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FOR APPROVAL

UNIFORM EASEMENT RELOCATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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June 29, 2020

UNIFORM EASEMENT RELOCATION ACT

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UNIFORM EASEMENT RELOCATION ACT

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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

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[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"). The flexible approach 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.

servitude relocation to be "borne by the owner of the servient estate."[5]

In 2000, the American Law Institute altered the landscape of easement and servitude relocation in the U.S. when it promulgated Section 4.8(3) of the Restatement (Third) of Property: Servitudes (the Restatement). The Restatement offered an approach to easement relocation that essentially adopts the civil law approach used in Louisiana and much of the rest of the world and allows a servient estate owner to relocate an easement in the following terms:

> (3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
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> (a) significantly lessen the utility of the easement;
>
> (b) increase the burden on the owner of the easement in its use and enjoyment; or
>
> (c) frustrate the purpose for which the easement was created.[6]

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

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[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 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 given that the creating instrument did not expressly deny the servient owner the power to relocate, even though the new lagoon was further away from the dominant estate).

[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 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

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

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

In the years preceding and following the promulgation of the Restatement, a handful of states also enacted statutes that allow for the relocation of specific kinds of easements without the consent of the easement holder as long as the relocated easement provides the same functional benefit to the easement holder. These particularized

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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 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 McGoey 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 *McGoey* 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 *McGoey* 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).

easement relocation statutes apply to vehicular ingress and egress easements in Idaho and Virginia,[16] and to irrigation easements in Idaho and New Mexico.[17] As some form of unilateral easement relocation is currently permitted in 20 states but is either prohibited by the common law or uncertain in the remaining states, U.S. law currently lacks uniformity.[18]

The UERA responds to this disharmony by adopting the approach long practiced in Louisiana, followed by a number of state statutes, embraced by a number of leading state court decisions adopting the Restatement, and even recently embraced by prominent judicial decisions abroad.[19] One overarching goal of the UERA is to ensure that relocation 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 and, thus, protects those parties' rights both retroactively and prospectively. The act borrows key ideas from the Restatement but departs in several respects. First, the act excludes certain categories of easements from relocation and prohibits relocation in several other specific situations. Next, the act adds several substantive conditions for an easement relocation and clarifies a fundamental aspect of the Restatement approach. Third, the act prohibits servient estate owners from engaging in self-help and instead requires servient estate owners seeking to use the act to file a civil action and serve a summons and complaint (and thus provide notice to) the easement holder whose easement is subject to the proposed relocation and other interested persons. The act also specifies the contents of the complaint and specifies the determinations a court must make to approve a proposed easement relocation. Finally, the UERA addresses several other issues that might arise in a judicial relocation under the act, including expenses, the limited effect of a relocation, waiver, and legal transition.

II. Scope

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

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[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 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).

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

Section 3(b)(1), however, enumerates three specific categories of easements that cannot be 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 Section 2(11) to mean a "nonpossessory property interest in which the easement holder is a publicly regulated or publicly owned utility under federal law or law of this state." That section also specifies that the term "public-utility easement" includes "an easement benefitting an intrastate utility, an interstate utility, or a utility cooperative" 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 Section 2(2), 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, 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 light or view and restrictive covenants prohibiting certain kinds of development or economic activity on a servient estate.

Sections 3(b)(2) and (3) provide two other limitations on the right of a servient estate owner to relocate an easement. First, 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 the act or having to address the merits of a proposed easement relocation under the act. Section 3(b)(3) provides that an easement cannot be relocated if the relocation would require an improvement or other modification to the dominant estate which would encroach on an area of the dominant estate burdened by a public-utility easement, conservation easement, or negative easement." This exclusion focuses exclusively on changes to the dominant estate from a proposed relocation which could impact one of the listed categories of

easements. Like Section 3(b)(2), Section 3(b)(3) protects the holder of an easement in one of the listed categories affecting the dominant estate from having its easement impaired by a relocation or having to address the merits of a proposed relocation under the act. The exclusions in Sections 3(b)(2) and (3) also provide extra protection for conservation easements, the tax-deductible status of which could be jeopardized if relocations under the act could encroach on areas of the servient or dominant estate burdened by a conservation easement.

Section 3(b)(4) provides that an easement cannot be relocated to "a location other than the servient estate," thus preventing a servient estate owner from relying on this act to relocate an easement to any other parcel of land other than the servient estate. Finally, Section 3(c) makes clear that this act does not prevent a servient estate owner and an easement holder from relocating an easement by consent. In other words, a servient estate owner and an easement holder are free to relocate an easement outside of this act, unless otherwise limited or prohibited by applicable law. The freedom to relocate an easement by consent guaranteed by Section 3(c) could be used by a servient estate owner and an easement holder to relocate an easement to a parcel of land other than the servient estate burdened by the easement.

III. Substantive Criteria for Relocation

Section 4 is the core of the act. This section provides that a servient estate owner may relocate an easement "only if" the relocation does not "materially" impair the interests of the easement holder, security-interest holders, or owners of other interests in the servient or dominant estate. One goal of the act is to ensure that relocation 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. The materiality qualification in Section 4 is consistent with that goal because it 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).

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

Sections 4(4) and 4(5) are also substantive conditions not found in the Restatement. They provide additional protection for the easement holder and those who

use the easement. They do so by guaranteeing that a proposed easement relocation will not materially: "(4) during or after the relocation, impair the safety of the easement holder or others entitled to use and enjoy the easement;" and "(5) during the relocation, disrupt the use and enjoyment of the easement . . . unless the servient estate owner substantially mitigates the disruption." Section 4(5) will be particularly significant in any case in which an easement serves a dominant estate that is already in active use, whether commercial, industrial, or residential. Section 4(6) would prevent an easement relocation if it would materially "impair improvements on or the physical condition or use of the dominant estate."

Section 4(7) also addresses a subject not covered by the Restatement. It provides protection against impairment of the interest of a security-interest holder of record in the value of its collateral, a real-property interest of a lessee of record in the dominant estate, or any other person with a real-property interest of record in the servient or dominant estates.

IV. Procedural Requirements: Complaint, Parties, Service, Order, Recordation

Sections 5 and 6 are also important safeguards as they codify the rulings of several leading judicial decisions that embraced the Restatement approach to easement relocation but insisted that a non-consensual easement relocation can only occur with judicial approval.[20] Section 5(a) thus requires a servient estate owner seeking to relocate an easement under Section 4 to file a civil action. Section 5(b) requires the servient estate owner to serve a summons and complaint upon the easement holder whose easement is the subject of relocation, a security-interest holder of record with an interest in either the servient or dominant estate, a lessee of record with an interest in the dominant estate, and any other person, if the relocation would encroach on an area of the servient estate or dominant estate burdened by a real-property interest of record owned by that person. This provision essentially establishes the necessary parties to an easement relocation proceeding and guarantees notice of the proceeding to those persons. Section 5(c) details the information that must be contained within or must accompany the servient estate owner's complaint, including a statement that the servient estate owner has made a reasonable attempt to notify holders of the excluded categories of easements of the proposed relocation. Section 5(d) provides a mechanism for waivers and subordination agreements to be filed in a relocation proceeding.

Section 6 focuses on the obligations of a court when confronted with a complaint seeking to approve an easement relocation. Section 6(a) specifies the findings a court must make before approving an easement relocation. Importantly, this section requires

[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").

the court to make two findings: first, the easement is itself eligible for relocation under Section 3; and, second, the servient estate owner has satisfied the conditions for relocation under Section 4. Section 6(b) addresses the order authorizing the relocation and details the information that must be contained in the order. Section 6(c) gives a court discretion to "include any other provision consistent with this [act] for the fair and equitable relocation of an easement." Finally, Section 6(d) requires a servient estate owner that obtains approval for relocation to record a certified copy of the court order approving relocation. In most cases, this will be the first of two documents that must be recorded to complete an easement relocation. The second document will be the relocation affidavit specified in Section 9, which certifies substantial completion of the improvements necessary for the easement to be used in its new location. In cases in which no improvements need to be constructed or altered for use of the relocated easement, the recordation of a certified copy of the court order approving relocation under Section 6(d) will constitute completion of the relocation.

V. Other Matters – Expenses, Correlative Duty of Good Faith, Affidavit of Relocation, Limited Effect of Relocation, Non-Waiver, Severability, and Transitional Provision

The rest of the act addresses a number of ancillary yet important issues that may arise under a judicial relocation. Section 7 provides that the servient estate owner is responsible for "all reasonable expenses associated with the relocation of an easement under this [act] as determined by the court under Section 6(b)," and then it enumerates in Sections 7(1) through 7(9) what those expenses might include.

Section 8 requires all parties in the civil action to act in good faith to facilitate the relocation of an easement.

Section 9(a) requires that when the relocation is "substantially complete and the easement holder can enter, use, and enjoy the easement in its new location," the servient estate owner must record an affidavit attesting to this fact in the local land records and send the affidavit to the easement holder and other parties by certified mail. Subsection 9(b) assures that the easement holder continues to have the right to enter, use, and enjoy the easement in the current location until the affidavit attesting to substantial completion is recorded and sent to the parties.

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

Section 11 provides that the servient estate owner's right to relocate an easement "may not be waived, excluded, or restricted by agreement" and specifies that this rule of non-waiver applies "even if: (1) the instrument creating the easement prohibits relocation or contains a waiver, exclusion, or restriction of this [act]; (2) the instrument creating the

easement requires consent of the easement holder to amend the terms of the easement, or (3) the location of the easement is fixed by the instrument creating the easement, another agreement, previous conduct, acquiescence, estoppel, or implication." Section 11(1), to be clear, deviates from the Restatement by strictly prohibiting the waiver of relocation rights in an instrument creating an easement. Sections 11(2) and (3) represent a policy choice to reject the narrow approach to easement relocation followed by the courts in several states that limited application of the Restatement to undefined easements.[21] These provisions, and especially Sections 11(1) and (2), are designed to assure the act remains useful for years to come instead of being easily negated by boilerplate provisions in easement agreements excluding the act.

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

Section 14 is the transitional provision and specifies that the act "applies to an easement created before, on, or after [the effective date of this [act]]." As explained in Comment 1 to Section 14, a relocation can only proceed under this act if the servient estate owner can "demonstrate that the relocated easement will continue to deliver to the easement holder the same affirmative, easement-related benefits the easement holder obtained at the easement's original location." Further, as Comment 2 to Section 14 observes, "[r]etroactive application of the act will not deprive the easement holder of any of the functional benefits of the easement upon relocation and will not cause the easement holder to 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 act." Thus, retroactive application of the act should not constitute an uncompensated taking of private property under state or federal constitutional principles.[22]

[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] *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").

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

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

(5) "Easement in gross" means a nonpossessory property interest that:

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

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

(6) "Easement holder" means:

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

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

(7) "Lessee of record" means a person holding a lessee's interest under a recorded lease or memorandum of lease.

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

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

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

other legal entity.

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

(12) “Real property” means an estate or interest in, over, or under land, including 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 lessor and lessee and, unless the interest is personal property under law of this state other than this [act], an interest in a common-interest community.

(13) “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.

(14) “Security instrument” means a mortgage, deed of trust, security deed, contract for deed, lease, or other record 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 record 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

record creating a lien on real property to secure an obligation under a covenant running with the real property or owed by a unit owner to a common-interest community association.

(15) "Security-interest holder of record" means a person holding an interest in real property created by a recorded security instrument.

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

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

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

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

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 (16) are derived from Restatement § 1.1(1)(b) and (c).

2. The definition of easement in Section 2(4) does not include 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 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 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)(i) and (ii), may be entitled to hold a conservation easement. As Section 2(2) makes clear, however, for a non-possessory property interest to be classified as a conservation easement it must serve one of the specific purposes enumerated in Sections 2(2)(A) through (E) or another purpose specifically authorized under applicable state law. *See* Section 2(2)(F). Further, as Section 2(6)(B) makes clear, the holder of a conservation easement is its grantee or a successor of the initial grantee.

5. The definition of "easement holder" in Section 2(6) 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, a public-utility easement, conservation easement, or negative easement, the grantee of the easement or a successor of the grantee. When a public-utility easement, conservation easement, or negative easement is an appurtenant easement rather than an easement in gross, the easement holder could be either the owner of the dominant estate or the grantee of the easement or its successor.

6. The definition of "lessee of record" in Section 2(7) parallels the definition of security-interest holder of record in Section 2(15).

7. The term "negative easement" in section 2(8) 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."); Jon W. Bruce & James W. Ely, *The Law of Easements and Licenses in Land* § 2:10 (2019 Edition) ("An affirmative easement authorizes the holder to make active use of the servient estate in a manner that, if no easement existed, would constitute a trespass. . . . . In contrast, a negative easement enables the holder to prevent the owners of the servient estate from doing things the owner would otherwise be entitled to do.").

8. The definition of "order" in Section 2(9) is derived from Black's Law Dictionary.

9. The definition of "person" in Section 2(10) 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.

10. The definition of a "public-utility easement" in Section 2(11) is intended to encompass both an investor-owned but publicly regulated utility as well as a publicly owned utility. The term includes an easement benefitting an interstate utility, an intrastate utility, or a utility cooperative to make clear that the wide spectrum of public utilities in the United States will be excluded from the scope of the act under Section 3(b)(2).

11. The definition of "real property" used in Section 2(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(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).

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

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

14. The definition of "title evidence" in Section 2(17) is taken almost verbatim from the Uniform Nonjudicial Foreclosure Act § 102(22) (2002).

15. The definition of "unit" in Section 2(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 easement established by express grant or reservation or by prescription, implication, necessity, estoppel, or other method for creating an easement.

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

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

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

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

easement; or

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

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

Comment

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

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

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

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

5. Another example of a negative easement that would be ineligible for relocation under the act is an environmental covenant designed 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," as that term is defined in Section 2(8) of the act.

6. Section 3(b)(2) explicitly provides that a relocation cannot occur under the act if the new location of the easement "would encroach on an area of the servient estate burdened by a public-utility easement or conservation easement" because to do so would violate the respective easement holder's quiet enjoyment of that particular easement. This section anticipates a situation in which a servient estate is burdened not only by a typical

affirmative easement, such as a right of way for vehicular access, but also by a public-utility easement or conservation easement. This exclusion is particularly important in the case of conservation easements. Even though a proposed relocation of an easement might meet all of the requirements of section 4 and thus provide the same affirmative, easement-related benefits to a dominant estate owner or other easement holder, if the new location of the easement would encroach upon an area of the servient estate that is burdened by a conservation easement, the relocation could frustrate the purposes of the conservation easement. In addition, the possibility of such relocations under the act would jeopardize the deductibility of the conservation easements donated in the adopting state under federal tax statutes and regulations.

7. Section 3(b)(3) explicitly provides that a relocation cannot occur under the act if the relocation would require "an improvement or other modification to the dominant estate which would encroach on an area of the dominant estate burdened by a public-utility easement, conservation easement, or negative easement." As with Section 3(b(2), this section protects the quiet enjoyment of the holder of a public-utility easement, conservation easement, or negative easement on the dominant estate, as well as the tax-deductible status of conservation easements in the adopting states.

8. Section 3(b)(4) provides that this act may not be used to relocate an easement to any property other than the servient estate already burdened by the easement. Thus, a servient estate owner cannot use this act to relocate an easement to another parcel of real property even though a proposed relocation to that other parcel might satisfy the conditions of Section 4. Nothing in this act, however, prevents a servient estate owner from seeking and obtaining easement holder consent to relocate an easement to another parcel of land owned by the servient estate owner other than the servient estate burdened by the easement.

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

SECTION 4. RIGHT OF SERVIENT ESTATE OWNER TO RELOCATE EASEMENT. A servient estate owner may relocate an easement under this [act] only if the relocation does not materially:

(1) lessen the utility of the easement;

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

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

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

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

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

(7) impair the value of the collateral of a security-interest holder of record in the servient estate or dominant estate, impair a real-property interest of a lessee of record in the dominant estate, or impair a real-property interest of record of any other person in the servient estate or dominant estate.

Comment

1. Section 4 sets forth the general rule for relocation of an easement under the act. The conditions in this section are intended to ensure that relocation 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), (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 Sections 4(4), (5), (6), and 7, and they further protect the interests of the easement holder, security-interest holders, and 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) 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").

3. The introductory portion of Section 4 does not require "a strong showing of necessity" as 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).

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

5. One common set of factors that courts routinely consider in determining whether to allow an easement relocation to proceed under the Restatement or an analogous state statute relates to the specific route of the relocated easement (including its access points), its gradient, and its 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 Parish*, 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 benefitting three enclosed lots). Any facts related to the route (including access points), gradient, and width of the relocated easement could be considered by a court under Sections 4(1) through 4(4) of the act.

6. Other factors that a court could consider in determining whether a proposed relocation satisfies Sections 4(1), (2), and (3) include: (1) ease of access to a public road, including any change in the location of an access point on the dominant estate; (2) the length of an easement; (3) any physical damage to the dominant estate that would be caused by the relocation; and (4), in the case of an irrigation or flowage easement, the volume and velocity of liquids that could be transported by the relocated easement. Facts pertaining to possible physical damage to the dominant estate as well as negative effects on access points could also be addressed under Section 4(6).

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

7. Section 4(3) specifically states that a servient estate owner should be entitled to relocation only if the relocation does not materially "impair an affirmative, easement-related purpose for which the easement was created." This section is intended to distinguish the express and primary entry, use and enjoyment rights created by an affirmative easement eligible for relocation under the act from any unexpressed and ancillary negative powers that an easement holder might claim in connection with an affirmative easement, such as preventing the owner of the servient estate from developing that 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 a ditch irrigation easement to facilitate a trail extension because the alteration of the easement would materially and adversely affect the maintenance rights that an irrigation company enjoyed by virtue of the easement), *with, M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that an "easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose"). If 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 negative easement—one of the easements that cannot be relocated under this act. *See* Section 3(b)(1).

8. Section 4(4) refers to the safety of the easement holder or others entitled to use the easement during and after the relocation. Courts have often 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, *inter alia*, 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 the age of the old lagoon).

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

10. Section 4(6) addresses the interests of the easement holder and others in improvements located on the dominant estate and in the physical condition or use of the dominant estate. For instance, if the proposed relocation requires the construction of a new entry point or driveway on the dominant estate and the new entry point or driveway would be materially more expensive to maintain, materially more difficult to use, materially less safe than an existing entry point or driveway already located on the dominant estate, or in any other way would materially disrupt the use of the dominant estate, the proposed relocation could not proceed. Likewise, if a proposed relocation would materially impair, for example, woods, wildlife habitat, or watersheds on the dominant estate, the proposed relocation could not proceed. If a proposed relocation would have no material effect on improvements or the physical condition or use of the dominant estate, Section 4(6) would not be implicated.

11. Section 4(7) addresses the interests of a security-interest holder having an interest in either the servient or dominant estate, a lessee of record having a lessee's interest under a lease in the dominant estate, or the real-property interest of record of any other person in the servient estate or dominant estate. If a security-interest holder of

record having an interest in either the servient estate or dominant estate can show that the value of its collateral will be materially impaired by the relocation of an easement, the proposed relocation could not proceed. Similarly, if a lessee of record having a real-property interest in the dominant estate can show that this interest would be materially impaired by the relocation, the proposed relocation could not proceed. Section 10 of the act addresses other issues that may be related to the interests of a security-interest holder of record, namely the effect of an easement relocation on a default clause, due-on-sale clause, or other transfer-restriction clause.

The reference in Section 4(7) to "a real-property interest of record of any other person in the servient estate or dominant estate" is intended to encompass persons such as the holder of another easement that burdens the servient estate or dominant estate or the owner of an interest in a common-interest community. Thus, if a proposed relocation of an easement providing vehicular ingress and egress across a servient estate would result in the material impairment of an irrigation easement that also burdened the servient estate by reducing the volume of water that could be conveyed through the irrigation easement, the holder of the irrigation easement could assert its rights under Section 4(7) and block the proposed relocation. Additionally, if a proposed relocation of an easement encroaches on an existing, recorded easement (other than a public-utility easement or conservation easement) and would result in a change in the priority of the recorded easement due to the operation of Section 10(a)(5) that impaired a real-property interest of the easement holder, the affected easement holder could, in principle, assert its rights under Section 4(7) and block the proposed relocation as a material impairment of the recorded easement.

12. A servient estate owner's right to relocate an easement eligible for relocation under this act is not affected by a limitation on the term or 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, nothing in this act prevents such an action.

SECTION 5. COMMENCEMENT OF CIVIL ACTION.

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

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

(1) the easement holder whose easement 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, if the relocation would encroach on an area of the servient estate or dominant estate burdened by a real-property interest of record owned by that person.

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

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

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

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

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

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

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

(d) A document in recordable form executed by a person designated as a party to the civil action under subsection (b)(2), (3), or (4), in which the person states that it waives any right it may have to contest or obtain relief in connection with the relocation, or in which it subordinates its interest to the proposed relocation, may be filed at the commencement of the proceeding or by motion at any time before the final order. On filing of the document, the court may issue an order dismissing the person from any

requirement to answer or participate further in the civil action.

Comment

1. Section 5(a) clarifies 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, if the relocation would encroach on an area of the servient estate or dominant estate burdened by 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. Section 5(c)(6) addresses the issue of notice to the holder of a public-utility easement, conservation easement, or negative easement. 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 Section 5(b)(2) would include a secured party who holds a security interest in all or any part of either the servient estate or dominant estate.

4. The service requirement imposed under Section 5(b)(4) contemplates, for example, a person who holds another easement 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 area of the particular estate burdened by the easement. This section would give the other easement holder an opportunity to argue that the proposed relocation would result in a material impairment of the easement holder's real-property interest under Section 4(7). Section 5(b)(4) would likewise require service of a summons and complaint on a person whose recorded real property interest would be subject to a potential priority change due to the operation of Section 10(a)(5).

5. Section 5(c) sets forth the required contents of the complaint seeking relocation. The general purpose of these requirements is to provide an easement holder

and other interested persons entitled to service with sufficient information to decide whether to consent or object to the proposed relocation.

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

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

SECTION 6. REQUIRED FINDINGS; ORDER.

(a) The servient estate owner may not obtain an order approving the relocation of an easement unless the court determines that the servient estate owner has:

(1) established that the easement is eligible for relocation under Section 3; and

(2) satisfied the conditions for relocation under Section 4.

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

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

(2) recite the recording data of the instrument creating the easement, if any, [and] any amendments [, and any preservation notice as defined under [cite to this state's marketable title act]];

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

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

easement;

(5) describe all mitigation required of the servient estate owner during relocation;

(6) refer in detail to the plans and specifications of all improvements necessary for the easement holder to enter, use, and enjoy the easement in the new location;

(7) specify all conditions to be satisfied by the servient estate owner to relocate the easement and construct all improvements necessary for the easement holder to enter, use, and enjoy the easement in the new location;

(8) include a provision for payment by the servient estate owner of expenses under Section 7;

(9) include a provision for compliance by the parties with the obligation of good faith arising under Section 8; and

(10) instruct the servient estate owner to record the affidavit, if required under Section 9(a), when the servient estate owner substantially completes relocation.

(c) An order issued under subsection (b) may include any other provision consistent with this [act] for the fair and equitable relocation 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) 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 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. Section 6(a)(1) requires the court to make the following threshold determinations: 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); the proposed relocation will not result in an impermissible encroachment under Section 3(b)(2) or Section 3(b)(3); and the servient estate owner is not seeking to relocate an easement to a location other than the servient estate, which is prohibited by Section 3(b)(4). Section 6(a)(1) provides additional protection to holders of public-utility easements, conservation easements, and negative easements by drawing the court's attention to the scope of the act. 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)-(d) require 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. Sections 6(b)(1)-(7) set forth some of the important information that must be included in the court's order. These provisions adopt the approach of *R & S Inv's v. Auto Auctions Inc.*, 725 N.W.2d 871, 878 (Neb. Ct. App. 2006), which requires an owner of a servient estate that satisfies the criteria for easement relocation under Restatement § 4.8(3) to execute a new document setting forth the new location and other relevant terms of the relocated easement. 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.

3. Sections 6(b)(8) and (9) require the court's order approving relocation to provide for payment of the costs and expenses authorized under Section 7 and to provide for the obligations arising under Section 8 relating to the parties' on-going duties of good faith.

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

5. Section 6(c) recognizes a court's equitable power to issue other incidental orders necessary to implement a fair and equitable relocation. For example, under this section, a court could require the owner of the servient estate to complete the relocation within a fixed period of time or lose the right to relocate.

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

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 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;

(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 coverage related to the relocation;

(7) 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 Section 6(b)(6);

(8) payment of any maintenance cost associated with the relocated easement which is greater than the maintenance cost associated with the easement before relocation; and

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

Comment

Section 7 first states the general obligation of the servient estate owner to pay for all reasonable expenses associated with relocation as determined by the court. The subsections provide courts with guidance as to the items that might constitute an expense chargeable to the servient estate owner under this general obligation and which will be specified in the court's order under Section 6(b)(8). The enumerated items represent an illustrative, but not exhaustive, list of chargeable expenses.

SECTION 8. DUTY TO COOPERATE IN GOOD FAITH. After the court issues an order under Section 6 approving a relocation and the servient estate owner commences the process of relocation, the servient estate owner, the easement holder, and all other parties in the civil action shall act in good faith to facilitate the relocation of the easement in compliance with this [act].

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).

SECTION 9. RELOCATION AFFIDAVIT.

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

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

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

Comment

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

2. Section 9(c) is intended to apply to easements that can be used and enjoyed without any improvements on the servient estate or that exist without any improvements on the servient estate. An example is an easement providing pedestrian access or recreational access over a specified portion of a servient estate unmarked by a path or trail. Another example is an easement for which improvements on the servient estate have not yet been constructed by the easement holder. In such cases, the order approving relocation of the easement under Section 6(b) might justifiably not mention construction of any improvements on the servient estate in its new location. Thus, when the servient estate owner records the order approving relocation under Section 6(b), as required by Section 6(d), that recording will constitute relocation.

SECTION 10. LIMITED EFFECT OF RELOCATION.

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

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

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

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

(4) is not a breach or default by the servient estate owner of a recorded document affected by the relocation except as otherwise determined by a court under law

other than this [act];

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

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

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

Comment

1. The relocation of an easement under this act redefines where the easement is located. As Section 10(a)(1) makes clear, the relocation does not constitute a transfer or a new grant of an interest in either a servient estate burdened by the easement or a dominant estate benefited by the easement. Consequently, as Sections 10(a)(2)-(4) clarify, an easement relocation that occurs pursuant to this act should not trigger a breach or default, a due-on-sale clause, or other transfer-restriction clause under an applicable recorded document.

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

As the Garn Act is generally concerned with transfers of occupancy of mortgaged, residential real estate, the Garn Act will not commonly be applicable to easement relocations under this act. See generally Grant S. Nelson et al., *Real Estate Finance Law* § 5.24, at 344-47 (6th ed. 2015). This conclusion is buttressed by recognition that an easement relocation does not create a new property interest burdening the servient estate or benefitting the dominant estate; it simply changes the location of the existing easement. It is conceivable, however, that a specialized loan document—for example, a commercial loan document—might expressly characterize an easement relocation that occurs without the consent of the lender as an event triggering a default, a due-on-sale

clause, or some other transfer-restriction clause. Whether the preemption provisions of the Garn Act, 12 U.S.C.A. §1701j-3(b), or any other law for that matter, would allow enforcement of such a clause is a question that state and federal courts would have to resolve in an applicable case. However, as standard residential loan documents do not specifically characterize an easement relocation as an event triggering a default or due-on-sale clause, Section 10(a)(2) clarifies that, in such a case, an easement relocation will not have the effect of triggering a breach or default or application of a due-on-sale clause or other transfer-restriction clause. Parties considering the impact of the Garn Act should consider the concluding thoughts of several experts on the subject:

> It is easy but dangerous to suppose that the passage of the Garn Act solved all problems associated with due-on-sale clauses, or that all aspects of them are now governed by the Act. The Act declares that the clauses are generally enforceable, and it lists certain exceptional situations in which the courts may not enforce them; both of these provisions preempt any contrary state law. *But lenders are still bound by the language of the clauses they use, and state law governs the interpretation of that language*. For example, words like "transfer" and "sale" are defined by state case law. A clause under which the lender covenants not to withhold consent to a transfer "unreasonably" must be tested under state concepts of reasonableness. . . . . *Conflicts and ambiguities in the documents must be settled using traditional state law techniques*.

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

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

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

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

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

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

(3) the location of the easement is fixed by the instrument creating the easement, 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 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) 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 potentially subject to relocation under this act.

4. Section 11(3) 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 the act. Accordingly,

Section 11(3) 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 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 14. TRANSITIONAL PROVISION. This [act] applies to an easement created before, on, or after [the effective date of this [act]].

Comment

1. Section 14 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 to 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 by satisfying all of the conditions 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 and others entitled to use and enjoy the easement the same affirmative, easement-related benefits obtained at the easement's original location and that the relocation will not materially impair the interests of the easement holder, security-interest holders, or other owners of interests in the servient or dominant estate.

2. Retroactive application of the act will not deprive the easement holder or others entitled to use and enjoy the easement of any of the functional benefits of the

easement upon relocation and will not cause the easement holder, security-interest holders, or other owners of interests in the servient or dominant estate to suffer 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 act. Consequently, an easement holder, others entitled to use and enjoy the easement, security-interest holders, or other owners of interests in the servient or dominant estate 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 statute 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 criticism 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 Restatement § 4.8(3) are satisfied, the relocated easement increases overall utility without decreasing the easement's utility to the easement holder, and (iii) if the easement holder has some non-access related interests in mind at the time of creation, those interests can be served by restrictive covenants).

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

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

[SECTION 16. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .]

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