

**Termination and Amendment  
of Easements;  
Enforcing Easements;  
Drafting Easements**

**Section IV**

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# Termination and Amendment of Easements

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## Overview

Nearly all jurisdictions hold that unless otherwise stated, an easement is a permanent interest and of perpetual duration. *Hunter v. Keys*, 229 Wis. 2d 710, 600 N.W.2d 269 (Wis. Ct. App. 1999).<sup>1</sup> Nonetheless, easements may be terminated in a variety of ways. The tidiest way to amend or terminate an easement is through an agreement of the parties, either at the time of drafting or afterward. However, even apart from the consensus of the parties, numerous judicial doctrines have been established that allow for the destruction or modification of these non-possessory interests in land when the parties act in a certain way or when the nature of the easement or the easement property itself has changed in significant ways. Wisconsin courts, to the extent that they have addressed the issue of easement termination, tend to follow the majority position on these doctrines. Accordingly, this section on easement termination will be reminiscent of a first year property lecture.

### A. Termination by the Parties

The parties to an easement may agree to provide for the easement's termination. This can be done either prospectively by defining the easement's term at the drafting stage or subsequently by an amendment or agreement between the dominant and servient owners to terminate the easement.

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<sup>1</sup> Restatement of the Law (Third) Property: Servitudes § 4.3.

## 1. Prospective Termination of Easement

### a. Term of Years

The duration of an easement may be limited by providing that the easement endure for a specific term of years. Such an easement is often called a lease or an easement lease, though such a term is probably not appropriate for a non-possessory interest. The grant of an easement for a specific term of years has been recognized in Wisconsin. See *Chicago, M. & St. P. R. Co. v. H.W. Wright Lumber Company*, 123 Wis. 46, 100 N.W. 1034 (1904) (enforcing a provision in the easement agreement limiting the term of the easement to ten years).

### b. Defeasible Easements

The duration of an easement may also be limited by creating a defeasible easement. There are two types of defeasible easements: an easement determinable and an easement subject to condition subsequent. An easement determinable triggers an automatic reverter on the occurrence of a specified event, while an easement that is subject to a condition subsequent terminates only when the owner of the servient estate reenters the easement property or takes some affirmative act giving notice of reentry upon the occurrence of a specified event. There is no Wisconsin case explicitly recognizing such easements by name. Nonetheless, Wisconsin does recognize determinable fees and fees subject to condition subsequent, Wis. Stat. § 700.02, and most other jurisdictions acknowledge the existence of these types of easement interests. See *Higdon v. Davis*, 315 N.C. 208 (1985), *Lincoln v. Narom Development Co.*, 10 Cal. App. 3d 619 (1970), *Erie Haven, Inc. v. First Church of Christ*, 155 Ind. App. 283 (1973), *Sentell v. Williamson County*, 801 S.W.2d 220 (Texas Court of Appeals, Austin 1990).<sup>2</sup> Furthermore, although Wisconsin courts have never used the terms “easement determinable” or “easement subject to condition subsequent,” there are Wisconsin cases recognizing provisions that terminate the easement upon the occurrence of a specified event. In *Chicago, M. & St. P. R. Co. v. H.W. Wright Lumber Company*, supra, the court enforced a provision providing that the easement was to terminate the earlier of ten years from commencement or the cutting of timber on the property. Also, in *Harmony Antique Cars, Inc. v. LSH, Inc.*, 2000 WI App 186, 238 Wis. 2d 447, 617 N.W.2d 907, the Court of Appeals acknowledged the validity of an easement provision that specified the right of way would terminate when the dominant owner removed a radio communications tower from its property.

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<sup>2</sup> Defeasible easements also find support in the Third Restatement. See Restatement of the Law (Third) Property: Servitudes § 7.1.

Accordingly, Wisconsin courts seem to be in accord with the majority of jurisdictions recognizing defeasible easements.

*c. Caveat Scriptor!*

Although it may seem a simple enough matter to draft an easement that is to terminate on the occurrence of a specific event, readers should be aware that an infelicitous ambiguity in drafting can have significant effect on the duration of the easement. In *Harmony Antique Cars, Inc. v. LSH, Inc.*, supra, the owner of two adjacent parcels conveyed one of the parcels and in the conveyance instrument reserved an easement stating:

“Grantor reserves a right of way for a guy wire and associated hardware in its present location until such time as grantor, their heirs or assigns, remove the radio communications tower located on grantor’s adjoining property.”

The grantor’s successor removed the radio tower, replaced it with a new tower at a different location on the property, and ran the guy wire across the servient estate along a different path than the original wire. The servient owner claimed that the easement was terminated when the original tower was removed and the location of the tower and guy wire path changed. The court of appeals rejected the servient owner’s argument and held that the phrase “present location” referred only to the location of the right of way and “was not part of the phrase describing when the easement lasts ‘until’”. *Idem* at 5. The court also found that the phrase “until such time as grantor remove the ... tower” was ambiguous. It stated that the phrase “might reasonably be read as referring to the removal of the specific original tower or it might reasonably be a way of referring to a time at which no radio tower is maintained on the property.” *Idem* at 6. Faced with this perceived ambiguity in the language of the document, the court appealed to extrinsic evidence of the intent of the parties. The result was that the court imposed what it thought to be a “reasonable term,” namely, that the easement would exist so long as there was a tower on the property.

This case serves as an example and warning to the drafter of a defeasible easement instrument (and contracts generally). What may seem clear to the drafter at the time of drafting may be deemed ambiguous in the enforcement context. When specifying the event that is to trigger defeasance, the prudent drafter should take pains to be precise about which exact conditions will trigger the forfeiture. It is also advisable, to the extent possible, to set forth in recitals the intentions of the parties and the ends desired to be achieved by the defeasance provisions.

Otherwise, one risks having the term of the easement set by the court and possibly enduring perpetually.

## 2. Subsequent Agreement by the Parties

When the parties fail to express the term of the easement in the instrument itself, it is nonetheless possible for the easement to be amended or terminated by an agreement of the parties. The easement instrument itself may even set forth procedures for modifying the easement agreement. For example, in a case where there are numerous parties to an easement, it is common for the easement instrument to provide that the agreement may be amended by a majority of the parties. As with contracts, the terms of the agreement may be modified as agreed upon by the parties,

It should be noted, however, that because an easement is an interest in land, an agreement amending or terminating such interest is subject to the statute of frauds, Wis. Stat. § 706.02, and must be in writing. *Negus v. Madison Gas & Electric Co.*, 112 Wis. 2d 52, 331 N.W.2d 658 (Wis. Ct. App. 1983). Furthermore, if the amendment is to be binding upon bona-fide purchasers of property subject to the easement, it must also be recorded.

## 3. Other Means of Terminating an Easement

In addition to prospective and subsequent agreement of the parties, easements may also be terminated in other ways, sometimes unbeknownst to and against the will of the party holding the easement. At this point it should be mentioned that while the law is generally established that the following methods of terminating easements constitute separate doctrines, it is worth pointing out that in certain circumstances, an easement may be adjudged terminated based on multiple theories. In such circumstances it is often the case that the court will fail to clearly set forth which theory is being relied upon. In the case of abandonment, for example, it is well recognized that “judicial opinions commonly contain loose assertions about the concept of abandonment, or blend abandonment law with principles of prescription and estoppel.”<sup>3</sup> Similarly, the distinction between the doctrines of cessation of purpose and end of necessity is often blurred. *Niefeldt v. Evans*, 272 Wis. 362, 75 N.W. 2d 307 (1956). Nonetheless, the following doctrines do constitute separate methods of easement termination and the property lawyer should be aware of these distinctions and possess all of them in his arsenal of arguments should the need arise.

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<sup>3</sup> Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land*. (West Group, 2001 ed., and Supplement 2002), § 10:18.

### a. *Abandonment*

An owner of an easement may also terminate the easement by abandoning it. In order to abandon an easement, the owner must cease from using the easement and take some additional affirmative act manifesting his intent to abandon the easement rights. "It is well settled that in order to constitute an abandonment of property there must be a relinquishment coupled with an intent to part with it permanently" *State v. Murray*, 195 Wis. 657, 219 N.W. 271 (1928). Thus, though nonuse is a necessary prerequisite for abandonment, it alone is not a sufficient condition for abandonment. "Nonuse does not of itself constitute abandonment no matter how long continued." *Burkman v. City of New Lisbon*, 246 Wis. 547, 18 N.W. 2d 4 (1945) (citing Restatement, 5 Property, § 504, comment d.) Typically, there must be "some affirmative act" in addition to nonuse indicating that the easement holder intends to abandon the easement. *Sabados v. Kiraly*, 258 Pa. Super. 532, 393 A.2d 486 (Pa. 1978). Courts will, however, consider nonuse as evidentiary of an intent to abandon when such nonuse is coupled with other circumstances.

As one might guess, the issue that is usually at the heart of the controversy in cases alleging termination by abandonment is whether the conduct of the easement holder was such as to evidence an intent to permanently abandon the easement. Although intent is a factual question and thus peculiar to the circumstances of the case, past actions that have been held to evidence intent to abandon are instructive. For example, in *Stenz v. Mahoney*, *supra*, a right of way easement existed over a joint stairway between two adjacent building owners. When one owner insisted that the stairway, which encroached upon his property, be moved, the court found that this act manifested that owner's intent to abandon the easement over the staircase. Intent to abandon has also been found to be manifested where the dominant owner extended his building to block the driveway easement *Haskell v. Borschowa*, 532 P.2d 14 (Or. 1975), and also where the holder of an appurtenant right of way lowered the street grade on his own parcel so as to make use of the easement impossible *Fletcher v. Stapleton*, 10 P.2d 1019 (Cal. Ct. App. 1932).

It is worth mentioning here that oral or written express intent to abandon an easement does not generally qualify as the sort of affirmative act required to prove abandonment. The reason for this is that such an express communication of intent would constitute a release rather than an abandonment.<sup>4</sup> Of course, the result in

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<sup>4</sup> Restatement of the Law (Third) Property: Servitudes § 7.4. comment a.

such a case would be the same, *i.e.*, the termination of the easement, if the release be writing and properly recorded.

***b. Renunciation or Release***

An easement is terminated when the easement holder releases all his rights under the easement to the servient owner. An easement “may be extinguished by renunciation of the party entitled to it.” *Stenz v. Mahoney*, 114 Wis. 117, 89 N.W. 819 (1902). This may be in the form of a deed conveying back the easement rights to the servient parcel, or simply by giving notice to the servient owner that he is releasing the easement rights. Again, because the an easement is an interest in land, the notice to release the easement must satisfy the statute of frauds. Otherwise, the release will not be binding, though it may count as evidence that the easement holder abandoned the easement. Moreover, the release should likely be recorded so as to give notice that the easement has been extinguished.

It should be noted that in the case of so called “mutual easements,” the release of both parties is required to destroy the easement rights as to both parties. In these cases where multiple parties may have a right of way over a single easement area, there are technically multiple, separate easement interests, one belonging to each party. Accordingly, the unilateral release of the easement by one party does not destroy the other party’s easement rights. *Wausau Theatres Company v. Genrich*, 251 Wis. 454, 29 N.W. 2d 502 (1947).

***c. Cessation of Purpose or Changed Conditions***

Easements are frequently created to suit a specifically defined purpose. At common law, when the underlying purpose of such an easement ends, the easement itself is destroyed. *American Oil Co. v. Leaman*, 199 Va. 637, 101 S.E. 2d 540 (Va. 1958) The rationale for this is to eliminate obsolete burdens upon the land. Furthermore, the doctrine of cessation of purpose is derivative of the judicial wish to give effect to the intent of the parties in that it assumes that the parties would not intend the easement to outlast the purposes for which it was created. Thus, the judicial analysis under this doctrine involves first, the determination of the easement’s purpose and second, the finding that the purpose is no longer viable. It should be noted that whether a purpose is no longer viable is distinct from the question whether the parties still make use of the easement, since an easement may still be viable for its intended use in spite of the fact that no one uses it. *First Nat’l Bank v. Konner*, 373 Mass. 463, 367 N.E. 2d 1174 (1977). Moreover, the cessation of purpose doctrine is distinct from abandonment in that it

does not require any affirmative act or intent to abandon on the part of the easement holder.

The doctrine of cessation of purpose is also akin to, but distinct from, the doctrine that an easement of necessity ends when the necessity giving rise to the easement ends. Although sometimes courts will speak as if the doctrines are one and the same, properly speaking, termination by cessation of purpose is distinct from termination of an easement by necessity upon disappearance of the necessity giving rise to the easement. The distinction lies in the fact that the doctrine of necessity 1) only applies to easements created by necessity and 2) focuses on the need for the easement rather than the purpose of the easement, which purpose may or may not be grounded on equitable necessities. See *Millen v. Thomas*, 201 Wis. 2d 675, 550 N.W. 2d 134 (Wis. Ct. App. 1996), distinguishing between the two methods of terminating easements.

#### *d. Misuse*

If an easement holder misuses the easement, the remedy available to the servient owner is typically an injunction against such misuse. However, an easement may also be terminated by excessive or improper use of the easement. Since courts disfavor the forfeiture of easements, *Luttrupp v. Kilborn*, 186 Wis. 217, 222, 202 N.W. 368 (1925), it is usually difficult to show that the easement has terminated because of misuse. It is generally held that in order to justify the forfeiture of an easement by misuse, “the misuse must be willful and substantial, and such that it cannot be separated from that which is permitted.” *Vieth v. Dorsch*, 274 Wis. 17, 79 N.W. 2d 96 (1956). For example, in the leading case, *Crmins v. Gould*, 149 Cal. App. 2d 383 (Cal. Ct. App. 1957), the easement holders extended the existing, private right of way to a public street and dedicated that extended portion to the public. The court found that the easement holders’ valid use of the right of way had become inseparable from the excessive misuse by the public and that the easement was thus extinguished from the misuse. Admittedly, such cases where it is impossible to separate the valid use from the misuse are rare, but nonetheless this rule is acknowledged in most jurisdictions and can be useful to the servient owner in such situations.

#### *e. Merger*

An “easement is generally extinguished when the dominant and servient estate come under the same ownership.” *Millen v. Thomas*, supra at 679. The reason for this is that an easement is an interest in land in possession of another and “this prerequisite situation ceases to exist when the owner of an easement in

gross becomes the owner of the servient tenement or when the dominant and servient tenements of an appurtenant easement come into the same ownership.” *Kallas v. B&G Realty*, 169 Wis. 2d 412, 485 N.W. 2d 278 (Wis. Ct. App. 1992) (quoting 3 R. Powell & P. Rohan, *Powell on Real Property* para. 425 at 34-274 to 34-275 (1991 rev.)). Furthermore, when an easement is destroyed by merger, the easement is not resurrected when the owner conveys what used to be the dominant tenement. In order to create such an easement, the grantor would have to specifically grant it anew. *Kallas*, supra at 420.

#### *f. Estoppel*

An easement may also be terminated or modified when the servient owner substantially and detrimentally changes his position in reasonable reliance upon the conduct or communication of the easement holder that the easement holder intended to terminate or modify the easement. The doctrine of estoppel is distinct from renunciation or abandonment in that the doctrine requires action by the owner of the servient estate. Moreover, estoppel is used chiefly as an equitable means of preventing injustice resulting from justified reliance and courts will only modify or terminate an easement to the extent that justice demands. Thus, an action for termination or modification by estoppel may result in only a partial termination of the easement or possibly only a temporary extinguishment or suspension of an easement, if that is all that a court deems required to prevent the injustice resulting from reliance. See *Baptist Church in the Great Valley v. Urquhart*, 406 Pa. 620, 178 A.2d 583 (Pa. 1962), where the court modified the easement to the extent necessary to prevent unreasonable harm, and *Stueck v. G. C. Murphy Co.*, 107 Conn. 656, 142 A. 301 (Conn. 1928), allowing the temporary suspension of easements.

#### *g. Prescription*

Easements may also be terminated by prescription. This requires the adverse use of the easement by the servient owner. This immediately presents a significant distinction from the creation of an easement by prescription. Namely, in the case of extinguishing an easement by prescription, the adverse use is by someone who already has the right to possession of the property adversely used. One must recall that a servient owner has the right to make full use of the easement property so long as it does not unreasonably interfere with the rights of the easement holder. *Wisconsin Tel. Co. v. Reynolds* 2 Wis. 2d 649, 652, 87 N.W.2d 285 (Wis. 1958). Thus, in order to constitute prescription of the easement, the servient owner must not only use the easement property but the use must also constitute an unreasonable interference with the rights of the dominant owner. The

adverse user's use of the land must generally be that required of an adverse possessor, *i.e.*, it must be open, notorious, visible, exclusive, hostile and continuous. However, the adverse use required to destroy an easement by prescription is distinct from the action of the adverse possessor in that an easement is not a possessory interest and the conduct of the user need not be such as to give notice of an intent to possess. Rather, it must give notice of the servient owner's intent to destroy the easement by interfering with the easement's use. The question of what sort of use constitutes such unreasonable interference is a question of fact but acts such as blocking a right of way with trees, boulders, walls, buildings, or other similarly permanent obstacles to use of the easement all are sufficient to constitute adverse use for destroying an easement by prescription, *Simpson v. Fowles*, 536 P.2d 499 (Or. 1975), *Desotell v. Szczygiel*, 338 Mass. 153, 154 N.E. 2d 698 (1958), *Glatts v. Henson*, 31 Cal. 2d 368, 188 P.2d 745 (Cal. 1948).

Thus, the adverse user's use of the land must generally be that required of an adverse possessor, *i.e.*, it must be open, notorious, visible, exclusive, hostile and continuous. The adverse use required to destroy an easement by prescription is distinct from the action of the adverse possessor in that an easement is not a possessory interest and the conduct of the user need not be such as to give notice of an intent to possess. Rather, it give notice of the servient owner's intent to destroy the easement by interfering with the easement's use.

#### *h. Sale to Bona Fide Purchaser*

Wisconsin's race-notice statute, Wis. Stat. § 706.08(1)(a), provides that "every conveyance that is not recorded as provided by law shall be void as against any subsequent purchaser, in good faith, and for a valuable consideration, of the same real estate or any portion of the same real estate whose conveyance is recorded first." Thus, a "purchaser of land without knowledge or actual or constructive notice of the existence of an easement takes title to the same relieved of the burden or charge of the easement." *Schwab v. Timmons*, 224 Wis. 2d 27, 43, 589 N.W. 2d 1 (Wis. 1999). This applies to express easements as well as to easements created by necessity or otherwise. In *Backausen v. Mayer*, 204 Wis. 286, 234 N.W. 904 (1931), the plaintiff purchased a parcel that was servient to an easement of necessity. The easement was not recorded and plaintiff had no notice, actual or constructive, that the easement was there. The Court held that the plaintiff took the land "free and clear of the burden of the easement unless he had knowledge or notice, actual or constructive, of the existence of this way of necessity." at 290. Thus, the easement was extinguished upon the sale to the bona fide purchaser. Though this seems to be a rather harsh result, it is required by the language of the recording statute and the case is still good law and has been

recently acknowledged by the supreme court. *Schwab v. Timmons*, supra. Accordingly, easement holder whose easement has been created by necessity or prescription should make sure to record an affidavit regarding the ownership of such easement.

### **Suggested Reading**

Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land*. (West Group, 2001 ed., and Supplement 2002).

Restatement of the Law (Third) Property: Servitudes (2000).

# Enforcing Easements

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## Overview

While Wisconsin law is fairly straightforward in outlining the remedies available to an easement holder, the enforcement-related issue of an easement's scope crops up repeatedly in the prevailing case law. This issue has given rise to a good many problems in easement enforcement, and so merits special attention in these materials. In addition, parties considering an easement are well advised to consider tailoring an appropriate area of stipulated remedies beyond those typically offered by the state's common law. Accordingly, after reviewing the general common law remedies available to easement holders, these materials will consider some of the issues involved in determining the enforceable scope of an easement, and then turn to drafting solutions that can help an aggrieved party enforce the obligation that is central to his bargain.

### A. Remedies

#### 1. Legal Remedies

##### a. *Damages for Loss of Use*

An easement holder is entitled to recover the actual damages that result from losing the use of an easement. *Weller v. Heimbruck*, 145 Wis. 217, 129 N.W. 1067 (Wis. 1911). In *Weller*, the owner of a servient estate erected a gate and prevented the owner of the dominant estate from driving stock over the access easement to his pastures. At trial, the court awarded the plaintiff easement owner monetary damages resulting from the "loss of use of the land and loss of crops and pasturage" suffered as a result of being deprived his rights under the easement. On appeal, the servient owner argued that the plaintiff was entitled only to the difference between the rental value of his land with the right of way open and the rental value of the land with the right of way closed. The court held that while difference in value might be an appropriate remedy if the easement holder had kept the dominant estate for rent, it was inappropriate when the easement holder used the dominant estate himself. Accordingly, the court affirmed the trial court's decision and held the easement holder "entitled to such damages as naturally and

proximately resulted from the act complained of, and such as would fairly and reasonably compensate him for the wrong which he suffered.”

*b. Damages for Failure to Pay Financial/Maintenance Obligations*

A claim for damages may also arise out of the failure to fulfill certain maintenance or financial obligations under an easement. Absent any agreement to the contrary, the owner of a servient estate has no duty to repair or to maintain easement property. *Koch v. Hustis*, 113 Wis. 599, 87 N.W. 834 (Wis. 1902). On the contrary, unless otherwise provided in the pertinent easement instrument, “the holder of an easement must repair the easement.” *Shanak v. City of Waupaca*, 185 Wis. 2d 568, 584, 518 N.W. 2d 310 (Wis. Ct. App. 1994). This duty is not contractual, nor does it sound in tort, but rather “arises out of the relationship between the parties as easement holder and landowner.” *Id.* at 586.

An easement holder who fails to fulfill the duty to repair an easement can be held liable for damages to the servient estate resulting from that failure. In *Shanak*, the City of Waupaca held a right of way permitting a city street to pass over a dam and waterway. The owner of the servient estate operated a hydroelectric facility using water from the dam. When part of the dam fell into disrepair, it disturbed waterflow to the degree that it adversely affected use of the hydroelectric facility. The court of appeals held that the city, as easement holder, had a duty to maintain and repair the dam. The court also held the city liable to the owner of the servient estate for damages resulting from the breach of that duty, declaring the servient owner entitled to recover “damages incident to the repairs, such as loss of electric power, damage to their hydroelectric equipment while the pond was drawn down, and loss of business profits caused by the drawdown.” *Id.* at 586.

Having mastered the general rules summarized above, however, readers should recognize that equity may sometimes compel the owner of a servient estate to contribute to the costs of maintaining an easement. In *Falk Corp. v. Ryan*, 1995 Wisc. App. LEXIS 1308 (unpublished opinion), the Wisconsin Court of Appeals considered an easement instrument that addressed liability for the costs of snow removal incurred to clear a parking easement area, but that failed to address other maintenance concerns. Citing an Iowa Supreme Court decision, the court in *Falk* noted that, in cases where “the easement is used equally for the benefit of both [a dominant and a servient estate], equity allows the costs of maintenance of a right of way to be apportioned between the owners of the two estates.” *Id.* at 14. Other jurisdictions have also endorsed this exception to the general rule in those situations where the owners of a dominant and a servient estate share use of an

easement area. *See, e.g., Bowen v. Buck & Fur Hunting Club*, 217 Mich. App. 191, 550 N.W. 2d 850, (Mich. Ct. App. 1996); *Larabee v. Booth*, 463 NE. 2d 487 (Ind. Ct. App. 1984); *Barnard v. Gaumer*, 146 Colo. 409, 361 P.2d 778 (Colo. 1961).

## 2. **Equitable Remedies.**

### a. *Injunction.*

While equitable remedies are generally available only when no adequate legal remedy exists, certain recurrent situations may make such equitable remedies available to easement holders. When the owner of a servient estate frequently and persistently interferes with an easement holder's rights, for example, the appropriate remedy for the owner of the dominant estate may be a suit at equity seeking injunction. *Fritsche v. Fritsche*, 45 N.W. 1089, 77 Wis. 270 (1890).

### b. *Ejectment.*

While injunction may sometimes be permitted, ejectment is not an appropriate remedy against a servient owner's obstructing an easement. This is because ejectment is an action brought to remove someone in *wrongful* possession of the land. Because an easement is a non-possessory interest in the servient estate, an easement holder has no possessory rights over the servient estate, and the owner of the servient estate thus cannot be said to wrongfully possess the same. *Shearer v. Congdon*. 25 Wis. 2d 663, 131 N.W. 2d 377 (Wis. 1964). Consequently, no "action of ejectment will lie to recover a mere right of way." *City of Racine v. Crotsenberg*, 61 Wis. 481, 485, 21 N.W. 520 (Wis. 1884); *see also Fritsche v. Fritsche, supra* (holding ejectment improper against the servient owner).

### c. *Alteration of Existing Easement.*

Wisconsin courts have also considered whether altering a grant of easement may be permitted as an equitable remedy, and have in some circumstances taken the step of redelineating the extent of an easement property. In *Atkinson v. Mentzel*, 211 Wis.2d 628, 566 N.W.2d 158 (Wis. Ct. App. 1997), for example, the language of an easement grant failed to describe the exact location of an access easement. The court of appeals held, however, that, where the parties disagreed as to the location of the easement, the court had the power to define and expand the easement property to assure that the easement owner would have reasonable and proper enjoyment of the pertinent easement right.

### 3. Self Help.

Although not technically a court-awarded remedy, self-help is often the most efficient method of enforcing easement rights. Wisconsin courts do permit such action in the case of rights of way. In *Eckendorf v. Austin*, 239 Wis. 2d 69, 619 N.W.2d 129 (Wis. Ct. App. 2000), for example, the court of appeals held that an easement holder had acted lawfully in removing a neighbor's tree that blocked the dominant owner's use of the pertinent easement. Likewise, in *Johnson v. Borson*, 77 Wis. 593 (1890), the Wisconsin Supreme Court held that a servient owner's obstructing a dominant owner's way of necessity at a specific point on the servient estate would justify the dominant owner's crossing the servient owner's land at another location.

#### B. The Role of Scope in Enforcement

"The owner of property subject to an easement may make all proper use of his land including the right to make changes in or upon it, nevertheless such owner may not unreasonably interfere with the use by the easement holder." *Wisconsin Tel. Co. v. Reynolds* 2 Wis. 2d 649, 652, 87 N.W.2d 285 (Wis. 1958).

Enforcing an easement generally involves two steps. First, the scope and extent of the easement must be determined. The scope of an easement depends chiefly on the purpose intended for the easement at the time of granting. Second, enforcement turns on whether the owner of the servient estate is interfering with the easement holder's reasonable enjoyment of the easement rights. Although some interference is permissible, actions that unreasonably interfere with the easement holder's enjoyment are prohibited, and such action may be enjoined.

In cases where an easement arises under a written instrument, a court will first look to the language of the instrument to determine the scope of the easement. The instrument's construction is a question of law and will be done by the court. *Eckendorf, supra* at 75. Generally speaking, "it is the purpose stated in the grant that defines the easement's reasonable use." *Id.* "The use of the easement must be in accordance with and confined to the terms and purposes of the grant." *Hunter v. McDonald*, 78 Wis. 2d 338, 342, 254 N.W.2d 282 (Wis. 1977). The purposes stated in the written easement (*e.g.*, access, parking, placement of temporary improvements, encroachment, and so forth) will thus determine the rights of the easement holder. As long as the use is in accord with the purpose of the easement, the easement "grant gives the grantee all rights that are incident or necessary to the

reasonable and proper enjoyment of the easement.” *Hunter v. Keys*, 229 Wis. 2d 710, 600 N.W.2d 269 (Wis. Ct. App. 1999).

The precise language of an easement’s granting is central to determining the purpose and scope of the easement. In *Atkinson v. Mentzel*, 211 Wis.2d 628, 566 N.W.2d 158 (Wis. Ct. App. 1997), for example, the owner of a dominant estate brought suit to determine the scope and extent of an easement created “to provide access from Lake Shore Drive to the following described real property and [to] allow access for all uses of said property other than retail sales.” The dominant owner claimed that the easement permitted him to have utility access on the servient estate. The court agreed, reasoning that, since the term used in the easement was “access” and not “ingress or egress,” the contemplated rights of access were not limited merely to ingress and egress. The court also noted that the only type of access restricted by the key granting clause was access related to retail sales, and so concluded that the easement holder was not precluded from enjoying utility access or from installing the requisite utility lines.

It surely bears noting, however, that the Wisconsin Court of Appeals construed the purposes of another, seemingly similar easement quite differently in *Hunter v. Keys*, 229 Wis. 2d 710, 600 N.W.2d 269 (Wis. Ct. App. 1999), denying the holder of an access easement the right to install utility cables. In *Hunter*, a servient estate owner asked the court to consider the extent and scope of an access and egress easement and to enjoin a dominant owner from pursuing any road construction or utility installation in the agreed easement area. The court of appeals reiterated the well-worn principle that “the owner of an easement may make changes in the easement for the purpose specified in the grant as long as the changes are reasonably related to the easement holder’s right and do not unreasonably burden the servient estate,” and predictably concluded that building a road over the easement area was both reasonably related to the easement’s purpose not an unreasonable burden upon the servient estate. The court also held, though, that, as the written terms of the pertinent easement instrument did not expressly recite a purpose to include utility access, the easement holder had no right to install utilities on the easement property.

As should be clear from these cases, the purposes of the easement will be of great consequence in determining the exact rights granted to the easement holder. This places obvious demands on the drafter of the easement to be clear about just what uses are to be granted. Nonetheless, as stated above, determining the scope of the easement is only one part of enforcement. The second step examines whether a servient owner’s activity unreasonably interferes with the easement holder’s use of an easement.

A servient owner's use of an easement estate is limited by the rights of the easement holder. Generally speaking, the servient owner may make "all proper use of his land[,] including the right to make changes in or upon it," but "may not unreasonably interfere with the [easement area's] use by the easement holder." *Hunter v. McDonald*, *supra* at 344. This means that the servient owner's duty is defined "in terms of protecting the easement holder's rights to use the easement for the purpose for which it was created." *Id.* Thus, a court determining an easement's scope will examine whether a particular activity unreasonably interferes with the intended scope of the easement.

What constitutes an unreasonable interference is usually a question of fact. Accordingly, general rules about what sorts of interference will be considered unreasonable are difficult to state reliably. In Wisconsin, however, several leading cases help to provide some basic examples of what courts judge to be unreasonable interference.

Generally, a physical obstruction in a right of way will amount to unreasonable interference with the enjoyment of the dominant owner's rights. In *Eckendorf*, *supra*, for example, a court found unreasonable interference in a tree on the easement property that had branches obstructing the pertinent right of way. In this situation, the court authorized the dominant estate's owner to remove the tree.

While a tree might in such circumstance rise to the level of an unreasonable interference, a gate across a right of way may not. In *Whaley v. Jarrett*, 69 Wis. 613, 34 N.W. 727 (Wis. 1887), then, the court declared that a "grant of way across one's land does not imply that it is to be open and free from gates, unless the nature of the use to which it is to be applied indicates thereby that it should be open and unobstructed." Thus, unless the terms of the easement so indicate, reasonable gates—ones that may be opened with ease—may block a right of way.

Grading and excavating the land subject to a utility easement can unreasonably interfere with the easement holder's rights. In *Wisconsin Tel. Co. v. Reynolds*, 2 Wis. 649, 87 N.W.2d 285 (Wis. 1958), a property owner's contractor was excavating the ground above a utility easement where the telephone company's utility conduit was located. The telephone company requested that, when the excavation reached a certain point, the contractor notify the company so that the company could assist the contractor and thus avoid damaging the conduit. The contractor proceeded to excavate without the assistance of the company and

severed the conduit. The court stated that the contractor's careless excavation of the land unreasonably interfered with the company's rights under the easement.<sup>1</sup>

It also bears noting that prohibited unreasonable interference with an easement right need not be in the form of an actual, physical encroachment upon an easement area. In *Hunter v. McDonald, supra*, the owner of a servient estate attempted to slow traffic in an easement area by erecting metal stakes and rock structures adjacent to, but not upon, the right of way. The metal stakes prevented the easement holder from using the right of way without damaging the holder's large vehicles. Under these circumstances, the Wisconsin Supreme Court found that, even though there was no physical encroachment upon the easement area itself, the servient estate owner's structures nonetheless unreasonably interfered with the dominant owner's use of the easement. Accordingly, the court upheld an injunction requiring the servient owner to keep clear a two foot area on either side of the easement.

It is also the case that interference with an easement holder's rights may be found unreasonable even when the interference is only for a short time. In *Lintner v. Augustine Furniture Co.*, 199 Wis. 71, 225 N.W. 193 (Wis. 1929), the plaintiff owned a private right of way easement through an alley. The defendant's dominant estate consisted of a restaurant adjacent to the alley, which alley the dominant owner used to receive truck shipments to the restaurant's back door. The servient owner claimed that the dominant owner's trucks blocked the right of way when they stopped to deliver supplies four to five times a day. The court found that the truck deliveries did unreasonably interfere with the enjoyment of the right of way. "[T]he fact that the damage sustained by [servient owner] by each interference with his right to use this right of way is so small," the Court observed, should not preclude an injunction tailored to protect the servient owner's rights. Accordingly, the court enjoined the dominant owner from receiving truck deliveries blocking the servient owner's right of way.

### **C. Drafting for Remedies**

In addition to the common law remedies mentioned above, it is also possible—indeed, advisable—to include suitable remedies in the governing easement instrument. Generally speaking, there are two ways to provide for remedies. First, the drafter may create suitable covenants and stipulate remedies for the breach of such covenants. While these would technically be restrictive

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<sup>1</sup> It should be noted that the damage award in this case was grounded not on the basis of the violation of easement rights but on the trespass to personal property that occurred when the conduit was destroyed.

covenants running with the land, this is akin to the approach that views the easement agreement as a contract for performance between the parties. Second, a drafter may make the easement interest in land a defeasible interest such that the easement may terminate under certain conditions. This is more in keeping with the view that an easement is not a contract for performance between two parties but rather a property interest in land, creating independent obligations upon those who own the servient and dominant estates. *Shanak v. City of Waupaca*, supra at 586.

### **1. Breach of Covenant.**

It is possible to provide covenants in the easement agreement and stipulate remedies for the breach of such covenants. For example, in the case of one estate owner's covenant to maintain an easement area by removing snow and ice from a parking lot or right of way, the easement agreement—in addition to the obvious right to self-help—might provide the other estate's owner a lien on the property of the first to secure all maintenance costs incurred as a result of the first's failure to perform agreed maintenance obligations. Although there is no Wisconsin case law discussing the creation of a lien on an estate through an easement instrument, liens generally may arise by contract and may be enforced if the amount secured is reasonably specified in the pertinent lien provision. *Feest v. Hillcrest Cemetery, Inc.*, 247 Wis. 160 (Wis. 1945).

Another possible stipulated remedy, perhaps most useful in the context of a shared right of way or parking easement, is the right to eject the breaching party and prevent his use of the easement property for the duration of his breach. As noted above, the remedy of ejectment is not available at common law against a servient owner; the servient owner has the right to possess the burdened easement area while the easement holder does not. If, however, a servient owner consents to such a restriction on the right to possess the servient estate, this predicate falls away. While no reported Wisconsin case upholds the validity of a contractual right to eject the owner of a servient estate, such a remedy seems logically consistent.

### **2. Defeasance**

An alternate remedy is defeasance—whether defeasance on a determinable estate or defeasance subject to a condition subsequent. An easement determinable triggers an automatic reverter on the occurrence of a specified event, while an easement that is subject to a condition subsequent terminates only when the owner of the servient estate reenters that estate or takes some affirmative act giving notice of reentry upon the occurrence of a specified event. Although there is no Wisconsin case recognizing such easements, Wisconsin does recognize

determinable fees and fees subject to condition subsequent, Wis. Stat. § 700.02, and most other jurisdictions acknowledge the existence of these types of easement interests. See *Higdon v. Davis*, 315 N.C. 208 (1985), *Lincoln v. Narom Development Co.*, 10 Cal. App. 3d 619 (1970), *Erie Haven, Inc. v. First Church of Christ*, 155 Ind. App. 283 (1973), *Sentell v. Williamson County*, 801 S.W.2d 220 (Texas Court of Appeals, Austin 1990). Defeasible easements also find support in the Third Restatement. See Restatement of the Law (Third) Property: Servitudes § 7.1.

In either form, a defeasible easement triggers defeasance as the remedy for an easement holder's failure to perform its obligations. Thus, an easement may provide for defeasance upon a party's failure: to maintain or construct the right of way, *Lincoln v. Narom Development Co.*, 10 Cal. App. 3d 619 (1970); to pay a lump sum by a certain date, *Dees v. Colonial Pipeline Company*, 266 N.C. 323 (1966); to pay an annual fee, *Akasu v. Power*, 325 Mass. 97 (Mass.1950); to duly observe a condition prohibiting the expansion of loading docks, *Jabour v. Toppino*, 293 So.2d 123 (Fla. Dist. Ct. App. 1974); or to properly observe a condition regulating a building's enlargement, *Eis v. Meyer*, 213 Conn. 29 (1989). Accordingly, the defeasible easement can be used to secure the performance of a variety of obligations.

As a remedy, defeasance presents several advantages over common law remedies available to the servient estate. In most instances, for example, it will be easier to prove the occurrence of the condition that triggers defeasance than to prove that the easement holder materially violated a covenant in the easement or unreasonably interfered with the servient estate in such a way as to warrant damages or justify specific enforcement or an injunction. In the event of defeasance, no questions of materiality or reasonableness enter the calculation; the holder of the servient estate must merely prove that a stated condition occurred. If a servient estate will not have the resources to sustain a heavily litigated enforcement process, creating an easement determinable should materially simplify the task of enforcement.

In drafting a defeasible easement, however, a drafter must use the proper words to make sure that the remedy provided is the same as the remedy desired—taking great care, for instance, to avoid creating a mere covenant to perform.<sup>2</sup> In addition, a drafter must take considerable care to draft the desired species of

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<sup>2</sup> Where the language is ambiguous, the matter of whether a clause will be construed as a covenant or as a condition subsequent depends on the intent of the parties. To review a discussion language best suited to creating covenants and conditions, see Annotation "Commencement and Duration of Express Easement as Affected by Provision in Instrument Creating It" 154 ALR 5 (1945).

defeasible easement. The easement determinable will terminate immediately upon the occurrence of the stated event (e.g. failure to maintain). Because such a termination involves an automatic forfeiture, it affords the parties to the easement little room to negotiate in the event of such failure, since the easement will have already been destroyed upon the failure. However, the easement subject to condition subsequent—which requires reentry—may allow more opportunity to negotiate without terminating the easement.

A capable drafter often seeks to provide a client with multiple remedies. Thus, it is perhaps useful to include both covenants for performance, with corresponding remedies for breach, and to provide for defeasance on the occurrence of a condition subsequent. This is typically done by providing covenants for some obligations and conditions for others. An easement agreement may also be drafted so the event that triggers a breach of covenant also constitute a condition subsequent, thus providing the aggrieved party with a choice of remedies. Be aware, however, that—given the recognized judicial preference for enforcing remedies for breach of covenant rather than defeasance—so drafting an agreement may make the remedy of defeasance, as a practical matter, unavailable. *See Lincoln v. Narom Development Co.*, 10 Cal. App. 3d 619 (1970).

## **Suggested Reading**

Annot., "Commencement and Duration of Express Easement as Affected by Provision in Instrument Creating It" 154 A.L.R. 5 (1945).

Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land*. (West Group, 2001 ed., and Supplement 2002).

Restatement of the Law (Third) Property: Servitudes (2000).

# Drafting Easements

Michael J. Ostermeyer  
Bernard J. Kearney III  
Quarles & Brady LLP

## Overview

[Conveyance subject to statute of frauds]

[LIST drafting points]

## Additional Reading

Robert Kratovil, "Easement Draftsmanship and Conveyancing," 38 Cal. L. Rev. (1950)

Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land*. (West Group, 2001 ed., and Supplement 2002).

Restatement of the Law (Third) Property: Servitudes (2000).

EASEMENT AGREEMENT

Document Number

Document Title

1 This Easement Agreement
2 ("Agreement") is made this \_\_\_\_ day of
3 \_\_\_\_\_, 200\_\_ (the "Effective Date")
4 by and between [GRANTOR NAME], a(n)
5 [GRANTEE NAME] ("Grantor"), and
6 [GRANTEE NAME], a(n) [GRANTEE ENTITY]
7 ("Grantee") (singularly a "Party," and
8 collectively the "Parties").

9 RECITALS:

10 A. Grantor owns fee simple
11 absolute title to certain property located in
12 the [MUNICIPAL BODY] of \_\_\_\_\_,
13 County of \_\_\_\_\_, State of
14 Wisconsin, which property is more
15 particularly described on Exhibit A attached
16 to and incorporated into this Agreement (the
17 "Grantor Parcel"); and

18 B. Grantee owns fee simple absolute title to certain property located in
19 the [MUNICIPAL BODY] of \_\_\_\_\_, County of \_\_\_\_\_, State of
20 Wisconsin, which property is more particularly described on Exhibit B attached to
21 and incorporated into this Agreement (the "Grantee Parcel"); and

22 C. The Parties desire to create a non-exclusive, perpetual easement for
23 ingress and egress to the Grantee Parcel, upon, over, across, under, and through<sup>1</sup>
24 the Grantor Parcel, for the benefit of and appurtenant to the ownership of title of
25 the Grantee Parcel or any portion thereof.

26 AGREEMENT

27 NOW, THEREFORE in consideration of the mutual covenants of the
28 Parties and for other good and valuable consideration, the receipt and sufficiency
29 of which are hereby acknowledged, the Parties agree as follows:

Recording Area

Name and Return Address

Parcel Identification Number (PIN)

<sup>1</sup> This recital should be consistent with the extent and scope of the grant in Paragraph 1.

1           **1. Grant of Easement.** Grantor hereby grants for the benefit of the  
2 Grantee Parcel the following easement of record: A non-exclusive right of ingress  
3 and egress for vehicular and pedestrian access to the Grantee Parcel upon, over,  
4 across, under, and through<sup>2</sup> such private street improvements (the “**Private Street**  
5 **Improvements**”) as exist on the Effective Date within the easement area  
6 [depicted][described] on the Exhibit C attached to and incorporated into this  
7 Agreement (the “**Easement Area**”) <sup>3</sup>. The easement granted herein is for the  
8 benefit of the owner of the fee title to the Grantee Parcel or any portion of the  
9 Grantee Parcel, and its agents, employees, customers, invitees, designees,  
10 licensees, tenants and occupants of the Grantee Parcel or any portion thereof  
11 (collectively, the “**Beneficiaries**”) <sup>4</sup>.

12           **2. Maintenance, Repair, and Operation.**

13           **(a)** Grantor hereby covenants at all times to maintain (including  
14 repairing, replacing, and improving, as Grantor reasonably determines necessary)  
15 all of the Private Street Improvements in a condition sufficient to permit safe  
16 passage upon, over, across and through the Easement Area at all times by the  
17 Beneficiaries.

18           **(b)** Grantee covenants that it shall pay to Grantor, within ten (10)  
19 days after Grantor’s request for such payment, [SPECIFY PORTION OR PERCENTAGE]  
20 of all costs and expenses (collectively, the “**Expenses**”) incurred [by Grantor] with  
21 respect to the Private Street Improvements or the Easement Area in each calendar  
22 year. Such Expenses shall include, without limitation, all costs and expenses  
23 incurred in paving, resurfacing, patching, striping, plowing, clearing, cleaning,  
24 rebuilding, draining, lighting, ensuring traffic control, and insuring the Private  
25 Street Improvements and the Easement Area.

26           **(c)** [Grantor hereby grants to the owner(s) of the fee simple  
27 absolute title to all or any portion of the Grantee Parcel a revocable license to enter  
28 upon such areas of the Grantor Parcel as must reasonably be accessed from time to

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<sup>2</sup> Consider scope of grant.

<sup>3</sup> Consider whether Private Street Improvements (the physical improvement) is different from the Easement Area (the physical location). Be sure rights and obligations refer to proper term.

<sup>4</sup> Consider whether the list of Beneficiaries who are entitled to exercise rights should be broader or narrower.

1 time for the limited purpose of Grantee's performing Grantee's obligations  
2 hereunder.]<sup>5</sup>

3 (d) Upon termination of this Agreement, Grantee shall restore the  
4 Easement Area to the same condition as existed on the date of this Agreement,  
5 ordinary wear and tear alone excepted.

6 **3. Continued Use.**

7 (a) Grantor hereby expressly retains all right, title, and interest in  
8 and to the Grantor Parcel, subject only to the rights established under Sections 1  
9 and 2 above.

10 (b) Grantee shall not unreasonably interfere with the rights retained  
11 by Grantor under this Agreement. Further, Grantee shall comply with all Laws and  
12 Regulations applicable to Grantee's rights or obligations hereunder or to the  
13 Easement Area.<sup>6</sup>

14 **4. Term.** The easements and all other rights and obligations established  
15 hereby shall be perpetual.<sup>7</sup>

16 **5. Binding Effect; Amendment.** The covenants contained in this  
17 Agreement and the easement established under this Agreement: shall bind and  
18 inure to the benefit of all fee simple absolute titleholders of the Grantor Parcel and  
19 the Grantee Parcel, or any portion thereof, and to their respective successors and  
20 assigns; shall constitute covenants that run with the Grantor Parcel and the Grantee  
21 Parcel; and shall be amended, modified, or terminated, if at all, only by the written  
22 agreement of all parties holding (at the time of such amendment, modification, or  
23 termination) fee simple absolute title to any part of the Grantor Parcel or the  
24 Grantee Parcel.

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<sup>5</sup> Reminder: In situations in which the Grantee is obligated to maintain an easement, the Grantor should (1) retain for itself the right to maintain the easement in the event that Grantee fails to do so and (2) create a default mechanism which suspends the Grantee's right to use the easement if the Grantee fails to perform its maintenance obligations.

<sup>6</sup> Note: if a grantor grants an exclusive easement, the grantor does not retain for itself the right it has granted to the grantee. Consider whether Grantor intends to retain for its own use the same species of rights it is granting to Grantee.

<sup>7</sup> Indicate whether the easement is to be granted for a limited term, perpetual term, or until a specified event (including default) occurs.

1           **6. Miscellaneous.**

2                   **6.1 Definition.** For purposes of this Agreement, the following  
3 term(s) shall have the stated definition(s):

4                           **(a) Laws and Regulations** shall mean every law, regulation,  
5 order, rule, judgment, or consent agreement, including, without limitation, those  
6 relating to: zoning; building; use and occupancy; fire safety; health; sanitation; air,  
7 water, or soil pollution; environmental protection; hazardous or toxic materials,  
8 substances, or wastes; conservation; parking; architectural barriers to the  
9 handicapped; or restrictive covenants or other agreements affecting title to the  
10 Grantor's Parcel or the Grantee's Parcel.

11                   **6.2 Indemnity and Waiver.** In addition to (and in no way in lieu  
12 of) other indemnities specifically set forth elsewhere in this Agreement, each Party  
13 (for purposes of this Agreement, an "**indemnitor**") agrees to indemnify, defend,  
14 and hold harmless the other Party and its agents, officers, directors, employees,  
15 tenants, and licensees from and against any and all liabilities, claims, demands,  
16 costs, and expenses of every kind and nature (including reasonable attorney's fees)  
17 arising in connection with the indemnitor's rights or obligations arising under this  
18 Agreement, including those arising from any injury (including death) or damage to  
19 any person or property sustained on or about such indemnitor's Parcel and  
20 resulting from (i) the negligent or intentionally wrongful act or omission of such  
21 indemnitor, its agents, employees, tenants, invitees, or licensees, or (ii) the failure  
22 of such indemnitor to perform its obligations under this Agreement; provided,  
23 however, that such indemnitor's obligations hereunder shall not apply to the extent  
24 any such injury or damage results from the negligent or intentionally wrongful act  
25 or omission of the Party seeking indemnification, its agents, officers, directors,  
26 employees, tenants, or licensees. Further, each of the Parties hereby waives any  
27 and all rights of recovery against the other Party for any risks or losses with respect  
28 to the rights and obligations arising hereunder to the extent such risk or loss is or  
29 would be covered by insurance carried by such Party as required hereunder,  
30 without regard to any deductible. It is understood that this waiver applies to any  
31 loss or damage regardless of the cause, including, without limitation, if caused by  
32 the negligence of the Parties or their respective agents, employees, tenants,  
33 invitees, or licensees.<sup>8</sup>

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<sup>8</sup> Consider whether waiver and indemnity provisions need or ought to be consistent with regard to exclusion of the indemnified party's negligence and whether the scope of the waiver coincides with the scope of the insurance.

1           **6.3 Insurance.** Grantee shall, at Grantee's expense, obtain and  
2 maintain during the term of this Agreement and any other period during which  
3 Grantee shall have access to or possession of all or any portion of the Grantor  
4 Parcel or the Easement Area (i) a comprehensive general liability insurance in  
5 limits of not less than [SPECIFY AMOUNT] for injury or death arising out of any one  
6 occurrence and [SPECIFY AMOUNT] for damage to property in respect of one  
7 occurrence, or in any increased amount reasonably required by Grantor, protecting  
8 (A) as named insureds Grantor and Grantee and (B) as additional insureds, those  
9 agents and interest holders specified from time to time in writing by Grantor  
10 against any and all claims for personal injury, death, or property damage occurring  
11 in, upon, adjacent to, or in connection with the Easement Area or the rights and  
12 obligations of Grantee hereunder; and (ii) insurance against loss or damage by fire  
13 and such other risks and hazards as are insurable under then available standard  
14 forms of fire insurance policies with extended coverage, insuring on a replacement  
15 cost basis [SPECIFY INSURED IMPROVEMENTS], protecting Grantor and Grantee [AND  
16 ANY OTHERS TO BE PROTECTED] as named insureds [and as additional insureds].  
17 Such comprehensive general liability insurance policy shall include a contractual  
18 liability endorsement protecting Grantee against loss arising out of liabilities  
19 assumed by Grantee hereunder by indemnity or otherwise and shall also contain a  
20 severability clause or endorsement pursuant to which each named insured and  
21 additional insured shall be entitled to the protection of such policy with respect to  
22 liabilities to the other named and additional insureds. All insurance to be carried  
23 by Grantee shall be written in form and substance reasonably satisfactory to  
24 Grantor by an insurance company of recognized responsibility licensed to do  
25 business in the State of Wisconsin. At the commencement of the term of this  
26 Agreement, and from time to time at Grantor's request, original insurance policies  
27 or appropriate certificates (ACORD Form 25-S) of such policies (and  
28 subsequently any endorsements to and renewals or replacements of such policies)  
29 shall be deposited with Grantor. Grantee hereby acknowledges that a waiver of the  
30 insurer's right of subrogation against Grantor is obtainable under normal  
31 commercial insurance practice on the date of this Agreement and agrees to include  
32 such waiver in the policies required hereunder.

33           **6.4 Estoppel Letter.** Each Party covenants that, within ten (10)  
34 days after the written request of any other Party, the Party so requested shall  
35 deliver a letter certifying: (i) the date of this Agreement and any amendments  
36 hereto; (ii) that the Agreement is in full force and effect; (iii) that, as of the date so  
37 certified, and to the extent of the certifying Party's actual knowledge, no Party is in  
38 default under this Agreement, and that there exist no defenses or offsets to the  
39 enforcement hereof; (iv) that such Party is not subject to any bankruptcy,



1           **6.9 Severability**. If any provision, clause, or part of this  
2 Agreement, or any application of the same under certain circumstances, is held  
3 invalid or unenforceable by a court of competent jurisdiction, such holding shall  
4 not affect any of the other terms or provisions of this Agreement, and the same  
5 shall continue to be effective to the fullest extent permitted by law.

6           **6.10 Governing Law**. This Agreement concerns property located in  
7 the State of Wisconsin and shall be governed by and construed in accordance with  
8 the laws of the State of Wisconsin.

9           **6.11 Relationship of the Parties**. The Parties acknowledge that  
10 neither Party is an agent for the other Party and that no Party shall or can bind or  
11 enter into agreements for the other Party.

12           **6.12 Entire Agreement**. This Agreement and the documents  
13 referred to in this Agreement and to be delivered pursuant to this Agreement  
14 constitute the entire agreement among the Parties regarding the easements created  
15 hereunder.

16           **6.13 Waiver**. No waiver by any Party with respect to performance  
17 or satisfaction of any covenant, condition, or obligation arising under this  
18 Agreement shall be valid unless in writing, and the same shall not be considered a  
19 waiver by such Party of any other covenant, condition, or obligation hereunder or  
20 of any other untimely performance of the covenant, condition, or obligation so  
21 waived.

22           **6.14 Authority**.

23           **(a) Grantor**. The execution and delivery of this Agreement  
24 by Grantor and the execution by the person signing this Agreement on behalf of  
25 Grantor has been duly authorized by all necessary action of Grantor. This  
26 Agreement constitutes a valid and binding obligation of Grantor. None of the  
27 execution, delivery, or performance of Grantor's obligations under this Agreement  
28 will violate or conflict with any other agreement by which Grantor is bound.

29           **(b) Grantee**. The execution and delivery of this Agreement  
30 by Grantee and the execution by the person signing this Agreement on behalf of  
31 Grantee has been duly authorized by all necessary action of Grantee. This  
32 Agreement constitutes a valid and binding obligation of Grantee. None of the  
33 execution, delivery, or performance of Grantee's obligations under this Agreement  
34 will violate or conflict with any other agreement by which Grantee is bound.





1 **MORTGAGEE'S SUBORDINATION**

2 **WHEREAS**, pursuant to a [specify mortgage instrument] (the "**Grantor's**  
3 **Mortgage**") given to [MORTGAGEE NAME], a(n) [MORTGAGEE ENTITY] (the  
4 "**Grantor's Mortgage**"), by Grantor, dated as of \_\_\_\_\_ and recorded  
5 with the Recorder of Deeds for the County of \_\_\_\_\_, State of \_\_\_\_\_  
6 on \_\_\_\_\_ in [RECORD AND PAGE DATA] took an interest as mortgagee in a  
7 portion of certain real property described on Exhibit D attached to and made a part  
8 of this Agreement (the "**Mortgaged Property**"); and

9 **WHEREAS**, the Grantor's Mortgagee now wishes to consent to the terms  
10 and conditions of this Agreement, and to subordinate its lien under the Grantor's  
11 Mortgage to the terms and conditions of this Agreement, and to make the  
12 Mortgaged Property and interest of the Grantor's Mortgagee in such Mortgaged  
13 Property subject to all easements and other interests arising under this Agreement;

14 **NOW, THEREFORE**, the Grantor's Mortgagee joins in this Agreement for  
15 the limited purposes of (i) consenting to all terms and conditions of this  
16 Agreement, and (ii) subordinating its lien under the Grantor's Mortgage to the  
17 terms and conditions of this Agreement. Accordingly, the Grantor's Mortgagee  
18 hereby declares that the Grantor's Mortgage and all of the terms, covenants, and  
19 provisions of the Grantor's Mortgage (as well as all renewals, modifications,  
20 supplements, replacements, and extensions with respect to the same) are and shall  
21 hereafter be subordinate in all respects to any easements and other interests of any  
22 kind arising under this Agreement with the same force and effect as if this  
23 Agreement had been executed, delivered, and recorded before the execution,  
24 delivery, and recording of the Grantor's Mortgage.

25 \_\_\_\_\_  
26 By: \_\_\_\_\_  
27 Name: \_\_\_\_\_  
28 Title: \_\_\_\_\_



## **INDEX TO EXHIBITS**

EXHIBIT A	Legal Description of Grantor Parcel
EXHIBIT B	Legal Description of Grantee Parcel
EXHIBIT C	Easement Area
EXHIBIT D	Legal Description of Mortgaged Property