



Assembly Committee on Local Government

Public Hearing, January 12, 2022

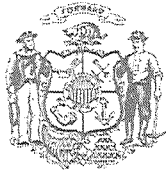
Assembly Bill 707

Testimony of State Representative Dave Murphy

Mr. Chair and members of the committee, thank you for hearing Assembly Bill 707 today.

Easements are a necessity for the existence of public utilities and other critical functions of the world we live in; however, due to an oversight in Wisconsin law, they must be renewed every 40 years. An expired easement may go unnoticed for years until a property is sold, resulting in delays and unnecessary complications. The simple solution our bill proposes is to allow easements to exist in perpetuity unless the parties involved write in a specific termination timeframe.

This bill eliminates unnecessary paperwork and ensures that property owners will not be surprised when they sell.



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*Testimony before the Assembly Committee on Local Government
State Senator André Jacque
January 12, 2022*

Chairman Novak and Committee Members,

Thank you for the opportunity to testify before you today in support of Assembly Bill 707, the Ease of Easements Act, creating an exception to the 40-year recording requirement for certain easements.

An easement is an interest in real property that gives someone the right to use another person's property. However, this right is not automatic, and under current Wisconsin law must be established in writing and recorded to be preserved. Further, access easements presently expire automatically after 40 years, unless renewed by re-recording the easements.

If not timely and properly re-recorded, an access easement would no longer be enforceable as originally intended. Property owners are generally unaware that the easements have expired because that typically requires a title examination to see what has – and has not -- been re-recorded. For property owners, sellers and buyers, it is a shock for an owner to discover the easement providing access to the property has expired just as the property is going to be sold to a purchaser.

Assembly Bill 707 creates a simple exception from the statute, as is enjoyed by conservation easements, utilities and railroads easements, and interests of political subdivisions. Critical real estate access easements establishing ingress and egress to property owners' land would be honored as written and would not require re-recording after 40 years to remain in effect as intended. The presumption should be if the parties did not include a termination timeframe in the access easement, then the easement continues in perpetuity unless otherwise negotiated.

Thank you for your consideration of AB 707.



To: Members, Assembly Committee on Local Government
From: Cori Lamont, Senior Director of Legal and Public Affairs
Tom Larson, Executive Vice President
Date: January 12, 2022
RE: AB 707/ SB 682 - 40-year Expiration of Access Easements in Wisconsin

The Wisconsin REALTORS® Association (WRA) supports AB 707, legislation eliminating a statutory expiration of access easements.

Issue

Under current Wisconsin law, access easements automatically expire after 40 years, unless renewed by re-recording the easements. Because most property owners are unaware of the re-recording requirements, these access easements will automatically expire, causing tremendous confusion and negatively impacting property values.

Background

An easement is an interest in real property that gives someone the right to use another person's property; a right that is not automatic and under current Wisconsin law must be established in writing and recorded to be preserved. Easements are executed for many different reasons including accessing landlocked parcels but also accessing waterfront and hunting lands.

To best preserve the rights of the owner of the property using the easement for access (the "benefited property") and provide public notice of the right to use the property the easement crosses over (the "burdened property"), the easement should be recorded with the Register of Deeds in the county where the property is located.

Current Wisconsin Law

- **To continue the effectiveness of an easement, another instrument must be timely recorded** expressly referring to the original easement ("re-recorded") **even if the original easement on its face says it never expires.** (Wis. Stat. § 893.33)
- Generally, under the law, **if an access easement, is not re-recorded** at the Register of Deeds office within a certain timeframe, **the interest is extinguished and unenforceable.**
- Certain interests are **not subject to the re-recording requirement**, such as interests of **utilities and railroads**, interests of **political subdivisions** and **conservation easements.**
- Purpose of Wis. Stat. § 893.33
 - Clean up title by eliminating old interests that create a cloud on title as a matter of law.
 - Reduce confusion by statutorily causing them to expire or result in other legal procedures to eliminate them from the title to a property.
 - Limits how far back title companies need to search in the records when preparing title commitments.

- History of the 40-year limit
 - **Until July 1, 1980**, the **requirement to re-record** was **every 60 years**. An easement had to be put of record at least every 60 years or it was no longer enforceable.
 - In the late 1970's, the **Wisconsin Legislature changed** the statute so that on **July 1, 1980**, the **60-year** re-recording period was **reduced to 40 years**.
 - Easements recorded on and after July 1, 1980 end after 40 years, unless properly extended.
 - Documents recorded between July 1, 1960 and June 30, 1980, appear to have the shortened period of 40 years for re-recording that ended June 30, 2020.

Severe Consequences for Real Estate Transactions

- **Property owners** are generally **unaware** the **easements have expired** because that typically requires a title examination to see what has – and has not -- been re-recorded.
- For property owners, sellers and buyers, it is a shock for an owner to discover the easement providing access to the property has expired just as the property is going to be sold to a purchaser.
- When the parties learn the 40-year on the easement has occurred and the easement no longer exists, the **surprised burdened property owner often asks for a lump sum of money, even though they believed the easement went on in perpetuity.**

Parties Should have the Freedom to Contract

- It is **against public policy** to have a **law automatically terminate** a previously **negotiated contract between two parties** simply because the agreement was not re-recorded after 40 years.
- **As with other contracts, state law should not override agreements between two private parties.**
- The **presumption should be if the parties did not include a termination timeframe** in the access easement, then the **easement continues in perpetuity.**

AB 707 provides

- An elimination of the re-recording requirement for access easements.
- An elimination of the 40-year statute of limitations for access easements.
- Recorded access easements continue in perpetuity unless the parties agree otherwise.

We respectfully request your support for AB 707.

Amendment to the Marketable Title Act

- I. Background on the Model Marketable Title Act
 - a. Wisconsin adopted its version of the Marketable Title Act in 1942.
 - b. The first states adopted a Marketable Title Act in 1963 with the purpose of liberating real property from ancient title defects.
 - c. The philosophy first surfaced in 1960 as property-owners across the country were having problems with ancient restrictions and easements on their property.
 - i. “No other remedial legislation which has been exacted or proposed in recent years for the improvement of conveyancing offers as much as the marketable title act. It may be regarded as the Keystone in the arch which constitutes the structure of a modernized system of conveyancing.” Prof. Lewis Simes, University of Michigan 1960
 - d. In 1990 the Uniform Law Commission created the Model Marketable Title Act.
 - e. Since then 18 states including all of the states that border Wisconsin have passed some version of the Model Marketable
 - i. Wisconsin’s version of the Marketable Title Act serves Wisconsin property owners by allowing them, their lenders, their insurers and their successors in title to ignore restrictions and covenants that have not been re-recorded for more than 40 years.
 - ii. That provision was reduced from 60 years to 40 years in 1980, with a legislative effective date of 2020, hence why we are here today.
 - iii. The Wisconsin Land Title Association engaged in substantial education on this issue statewide, even recording an educational video distributed by the Wisconsin Realtors Association.
 - iv. The WRA now asks for an amendment to the Marketable Title Act to allow easements and restrictive covenants to last forever.
 - v. Mr. Twist v. TJ Auto (2014 Court of Appeals Decision)
 1. The case terminated an easement because it had not been re-recorded within the statutory timeframe.
 2. The Mr. Twist court understood a potential solution:
 - a. The circuit court explained that if evidence of use were allowed the Mr. Twist easement would have survived.
 - vi. There is a better solution
 1. Of the states that have a Marketable Title Act, Wisconsin is the only one that prohibits enforcement of an easement or restrictive covenant based solely on the failure to record after the passage of time.
 2. All of the others contain this key language:

- a. **the use or occupancy of the easement area is actual, visible, open and notorious and so long as the use or occupancy of the easement area continues to be actual, visible, open and notorious.**
- b. This language is consistent with Wisconsin's other statutes related to use of property, as well as case law related to easements and adverse possession.
- c. Consistent with Mineral Rights Statute
 - i. Use or re-record (Wis. Stat. Sec. 705.057)
 1. Use or exploration for minerals
 2. Conveyance of mineral interest
 3. Property taxes paid on mineral rights
 4. Re-recording of the interest every 20 years
- d. This language allows for the continuation of the easement as long as there is evidence it is being used, even if it was not timely re-recorded.
- e. This language fixes the concerns of the WRA and keeps from opening a Pandora's box of consequences

II. Argument as to freedom of contract

- a. No contract is free from a Statute of Limitations in Wisconsin.
- b. The WRA argues that parties should be allowed to rely on their contracts for easements regardless of age.
- c. The 40-year Statute of Limitations without re-recording is far more forgiving.
- d. Wis. Stat. Sec. 402.725 provides a 6-year statute of limitations for contract.
 - i. "An action for breach of any contract for sale **must be commenced within 6 years after the cause of action has accrued.**"

III. Consequences to Wisconsin Real Property Owners

- a. The argument made by the WRA only considers the position of the benefitted property
 - i. The burdened property owner, the party across whose land the easement runs, suffers under this statute.
 - ii. That property owner has more valuable property once the easement is terminated.
 - iii. Both property owners have rights under the statute.
 - iv. This amendment prioritizes the rights of one over the other
- b. Old easements become effective again
 - i. The result is the easements that have been disregarded for as long as a century are suddenly revived.

- ii. Law of unintended consequences
- iii. The same owners who ask for this revision because they may lose a right, could have their property burdened with an easement that was disregarded generations ago
- iv. Constitutional issue of due process
 - 1. Burdened property owners
- c. Cost of title insurance policies
 - i. Significant increase to the amount of searching
 - ii. Policies could increase by hundreds of dollars
 - iii. Searches will have to go all the way back to patent
 - iv. With the marketable title act, searches are only required to go back 40 years
 - v. Availability of documents in counties
 - 1. There is no uniformity for Registers of Deeds in which documents are available online
 - 2. Counties changed over time
 - a. Brown County once included 8 counties, including for example Oneida
 - b. Would need to go to Brown County to search ancient records for property in other counties
 - vi. Legibility of ancient documents
 - vii. Access to government offices
 - 1. Many still with restrictions during the pandemic



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The Wisconsin Land Title Association would respectfully ask for a substitute amendment to AB 707.

This would DELETE the new exemption to the 40 year rule and instead create a new EXCEPTION to the statute of limitations in 893.33(6) which would extend the life of an easement if, when the statutory time period expired or expires, the use or occupancy of the easement area is "actual, visible and notorious" (which is language straight out of the bona fide purchaser statute in 706.09(2)(a)):

- *893.33 (6m) (b) An ingress and egress easement set forth in a recorded instrument if, when the time period set forth in 893.33(6) has expired, the use or occupancy of the easement area is actual, visible, open and notorious and so long as the use or occupancy of the easement area continues to be actual, visible, open and notorious.*

This means that if you are active in either keeping the paperwork up to date, or active in physically using your easement, that easement will in effect never expire. It has the added benefit of not causing any of the adverse effects that we have outlined today in our testimony.