

No Private Cause of Action to Compel Towns to Construct Roads to Meet Wis. Stat. § 82.50 Standards

The Wisconsin Supreme Court has ruled that individuals have no private right of action for mandamus or damages to compel a town to construct roads to the standards for “town roads” under Wis. Stat. § 82.50. *DSG Evergreen Family Limited Partnership v. Town of Perry*, 2020 WI 23 (2/27/2020).

The Town of Perry acquired by eminent domain approximately 12 of 92 acres of farmland owned by DSG for purposes of creating a park preserving the oldest surviving Norwegian log church in the state. Before the taking, DSG’s access from a county highway to its farmland was via a field road. However, DSG had planned to construct a home and accessory buildings in the location of the 12 acres that were acquired. Accordingly, DSG had constructed the road to the higher standards for a driveway. As part of the taking, Perry committed to constructing a replacement “field road, to the same construction standards as the existing field road.” The new road would serve as the access to both the park and to DSG’s remaining land.

The town constructed the new road to the driveway standards. Under the town’s driveway ordinance, the term “field road” is defined as a private road used only for agricultural purposes. A “driveway” is a private road used for residential purposes. The ordinance sets design specifications applicable to field roads and driveways.

The town laid out the road as a “parkway” pursuant to Chapter 27, Stats., not a town road under Chapter 82, Stats. DSG filed a declaratory judgment action seeking by mandamus to compel the town to reconstruct the new road to the standards of a town road set out in Wis. Stat. § 82.50. In the alternative, DSG alleged a private right of action seeking damages for the cost of reconstructing the road. DSG argued that, by opening any type of road to the general public, the town was obligated to meet the statutory standards independent of any obligations arising out of the condemnation. The Supreme Court rejected both claims.

With respect to the first claim, the court found that § 82.50 includes an element of discretion in that the Department of Transportation may approve deviations from the standards. The remedy of mandamus applies only when there is a clear duty imposed by law and nothing is left to the discretion of the governmental body. The court also found that the claim was not ripe for adjudication, because there had been no determination by the department whether to approve any deviation from the standards and the town has discretion in how to apply for such relief.

Regarding the second claim, the court explained that a private right of action for failure to comply with statutory obligations exists only when the legislature intends to create such a right and the statute provides for private civil

liability rather than merely providing for the protection of the general public. The court held that § 82.50(1) does meet either criteria.

The court seems to have assumed, without deciding, that parkways laid out under Chapter 27 must meet the standards of § 82.50. The town also briefed the question of whether all town “highways” laid out under Chapter 82 (which is entitled “Town Highways”) must necessarily meet the standards for “town roads” under § 82.50, since there is a statutory definition of “highway” and treating them as interchangeable with “town roads” leads to inconsistencies or redundancies with other provisions of Chapter 82. State transportation aids statutes also distinguish between general aids for “highways” and local roads improvement funding, which applies to town roads, but not to all thoroughfares that meet the definition of a town “highway.” The court did not address this question.

On an independent basis, DSG also sought to have the new road reconstructed to higher standards on the grounds that the road does not meet DSG’s interpretation of the applicable “construction standards” promised in the condemnation petition. The town contends that DSG’s alleged interpretation is incorrect. The lower courts did not decide the correct interpretation and, instead, dismissed this portion of the case on claim preclusion grounds. The supreme court held that claim preclusion did not apply and remanded the matter back for a decision on the merits.

—Mark J. Steichen