D R A F T

FOR DISCUSSION ONLY

EASEMENT RELOCATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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February 12, 2020

EASEMENT RELOCATION ACT

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EASEMENT RELOCATION ACT

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

SECTION 2. DEFINITIONS. In this [act]:

(1) "Appurtenant easement" means an easement that:

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

(B) is tied to or dependent on ownership or occupancy of a particular unit or parcel of real property.

(2) "Condemnation easement" means an easement created by condemnation, expropriation, or exercise of eminent domain.

(3) "Conservation easement" means an easement created for one or more of the following conservation purposes that serve the public interest:

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

(B) assuring the availability of real property for agricultural, forest, outdoor recreational, or open-space uses;

(C) protecting natural resources, including wetlands, grasslands, or riparian areas;

(D) maintaining or enhancing air or water quality;

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

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

(5) "Easement" means a nonpossessory right to enter, use, and 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.

(6) "Easement in gross" means an easement that:

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

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

(7) "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, negative easement, or condemnation easement, the person entitled to enforce the easement.

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

(9) "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.

(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" [has the meaning provided in [cite to applicable law of this state]] [means an easement in gross in which the easement holder is a publicly regulated utility under [cite to applicable law of this state]] and includes an easement benefitting a utility cooperative.

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

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

(15) “Security-interest holder of record” means a person that holds an interest in real property created by a security instrument and whose interest is recorded in [the applicable public records].

(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, attorney’s opinion of title based on examination of the public

records or 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.

(19) "Utility cooperative":

(A) means a not-for-profit association whose purpose is to deliver a public utility, such as electricity, water, or telecommunications, to its customers or members; and

(B) includes an electric cooperative, rural electric cooperative, rural water district, and rural water association.

Legislative Notes: *Paragraph (8) allows a state to specify the applicable public records in which a lessee's interest in a lease must be recorded to qualify the lessee as a "lessee of record."*

Paragraph (11) provides a state the option of using its own definition of "public-utility easement," or using the default language provided above which defines a public-utility easement as "an easement in gross in which the easement holder is a publicly regulated utility" under applicable state law. Regardless of which option is selected, a public-utility easement includes an easement benefitting a "utility cooperative."

Paragraph (15) allows a state to specify the applicable public records in which a security-interest holder's interest in real property must be recorded to qualify the security-interest holder as a "security-interest holder of record."

Comment

1. The foundational definition of "easement" in Section 2(5) 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 (6) are based on Restatement § 1.5(1) and (2). The definitions of "dominant estate" and "servient estate" used in Sections 2(4) and (16) respectively are derived from Restatement § 1.1(1)(b) and (c).

2. The definition of easement in Section 2(5) does not include an irrevocable 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 some kind 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(5) 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)(3) is based in large part on the Uniform Conservation Easement Act (UCEA) § 1 (1981, amended 1987). Some modifications of that definition have been made to widen the scope of "conservation purposes" beyond those listed in UCEA. In addition, the definition of a conservation easement used in this subsection 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)(a) and (b), may be entitled to enforce a conservation easement. As section 2(3) makes clear, however, for an easement to be classified as a conservation easement it must serve one of the specific purposes enumerated in this section *and* "serve the public interest." As Section 2(7)(B) makes clear, the holder of a conservation easement is the person entitled "to enforce" the conservation easement.

5. The definition of "easement holder" in Section 2(7) 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, negative easement, or condemnation easement, the person entitled to enforce the easement. When a public utility easement, conservation easement, negative easement, or condemnation easement is also an appurtenant easement, the easement holder could be either the owner of the dominant estate or the person entitled to enforce one of those easements.

6. The definition of "lessee of record" in Section 2(8) parallels the definition of security-interest holder of record in Section 2(15).

7. The term "negative easement" in section 2(9) 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 "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.

9. As the Legislative Note indicates, Section 2(11) gives a state legislature a choice between using the state's own definition of a "public utility easement," or defining the term as "an easement in gross in which the easement holder is a publicly regulated utility," as that term is defined in applicable state law. In either case, the term public-utility easement includes an easement benefitting a "utility cooperative" as that term is defined in Section 2(19).

10. 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. The terms "lessor and lessee" are used in Section 2(12), rather than the terms "landlord and tenant" as in the Uniform Nonjudicial Foreclosure Act § 102(13), for the sake of consistency with other provisions of the act.

11. The definition of "record," used as a noun, found in Section 2(13) is the standard ULC definition.

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

13. The definition of "title evidence" in Section 2(17) is taken almost verbatim from the

Uniform Nonjudicial Foreclosure Act § 102(22) (2002).

14. 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, or estoppel.

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

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

(2) an easement if the new location encroaches on another easement, including a public-utility easement, conservation easement, negative easement, or condemnation easement; or

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

Comment

1. Section 3 specifies the categories of easements *eligible* for relocation under Section 4 and the categories of easements *not eligible* for relocation under that section. It also identifies two situations when an easement that is otherwise eligible for relocation cannot be relocated under the act. The only kind of easement *eligible* for relocation is an affirmative easement other than a public utility easement and a condemnation easement. Public-utility easements, conservation easements, negative easements, and condemnation easements are specifically excluded under Section 3(b)(1) and thus are *not eligible* for relocation under Section 4. Sections 3(b)(2) and (3) provide two other important limitations on the scope of the act by specifying, respectively, that the new location of an easement cannot encroach upon any other easement, including a public-utility easement, conservation easement, negative easement, or condemnation easement, and that the act cannot be used to relocate an easement to any property other than the servient estate.

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

3. Section 3(b)(1) enumerates the four kinds of easements that may never be relocated under the act: public utility easements, conservation easements, negative easements, or condemnation easements. As specified under Section 3(b)(1), condemnation easements, that is, easements created by condemnation, expropriation or the exercise of eminent domain, are not subject to relocation under this act even though they may be affirmative easements. Similarly, public-utility easements are excluded from the scope of the act even though they may be affirmative 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 never be relocated under the act.

5. Another example of a negative easement that would be ineligible for relocation under this 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(9) 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 upon another easement, including a public utility easement, a conservation easement, negative easement, or condemnation easement and, therefore, would violate the respective easement holder's quiet enjoyment of that particular easement . This section thus 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 other easements. This exclusion is particularly important in the case of conservation easements. Even though a proposed relocation of an affirmative 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 burdened by a conservation easement, the relocation could frustrate the purposes of the conservation easement and jeopardize its tax-exempt status.

7. Section 3(b)(3) prohibits relocation of an easement to any property other than the servient estate already burdened by the easement. This exclusion is echoed in affirmative

language in Section 4(a): "The owner of a servient estate may relocate an easement to another location on the servient estate . . . ."

SECTION 4. RIGHT OF SERVIENT ESTATE OWNER TO RELOCATE EASEMENT.

(a) A servient estate owner may obtain an order under this [act] to relocate an easement to another location on the servient estate to permit use, enjoyment, or development of the servient estate only if the relocation does not materially:

(1) lessen the utility of the easement;

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

(3) frustrate the affirmative, easement-related purposes for which the easement was created;

(4) lessen the quality of the improvements for use and enjoyment of the easement;

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

(6) during the process of 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; or

(7) impair the value of the collateral or other real-property interest of a security-interest holder of record or lessee of record entitled to notice under Section 6(a).

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

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

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

Comment

1. Section 4(a) sets forth the general rule for relocation of an easement under the act. It builds upon Restatement § 4.8(3) but creates a more rigorous set of criteria for relocation. This section authorizes relocation of an easement to permit use, enjoyment or development of the servient estate as long as the objectives set forth in the section can be accomplished without material interference with or harm to the affirmative, easement-related purposes for which the easement was created. Restatement § 4.8(3), cmt (f), at 563. As the Supreme Judicial Court of Massachusetts explains, this rule "maximizes the over-all property utility by increasing the value of the servient estate without diminishing the value of the dominant estate" and provides the additional benefit of minimizing "the cost associated with an easement by reducing the risk that the easement will prevent future beneficial development of the servient estate." *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1057 (Mass. 2004). By eliminating the absolute veto power of an easement holder, the Restatement rule actually "encourages the use of easements." *Id*. *See also Roaring Fork Club L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1236 (Colo. 2001) (emphasizing that the Restatement rule "maximizes the overall utility of the land" because the "burdened estate profits from an increase in value while the benefitted estate suffers no decrease") (citing to Restatement § 4.8(3), cmt (f), at 563).

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

3. The introductory portion of Section 4(a) also makes clear that the relocation of an easement under this act will be to another location on the *same servient estate*, not to another estate, even if that other estate is owned by the same person that owns the servient estate on which the easement is currently located. This provision reiterates the prohibition stated in Section 3(b)(3).

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

5. Sections 4(a)(1) through (3) generally mirror the substantive requirements of 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 is completed*, 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 "affirmative, easement-related purposes," rather than simply "purpose." *Cf.,* Restatement § 4.8(3)(c) ("frustrate the purpose for which the easement was created"). *Cf.,* Restatement § 4.8(3)(c). Sections 4(a)(4) through (7) are new substantive requirements not mentioned in the Restatement.

6. One common set of factors that courts have considered in determining whether to allow an easement relocation to proceed under the Restatement or similar state statutes include the *nature* of the proposed new route for the easement in terms of its *route*, *gradient*, and *width*. *See,* e.g., *Carlin v. Cohen*, 895 N.E.2d 793, 798-99 (Mass. App. Ct. 2008) (affirming trial court ruling that the owner of a servient estate was entitled to relocate a pedestrian beach access easement because the entry point of the relocated easement was not more difficult to reach than under the original easement, and, even though the owner of the dominant estate would have to walk over a knoll, there was no evidence the original easement path was more level); *Belstler v. Sheller*, 264 P.3d 926, 933 (Idaho 2011) (affirming trial court refusal to approve relocation of express ingress and egress easement under Idaho Code § 55-313 because relocation would have rendered road grades on easement substantially steeper than in original location and would have created hazard for owners of dominant estate in using the easement); *Welch v. Planning and Zoning Comm'n of E. Baton Rouge Par.*, 220 So. 3d 60, 65-68 (La. Ct. App. 2017) (holding that developer of new subdivision was not justified in unilaterally relocating a servitude under Article 748 of the Louisiana Civil Code because new rights-of-way provided over public roads were only 20 feet wide and thus diminished utility of servitude which provided for 30 foot wide right-of-way benefiting three enclosed lots). All of these factors would be considered by a court under Sections 4(a)(1) through (3) of the act when it determines whether a proposed relocation would "lessen the utility of the easement," Section 4(a)(1), "increase, after the relocation is complete, the burden on the easement holder in its reasonable use and enjoyment of the easement," Section 4(a)(2), or "frustrate affirmative, easement-related purposes for which the easement was created," Section 4(a)(3).

7. Other factors that a court could consider in determining whether a proposed relocation satisfies Sections 4(a)(1) through (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 fluids that could be transported by the relocated easement.

8. Sections 4(a)(1) through (3) require courts to consider whether a proposed new location of an easement will provide the same general utility to the easement holder without causing material harm to the easement holder in connection with the affirmative, easement-related purposes of the easement. As section 4(a)(3) specifically indicates, a servient estate owner should be entitled to relocation as long as the relocation does not materially impinge upon the affirmative, easement-related benefits of an easement, rather than any unexpressed and

ancillary advantages that an easement holder might claim in connection with the easement, such as preventing the owner of the servient estate from developing that parcel of land. *Compare Manning v. Campbell*, 268 P.3d 1184, 1187-88 (Idaho 2012) (holding that servient owner was not entitled to relocate a driveway access easement under Idaho Code § 55-313 because the relocated easement would not have connected to any existing route for vehicular travel and would have required owners of the dominant estate to construct a new driveway on their property across their front lawn, and, thus, would injure the owners of the dominant estate and their property), and *City of Boulder v. Farm and Irrigation Co.*, 214 P.3d 563, 567-69 (Colo. App. 2009) (refusing to allow alteration of ditch irrigation easement under *Roaring Fork Club* to facilitate trail extension because alteration of the easement would materially and adversely affect the maintenance rights that irrigation company enjoyed by way of easement from state department of transportation), *with M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that an "easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose"). If an owner of a dominant estate actually wants to obtain a property interest in a servient estate that prevents development of that estate in some manner, the owner of the dominant estate can always negotiate for and acquire a restrictive covenant or negative easement, that is, a type of easement that cannot be relocated under this act. *See* Section 3(b)(1).

9. Section (4)(a)(4) requires a court to consider the quality of the improvements used by the easement holder to enjoy the easement. 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 of those improvements compared to the improvements used by the easement holder in the easement's prior location, the court would be required to reject the proposed relocation.

10. Section 4(a)(5) refers to the safety of the easement holder or others entitled to use the easement both during the process of relocation and after the relocation is complete. Courts have considered the safety of individuals using the easement and public health and safety more generally, including the potential of a relocated easement to provide public health and safety benefits. *See R & S Inv's v. Auto Auctions Ltd.*, 725 N.W.2d 871, 876-78, 881 (Neb. Ct. App. 2006) (holding that servient owner could relocate an easement for a sanitary sewer lagoon, even though the new lagoon was located 500 feet farther away from dominant estate than the old one, because the servient owner constructed the new lagoon with greater wastewater capacity and all necessary piping and connections and thus alleviated serious environmental concerns related to age of the old lagoon).

11. Section (4)(a)(6) establishes a substantive requirement not found under Restatement § 4.8(3), by requiring the court to consider whether, *during the process of relocating the easement,* relocation will disrupt the easement holder's use and enjoyment of the easement or the dominant estate and the extent to which the owner of a servient estate can *mitigate this disruption* during the process of relocation. This subsection 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 traffic away from the original easement location.

12. Section 4(a)(7) addresses the property interests of two specific kinds of persons

entitled to notice under Section 6(a) other than the principal easement holder; namely, a security-interest holder having an interest in either the servient or dominant estate or a lessee of record having a lessee's interest under a lease in the dominant estate. This section provides that if a court finds that the actual real property interests of such a person are materially impaired, then the proposed relocation may not proceed. Thus, if a security-interest holder of record having an interest in either the servient estate or dominant estate can show that the actual value of its collateral will be materially impaired by the relocation of an easement, the proposed relocation cannot proceed. Similarly, if a lessee of record having a leasehold interest in the dominant estate can show its leasehold interest would actually be materially impaired by the relocation, the proposed relocation cannot proceed. Section 9 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.

13. Section 4(b) provides that the core relocation right established by Section 4(a) is not subject to waiver, exclusion, or restriction by contracting parties. In other words, an owner of a servient estate and an easement holder of an easement otherwise eligible for relocation under Section 4 cannot agree *ex ante* to waive, exclude, or restrict application of the act. Further, if the parties to 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.

14. Section 4(b)(1) clarifies that even when an easement contains a general clause requiring mutual consent to amend the easement, the easement will remain eligible for relocation under Section 4(a).

15. Section 4(b)(2) specifies that even when an easement has been localized by a metes and bounds description in the instrument that creates the easement, by another agreement, by previous conduct of the parties, or by acquiescence, estoppel, or implication, the easement remains subject to relocation under Section 4(a). Accordingly, Section 4(b)(2) 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).

16. A servient estate owner's right to relocate an easement eligible for relocation under Section 3 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.

17. An easement holder and an owner of a servient estate can always agree to an easement relocation by mutual consent without regard to any provisions of the act.

SECTION 5. CIVIL ACTION TO RELOCATE EASEMENT.

(a) A servient estate owner must commence a civil action to obtain an order to relocate an

easement under Section 4.

(b) Before authorizing the relocation of an easement, the court must determine that:

(1) the servient estate owner complied with Section 6;

(2) the easement is eligible for relocation under Section 3, and

(3) servient estate owner has satisfied the conditions for relocation under Section 4(a).

(c) If the court makes the determinations under subsection (b), it shall issue an order authorizing the relocation of the easement.

(d) A servient estate owner shall record, in the form required by the recording statutes of this state, a certified copy of an order issued under subsection (c) and a statement that:

(1) the order was obtained in accordance with this [act];

(2) identifies the recording data of the original document establishing the easement, if any, and any amendments;

(3) identifies the immediately preceding location of the easement; and

(4) specifies, in a legally sufficient description, the new location of the easement.

(e) An order under subsection (c):

(1) must include a provision requiring payment by the servient estate owner of costs under Section 7 and any obligations arising under Section 8; and

(2) may include a provision consistent with this [act] for the fair and equitable relocation of an easement.

Comment

1. Section 5(a) clarifies initially that an owner of a servient estate may not engage in self-help if it desires to relocate an easement and, therefore, must commence a civil action to obtain judicial approval for relocation. 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) specifies the determinations a court must make before authorizing a proposed relocation under this act. First, under Section 5(b)(1), a court must determine that the servient estate owner has complied with all notice requirements set forth in Section 6. Next, section 5(b)(2) requires the court to make the threshold determinations that the easement proposed for relocation is, in fact, eligible for relocation under Section 3(a), is not one of the easements excluded from the scope of the act in Section 3(b)(1), and that the proposed relocation will not result in an impermissible encroachment under Section 3(b)(2) or seek to relocate an easement to a location other than the servient estate as prohibited by Section 3(b)(3). Finally, Section 5(b)(3) mandates that the court determine that the proposed relocation meets the substantive conditions for relocation under Section 4(a), all of which are designed to protect the affirmative, easement-related interests of the easement holder or the real property interests of a security interest holder of record, or a lessee of record having an interest in the dominant estate.

3. Once a servient estate owner has complied with the procedural requirement of Sections 5(a) and the notice requirements of Section 6, and a court makes the required determinations under Section 5(b), Sections 5(c) and (d) require, respectively, a court to issue an order authorizing the relocation and the owner of the servient estate to record a certified copy of that order along with an explanatory statement in the relevant public records of the state. Subsections 5(d)(1)-(4) set forth the contents of the court's order and explanatory statement, which include a statement that the order was issued in conformity with this act, information about the recording data of the original document establishing the easement, if any, and amendments thereto, the location of the easement immediately preceding relocation, and the new location of the easement. Section 5(d) thus adopts the approach of *R & S Inv's v. Auto Auctions Inc.*, 725 N.W.2d 871, 878 (Neb. Ct. App. 2006), which required an owner of a servient estate that satisfied 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.

4. Section 5(e)(1) requires the court's order authorizing relocation to provide for payment of the costs and expenses authorized under Section 7 and any obligations arising under Section 8 relating to the parties' on-going duties of good faith or the obligation of the owner of the servient estate to mitigate disruption during the process of relocation.

5. Section 5(e)(2) recognizes a court's equitable power to issue other incidental orders necessary to implement a fair and efficient relocation and to assure that the easement holder suffers no material harm to its affirmative, easement-related interests upon relocation.

6. Implicit in all of Section 5 is the understanding that a servient estate owner and an easement holder may always agree to relocation of an easement under any terms they find mutually acceptable. In the case of an easement relocation arranged by mutual consent of the servient estate owner and the easement holder, the interests of and form and scope of notice to be provided to other interested parties, including the holder of another easement on the servient estate, a security-interest holder of record, or a lessee of record, is a matter of private concern to the servient estate owner and the easement holder and is not addressed by this act.

SECTION 6. NOTICE.

(a) Before a servient estate owner commences a civil action under Section 5(a), the owner must give notice under this section in a record to:

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

(2) any other easement holder of an easement on the servient estate, including the holder of a public-utility easement, conservation easement, negative easement, or condemnation easement;

(3) a security-interest holder of record of an interest in the servient estate or dominant estate affected by the relocation; and

(4) a lessee of record of an interest in the dominant estate.

(b) The notice under subsection (a) must contain:

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

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

(3) a survey of the servient estate showing current easements and the proposed relocated easement;

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

(5) a statement of the reasons the easement is eligible for relocation under Section 3; and

(6) a statement of the reasons the proposed relocation satisfies the conditions for relocation under Section 4.

(c) Subject to subsection (f), notice under subsection (a)(1) and (2) to an easement holder of record must be given in a manner and to the address provided in the recorded easement.

(d) Subject to subsection (f), notice under subsection (a)(3) must be given in the manner and to the address provided in the recorded security instrument.

(e) Subject to subsection (f), notice under subsection (a)(4) must be given in the manner and to the address provided in the recorded lease or memorandum of lease.

(f) If a recorded instrument described in subsection (c), (d), or (e) does not indicate the manner of or address for notice, notice must be given [in a manner consistent with the rules of civil procedure in this state applicable to a civil action] [in a manner consistent with the rules of civil procedure in this state applicable to a quiet title action] [in a manner reasonably calculated to provide notice].

(g) If an easement to be relocated is not the subject of a recorded easement agreement, notice to the easement holder must be given [in a manner consistent with the rules of civil procedure in this state applicable to a civil action] [in a manner consistent with the rules of civil procedure in this state applicable to a quiet title action] [in a manner reasonably calculated to provide notice].

Legislative Note: *Subsections (f) and (g) provide the state the option of requiring notice in the manner consistent with the rules of civil procedure applicable to a civil action, the rules of civil procedure applicable to a quiet title action, or in a manner reasonably calculated to provide notice. Subsection f applies if a recorded instrument establishing an easement, a security interest or lease does not specify a manner of notice. Subsection (g) applies if the easement to be relocated is not the subject of a recorded easement agreement as in the case of an easement created by prescription, implication, necessity, or estoppel.*

Comment

1. The owner of a servient estate seeking to relocate an easement must give written notice of its intent to relocate the easement not only to the easement holder but also to other interested persons. Section 6(a) enumerates the persons that must receive written notice of the proposed relocation; namely, the holder of the easement to be relocated, the holder of any other easement on the servient estate, a security-interest holder of record with an interest in either the servient or dominant estate affected by the relocation, and a lessee of record having an interest in the dominant estate.

2. Section 6(b) sets forth the specific contents of the notice document. The general purpose of these content requirements is to provide an easement holder and other interested persons entitled to notice with sufficient information to decide whether to consent or object to the proposed relocation.

3. Subsections 6(c) through (g) indicate the manner of and address for giving notice to the persons entitled to notice under the act. The manner of and address for notice is generally determined by the relevant document of record. In the event that the relevant document of record does not indicate a manner of and address for notice, Section 6(f) provides that the manner of and address for notice will be governed by, at a state's option, the rules of civil procedure applicable to a civil action, the rules of civil procedure applicable to a quiet title action, or in a manner reasonably calculated to provide notice.

4. Section 6(g) addresses notice obligations when the easement to be relocated is not the subject of a recorded easement agreement. This situation could arise, for example, in the case of an easement created by prescription, implication, necessity, or estoppel. Regardless of the circumstances, Section 6(g) requires notice to the easement holder, at a state's option, in a manner consistent with the rules of civil procedure applicable to a civil action, in a manner consistent with the rules of civil procedure applicable a quiet title action, or in a manner reasonably calculated to provide notice.

5. If an owner of a servient estate attempts to commence an action seeking to relocate an easement and fails to provide proof of its attempt to give notice to the easement holder and other interested persons entitled to notice under Section 6(a), or if the notice is deficient, then the court shall not issue an order authorizing relocation of the easement.

SECTION 7. COSTS OF RELOCATION. A servient estate owner is responsible for all reasonable costs associated with relocation of an easement authorized under Section 5, including the cost of:

(1) constructing works on the servient estate necessary for the use and enjoyment of the easement in its new location;

(2) during the process of 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 a governmental approval or permit required to relocate the easement;

(4) preparing and recording, in the form required by the recording statutes of this state, an order and the statement required by Section 5(d) and any other documents required to be recorded;

(5) title evidence required under Section 6(b)(4);

(6) title insurance for the easement holder, security-interest holder of record, or lessee of record in connection with the relocation;

(7) a professional necessary to review plans and specifications for improvements to be constructed in the relocated easement and to confirm compliance with the plans and specifications; and

(8) payment of any maintenance costs associated with the relocated easement which are greater than the maintenance costs associated with the easement before relocation.

Comment

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

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

3. The relocation of an easement cannot proceed if it would violate some other applicable law or regulation such as a zoning or land use regulation. Thus, one of the expenses potentially chargeable to a servient estate owner under Section 7(3) is the cost associated with

obtaining any governmental approvals or permits required by other applicable law to relocate the easement, including attorney fees incurred in obtaining these approvals or permits.

4. The specific requirements for notice of record that establish the relocated easement's new location are set forth in Section 5(d)(1) through (4).

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

(a) After the court has authorized a relocation under this act, the servient estate owner and the easement holder shall act in good faith to facilitate the relocation of an easement in compliance with this [act].

(b) The servient estate owner shall mitigate disruption to the use and enjoyment of an easement and the dominant estate during the process of relocating an easement.

Comment

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

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

demands").

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

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

SECTION 9. LIMITED EFFECT OF RELOCATION. 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) does not constitute a default or 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) does not affect the priority of the easement; and

(4) is not a transfer for purposes of [the Uniform Fraudulent Transfer Act] [the Uniform Voidable Transfers Act] [or any fraudulent conveyance statute in this state].

Legislative Note*: Paragraph (4) gives a state the option of providing that an easement relocation under the act is not a transfer for purposes of the Uniform Fraudulent Transfers Act (1984), the Uniform Voidable Transfers Act (2014), or any other fraudulent conveyance statute in the state.*

Comment

1. The relocation of an easement under this act redefines where the easement is located. As Section 9(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 Section 9(2) clarifies, an easement relocation that occurs pursuant to this act should not trigger a default, a due-on-sale clause, or other transfer-restriction clause under an applicable loan 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 several 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 the mortgaged 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 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), 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 9(3) clarifies that, in such a case, an easement relocation will not have the effect of triggering a 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 9(3), 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. The notice document that must be filed in the public records after successful completion of the procedures set forth in this act pursuant to Section 5(d) will have the same priority as the original recorded easement and thus will relate back to the original recorded easement.

4. Section 9 does not affect the right of a security-interest holder of record to challenge a proposed easement relocation under Section 4(a)(7) on the ground that the relocation will impair the real property interests of the security interest holder by, for example, lowering the value of the security interest holder's collateral. Section 6(a)(3) guarantees that any security-interest holder of record having an interest in the servient estate or dominant estate will receive notice of the proposed easement relocation.

SECTION 10. 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 11. 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 12. TRANSITIONAL PROVISION. This [act] applies to an easement created before, on, or after [the effective date of this [act]].

Comment

1. Section 12 clarifies that the act will have retroactive effect and thus will apply to all

eligible easements created prior to the effective date of the act as well as easements created on or after the effective date of the act. As an owner of a servient estate can only obtain judicial approval for a proposed relocation in the face of an easement holder objection by satisfying the 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 the same affirmative, easement-related benefits the easement holder obtained at the easement's original location.

2. Retroactive 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 easement. Consequently, an easement holder will not suffer an uncompensated taking of a property interest upon a relocation undertaken pursuant to the act. *See Statewide Construction, Inc. v. Pietri*, 247 P.3d 650, 656-57 (Idaho 2011) (holding that application of an Idaho statute, I.C. § 55-313, which gives a servient estate owner the right to relocate a motor vehicle access easement on terms similar to those found in Restatement § 4.8(3), was not an unconstitutional taking of private property without just compensation under either the Fifth Amendment to the U.S. Constitution or the Idaho Constitution because the statute expressly requires that the change must be made in a way "as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access" and because any relocation authorized by the statue will "provide the dominant estate holders with the same beneficial interest they were entitled to under the easement by its original location"); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that an "easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose"). *See also* Susan French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 REAL PROP. PROB. & TR. J. 1, 5 and 9 (2003) (responding to 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 13. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

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