

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2012AP2183

Cir. Ct. No. 2012CV54

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**MATTHEW RUNKLE, JENNY RUNKLE, ROBERT KUBESH, FRANCES
KUBESH, PHILIP KUBESH, SHELLEY KUBESH, JEREMY JOB, AMY
JOB, JASON PINNOW AND ERIN PINNOW,**

PLAINTIFFS-APPELLANTS,

v.

TOWN OF ALBANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Green County:
JAMES R. BEER, Judge. *Reversed and cause remanded with directions.*

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 HIGGINBOTHAM, J. The issue presented on appeal by Matthew and Jenny Runkle and others who own homes located on Proverbs Pass (the

Owners) is whether the Town of Albany (the Town) accepted Proverbs Pass as a town road by approving and recording a plat that included Proverbs Pass, pursuant to WIS. STAT. § 236.29(2) (2011-12).¹ The circuit court granted summary judgment in favor of the Town, concluding that the Town did not accept the plat and the dedication of Proverbs Pass, and dismissed the action. We conclude that the Town accepted the plat and the dedication of Proverbs Pass.² We therefore reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 The pertinent facts are undisputed. Proverbs Pass is a street located in the plat of Hosanna Estates (the plat) in the Town. The plat was approved by the Town board and subsequently recorded in the Green County register of deeds. The Owners purchased lots on Proverbs Pass and constructed residences on the lots.

¶3 The Town entered into a development agreement with a developer to construct improvements within the plat, including the construction of Proverbs Pass. The developer did not complete the construction of Proverbs Pass. The Town also has not completed construction of Proverbs Pass or maintained it.

¶4 The Owners filed a complaint against the Town, seeking a declaratory judgment that the Town accepted Proverbs Pass as a town road and a

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² As we discuss later in the opinion, our conclusion that the Town accepted the plat and the dedication of Proverbs Pass does not resolve the separate issue of whether the Town is obligated to construct and maintain Proverbs Pass.

writ of mandamus requiring the Town to complete construction of Proverbs Pass and to maintain it, including by providing snow removal services. The Owners also brought a claim under 42 U.S.C. § 1983 alleging that the Town’s “refusal ... to satisfy its obligations” to construct and maintain Proverbs Pass has deprived them of their rights under the equal protection clause of the United States and Wisconsin constitutions. In its answer, the Town admitted that the Town board had approved the plat and recorded the plat with the register of deeds. However, the Town denied that it accepted Proverbs Pass as a town road. The Town also denied that it had any obligation to complete construction of Proverbs Pass or to maintain it.

¶5 The Owners subsequently moved for partial judgment on the pleadings, seeking a declaration that the Town had accepted Proverbs Pass as a town road. In response, the Town filed a motion for summary judgment on the ground that the Town had not accepted Proverbs Pass as a town road. The circuit court denied the Owners’ motion, granted the Town’s motion, and dismissed the action.³ The Owners appeal.

DISCUSSION

¶6 We review a grant or denial of summary judgment as a question of law subject to de novo review, applying the same methodology as the circuit court. *State v. Bobby G.*, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no

³ The Owners’ motion was treated as a summary judgment motion because matters outside the pleadings were presented to and not excluded by the circuit court. *See* WIS. STAT. § 802.06(3).

genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶7 The only issue presented by the parties is whether the Town accepted Proverbs Pass as a town road when the Town approved the plat and recorded the plat with the county register of deeds. The Owners contend that, because it is undisputed that the Town approved and recorded the plat, the Town accepted Proverbs Pass as a town road, pursuant to WIS. STAT. § 236.29(2).

¶8 The Town responds that, although it approved and recorded the plat, those two acts alone are insufficient to establish that it accepted Proverbs Pass as a town road. The Town argues that acceptance occurs only when the plat is approved, recorded, and “all other required approvals are obtained.” WIS. STAT. § 236.29(2). The Town contends that it conditioned its acceptance of Proverbs Pass as a town road on the developer meeting certain conditions set forth in the development agreement, and that, because those conditions were not met, “all other required approvals” were not obtained and thus the Town did not accept Proverbs Pass as a town road.

¶9 The circuit court granted summary judgment in favor of the Town on the ground that the Town did not accept the plat and the dedication of Proverbs Pass because the Town conditioned its acceptance on the developer meeting certain conditions set forth in the development agreement that the developer did not meet.

¶10 WISCONSIN STAT. § 236.29(2) provides as follows:

When a final plat of a subdivision has been approved by the governing body of the municipality or town in which the subdivision is located and all other required approvals are obtained and the plat is recorded, that approval constitutes

acceptance for the purpose designated on the plat of all lands shown on the plat as dedicated to the public including street dedications.

¶11 We conclude that the issue of whether the Town accepted the plat is governed by *Vande Zande v. Town of Marquette*, 2008 WI App 144, ¶18, 314 Wis. 2d 143, 758 N.W.2d 187. In *Vande Zande*, the pertinent issue was whether the Town of Marquette took the necessary steps to accept a dedication of a public access to a lake located in the Town. *Id.*, ¶14. There was no dispute that the Town approved the plat that included the public access. *Id.*, ¶9. Based on our reading of WIS. STAT. § 236.29(2), we concluded that “a town board’s approval of a final plat constitutes acceptance of any dedications to the public made therein. No further action is necessary.” *Id.*, ¶18; *see also* Trayton L. Lathrop, *Wisconsin’s 1955 Platting Law*, 1956 Wis. L. Rev. 385, 396 (1956) (“When an approved plat is recorded, it is deemed that streets and other lands dedicated to the public are accepted by the town or municipality involved.”). Applying *Vande Zande* here, we conclude that the Town accepted the plat and the dedication of Proverbs Pass when it approved and recorded the plat.

¶12 We reject the Town’s argument that the Town conditioned its acceptance of the plat on the developer meeting certain conditions set forth in the development agreement. As we have explained, a plat is accepted when a town approves and records the plat. *Vande Zande*, 314 Wis. 2d 143, ¶18. Here, the Town did not condition its approval of the plat on the developer meeting certain conditions set forth in the development agreement. Rather, the Town approved the plat on the condition that the Town receive: (1) an irrevocable letter of credit in the amount of approximately \$350,000; (2) a completed developer’s agreement consistent with six outlined terms; and (3) a state certified final plat. The Town concedes that all three conditions were met and that the Town approved the plat.

Because there is no dispute that the conditions for approving the plat were satisfied and that the Town recorded the plat with the register of deeds, we conclude that the Town has accepted the plat and the dedication of Proverbs Pass.

¶13 We note that our conclusion that the Town has accepted the plat and the dedication of Proverbs Pass does not resolve the question of whether the Town is obligated to complete construction and to maintain Proverbs Pass for the public. *See Carroll v. Town of Balsam Lake*, 206 Wis. 2d 529, 537, 559 N.W.2d 261 (Ct. App. 1996) (“The acceptance of a plat by the city does not require that it shall open all the streets and alleys for immediate use”) (quoting another source); *see also* WIS. STAT. ch. 82 (containing procedures for requesting a town to open a street to the public). Whether the Town has any obligation to construct and maintain Proverbs Pass is a separate issue that must be addressed by the circuit court on remand.

¶14 We also note that the circuit court dismissed the action without giving the Owners an opportunity to pursue their mandamus action and their action under 42 U.S.C. § 1983. The Owners asserted in their motion for partial judgment on the pleadings that they “reserve[d] their right” to pursue at a later date the other causes of action set forth in the complaint. The Town does not dispute that the Owners reserved that right. Accordingly, we reverse the circuit court’s determination that the Town did not accept the plat and the dedication of Proverbs Pass and remand to the circuit court to adjudicate the remaining causes of action and to resolve whether the Town has any obligation to construct and maintain Proverbs Pass.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

