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Testimony before the Senate Committee on Housing, Commerce and Trade
State Senator André Jacque
February 3, 2022

Chairman Jagler and Committee Members,

Thank you for the opportunity to testify before you today in support of Senate Bill 682, 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.

Senate Bill 682 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 SB 682.

DAVE MURPHY

State Representative • 56th Assembly District

Senate Committee on Housing, Commerce and Trade

Public Hearing, February 3, 2022

Senate Bill 682

Testimony of State Representative Dave Murphy

Mr. Chair and members of the committee, thank you for hearing Senate Bill 682 today.

Easements are a necessity of the world we live in; however, due to an oversight in Wisconsin law, certain easements related to the right to cross a property must be renewed and re-recorded every 40 years. An expired easement providing the only access route to property 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.

We have also been working closely with the Wisconsin Land Title Association and the Wisconsin Realtors Association to hammer out an amendment that would ensure easements that predate 1960 would exist in perpetuity if either: a) the paperwork is up-to-date or b) the easement is being actively and visibly used.

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WISCONSIN LAND TITLE ASSOCIATION

Comments and Observations about Wisconsin Senate Bill 682 Feb. 2, 2022

BACKGROUND REGARDING WISCONSIN'S MARKETABLE TITLE ACT

Wisconsin adopted its version of the marketable title act in 1942, which is now embedded within Chapter 893 of the Wisconsin Statutes which includes various statutes of limitations. Wisconsin didn't stand alone in adopting a marketable title act in the 1940's – in fact our neighboring states of Minnesota, Iowa, Michigan and Illinois, and other states in the Midwest, all adopted some version of a marketable title act in the 1940's to modernize what was then an already problematic issue of restrictions and easements.

In the 1960's, other states in the Union recognized that property-owners across the country were having problems with ancient restrictions and easements and recognized the negative effect on modern real estate development. Raising that concern, the Marketable Title Act was approved in 1963 and revamped in 1990 by the Uniform Law Commission as the Uniform Law Commission. The preeminent Professor Lewis Simes of the University of Michigan stated *"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."*

At its base, a marketable title act imposes the reasonable obligation on a person who wants to either use someone else's property in some manner, say an access easement, or prohibit someone else to use their property in a certain fashion, say a limitation on selling liquor on the property, to either: (i) provide ***constructive notice*** of that use or limitation by properly recording a document with the Register of Deeds that the use or prohibition continues to be in play, or (ii) for an easement, provide ***actual notice*** by using the easement (with such use being obvious with a reasonable inspection of the burdened land).

Where Wisconsin's marketable title law fails is that we currently don't have the second means to continue an easement - actual notice – in §893.33 we only have the constructive notice provision. And Wisconsin's constructive notice provision, which originally allowed for a continuation of the use if constructive notice was provided by re-recording the easement or restriction every 60 years, was reduced to a 40-year statute effective July 1, 2020.

WLTA SOLUTION

The Wisconsin Land Title Association (WLTA), which represents the title industry in Wisconsin including hundreds of Wisconsinites who perform searches in the 72 Wisconsin Register of Deeds Offices for almost all real estate transactions in the State, has deep concerns about the Bill as presented which will disrupt how we currently do business by requiring our professionals to conduct land record searches for 170 years, when currently the search

time period is 40 years. If the Bill is passed, this *will* cost the Wisconsin consumer money, as our industry will be forced to pass the additional time and expenses for producing our products onto the consumer.

The WLTA is seeking a balanced solution to the concerns raised about access easements and proposed that a new exception be added 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, open and notorious":

- *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 is a balanced approach whereby the party benefitted by an easement may continue to use the easement if either ***constructive notice*** is provided to the burdened property owner by timely re-recording OR ***actual notice*** by use of the easement. The proposed language of *"actual, visible, open and notorious"* has long been approved in Wisconsin in §706.09(2)(a). The concept of actual or constructive notice is seen throughout the law, including Wisconsin's own mineral rights statute in §705.057 which allows a person who intends to retain subsurface mineral rights against an owner of real property retains those rights only if the mineral rights holder either actually uses or explores for minerals *or* records a document in the land records stating that they want to continue to hold such mineral rights.

WLTA CONCERNS WITH THE CURRENT BILL VERSION

I. Proponents of the current Bill have raised the argument that a contract should last forever

a. No contract is free from a Statute of Limitations in Wisconsin.

b. The Wisconsin Realtors Association (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. "An action for breach of any contract for sale **must be commenced within 6 years after the cause of action has accrued.**"

II. 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 on reviving a dead easement against a burdened property owners

c. Cost of title insurance policies

i. Significant increase to the amount of searching and some title companies may choose not to insure transactions for lower dollar amounts simply because the costs to perform the search will outweigh the premiums they are allowed to charge.

ii. Policies could increase by hundreds of dollars

iii. Searches will have to go all the way back to patent; whereas with Wisconsin's current marketable title act, searches are only required to go back 40 years

iv. Availability of documents in counties - there is no uniformity for Wisconsin Registers of Deeds in which documents are available online. – about ½ of the Wisconsin counties don't have documents available online prior to 1960

How can a Seller provide a Warranty Deed when an easement, long dead, can be brought to life when re-recorded? Is YOUR title safe? If you bought your property before today, your title search was based on a 40 or 60 year search of the property. What happens if your neighbor decides to renew a long since dead easement against your property? What about your constituents?

Wisconsin REALTORS® Association

To: Members, Senate Housing, Commerce and Trade

From: Cori Lamont, Senior Director of Legal and Public Affairs
Tom Larson, Executive Vice President

Date: February 3, 2022

RE: SB 682/ AB 707: 40-year Expiration of Access Easements in Wisconsin

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The Wisconsin REALTORS® Association (WRA) supports SB 682, legislation eliminating a statutory expiration of access easements.

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 for property owners and negatively impacting property values.

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 on commercial, residential and agricultural parcels as well as landlocked parcels, parking lots, hunting land and waterfront properties for a variety of reasons.

Generally, under the law, if an access easement is not re-recorded at the register of deeds office within a certain time frame, the interest is extinguished and unenforceable, even if the original easement provides it goes on in perpetuity. It is important to note that certain interests are not subject to the re-recording, such as interests of utilities and railroads, interests of political subdivisions and conservation easements.

Severe consequences for real estate transactions

- Property owners are generally unaware that easements have expired.
- 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 expiration 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 time frame in the access easement, then the easement continues in perpetuity.

SB 682 to be amended to provide

- All easements recorded after January 1, 1960, go on in perpetuity.
- Access easements recorded before January 1, 1960, can be shown to exist by (1) open and notorious use, or (2) by re-recording the instrument.

We respectfully request your support for SB 682.

REAL PROPERTY, PROBATE & TRUST LAW SECTION

To: Senate Committee on Housing, Commerce and Trade
Date: February 3, 2022
Re: Amendment Consideration on SB 682 – Recording 40 Year Easements

Like the Wisconsin Realtors Association, the board of the Real Property Probate and Trust Section (RPPT) of the State Bar would like to see legislation modifying Wis. Stat. section 893.33 to create an exception for easement rights where the easements continue to be used. RPPT understands that an amendment is being worked on with stakeholders and would like to present an additional option for the committee to consider. If adopted this amendment would bring legal clarity and ultimately reduce disputes and costs for residents.

The RPPT Section board would like to see the following proposed substitute amendment Language:

(6m) This section does not apply to an interest in any of the following:
(a) ...
(b) An easement set forth in a recorded instrument if any of the following applies:
1. The instrument is recorded on or after January 1, 1960.
2. A notice or instrument meeting the requirements of sub (1) is recorded on or after January 1, 1960.
3. The use or occupancy of the easement area was actual, visible, open and notorious at such time when a person entitled to assert this section as a defense or in an action to establish title acquired the real estate subject to the easement.

We believe all stakeholders are in agreement on using January 1, 1960 as a starting date. RPPT would like consideration on two additional important points. First, our proposed amendment would apply to all recorded easements rather than just access easements in order to avoid uncertainty for landowners and to limit the potential for future legal disputes. Second, our proposal would replace the term "observable physical evidence" with language consistent with the related current law under 706.09.

We appreciate the consideration and look forward to continuing to work with the authors and other stakeholders on this important piece of legislation.

If you have any additional questions please contact Cale Battles, Government Relations Coordinator, at (608) 250-6077 or cbattles@wisbar.org.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

STATE BAR OF WISCONSIN

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