COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

Nos. 98-1753, 98-1762

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

NO. 98-1753

IN THE MATTER OF THE PLAT OF EAU CLAIRE LAKES PARK:

TOWN OF BARNES,

APPELLANT,

V.

WILBUR MASON, JULE REID AND MAURICE J. STROHMAN,

RESPONDENTS.

NO. 98-1762

TOWN OF BARNES,

PLAINTIFF-APPELLANT,

V.

WILBUR MASON, JULE REID AND MAURICE J.

STROHMAN,

DEFENDANTS-RESPONDENTS.

APPEALS from judgments of the circuit court for Bayfield County: THOMAS J. GALLAGHER, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Wilbur Mason, Jule Reid, Maurice Strohman, and their spouses (the applicants) filed an application to vacate a portion of a plat pursuant to §§ 236.40 and 236.43, STATS. The Town of Barnes filed a separate action seeking a declaration of rights and damages for slander of title. The trial court dismissed the Town's action and ordered the designated portion of the plat vacated. The Town appeals and argues: (1) There is sufficient evidence to establish the dedication of the parcel as a public park, highway or public way; and (2) a publicly dedicated park may not be vacated without the Town's approval. We reject its arguments and affirm the judgments.

The underlying facts are essentially undisputed. The Eau Claire Lakes Park plat was recorded in 1931 in Bayfield County. According to the surveyor's certificate, the plat, executed by owner Alvin Johnson, divided an isthmus into blocks, lots, outlots, streets and parks. The narrow thirty by eighty-seven-foot parcel in question runs east from the town road to the water's edge. The face of the plat does not indicate that the parcel was to be conveyed to the Town. The parcel is located across the road from a resort, public boat landing and parking area providing access to a lake.

After the plat was recorded, there was no record of any conveyance of the disputed parcel by Johnson. Johnson died in 1946. The inventory filed to probate Johnson's estate included some parcels in the plat, but did not include the thirty-foot strip in question.

The applicants own land adjoining the disputed strip. The Town never made any improvement to the parcel. Mason testified at trial that in 1996, a private citizen took a "weed whacker" through the brush and small trees, leaving small stumps and brush across the area that was brushed. In 1996, Johnson's heirs gave the applicants a quitclaim deed to the parcel in question.

Section 236.42, STATS., provides that after proper notice and hearing, the court may "in its discretion" grant an order vacating or altering the plat or any part thereof, with certain exceptions, including: "The court shall not vacate any parts of the plat which have been dedicated to and accepted by the public for public use except as provided in s. 236.43." We uphold discretionary decisions if the record discloses that the court examined the relevant facts, applied the proper legal standard and, using a demonstrated rational process, reached a reasonable conclusion. ***Schneller v. St. Mary's Hosp. Med. Ctr.,*** 162 Wis.2d 296, 306, 470 N.W.2d 873, 876 (1991).

The Town contends that the court erroneously concluded that the evidence failed to support a finding that the parcel had been dedicated and accepted for public use. Although the Town concedes that there is no evidence of

any formal dedication,[1] it argues that the trial court erred when it found that there was "no evidence" of common law dedication and acceptance by the Town. "The essential requisites of a valid common-law dedication are that there must be an intent to dedicate on the part of the owner and an acceptance of the dedication by the proper public authorities, or by general public user." ***Galewski v. Noe***, 266 Wis. 7, 12, 62 N.W.2d 703, 706 (1954) (citation omitted). "Dedications or offers thereof need not be in writing, nor in any particular form. The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication." ***Id***.

The Town argues that the following "uncontroverted documentary evidence" requires a finding that the parcel was offered and accepted for public dedication: (1) The inventory of Johnson's estate, upon which final judgment was entered in 1947, did not include the land in question and there is no record of conveyance subsequent to the 1931 recording of the plat; (2) in 1956, Johnson's son wrote a letter indicating that his father intended to dedicate the parcel; (3) the parcel was listed on tax rolls as owned by the Town; and (4) Mason's solicitation to the Town to purchase the parcel is reputation evidence of ownership.

The Town's argument asks this court to draw inferences contrary to those drawn by the trial court. This we are not empowered to do. *See* ***C.R. v. American Standard Ins. Co.,*** 113 Wis.2d 12, 15, 334 N.W.2d 121, 123 (Ct. App. 1983) ("If more than one reasonable inference may be drawn, an appellate court

[1] The court observed that the plat as recorded in 1931 contains no offer of donation or dedication of any land to the public. The Town agrees that the plat is silent in this respect. The court also found that there is no evidence of any subsequent offer of dedication by owners of the land and no evidence of formal acceptance by the Town; the Town does not challenge this finding.

must accept the one chosen by the trial court."). Here, after an examination of the evidence, the court rejected the Town's interpretation The court rejected the claim that the parcel is listed on tax rolls as evidence of acceptance, because the parcel was not correctly described in the tax rolls. The tax rolls described it as the south thirty feet of block one and that is not where the parcel is located. The south thirty feet of block one is in lot 8 of block one. The court concluded: "The most reasonable inference from all the evidence is that the Town has always dealt with this strip out of uncertainty and confusion as to ownership, and that does not rise to acceptance."

In the context of the court's written decision, its finding of "no evidence" can be properly interpreted as "no direct evidence." The 1956 letter, written by Johnson's son, is not direct evidence of dedication or acceptance. The Town places great reliance on the letter which states that it was his father's intention that the parcel be used for public enjoyment. The weight of evidence is a matter uniquely within the province of the trial court. Section 805.17(2), STATS. Here, the trial court was entitled to give little weight to the letter, written many years after Johnson's death, especially in light of evidence that Johnson's widow had indicated that she continued to own the parcel.

In addition, more than one reasonable inference may be drawn from the absence of the parcel from the inventory of Johnson's estate, as well as from Mason's offer to purchase the disputed parcel. Further, the record fails to indicate that there was any public use of or improvement made to the parcel. All the facts relied on by the Town have implications inconsistent with intent to dedicate and acceptance. Consequently, the trial court could reasonably conclude that the

evidence was insufficient and demonstrate intent to dedicate and acceptance of the land for public purposes.[2]

Next, the Town argues that because the parcel in question is a public park, the trial court may not vacate the dedication without the Town's express approval. Section 236.43(3), STATS., provides:

> The court may vacate land, in a city, village or town, platted as a public park or playground upon the application of the local legislative body of such city, village or town where the land has never been developed or used by said city, village or town as a public park or playground.

We are unpersuaded. The record supports the trial court's determination that the parcel in question has never been dedicated or accepted as a platted public park or playground. There is no evidence that the property has ever been used or improved as a public park or playground. There is no suggestion that there has been any formal dedication or acceptance. As a result, § 236.43(3), STATS., does not apply.[3]

Finally, the Town argues that the deed the applicants received from Johnson's heirs is a nullity under § 893.33, STATS. The Town does not, however, offer any suggestion that this issue was before the trial court. Without any cite to the record indicating that this issue was raised before the trial court, we decline to address it on appeal. *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992); *see also* RULE 809.19(1)(e), STATS., (providing that briefs

[2] In view of our conclusion, we need not address whether the court properly vacated the dedication under § 236.43, STATS.

[3] The Town further argues that § 80.32, STATS., does not apply. Because there is no indication that the trial court relied on this section, we do not address this issue.

must contain "citations to the … parts of the record relied on"). This argument, therefore, is rejected.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.