

## PUBLIC HIGHWAYS AREN'T A SUBSTITUTE FOR PRIVATE EASEMENTS

Those professional engineers who are engaged in real estate subdivision development and highway engineering will be interested in a recent Wisconsin Supreme Court case, AKG Real Estate, LLC v. Patrick Kosterman, et al., decided by the Wisconsin Supreme Court in July of 2006. In that case, a subdivision developer brought an action against the holder of an easement seeking a declaratory judgment that the developer had the right to terminate private road easements upon providing public road access. The dominant estate owner, which held the easement, brought a counterclaim for a declaration that the easements remained in full force and effect and could not be substituted or terminated by public access. In a published decision, the Wisconsin Court of Appeals held that the servient estate owner upon whose land the easement was located could unilaterally terminate an express right-of-way easement once the servient estate provided an alternate public route of ingress and egress to the dominant estate. The Wisconsin Supreme Court reversed the Court of Appeals, concluding that the owner of a servient estate cannot unilaterally relocate or terminate an express easement with a public road.

The facts in this case involved the creation of the easements when the dominant and servient estates were under common ownership consisting of 84 acres of vacant land along Highway 31 in Racine County. The owners deeded a 4-acre parcel, which became the dominant estate, to their son and daughter-in-law and created easements because the dominant estate lacked access to a public road. The easements were expanded to a 66' width which would permit the creation of a public road. Eventually, the servient estate was purchased by AKG Real Estate, LLC, a developer, which planned two public roads connecting with Highway 31 from the subdivision.

The Wisconsin Department of Transportation (DOT) would not consent to a public road

along the easements because of an insufficient minimum distance from other roads connecting to the state highway. Therefore, in order to develop the subdivision as planned, AKG needed to relocate the easements, but the dominant estate owners refused to consent to the relocation. AKG then sought a declaratory judgment from the courts holding that the easements terminated once AKG provided alternative public road access to the dominant estate.

The circuit court initially held that the easements were terminated once AKG provided public road access and the Court of Appeals affirmed the circuit court. The Court of Appeals concluded that the intent of the easements was to provide public road access and that the refusal of the dominant estate to consent was unreasonable and would impose costs far in excess of the benefits to the concerned parties.

Upon review by the Wisconsin Supreme Court, the Court of Appeals was reversed. The Supreme Court held that the express easements were not subject to the recognized rule that an easement for a particular purpose terminates when it becomes impossible to use the easement as originally intended. The court held that the primary purpose of the easement was not to become a public road, but rather to provide ingress and egress to the dominant estate over a described route. The court held that purpose was not frustrated by DOT regulations making it impossible to construct a public road along that route. The court also rejected AKG's argument that the easement would not be necessary to provide access once a public road was built, holding that it is longstanding Wisconsin easement law that an express easement does not terminate even when the necessity or purpose of the easement ceases.

The Wisconsin Supreme Court was not persuaded that express easements should be unilaterally modified because of a change of economic circumstances.

While two concurring justices on the Supreme Court were of the opinion that Wisconsin law permitted the termination of express easements when conditions changed to the extent that the purpose of the easement could no longer be accomplished, they joined the majority of the court because they did not believe there had been changed conditions established in the case.

This case evidences the protection the courts will accord to express easements once they are granted and that public access is not necessarily a sufficient substitute for a private easement.