# Subdivisions & Water

## *PUBLIC ACCESS REQUIREMENTS*

*s. 236.16 (3)(a), Wis. Stats.*

**Subdivisions abutting a navigable lake or stream** must provide a 60 foot wide public access to the lake or stream, at half mile intervals as measured along the shoreline, unless there is an existing public access at least 60 feet wide, within 1/2 mile of the subdivision. This public access must extend to the low watermark and be connected to public roads. **Plat Review can not waive public access requirements**; if existing access does not meet the requirements of this section, then access must be provided with the plat.

In general, access is required to all lakes and streams deemed to be public, or "waters of the state", including but not limited to:

- Lakes meandered by the original USPLS surveys.
- Waters of the Great Lakes.
- Named creeks, streams, and rivers.
- Natural lakes and ponds over 5 acres.
- Other perennial, navigable streams.
- Man-made flowages, lakes created by damming.

In general, access is not required to:

- Intermittent streams, ditches, or drainage ways, regardless of navigability.
- Man-made ponds.
- Farm ditches and drainage ways.

Plat Review uses a variety of reference maps to determine if public access is required to a particular body of water; however, development, terraforming, and other activities may occur that create watercourses that require public access and are not identifiable on maps.

The half mile interval for public access is measured along the shoreline from the farthest point of the plat. (In other words, no point along the shore within the subdivision may be more than 1/2 mile from a public access.)

Access areas on either shore of a stream that meet the requirements of this section are acceptable.

## *PUBLIC ACCESS REQUIREMENTS*

**Existing Public Access** more than 1/2 mile from the subdivision may be accepted, if the access has shoreline frontage greater than 60 feet. Existing access that meets or exceeds the ratio of 60 feet per half mile (60/2640 = 0.0227), may be accepted as meeting the requirements of this section. The location, width of, and distance to the access must be noted on the plat.

**Examples:**

1) A public boat landing with 165' of frontage exists 3750' from the farthest point of the subdivision as measured along the shore. 3750' x 0.0227 = 85' of frontage required. The landing provides sufficient access; none is required on the plat.

2) A public park with 125' of frontage exists 5740' from the farthest point of the subdivision as measured along the shore. 5740' x 0.0227 = 130' of frontage required. The park does not provide sufficient access; access is required on the plat.

3) A 100' wide public road crosses a stream 4400' from the farthest point of the subdivision as measured along the shore. 4400' x 0.0227 = 100' of frontage required. The street provides sufficient access; none is required on the plat.

*s. 236.16 (3)(a), Wis. Stats.*

**Existing Public Access** that does not meet the 60 feet per 1/2 mile ratio may be accepted, if agreed upon by the Department of Administration (Plat Review) and the Department of Natural Resources.

**Access Types**

There are several acceptable methods to provide public access with a subdivision plat:

- A public street that abuts or crosses the water.
- A delineated parcel marked "Dedicated for Public Access".
- A dedicated public park that adjoins the water.
- A parcel (such as an outlot) that adjoins the water, and is dedicated to a public entity.
- A perpetual Grant of Easement to the public that provides access to the water may be accepted in special cases.

*s. 236.16 (3)(b), Wis. Stats.*

**Access Vacation**

Public access created under ch. 236 may be vacated by circuit court action, as provided for by s. 236.43; or under the provisions of s. 66.1003, Wis. Stats., and subject to s. 66.1006, Wis. Stats.

## PUBLIC ACCESS REQUIREMENTS

### Access Abandonment or Discontinuance

*s. 66.1006, Wis. Stats*

**Department of natural resources approval of discontinuance.** No resolution, ordinance, order, or similar action of a town board or county board, or of a committee of a town board or county board, discontinuing any highway, street, alley, or right-of-way that provides public access to any navigable lake or stream shall be effective until such resolution, ordinance, order, or similar action is approved by the department of natural resources.

*NR 1.92, Wis. Admin. Code*

Any municipality subject to s. 66.1006, Stats., which proposes to abandon or discontinue any highway, street, alley or right-of-way, which provides public access to a navigable waterway, shall provide a copy of the resolution or ordinance and notify the department (of natural resources) at least 10 working days prior to acting on a resolution or ordinance to abandon or discontinue. Within 10 working days of enacting an ordinance or resolution subject to approval under s. 66.1006, Stats., the municipality shall submit a copy of the ordinance or resolution to the department. Upon receipt of the ordinance or resolution, the department shall publish a notice of the proposed abandonment pursuant to the procedures in s. 31.06, Stats. If no hearing is requested, the department shall proceed under sub. (2) to grant or deny the petition.

### Access Improvements

*s. 236.16 (3)(c), Wis. Stats.*

Except for providing erosion control as outlined in s. 236.16 (3)(d), local units of government do not have to improve lands provided for public access.

## LANDS ADJOINING WATER

*s. 236.16 (4), Wis. Stats.*

*66 Atty. Gen. 85.*

If the subdivider has any interest in lands between the subdivision and the water's edge of an adjacent lake or stream, and if the lands are for any reason unplattable, such lands must be included within the subdivision.

# Subdivisions & Water

## *WATER BOUNDARIES*

### Parcels containing navigable streams

*FAS, LLC v. Town of Bass Lake, 2007 WI 73, 294 Wis. 2d 697, 717 N.W. 2d 853*

The Supreme Court of Wisconsin in the opinion *FAS, LLC vs. Town of Bass Lake*, concluded that a navigable stream crossing a parcel does not sever the parcel when qualified title to property on both sides of the stream is held by the same owner. Parcel boundaries may then cross the navigable stream.

Plat Review follows this determination until further judicial or legislative action says otherwise; we recommend that the developer consult local land division and zoning regulations to determine area and frontage requirements of parcels that contain watercourses.

### Parcels bounded by navigable streams

When a watercourse is used as a boundary between parcels, any non-buildable parcel created should be designated as an outlot or public dedication; meander lines may be required for one or both parcels on each side of the watercourse.

Parcels that contain or cross intermittent natural or man-made drainage ways, ditches, swales, etc. generally do not require meandering.

An outlot on one side of the watercourse may be combined with the adjoining lot for purposes of conveyance when a restriction is placed on the plat, similar as follows:

**Combined Conveyance Restriction**

*The following parcels are consolidated for all purposes, including those of assessment, taxation, and conveyance:*

*Lot 173 is combined with outlot 1;*
*Lot 174 is combined with outlot 2; (etc).*

# Subdivisions & Water

## *WATER BOUNDARIES*

**Subdivisions bounded by public water**

In general, subdivision exterior boundaries along water extend and should be shown to the water's edge of public lakes, and to the thread or center of navigable streams, dependent upon the deed description.

A public lake or navigable stream along an exterior subdivision boundary must be meandered, with monuments set at least 20' from the water's edge or top of bank. The lands between the meander line and the water's edge or center of stream must be included in the metes and bounds description in the Surveyor's Certificate (unless the meander line crosses the water, in which case the lands are excluded).

**Lots/Outlots/Public Dedications bounded by public water**

In general, lot and other parcel boundaries along water extend and should be shown to the water's edge of public lakes, and to the thread or center of navigable streams, dependent upon the deed description.

A public lake or navigable stream along a lot or other parcel boundary must be meandered, with monuments set at least 20' from the water's edge or top of bank.

**Lots/Outlots/Public Dedications bounded by private water**

Lot and other parcel boundaries along private water, where the subdivider has title to the bed (such as a man-made pond or lake) may extend into the water, or to the water's edge, or to the ordinary high water mark, depending on the intent of the subdivider. All lands beneath the water must be accounted for, either as part of the adjoining lots, or the lake or pond may be encompassed by an outlot

To ensure accurate retracement, Plat Review may require specific monumentation for parcel boundaries that include the bed of a lake or pond.

## *WATER BOUNDARIES*

### Ordinary High Water Mark (OHWM)

*s. 236.025, Wis. Stats.*

There are two options available to determine the OHWM and depict it on the plat. Either method may be used for different areas on the same plat if needed:

*s. 236.025 (1)(a), Wis. Stats.*

-Incorporate into the plat the OHWM as determined by the Department of Natural Resources or as otherwise determined according to law.

*s. 236.025 (1)(b) & (2), Wis. Stats.*

-Incorporate into the plat an OHWM that has been approximated by a professional land surveyor by locating the point on the lakeshore or stream bank at which the action of the water is continuous enough to be easily recognizable through erosion, destruction of vegetation, or other marks. If the location of the OHWM is difficult to determine within the subdivision, points on adjacent lands may be used to interpolate the OHWM elevation within the subdivision.

*s. 236.025 (3), Wis. Stats.*

When an OHWM is approximated in this manner, the plat must include a statement that such mark is for reference only.

### Public Trust Information

Any subdivision that is bounded by or contains navigable waters must include the following statement:

*s. 236.20 (6), Wis. Stats.*

> "Any land below the ordinary high water mark of a lake or navigable stream is subject to the public trust in navigable waters that is established under article IX, section 1, of the state constitution".

## EXAMPLES RELATED TO THIS SECTION

**Attorney General opinion regarding lake bed title.**

**Lot/Outlot numbering for parcels severed by navigable stream.**

**Attorney General opinion regarding public access to lakes and streams.**

**Attorney General opinion regarding parcels separated by navigable water.**

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JOHN W. REYNOLDS
ATTORNEY GENERAL

N. S. HEFFERNAN
DEPUTY ATTORNEY GENERAL

# The State of Wisconsin
## Office of Attorney General
## Madison

September 9, 1960

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WILLIAM WILKER
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ATTORNEYS
MILO W. OTTOW
CHIEF INVESTIGATOR

To Whom It May Concern:

This office has had numerous requests, similar to yours, relating to the use of the beach or shore area adjacent to a public lake. While this office is not authorized to render legal advice to private persons, I consider that the public interest in this question makes it appropriate for me to comment thereon.

The title to the bed of a lake below ordinary highwater mark is in the state to be held in trust for the public. By ordinary highwater mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark by erosion, destruction of terrestrial vegetation, or other easily recognized characteristics. The public has the right to use the water area for boating, fishing, swimming and the like. This right extends only to the water's edge. At times of ordinary highwater the water's edge will reach the highwater mark. At times of low water there will be a beach area of exposed lake bed between the actual water's edge and the highwater mark. The public may use the lake only to the water's edge and may not go upon the exposed lake bed or beach between the water's edge and the highwater mark. The owner of adjacent lake shore property has the exclusive right to use this exposed lake bed area for access to the water. Such an owner has a right to prevent the public from walking along the lake shore on this exposed lake bed. However, the public would have a right to boat, swim, or walk in the water along the shore. For further discussion of these principles see C. Beck Co. v. Milwaukee, (1909) 139 Wis. 340; Polebitzke v. John Week L. E., (1916) 163 Wis. 322; Doemel v. Jantz, (1923) 180 Wis. 225; Muench v. P. S. C., (1951) 261 Wis. 492; (1946) Wis. Law Rev. 345.

I am pleased to furnish this information and hope that it will be helpful to you. However, any person with a specific problem as to his property rights should consult with an attorney in private practice and be guided by his advice.

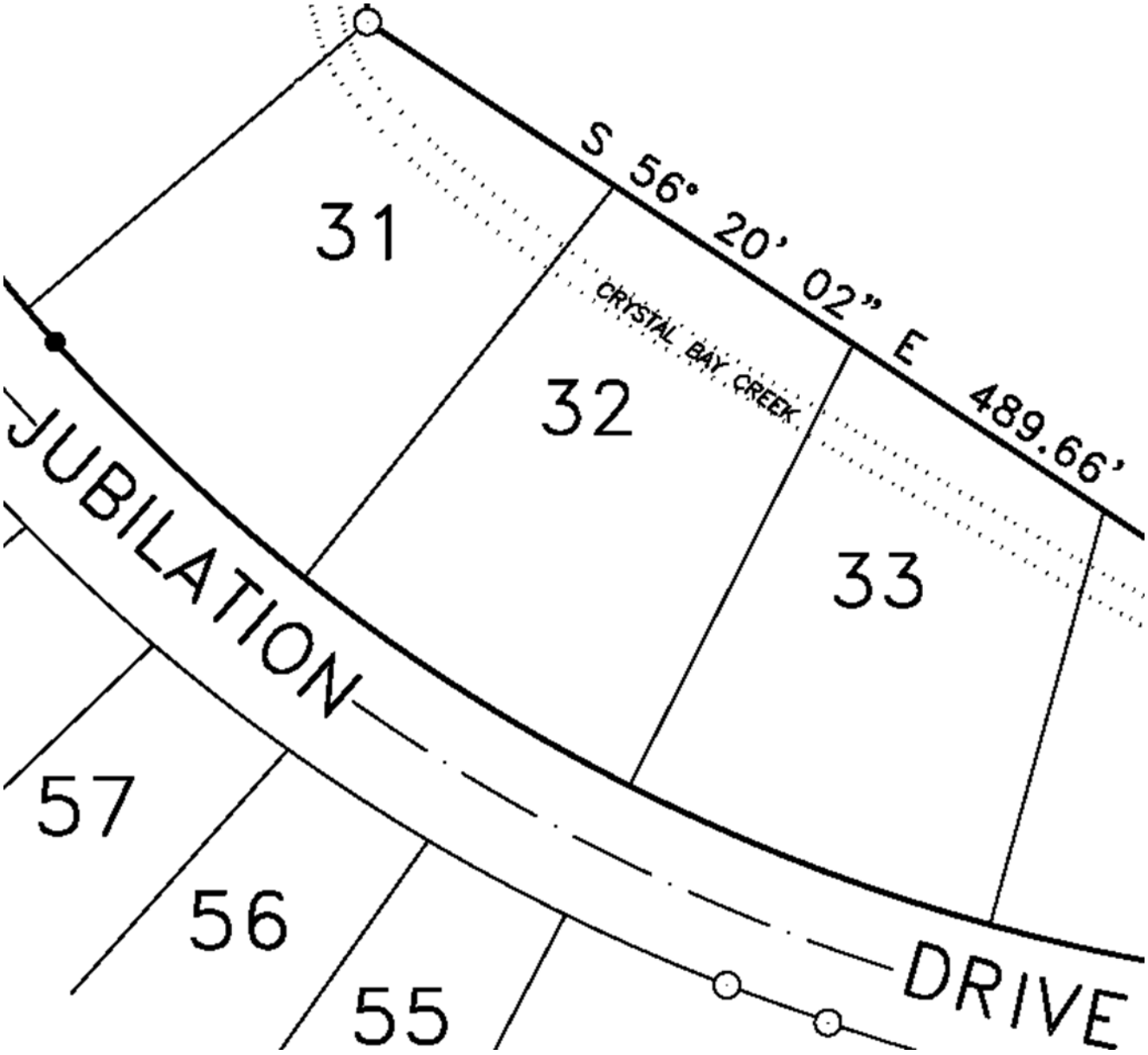
Very truly yours,

John W. Reynolds

JOHN W. REYNOLDS
Attorney General

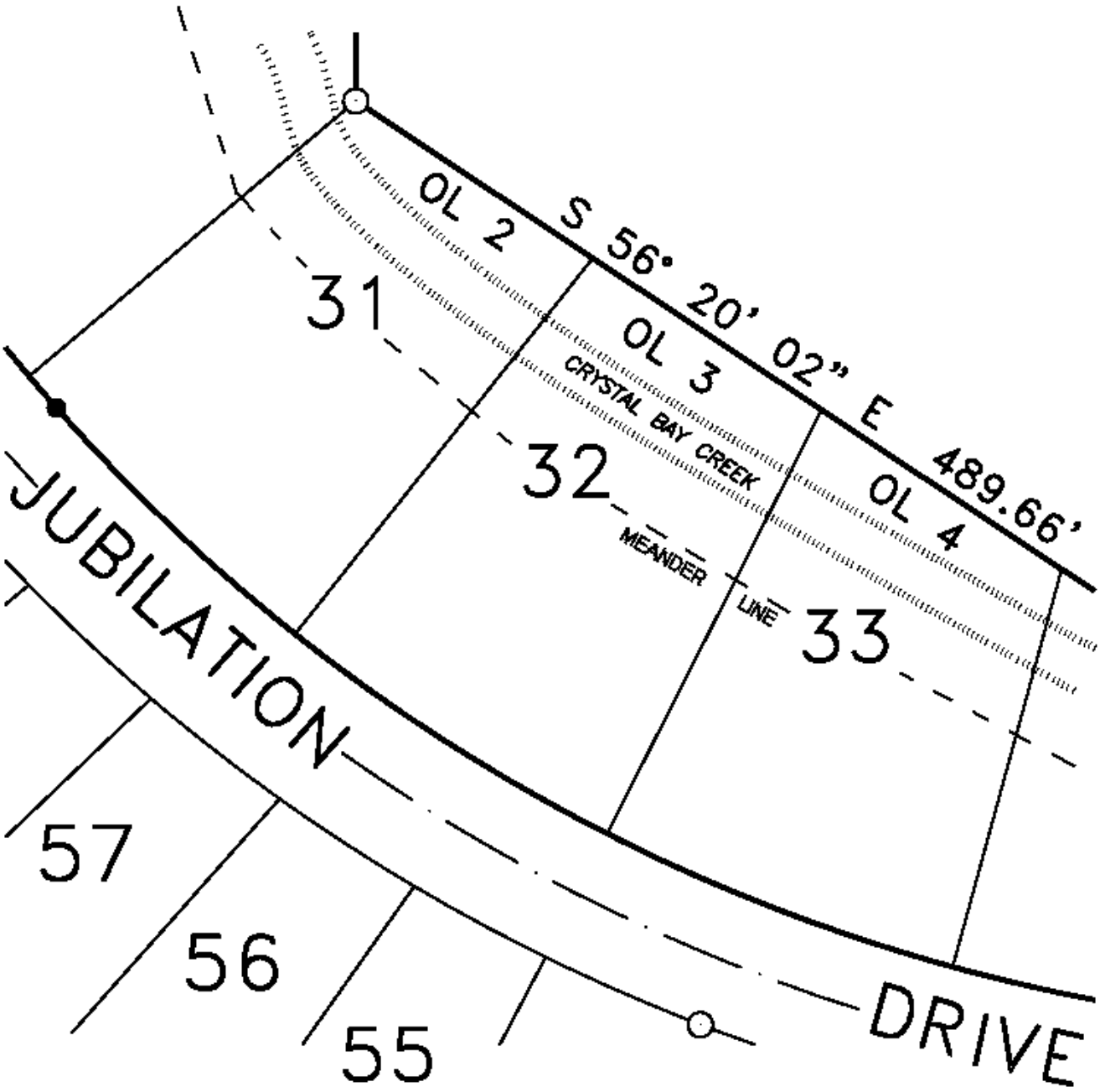
# Subdivisions & Water

PARCELS MAY EXTEND ACROSS A NAVIGABLE STREAM LIKE THIS:



# Subdivisions & Water

OR PARCELS MAY BE BOUNDED BY A STREAM LIKE THIS:



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OPINIONS OF THE ATTORNEY GENERAL

Public Access-Lakes--Public access to a lake or stream under 236.16 (3) must be connected with rest of public highway system by public road. Width of public road depends on statutes.

March 27, 1963.

FRANK P. ZIEDLER,
Director, Department of Resource Development.

You ask several questions concerning access to lake and stream shore plats. You quote sec. 236.16 (3) as follows:

> "(3) LAKE AND STREAM SHORE PLATS. All subdivisions abutting a lake or stream shall provide public access at least 60 feet wide providing access to the low water mark so that there will be public access at not more than one-half mile intervals as measured along the lake or stream shore unless topography and ground conditions do not permit."

You ask four questions concerning this section. They will be answered separately in the following paragraphs.

I

The first question reads, "To satisfy the requirement of 236.16 (3), must the public access to a lake or stream be connected by public ways to the rest of the public highway system of the state?"

It is my opinion that the public access at the low water mark must be connected to the rest of the public highway system in order that public access is provided as per the statute. The section provides that all subdivisions abutting a lake or stream shall provide public access at least 60 feet wide providing access to the low water mark. If the public access at the low water mark does not connect to the system of public highways, this would not be public access.

II.

Your second question reads, "Suppose the local governing body does not want to accept responsibility for the streets or roads of a plat and would accept the plat only if the roads were designated 'private roads,' and the roads would provide the only means of connecting to the rest of the public road system, would an area abutting the lake or stream which is connected to these private roads but designated 'public access' still be eligible to be considered to fulfill the requirements of 236.16 (3)?"

It is my opinion that if the local governing body does not want to accept the plat unless the roads in the plat were designated private roads, and the private roads would provide the only means for connecting

public access and the public roads system, the requirements of sec. 236.16 (3) are not being fulfilled. Therefore, the plat would not be eligible to be recorded under Ch. 236.

In passing, it may be helpful to observe that the recourse the property owner would have would depend upon whether the property in question was in a town, city or village. If it were in a town, the property owner could petition with six or more resident fee holders, to lay out a town road to the public access. If the town refused, the property owner could attempt to use sec. 80.39 which provides that the county board may lay out highways and ask that a public highway be laid out to the public access. The county board may also enter into an agreement with the city, village or town to enable the county to construct and maintain the street or highway in the municipalities, should the local unit not want the responsibility. (See sec. 83.035.) The county board, under sec. 83.03, may also construct, improve or repair or aid in constructing or improving or repairing any highway in the county.

There is also a provision in sec. 23.09 (14) whereby the county board of any county may condemn a right of way for any public highway to any navigable stream, lake or other navigable waters. Sec. 23.09 (15) provides a means of making an application to the conservation commission for state aid for public access to waters.

If the property is in the city, there is a procedure in sec. 62.22 for ten resident fee holders to petition to open a street. Likewise, if the property is in a village, sec. 61.36 gives the village board the power to lay out a street. Therefore, the property owner could petition the village board.

III.

Your third question reads, "236.16 (3) states that the public access be 60 feet wide; how far back from the low water mark does this 60-foot width of access have to be extended? As an example, could this 60-foot access area be say 150 feet long, thence connected by a street of less than 60 feet wide to the existing public highway system?"

It is my opinion that the access must be 60 feet wide at the low and high water mark. However, if the minimum street width, as established under sec. 236.16 (2) is provided, and this street is connected to the public access, the requirements of statute have been met. If there is an existing public highway system with a street less than 60 feet wide to which the 60 foot access at high water mark is connected, it is my opinion that sec. 236.16 (3) has been complied with. There are other sections of the statutes that provide for minimum street width in addition to sec. 236.16 (2), therefore, I assume that any public highway connecting the public access to the high water mark would be of a sufficient width to provide adequate public access.

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IV.

Your fourth question reads, "The 1955 revisions of chapter 236 changed the width of the public access to lake and stream plats from 50 to 60 feet. If there already exists a 50-foot public access to the water's edge, as previously required, which 50-foot access is within one-half mile (as measured along the shore line) of all points on the new plat, does the new owner have to provide 60 feet within his plat or arrange for the widening of the existing 50-foot access to 60 feet?"

In your fourth question, if you assume that the 50-foot access is not part of any plat, it would then be my opinion that it would be necessary to widen the access to 60 feet, unless topography and ground conditions did not permit, or the new plat should contain a public access. However, if the 50-foot access was within a plat that was recorded, then the access would not have to be widened, nor would it be necessary to provide a 60-foot access in the new plat.

AJF

CAPTION: For the purpose of determining lot area under the provisions of sec. 236.02(8), Stats.:

(1) If a lot abuts a public or private road or street, the total lot size (area) does not include the land extended to the middle of the road or street.

(2) An easement of access to a parcel is not to be included in determining the total lot area.

(3) A body of navigable water separates a parcel of land as effectively as does a public highway.

January 10, 1977

Mr. William R. Bechtel, Secretary
Department of Local Affairs and Development
123 West Washington Avenue
Madison, Wisconsin 53702

You have requested my opinion on a series of questions relating to the calculation of land area for purposes of construing and applying sec. 236.02(8), Stats., and Wis. Adm. Code section H 65.03. Section 236.02(8), Stats., defines "subdivision" for purposes of ch. 236, Stats.:

> "(8) 'Subdivision' is a division of a lot, parcel or tract of land by the owner thereof or his agent for the purpose of sale or of building development, where:
>
> "(a) The act of division creates 5 or more parcels or building sites of 1 1/2 acres each or less in area; or
>
> "(b) Five or more parcels or building sites of 1 1/2 acres each or less in area are created by successive divisions within a period of 5 years."

The significance of this section is its specification of the conditions under which a division of land will trigger the application of ch. 236, Stats.

Your first question, which appears substantially identical to your questions four (c) and five, is as follows:

> If a lot abuts a public road or street, does the total lot size (area) include the land extendad to the middle of the road or street?

"a. Is the anser to this question affected by the status of a public street. Specifically, does it a difference if the public street is a town road, city street, County Trunk Highway, State Trunk Highway or Federal Highway?"

I assume this question is asked in light of the long-standing Wisconsin rule, stated in Walker v. Green Lake County, 269 Wis. 103, 69 N.W.2d 252 (1955), quoting from 25 Am. Jur. Highways, sec. 132, p. 426, as follows:

> "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 presecription, or by the direct action of the public authorities, the public acquires merely an easement of passage, the fee title remaining in the landowner."

The leading case on the subject appears to be Spence v. Frantz, 195 Wis. 69, 217 N.W. 700 (1928):

> "It has long been the established law in Wisconsin that the abutting owner has title to the center of the highway or street adjacent to his property, subject to the public easement. It is equally clear that the conveyance of abutting property transfers the legal title to the land to the center of the adjacent street or highway, in the absence of a clear intent to the contrary, even where the conveyance names the highway as the boundary of the parcel conveyed. Gove v. White, 20 Wis. 425, 432." 195 Wis. at 70.

The same rule is applied to the owners of subdivision lots abutting public streets, whether or not the street was included in the recorded plat. Williams v. Larson, 261 Wis. 629, 53 N.W.2d 625 (1952).

In my opinion, however, the area of abutting roads or streets is not to be included in determining the size of lots under sec. 236.02(8), Stats., regardless of whether the public holds afee or an easement, and regardless of the status of such road or street.

This question has apparently never been judicially treated in Wisconsin in the context of sec. 236.02(8), Stats. A similar question has been raised, however, in the context fo determining the area of a homestead exempt from execution by creditors. Weishrod v. Daenicke, 36 Wis. 73 (1874). The statute involved in Weisbrod exempted as homestead a quantity of land not to exceed one-quarter acre, owned and occupied by any resident of the state. In its construction of this provision, the court held that the exempt area is to be determined without inclusion of the land to the center of the street. The rationale of the holding is set forth in the opinion as follows:

"...while the owner of the abutting lot has an estate in fee to the center of the street, and has the right to the enjoyment of any use of his estate consistent with the servitude to which it is subjected, yet...he has no right to obstruct the street in front of his lot in an improper manner or for an unreasonable time. Hundhausen v. Atkins, imp., ante, p. 29. And it is too obvious for argument that the use of a street by the public, and its use and occupancy by the owner for a homestead, are wholly inconsistent with each other. The word 'occupied' has controlling force in determining the question before us and the proper construction of the statute. The object of the statute doubtless is, to secure to the debtor a home—land which he may live upon, occupy and possess as and for a homestead. He has no right to occupy the street for such a purpose, to build upon it, to cultivate it, or to appropriate it to any domestic use. Now suppose the defendant's lots had been bounded by two wide avenues, like some in this city: is it not apparent, if the land in the streets is computed in the quantity exempt, that the owner would have but a small parcel which he could occupy as a home for this family?" 36 Wis. at 76.

Wegge v. Madler, 129 Wis. 412, 109 N.W. 223 (1906), which cites Weisbrod, Supra, with approval, is cited as authority in Loveladies Property Owners Association, Inc. v. Barnegat City Service Co., Inc. 60 N.J. Super. 491, 159 A.2d 417 (1960), a New Jersey case dealing with substantially the same issue you raise. That case involved an action to enjoin development of certain platted areas in a subdivision for residential purposes, and to enjoin issuance of building permits, on the ground that lots laid out in the plat did not meet minimum area requirements set forth in the township zoning ordinance. Access to the lots in question was to be provided by a series of private easements. If the area of these easements were to be included in calculating the area of abutting lots, those lots would have satisfied minimum lot size requirements. The court there stated:

"If these access strips had been dedicated by the developers as public streets instead of being reserved as private easements ... no colorable claim for their inclusion in the required lot area would be maintainable, and this despite the fact that title in fee to the strip may rest in the abutting property owners. See Clarks Lane Garden Apartments v. Schloss, 197 Md. 457, 79 A. 2d 538 (Ct. App. 1951). In the leading case of Montgomery v. Hines, 134 Ind. 221, 33 N.E. 1100 (Sup. Ct. 1893) ... the court voiced the self-evident proposition that:

> '"[l]ot" and "street" are two separate and distinct terms, and have separate and distinct meanings. The term "lots," in its common and ordinary meaning, includes that portion of the platted territory measured and set apart for individual and private use and occupancy; while the term "streets" means that portion set apart and designated for the use of the public ***.' 33 N.E., at page 1101. Thus the determination, in terms of relevance to the present inquiry, of which area is a lot and which a street, these areas being mutually exclusive, depends not on the way title is held, or platted areas apparently bounded on a filed map, but rather on the function which each separate area is to serve as observable by inspection of the plat. ..." 159 A.2d at pp. 422-423.

See also Sommers v. Mayor and City Council of Baltimore, 215 Md. 1, 135 A. 2d 625 (1957); and Peake v. Azusa Valley Savings Bank, 37 Cal. App.2d 296, 99 P.2d 382, 384 (1940).

The functional distinction of Loveladies, Supra, is consistent with Weisbrod, Supra, and appears equally applicable to the construction of sec. 236.02(8), Stats. The purposes of ch. 236, Stats., are set forth in sec. 236.01, Stats. In order to construe sec. 236.02(8), Stats., so as most effectively to accomplish those purposes, especially "to prevent the overcrowding of land" and "to provide for adequate light and air," its 1 1/2 acre cutoff should be calculated exclusive of abutting roads and streets.

As indicated above, sec. 236.02(8), Stats., specifies those divisions of land to which ch. 236, Stats., will apply. Once it has been determined that ch. 236, Stats., is applicable, Wis. Adm. Code ch. H 65, adopted by the Department of Health and Social Services in furtherance of its plat review responsibilities, may also be applicable.

H 65 is authorized by the following statutory provisions:

> "(1) Approval of the preliminary or final plat shall be conditioned upon compliance with:
>
> "***
>
> "(d) The rules of the department of health and social services relating to lot size and lot elevation necessary for proper sanitary conditions in a subdivision not served by a public sewer, where provision for such service has not been made. ..." Sec. 236.13(1)(d), Stats.

"(f) The department [of health and social services] may make and enforce rules relating to lot size and lot elevation necessary for proper sanitary conditions in the development and maintenance of subdivisions not served by a public sewer, where provision for such service has not been made." Sec. 140.05(f), Stats.

Apparently Wis. Adm. Code ch. H 65, does contain its own rule governing treatment of highway easements, found in Wis. Adm. Code section H 65.03:

"EASEMENTS. Easements for streets or utilities which are greater than 20 feet wide shall not be considered in determining minimum lot area unless approved in writing by the department."

However, such rule is only applicable for determining minimum lot area for the purposes of Wis. Adm. Code ch. H 65.

Yours second question is:

"If a lot abuts a private road or street, does the total lot size (area) include the land extended to the middle of the road or street?

"a. Is the answer to this question affected by the number of owners of the private road or street, i.e., single or lot owners association ownership?"

In the context of sec. 236.02(8), Stats., it is my opinion that two requirements must be met in order for the area of a private street to be includable in the area of a lot. First, implicit in the terms adopted by sec. 236.02(8), Stats., to identify areas of land, i.e., lot, parcel and tract, is a concept of unity of ownership. 52 OAG 411 (1963); and Griffin v. Denison Land Co., 18 N.D. 246, 119 N.W. 1041 (1909). As noted in my discussion of your first question, the basis of the argument for inclusion of the area of public roads was private ownership by abutting owners of land underlying the road. In the case of private roads where the abutting owner has no fee interest in the area of the road, no colorable claim can be made to inclusion of the road's area in determining the size of the abutting lot.

Second, even where unity of ownership exists, the area sought to be included must satisfy the functional test laid out above. Loveladies, Supra, expressly holds that the distinction between streets and lots applies to private as well as public streets. Thus the private driveway on the conventional lot, lying entirely upon an integrated area of land of single ownership, and subject to whatever domestic uses its owner selecta, should be included in determining lot size. But a private drive providing a right-of-way through the lands of others, which is not part of an integrated area of land, and not subject to domestic use by the owner, should not be included.

Your third question is:

> "Is an easement that has been granted over the land of others for the purpose of ingress and egress to a parcel to be included in the total lot area for the purpose of sec. 236.02(8) and/or sec. H 65.03, Wis. Admin. Code?"

The answer is no. The unity of ownership and functional distinction criteria apply. Where an easement has been granted for purposes of ingress and egress, the area subject to the easement must be excluded in calculating lot size on the functional basis, just as a public highway is excluded.

Fourth, you ask whether a single lot may consist of two parcels separated by land owned by another party, such as a public highway.

The weight of authority requires that sec. 236.02(8), Stats., be construed as providing a negative response.

> "'The word lot means any portion, piece or division of land.' It 'denotes a single piece of land, lying in a solid body and separated from contiguous land by such subdivisions as are usual to designate different tracts of land, and in the subdivision of a tract of land into city lots, each lot in a city constitutes but a single piece or parcel of land.'" 2 McQuillin, Municipal Corporations (1966 Rev. Vol.), sec. 7.19, p. 360.

> "... Tracts of land, separated by a public thoroughfare, do not constitute a single lot." 101 C.J.S. Zoning, sec. 144, p. 905.

See also Sanfilippo v. Bd. of Review of Town of Middletown, 96 R.I. 17, 188 A.2d 464 (1963), where a board of review finding that three parcels constituted a single lot was overturned as arbitrary on the basis of physical facts. Among the facts considered was the intervention of a public highway setting one parcel apart from the others.

A lot for purposes of sec. 236.02(8), Stats., cannot consist of separate parcels which are not susceptible to integration into a single unit of land. This includes the situation where the parcels are separated by land in other possession, such as a public highway.

Wis. Adm. Code section H 65.03(4)(b), permits use of combinations of lots to make up the area required by that chapter. However, inasmuch as the purpose of that chapter is to require sufficient land area for sewage disposal, it is clear that a parcel set off by a highway which is not available for sewage disposal purposes should not be included.

# Subdivisions & Water

**Finally, you ask whether a lot may extend across navigable water such as a channel or lagoon.**

**The answer is again no. A body of navigable water separates a parcel of land as effectively as does a public highway. Land owners abutting on navigable streams hold a qualified title to the center of the stream bed. Muench v. Public Service Comm., 261 Wis. 492, 501, 53 N.W.2d 514 (1952). Title to the lands underlying navigable lakes is held by the state. State v. McFarren, 62 Wis. 2d 492, 498, 215 N.W.2d 459 (1974). Abutting land owners are prohibited from placing structures and obstructions in navigable waters without first securing a permit from the Department of Natural Resources. Sec. 30.12, Stats. Therefore, parcels separated by navigable waters are no more susceptible to functional integration than parcels separated by public highways.**

**I am acutely aware that the answer given to question three above may encourage potential developers to pattern their developments in such a way as to separate lands to be divided by dedicating public roads and/or creating private roads separating lots which are then further divided into less than 5 parcels of 1 1/2 acres each or less thereby avoiding statutory platting requirements. You may wish to monitor developments to determine whether this is in fact occurring and to suggest that the Legislature change the law if it appears that the public purposes underlying the platting laws are being frustrated.**

**BCL:JCM:ked**

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The following excerpt is the conclusion of the Supreme Court Opinion FAS, LLC v. Town of Bass Lake, 2007 WI 73, 294 Wis. 2d 697, 717 N.W. 2d 853 relating to parcel boundaries crossing navigable streams.

III. CONCLUSION

¶33 We conclude that a navigable stream meandering over a parcel does not divide the parcel into two parcels when the same riparian owner holds qualified title to the property on both shores of the stream. We also conclude that under the Sawyer County Zoning Ordinances then in effect, the entire parcel, including the streambed, is used to calculate the width of the lakeshore frontage. Therefore, because the board of appeals proceeded on an incorrect theory of law in regard to whether the navigable stream divided the parcel, it inaccurately calculated the width of the parcel at issue under the then effective zoning ordinance. Accordingly, we affirm the court of appeals.

*By the Court.*—The decision of the court of appeals is affirmed.

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