify the easement holder or determine that person's current address. Hence, in the case of an appurtenant easement, notice must be delivered to the address of the dominant estate. *See* Uniform Home Foreclosures Procedures § 204(b) (2015). In the case of an easement in gross in which the current address or identity of the easement holder is not known, notice must be delivered to the last-known address of the easement holder.

7. Alternative A, Section 5(f), derived from the Uniform Partition of Heirs Property Act, Section 4, provides a method of notice by publication in the case of an appurtenant easement when the dominant estate lacks an address.

8. Alternative B, Section 5(c) gives a state the option of using the methods of service of process for declaratory judgment actions in the state. This is one the approaches used for notice under the Uniform Partition of Heirs Property Act §4(a) (2010) (stating, in pertinent part, "[t]his [act] does not limit or affect the method by which service of a [complaint] in a partition action may be made").

SECTION 6. PROCEDURE FOR NON-CONSENSUAL RELOCATION.

(a) An owner of a servient estate shall bring an action seeking approval of a proposed relocation of an easement if:

(1) the easement holder's identity is unknown or not reasonably ascertainable; or

(2) the owner of the servient estate gives notice in a record under Section 5 of the

intent to seek relocation and the easement holder and security-interest holder fail to respond in a record to the notice not later than 60 days after notice is given.

(b) In an action under subsection (a), the court shall determine whether the easement falls within the scope of easements eligible for relocation under Section 3(b)-(c).

(c) The owner of a servient estate shall bring an action seeking approval of a proposed relocation of an easement if the owner gives notice under Section 5 in a record and the easement holder or a security-interest holder having an interest in the servient estate or dominant estate objects in a record to the relocation not later than 60 days after notice is given.

(d) If the court orders that an owner of a servient estate may relocate an easement, the owner shall execute and [record][register][insert relevant state-specific language to indicate public records] a document, in the form required by the [recording][registration] statutes of this state, that:

(1) states that the order granting the relocation was obtained in accordance with this section and Section 4;

(2) contains a certified copy of the final order or judgment of the court granting the request for relocation; and

(3) specifies the old and new locations of the easement and refers to the original [recorded][registered] document, if any.

(e) The court, exercising its equitable powers, may render an order not inconsistent with this [act] for the fair and equitable relocation of an easement, including ordering the payment of additional costs associated with maintenance of the relocated easement and addressing the interests of a security-interest holder in the servient estate or dominant estate.

Legislative Note: *In Section 6(d), state drafters have the option of using the terms "record" and "recording" or "register" and "registering", or can insert state specific language to indicate*

the relevant public records where the document evidencing the relocation must be filed.

Comment

1. If an easement holder's identity cannot be determined, or if an easement holder or security-interest holder fails to grant consent to or object to a request to relocate within the 60-day period after receiving notice, Section 6(a) entitles an owner of a servient estate to proceed with an action to obtain judicial approval to relocate an easement.

2. Section 6(b) requires the court to review the request for relocation and determine whether the easement at issue is, in fact, eligible for relocation under Section 3(b) and is not disqualified for easement relocation under Section 3(c) by virtue of being a public utility easement, a conservation easement or a negative easement. This provision is intended to provide protection for difficult-to-identify easement holders and, in particular, conservation organizations that have an interest in preserving conservation easements but might lack the organizational capacity to respond to a servient estate owner's notice of an intent to relocate an easement.

3. When an easement holder or security-interest holder timely objects to relocation, Section 6(c) authorizes the owner of a servient estate to file what amounts to a declaratory judgement action to obtain judicial approval of the proposed relocation. If judicial approval is granted, the owner of the servient estate may proceed with relocation but must still comply with all other provisions of the act.

4. The 60-day notice period specified throughout Section 6 is intended to give easement holders and security-interest holders a reasonable opportunity to investigate the terms of the proposed easement relocation without causing an undue delay to realization of the plans of the servient estate owner for development or improvement of the servient estate and to establish a notice period that is simple and easy to calculate. State statutes that allow easement relocation at the expense of the owner of the servient estate sometimes require notice but do not specify a notice period. *See*, *e.g.*, Va. Code § 55-50 (merely requiring "petition to the circuit court and notice to all parties in interest"); Idaho Code § 18-4308 (providing for relocation of irrigation ditches at servient estate owner's expense, but not indicating a notice period); Idaho Code § 55-313 (providing for relocation of motor vehicle access easements at servient-estate owner's expense, but not indicating a notice period); 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," but not indicating whether notice or any special procedure is required).

5. At least one court has required an owner of a servient estate that has satisfied the criteria for easement relocation under section 4.8(3) of the Restatement to execute a new document setting forth the new location and other relevant terms of the relocated easement. *R & S Inv's v. Auto Auctions Inc.*, 725 N.W.2d 871, 878 (Neb. Ct. App. 2006). Section 6(d) adopts that approach and specifies the contents of such a document for completing relocation of an easement under Section 6 (non-consensual relocation). All implied and express duties and obligations imposed on the owner of the servient estate at the old location shall apply in the new location, unless a court determines they are no longer applicable.

6. Section 6(e) recognizes a court's residual power to issue other incidental orders necessary to implement a fair and efficient relocation that assures the easement holder suffers no material harm upon relocation. It also recognizes a court's power to address what is likely to be the unusual case of a specialized mortgage loan document that characterizes an easement relocation as an event triggering a default or a due-on-sale clause. *See infra* Section 10.

7. If an owner of a servient estate attempts to file an action seeking to relocate an easement and does not provide proof of its attempt to provide notice to the easement holder or security-interest holders and of the expiration of the notice period set forth in this section, a court would be entitled to dismiss the action.

SECTION 7. COSTS AND EXPENSES OF RELOCATION CHARGEABLE TO OWNER OF SERVIENT ESTATE. If an owner of a servient estate seeks to relocate an easement under this [act], the owner is responsible for all costs and expenses associated with relocation, including the cost of:

(1) 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;

(2) mitigating temporary disruption the relocation causes to the easement holder;

(3) obtaining required governmental approvals or permits to relocate the easement;

(4) preparing and [recording or registering] any instrument relocating the easement in the relevant [state-specific public records];

(5) the title report required under Section 5(a)(2); and

(6) title-insurance costs incurred by security-interest holders in connection with the relocation.

Comment

1. Section 7 provides courts with guidance as to the items that might constitute an expense chargeable to the owner of the servient estate. The enumerated items represent an illustrative, but not exhaustive, list of chargeable expenses.

2. Attorney's fees incurred by the easement holder might well constitute part of the expenses chargeable under the various subsections, particularly under subsections (3) and (4) pertaining to the acquisition of governmental approvals and preparing an instrument for filing in the public records designed to provide third party effect for the relocated easement. Other expenses related to obtaining governmental approval or preparing instruments for filing in the public records, such as obtaining necessary consents from co-owners or other interested parties, could also be chargeable under subsections (3) and (4).

3. The specific requirements for a notice document that establishes the easement's new relocation and that must be filed in the public records are set forth in Section 5(a).

SECTION 8. DUTY TO COOPERATE IN GOOD FAITH; DUTY TO MITIGATE DISRUPTION.

(a) An owner of a servient estate and an easement holder shall act in good faith to facilitate the relocation of an easement in compliance with this [act] and an order under Section 6(e) issued by a court.

(b) An owner of a servient estate shall mitigate disruption to the use and enjoyment of an easement or the dominant estate caused by relocation of an easement.

Comment

1. The duty of an owner of a servient estate and easement holder to cooperate in good faith to facilitate a swift relocation of the easement and to comply with any orders issued by a court pursuant to Section 6(e) is grounded in an understanding of an easement as a long-term, concurrent property relationship that imposes mutual duties of accommodation on both parties—the owner of the servient estate and the easement holder. For a general discussion of the principle of mutual accommodation in the law of easements and servitudes at common and civil law, see 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, 36-47 (2005).

2. For judicial endorsements of the principle of mutual accommodation and the duty to consider the rights and interests of the other party in an easement relationship in the specific context of easement relocation, see *Roaring Fork Club L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1232 (Colo. 2001) (explaining that Colorado law increasingly recognizes that when there are two competing interests in the same land, those interests "should be accommodated, if possible," and endorsing the Restatement approach to easement relocation as consistent with that "accommodation doctrine"); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that an "easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose," and quoting *Roaring Fork Club L.P.*, 36 P.3d at 1237 for the proposition that

"[c]learly, the best course is for the owners to agree to alterations that would accommodate both parties use of their respective properties to the fullest extent possible"); *R & S Inv's v. Auto Auctions Ltd.*, 725 N.W.2d 871, 880 (Neb. Ct. App. 2006) (stating that "Nebraska case law provides that the owner of a servient estate and the owner of a dominant estate enjoy correlative rights to use the subject property, and the owners must have due regard for each other and should exercise that degree of care and use which a just consideration of the rights of the other demands").

3. The imposition of a duty to act in good faith in the context of long-term property relationships is not new to uniform acts promulgated by the Uniform Law Commission or the National Commission on Uniform State Laws. *See, e.g.*, Uniform Common Interest Ownership Act §1-113 (2008) ("Every contract or duty governed by this [act] imposes an obligation of good faith in its performance or enforcement."); Uniform Home Foreclosure Procedures Act § 105 (2015). *See also* Uniform Simplification of Land Transfers Act § 2-103(i)(b) (1980), *and* Uniform Commercial Code §§ 1-304, 7-404.

4. The duty of the owner of the servient estate to mitigate disruption of the use and enjoyment of the easement or the dominant estate is an important safeguard in the relocation process, particularly if a dominant estate is already developed for commercial purposes. This safeguard goes above and beyond the safeguards employed in Restatement § 4.8(3) to assure that relocation of the easement does not cause any harm to the easement holder and, therefore, should protect the easement holder's rights both retroactively and prospectively.

SECTION 9. RELOCATION OF EASEMENT BY CONSENT.

(a) An easement holder and an owner of a servient estate may relocate an easement by mutual consent without regard to this [act].

(b) Not later than 60 days after notice is given under Section 6, an easement holder may consent to relocation of the easement on the condition that the relocation is subject to specified provisions of this [act] and may assert all rights under this [act] by consenting to the relocation.

(c) If an easement holder consents under this section to relocation of the easement, the owner of the servient estate and the easement holder shall execute, and the owner shall [record] [register] in the [insert relevant state-specific language to indicate public records], a document. The document must be in the form required by the [recording] [registration] statutes of this state and must:

(1) state that consent to the relocation was given under this section; and

(2) specify the old and new locations of the easement and refer to the original [recorded] [registered] document, if any.

Comment

1. Section 9(a) confirms the freedom of an easement holder and an owner of a servient estate to agree to relocate an easement on any terms mutually acceptable to both parties outside the provisions of the act. In other words, nothing in this act prohibits the parties to an easement from agreeing to relocate an easement without following the provisions of this act. Accordingly, the owner of a servient estate and an easement holder might agree to move an easement to a mutually acceptable location and yet also agree to share the costs of relocation because the relocated easement provides substantial benefits to the easement holder as well as the owner of the servient estate.

2. Section 9(b) recognizes that once an owner of a servient estate requests relocation under the terms of this act, the easement holder can agree to move the easement to a specific location but can otherwise condition its acceptance on compliance with all or certain other terms of the act. However, under a new agreement established pursuant to Section 9(a) or (b), the parties may still not agree that the new easement relocation will be exempt from relocation under this act. Put differently, the non-waiver rule adopted in Section 4(b) of the act remains in effect and cannot be nullified even upon an agreement to relocate an easement under Sections 9(a) or (b).

3. If an easement holder agrees to a relocation after receiving the notice described in Section 5 and avails itself of all or certain of the provisions of the act not later than sixty days after receipt of that notice, Section 9(b) provides that the owner of a servient estate must still comply with those provisions in the act intended to protect the interests of the easement holder as detailed in Section 7 (payment of costs and expenses resulting from relocation) and Section 8 (cooperate in good faith and mitigate disruption), unless otherwise agreed by the parties. Section 9(c) requires execution and recordation of a document establishing the new easement location in the case of consensual relocation under either Sections 9(a) or 9(b).

SECTION 10. CHARACTERIZATION OF RELOCATION OF EASEMENT.

Relocation of an easement under this [act]:

(1) is not a new transfer and is not a new grant of an interest in the servient estate or the dominant estate affected by the easement;

(2) does not affect the priority of the easement; and

(3) does not constitute a default or trigger a due-on-sale clause under any security instrument.

Comment

1. The relocation of an easement under the act simply redefines where the easement is located. It does not constitute a transfer or a grant of an interest in either a servient estate burdened by the easement or a dominant estate benefited by the easement. As such, an easement relocation that occurs pursuant to this act would not normally trigger a default or due-on-sale clause under an applicable loan document. It is conceivable that a very specialized loan document might characterize an easement relocation as an event triggering a default or due-on-sale clause. In that unusual circumstance, the preemption provisions of the Garn Act, 12 U.S.C.A. §1701j-3(b), would allow enforcement of such a clause. However, as most loan documents do not characterize an easement relocation as an event triggering a default or due-on-sale clause, Section 10 clarifies that, in the normal case, an easement relocation cannot be characterized as an event triggering a default or application of such a clause. For a discussion of the enforceability of and restrictions on due-on-sale clauses, see GRANT S. NELSON ET AL., REAL ESTATE FINANCE LAW §§ 5.21-5.26, at 321-61 (6th ed. 2015).

SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMERCE ACT. This act modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 13. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

SECTION 14. EFFECTIVE DATE. This [act] takes effect . . . .