

HOW ARE PUBLIC WAYS IN SUBDIVISIONS LAWFULLY DISCONTINUED?

For professional engineers and for surveyors a discussion of a recent decision of the Court of Appeals of Wisconsin is relevant. Even for professional engineers who are not engaged in professional tasks involving subdividing of land or establishing or protecting access to navigable water, the Court of Appeals decision in Vande Zande v. Town of Marquette decided on August 13, 2008, is interesting.

In Wisconsin, title to the beds of navigable lakes and rivers is held in trust for the public's use and enjoyment. In Vande Zande v. Town of Marquette, the Court of Appeals noted that since 1923 the Wisconsin legislature has required the developers of riparian land to provide, at half-mile intervals or less, access to navigable waters. The Court was called upon to decide whether "public access" to Lake Puckaway in the Town of Marquette as provided in an approved subdivision was either never properly created or whether the town by inaction had abandoned it.

It seems that Fred Stamm and his wife owned land on the shore of Lake Puckaway and began to develop the land in 1970 when they filed a certified survey map which showed the disputed parcel designated as "public access." Ultimately, 14 parcels were created by subdividing additional land and each purchaser of a lot received an undivided 1/30th interest in the "public access" parcel. In 2006 the town board advised the lot owners that they had no valid claim to the access because it was "public access," available to all. The lot owners asserted that the access parcel was not a public lake access because no public access was ever created; that the Stamms in dividing the property did not dedicate the disputed parcel as public access; that the town did not properly accept the dedication even if it was made; that even if the "public access" did exist when created, it has ceased to exist because of the town's inaction to maintain it as a public access, which the lot owners argued, constituted a discontinuance of the "public access."

The Court of Appeals observed that there was no dispute that the Stamms had created the

plat and that it was approved with the disputed parcel marked as “public access.” The Court rejected the lot owners’ claim that the label “public access” was not equal to the label “dedicated to the public” which was used in Chapter 236 of the Wisconsin Statutes of 1973. The Court held that the word “public” was obviously intended to mean “public,” thereby establishing a “public access.”

The land owners’ argument that the town failed to take the necessary steps to accept the dedication was also rejected because when a final plat of a subdivision has been approved by the governing body of the municipality or town in which it is located, Wisconsin Statutes expressly state that the approval constitutes an acceptance for the purpose of designations on the plat of lands shown to be dedicated to the public.

In addressing the land owners’ argument that the public access had been discontinued by lack of use or improvement, the Court discussed the statutes that involve the discontinuance of highways and compared them with the statutes that provide for discontinuance of public areas in subdivisions. The Court noted that under Chapter 82 of the Wisconsin Statutes (previously Chapter 80 of the statutes), a highway may be discontinued in one of two ways: if it is not opened, traveled or worked within four years of being laid out, or if it has been entirely abandoned as a route of travel and no highway funds have been spent on it for five years. The lot owners contended that those highway statutes applied because the “public access” was never opened and it was abandoned as a route of travel and no highway funds were expended on it for five years. The town did not dispute it but argued that the “public access” was not a highway and argued that Chapter 236, relating to the platting of land, controlled the discontinuance of the public lake access. The Court held:

However, after examining the recent history of both provisions, we conclude that the legislature has chosen § 236.43 as the exclusive means for the termination of a

public access to a lake, regardless of when the access was laid out.

Section 236.43 of the Wisconsin Statutes provides for the vacation of areas dedicated to the public by court action. The statute states:

236.43 Vacation or alteration of areas dedicated to the public. Parts of a plat dedicated to and accepted by the public for public use may be vacated or altered as follows:

- (1) The court may vacate streets, roads or other public ways on a plat if:
 - (a) The plat was recorded more than 40 years previous to the filing of the application for vacation or alteration; and
 - (b) During all that period the areas dedicated for streets, roads or other public ways were not improved as streets, roads or other public ways; and
 - (c) Those areas are not necessary to reach other platted property; and
 - (d) All the owners of all the land in the plat or part thereof sought to be vacated and the governing body of the city, village or town in which the street, road or other public way is located have joined in the application for vacation.

The court concluded that § 236.43 provided the sole means for vacating a public access. Curiously, the Court of Appeals did not discuss the degree to which the circuit court examined § 236.43 of the statutes in deciding that the lot owners had no private property right in this “public access” parcel. However, what is clear from the decision and the rule of law it produces is that land dedicated as public access to navigable waters in approved subdivisions may only be vacated or altered under Chapter 236 of the Wisconsin Statutes.