

3079 TERMINATION OF EASEMENT BY ABANDONMENT

(Servient landowner) contends that the easement was abandoned by (easement holder). To prove this abandonment, (servient landowner) must prove that (easement holder) has shown by (his) (her) (its) conduct a clear intention to forgo all future uses authorized by the easement. The fact that (easement holder) has not used the easement for (specify period of nonuse, e.g., three years) is not by itself proof of abandonment, but it is evidence that you may consider in deciding whether (he) (she) (it) intended to abandon the easement. You must find that (easement holder)’s conduct clearly indicates an intention to give up the use of the easement for the future as well as for the present.

[Conduct, that is inconsistent with the continued use of the easement, indicates an intention to give it up].

[Use this paragraph if there is evidence of that the easement holder made verbal expressions indicative on an intent to abandon: Verbal expressions, by themselves are insufficient to constitute the type of conduct required to forgo all future uses authorized by an easement. However, verbal expressions may give meaning to acts that indicate an intention to abandon an easement but do not conclusively demonstrate such an intention on their own.]

COMMENT

This instruction and comment were approved by the Committee in September 2021.

This instruction should be used when a servient landowner sues or defends by claiming that the dominant owner's easement has been abandoned.

In Burkman v. New Lisbon, 246 Wis. 547, 18 N.W.2d 4 (1945), the Wisconsin Supreme Court adopted comments (c) and (d) of the RESTATEMENT OF THE LAW OF PROPERTY, VOL. V, § 504 (1940) to determine whether flowage rights acquired by prescription were lost by abandonment. Comments (c) and (d) read as follows:

c. Conduct as to Use. An intentional relinquishment of an easement indicated by conduct respecting the use authorized by it constitutes an abandonment of the easement. The intention required in the abandonment of an easement is the intention not to make in the future the uses authorized by it. The benefit of an easement lies in the privilege of use of the land subject to it. There is no abandonment unless there is a giving up of that use. The giving up must be evidenced by conduct respecting the use of such a character as to indicate an intention to give up the use for the future as well as for the present. Conduct, when inconsistent with the continuance of the use, indicates an intention to give it up. The conduct required for abandonment cannot consist of verbal expressions of intention. Such expressions are effective to extinguish an easement only when they comply with the requirements of a release and operate as such. Verbal expressions of an intention to abandon are relevant, however, for the purpose of giving meaning to acts which are susceptible of being interpreted as indicating an intention to give up the use authorized by an easement, but which do not give themselves conclusively demonstrate the intention which animated them.

d. Non-use. Conduct from which an intention to abandon an easement may be inferred may consist in a failure to make the use authorized. Non-use does not of itself produce an abandonment no matter how long continued. It but evidences the necessary intention. Its effectiveness as evidence is dependent upon the circumstances. Under some circumstances a relatively short period of non-use may be sufficient to give rise to the necessary inference; under other circumstances a relatively long period may be insufficient. The duration of the period of nonuse, though never conclusive as to the intention to abandon, is ordinarily admissible for the purpose of showing intention in that regard. (Emphasis added).

Comments (c) and (d) of the RESTATEMENT OF THE LAW OF PROPERTY, VOL. V, § 504 (1940) were also adopted by the Wisconsin Court of Appeals in Spencer v. Kosir, 2007 WI App 135, 301 Wis.2d 521, 733 N.W.2d 921 and Bohn v. Leiber, 2020 WI App 52, 393 Wis.2d 757, 948 N.W.2d 370.

Demonstrating an intention to permanently abandon. In Spencer v. Kosir, 2007 WI App 135, 301 Wis.2d 521, ¶10, 733 N.W.2d 921, the Wisconsin Court of Appeals noted the requirement that there be an “affirmative act” by the easement holder, rather than the property owner, to show abandonment. For example, despite a significant period of non-use by the easement holder, along with acquiescence in the property owner's non-permitted use of the property, the court found no abandonment since there was a lack of an affirmative action by the easement holder demonstrating his intent to abandon. Id. at ¶¶9-10.

In regard to the affirmative action requirement, Bohn v. Leiber, 2020 WI App 52, 393 Wis.2d 757, 766, 948 N.W.2d 370, is distinguishable from Spencer, supra. In Bohn, the Wisconsin Court of Appeals

determined that the easement holder's comment that "he had 'no intention of ever building a roadway on the easement,' by itself, would be insufficient to constitute abandonment." Additionally, the fact that the easement area was never utilized as a roadway, by itself, would also be insufficient to show abandonment. Id. at 766. However, when these examples were coupled with the easement holder's affirmative act of planting numerous trees within the easement area, the court concluded that there was a question of fact as to whether the easement was abandoned.

