UNIFORM EASEMENT RELOCATION ACT (UERA)

Introduction

In North Carolina as in most states, an easement may not be relocated without the easement holder's consent.[1] The UERA changes this traditional common law rule by establishing a process whereby a servient estate owner can relocate an easement unilaterally. The UERA is a relatively new uniform statute that seeks to synchronize the various mechanisms for unilateral relocation that exist in a minority of states. This memo summarizes the features of the UERA and some of the attendant issues.

Features of the UERA

The Process

The UERA requires a servient estate owner to file a civil action to seek relocation of an easement.[2] Service upon the easement holder and any other person with an interest in the easement must include the proposed relocation site and details regarding its completion.[3] The servient estate owner must show that relocation will not do *any* of the following:

1. Lessen the utility of the easement.
2. Increase the burden on the easement holder in its reasonable use and enjoyment of the easement.
3. Impair an affirmative, easement-related purpose for which the easement was created.
4. Impair the safety of the easement holder.
5. Disrupt the easement holder's use and enjoyment of the easement during relocation, unless such disruption is substantially mitigated.
6. Impair the physical condition, use, or value of the dominant estate
7. Impair the value of:
    a. The collateral of a security-interest holder of record.
    b. A real-property interest of a lessee of record.
    c. A real-property interest of any other person in the dominant or servient estate.

If the servient estate owner successfully shows the above, then the court can order relocation of the easement in accordance with the proposed relocation plan, as modified by the court's equitable powers. A relocation affidavit would be recorded in the register of deeds after relocation is complete. The servient estate owner must pay all costs associated with relocation but

[1] *See, e.g., Town of Carrboro v. Slack*, 261 N.C. App. 525 (2018); *A. Perin Dev. Co. v. Ty-Par Realty Co.*, 193 N.C. App. 450 (2008). The North Carolina Supreme Court last considered the question in 1957, stating, "Unless there is an express grant which provides otherwise, *ordinarily*, when the location of an easement is once selected it cannot be changed by either the landowner or the owner of the easement without the other's consent." *Cooke v. Wake Elec. Membership Corp.*, 245 N.C. 453 (1957) (emphasis added). The possibility remains that the Court could recognize unilateral relocation in limited contexts, as other states' high courts have done.

[2] This deters the servient estate owner from engaging in self-help.

[3] This would include a security-interest holder of record and lessee of record that has an interest in the dominant estate. This does not include the owner of a real-property interest in oil, gas, or minerals unless the interest includes an easement to facilitate oil, gas, or mineral development.

is not responsible for the easement holder's attorneys' fees. Relocation will not trigger a due-on-sale clause, constitute a default under a lease, or affect the priority of the easement relative to other real-property interests.

Exclusions

Three categories of easements are excluded: (1) public utility, (2) conservation, and (3) negative. Public utility easements are exempted due to their ubiquity and importance to infrastructure. Conservation easements (which are a type of negative easement) are specifically carved out because the possibility of relocation could jeopardize their favorable tax treatment. The broader category of negative easements is also excluded, which typically take the form of restrictive covenants.

Retroactivity

The UERA applies to easements created before enactment of the law. The justification is that the change of law does not unjustly deprive an easement holder of any existing use right. Nevertheless, retroactive application will disrupt the settled expectations of the original parties. This can result in a windfall for the servient estate owner. The original parties that created an easement before enactment of the UERA would not have been able to incorporate the risk of relocation into the price of the easement, which risk would have resulted in a price adjustment at the servient estate owner's expense. As discussed below, the UERA drafters admit that the law reduces the value of easements subject to it. The UERA grants a relocation right to a servient estate owner that did not bargain for it. Retroactive application may also present constitutional issues relating to the Takings, Contract, and Due Process clauses. These constitutional challenges have yet to be fully explored in other states.

No Waiver

A servient estate owner cannot waive its rights under the UERA. Otherwise, the drafters anticipate that all instruments creating easements would include a boilerplate waiver provision. This rule prohibits consenting parties from permanently fixing an easement in a particular location. Even an easement relocated by mutual consent could still be subject to subsequent unilateral relocation. The intent of the parties may not be considered as to the physical boundaries of the easement but may be relevant as to whether an affirmative, easement-related purpose would be stifled by relocation.

<u>Theory of the UERA</u>

Utility vs Property Rights

The UERA entails a significant reconceptualization of easements. It prioritizes the utility of property ownership over the absolutist nature of property ownership. As long as the servient estate owner can show that the easement holder retains the same functional benefit of the easement the easement holder's property rights can be circumvented. Unilateral relocation treats nonpossessory interests (easements) as lesser than possessory interests. To illustrate, consider the

idea in the context of fee title. It is difficult to imagine a law that would subject a fee title owner to relocation of its property boundaries by an adjacent landowner. Easements have historically benefitted from the traditional understanding of property rights. "At common law, closing an existing easement and opening an alternate route would be indistinguishable from taking private property and offering other property in exchange."[4] As traditionally understood, the property interests of the dominant estate and servient estate owners are mutually exclusive. The UERA recharacterizes that relationship by subordinating the importance of an easement's location to an easement's utility and economic value. The UERA drafters go as far to say that the easement holder's demand to be compensated for relocation is a "ransom payment." Unilateral relocation essentially subjects property ownership to a reasonableness requirement (i.e., an easement holder may object to relocation unless the objection is unreasonable). Easements become more like use rights or licenses rather than full property rights. Land ownership becomes more uncertain due to possible relocation and more unpredictable due to varying judicial application of the law to a particular case.

The requirement that relocation cannot impair the value of the dominant estate is in tension with the UERA drafters' assertion that the law will render easements less valuable. An easement holder may retain the same utility of the easement but may lose the economic value that could have been extracted through bargaining with the servient estate owner. Unilateral relocation looks somewhat like a private form of condemnation; however, compensation for the relocation is not afforded to the easement holder. The UERA charges a court with the difficult task of determining the utility of an easement. Traditional common law leaves that decision solely with the easement holder.

Dominant Estate vs Servient Estate

The UERA changes the power dynamic between dominant and servient estates. The law seeks to counter the dominant estate owner's "bilateral monopoly" in negotiations with the servient estate owner regarding relocation of an easement. "Bilateral monopoly" is another way of saying that two property owners cannot come to terms—after all, property ownership is a monopoly. With unilateral relocation as a possibility, an easement holder is on shakier ground when refusing to negotiate or objecting to relocation. The servient estate owner would have additional leverage in presenting relocation offers to an easement holder. The UERA drafters promote unilateral relocation as a way to prevent disputes. Suing an easement holder may foster ill-will, but the fact that an easement holder who loses in the action is not compensated for the relocation and must pay its own attorneys' fees may incentivize cooperation.[5] The underlying assumption of the UERA is that relocation of an easement—as long as the easement holder does not sacrifice any utility—is the most efficient outcome. Because voluntary bargaining will not necessarily achieve this outcome in a neutral market, a failsafe is required.

The possibility of unilateral relocation affords a considerable benefit to landowners burdened by an easement, particularly developers with greater resources and sophistication. The

[4] John V. Orth, *Relocating Easements: A Response to Professor French*, 38 Real Prop. Prob. & Tr. J. 643, 649 (2004).

[5] One possible change to the UERA would be to require the servient estate owner to make a bona fide offer to the easement holder before filing the action.

UERA promotes development of land by allowing a servient estate owner to bypass an easement holder that is obstinate, unreasonable, or otherwise unwilling to agree to relocation. The UERA prohibits an easement holder from raising anti-development as a defense against relocation; any concerns about development would have to be couched under the statutory factors relating to use and enjoyment, safety, and value. This prevents the dominant estate from asserting any ancillary negative powers against the servient estate that do not interfere with use of the easement. Although encouraging development is a professed goal, the UERA does not grant easement holders the same right of relocation. Development on the dominant estate could benefit from relocation as much as development on the servient estate. Further, relocation of a negative easement that would benefit development is excluded from the law. The no-waiver provision of the law also runs counter to the pro-development rationale. The permanence of an easement's location can be as important as its flexibility, yet a party seeking an easement cannot bargain for the would-be servient estate owner's relocation rights.

The UERA also purports to correct an incongruity that supposedly exists between the dominant and servient estate. Unilateral relocation by the servient estate owner is framed as the reciprocal of the easement holder's right to change use of the easement due to development needs or changed conditions. This reasoning has been received skeptically. First, the argument assumes that the use of an easement is analogous with the location of an easement. Second, the easement holder's right to change its use of the easement is arguably symmetrical with the servient estate owner's right to use the easement area so long as there is no interference with the easement holder's use and enjoyment of the easement. Third, if reciprocation is the goal, then self-help for a servient estate owner's relocation of an easement is warranted. Easement holders are not required to seek judicial approval before changing use of an easement, so one would expect the UERA to afford the same right to servient estate owners instead of making a civil action a prerequisite.

Other Jurisdictions

As in North Carolina, the majority rule is the traditional common law rule: an easement may not be relocated without the consent of the easement holder.[6] The UERA has been enacted in only one state (Nebraska) and introduced in four others (Colorado, Nevada, Utah, West Virginia). Due to its recent creation, there may be unanticipated effects on common-interest communities, title insurance, security-interest holders, unrecorded leases, and other aspects of real property law that have not been fully contemplated. A minority of states allow some form of unilateral relocation, whether by statute or through state courts' equity powers. The standards vary, but all involve the basic idea that relocation cannot materially harm the easement holder. Some states limit relocation by type or category of easement, allowing relocation only of access, irrigation, or subsurface easements. Others allow relocation only for implied or temporary easements. The Restatement (Third) of Property (2000) also permits unilateral relocation under similar terms as the UERA. However, the UERA goes further than the Restatement in several key respects, including the retroactivity and no-waiver provisions.

[6] North Carolina allows, to a limited extent, relocation of an easement that does not have a fixed location or defined boundaries.

Additional Resources

Susan F. French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 Real Prop. Prob. & Tr. J. 1 (Spring 2003).

John V. Orth, *Relocating Easements: A Response to Professor French*, 38 Real Prop. Prob. & Tr. J. 643 (Winter 2004).

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 (Fall 2005).

Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 7.13 (2020).

Student Note, *The Right of Owners of Servient Estates to Relocate Easements Unilaterally*, 109 Harv. L. Rev. 1693 (May 1996).