Wisconsin Municipal Law Blog

Recent cases and misc. issues relevant to the municipalities of Wisconsin and their citizens.

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Road Right of Ways in Wisconsin are Presumed to be 66 Feet Wide

In Wisconsin, by law, the width of a road is presumed to be 66 feet, unless there is evidence to the contrary. It does not matter how the road came into being. In fact, although this is often misunderstood by landowners and sometimes by municipal officials, the historical "ownership" of the underlying land is quite often irrelevant to most road matters. The state, counties and local municipalities have all the normal rights and obligations with respect to roads whether they own the land, or whether they have some kind of granted easement, or whether there is no record at all of how the road was established. As long as the road has existed and been maintained by the municipality, generally for ten years or more, then the public right of way exists, no matter who thinks they "own" the underlying land.

In a recent case, Village of Brown Deer v. Leland P, the Village of Brown Deer was implementing road projects, and some of the adjoining landowners balked for various reasons. There was no argument as to how Brown Deer had acquired the right of ways – apparently no one knew for sure. But everyone agreed that the road had been a public road long enough that it was a public road. The disagreement was over the width. In some places, buildings were within the default 66 feet, and in other places the landowners simply wanted to keep the right of way narrower (the court did not give the details of why the residents balked).

To begin with, the court noted that the 66 foot width is the statutory presumption – that means that the law presumes the width is 66 feet. Thus the burden to prove a right of way is not 66 feet is on the challenger. A presumption can be overcome by evidence, such as in this case, a building encroaching into the 66 feet for a long enough time. But without greater evidence to the contrary, the width is 66 feet.

This entry was posted on Monday, December 30th, 2013 at 7:57 pm and is filed under Caselaw Summaries, Highways, Roads, etc.. You can follow any responses to this entry through the RSS 2.0 feed. You can leave a response, or trackback from your own site.

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Managing Highway Right of Ways
Aug 01, 2014

Managing Highway Right of Ways

By WTA Attorney Lee Turonie

Highway right of ways are the areas outside of the surfaced and vehicle-traveled portion of the highway. Local governments such as towns are responsible and liable for the management of their highways, including right of way maintenance. Wis. Stat. §§ 82.03 & 893.83. Below are several highway right of way issues that you will need to manage.

Trees

The town shall cause the removal, cutting or trimming of any tree, shrub or other vegetation in the highway right of way to provide safety to the users of the highway. § 66.1037(1). The elimination of minor vegetation is usually without issue. However, the logging of trees almost always causes issues because the resulting timber has significant value. What you can do with the timber will depend largely upon which type of public highway you are logging.

If the right of way being logged is a highway by either deed or plat, then the trees are owned by the municipality. This is because deeds and plats are recorded written instruments of land ownership, meaning that towns own these lands in their entirety. Therefore, the town also owns the trees growing on such land. Once cut it is the town board that decides how to dispose of the timber. (But remember that the town cannot sell town property to any current town officer or employee per § 175.10.) No one can cut down or otherwise injure the trees on these highway right of ways except for the town or someone with the town's permission. § 86.03(4).

All other town highways were either created by town board order or are an unrecorded highway by use. These are easement forms of ownership for the town where the adjacent landowners still own out to lot lines at the center of the highway. Although the town's rights and responsibilities to remove these trees are the same as any other highway, the trees themselves are not owned by the town. These trees are owned by those adjacent landowners. The town board cannot decide how to dispose of any resulting timber unless the landowners have granted the town that permission, and the town should seek that in writing if it is being given. Otherwise, any downed trees may be moved out of the way towards the edge of the right of way but ultimately must remain for the landowners' to take possession of them. Landowners could also log timber on these highway rights of way entirely of their own accord since they own the trees.

No cultivation within the highway right of way

Active cultivation within the highway right of way by adjacent owners or occupiers of lands is largely prohibited. They may plant trees, shrubs and hedges within the highway right of way only if the town has given them permission. This type of cultivation is only permissible

within the first ten feet of the highway right of way from its outer edge. Any plants so cultivated may still be removed later by either the town or the residents. § 86.03(3).

Farming is also supposed to be excluded from the highway right of ways. No person may plow, cultivate crops or otherwise work the land such that its drainage may be affected. Nor can any person operate farm or other machinery such that it damages the right of ways. These are misdemeanor violations. § 86.021.

No altering of the highway right of way without permission

It is also a misdemeanor violation to make any ditch, depression or embankment such that it impedes use of a highway, or to place any obstruction in a highway or in a ditch that drains the highway. § 86.022.

In fact, no person may even dig in a highway right of way without first getting a permit from the town. Violators may be fined and the highway authority may return the highway to its original condition. § 86.07.

Finally, anyone wishing to place utility-type lines within the highway right of way with either poles or pipes must make a written request to the town first, with the town required to respond within twenty days while having the option of adding reasonable conditions. § 86.16. Violators of this statute may also be cited for a forfeiture.

Encroachments

You are responsible to keep the highway right of ways free from encroachments such as fences, stands, buildings and other structures or objects. The town provides the offending occupant or owner of land with the encroachment an order specifying the extent and location of the encroachment with reasonable certainty and allowing 30 days for its removal to beyond the highway right of way. § 86.04.

If the encroachment remains the town brings an action in court for a $1.00 penalty per day that it remains. During such action a landowner might put forth a claim that the land is theirs and not in the highway right of way. A judgment in favor of the town will also order the encroachment removed within a period of time, at the expiration of which, the town may go ahead and remove any remaining encroachment at the expense of the occupant or owner.

Removal of encroachments is very important for two reasons. First, a known dangerous object might lead to liability exposure for the town should there be an accident involving it. Second, highway right of way land can be adversely possessed and lost to the landowner, and this just leaves the town and its taxpayers paying for the very same land a second time in order to maintain the same highway right of way as was had before.

A green thumb in public relations

There is often no matter more controversial with the public than how the highway right of ways are managed, in particular with the logging of trees. There is no legal question about the town's ability to do such things. However, it is yet highly recommended to go the extra mile informing residents about impending right of way maintenance, particularly tree removal, and to work with them on the issue as best as you are able to balance that compared to your necessity to manage your highway right of way maintenance responsibilities and liability exposure.