STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT II
APPEAL No. 2020AP1706

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Plaintiffs-Appellants,

JENNIFER DEBRUIN, JOHN DEBRUIN, and CLAIRE GEALL SUTTON,

Plaintiffs,

v.

CITY OF NEENAH,

Defendant-Respondent.

Appeal from the Circuit Court of Winnebago County, Case No. 2020CV00270, The Honorable Karen L. Seifert Presiding

LEAGUE OF WISCONSIN MUNICIPALITIES' AMICUS CURIAE BRIEF

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Judge Seifert's oral decision notes the apparent conflict between the statute providing that statutory dedications by plat convey a fee simple interest held in trust for the public and case law providing that property obtained for public highway use, however acquired, is only an easement for highway purposes. However, she found it unnecessary to resolve it concluding that regardless of how the City's property interest is characterized, the City was within its rights to build the proposed path. Apps' Appx. 6-7.

We agree that regardless of how the City's property interest is characterized, the City is authorized to build such a path within the right-of-way. However, if the Court decides to reconcile the conflict, it is important that the Court note the differences between statutory and common-law dedications and we urge the Court to examine the "long line of decisions" cited in Thorndike v. City of Milwaukee, 143 Wis. 1, 126 N.W. 881 (1910), later relied on in Stuart v. City of Neenah, 215 Wis. 546, 255 N.W. 142 (1934), to understand why the statutory language and the Wisconsin Supreme Court's more recent treatment of statutory dedication in Heise v. Village of Pewaukee, 92 Wis. 2d 333, 285 N.W.2d 859 (1979), deserve greater weight than the earlier cases.

Despite Appellants' assertion that ownership of the property in question was not before the circuit court on summary judgment and was not part of the Plaintiffs' Complaint, Apps' Reply Br. 1, Plaintiffs' Amended Complaint sought, among other things an order declaring the parties' property rights, including the City's highway easement rights . . . ." Apps' Appx. 37. The circuit court declined to answer but appeared to believe the issue was before it. Given that, and Appellants' repeated characterization of the City's interest as simply a "highway easement," the nature of the City's property interest does appear to be an issue before this Court.

Wisconsin municipalities have authority to acquire property for streets by gift, purchase, or condemnation. Wis. Stat. §§ 61.34(3) and 62.22(1). Most municipal streets are acquired through dedication. When land is subdivided, streets and other public spaces are created by dedication to the public. *Vande Zande v. Town of Marquette*, 2008 WI App 144, ¶ 8, 314 Wis. 2d 143, 758 N.W.2d 187. Wisconsin recognizes two distinct types of dedication: statutory and common law. *Galewski v. Noe*, 266 Wis. 7, 15, 62 N.W.2d 703 (1954). Statutory dedication consists in whatever conduct is prescribed by statute, and usually requires the filing of a plat in accordance with law. Common law dedication requires an explicit or implicit offer to dedicate land, and municipal acceptance of the offer or acceptance by general public use.

Cohn v. Town of Randall, 2001 WI App 176, ¶ 6, 247 Wis. 2d 118, 633 N.W.2d 674. While statutory dedication conveys a fee simple interest, common law dedication conveys only an easement for highway purposes. *Thorndike*, 126 N.W. 881, 886. A defective statutory dedication, if accepted by the public, is treated as a common-law dedication. *Id. Thorndike* expressly recognizes the difference between these dedication types. *Id.*

This case involves a statutory dedication accomplished through the recording of a plat in 1873 that clearly shows Lakeshore Avenue in the City of Neenah extending to the shore of Lake Winnebago. In 1873, Ch. XLVII, 1871 Wis. Rev. Stats. provided that every donation or grant to the public marked on a plat "*shall* be deemed . . . . a sufficient conveyance to vest the *fee simple* of all such parcel or parcels of land as are therein expressed ..." and that "*land intended to befor (sic) the streets, alleys, ways, commons, or other public uses in any town or city*, or addition thereto, *shall* be *held in the corporate name thereof*, in trust to, and for the uses and purposes set forth and expressed and intended." (emphasis added).

The statute is straightforward. Recording a plat in compliance with the statute conveys a fee simple interest in land intended for streets and other public uses, held in the municipality's corporate name, in trust for the public for the uses and purposes set forth. Though the

statutory language has been modernized, its essential components have not changed through the years.[1]

Appellants argue municipalities cannot hold a fee simple interest in dedicated right-of-way and that a highway easement is the only property interest available. *See* Apps' Br. 16. Appellants base this argument on *Stuart*, which quotes *Thorndike*, in which the Wisconsin Supreme Court stated:

> By a long line of decisions in this state with reference to streets and roads it has become the settled law of this state that in the case of a road or street, whether acquired by condemnation, conveyance, by common-law dedication or by statutory dedication, the city, town, or village takes only an easement for highway purposes, while the fee is held by the abutting landowner. This brings all roads and streets within an (sic) uniform rule, *but whether the ruling was originally correct as regards statutory dedication by plat under the statutes quoted is doubtful.* However this may be, the rule has been so often applied and is of such long standing that it has become a rule of property with reference to roads and streets, and cannot now be departed from.

Thorndike, 126 N.W. 881, 886 (emphasis added).

However, there are four primary issues with relying on *Thorndike*. First, the court's opinion conflicts with the plain language of the statute in effect at the time. Second, the "long line of decisions"

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[1] The current version of the statute provides that "when any plat is certified, signed, acknowledged and recorded as prescribed in this chapter, every donation or grant to the public or any person, society or corporation marked or noted as such on said plat shall be deemed a sufficient conveyance *to vest the fee simple* of all parcels of land so marked or noted . . . . and the land intended for the streets, alleys, ways, commons or other public uses as designated on said plat shall be held by the town, city, or village in which such plat is situated in trust to and for such uses and purposes." Wis. Stat. § 236.29(1) (2019-21) (emphasis added).

Thorndike cites do not stand for the proposition for which they are cited. Third, the *Thorndike* court acknowledged that statutory dedications are elevated above and distinct from common-law dedications and recognized it was doubtful that a statutory dedication did indeed result only in a highway easement, yet stated it was too late to change course which left a persisting conflict with Wisconsin's statutory dedication language. *Id.* Finally, *Thorndike*, along with subsequent opinions reiterating it, conflicts with *Heise*, the most recent Wisconsin Supreme case interpreting Wisconsin's statutory dedication statute.

In *Heise,* the Wisconsin Supreme Court considered ownership of a parcel of land that had been dedicated to the Village of Pewaukee for street purposes and that terminated at lake edge. The *Heise* court did not directly address the question of whether the village could own a fee simple interest in the dedicated right-of-way, but rather looked to the issue of whether riparian rights entitled the village to ownership of a newly created extension of the original dedicated property that developed from accretion, reliction, or reclamation. *Heise*, 92 Wis. 2d 333, 343-45. Nonetheless, the discussion in *Heise* is instructive. The court concluded the village did own the newly created land. *Id.* at 345. While the court did not specifically describe the village's interest as a fee simple, the language the court used is instructive in that it concluded

the village "held title" due to its "ownership" of the original parcel of land up to the shoreline. *Id.* If the *Heise* court believed a municipality could only hold a highway easement in a street, it would not have described that type of property interest using phrases typically reserved for fee simple owners.

Heise is not the only case acknowledging municipalities' ability to own a fee simple interest in the right-of-way. The 1933 Wisconsin Supreme Court case, *Randall v. City of Milwaukee*, 212 Wis. 374, 249 N.W. 73 (1933), considered the appeal of a judgment that enjoined the city from constructing an entrance shelter for a pedestrian underpass. Again, the issue before the court was not one of ownership, but the language the court used is instructive. In particular, the *Randall* court noted that the court "has recognized that an owner of land abutting on a street has [certain rights], as an incident to his ownership, whether he *or the public owns the fee* to the center of the street." *Id.* at 74 (emphasis added).

McQuillin Law of Municipal Corporations also recognizes that municipalities may hold fee simple interests in public rights-of-way. "A municipality may acquire title to a street by accepting a dedication." 10A McQuillin Mun. Corp. § 30:35(3d ed.) (internal citations omitted). McQuillin acknowledges that the default scenario is one where abutting property owners own fee in the public right-of-way to the centerline, but

also that a municipality may own the fee simple interest if a property owner has divested him or herself of title.

> Unless the contrary is made to appear by competent evidence, the established rule of the common law followed in a majority of the states is that the abutting landowner will be held to own the fee in the public way in front of his or her property to the center of it, subject to the public easement, *unless the owner has been divested of title, as by an accepted dedication, condemnation, or by other means.* Regardless of how a street was dedicated to the public, title to a street that is vacated or abandoned vests in the owners of the lots abutting the street.

Id. (footnotes omitted) (emphasis added). It is clear from the plain language of Ch. XLVII, 1871 Wis. Rev. Stats. and Wis. Stat. § 236.29(1) (2019-21), the most recent caselaw on the topic, and the Wis. Stat. § 66.1005 reversion of title statute that Wisconsin follows the majority rule.

Although the parties agree the statements in *Stuart* are dicta, this Court cannot dismiss a statement from a Wisconsin Supreme Court opinion by concluding it is dictum. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 782 N.W.2d 682. However, this court does not need to dismiss those statements as dicta because *Stuart* or *Thorndike* are factually distinct and do not control, *Heise* does.

REGARDLESS OF WHETHER A MUNICIPALITY HOLDS A HIGHWAY EASEMENT OR FEE SIMPLE INTEREST IN THE RIGHT-OF-WAY, THE CITY'S PROPOSED PATH IS A PROPER USE OF THE RIGHT-OF-WAY.

Municipalities hold rights-of-way in trust for the public, whether that is through a highway easement or fee simple interest. Accordingly, municipalities cannot use the right-of-way for any purpose they desire. Such use must be for highway or transportation purposes. However, municipalities should not be artificially constrained in terms of what constitutes a proper highway or transportation use. Wisconsin Stat. § 990.01(12) defines "highway" to include all public ways and throughfares and all bridges upon the same. This broad definition applies "unless it would produce a result inconsistent with the manifest intent of the Legislature." *Heise*, 92 Wis. 2d 333, 348 (internal quotation omitted).

> It is true that the original definitions of highways were limited to lands used for the purpose of direct travel. However, the term "highway" may be used in a broader sense. The conception of highways is changing and it is now felt that highways established for the general benefit must admit new methods of use whenever it is found that the general benefit requires it. For the courts to limit the use of highways without considering new methods and usage would defeat, to some extent at least, the purpose for which highways are established.

Id. (internal citations omitted).

Appellants offer two primary arguments: 1) the city's "trail" improperly expands the scope of the city's "easement" (assuming arguendo that the city does only hold an easement) because the city is

limited to the original geographic footprint of Lakeshore Avenue, and 2) the "trail" is an improper use of a highway easement and only a traditionally constructed sidewalk is permitted. *See* Apps' Br. 18, 20.

Appellants' first argument is misguided. Even assuming a municipality only holds a highway easement for a right-of-way, municipalities cannot reasonably be expected to foresee the complete and final use of the right-of-way either at the time of its dedication or when the street is first opened and improved. "Cities and villages must have a '. . . . chance of growth commensurate with the public necessity, which will not be lost by mere lapse of time . . . .'" *Heise*, 92 Wis. 2d 333, 351 (internal citation omitted). "The public use is the dominant interest, and the public authorities are the exclusive judges when and to what extent the street shall be improved. Courts can interfere only in cases of fraud or oppression, constituting manifest abuse of discretion." *City of Jefferson v. Eiffler*, 16 Wis. 2d 123, 132, 113 N.W.2d 834 (1962).

Regarding the second argument, Appellants further claim the city's proposed path does not support the street's primary use as a proper sidewalk should because it allows for alternative modes of travel. Apps' Br. 19. However, "[a] street purpose . . . . is exclusively a highway purpose, and any use of the street, which improves or benefits it as a highway, is a proper street use." *Randall*, 249 N.W. 73, 76. The city's proposed uses for this path clearly provide a benefit to Lakeshore

Avenue's use as a highway by removing additional modes of transportation and street users from the street proper. By placing these additional street users on a separate path from that portion of right-of-way used by vehicles, the city aids in the safe and orderly flow of traffic along the street and facilitates the safe passage of alternative street users on the path.

That the path is in a location that is more offset from the paved street surface than a typical sidewalk does not negate its purpose as a supporting structure to the right-of-way. Municipalities need discretion regarding the design details of their rights-of-way. Not only does such discretion allow a municipality to avoid unforeseen issues like disturbing burial grounds, as in this case, it allows a municipality to address the circumstances unique to each street and to address the inevitable evolution of transportation needs over time.

The Wisconsin Supreme Court has long been deferential to municipalities' determinations of appropriate transportation uses of local rights-of-way and understanding of the fact that transportation uses evolve over time. This is evidenced by the court's discussion in *Randall*.

> Lands are set aside for public streets and highways, not for the present, with its necessities and modes of use, but for all time, with all the added demands that may be made upon the public ways within the scope of their original design, in the course of natural development that is constantly going on . . . . The trend of judicial

> opinion [in the matter] is that a general dedication of a street or highway to public use ordinarily is all-inclusive in character, and, at the time such dedication becomes effective, embraces, not only any and every use then known, practiced, or even conjectured either by the general public or by private individuals for the moving, carriage, locomotion, transportation, or conveyance of either persons or property of any kind, but as well includes any other or additional reasonable use either of a similar or of a dissimilar kind, nature, or character which thereafter may be discovered for the benefit or welfare of the traveling public."

Randall, 249 N.W. 73, 75 (internal citations omitted).

Moreover, the path at issue is not "offset and entirely independent of any highway, road, or street" as Appellants claim. Apps' Br. 21. Rather, it's located squarely within the boundaries of the dedicated right-of-way. This is not the same as a recreational trail running, truly independently, through a municipality and in no way affiliated with a vehicular right-of-way. A municipality has the discretion to design right-of-way improvements in such fashion as the municipality finds best benefits the right-of-way for highway purposes. There may be many reasons for a municipality to determine that a path being more offset from the improved street is the ideal design. In the instant case, avoiding the disturbance of burial grounds and preserving trees are two such reasons. However, municipalities may also simply determine a path should be offset from the street to leave room for future street expansion while still providing safe passage for pedestrians and other street users.

Essentially, the Appellants are asking this court to hold that 1) a municipality can only construct a path in the right-of-way at the time the first street improvement is made; 2) such path may only be located directly adjacent to the improved street in a linear or parallel fashion, as a more typical sidewalk might be; and 3) such path can never allow for travel by anyone other than a pedestrian on foot. Such limitations would drastically infringe on Wisconsin municipalities' home rule authority and their judicially recognized discretion to determine local transportation needs and uses. Construction of the proposed path is clearly a proper use of a municipal right-of-way regardless of whether the city owns title in fee or holds a highway easement. Likewise, a municipality's determination that a path should be more offset from the street and open to alternate modes of travel besides pedestrian travel does not defeat the benefit such path provides to the public. Rather, it reflects the recognized fluidity in transportation uses and needs that will inevitably occur over time.

CONCLUSION

Statutory dedication conveys a fee simple interest under the relevant statute and *Heise*, and the City's proposed path is an appropriate use of right-of-way.

Respectfully submitted March 22, 2021.

League of Wisconsin Municipalities

By: 

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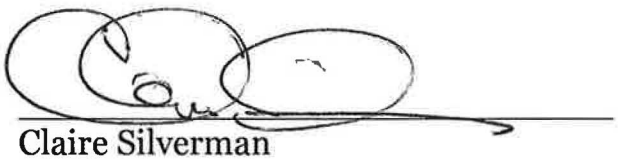
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2998 words.

I further certify that the electronic brief submitted in compliance with the requirements of sec. 809.19(12) is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate is included with the paper copies of this brief filed with the Court and mailed this day to all parties.

Dated: March 22, 2021.



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