

D R A F T  
FOR DISCUSSION ONLY

# RELOCATION OF NON-UTILITY EASEMENTS ACT

**[Tentative new name: EASEMENT RELOCATION ACT]**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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~~November~~ February 1-2-3, 2018, 2019 Drafting Committee Meeting

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By  
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~~September 11, 2018~~ January 4, 2019

**EASEMENT RELOCATION ~~OF NON-UTILITY EASEMENTS~~ ACT**

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**EASEMENT RELOCATION ~~OF NON-UTILITY EASEMENTS ACT~~**

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1 ~~RELOCATION OF NON-UTILITY EASEMENTS ACT~~

2 [EASEMENT RELOCATION ACT]

3 [ARTICLE] 1

4 SHORT TITLE AND DEFINITIONS [GENERAL PROVISIONS]

5 SECTION 101. SHORT TITLE. This [~~Aetact~~] may be cited as the Easement  
6 Relocation ~~of Non-Utility Easements~~ Act.

7 SECTION 102. DEFINITIONS. In this [~~Aetact~~]:

8 (a) “Conservation easement” means ~~a negativean~~ easement that is ~~[[~~granted in perpetuity;  
9 and]]<sup>1</sup> created for conservation purposes ~~or preservation purposes, andand~~ whose ~~easement~~  
10 holder is a ~~government entity or a~~ conservation organization. ~~“Conservation purposes” include~~

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

14 (c) “Conservation purposes” means:

15 (1) retaining or protecting the natural, scenic, or open-space ~~valuevalues~~ of  
16 ~~land,real property;~~

17 (2) assuring the availability of ~~landreal property~~ for agricultural, forest,  
18 recreational, or open-space use;~~;~~

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

21 (4) maintaining or enhancing air or water quality ~~[or supply.~~“~~Preservation~~  
22 ~~purposes” include];~~

---

<sup>1</sup> This double bracketed language is included at the suggestion of the Land Trust Alliance.

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

~~(b) “Conservation organization” means a charitable corporation, charitable association, or charitable trust whose purpose or powers include conservation purposes or preservation purposes.~~

~~(e)(6) accomplishing any other purpose specified in the law governing conservation easements of this state.<sup>2</sup>~~

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

~~(de)~~ “Easement” means a nonpossessory affirmative right to enter and use real property owned by or in the possession of another and ~~that~~which obligates the owner or possessor of ~~that~~the real property not to interfere with ~~(1)~~ the uses permitted by the instrument creating the easement; or ~~(2)~~, in the case of a non-express easement, the uses authorized by law. ~~As used in this [Act], an easement~~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

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<sup>2</sup> 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.

1 of real property. ~~[As used in this [Act], an easement excludes a negative easement and a utility~~  
2 ~~easement.]~~

3 (ef) “Easement holder” ~~,” except as otherwise provided in this subsection,~~ means ~~the~~a  
4 person entitled to enforce an easement. In the case of an appurtenant easement, the ~~easement~~  
5 ~~holder is~~ term means the owner of the dominant estate. In the case of an easement in gross, the  
6 ~~easement holder is the~~ term means a person entitled to enjoy the benefit of the easement. In the  
7 case of a conservation easement, the term means a conservation organization or a governmental  
8 entity empowered to hold an interest in real property under the laws of this State or the United  
9 States.

10 (fg) “Negative easement” means an easement whose primary purpose is to impose on the  
11 owner of ~~the~~a servient estate a duty not to engage in certain uses of ~~that~~the estate. ~~For the~~  
12 ~~purposes of this subsection, a conservation easement is a negative easement.~~

13 (gh) “Person” means an individual, ~~firm, partnership, estate, business or nonprofit entity,~~  
14 public corporation, ~~company, association, joint stock association, government~~ or governmental  
15 subdivision, agency, or instrumentality, or other legal entity. ~~It includes a trustee, receiver,~~  
16 ~~assignee, or similar representative of any of them.~~

17 (hi) “Record” means information that is inscribed on a tangible medium or ~~that is~~ stored  
18 in an electronic or other medium and is retrievable in perceivable form.

19 (ij) “Servient estate” means ~~the~~an estate or interest in real property that is burdened by an  
20 easement.

21 (j) ~~“Utility”~~ “Public utility easement” [has the meaning set forth in the laws of this state]  
22 [means an easement created for the purpose of furnishing or transmitting utility services. ~~For~~  
23 purposes in favor of ~~this subsection,~~ “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,

~~telecommunications~~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 ~~subsection~~Section 102(~~de~~) 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 ~~subsection~~Section 102(~~de~~) are based on Restatement § 1.5(1)-(2). The definitions of “dominant estate” and “servient estate” in ~~subsections~~Sections 102(~~ed~~) and ~~102(i)(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 definition of conservation easement in subsection 102(a) is derived largely from Restatement § 1.6, but it adds the requirement that the easement is “granted in perpetuity” and also specifies that a conservation easement is held by a “conservation organization.” As the Restatement explains, a “conservation organization” is a “charitable corporation, charitable association, or charitable trust whose purpose or powers include conservation or preservation purposes.” Restatement § 1.6(2).~~

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). ~~See also As the~~ Restatement § 1.3 cmt. C (“[n]egative easements are the same as restrictive covenants”). ~~As the~~ comments to the Restatement 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 ~~subsection~~Section 102(f) ~~of the act~~g offers ~~an even~~ more precise definition of the term by borrowing from Article 706 of the Louisiana Civil Code. ~~See, which defines “[n]egative~~ ~~La. Civ. Code art. 706 (“Negative servitudes are” 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 (4<sup>th</sup> 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 act has been drafted with the specific intention to exempt both conservation easements and utility easements from its scope. This intention is realized in two ways. First, this section defines negative easements to include conservation easements and then it excludes negative easements, along with utility easements, from the definition of “easement.” See subsections 102(d) and (f). Second, the act specifically exempts both negative easements and utility easements from its scope in subsections 201(b)–(c). See Reporter’s Note following Section 201 of this act.~~

~~The definition of “utility easement” and “utility services” in subsection 102(j) is adapted from Va. Code § 55-50.2 (2006).~~

~~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~~

1 entities but also governmental entities as they can be holders of both conventional affirmative  
2 easements and conservation easements.

3  
4 The definitions of a “public utility easement” and “utility services” in Sections 102(k)  
5 and (l) are adapted from Va. Code § 55-50.2 (2006) and also incorporate the definition of a  
6 “transmitting utility” from U.C.C. § 9:102(a)(81) (“Transmitting utility means a person primarily  
7 engaged in the business of: (A) operating a railroad, subway, street railway, or trolley bus; (B)  
8 transmitting communications electrically, electromagnetically, or by light; (C)  
9 transmitting goods by pipeline or sewer; or (D) transmitting or producing and transmitting  
10 electricity, steam, gas, or water.”)

11  
12 [  
13 The term “real property” is used in subsection 102(d) instead of the term “land,” as found  
14 in the Restatement, because an easement will sometimes benefit or burden real property interests  
15 other than ownership of land—for example, condominium units or parts of buildings owned by  
16 condominium associations.

### 17 18 **Reporter’s Note**

19  
20 I decided to use the definition of “conservation easement” and related definitions from  
21 the Restatement rather than the definition formulated by the Land Trust Alliance (See Land Trust  
22 Alliance letter dated August 16, 2018, available in our on-line ULC folder), because the former  
23 is more general in scope and the Land Trust Alliance definition cross-references provisions of  
24 the Internal Revenue Code, a source outside the act. If there were ever changes to the Internal  
25 Revenue Code this could undermine our objective of exempting conservation easements from the  
26 act. I underscore that our clear intention is to exclude all negative easements, including all  
27 conservation easements, from the scope of the act. Nonetheless, the drafting committee should  
28 carefully consider the language offered by the Land Trust Alliance.

## 29 30 **ARTICLE 2**

### 31 **SCOPE**

#### 32 **SECTION 201. GENERAL APPLICABILITY. – NATURE OF EASEMENT.**

33 {{ (a) ~~Other than~~ Except as set forth in subsections 201(b) and (c) below, } otherwise  
34 provided, this [Act] applies to all easements, whether created an easement established by  
35 express ~~contract, grant or reservation or by~~ prescription, implication ~~or~~, necessity, or estoppel.  
36 {{ (b) This [Act] does not apply to a public utility easements. } easement.  
37 {{ (c) This [Act] does not apply to a conservation easement.  
38 \_\_\_\_\_ (d) This [act] does not apply to a negative easements. } easement.

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Comment

This section is intended to make plain Section 201 specifies the limited scope categories of the easements *eligible and ineligible* for relocation under ~~section 301~~ Section 302 of the act. The only ~~easements~~ kind of easement eligible for relocation ~~are~~ is an affirmative easement other than a public utility easement. ~~Subsection (easement or a conservation easement. Section 201(a) underscores that all affirmative, non-express easements, including those other than the excluded categories, whether created by express grant or reservation or by prescription, implication, or necessity, or estoppel, are eligible for relocation under Section 301 of the act. Utility~~ Public utility easements, conservation easements and negative easements are specifically excluded under subsections Sections 201(b) through (d) and are thus not eligible ~~ineligible~~ for relocation under ~~Section 301 of the act. Likewise, negative easements, including by definition conservation easements, are specifically excluded under subsection 201(c) and thus not eligible for relocation under Section 301 of the act. 302.~~

Reporter's Note

I recognize that subsections (b) and (c) are arguably redundant in that utility easements and negative easements, including specifically conservation easements, are expressly exempted from the definition of "easement" under subsection 102(d). However, out of an abundance of caution, and to make our intentions perfectly clear, I have also *provisionally* included these exclusions in this section on scope of the act. An alternative approach would be to eliminate *either* the definitional exclusions in the last sentence of subsection 102(d) *or* the exclusions from scope in this section.

SECTION 202. GENERAL APPLICABILITY TO EXISTING EASEMENTS.

TIME OF CREATION OF EASEMENT. This [~~Aet~~act] applies to an easement ~~eligible for relocation under Section 301 of the [Act] even if the easement was created before, on, or after [the effective date of the [Act].~~ this [act]].

Comment

This section clarifies that the act ~~is intended to will~~ have retroactive effect and thus will apply to all easements created prior to the effective date of the act.

Reporter's Note

1 ~~During our June conference call, as well as easements created on or after the drafting~~  
2 ~~committee decided effective date of the act. As a servient estate owner can only obtain judicial~~  
3 ~~approval for a proposed relocation in the face of an easement holder objection by satisfying the~~  
4 ~~criteria set out in Section 302, a servient estate must demonstrate that the act should have~~  
5 ~~retroactive effect. Without retroactive effect, we reasoned, relocated easement will continue to~~  
6 ~~deliver to the easement holder the same affirmative, *easement-related* benefits that flowed to the~~  
7 ~~easement holder at the easement's original location. Section 306 enumerates detailed factors that~~  
8 ~~will assist a court in making this determination of functional equivalency in terms of affirmative,~~  
9 ~~easement-related benefits.~~

10  
11 ~~As the easement holder will not be deprived of any of the functional benefits of the~~  
12 ~~easement upon relocation, the easement holder will suffer no loss, regardless of whether the act~~  
13 ~~might not be worth pursuing because many of the knotty problems created by old easements~~  
14 ~~would remain unresolved under applies to an easement created before, on or after the effective~~  
15 ~~date of the easement. Consequently, an easement holder will not suffer an uncompensated taking~~  
16 ~~of a property interest upon a relocation undertaken pursuant to the act. *See Statewide*~~  
17 ~~*Construction, Inc. v.* I believe that reasoning to be sound. However, if we maintain that~~  
18 ~~approach, we must still keep in mind that the decision to give the law retroactive effect will be~~  
19 ~~one of the most important policy choices we will be called upon to defend.~~

20  
21 ~~Some may say *Pietri*, 247 P.3d 650, 656-57 (Idaho 2011) (holding that application of an~~  
22 ~~Idaho statute, I.C. § 55-313, giving servient estate owners the right to relocate a motor vehicle~~  
23 ~~access easement on terms similar to those found in Restatement § 4.8(3), was not an~~  
24 ~~unconstitutional taking of private property without just compensation under either the Fifth~~  
25 ~~Amendment to the U.S. Constitution or the Idaho Constitution because the statute expressly~~  
26 ~~requires that making the act retroactive eliminates the freedom of an easement holder the change~~  
27 ~~must be made in a way “as not to obstruct motor vehicle travel, or to otherwise injure any person~~  
28 ~~or persons using or interested in such access” and because any relocation authorized by the statue~~  
29 ~~will “provide the dominant estate holders with the same beneficial interest they were entitled to~~  
30 ~~under an existing express easement to bargain for consent to relocation—a bargaining the~~  
31 ~~easement by its original location”); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1058-59~~  
32 ~~(Mass. 2004) (observing that an “easement is created to serve a particular objective, not to grant~~  
33 ~~the easement holder the power that may have been understood by all parties at the time to veto~~  
34 ~~other uses of creation of an express easement. Eliminating this opportunity to bargain for~~  
35 ~~relocation could, in theory, create windfall gains for the servient estate owner, according to~~  
36 ~~several academic and judicial critics of the Restatement approach to easement relocation that do~~  
37 ~~not interfere with that purpose”). *See John V. Orth also Susan French, Relocating Easements, A*~~  
38 ~~*Response to Professor French, Restatement (Third), Servitudes § 4.8(3)*, 38 REAL PROP. PROB.~~  
39 ~~& TR. J. 643, 646-48 (2004); JON W. BRUCE & JAMES W. ELY, JR., LAW OF EASEMENTS 1, 5 and~~  
40 ~~LICENSES IN LAND § 7.17 (2018); *Herren* 9 (2003) (responding to critique ~~vs.~~ *Pettengil*, 538 S.E.2d~~  
41 ~~735, 736 (Ga. 2000); *AKG Real Estate L.L.C. v. Kosterman*, 717 N.W.2d 835, 844-47 (Wis.~~  
42 ~~2006) (criticizing Restatement approach as “a means for purchasers of servient estates to reap a~~  
43 ~~windfall at the expense of owners of dominant estates”).~~

44  
45 ~~The primary countervailing arguments against the claim that the Restatement approach~~  
46 ~~creates to easement relocation could lead to windfall gains for servient estate owners are as~~

1 follows: ~~(1) the likelihood by observing~~ that ~~(i)~~ in most easement negotiations ~~the parties~~  
2 ~~gave~~ little, if any, attention to the future location of ~~the an~~ easement or ~~to the issue of~~  
3 relocation rights ~~unless there is some specific language in the agreement indicating to the~~  
4 ~~contrary;~~ ~~(2) if a servient estate owner satisfies the,~~ ~~(ii) if~~ requirements imposed by section 4.8(3)  
5 ~~(or Section 301 of our act) and demonstrates that the new location continues to provide the same~~  
6 ~~easement related benefits as the original location, then the relocated easement will increase “are~~  
7 ~~satisfied, the relocated easement increases~~ overall utility” without decreasing the easement’s  
8 utility to the easement holder; and ~~(3iii)~~ if the easement holder ~~really had~~ has some non-access  
9 related interests in mind at the time of creation—~~if the easement holder wanted to obtain some~~  
10 ~~broader veto power over development on the servient estate—there are well recognized private~~  
11 ~~land use restrictions that can accomplish this result, most notably, those interests can be served~~  
12 ~~by restrictive covenants. See Susan French, Relocating Easements: Restatement (Third),~~  
13 ~~Servitudes § 4.8(3), 38 REAL PROP. PROB. & TR. J. 1, 5, 9 (2003). For a more detailed discussion~~  
14 ~~of this debate, see my December 2, 2010 Memorandum to Wilson Freyermuth (2010 Memo), 24-~~  
15 ~~27, previously distributed and included in our online ULC folder.~~

16  
17 It should also be noted that the concern about eliminating the right to bargain for consent  
18 to relocation of an easement or release of any other aspect of an agreement with respect to  
19 existing easements worried the Law Commission of England and Wales when it considered the  
20 same subject. In the end, that Law Commission recommended to the House of Commons that  
21 easements and profits be subject to judicial modification under a statutory changed conditions  
22 analysis (just as restrictive covenants have been ever since adoption of Section 84 of the Law of  
23 Property Act 1925), but it also recommended that this change in the law should only be given  
24 prospective effect. LAW COMM’N OF ENG. AND WALES, MAKING LAND WORK: EASEMENTS,  
25 COVENANTS AND PROFITS À PRENDRE 164 (2011), at 1.

26  
27 **SECTION 203. APPLICABILITY TO ~~EASEMENT~~EASEMENT WITH**  
28 **GENERAL MUTUAL CONSENT CLAUSE AND EASEMENT WITH SPECIFIED**  
29 **LOCATIONSLOCATION.** This [~~Act~~act] applies to an easement eligible for relocation under  
30 Section ~~301~~302 even if:

31 (a~~1~~) the instrument creating the easement contains language requiring consent of the  
32 parties to amend ~~(i)~~ generally, the terms ~~of the easement, or (ii) specifically, the location~~ of the  
33 easement; or

34 (b~~2~~) the location of the easement has been fixed by the instrument creating the easement,  
35 ~~some other~~another agreement, previous conduct of the parties, or acquiescence.

36 **Comment**

~~This section~~Section 203 first clarifies that even when an easement contains a general clause requiring mutual consent to amend an easement ~~and even if this mutual consent clause specifically references an easement's location~~, the easement will be eligible for relocation under Section ~~301 of the act. Subsection (b)~~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 ~~301 of the act~~302. Accordingly, ~~subsection (b) makes clear that this act~~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 ~~limited~~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.]**<sup>3</sup>

**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 eligible 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.

## **[ARTICLE] 3**

# **RELOCATION OF AN EASEMENT**

## **SECTION 301. RELOCATION OF ~~AN~~ 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].

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<sup>3</sup> 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.



(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.** ~~[Unless expressly denied by the terms of the easement pursuant~~ **TO RELOCATE EASEMENT.** Subject to Section 305 ~~of the [Act],~~ the owner of ~~the~~ servient estate ~~is entitled to~~ may relocate ~~the~~ 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:

~~(a) significantly~~<sup>1)</sup> lessen the utility of the easement;

~~(b)~~<sup>2)</sup> increase the burden on the easement holder in its use and enjoyment of the easement;

or

~~(c)~~<sup>3)</sup> frustrate the ~~[[affirmative, easement-related]]~~<sup>4)</sup> purpose for which the easement was created ~~either during or after relocation.~~

### Comment

### Comment

~~This section~~ **Section 302** sets forth the general rule for relocation of an easement under the

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<sup>4</sup> This double bracketed language is new and should be discussed by the Drafting Committee.

1 act and largely tracks Restatement § 4.8(3). This section thus seeks to permit development or  
2 improvement of the servient estate as long as the objectives set forth in the section can be  
3 accomplished without interfering with or harming the affirmative, easement-related interests of  
4 the easement holder. *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1057 (Mass. 2004);  
5 Restatement § 4.8(3), cmt- (f), at 563. As the Supreme Judicial Court of Massachusetts explains,  
6 this rule “maximizes the over-all property utility by increasing the value of the servient estate  
7 without diminishing the value of the dominant estate” and provides the additional benefit of  
8 minimizing “the cost associated with an easement by reducing the risk that the easement will  
9 prevent future beneficial development of the servient estate” and, ~~thus~~therefore, “encourages the  
10 use of easements.” *M.P.M. Builders L.L.C.*, 809 N.E.2d at 1057; *see also Roaring Fork Club*  
11 *L.P. v. St. Jude’s Co.*, 36 P.3d 1229, 1236 (Colo. 2001) (emphasizing that the Restatement rule  
12 “maximizes the overall utility of the land” because the “burdened estate profits from an increase  
13 in value while the benefitted estate suffers no decrease”) (citing to Restatement § 4.8(3), cmt- (f),  
14 at 563).

15  
16 Currently some form of unilateral easement relocation is permitted in 22 states. Courts in  
17 seven states (Colorado, Massachusetts, Nebraska, New York, South Dakota, Nevada, and  
18 Vermont) have expressly adopted section 4.8(3) of the Restatement for relocation of express  
19 easements in some form or another. *See Roaring Fork Club L.P. v. St. Jude’s Co.*, 36 P.3d 1229,  
20 1237-39 (Colo. 2001) (adopting section 4.8(3) to govern applications for relocation of irrigation  
21 ditch easements); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1057-59 (Mass. 2004)  
22 (adopting section 4.8(3) for all express easements); *R & S Invs. v. Auto Auctions Ltd.*, 725  
23 N.W.2d 871, 879-881 (Neb. 2006) (adopting section 4.8(3) for relocation of sewer lagoon  
24 easement); *Lewis v. Young*, 705 N.E.2d 649, 653-54 (N.Y. 1998) (holding that a servient  
25 landowner could relocate a driveway burdened with an *undefined* ingress and egress easement);  
26 *Stanga v. Husman*, 694 N.W.2d 716, 718-720 (S.D. 2005) (approving *ex post* the modification of  
27 an express ingress and egress easement whose location was not specified in the creating  
28 instrument); *St. James Vill. Inc. v. Cunningham*, 210 P.3d 190, 193-196 (Nev. 2009) (adopted  
29 section 4.8(3) but limited its scope to situations when the creating instrument does not define the  
30 easement through specific reference to its location or dimensions); *Roy v. Woodstock Cmty. Tr.*  
31 *Inc.*, 94 A.3d 537, 538-40 (Vt. 2014) (adopting section 4.8(3) to permit a servient estate owner to  
32 relocate subsurface water line easements to facilitate an affordable housing development on an  
33 eight-acre tract of land); *but see Sweezy v. Neal*, 904 A.2d 1050, 1057-58 (Vt. 2006) (rejecting  
34 application of section 4.8(3) for relocation of surface easements).

35  
36 Several Illinois appellate court decisions also suggest that Illinois is gradually moving in  
37 the direction of adopting section 4.8(3) to approve unilateral easement relocation and other  
38 unilateral modifications of an easement. *See McGoey v. Brace*, 918 N.E.2d 559, 563-567 (Ill.  
39 App. Ct. 2009) (holding that the approach of section 4.8(3) comports with prior Illinois  
40 precedent allowing either the dominant or servient estate owner to make changes to an easement  
41 as long as the changes are not “substantial”); *527 S. Clinton L.L.C. v. Westloop Equities L.L.C.*,  
42 932 N.E.2d 1127, 1138 (Ill. App. Ct. 2010) (citing *McGoey* and the Restatement to the effect that  
43 a servient estate owner may modify or relocate an easement “so long as the changes would not  
44 cause substantial harm to the dominant estate”).

45  
46 Kentucky courts have long allowed easement relocation under conditions generally



1 similar to the Restatement. *Wells v. Sanor*, 151 S.W.3d 819, 823 (Ky. Ct. App. 2005) (“Kentucky  
2 follows a minority position that in addition to mutual consent also allows the owner of a servient  
3 estate to unilaterally modify or alter the location of a roadway easement so long as it does not  
4 change the beginning and ending points and does not result in material inconvenience to the  
5 rights of the dominant estate.”); *see also Stewart v. Compton*, 549 S.W.2d 832, 833 (Ky. Ct.  
6 App. 1977); *Terry v. Boston*, 54 S.W.2d 909, 909-10 (Ky. 1932); *but see Adams v. Pergrem*, No.  
7 2006-CA-001861-MR, 2007 WL 4277900, at \*1 (Ky. Ct. App. Dec. 7, 2007) (citing *Wells* and  
8 observing in dicta that “unless a granting instrument provides otherwise, an easement with a  
9 fixed location cannot be relocated without the express or implied consent of the owners of both  
10 the servient and dominant estates”).

11  
12 Under its Civil Code, Louisiana has long allowed the relocation of both conventional  
13 servitudes and servitudes of passage established by law to provide access to enclosed estates.  
14 La. Civ. Code arts. 748, 695. The general rule is stated in Article 748: “If the original location  
15 [of a servitude] has become more burdensome for the owner of the servient estate, or if it  
16 prevents him from making useful improvements on his estate, he may provide another equally  
17 convenient location for the exercise of the servitude which the owner of the dominant estate is  
18 bound to accept. All expenses of relocation are borne by the owner of the servient estate.” La.  
19 Civ. Code art. 748.

20  
21 Courts in six states (Florida, Maryland, Minnesota, Mississippi, Pennsylvania, and South  
22 Carolina) permit servient owners to relocate non-express easements of some form or another  
23 (easements by necessity, easements implied by recorded plats or prior use, or prescriptive  
24 easements), in some cases relying on the Restatement, in others not. *See Enos v. Casey Mountain*  
25 *Inc.*, 532 So. 2d 703, 706 (Fla. Dist. Ct. App. 1988) (allowing unilateral relocation of easements  
26 implied by reliance on recorded subdivision plat); *Millison v. Laughlin*, 142 A.2d 810, 813-816  
27 (Md. 1958) (holding that servient estate owner could relocate utility pole easement implied by  
28 prior use to reduce danger and annoyance and given that termini would remain unchanged); *Bode*  
29 *v. Bode*, 494 N.W.2d 301, 302 (Minn. Ct. App. 1992) (relying on equitable principles to hold that  
30 where the location of an easement by necessity has not been established by agreement of the  
31 parties, trial court has power to establish the location in a place desired by the owner of the  
32 servient estate); *Huggins v. Wright*, 774 So. 2d 408, 412 (Miss. 2000) (servient tenant could be  
33 granted the option of relocating easement by necessity for utilities and ingress/egress, at its  
34 expense, in part because old, existing roadway in which original easement of necessity was  
35 located divided property in half); *Taylor v. Hays*, 551 So. 2d 906, 908-10 (Miss. 1989) (same);  
36 *Soderberg v. Weisel*, 687 A.2d 839, 842 (Pa. Super. Ct. 1997) (recognizing possibility of  
37 unilateral relocation of a prescriptive easement if new easement location is as safe as the original,  
38 the relocation is a *relatively minor change* and the reasons for relocation are substantial);  
39 *Goodwin v. Johnson*, 591 S.E.2d 34, 37-39 (S.C. Ct. App. 2003) (applying Restatement § 4.8(3)  
40 to approve unilateral relocation of easement of necessity).

41  
42 Courts in three more states (Oregon, Missouri, and New Jersey,) have allowed limited  
43 balancing of the equities when easement holders have sought injunctive relief in response to  
44 proposed or completed relocations. *See Vossen v. Forrester*, 963 P.2d 157, 161-62 (Or. Ct. App.  
45 1998) (allowing relocation of a beach access easement when the servient owner mistakenly built  
46 a house that minimally encroached on the easement, the cost of removing the house would have

1 been substantial, and the easement holders knew of the encroachment at the time construction  
2 began); *S. Star Cent. Gas Pipeline Inc. v. Murray*, 190 S.W.3d 423, 430 (Mo. Ct. App. 2006)  
3 (denying injunction sought by pipeline company several years after it received notice of servient  
4 estate owners' expansion of home and encroachment on easement, and noting that the creating  
5 instrument did not definitely fix the location and observing that *grantee* of easement is entitled to  
6 a convenient, reasonable, and accessible way within the limits of the grant); *Umprhes v. J.R.*  
7 *Mayer Enters. Inc.*, 889 S.W.2d 86, 90 (Mo. Ct. App. 1994) (denying dominant estate owner's  
8 request for injunction to restore a prescriptive roadway easement to its original position and  
9 relegating dominant owner to monetary damages, even though servient owner unilaterally  
10 relocated roadway 10-12 feet from its original location, in light of minor injury to dominant  
11 estate, original location's lack of uniqueness, and new roadway's close fit to description in  
12 original deed on which dominant owners based their interest); *Bubbis v. Kassin*, 803 A.2d 146,  
13 152 (N.J. Super. Ct. App. Div. 2002) (denying injunctive relief and, therefore, allowing  
14 temporary relocation of an implied beach access easement when the servient estate owner  
15 showed that enforcement of the easement in its original location "would have a severe adverse  
16 effect upon the [servient owners'] beneficial enjoyment of their property" and that this adverse  
17 effect "substantially outweighs the inconvenience to plaintiffs" in being required to walk an  
18 additional distance to gain access to the beach and ocean via another route or a substitute  
19 easement); *Kline v. Bernardsvill Ass'n Inc.*, 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div.  
20 1993) (compelling relocation of an easement "to advance the interests of justice where the  
21 modification is minor and parties' essential rights are fully preserved," but cautioning that  
22 relocation should be "an extraordinary remedy and should be grounded in a strong showing of  
23 necessity").  
24

25 Three more states (Idaho, Virginia, and New Mexico) allow relocation by statute for  
26 certain kinds of easements provided relocation does not harm the easement holder or dominant  
27 estate owner. See Idaho Code § 18-4308 (Michie Supp. 2010) (allowing relocation of irrigation  
28 ditch easements); Idaho Code § 42-1207 (Michie Supp. 2010) (same); Idaho Code § 55-313  
29 (Michie Supp. 2010) (allowing relocation of motor vehicle access easements); Va. Code § 55-50  
30 (2007) (allowing for judicial relocation on an easement of ingress and egress, provided it has  
31 been in existence for ten years); N.M. Stat. § 73-2-5 (allowing relocation of irrigation ditch  
32 easements).  
33

34 Courts in eight states (Alabama, Connecticut, Georgia, North Carolina, Pennsylvania,  
35 Vermont, Washington, and Wisconsin) have expressly rejected section 4.8(3) of the Restatement.  
36 See *Tietel v. Wal-Mart Stores Inc.*, 287 F. Supp. 2d 1268, 1276-77 (M.D. Ala. 2003) (declining  
37 to apply section 4.8(3) as inconsistent with Alabama law, especially *Arp v. Edwards*, 706 So. 2d  
38 736, 739 (Ala. Civ. App. 1997)); *Alligood v. Lasaracina*, 999 A.2d 836, 839 (Conn. App. Ct.  
39 2009) (explicitly rejecting Restatement approach on grounds of "uniformity, stability,  
40 predictability and judicial economy"); *Herrin v. Pettergill*, 538 S.E.2d 735, 736 (Ga. 2000)  
41 (expressly rejecting section 4.8(3)); *Sloan v. Rhodes*, 560 S.E.2d 653, 655 (Ga. 2002) (affirming  
42 *Herrin v. Pettergill*); *A. Perin Dev. Co. L.L.C. v. Ty-Par Realty Inc.*, 667 S.E.2d 324, 326-27  
43 (N.C. Ct. App. 2008) (rejecting approach of *M.P.M. Builders L.L.C.*); *McNaughton Props. L.P.*  
44 *v. Barr*, 981 A.2d 222, 225-29 (Pa. Super. Ct. 2009) (rejecting Restatement approach as applied  
45 to express easements as a question of first impression even though 142 acre servient estate owner  
46 offered to provide 1.83 dominant estate owner access to public roads that would have been safer

1 and shorter via new street system proposed for development of servient estate); ~~Sweezy~~*Sweezy*  
2 v. *Neal*, 904 A.2d 1050, 1057-58 (Vt. 2006) (rejecting Restatement approach as applied to  
3 surface easements but allowing servient estate owner to “bend the easement” around a new  
4 addition to his house); *Crisp v. Vanlaecken*, 122 P.3d 926, 928-29 (Wash. Ct. App. 2005);  
5 *MacMeekin v. Low Income Hous. Inst.*, 45 P.3d 570, 579 (Wash. Ct. App. 2002) (expressly  
6 rejecting section 4.8(3)); *AKG Real Estate L.L.C. v. Kosterman*, 717 N.W.2d 835, 842-47 (Wisc.  
7 2006) (rejecting proposed relocation of right of way easement under the impossibility of purpose  
8 doctrine as stated in Restatement § 7.10(1), the changed conditions doctrine as stated in  
9 Restatement § 7.10(2), and the unilateral relocation rule found in §4.8(3)) (stating that “parties  
10 need not include a provision in an express easement to prevent unilateral modification or  
11 relocation” and thus “the rule is that the owner of the servient estate cannot unilaterally modify  
12 an express easement”); *see also* JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS*  
13 *AND LICENSES IN LAND* § 7.13, 717 (2018) (rejecting and criticizing the Restatement approach  
14 and citing other decisions following traditional common law mutual consent rule).

15  
16 ~~Civil Codes in foreign jurisdictions use varying formulations of the triggering~~  
17 ~~justification for servitude relocation from the servient estate owner’s perspective, some even~~  
18 ~~broader than in the Restatement. See, e.g., BGB (Germany) § 1023(1) (trans. Ian S. Forrester et~~  
19 ~~al., Fred B. Rothman & Co. 1975) (servitude relocation triggered if “the use on the present~~  
20 ~~location is especially onerous for him”)~~ (emphasis added); C.C. (Italy) art. 1068 (trans. and eds  
21 Mario Beltrano et al., Oceana 2010) (allowing a servient estate owner to relocate if “original use  
22 has become more burdensome for the servient land or interferes with work, repairs or  
23 ~~improvements on it,”)~~ (emphasis added); C.C. (Brazil) art. 1384 (2004) (same as Italy); C.C.  
24 (Switz.) § 742 (trans. Ivy Williams, Oxford 1925) (“Where the servitude affects one part only of  
25 the servient property, the servient owner can, by showing that the change would be for his benefit  
26 and by undertaking to bear the cost of it, require that the servitude be moved so that it may affect  
27 a different part of his property . . .”) (emphasis added). The new Dutch Civil Code does not even  
28 state a predicate justification from the servient owner’s perspective. It simply allows servitude  
29 relocation “provided that this move is possible without diminishing the enjoyment of the owner  
30 of the dominant land.” NWB Book 5, art. 73.

### 31 32 **Reporter’s Note**

33  
34 Section ~~301 makes clear~~302 implicitly indicates that the right to relocate an easement  
35 belongs *only* to the servient estate owner. ~~Accordingly, this section comports with the drafting~~  
36 ~~committee’s tentative decision made during our June conference call and~~The act, therefore, does  
37 not change the well-established common law rule that *an easement holder may not* unilaterally  
38 relocate an easement without the consent of the servient estate owner unless that right has been  
39 specifically reserved or granted in the creating instrument. *M.P.M. Builders L.L.C. v. Dwyer*, 809  
40 N.E.2d 1053, 1057 (Mass. 2004) (citing additional authority for rule that easement holder may  
41 not unilaterally relocate an easement); Restatement § 4.8(3), cmt. (f), at 563. *But see* *McGoey v.*  
42 *Brace*, 918 N.E.2d 559, 563-567 (Ill. App. Ct. 2009) (holding that the approach of section 4.8(3)  
43 comports with prior Illinois precedent allowing either the dominant or servient estate owner to  
44 make changes to an easement as long as the changes are not “substantial”~~”).~~

45  
46 ~~Unlike the holding in~~ *Kline v. Bernardsvill Ass’n Inc.*, 631 A.2d 1263, 1267 (N.J. Super.

~~Ct. App. Div. 1993), Section 301 makes clear~~<sup>302 clarifies</sup> 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) ~~and), Section 301 state~~<sup>302 states</sup> that a servient estate owner can seek relocation “to permit normal use or development of the servient estate.” Section ~~301~~<sup>302, however,</sup> 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), ~~which provides in pertinent part: “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, . . .”~~ La. Civ. Code art. 748 (emphasis added). If the drafting committee believes that the substantive and procedural safeguards now found in Sections 301, 302, 303, 304, 306, 307 and 308 are sufficient to prevent any harm to the easement holder, then, arguably, a good reason for relocation should be enough and requiring a strong showing of necessity is unwarranted.). 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),]]<sup>5</sup> 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

---

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

1 servient estate owner provides a record described in Section 303 and the easement holder fails to  
2 respond to the request to relocate in a record not later than 60 days after receipt of a record  
3 described in Section 303, the servient estate owner may bring an action in a court to obtain  
4 approval of the proposed relocation.

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

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

12 (d) If, in a final order or judgment, the court determines that a servient estate owner is  
13 entitled to relocate an easement, the servient estate owner may proceed with the relocation,  
14 subject to Sections 307, 308, and 309.

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

### 19 Comment

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

24  
25 Section 305(b) requires the court to review the request for relocation and determine  
26 whether the easement at issue is, in fact, eligible for relocation under Section 201; i.e., that the  
27 easement is not disqualified for easement relocation by virtue of being a public utility easement,



1 a conservation easement or a negative easement. This provision is intended to provide protection  
2 for difficult to identify easement holders and, in particular, conservation organizations that have  
3 an interest in preserving conservation easements but might lack the organizational capacity to  
4 respond to a servient estate owner's notice of an intent to relocate an easement.

5  
6 When an easement holder timely objects to relocation, Section 305(c) authorizes the  
7 servient estate owner to file what amounts to a declaratory judgement action to obtain judicial  
8 approval of the proposed relocation. If judicial approval is granted, the servient estate owner may  
9 proceed with relocation but must still comply with all other provisions of the act.

10  
11 The 60-day notice period specified throughout Section 305 (and in Section 304) is  
12 intended to give easement holders a reasonable opportunity to investigate the terms of the  
13 proposed easement relocation without causing an undue delay to realization of the servient  
14 estates owner's plans for development or improvement of the servient estate and to establish a  
15 notice period that is simple and easy to calculate. State statutes that allow easement relocation at  
16 the servient estate owner's expense sometimes require notice but do not specify a notice period.  
17 See, e.g., Va. Code § 55-50 (merely requiring "petition to the circuit court and notice to all  
18 parties in interest"); Idaho Code § 18-4308 (providing for relocation of irrigation ditches at  
19 servient estate owner's expense, but not indicating a notice period); Idaho Code § 55-313  
20 (providing for relocation of motor vehicle access easements at servient estate owner's expense,  
21 but not indicating a notice period); N.M. Stat. § 73-2-5 (allowing for relocation of irrigation  
22 ditches "so long as such alteration or change of location does not interfere with the use or access  
23 to such ditch by the owner of the dominant estate," but not indicating whether notice or any  
24 special procedure is required).

25 If a servient estate owner attempts to file an action seeking to relocate an easement and  
26 does not provide proof of its attempt to provide notice to the easement holder and of the  
27 expiration of the delay period set forth in this section, a court would be entitled to dismiss the  
28 action.

29  
30 Section 305(d) reiterates that even if a court determines that a servient estate owner is  
31 entitled to relocate an easement in a non-consensual proceeding, the servient estate owner must  
32 still comply with all provisions in the act intended to protect the interests of the easement holder,  
33 including Section 307 (payment of costs and expenses resulting from relocation), Section 308  
34 (cooperate in good faith and minimize disruption of use and enjoyment), and Section 309  
35 (execution and recordation of document establishing new easement location).

36  
37 Section 305(e) recognizes a court's residual power to issue other incidental orders  
38 necessary to implement a fair and efficient relocation that assures the easement holder suffers no  
39 material harm upon relocation. It also recognizes a court's power to address what is likely to be  
40 the unusual case of a specialized mortgage loan document that characterizes an easement  
41 relocation as an event possibly triggering a default or a due-on-sale clause. See infra Section 311  
42 and the comment thereto.

43  
44 **SECTION 306. FACTORS RELEVANT TO DETERMINE WHETHER AN**  
45 **EASEMENT IS ELIGIBLE FOR RELOCATION. ~~In~~In a proceeding under Section 305(b), a**

1 court shall, in determining whether a servient estate owner ~~is entitled to~~may relocate an easement  
2 under Section ~~301 of this [Act], a court shall give consideration to~~302, consider the following  
3 factors:

4 ~~(a)[(1) whether the easement is eligible or ineligible for relocation under Section 201;]]<sup>6</sup>~~  
5 (2) whether the proposed relocation will significantly materially affect the route, gradient,  
6 or width of the easement;

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

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

13 ~~(e5) whether, once relocation is complete,~~ there will be a material burden upon or harm to  
14 the easement ~~holder~~holder's [[affirmative, easement-related]]<sup>7</sup> interests once the relocation is  
15 complete;

16 ~~(d) whether the proposed relocation will have a significant effect on public safety or the~~  
17 safety6) interests of individuals using parties other than the easement holder entitled to notice  
18 under Section 303 that have not consented to the relocation; and

19 (e7) any other factor that may be material to the easement holder's right to use and enjoy  
20 the easement.

21 Comment

22 ~~Comment~~

---

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

<sup>7</sup> This double bracketed language is new.



1 This section identifies specific factors relevant to the determination under Section 301 of  
2 the act as to whether a proposed new location of an easement will provide the same general  
3 utility to the easement holder without causing any harm to the easement holder. The enumerated  
4 factors represent an illustrative, but not an exhaustive, list of factors that parties and courts  
5 should consider. Subsections (a)–(d) are intended to channel a court’s exercise of the discretion  
6 afforded by Section 301 of the Act into four primary streams of factual analysis. Subsection (e)  
7 preserves a court’s freedom to consider any other factors that have not been anticipated by the  
8 act.

9 In states in which unilateral easement relocation is permitted either by judicial precedent  
10 or by statute, courts have considered a number of factors in determining whether to allow a  
11 proposed easement relocation or modification to proceed. Those factors include all  
12 aspects. Section 306 sets forth specific factors that a court should consider in determining whether  
13 to allow an easement relocation to proceed under Section 302 act in an action authorized by  
14 Section 305(b). Of course, some factors may not be relevant to a particular relocation dispute,  
15 and thus a court may always indicate that one or more factors is not relevant to a particular  
16 matter.

17  
18 Section 306(1) focuses the attention of a court on the threshold inquiry of whether a  
19 particular easement is the kind of easement eligible for relocation under Section 201(a) or the  
20 kind of easement ineligible for relocation under Sections 201(b) through (c). If the latter, the  
21 court would have no need to consider the remaining factors.

22  
23 Section 306(2) requires courts to consider the nature of the quality of the proposed new  
24 route for the easement in terms of its route, gradient, and its impact on the width. Courts almost  
25 always consider these interrelated factors in deciding whether to allow easement holder or  
26 servitude relocations to proceed. See, e.g., *Carlin v. Cohen*, 895 N.E.2d 793, 798-99 (Mass. App.  
27 Ct. 2008) (~~applying *M.P.M. Builders L.L.C.* and~~ affirming trial court ruling that servient estate  
28 owner was entitled to relocate a pedestrian beach access easement because entry point of  
29 relocated easement was not more difficult to reach than under original easement, and, even  
30 though dominant estate owner would have to walk over a knoll, there was no evidence original  
31 easement path was more level); *Belstler v. Sheller*, 264 P.3d 926, 933 (Idaho 2011) (affirming  
32 trial court refusal to approve relocation of express ingress and egress easement under Idaho Code  
33 § 55-313 because relocation would have rendered road grades on easement substantially steeper  
34 than in original location and would have created hazard for dominant estate owners in using  
35 easement); *Welch v. Planning and Zoning Comm’n of E. Baton Rouge Par.*, 220 So. 3d 60, 65-68  
36 (La. Ct. App. 2017) (holding that developer of new subdivision was not justified in unilaterally  
37 relocating a servitude under Article 748 of the Louisiana Civil Code because new rights-of-way  
38 provided over public roads were only 20 feet wide and thus diminished utility of servitude which  
39 provided for 30 foot wide right-of-way benefiting three enclosed lots).

40  
41 Section 306(3) mandates that courts consider the safety of individuals using the easement  
42 and public health and safety. Courts frequently consider these interrelated factors when  
43 evaluating the route, gradient and width of a proposed new location for an easement. Courts  
44 sometimes take into account the effect of a proposed easement relocation on public health and  
45 safety more generally, including the potential for the improved effectiveness of an easement. See  
46 *R & S Invests. v. Auto Auctions Ltd.*, 725 N.W.2d 871, 876-78, 881 (Neb. Ct. App. ~~*Manning*~~

1 ~~2006) (holding that servient owner could relocate an easement for a sanitary sewer lagoon,~~  
2 ~~even though the new lagoon was located 500 feet farther away from dominant estate than the old~~  
3 ~~one, because the servient owner constructed the new lagoon with greater wastewater capacity~~  
4 ~~and all necessary piping and connections and alleviated serious environmental concerns related~~  
5 ~~to age of old lagoon).~~

6  
7 Section 306(4) requires courts to consider whether the process of relocating the easement  
8 will materially disrupt the easement holder's use and enjoyment of the easement during the  
9 process of relocation and the extent to which the servient estate owner can abate or minimize this  
10 disruption during the process of relocation. This subsection could thus lead a court to require a  
11 servient estate owner to complete construction of a new access road or driveway along the route  
12 of the relocated easement before diverting traffic away from the original easement location.

13  
14 Section 306(5) requires courts to consider whether a proposed new location of an  
15 easement will provide the same general utility to the easement holder without causing any  
16 material harm to the easement holder in connection with the express purpose of the easement. In  
17 other words, the subsection focusses judicial attention on the affirmative, easement-related  
18 benefits of an easement, rather than any ancillary or incidental advantages that an easement  
19 holder might claim in connection with the easement such as preventing the servient estate owner  
20 from developing the servient estate. Compare Manning v. Campbell, 268 P.3d 1184, 1187-88  
21 (Idaho 2012) (holding that servient owner was not entitled to relocate a driveway access  
22 easement under Idaho Code § 55-313 because the relocated easement would not have connected  
23 to any existing route for vehicular travel and would have required dominant estate owners to  
24 construct a new driveway on their property across their front lawn, and, thus, would injure the  
25 dominant estate owners and their property); Welch v. City of Boulder v. Planning and  
26 Zoning Comm'n of E. Baton Rouge Par., 220 So. 3d 60, 65-68 (La. Ct. App. 2017) (holding that  
27 developer of new subdivision was not justified in unilaterally relocating a servitude under Article  
28 748 of the Louisiana Civil Code because new rights of way provided over public roads were  
29 only 20 feet wide and thus diminished utility of servitude which provided for 30 foot wide right-  
30 of-way benefiting three enclosed lots).

31  
32 ~~Courts have also considered factors related to functional utility of the easement, public~~  
33 ~~safety and health. See R & S Invests. v. Auto Auctions Ltd., 725 N.W.2d 871, 876-78, 881 (Neb.~~  
34 ~~Ct. App. 2006) (holding that servient owner could relocate an easement for a sanitary sewer~~  
35 ~~lagoon because the servient owner constructed a new lagoon with greater wastewater capacity~~  
36 ~~and all necessary piping and connections, alleviated serious environmental concerns related to~~  
37 ~~age of old lagoon, even though the new lagoon was located 500 feet farther away from dominant~~  
38 ~~estate than the old one); City of Boulder v. Farm and Irrigation Co., 214 P.3d 563, 567-69 (Colo.~~  
39 ~~App. 2009) (refusing to allow alteration of ditch irrigation easement under Roaring Fork Club~~  
40 ~~L.P. so that city could build trail extension because alteration would materially and adversely~~  
41 ~~affect the maintenance rights that irrigation company enjoyed by way of easement from state~~  
42 ~~department of transportation); Belstler v. Sheller, 264 P.3d 926, 933 (Idaho 2011) (affirming trial~~  
43 ~~court refusal to approve relocation of express ingress and egress easement under Idaho Code §~~  
44 ~~55-313 because relocation would have rendered road grades on easement substantially steeper~~  
45 ~~than in original location and would have created hazard for dominant estate owners in using~~  
46 ~~easement).), 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 ~~303~~307. COSTS AND EXPENSES OF RELOCATION CHARGEABLE TO ~~THE~~ SERVIENT ESTATE OWNER.** ~~When~~If a servient estate owner seeks to relocate an easement under Section ~~301 of this [Act], the servient estate~~302, the owner is responsible for all costs and expenses associated with relocation, including the cost of:

(~~a~~1) constructing all works or improvements necessary for the use and preservation of the easement in its new location ~~and~~, repairing any physical damage to the dominant estate caused by the relocation, and relocating improvements on the dominant estate affected by the relocation;

(~~b~~2) minimizing and alleviating any temporary disruption ~~that~~ the relocation process ~~may cause~~causes to the easement holder;

(~~e~~3) obtaining any ~~planning, zoning or land use~~governmental approvals or permits required by law to relocate the easement;

~~(d) amending any instrument establishing the easement;~~ and

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

#### Comment

#### ~~Comment~~

~~This section is intended to give~~Section 307 provides courts with guidance as to the items that might constitute an expense chargeable to the servient estate owner under Section ~~301 of the act~~302. The enumerated items represent an illustrative, but not ~~an~~-exhaustive, list of ~~such~~ chargeable expenses. ~~The concept of “works or improvements necessary for the use and~~

1 preservation of the easement” in subsection (a) is borrowed from La. Civ. Code art. 744  
2 (providing that normally the owner of the dominant estate has “the right to make at his expense  
3 all the works that are necessary for the use and preservation of the servitude.”).  
4

5 Attorney’s fees incurred by the easement holder might well constitute part of the  
6 expenses chargeable under the various subsections, particularly under subsections (3) and (4)  
7 pertaining to the acquisition of governmental approvals and preparing an instrument for filing in  
8 the public records designed to provide third party effect for the relocated easement. Other  
9 expenses related to obtaining governmental approval or preparing instruments for filing in the  
10 public records, such as obtaining necessary consents from co-owners or other interested parties,  
11 could also be chargeable under subsections (3) and (4).  
12

13 The specific requirements for a notice document that establishes the easement’s new  
14 relocation and that must be filed in the public records are set forth in Section 309.  
15

16 **SECTION ~~304~~308. DUTY TO COOPERATE ~~AND~~ IN GOOD FAITH; DUTY TO**  
17 **MINIMIZE AND ALEVIATE DISRUPTION.** ~~If an easement holder consents to relocation as~~  
18 ~~provided in Section 306(b) of the [Act] or is deemed to have consented to a proposed relocation~~  
19 ~~under Section 306(c) of the [Act], or if the~~

20 (a) A servient estate owner ~~obtains judicial approval to relocate and~~ an easement ~~under~~  
21 ~~Section 306(d) of the [Act], then~~

22 ~~(a) the servient estate owner and the easement holder shall have a reciprocal duty to~~  
23 cooperate in good faith to facilitate the swift and safe relocation of ~~the~~an easement, ~~and~~.

24 ~~(b) the~~A servient owner shall ~~have the duty to~~ minimize and alleviate any disruption to  
25 the ~~easement holder’s~~ use and enjoyment of ~~the~~an easement or the dominant estate.

26 ~~Comment~~

27 Comment

28 The ~~reciprocal~~ duty of the servient estate owner and easement holder to cooperate in good  
29 faith to facilitate a swift and ~~speedy~~safe relocation of the easement is grounded in an  
30 understanding of an easement as a long-term, concurrent property relationship that imposes  
31 mutual duties of accommodation on both parties—the servient estate owner and the easement  
32 holder. For a general discussion of the principle of mutual accommodation in the law of  
33 easements and servitudes at common and civil law, see John A. Lovett, *A Bend in the Road:*  
34 *Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38

1 CONN. L. REV. 1, 36-47 (2005).

2  
3 For judicial endorsements of the principle of mutual accommodation and the duty to  
4 consider the rights and interests of the other party in an easement relationship in the specific  
5 context of easement relocation, see *Roaring Fork Club L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1232  
6 (Colo. 2001) (explaining that Colorado law increasingly recognizes that when there are two  
7 competing interests in the same land, those interests “should be accommodated, if possible,” and  
8 ~~that inflexible notions of dominant and servient estates do little to advance that accommodation”~~  
9 ~~and explaining that endorsing~~ the Restatement approach to easement relocation ~~is the most as~~  
10 consistent with that “accommodation doctrine”); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d  
11 1053, 1058-59 (Mass. 2004) (~~opining observing~~ that an “easement is created to serve a particular  
12 objective, not to grant the easement holder the power to veto other uses of the servient estate that  
13 do not interfere with that purpose,” and quoting *Roaring Fork Club L.P.*, 36 P.3d at 1237 for the  
14 proposition that “[c]learly, the best course is for the owners to agree to alterations that would  
15 accommodate both parties use of their respective properties to the fullest extent possible”); *R & S*  
16 *Invs. v. Auto Auctions Ltd.*, 725 N.W.2d 871, 880 (Neb. Ct. App. 2006) (stating that “Nebraska  
17 case law provides that the owner of a servient estate and the owner of a dominant estate enjoy  
18 correlative rights to use the subject property, and the owners must have due regard for each other  
19 and should exercise that degree of care and use which a just consideration of the rights of the  
20 other demands”).

21  
22 The duty of the servient estate owner to minimize and alleviate any disruption of the use  
23 and enjoyment of the easement or the dominant estate is ~~a fundamental an important~~ safeguard  
24 ~~of in~~ the relocation process, particularly if ~~the a~~ dominant estate is already developed for  
25 commercial purposes. This safeguard goes above and beyond the safeguards employed in  
26 Restatement § 4.8(3) to assure that relocation of the easement does not cause any harm to the  
27 ~~dominant estate owner easement holder~~ and, therefore, should protect the easement holder's  
28 rights ~~of the dominant estate owner~~ both retroactively and prospectively.

29  
30 ~~[SECTION 305—TWO OPTIONS TO CONSIDER OR TO DELETE ENTIRELY]~~

31 ~~Alternative A~~

32 ~~[SECTION 305. RIGHT OF PARTIES TO EXCLUDE APPLICATION. The~~  
33 ~~parties to an instrument creating an easement after the effective date of the [Act] shall have the~~  
34 ~~right to provide that an easement otherwise eligible for relocation under Section 301 of the [Act]~~  
35 ~~shall not be subject to the provisions of this [Act].]~~

1 **Alternative B**

2 ~~[SECTION 305. RIGHT OF PARTIES TO LIMIT APPLICATION. The parties to~~  
3 ~~an instrument creating an easement after the effective date of the [Act] shall have the right to~~  
4 ~~provide that an easement otherwise eligible for relocation under Section 301 of the [Act] shall~~  
5 ~~not be subject to the provisions of the [Act] for a period of \_\_\_ years after the date of the~~  
6 ~~instrument.]~~

7 **End of Alternatives**

8 **Comment**

9 ~~———This section provides that parties to a new instrument creating an easement after the~~  
10 ~~effective date of the act have the power to opt-out of the act’s provisions either totally or for a~~  
11 ~~stated number of years. Either option creates a new default regime for easement relocation after~~  
12 ~~the effective date of the act. This new default regime puts the burden on the easement holder to~~  
13 ~~declare its intention that the act not apply to the easement (Option A) or not apply to the~~  
14 ~~easement for a stated number of years (Option B).~~

15 **Reporter’s Note**

16 I have bracketed this entire section because, even though the drafting committee  
17 tentatively agreed during our June conference call that parties to an easement should have the  
18 right to opt-out of the provisions of this act, after further consideration I recommend that the  
19 drafting committee delete this section in its entirety. If the substantive and procedural safeguards  
20 now found in sections 301, 302, 303, 304, 306, 307 and 308 are sufficient to prevent any harm to  
21 the easement holder, then the change in the law effectuated by the act should arguably apply not  
22 only retroactively to old easements that contain provisions requiring consent to any amendment  
23 of material terms (even ones specifically focused on the location of an easement), but also  
24 prospectively to new easements created after the effective date of the act, even if those easement  
25 agreements contain similar provisions. This is the approach followed by Article 1023 of the  
26 German Civil Code, one of the most influential civil law codifications in the world. See BGB  
27 (Germany) § 1023(1) providing:

28 (1) Where the use of an easement for the time being is restricted to part of the  
29 servient plot of land, the owner may require the use to be moved to another place  
30 that is equally suitable for the person entitled, if the use in the previous place is  
31 particularly arduous for him; he must bear and advance the costs of moving. This  
32 also applies if the part of the plot of land to which the use is restricted is  
33 determined by legal transaction.

34 (2) The right to move the use may not be excluded or restricted by legal



1 ~~transaction.~~

2  
3 ~~÷ (emphasis added).~~

4  
5 ~~Several other foreign jurisdictions allow a land use right or restriction, including an easement or~~  
6 ~~servitude, to be subject to judicial modification or termination under statutory changed~~  
7 ~~conditions doctrines at any time. See Lovett, December 2010 Memo, at 13-21 (discussing~~  
8 ~~Australia, New Zealand, the Province of British Columbia in Canada, Northern Ireland, South~~  
9 ~~Africa, and Switzerland).~~

10  
11 ~~Other jurisdictions, principally Scotland and the Netherlands, allow such modification,~~  
12 ~~but only after the lapse of a specific period of time—five years in Scotland and 20 years in the~~  
13 ~~Netherlands—during which the land use right or restriction is not subject to any form of judicial~~  
14 ~~modification. See Lovett, December 2010 Memo, at 14-15, 20-21, 31-32. This is the approach~~  
15 ~~that I recommended in my 2005 law review article on the subject of easement relocation. John A.~~  
16 ~~Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third)*~~  
17 ~~*of Property: Servitudes*, 38 CONN. L. REV. 1, 47-56 (2005). In that article, I described my~~  
18 ~~approach as being based on the “Temporally Constrained Freedom of Contract Model proposed~~  
19 ~~by Professors Carol Rose and Allison Dunham.” *Id.* at 47. I wrote:~~

20  
21 ~~Borrowing from these numerous recommendations for temporal restraints on~~  
22 ~~servitude duration that emerged from the servitude reform and unification debate,~~  
23 ~~my first proposal for refining section 4.8(3) seeks to preserve a measure of~~  
24 ~~easement holder certainty while limiting the harmful effects of prolonged and~~  
25 ~~potentially unlimited property rule protection by establishing a fixed period of~~  
26 ~~time (for instance thirty years) during which an easement’s initial location could~~  
27 ~~not be changed without the consent of the easement holder.~~

28  
29 ~~*Id.* at 52-53. I justified this proposal in the following terms:~~

30  
31 ~~By adding a temporally defined property rule protection phase, followed by a~~  
32 ~~classic pliability rule phase, my version of section 4.8(3) would provide more~~  
33 ~~certain, crystalline incentives for development of dominant estates and the~~  
34 ~~easements that serve them for fixed periods of time and yet still limit “the social~~  
35 ~~deadweight loss” that can result from perpetual and exclusive property rule~~  
36 ~~protection.~~

37  
38 ~~*Id.* at 54-55 (quoting Abraham Bell and Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L.~~  
39 ~~REV. 1, 42, 71 (2002)).~~

40  
41 ~~If parties are allowed to opt out of the act’s easement relocation regime, it is quite~~  
42 ~~possible—maybe even likely—that in most cases parties to an express easement created after the~~  
43 ~~effective date of the act will do so. This will leave parties to such an easement in the same~~  
44 ~~deadlock position 20 or 30 years from now. Leaving this section in place and allowing parties to~~  
45 ~~opt out of the provisions of the act for future easements will create the anomalous situation that~~  
46 ~~*old easements* containing express clauses requiring consent to amendment and specified~~

1 ~~easement locations will be subject to relocation, whereas new easements with opt-out clauses~~  
2 ~~will not be subject to relocation. This just seems odd to me and perhaps not defensible in terms~~  
3 ~~of fairness.~~

4  
5 ~~If, however, the drafting committee decides not to delete this section and, thus, makes the~~  
6 ~~act a prospective default regime, I recommend that it consider allowing parties to exclude~~  
7 ~~application of the act only for a finite period of time, after which an easement will automatically~~  
8 ~~become subject to relocation under the terms of the act (Option B). Again, this was my~~  
9 ~~recommendation in 2005.~~

10  
11 ~~———— SECTION 306. PROCEDURES FOR INVOKING THE RIGHT TO RELOCATE.~~

12 ~~(a) A servient estate owner may only exercise the right to relocate an eligible easement~~  
13 ~~under Section 301 of the [Act] if the servient estate owner first gives notice in a record to the~~  
14 ~~easement holder of its intention to seek relocation and a statement of the scope, nature, extent~~  
15 ~~and location of the proposed relocation and the reasons that the proposed relocation satisfies the~~  
16 ~~requirements of Section 301.~~

17 ~~(b) If the easement holder in a record grants consent to the request to relocate within 60~~  
18 ~~days after receipt of the record described in subsection 306(a), then the servient estate owner~~  
19 ~~may proceed with the relocation, subject to the provisions of this [Act], including the~~  
20 ~~requirements to: (i) pay all costs and expenses associated with the relocation, as provided in~~  
21 ~~Section 303 of the [Act]; (ii) cooperate in good faith and minimize and alleviate disruption, as~~  
22 ~~provided in Section 304 of the [Act]; and (iii) execute and record a notice document, as provided~~  
23 ~~in Section 307 of the [Act].~~

24 ~~(c) If the servient estate owner provides the record described in subsection 306(a) and the~~  
25 ~~easement holder fails to either consent or object to the request to relocate in a record within 60~~  
26 ~~days after receipt of the record described in subsection 306(a), then the easement holder shall be~~  
27 ~~deemed to have consented to the request for relocation and the servient estate owner may~~  
28 ~~proceed with the relocation, subject to the provisions of this [Act], including the requirements to:~~



1 ~~(i) pay all costs and expenses associated with the relocation, as provided in Section 303 of the~~  
2 ~~[Act]; (ii) cooperate in good faith and minimize and alleviate disruption, as provided in Section~~  
3 ~~304 of the [Act]; and (iii) execute and record a notice document, as provided in Section 307 of~~  
4 ~~the [Act].~~

5 ~~(d) If a servient estate owner provides the record described in subsection 306(a), and the~~  
6 ~~easement holder in a record objects to the relocation within 60 days after receipt of the record~~  
7 ~~described in subsection 306(a), then the servient estate owner may bring an action in a court of~~  
8 ~~general or specific jurisdiction to obtain court approval of the proposed relocation. If, in a final~~  
9 ~~order or judgment, the court grants the servient estate owner's request to relocate, then the~~  
10 ~~servient estate owner may proceed with the relocation, subject to the provisions of this [Act],~~  
11 ~~including the requirements to: (i) pay all costs and expenses associated with the relocation, as~~  
12 ~~provided in Section 303 of the [Act]; (ii) cooperate in good faith and minimize and alleviate~~  
13 ~~disruption, as provided in Section 304 of the [Act]; and (iii) execute and record a notice~~  
14 ~~document, as provided in Section 307 of the [Act].~~

#### 15 **Comment**

16 ~~——— This section is intended to make clear that a servient estate owner may not engage~~  
17 ~~in self help if it desires to relocate an easement. It codifies the rulings of the highest courts of~~  
18 ~~several states that have adopted the Restatement approach to easement relocation. See *Rearing*~~  
19 ~~*Fork Club L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1237-38 (Colo. 2001) (stating that a court is the~~  
20 ~~appropriate forum to resolve disputes over easement relocation and advising that “to avoid an~~  
21 ~~adverse ruling of trespass or restoration — the burdened owner should obtain a court declaration~~  
22 ~~before commencing alterations”); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1059~~  
23 ~~(Mass. 2004) (commenting that “the servient estate owner should seek a declaration from the~~  
24 ~~court that the proposed changes meet the criteria in [section] 4.8(3)” and “may not resort to self-~~  
25 ~~help remedies”).~~

26  
27 ~~The servient estate owner seeking to relocate an easement must give written notice of its~~  
28 ~~intent to relocate the easement in accordance with subsection (a) of this section. The easement~~  
29 ~~holder then has 60 days to reply to the request for relocation. When the easement holder timely~~  
30 ~~consents to the relocation, the servient estate owner may proceed with the relocation but must~~  
31 ~~still comply with all other provisions of the act.~~

1 When an easement holder fails to grant consent or object within the 60-day period, this  
2 non-response is deemed to constitute consent to the relocation. In such a case, the servient estate  
3 owner may proceed with relocation but must still comply with all other provisions of the act.  
4

5 ~~When an easement holder timely objects to relocation, the servient estate owner may file~~  
6 ~~what amounts to a declaratory judgment action to obtain judicial approval of the proposed~~  
7 ~~relocation. If judicial approval is granted, the servient estate owner may proceed with relocation~~  
8 ~~but must still comply with all other provisions of the act.~~  
9

10 The 60-day notice period was selected to give easement holders a reasonable opportunity  
11 to investigate the terms of the proposed easement relocation without causing an undue delay to  
12 realization of the servient estates owner's plans for development or improvement of the servient  
13 estate and to establish a notice period that is simple and easy to calculate. ~~State statutes that~~  
14 ~~allow easement relocation at the servient estate owner's expense sometimes require notice but do~~  
15 ~~not specify a notice period. See, e.g., Va. Code § 55-50 (merely requiring "petition to the circuit~~  
16 ~~court and notice to all parties in interest"); Idaho Code § 18-4308 (providing for relocation of~~  
17 ~~irrigation ditches at servient estate owner's expense, but not indicating a notice period); Idaho~~  
18 ~~Code § 55-313 (providing for relocation of motor vehicle access easements at servient estate~~  
19 ~~owner's expense, but not indicating a notice period); N.M. Stat. § 73-2-5 (allowing for relocation~~  
20 ~~of irrigation ditches "so long as such alteration or change of location does not interfere with the~~  
21 ~~use or access to such ditch by the owner of the dominant estate," but not indicating whether~~  
22 ~~notice or any special procedure is required).~~  
23

### 24 **Reporter's Notice**

25

26 I decided to require notice only to the easement holder for simplicity's sake and because  
27 all parties with a stake in the dominant estate are protected by the safeguards included in  
28 Sections 301, 302, 303, 304 and 307 of the act. Accordingly, other interested parties, including  
29 mortgagees, would have no basis for complaining that their interest has been impaired by a  
30 relocation undertaken in compliance with the act.  
31

32 ~~SECTION 307~~The duty of parties in long-term property relationships to act in  
33 good faith is not new to uniform acts promulgated by the Uniform Law Commission. *See, e.g.,*  
34 *Uniform Common Interest Ownership Act* Section 1-113 ("Every contract or duty governed by  
35 this [act] imposes an obligation of good faith in its performance or enforcement.). *See also*  
36 *Uniform Simplification of Land Transfers Act* Section 2-103(i)(b) and *Uniform Commercial*  
37 *Code* Sections 1-304, 7-404.  
38

### 39 **SECTION 309. EXECUTION AND RECORDATION OF DOCUMENT**

#### 40 **ESTABLISHING NEW LOCATION OF EASEMENT.**

41 (a) If ~~the~~an easement holder grants consent to ~~the~~a relocation ~~as set forth in~~under Section  
42 ~~306(b) of the [Act], then~~304, the servient estate owner and the easement holder shall execute and

1 ~~record~~the servient estate owner shall cause to be recorded in the relevant public records a  
2 document,~~in~~. The document must be in the form required by the recording statutes of this state:

3 ~~(i) stating and:~~

4 (1) state that the relocation was obtained in accordance with Section ~~306(b) of the~~  
5 ~~[Act];304;~~ and ~~(ii) setting~~

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

7 (b) ~~Provided the~~If a court determines that a servient estate owner ~~has complied with the~~  
8 ~~notice requirements for relocation of~~is entitled to relocate an easement ~~in~~pursuant to Section  
9 ~~306(a) of the [Act], if the easement holder fails either to consent or object to the request for~~  
10 ~~relocation as set forth in Section 306(c) of the [Act], then~~305, the servient estate owner shall  
11 execute and record in the relevant public records a document,~~in~~. The document must be in the  
12 form required by the recording statutes of this state: ~~(i) stating that the relocation was obtained in~~  
13 ~~accordance with Section 306(c) of this [Act]; and (ii) setting forth with specificity the new~~  
14 ~~location of the easement.;~~

15 ~~(c) If the relocation occurs after completion of a judicial proceeding under Section~~  
16 ~~306(d) of the [Act], then the servient estate owner shall execute and record in the relevant~~  
17 ~~public records a document, in form required by the recording statutes of this~~1) state: ~~(i)~~  
18 ~~stating~~ that the relocation was obtained in accordance with Section ~~306(d) of the [Act];~~  
19 ~~(ii) containing adequate citation to~~305;

20 (2) contain a certified copy of the final order or judgment of the court granting the  
21 request for relocation; and ~~(iii) setting forth with specificity the new location of the easement.~~

22 ~~Comment~~

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

**Comment**

At least one court has required a servient estate owner ~~who~~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 ~~three~~two procedural mechanisms set forth for completing relocation of an easement under ~~Section 306 of the act~~Sections 304 and 305.

**SECTION ~~308. METHODS~~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~~act] must be accomplished in a manner ~~reasonably suitable under the circumstances and likely to result in receipt of the notice.~~ ~~Permissible~~consistent with service of process in this state.]]<sup>8</sup>

**Legislative note:** Section 310 provides for methods of notice ~~include first-class mail,~~based on the Uniform Home Foreclosures Procedures Act, Sections 202 and 204 (2015). A

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<sup>8</sup> The double brackets for Sections 310(a)-(c) and Section 310(d) indicate a subject for Drafting Committee discussion.

1 state, however, may decide to employ its own methods of notice consistent with the rules for  
2 service of process in that state. Hence, the bracketed language at the end of this section is an  
3 alternative to subsections (a) through (c).

#### 4 5 Comment

6  
7 Section 310, setting forth the requirements for pre-litigation notice of an intent to seek  
8 relocation of an easement under Section 302, is derived from Sections 202 and 204 of the  
9 Uniform Home Foreclosures Procedures Act (2015). It does not displace any other notices  
10 required by applicable state law for initiation of a judicial proceeding by personal service.

11  
12 Notice under this section must be sent by first class mail. First class mail has the  
13 characteristic that it will be delivered to the last known address whether or not the recipient  
14 accepts delivery, in person. The servient estate owner may supplement first class mail with  
15 certified mail or overnight delivery to the person's last known place, residence or place of  
16 business, or a properly directed electronic message but may not rely solely on methods that  
17 require the recipient to accept delivery in person.

18 (b) Notice otherwise required under this [Act] need not be provided to a person whose  
19 identity or location is unknown or not reasonably ascertainable.

#### 20 Comment

21  
22 This section is taken from Section 109 of the Uniform Trust Code.

#### 23 Reporter's Note

24  
25 Because there are many notice requirements in effect in every jurisdiction, I chose this  
26 provision because it is a widely recognized provision in many jurisdictions. As the comments to  
27 Section 204 of the Uniform Home Foreclosures Procedures Act indicate, Sections 310(b) and (c)  
28 of this act address situations that may arise when an easement holder has sold a dominant estate  
29 to another person or when the easement holder has died and the interest in the easement has  
30 passed to an heir or devisee. In either case, it may be difficult or impossible to identify or locate  
31 the easement holder.

#### 32 33 SECTION 311. CHARACTERIZATION OF RELOCATION OF EASEMENT.

34  
35 Relocation of an easement under this [act] is neither a transfer nor a grant of an interest in the  
36 servient estate or the dominant estate affected by the easement.

#### 37 Comment

38  
39 The relocation of an easement under the act simply redefines where the easement is  
40 located. It does not constitute a transfer or a grant of an interest in either a servient estate

1 burdened by the easement or a dominant estate benefited by the easement. As such, an easement  
2 relocation that occurs pursuant to this act would not normally trigger a default or due-on-sale  
3 clause under an applicable loan document. It is conceivable that a very specialized loan  
4 document might characterize an easement relocation as an event triggering a default or due-on-  
5 sale clause. In that unusual circumstance, the preemption provisions of the Garn Act, 12  
6 U.S.C.A. §1701j-3(b), would allow enforcement of such a clause. However, as most loan  
7 documents do not characterize an easement relocation as an event triggering a default or due-on-  
8 sale clause, Section 312 clarifies that, in the normal case, an easement relocation cannot be  
9 characterized as an event triggering a default or application of such a clause. For a discussion of  
10 the enforceability of and restrictions on due-on-sale clauses, see Grant S. Nelson et al., Real  
11 Estate Finance Law §§ 5.21-5.26, at 321-61 (6th ed. 2015).

12  
13 **SECTION 312.**

14  
15 **~~SECTION 309.~~ UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In  
16 applying and construing this uniform act, consideration must be given to the need to promote  
17 uniformity of the law with respect to its subject matter among the states that enact it.

18 **SECTION ~~310~~313. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**  
19 **AND NATIONAL COMMERCE ACT.** This act modifies, limits, or supersedes the Electronic  
20 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not  
21 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize  
22 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.  
23 Section 7003(b).

24 **SECTION ~~311~~314. REPEALS; CONFORMING AMENDMENTS.**

25 \_\_\_\_\_ (a) . . . .

26 \_\_\_\_\_ (b) . . . .

27 \_\_\_\_\_ (c) . . . .

28 **SECTION 315. EFFECTIVE DATE.** This [~~Aet~~act] takes effect . . . .