

D R A F T

FOR ~~DISCUSSION ONLY~~ APPROVAL

UNIFORM EASEMENT RELOCATION ACT

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UNIFORM EASEMENT RELOCATION ACT

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UNIFORM EASEMENT RELOCATION ACT

Prefatory Note

I. Background

The Uniform Easement Relocation Act (“UERA” or “the act”) is designed to provide a simple and practical solution to a problem that has confronted servient estate owners, easement holders, and courts for many decades in the United States. Before 2000, under the most widely employed common law rule, a servient estate owner whose property was burdened by an easement could not relocate the easement without the consent of the easement holder.¹ This rule, however, was not followed in every state. Some state courts drew on equitable balancing principles and occasionally allowed servient estate owners to relocate an easement without the consent of the easement holder, particularly if the change to the easement was relatively modest, the interests of the servient estate owner were substantial, or there was evidence of easement holder acquiescence.² Relying on a statute that permitted special proceedings for easement relocation, Kentucky courts occasionally allowed easements to be relocated.³ Finally, grounded in its 200 year old civil law tradition, the Louisiana Civil Code has for decades provided that “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, [the owner of the servient estate] may provide another equally convenient location for the exercise of the servitude which the owner of the servitude is bound to accept.”⁴ Moreover, Louisiana law has always required the expenses of a unilateral

¹ See, e.g., *Stamatis v. Johnson*, 224 P.2d 201, 202-03 (Ariz. 1950); *Davis v. Bruk*, 411 A.2d 660, 665 (Me. 1980); *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 588 (Wyo. 1999). See also JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 7.13 (2019 edition).

² See, e.g., *Enos v. Casey Mountain, Inc.*, 532 So.2d 703, 706 (Fla. Dist. Ct. App. 1988); *Kline v. Bernardsville Ass’n, Inc.* 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993); *Vossen v. Forrester*, 963 P.2d 157, 161-62 (Or. Ct. App. 1998); *Southern Star Central Gas Pipeline, Inc. v. Murray*, 190 S.W.3d 423, 430 (Mo. Ct. App. 2006); *Umprhes v. J.R. Mayer Enters., Inc.*, 889 S.W.2d 86, 90 (Mo. Ct. App. 1994).

³ *Wells v. Sanor*, 151 S.W.3d 819, 823 (Ky. Ct. App. 2005) (“Kentucky follows a minority position that in addition to mutual consent also allows the owner of a servient estate to unilaterally modify or alter the location of a roadway easement so long as it does not change the beginning and ending points and does not result in material inconvenience to the rights of the dominant estate.”); *Stewart v. Compton*, 549 S.W.2d 832, 833 (Ky. Ct. App. 1977); *Terry v. Boston*, 54 S.W.2d 909, 909-910 (Ky. 1932). But see *Adams v. Pergrem*, 2007 WL 4277900 (Ct. App. Ky. Dec. 7, 2007) (citing *Wells* and observing in dicta that “unless a granting instrument provides otherwise, an easement with a fixed location cannot be relocated without the express or implied consent of the owners of both the servient and dominant estates”). Kentucky’s The flexible approach apparently derived from used by Kentucky courts has its origins in a now repealed statute that allowed for a special court proceeding to approve easement relocations. F.M. English, Annotation, *Relocation of Easements*, 80 A.L.R.2d 743, § 9 (1961).

⁴ La. Civ. Code art. 748.

1 servitude relocation to be “borne by the owner of the servient estate.”⁵

2
3 In 2000, the American Law Institute altered the landscape of easement and
4 servitude relocation in the U.S. when it promulgated Section 4.8(3) of the Restatement
5 (Third) of Property: Servitudes (the Restatement). The Restatement offered an approach
6 to easement relocation that essentially adopts the civil law approach used in Louisiana
7 and much of the rest of the world and allows a servient estate owner to relocate an
8 easement ~~“at the servient owner’s expense” and “to permit normal use or development of~~
9 ~~the servient estate,” provided the changes in the easement “do not in the following terms:~~

10
11 (3) Unless expressly denied by the terms of an easement, as defined in §
12 1.2, the owner of the servient estate is entitled to make reasonable changes
13 in the location or dimensions of an easement, at the servient owner’s
14 expense, to permit normal use or development of the servient estate, but
15 only if the changes do not

- 16 (a) significantly lessen the utility of the easement;
17 (b) increase the burden on the owner of the easement in its use and
18 enjoyment; or
19 (c) frustrate the purpose for which the easement was created.”⁶

20
21 A number of state courts, including several state supreme courts, have robustly
22 adopted the Restatement approach to easement relocation.⁷ Some state courts rejected the
23 Restatement approach.⁸ Still other state courts adopted the Restatement approach but

⁵ *Id.* Similarly, the Louisiana Civil Code has always allowed the owner of a servient estate burdened by a legal servitude of passage benefitting an enclosed estate (the civil law analogue of an easement by necessity) to relocate the servitude “to a more convenient place at his own expense, provided that it affords the same facility to the owner of the enclosed estate.” La. Civ. Code art. 695.

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

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

⁸ *Stowell v. Andrews*, 194 A.3d 953, 964-66 (N.H. 2018); *Alligood v. LaSaracina*, 999 A.2d 836, 839 (Conn. App. C. t2010); *AKG Real Estate, LLC v. Kosterman*, 717 N.W.2d 835, 842-847 (Wisc. 2006) (rejecting proposed relocation of right of way easement under, *inter alia*, the

1 limited its application to undefined easements,⁹ sub-surface easements,¹⁰ or non-express
2 easements such as easements by necessity,¹¹ or prescriptive easements.¹²

3
4 In states where reported judicial decisions have yet to confront the issue, either
5 the mutual consent rule or the equitable balancing approach still prevails. In Illinois, the
6 law is in flux but seems to be moving in the direction of the Restatement approach.¹³
7 Finally, it should be noted that prior to the promulgation of the Restatement a handful of
8 courts had also rejected the mutual consent rule in the context of easements created by
9 implication based on prior use,¹⁴ or implied by reliance on recorded subdivision plats.¹⁵

10
11 In the years preceding and following the promulgation of ~~Section 4.8(3); the~~

unilateral relocation rule found in § section 4.8(3)); *MacMeekin v. Low Income Housing Institute*, 45 P.3d 570, 578 (Wash. Ct. App. 2002); *Herrin v. Pettergill*, 538 S.E.2d 735, 736 (Ga. 2000). *See also* *Sweezy v. Neal*, 904 A.2d 1050, 1057-58 (Vt. 2006) (rejecting Restatement approach as applied to surface easement but allowing servient estate owner to “bend the easement” around a new addition to his house).

⁹ *Lewis v. Young*, 705 N.E.2d 649, 653-54 (N.Y. 1998) (relying on tentative draft of Section 4.8(3) and holding that a servient estate owner may unilaterally relocate an easement that lacks a metes and bounds description or other indication of the easement’s location); *Stanga v. Husman*, 694 N.W.2d 716, 718-720 (S.D. 2005) (approving modification of an express ingress and egress easement whose location was not specified in the creating instrument); *St. James Village, Inc. v. Cunningham*, 210 P.3d 190, 193-196 (Nev. 2009) (adopting section 4.8(3)~~);~~ but limiting its scope to situations when the creating instrument does not define the easement through specific reference to its location or dimensions).

¹⁰ *Roy v. Woodstock Community Trust, Inc.* 94 A.3d 530, 537-40 (Vt. 2014).

¹¹ *Goodwin v. Johnson*, 591 S.E.2d 34, 37-39 (S.C. Ct. App. 2003) (applying Restatement § 4.8(3) to approve unilateral relocation of easement of necessity). Several decisions predating or not citing the Restatement also declined to apply the mutual consent rule to easements of necessity. *Bode v. Bode*, 494 N.W.2d 301, 302 (Minn. Ct. App. 1992); *Huggins v. Wright*, 774 So.2d 408, 412 (Miss. 2000).

¹² *McNaughton Properties, LP v. Barr*, 981 A.2d 222, 225-229 (Penn. Sup. Ct. 2009) (rejecting Restatement approach as applied to express easements as a question of first impression and limiting *Soderberg v. Weisel*, 687 A.2d 839, 842 (Pa. Sup. Ct. 1997), which recognized possibility of unilateral relocation ~~of a prescriptive easement if~~ if the new easement location is as safe as the original, the relocation is a *relatively minor change*, and the reasons for relocation are substantial, to prescriptive easements).

¹³ *See McGoe v. Brace*, 918 N.E.2d 559, 563-567, 569 (Ill. Ct. App. 2009) (holding that the approach of section 4.8(3) comports with prior Illinois precedent allowing either the dominant or servient estate owner to make changes to an easement as long as the changes are not “substantial” and indicating that when evaluating the “substantiality” of a proposed relocation, courts should examine the burden and harm to the dominant estate owner resulting from the relocation in light of the policy factors set forth in the Restatement); 527 S. Clinton, LLC. v. Westloop Equities, LLC., 932 N.E.2d 1127, 1138 (Ill. Ct. App. 2010) (citing *McGoe* and the Restatement and holding that a servient estate owner may modify or relocate an easement “so long as the changes would not cause substantial harm to the dominant estate”); 527 S. Clinton, LLC. v. Westloop Equities, LLC., 7 N.E.3d 756, 768 (Ill. Ct. App. 2014) (citing and discussing the “substantiality of the change” analysis stated in *McGoe* approvingly).

¹⁴ *Millison v. Laughlin*, 142 A.2d 810, 813-816 (Md. 1958).

¹⁵ *Enos v. Casey Mountain, Inc.*, 532 So.2d 703, 706 (Fla. Dist. Ct. App. 1988).

1 Restatement, a handful of states also enacted statutes that allow for the relocation of
2 specific kinds of easements without the consent of the easement holder as long as the
3 relocated easement provides the same functional benefit to the easement holder. These
4 particularized easement relocation statutes apply to vehicular ingress and egress
5 easements in Idaho and Virginia,¹⁶ and to irrigation easements in Idaho and New
6 Mexico.¹⁷ As some form of unilateral easement relocation is currently permitted in 20
7 states but is either prohibited by the common law or uncertain in the remaining states,
8 U.S. law currently lacks uniformity.¹⁸

9
10 The UERA responds to this disharmony by adopting the approach long practiced
11 in Louisiana, followed by a number of state statutes, embraced by a number of leading
12 state court decisions adopting the Restatement, and even recently embraced by prominent
13 judicial decisions abroad.¹⁹ One overarching goal of the UERA is to ensure that
14 relocation of an easement does not cause material harm to the easement holder, security-
15 interest holders, or owners of other interests in the servient or dominant estate and, thus,
16 protects those parties' rights both retroactively and prospectively. The act borrows key
17 ideas from the Restatement but departs in several respects. First, the act excludes certain
18 categories of easements from relocation and prohibits relocation in ~~two~~ several other
19 specific situations. Next, the act adds several substantive conditions for an easement
20 relocation and clarifies a fundamental aspect of the Restatement approach. Third, the act
21 prohibits servient estate owners from engaging in self-help and instead requires servient
22 estate owners seeking to use the act to file a civil action and serve a summons and
23 complaint (and thus provide notice to) the easement holder whose easement is subject to
24 the proposed relocation and other interested persons. The act also specifies the contents
25 of the complaint and specifies the determinations a court must make to approve a
26 proposed easement relocation. Finally, the UERA addresses several other issues that
27 might arise in a judicial relocation under the act, including expenses, the limited effect of
28 a relocation, waiver, and legal transition.

29 II. 30

¹⁶ IDAHO CODE § 55-313 (Michie Supp. 2010) (authorizing change of private access roads across private lands at landowner's expense if change is "made in such a manner as not to obstruct motor vehicle travel or to otherwise injure any person or persons using or interested in such access"); VA. CODE § 55-50 (LexisNexis 2007) (authorizing ~~relocating~~ relocation of an easement of "ingress and egress" that has been "in existence for not less than ten years" as long as the servient owner provides notice to all parties in interest, obtains court approval, and the relocation will not cause "economic damage to the parties in interest" or "undue hardship").

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

¹⁸ For a detailed discussion of U.S. case law preceding and following the promulgation of the Restatement, see John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 Conn. L. Rev. 1, 26-32 (2005).

¹⁹ *Linvestment CC v. Hammersley et al*, 3 S.A. L. Rep. 283 (South Africa Sup. Ct. App. 2008).

-Scope

~~Subsection~~ Section 3(a) makes clear that the substantive provisions of the act will apply to an easement regardless of the easement's method of creation. Thus, the act applies to "an easement established by express grant or reservation or by prescription, implication, necessity, estoppel, or other method for creating an easement."

~~Subsection~~ Section 3(b)(1), however, enumerates three specific categories of easements that cannot be ~~located~~ relocated under the act: (1) public-utility easements; (2) conservation easements; and (3) negative easements. From the beginning of its work on the Act, the Uniform Law Commission intended to exclude public-utility easements from the scope of the act because of their ubiquity and importance to local development. Although the substantive provisions of Section 4, standing alone, are sufficient to protect the interests of holders of public-utility easements, the Drafting Committee, following guidance from the Uniform Law Commission's Scope and Program Committee, tailored the act to exclude public-utility easements. Public-utility easements are defined broadly in ~~subsection~~ Section 2(~~4011~~) to mean "an easement a "nonpossessory property interest in which the easement holder is a publicly regulated or publicly owned utility" under applicable federal law or law of this state law, and the definition." That ~~section~~ also specifies that the term "public-utility easement" includes "an easement benefitting an easement benefitting intrastate utility, an interstate utility, or a utility cooperative," a term which is broadly defined under subsection 2(18)." to emphasize the breadth of this important exclusion.

Similarly, the act excludes conservation easements from relocation under the act because of their importance to many constituencies in the United States, because conservation easements are already carefully regulated under state law, including versions of the Uniform Conservation Easement Act (UCEA), and because conservation easements enjoy favorable state and federal tax treatment essential to their long-term sustainability that could be jeopardized by even the possibility of relocation. The definition of a conservation easement, found in ~~subsection~~ Section 2(~~32~~), generally follows the definition of a conservation easement in UCEA but also recognizes that some state statutes allow for conservation purposes other than those specifically enumerated in UCEA. Thus, ~~subsection~~ Section 2(2)(F) recognizes as an animating conservation purpose "any other purpose" under applicable state law. Finally, the act also excludes any negative easement from relocation under the act. The kind of negative easements, other than conservation easements, that would be excluded from relocation include easements of ~~view or~~ light or view and restrictive covenants prohibiting certain kinds of development or economic activity on a servient estate.

~~Subsections~~ Sections 3(b)(2) and (3) provide two other limitations on the right of a servient estate owner to relocate an easement. First, ~~subsection~~ Section 3(b)(2) provides that an easement cannot be relocated if "the proposed relocation would encroach on an area of the servient estate burdened by a public-utility easement or conservation easement." This exclusion protects the holder of a public-utility easement or conservation easement on the servient estate from having its easement impaired by a relocation under

1 the act or having to address the merits of a proposed easement relocation under the act. ~~It~~
2 ~~thus provides extra protection for holders of conservation easements in particular as they~~
3 ~~seek to maintain the tax-deductible status of those easements. Subsection 3(b)(3) provides~~
4 ~~protection for the holder of a public-utility easement, conservation easement, or negative~~
5 ~~easement to the extent a proposed relocation would~~ “Section 3(b)(3) provides that an
6 ~~easement cannot be relocated if the relocation would~~ require an improvement or other
7 modification to the dominant estate which would encroach on an area of the dominant
8 estate burdened by a public-utility easement, conservation easement, or negative
9 easement.” ~~The~~ This exclusion focuses exclusively on changes to the dominant estate ~~that~~
10 ~~would result~~ from a proposed relocation ~~that would~~ which could impact one of the
11 ~~excluded listed~~ categories of easements ~~under~~. Like Section 3(b)(1) ~~and thus~~
12 ~~complements the substantive condition for relocation found in 2), Section 4(6), which~~
13 ~~concerns improvements located on or~~ 3(b)(3) protects the holder of an easement in one of
14 the ~~physical condition of~~ listed categories affecting the dominant estate from having its
15 easement impaired by a relocation or having to address the merits of a proposed
16 relocation under the act. The exclusions in Sections 3(b)(2) and (3) also provide extra
17 protection for conservation easements, the tax-deductible status of which could be
18 jeopardized if relocations under the act could encroach on areas of the servient or
19 dominant estate burdened by a conservation easement.

20
21 ~~Finally, subsection~~ Section 3(b)(4) provides that an easement cannot be relocated
22 to “a location other than the servient estate,” thus preventing a servient estate owner from
23 ~~relocating an easement to any other parcel of land other than the servient estate. relying~~
24 ~~on this act to relocate an easement to any other parcel of land other than the servient~~
25 ~~estate. Finally, Section 3(c) makes clear that this act does not prevent a servient estate~~
26 ~~owner and an easement holder from relocating an easement by consent. In other words, a~~
27 ~~servient estate owner and an easement holder are free to relocate an easement outside of~~
28 ~~this act, unless otherwise limited or prohibited by applicable law. The freedom to relocate~~
29 ~~an easement by consent guaranteed by Section 3(c) could be used by a servient estate~~
30 ~~owner and an easement holder to relocate an easement to a parcel of land other than the~~
31 ~~servient estate burdened by the easement.~~

32 33 **III. Substantive Criteria for Relocation**

34
35 Section 4 is the core of the act. This section provides that a servient estate owner
36 may relocate an easement “only if” the relocation does not “materially” impair the
37 ~~easement holder’s functional interests of the easement holder, security-interest holders, or~~
38 ~~owners of other~~ interests in the servient or dominant estate. One goal of the act is to
39 ensure that relocation of an easement ~~and~~ does not “materially” impair the “collateral” or
40 “other real property interests” cause material harm to the easement holder, security-
41 interest holders, or owners of other interested persons. Subsections interests in the
42 servient or dominant estate. The materiality qualification in Section 4 is consistent with
43 that goal because it permits a relocation only if its effects on the interests of the easement
44 holder, security-interest holders, and others owning interests in the servient or dominant
45 estate are immaterial (i.e., negligible or trivial).

1 Sections 4(1) through 4(3) generally track the core conditions of Section 4.8(3) of
2 the Restatement, ~~yet subsection.~~ However, Section 4(3) clarifies exactly what is at stake
3 in a proposed easement relocation—protection of the “affirmative, easement-related
4 purposes for which the easement was created.” As comment 7 to Section 4 explains in
5 more detail, this provision means that an easement holder should not be able to block a
6 proposed easement relocation simply by asserting that an easement was actually, though
7 silently, created to give the easement holder some veto power over development on the
8 servient estate. If that is the intention of the owner of another parcel of land or another
9 unit of real property (or any other ~~person~~ easement holder for that matter ~~holding title to~~
10 ~~an easement~~) that person can always achieve such a goal by negotiating for and obtaining
11 a negative easement ~~or restrictive covenant~~—precisely one of the property interests
12 exempt from the scope of the act.

13
14 Subsections Sections 4(4) and 4(5) are also ~~new~~ substantive conditions not found
15 in the Restatement. They provide additional protection for the easement holder and those
16 who use the easement. They do so by guaranteeing that a proposed easement relocation
17 will not materially: “(4) during or after the relocation, impair the safety of the easement
18 holder or others entitled to use and enjoy the easement;” and “(5) during the relocation,
19 disrupt the use and enjoyment of the easement . . . unless the servient estate owner
20 substantially mitigates the disruption.” Subsection Section 4(5) will be particularly
21 significant in any case in which an easement serves a dominant estate that is already in
22 active use, whether commercial, industrial, or residential. Subsection Section 4(6) would
23 prevent an easement relocation if it would materially “impair improvements on or the
24 physical condition or use of the dominant estate.”

25
26 Subsection Section 4(7) also addresses a subject not covered by the Restatement.
27 It provides protection ~~for~~ against impairment of the ~~interests~~ interest of a security-interest
28 holder of record in the value of its collateral ~~and for the,~~ a real-property interest of a
29 lessee of record in the dominant estate, or any other person ~~whose~~ with a real-property
30 interest of record in the servient ~~estate~~ or dominant ~~estate is adversely affected by the~~
31 relocation estates.

32 33 **IV. Procedural Requirements: Complaint, Parties, Service, Order, Recordation**

34
35 Sections 5 and 6 are also important safeguards as they codify the rulings of
36 several leading judicial decisions that embraced the Restatement approach to easement
37 relocation but insisted that a non-consensual easement relocation can only occur with
38 judicial approval.²⁰ Subsection Section 5(a) thus requires a servient estate owner seeking
39 to relocate an easement under Section 4 to file a civil action. Subsection Section 5(b)

²⁰ 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”).

1 requires the servient estate owner to serve a summons and complaint upon the easement
2 holder whose easement is the subject of relocation, a security-interest holder of record
3 with an interest in either the servient or dominant estate ~~that will be adversely affected by~~
4 ~~the relocation~~, a lessee of record with an interest in the dominant estate, and any other
5 person ~~whose real property interest in, if the relocation would encroach on an area of~~ the
6 servient estate or dominant estate ~~is affected~~ burdened by a real-property interest of
7 record owned by the relocation that person. This provision essentially establishes the
8 necessary parties to an easement relocation proceeding and guarantees notice of the
9 proceeding to those persons. ~~Finally, subsection Section~~ 5(c) details the information that
10 must be contained within or must accompany the servient estate owner's complaint,
11 including a statement ~~attesting to the efforts of that~~ the servient estate owner ~~to provide~~
12 has made a reasonable notice attempt ~~to the~~ notify holders of the excluded categories of
13 easements ~~of the proposed relocation~~. Section 5(d) provides a mechanism for waivers
14 and ~~subrogations~~ subordination agreements to be filed in a relocation proceeding.

15
16 Section 6 ~~foeusses~~ focuses on the obligations of a court when confronted with a
17 complaint seeking to approve an easement relocation. ~~First, subsection Section~~ 6(a)
18 specifies the findings a court must make before approving an easement relocation.
19 Importantly, this ~~subsection section~~ requires the court to make two findings: first, the
20 easement is itself eligible for relocation under Section 3 ~~(; and thus does not constitute~~
21 ~~one of the excluded categories of easements under Section 3(b)(1) or violate one of the~~
22 ~~other scope restrictions under Sections 3(b)(1)-(3)); and,~~ second, the servient estate
23 owner has satisfied the ~~substantive~~ conditions for relocation under Section 4. ~~Subsection~~
24 Section 6(b) ~~provides for addresses~~ the ~~issuance of an~~ order authorizing the relocation
25 and details the information that must be contained in the order. ~~Subsection Section~~ 6(c)
26 gives a court discretion to “include any other provision consistent with this [act] for the
27 fair and equitable relocation of an easement.” Finally, ~~subsection Section~~ 6(d) requires a
28 servient estate owner that obtains approval for relocation to record a certified copy of the
29 court order approving relocation. In most cases, this will be the first of two documents
30 that must be recorded to complete an easement relocation; ~~the second being the~~
31 Relocation Affidavit. ~~The second document will be the relocation affidavit~~ specified in
32 Section 9, which certifies substantial completion of the improvements necessary for the
33 easement to be used in its new location. In cases in which no improvements need to be
34 constructed or altered for use of the relocated easement, the recordation of a certified
35 copy of the court order approving relocation under ~~subsection Section~~ 6(bd) will
36 constitute completion of the relocation.

37 38 **V. Other Matters – Expenses, Correlative Duty of Good Faith, ~~Mitigation~~, Affidavit** 39 **of Relocation, Limited Effect of Relocation, Non-Waiver, Severability, and** 40 **Transitional Provision**

41
42 The rest of the act addresses a number of ancillary yet important issues that may
43 arise under a judicial relocation. ~~First, section Section~~ 7 provides that the servient estate
44 owner is responsible for “all reasonable expenses associated with the relocation of an
45 easement under this [act] as determined by the ~~order specified in court under~~ Section
46 6(b),” and then it enumerates in ~~subsections Sections~~ 7(1) through ~~(87)(9)~~ what those

1 expenses might include.

2
3 Section 8 requires ~~the primary all parties to an easement relocation, the servient~~
4 ~~estate owner and the easement holder, as well as other parties in the civil action~~ to act in
5 good faith to facilitate the relocation of an easement. ~~Importantly, it also~~

6
7 Section 9(a) requires ~~the servient estate owner to “mitigate disruption to the use~~
8 ~~and enjoyment of an easement and the dominant estate state during relocation of the~~
9 ~~easement,” thus complimenting the substantive condition for relocation found in~~
10 ~~subsection 4(5).~~

11
12 Subsection 9(a) provides that when the relocation is “substantially complete and
13 the easement holder can enter, use, and enjoy the ~~relocated~~ easement ~~for in~~ its ~~intended~~
14 ~~purpose, new location,”~~ the servient estate owner ~~shall must~~ record an affidavit ~~certifying~~
15 ~~attesting to this fact in the local land records and send the affidavit to the easement holder~~
16 ~~and other parties by certified mail. Subsection 9(b) assures that the easement has been~~
17 ~~relocated.” This provision has the effect, as specified in subsection 9(b), that “the~~
18 ~~easement holder will continues to~~ have the right to enter, use, and enjoy the easement in
19 the current location” until the affidavit attesting to substantial completion is recorded. ~~and~~
20 ~~sent to the parties.~~

21
22 Section 10 addresses the limited effect of relocation of an easement under the act.
23 It specifically provides that a relocation under the act: “(1) is not a new transfer or a new
24 grant of an interest in the servient estate or the dominant estate; (2) does not constitute a
25 breach or default of or otherwise trigger a due-on-sale clause or other transfer restriction
26 clause under a security instrument, except as otherwise determined by a court under law
27 other than this [act]; (3) does not constitute a breach or default of a lease, except as
28 otherwise determined by a court under law other than this [act]; (4) does not affect the
29 priority of the easement; and (5) is not a fraudulent conveyance or voidable transaction
30 under any law of this state.” All of these provisions

31
32 Section 10 addresses the limited effect of relocation of an easement under the act.
33 All of the provisions in Section 10 are based on the fundamental premise that an
34 easement relocation under the act does not create a new easement. Rather, it merely
35 changes where on the servient estate the easement may be utilized by the easement holder
36 to satisfy the affirmative, easement-related purposes of the easement.

37
38 Section 11 provides that the servient estate owner’s right to relocate an easement
39 “may not be waived, excluded, or restricted by agreement” and specifies that this rule of
40 non-waiver applies “even if: (1) the instrument creating the easement prohibits relocation
41 or contains a waiver, exclusion, or restriction of this [act]; (2) the instrument creating the
42 easement requires consent of the easement holder to amend the terms of the easement, or
43 (23) the location of the easement is fixed by the instrument creating the easement,
44 another agreement, previous conduct, acquiescence, estoppel, or implication.” ~~These~~
45 ~~provisions~~ Section 11(1), to be clear, deviates from the Restatement by strictly
46 prohibiting the waiver of relocation rights in an instrument creating an easement.

1 Sections 11(2) and (3) represent a policy choice to reject the narrow approach to
2 easement relocation followed by the courts in a few several states that limited application
3 of Section 4.8(3) of the Restatement to undefined easements,²¹ and.²² These provisions,
4 and especially Sections 11(1) and (2), are designed to assure the act remains useful for
5 years to come instead of being easily negated by boilerplate provisions in easement
6 agreements excluding the act.

7
8 Sections 12, 13, and 15 are standard provisions found in many uniform acts
9 promulgated by the Uniform Law Commission. Section 12 addresses uniformity of
10 application and construction of the act. Section 13 addresses the relation of the act to the
11 Electronic Signatures in Global and National Commerce Act. Section 15 features is the
12 Uniform Law Commission’s standard severability provision.

13
14 Section 14 is the transitional provision and specifies that the act “applies to an
15 easement created before, on, or after [the effective date of this [act]].” As explained in
16 Comment 1 to Section 14, a relocation can only proceed under this act if the servient
17 estate owner can “demonstrate that the relocated easement will continue to deliver to the
18 easement holder the same affirmative, easement-related benefits the easement holder
19 obtained at the easement’s original location.” Further, as Comment 2 to Section 14
20 observes, “[r]etroactive application of the act will not deprive the easement holder of any
21 of the functional benefits of the easement upon relocation and will not cause the easement
22 holder to suffer any other easement-related material harm, even during the relocation
23 process, regardless of whether the act applies to an easement created before, on, or after
24 the effective date of the act.” Thus, retroactive application of the act should not constitute
25 an uncompensated taking of private property under state or federal constitutional
26 principles.²³
27

²¹ Lewis v. Young, 705 N.E.2d 649, 653-54 (N.Y. 1998); Stanga v. Husman, 694 N.W.2d 716,
718-720 (S.D. 2005); St. James Village, Inc. v. Cunningham, 210 P.3d 190, 193-196 (Nev. 2009).

²² Lewis v. Young, 705 N.E.2d 649, 653-54 (N.Y. 1998); Stanga v. Husman, 694 N.W.2d 716,
718-720 (S.D. 2005); St. James Village, Inc. v. Cunningham, 210 P.3d 190, 193-196 (Nev. 2009).

²³ See *Statewide Construction, Inc. v. Pietri*, 247 P.3d 650, 656-57 (Idaho 2011) (holding that application of an Idaho statute, I.C. § 55-313, which gives a servient estate owner the right to relocate a motor vehicle access easement on terms similar to those found in Restatement § 4.8(3), was not an unconstitutional taking of private property without just compensation under either the Fifth Amendment to the U.S. Constitution or the Idaho Constitution because the statute expressly requires that the change must be made in a way “as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access” and because any relocation authorized by the statute will “provide the dominant estate holders with the same beneficial interest they were entitled to under the easement by its original location”).

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UNIFORM EASEMENT RELOCATION ACT

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

SECTION 2. DEFINITIONS. In this [act]:

- (1) “Appurtenant easement” means a nonpossessory property interest that:
- (A) provides a right to enter, use, or enjoy a servient estate; and
 - (B) is tied to or dependent on ownership or occupancy of a unit or a parcel of real property.
- (2) “Conservation easement” means a nonpossessory property interest created for one or more of the following conservation purposes:
- (A) retaining or protecting the natural, scenic, wildlife, wildlife habitat, biological, ecological, or open-space values of real property;
 - (B) ensuring the availability of real property for agricultural, forest, outdoor recreational, or open-space uses;
 - (C) protecting natural resources, including wetlands, grasslands, and riparian areas;
 - (D) maintaining or enhancing air or water quality;
 - (E) preserving the historical, architectural, archeological, paleontological, or cultural aspects of real property; or
 - (F) any other purpose under [cite to applicable state law].
- (3) “Dominant estate” means an estate or interest in real property that is benefitted by an appurtenant easement.
- (4) “Easement” means a nonpossessory property interest that provides a right to

1 enter, use, or enjoy real property owned by or in the possession of another which
2 obligates the owner or possessor not to interfere with the entry, use, or enjoyment
3 permitted by the instrument creating the easement or, in the case of an easement not
4 established by express grant or reservation, the entry, use, or enjoyment authorized by
5 law. The term includes an appurtenant easement and an easement in gross.

6 (5) “Easement in gross” means a nonpossessory property interest that:

7 (A) provides a right to enter, use, or enjoy a servient estate; and

8 (B) is not tied to or dependent on ownership or occupancy of a unit or a
9 parcel of real property.

10 (6) “Easement holder” means:

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

12 (B) in the case of an easement in gross, public-utility easement,
13 conservation easement, or negative easement, the grantee of the easement or a successor.

14 (7) “Lessee of record” means a person holding a lessee’s interest under a recorded
15 lease or memorandum of lease.

16 (8) “Negative easement” means a nonpossessory property interest whose primary
17 purpose is to impose on a servient estate owner a duty not to engage in a specified use of
18 the estate.

19 (99) “Order” means a final action, judgment, or decree of a court which
20 terminates a civil action, decides some matter litigated by the parties, operates to divest
21 some right, or completely disposes of the subject matter and the rights of the parties.

22 (10) “Person” means an individual, estate, business or nonprofit entity, public
23 corporation, government or governmental subdivision, agency, or instrumentality, or

1 other legal entity.

2 (~~1011~~) “Public-utility easement” means a nonpossessory property interest in
3 which the easement holder is a publicly regulated or publicly owned utility under ~~[cite to~~
4 ~~applicable federal law or~~ law of this state~~].~~ The term includes an easement benefitting an
5 intrastate utility, an interstate utility, or a utility cooperative. The term “utility
6 cooperative” means a non-profit entity whose purpose is to deliver a utility service, such
7 as electricity, oil, natural gas, water, or telecommunications, to its customers or members
8 and includes an electric cooperative, rural electric cooperative, rural water district, and
9 rural water association.

10 (~~1112~~) “Real property” means an estate or interest in, over, or under land,
11 including structures, fixtures, and other things that by custom, usage, or law pass with a
12 conveyance of land whether or not described or mentioned in the contract of sale or
13 instrument of conveyance. The term includes the interest of a lessor and lessee and,
14 unless the interest is personal property under law of this state other than this [act], an
15 interest in a common-interest community.

16 (~~1213~~) “Record”, used as a noun, means information that is inscribed on a
17 tangible medium or that is stored in an electronic or other medium and is retrievable in
18 perceivable form.

19 (~~1314~~) “Security instrument” means a mortgage, deed of trust, security deed,
20 contract for deed, lease, or other ~~document record~~ that creates or provides for an interest
21 in real property to secure payment or performance of an obligation, whether by
22 acquisition or retention of a lien, a lessor’s interest under a lease, or title to the real
23 property. A ~~document record~~ is a security instrument even if it also creates or provides

1 for a security interest in personal property. The term includes a modification or
2 amendment of a security instrument and a ~~document~~ record creating a lien on real
3 property to secure an obligation under a covenant running with the real property or owed
4 by a unit owner to a common-interest community association.

5 (4415) “Security-interest holder of record” means a person holding an interest in
6 real property created by a recorded security instrument.

7 (4516) “Servient estate” means an estate or interest in real property that is
8 burdened by an easement.

9 (4617) “Title evidence” means a title insurance policy, preliminary title report or
10 binder, title insurance commitment, abstract of title, attorney’s opinion of title based on
11 examination of public records or on an abstract of title, or any other means of reporting
12 the state of title to real property which is customary in the locality.

13 (4718) “Unit” means a physical portion of a common-interest community
14 designated for separate ownership or occupancy with boundaries described in a
15 declaration establishing the common-interest community.

16 ~~(18) “Utility cooperative” means a nonprofit entity whose purpose is to deliver a~~
17 ~~utility service, such as electricity, water, or telecommunications, to its customers or~~
18 ~~members. The term includes an electric cooperative, rural electric cooperative, rural~~
19 ~~water district, and rural water association.~~

20 **Legislative Note:** Paragraph (2) allows a state to reference any other applicable state
21 law that specifies additional purposes that a conservation easement may serve other than
22 those listed in Paragraph (2)(A) through (E).

23
24 ~~Paragraph (10) allows a state to reference applicable state law establishing and~~
25 ~~governing a publicly regulated or publicly owned utility.~~
26
27

Comment

1. The foundational definition of “easement” in Section 2(4) is based on the Restatement (Third) of Property: Servitudes § 1.2(1) and (4) (2000) (hereinafter “Restatement”). The definitions of “appurtenant easement” and “easement in gross” used in Sections 2(1) and (5) are based on Restatement § 1.5(1) and (2). The definitions of “dominant estate” and “servient estate” used in Sections 2(3) and (~~15~~16) are derived from Restatement § 1.1(1)(b) and (c).

2. The definition of easement in Section 2(4) does not include ~~an irrevocable a~~ license. A license is usually understood to be the permission to do something on the land of another person that, without the authority granted by the permission, would be a trespass or otherwise unlawful. Jon W. Bruce & James W. Ely, *The Law of Easements and Licenses in Land* §§ 1:4, 11:1 (2019 Edition). Unlike an easement, a license is generally revocable, can be created orally, is not transferable or assignable unless the parties specifically intend otherwise, and, most important, does not create a property interest in land. *Id.* §§ 1:4, 11:1. Despite these fundamental differences between an easement and a license, some courts have recognized that, under certain circumstances (when a license is coupled with ownership of personal property located on the land of the licensor or when a licensee has made significant expenditures in reliance on the license), that equity can transform a revocable license into an irrevocable license. Jon W. Bruce & James W. Ely, *The Law of Easements and Licenses in Land* §§ 11:7 - 11:9 (2019 Edition). However, “[a]n irrevocable license is, for most purposes, the functional equivalent of an easement by estoppel.” *Id.* § 11:7. As Section 3(a) makes clear, this act applies to easements created by estoppel. Thus, to the extent a license is recognized by a court as an irrevocable license, it should be understood as an easement by estoppel and thus would be subject to relocation under the act.

3. The definition of “easement” in Section 2(4) does not include any reference as to whether an easement “runs with the land” and benefits successive owners of a dominant estate or burdens successive owners of a servient estate because enforceability of an easement against successive owners depends, *inter alia*, upon compliance with the notice and recordation requirements under the state’s recording act. In general, though, assuming compliance with other aspects of state law, an easement will run with the land and the benefits and burdens of an easement will pass automatically to successors. *See* Restatement § 1.1 and comments a and b.

4. The definition of “conservation easement” in Section (~~2~~)(2) is based in large part on the Uniform Conservation Easement Act (UCEA) § 1 (1981, last revised or amended 1987). Some modifications ~~of~~ to that definition have been made to widen the scope of “conservation purposes” beyond those listed in UCEA. In addition, the definition of a conservation easement used in this ~~subsection~~ section is not linked to a particular definition of a “holder” of a conservation easement as is the case under UCEA because today other entities and persons besides a “charitable organization, charitable association, or charitable trust,” or a “governmental body,” UCEA § 1(2)(~~ai~~) and (~~bii~~), may be entitled to ~~enforce~~ hold a conservation easement. As Section 2(2) makes clear,

1 however, for a non-possessory property interest to be classified as a conservation
2 easement it must serve one of the specific purposes enumerated in Sections 2(2)(A)
3 through (E) or another purpose specifically authorized under applicable state law. *See*
4 Section 2(2)(F). Further, as Section 2(6)(B) makes clear, the grantee holder of a
5 conservation easement is its holder, grantee or a successor of the initial grantee.
6

7 5. The definition of “easement holder” in Section 2(6) is derived from
8 Restatement § 1.5 and includes, in the case of an appurtenant easement, the owner of the
9 dominant estate, and, in the case of an easement in gross, a public-utility easement,
10 conservation easement, or negative easement, the grantee of the easement or a successor
11 of the grantee. When a public-utility easement, conservation easement, or negative
12 easement is an appurtenant easement rather than an easement in gross, the easement
13 holder could be either the owner of the dominant estate or the grantee of the easement or
14 its successor.
15

16 6. The definition of “lessee of record” in Section 2(7) parallels the definition of
17 security-interest holder of record in Section 2(~~14~~-15).
18

19 7. The term “negative easement” in section 2(8) is generally synonymous with
20 the term “restrictive covenant.” Restatement § 1.3 cmt (c). For a discussion of the
21 historical evolution of negative easements and restrictive covenants at common law, see
22 Restatement § 1.2, cmt (h). Section 1.3(3) of the Restatement defines a “restrictive
23 covenant” as a “negative covenant that limits permissible uses of land” and explains that
24 a “‘negative easement’ is a restrictive covenant.” Restatement § 1.3(3). As the
25 Restatement comments further explain, “[t]he most common uses of negative easements
26 in modern law have been to create conservation easements and easements for view.”
27 Restatement § 1.2, cmt (h). *See also* La. Civ. Code art. 706 (defining “[n]egative
28 servitudes” as “those that impose on the owner of the servient estate the duty to abstain
29 from doing something on his estate”); Joseph William Singer, *Property* 179 (4th ed. 2014)
30 (“A right to do something on someone else’s land is an affirmative easement. A right to
31 prevent others from doing something on their own land is either a negative easement or
32 restrictive covenant.”); Jon W. Bruce & James W. Ely, *The Law of Easements and*
33 *Licenses in Land* § 2:10 (2019 Edition) (“An affirmative easement authorizes the holder
34 to make active use of the servient estate in a manner that, if no easement existed, would
35 constitute a trespass. . . . In contrast, a negative easement enables the holder to prevent
36 the owners of the servient estate from doing things the owner would otherwise be entitled
37 to do.”).
38

39 8. The definition of “order” in Section 2(9) is derived from Black’s Law
40 Dictionary.
41

42 9. The definition of “person” in Section 2(~~9~~10) follows the standard definition of
43 person used by the Uniform Law Commission and thus includes not only individuals and
44 private entities but also governmental entities, as they can be holders of both
45 conventional affirmative easements, conservation easements, and public-utility
46 easements.

~~9. Section 2(10) defines. The definition of a “public-utility easement,” as “a nonpossessory property interest in which the easement holder” in Section 2(11) is a intended to encompass both an investor-owned but publicly regulated or utility as well as a publicly owned utility” under applicable state law. The term “public-utility easement” includes an easement benefitting a “an interstate utility, an intrastate utility, or a utility cooperative” as to make clear that term is defined in Section 2(18). In many parts of the wide spectrum of public utilities in the United States, utility cooperatives, including electric cooperatives, rural electric cooperatives, rural water districts, and rural water associations, provide will be excluded from the same basic services as public utilities scope of the act under Section 3(b)(2).~~

~~1011.~~ The definition of “real property” used in Section 2(~~11~~12) is taken almost verbatim from the Uniform Nonjudicial Foreclosure Act § 102(13) (2002). The term “real property” is used throughout the definitions found in Section 2, instead of the term “land,” as found throughout the Restatement, because an easement will sometimes benefit or burden real property interests other than ownership of land – for example, condominium units or parts of buildings owned by condominium associations. Section 2(~~11~~12) refers to the interest of a “lessor and lessee,” rather than a “landlord and tenant,” as in the Uniform Nonjudicial Foreclosure Act § 102(13), for the sake of consistency with other provisions of the act. The general reference to the interest of a lessor or lessee in this section has no bearing on the definition of a “lessee of record” in Section 2(7).

~~1112.~~ The definition of “record,” used as a noun, found in Section 2(~~12~~13) is the standard Uniform Law Commission definition.

~~1213.~~ The definitions of a “security instrument” and “security-interest holder of record” used in Sections 2(~~13~~14) and 2(~~14~~15) are based on the Uniform Nonjudicial Foreclosure Act §§ 102(19) and 102(10) (2002).

~~1314.~~ The definition of “title evidence” in Section 2(~~16~~17) is taken almost verbatim from the Uniform Nonjudicial Foreclosure Act § 102(22) (2002).

~~1514.~~ The definition of “unit” in Section 2(~~17~~18) is based on the Uniform Common Interest Ownership Act (UCIOA) § 103(35) (2008). *See also* UCIOA § 2-105(a)(5) (specifying the contents of a declaration in the context of a condominium or planned community). The term “common interest community” is defined in UCIOA § 103(9) (2008) as “real estate described in a declaration with respect to which a person, by virtue of the person’s ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or other expenses related to, common elements, other units, or other real estate described in the declaration.”

SECTION 3. SCOPE; EXCLUSIONS.

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

1 easement established by express grant or reservation or by prescription, implication,
2 necessity, estoppel, or other method for creating an easement.

3 (b) This [act] may not be used to relocate:

4 (1) a public-utility easement, conservation easement, or negative
5 easement;

6 (2) an easement if the proposed location would encroach on an area of the
7 servient estate burdened by a public-utility easement or conservation easement;

8 (3) an easement if the relocation would require an improvement or other
9 modification to the dominant estate which would encroach on an area of the dominant
10 estate burdened by a public-utility easement, conservation easement, or negative
11 easement; or

12 (4) an easement to a location other than the servient estate.

13 (c) This [act] does not prevent relocation of an easement by consent.

14 **Comment**

15 1. Section 3 specifies the categories of easements eligible and ineligible for
16 relocation under the act. It also identifies three situations when an easement that is
17 otherwise eligible for relocation cannot be relocated under the act.

18
19 2. Section 3(a) makes clear that all easements, other than the excluded categories,
20 whether created by express grant or reservation, or by prescription, implication,
21 necessity, estoppel, or any other method for creating an easement, are eligible for
22 relocation under Section 4.

23
24 3. Section 3(b)(1) enumerates the three kinds of easements that may not be
25 relocated under the act: public-utility easements; conservation easements; and negative
26 easements.

27
28 4. Conservation easements are often included in the broader category of negative
29 easements. Section 3(b)(1), however, lists both conservation easements and negative
30 easements as excluded categories because of the importance of making clear to all
31 potential users of the act that a conservation easement, as well as any other kind of
32 negative easement, may not be relocated under the act.

1 5. Another example of a negative easement that would be ineligible for relocation
2 under the act is an environmental covenant designed to restrict certain activities and uses
3 of affected real property as a result of an environmental response project. The Uniform
4 Environmental Covenants Act § 2(4) (2003) defines an environmental covenant as “a
5 servitude arising under an environmental response project that imposes activity and use
6 limitations.” The term “environmental response project” is defined in the Environmental
7 Covenants Act § 2(5) (2003). Although an affirmative right of way or parking easement
8 that is connected to an environmental covenant could, in principle, be subject to
9 relocation under this act, the relocation could only occur if the servient estate owner
10 could satisfy the other requirements of the act. However, the environmental covenant
11 itself would be ineligible for relocation because its “primary purpose” is to restrict
12 activities and uses of the affected real property and thus would be characterized as a
13 “negative easement,” as that term is defined in Section 2(8) of the act.
14

15 6. Section 3(b)(2) explicitly provides that a relocation cannot occur under the act
16 if the new location of the easement “would encroach on an area of the servient estate
17 burdened by a public-utility easement or conservation easement” because to do so would
18 violate the respective easement holder’s quiet enjoyment of that particular easement. This
19 section anticipates a situation in which a servient estate is burdened not only by a typical
20 affirmative easement, such as a right of way for vehicular access, but also by a public-
21 utility easement or conservation easement. This exclusion is particularly important in the
22 case of conservation easements. Even though a proposed relocation of an ~~affirmative~~
23 easement might meet all of the requirements of section 4 and thus provide the same
24 affirmative, easement-related benefits to a dominant estate owner or other easement
25 holder, if the new location of the easement would encroach upon “an area of the servient
26 estate”²² that is burdened by a conservation easement, the relocation could frustrate the
27 purposes of the conservation easement ~~or~~. In addition, the possibility of such relocations
28 under the act would jeopardize the deductibility of the conservation ~~easement~~ easements
29 donated in the adopting state under federal tax statutes and regulations.
30

31 7. Section 3(b)(3) ~~anticipates explicitly provides that~~ a ~~situation in which a~~
32 ~~proposed relocation cannot occur under the act if the~~ relocation would require “an
33 improvement or other modification to the dominant estate which would encroach on an
34 area of the dominant estate burdened by a public-utility easement, conservation easement,
35 or negative easement.” ~~In the event a proposed relocation would require these kinds of~~
36 ~~changes on the dominant estate that would encroach on one of these categories of~~
37 ~~excluded easements, the proposed relocation could not proceed. Section 3(b)(3) thus~~
38 ~~complements the substantive condition for relocation found in Section 4(6) that prohibits~~
39 ~~a relocation that would materially “impair improvements on or the physical condition of~~
40 ~~the dominant estate.”~~ As with Section 3(b)(2), this section protects the quiet enjoyment of
41 the holder of a public-utility easement, conservation easement, or negative easement on
42 the dominant estate, as well as the tax-deductible status of conservation easements in the
43 adopting states.
44

45 8. Section 3(b)(4) ~~prohibits relocation of~~ provides that this act may not be used to
46 relocate an easement to any property other than the servient estate already burdened by

1 the easement. Thus, a servient estate owner cannot use this act to relocate an easement to
2 another parcel of real property ~~other than the original servient estate~~ even though a
3 proposed relocation to that other parcel might satisfy the conditions of Section 4. Nothing
4 in this act, however, prevents a servient estate owner from seeking and obtaining
5 easement holder consent to relocate an easement to another parcel of land owned by the
6 servient estate owner other than the servient estate burdened by the easement.

7
8 9. Section 3(c) makes clear that the act does not prevent the owner of a servient
9 estate and an easement holder from agreeing to the relocation of an easement. However,
10 other applicable law may limit or prohibit the relocation of certain kinds of easements by
11 agreement. For example, federal and state laws generally prohibit the relocation of
12 conservation easements.

13 14 **SECTION 4. RIGHT OF SERVIENT ESTATE OWNER TO RELOCATE**

15 **EASEMENT.** A servient estate owner may relocate an easement under this [act] only if
16 the relocation does not materially:

17 (1) lessen the utility of the easement;

18 (2) after the relocation, increase the burden on the easement holder in its
19 reasonable use and enjoyment of the easement;

20 (3) impair an affirmative, easement-related purpose for which the easement was
21 created;

22 (4) during or after the relocation, impair the safety of the easement holder or
23 others entitled to use and enjoy the easement;

24 (5) during the relocation, disrupt the use and enjoyment of the easement by the
25 easement holder or others entitled to use and enjoy the easement, unless the servient
26 estate owner substantially mitigates the disruption ~~under Section 8~~;

27 (6) impair improvements on or the physical condition or use of the dominant
28 estate; or

29 (7) impair the value of the collateral of a security-interest holder of record in the
30 servient estate or dominant estate ~~or~~, impair ~~the a~~ real-property interest of a lessee of

record in the dominant estate, or ~~any other person whose~~ impair a real-property interest of
record of any other person in the servient estate or dominant estate ~~is adversely affected~~
~~by the relocation.~~

Comment

1. Section 4 sets forth the general rule for relocation of an easement under the act. ~~It builds upon Restatement § 4.8(3) but creates a more rigorous set of criteria for The~~
~~conditions in this section are intended to ensure that~~ relocation. ~~Subsections of an~~
~~easement does not cause material harm to the easement holder, security-interest holders,~~
~~or owners of other interests in the servient or dominant estate. Sections 4(1) through,~~
~~(2), and (3) generally mirror the Restatement. However, by including a materiality~~
~~qualification applicable to all conditions, this section permits a relocation only if its~~
~~effects on the interests of the easement holder, security-interest holders, and others~~
~~owning interests in the servient or dominant estate are “immaterial” (i.e., negligible or~~
~~trivial).~~

As the Supreme Judicial Court of Massachusetts explains, the Restatement rule
“maximizes the over-all property utility by increasing the value of the servient estate
without diminishing the value of the dominant estate” and provides the additional benefit
of minimizing “the cost associated with an easement by reducing the risk that the
easement will prevent future beneficial development of the servient estate.” *M.P.M.*
Builders L.L.C. v. Dwyer, 809 N.E.2d 1053, 1057 (Mass. 2004). By eliminating the
absolute veto power of an easement holder, the Restatement rule actually “encourages the
use of easements.” *Id.* See also *Roaring Fork Club L.P. v. St. Jude’s Co.*, 36 P.3d 1229,
1236 (Colo. 2001) (emphasizing that the Restatement rule “maximizes the overall utility
of the land” because the “burdened estate profits from an increase in value while the
benefitted estate suffers no decrease”) (citing to Restatement § 4.8(3), cmt (f), at 563).
Section 4 of the act is generally consistent with the purposes of Restatement § 4.8(3) but
adds a number of additional safeguards. ~~These additional safeguards are~~ found in
~~subsections Sections 4(4), (5) and, (6), to and 7, and they further~~ protect the interests of
the easement holder ~~in its ability to use an affirmative easement when that easement is~~
~~the subject of a proposed relocation and to protect the easement holder’s, security-~~
~~interest in maintaining improvements on holders, and the physical condition of the~~
~~owners of other interests in the servient or~~ dominant estate.

2. The introductory portion of Section 4 states that the right to relocate an
easement belongs to the owner of a servient estate. Consequently, the act does not change
the well-established common law rule that an easement holder may not unilaterally
relocate an easement unless that right has been specifically reserved or granted in the
creating instrument. *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1057 (Mass.
2004) (citing additional authority for rule that easement holder may not unilaterally
relocate an easement); Restatement § 4.8(3), cmt (f), at 563. *But see McGoey v. Brace*,
918 N.E.2d 559, 563-567 (Ill. App. Ct. 2009) (holding that the approach of section 4.8(3)

1 comports with prior Illinois precedent allowing either the dominant or servient estate
2 owner to make changes to an easement as long as the changes are not “substantial”).
3

4 3. The introductory portion of Section 4 does not require “a strong showing of
5 necessity” as a condition to relocate an easement. *Cf.*, *Kline v. Bernardsville Ass’n Inc.*,
6 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993).
7

8 4. Sections 4(1)~~through~~, (2), and (3) generally ~~mirror the substantive~~
9 ~~requirements of track~~ Section 4.8(3)(a)-(c) of the Restatement with some modification.
10 Section 4(a)(2) specifies that an easement relocation cannot proceed if the new location
11 would, “after the relocation, increase the burden on the easement holder in its reasonable
12 use and enjoyment of the easement.” *Cf.* Restatement § 4.8(3)(b) (“increase the burdens
13 on the owner of the easement in its use and enjoyment”). Section 4(a)(3) uses the phrase
14 “impair an affirmative, easement-related purpose.” *Cf.*, Restatement § 4.8(3)(c)
15 (“frustrate the purpose for which the easement was created”). Sections ~~4(a)(4)~~ through
16 ~~4(7)~~ are new substantive requirements not mentioned in the Restatement.
17

18 5. One common set of factors that courts routinely consider in determining
19 whether to allow an easement relocation to proceed under the Restatement or an
20 analogous state statute relates to the specific route of the relocated easement (including
21 its access points), its gradient, and its width. *See, e.g., Carlin v. Cohen*, 895 N.E.2d 793,
22 798-99 (Mass. App. Ct. 2008) (affirming trial court ruling that the owner of a servient
23 estate was entitled to relocate a pedestrian beach access easement because the entry point
24 of the relocated easement was not more difficult to reach than under the original
25 easement, and, even though the owner of the dominant estate would have to walk over a
26 knoll, there was no evidence the original easement path was more level); *Belstler v.*
27 *Sheller*, 264 P.3d 926, 933 (Idaho 2011) (affirming trial court refusal to approve
28 relocation of express ingress and egress easement under Idaho Code § 55-313 because
29 relocation would have rendered road grades on easement substantially steeper than in
30 original location and would have created hazard for owners of dominant estate in using
31 the easement); *Welch v. Planning and Zoning Comm’n of E. Baton Rouge Par., Parish*,
32 220 So. 3d 60, 65-68 (La. Ct. App. 2017) (holding that developer of new subdivision was
33 not justified in unilaterally relocating a servitude under Article 748 of the Louisiana Civil
34 Code because new rights-of-way provided over public roads were only 20 feet wide and
35 thus diminished utility of servitude which provided for 30 foot wide right-of-way
36 ~~benefiting~~ ~~benefitting~~ three enclosed lots). Any facts related to the route (including access
37 points), gradient, and width of the relocated easement could be considered by a court
38 under Sections 4(1) through ~~4(4)~~ of the act.
39

40 6. Other factors that a court could consider in determining whether a proposed
41 relocation satisfies Sections 4-~~1)through~~, (2), and (3) include: (1) ease of access to a
42 public road, including any change in the location of an access point on the dominant
43 estate; (2) the length of an easement; (3) any physical damage to the dominant estate that
44 would be caused by the relocation; and (4), in the case of an irrigation or flowage
45 easement, the volume and velocity of liquids that could be transported by the relocated
46 easement. Facts pertaining to possible physical damage to the dominant estate as well as

1 negative effects on access points could also be addressed under Section 4(6).

2
3 Furthermore, using these same criteria, a court could also consider whether a
4 proposed relocation would have a negative impact on the quality or utility of
5 improvements that already exist on the easement or on the dominant estate and consider
6 the quality of proposed replacement improvements. Thus, if the owner of the servient
7 estate proposes to build improvements on the relocated easement with materials or
8 methods that would materially lessen the quality or utility of those improvements
9 compared to the improvements used by the easement holder in the easement's current
10 location, the court could reject the proposed relocation.

11
12 7. Section 4(3) specifically indicates states that a servient estate owner should be
13 entitled to relocation, ~~provided the other substantive criteria of Section 4 are satisfied, as~~
14 ~~long as only if~~ the relocation does not materially "impair an affirmative, easement-related
15 purpose for which the easement was created." This subsection section is intended to
16 distinguish the express and primary entry, use and enjoyment rights created by an
17 affirmative easement eligible for relocation under the act from any unexpressed and
18 ancillary negative powers that an easement holder might claim in connection with an
19 affirmative easement, such as preventing the owner of the servient estate from developing
20 that estate. *Compare Manning v. Campbell*, 268 P.3d 1184, 1187-88 (Idaho 2012)
21 (holding that servient owner was not entitled to relocate a driveway access easement
22 under Idaho Code § 55-313 because the relocated easement would not have connected to
23 any existing route for vehicular travel and would have required owners of the dominant
24 estate to construct a new driveway on their property across their front lawn, and, thus,
25 would injure the owners of the dominant estate and their property), and *City of Boulder v.*
26 *Farm and Irrigation Co.*, 214 P.3d 563, 567-69 (Colo. App. 2009) (refusing to allow
27 alteration of a ditch irrigation easement ~~under Roaring Fork Club~~ to facilitate a trail
28 extension because the alteration of the easement would materially and adversely affect
29 the maintenance rights that an irrigation company enjoyed by way virtue of the easement
30 ~~from state department of transportation~~), with *M.P.M. Builders L.L.C. v. Dwyer*, 809
31 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that an "easement is created to serve a
32 particular objective, not to grant the easement holder the power to veto other uses of the
33 servient estate that do not interfere with that purpose"). If an owner of a dominant estate
34 actually wants to obtain a property interest in a servient estate that prevents development
35 of that estate in some manner, the owner of the dominant estate can always negotiate for
36 and acquire a ~~restrictive covenant or~~ negative easement—one of the types of easement
37 easements that cannot be relocated under this act. See Section 3(b)(1).

38
39 8. Section 4(4) refers to the safety of the easement holder or others entitled to use
40 the easement during and after the relocation. Courts have often considered the safety of
41 individuals using the easement and public health and safety more generally, including the
42 potential of a relocated easement to provide public health and safety benefits. See *R & S*
43 *Inv's v. Auto Auctions Ltd.*, 725 N.W.2d 871, 876-78, 881 (Neb. Ct. App. 2006) (holding
44 that servient owner could relocate an easement for a sanitary sewer lagoon, even though
45 the new lagoon was located 500 feet farther away from dominant estate than the old one,
46 because, *inter alia*, the servient owner constructed the new lagoon with greater

1 wastewater capacity and all necessary piping and connections and thus alleviated serious
2 environmental concerns related to the age of the old lagoon).

3
4 9. Section 4(5) ~~establishes a substantive requirement not found under~~
5 ~~Restatement § 4.8(3), by requiring~~ requires the court to consider whether the proposed
6 relocation will materially, “during the relocation, disrupt the use and enjoyment of the
7 easement by the easement holder or others entitled to use and enjoy the easement, unless
8 the servient estate owner substantially mitigates the disruption ~~under Section 8.~~” This
9 ~~subsection~~ section would thus justify a court order requiring an owner of a servient estate
10 to complete construction of a new access road or driveway on the route of the relocated
11 easement before diverting ~~traffic away from the original easement location~~ access or
12 traffic away from the current easement location. The duty of the owner of the servient
13 estate to mitigate disruption is an important safeguard in the relocation process,
14 particularly if a dominant estate is already developed for active use. This safeguard goes
15 beyond those employed in Restatement § 4.8(3) to assure that relocation of an easement
16 under the act does not cause any affirmative easement-related harm to the easement
17 holder.

18
19 10. Section 4(6) addresses the interests of the easement holder and others in
20 improvements located on the dominant estate and in the physical condition or use of the
21 dominant estate, ~~rather than in the easement alone.~~ For instance, if the proposed
22 relocation requires the construction of a new entry point or driveway on the dominant
23 estate and the new entry point or driveway would be materially more expensive to
24 maintain, materially more difficult to use, ~~or materially~~ less safe than an existing entry
25 point or driveway already located on the dominant estate, ~~these factors or in any other~~
26 way would materially disrupt the use of the dominant estate, the proposed relocation
27 ~~could be considered by a court under section 4(6) to the extent they were not already~~
28 ~~made relevant under sections 4(1) (4).~~ proceed. Likewise, if a proposed relocation would
29 ~~result in the destruction of~~ materially impair, for example, woods, wildlife habitat, or
30 watersheds on the dominant estate, ~~these factors the proposed relocation~~ could also be
31 ~~considered by a court under section 4(6).~~ not proceed. If a proposed relocation would have
32 no material effect on improvements ~~located on the dominant estate or~~ or the physical
33 condition or use of the dominant estate, ~~section~~ Section 4(6) would not be implicated.

34
35 11. Section 4(7) addresses the interests of a security-interest holder having an
36 interest in either the servient or dominant estate, a lessee of record having a lessee’s
37 interest under a lease in the dominant estate, or ~~any other person whose~~ the real-property
38 interest of record of any other person in the servient estate or dominant estate ~~is adversely~~
39 ~~affected by the relocation.~~ If a security-interest holder of record having an interest in
40 either the servient estate or dominant estate can show that the value of its collateral will
41 be materially impaired by the relocation of an easement, the proposed relocation could
42 not proceed. Similarly, if a lessee of record having a ~~leasehold~~ real-property interest in
43 the dominant estate can show ~~its leasehold~~ that this interest would be materially impaired
44 by the relocation, the proposed relocation could not proceed. Section 10 of the act
45 addresses other issues that may be related to the interests of a security-interest holder of
46 record, namely the effect of an easement relocation on a default clause, due-on-sale

1 clause, or other transfer-restriction clause.

2
3 The reference in ~~section~~ Section 4(7) to “~~any other person whose a~~ real-property
4 interest of record of any other person in the servient estate or dominant estate ~~is adversely~~
5 ~~affected by the relocation~~” is intended to encompass persons such as ~~holders of other~~
6 ~~access easements or flowage easements across either~~ the holder of another easement that
7 burdens the servient estate or dominant estate or ~~owners~~ the owner of interests an interest
8 in a common-interest community, ~~as long as these persons’~~. Thus, if a proposed
9 relocation of an easement providing vehicular ingress and egress across a servient estate
10 would result in the material impairment of an irrigation easement that also burdened the
11 servient estate by reducing the volume of water that could be conveyed through the
12 irrigation easement, the holder of the irrigation easement could assert its rights under
13 Section 4(7) and block the proposed relocation. Additionally, if a proposed relocation of
14 an easement encroaches on an existing, recorded easement (other than a public-utility
15 easement or conservation easement) and would result in a change in the priority of the
16 recorded easement due to the operation of Section 10(a)(5) that impaired a real-property
17 interests are “adversely affected by the relocation.” interest of the easement holder, the
18 affected easement holder could, in principle, assert its rights under Section 4(7) and block
19 the proposed relocation as a material impairment of the recorded easement.

20
21 12. A servient estate owner’s right to relocate an easement eligible for relocation
22 under this act is not affected by a limitation on the term or duration of an easement
23 established by agreement. Although it is unlikely that an owner of a servient estate would
24 seek judicial approval to relocate a short-term easement, nothing in this act prevents such
25 an action.

26 27 **SECTION 5. COMMENCEMENT OF CIVIL ACTION.**

28 (a) A servient estate owner must commence a civil action to obtain an order to
29 relocate an easement under this [act].

30 (b) A servient estate owner that commences a civil action under subsection (a)
31 shall serve a summons and complaint on:

32 (1) the easement holder whose easement is the subject of the relocation;

33 (2) a security-interest holder of record of an interest in the servient estate
34 or dominant estate;

35 (3) a lessee of record of an interest in the dominant estate; and

36 (4) any other person ~~whose real-property interest in, if the relocation~~

1 ~~would encroach on an area of~~ the servient estate or dominant estate ~~is affected~~ burdened
2 by ~~the relocation. a real-property interest of record owned by that person.~~

3 (c) A complaint under this section must contain or be accompanied by:

4 (1) a statement of intent of the servient estate owner to seek the relocation;

5 (2) a statement of the nature, extent, and anticipated dates of
6 commencement and completion of the proposed relocation;

7 (3) information sufficient to identify the current and proposed locations of
8 the easement;

9 (4) a statement of the reason the easement is eligible for relocation under
10 Section 3;

11 (5) a statement of the reason the proposed relocation satisfies the
12 conditions for relocation under Section 4; and

13 (6) a statement that the servient estate owner has made a reasonable
14 attempt to notify the holders of ~~a~~ any public-utility easement, conservation easement, or
15 negative easement on the servient estate or dominant estate of the proposed relocation.

16 ~~(d) If a complaint under this section is accompanied by a~~ (d) A document in
17 recordable form executed by a person designated as a party to the civil action under
18 ~~subsections subsection~~ (b)(2), ~~(3),~~ (3), or (4), in which ~~that~~ the person states that it waives
19 any right it may have to contest or obtain relief in connection with the relocation, or in
20 which it ~~subrogates~~ subordinates its interest to the proposed relocation, ~~then this~~
21 ~~document~~ may be filed at the commencement of the proceeding or by motion at any time
22 ~~prior to~~ before the final order. ~~Upon~~ On filing of the document, the court may issue an
23 order dismissing ~~that~~ the person from any requirement to answer or participate further in

the civil action.

Comment

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

2. Section 5(b) requires the owner of a servient estate seeking to relocate an easement under the act to serve a summons and complaint on: (1) the holder of the easement that is the subject of the relocation; (2) a security-interest holder of record of an interest in the servient estate or dominant estate; (3) a lessee of record of an interest in the dominant estate; and (4) any other person ~~whose real-property interest in, if the relocation would encroach on an area of~~ the servient estate or dominant estate ~~is affected~~ burdened by the relocation, a real-property interest of record owned by that person. The requirement to serve a summons and complaint on these persons guarantees that they will receive notice of the proposed relocation in a manner consistent with the applicable rules of civil procedure in the state. ~~Notice Section 5(c)(6) addresses the issue of notice to the holder of a public-utility easement, conservation easement, or negative easement is addressed in Section 5(e)(6).. Once a civil action has been filed by the owner of the servient estate, the parties served with a summons and complaint may take advantage of all of the procedural rights provided under the applicable rules of civil procedure.~~

3. The reference to a security-interest holder of record in ~~subsection~~ Section 5(b)(2) would include a secured party who holds a security interest in all or any part of ~~the servient or dominant estate and not the entirety of~~ either estate.

~~4. The reference in Section 5(b)(4) to “any other person whose real-property interest in the servient~~ the servient estate or dominant estate ~~is affected by the relocation”.~~

~~4. The service requirement imposed under Section 5(b)(4) contemplates, for example, a person who holds another~~ access ~~easement or owns in the servient or dominant estate (other than a public-utility easement, conservation easement, or negative easement), if the proposed relocation would encroach on an interest in a common-interest community in either estate. By requiring the servient estate owner to serve a summons and complaint on such a person, the act gives that person~~ area of the particular estate burdened by the easement. This section would give the other easement holder an

1 opportunity to argue ~~before a court~~ that the proposed relocation ~~should be disallowed~~
2 ~~because of~~ would result in a material ~~adverse effect on that person's real~~ impairment of
3 the easement holder's real-property interest under Section 4(7). Section 5(b)(4) would
4 likewise require service of a summons and complaint on a person whose recorded real
5 property interest under the catch-all substantive criteria found at would be subject to a
6 potential priority change due to the ~~conclusion~~ operation of ~~section 4(7)~~ Section 10(a)(5).
7

8 5. Section 5(c) sets forth the required contents of the complaint seeking
9 relocation. The general purpose of these requirements is to provide an easement holder
10 and other interested persons entitled to service with sufficient information to decide
11 whether to consent or object to the proposed relocation.
12

13 6. Section 5(c)(6) specifically requires that the servient estate owner's complaint
14 contain or be accompanied by a statement that the servient estate owner made a
15 reasonable effort to provide ~~a statement in its complaint attesting to its efforts to give~~
16 ~~reasonable notice~~ notification of the proposed relocation to the holder of ~~a~~ any public-
17 utility easement, conservation easement, or negative easement on the servient ~~estate~~ or
18 dominant estate. As these categories of easements are excluded from the scope of the act
19 under Section 3(b)(1) and further protected from encroachments under Sections 3(b)(2)
20 and (3), the holders of such easements need not be served a summons and complaint and
21 thus become parties to a judicial easement relocation proceeding. If the act required such
22 an easement holder to be served with a summons and complaint, there is a risk that a final
23 judgment adverse to that holder's interests would be binding on that party. Section
24 5(c)(6), however, provides a mechanism to assure that the servient estate owner gives
25 will provide notice to the ~~holder~~ holders of such ~~an easement~~ easements so that ~~the~~
26 ~~easement a~~ holder could intervene in the judicial proceeding if it saw a need.
27

28 7. Section 5(d) provides a mechanism for the filing of waivers and ~~subrogations~~
29 subordination agreements by parties who wish to consent to a proposed relocation and be
30 dismissed from a judicial easement relocation proceeding.
31

32 SECTION 6. REQUIRED FINDINGS; ORDER.

33 (a) ~~Before issuing~~ The servient estate owner may not obtain an order approving
34 the relocation of an easement; unless the court ~~must determine~~ determines that the
35 servient estate owner has:

- 36 (1) established that the easement is eligible for relocation under Section 3;
37 and
38 (2) satisfied the conditions for relocation under Section 4.

39 (b) An order approving relocation of an easement must:

1 (1) state that the order was issued in accordance with this [act];

2 (2) recite the recording data of the instrument creating the easement, if

3 any, [and] any amendments, ~~+~~ [], and any preservation notice as defined under [cite to this

4 state's marketable title act]];

5 (3) identify the immediately preceding location of the easement;

6 (4) describe in a legally sufficient manner the new location of the

7 easement;

8 (5) describe ~~any~~ all mitigation required of the servient estate owner during

9 relocation;

10 (6) refer in detail to the plans and specifications of all improvements

11 necessary for the easement holder to enter, use, and enjoy the easement in ~~its~~ the new

12 location;

13 (7) specify all conditions to be satisfied by the servient estate owner to

14 relocate the easement and construct all improvements necessary for the easement holder

15 to enter, use, and enjoy the easement in ~~its~~ the new location;

16 (8) include a provision for payment by the servient estate owner of

17 expenses under Section 7;

18 (9) include a provision for compliance by the parties with the ~~obligations~~

19 obligation of good faith arising under Section 8; and

20 (10) ~~require~~ instruct the servient estate owner to record the affidavit, if

21 required under Section 9 ~~if (a), when~~ the servient estate owner substantially completes

22 relocation.

23 (c) An order issued under subsection (b) may include any other provision

consistent with this [act] for the fair and equitable relocation ~~in the interest of the parties~~
of an easement.

(d) Before a servient estate owner proceeds with a relocation, the owner must
record a certified copy of the order issued under subsection (b)-) in the land records of all
jurisdictions in which the servient estate is located.

Legislative Note: The bracketed language in subsection (b)(2) ~~will only be~~ is applicable
only in a state that has a marketable title act. The additional language requires a servient
estate owner seeking to complete a relocation under the act to include in the order
required by this section the recording data regarding a preservation notice filed by an
easement holder who recorded such a notice to preserve the effectiveness of an easement
originally recorded ~~prior to~~ before the statutory root of title.

Comment

1. Section 6(a) specifies the determinations a court must make before authorizing
a proposed relocation under this act. ~~First, section~~ Section 6(a)(1) requires the court to
make the following threshold determinations ~~that:~~ the easement proposed for relocation
is, in fact, eligible for relocation under Section 3(a)-); the easement is not one of the
easements excluded from the scope of the act in Section 3(b)(1), ~~and that~~; the proposed
relocation will not result in an impermissible encroachment under ~~Sections~~ Section
3(b)(2)-(3) or ~~seek~~ Section 3(b)(3); and the servient estate owner is not seeking to
relocate an easement to a location other than the servient estate ~~as, which is~~ prohibited by
Section 3(b)(4). ~~It thus~~ Section 6(a)(1) provides additional protection ~~for the~~ to holders of
~~the excluded categories of public-utility~~ easements ~~enumerated in Section 3(b)(1),~~
conservation easements, and negative easements by drawing the court's attention to the
scope of the act. ~~Second,~~ Section 6(a)(2) mandates that the court determine that the
proposed relocation satisfies the substantive conditions for relocation under Section 4.

2. Once a court makes the required determinations under Section 6(a), Sections
6(b) ~~and (e)-(d)~~ require ~~a~~ the court to issue an order authorizing the relocation and the
owner of the servient estate to record a certified copy of that order along with an
explanatory statement in the relevant public records of the state. ~~Subsections~~ Sections
6(b)(1)-(7) set forth some of the important information that must be included in the
court's order ~~and explanatory statement, such as a statement that the order was issued in~~
~~conformity with this act, information about the recording data of the original instrument~~
~~establishing the easement, if any, and amendments thereto (and information about a~~
~~preservation notice in states with a marketable title act), the location of the easement~~
~~immediately preceding relocation, the new location of the easement, any mitigation~~
~~required during the process of relocation, and information pertaining to any~~
~~improvements to be constructed on the servient or dominant estates necessary for the~~
~~easement holder to enter, use, and enjoy the easement in its new location and any related~~

1 ~~conditions. These subsections thus. These provisions~~ adopt the approach of *R & S Inv's v.*
2 *Auto Auctions Inc.*, 725 N.W.2d 871, 878 (Neb. Ct. App. 2006), which requires an owner
3 of a servient estate that satisfies the criteria for easement relocation under Restatement §
4 4.8(3) to execute a new document setting forth the new location and other relevant terms
5 of the relocated easement. All implied and express duties and obligations imposed on the
6 owner of the servient estate at the previous location shall apply in the new location,
7 unless a court determines they are no longer applicable.

8
9 3. Sections 6(b)(8) and (9) require the court's order approving relocation to
10 provide for payment of the costs and expenses authorized under Section 7 and to provide
11 for the obligations arising under Section 8 relating to the parties' on-going duties of good
12 faith ~~and the obligation of the owner of the servient estate to mitigate disruption during~~
13 ~~the process of relocation.~~

14
15 4. Section 6(b)(10) includes one final element of an order approving relocation of
16 an easement—~~a requirement~~ an instruction to record the relocation affidavit, if required
17 under ~~section~~ Section 9 ~~of the act if (a), when~~ the servient estate owner substantially
18 completes relocation. This ~~requirement~~ instruction is important because the affidavit will
19 provide final written notice that the proposed relocation and all necessary improvements
20 have been substantially completed. Until this affidavit is recorded in the applicable public
21 records, and sent to the relevant parties, Section 9(b) clarifies that the easement holder
22 maintains the right to enter, use, and enjoy the easement in its current location subject to
23 any court order approving relocation under Section 6(b).

24
25 5. Section 6(c) recognizes a court's equitable power to issue other incidental
26 orders necessary to implement a fair and ~~efficient relocation and to assure that the~~
27 ~~easement holder suffers no material harm to its affirmative, easement-related interests~~
28 ~~upon relocation.~~ equitable relocation. For example, under this section, a court could
29 require the owner of the servient estate to complete the relocation within a fixed period of
30 time or lose the right to relocate.

31
32 6. Section 6(d) requires the servient estate owner to record a certified copy of the
33 court's order approving relocation under Section 6(b). Thus, when the court requires
34 construction of improvements for the entry, use, and enjoyment of the easement in its
35 new location, Section 6(d), along with Section 6(b)(~~8~~10) and Section 9, require that a
36 servient owner seeking to relocate an easement under the act must ultimately record two
37 documents: first, the certified copy of the court order approving relocation obtained under
38 Section 6(b), and second, when the relocation is substantially complete, the relocation
39 affidavit specified under Section 9. When the court does not require the construction of
40 improvements, the only document that must be recorded is the certified copy of the order
41 specified by Section 6(b).

42
43 ~~7. Implicit in both Sections 5 and 6 is the understanding that a servient estate~~
44 ~~owner and an easement holder generally may agree to the relocation of an easement~~
45 ~~(other than a conservation easement) under any terms they find mutually acceptable. In~~
46 ~~the case of an easement relocation arranged by mutual consent of the servient estate~~

owner and the easement holder, notice to to other interested persons, including the holder of another easement on the servient estate or dominant estate, a security interest holder of record, or a lessee of record, is a matter of private concern and is not addressed by this act.

SECTION 7. EXPENSES OF RELOCATION. A servient estate owner is responsible for all reasonable expenses associated with the relocation of an easement under this [act] as determined by the court ~~in~~ under Section 6(b), including the expense of:

(1) constructing improvements on the servient estate or dominant estate in conformity with the order issued under Section 6;

(2) during the relocation, mitigating disruption in the use and enjoyment of the easement by the easement holder or another person entitled to use and enjoy the easement;

(3) obtaining governmental approvals or permits required to relocate the easement and construct necessary ~~improvements~~ improvements;

(4) preparing and recording, in the form required by the recording statutes of this state, the certified copy required by Section 6(d) and any other document required to be recorded;

(5) any title work that may be required to complete relocation or may be required by a party to the civil action as a result of the relocation;

(6) applicable premiums for title insurance ~~premiums for applicable~~ endorsements; coverage related to the relocation;

(7) ~~a professional~~ experts necessary to review plans and specifications for an improvement to be constructed in the relocated easement or on the dominant estate and to confirm compliance with the plans and specifications referenced in the order under

1 Section 6(b)(6); ~~and~~

2 (8) payment of any maintenance cost associated with the relocated easement

3 which is greater than the maintenance cost associated with the easement before

4 relocation; and

5 (9) obtaining third-party consents required to relocate the easement.

6 **Comment**

7 ~~1. Section 7 provides first states the general obligation of the servient estate~~
8 ~~owner to pay for all reasonable expenses associated with relocation as determined by the~~
9 ~~court. The subsections provide~~ courts with guidance as to the items that might constitute
10 an expense chargeable to the ~~owner of the servient estate under section 6(b)(8) if a~~
11 ~~servient estate owner succeeds under this general obligation and which will be specified~~
12 ~~in obtaining a judicial the court's order authorizing relocation of an easement. under~~
13 Section 6(b)(8). The enumerated items represent an illustrative, but not exhaustive, list of
14 chargeable expenses.

15
16 ~~2. Attorney's fees incurred by the easement holder might constitute part of the~~
17 ~~expenses chargeable under the various subsections, particularly under subsections (3) and~~
18 ~~(4) pertaining to the acquisition of governmental approvals or permits to comply with~~
19 ~~applicable law, such as a zoning or land use regulation, and preparing an instrument for~~
20 ~~filing in the public records designed to provide third parties with notice of the relocated~~
21 ~~easement. Other expenses related to obtaining a required governmental approval or~~
22 ~~permit or preparing an instrument for filing in the public records, such as obtaining a~~
23 ~~necessary consent from co-owners or other interested parties, could also be chargeable~~
24 ~~under subsections (3) and (4).~~

25
26 **SECTION 8. DUTY TO COOPERATE IN GOOD FAITH; ~~DUTY TO~~**
27 **~~MITIGATE DISRUPTION.~~**

28 ~~(a).~~ After the court issues an order under Section 6~~(b)~~ approving a relocation and
29 the servient estate owner commences the process of relocation, the servient estate owner,
30 the easement holder, and all other parties in the civil action shall act in good faith to
31 facilitate the relocation of the easement in compliance with this [act].

32 ~~(b) A servient estate owner shall mitigate disruption to the use and enjoyment of~~
33 ~~an easement and the dominant estate during relocation of the easement.~~

Comment

1. The duty of an owner of a servient estate and easement holder to cooperate in good faith to facilitate the relocation of an easement is grounded in an understanding of an easement as a long-term, concurrent property relationship that imposes mutual duties of accommodation on both parties—the owner of the servient estate and the easement holder. For a general discussion of the principle of mutual accommodation in the law of easements and servitudes at common and civil law, see John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 Conn. L. Rev. 1, 36-47 (2005).

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

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

~~4. The duty of the owner of the servient estate to mitigate disruption in the use and enjoyment of the easement or the dominant estate during the process of relocation is an important safeguard in the relocation process, particularly if a dominant estate is already developed for active use of any kind. This safeguard goes beyond those employed in Restatement § 4.8(3) to assure that relocation of the easement does not cause any easement-related harm to the easement holder and, therefore, should protect the easement holder’s rights both retroactively and prospectively. Thus, a servient estate owner seeking to relocate an ingress and egress easement will likely be required to complete a road at the new location of the easement before closing a road at the old location. Similar~~

1 ~~requirements would apply to construction of improvements necessary for the functioning~~
2 ~~of an irrigation or drainage easement.~~

3 4 **SECTION 9. RELOCATION AFFIDAVIT.**

5 (a) When the relocation of an easement is substantially complete and the easement
6 holder can enter, use, and enjoy the easement in ~~its~~ the new location, the servient estate
7 owner shall record an affidavit certifying that the easement has been relocated in the land
8 records of all jurisdictions in which the servient estate is located and shall send the
9 affidavit to the easement holder and parties to the civil action by certified mail.

10 (b) Until an affidavit under subsection (a) is recorded and sent, the easement
11 holder has the right to enter, use, and enjoy the easement in ~~its~~ the current location,
12 subject to the court's order under Section 6(~~b~~) approving relocation.

13 (c) If the ~~order~~ order under Section 6(~~b~~) does not require an improvement to be
14 constructed as a condition of the relocation, recording the order under Section 6(~~b~~d)
15 constitutes relocation.

16 **Comment**

17 ~~1. This section is intended to clarify~~ 1. Section 9 clarifies when a proposed
18 easement relocation is considered to be final and complete as a legal fact. When an
19 easement includes existing improvements that are necessary for use and enjoyment of the
20 easement, an easement relocation will not be final and complete as a legal fact until the
21 servient estate owner substantially completes all the improvements necessary for the
22 easement holder to enter, use, and enjoy the easement in its new location. In such a case,
23 when the necessary improvements are substantially complete, the servient estate owner
24 must record the relocation affidavit specified in Section 9(a~~-~~) and send the affidavit to
25 the easement holder and other parties by certified mail. Until this affidavit is recorded,
26 and sent, Section 9(b) makes clear that the easement holder ~~has~~ continues to have the
27 right to enter, use, and enjoy the easement in its current location.

28
29 ~~2. Subsection~~ Section 9(~~b~~c) is intended to apply to easements that can be used
30 and enjoyed without any improvements on the servient estate or that exist without any
31 improvements on the servient estate. ~~One~~ An example is an easement providing
32 pedestrian access or recreational access over a specified portion of a servient estate
33 unmarked by a path or trail. Another example is an easement for which ~~no~~ improvements

1 on the servient estate have not yet been constructed by the easement holder. In such
2 cases, the order approving relocation of the easement under Section 6(b) may might
3 justifiably not require mention construction of any improvements on the servient estate in
4 its new location. Thus, when the servient estate owner records the order approving
5 relocation under Section 6(b), as required by Section 6(d), that recording will constitute
6 relocation.

8 SECTION 10. LIMITED EFFECT OF RELOCATION.

9 (a) Relocation of an easement under this [act]:

10 (1) is not a new transfer or a new grant of an interest in the servient estate
11 or the dominant estate;

12 (2) does is not constitute a breach or default of or otherwise trigger a due-
13 on-sale clause or other transfer-restriction clause under a security instrument, except as
14 otherwise determined by a court under law other than this [act];

15 (3) does is not constitute a breach or default of a lease, except as otherwise
16 determined by a court under law other than this [act];

17 ~~(4)~~ is not a breach or default by the servient estate owner of a recorded
18 document affected by the relocation except as otherwise determined by a court under law
19 other than this [act];

20 (5) does not affect the priority of the easement; and

21 (56) is not a fraudulent conveyance or voidable transaction under any law
22 of this state.

23 (b) This [act] does not affect any other method of relocating an easement
24 permitted under law of this state other than this [act].

25 Comment

26
27 1. The relocation of an easement under this act redefines where the easement is
28 located. As Section 10(a)(1) makes clear, the relocation does not constitute a transfer or a
29 new grant of an interest in either a servient estate burdened by the easement or a

1 dominant estate benefited by the easement. Consequently, as Sections 10(a)(2)~~and~~
2 ~~(a)(3)-(4)~~ clarify, an easement relocation that occurs pursuant to this act should not
3 trigger a breach or default, a due-on-sale clause, or other transfer-restriction clause under
4 an applicable loan recorded document, ~~or a breach or default of a lease.~~

5
6 2. The enforceability of due-on-sale clauses was substantially altered with
7 Congressional adoption of Section 341 of the Garn-St. Germain Depository Institutions
8 Act of 1982 (The Garn Act, 12 U.S.C.A. § 1701j-3(b)). The Garn Act was adopted to
9 preempt state laws that restrict the enforcement of due-on-sale clauses and thus render
10 such clauses generally enforceable. Grant S. Nelson et al., *Real Estate Finance Law* §
11 5.24, at 336 (6th ed. 2015). However, Congress also exempted certain transfers from the
12 act and thus effectively declared that these types of transfers may not be used as the basis
13 for due-on-sale clause acceleration. 12 U.S.C.A. § 1701j-3(d)(1)-(9). In the words of
14 leading authorities on the subject: “When a transfer of one of these types is involved, the
15 Act is preemptive; acceleration under a due-on-sale clause is prohibited even if permitted
16 by state law.” Grant S. Nelson et al., *Real Estate Finance Law* § 5.24, at 344 (6th ed.
17 2015). It should be noted, however, that these exclusions “only apply if the mortgaged
18 real estate contains ‘less than five dwelling units.’” Id. (quoting 12 U.S.C.A. § 1701j-
19 3(d)).
20

21 As the Garn Act is generally concerned with transfers of occupancy of mortgaged,
22 residential real estate, the Garn Act will not commonly be applicable to easement
23 relocations under this act. See generally Grant S. Nelson et al., *Real Estate Finance Law*
24 § 5.24, at 344-47 (6th ed. 2015). This conclusion is buttressed by recognition that an
25 easement relocation does not create a new property interest burdening the servient estate
26 or benefitting the dominant estate; it simply changes the location of the existing
27 easement. It is conceivable, however, that a specialized loan document—for example, a
28 commercial loan document—might expressly characterize an easement relocation that
29 occurs without the consent of the lender as an event triggering a default, a due-on-sale
30 clause, or some other transfer-restriction clause. Whether the preemption provisions of
31 the Garn Act, 12 U.S.C.A. § 1701j-3(b), or any other law for that matter, — would allow
32 enforcement of such a clause is a question that state and federal courts would have to
33 resolve in an applicable case. However, as standard residential loan documents do not
34 specifically characterize an easement relocation as an event triggering a default or due-
35 on-sale clause, Section 10(a)(2) clarifies that, in such a case, an easement relocation will
36 not have the effect of triggering a breach or default or application of a due-on-sale clause
37 or other transfer-restriction clause. Parties considering the impact of the Garn Act should
38 consider the concluding thoughts of several experts on the subject:
39

40 It is easy but dangerous to suppose that the passage of the Garn Act solved
41 all problems associated with due-on-sale clauses, or that all aspects of
42 them are now governed by the Act. The Act declares that the clauses are
43 generally enforceable, and it lists certain exceptional situations in which
44 the courts may not enforce them; both of these provisions preempt any
45 contrary state law. *But lenders are still bound by the language of the*
46 *clauses they use, and state law governs the interpretation of that*

1 language. For example, words like “transfer” and “sale” are defined by
2 state case law. A clause under which the lender covenants not to withhold
3 consent to a transfer “unreasonably” must be tested under state concepts of
4 reasonableness. . . . *Conflicts and ambiguities in the documents must be*
5 *settled using traditional state law techniques.*

6
7 Grant S. Nelson et al., *Real Estate Finance Law* § 5.26, at 360 (6th ed. 2015) (footnotes
8 omitted) (emphasis added).
9

10 3. As stated under Section 10(a)(~~4~~5), the relocation of an easement under this act
11 does not alter the priority of the easement vis-à-vis other recorded interests in the servient
12 or dominant estate: assuming compliance with the substantive conditions of relocation
13 under Sections 4(1)-(7). The notice documents that must be filed in the public records
14 ~~after successful completion of the procedures set forth in this act~~ pursuant to either
15 Section 6(d) or Section 9 will have the same priority as the original recorded easement
16 and thus will relate back to the original recorded easement. If a servient estate owner
17 obtains an order to relocate an easement under the act and the new location encroaches on
18 another recorded easement and changes the priority of the encroached easement by
19 operation of Section 10(a)(5), the holder of the encroached easement could argue that the
20 relocation constitutes a material impairment under Section 4(7).
21

22 4. Section 10 does not affect the right of a security-interest holder of record to
23 challenge a proposed easement relocation under Section 4(7) on the ground that the
24 relocation will impair the interests of the security-interest holder by reducing the value of
25 its collateral. Subsection Section 5(b)(2) guarantees that any security-interest holder of
26 record having an interest in the servient estate or dominant estate will receive a summons
27 and complaint and thus notice of the proposed relocation.
28

29 **SECTION 11. NON-WAIVER.** The right of a servient estate owner ~~under this~~
30 ~~[act]~~ to relocate an easement under this [act] may not be waived, excluded, or restricted
31 by agreement even if:

32 (~~1~~) the instrument creating the easement prohibits relocation or contains a
33 waiver, exclusion, or restriction of this [act];

34 (2) the instrument creating the easement requires consent of the easement holder
35 to amend the terms of the easement; or

36 (~~2~~3) the location of the easement is fixed by the instrument creating the easement,
37 another agreement, previous conduct, acquiescence, estoppel, or implication.

Comment

1. Section 11 provides that the core relocation right established by Section 4 is not subject to waiver, exclusion, or restriction by contracting parties. In other words, an owner of a servient estate and an easement holder of an easement otherwise eligible for relocation ~~under Section 4~~ cannot agree *ex ante* to prohibit relocation or waive, exclude, or restrict application of the act. Further, if the parties to a proposed easement relocation agree to relocate an easement, the newly relocated easement would still be subject to relocation in the future to the extent the servient estate owner could satisfy the requirements of this act.

2. ~~Section 11(1)~~ Section 11(1) contemplates that after enactment of this act some easement forms may be revised in an attempt to avoid application of this act by including an express term prohibiting easement relocation or by including an express waiver, exclusion, or restriction of this act. Such terms are ineffective under Section 11(1). Section 11(1) thus differs from Section 4.8(3) of the Restatement, which provides that the servient estate owner's right to relocate an easement can be "expressly denied" by the terms of an easement. The substantive and procedural safeguards included in this act remove any justification to allow the waiver of a servient estate owner's relocation right under this act.

3. Section 11(2) clarifies that even when an easement contains a general clause requiring easement holder consent to amend the easement, the easement will remain ~~eligible for~~ potentially subject to relocation under ~~Section 4~~ this act.

4. ~~Section 11(23)~~ Section 11(23) specifies that even when an easement has been localized by a metes and bounds description in the instrument that creates the easement, by another agreement, by previous conduct of the parties, or by acquiescence, estoppel, or implication, the easement remains subject to relocation under ~~Section 4~~ the act. Accordingly, Section 11(23) specifically rejects the narrow approach to easement relocation adopted by several courts that limit application of Section 4.8(3) of the Restatement to undefined easements, *i.e.*, those that lack a metes and bounds description or other specific indication of the easement's original location in the creating instrument. *Lewis v. Young*, 705 N.E.2d 649 (N.Y. 1998); *Stanga v. Husman*, 694 N.W.2d 716, 718-881 (S.D. 2005); *St. James Village, Inc. v. Cunningham*, 210 P.3d 190, 193-96 (Nev. 2009).

SECTION 12. UNIFORMITY OF APPLICATION AND

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

SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN

1 **GLOBAL AND NATIONAL COMMERCE ACT.** This act modifies, limits, or
2 supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C.
3 Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act,
4 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices
5 described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

6 **SECTION 14. TRANSITIONAL PROVISION.** This [act] applies to an
7 easement created before, on, or after [the effective date of this [act]].

8 **Comment**
9

10 1. Section 14 clarifies that the act will have retroactive effect and thus will apply
11 to all eligible easements created prior to the effective date of the act as well as to
12 easements created on or after the effective date of the act. As an owner of a servient
13 estate can only obtain judicial approval for a proposed relocation ~~in the face of an~~
14 ~~easement holder objection~~ by satisfying all of the conditions set out in Section 4, an
15 owner of a servient estate must demonstrate that the relocated easement will continue to
16 deliver to the easement holder and others entitled to use and enjoy the easement the same
17 affirmative, easement-related benefits ~~the easement holder~~ obtained at the easement's
18 original location and that the relocation will not materially impair the interests of the
19 easement holder, security-interest holders, or other owners of interests in the servient or
20 dominant estate.

21
22 2. Retroactive application of the act will not deprive the easement holder or
23 others entitled to use and enjoy the easement of any of the functional benefits of the
24 easement upon relocation and will not cause the easement holder ~~to suffer any other~~
25 ~~easement-related, security-interest holders, or other owners of interests in the servient or~~
26 ~~dominant estate to suffer~~ material harm, even during the relocation process, regardless of
27 whether the act applies to an easement created before, on, or after the effective date of the
28 act. Consequently, an easement holder, others entitled to use and enjoy the easement,
29 security-interest holders, or other owners of interests in the servient or dominant estate
30 will not suffer an uncompensated taking of a property interest upon a relocation
31 undertaken pursuant to the act. *See Statewide Construction, Inc. v. Pietri*, 247 P.3d 650,
32 656-57 (Idaho 2011) (holding that application of an Idaho statute, I.C. § 55-313, which
33 gives a servient estate owner the right to relocate a motor vehicle access easement on
34 terms similar to those found in Restatement § 4.8(3), was not an unconstitutional taking
35 of private property without just compensation under either the Fifth Amendment to the
36 U.S. Constitution or the Idaho Constitution because the statute expressly requires that the
37 change must be made in a way “as not to obstruct motor vehicle travel, or to otherwise
38 injure any person or persons using or interested in such access” and because any
39 relocation authorized by the ~~statue~~ statute will “provide the dominant estate holders with

1 the same beneficial interest they were entitled to under the easement by its original
2 location”); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004)
3 (observing that an “easement is created to serve a particular objective, not to grant the
4 easement holder the power to veto other uses of the servient estate that do not interfere
5 with that purpose”). *See also* Susan French, *Relocating Easements: Restatement (Third),*
6 *Servitudes* § 4.8(3), 38 Real Prop. Prob. & Tr. J. 1, 5 and 9 (2003) (responding to
7 criticism that the Restatement approach to easement relocation could lead to windfall
8 gains for owners of servient estates by observing that (i) in most easement negotiations
9 parties give little, if any, attention to the future location of an easement or relocation
10 rights, (ii) if requirements imposed by Restatement § 4.8(3) are satisfied, the relocated
11 easement increases overall utility without decreasing the easement’s utility to the
12 easement holder, and (iii) if the easement holder has some non-access related interests in
13 mind at the time of creation, those interests can be served by restrictive covenants).

14
15 **[SECTION 15. SEVERABILITY.** If any provision of this [act] or its
16 application to any person or circumstance is held invalid, the invalidity does not affect
17 other provisions or applications of this [act] which can be given effect without the invalid
18 provisions or application, and to this end the provisions of this act are severable.]

19 ***Legislative Note:*** *Include this section only if this state lacks a general severability*
20 *statute or a decision by the highest court of this state stating a general rule of*
21 *severability.*

22
23 **[SECTION 16. REPEALS; CONFORMING AMENDMENTS.**

24 (a)

25 (b)

26 (c)]

27 **SECTION 17. EFFECTIVE DATE.** This [act] takes effect