D R A F T

FOR DISCUSSION ONLY

EASEMENT RELOCATION ACT

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October 7, 2019

EASEMENT RELOCATION ACT

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EASEMENT RELOCATION ACT

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EASEMENT RELOCATION ACT

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

SECTION 2. DEFINITIONS. In this [act]:

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

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

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

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

(5) "Easement holder" means:

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

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

(6) "Lessee of record" means a person holding a lessee's interest under a lease whose interest is recorded in the applicable public records.

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

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

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

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

(11) “Security-interest holder” means a person that holds an interest in real property established by a security instrument and whose interest is recorded in the applicable public records.

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

(13) "Title evidence" means a title insurance policy, a preliminary title report or binder, a title insurance commitment, an attorney's opinion of title based on examination of the public records or an abstract, or any other means of reporting the state of title to real property which is customary in the locality.

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

Comment

1. The foundational definition of "easement" in Section 2(3) is based on the Restatement (Third) of Property: Servitudes § 1.2(1) (2000) (hereinafter "Restatement"). The definitions of "appurtenant easement" and "easement in gross" used in Sections 2(1) and (4) are based on Restatement § 1.5(1) and (2). The definitions of "dominant estate" and "servient estate" used in Sections 2(2) and (12) are derived from Restatement § 1.1(1)(b) and (c).

The definition of "easement" in Section 2(3) 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 any 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.

2. The term "real property" is used in Section 2(3), instead of the term "land," as found throughout the Restatement, because an easement will sometimes benefit or burden real property interests other than ownership of land – for example, condominium units or parts of buildings owned by condominium associations. The definition of "real property" used in Section 2(8) is taken from the Uniform Nonjudicial Foreclosure Act § 102(13) (2002).

3. The definition of "easement holder" in Section 2(5) is derived from Restatement § 1.5 and includes, in the case of an appurtenant easement, the owner of the dominant estate, and, in the case of an easement in gross, the person entitled to entry and use.

4. The definition of "lessee of record" in Section 2(6) largely parallels the definition of security-interest holder in Section 2(11).

5. The definition of "person" in Section 2(7) follows the standard definition of person used by the Uniform Law Commission and thus includes not only individuals and private entities but also governmental entities, as they can be holders of both conventional affirmative

easements, conservation easements, and public utility easements.

6. The definition of a "security instrument" in Section 2(10) is based on the Uniform Nonjudicial Foreclosure Act § 102(19) (2002). The definition of a "security-interest holder" used in Section 2(11) is derived from the Uniform Nonjudicial Foreclosure Act § 102(10) (2002).

7. The definition of "title evidence" in Section 2(13) is taken verbatim from the Uniform Nonjudicial Foreclosure Act § 102(22) (2002).

8. The definition of "unit" in Section 2(14) is based on the Uniform Common Interest Ownership Act (UCIOA) § 103(35) (2008). *See also* UCIOA § 2-105(a)(5) (specifying the contents of a declaration in the context of a condominium or planned community). The term "common-interest community" is defined in UCIOA § 103(9) (2008) as "real estate described in a declaration with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or other expenses related to, common elements, other units, or other real estate described in the declaration."

SECTION 3. SCOPE, APPLICABILITY, AND EXCLUSIONS.

(a) In this section:

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

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

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

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

(B) assuring the availability of real property for agricultural, forest,

recreational, or open-space use;

(C) protecting natural resources;

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

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

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

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

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

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

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

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

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

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

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

(1) public-utility easement;

(2) conservation easement; or

(3) negative easement.

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

Comment

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

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

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

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

others from doing something on their own land is either a negative easement or restrictive covenant.").

Undoubtedly, some express easements, have both negative and affirmative elements. The primary purpose of a conservation easement, for example, is to limit development on the servient estate to promote a conservation-related value. A conservation easement, however, may also have a secondary component which may entail, for instance, providing a conservation organization with a right of entry to portions of the servient estate to monitor and enforce the terms of the easement. The broad definition of "conservation easement," "conservation organization," and "conservation purposes" in Section 3(a)(1)-(3) and the qualifying language in Section 3(a)(4) specifying that a "negative easement" is one whose "primary purpose" is to impose a negative duty not to engage in specified uses of the servient estate should give parties and courts sufficient guidance to apply the relevant exclusions and assure both that the core purpose of a conservation easement is not frustrated by any proposed relocation and that some other kind of primarily negative easement is not subject to relocation.

Thus, if a conservation easement provides a specific right of way over a portion of a servient estate for purposes of monitoring the negative restriction at the heart of the easement, a court could only authorize relocation of this right of way if the servient estate owner could satisfy the other requirements of this act with respect to that right of way. In no case, however, would a servient estate owner be able to relocate the actual negative restriction preventing development of the affected portion of the servient estate that is at the core of a conservation easement.

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

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

6. Section 3(b)(2) clarifies that the act will have retroactive effect and thus will apply to all eligible easements created prior to the effective date of the act as well as easements created on or after the effective date of the act. As an owner of a servient estate can only obtain judicial approval for a proposed relocation in the face of an easement holder objection by satisfying the criteria set out in Section 4, an owner of a servient estate must demonstrate that the relocated

easement will continue to deliver to the easement holder the same affirmative, *easement-related* benefits that flowed to the easement holder at the easement's original location.

The easement holder will not be deprived of any of the functional benefits of the easement upon relocation and cannot suffer any other easement-related material harm, even during the relocation process, regardless of whether the act applies to an easement created before, on, or after the effective date of the easement. Consequently, an easement holder will not suffer an uncompensated taking of a property interest upon a relocation undertaken pursuant to the act. *See Statewide Construction, Inc. v. Pietri*, 247 P.3d 650, 656-57 (Idaho 2011) (holding that application of an Idaho statute, I.C. § 55-313, 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 statue will "provide the dominant estate holders with the same beneficial interest they were entitled to under the easement by its original location"); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that an "easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose"). *See also* Susan French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 REAL PROP. PROB. & TR. J. 1, 5 and 9 (2003) (responding to critique that the Restatement approach to easement relocation could lead to windfall gains for owners of servient estates by observing that (i) in most easement negotiations parties give little, if any, attention to the future location of an easement or relocation rights, (ii) if requirements imposed by section 4.8(3) are satisfied, the relocated easement increases overall utility without decreasing the easement's utility to the easement holder, and (iii) if the easement holder has some non-access related interests in mind at the time of creation, those interests can be served by restrictive covenants).

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

8. Section 3(b)(3)(B) specifies that even when an easement has been localized by a metes and bounds description in the instrument that creates the easement, by another agreement, by previous conduct of the parties, or by acquiescence, estoppel or implication, the easement remains subject to relocation under Section 4. Accordingly, Section 3(b)(3)(B) specifically rejects the narrow approach to easement relocation adopted by 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 4. RIGHT OF OWNER OF SERVIENT ESTATE TO RELOCATE EASEMENT.

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

(1) lessen the utility of the easement;

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

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

(4) impair the value of the collateral or other real-property interest of a security-interest holder or lessee of record entitled to notice under Section 5 that objects to the relocation;

(5) disrupt, during the process of relocation, the use and enjoyment of the easement by the easement holder or others entitled to use the easement unless the owner of the servient estate substantially mitigates such temporary disruption; or

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

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

Comment

1. Section 4(a) sets forth the general rule for relocation of an easement under the act. It builds upon Restatement § 4.8(3) but creates a more rigorous set of criteria for relocation. This section authorizes relocation of an easement to permit use, enjoyment or development of the servient estate as long as the objectives set forth in the section can be accomplished without interfering with or harming the *affirmative, easement-related* interests of the easement holder. Restatement § 4.8(3), cmt (f), at 563. As the Supreme Judicial Court of Massachusetts explains, this rule "maximizes the over-all property utility by increasing the value of the servient estate without diminishing the value of the dominant estate" and provides the additional benefit of

minimizing "the cost associated with an easement by reducing the risk that the easement will prevent future beneficial development of the servient estate." *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1057 (Mass. 2004). 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).

2. As Sections 5 and 6 of the act specify, a servient estate owner seeking to relocate an easement must comply with detailed notice and procedural requirements. In addition, Section 7 requires that all expenses of the relocation must be paid for by the owner of the servient estate. In this latter respect, the act is consistent with both Restatement § 4.8(3) and La. Civ. Code art. 748.

3. The introductory portion of Section 4(a) indicates that the right to relocate an easement belongs *only* to the owner of a servient estate. 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) comports with prior Illinois precedent allowing either the dominant or servient estate owner to make changes to an easement as long as the changes are not "substantial").

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

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

6. Specific factors that courts have considered in determining whether to allow an easement relocation under the Restatement or similar state statutes include the nature of the proposed new route for the easement in terms of its route, gradient, and width. *See,* e.g., *Carlin v. Cohen*, 895 N.E.2d 793, 798-99 (Mass. App. Ct. 2008) (affirming trial court ruling that the owner of a servient estate was entitled to relocate a pedestrian beach access easement because the entry point of the relocated easement was not more difficult to reach than under the original easement, and, even though the owner of the dominant estate would have to walk over a knoll, there was no evidence the original easement path was more level); *Belstler v. Sheller*, 264 P.3d 926, 933 (Idaho 2011) (affirming trial court refusal to approve relocation of express ingress and egress easement under Idaho Code § 55-313 because relocation would have rendered road grades

on easement substantially steeper than in original location and would have created hazard for owners of dominant estate in using the easement); *Welch v. Planning and Zoning Comm'n of E. Baton Rouge Par.*, 220 So. 3d 60, 65-68 (La. Ct. App. 2017) (holding that developer of new subdivision was not justified in unilaterally relocating a servitude under Article 748 of the Louisiana Civil Code because new rights-of-way provided over public roads were only 20 feet wide and thus diminished utility of servitude which provided for 30 foot wide right-of-way benefiting three enclosed lots).

Other factors that a court could consider in determining whether a proposed relocation would lessen the utility of the easement under Section 4(a)(1), frustrate the primary purpose of the easement under Section 4(a)(2), or increase the burden on the easement holder in its reasonable use and enjoyment of the easement under Section 4(a)(6) would include: (1) the quality of the material to be used to construct the improvement to be located in the easement; (2) ease of access to a public road; (3) the length of an easement; and (4), in the case of an irrigation or flowage easement, the volume and velocity of fluids that could be transported by the relocated easement.

7. Sections 4(a)(1),(2) and (6) require courts to consider whether a proposed new location of an easement will provide the same general utility to the easement holder without causing material harm to the easement holder in connection with the express purpose of the easement. As section 4(a)(2) indicates by directing a court's attention to the "primary purpose for which the easement was created," a servient estate owner should be entitled to relocation as long as the relocation does not materially impinge upon the *easement-related benefits* of an easement, rather than any ancillary or incidental advantages that an easement holder might claim in connection with the easement such as preventing the servient estate owner from developing the servient estate. *Compare Manning v. Campbell*, 268 P.3d 1184, 1187-88 (Idaho 2012) (holding that servient owner was not entitled to relocate a driveway access easement under Idaho Code § 55-313 because the relocated easement would not have connected to any existing route for vehicular travel and would have required owners of the dominant estate to construct a new driveway on their property across their front lawn, and, thus, would injure the owners of the dominant estate and their property), and *City of Boulder v. Farm and Irrigation Co.*, 214 P.3d 563, 567-69 (Colo. App. 2009) (refusing to allow alteration of ditch irrigation easement under *Roaring Fork Club* to facilitate trail extension because alteration of the easement would materially and adversely affect the maintenance rights that irrigation company enjoyed by way of easement from state department of transportation), *with M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that an "easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose"). If an owner of a dominant estate actually wants to obtain a property interest in a servient estate that prevents development of that estate in some manner, the owner of the dominant estate can always negotiate for and acquire a restrictive covenant or negative easement.

8. Section 4(a)(3) refers to the safety of the easement holder or others entitled to use the easement both during the process of relocation and after the relocation is complete. Courts have considered the safety of individuals using the easement and public health and safety more generally, including the potential of a relocated easement to provide public health and safety

benefits. *See R & S Inv's v. Auto Auctions Ltd.*, 725 N.W.2d 871, 876-78, 881 (Neb. Ct. App. 2006) (holding that servient owner could relocate an easement for a sanitary sewer lagoon, even though the new lagoon was located 500 feet farther away from dominant estate than the old one, because the servient owner constructed the new lagoon with greater wastewater capacity and all necessary piping and connections and thus alleviated serious environmental concerns related to age of the old lagoon).

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

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

11. Section 4(b) provides that the core relocation right established by the act 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 waive, exclude, or restrict application of the act. Further, if the parties to an easement relocation dispute agree to relocate an easement and create a new easement agreement pursuant to that settlement, the newly relocated easement would still be subject to relocation in the future to the extent the servient estate owner could satisfy other requirements of this act.

12. An easement holder and an owner of a servient estate can always agree to an easement relocation by mutual consent without regard to any provisions of the act. An easement holder may also consent to a proposed relocation after receiving notice under Section 5 and condition that consent upon the servient estate owner's compliance with all or certain provisions of the act as specified under Section 9(a).

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

14. A servient estate owner's right to relocate an easement eligible for relocation under Section 3 is not affected by a limitation on the duration of an easement established by agreement.

Although it is unlikely that an owner of a servient estate would seek judicial approval to relocate a short-term easement or a short-term irrevocable license, nothing in act prevents such an action.

SECTION 5. NOTICE OF INTENT TO RELOCATE EASEMENT.

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

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

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

(3) a statement of the reasons the easement is eligible for relocation under Section 3 of this [act];

(4) a statement of the reasons the proposed relocation satisfies Section 4 of this [act]; and

(5) a statement of the estimated cost of the proposed relocation and demonstration of the servient estate owner's ability to pay those costs and complete the relocation.

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

(c) Notice under subsection (a) to a lessee of record must be given in the manner and to the address provided in the recorded lease or memorandum of lease.

Alternative A

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

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

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

(g) In the case of an appurtenant easement, if a dominant estate lacks an address and notice must be sent to the dominant estate under subsections (e) and (f), the owner of the servient estate must post a conspicuous sign on the dominant estate. The sign must state that the owner of the servient estate seeks to relocate an easement on the servient estate, identify the name and address of the owner of the servient estate, and state the nature, extent, location, and anticipated dates of commencement and completion of the relocation. The sign must remain in place for sixty days from the date of initial posting.

Alternative B

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

End of Alternatives

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

Comment

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

2. The owner of a servient estate seeking to relocate an easement must give written notice of its intent to relocate the easement. As set forth in Section 6, the easement holder then has 60 days to reply to the request for relocation. When the easement holder timely consents to the relocation, the owner of the servient estate may proceed with the relocation as long as no other noticed security-interest holder or lessee of record has objected to the relocation. If consent is conditioned on compliance with all or specified provisions of this act as provided under Section 9(a), the owner of the servient estate must still comply with all of those applicable provisions.

3. Section 5(a) through (c) requires that the owner of the servient estate also give notice to a security-interest holder with an interest in either the servient estate or dominant estate affected by a proposed easement relocation and to a lessee of record having a leasehold interest in the dominant estate. Section 10 of the act clarifies that the relocation of an easement under the terms of the act will generally not constitute a transfer or grant of an interest in either the servient or dominant estate for purposes of triggering a default or a due-on-sale clause. The notice requirement under Sections 5(a) and (b) will thus give affected security-interest holders, including first lien holders, an opportunity, in the unusual context of a specific loan document that characterizes relocation of an easement without consent as a transfer or grant of an interest

in the relevant property, an opportunity to raise the issue in court.

4. The specific contents of the notice document are set forth in Section 5(a)(1) through (5). The general purpose of these content requirements is to provide an easement holder, a security-interest holder or a lessee of record with sufficient information to decide whether to consent or object to the proposed relocation. For the definition of "title evidence" referenced in Section 5(a)(2), see Section 2(10).

5. Alternative A for Section 5(d) and (e), setting forth the methods of notice of an intent to seek relocation of an easement, is derived from the Uniform Home Foreclosures Procedures Act §§ 202 and 204 (2015) and the Uniform Partition of Heirs Property Act § 4 (2010). These provisions do not displace any other notices required by applicable state law for initiation of a judicial proceeding by personal service.

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

7. Alternative A, Subsections 5(e) and (f) of this act address situations that may arise when an easement holder has sold a dominant estate to another person or, in the case of either an appurtenant easement or an easement in gross, when the easement holder has died and the interest in the easement has passed to an heir or devisee. In either case, it may be difficult or impossible to identify the easement holder or determine that person's current address. Hence, in the case of an appurtenant easement, notice must be delivered to the address of the dominant estate. *See* Uniform Home Foreclosures Procedures § 204(b) (2015). In the case of an easement in gross in which the current address or identity of the easement holder is not known and cannot be reasonably ascertained, notice must be delivered to the last-known address of the easement holder. In jurisdictions where property ownership is reflected in publicly available property tax records, an owner of a servient estate would have a duty to investigate those records and provide notice to the owner of the dominant estate reflected in those records.

8. Alternative A, Section 5(g), derived from the Uniform Partition of Heirs Property Act § 4 (2015), provides a method of notice by posting a conspicuous sign in the case of an appurtenant easement when the dominant estate lacks an address. This section requires a sign to remain in place for sixty days after initial placement to correspond with the notice periods set forth in Section 6 of the act.

9. Alternative B, Section 5(d) gives a state the option of using the methods of service of process for a declaratory judgment action in the state. This is one of the approaches used for notice under the Uniform Partition of Heirs Property Act § 4(a) (2010) (stating, in pertinent part,

"[t]his [act] does not limit or affect the method by which service of a [complaint] in a partition action may be made").

SECTION 6. PROCEDURE FOR NON-CONSENSUAL RELOCATION.

(a) An owner of a servient estate seeking to relocate an easement without the consent of the easement holder must bring an action seeking approval of the proposed relocation if:

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

(2) the owner of the servient estate gives notice in a record under Section 5 of the intent to seek relocation and the easement holder, security-interest holder, and lessee of record entitled to notice under Section 5 fail to respond in a record to the notice within 60 days after notice is given.

(b) In an action under subsection (a), the court shall determine that the easement is eligible for relocation under Section 3(c).

(c) The owner of a servient estate seeking to relocate an easement without the consent of the easement holder must bring an action seeking approval of the proposed relocation if the owner gives notice under Section 5 in a record and the easement holder, security-interest holder, or lessee of record entitled to notice under Section 5 objects in a record to the relocation within 60 days after notice is given.

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

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

(2) contains a certified copy of the final order or judgment of the court granting

the request for relocation; and

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

(e) In exercising its equitable powers, the court may render an order consistent with this [act] for the fair and equitable relocation of an easement, including the payment of costs and expenses described in Section 7 and additional costs associated with maintenance of the relocated easement and addressing the interests of a security-interest holder in the servient estate or dominant estate.

Legislative Note: *In Section 6(d), state drafters have the option of using the terms "record" and "recording" or "register" and" registering", or can insert state specific language to indicate the relevant public records where the document evidencing the relocation must be filed.*

Comment

1. Section 6(a) provides that the owner of servient estate that seeks to relocate an easement without the prior consent of the easement holder must bring a judicial action when an easement holder's identity is unknown and cannot be determined or when an easement holder, security-interest holder and lessee of record who are entitled to notice under Section 5 fail to grant consent to or object to a request to relocate within 60 days after receiving notice.

2. Section 6(b) requires the court to review the request for relocation and determine whether the easement at issue, in fact, is eligible for relocation under Section 3. This provision is intended to provide protection for difficult-to-identify easement holders and, in particular, conservation organizations that have an interest in preserving conservation easements but might lack the organizational capacity to respond to a servient estate owner's notice of an intent to relocate an easement.

3. When the owner of servient estate seeks to relocate an easement without obtaining the prior consent of the easement holder, or when an easement holder, security-interest holder or lessee of record entitled to notice under Section 5 timely objects to relocation, Section 6(c) authorizes the owner of a servient estate to file what amounts to a declaratory judgement action to obtain judicial approval of the proposed relocation. If judicial approval is granted, the owner of the servient estate may proceed with relocation but must still comply with all other provisions of the act.

4. The 60-day notice period specified throughout Section 6 is intended to give an easement holder, a security-interest holder or a lessee of record a reasonable opportunity to investigate the terms of the proposed easement relocation without causing an undue delay to realization of the plans of the owner of the servient estate for development or improvement of the servient estate and to establish a notice period that is simple and easy to calculate. State statutes that allow easement relocation at the expense of the owner of the servient estate sometimes require notice but do not specify a notice period. *See*, *e.g.*, Va. Code § 55-50 (merely requiring "petition to the circuit court and notice to all parties in interest"); Idaho Code § 18-4308 (providing for relocation of irrigation ditches at servient estate owner's expense, but not indicating a notice period); Idaho Code § 55-313 (providing for relocation of motor vehicle access easements at servient-estate owner's expense, but not indicating a notice period); N.M. Stat. § 73-2-5 (allowing for relocation of irrigation ditches "so long as such alteration or change of location does not interfere with the use or access to such ditch by the owner of the dominant estate," but not indicating whether notice or any special procedure is required).

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

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

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

8. Implicit in all of Section 6, and in particular in Section 6(a) and (c), is recognition that an owner of a servient estate and an easement holder may always agree to the relocation of an easement under any terms they find mutually acceptable. In the case of an easement relocation arranged by mutual consent of the owner of the servient estate and the easement holder, the interests of and form and scope of notice to be provided to security-interest-holders and lessees of record is a matter of private concern to the owner of the servient estate and the easement holder and is not addressed by this act.

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

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

(2) mitigating, during the process of relocation, temporary disruption in the use and enjoyment of the easement by the easement holder or others entitled to use the easement;

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

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

(5) title evidence required under Section 5(a)(2);

(6) title-insurance costs incurred by a security-interest holder or lessee of record in connection with the relocation; and

(7) the costs of professionals necessary to review the plans and specifications for the improvements to be constructed in the relocated easement and to confirm compliance with the plans and specification.

Comment

1. Section 7 provides courts with guidance as to the items that might constitute an expense chargeable to the owner of the servient estate if a servient estate owner succeeds in obtaining a judicial order authorizing relocation of an easement under the act. The enumerated items represent an illustrative, but not exhaustive, list of chargeable expenses.

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

3. The specific requirements for notice of record that establish the easement's new location are set forth in Section 6(d).

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

(a) An owner of a servient estate and an easement holder must act in good faith to facilitate the relocation of an easement in compliance with this [act].

(b) An owner of a servient estate must mitigate temporary disruption to the use and enjoyment of an easement and the dominant estate during the process of relocating an easement.

Comment

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

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

provides that the owner of a servient estate and the owner of a dominant estate enjoy correlative rights to use the subject property, and the owners must have due regard for each other and should exercise that degree of care and use which a just consideration of the rights of the other demands").

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

4. The duty of the owner of the servient estate to mitigate temporary disruption of 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 above and beyond the safeguards employed in Restatement § 4.8(3) to assure that relocation of the easement does not cause any harm to the easement holder and, therefore, should protect the easement holder's rights both retroactively and prospectively.

SECTION 9. RELOCATION OF EASEMENT BY CONDITIONAL CONSENT AFTER NOTICE.

(a) Any time after notice is given under Section 5, an easement holder may consent to relocation of the easement on the condition that the relocation is subject to all or specified provisions of this [act] and may assert all rights under this [act] by consenting to the relocation.

(b) If an easement holder and an owner of the servient estate agree to a relocation after notice is given under Section 5, without opposition to the relocation from any security interest holder or lessee of record, then the owner of the servient estate and the easement holder must execute, and the owner of the servient estate must [record] [register] in the [insert relevant state-specific language to indicate public records], a document in the form required by the [recording] [registration] statutes of this state. That document must:

(1) state that consent to the relocation was given under subsection 9(a); and

(2) specify the immediately preceding and new locations of the easement and

refer to the original [recorded] [registered] document, if any.

Comment

1. As noted in Section 4, comment 12 and Section 6, comment 8, a servient estate owner and an easement holder may always agree to relocate an easement on any terms mutually acceptable to both parties without following the provisions of the act.

2. Section 9(a) recognizes that once an owner of a servient estate requests relocation under the terms of this act by giving notice in compliance with Section 5, the easement holder can consent to the proposed relocation and can condition its consent on compliance with all or certain terms of the act. However, under a new agreement established pursuant to Section 9(a), the parties may still not agree that the new easement relocation will be exempt from relocation under this act. Thus the non-waiver rule adopted in Section 4(b) of the act remains in effect and cannot be nullified even upon an agreement to relocate an easement under Section 9(a).

3. If an easement holder conditionally consents to a relocation after receiving the notice described in Section 5 and avails itself of all or certain of the provisions of the act, and if there has been no opposition from any security interest holder or lessee of record, Section 9(b) requires execution and recordation of a document stating that consent to relocation was given under Section 9(a) and specifying the previous and new easement locations.

SECTION 10. LIMITED EFFECT OF RELOCATION. Relocation of an easement under this [act]:

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

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

(3) does not constitute a default or trigger a due-on-sale clause under any security instrument except as otherwise determined by the court or as provided under federal law.

Comment

1. The relocation of an easement under the act simply redefines where the easement is located. It does not constitute a transfer or a grant of an interest in either a servient estate burdened by the easement or a dominant estate benefited by the easement. As such, an easement relocation that occurs pursuant to this act would not normally trigger a default or due-on-sale clause under an applicable loan document.

2. It is conceivable that a very specialized loan document might characterize an easement relocation as an event triggering a default or due-on-sale clause. In that unusual circumstance,

the preemption provisions of the Garn Act, 12 U.S.C.A. §1701j-3(b), would allow enforcement of such a clause. This explains the final proviso in Section 10(3). However, as most loan documents do not characterize an easement relocation as an event triggering a default or due-on-sale clause, Section 10 clarifies that, in the normal case, an easement relocation will not have the effect of triggering a default or application of a due-on-sale clause. For a discussion of the enforceability of and restrictions on due-on-sale clauses, see GRANT S. NELSON ET AL., REAL ESTATE FINANCE LAW §§ 5.21-5.26, at 321-61 (6th ed. 2015). Section 10(3) of the act essentially declares that the relocation of an easement under the terms of the act does not constitute a default or trigger a due-on-sale clause unless the relevant security instrument specifically and expressly states that a unilateral relocation of an easement has such an effect, in which case the Garn Act would apply.

3. For an example of a uniform act provision declaring that certain contractual terms are "ineffective," see Uniform Commercial Code § 9-406(d) (providing that generally a term restricting assignment (i) in an agreement between an account debtor and an assignor, or (ii) in a promissory note: is "ineffective.").

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

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

SECTION 13. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

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