



# When Is a Street a Street?

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When is a street a street? Although the question posed by this title may sound like a riddle or the lead-in to a joke, being unable to answer that question is no laughing matter when the outcome is important to those with a stake in the issue. An article with this same title appeared in the January 1952 issue of *The Municipality*. It was written by Robert D. Sundby, who was then League Assistant Legal Counsel, later League Legal Counsel and, eventually, a Wisconsin court of appeals judge whom I had the honor and pleasure of serving as law clerk for following my graduation from law school.

The article noted that “[m]unicipal officials are continually faced with problems requiring a determination of whether or not a street is a street or whether or not land has been effectively reserved for street purposes.” The article summarized legal factors governing the existence of municipal streets and also discussed when a street ceases to be a street. Although the law in this area has not changed dramatically since then, it’s worth revisiting this important topic since it remains relevant and some laws discussed in that 1952 article (e.g., provisions in Chapter 236 which governs platting and subdivisions) were newly enacted<sup>1</sup> while other laws cited

in the article (e.g., Chapters 80 and 81 governing highways) have since been repealed, recodified, and renumbered.<sup>2</sup>

## I. Creation and Existence of Streets

In Wisconsin, village boards and common councils have authority to acquire property for streets by gift, purchase, or condemnation,<sup>3</sup> and have management and control of municipal streets.<sup>4</sup> A municipality may own a street in fee simple, meaning it owns it completely, or it may have only a right-of-way or an easement for the benefit of the public. Property for streets that is not acquired by purchase or condemnation is typically acquired by dedication or prescription. Both are briefly discussed below.

### a. Dedication

Most village and city streets are acquired through dedication by the owner to the public. The term “dedication” implies a complete act which consists of an offer of appropriation on the part of an owner of land or an interest therein for public use, and an acceptance thereof.<sup>5</sup> Wisconsin recognizes two distinct types of dedication – statutory and common law.<sup>6</sup> Intent to dedicate to the public use is an essential component of either statutory or common law dedication, since the municipality cannot accept that which is not offered in the first instance.<sup>7</sup>

## 1. Statutory Dedication

A statutory dedication is made pursuant to the terms of a statute, and is almost universally created by the filing and recording of a plat.<sup>8</sup> Pursuant to sec. 236.13, municipalities can require subdividers to dedicate streets as a condition of plat approval. Where required by law, it is also necessary that all applicable statutes and ordinances be complied with before statutory dedication may occur.<sup>9</sup> The name of the street shall be printed on the plat and roads or streets not dedicated to the public use shall be clearly marked private. Sec. 236.13. Certified survey maps may be used for the dedication of streets. Sec. 236.34. A statutory dedication vests fee simple (complete ownership) to the property in the name of the municipality to be held by the municipality in trust for use by the public for the use intended. Wis. Stat. sec. 236.29(1).

When a final plat of a subdivision has been approved by the governing body of the municipality 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. Wis. Stat. sec. 236.29(2). The acceptance

1. Wis. Laws of 1951, Chapter 520.

2. See 2003 Wis. Act 214.

3. See Wis. Stat. sec. 61.34(3) and 62.22(1). “Street” is a generic term for a public thoroughfare and, as used in this article, includes public alleys. The 2017-19 biennial budget, 2017 Wis. Act 59, creates sec. 32.015 which prohibits municipalities from using eminent domain to establish or extend recreational trails, bike lanes, and pedestrian walkways.

4. See Wis. Stat. secs. 62.11(5) (cities) and 61.34 (villages).

5. *Cohn v. Town of Randall*, 247 Wis. 2d 118, 2001 WI App 176, 633 N.W.2d 674 (Ct. App. 2001); *City of Beaver Dam v. Cromheecke*, 222 Wis. 2d 608, 587 N.W.2d 923 (Ct. App. 1998); *Galewski v. Noe*, 266 Wis. 7, 62 N.W.2d 703 (1954).

6. *Galewski v. Noe*, 266 Wis. 7, 15, 62 N.W.2d 703 (1954).

7. *Cohn v. Town of Randall*, 2001 WI App 176, ¶ 6, 247 Wis. 2d 118, 123-24, 633 N.W.2d 674, 677.

8. *Id.*; *Vande Zande v. Town of Marquette*, 2008 WI App 144, 314 Wis. 2d 143, 758 N.W.2d 187.

9. *Cohn, supra*.

of a plat does not require that a municipality open all the streets and alleys shown on the map for immediate use and failure to use or occupy the same until the necessity arises does not abandon the public right. The governing body is the judge of the public necessity for opening its streets and alleys as discussed below.

**2. Common-law Dedication**

Unlike a statutory dedication where the owner demonstrates his intention to dedicate streets by the filing of a plat, in a common-law dedication the owner may demonstrate his intention to dedicate streets by any act, no matter how informal. A common-law dedication may be accomplished by deed, or from an oral declaration on the part of the owner, or from an incomplete or defective statutory dedication.<sup>10</sup> Common-law dedication requires an explicit or implicit offer to dedicate land, and an acceptance of the offer by the municipality or by general public use. *Galewski*, 266 Wis. at 12, 62 N.W.2d 703. A dedication is express when the intent is manifested by oral or written words, and is implied when the intent must be gathered from the

acts of the dedicator. However, it is clear that a dedication is an unequivocal act shown by affirmative evidence and the burden of showing that act falls upon the party asserting the dedication.<sup>11</sup> It is vital to a dedication of property to public use that it be forever and irrevocable after acceptance. *City of Beaver Dam v. Crombeecke*, 222 Wis. 2d 608, 587 N.W.2d 923 (Ct. App. 1998).

**Effect of Reservation or Exception in Conveyance** Whenever an executed and recorded deed, land contract, or mortgage of lands abutting on an existing public street, highway, or alley or a projected extension thereof contains language reserving or excepting certain lands for street, highway, or alley purposes, the reservation or exception constitutes a dedication for such purpose to the public body having jurisdiction over the same unless the language of the reservation or exception plainly indicates an intent to create a private way. Any reservation or exception is not effective until accepted by a resolution of the governing body having jurisdiction over such street, highway, alley, or projected extension thereof.<sup>12</sup>

**Curative Provisions for Defects:** Wis Stat. sec. 66.1033 contains curative provisions for defects, omissions, informalities in the proceedings of or execution of a plat, deed of dedication, order or resolution by a city or village. The kind of protection afforded depends on whether the execution was before or after January 1, 2005. See the statute for additional details.

**b. Prescription**

Prescription is a method of acquiring an easement by use. This is distinguished from the use that constitutes acceptance of an offer of dedication. In prescription, there is no offer to dedicate. The easement is established by a use by the public for such a period of time that a conclusive presumption arises that the street was laid out and established by competent authority or a valid easement was granted by the owner.<sup>13</sup> The use necessary to establish a street by prescription must be under a claim of right, must be open and notorious, and must have continued uninterrupted by the rightful owner for a long period of time (20 years in Wisconsin).<sup>14</sup>

10. 11A McQuillin, *The Law of Municipal Corporations*, sec.33.33 (3d ed.).

11. *Cohn, supra*.

12. Wis. Stat. sec. 66.1024, formerly sec. 80.01(5) as affected by 2003 Wis. Act 214 which repealed Chapters 80 and 81.

13. Sundby, R. *When is a Street a Street? The Municipality* at p. 16 (1952)

14. *Ruchti v. Monroe*, 83 Wis.2d 551, 266 N.W.2d 309 (1977).

**Wisconsin Rapids**

The City of Wisconsin Rapids has 150 centerline miles of roads.

The City has done 0 miles of overlay in the last five years.

The City has averaged 0.8 miles of reconstruction per year over the last five years.

“Obviously, this practice is unsustainable as our streets cannot last 187 years. The City should be reconstructing or overlaying about three miles of streets every year to be sustainable. The soil conditions are such that maintenance practices are very effective, and many local streets can be maintained for 50–60 years.

Wisconsin Rapids performs about 7.5 miles of chip seal maintenance on local and collector streets each year in the five years. The City should be doing around 11 miles of chip seal per year to be fully sustainable.”



## II. Opening, Widening, Extension or Change of Streets.

### Opening:

The governing body is the judge of the necessity of opening streets and as to whether any public convenience or use will be subserved thereby and in most cases, failure to use or occupy the same until the necessity arises does not abandon the public right.<sup>15</sup>

### Minimum/Excess Street Widths:

Wis. Stat. sec. 236.16(2) states that all streets shall be of the width specified on the master plan or official map or of a width at least as great as that of the existing streets if there is no master plan or official map, but no full street shall be less than 60 feet wide unless otherwise permitted by local ordinance. Section 66.1031 governs establishing excess widths.

### Official maps

The official map procedure provides a means by which the municipality can reserve land for future street purposes thereby reducing the cost of eventually opening a street.

Establishment: Where a city council or village board has created an official map of the city or village or any part thereof by resolution or ordinance pursuant to Wis. Stat. 62.23(6)(b)<sup>16</sup> showing, among other things, the location of streets<sup>17</sup> the map is conclusive with respect to the location and widths of streets. However, the placing of the street on the official map does not constitute the opening or establishment of the street or the taking or acceptance of any land for street purposes. Sec. 62.23(6)(c). The ordinance or resolution shall require the clerk at once to record a certificate with the register of deeds of the county or counties in which the city or village is

situated showing that the municipality has established an official map.

Amendment: The governing body may amend the official map to establish, among other things, the exterior lines of planned new streets or to widen, narrow, extend, or close existing ones. No such change is effective until after a public hearing concerning the proposed change before the governing body or a committee appointed by the governing body from its members, at which parties in interest and citizens shall have an opportunity to be heard. Notice of the public hearing shall be published as a class 2 notice under ch. 985. Before amending the map, the governing body must refer the matter to the plan commission for report, but if the plan commission does not make its report within 60 days, it forfeits the right to further suspend action. When adopted, amendments become a part of the official map and are conclusive with respect to the location and width of the streets shown on the map. As with the adoption of the official map initially, the placing of any street upon the official map does not constitute the opening or establishment of any street, or the taking or acceptance of any land for these purposes. Sec. 62.23(6)(c).

The locating, widening, or closing, or the approval of the locating, widening, or closing of streets by the municipality under provisions of law other than sec. 66.23 shall be deemed to amend the official map, and are subject to 66.23, except that changes or additions made by a subdivision plat approved by the city under ch. 236 do not require the public hearing specified in 66.23(6)(c) if the changes or additions do not affect any land outside the platted area.

### Protections Afforded by Official Map:

No permit may be issued to construct or enlarge any building within the limits of any street shown or laid out on the

official map except as provided under sec. 62.23(6)(e). Streets shown on the official map may be shown as extending beyond the boundaries of a city or village a distance equal to the municipality's extraterritorial plat approval jurisdiction under sec. 236.10(1)(b)2. Any person desiring to construct or enlarge a building within the limits of a street so shown as extended may apply to the authorized official of the city or village for a building permit. Any person desiring to construct or enlarge a building within the limits of a street, shown on the official map within the incorporated limits of the municipality shall apply to the authorized official of the city or village for a building permit. This is significant because unless an application is made, and the building permit granted or not denied within 30 days, the person is not entitled to compensation for damage to the building in the course of construction of the street shown on the official map. Before taking action, the zoning board of appeals or governing body if there is no zoning board of appeals must hold a hearing. In municipalities that have established an official map pursuant to sec. 62.23(6), sub (h) prohibits construction of any public sewer or other municipal street utility or improvement in any street until such street is duly placed on the official map.

### Opening, Widening and Extension of Streets

Wisconsin Stat. sec. 61.36 authorizes village boards to, without limitation because of enumeration, lay out, open, change, widen or extend among other things, roads, streets, alleys, and improve, repair or discontinue the same or any part thereof and to build, alter, repair or otherwise improve or vacate or discontinue sidewalks and crosswalks and build and maintain roads and sidewalks required to connect the village with

15. See *Klinkert v. Racine*, 177 Wis. 200, 188 N.W. 72 (1922) and *Jefferson v. Eiffler*, 61 Wis. 2d 123, 113 N.W.2d 834 (1962).

16. Wis. Stat. sec. 62.23 is applicable to villages by virtue of Wis. Stat. sec. 61.35.

17. Sec. 62.23(6)(b) refers to streets, highways, parkways, and other things so, again, street is used generically in this article.

any transportation terminal or village property outside of its limits.

In cities, Wis. Stat. sec. 62.22(4)(a) provides the method by which “resident freeholders”<sup>18</sup> in a particular aldermanic district can petition the common council for the opening, widening, extension, or change of any street in that district. A similar provision in sec. 62.22(4)(b) authorizes the owner or owners of one-third or more of the land in a block in which an alley or proposed alley is situated, without regard to residency, to petition the council for the opening, widening, extension, or change of an alley. Section 62.22(4)(c) governs how such petitions are handled after being presented to the council. Finally, sec. 62.22(4)(d) authorizes the council to take action in the absence of a petition.

#### *Lis Pendens (Notice to others required)*

Under sec. 840.11(1), every person who applies to any court or governing body to lay out, widen, vacate, or extend any street must, at or before filing the same with the proper officer, present for recording in the office of the register of deeds of each county in which the affected land is situated a *lis pendens*, as provided in s. 840.10, containing the person’s name and a brief statement of the object thereof and a map and description of the land to be affected thereby. No final order, judgment, or decree or final resolution or order taking or affecting such land, based upon any application therefor, is notice to any subsequent purchaser or encumbrancer unless a certified copy thereof, containing a legal description, as defined in s. 706.01 (7r), of the land affected thereby, and accompanied with a map showing the location thereof, is recorded in the office of the register of deeds of the county in which the land is situated. However, see curative provisions contained in Wis. Stat. sec 66.1033.

### III. When Does A Street Cease to Be a Street?

#### Vacation and Discontinuance of Public Ways

Wisconsin Stat. sec. 62.73 governs discontinuance of public grounds in first class cities (Milwaukee). In other cities and villages, discontinuance of public ways is governed by Wis.Stat. sec. 66.1003 and Wis. Stat. sec. 236.43 and, in limited instances sec. 66.22(4). Because these statutes and the procedures for discontinuing or vacating streets and alleys are discussed at length in a November 2004 legal comment available from the League and on the League’s Legal CD (Platting 144R1 and 145R1, Streets and Alleys 620R1), they will not be detailed here.

#### Reversion:

When any highway or public ground acquired or held for highway purposes is discontinued, the land where the highway or public ground is located shall belong to the owner or owners of the adjoining lands. If the highway or public ground is located between the lands of different owners, it shall be annexed to the lots to which it originally belonged if that can be ascertained. If the lots to which the land originally belonged cannot be ascertained, the land shall be equally divided between the owners of the lands on each side of the highway or public ground. Wis. Stat. sec. 66.1005(1). Whenever any public highway or public ground acquired or held for public purposes has been vacated or discontinued, all easements and rights incidental to the easements that belong to any county, school district, town, village, city, utility, or person that relate to any underground or overground structures, improvements, or services and all rights of entrance, maintenance, construction, and repair of the structures, improvements, or services shall continue,

unless the owner of the easements and incidental rights gives written consent to the discontinuance of the easements and rights as a part of the vacation or discontinuance proceedings and the vacation or discontinuance resolution, ordinance or order refers to the owner’s written consent; or the owner of the easements and incidental rights fails to use the easements and rights for a period of 4 years from the time that the public highway or public ground was vacated or discontinued. Sec. 66.1005(2) (a). The easements and incidental rights may be discontinued in vacation or discontinuance proceedings in any case where benefits or damages are to be assessed if either the interested parties fail to reach an agreement permitting discontinuance of the easements and incidental rights or the owner of the easements and incidental rights refuses to give written consent to their discontinuance. Sec. 66.1005(2)(b).

#### Platting 172; Streets and Alleys 649

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18. Freeholders own property outright but sec. 62.22(4)(a) provides that a person in possession of land under a contract of purchase and sale or a bond for a deed shall be deemed a freeholder.