COURT OF APPEALS DECISION DATED AND FILED

January 29, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP1141 **Cir. Ct. No. 2007CV3352**

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

LOUIS MARINO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOEL MARINO, AND SETH NICHOLSON,

PLAINTIFFS-APPELLANTS,

V.

CITY OF MADISON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 VERGERONT, J. This action arises out of a dispute over a twelve-foot-wide strip of land between the east side of West Shore Drive and Monona Bay in Madison, Wisconsin. The owners of two residential lots abutting the west side of West Shore Drive claim title to this land as does the City of Madison. The

circuit court concluded that the City of Madison held title to this land, in trust for the public, and could therefore proceed with the construction of a storm sewer outfall.[1] The plaintiffs appeal, contending that the court made a number of errors in arriving at its conclusion. For the reasons we explain below, we affirm.

BACKGROUND

¶2 At the time this action was filed, Joel Marino and Seth Nicholson each owned and occupied residential property on the west side of West Shore Drive.[2] On the east side of West Shore Drive, across from their lots, there is land running along the shore of Lake Monona Bay approximately twenty-six feet in width, which we will refer to as "the shoreland." Marino and Nicholson maintained and used seasonal piers extending from the shoreland into Monona Bay and made use of the bay for boating, fishing, swimming, and other activities.

¶3 Between the two lots is a twelve-foot-wide alley that runs from West Shore Drive to Park Street. Marino, Nicholson, and other property owners have used the alley to access their property, homes, and garages.

¶4 The dispute giving rise to this action began with the City's plan to construct a storm sewer outfall structure on the shoreland. The plan was to build on a strip of land twelve feet in width running from the east side of West Shore Drive to the bay, which the City contends is an extension of the twelve-foot-wide

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[1] The outfall is the sewer opening that permits the storm water to drain into the lake.

[2] The Estate of Joel Marino was substituted for Marino as a plaintiff after Marino's death, which occurred while the action was pending in the circuit court. Unless necessary to distinguish between Marino and the Estate, we use the term "the plaintiffs" to mean either Marino and Nicholson or the Estate and Nicholson.

alley on the other side of West Shore Drive. We will call this twelve-foot-wide strip of the shoreland "the disputed strip." As planned, the outfall would require relocation of Nicholson's pier.

¶5 The plaintiffs filed this action for a declaration that they, not the City, owned the disputed strip and therefore had riparian rights on Monona Bay.[3] They also claimed a public nuisance. They sought an injunction permanently enjoining the project at the proposed location as well as a temporary injunction. The circuit court denied the plaintiffs' motion for an injunction temporarily enjoining the beginning of the construction of the project, although the court did order the City to cease trespassing on the plaintiffs' lots and to repair any damage it had caused.

¶6 The parties entered into an extensive stipulation of facts and the court held an evidentiary hearing at which additional evidence was presented. The court concluded: (1) the alley was created by the 1854 plat of the Greenbush Addition and dedicated, pursuant to statute, to the Village of Madison, which became incorporated as a city in 1856; (2) because of the statutory dedication, the City holds fee simple to the alley, in trust, and neither plaintiff has any interest therein; (3) under the doctrine of accretion/reclamation, the City also holds fee simple, in trust, to the disputed strip and neither plaintiff has any interest therein; and (4) neither the alley nor the disputed strip was conveyed, vacated, or

[3] At the time this action was filed there was a proceeding pending on the City's application to the Wisconsin Department of Natural Resources (DNR) for a permit under WIS. STAT. ch. 30 to install the proposed storm sewer outfall. The plaintiffs requested a contested case hearing after DNR granted the permit and brought this action after the administrative law judge (ALJ) determined that the issue of title to the disputed strip had to be resolved by the court, not the administrative agency.

discontinued by the City. Accordingly the court held, the City was the appropriate applicant for the DNR permit. The court entered judgment denying the plaintiffs a permanent injunction.

DISCUSSION

¶7 On appeal the plaintiffs contend that the court erred in each of its four conclusions. To the extent the plaintiffs challenge findings of fact made by the circuit court, we accept the circuit court's findings unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2007-08).[4] Whether the court employed a correct legal standard is a question of law, as is the question whether the court correctly applied the legal standard to the facts it found and to the undisputed facts. ***McLellan v. Charly***, 2008 WI App 126, ¶28, 758 N.W.2d 94. We review questions of law de novo. ***Id.***

I. Statutory Dedication of the Alley

¶8 The plaintiffs challenge the circuit court's conclusion that the alley was created by the 1854 plat and dedicated pursuant to WIS. REV. STAT. ch. 41, § 5 (1849). First, they contend that it is not clear that the 1854 plat shows the alley's existence. In order to address this argument, we provide some additional factual background.

¶9 The 1854 plat of the Greenbush Addition to Madison was the first plat of the area.[5] At that time Madison was a village, not a city; it became

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[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[5] This plat was recorded on October 3, 1854, as document no. 117.

incorporated in 1856. The plat shows that the shore of Lake Monona Bay was located at approximately the western part of what is now Marino's lot, in Block 25. (As we explain later in more detail, the eastern portion of the plaintiffs' lots, the eastern portion of the alley, West Shore Drive, and the shoreland consist of filled land over the former lakebed.) The plat shows two lines that appear to be an alley between each of the east/west streets from Milton Street to the southernmost street, Erin Street, with a row of lots on each side of each alley. None of these are labeled as alleys, but there is no suggestion in the evidence or from the plaintiffs' briefs that they could be anything other than alleys. South of Erin Street there is one row of lots, including Block 25, and south of this row there is a narrow strip—narrower than the alleys to the north—between the lots and the line showing the southern most boundary of the plat.[6] This narrow strip, not labeled as an alley, is what the City contends and the court agreed is the alley that now runs between the plaintiffs' lots, although, as noted above, the eastern portion of this alley, like the eastern portion of the plaintiffs' lots, was under water in 1854.

¶10 The surveyor's certification on the plat states that "[t]he alleys are 16 1/2 feet wide, except where otherwise marked." Because the strip that the City contends is the alley is narrower than the alleys to the north and there is no notation that it has a width less than 16 1/2 feet, the plaintiffs contend it is not an alley. However, at the evidentiary hearing there was testimony that this narrow strip was nonetheless an alley.

[6] The 1854 plat does not include the location of Nicholson's lot because his lot is in the Addition to West Bay, not the Greenbush Addition.

¶11 A professional land surveyor testified that in his opinion this strip was an alley both because of his knowledge of how old plats were drawn, the function that alleys performed, and the surveyor's notes making it clear that there were alleys on the plat. He also testified that the 1916 Spohn–Levander Replat of Block 25 of the Greenbush Addition showed that this was a twelve-foot-wide public alley and did not add to or subtract anything from the alley. Further, several other plats show a twelve-foot-wide alley there as ancillary information. He acknowledged that the surveyor's notes on the 1854 plat indicated that an alley narrower than 16 1/2 feet would be marked and the twelve-foot-wide alley was not so marked, and he could not explain the absence of a notation. However, based on his knowledge of how platting was done at the time, he thought that the narrower alley at the southern boundary resulted from laying out the lots and alleys from north to south and giving the southernmost alley the width that was left over after all the lots and the other alleys had been laid out. The land surveyor also testified that other plats of the neighboring areas had alleys that were not labeled as alleys and some were sixteen feet and some were twelve feet.

¶12 The plaintiffs point to no evidence and offer no developed argument supporting the proposition that the strip in question on the 1854 plat was anything other than the "Public Alley 12′ Wide" labeled as such on the 1916 Spohn-Levander Replat of Block 25 of the Greenbush Addition. To the extent there may be an ambiguity in the 1854 plat or any conflict in the testimony, it was the circuit court's role as fact finder to resolve the ambiguity or conflict. The circuit court implicitly credited the land surveyor's testimony, and that testimony provides an ample basis for the court's determination that the 1854 plat created the original twelve-foot-wide alley that now, with an extension from the filling of the lakebed, runs between the plaintiffs' lots.

¶13 The plaintiffs also appear to challenge the court's conclusion that there was a statutory dedication of the alley pursuant to WIS. REV. STAT. ch. 41, § 5 (1849). That chapter provided for the laying out of plats, and § 5 stated:[7]

> When the plot or map shall have been made out and certified, acknowledged and recorded as required by this chapter, every donation or grant to the public … marked or noted as such on said plot or map, shall be deemed in law and in equity, a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, and shall be considered to all intents and purposes, a general warranty against such donor or donors, their heirs and representatives, to the said donee or donees, grantee or grantees, for his, her or their use, for the uses and purposes therein named, expressed and intended, and no other use or purpose whatever; and the land intended to be for 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 or intended.

¶14 Wisconsin law recognizes two distinct ways that roads, alleys, or other areas may be dedicated for public purposes: statutory and common law. ***Cohn v. Town of Randall***, 2001 WI App 176, ¶6, 247 Wis. 2d 118, 633 N.W.2d 674. Statutory dedication consists of whatever conduct is prescribed by statute, which usually requires the execution and filing of a plat as prescribed in the statute. ***Id.*** 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. ***Id.*** Intent to dedicate to the public use is an essential component of either statutory or common law dedication. ***Id.***

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[7] WISCONSIN REV. STAT. ch. 41, § 5 (1849) has been renumbered several times while retaining essentially the same language. *See* WIS. REV. STAT. ch. 47, § 5 (1858); WIS. REV. STAT. ch. 101, § 2263 (1878); WIS. STAT. § 236.11, enacted by 1925 Wis. Laws, ch. 4; WIS. STAT. § 236.12, enacted by 1935 Wis. Laws, ch. 186, § 2; and the current version, WIS. STAT. § 236.29(1) (2007-08), enacted by 1955 Wis. Laws, ch. 570, § 4.

¶15 The plaintiffs do not contend that the 1854 plat was not "made out and certified, acknowledged and recorded as required by [the statute]." WIS. REV. STAT. ch. 41, § 5 (1849). They make a brief statement that the alley was not "marked or noted" as an alley. *See **id.*** However, a narrow strip was shown on the 1854 plat in a location that is consistent with being an alley. The plaintiffs do not develop an argument to support the proposition that the evidence presented at the evidentiary hearing, which the circuit court implicitly credited, was not sufficient to establish that this was a twelve-foot-wide alley that the owner intended to dedicate as a public alley. Accordingly, we conclude the alley was dedicated pursuant to WIS. REV. STAT. ch. 41, § 5 (1849) by the recording of the 1854 plat.

II. Effect of Statutory Dedication

¶16 The plaintiffs contend that the circuit court erred in concluding that, as a result of the statutory dedication, the Village of Madison (and, after 1856, the City of Madison) held fee simple to the alley, qualified by the trust for the public use. In their view, case law establishes that, with respect to roads and alleys, the abutting lot owners hold title to the center of the road or alley, subject to an easement for public use.[8] The City responds that this is true only for common law dedication and that, because the dedication here occurred pursuant to statute, the

[8] We understand the parties to implicitly agree that there is no distinction between statutorily dedicated roads and streets, on the one hand, and statutorily dedicated alleys, on the other hand, for purposes of the statute's effect on the interest the municipality acquires under the statute.

City acquired fee simple to the alley qualified by the trust, as specified in the statute.[9]

¶17 The cases provided by the parties contain apparently inconsistent statements of the law on this point, which were made in the course of deciding issues that are, for the most part, significantly different from the issue presented on this appeal. ***Heise v. City of Pewaukee***, 92 Wis. 2d 333, 285 N.W.2d 859 (1979), appears to be the most recent treatment of the effect of statutory dedication of a street in a context that is relevant to this case. We therefore turn to ***Heise*** without attempting to harmonize or choose among the older cases. However, in the accompanying footnote we briefly discuss the parties' arguments, based on the more pertinent prior cases, in the event this may prove helpful to the parties or to another court.[10]

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[9] The term "fee simple" describes "[a]n interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs…." ***ABKA Ltd. P'ship v. DNR***, 2001 WI App 223, ¶28, 247 Wis. 2d 793, 635 N.W.2d 168 (citing BLACK'S LAW DICTIONARY 630 (7th ed. 1999)).

[10] In ***Kimball v. City of Kenosha***, 4 Wis. 336, [*321], 341, [*330] (1855), on which the City relies, the court stated:

> Were it not for this statute, [WIS. REV. STAT. ch. 41, § 5] the deed of Crosit would have conveyed to the plaintiff the fee of the land to the centre of the street, subject to the public easement. This is the uniform doctrine in regard to roads and streets, or lands bounded thereon, in the country, and in villages. Southport was an unincorporated village at the time of the conveyance by Crosit to the plaintiff, and the common law prevailed, except so far as it was modified by the statute then in force as above recited. The effect of this statute was, to pass a trust estate in the land designated as streets, to the corporate authorities.… But the fee, if it can be so called, was a qualified one. The estate so conveyed was a trust estate, to be *held* for a particular, specified use, and no other. This estate, by the statute, vested upon the recording of the plot, so that the proprietor was inhibited from

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> resuming, or, rather, from otherwise disposing of the estate or use of the land thus designated as streets on the plot so recorded.

(Citations omitted, emphasis in original.)

Under ***Kimball***, then, it appears that the City holds a qualified fee—that is, fee qualified by a trust—in the statutorily dedicated alley. However, the later case of ***Thorndike v. City of Milwaukee***, 143 Wis. 1, 126 N.W. 881 (1910), states a different rule for statutorily dedicated streets and roads. The court in ***Thorndike*** first states that the statute (WIS. REV. STAT. ch. 101, § 2263 (1878), *see* footnote 7) "gives the plat the legal effect of a conveyance in fee—an effect beyond that of a common-law dedication." 143 Wis. at 15. (This is apparently the statement the circuit court relied on in citing ***Thorndike*** in support of its conclusion that the City took a fee to the alley qualified by the trust.) However, after this statement the ***Thorndike*** court continues:

> 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 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.

Id. (citations omitted, emphasis added).

The plaintiffs rely on the above indented quote. The City responds that it is dicta, because the issue in ***Thorndike*** was whether the owners of lots that did not abut a square dedicated to the public or the streets around the square could sue on their own behalf to challenge the use the city proposed to make of the square. The City also contends that the ***Thorndike*** court mistakenly cites ***Gardiner v. Tisdale***, 2 Wis. 115, [*153] (1853), in support of the quoted proposition because in ***Gardiner*** the court discusses an abutting landowner's fee in a street or road only in the context of a common law dedication. *See* ***id.*** at 140, 141, [*187]. The City makes the same point about the ***Thorndike*** court's citation of ***Weisbrod v. Chicago & Northwestern Railway Co.***, 21 Wis. 609, [*602], 615-16, [*608-09] (1867). The City asserts that the ***Weisbrod*** court, after noting that the plat was not properly acknowledged so as to entitle it to be recorded, in essence resolved the dispute between the lot owners by means of a common law dedication. Finally, the City contends that the rule stated in ***Thorndike*** ignores the statutory language, which states that a plat that meets the requirements of WIS. REV. STAT. ch. 101, § 2263 (1878) conveys the "fee simple" of the dedicated spaces, with the town or city holding the dedicated streets and alleys in trust for the expressed or intended public uses.

While the City's points may be well taken, we are not at liberty to disregard a more recent decision in favor of an earlier decision even if we think the earlier decision, not the later decision, correctly states the law. *See* ***Ambrose v. Continental Ins. Co.***, 208 Wis. 2d 346, 354,

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¶18 In ***Heise***, 92 Wis. 2d at 336, a plat was recorded in 1887 showing the intersection of an avenue with Lake Street, which terminated at the boundary of Lake Pewaukee. The avenue ran parallel to the lake's boundary, with a strip of dry land separating the avenue from the lake. ***Id.*** Subsequently new land was created on the lakebed that extended beyond the original termination of Lake Street and increased the width of the dry land between the avenue and the water. ***Id.*** at 336, 338. The dispute arose because an owner of the lot on some of the new land that was immediately adjacent to the new land extending beyond the original termination of Lake Street built a garage and patio that encroached on that extension. ***Id.*** at 338, 340.

¶19 The lot owner in ***Heise*** contended that the extension of Lake Street was never effectively dedicated, and the supreme court framed the issue as whether "the Village [of Pewaukee] held title to the disputed portion of the Lake Street extension." ***Id.*** at 342. The court began by observing that "it is undisputed by the parties that the recording of the plat … constituted a statutory dedication to the Village of Pewaukee of the original Lake Street then and there existing as of

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560 N.W.2d 309 (Ct. App. 1997). Looking, then, to cases decided after ***Thorndike***, we see a continuing inconsistency in the statement of the proper rule. *See* ***Stuart v. City of Neenah***, 215 Wis. 546, 550, 255 N.W. 142 (1934) (quoting with approval the ***Thorndike*** language that "whether [a street or road is] 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" (citation omitted; emphasis added)); ***Walker v. Green Lake County***, 269 Wis. 103, 69 N.W.2d 252 (1955) (*in the absence of a statute expressly providing for the acquisition of the fee*, or of a deed from the owner expressly conveying the fee, when a highway is established by dedication or prescription, or by the direct action of the public authorities, the public acquires merely an easement of passage, the fee title remaining in the landowners) (emphasis added); and ***Gogolewski v. Gust***, 16 Wis. 2d 510, 515, 114 N.W.2d 776 (1962) (referring to WIS. REV. STAT. ch. 41, § 5 (1849) and a successor statute, WIS. STAT. § 236.11 (1931), *see* footnote 7, and stating: "The title thus given to a town, city or village with respect to platted streets was early construed to be but an easement for highway purposes, the owners of the abutting property owning to the center of the street subject to this easement.").

18[8]7." ***Id.*** at 342-43.[11] However, the court noted, the dispute arose because the extension of Lake Street did not exist at that time and therefore was not reflected in the dedication. ***Id.*** at 343. The court stated:

> since the village owned the land known as Lake Street down to the old waterline by virtue of the 1887 dedication, the question arises as to whether the village, by virtue of its title to the original land, was also entitled to the newly created land between Lake Street's original termination point and the new waterline.

Id. The court resolved this issue by applying the well-established doctrine that an owner of land abutting water of a river or lake possesses riparian rights that include the right to newly created lands formed by accretion or reliction. ***Id.*** at 343-44, 345. The court reaffirmed that "riparian rights are not limited to private owners." ***Id.*** at 344. Although it was not clear in ***Heise*** whether the new land was created by natural causes (accretion or reliction) or artificial means (reclamation), the court concluded it did not make a difference in deciding who had title to the new land. ***Id.*** at 336 nn.3, 4 & 5, 344-45.[12] The court held that "regardless of whether the land in the Lake Street extension was formed as a result of natural or artificial processes, the Village of Pewaukee has title to the land by virtue of its ownership of Lake Street up to the original shoreline." ***Id.*** at 345.

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[11] The original language in the opinion says "existing as of 1877." ***Heise v. Village of Pewaukee***, 92 Wis. 2d 333, 343, 285 N.W.2d 859 (1979). However, this date appears to be a typographical error because the date the plat was recorded is stated to be 1887 at four other places in the opinion. ***Id.*** at 336, 343.

[12] Accretion is a process whereby land is created through the gradual deposit of soil by operation of natural causes, whereas reliction is a process whereby there is a permanent receding or withdrawal in a lake or river bed. ***Id.*** at 336 nn. 3 & 4. In contrast, reclamation is the process whereby land is created by artificial means. ***Id.*** at 336 n.5. We have called the doctrine the ***Heise*** court applied the doctrine of "accretion/reclamation" because the parties and court refer to it as the doctrine of accretion, but it is undisputed in this case that the filling of the lakebed occurred by artificial means, that is, reclamation.

¶20 We recognize that the parties in ***Heise*** did not dispute that the 1887 recording of the original plat constituted a statutory dedication of Lake Street to the village, whereas in this case the plaintiffs dispute that the 1854 plat constituted a statutory dedication of the then-existing alley. However, we have concluded that there was a statutory dedication of the alley. ***Heise*** describes the effect of that statutory dedication as "the village *own[ing]* the land known as Lake Street down to the old waterline …" and the village having "*title* to the original land." ***Id.*** at 343 (emphasis added). The statute in effect in 1887 was substantively the same as WIS. REV. STAT. ch. 41, § 5 (1849). *See* footnote 7. The ***Heise*** court concluded that the village had "*title* to the [new] land by virtue of its *ownership* of Lake Street up to the original shoreline." ***Id.*** at 345 (emphasis added). Whatever prior cases have said that might support the plaintiffs' proposition that the municipality does not take title to a street as the result of a statutory dedication, we read ***Heise*** to say that it does.[13] We have located no more recent case, and the parties have provided none, that would require or permit us to disregard ***Heise*** on this point.

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[13] We note that in ***Heise***, in discussing a second issue—whether title to the disputed strip had reverted to the lot owner as a successor to the original grantors under a warranty deed that purported to convey the new land extending beyond the original termination of Lake Street to the village—the court made this statement:

> It is undisputed that the owner of land abutting a public highway holds title to the center of the highway subject to the public easement. ***Walker v. Green Lake County***, 269 Wis. 103, 111, 69 N.W.2d 252 (1955); ***Spence v. Frantz***, 195 Wis. 69, 70, 217 N.W. 700 (1928); [***Town of***] ***Hustisford v. Knuth***, 190 Wis. 495, 496, 209 N.W. 687 (1926); ***Mueller v. Schier***, 189 Wis. 70, 81, 205 N.W. 912 (192[5]); ***Gardiner v. Tisdale***, 2 Wis. [115,] (*153) (1853). When the highway is discontinued or vacated the land reverts to the owner unencumbered by the easement. ***Id.*** *This reversionary interest exists independently of sec. 66.296, Stats. As the cases above cited indicate, this right existed at common law.* The right has been codified in sec. 80.32(3).

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¶21 We also recognize that the court in ***Heise*** does not describe the village's interest as "fee simple." However, it is necessarily implicit from the court's use of the terms "title," "own," and "ownership" that the village's interest was not an easement and that the abutting landowner had no interest in Lake Street. We view the court's use of the term "title" as the equivalent of a fee simple interest, and neither party suggests otherwise.

¶22 We therefore conclude that the effect of the statutory dedication was that the City acquired title, or fee simple, to the alley shown on the 1854 plat by virtue of the statutory dedication qualified by the trust specified in the statute.

III. Application of the Accretion/Reclamation Doctrine

¶23 As noted above, the eastern portion of the plaintiffs' lots, the eastern portion of the alley, West Shore Drive, and the shoreland, including the disputed strip, consist of filled land over the former lakebed. The plaintiffs contend the circuit court erred in concluding that the City had title to the disputed strip under the accretion/reclamation doctrine. Acknowledging ***Heise***, they assert that it is distinguishable on three grounds. Before addressing these arguments we set forth additional facts.

> (Emphasis supplied.) ***Miller v. City of Wauwatosa***, 87 Wis. 2d 676, 680, 275 N.W.2d 876 (1979).

92 Wis. 2d at 346. While in isolation this paragraph, particularly the first sentence, might appear to support the plaintiffs' position that the municipality acquires only an easement by virtue of a statutory dedication of a street, we are satisfied that this paragraph does not support that position. The issue the ***Heise*** court is addressing here does not involve the nature of the municipality's title or interest vis-à-vis abutting lot owners, but, rather, what happens when the municipality discontinues or vacates a public use.

¶24 The filling of the former lakebed occurred pursuant to city ordinances and state legislative enactments and was accomplished in 1907 and 1908, with the property owners around the bay contracting for the filling. These property owners entered into a 999-year lease in October 1907 with the Madison Park and Pleasure Drive Association (MPPDA), which was created pursuant to a statute providing for the incorporation of organizations to create and maintain parks and drives and hold them in trust for certain classes of cities. Under the lease the property owners agreed that, upon filling Monona Bay, they would construct and dedicate sidewalks and the pleasure drive and lease the shoreland to the MPPDA for park purposes; in return, the MPPDA would maintain the shoreland and exercise exclusive control over it. The property owners, who included the then-owners of the two lots on the original shoreline located on what is now part of Marino's and Nicholson's lots, retained riparian rights for themselves and their heirs and assigns, including the right to construct a pier on the bay opposite each residential lot and a walkway thereto for the benefit of such lot owners. In 1937 the MPPDA quitclaimed its interest in the lease to the City.

¶25 We now turn to the plaintiffs' arguments that ***Heise*** does not support the application of the accretion/reclamation doctrine because of the different facts in this case. First, the plaintiffs point out that it was unclear in ***Heise*** how the new land was created. In contrast, they contend, it is clear how this occurred here, and there was an agreement on the rights in the new land, as documented in "the lease, MPPDA minutes, the City ordinances, and state statute [which] unmistakably reserved all riparian rights to the landowners on the shore except the ends of Erin, Drake, and Emerald street." We see in these referenced documents that the property owners retained their riparian rights, but we do not see a statement that they held title to all the shoreland to the exclusion of the City. Moreover, we

agree with the circuit court that, because the City was not a party to the lease, any provisions in the lease that might be construed to mean that the property owners held title to all the shoreland is not binding on the City.

¶26 The plaintiffs also argue that in ***Heise*** there was a 1908 replat that showed Lake Street extending to the water, while here the 1912 plat of the Addition to West Bay and the 1917 Spohn-Levander Replat of Block 25 of the Greenbush Addition do not show an extension of the alley, but show it stopping at what is now called West Shore Drive. However, while the 1908 replat was recounted by the ***Heise*** court when setting forth the facts of the case, ***id.*** at 336, 338-39, it was not referred to in the discussion of the issue of who held title to the disputed portion of Lake Street. The court's reasoning on this issue, as we have explained above, was based on the village's title to the original Lake Street acquired by the 1887 statutory dedication and on the principle that, as a riparian owner, it acquired title under the accretion/reclamation doctrine.

¶27 Third, the plaintiffs assert that, because an alley exists only within a block, it cannot be continued on the other side of a street—in this case, West Shore Drive—under the doctrine of accretion/reclamation. The statutory definitions of alley that the plaintiffs rely on are varied and are from several different statutory contexts, none of which are tied directly or indirectly to the doctrine of accretion/reclamation.[14] The purpose of the doctrine is to protect the

[14] The plaintiffs rely on the following statutory definitions. For purposes of describing the land, the owners of which must sign a petition to discontinue a public way or an objection to a resolution to discontinue, "[t]he beginning and ending of an alley shall be considered to be within the block in which it is located." WIS. STAT. § 66.1003(2), (4)(c). For purposes of WIS. STAT. ch. 236 "Platting Lands and Recording and Vacating Plats," an alley is "a public or private right-of-way shown on a plat, which provides secondary access to a lot, block or parcel of land." WIS. STAT. § 236.02(1). In WIS. STAT. chs. 340-349 and 351, which relate to vehicles and operating motor vehicles, an alley is "every highway within the corporate limits of a city, village or town

(continued)

riparian owner's access to the water. ***De Simone v. Kramer***, 77 Wis. 2d 188, 199, 252 N.W.2d 653 (1977). The alley here as originally platted went to the water, and the application of the doctrine in this case fulfills the purpose of maintaining access to the water after the lakebed was filled in.

¶28 Finally, the plaintiffs contend that the record in this case shows that only certain designated streets were intended to extend over the new shoreland to the water and there was no such intent for this or any other alley. They point to a provision in the 1906 city ordinance establishing the new dock line that stated that three streets would be extended as public streets out to that dock line. They also point to the dotted line running down the center of Erin Street on the 1917 Spohn-Levander Replat of the Greenbush Addition that continues to cross the new drive and ends on the east side of the new drive, now West Shore Drive. (This dotted line does not appear to cross the new shoreland to the new shoreline.) However, the plaintiffs do not provide any authority for the proposition that the City's failure to assert an extension for the alley at that time precludes application of the accretion/reclamation doctrine, and we see no support for this proposition in the case law provided.

¶29 Based on the arguments presented, we conclude that the doctrine of accretion/reclamation applies in this case and the City has title to the disputed strip by virtue of its ownership of the original alley up to the original shoreline.[15]

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primarily intended to provide access to the rear of property fronting upon another highway and not for the use of through traffic." WIS. STAT. § 340.01(2).

[15] We do not understand the plaintiffs to argue that the City does not have title to the eastern portion of the alley—the portion on the filled land—under the doctrine of accretion/reclamation if the City acquired title to the original alley by virtue of statutory dedication. If they do intend to argue this, we clarify here that the accretion/reclamation doctrine (continued)

IV. Discontinuance

¶30 The plaintiffs contend that, even if the City at one time owned the disputed strip, it has discontinued use of this strip under WIS. STAT. § 82.19(2)(a) and (2)(b)2. Section 82.19(2) provides:

> (2)(a) Every highway shall cease to be a public highway 4 years from the date on which it was laid out, except the parts of the highway that have been opened, traveled, or worked within that time.
>
> (b) 1. In this paragraph, "vehicular travel" means travel using any motor vehicle required to be registered under ch. 341 or exempt from registration under s. 341.05.
>
> 2. Any highway that has been entirely abandoned as a route of vehicular travel, and on which no highway funds have been expended for 5 years, shall be considered discontinued.
>
> (c) This subsection does not apply to state or county trunk highways or to any highway, street, alley, or right-of-way that provides public access to a navigable lake or stream.

¶31 The City responds that WIS. STAT. § 82.19(2)(c) plainly precludes the application of subsec. (2) in this case because it states that the subsection does not apply to any "alley, or right-of-way that provides public access to a navigable lake.…" The plaintiffs reply that in the context of this case para. (2)(c) is ambiguous because the 999-year lease already provides public access along the entire shoreland and for this reason we should construe the subsection not to apply in this case.

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operates to give the City title to the eastern portion of the alley for the same reasons the doctrine applies to the disputed strip.

¶32 We agree with the City that the meaning of WIS. STAT. § 82.19(2)(c) is plain and disagree with the plaintiffs that the facts in this case create an ambiguity. The disputed strip does provide public access to a navigable lake. Nothing in the statutory language suggests that para. (2)(c) does not apply if the public has other means of access to the navigable lake or river. Accordingly, we apply the plain meaning of para. (2)(c), *see* ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110, and conclude subsec. (2) does not provide grounds for discontinuance.

V. Equitable Estoppel

¶33 In the context of other arguments, the plaintiffs assert that, based on ***Paine Lumber Co. v. City of Oshkosh***, 89 Wis. 449, 61 N.W. 1108 (1895), the City is equitably estopped from asserting title to the disputed strip now. The circuit court did not address equitable estoppel in its written opinion. We are uncertain whether this argument was presented in the circuit court with sufficient prominence so that the circuit court understood it was being called upon to rule on it. In any case we conclude that ***Paine Lumber*** does not support the plaintiffs' position.

¶34 In ***Paine Lumber*** application was made to the city council to open a platted street for public use. ***Id.*** at 458. The city council refused to do so, declaring that "'it was best to let the parties interested determine the matter[,]'" which, the court stated, was "practically a declaration on the part of the council that it would not interfere in the premises." ***Id.*** There is no comparable action by the City in this case. It was not a party to the lease and the 1906 ordinance described in paragraph 28 cannot reasonably be considered a statement by the City that it did not intend to assert any interest in the disputed strip.

¶35 We do not discuss equitable estoppel further because the plaintiffs have limit their argument on this point to ***Paine Lumber***.

CONCLUSION

¶36 The circuit court correctly declared that the City holds title to the disputed strip in trust for the public. Because the plaintiffs' public nuisance claim depended upon the City not having title to the disputed strip, the circuit court properly ruled against the plaintiffs on that claim. Accordingly, the circuit court properly denied the plaintiffs' request for a permanent injunction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.