

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 14, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0092

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

**IN RE THE MATTER OF THE VACATION OF A PORTION
OF DRY CREEK ROAD, F/K/A NICKLOS DRIVE, LOCATED
IN GOVERNMENT LOT THREE (3), IN SECTION THIRTY (30), TOWNSHIP
THIRTY-FOUR (34), RANGE SEVENTEEN (17), IN THE TOWNSHIP
OF BALSAM LAKE, THE PLAT OF SHADY SHORES ON DEER LAKE,
POLK COUNTY, WISCONSIN, BEING SOUTHERLY TO THE
SHORE OF DEER LAKE FROM THE EXTENSION OF SOUTHERLY
BOUNDARY OF DRY CREEK ROAD (NICKLOS DRIVE), FROM THE EASTERLY
BOUNDARY OF LOT 8 TO THE EASTERLY BOUNDARY OF SAID PLAT:
ALICE L. ANDREWS, ALLEN D. BUNE, TRUSTEE OF THE ALLEN D. BUNE
REVOCABLE TRUST, JERE K. ERICSON, SUSAN J. ERICSON, JOHN J. FUCHS,
KENNETH J. JOHNSON, CHARLEENE JOHNSON, STEVEN C.
JORGENSEN, BARBARA L. JORGENSEN, L. WILLIAM SATHERS,
LINNELL L. SATHERS, JOHN R. TESTER AND JOYCE L. TESTER,**

PLAINTIFFS-APPELLANTS,

v.

TOWN OF BALSAM LAKE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Polk County:
ROBERT RASMUSSEN, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

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

¶1 PER CURIAM. Landowners¹ appeal a judgment approving the Town of Balsam Lake's plan to develop a platted access to Deer Lake. The landowners argue that (1) the trial court erroneously refused to vacate the platted access road pursuant to WIS. STAT. § 236.43(1) (1995-96);² (2) the Town never accepted the dedication of the access; and (3) the Town's development plan exceeds the lawful scope of dedication. We reject the landowners' first two contentions. However, because the Town's development plan exceeds the scope of the dedication, we reverse and remand for further proceedings.

¶2 In 1947, a recorded plat granted the Town an access easement extending from Dry Creek Road to Deer Lake. The Town never opened or improved the access. In 1997, adjacent landowners brought this action seeking to vacate the undeveloped access. The trial court found that the landowners satisfied the statutory criteria to vacate the access, but ordered the matter adjourned to permit the Town to submit a proposed site development plan. The court explained:

It is certainly understandable that the plaintiffs would prefer to maintain their privacy by having this platted access vacated. The subject property is at the end of a

¹ The landowners are the named plaintiffs in the caption.

² There is no dispute that the 1995-96 statutes governed. All statutory references are to the 1995-96 version unless otherwise noted.

dead end road and the increased traffic which improvement and development of the subject property into a useable lake access will create is indisputable.

However, in late 20th century America, in a very recreation-oriented society, with ever increasing need and desire for access to lakes, by those not fortunate enough to live on the lake, this court must make appropriate and adequate provision to recognize the needs and desires of all members of the public

¶3 The Town in turn submitted its plan, which included picnic tables, an outhouse, refuse cans and a dock. The court approved the plan, with minor changes, and denied the landowners' petition to vacate. The landowners appeal.

¶4 WISCONSIN STATS. § 236.42 provides that after proper notice and hearing, the court may "in its discretion" grant an order vacating or altering a plat or any part thereof. However, "[t]he 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." *See* WIS. STAT. § 236.42.

¶5 WISCONSIN STATS. § 236.43 provides:

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 have joined in the application for vacation.

¶6 The parties do not dispute that all the statutory elements have been satisfied.³ Also, it is undisputed that the court possesses the discretionary authority to adjourn the proceedings to submit a proposed development plan. In *Closser v. Town of Harding*, 212 Wis. 2d 561, 578-79, 569 N.W.2d 338 (Ct. App. 1997), we observed,

Had the Town sought an adjournment to demonstrate its intent to provide access to the lake, the trial court had the discretion to grant it. *Selk v. Township of Minocqua*, 143 Wis.2d 845, 422 N.W.2d 889 (Ct. App. 1988). In that case, in a proceeding to vacate land dedicated as a street leading to Lake Minocqua in 1906 but never developed, the trial court did not erroneously exercise its discretion by adjourning to allow the town a specified time in which to develop the land for "the extraordinary public benefit derived from lake access." *Id.* at 847, 422 N.W.2d at 889.

¶7 The landowners argue that the trial court erroneously exercised its discretion by failing to vacate the road. They contend that the court gave two reasons for denying their claim: First, the legislature gave municipalities "veto power" in 1997 Wis. Act 172 over WIS. STAT. § 236.43 actions commenced after its effective date of May 7, 1998.⁴ The Town does not dispute that the Act's

³ Neither party addresses WIS. STAT. § 236.43(4), which provides:

When the plat is being vacated or altered in any 2nd, 3rd or 4th class city or in any village or town which includes a street, road, alley or public walkway, said street, road, alley or public walkway may be vacated or altered by the circuit court proceeding under ss. 236.41 and 236.42 upon the following conditions:

(a) A resolution is passed by the governing body requesting such vacation or alteration.

(b) The owners of all frontage of the lots and lands abutting on the portion sought to be vacated or altered request in writing that such action be taken.

⁴ This Act amended WIS. STAT. § 236.43(1)(d) to read: "All owners of 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."

effective date post-dated the July 11, 1997, commencement of this action. The landowners argue that the court's reliance on this factor was erroneous because the court should not have considered subsequent legislative intent. The second reason the court gave was that there was a need for access to Deer Lake for recreational purposes.

¶8 If we accept the parties' characterization of the court's decision-making function in this instance as one of discretion, and we do, the landowners' argument fails to demonstrate reversible error.⁵ The landowners challenge only the first basis for the trial court's decision. We will not reverse a discretionary determination "if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." *Prahl v. Brosamle*, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). We acknowledge that the exercise of the court's discretion under a mistaken view of the law would be an erroneous exercise of discretion. See *Schaefer v. Potosi Village Bd.*, 177 Wis. 2d 287, 292, 501 N.W.2d 901 (Ct. App. 1993). Even if the circuit court had had a mistaken view of the law, however, this is not necessarily grounds for automatic reversal. "A reviewing court is obliged to uphold a discretionary decision of a trial court, if it can conclude *ab initio* that there are facts of record which would support the trial judge's decision had discretion been exercised on the basis of those facts." *Schmid v. Olsen*, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983). Indeed, "we generally look for reasons to sustain discretionary decisions." *Burkes v. Hales*, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991) (footnote omitted).

⁵ On review, we confine ourselves only to the theories raised and issues argued by the appellant. *Public Service Employees Union v. WERC*, 246 Wis. 190, 199, 16 N.W.2d 823 (1944).

¶9 Here, the trial court's exercise of discretion was not based solely on the legislative intent expressed in the subsequent legislation. Instead, the trial court's second consideration involved the need for public access to Deer Lake for recreational purposes. The landowners do not attack this consideration as a legitimate basis for the court's decision. As an independent basis, the reasonableness of which was not apparently influenced or affected by the trial court's other allegedly erroneous legal conclusion, it provides a rational basis for the decision. Therefore, we cannot conclude that the court's decision was the result of an allegedly mistaken view of the law or predicated on an erroneous legal conclusion. *See State v. Hutnik*, 39 Wis. 2d 754, 764, 159 N.W.2d 733 (1968). Because the second basis for the trial court's determination is not challenged, we conclude that the landowners fail to demonstrate reversible error.

¶10 Next, the landowners argue that the Town never accepted the easement and, therefore, the platted road should have been vacated. The Town responds that formal acceptance is not required according to WIS. STAT. § 236.50(2), which provides:

No plat which was recorded in the office of any register of deeds prior to July 1, 1956, shall be held invalid by reason of noncompliance with any statute regulating the platting of lands, in force at the time of such recording. Any unaccepted offer of donation or dedication of land attempted to be made in any such plat shall be as effectual as though all statutory requirements had been complied with unless an action to set aside such offer of donation or dedication is commenced prior to July 1, 1958.

¶11 The landowners do not reply to the Town's argument. Therefore, the Town's argument is deemed admitted and we do not address it further. *See Charolais Breeding Ranches v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶12 Finally, the landowners contend that the trial court erroneously approved the Town's plan because it exceeded the lawful scope of the dedication. Here, there is no dispute that the purpose of the dedication was to provide a public road or walkway for lake access. The Town offers no evidence that the dedication's scope included a public park or dock.

¶13 We agree that the Town's proposal exceeds the lawful scope of the easement. "Where the owner has dedicated land for a street, the municipality may not appropriate it for other uses. 11A MCQUILLIN, *Municipal Corporations* § 33.74 (3d ed. 1991). 'Land dedicated for a street cannot be used ... as a park or public square.' *Id.* (footnotes omitted).]" *Closser*, 212 Wis. 2d at 574 n.3. Because the Town's plan includes picnic tables, an outhouse and a dock, it contemplates use as a public park.

¶14 The Town argues that these uses are merely incidental to the permissible purpose of lake access. We are unpersuaded. Although dedicated as a street or road, improvement of land as another type of public way may meet the requirements of WIS. STAT. § 236.43(1). For example, a walkway cleared and improved to be conducive to pedestrian traffic is a public way improved in accordance with § 236.43(1). See *In re K.G.R. Partnership*, 187 Wis. 2d 376, 385, 523 N.W.2d 120 (Ct. App. 1994). However, it has been held that isolated improvements to provide for a scenic outlook were not improvements as a street, road or public way under subsec. (1). See *Closser*, 212 Wis. 2d at 573. We conclude that the Town's proposed uses go beyond those merely incidental to a public way for lake access.

¶15 In conclusion, we reject the landowners' suggestion that the court erroneously exercised its discretion when, instead of vacating the road, it

adjourned to permit the Town to submit a development plan. We also reject their claim that the road should be vacated because of the lack of formal acceptance of the dedication. We agree, however, with their contention that the Town's proposal was inconsistent with the purpose of the dedication. Accordingly, we remand with directions that the court, in its discretion, may adjourn the proceedings to permit the Town to file an amended development plan limited to providing lake access to the public.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(3)(b)5.

