



# OFFICIAL NOTICE AND AGENDA

Notice is hereby given that the City of Stoughton Utilities Committee will hold a special joint meeting with the City of Stoughton Public Works Committee on the date and at the time and location given below.

Meeting of: **CITY OF STOUGHTON UTILITIES COMMITTEE &  
CITY OF STOUGHTON PUBLIC WORKS COMMITTEE**

Date/Time: Thursday, July 18, 2019 at 6:00 p.m.

Location: City of Stoughton Council Chambers, Stoughton Public Safety Building  
321 South Fourth Street, Stoughton, Wisconsin

Members: Stoughton Utilities Committee:  
Citizen Member Kym Ackerman, Citizen Member David Erdman (Chair),  
Aldersperson Ben Heili, Aldersperson Regina Hirsch, Aldersperson Greg Jenson, Citizen  
Member John Kallas, Mayor Tim Swadley (Vice-Chair)

Stoughton Public Works Committee:  
Aldersperson Matt Bartlett (Chair), Aldersperson Sid Boersma (Vice-Chair),  
Aldersperson Tom Majewski, Aldersperson Lisa Reeves, Mayor Tim Swadley

## **AGENDA:**

### CALL TO ORDER

### PRESENTATIONS

1. City of Stoughton staff presentation on the placement of fencing in utility easements

### PUBLIC COMMENT PERIOD

### NEW BUSINESS

1. Amending Zoning Code Section 78-718 (3)(i) of the Stoughton Municipal Code related to the placement of fencing in utility easements (**Action**)

### ADJOURNMENT

#### Notices Sent To:

Stoughton Utilities Committee Members  
Stoughton Utilities Director Jill M. Weiss, P.E.  
Stoughton Utilities Assistant Director Brian Hoops

Stoughton Public Works Committee Members  
Stoughton Director of Public Works Brett Hebert  
Stoughton Public Works Administrative Assistant Vickie Erdahl

cc: Stoughton City Attorney Matthew Dregne  
Stoughton Common Council Members  
Stoughton City Clerk Holly Licht  
Stoughton Leadership Team  
Stoughton Utilities Electric System Supervisor Bryce Sime  
Stoughton Utilities Operations Superintendent Sean Grady  
Stoughton Utilities Water System Supervisor Kent Thompson  
Stoughton Utilities Wastewater System Supervisor Brian Erickson  
Unified Newspaper Group – Stoughton Courier Hub

**ATTENTION COMMITTEE MEMBERS:** Two-thirds of members are needed for a quorum. The committee may only conduct business when a quorum is present. If you are unable to attend the meeting, please contact Brian Hoops via telephone at (608) 877-7412, or via email at [BHoops@stoughtonutilities.com](mailto:BHoops@stoughtonutilities.com).

It is possible that members of, and possibly a quorum of members of other committees of the Common Council of the City of Stoughton may be in attendance at this meeting to gather information. No action will be taken by any such group(s) at this meeting other than the Stoughton Utilities Committee and Stoughton Public Works Committee consisting of the members listed above. An expanded meeting may constitute a quorum of the Common Council.

Upon reasonable notice, efforts will be made to accommodate the needs of disabled individuals through appropriate aids and services. For information, or to request such assistance, please contact Stoughton Utilities at (608) 873-3379.

Current and past Stoughton Utilities Committee documents, including meeting notices, meeting packets, and meeting minutes, are available for public download at <https://stoughtonutilities.com/uc>.

Current and past Stoughton Public Works Committee documents, including meeting notices, meeting packets, and meeting minutes, are available for public download at <https://stoughtoncitydocs.com/public-works>.



600 South Fourth Street P.O. Box 383  
Stoughton, WI 53589-0383

*Serving Electric, Water & Wastewater Since 1886*

**Date:** July 12, 2019

**To:** Stoughton Utilities Committee  
Stoughton Public Works Committee

**From:** Jill M. Weiss, P.E., Stoughton Utilities Director  
Brett Hebert, Director of Public Works  
Rodney Scheel, Director of Planning & Development  
Michael Stacey, Zoning Administrator

**Subject:** Amending Zoning Code Section 78-718 (3)(i) of the Stoughton Municipal Code related to the placement of fencing in utility easements

## MUNICIPAL CODE OF THE CITY OF STOUGHTON, WISCONSIN

### ARTICLE VII. - PERFORMANCE STANDARDS

#### Sec. 78-718. - Fencing standards.

##### (3) Standards.

- (i) Easements. No fence shall be located within any easement designed to convey stormwater drainage, sanitary sewer, electric distribution and water distribution.

Following numerous internal meetings and much consideration from the affected departments of the City of Stoughton Departments, our unanimous recommendation is to repeal Zoning Code Section 78-718 (3)(i) of the Stoughton Municipal Code and recreate it as follows:

#### Sec. 78-718. - Fencing standards.

##### (3) Standards.

##### (i) Easements:

- a. For purposes of this subsection, "Utility Easement Area" means a land area subject to an easement that allows the City of Stoughton or a public utility to use the land for the installation, operation or maintenance of facilities used for the distribution of electricity, or for the conveyance of water, wastewater or stormwater.
- b. Except as expressly authorized by this subsection, no fence shall be located within the boundaries of a Utility Easement Area.
- c. This subsection shall not apply to any fence existing on the date this subsection is adopted, and any such fence may be maintained, repaired or replaced without restriction under this subsection.

- d. In the case of a Utility Easement Area that is more than 12 feet wide, and where no underground facilities are located within the Utility Easement Area, the restrictions in this section shall be limited to an area that is 12 feet wide, as measured from *[to be determined]*. However, if a Utility Easement Area has been graded to create a drainage swale to convey surface water, no fence may be located within the boundaries of the drainage swale.
- e. Notwithstanding the limitation in subsection (i)b., where a legal, existing fence is located in a Utility Easement Area along and parallel to the property line between two parcels, a new fence may be located within the Utility Easement Area in order to be connected, in a generally perpendicular manner, to the existing, as illustrated in Figure *[to be determined]*, below. However, if a Utility Easement Area has been graded to create a drainage swale to convey surface water, no fence may be located within the boundaries of the drainage swale.

#### Background and Ordinance History:

- Prior to 1997, fencing was not regulated by ordinance in the Zoning Code.
- In 1997, the Zoning Code was amended to include regulation of fencing, including a prohibition of fencing within easements.
- In 2009, the Zoning Code was amended to remove the prohibition of fencing within easements.
- In 2011, the Zoning Code was amended to again include a prohibition of fencing within easements.
- On June 10, 2019, the Stoughton Planning Commission met to discuss a request received from a citizen to revise the Zoning Code as follows:
  - 78-718 (3)(i) *Easements*. No fence shall be located within any easement designed to convey stormwater drainage, sanitary sewer, electric distribution and water distribution-  
“unless a written exception has been made by the affected utility, to be determined on a case by case basis”
- On June 17, 2019, the Stoughton Utilities Committee met to discuss the citizen request and the potential revision to the Zoning Code. Concerns were raised such as access to infrastructure to perform system maintenance, upgrades, replacement, and emergency repairs; delayed outage response and restoration; the high potential for fencing damage during routine and emergency projects; the subjective nature of case-by-case approvals and the issues that could arise; and the transfer of liability and notification of such to future property owners should individual exceptions be made.
- On June 25, 2019 during the first reading of the proposed ordinance change, the Stoughton Common Council voted to refer discussion of possible ordinance modification to a joint meeting of the Stoughton Public Works Committee and Stoughton Utilities Committee for their review and recommendation.

In the weeks since the June 10, 2019 Stoughton Planning Commission meeting, meetings have been held with representatives from the Stoughton Department of Planning & Development, Stoughton Department of Public Works, Stoughton Utilities, Stoughton Mayor’s Office, and the City Attorney to discuss the topic of fencing in easements and if/how the ordinance should be amended. Participants of these meetings have included:

- Mayor Tim Swadley,
- Brett Hebert, Director of Public Works,
- Rodney Scheel, Director of Planning & Development,
- Michael Stacey, Zoning Administrator,
- Jill Weiss, Stoughton Utilities Director,
- Matt Dregne, City Attorney (Stafford Rosenbaum LLP), and
- Taijae Evans, Law Clerk (Stafford Rosenbaum LLP)

The information contained within this memo is the product of these joint meetings, and is the unanimous recommendation of the participating City of Stoughton staff.

#### Easement and Fencing Considerations:

The City of Stoughton, including Stoughton Utilities, has overhead and underground electric, stormwater sewer, sanitary sewer, and water infrastructure contained within utility easements throughout the community. These easements and the infrastructure installed within are typically located along back and side property boundaries, on parcels of all zoning classifications.

Prohibiting fences from being installed within these easements is important for the maintenance and safe access to of this infrastructure, including during preventative maintenance, scheduled replacement and upgrade, and emergency repair/restoration work. Easements are sized to allow for employee and equipment access, safe operating clearances, and safe trenching/shoring.

Reasons for the fencing prohibition in easements was originally added, and then re-added following its removal, include, but are not limited to the following:

- Delayed emergency restoration, such as during a response to a severe storm event and resulting power outages, water main breaks and pipe repairs, and clearing of sanitary sewer blockages and prevention of sewage backups into homes.
  - Fencing can make access to both overhead and underground infrastructure difficult or impossible,
  - Working around fencing can result in employees not being able to adhere to the required safe operating clearances or best safety practices,
  - Working around and/or removing fencing adds time to restoration efforts,
  - Restoration delays impact all customers, potentially including those with critical medical needs, and not just those customers with the fence that is hindering the restoration resulting in delay.
- Increased costs to all ratepayers during planned maintenance projects.
  - There are costs associated with identifying, notifying, and requesting fences be removed, as well as the administrative challenges associated with ensuring compliance,
  - There are costs associated with removing fences that are not removed by the owners, as well as the administrative and legal challenges of recouping those expenses,
  - If design considerations and project modifications are included to avoid existing fencing, additional costs which are borne by all ratepayers, not just those with the fencing that impacts the project and results in higher costs.

- Fencing in utility easements can increase the city’s liability for the protection of such fencing during emergency and routine infrastructure maintenance, and possible repair or replacement once work is complete.
  - Agreements with the homeowner that installed the fence may not be conveyed or transferred to subsequent owners of the property,
  - City employees are not fence builders, and may not be able to remove a fence in an emergency scenario in the manner in which a homeowner expects/demands,
  - Potential reimbursement and/or legal costs resulting from damage claims filed against the city,
- All costs associated with the removal, repair, and/or replacement of fencing within easements may potentially be borne by all ratepayers, not just the individual property owners that installed or own the fencing located within the easement.

Liability:

Matt Dregne, city attorney for Stoughton, initially considered the value of the zoning language and questioned if it was in keeping with the desired protections for utility easement. Following the Stoughton Planning Commission’s recommendation, a legal opinion of utility easements was developed by Attorney Dregne on June 25, 2019 (enclosed).

The general finding is that a utility easement allows for the utility to access and use the easement, but the utility’s liability for any damage that occurs during infrastructure maintenance efforts is determined on a case-by-case basis. The result of this opinion is that the City of Stoughton and Stoughton Utilities may be liable for any damage that may occur to fencing installed within utility easements.

During our meetings on this topic, we have considered numerous potential ordinance language modifications in an effort to protect the City’s and Utilities’ interests and minimize liability and that could be applied uniformly and equally to all properties within the city, while balancing those protections with the needs and desires of Stoughton residents.

Staff recognizes that some properties have more significant challenges than others. We considered language to reduce easement sizes where they were larger than standard, while also maintaining accessibility to existing infrastructure, and establishing a method that is standardized and enforced.

Individual Property Reviews:

At the June 25, 2019 meeting of the Stoughton Common Council, three property owners spoke in favor of modifying the existing ordinance language during the public comment period. All three described their individual properties, and each property owner referenced easements that are larger than the standard sized easement that exist on most properties with easements within the city.

As part of staff’s review of the ordinance, and while considering options and potential ordinance language modifications, the team reviewed each of the three properties. Below are the findings of this review:

- 100 Ashberry Lane
  - This property has a 42’ Wisconsin Department of Transportation (DOT) imposed building setback line. The city cannot provide relief to this property owner for the DOT building setback line, and any changes made to the ordinance language would not benefit them, as this is not an easement issue.

- 736 Berry Street
  - This property has a number of easement encumbrances, but the most significant is a “Public Utility Easement” that bisects the property and contains underground electric utility infrastructure. The easement and the location of the underground electric infrastructure were driven by the developer’s private stormwater management design that affected the western portion of this lot.

The proposed ordinance change does not provide relief to this property owner since underground electric infrastructure is in the easement that bisects this property. However, the property owner could go through the legal process to vacate the stormwater easement if it was no longer needed, and vacate the public utility easement if it is not being used. The public utility easement is not being used for electric. The electric for the property runs along the south and west property lines.

- 1509 Milwaukee Street
  - This property has 30’ utility easement on the west side of the property, a 12’ utility easement along the south side of the property, and no easement along the east side of the property. Power to the homes in this neighborhood is installed underground in the easement that exists on the south side of the properties all along this region of Milwaukee Street.

In the easement along the west property line exists overhead electrical lines including both 69 kV transmission lines owned by American Transmission Company (ATC) and 12 kV distribution lines owned by Stoughton Utilities. The power poles are owned by ATC, however Stoughton Utilities owns infrastructure that is underbuilt on these poles. These poles and overhead infrastructure existed prior to the development of the neighborhood in the 1990s.

#### Summary and Final Recommendation:

City of Stoughton and Stoughton Utilities staff, along with the Mayor and City Attorney, have spent a considerable amount of time discussing and researching this topic, and have considered and investigated possible solutions that best benefit and protect all city residents and utility ratepayers.

Staff recommends that this section of the Zoning Code be modified to include additional exceptions for the following reasons:

1. Staff recognizes that platted easements larger than a standard size may be especially onerous on property owners, and such sizes may not be necessary when no underground infrastructure is present.
2. Generally, city-owned underground utilities intended for the easement will have been installed prior to a property owner requesting a fence permit.
3. Perpendicular connections to existing lawful fences in easements allows neighboring property owners similar use of an easement.

Accordingly, our unanimous recommendation to the Stoughton Utilities Committee and the Stoughton Public Works Committee is to review and approve the repeal of Zoning Code Section 78-718 (3)(i) of the Stoughton Municipal Code and its recreation as shown above and in the attached document, and recommend the ordinance to be adopted by the Stoughton Common Council.

Section 78-718(3)(i) is repealed and recreated to provide as follows:

(i) *Easements.*

- a. For purposes of this subsection, “Utility Easement Area” means a land area subject to an easement that allows the City of Stoughton or a public utility to use the land for the installation, operation or maintenance of facilities used for the distribution of electricity, or for the conveyance of water, wastewater or stormwater.
- b. Except as expressly authorized by this subsection, no fence shall be located within the boundaries of a Utility Easement Area.
- c. This subsection shall not apply to any fence existing on the date this subsection is adopted, and any such fence may be maintained, repaired or replaced without restriction under this subsection.
- d. In the case of a Utility Easement Area that is more than 12 feet wide, and where no underground facilities are located within the Utility Easement Area, the restrictions in this section shall be limited to an area that is 12 feet wide. Where the exterior boundary of the Utility Easement Area is a property line, the 12-foot area in which the restrictions apply shall be measured from the property line. Where the exterior boundary of the Utility Easement Area is not a property line, the 12-foot-area shall be measured from that exterior boundary of the Utility Easement Area that is closest to a property line. However, if a Utility Easement Area has been graded to create a drainage swale to convey surface water, no fence may be located within the boundaries of the drainage swale.
- e. Notwithstanding the limitation in subsection (i)b., where a legal, existing fence is located in a Utility Easement Area along and parallel to the property line between two parcels, a new fence may be located within the Utility Easement Area in order to be connected, in a generally perpendicular manner, to the existing, as illustrated in Figure 1, below. However, if a Utility Easement Area has been graded to create a drainage swale to convey surface water, no fence may be located within the boundaries of the drainage swale.

FIGURE 1

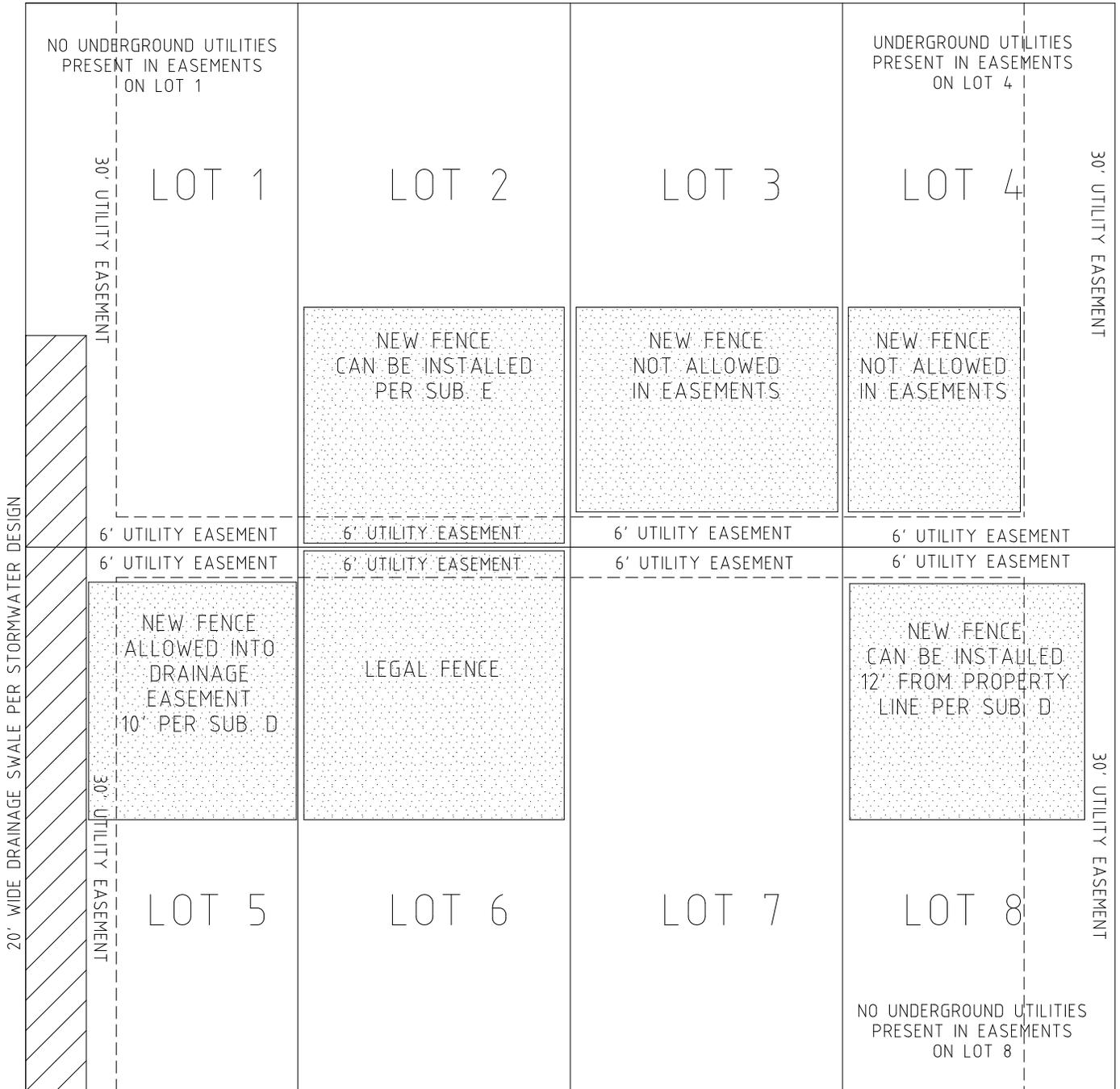


Figure 1 Description:

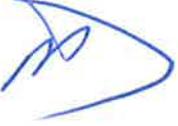
Lot 6 has an existing fence installed at the time of adoption that extends to the rear lot line within the utility easement. Therefore, Lot 2 can install a fence across their 6' utility easement to abut existing Lot 6 fence per proposed language in Subsection e.

A new fence for Lot 3 would need to install their fence outside the 6' utility easement per proposed language in Subsection e.

Since there are underground utilities in the 30' utility easement on Lot 4, a fence would need to be installed outside both the 30' side utility easement and the 6' rear utility easement per proposed language in Subsection d.

Since there are no underground utilities in the 30' utility easement on Lot 8, a fence could be installed up to 12 feet from the side property line per proposed language in Subsection d but would need to be constructed outside the 6' rear utility easement.

Lot 5 has 30' drainage easement that has an approved stormwater design that identifies the 20 feet closest to the side property line as a drainage swale. Therefore, a fence could be installed 10 feet into the drainage easement but would need to be constructed outside the 6' rear utility easement.

To Jill Weiss  
From Matt Dregne   
Date June 25, 2019  
Re Utility Easement

**QUESTION PRESENTED**

1. What are the rights and restrictions on a utility easement?
2. Can property owners install improvements within a utility easement?
3. Does a utility have a financial responsibility to repair or reimburse property that interferes with the easement's scope?

**SUMMARY**

Courts have found that an electric utility is permitted to enter a property owner's land in order to maintain, construct, and reconstruct transmission lines. As an indirect result, the utility may also be authorized to survey the property for new transmission lines. However, the utility may not use any lands beyond the boundaries of the easement for any purpose, including ingress to and egress from the right-of-way, without the written consent of the landowner. A utility may take advantage of advances in technology for convenient use of the rights granted within an easement. Yet, the utility's rights are not unlimited, and its actions must be within the scope of the easement

Courts have found that, a utility will not have financial liability for the destruction of property that interferes with the enjoyment of the easement. However, a utility will incur a financial responsibility to repair or reimburse property if its actions are outside the scope of the easement. A servient estate may install improvements to their property, such as a fence, pool, swingset or other structures, so long as it does not interfere with the utility's

enjoyment of their easement. Whether a particular piece of property constitutes an unreasonable interference is a question of fact. Unless authorized by the terms of the servitude, the holder of an easement is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.

## DISCUSSION

### **I. What are the rights and restrictions on a utility easement?**

Traditionally, an easement grants someone the right to use another's land. *Konneker v. Romano*, 2010 WI 65, ¶25, 326 Wis. 2d 268, 785 N.W.2d 432 (quoting *Hunter v. McDonald*, 78 Wis. 2d 338, 343, 254 N.W.2d 282 (1977)). It also creates two estates: the dominant estate, (enjoys the ability to use the land in the way described in the easement), and the servient estate, (authorizes the dominant estates access). *In re Garza*, 2017 WI 35, 374 Wis. 2d 555, 893 N.W.2d 1. The dominant estate holder's "use of the easement must be in accordance with and confined to the terms and purposes of the grant." *Id.* (quoting *Stoesser v. Shore Drive P'ship*, 172 Wis. 2d 660, 668, 494 N.W.2d 204 (1993)).

Under Wis. Admin. Code § PSC 113.0510, a utility must make a reasonable attempt at contacting landowners a minimum of 24 hours before beginning maintenance activities in a right-of-way (emergency repairs are exempt from this notification requirement). An electric transmission line right-of-way (ROW) is a strip of land that an electric utility uses to construct, maintain, or repair a large power line. Any use not authorized by the specific right-of-way is outside the easement's scope and thus prohibited. *Grygiel v. Monches Fish & Game Club, Inc.*, 2010 WI 93, ¶34, 328 Wis. 2d 436, 787 N.W.2d 6. An easement holder becomes a trespasser to the extent that the holder's use of the servient estate exceeds the scope of the easement. However, seldom does a utility commit trespass, since most utility easements provide broad rights. *Wisconsin Pub. Serv. Corp. v. Andrews*, 2009 WI App 30, 316 Wis. 2d 734, 766 N.W.2d 232.<sup>1</sup> The Restatement (Third) of Property describes the "right to use" as follows:

Except as limited by the terms of the servitude determined under § 4.1, the holder of an easement or profit as defined in § 1.2 is entitled to use the servient estate in a manner that is reasonably necessary for the enjoyment of the servitude. The manner, frequency, and intensity of the use may change over time to help take advantage of developments in technology. Unless authorized by the terms of the servitude, the holder is not entitled to

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<sup>1</sup> *Andrews*, 316 Wis. 2d 734. (Allowed an electric utility to enter property owner's land and order to maintain, construct and reconstruct transmission lines. Court also found that surveying property for new transmission lines is well within the utility's broad rights).

cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.

## II. Can property owners install improvements within a utility easement?

Sometimes, but this question must be answered on a case-by-case basis, since its answer is contingent on whether the property owner's improvements constitute an unreasonable interference. Although Wisconsin courts are silent on the type of improvements that constitute an unreasonable interference; the prevailing view is that the owner of a servient estate may not erect any structures that encroach on the holder's enjoyment of the easement. Restatement (Third) of Property § 1.2; *Columbia Gas Transmission Corp. v. Savage*, 863 F. Supp. 198, 202, 131 O.G.R. 365 (M.D. Pa. 1994) (construction of storage shed within gas pipeline easement area interfered with maintenance of pipeline); *see also*.<sup>2</sup> The wording of an easement grant may be the best indication of an interference by the landowner. *Zirinsky v. Carnegie Hill Capital Asset Management, LLC*, 139 Conn. App. 706, 717–718, 58 A.3d 284, 291 (2012)<sup>3</sup>; *Pelly v. Panasyuk*, 2 Wash. App. 2d 848, 863–867, 413 P.3d 619, 623-630 (Div. 1 2018).<sup>4</sup>

Historically, Wisconsin courts have allowed the holder of an easement to take advantage of developments in technology. *Andrews*, 316 Wis. 2d 734 ¶ 10 (allowed construction of a high voltage electric transmission line, although the original easement did not expressly provide such rights); *In re Garza*, 374 Wis. 2d 555 ¶ 30.<sup>5</sup> The main consensus among courts is that an easement holder is entitled to make improvements that are reasonably necessary to enjoy the easement. *Blackhawk Development Corp. v. Village of Dexter*, 473 Mich. 33, 41-42, 700 N.W.2d 364, 369 (2005). Such improvements, however, must not unreasonably increase the burden on the servient estate. *Professional Executive*

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<sup>2</sup> *Howard v. Cramlet*, 56 Ark. App. 171, 175, 939 S.W.2d 858, 860 (1997) ("The owner of a servient estate may not erect a barrier that unreasonably interferes with the right of passage by the easement owner."); *Warsaw v. Chicago Metallic Ceilings, Inc.*, 35 Cal. 3d 564, 572–573, 199 Cal. Rptr. 773, 676 P.2d 584, 588–589 (1984) (construction of warehouse on portion of easement obstructed use by dominant owner); *Hoff v. Scott*, 453 So. 2d 224, 226 (Fla. Dist. Ct. App. 5th Dist. 1984) (servient owner cannot place mobile home and shed on easement area); *Mayer v. Smith*, 2015-NMCA-060, 350 P.3d 1191, 1197 (N.M. Ct. App. 2015), cert. denied, 2015-NMCERT-004, 348 P.3d 694 (N.M. 2015) (erection of fence within easement area by servient owner interfered with access to full width of easement); *Pizzarelle v. Dempsey*, 259 Va. 521, 530–531, 526 S.E.2d 260, 265–266 (2000) (servient owner interfered with easement for ingress and egress by planting trees and erecting fence inside easement area, thereby rendering portion of easement unusable).

<sup>3</sup> *Zirinsky v. Carnegie Hill Capital Asset Management, LLC*, 139 Conn. App. 706, 717–718, 58 A.3d 284, 291 (2012) (found that servient owner's conduct in planting six large trees in easement area interfered with easement holder's right to use and landscape area as provided in grant)

<sup>4</sup> *Pelly v. Panasyuk*, 2 Wash. App. 2d 848, 863–867, 413 P.3d 619, 623-630 (Div. 1 2018) (ordered servient owner to remove dock, fence and hedge from easement for ingress and egress over lakefront property where easement holder retained "right to prohibit the placing of any road or other permanent structure of any kind" on easement area).

<sup>5</sup> *In re Garza*, 374 Wis. 2d 555 ¶ 30. (Concluded that the change from wood to steel poles was a reasonable change made to take advantage of developments in technology).

*Center v. LaSalle Nat. Bank*, 211 Ill. App. 3d 368, 371, 155 Ill. Dec. 853, 570 N.E.2d 366, 376 (1st Dist. 1991) (installation of curtain drain is not repair of septic field easement, and would place greater burden on servient property).

### **III. Does a utility have a financial responsibility to repair or reimburse property that interferes with the easement's scope?**

Often no, but it depends on whether property is within the easement's scope. Even when property is within the easement's scope, the dominant estate cannot cause unreasonable damage to the servient estate. *In re Garza*, 374 Wis. 2d 555 ¶ 31 (quoting Restatement (Third) of Property: Servitudes § 4.10); Wis. Stat. § 182.017(5)<sup>6</sup>; Wis. Stat. § 182.017(7) (c) to (h).<sup>7</sup>

Every easement carries with it by implication the right to do what is reasonably necessary for the full enjoyment of the easement. *Roundy's Inc. v. N.L.R.B.*, 674 F.3d 638, 192 L.R.R.M. (BNA) 3079, 163 Lab. Cas. P 10586, 2012 WL 752541 (7th Cir. 2012); see also.<sup>8</sup> Sometimes “reasonably necessary” means the removal or destruction of the owner's property. When such action is deemed reasonably necessary, the utility does not incur a financial responsibility to replace the damaged property. *In re Garza*, 374 Wis. 2d 555 (allowed utilities to enter a property owner's land to both trim and remove trees that threatened or endangered the operation of the relevant transmission line); *Brown v. Wisconsin-Minnesota Light & Power Co.*<sup>9</sup>

However, a utility cannot cause damage to property that does not unreasonable interfere with the easement. Whether property constitutes an unreasonable interference is a question of fact. When an issue arises, the easement holder has the burden of proving unreasonable

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<sup>6</sup> Wis. Stat. § 182.017(5). (In constructing and maintaining high-voltage transmission lines on the property covered by the easement the utility shall: ensure that topsoil is stripped, piled or replaced; restore to its original condition any slope, terrace, or waterway which is disturbed by the construction or maintenance; clear all debris and remove all stones and rocks resulting from construction activity; satisfactorily repair to its original condition any fence damaged as a result of construction or maintenance operations; pay for any crop damage caused by such construction or maintenance and; supply and install any necessary grounding of a landowner's fences, machinery or buildings).

<sup>7</sup> Wis. Stat. § 182.017(7) (c) to (h). (Any company which shall in any manner destroy, trim or injure any shade or ornamental trees along any such lines or systems, or, in the course of tree trimming or removal, cause any damage to buildings, fences, crops, livestock or other property, except by the consent of the owner, or after the right so to do has been acquired, shall be liable to the person aggrieved in 3 times the actual damage sustained, besides costs.

<sup>8</sup> *Scheeler v. Dewerd*, 256 Wis. 428, 41 N.W.2d 635 (1950). (Allowed the parties to upgrade well facilities from a hand pump to modern plumbing equipment); *In re Garza, Supra* 4 (Court allowed assignee of an easement to enter the property to replace wood poles with steel poles since the change from wood to steel placed no undue burden on the property owners).

<sup>9</sup> *Brown v. Wisconsin-Minnesota Light & Power Co.*, 170 Wis. 288, 174 N.W. 903 (1919). (Power Company had the right to trim branches that were within 10 feet on the power lines).

interference. *Connecticut Light and Power Co. v. Holson Co.*, 185 Conn. 436, 443, 440 A.2d 935, 939 (1981); *Morgan v. New Sweden Irr. Dist.*, 156 Idaho 247, 256, 322 P.3d 980, 989 (2014).<sup>10</sup>

## CONCLUSION

When a servient estate agrees to grant an easement to a utility, the Parties are agreeing to a contract. Every easement carries with it by implication the right to do what is reasonably necessary for the full enjoyment of the easement. However, a utility's rights are not unlimited, and they cannot cause unreasonable damage to the servient estate. When an issue arises concerning whether a party exceeded its rights, interpreting the terms of the easement is often the first step in the court's analysis. The utility has the burden of showing that a servient estate's activities interfere unreasonably with its right to enjoyment.

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<sup>10</sup> *Connecticut Light and Power Co. v. Holson Co.*, 185 Conn. 436, 443, 440 A.2d 935, 939 (1981) (found that the easement holder had the burden of establishing that the servient owner's activities interfered with the holder's enjoyment of the easement; *Morgan v. New Sweden Irr. Dist.*, 156 Idaho 247, 256, 322 P.3d 980, 989 (2014) (found that "an easement holder has the burden of showing unreasonable interference")