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FOR DISCUSSION ONLY

RELOCATION OF NON-UTILITY EASEMENTS ACT

[Tentative new name: EASEMENT RELOCATION ACT]

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

February 1-2, 2019 Drafting Committee Meeting

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the drafting committee. They do not necessarily reflect the views of the Conference and its commissioners and the drafting committee and its members and reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

January 4, 2019

[EASEMENT RELOCATION ACT]

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RELOCATION OF AN EASEMENT

[EASEMENT RELOCATION ACT]

[ARTICLE] 1

SHORT TITLE AND DEFINITIONS [GENERAL PROVISIONS]

SECTION 101. SHORT TITLE. This [act] may be cited as the Easement Relocation Act.

SECTION 102. DEFINITIONS. In this [act]:

(a) "Conservation easement" means an easement that is [[granted in perpetuity and]][1] created for conservation purposes and whose holder is a conservation organization.

(b) "Conservation organization" means a charitable organization, entity, corporation, or trust or government entity, jurisdiction, or agency organized for or whose powers or purposes include conservation purposes.

(c) "Conservation purposes" means:

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

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

(3) protecting natural resources [, including plant and wildlife habitats and ecosystems];

(4) maintaining or enhancing air or water quality [or supply];

(5) preserving the historical, architectural, archeological, or cultural aspects of real property; and

(6) accomplishing any other purpose specified in the law governing conservation

[1] This double bracketed langauged is included at the suggestion of the Land Trust Alliance.

easements of this state.[2]

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

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

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

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

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

(f) "Easement holder," except as otherwise provided in this subsection, means a person entitled to enforce an easement. In the case of an appurtenant easement, the term means the owner of the dominant estate. In the case of an easement in gross, the term means a person entitled to enjoy the benefit of the easement. In the case of a conservation easement, the term means a conservation organization or a governmental entity empowered to hold an interest in real property under the laws of this State or the United States.

[2] Section 301(c) is new and is intended to make the definitions found in Sections 301(a) and (b) more concise. The content of Section 301(c) was found in earlier versions of the act and is largely taken from UCEA, with some modifications, particularly subsection (c)(6), suggested by the Land Trust Alliance and will be discussed at the next Drafting Committee meeting.

(g) "Negative easement" means an easement whose primary purpose is to impose on the owner of a servient estate a duty not to engage in certain uses of the estate.

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

(i) "Record" means information that is inscribed on a tangible medium or stored in an electronic or other medium and is retrievable in perceivable form.

(j) "Servient estate" means an estate or interest in real property that is burdened by an easement.

(k) "Public utility easement" [has the meaning set forth in the laws of this state] [means an easement created for the purpose of furnishing or transmitting utility services in favor of a publicly regulated utility that provides services on a non-discriminatory basis].

(*l*) "Utility services" means:

(1) any product, services, or equipment related to energy, power, communications, water or storm or sanitary sewerage, and

(2) any product, services or equipment of a transmitting utility as defined in Uniform Commercial Code Article 9, Section 102(a)(81).

Legislative Note*: *The bracketed language in Section 102(c) – "including plant and wildlife habitats and ecosystems" and "or supply" – comes from the Restatement (Third) of Property: Servitudes § 1.6 (2000), which in turn follows the Uniform Conservation Easement Act (UCEA) Section 1 (1981, amended 2007). The additional language was likely added to the Restatement to make the latter more expansive. States may chose whether to include the slightly more expansive language found in the bracketed subsections.

The bracketed language found in Section 102(k) gives a state the option of using its own definition of a public utility easement rather than the default definition supplied by the act.

Comment

The foundational definition of "easement" in Section 102(e) 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 102(e) are based on Restatement § 1.5(1)-(2). The definitions of "dominant estate" and "servient estate" in Sections 102(d) and (j) are derived from Restatement § 1.1(1)(b)-(c). The term "real property" is used in Section 102(e), 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 definitions of "conservation easement," "conservation organization" and "conservation purposes" in Sections 102(a) through (c) generally mirror the Uniform Conservation Easement Act (UCEA) Section 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 Section 1(1). The phrase "assuring the availability of real property for," used Section 102(c), has been slightly modified from both UCEA Section 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 qualification in Section 102(a) that a conservation easement is "granted in perpetuity" reflects a fundamental characteristic of conservation easements under contemporary easement conservation law. The final clause in Section 102(c) referring to "any other purpose specified in the law governing conservation easements of this state" has been added to reflect that the purposes of conservation easements are dynamic as states continue to recognize new purposes for conservation easements. The touchstone of a conservation easement, however, 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). The definition of "negative easement" used in Section 102(g) offers an even more precise definition of the term by borrowing from Article 706 of the Louisiana Civil Code, which defines "[n]egative servitudes" as "those that impose on the owner of the servient estate the duty to abstain from doing something on his estate". La. Civ. Code art. 706. For a similar explanation of the distinction between affirmative and negative easements, see 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.").

The definition of "easement holder" in Section 102(f) is derived from Restatement § 1.5 but also incorporates the definition of an easement "holder" as defined in UCEA Section 1(2)(i).

The definition of "person" in Section 102(h) follows the standard definition of person used by the Uniform Law Commimssion 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.

The definitions of a "public utility easement" and "utility services" in Sections 102(k) and (l) are adapted from Va. Code § 55-50.2 (2006) and also incorporate the definition of a "transmitting utility" from U.C.C. § 9:102(a)(81) ("Transmitting utility means a person primarily engaged in the business of: (A) operating a railroad, subway, street railway, or trolley bus; (B) transmitting communications electrically, electromagnetically, or by light; (C) transmitting goods by pipeline or sewer; or (D) transmitting or producing and transmitting electricity, steam, gas, or water.")

[ARTICLE] 2

SCOPE

SECTION 201. GENERAL APPLICABILITY – NATURE OF EASEMENT.

(a) Except as otherwise provided, this [act] applies to an easement established by express grant or reservation or by prescription, implication, necessity, or estoppel.

(b) This [act] does not apply to a public utility easement.

(c) This [act] does not apply to a conservation easement.

(d) This [act] does not apply to a negative easement.

Comment

Section 201 specifies the categories of easements *eligible* and *ineligible* for relocation under Section 302 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. Section 201(a) 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 302 of the act. Public utility easements, conservation easements and negative easements are specifically excluded under Sections 201(b) through (d) and are thus ineligible for relocation under Section 302.

SECTION 202. GENERAL APPLICABILITY – TIME OF CREATION OF EASEMENT.

This [act] applies to an easement created before, on, or after [the effective date of this [act]].

Comment

This section 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 a servient estate owner 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 302, 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. Section 306 enumerates detailed factors that will assist a court in making this determination of functional equivalency in terms of affirmative, easement-related benefits.

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 servient estate owners 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).

SECTION 203. APPLICABILITY TO EASEMENT WITH GENERAL MUTUAL CONSENT CLAUSE AND EASEMENT WITH SPECIFIED LOCATION. This [act] applies to an easement eligible for relocation under Section 302 even if:

(1) the instrument creating the easement contains language requiring consent of the

parties to amend generally the terms of the easement; or

(2) the location of the easement has been fixed by the instrument creating the easement, another agreement, previous conduct of the parties, or acquiescence.

Comment

Section 203 first 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 302. This section next 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, the easement remains subject to relocation under Section 302. Accordingly, Section 203(2) 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 204. NON-WAIVER. A right to seek relocation of an easement under Section 302 may not be excluded or restricted by legal transaction.][3]

Legislative Note: *Section 204 is bracketed to indicate that a state may remove the non-waiver provision of the act or, in the alternative, allow parties to agree that a newly created easement is not subject to relocation for a limited time, after which an eligble easement will be subject to relocation under the act regardless of any provision in an easement agreement to the contrary.*

Comment

Section 204 explicitly provides that the core relocation right established by the act is not subject to waiver by contracting parties. In other words, a servient estate owner and an easement holder of an easement otherwise eligible for relocation under Section 302 cannot agree *ex ante* to exclude or restrict application of the act.

Parties can, of course, agree to an easement relocation by mutual consent completely outside the act or can agree 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. *See infra* Sections 301 and 304.

[3] The Drafting Committee should consider whether Section 204 should be subject to legislation deletion or modification at all, as the Legislative Note above indicates, or should essentially be a non-severable provision of the act.

[ARTICLE] 3

RELOCATION OF AN EASEMENT

SECTION 301. RELOCATION OF EASEMENT BY CONSENT.

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

(b) An easement holder has the right to consent to a request to relocate an easement on the condition that the relocation is subject to this [act].

Comment

Section 301(a) confirms the freedom of an easement holder and a servient estate owner to agree to relocate an easement on any terms mutually acceptable to both parties outside the provisions of the act. Accordingly, the easement holder and a servient estate owner might agree to move an easement to a mutually acceptable location but also might agree to share the costs of relocation because the relocated easement provides substantial benefits to the easement holder as well as the servient estate owner.

Section 301(b) recognizes that once a servient estate owner requests relocation under the terms of this act, the easement holder might agree to move the easement to a specific location but could otherwise condition its acceptance on compliance with the other terms of the act as set forth in Section 304.

SECTION 302. RIGHT OF SERVIENT ESTATE OWNER TO RELOCATE EASEMENT.

Subject to Section 305, the owner of a servient estate may relocate an easement, at the servient owner's expense, to permit normal use or development of the servient estate or to make improvements on or to the servient estate, but only if the relocation does not materially:

(1) lessen the utility of the easement;

(2) increase the burden on the easement holder in its use and enjoyment of the easement; or

(3) frustrate the [[affirmative, easement-related]][4] purpose for which the easement was created.

[4] This double bracketed language is new and should be discussed by the Drafting Committee.

Comment

Section 302 sets forth the general rule for relocation of an easement under the act and largely tracks Restatement § 4.8(3). This section thus 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. *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1057 (Mass. 2004); 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" and, therefore, "encourages the use of easements." *M.P.M. Builders L.L.C.*, 809 N.E.2d at 1057; *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).

Currently some form of unilateral easement relocation is permitted in 22 states. Courts in seven states (Colorado, Massachusetts, Nebraska, New York, South Dakota, Nevada, and Vermont) have expressly adopted section 4.8(3) of the Restatement for relocation of express easements in some form or another. *See 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); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1057-59 (Mass. 2004) (adopting section 4.8(3) for all express easements); *R & S Invs. v. Auto Auctions Ltd.*, 725 N.W.2d 871, 879-881 (Neb. 2006) (adopting section 4.8(3) for relocation of sewer lagoon easement); *Lewis v. Young*, 705 N.E.2d 649, 653-54 (N.Y. 1998) (holding that a servient landowner could relocate a driveway burdened with an *undefined* ingress and egress easement); *Stanga v. Husman*, 694 N.W.2d 716, 718-720 (S.D. 2005) (approving *ex post* the modification of an express ingress and egress easement whose location was not specified in the creating instrument); *St. James Vill. Inc. v. Cunningham*, 210 P.3d 190, 193-196 (Nev. 2009) (adopted section 4.8(3) but limited its scope to situations when the creating instrument does not define the easement through specific reference to its location or dimensions); *Roy v. Woodstock Cmty. Tr. Inc.*, 94 A.3d 537, 538-40 (Vt. 2014) (adopting section 4.8(3) to permit a servient estate owner to relocate subsurface water line easements to facilitate an affordable housing development on an eight-acre tract of land); *but see Sweezey v. Neal*, 904 A.2d 1050, 1057-58 (Vt. 2006) (rejecting application of section 4.8(3) for relocation of surface easements).

Several Illinois appellate court decisions also suggest that Illinois is gradually moving in the direction of adopting section 4.8(3) to approve unilateral easement relocation and other unilateral modifications of an easement. *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"); *527 S. Clinton L.L.C. v. Westloop Equities L.L.C.*, 932 N.E.2d 1127, 1138 (Ill. App. Ct. 2010) (citing *McGoey* and the Restatement to the effect that a servient estate owner may modify or relocate an easement "so long as the changes would not

cause substantial harm to the dominant estate").

Kentucky courts have long allowed easement relocation under conditions generally similar to the Restatement. *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, 909-10 (Ky. 1932); *but see Adams v. Pergrem*, No. 2006-CA-001861-MR, 2007 WL 4277900, at *1 (Ky. Ct. App. Dec. 7, 2007) (citing *Wells* and observing in dicta that "unless a granting instrument provides otherwise, an easement with a fixed location cannot be relocated without the express or implied consent of the owners of both the servient and dominant estates").

Under its Civil Code, Louisiana has long allowed the relocation of both conventional servitudes and servitudes of passage established by law to provide access to enclosed estates. La. Civ. Code arts. 748, 695. The general rule is stated in Article 748: "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 dominant estate is bound to accept. All expenses of relocation are borne by the owner of the servient estate." La. Civ. Code art. 748.

Courts in six states (Florida, Maryland, Minnesota, Mississippi, Pennsylvania, and South Carolina) permit servient owners to relocate non-express easements of some form or another (easements by necessity, easements implied by recorded plats or prior use, or prescriptive easements), in some cases relying on the Restatement, in others not. *See Enos v. Casey Mountain Inc.*, 532 So. 2d 703, 706 (Fla. Dist. Ct. App. 1988) (allowing unilateral relocation of easements implied by reliance on recorded subdivision plat); *Millison v. Laughlin*, 142 A.2d 810, 813-816 (Md. 1958) (holding that servient estate owner could relocate utility pole easement implied by prior use to reduce danger and annoyance and given that termini would remain unchanged); *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) (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); *Taylor v. Hays*, 551 So. 2d 906, 908-10 (Miss. 1989) (same); *Soderberg v. Weisel*, 687 A.2d 839, 842 (Pa. Super. Ct. 1997) (recognizing 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); *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).

Courts in three more states (Oregon, Missouri, and New Jersey,) have allowed limited balancing of the equities when easement holders have sought injunctive relief in response to

proposed or completed relocations. *See 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); *S. Star Cent. Gas Pipeline Inc. v. Murray*, 190 S.W.3d 423, 430 (Mo. Ct. App. 2006) (denying injunction sought by pipeline company several years after it received notice of servient estate owners' expansion of home and encroachment on easement, and noting that the creating instrument did not definitely fix the location and observing that *grantee* of easement is entitled to a convenient, reasonable, and accessible way within the limits of the grant); *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, in light of 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); *Bubbis v. Kassin*, 803 A.2d 146, 152 (N.J. Super. Ct. App. Div. 2002) (denying injunctive relief and, therefore, allowing temporary relocation of an implied beach access easement when the servient estate owner showed that enforcement of the easement in its original location "would have a severe adverse effect upon the [servient owners'] beneficial enjoyment of their property" and that 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. Bernardsvill 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").

Three more states (Idaho, Virginia, and New Mexico) allow relocation by statute for certain kinds of easements provided relocation does not harm the easement holder or dominant estate owner. *See* Idaho Code § 18-4308 (Michie Supp. 2010) (allowing relocation of irrigation ditch easements); Idaho Code § 42-1207 (Michie Supp. 2010) (same); Idaho Code § 55-313 (Michie Supp. 2010) (allowing relocation of motor vehicle access easements);Va. Code § 55-50 (2007) (allowing for judicial relocation on an easement of ingress and egress, provided it has been in existence for ten years); N.M. Stat. § 73-2-5 (allowing relocation of irrigation ditch easements).

Courts in eight states (Alabama, Connecticut, Georgia, North Carolina, Pennsylvania, Vermont, Washington, and Wisconsin) have expressly rejected section 4.8(3) of the Restatement. *See Tietel v. Wal-Mart Stores Inc.*, 287 F. Supp. 2d 1268, 1276-77 (M.D. Ala. 2003) (declining to apply section 4.8(3) as inconsistent with Alabama law, especially *Arp v. Edwards*, 706 So. 2d 736, 739 (Ala. Civ. App. 1997)); *Alligood v. Lasaracina*, 999 A.2d 836, 839 (Conn. App. Ct. 2009) (explicitly rejecting Restatement approach on grounds of "uniformity, stability, predictability and judicial economy"); *Herrin v. Pettergill*, 538 S.E.2d 735, 736 (Ga. 2000) (expressly rejecting section 4.8(3)); *Sloan v. Rhodes*, 560 S.E.2d 653, 655 (Ga. 2002) (affirming *Herrin v. Pettergill*); *A. Perin Dev. Co. L.L.C. v. Ty-Par Realty Inc.*, 667 S.E.2d 324, 326-27 (N.C. Ct. App. 2008) (rejecting approach of *M.P.M. Builders L.L.C.*); *McNaughton Props. L.P.*

v. Barr, 981 A.2d 222, 225-29 (Pa. Super. Ct. 2009) (rejecting Restatement approach as applied to express easements as a question of first impression even though 142 acre servient estate owner offered to provide 1.83 dominant estate owner access to public roads that would have been safer and shorter via new street system proposed for development of servient estate); *Sweezey v. Neal*, 904 A.2d 1050, 1057-58 (Vt. 2006) (rejecting Restatement approach as applied to surface easements but allowing servient estate owner to "bend the easement" around a new addition to his house); *Crisp v. Vanlaecken*, 122 P.3d 926, 928-29 (Wash. Ct. App. 2005); *MacMeekin v. Low Income Hous. Inst.*, 45 P.3d 570, 579 (Wash. Ct. App. 2002) (expressly rejecting section 4.8(3)); *AKG Real Estate L.L.C. v. Kosterman*, 717 N.W.2d 835, 842-47 (Wisc. 2006) (rejecting proposed relocation of right of way easement under the impossibility of purpose doctrine as stated in Restatement § 7.10(1), the changed conditions doctrine as stated in Restatement § 7.10(2), and the unilateral relocation rule found in §4.8(3)) (stating that "parties need not include a provision in an express easement to prevent unilateral modification or relocation" and thus "the rule is that the owner of the servient estate cannot unilaterally modify an express easement"); *see also* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7.13, 717 (2018) (rejecting and criticizing the Restatement approach and citing other decisions following traditional common law mutual consent rule).

Section 302 implicitly indicates that the right to relocate an easement belongs *only* to the servient estate owner. 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 servient estate owner 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").

Section 302 clarifies that "a strong showing of necessity" is not a condition to relocate an easement. *Cf. Kline v. Bernardsvill Ass'n Inc.*, 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993). Just like Restatement § 4.8(3), Section 302 states that a servient estate owner can seek relocation "to permit normal use or development of the servient estate." Section 302, however, also allows a servient estate owner to seek relocation to make "improvements on or to the servient estate." This additional justification is borrowed from Article 748 of the Louisiana Civil Code, the source for Restatement § 4.8(3). La. Civ. Code art. 748 (emphasis added).

SECTION 303. REQUIREMENT OF SERVIENT ESTATE OWNER TO PROVIDE NOTICE OF INTENT TO RELOCATE EASEMENT. A servient estate owner may exercise the right to relocate an eligible easement under Section 302 only if the servient estate owner first gives notice in a record to the easement holder and a voluntary lien holder with an interest in the servient or dominant estate. The record must contain:

(1) a statement of the servient estate owner's intention to seek relocation and the scope, nature, extent, location, and probable commencement and completion of the relocation;

(2) a title report on the servient and dominant estates; and

(3) a statement of the reasons the proposed relocation satisfies the requirements of Section 302.

Comment

Section 303 clarifies that a servient estate owner may not engage in self-help if it desires to relocate an easement. 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").

The servient estate owner seeking to relocate an easement must give written notice of its intent to relocate the easement. As set forth in Sections 304 and 305, the easement holder then has 60 days to reply to the request for relocation. When the easement holder timely consents to the relocation, the servient estate owner may proceed with the relocation under Section 304. However, as that section explains, the servient estate owner must still comply with all other provisions of the act.

This section requires that the servient estate owner give notice to a voluntary lien holder with an interest in either the servient or dominant estate affected by a proposed easement relocation. Section 311 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 303 of the act will thus give affected lien 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.

SECTION 304. PROCEDURE FOR CONSENSUAL RELOCATION. If an easement holder in a record [[, exercising the right to consent specified in Section 301(b),]][5]

[5] This double bracketed language is included to highlight for Drafting Committee discussion the relationship between Section 301(b) and Section 304.

grants consent to a request to relocate not later than 60 days after receipt of the record described in Section 303, a servient estate owner may proceed with the relocation, subject to Sections 307, 308, and 309.

Comment

Section 304 establishes the process for relocating an easement in a manner consistent with the act if the easement holder consents to the proposed easement after receiving the notice described in Section 303. It specifies that the servient estate owner must still comply with all provisions in the act intended to protect the interests of the easement holder as detailed in Section 307 (payment of costs and expenses resulting from relocation), Section 308 (cooperate in good faith and minimize disruption of use and enjoyment), and Section 309 (execution and recordation of document establishing new easement location).

SECTION 305. PROCEDURE FOR NON-CONSENSUAL RELOCATION.

(a) If an easement holder's identity is unknown or not reasonably ascertainable, or if the servient estate owner provides a record described in Section 303 and the easement holder fails to respond to the request to relocate in a record not later than 60 days after receipt of a record described in Section 303, the servient estate owner may bring an action in a court to obtain approval of the proposed relocation.

(b) In a proceeding under subsection (a), the court, upon review of the servient estate owner's request to relocate, shall determine whether the easement is eligible for relocation under Section 201.

(c) If a servient estate owner provides a record described in Section 303 and the easement holder in a record objects to the relocation not later than 60 days after receipt of the record described in Section 303, the servient estate owner may bring an action in a court to obtain approval of the proposed relocation.

(d) If, in a final order or judgment, the court determines that a servient estate owner is entitled to relocate an easement, the servient estate owner may proceed with the relocation,

subject to Sections 307, 308, and 309.

(e) The court, exercising its equitable powers, may make other orders necessary for the fair and equitable relocation of an easement, including ordering the payment of additional costs associated with maintenance of the relocated easement and any orders addressing the interests of voluntary lien holders in the servient or dominant estate.

Comment

If an easement holder's identity cannot be determined or if an easement holder fails to grant consent to or object to a request to relocate within the 60-day period after receiving notice, Section 305(a) entitles a servient estate owner to proceed with an action to obtain judicial approval to relocate an easement.

Section 305(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 201; *i.e.*, that the easement is not disqualified for easement relocation 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.

When an easement holder timely objects to relocation, Section 305(c) authorizes the servient estate owner to file what amounts to a declaratory judgement action to obtain judicial approval of the proposed relocation. If judicial approval is granted, the servient estate owner may proceed with relocation but must still comply with all other provisions of the act.

The 60-day notice period specified throughout Section 305 (and in Section 304) is intended to give easement holders a reasonable opportunity to investigate the terms of the proposed easement relocation without causing an undue delay to realization of the servient estates owner's plans 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 servient estate owner's expense 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).

If a servient estate owner 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 and of the expiration of the delay period set forth in this section, a court would be entitled to dismiss the action.

Section 305(d) reiterates that even if a court determines that a servient estate owner is entitled to relocate an easement in a non-consenusal proceeding, the servient estate owner must still comply with all provisions in the act intended to protect the interests of the easement holder, including Section 307 (payment of costs and expenses resulting from relocation), Section 308 (cooperate in good faith and minimize disruption of use and enjoyment), and Section 309 (execution and recordation of document establishing new easement location).

Section 305(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 possibly triggering a default or a due-on-sale clause. See infra Section 311 and the comment thereto.

SECTION 306. FACTORS RELEVANT TO DETERMINE WHETHER EASEMENT IS ELIGIBLE FOR RELOCATION. In a proceeding under Section 305(b), a court shall, in determining whether a servient estate owner may relocate an easement under Section 302, consider the following factors:

[[(1) whether the easement is eligible or ineligible for relocation under Section 201;]][6]

(2) whether the proposed relocation will materially affect the route, gradient, or width of the easement;

(3) whether the proposed relocation will materially affect the safety of individuals using the easement or public health or safety;

(4) whether the process of relocating the easement will cause a material disruption to the easement holder's enjoyment of the easement or the dominant estate during the process of relocation and the degree to which any disruption can be minimized and alleviated by the servient estate owner during the process of relocation;

[6] Section 306(1) has been included at the request of the Land Trust Alliance and should be discussed by the Drafting Committee.

(5) whether there will be a material burden upon or harm to the easement holder's [[affirmative, easement-related]][7] interests once the relocation is complete;

(6) interests of parties other than the easement holder entitled to notice under Section 303 that have not consented to the relocation; and

(7) any other factor that may be material to the easement holder's right to use and enjoy the easement.

Comment

Section 306 sets forth specific factors that a court should consider in determining whether to allow an easement relocation to proceed under Section 302 act in an action authorized by Section 305(b). Of course, some factors may not be relevant to a particular relocation dispute, and thus a court may always indicate that one or more factors is not relevant to a particular matter.

Section 306(1) focuses the attention of a court on the threshold inquiry of whether a particular easement is the kind of easement eligible for relocation under Section 201(a) or the kind of easement ineligible for relocation under Sections 201(b) through (c). If the latter, the court would have no need to consider the remaining factors.

Section 306(2) requires courts to consider the nature of the proposed new route for the easement in terms of its route, gradient, and width. Courts almost always consider these interrelated factors in deciding whether to allow easement or servitude relocations to proceed. *See*, e.g., *Carlin v. Cohen*, 895 N.E.2d 793, 798-99 (Mass. App. Ct. 2008) (affirming trial court ruling that servient estate owner 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 dominant estate owner 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 dominant estate owners 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).

Section 306(3) mandates that courts consider the safety of individuals using the easement and public health and safety. Courts frequently consider these interrelated factors when

[7] This double bracketed language is new.

evaluating the route, gradient and width of a proposed new location for an easement. Courts sometimes take into account the effect of a proposed easement relocation on public health and safety more generally, including the potential for the improved effectiveness of an easement. *See R & S Invests. 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).

Section 306(4) requires courts to consider whether the process of relocating the easement will materially disrupt the easement holder's use and enjoyment of the easement during the process of relocation and the extent to which the servient estate owner can abate or minimize this disruption during the process of relocation. This subsection could thus lead a court to require a servient estate owner 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.

Section 306(5) requires 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. In other words, the subsection focusses judicial attention on 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 dominant estate owners to construct a new driveway on their property across their front lawn, and, thus, would injure the dominant estate owners 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 L.P.* 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 a dominant estate owner actually wants to obtain a property interest in a servient estate that prevents development of that estate in some manner, the dominant estate owner can always negotiate for and acquire a restrictive covenant or negative easement.

Section 306(7) preserves a court's freedom to consider any other factors not anticipated by the act.

SECTION 307. COSTS AND EXPENSES OF RELOCATION CHARGEABLE TO SERVIENT ESTATE OWNER. If a servient estate owner seeks to relocate an easement under Section 302, 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) minimizing and alleviating any temporary disruption the relocation process causes to the easement holder;

(3) obtaining any governmental approvals or permits required by law to relocate the easement; and

(4) preparing, recording, or registering any instrument relocating the easement in the relevant public records to assure that the relocated easement is effective against third parties and successors of the servient estate owner.

Comment

Section 307 provides courts with guidance as to the items that might constitute an expense chargeable to the servient estate owner under Section 302. The enumerated items represent an illustrative, but not exhaustive, list of chargeable expenses.

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).

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 309.

SECTION 308. DUTY TO COOPERATE IN GOOD FAITH; DUTY TO MINIMIZE AND ALEVIATE DISRUPTION.

(a) A servient estate owner and an easement holder shall cooperate in good faith to facilitate the swift and safe relocation of an easement.

(b) A servient owner shall minimize and alleviate any disruption to the use and enjoyment of an easement or the dominant estate.

Comment

The duty of the servient estate owner and easement holder to cooperate in good faith to facilitate a swift and safe relocation of the easement 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 servient estate owner 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).

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 Invs. 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").

The duty of the servient estate owner to minimize and alleviate any 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.

The duty of parties in long-term property relationships to act in good faith is not new to uniform acts promulgated by the Uniform Law Commission. *See, e.g.*, Uniform Common Interest Ownership Act Section 1-113 ("Every contract or duty governed by this [act] imposes an obligation of good faith in its performance or enforcement.). *See also* Uniform Simplification of Land Transfers Act Section 2-103(i)(b) and Uniform Commercial Code Sections 1-304, 7-404.

SECTION 309. EXECUTION AND RECORDATION OF DOCUMENT ESTABLISHING NEW LOCATION OF EASEMENT.

(a) If an easement holder grants consent to a relocation under Section 304, the servient estate owner and the easement holder shall execute and the servient estate owner shall cause to be recorded in the relevant public records a document. The document must be in the form required by the recording statutes of this state and:

(1) state that the relocation was obtained in accordance with Section 304; and

(2) set forth with specificity the new location of the easement.

(b) If a court determines that a servient estate owner is entitled to relocate an easement pursuant to Section 305, the servient estate owner shall execute and record in the relevant public records a document. The document must be in the form required by the recording statutes of this state and:

(1) state that the relocation was obtained in accordance with Section 305;

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

(3) set forth with specificity the new location of the easement.

Comment

At least one court has required a servient estate owner 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 Invs. v. Auto Auctions Inc.*, 725 N.W.2d 871, 878 (Neb. Ct. App. 2006). This section adopts that approach and

specifies the contents of such a document under the two procedural mechanisms set forth for completing relocation of an easement under Sections 304 and 305.

SECTION 310. METHOD OF NOTICE.

[[(a) Notice required by Section 303 must be sent by first-class mail addressed to the easement holder at the easement holder's last-known address. If the easement holder's representative has requested in a record notice by electronic mail and has provided the servient estate owner an electronic-mail address, the notice also must be sent to the electronic-mail address.

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

(c) If a servient estate owner knows the identity of the easement holder but does not know the easement holder's address, notice must be sent to the address of the dominant estate in the case of an appurtenant easement.]]

[[(d) Notice to a person under this [act] must be accomplished in a manner consistent with service of process in this state.]][8]

Legislative note: *Section 310 provides for methods of notice based on the Uniform Home Foreclousres Procedures Act, Sections 202 and 204 (2015). A state, however, may decide to employ its own methods of notice consistent with the rules for service of process in that state. Hence, the bracketed language at the end of this section is an alternative to subsections (a) through (c).*

Comment

Section 310, setting forth the requirements for pre-litigation notice of an intent to seek relocation of an easement under Section 302, is derived from Sections 202 and 204 of the Uniform Home Foreclosures Procedures Act (2015). It does not displace any other notices

[8] The double brackets for Sections 310(a)-(c) and Section 310(d) indicate a subject for Drafting Committee discussion.

required by applicable state law for initiation of a judicial proceeding by personal service.

Notice under this section must be sent by first class mail. 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 servient estate owner 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.

As the comments to Section 204 of the Uniform Home Foreclosures Procedures Act indicate, Sections 310(b) and (c) of this act address situations that may arise when an easement holder has sold a dominant estate to another person or 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 or locate the easement holder.

SECTION 311. CHARACTERIZATION OF RELOCATION OF EASEMENT.

Relocation of an easement under this [act] is neither a transfer nor a grant of an interest in the servient estate or the dominant estate affected by the easement.

Comment

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 312 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 312. 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 313. 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 314. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

SECTION 315. EFFECTIVE DATE. This [act] takes effect . . . .