

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

Senate Bill 266

BY SENATOR SYPOLT

[Introduced February 12, 2021; referred
to the Committee on the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §36-16-1, §36-16-2, §36-16-3, §36-16-4, §36-16-5, §36-16-6, §36-16-7, §36-
 3 16-8, §36-16-9, §36-16-10, §36-16-11, §36-16-12, §36-16-13, and §36-16-14, all relating
 4 to creating the Uniform Easement Relocation Act; providing short title and definitions;
 5 scope of article; stating the right of servient estate owner to relocate easement; requiring
 6 commencement of civil action; requiring findings and court order; expenses of relocation
 7 and duty to act in good faith; limited effect of relocation of easement; providing that right
 8 to relocate may not be waived; relation to Electronic Signatures in Global and National
 9 Commerce Act; and providing that article applies to an easement created before, on, or
 10 after the effective date of this article.

Be it enacted by the Legislature of West Virginia:

ARTICLE 36. UNIFORM EASEMENT RELOCATION ACT.

§36-16-1. Short title.

1 This article may be cited as the Uniform Easement Relocation Act.

§36-16-2. Definitions.

1 In this article:

2 “Appurtenant easement” means an easement tied to or dependent on ownership or
 3 occupancy of a unit or a parcel of real property.

4 “Conservation easement” means a nonpossessory property interest created for one or
 5 more of the following conservation purposes:

6 (1) Retaining or protecting the natural, scenic, wildlife, wildlife-habitat, biological,
 7 ecological, or open-space values of real property;

8 (2) Ensuring the availability of real property for agricultural, forest, outdoor-recreational, or
 9 open-space uses;

10 (3) Protecting natural resources, including wetlands, grasslands, and riparian areas;

11 (4) Maintaining or enhancing air or water quality;

12 (5) Preserving the historical, architectural, archeological, paleontological, or cultural
13 aspects of real property; or

14 (6) Any other purpose under relating to natural resources under state law.

15 “Dominant estate” means an estate or interest in real property benefitted by an
16 appurtenant easement.

17 “Easement” means a nonpossessory property interest that:

18 (1) Provides a right to enter, use, or enjoy real property owned by or in the possession of
19 another; and

20 (2) Imposes on the owner or possessor a duty not to interfere with the entry, use, or
21 enjoyment permitted by the instrument creating the easement or, in the case of an easement not
22 established by express grant or reservation, the entry, use, or enjoyment authorized by law.

23 “Easement holder” means:

24 (1) If an appurtenant easement, the dominant estate owner; or

25 (2) If an easement in gross, public-utility easement, conservation easement, or negative
26 easement, the grantee of the easement or a successor.

27 “Easement in gross” means an easement not tied to or dependent on ownership or
28 occupancy of a unit or a parcel of real property.

29 “Lessee of record” means a person holding a lessee’s interest under a recorded lease or
30 memorandum of lease.

31 “Negative easement” means a nonpossessory property interest whose primary purpose is
32 to impose on a servient estate owner a duty not to engage in a specified use of the estate.

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

35 “Public-utility easement” means a nonpossessory property interest in which the easement
36 holder is a publicly regulated or publicly owned utility under federal law or law of this state or a
37 municipality. The term includes an easement benefiting an intrastate utility, an interstate utility, or

38 a utility cooperative.

39 “Real property” means an estate or interest in, over, or under land, including structures,
40 fixtures, and other things that by custom, usage, or law pass with a conveyance of land whether
41 or not described or mentioned in the contract of sale or instrument of conveyance. The term
42 includes the interest of a lessor and lessee and, unless the interest is personal property under
43 law of this state other than this [act], an interest in a common interest community.

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

46 “Security instrument” means a mortgage, deed of trust, security deed, contract for deed,
47 lease, or other record that creates or provides for an interest in real property to secure payment
48 or performance of an obligation, whether by acquisition or retention of a lien, a lessor’s interest
49 under a lease, or title to the real property. The term includes:

50 (1) A security instrument that also creates or provides for a security interest in personal
51 property;

52 (2) A modification or amendment of a security instrument; and

53 (3) A record creating a lien on real property to secure an obligation under a covenant
54 running with the real property or owed by a unit owner to a common-interest community
55 association.

56 “Security-interest holder of record” means a person holding an interest in real property
57 created by a recorded security instrument.

58 “Servient estate” means an estate or interest in real property that is burdened by an
59 easement.

60 “Title evidence” means a title insurance policy, preliminary title report or binder, title
61 insurance commitment, abstract of title, attorney’s opinion of title based on examination of public
62 records or an abstract of title, or any other means of reporting the state of title to real property
63 which is customary in the locality.

64 “Unit” means a physical portion of a common-interest community designated for separate
 65 ownership or occupancy with boundaries described in a declaration establishing the common-
 66 interest community.

67 “Utility cooperative” means a nonprofit entity whose purpose is to deliver a utility service,
 68 such as electricity, oil, natural gas, water, sanitary sewer, stormwater, or telecommunications, to
 69 its customers or members and includes an electric cooperative, rural electric cooperative, rural
 70 water district, and rural water association.

§36-16-3. Scope; Exclusions.

1 (a) Except as otherwise provided in subsection (b) of this section, this article applies to an
 2 easement established by express grant or reservation or by prescription, implication, necessity,
 3 estoppel, or other method.

4 (b) This article may not be used to relocate:

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

6 (2) An easement if the proposed location would encroach on an area of an estate
 7 burdened by a conservation easement or would interfere with the use or enjoyment of a public-
 8 utility easement or an easement appurtenant to a conservation easement.

9 (c) This article does not apply to the relocation of an easement by consent.

§36-16-4. Right of servient estate owner to relocate easement.

1 A servient estate owner may relocate an easement under this article only if the relocation
 2 does not materially:

3 (1) Lessen the utility of the easement;

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

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

7 (4) During or after the relocation, impair the safety of the easement holder or another
 8 entitled to use and enjoy the easement;

9 (5) During the relocation, disrupt the use and enjoyment of the easement by the easement
 10 holder or another entitled to use and enjoy the easement, unless the servient estate owner
 11 substantially mitigates the duration and nature of the disruption;

12 (6) Impair the physical condition, use, or value of the dominant estate or improvements on
 13 the dominant estate; or

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

§36-16-5. Commencement of civil action.

1 (a) To obtain an order to relocate an easement under this article, a servient estate owner
 2 shall commence a civil action.

3 (b) A servient estate owner that commences a civil action under subsection (a) of this
 4 section:

5 (1) Shall serve a summons and complaint on:

6 (i) The easement holder whose easement is the subject of the relocation;

7 (ii) A security-interest holder of record of an interest in the servient estate or dominant
 8 estate;

9 (iii) A lessee of record of an interest in the dominant estate; and

10 (iv) Except as otherwise provided in paragraph (2) of this section, any other owner of a
 11 recorded real-property interest if the relocation would encroach on an area of the servient estate
 12 or dominant estate burdened by the interest; and

13 (2) Is not required to serve a summons and complaint on the owner of a recorded real-
 14 property interest in oil, gas, or minerals unless the interest includes an easement to facilitate oil,
 15 gas, or mineral development.

16 (c) A complaint under this section must state:

17 (1) The intent of the servient estate owner to seek the relocation;

18 (2) The nature, extent, and anticipated dates of commencement and completion of the
19 proposed relocation;

20 (3) The current and proposed locations of the easement;

21 (4) The reason the easement is eligible for relocation under §36-16-3 of this code;

22 (5) The reason the proposed relocation satisfies the conditions for relocation under
23 Section 4; and

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

27 (d) At any time before the court renders a final order in an action under subsection (a) of
28 this section, a person served under this section may file a document, in recordable form, that
29 waives its rights to contest or obtain relief in connection with the relocation or subordinates its
30 interests to the relocation. On filing of the document, the court may order that the person is not
31 required to answer or participate further in the action.

§36-16-6. Required findings; order.

1 (a) The court may not approve relocation of an easement under this article unless the
2 servient estate owner:

3 (1) Establishes that the easement is eligible for relocation under §36-16-3 of this code,
4 and

5 (2) Satisfies the conditions for relocation under §36-16-4 of this code.

6 (b) An order under this article approving relocation of an easement shall

7 (1) State that the order is issued in accordance with this article;

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

- 11 (3) Identify the immediately preceding location of the easement;
- 12 (4) Describe in a legally sufficient manner the new location of the easement;
- 13 (5) Describe mitigation required of the servient estate owner during relocation;
- 14 (6) Refer in detail to the plans and specifications of improvements necessary for the
15 easement holder to enter, use, and enjoy the easement in the new location;
- 16 (7) Specify conditions to be satisfied by the servient estate owner to relocate the easement
17 and construct improvements necessary for the easement holder to enter, use, and enjoy the
18 easement in the new location;
- 19 (8) Include a provision for payment by the servient estate owner of expenses under §36-
20 16-7 of this code;
- 21 (9) Include a provision for compliance by the parties with the obligation of good faith under
22 §36-16-8 of this code; and
- 23 (10) Instruct the servient estate owner to record an affidavit, if required under §36-16-9 of
24 this code, when the servient estate owner substantially completes relocation.
- 25 (c) An order under subsection (b) of this section may include any other provision consistent
26 with this article for the fair and equitable relocation of the easement.
- 27 (d) Before a servient estate owner proceeds with relocation of an easement under this
28 article, the owner must record, in the land records of each jurisdiction where the servient estate
29 is located, a certified copy of the order under subsection (b) of this section.

§36-16-7. Expenses of relocation.

- 1 A servient estate owner is responsible for reasonable expenses of relocation of an
2 easement under this article, including the expense of:
- 3 (1) Constructing improvements on the servient estate or dominant estate in
4 accordance with an order under Section 6;
- 5 (2) During the relocation, mitigating disruption in the use and enjoyment of the easement
6 by the easement holder or another person entitled to use and enjoy the easement;

7 (3) Obtaining a governmental approval or permit to relocate the easement and construct
8 necessary improvements;

9 (4) Preparing and recording the certified copy required by §36-16-6(d) of this code and
10 any other document required to be recorded;

11 (5) Any title work required to complete the relocation or required by a party to the civil
12 action as a result of the relocation;

13 (6) Applicable premiums for title insurance related to the relocation;

14 (7) Any expert necessary to review plans and specifications for an improvement to be
15 constructed in the relocated easement or on the dominant estate and to confirm compliance with
16 the plans and specifications referred to in the order under §36-16-6 of this code;

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

19 (9) Obtaining any third-party consent required to relocate the easement.

§36-16-8. Duty to act in good faith.

1 After the court approves relocation of an easement and the servient estate owner
2 commences the relocation, the servient estate owner, the easement holder, and other parties in
3 the civil action shall act in good faith to facilitate the relocation in compliance with this article.

§36-16-9. Relocation affidavit.

1 (a) If an order under §36-16-6 of this code requires the construction of an improvement as
2 a condition for relocation of an easement, relocation is substantially complete, and the easement
3 holder is able to enter, use, and enjoy the easement in the new location, the servient estate owner
4 shall:

5 (1) Record, in the land records of each jurisdiction where the servient estate is located, an
6 affidavit certifying that the easement has been relocated; and

7 (2) Send, by certified mail, a copy of the recorded affidavit to the easement holder and
8 parties to the civil action.

9 (b) Until an affidavit under subsection (a) of this section is recorded and sent, the
 10 easement holder may enter, use, and enjoy the easement in the current location, subject to the
 11 court’s order under §36-16-6 of this code approving relocation.

12 (c) If an order under §36-16-6 of this code does not require an improvement to be
 13 constructed as a condition of the relocation, recording the order under §36-16-6 of this code
 14 constitutes relocation.

§36-16-10. Limited effect of relocation.

1 (a) Relocation of an easement under this article:

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

4 (2) Is not a breach or default of, and does not trigger, a due-on-sale clause or other
 5 transfer-restriction clause under a security instrument, except as otherwise determined by a court
 6 under law other than this article;

7 (3) Is not a breach or default of a lease, except as otherwise determined by a court under
 8 law other than this article;

9 (4) Is not a breach or default by the servient estate owner of a recorded document affected
 10 by the relocation, except as otherwise determined by a court under law other than this article;

11 (5) Does not affect the priority of the easement with respect to other recorded real-property
 12 interests burdening the area of the servient estate where the easement was located before the
 13 relocation; and

14 (6) Is not a fraudulent conveyance or voidable transaction under law.

15 (b) This article does not affect any other method of relocating an easement permitted
 16 under law of this state other than this article.

§36-16-11. Non-waiver.

1 The right of a servient estate owner to relocate an easement under this article may not be
 2 waived, excluded, or restricted by agreement even if the:

3 (1) Instrument creating the easement prohibits relocation or contains a waiver, exclusion,
4 or restriction of this article;

5 (2) Instrument creating the easement requires consent of the easement holder to amend
6 the terms of the easement; or

7 (3) Location of the easement is fixed by the instrument creating the easement, another
8 agreement, previous conduct, acquiescence, estoppel, or implication.

§36-16-12. Uniformity of application and construction.

1 In applying and construing this uniform act, consideration shall be given to the need to
2 promote uniformity of the law with respect to its subject matter among the states that enact it.

§36-16-13. Relation to electronic signatures in Global and National Commerce Act.

1 This article modifies, limits, or supersedes the Electronic Signatures in Global and National
2 Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section
3 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices
4 described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

§36-16-14. Transitional provision.

1 This article applies to an easement created before, on, or after the effective date of this
2 article.

NOTE: The purpose of this bill is to create the Uniform Easement Relocation Act providing the right of a servient estate owner to relocate easement.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.