



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 6

TO: MEMBERS OF THE STUDY COMMITTEE ON THE PRESERVATION OF BURIAL SITES

FROM: Anna Henning, Senior Staff Attorney, and Amber Otis, Staff Attorney

RE: Archaeological Easements

DATE: September 23, 2016

During its September 8, 2016 meeting, the Study Committee on the Preservation of Burial Sites discussed options for providing compensation to landowners whose property is cataloged as a burial site under Wisconsin's burial sites preservation law. As part of that discussion, study committee members requested information regarding the use of archeological easements in other states. This Memo provides a brief overview and some examples of other states' use of easements for purposes of archaeological study or preservation.

BACKGROUND

An easement is a nonpossessory right in land – i.e., a property right held by a person other than the owner of the property. A person who owns property subject to an easement must not use their property in a manner that unreasonably interferes with the easement. However, an easement holder must limit use of the land to the scope of the easement. [See *Konneker v. Romano*, 2010 WI 65.] When an easement is granted in a deed, Wisconsin courts typically focus on the language in the deed to determine the scope of the easement. [*Grygiel v. Monches Fish & Game Club, Inc.*, 2010 WI 93.]

Although easements can be structured in multiple ways and derive from various sources of law, they generally fall into two categories: (1) traditional easements; and (2) conservation easements. Traditional easements confer a right to an easement holder to use property in a certain way – for example, for a highway, to access water, or for activities such as hunting. In contrast, conservation easements have a primary focus of limiting the property owner's development of property. In practice, however, both types of easements limit a property owner's use of their property.

Easements have become an increasingly popular tool for protecting cultural resources throughout the country. They come in multiple forms and names. Such easements may have different contexts and purposes. For example, historic preservation easements often protect buildings or districts, whereas archaeological easements may protect an in-ground site for future archaeological study. Other types of cultural resources easements may protect a sacred or cultural resource from any disturbance, including from archaeological study.¹

One reason that “conservation easement” has become a common descriptor for various types of easements is that “conservation easement” is the terminology used by the Internal Revenue Code for tax deductions. Under federal law, conservation easements that are donated to a government entity or charitable organization are generally tax deductible. The Internal Revenue Code defines “conservation easement” to include easements granted for outdoor recreation, natural habitat, open space, scenic and historic preservation of land and buildings. [26 U.S.C. s. 170 (h) (4) (A).] Thus, archaeological easements and historic preservation easements are considered a subset of “conservation easement” for purposes of federal tax law.

Wisconsin law similarly defines “conservation easement” relatively broadly, to include limitations on the use of property for various purposes, including for preserving a burial site. Specifically, under current state law, “conservation easement” means:

A 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 the burial sites preservation law**, or preserving the historical, architectural, archaeological or cultural aspects of real property. [Emphasis added.]

[s. 700.40 (1) (a), Stats.]

Wisconsin law authorizes the creation and conveyance of conservation easements and establishes certain standards regarding the validity and enforcement of conservation easements. [s. 700.40, Stats.] The law is based on the uniform conservation easement act and is similar to conservation easement laws in other states. For example, as is typically true of conservation easements, Wisconsin law specifies that conservation easements are presumed to be unlimited in duration.

¹ For more extensive background information, see, e.g., Jessica Owley, *Cultural Heritage Conservation Easements: Heritage Protection with Property Law Tools*, Land Use Policy 49, 177-182 (December 2015).

EXAMPLES OF APPROACHES IN OTHER STATES

Some states, including Wisconsin, include specified cultural or preservation purposes within the definition of “conservation easement” to specifically authorize the creation and conveyance of a conservation easement for those purposes. Other states have separately authorized easements specific to archaeological, cultural, or historical preservation. For example, in addition to a general statute relating to conservation easements, Maine has a separate statute specific to “archaeological easements.” [33 MRSA ss. §1551-1555.]

Based on an initial and non-exhaustive review of approaches in other states, it appears that, in addition to authorizing such easements, some states have laws or programs that proactively encourage or incentivize easements. Many such programs focus on historic preservation, generally, rather than on burial sites.

Most, if not all, relevant easement programs rely on voluntary grants of easements. Some states provide for grants of such easements to a government entity, whereas other states designate specified private organizations to receive such easements. For example, in Texas, the Texas Historical Commission encourages landowners to enter voluntary legal agreements with qualified organizations to protect a significant historic property, landscape, or archeological site by restricting future development of the property. [See, <http://www.thc.texas.gov/project-review/preservation-covenants-and-easements>.]

Some states provide special tax credits or other incentives as a financial benefit to a landowner in exchange for the grant of an easement. For example, Virginia’s historic preservation law encourages private landowners to donate historic preservation easements to the state. Such easements are held by the Virginia Board of Historic Resources. Landowners who donate an easement through the Historic Preservation Easement Program are eligible to receive certain tax benefits, including a state tax credit, called a land preservation tax credit. In addition, the land subject to a conservation easement is typically entitled to taxation at use value rates. [Virginia Code s. 10-12204.] Similarly, Michigan encourages landowners to donate historic preservation easements and provides certain state tax incentives for doing so. [Mich. Comp. Laws s. 324.2140 (b).]

Some states make grant funding available for preserving properties that are protected by an easement. For example, in Texas, several state grant programs may provide funding for preservation work at properties protected by an easement. Similarly, in Maine, certain grant funding is conditioned on the grant of an easement. [See, http://www.state.me.us/mhpc/historic_preservation_easements/index.html.]

It appears uncommon for state programs to require that general public access be authorized as part of a conservation easement. Instead, many easements are structured to confer access to the state or private entity that may have an interest in managing the site, and, in some cases, access may be required for certain persons or groups with a special connection to a site. However, a legal conveyance could specifically allow broader access to a site.

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