



LEGAL UPDATE

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A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

Wisconsin's New Access Easement Law

While there are different types of easements, this *Legal Update* focuses solely on access easements. An access easement is the ability to use another's land to allow access for a specific purpose. More specifically for this discussion, an access easement "allows a person to travel across another's land to reach a location or for another specified purpose." Wis. Stat. § 893.33 (6m)(b).

To learn more about different types of easements, see the August 2000 *Legal Update*, "Express Easements," at www.wra.org/LU0008.

Further, this *Legal Update* focuses on recorded access easements. "Recorded" means that the easement is recorded at the register of deeds in the county where the property is located. Therefore, when searching the land records in the county where the parcel is located, the easement would be discovered as part of the land's title.

Access easements exist on various types of property, such as residential, commercial, agricultural and industrial, and allow different types of access such as a joint driveway, or the ability to cross over another's land to gain access to the private pier or to hunt or to fish, or the ability to use someone else's land to allow access for their farm equipment, or the ability to access a business parking lot by utilizing the road of another. And no surprise as a state that has more than 10,000 lakes and 80,000 plus of miles in rivers in streams, more than 14 million acres of farmland, and hundreds of thousands of businesses and more than 2.5 million properties, access easements are common.

Consider this scenario:

Parcel A and Parcel B are neighboring properties. Parcel A, which includes a single-family home and garage is located on the lake. The only way to access Parcel A's property is by use of a driveway shared with Parcel B and primarily located on Parcel B. The driveway easement was created and recorded in 1979 when the land was split up to create Parcels A and B. The recorded easement provides it goes on in perpetuity.

The owners of Parcel A and B go along with no issue for 41 years. On September 1, 2020, Parcel B is sold "subject to easements and restrictions of record." There is document record referencing the driveway easement and the easement itself was not re-recorded. The owner of Parcel B provided written disclosure as to the existence of the driveway easement in the transaction. The owner of Parcel A continues to use the driveway. However, the new owner of Parcel B has

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just learned about a law that provides if an easement or a reference to an easement is not re-recorded within 40 years, the easement is extinguished. The owner of Parcel B tells the owner of Parcel A they must pay \$50,000 for the driveway access, and the owner of Parcel B will agree to a new easement to be recorded. Otherwise, the owner of Parcel B tells the owner of Parcel A their access via Parcel B is denied.

The owner of Parcel A has an issue because the law, until recently, was behind the owner of Parcel B on this one.

Until March 13, 2022, Wisconsin law provided that if an access easement, or an instrument referring to the easement, wasn't re-recorded at the register of deeds within the 40 years, the easement was extinguished and unenforceable, even if the original easement agreement provides it goes forever.

The History of the 40-Year Limit

Wis. Stat. § 893.33, an initiative backed by land title proponents, was originally created to help clean up title by eliminating old interests that create a cloud on title as a matter of law. The concept was to reduce confusion by statutorily causing easements to expire and thus eliminating them from the title to ensure there were no abandoned easements that could someday impact future property owners. Further, Wis. Stat. § 893.33 limited how far back title companies needed to search in the records when preparing title commitments.

Until July 1, 1980, the requirement to re-record was every 60 years. However, in the late 1970s, the Wisconsin Legislature changed the statute reducing the re-recording requirement from 60 years to 40 years. Essentially all easements created as of July 1, 1980, had to be re-recorded every 40 years. Otherwise, those easements would expire July 1, 2020.

Therefore, in the summer of 2020, when COVID-19 was at its height, property owners started to discover easements impacting their property or its use did not meet the statutory requirements of Wis. Stat. § 893.33, resulting in unenforceable easements.

The WRA, concerned about the impact this 40-year statute of limitation had on property owners as well as the fact that the average property owner was unaware of the law, added to its list of legislative priorities for the 2021-2022 session to advocate for the freedom to contract. Essentially, the WRA's position was that state law should not override agreements between two private parties.



REALTOR® Practice Tip

In *TJ Auto LLC v. Mr. Twist Holdings LLC*, 2014 WI APP 81, the Wisconsin Court of Appeals, held that an easement became unenforceable because it was not re-recorded within the 40-year statute of limitations. To learn more about the history of this case and how it relates to the 40-year statute of limitations, see www.wra.org/WREM/Jan15/Easements.



REALTOR® Practice Tip

There are still other ways easements can be terminated, such as by mutual agreement by the parties, merger of the parcel – making the need for the easement obsolete, a specific termination date, abandonment of the easement, misuse of the easement, etc. To learn more about easement termination, see the August 2000 *Legal Update*, “Express Easements,” at www.wra.org/LU0008.

The New Law

In March 2022, Gov. Evers signed legislation addressing the 40-year statute of limitations on access easements, creating 2021 Wis. Act 174. Act 174 can be found at <https://docs.legis.wisconsin.gov/2021/related/acts/174.pdf>.

Again, prior to Act 174, Wisconsin law provided that if an access easement wasn't re-recorded at the register of deeds within the 40 years, the easement was extinguished and unenforceable, even if the original easement agreement provides it goes forever.

To help provide guidance as to the new law and its application, the following are the top 10 things to know about Wisconsin's new law impacting access easements.

- 1. Only applies to access easements.** Access easements are commonly executed on commercial, residential and agricultural parcels to provide access to landlock parcels (e.g., joint driveway), parking lots, hunting land and water, and to accommodate farm equipment. Act 174 only addresses private easement agreements.



REALTOR® Practice Tip

Wisconsin law exempts certain interests from the 40-year statute of limitations, such as interests of utilities and railroads, political subdivisions and conservation easements.

- 2. Protects 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 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.

- 3. Applies only to recorded access easements.** This legislation only applies to easements recorded at the county register of deeds where the property is located.



REALTOR® Practice Tip

If a party in your transaction claims there is a verbal access easement agreement, immediately direct the party to speak to legal counsel. REALTORS® should speak to their supervising broker as well about the next steps for the firm.

Wis. Stat. § 893.33 (6m) (b) An easement set forth in a recorded instrument that allows a person to travel across another's land to reach a location or for another specified purpose if any of the following applies:

1. The instrument is recorded on or after January 1, 1960.
2. An instrument is recorded before January 1, 1960, and a notice, the instrument, or an instrument expressly referring to the easement is recorded on or after January 1, 1960, and before the property is sold or transferred.
3. The instrument or instruments expressly referring to the easement were recorded before January 1, 1960, and it is apparent from or can be proved from physical evidence of its use at such time when a person acquired the real estate subject to the easement.

- 4. Access easements recorded on or after January 1, 1960, run in perpetuity.** Any easement that is recorded on or after January 1, 1960, no longer has any statutory re-recording agreements.

- 5. Access easements recorded on or before January 1, 1960, run in perpetuity if one of the following applies:**

- a) The easement was recorded before January 1, 1960, and a notice, an instrument, or an instrument referring to the easement is recorded after January 1, 1960, AND before the property is sold or transferred.
- b) The easement or express reference to the easement was recorded before January 1, 1960, AND it is apparent from or can be proved from physical evidence of its use at such time a person acquired the property subject to the easement.

Wis. Stat. § 893.33(6m)(b) 2 and 3 were created to provide certain steps for easements recorded on or before January 1, 1960. The objective of this section was to ensure that random third parties did not pop in claiming rights to unused recorded easements decades later unless certain qualifications were met to keep the easement enforceable. Additionally, the 1960 timeframe was selected to make sure title companies did not have to conduct title searches back to the original creation of the title.



REALTOR® Practice Tip

The parties should always be encouraged to speak with their private legal counsel as to the existence, use, maintenance requirements or term of any easement.

- 6. **The terms of the access easement agreement control.** If the access easement agreement provides a specific termination date for the easement, the easement agreement controls. The statute does not trump the agreement. Again, public policy supports the parties' right to contract freely.
- 7. **The legislation is retroactive for access easements.** Unless the easement provides otherwise, an access easement recorded on or after January 1, 1960, goes on in perpetuity. See Wis. Stat. § 893.33(6m)1. Additionally, any access easement recorded on or after January 1, 1960, that meets the requirements of Wis. Stat. §§ 893.33(6m)2 and 3, also goes on in perpetuity.

- 8. **The legislation applies to current litigation.** Since Act 174 is retroactive, it may be asserted as to the enforceability of the easement regarding any action, defense or counterclaim against pending litigation even before March 13, 2022. Therefore, it is possible that current litigation will be impacted by Act 174.
- 9. **The legislation does not impact any litigation resolved as of the bill's effective date.** Act 174 does not modify any litigation that was resolved as of March 13, 2022.
- 10. **Effective date is March 13, 2022.** Act 174 is effective as of March 13, 2022.

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 **REALTOR® Practice Tip**

REALTORS® cannot provide legal advice and should have the parties confirm with their legal counsel about the enforceability of the access easements.

 **REALTOR® Practice Tip**


The parties or their legal counsel should create an easement agreement. Arguably, drafting easements is the practice of law, and since real estate licensees cannot practice law, easement agreements should be drafted by an attorney or the parties.

Act 174 provides this guidance as to applicability of Wis. Stat. 893.33(6m)

SECTION 3. Initial applicability.

(1) This act first applies retroactively to an action commenced or defense or counterclaim asserted before, and first applies to an action commenced or defense or counterclaim asserted on or after, the effective date of this subsection unless a final judgment has been entered resolving the action, defense, or counterclaim.

(2) This act first applies to an easement set forth in a recorded instrument that is entered into before, on, or after the effective date of this subsection unless the instrument contains provisions inconsistent with that treatment.

 **REALTOR® Practice Tip**

Even though the access easement may potentially go on in perpetuity, the seller shall disclose the easement to the buyer. An easy way for the seller to make this disclosure in writing is to use the Real Estate Condition Report (RECR) and the Vacant Land Disclosure Report (VLDR).

Section F8 of the RECR and section E8 of the VLDR include the following:

Other than public rights-of-way, are you aware of nonowners having rights to use part of the property, including, but not limited to, private rights-of-way and easements other than recorded utility easements?

If the seller does not disclose the existence of the access easement, the real estate licensee would be obligated to do so in writing.



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