

Northwest Chapter WSLs Continuing Education Seminar

1 Nov 2024

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Easements

A. Introduction

1. Characteristics

Definition¹

easement

An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road)...

Unlike a lease or license, an easement may last forever, but it does not give the holder the right to possess, take from, improve, or sell the land.

An easement is a right to limited use of another's land. It is a non-possessory interest because the easement holder does not own the land. The holder is limited to a specific use(s) and cannot realize profit from the use.

An easement has a *benefit* and a *burden*, Figure 1.

Benefit -The right(s) granted to easement holder. The benefit can be assigned to a property (dominant estate) or a person.

Burden - The obligation imposed on the owner of the land subject to the easement. Usually in the form of a restriction or encumbrance on the land

In general, the burdened party (servient estate) cannot do anything to interfere with the enjoyment of the easement. For instance, if an easement granted the dominant estate the right to drive over a certain portion of the burdened property, then a wall cannot be constructed to prevent the enjoyment of that right, Figure 2.

The servient estate cannot revoke an easement as long as terms of the easement are not violated.

An easement may be affirmative or negative.

An affirmative easement grants a right of use in a servient estate.

A negative easement prevents the servient estate owner from doing some act on his her land.

Most easements are affirmative. While not as numerous, negative easements include wind and solar access and conservation reserve easements.

2. License; Lease

An easement is similar to, but different from, licenses and leases.

license

1. *A permission, usu. revocable, to commit some act that would otherwise be unlawful; esp., an*

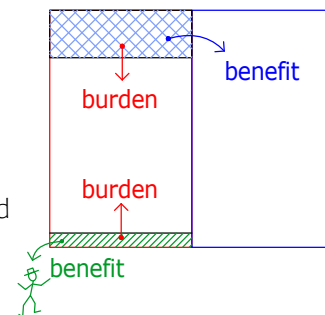


Figure 1: Benefit and Burden

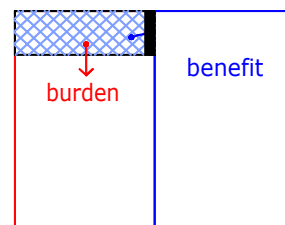


Figure 2: Interference

¹Definitions are from *Black's Law Dictionary*, 9th Edition, West Publishing Company, 2009.

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agreement (not amounting to a lease or profit á prendre) that it is lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal, such as hunting game

lease

1. A contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usu. rent. The lease term can be for life, for a fixed period, or for a period terminable at will.

A license is personal to the user and generally cannot be transferred to a third party. A license can be revoked by the granting party.

A lease grants a possessory interest in the land of another but for a fixed time period. The lessor may revoke the lease if the lessee violates its terms. A lease requires the lessee recompense the lessor.

B. Easement Classification

While there are many reasons for an easement, they all fall into one of two classes based on whom is assigned the benefit.

1. Appurtenant easement

The benefit is assigned to, and runs with, a parcel of land. When the land is sold, the easement goes with it. The easement cannot be conveyed separately from the dominant estate.

Benefit and burden are associated with properties not individuals, that is, dominant estate and servient estate.

Example

Parcels A and B share a common driveway over Parcel A, Figure 3.

benefited property - Parcel B is the dominant estate.

Burdened property - Parcel A is the servient estate

If Parcel B is conveyed, new owner has the right to enjoy the easement.
The benefit runs with the land.

If Parcel A is conveyed, new owner is subject to the burden of the easement.

Parcel B owner cannot convey his easement (by sale, gift, grant, or otherwise) separately to another party (eg, utility company).

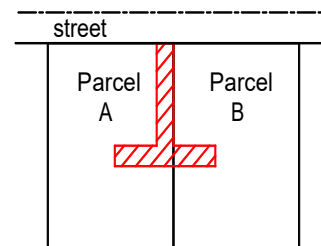


Figure 3: Shared driveway

2. Easement in gross

The benefit is assigned to an entity, not a property. There is no dominant estate but there still is a servient estate. Because the easement belongs to an entity, and not attached to land, it may be conveyed to a third

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party. The beneficiary may not even be a property owner, let alone have land adjacent to the burdened property.

Example:

Lot 12 is a waterfront property on a navigable lake. A friend of the lot owner is an avid kayaker. The lot owner gives his friend an easement across the northerly 10 feet of Lot 12 so the friend can carry his kayak to and from the Lake, Figure 4.

Lot 12 is a servient estate, but there is no dominant estate because the easement benefit is not assigned to a parcel.

The kayaker is free to convey his easement to another party; the servient estate cannot prevent the easement transfer.

Because Lot 12 is the servient estate, subsequent owners are also subject to the easement.

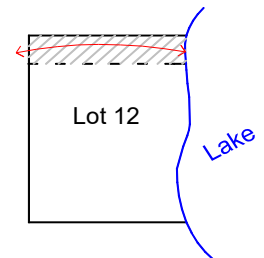


Figure 4: Easement in gross

Generally if it isn't clear whether the easement in question is appurtenant or in gross, courts tend to interpret as the former, *Spensley v. Valentine*, 34 Wis. 154, 160 (1874).

C. Easement Types

There are various methods by which easements can be created depending on use, beneficiary(ies), voluntary/involuntary burden, purpose, etc.

1. Express Grant (or Reservation)

Common method used in written descriptions. The easement is granted in writing by the owner of the servient estate. It can be granted to another or reserved out as part of a conveyance. Since it is part of a conveyance and a conveyance is subject to the statute of frauds, so is the creation of the easement.

2. Dedication

Similar to express grant except it is created by inclusion on a recorded plat [Wis Stat 23.29(1)] or CSM [Wis Stat 236.34(1)(e)], shown graphically with supportive text. This process can be used to grant easement to public, private parties, or corporations. May also include more restricted easements (as to who can enjoy) in the form of utility easements, drainage easements, sight easements, etc. Figure 5 is part of a subdivision plat¹ with public dedication and owner's certificate.

¹Taken from the *Wisconsin Platting Manual*.

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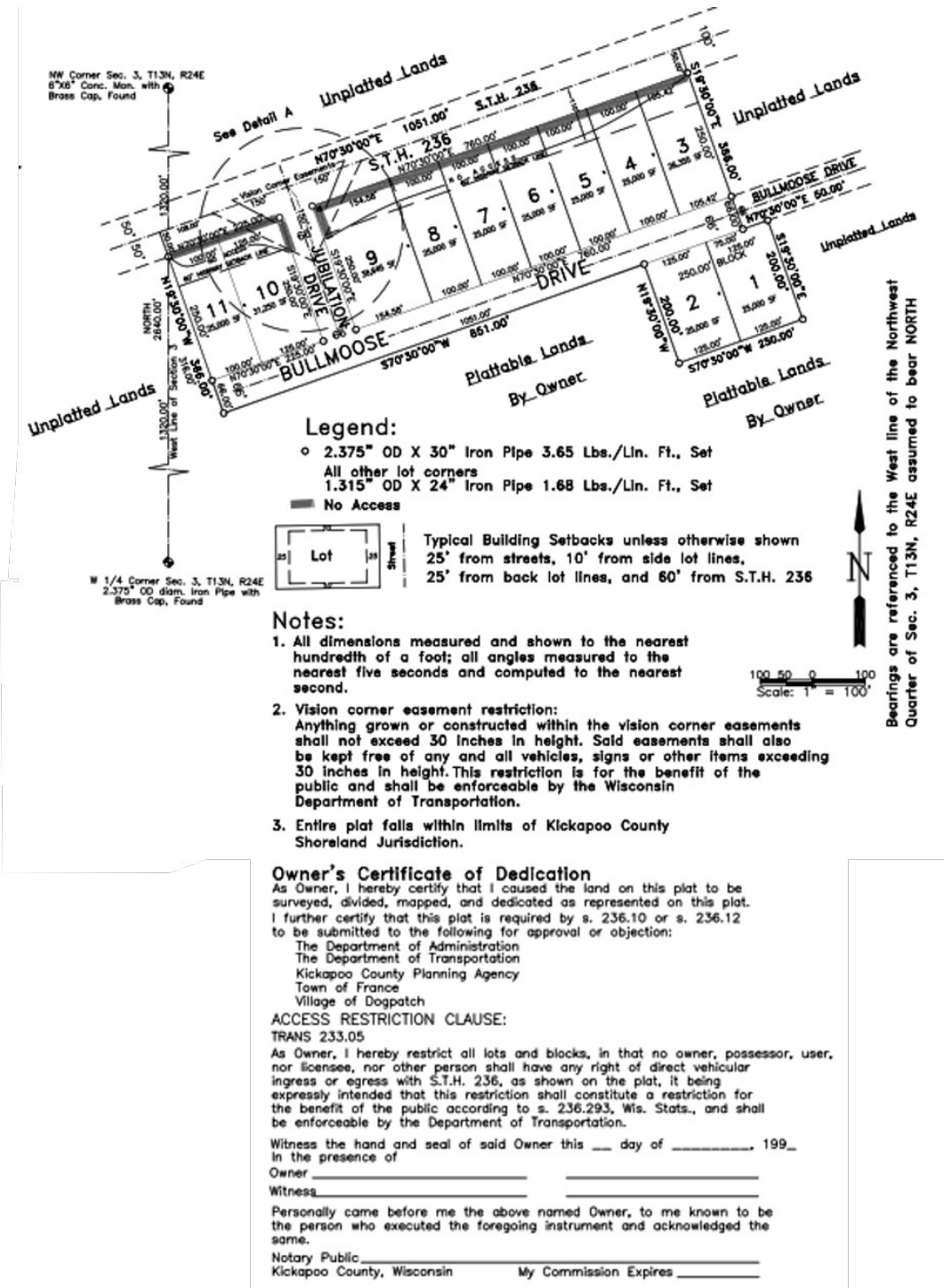


Figure 5: Plat with Public Dedication

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3. By Necessity

Used primarily to alleviate land-locked parcels created by land divisions.

“A way of necessity typically arises where an owner serves a landlocked portion of his property by conveying such parcel to another. “

Backhausen v. Mayer, 204 Wis. 286, 234 N.W. 904 (1931).

Example:

Adjacent Lots 1 and 2 are in the same subdivision, Figure 6.

Lot 2 is divided into two parcels: a new Parcel A, and the remainder, Parcel B. There is no written record of an access easement for Parcel A, Figure 7. Lot 1 has access onto Oak Street, Lot 2 onto Elm Street.

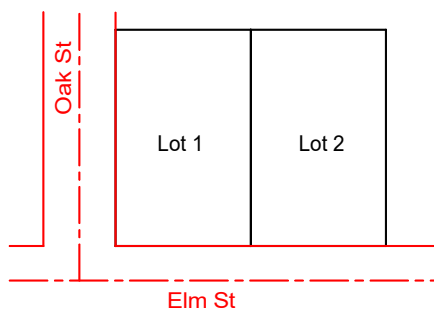


Figure 6: Two Adjacent Lots

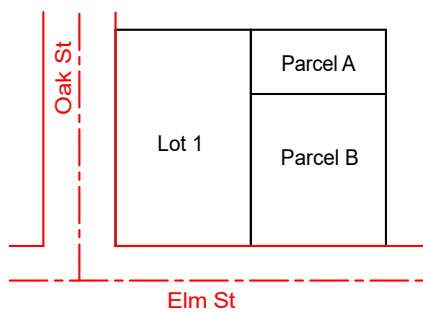


Figure 7: Landlocked Parcel

As a result of the subdivision Parcel A winds up land-locked without public street access.

Parcel A could gain an easement by necessity over Parcel B.

Why not an easement over Lot 1, particularly if access to Oak street would be shorter or more conducive than one across Parcel B?

Because Lot 1 did not create the condition requiring an easement by necessity. The parent parcel must provide for the situation created so Parcel A would have the right to cross Parcel B for street access.

“To establish an easement of necessity, the party seeking the easement has the burden to first prove two elements: (1) common ownership or unity of title of the two parcels; and (2) that the property is "landlocked," meaning that a piece of land is surrounded by land belonging to other persons so that it cannot be reached by a public roadway”

Ludke v. Egan, 87 Wis. 2d 221, 229-30, 274 N.W.2d 641, 645 (1979)

An easement by necessity might not be permanent.

“[a] way of necessity will continue as long as the necessity exists and until another lawful way has been acquired.”

Niedfeldt v. Evans, 272 Wis. 362, 364, 75 N.W.2d 307 (1956).

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4. Prescription

A prescriptive easement is created through long standing use of another's land without express permission. It's sorta kinda like adverse possession, except not quite. But it is just as confusing.

Simple example:

A parcel is bounded on the north by a public street and on the south by a navigable river.

For 20 years various people, without the parcel owner's permission, have walked along the east edge of the parcel to the river to fish or skim stones, Figure 8.

The public may gain a prescriptive easement across the parcel for continued access to the water. This is limited to the actual use and the land over which the use occurred (eg, no ATVing anywhere on the parcel or putting in a public boat landing).

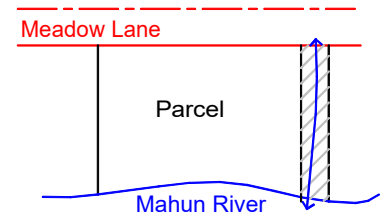


Figure 8: Prescriptive Easement

Makes sense, right? Prescriptive use is addressed in Wis Stat §893.28 *Prescriptive rights by adverse user*.

(1) Continuous adverse use of rights in real estate of another for at least 20 years, except as provided in s. 893.29 establishes the prescriptive right to continue the use. Any person who in connection with his or her predecessor in interest has made continuous adverse use of rights in the land of another for 20 years, except as provided by s. 893.29, may commence an action to establish prescriptive rights under ch. 843.

(2) Continuous use of rights in real estate of another for at least 10 years by a domestic corporation organized to furnish telegraph or telecommunications service or transmit heat, power or electric current to the public or for public purposes, by a cooperative association organized under ch. 185 or 193 to furnish telegraph or telecommunications service, or by a cooperative organized under ch. 185 to transmit heat, power or electric current to its members, establishes the prescriptive right to continue the use, except as provided by s. 893.29. A person who has established a prescriptive right under this subsection may commence an action to establish prescriptive rights under ch. 843.

(3) The mere use of a way over unenclosed land is presumed to be permissive and not adverse.

A careful reading of Wis Stat §893.28:

- Paragraph (1) applies to individuals not covered by paragraph (2). Their use must be adverse (and typically hostile) to the title holder and continuous for a period of 20 years.
- Paragraph (2) applies to identified domestic corporations. There is no requirement the use be adverse and the time period is reduced to 10 years.
- Land must be enclosed in order for a prescriptive use exist - it requires effort on the part of the user.

How does prescriptive use differ from adverse possession? The primary elements of adverse possession is that the use be visible, open, notorious, hostile, adverse, exclusive, and continuous for the specified time period.

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An easement by prescription requires the following elements, (1) adverse use hostile and inconsistent with the exercise of the titleholder's rights; (2) which is visible, open and notorious; (3) under an open claim of right; (4) and is continuous and uninterrupted for twenty years.

Mayer v. Grueber, 29 Wis.2d 168, 177, 138 N.W.2d 197 (1965)

In *Bauer v. Wisconsin Energy Corp.*, 970 NW 2d 243, a utility with an underground gas line claimed a prescriptive easement when a subsequent owner, Bauer, tried blocking the use. Bauer argued that the easement was not disclosed at time of her property acquisition and because it was underground she did not have opportunity to see the use - it wasn't open. Interpreting Wis Stat §893.28 as it was worded:

§ 893.28(2) contains no mention of the use being either "visible, open, and notorious" or "under an open claim of right."

the court ruled in favor of the utility. Despite the use being hidden from the owner, Wis Stat §893.28(2) did not require the use be visible.

Another difference is exclusivity. In adverse possession only one party can possess at a time although multiple parties can individually possess in sequence (exclusive use). Prescription is not limited to a single user at a time - multiple parties may involved.

Finally, an adverse claim is for ownership while a prescription is only for use: the underlying fee still belongs to the servient estate.

5. Implied

An implied easement is not created by written document but from an action which leads to the belief that one was intended.

Example:

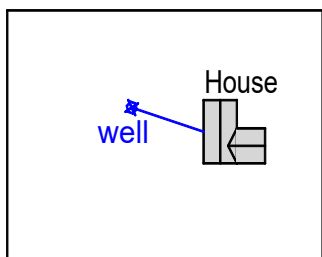


Figure 9: Before Division

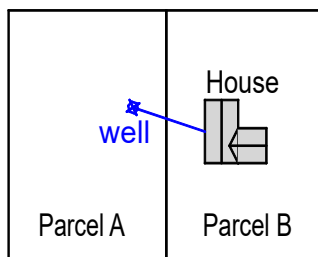


Figure 10: After Division

An owner has a parcel on which is a house and connected well, Figure 9. She creates and conveys a westerly portion, Parcel A, and retains the remainder. The house and well are on different parcels, Figure 10, and a reservation clause for well access was not included in Parcel A's description.

Although an easement to use and maintain the well was not expressly created by deed, Parcel A may have an easement to it by implication. Because it is not written, a court would need to determine if the easement is necessary for the beneficial enjoyment of Parcel B. It would also consider if there were another economically viable alternative in which case an implied easement would not be awarded.

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Wisconsin courts generally do not recognize easements created by implication:

“Some states do recognize this theory, but Wisconsin has always followed the strict rule as to easements. Here it is held that easements in the land of another, with the exception of rights of way by necessity, can only be created by grant or prescription.”

Tarman v. Birchbauer, 257 Wis. 1 - Wis: Supreme Court 1950

The court ruled that an easement could only be created by a formal process, necessity, or prescription.

6. Condemnation

Easements can be (forcibly) obtained by authorities having the power of condemnation. Wis Stat Chapter 32 *Eminent Domain* addresses the operational aspects of condemnation, which is based on an authority acting on behalf and for the good of the public. While originally limited to government and its representative agencies, condemnation authorities have expanded to include (under specific conditions) public utility corporations, railroad corporations, housing authority, and more. These authorities are defined in Wis Stat §32.02.

A typical example of an easement by condemnation is a public road which must cross land where the owner does not want to grant an easement. If it can be shown that the particular location is necessary then the needed easement can be acquired by the government.

A contemporary example of utility application is American Transmission Company's (ATC) Badger Coulee Transmission Line Project in southwestern Wisconsin. ATC has the power of condemnation under Wis Stat §32.02(6).

Condemnation is not just taking some one's property or specific property rights. Eminent domain is from the Fifth Amendment of the US Constitution and reflected in Article I, Section 13, of Wisconsin's Constitution:

“The property of no person shall be taken for public use without just compensation.”

The property owner must be provided something of value in return for his/her loss. What constitutes “just compensation” can be quite complex and involved and itself as controversial as the condemnation. Also muddying the waters lately is the definition of “public use” as condemnation has seen limited use for commercial purposes. The justification being an economic benefit for the public in way of additional jobs and income.

D. Formal Easement Creation

1. Elements

Whether written or appearing on a map easement creation should clearly express purpose, location, beneficiary.

Purpose defines what the easement is for along with limitations on both burden and benefit.

Location identifies where on the servient estate the easement can be enjoyed.

Beneficiary is who has right of enjoyment, either an entity or a property.

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If any are not defined then application and interpretation may be guided by common law or a court may ultimately render a decision.

In order to grant an easement as part of a conveyance, the grantor must either have the rights to give or the easement must already run with the parcel.

Written requirements are detailed in Wis Stat §706.02. However in Wis Stat §706.001 *Scope and construction*:

(2) Excluded from the operation of this chapter are transactions which an interest in land is affected:

- (a) By act or operation of law; or
- (b) By will; or
- (bm) By nonprobate transfer on death under s. 705.15; or
- (c) By lease for a term limited to one year or less;

Written requirements do not apply to easements created by involuntary methods (implication, necessity, etc), or plats and CSMs for public dedications. These are created by common law or statute (eg, Wis Stat Chp 236). Regardless, easement creation must include what, where, and for whom.

A formal easement may also include a temporal attribute based on a date or condition such as a temporary construction easement. If so, the condition or time limit must be clearly identified, Figure 11.

Also a temporary limited easement for building removal including for such purpose the right to operate necessary equipment thereon, the right of ingress and egress, as long as required for such public purpose, including the right to preserve, protect, remove or plant thereon any vegetation that the highway authorities may deem desirable to prevent erosion of the soil. This easement is to terminate upon completion of construction of Project I.D. 1204-06-72.

Figure 11: Temporary Easement

a. Purpose

Defines what the beneficiary may do, as well as what the burden is. If the easement grants the use of a walking path then the beneficiary would not be able to drive a vehicle on it. They may, however, physically smooth a path to make walking access easier. An electrical utility may need to periodically clear vegetation and perform maintenance which requires vehicle access.

“We have long recognized that, implied in every easement, unless otherwise stated, is the right of the dominant estate to do what is reasonably necessary to enjoy the easement.”

Garza v. American Transmission Co., 2017 WI 35 (April 13, 2017)

The servient estate still owns the underlying fee so may erect a fence with a gate, landscape, etc, as long as it does not obstruct or impede the use.

b. Location and Extent

The location and extent of an easement is as important as what it is for. If the physical location and limits of the easement are not stated, or are ambiguous, it may require court intervention to resolve conflicts. A court will try to determine the easement location and extent so that it is as fair to all parties as possible.

“The easement is described as “a right of way for road purposes.” The easement does not have a specified width or location. When the location of an easement is not defined, the court has the inherent power to

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affirmatively and specifically determine its location, after considering the rights and interests of both parties.”

Spencer v. Kosir, 733 NW 2d 921 - Wis_ Court of Appeals 2007

Considering how difficult that can be, location and extent should be described as accurately as possible.

c. Beneficiary

In general, the beneficiary of an express (written) easement is contained in its wording. The beneficiary(ies) of an unwritten easement is a result of actions creating the situation. An easement created by subdivision plat or CSM graphically depicts location and extent and identifies the purpose.

2. Creation Instruments

There are a few instruments which can be used for easement creation and conveyance. In all cases, it should be clear:

- who are the burdened and benefited entities
- what rights (and limitations) are involved
- physical location and extent of those rights

Kind of sounds like deed requisites, doesn't it? Well, property rights are being conveyed from one party to another so the Statute of Frauds applies¹. Physical location and extent are the same as a description on a deed so it has the same interpretation issues and resolutions, warts and all.

Easement by dedication and express easement are both conveyed by legal written instrument. This ensures Statute of Frauds conformity and provides for constructive notice.

a. Plat or CSM

Locations can be depicted on a plat or CSM with the same level of accuracy and information as the parcel boundaries. Figure 12 is a part of a two lot CSM with a number of existing easements shown graphically and some by reference to a record document. For example, along the west side of both lots is a “10' easement granted to Wisconsin Electric Power Company by CSM #3144”.

A parcel's description is with reference to the map on which the easements are shown so these become part of the parcel description as appropriate. For example, Lot 1 of the Figure 12 CSM is a servient estate burdened by electric utility, stormwater ditch, and access easements shown on the map. Some of these are appurtenant easements while others are in gross. The lot is also a dominant estate as it has access rights on Tower Drive. The dominant estate(s) and their rights should be identified on the map or in related record(s).

Required public easement grants on a map, such as Tower Drive, are both appurtenant as they benefit and attach to parcels and in gross as they are dedicated to the government on behalf of the public.

¹ For voluntary conveyances (or by condemnation). Unless ordered by a court, valid involuntary easements exist as unwritten rights, the highest element in the Rules of Construction.

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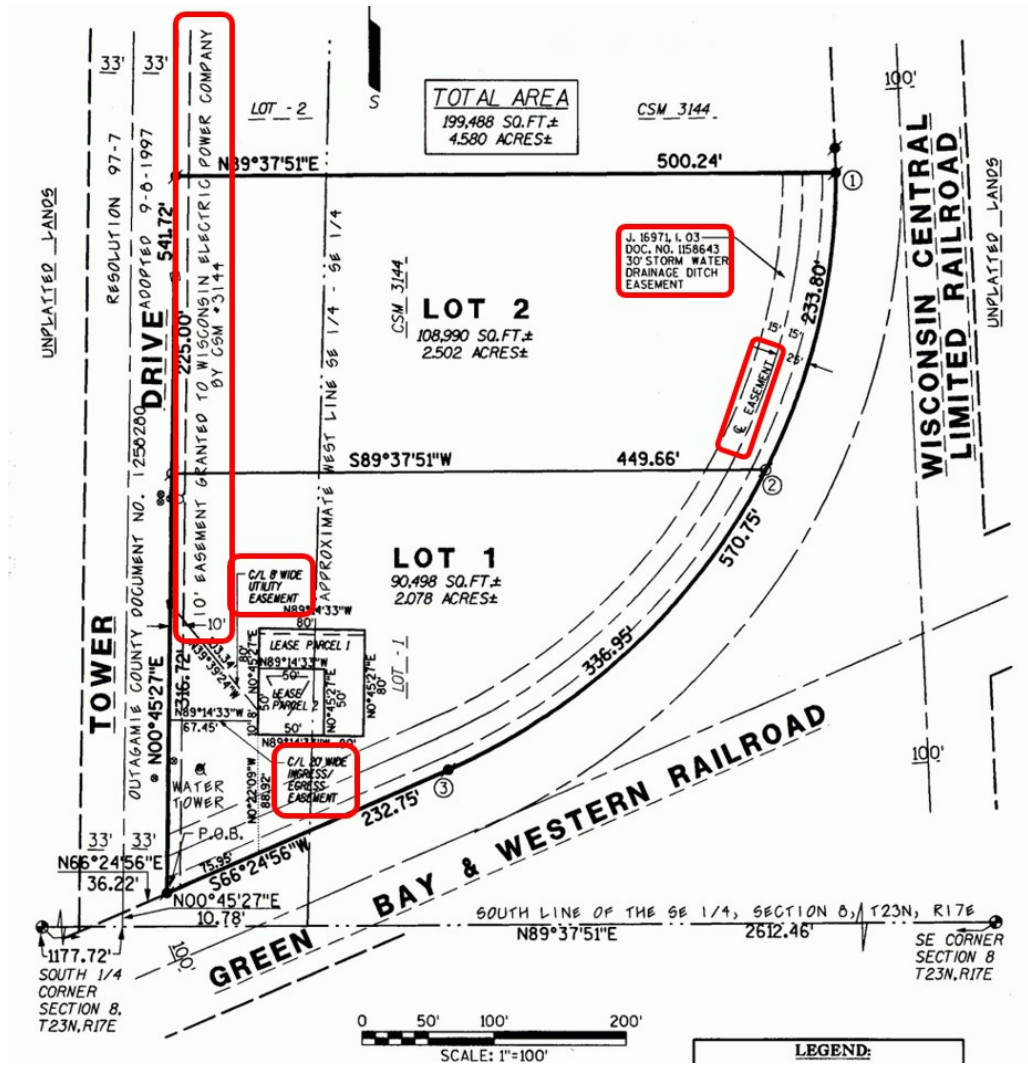


Figure 12: CSM with Easements

A plat or CSM which contains a public easement dedication (street, park, etc) must include an Owner's Certificate and an Approval Certificate of the jurisdictional governing unit, Wis Stat § 236.10(3). The owner offers the dedication and the governing unit accepts it. The easement is created when both certificates are signed (offer and acceptance) and the plat/CSM is recorded (boundaries created).

Condominium plats do not have authority under Wis Stat §703 to dedicate any area, including streets, to the public. Existing public areas within the Condominium cannot be altered by its plat. Wis Stat §703.32(4) provides the Condominium Association an "irrevocable right and easement to enter units to make repairs to common elements". This does not, however, prevent a Condominium plat from granting utility easements.

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b. Deed

Easements can be included as augmenting or qualifying clauses in a narrative description on a deed. An augmenting clause adds rights to a property. The property description in Figure 13 has an access easement added

Because it benefits the property, not an individual, this is an appurtenant easement. When the land is conveyed, the next owner can enjoy the access right.

**The East 100 acres of the East 3/4ths of S1/2,
Section 22.**

All in Township 9 North, Range 10 East.

Together with an easement over the West 2 rods of the W1/2 W1/2 NW1/4 of Section 26, and over the South 2 rods of the West 2 rods of the SW1/4 SW1/4 of Section 23, Township 9 North, Range 10 East, for ingress and egress in and from the above described premises.

Figure 13: Easement in Augmenting Clause

A qualifying clause removes rights from a property or otherwise restricts them. Words like “Subject to” or “reserving” are generally used to identify the easement either by description or reference to another document:

Subject to a 50 foot wide electric line easement as described in Vol 338 page 29, Badger County Register of Deeds.

An augmenting clause would be included in a dominant estate’s description; a qualifying clause in the servient estate’s.

c. Easement Document

An easement document is a deed that describes the easement location and its use. The grantee is the beneficiary, the grantor the servient estate. The grantor’s deed may or may not be identified (it should be) and the grantor’s deed may or may not identify the easement document.

The easement document must comply with the Statute of Frauds and meet Wisconsin’s deed requirements.

Due to the nature of easements, the easement document can be a bit more involved to correctly compose than a narrative property description. Depending on the easement purpose the document may include a lengthy list of conditions and restrictions. Figure 14 is an easement document for Wisconsin Power and Light. Note the allowed uses and the servient estate restrictions.

Being independent of a deed, when property is conveyed, the easement document is not modified to identify the new owners¹.

¹ Recall that an easement in gross can be sold without permission of the servient estate.

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Grantor(s) Robert J. Zimmerman and Helen Zimmerman, his wife

in consideration of One Dollar (\$1.00) and other good and valuable consideration to them paid by WISCONSIN POWER AND LIGHT COMPANY, a Wisconsin corporation, grantee, receipt of which is hereby acknowledged, does hereby grant, convey, and warrant unto said WISCONSIN POWER AND LIGHT COMPANY, its successors and assigns, the perpetual right and easement to erect and maintain a line of single pole structures and wires, including other appurtenances for the transmission of electrical current, and to permit the attachment thereto of electric or telephone wires owned by others, upon, over and across land owned by the grantor in the Town of Prairie du Chien County of Crawford, State of Wisconsin, said easement to be 26 feet in width, lying 3 feet west of and 25 feet east of the reference line described as follows:

Commencing at a point in the north line of the NW 1/4 of the NW 1/4 of Section 15, T 7 N, R 6 W, 773 feet east of the northwest corner thereof; thence S 30° 34' E 35 feet; thence S 40° 17' E 1,799 feet; thence S 70° 51' W 50 feet to a point, said point being the point of beginning; thence continuing S 70° 51' W 434 feet to the grantors south property line and being through part of the SW 1/4 of the NW 1/4 of Section 15, T 7 N, R 6 W as recorded in the office of the Register of Deeds for Crawford County, Wisconsin, in Volume 178 of Deeds, page 317.

This easement supplements that certain easement recorded in the office of the Register of Deeds for Crawford County, Wisconsin, in Volume 158 of Easements, page 548.

TOGETHER with the right to enter upon said premises for the purpose of erecting such structures and stringing said wires, inspecting, and repairing or removing the same. The grantor agrees that no hay or grain stacks, buildings, mobile homes, trees, tanks, antennas, windmills or other structures shall be placed within above described easement strip; and that the grantee has the right to trim or remove such trees as may be located within above distances from the reference line, and other trees which, in the judgment of the grantee, may interfere with or endanger said electric line, and chemically treat from time to time the area within the boundaries of said easement for the purpose of controlling the growth of trees and shrubs growing within said boundaries, without additional compensation. The grantor further agrees that the elevation of the existing ground surface located within said easement strip will not in any way be altered more than one (1) foot without the prior written consent of the grantee. Said grantee, however, expressly agrees that it will pay a reasonable sum for damage to other property, including crops, that may be caused by its employees in building and repairing said structures and wires.

Said grantee shall not have the right to erect any fence or building on such land other than said line structures and wires, and the right is hereby expressly reserved to said grantor, his heirs or assigns, of every use and enjoyment of said land not inconsistent with the maintenance, operation, repair, and removal of such structures and wires, and the trimming and removal of such trees as aforesaid.

This agreement is binding upon heirs, successors, and assigns of the parties hereto.

WITNESS the hand S and seal S of the grantor S this 18th day of May, A.D. 1978.
In presence of:

Figure 14: Utility Easement Document

E. Usage

1. Right of Enjoyment

Depending on the wording used to create the easement, its use may or may not be limited to the beneficiary. Problems arise when ambiguous terms are used to define rights:

“Subject to a 30 ft wide access easement along the westerly side...”

While intent may have been to allow movement in and out, the word “access” opens the scope of use. A few court decisions (*Atkinson v. Mentzel*, 566 NW 2d 158, Wis Court of Appeals (1997), *Werkowski v. Waterford Homes, Inc.*, 30 Wis. 2d 410, Wis Supreme Court (1966)) opined that access includes those things which allow the beneficiary reasonable enjoyment; things like electricity, water, telephone, etc.

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An appurtenant easement is attached to a dominant estate and cannot be separately conveyed to a different entity. It cannot be shared with a third party outside the dominant-servient estates relationship. Children of the dominant estate can inherit use of the easement as long as the additional dominant estates do not overburden the easement.

An easement in gross can be transferred by the beneficiary to another entity. Can the beneficiary share the easement with another? Inasmuch as it represents normal enjoyment, that should not be an issue. But can a half interest in the easement be sold to another? That's a good question, and may have to go back to the original wording.

Right of enjoyment cuts both ways: the servient estate cannot be prevented from using the underlying fee by unreasonable beneficiary use. Neither use can interfere with the other.

“We do not read the law to say that a broad grant of an access easement means that all accommodations which serve the purpose of the easement must be allowed. Rather, the test is whether the owner of the dominant estate can reasonably use the property as intended. Stated differently, but to the same effect, the easement must be interpreted so as to accomplish its purpose bearing in mind the reasonable convenience of both parties.”

Atkinson v. Mentzel, 566 NW 2d 158, Wis Court of Appeals (1997)

2. Overburdening

An easement is overburdened when use exceeds that expressed in the granting instrument or exceeds use reasonably anticipated by the parties at the time of creation.

Example 1

Residential Parcels A and B were created from the same parent. Parcel B was given an appurtenant easement for ingress/egress along the westerly side of Parcel A, Figure 15.

After a few years, the owner of Parcel B decided to turn his a home woodworking hobby into a business. As his business grew, obtaining material and shipping products required large truck access to his property. Eventually additional employees were hired and they used the easement to drive to and from work.

The original easement was to provide access for a residential lot and commercial use was probably not a reasonable anticipation. Supporting increased and heavier traffic for a commercial enterprise goes beyond the easement's intent and constitutes an overburden.

Example 2

What if instead Parcel B owner decided to subdivide his parcel, Figure 16, creating a street which connects to the easement to provide Lot owners access to Birch Street? Since more parties would be using the easement, would that constitute an overburden?

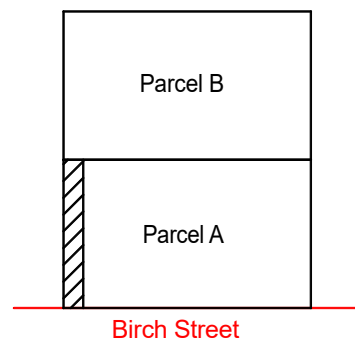


Figure 15: Overburden Example 1

Easements

Generally not. In most cases a parcel can be subdivided into smaller parts (if not in violation of other laws and ordinances) and that is a reasonable foreseen possibility when the appurtenant easement is created. Additional parties using the easement for residential access does not overburden it as long as the original easement were wide enough for the necessary road.

However, should the subdivider petition for and receive a land use change so the new parcels are commercial, then the use character of the easement may have changed and this could now constitute an overburden. It depends...

One could argue that if the Parcel B has been subdivided and sold off, it no longer exists and since it is gone, so is its appurtenant easement. Technically, that's not correct, since Parcel B lives on in its children. Just as a child parcel inherits its parent's senior-junior standing, each child inherits an interest in the parent's easement. As long as the use does not change.

It can get real messy real fast. What if the original appurtenant easement across Parcel A consisted of an unimproved lane just wide enough for a single vehicle to pass? Will that adequately support the four lots or can improvements be made to upgrade the access (eg, grading & paving) within the context of the original purpose? What about fire truck access? Is the new street in subdivided Parcel B limited to being a private street since there is no public access onto Birch Street?

Overburdening can also occur when a different use is added to the easement by the dominant estate. For example, if the owner of Parcel B wanted a telephone line installed, the telephone company could not run the line in through the existing appurtenant easement if it were strictly for ingress/egress. In this situation, it is similar to trespass (see next section).

Had the original easement purpose been stated as "for access purposes", then running in utility lines would not constitute an overburden. Just as in a property description, the word choice and their arrangement can alter the later interpretation of the intent. While the easement purpose can expressly detail allowable future uses to avoid these type of situations, trying to address them all isn't generally realistic.

3. Misuse/Trespass

Misuse or trespass is similar to overburdening in that the easement is used for a non-granted purpose. Misusing an easement can result in trespass - entry without permission. The actual distinction is best left to a court.

Example:

Jones provided an appurtenant access easement to the Badger Gun Club (BGC), Figure 17. This was to allow BGC members to access the site for meetings and shooting events.

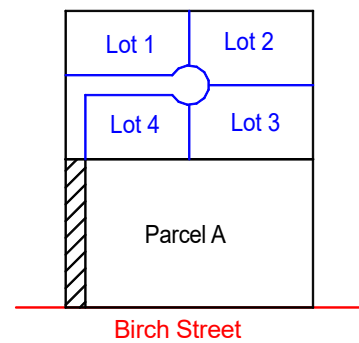


Figure 16: Overburden Example

2

Easements

Abutting Jones and the BGC to the north is a large wooded parcel owned by Hart. Hart gave BGC members permission to hunt on his land during deer gun season. The members used the easement across Jones' land to the BGC parcel where they would park their cars, then go hunting on Hart's land.

Jones takes BGC to court contending that the members are using easement for an unintended purpose. BGC claims that once members are on its land, they can go hunting on Hart's land.

Is this an allowed use?

By its express terms, this easement unambiguously limits the Club's use of the easement such that it may be used only to access or to leave the Club's property. As such, use of the easement to access any other property is outside the grant of this easement.

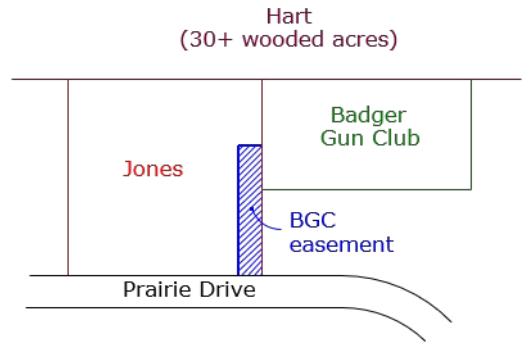


Figure 17: Misuse Example

Grygiel v. Monches Fish & Game Club, Inc., 787 NW 2d 6 - Wis: Supreme Court 2010

Misuse of an easement may be a legal basis for its discontinuance although courts tend to disfavor it. A common citation in most court cases dealing with misuse is:

"The courts appear to be in accord in considering that the mere use of an easement for an unauthorized purpose, or the misuse or excessive use thereof, is not sufficient to constitute an abandonment or forfeiture, the view being that an injunction is the proper and adequate remedy."

16 A.L.R (2d)

The judicial tendency is to resolve the situations by barring the misuse rather than terminating the easement.

4. Obstructing

The servient estate cannot interfere with beneficiary's easement use (*Atkinson v. Mentzel*).

Example

Parcel A a 30 acre farmette. The owner of Parcel A creates and conveys 5 acre Parcel B at the northeast corner of the farmette. The conveyance includes an access easement along the easterly edge of the farm, Figure 18(a).

Five years after the conveyance the farmette owner decides to raise a few horses. So he fences his property perimeter, including across both ends of the access easement, Figure 18(b).

This obstructs Parcel B's access since it is blocked.

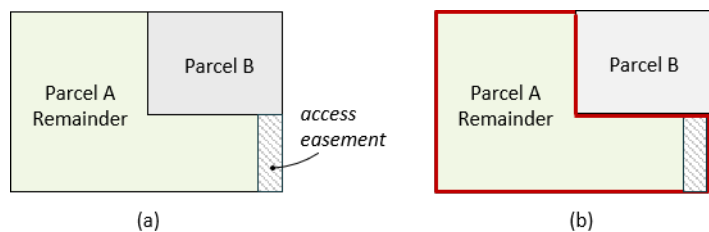


Figure 18: Obstruction Example

Easements

After a lawsuit threat, Parcel A owner installs gates at both ends of the access. Is the obstruction removed? What if the gates have locks?

5. Transmission Lines

Transmission lines are addressed in Wis Stat §182.017 *Transmission lines; privileges; damages*.

Specifically, requirements for high voltage transmission line easements are in Wis Stat §182.017(7):

Any easement for rights-of-way for high-voltage transmission lines as defined under s. 196.491 (1) (f) shall be subject to all of the following conditions and limitations:

(a) The conveyance under ch. 706 and, if applicable, the petition under s. 32.06(7), shall describe the interest transferred by specifying, in addition to the length and width of the right-of-way, the number, type and maximum height of all structures to be erected thereon, the minimum height of the transmission lines above the landscape, and the number and maximum voltage of the lines to be constructed and operated thereon.

High voltage lines are defined in Wis Stat §196.491(1)(f):

Except as provided in subs. (2) (b) 8. and (3) (d) 3m., "high-voltage transmission line" means a conductor of electric energy exceeding one mile in length designed for operation at a nominal voltage of 100 kilovolts or more, together with associated facilities, and does not include transmission line relocations that the commission determines are necessary to facilitate highway or airport projects.

Interestingly, Wis Stat §706.05 Formal requisites for record states:

(2m) (a) Except as provided in par. (b), any document submitted for recording or filing that is to be indexed in the real estate records, any document submitted for recording or filing that modifies an original mortgage or land contract and any subordination agreement submitted for recording or filing shall contain the full legal description of the property to which it relates if the document or subordination agreement is intended to relate to a particular parcel of land....

(b) The requirement of a full legal description under par. (a) does not apply to:

1. Descriptions of easements for the construction, operation or maintenance of electric, gas, railroad, water, telecommunications or telephone lines or facilities.
2. Descriptions of property that is subject to liens granted on property thereafter acquired by a rural electric cooperative organized under ch. 185, by a telephone cooperative organized under ch. 185 or 193, by a pipeline company under s. 76.02 (5), by a public utility under s. 196.01 (5), by a railroad under s. 195.02 (1), or by a water carrier under s. 195.02 (5)

While Wis Stat §182.017(7) requires "length and width" of the right-of-way, Wis Stat §706.05 specifically excludes utility easements from a "full legal description."

Strange.

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6. Break in Chain of Title

What if an appurtenant easement, explicitly created by a written conveyance, is accidentally left off the deed of a later conveyance of the same property? Does the easement cease to exist because it is no longer in the public record (and no longer in the chain of title)?

It still exists because an easement runs with the servient estate and would require a legitimate termination action. Likewise an appurtenant easement is attached to and runs with a dominant estate. A defect in the public record would not cause an easement to automatically cease. A title insurer scours the public record to determine, among other things, if there are any unresolved easements that have dropped off the public record. Any such situations are identified and excluded from title insurance coverage.

7. Who is the Beneficiary?

Although it's one of the three elements for easement definition, it's not always apparent who the beneficiary is.

Figure 19 is an example of a CSM portion showing drainage easements along the lot lines¹. Besides the lines on the map, there is no other explanation or dedication certificate on the CSM.

Location, purpose, and servient estates are identified but who benefits? Are the easements appurtenant or in gross? What does "drainage" consist of? Without this information it's uncertain how the easements can be utilized or terminated.

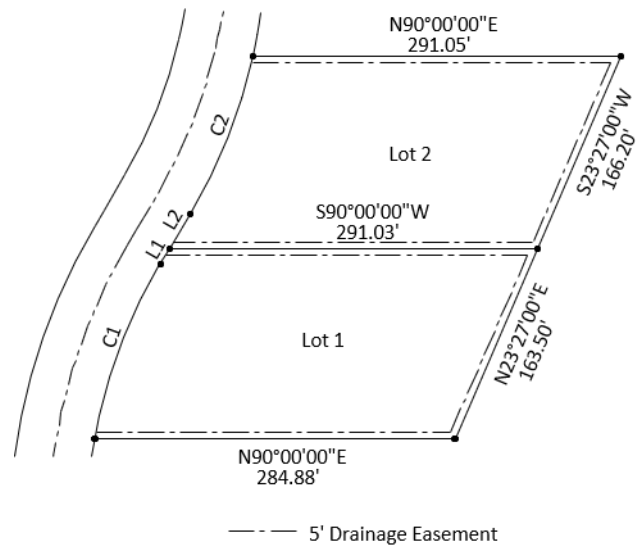


Figure 19: Drainage Easements

F. Easement Termination

Removing an easement can be more complex than creating it depending quite a bit on how or why the easement was created and if it is in gross or appurtenant.

The beneficiary may formally terminate an easement; the servient estate does not have the power to do so. Under some circumstances, the servient estate can initiate legal action to terminate an easement or sue for damages caused by the benefited party acting outside the easement's purpose or location. Sometimes it's not clear who the beneficiary is, either from the original creation or subsequent parcel divisions.

¹This was a common practice in some areas of Wisconsin. Sometimes they were also labeled as utility easements although no specific utility was identified.

Easements

The remainder of this section summarizes the major termination processes and additional considerations for some.

1. Release

Generally, the beneficiary can release the easement. Figuring out who all the beneficiaries are may be a challenge. Who benefits from "...to a utility easement..."? What about all the Lot owners in a subdivision which uses a parent's appurtenant easement? All having any type of legal interest in an easement must release it for termination.

2. Necessity Cessation

An easement by necessity would terminate should the necessity cease to exist (this is not always as obvious to determine as it seems). Because it is no longer needed, it no longer exists.

3. Vacation

A public dedication on a plat must be released not only by the respective government entity (in gross), but also by any owners who have purchased lots since they are beneficiaries (appurtenant). An easement to be terminated in one subdivision that joins with an easement in an abutting subdivision may require release from owners in the abutting subdivision.

4. Abandonment

This one can be touchy

Spencer v. Kosir, 733 NW 2d 921 - Wis: Court of Appeals 2007 involved a road easement that was granted but lay unused more than 50 years. It was continuously recorded on subsequent deeds. In 1999 the servient estate tried to use the easement claiming it was abandoned and extinguished based on non-use. The dominant estate sued claiming the easement was still valid. The Appellate Court agreed affirming the circuit court's ruling that just because the road easement was not used or improved does not mean it was extinguished.

In *Vieth v. Dorsch*, 274 Wis. 17 - Wis: Supreme Court 1956, the court ruled that reciprocal easements granted in 1891 were still in effect despite that over time one was not utilized:

"The mere fact that plaintiff and her predecessors, through no fault of defendant or his predecessors, have seen fit not to use the right of way over defendant's land, cannot destroy defendant's valuable right to use his own right of way over plaintiff's land. "

That word salad basically says that non-use does not constitute termination.

On the other hand, we have Wis Stat §82.19(2):

(a) Every highway shall cease to be a public highway 4 years from the date on which it was laid out, except the parts of the highway that have been opened, traveled, or worked within that time.

(b)

1. In this paragraph, "vehicular travel" means travel using any motor vehicle required to be registered under ch. 341 or exempt from registration under s. 341.05.

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2. Any highway that has been entirely abandoned as a route of vehicular travel, and on which no highway funds have been expended for 5 years, shall be considered discontinued.

(c) This subsection does not apply to state or county trunk highways or to any highway, street, alley, or right-of-way that provides public access to a navigable lake or stream.

The tendency is to hold private easements valid unless formally terminated by the benefited party while publicly held road easements can be terminated by abandonment.

5. Condition Met

Easements may also be extinguished, or changed, based on meeting a condition (much like a conditional fee). This can be the case with temporary easements for construction purposes. During road construction, an easement may need to be larger to accommodate construction activities (stock piling, haul roads, etc) in addition to the road itself. Once construction is completed (condition met) then the easement would "shrink down" to the final form needed for the road.

There may be specific terms in the easement wording which release an easement based on meeting specific conditions.

6. Single Owner of Servient & Dominant Estates

What if the same person owns the dominant and servient estates? In some jurisdictions, unless the land were legally consolidated (ie, the two parcels become one) the easement would continue to exist since either parcel could be conveyed separately from the other. In Wisconsin, an easement terminates when the owner of the dominant and servient estates is the same.

[I]f X owns parcel 1, the dominant tenement, but not parcel 2, the servient tenement, and later purchases parcel 2, the easement will be extinguished.... If X later sells parcel 1, the purchaser takes the property without the right to traverse parcel 2, unless X also grants to the purchaser an easement.

Kallas v. B & G Realty, 169 Wis.2d 412, 420, 485 N.W.2d 278 (Ct.App.1992).

Coming into common ownership

G. Some Observations

1. General

The Statute of Frauds requires transfer of rights be by written document. Voluntary easement creation can be done by one of three instruments:

- Plat or CSM
- Augmenting/qualifying deed clauses
- Easement document

The written requirements are detailed in Wis Stat §706.02. However in Wis Stat §706.001 *Scope and construction*:

(2) Excluded from the operation of this chapter are transactions which an interest in land is affected:

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- (a) By act or operation of law; or
- (b) By will; or
- (bm) By nonprobate transfer on death under s. 705.15; or
- (c) By lease for a term limited to one year or less;

Written requirements do not apply to easements created by involuntary methods (implication, necessity, etc), or plats and CSMs for public dedications. These are created by common law or statute (eg, Wis Stat Chp 236).

2. Rule of Construction

Whether created by a narrative- or map-based method, an easement description is the same as a property description because they do the same thing: define the location and extent of rights conveyed. They both define boundaries so we use the same procedures to locate easements as we do locating property lines.

Written evidence is used together with physical evidence and parol and the Rules of Construction principles:

- Unwritten rights
- Senior rights
- Written intention
 - Survey
 - Monument
 - Distance and direction
 - Coordinates
 - Area

3. Strip Description

With linear easements, such as utilities, location (and extent) identification is often done with a strip description. A strip description uses a narrative description of a reference line; extent is given as a width on each side of the reference line; the result is a long narrow strip.

Example, Figure 20

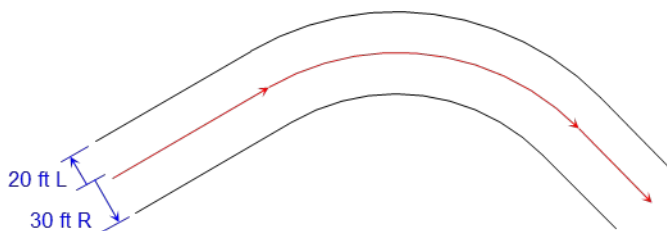


Figure 20: Strip Description

“...20 ft left and 30 ft right of the following described line ... thence N 60°00' E, 175.0 ft; thence 327.2 ft along a tangent curve right, said curve with a 250.0 ft radius and 75°00' central angle; thence S 45°00' E, 100.0 ft...”

The reference line does not have to be centrally located in the strip.

A strip description is actually a form of metes and bounds description. It can have the same

ambiguous situations and interpretation issues as a metes and bounds description. The Rules of Construction, controlling/informative terms, and extrinsic evidence are used to help resolve conflicting terms.

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Side lines are offsets from the reference line. When the reference line ends, so do the side lines.

This makes the end of the strip description perpendicular to the reference line. If the reference line ends at a property line other than perpendicularly, Figure 21, an overlap and gap are created. The servient estate cannot convey rights it does not have (overlap); but it can fail to include rights it does have (gap). The strip description must be carefully worded to avoid these situations.

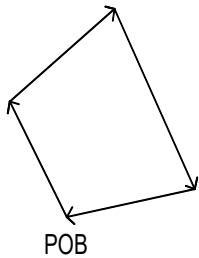


Figure 22:
Property

A major difference between a metes and bounds property description and an easement strip description is the former closes back on itself while the latter does not, Figures 22 and 25.

Closing back provides a mathematical check on distances and directions since error presence and overall effect can be determined.

With a long linear description, error effects are magnified as the description continues beyond the errors. Figure 24 shows the effect of slightly incorrect data for the first curve. The gray strip represents the correct location. Notice how the positions get progressively worse the further along the easement from the error.

Considering the length of some utility corridors, it is imperative the description writer include sufficient data for each course including appropriate control terms. An easement constitutes an encumbrance on the servient estate so it is a good idea to know where on the estate it is. The error at the end of Figure 24 can be a pretty substantial position shift on a small parcel.

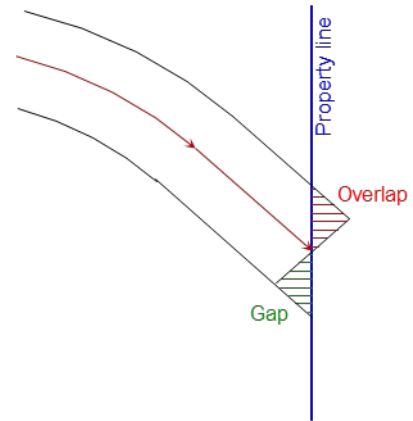


Figure 21: Strip Gap and Overlap

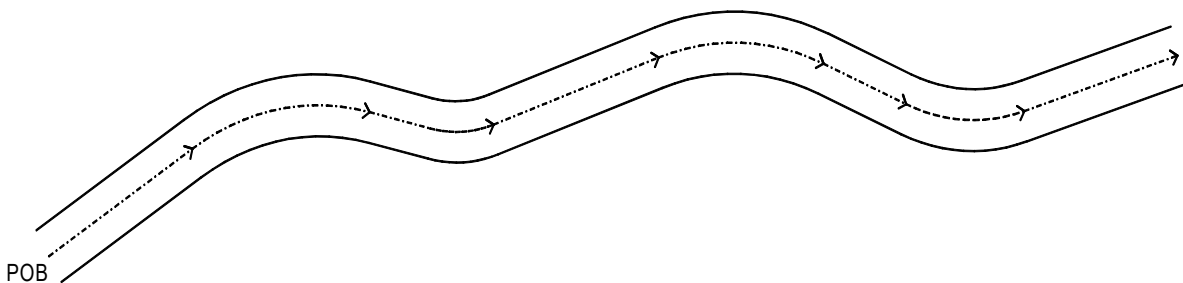


Figure 23: Strip

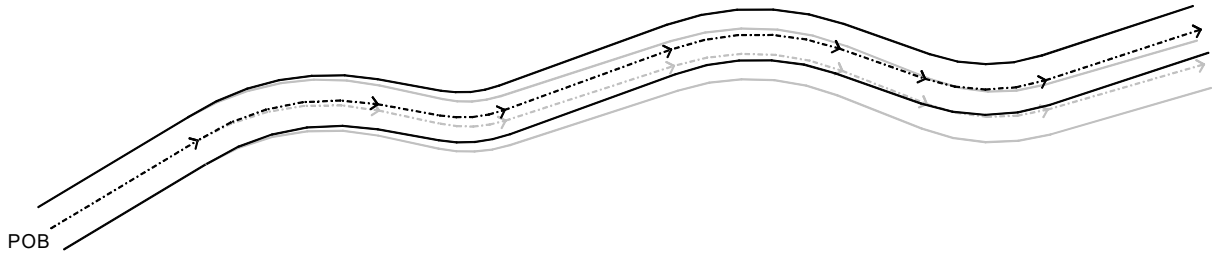


Figure 24: Description Error

4. Example Description Interpretation

Utility easements, in particular, can cause some serious location issues since the actual easement may be at the end of a lengthy centerline description. It is similar writing a metes and bounds description whose point of beginning (POB) is a thousand or more feet from the point of commencement (POC).

For example, Figure 25:

Grantor(s) Robert J. Zimmerman and Helen Zimmerman, his wife

in consideration of One Dollar (\$1.00) and other good and valuable consideration to them paid by WISCONSIN POWER AND LIGHT COMPANY, a Wisconsin corporation, grantee, receipt of which is hereby acknowledged, does hereby grant, convey, and warrant unto said WISCONSIN POWER AND LIGHT COMPANY, its successors and assigns, the perpetual right and easement to erect and maintain a line of single pole structures and wires, including other appurtenances for the transmission of electrical current, and to permit the attachment thereto of electric or telephone wires owned by others, upon, over and across land owned by the grantor in the Town of Prairie du Chien, County of Crawford, State of Wisconsin, said easement to be 28 feet in width, lying 3 feet west of and 25 feet east of the reference line described as follows:

Commencing at a point in the north line of the NW 1/4 of the NW 1/4 of Section 15, T 7 N, R 6 W, 773 feet east of the northwest corner thereof; thence S 3° 34' E 35 feet; thence S 4° 17' E 1,799 feet; thence S 7° 51' W 50 feet to a point, said point being the point of beginning; thence continuing S 7° 51' W 434 feet to the grantors south property line and being through part of the SW 1/4 of the NW 1/4 of Section 15, T 7 N, R 6 W as recorded in the office of the Register of Deeds for Crawford County, Wisconsin, in Volume 178 of Deeds, page 317.

This easement supplements that certain easement recorded in the office of the Register of Deeds for Crawford County, Wisconsin, in Volume 158 of Easements, page 548.

Figure 25: Strip Utility Description

The actual easement's POB is over 1800 feet from the POC which itself is almost 800 ft from a Section corner. There are no monument calls other than a point somewhere along the grantor's southerly line.

Figure 26 shows the description overlaid on the parcel layer and image from Crawford County's GIS¹.

¹I know, I know, a GIS is not survey accuracy depictions. But it is sufficient in this case to show basic spatial

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Figure 26: Strip Utility Plot

Something is definitely wrong since the easement (in red) ends in a cultivated field nowhere near a boundary. If we presume the 1799 ft segment was supposed to parallel the highway, that's a difference of about 10° . Rotating the entire description at the Section corner 10° left we get Figure 27.

relationships and the overall effect of cumulative errors.

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Figure 27: Rotated Description.

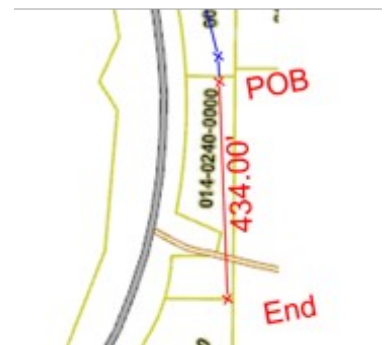


Figure 28: Parcel View

Looks much better. Zooming in on the parcel layer, Figure 28, the easement location, though not perfect, is more reasonable

This is strictly an office exercise and is not definitive of the correct location.

Easements

Because this is a Wisconsin Power and Light easement, it doesn't exist in isolation: one or more easements precede and follow it to form a continuous utility path.

Just like a property retracement, research is necessary to find other linked easement documents as well as investigation of physical evidence. Since there are no monument calls, bearings are only to nearest minute, distances to nearest foot, extrinsic evidence is needed. Utility poles and lines are secondary evidence - they are post-conveyance owing their existence to the original easement.

H. Closing Remarks

The seminar and this paper are not intended to be a definitive treatment of easements. The intent was to examine generally what easements are, estates involved, rights and restrictions, creation and termination, and some interpretation issues. Statutes and court decisions were included to reinforce the principles,

For greater detail and more examples refer to the following two tests:

Wisconsin Law of Easements and Restrictive Covenants, Ishikawa and Richards, Wis Bar Assoc

The premiere publication on easement law in Wisconsin. Mr. Ishikawa periodically presents at the WSLs Annual Institute.

Easements Relating to Land Surveying and Title Examination, Wilson, John Wiley & Sons

A very good detailed text on easements, although it does not address specifics in all states.

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