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FOR DISCUSSION ONLY

RELOCATION OF NON-UTILITY EASEMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

November 2-3, 2018 Drafting Committee Meeting

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September 11, 2018

RELOCATION OF NON-UTILITY EASEMENTS ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

ELLEN F. DYKE, 2125 Cabots Point Ln., Reston, VA 20191, *Chair*
JOHN P. BURTON, 119 E. Marcy St., Ste. 200, Santa Fe, NM 87501-2046
KENNETH D. DEAN, University of Missouri School of Law, 334 Hulston Hall, Columbia, MO 65211
LAWRENCE R. KLEMIN, 3929 Valley Dr., Bismarck, ND 58503-1729
JACQUELINE T. LENMARK, P.O. Box 598, Helena, MT 59624-0598
CRAIG S. LONG, Community Choice Credit Union, 6163 NW 86th St., Ste. 105, Johnston, IA 50131-2241
ROBERT L. MCCURLEY, 1341 Overlook Rd. N., Tuscaloosa, AL 35406
ANNE L. MCGIHON, P.O. Box 9396, Denver, CO 80209
J. CLIFF MCKINNEY, 111 Center St., Ste. 1900, Little Rock, AR 72201-4403
ESSON MCKENZIE MILLER, JR., 1503 Confederate Ave., Richmond, VA 23227-4405
ANNE HARTNETT REIGLE, Court of Common Pleas, Kent County Courthouse, 38 The Green, Dover, DE 19901-3602
JOHN A. LOVETT, Loyola University New Orleans College of Law, 7214 St. Charles Ave., Campus Box 901, New Orleans, LA 70118, *Reporter*

EX OFFICIO

ANITA RAMASASTRY, University of Washington School of Law, William H. Gates Hall, Box 353020, Seattle, WA 98195-3020, *President*
MARY M. ACKERLY, 782 Bantam Rd., Bantam, CT 06750-0815, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

IRA J. WALDMAN, 2029 Century Park E., Ste. 2100, Los Angeles, CA 90067

EXECUTIVE DIRECTOR

STEVEN L. WILLBORN, 111 N. Wabash Ave., Ste. 1010, Chicago, IL 60602, *Interim Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Ste. 1010
Chicago, IL 60602
312/450-6600
www.uniformlaws.org

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RELOCATION OF NON-UTILITY EASEMENTS ACT

ARTICLE 1

SHORT TITLE AND DEFINITIONS

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

SECTION 102. DEFINITIONS. In this [Act]:

(a) "Conservation easement" means a negative easement granted in perpetuity, created for conservation purposes or preservation purposes, and whose easement holder is a government entity or a conservation organization. "Conservation purposes" include retaining or protecting the natural, scenic, or open-space value of land, assuring the availability of land for agricultural, forest, recreational, or open-space use, protecting natural resources, including plant and wildlife habitats and ecosystems, and maintaining or enhancing air or water quality or supply. "Preservation purposes" include preserving the historical, architectural, archeological or cultural aspects of real property.

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

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

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

easement includes: an irrevocable license to enter and use the real property owned by or in the possession of another; an appurtenant easement that provides a right to use and enter a servient estate which is tied to or dependent upon ownership or occupancy of a particular unit or parcel of real property; and an easement in gross that provides a right to enter and use a servient estate which is neither tied to nor dependent upon ownership or occupancy of a particular unit or parcel of real property. [As used in this [Act], an easement excludes a negative easement and a utility easement.]

(e) "Easement holder" means the person entitled to enforce an easement. In the case of an appurtenant easement, the easement holder is the owner of the dominant estate. In the case of an easement in gross, the easement holder is the person entitled to enjoy the benefit of the easement.

(f) "Negative easement" means an easement whose primary purpose is to impose on the owner of the servient estate a duty not to engage in certain uses of that estate. For the purposes of this subsection, a conservation easement is a negative easement.

(g) "Person" means an individual, firm, partnership, corporation, company, association, joint-stock association, or governmental entity. It includes a trustee, receiver, assignee, or similar representative of any of them.

(h) "Record" 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.

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

(j) "Utility easement" means an easement created for the purpose of furnishing or transmitting utility services. For purposes of this subsection, "utility services" means any product, services, or equipment related to energy, power, telecommunications, water or

sewerage.

Comment

The foundational definition of easement in subsection 102(d) is based on the Restatement (Third) of Property: Servitudes § 1.2(1) (2000) (hereinafter "Restatement"). The definitions of appurtenant easement and easement in gross that are embedded in subsection 102(d) are based on Restatement § 1.5(1)-(2). The definitions of dominant estate and servient estate in subsections 102(c) and 102(i) are derived from Restatement § 1.1(1)(b)-(c).

The definition of conservation easement in subsection 102(a) is derived largely from Restatement § 1.6, but it adds the requirement that the easement is "granted in perpetuity" and also specifies that a conservation easement is held by a "conservation organization." As the Restatement explains, a "conservation organization" is a "charitable corporation, charitable association, or charitable trust whose purpose or powers include conservation or preservation purposes." Restatement § 1.6(2).

The term "negative easement" is generally synonymous with the term "restrictive covenant." For a discussion of the historical evolution of negative easements and restrictive covenants at common law, see Restatement § 1.2, cmt. (h). Section 1.3(3) of the Restatement defines a "restrictive covenant" as a "negative covenant that limits permissible uses of land" and explains that a "'negative easement' is a restrictive covenant.". Restatement § 1.3(3). *See also* Restatement § 1.3 cmt. C ("[n]egative easements are the same as restrictive covenants"). As the comments to the Restatement further explain, "[t]he most common uses of negative easements in modern law have been to create conservation easements and easements for view." Restatement § 1.2, cmt. (h). The definition of "negative easement" used in subsection 102(f) of the act offers a more precise definition of the term by borrowing from Article 706 of the Louisiana Civil Code. *See* La. Civ. Code art. 706 ("Negative servitudes are those that impose on the owner of the servient estate the duty to abstain from doing something on his estate. Such are the servitudes of prohibition of building and of the use of an estate as a commercial or industrial establishment."). For a similar explanation of the distinction between affirmative and negative easements, see 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.").

The act has been drafted with the specific intention to exempt both conservation easements and utility easements from its scope. This intention is realized in two ways. First, this section defines negative easements to include conservation easements and then it excludes negative easements, along with utility easements, from the definition of "easement." *See* subsections 102(d) and (f). Second, the act specifically exempts both negative easements and utility easements from its scope in subsections 201(b)-(c). *See* Reporter's Note following Section 201 of this act.

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

The term "real property" is used in subsection 102(d) instead of the term "land," as found in 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.

Reporter's Note

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

ARTICLE 2

SCOPE

SECTION 201. GENERAL APPLICABILITY.

[(a) Other than as set forth in subsections 201(b) and (c) below,] this [Act] applies to all easements, whether created by express contract, prescription, implication or necessity.

[(b) This [Act] does not apply to utility easements.]

[(c) This [Act] does not apply to negative easements.]

Comment

This section is intended to make plain the limited scope of the easements eligible for relocation under section 301 of the act. The only easements eligible for relocation are *affirmative* easements other than utility easements. Subsection (a) underscores that all affirmative, non-express easements, including those created by prescription, implication, or necessity, are eligible for relocation under Section 301 of the act. Utility easements are specifically excluded under subsection 201(b) and are thus not eligible for relocation under Section 301 of the act. Likewise, negative easements, including by definition conservation easements, are specifically excluded under subsection 201(c) and thus not eligible for relocation under Section 301 of the act.

Reporter's Note

I recognize that subsections (b) and (c) are arguably redundant in that utility easements

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

SECTION 202. APPLICABILITY TO EXISTING EASEMENTS. This [Act] applies to an easement eligible for relocation under Section 301 of the [Act] even if the easement was created before the effective date of the [Act].

Comment

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

Reporter's Note

During our June conference call, the drafting committee decided that the act should have retroactive effect. Without retroactive effect, we reasoned, the act might not be worth pursuing because many of the knotty problems created by old easements would remain unresolved under the act. I believe that reasoning to be sound. However, if we maintain that approach, we must still keep in mind that the decision to give the law retroactive effect will be one of the most important policy choices we will be called upon to defend.

Some may say that making the act retroactive eliminates the freedom of an easement holder under an existing express easement to bargain for consent to relocation—a bargaining power that may have been understood by all parties at the time of creation of an express easement. Eliminating this opportunity to bargain for relocation could, in theory, create windfall gains for the servient estate owner, according to several academic and judicial critics of the Restatement approach to easement relocation. *See* John V. Orth, *Relocating Easements, A Response to Professor French*, 38 REAL PROP. PROB. & TR. J. 643, 646-48 (2004); JON W. BRUCE & JAMES W. ELY, JR., LAW OF EASEMENTS AND LICENSES IN LAND § 7.17 (2018); *Herren v. Pettengil*, 538 S.E.2d 735, 736 (Ga. 2000); *AKG Real Estate L.L.C. v. Kosterman*, 717 N.W.2d 835, 844-47 (Wis. 2006) (criticizing Restatement approach as "a means for purchasers of servient estates to reap a windfall at the expense of owners of dominant estates").

The primary countervailing arguments against the claim that the Restatement approach creates windfall gains for servient estate owners are as follows: (1) the likelihood that in most easement negotiations the parties gave little if any attention to the future location of the easement or to the issue of relocation rights unless there is some specific language in the agreement indicating to the contrary; (2) if a servient estate owner satisfies the requirements imposed by section 4.8(3) (or Section 301 of our act) and demonstrates that the new location continues to provide the same easement related benefits as the original location, then the relocated easement

will increase "overall utility" without decreasing the easement's utility to the easement holder; and (3) if the easement holder really had some non-access related interests in mind at the time of creation—if the easement holder wanted to obtain some broader veto power over development on the servient estate—there are well recognized private land use restrictions that can accomplish this result, most notably restrictive covenants. *See* Susan French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 REAL PROP. PROB. & TR. J. 1, 5, 9 (2003). For a more detailed discussion of this debate, see my December 2, 2010 Memorandum to Wilson Freyermuth (2010 Memo), 24-27, previously distributed and included in our online ULC folder.

It should also be noted that the concern about eliminating the right to bargain for consent to relocation of an easement or release of any other aspect of an agreement with respect to existing easements worried the Law Commission of England and Wales when it considered the same subject. In the end, that Law Commission recommended to the House of Commons that easements and profits be subject to judicial modification under a statutory changed conditions analysis (just as restrictive covenants have been ever since adoption of Section 84 of the Law of Property Act 1925), but it also recommended that this change in the law should only be given prospective effect. LAW COMM'N OF ENG. AND WALES, MAKING LAND WORK: EASEMENTS, COVENANTS AND PROFITS À PRENDRE 164 (2011), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229064/1067.pdf.

SECTION 203. APPLICABILITY TO EASEMENTS WITH SPECIFIED LOCATIONS. This [Act] applies to an easement eligible for relocation under Section 301 even if:

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

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

Comment

This section first clarifies that even when an easement contains a clause requiring mutual consent to amend an easement and even if this mutual consent clause specifically references an easement's location, the easement will be eligible for relocation under Section 301 of the act. Subsection (b) specifies that even when an easement has been localized by a metes and bounds description in the instrument that creates the easement, by another agreement, by previous conduct of the parties or by acquiescence, the easement remains subject to relocation under Section 301 of the act. Accordingly, subsection (b) makes clear that this act rejects the narrow

approach adopted by the New York Court of Appeal in *Lewis v. Young*, 705 N.E.2d 649 (N.Y. 1998), which limited application of section 4.8(3) to an undefined easement, *i.e.*, one that lacks a metes and bounds description or other indication of the easement's location.

ARTICLE 3

RELOCATION OF AN EASEMENT

SECTION 301. RELOCATION OF AN EASEMENT BY SERVIENT ESTATE OWNER.

OWNER. [Unless expressly denied by the terms of the easement pursuant to Section 305 of the [Act],] the owner of the servient estate is entitled to relocate the easement, at the servient owner's expense, to permit normal use or development of the servient estate or to make improvements on or to the servient estate, but only if the relocation does not:

(a) significantly lessen the utility of the easement;

(b) increase the burden on the easement holder in its use and enjoyment of the easement; or

(c) frustrate the purpose for which the easement was created either during or after relocation.

Comment

This section sets forth the general rule for relocation of an easement under the act and largely tracks Restatement § 4.8(3). This section thus seeks to permit development or improvement of the servient estate as long as the objectives set forth in the section can be accomplished without interfering or harming the easement-related interests of the easement holder. *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1057 (Mass. 2004); 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" and, thus, "encourages the use of easements." *M.P.M. Builders L.L.C.*, 809 N.E.2d at 1057; *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).

Currently some form of unilateral easement relocation is permitted in 22 states. Courts in

seven states (Colorado, Massachusetts, Nebraska, New York, South Dakota, Nevada and Vermont) have expressly adopted section 4.8(3) of the Restatement for relocation of express easements in some form or another. *See 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); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1057-59 (Mass. 2004) (adopting section 4.8(3) for all express easements); *R & S Invs. v. Auto Auctions Ltd.*, 725 N.W.2d 871, 879-881 (Neb. 2006) (adopting section 4.8(3) for relocation of sewer lagoon easement); *Lewis v. Young*, 705 N.E.2d 649, 653-54 (N.Y. 1998) (holding that a servient landowner could relocate a driveway burdened with an *undefined* ingress and egress easement); *Stanga v. Husman*, 694 N.W.2d 716, 718-720 (S.D. 2005) (approving *ex post* the modification of an express ingress and egress easement whose location was not specified in the creating instrument); *St. James Vill. Inc. v. Cunningham*, 210 P.3d 190, 193-196 (Nev. 2009) (adopted section 4.8(3) but limited its scope to situations when the creating instrument does not define the easement through specific reference to its location or dimensions); *Roy v. Woodstock Cmty. Tr. Inc.*, 94 A.3d 537, 538-40 (Vt. 2014) (adopting section 4.8(3) to permit a servient estate owner to relocate subsurface water line easements to facilitate an affordable housing development on an eight-acre tract of land); *but see Sweezey v. Neal*, 904 A.2d 1050, 1057-58 (Vt. 2006) (rejecting application of section 4.8(3) for relocation of surface easements).

Several Illinois appellate court decisions also suggest that Illinois is gradually moving in the direction of adopting section 4.8(3) to approve unilateral easement relocation and other unilateral modifications of an easement. *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"); *527 S. Clinton L.L.C. v. Westloop Equities L.L.C.*, 932 N.E.2d 1127, 1138 (Ill. App. Ct. 2010) (citing *McGoey* and the Restatement to the effect 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").

Kentucky courts have long allowed easement relocation under conditions generally similar to the Restatement. *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."); *see also Stewart v. Compton*, 549 S.W.2d 832, 833 (Ky. Ct. App. 1977); *Terry v. Boston*, 54 S.W.2d 909, 909-10 (Ky. 1932); *but see Adams v. Pergrem*, No. 2006-CA-001861-MR, 2007 WL 4277900, at *1 (Ky. Ct. App. 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").

Under its Civil Code, Louisiana has long allowed the relocation of both conventional servitudes and servitudes of passage established by law to provide access to enclosed estates. La. Civ. Code arts. 748, 695. The general rule is stated in Article 748: "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, he may provide another equally

convenient location for the exercise of the servitude which the owner of the dominant estate is bound to accept. All expenses of relocation are borne by the owner of the servient estate." La. Civ. Code art. 748.

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

Courts in three more states (Oregon, Missouri, and New Jersey,) have allowed limited balancing of the equities when easement holders have sought injunctive relief in response to proposed or completed relocations. *See Vossen v. Forrester*, 963 P.2d 157, 161-62 (Or. Ct. App. 1998) (allowing relocation of a beach access easement when the servient owner mistakenly built a house that minimally encroached on the easement, the cost of removing the house would have been substantial, and the easement holders knew of the encroachment at the time construction began); *S. Star Cent. Gas Pipeline Inc. v. Murray*, 190 S.W.3d 423, 430 (Mo. Ct. App. 2006) (denying injunction sought by pipeline company several years after it received notice of servient estate owners' expansion of home and encroachment on easement, and noting that the creating instrument did not definitely fix the location and observing that *grantee* of easement is entitled to a convenient, reasonable, and accessible way within the limits of the grant); *Umprhes v. J.R. Mayer Enters. Inc.*, 889 S.W.2d 86, 90 (Mo. Ct. App. 1994) (denying dominant estate owner's request for injunction to restore a prescriptive roadway easement to its original position and relegating dominant owner to monetary damages, even though servient owner unilaterally relocated roadway 10-12 feet from its original location, in light of minor injury to dominant estate, original location's lack of uniqueness, and new roadway's close fit to description in original deed on which dominant owners based their interest); *Bubbis v. Kassin*, 803 A.2d 146, 152 (N.J. Super. Ct. App. Div. 2002) (denying injunctive relief and, therefore, allowing temporary relocation of an implied beach access easement when the servient estate owner showed that enforcement of the easement in its original location "would have a severe adverse effect upon the [servient owners'] beneficial enjoyment of their property" and that this adverse

effect "substantially outweighs the inconvenience to plaintiffs" in being required to walk an additional distance to gain access to the beach and ocean via another route or a substitute easement); *Kline v. Bernardsvill Ass'n Inc.*, 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993) (compelling relocation of an easement "to advance the interests of justice where the modification is minor and parties' essential rights are fully preserved," but cautioning that relocation should be "an extraordinary remedy and should be grounded in a strong showing of necessity").

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

Courts in eight states (Alabama, Connecticut, Georgia, North Carolina, Pennsylvania, Vermont, Washington, and Wisconsin) have expressly rejected section 4.8(3) of the Restatement. *See Tietel v. Wal-Mart Stores Inc.*, 287 F. Supp. 2d 1268, 1276-77 (M.D. Ala. 2003) (declining to apply section 4.8(3) as inconsistent with Alabama law, especially *Arp v. Edwards*, 706 So. 2d 736, 739 (Ala. Civ. App. 1997)); *Alligood v. Lasaracina*, 999 A.2d 836, 839 (Conn. App. Ct. 2009) (explicitly rejecting Restatement approach on grounds of "uniformity, stability, predictability and judicial economy"); *Herrin v. Pettergill*, 538 S.E.2d 735, 736 (Ga. 2000) (expressly rejecting section 4.8(3)); *Sloan v. Rhodes*, 560 S.E.2d 653, 655 (Ga. 2002) (affirming *Herrin v. Pettergill*); *A. Perin Dev. Co. L.L.C. v. Ty-Par Realty Inc.*, 667 S.E.2d 324, 326-27 (N.C. Ct. App. 2008) (rejecting approach of *M.P.M. Builders L.L.C.*); *McNaughton Props. L.P. v. Barr*, 981 A.2d 222, 225-29 (Pa. Super. Ct. 2009) (rejecting Restatement approach as applied to express easements as a question of first impression even though 142 acre servient estate owner offered to provide 1.83 dominant estate owner access to public roads that would have been safer and shorter via new street system proposed for development of servient estate); *Sweezy v. Neal*, 904 A.2d 1050, 1057-58 (Vt. 2006) (rejecting Restatement approach as applied to surface easements but allowing servient estate owner to "bend the easement" around a new addition to his house); *Crisp v. Vanlaecken*, 122 P.3d 926, 928-29 (Wash. Ct. App. 2005); *MacMeekin v. Low Income Hous. Inst.*, 45 P.3d 570, 579 (Wash. Ct. App. 2002) (expressly rejecting section 4.8(3)); *AKG Real Estate L.L.C. v. Kosterman*, 717 N.W.2d 835, 842-47 (Wisc. 2006) (rejecting proposed relocation of right of way easement under the impossibility of purpose doctrine as stated in Restatement § 7.10(1), the changed conditions doctrine as stated in Restatement § 7.10(2), and the unilateral relocation rule found in §4.8(3)) (stating that "parties need not include a provision in an express easement to prevent unilateral modification or relocation" and thus "the rule is that the owner of the servient estate cannot unilaterally modify an express easement"); *see also* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7.13, 717 (2018) (rejecting and criticizing the Restatement approach and citing other decisions following traditional common law mutual consent rule).

Civil Codes in foreign jurisdictions use varying formulations of the triggering

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

Reporter's Note

Section 301 makes clear that the right to relocate an easement belongs only to the servient estate owner. Accordingly, this section comports with the drafting committee's tentative decision made during our June conference call and does not change the well-established common law rule that *an easement holder* may not unilaterally relocate an easement without the consent of the servient estate owner 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")

Unlike the holding in *Kline v. Bernardsvill Ass'n Inc.*, 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993), Section 301 makes clear that "a strong showing of necessity" is not a condition to relocate an easement. Restatement § 4.8(3) and Section 301 state that a servient estate owner can seek relocation "to permit normal use or development of the servient estate." Section 301 also allows a servient estate owner to seek relocation to make "improvements on or to the servient estate." This additional justification is borrowed from Article 748 of the Louisiana Civil Code, the source for Restatement § 4.8(3), which provides in pertinent part: "If the original location [of a servitude] has become *mo re burdensome* for the owner of the servient estate, or if it *prevents him from making useful improvements* on his estate, . . ." La. Civ. Code art. 748 (emphasis added). If the drafting committee believes that the substantive and procedural safeguards now found in Sections 301, 302, 303, 304, 306, 307 and 308 are sufficient to prevent any harm to the easement holder, then, arguably, a good reason for relocation should be enough and requiring a strong showing of necessity is unwarranted.

SECTION 302. FACTORS RELEVANT TO DETERMINE WHETHER AN EASEMENT IS ELIGIBLE FOR RELOCATION. In determining whether a servient estate

owner is entitled to relocate an easement under Section 301 of this [Act], a court shall give consideration to:

(a) whether the proposed relocation will significantly affect the route, gradient or width of the easement;

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

(c) whether, once relocation is complete, there will be a material burden or harm to the easement holder;

(d) whether the proposed relocation will have a significant effect on public safety or the safety of individuals using the easement; and

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

Comment

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

In states in which unilateral easement relocation is permitted either by judicial precedent or by statute, courts have considered a number of factors in determining whether to allow a proposed easement relocation or modification to proceed. Those factors include all aspects of the quality of the new route and its impact on the easement holder. *See Carlin v. Cohen*, 895 N.E.2d 793, 798-99 (Mass. App. Ct. 2008) (applying *M.P.M. Builders L.L.C.* and affirming trial court ruling that servient estate owner was entitled to relocate pedestrian beach access easement because entry point of relocated easement was not more difficult to reach than under original easement, and, even though dominant estate owner would have to walk over a knoll, there was

no evidence original easement path was more level); *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 relocated easement would not have connected to any existing route for vehicular travel and would have required dominant estate owners to construct a new driveway on their property across their front lawn, and, thus, would injure the dominant estate owners and their property); *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).

Courts have also considered factors related to functional utility of the easement, public safety and health. *See R & S Invests. 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 because the servient owner constructed a new lagoon with greater wastewater capacity and all necessary piping and connections, alleviated serious environmental concerns related to age of old lagoon, even though the new lagoon was located 500 feet farther away from dominant estate than the old one); *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 L.P.* so that city could build trail extension because alteration would materially and adversely affect the maintenance rights that irrigation company enjoyed by way of easement from state department of transportation); *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 dominant estate owners in using easement).

SECTION 303. COSTS AND EXPENSES CHARGEABLE TO THE SERVIENT ESTATE OWNER. When a servient estate owner seeks to relocate an easement under Section 301 of this [Act], the servient estate owner is responsible for all costs and expenses associated with relocation, including the cost of:

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

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

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

(d) amending any instrument establishing the easement; and

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

Comment

This section is intended to give courts guidance as to the items that might constitute an expense chargeable to the servient estate owner under Section 301 of the act. The enumerated items represent an illustrative, but not an exhaustive, list of such chargeable expenses. The concept of "works or improvements necessary for the use and preservation of the easement" in subsection (a) is borrowed from La. Civ. Code art. 744 (providing that normally the owner of the dominant estate has "the right to make at his expense all the works that are necessary for the use and preservation of the servitude.").

SECTION 304. DUTY TO COOPERATE AND MINIMIZE AND ALEVIATE DISRUPTION. If an easement holder consents to relocation as provided in Section 306(b) of the [Act] or is deemed to have consented to a proposed relocation under Section 306(c) of the [Act], or if the servient estate owner obtains judicial approval to relocate an easement under Section 306(d) of the [Act], then

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

(b) the servient owner shall have the duty to minimize and alleviate any disruption to the easement holder's use and enjoyment of the easement or the dominant estate.

Comment

The reciprocal duty of the servient estate owner and easement holder to cooperate in good faith to facilitate a swift and speedy 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 servient estate owner 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).

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 that inflexible notions of dominant and servient estates do little to advance that accommodation" and explaining that the Restatement approach to easement relocation is the most consistent with that "accommodation doctrine"); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (opining 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 Invs. 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 and should exercise that degree of care and use which a just consideration of the rights of the other demands").

The duty of the servient estate owner to minimize and alleviate any disruption of the enjoyment of the dominant estate is a fundamental safeguard of the relocation process, particularly if the dominant estate is already developed for commercial purposes. This safeguard goes above and beyond the safeguards employed in Restatement § 4.8(3) to assure that relocation of the easement does not cause any harm to the dominant estate owner and, therefore, should protect the rights of the dominant estate owner both retroactively and prospectively.

[SECTION 305 – TWO OPTIONS TO CONSIDER OR TO DELETE ENTIRELY]

Alternative A

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

Alternative B

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

End of Alternatives

Comment

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

Reporter's Note

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

> (1) Where the use of an easement for the time being is restricted to part of the servient plot of land, the owner may require the use to be moved to another place that is equally suitable for the person entitled, if the use in the previous place is particularly arduous for him; he must bear and advance the costs of moving. This also applies if the part of the plot of land to which the use is restricted is determined by legal transaction.
>
> (2) *The right to move the use may not be excluded or restricted by legal*

transaction.

https://www.gesetze-im-internet.de/englisch_bgb/ : (emphasis added).

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

Other jurisdictions, principally Scotland and the Netherlands, allow such modification, but only after the lapse of a specific period of time – five years in Scotland and 20 years in the Netherlands – during which the land use right or restriction is not subject to any form of judicial modification. *See* Lovett, December 2010 Memo, at 14-15, 20-21, 31-32. This is the approach that I recommended in my 2005 law review article on the subject of easement relocation. 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, 47-56 (2005). In that article, I described my approach as being based on the "*Temporally Constrained Freedom of Contract Model* proposed by Professors Carol Rose and Allison Dunham." *Id*. at 47. I wrote:

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

Id. at 52-53. I justified this proposal in the following terms:

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

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

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

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

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

SECTION 306. PROCEDURES FOR INVOKING THE RIGHT TO RELOCATE.

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

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

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

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

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

Comment

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

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

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

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

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

Reporter's Notice

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

SECTION 307. EXECUTION AND RECORDATION OF DOCUMENT ESTABLISHING NEW LOCATION OF EASEMENT.

(a) If the easement holder grants consent to the relocation as set forth in Section 306(b) of the [Act], then the servient estate owner and the easement holder shall execute and record in the relevant public records a document, in form required by the recording statutes of this state: (i) stating that the relocation was obtained in accordance with Section 306(b) of the [Act]; and (ii) setting forth with specificity the new location of the easement.

(b) Provided the servient estate owner has complied with the notice requirements for

relocation of an easement in Section 306(a) of the [Act], if the easement holder fails either to consent or object to the request for relocation as set forth in Section 306(c) of the [Act], then the servient estate owner shall execute and record in the relevant public records a document, in form required by the recording statutes of this state: (i) stating that the relocation was obtained in accordance with Section 306(c) of this [Act]; and (ii) setting forth with specificity the new location of the easement.

(c) If the relocation occurs after completion of a judicial proceeding under Section 306(d) of the [Act], then the servient estate owner shall execute and record in the relevant public records a document, in form required by the recording statutes of this state: (i) stating that the relocation was obtained in accordance with Section 306(d) of the [Act]; (ii) containing adequate citation to the final order or judgment of the court granting the request for relocation; and (iii) setting forth with specificity the new location of the easement.

Comment

At least one court has required a servient estate owner who has satisfied the criteria for easement relocation under section 4.8(3) of the Restatement to execute a new document setting forth the new location and other relevant terms of the relocated easement. *R & S Invs. v. Auto Auctions Inc.*, 725 N.W.2d 871, 878 (Neb. Ct. App. 2006). This section adopts that approach and specifies the contents of such a document under the three procedural mechanisms set forth for completing relocation of an easement under Section 306 of the act.

SECTION 308. METHODS OF NOTICE.

(a) Notice to a person under this [Act] must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice. Permissible methods of notice include first-class mail, personal delivery, delivery to the person's last known place, residence or place of business, or a properly directed electronic message.

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

Comment

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

Reporter's Note

Because there are many notice requirements in effect in every jurisdiction, I chose this provision because it is a widely recognized provision in many jurisdictions.

SECTION 309. 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 310. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMERCE 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 311. EFFECTIVE DATE. This [Act] takes effect . . . .