



Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

May 19, 2011

Joint Committee on Finance

Paper #467

Land Acquisition and Easements (DNR -- Stewardship Program)

[LFB 2011-13 Budget Summary: Page 304, #2]

CURRENT LAW

Under the Warren Knowles-Gaylord Nelson Stewardship program, DNR acquires land and provides grants to local units of government and non-profit conservation organizations (NCOs) for land acquisition, easements, and nature-based outdoor recreational property development activities. 2007 Act 20 extended the stewardship program to fiscal year 2019-20 and increased the annual bonding allocation for the program from \$60 million to \$86 million beginning in 2010-11. Act 20 also increased the total general obligation bonding authority for the stewardship program by \$860 million, for a total authorization of \$1,663,000,000. The stewardship program is made up primarily of two subprograms, the land acquisition subprogram, and the property development and local assistance subprogram. In addition, Act 20 created a recreational boating aids subprogram.

GOVERNOR

Beginning in fiscal year 2011-12 (July 1, 2011), specify that DNR may obligate moneys from the stewardship program (the reauthorized stewardship 2000 program) only for the acquisition of land in fee simple and for the acquisition of a right or interest in land that is one of the following: (a) an easement, of up to five acres, that is necessary to provide the public access to land or a body of water that is required to be open to the public for which there is no other public access or for which public access is limited to the degree that a major amount of one or more nature-based outdoor activities is not allowed; (b) an easement, of up to five acres, for a state trail or the ice age trail; or (c) a forestry easement, which is defined as a conservation easement that includes all of the development rights in the land and that imposes an obligation on the owner of the land to ensure that the land is managed using sustainable forestry practices to produce forest products.

In addition, effective with fiscal year 2011-12, eliminate the use of stewardship bonding for the program that awards grants to local units of government and NCOs for the acquisition of development rights in lands for nature-based outdoor recreation.

Further, for any proposed land acquisition utilizing stewardship funds (including easements, except for the acquisition of forestry easements), the bill would require each city, village, town, or county to adopt a nonbinding resolution that supports or opposes the proposed acquisition of land if any portion of the land is located in the city, village, town or county. The bill would require DNR to provide written notification to each city, village, town, or county that is required to adopt a resolution. Within 30 days after receiving the notification, the bill would require each affected city, village, town, or county to adopt the resolution and provide the Department with a copy of the resolution. If the Department receives the copy within this time period, DNR would be required to consider the resolution before approving or denying the grant or acquisition. This provision would first apply to applications for grants and state aid that are submitted to the Department on the effective date of the bill, and to DNR acquisitions that are submitted to the Governor on the effective date of the bill.

DISCUSSION POINTS

A. Easements

1. The Department utilizes both fee title and conservation easement purchases in its land acquisition activities. Fee title (or fee simple) acquisition involves an outright purchase of land by the Department, allowing for complete state ownership and management of the parcel. DNR also purchases conservation easements, which involve a permanent, perpetual agreement entered into by the landowner and DNR in which the state purchases certain specifically identified property rights from the landowner. A conservation easement may provide for public access and recreational use, specify certain management criteria (such as maintaining streambank habitat or sustainable forestry practices) or contain certain development restrictions. The uniform conservation easement act under s. 700.40 of the state statutes governs these transactions. The statute authorizes conservation easements for the following purposes: (1) retaining or protecting natural, scenic, or open space values of real property; (2) assuring the availability of real property for agricultural, forest, recreational, or open space use; (3) protecting natural resources; (4) maintaining or enhancing air or water quality; (5) preserving a burial site; or (6) preserving the historical, architectural, archaeological or cultural aspects of real property. The seller of the easement retains ownership of the property, as well as the right to use the property subject to the restrictions set forth in the easement.

2. Under the land acquisition subprogram, DNR may obligate moneys to acquire land for any of the purposes specified under statute (such as fisheries, forests, natural areas, parks, trails, and wildlife areas). Table 1 shows how stewardship bonding authority was allocated under the land acquisition subprogram under the previous stewardship program and under current law.

TABLE 1

Stewardship Land Acquisition Subprogram Allocations

	Previous Stewardship <u>Program</u>	Reauthorized Stewardship Program <u>(beginning in 2010-11)</u>
Land Acquisition		
General DNR Land Acquisition	\$32,500,000	\$48,000,000*
NCO Acquisition (minimum)	8,000,000	12,000,000
Board of Commissioners of Public Lands Natural Areas	<u>2,000,000</u>	<u>2,000,000</u>
Total	\$42,500,000	\$62,000,000

*Includes grants for county forests beginning in 2010-11.

3. Under the bill, DNR could utilize stewardship funds for the acquisition of a "forestry easement," which the bill defines as "a conservation easement that includes all of the development rights in the land and that imposes an obligation on the owner of the land to ensure that the land is managed using sustainable forestry practices to produce forest products." In the past, the Department has used stewardship funds, as well as federal funds, to purchase forestry easements on large parcels. For example, in October, 2005, DNR acquired a conservation easement on 18,500 acres in Langlade County for \$9.2 million (including \$3 million in federal funds). The Wolf River Forest Legacy tract allows for permanent public access and sustainable forestry practices on over 28 square miles of privately owned forest. DNR indicates that a small number of past forestry easements have included a portion of a parcel where development was allowed. For example, in June, 2010, the Natural Resources Board approved the purchase of two easements covering 18,400 acres of hardwood forestland in Forest County from Wisconsin Timber Associates for \$8.3 million. The easement allows for public access and prevents development of the property except for three, 40 acre sites, each of which will be allowed to contain a five acre area that may be developed for residential use. Each of the three sites can be sold. The property is open to the public for all nature-based outdoor recreational activities including hunting, fishing, trapping, hiking, and cross-country skiing. The Department indicates that, under the bill, future forestry easements would not include such exceptions, and DNR would craft easements with terms which meet the requirement of including "all development rights".

4. Administration officials indicate that forestry easements were included as allowable stewardship acquisitions under the bill because they keep land in private ownership, maintain the ability of these lands to produce forest products into the future, assist forest products companies in maintaining jobs, and keep lands accessible for public recreation including hunting. In addition, DOA did not include forestry easements under the five acre maximum acreage limit in order to ensure DNR maintains flexibility in acquiring forestry easements.

5. With the exception of forestry easements, the bill would limit easements acquired using stewardship funds to less than five acres, and only for easements for state trails, or the ice age trail or to meet specified public access requirements. The following table shows the 97 easements acquired utilizing stewardship funds from fiscal year 2008-09 through March 15, 2011, by acreage.

This would represent approximately 35 stewardship projects annually in this time period.

TABLE 2
Stewardship Easement Acquisitions: June 1, 2008 through March 15, 2011

<u>Acres</u>	<u>Grants</u>		<u>DNR Land Acquisition</u>		<u>Total Easements</u>	
	<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Cumulative Percent</u>
Less than five	0	0.0%	28	38.9%	28	29%
Five to 9.9	1	4.0	14	19.4	15	44
10 to 39	9	36.0	9	12.5	18	63
40 or more	15	60.0	11	15.3	26	90
Forestry Easements	<u>0</u>	<u>0.0</u>	<u>10</u>	<u>13.9</u>	<u>10</u>	100
Total	25	100%	72	100%	97	

6. As shown in the table, almost three of 10 easements acquired using stewardship funds from June, 2008, through March 15, 2011, involved acquisitions of less than five acres. This includes nearly 40% of DNR easement acquisitions, while none of the easements acquired using stewardship grant funds during this time period were for easements of less than five acres. According to the Department, many of the easements DNR acquires of less than five acres are ingress and egress easements, which provide the right to enter and leave a property across a parcel which is not owned by the Department. Including forestry easements, the table would indicate that the bill may allow almost 40% of current easement projects to continue.

7. The table also shows that approximately 19.4% of the easements the Department acquired over this time period were for parcels of between five and 10 acres, while only one grant involved an easement of between five and ten acres. The Department points out that trail easements are often six acres (100 feet wide trail easement on ½ mile of property) or more, and that streambank protection and fisheries easements are also typically between five and 10 acres (or in some cases more than 10 acres). In the sample, almost 56% of stewardship easement projects exceeded 10 acres. Under the land acquisition subprogram, DNR may acquire land (or provide a grant to a non-profit conservation organization to acquire land) for the streambank protection program under section 23.094 of the statutes which aims to protect the water quality and fish habitats of Wisconsin streams by establishing buffers along selected streams. DNR may also use stewardship funds to acquire land (or provide grants to NCOs to acquire land) for habitat areas and fisheries under section 23.92 of the statutes. According to DNR, from January 1, 2001 to March 1, 2011, the Department had acquired 227 streambank protection and fisheries easements. Of these, 126 (56%) were less than five acres, 48 (21%) were between five and 10 acres and 53 (23%) were 10 acres or more. Therefore, increasing the maximum number of acres for an easement acquired using stewardship funds from five acres to 10 acres (Alternative A.1.b.) could be expected to capture approximately 77% of the streambank protection and fisheries easements, but fewer than one-half of all easements. However, depending on the size of the property and curvature of the

stream, some streambank protection easements could be more than 10 acres. The Department typically aims to purchase 66 feet along each shore of a river as an ideal buffer, which for a mile of streambank along a perfectly straight stream, would be 16 acres. Allowing for a maximum of 40 acres (Alternative A.1.c.), a typical quarter-quarter section parcel, would allow more flexibility for the Department to acquire larger easements or provide grants to acquire easements for parcels of particular significance.

8. Additionally, Table 2 suggests easements of the size typically acquired using stewardship grants in the past (96% of easements were for 10 or more acres since June 1, 2008) would not be allowed under the bill. With the exception of two grants to Oconto County for easement acquisitions, all of the stewardship grants awarded for easement acquisitions were awarded to non-profit conservation organizations (NCOs), and totaled approximately \$3 million in grants over the time period (or somewhat over \$1 million per year). The two grants to local governments in this time period totaled \$126,000. DNR easements of over five acres, excluding forestry easements, were \$2.8 million (approximately \$1 million per year). To the extent DNR easement purchases would be curtailed, additional fee title purchases may be made. Under current law this would result in an associated increase in aids in lieu of property tax payments (though under the bill these payments would not apply to future purchases).

9. Under the bill, stewardship funds may be utilized to acquire an easement, of up to five acres, that is necessary to provide the public access to land or a body of water that is required to be open to the public for which there is no other public access or for which public access is limited to the degree that a major amount of one or more nature-based outdoor activities is not allowed. This provision may be difficult to administer. For example, DNR would need to uniformly determine, what "necessary" access is, what parcels are "required" to be open to the public, and the degree to which no, or "limited" public access is otherwise available. Further, DNR may have considerable discretion in defining these terms. The language could be modified to allow easements which "provide public access to land or a body of water for one or more nature-based outdoor activities" (Alternative A.3.b.). Another option would be to specify that the easement must be open for all nature-based outdoor recreational activities (Alternative A.3.c.). However, the Department indicates that some easements, such as streambank protection easements are not open for hunting due to the narrow corridor of the property (66 feet on either side of a stream). If the Committee wished to provide more flexibility for streambank protection and fisheries easements, the bill could be modified to add streambank protection and fisheries easements, to the list of permissible types of easements using stewardship funds which are not subject to the acreage restriction (Alternative A.2.b.). Similarly, easements for state and national trails could be an exception to the limit (Alternative A.2.c.).

10. Easements generally allow for the acquisition of more acres per stewardship dollar than acquisition of land in fee simple. In addition, the Department does not make payments for aids in lieu of taxes on lands acquired by easement (however, the bill would eliminate payments in lieu of taxes on future fee title land purchases). Further, easements maintain private ownership while furthering state conservation and outdoor recreational goals, such as public access, sustainable forestry, and habitat protection. DNR land management costs may also be more limited on an easement. Finally, easements may be utilized as a less costly method than fee simple acquisition for ensuring compatible uses in buffer areas around sensitive state-owned conservation lands. The

Committee could retain the current provisions for the purchase of conservation easements (Alternatives A.4).

B. Acquisition of Development Rights

11. Under current law, the property development component of the property development and local assistance subprogram addresses property development on DNR-owned land, while the local assistance program awards stewardship grants to local governments (including tribes) and NCOs to acquire land for nature-based outdoor recreation and to local governments for nature-based outdoor recreational development on local conservation land. Funding obligated for property development is used for: (a) property development on DNR land; (b) property development on conservation easements adjacent to DNR land; and (c) grants to friends groups and non-profit conservation organizations for property development activities on DNR land. Funding obligated for local assistance is used for: (a) grants for acquisition and development of local parks (eligible development projects for nature-based outdoor recreation include fishing piers, hiking trails, and picnic facilities, among others); (b) grants for acquisition of urban green space; (c) grants for acquisition of property development rights; and (d) grants for acquisition and development of urban rivers. Stewardship funds may generally be provided for up to 50% of eligible project costs. Effective with fiscal year 2011-12, the bill would eliminate the use of stewardship bonding for the program that awards grants to local units of government and NCOs for the acquisition of development rights in lands for nature-based outdoor recreation. Table 3 shows how stewardship bonding authority for the property development and local assistance subprogram was allocated under the prior stewardship program and under current law.

TABLE 3

Property Development and Local Assistance Subprogram Allocations

	Previous Stewardship <u>Program</u>	Reauthorized Stewardship Program <u>(beginning in 2010-11)</u>
Property Development and Local Assistance		
Property Development	\$7,000,000	\$10,000,000
Local Assistance (maximum)	<u>8,000,000</u>	<u>11,500,000</u>
Total	\$15,000,000	\$21,500,000

12. The purpose of the acquisition of development rights program is to protect natural, agricultural, or forest lands that enhance nature-based outdoor recreation. This is achieved through grants to acquire "development rights" through a conservation easement on a parcel. The seller of the easement retains ownership of the property, as well as the right to use the property subject to the restrictions set forth in the easement. The Department currently sets aside 10 percent of the funds available to the local assistance program, or up to \$800,000, for grants for acquisition of development rights. To be eligible for funding a project must provide or enhance nature-based outdoor recreation. Priority is given to projects that have one or more of the following characteristics: (a) property with frontage on rivers, streams, lakes or estuaries, (b) property that creates a buffer between land that has been permanently protected for natural resource and

conservation purposes and from potential or existing residential, commercial, or industrial development; (c) property that is within the boundaries of an acquisition project established by DNR, a governmental unit, or an NCO where the uses of the property will complement the goals of the project and the stewardship program; and (d) property that connects two or more resource protection areas. The general provisions of the program specify that: (a) agriculture and forestry may be permitted on property acquired by an easement as long as those activities are compatible with the purposes of the stewardship program and the project; (b) any agriculture within the area covered by the easement is required to be carried out in accordance with the conditions, standards, and specifications of a soil and water conservation plan approved by the Natural Resources Conservation Service office located in each county; (c) harvesting of timber within an area covered by an easement must be carried out in accordance with the conditions of a forest management plan approved by DNR; (d) vegetative buffers must be established and maintained along lakes, ponds, wetlands, marshes, rivers, streams and ditches; and (e) there may be no activity that adversely affects the natural flow of surface or underground waters within the area of the easement.

13. According to the administration, easements for the acquisition of development rights are not an allowable use of stewardship funds under the bill because they do not assure public access for outdoor recreation (Alternative B1). Further, DOA argues that fee simple acquisitions, and forestry easements, are more useful to assure that the land is both preserved for future generations and is open for public recreation. In addition, the administration maintains that acquisition of development rights may not guarantee habitat management on these properties, whereas forestry easements or fee simple acquisition are more certain to protect habitat and ensure the property is properly managed.

14. If the acquisition of development rights program were to be maintained (Alternative B3), these grant projects generally may not fit under the remaining stewardship criteria established in the bill. For example, in 2002, DNR provided a grant to the Kinnickinnic River Land Trust for an easement on a 280 acre farm along the Kinnickinnic River in Pierce County. The terms of the easement allow for: (a) farming and selective timber harvest, in accordance with sustainable management plans; (b) public access to a corridor along the river for approximately 1,800 feet on the south side of the river and to ten acres of land on the north side of the river, which provides public access for nature-based outdoor recreational activities on the river including fishing, canoeing, kayaking, and hiking; and (c) remodeling or rebuilding of the existing home and construction of one additional home on the property in a residential zone specified under the easement. Even if a grant were to be within the size limits (or if the maximum acreage were to be increased), DNR grant staff indicate that most acquisition of development rights projects would not fit the criteria of being "necessary" to provide public access to a property that is required to be open to the public. For example, in October and November of 2010, DNR awarded two acquisition of development rights grants to the Natural Heritage Land Trust for easements along Vermont Creek in the Black Earth Creek watershed in western Dane County. One easement covers 10 acres and the other covers 8.4 acres. Together, the easements, on two contiguous properties, cover nearly 1.5 miles of a riparian corridor, prevent disturbance of the stream bank, and allow public pedestrian access along the river corridor within 66 feet of either side of the creek. Under the bill, an easement like this one that is contiguous to another easement that also provides public access may not meet the criteria of being "necessary" for public access. Another option would be to restore the acquisition of development rights program and add the acquisition of development rights program

to the list of permissible types of easements using stewardship funds which are not subject to the acreage restriction (Alternative B2).

C. Local Government Resolutions

15. For any proposed land acquisition utilizing stewardship funds (including easements, except for acquisition of forestry easements), the bill would require each city, village, town, or county to adopt a nonbinding resolution that supports or opposes the proposed acquisition of land if any portion of the land is located in the city, village, town or county. The bill would require DNR to provide written notification to each city, village, town, or county that is required to adopt a resolution. Within 30 days after receiving the notification, the bill would require each affected city, village, town, or county to adopt the resolution and provide the Department with a copy of the resolution. If the Department receives the copy within this time period, DNR would be required to consider the resolution before approving or denying the grant or acquisition. This provision would first apply to applications for grants and state aid that are submitted to the Department on the effective date of the bill, and to DNR acquisitions that are submitted to the Governor on the effective date of the bill. It could be argued that requiring local governments to adopt a resolution supporting or opposing a proposed stewardship land acquisition would bring greater local awareness of, and allow for greater public participation in, stewardship acquisitions (Alternative C1).

16. Under the bill, the resolution would be "non-binding" meaning that after considering the resolution, the Department could decide to move forward with the proposed acquisition despite local government opposition. The other option would be to specify that local governments pass a resolution which would be binding on DNR. This would require the Department to abandon a project if a local resolution was adopted that opposed the purchase (Alternative C2). However, it could be argued that DNR is responsible for balancing local sentiments with statewide conservation goals and therefore any resolution should be advisory. Further, a binding resolution may allow one municipality to effectively veto a project over the objections of an adjoining or overlaying jurisdiction.

17. On the other hand, in a situation where the timing of the purchase is an issue, the additional step of requiring a local government to pass a resolution, could potentially delay a purchase. In some instances, the ability to act within a limited time frame can be crucial to successful land purchase negotiations. In addition, the resolution requirement could affect an ongoing negotiation with a seller, who could be inclined to sell to a private owner rather than potentially being exposed to a public debate over the sale of his or property. This provision could be deleted (Alternative C3). Current law would not prohibit any local government from passing a resolution in favor of, or in opposition to, a state land acquisition.

ALTERNATIVES

A. Easements

1. Specify that easements acquired with stewardship funds must be:
 - a. Less than five acres (Governor).

- b. No more than 10 acres.
- c. No more than 40 acres.
- d. No acreage limit (current law).

2. Specify that one or more of the following types of easements acquired using stewardship funds are exempt from the maximum acreage requirement:

- a. Adopt the Governor's recommendation that forestry easements would be exempt from the maximum acreage requirement.
- b. Streambank protection and fisheries easements.
- c. State and national trails.

3. Specify that an easement may be acquired with stewardship funds, subject to the acreage limitation (if any), if:

- a. Adopt the Governor's recommendation to specify that an easement may be acquired if it is necessary to provide the public access to land or a body of water that is required to be open to the public for which there is no other public access or for which public access is limited to the degree that a major amount of one or more nature-based activities is not allowed; or,

- b. It provides public access to land or a body of water for one or more nature-based outdoor recreational activities; or

- c. It is open to the public for all nature-based outdoor recreational activities, under s. 23.0916(2) of the statutes.

4. Delete provisions (maintain current law related to stewardship program easements).

B. Acquisition of Development Rights

1. Adopt the Governor's recommendation to, effective with fiscal year 2011-12, eliminate the stewardship program that awards grants to local units of government and NCOs for the acquisition of development rights in lands for nature-based outdoor recreation.

2. Restore the acquisition of development rights program. In addition, specify that stewardship grants for the acquisition of development rights are not subject to an easement acreage restriction.

3. Delete provision (maintain the current acquisition of development rights program).

C. Local Government Resolutions

1. Adopt the Governor's recommendation to require that, for any proposed acquisition using stewardship funds, each city, village, town, or county must adopt a nonbinding resolution that

supports or opposes the proposed acquisition of land if any portion of the land is located in the city, village, town or county and require DNR to consider the resolution before approving or denying the grant or acquisition.

2. Adopt the Governor's recommendation except specify that the resolution be binding. If any affected city, village, town, or county adopted a resolution opposing the purchase within 30 days after receiving notice from DNR, and provided DNR with a copy of the resolution not later than seven days after the adoption, DNR could not proceed with the acquisition in that jurisdiction.

3. Delete provision (no local resolutions required).

Prepared by: Erin Probst