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DEPARTMENT OF JUSTICE

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OAG—08—10

Matthew Frank
Secretary
Wisconsin Department of Natural Resources
101 South Webster Street
Post Office Box 7921
Madison, Wisconsin 53707-7921

Re: County Forest Statute - Wis. Stat. § 28.11 - Conservation Easements

Dear Mr. Frank:

¶ 1. The Wisconsin Public Forests law in part seeks "to enable and encourage the planned development and management of the county forests for optimum production of forest products together with recreational opportunities, wildlife, watershed protection and stabilization of stream flow, giving full recognition to the concept of multiple-use to assure maximum public benefits; to protect the public rights, interests and investments in such lands" Wis. Stat. § 28.11(1). To help assure these policies are carried out, counties must apply for and obtain Wisconsin Department of Natural Resources (DNR) approval for entry of county lands into county forests and obtain forest management plan approvals from their county boards and the DNR. Wis. Stat. § 28.11(4)(a) and (b), (5)(a).

¶ 2. In your May 6, 2010, letter to me, you ask for an opinion relating to the authority of the DNR to allow for conservation easements and restrictive covenants in county forests under the county forest law. Specifically, you ask whether Wisconsin county forests registered under Wis. Stat. §§ 28.10 and 28.11 can allow conservation easements and restrictive covenants where such easements or covenants would not interfere with the purposes of the county forest system. For the following reasons, I believe the answer is that such easements are permitted as long as they are consistent with and do not interfere with the purposes of county forests and the management plans developed for them under the county forest law.

¶ 3. You do not define "conservation easements" or "restrictive covenants" and these terms are not used in Wis. Stat. ch. 28. Wisconsin Stat. § 700.40(1)(a) of the Uniform Conservation Easement Act defines the first term as follows:

"Conservation easement" means a holder's nonpossessory interest in real property imposing any limitation or affirmative obligation the purpose of which includes

retaining or protecting natural, scenic or open space values of real property, assuring the availability of real property for agricultural, forest, recreational or open space use, protecting natural resources, maintaining or enhancing air or water quality, preserving a burial site, as defined in s. 157.70 (1) (b), or preserving the historical, architectural, archaeological or cultural aspects of real property.

As explained at the DNR website, WDNR-Forest Legacy Program, (last revised Friday April 24, 2009), http://dnr.wi.gov/forestry/legacy/conservation_easements.htm:

Landowners place conservation easements on their property because they want to protect it beyond their lifetimes. Easements help them fulfill their vision for the future of their lands and waters.

A conservation easement is a transfer of usage rights which creates a legally enforceable land preservation agreement between a landowner and an easement holder for the purpose of conservation. It can restrict real estate development, commercial and industrial uses, and certain other activities on a property to a mutually agreed upon level. Conservation easements selectively target only those rights necessary to protect specific conservation values.

Such easements are mutually agreed by both seller and purchaser.

¶ 4. Although the term "restrictive covenant" is used in Wisconsin statutes in the real property context [e.g., see Wis. Stat. §§ 92.03(4), 236.42(2)(b), 706.11(1m)(b)2., 847.03(3), 847.10)], the term is not defined there. Black's Law Dictionary 392 (8th ed. 2004), defines "covenant" in the property context as a "promise made in a deed or implied by law; esp., an obligation in a deed burdening . . . a landowner." A "restrictive covenant" is defined as a "private agreement, usu. in a deed or lease, that restricts the use or occupancy of real property, esp. by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put." *Id.* at 393.

¶ 5. Both conservation easements and restrictive covenants often are intended to "run with the land," are permanent, and are binding on all future owners. They are filed with the local register of deeds with the transaction and deed documents. *E.g., see* Wis. Stat. § 59.43(1)(a). As mentioned above, a conservation easement or restrictive covenant may limit future uses of the land to any combination of forest, water or resource conservation, game or endangered species habitat, scenic, recreation, hunting, fishing or other similar purposes. These limits on land use can affect the value of the land for future sale and tax purposes.

¶ 6. Because easements and restrictive covenants serve the same purpose of limiting uses of land, I will use the term "conservation easement" to include both. Also, I will assume for the purposes of your question that either the conservation easements or restrictive covenants in

question would be for conservation purposes. I will also assume that the conservation easements or restrictive covenants that are the subject of this opinion are otherwise valid, comply with applicable laws, and were entered and duly recorded in compliance with applicable law.

¶ 7. The easements about which you ask would be encumbrances or limitations on county and public uses of county forests. They can accompany mutually agreed transactions of either land acquisition or sale. For example, a landowner or land trust may wish to donate or sell to a county for county forest purposes land that is impressed by a conservation easement previously purchased with Warren Knowles-Gaylord Nelson stewardship program funds. *See* Wis. Stat. § 23.0915; The Knowles-Nelson Stewardship Program, *Guidelines for Nonprofit Conservation Organization*, (Rev. 11/05), <http://dnr.wi.gov/org/caer/cfa/Grants/Forms/NCOGuidlines.pdf>. Or, the state or federal government may wish to purchase from a county an easement restricting uses of certain county forest land parcels for forest preservation, habitat, or conservation purposes.

¶ 8. In *County of Milwaukee v. Williams*, 2007 WI 69, ¶ 24, 301 Wis. 2d 134, 732 N.W.2d 770, the Wisconsin Supreme Court stated, "A county has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power. As a creature of the legislature, a county must exercise its powers within the scope of authority that the State confers upon it." (Internal quotation marks and citations omitted.)

¶ 9. In *Jackson County v. State*, 2006 WI 96, ¶ 16, 293 Wis. 2d 497, 717 N.W.2d 713, the court delineated the nature of the authority possessed by counties:

A county is a creature of the legislature and as such, it has only those powers that the legislature by statute provided. Wis. Const. art. IV, § 22. For more than a century, Wisconsin courts consistently have interpreted counties' powers as arising solely from the statutes[.]

¶ 10. As a direct consequence of the fact that all county powers must be derived from a statutory source, "[a] county's home rule power is more limited than the home rule power that is afforded to cities" *Jackson County*, 293 Wis. 2d 497, ¶ 17.

¶ 11. In *State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶ 10, 252 Wis. 2d 404, 643 N.W.2d 515, the Wisconsin Court of Appeals summarized applicable rules of statutory interpretation.

The aim of all statutory construction is to discern the intent of the legislature. We look first to the language of the statute to determine whether it plainly conveys the legislature's intent. When our inquiry is directed at whether the legislature intended to grant a particular power to an administrative agency, we first examine the language of the statute to determine whether it expressly grants that power; if it does, we conclude the legislature intended the agency to have that power. If the power is not expressly granted, we decide whether it is necessarily

implied—either because it is necessary to carry out the purpose of the statute, or necessary to fully exercise the powers expressly granted, or necessary to perform an express duty.

(Citations and footnotes omitted.) Statutory interpretation "'begins with the language of the statute. . ..'" *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). Statutory language must be construed in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes. *Kalal*, 271 Wis. 2d 633, ¶ 46.

¶ 12. I find in Wis. Stat. chs. 28 and 59 no specifically expressed authorization or prohibition of conservation easements in county forests. However, interpretation of the applicable statutes in context with each other leads me to the conclusion that the authority to allow conservation easements within county forests is necessarily implied. The following provisions of the state statutes are pertinent to answering your question.

¶ 13. The authority in Wis. Stat. chs. 28 or 59 on the types of acquisitions or sales of interests in county lands that may be made appears to be broad and with few exceptions, discussed below. In addition to providing counties with the authority to acquire land rights for any public uses and purposes, Wis. Stat. § 59.01 authorizes each county "to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it." Under Wis. Stat. § 59.03(2)(a), "Except as elsewhere specifically provided in these statutes, the board of any county is vested with all powers of a local, legislative and administrative character" Wisconsin Stat. § 59.03(2)(f) states, "The powers conferred by this subsection shall be in addition to all other grants of power and shall be limited only by express language." Finally, under Wis. Stat. § 59.04 provides, "To give counties the largest measure of self-government under the administrative home rule authority granted to counties in s. 59.03 (1), this chapter shall be liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power."

¶ 14. The statutes do not limit the authority of counties to purchase, acquire, sell or dispose of lands to only those lands that are unencumbered by easements. It is not uncommon for lands to be so encumbered, and the counties appear to have, subject to the limits of their authority, the power to acquire land whether it is so encumbered or not, so long as the acquisition is for a public use or purpose. Wis. Stat. §§ 59.01, 59.52(6)(a); 80 Op. Att'y Gen. 80 (1991) (A county may not acquire land for the purpose of leasing it to a private entity to operate a racetrack.) The notion that counties may acquire and own encumbered lands is supported by Wis. Stat. § 59.52(6)(c). That provision authorizes the county clerk, upon approval of the county board, to lease, sell or convey county property. A notable exception to this authority is that property "donated and required to be held for a special purpose" may not be sold or conveyed. This exception recognizes that the county may own donated lands that are impressed with a restriction that they may not be sold and must

remain in county ownership. Such a restriction is broader than an easement restricting land uses (but not ownership), and supports the notion that counties may acquire and own encumbered lands.

¶ 15. Wisconsin Stat. § 59.52(6)(e) authorizes counties to lease lands to the department for game management purposes. However, "[l]ands so leased shall not be eligible for entry under s. 28.11." This exception excluding DNR leased lands for game management purposes from entry into the county forest system is limited and does not inform the analysis here.

¶ 16. There being no limitation in Wis. Stat. ch. 59 on county ownership of lands encumbered by easements, the issue remains whether the county forest law in Wis. Stat. ch. 28 limits the authority of counties to acquire lands that are impressed with easement limitations on land use or limits their authority to sell easements limiting uses of lands in county forests.

¶ 17. As previously stated, authority for counties to grant conservation easements on lands enrolled in county forests or to acquire lands impressed with conservation easements for county forests is not expressly granted in Wis. Stat. ch. 28. However, there are significant indicia in the statutes that demonstrate that such authority is necessarily implied.

¶ 18. First and foremost, county forest lands are county lands. Wis. Stat. § 28.11(2). As discussed previously counties may acquire lands whether encumbered or not. The issue remains whether they may be acquired for county forest purposes.

¶ 19. Within the county forest law, Wis. Stat. § 28.10 provides specific authority to counties to acquire lands for county forest purposes. The authority of the county board under Wis. Stat. § 28.10, to "establish a county public forest and acquire land by tax deed or otherwise for that purpose" is broad and unqualified. The acquisition of land "by tax deed or otherwise" is not limited to acquisitions of unencumbered land. Wisconsin Stat. § 28.11(3)(c) empowers the county board to "[a]ppropriate funds for the purchase, development, protection and maintenance of such forests and to exchange other county-owned lands for the purpose of consolidating and blocking county forest holdings." Wisconsin Stat. § 28.11(3)(e) authorizes the county board to "[e]stablish aesthetic management zones along roads and waters" Acquisition and protection of lands in the county forest for these purposes may be served by lands impressed with conservation easements. In addition, Wis. Stat. § 28.11(5)(a) requires counties under the program to prepare a comprehensive county forest land use plan that "shall include . . . land acquisition" Again, this section does not limit land acquisition to unencumbered land. Moreover, this section also requires the plan to include "land use designations, . . . forest protection, annual allowable timber harvests, recreational developments, fish and wildlife management activities, roads, silvicultural operations" These land uses can be served by and consistent with conservation easements.

¶ 20. Additionally, Wis. Stat. § 28.11(4)(c) contemplates the existence in county forests of lands having uses that may be served and are fully compatible with conservation easements that run with them. That section provides for "county special-use lands" within the county forest that

"are not suited primarily for timber production . . . but . . . are suitable for scenic, outdoor recreation, public hunting and fishing, water conservation and other multiple-use purposes." These are consistent with the purpose of the county forest law "to enable and encourage the planned development and management of the county forests for optimum production of forest products together with recreational opportunities, wildlife, watershed protection and stabilization of stream flow, giving full recognition to the concept of multiple-use to assure maximum public benefits; to protect the public rights, interests and investments in such lands" Wis. Stat. § 28.11(1).

¶ 21. An interpretation of these provisions as including an unwritten restriction on the use of conservation easements in county forests would stifle the broad authority provided for land acquisitions and uses for county forest purposes. Limiting acquisitions and land agreements to unencumbered lands could significantly frustrate the public purposes to be served and public benefits to be derived from county forests including "for the purpose of consolidating and blocking county forest holdings." Wis. Stat. § 28.11(3)(c), (4)(b).

¶ 22. For the above reasons, I believe the legislature provided counties with the authority to acquire and grant conservation easements that run with the land in county forests because that authority is "necessarily implied from the powers expressly given or from the nature of the grant of power." *County of Milwaukee v. Williams*, 301 Wis. 2d 134, ¶ 24 (internal quotation marks and citation omitted). Because the broad authority of acquisition and management of county forests is not limited by the law, the counties' ability to fully carry out the purposes of the county forest law would be unduly constricted by an unexpressed, unqualified and unnecessary prohibition on the use of conservation easements, and such a prohibition could readily prevent consolidation and blocking of county forest holdings. I believe the authority to use conservation easements is necessary to carry out the purpose of the statute, is necessary to fully exercise the powers expressly granted, and is necessary to perform the express duties provided in the county forest law. *State ex rel. Treat v. Puckett*, 252 Wis. 2d 404, ¶ 10. Thus, counties have the authority to enter into conservation easements as part of their county forest acquisition and management authorities and duties.

¶ 23. I am mindful of the fact that it may be argued that the "Powers of county board" with respect to establishment and management of county forests are enumerated in Wis. Stat. § 28.11(3), and no express authority for conservation easements is provided within them or within the rest of Wis. Stat. ch. 28. Wisconsin Stat. § 28.11(3) provides, "The county board of any such county *may*" establish regulations governing public use of the county forest and enter into various agreements, including for projects or actions that ordinarily would not be consistent with the purposes of the county forests stated in Wis. Stat. § 28.11(1). For example, see Wis. Stat. § 28.11(3)(i) and (j) (leases for ore, mineral, gas or oil exploration and extraction). Thus, it may be argued that because it is not enumerated, the authority to provide for conservation easements in county forests is not provided. I would reject that argument for the following reasons.

¶ 24. The use of the term "may" in Wis. Stat. § 28.11(3) is ambiguous. The word "may" connotes that there are other powers the board may exercise to fulfill the purposes of the county forest law. Or, the term "may" can simply connote that the enumerated power is available but not mandated by the statutory provision. It might also connote that the enumerated list of authorities is exclusive. Accordingly, the term "may" is ambiguous as to whether it provides the exclusive powers enumerated. See *Eau Claire Cty. v. Teamsters Union No. 662*, 228 Wis. 2d 640, 645-646, 599 N.W.2d 423 (Ct. App. 1999), citing *In re J.A.L.*, 162 Wis. 2d 940, 962, 471 N.W.2d 493 (1991). Within the context of the above provisions of Wis. Stat. §§ 28.10 and 28.11, I am convinced that the enumerated powers in sub. (3) are not exclusive. For example, although the enumeration of powers under sub. (3) does not grant the board authority to approve county forest plans, that authority and duty is included in sub. (5). Although sub. (3) does not grant the board power to acquire lands for county forests, it is granted in Wis. Stat. § 28.10, and within the board's plan approval authority in sub. (5). Although sub. (3) does not grant the board power to apply for withdrawal of county forest lands, sub. (11) does. Clearly, the enumerated powers of the county board in Wis. Stat. § 28.11(3) with respect to county forests are not exclusive. Moreover, there are no provisions in Wis. Stat. § 28.11 that expressly or implicitly exclude the use conservation easements as a tool for fulfilling county forest purposes.

¶ 25. Although I find that conservation easements may be used as a tool to carry out county forest purposes, the authority to grant (sell) or acquire lands impressed with conservation easements for and in county forests is not without limits. Under Wis. Stat. § 28.10, encumbered lands must be acquired "for that purpose" only – that is, for establishing a public forest consistent with the county forest law. The grant of an easement on land in a county forest or the acquisition of lands impressed with conservation easements must not conflict with *and* be consistent with the purposes of the county forest law and with the county forest plan developed and approved by the county board and the department for the forest. I do not believe it is sufficient for an easement to be shown to "not interfere with the overall purpose of the county forest system" as your question is asked. An easement must be consistent with and not interfere or conflict with county forest law provisions of Wis. Stat. § 28.11, including with the county forest management plan developed and approved under Wis. Stat. § 28.11(5).

¶ 26. Lastly, counties that enter into conservation easement agreements, and the department that approves their use as part of the county forest plan approval process, should do so with open eyes. Easements and restrictive covenants appended to deeds often run with the land, are permanent, and may become unalterable. They may limit in perpetuity the uses to which land may be put, as they are intended to do. Even though an easement may be consistent with county forest purposes and its management plan, it may limit a county's options in the future to alter forest management plans for particular units or parcels, such as for mining leases. Because the *powers* enumerated in Wis. Stat. § 28.11(3) are completely within the discretion of the county board to exercise, the board has the discretion to permanently forego or limit the future exercise of particular powers in that section with respect to particular lands by entering into conservation easements that are otherwise consistent with the law and approved forest management plans.

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Agreements that violate statutorily created duties are voidable. I do not see such easements affecting the authority of the county board to seek, or for DNR to approve, county forest withdrawals under Wis. Stat. § 28.11(11). If withdrawals are granted, the easements would remain in force and unaffected. On the other hand, the *duties* imposed under Wis. Stat. § 28.11 for compliance with the provisions of the law may not be waived by the board by entry into an easement agreement.

¶ 27. For the foregoing reasons, I believe conservation easements and restrictive covenants are permissible in county forests as long as they are consistent with and do not interfere with the purposes of county forests and the management plans properly developed for them under the county forest law.

Sincerely,

J.B. VAN HOLLEN
Attorney General

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