COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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 Nos. 03-3340
03-3341

Cir. Ct. Nos. 02CV000616
02CV000732

STATE OF WISCONSIN

IN COURT OF APPEALS

DISTRICT II

NO. 03-3340

TOWN OF LAGRANGE,

PLAINTIFF-RESPONDENT,

V.

WALWORTH COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT,

ARMIJIT SIDHU AND JASWINDER SIDHU,

INTERVENORS- DEFENDANTS-APPELLANTS.

NO. 03-3341

LAUDERDALE LAKES LAKE MANAGEMENT DISTRICT,

PLAINTIFF-RESPONDENT,

V.

ARMIJIT SIDHU AND JASWINDER SIDHU,

DEFENDANTS-APPELLANTS,

WALWORTH COUNTY,

DEFENDANT-RESPONDENT,

TOWN OF LAGRANGE,

DEFENDANT-CROSS CLAIMANT-RESPONDENT,

V.

ARMIJIT SIDHU AND JASWINDER SIDHU,

CROSS-CLAIM DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 NETTESHEIM, J. In an earlier action, Armijit and Jaswinder Sidhu obtained a circuit court order vacating a portion of Lake Road, which runs between separate lots that the Sidhus own on the shore of Middle Lake in Walworth county. In the instant consolidated cases, Lauderdale Lakes Lake Management District (Lauderdale) and the Town of LaGrange sought to vacate that prior circuit court order, each relying on separate theories. The circuit court adopted the Town's theory, ruling that Lake Road was a privately platted road running to the benefit of all the owners of record in the subdivision where the Sidhu property is located. Since the Sidhus had failed to provide notice of the

prior vacation proceeding to the other subdivision owners of record as required by WIS. STAT. § 236.41(4) (2003-04),[1] the court ruled that the prior order vacating the portion of Lake Road at issue was of no legal effect. The Sidhus appeal. We uphold the circuit court's ruling and affirm the judgment vacating the prior order.

BACKGROUND

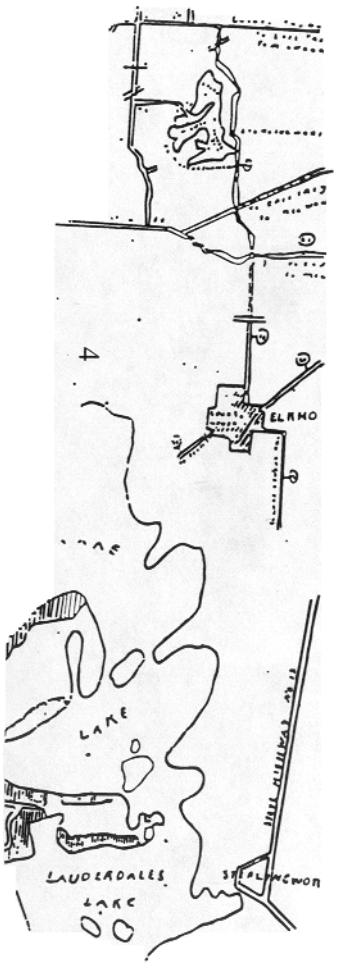
¶2 The facts and procedural history of this case, while extensive, are not in dispute. Cooper's Mid-Lakes Subdivision was platted and recorded in 1926. The certification accompanying the original plat stated that the roads shown on the plat were "private roads for the use and enjoyment of the owners of the lots within the subdivision only." The Town resolution accepting the plat similarly stated, "The roads shown on the plat are private roads, for the use and enjoyment of owners of lots within the addition only…." As depicted on the plat, Lake Road provides the owners of the subdivision lots with access to Middle Lake, which is part of the Lauderdale Lakes chain.

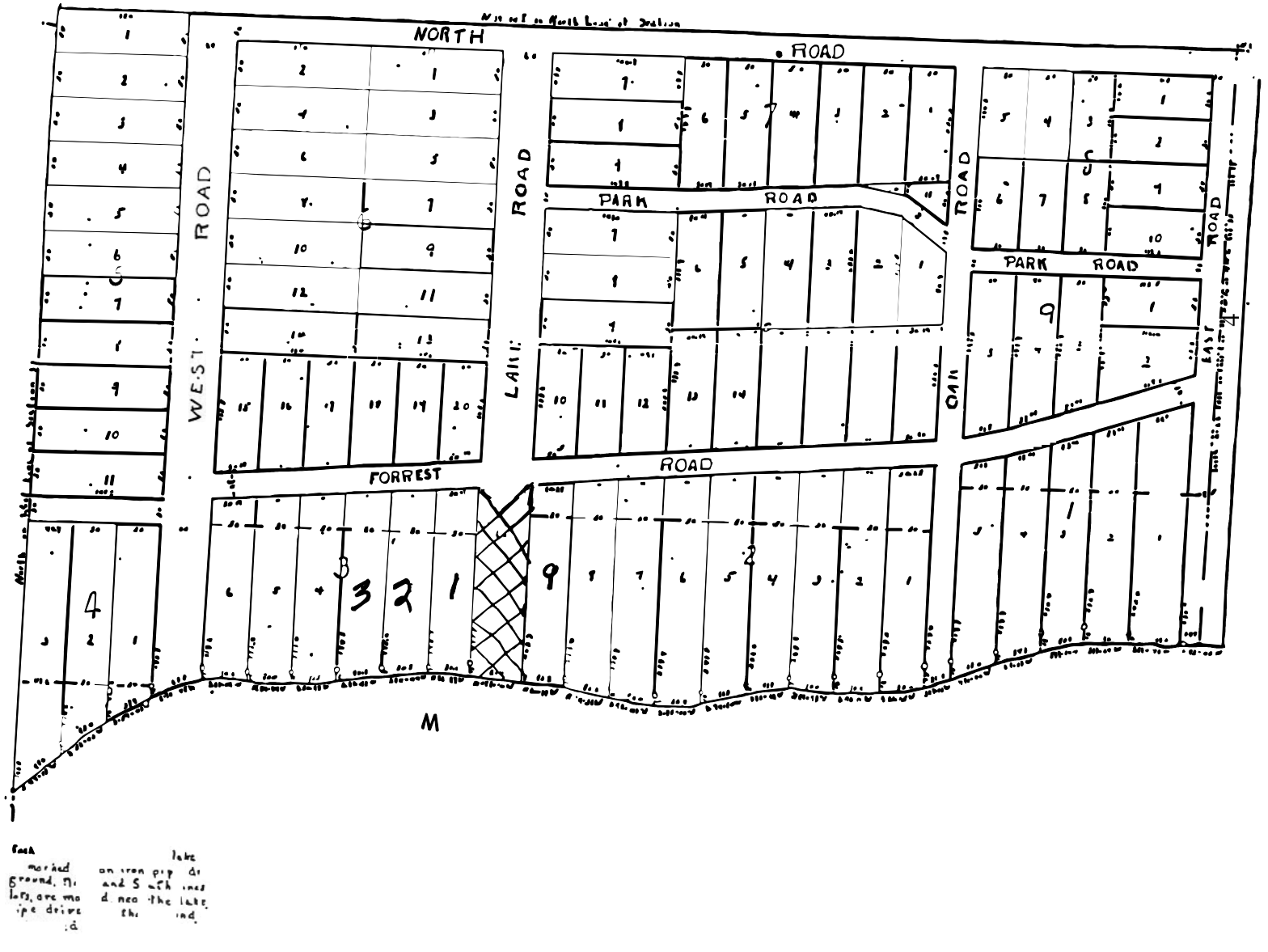
¶3 The Sidhus own lots 1, 2, 3, and 9, which are adjacent riparian lots in the subdivision. Three of the Sidhus' lots (lots 1, 2, and 3) are located on one side of Lake Road and Lot 9 is located on the other side of the road. The following diagram depicts the area. The "cross-checked" area depicts the portion of Lake Road at issue in this case.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Nos. 03-3340
03-3341

COOPER'S
MID-LAKES SUBDIVISION





¶4 In the late 1980s, the Sidhus constructed a pier that violated the Department of Natural Resources (DNR) regulations governing the number of permitted boat slips. Under those regulations, the number of permitted boat slips was determined by the amount of riparian ownership.[2]

¶5 In August 1995, the Sidhus applied to the DNR for permission to make the pier larger so as to accommodate even more boat slips. In support, the Sidhus contended they owned outright the portion of Lake Road lying between lots 1 and 9, or, alternatively, that they otherwise had acquired ownership of the roadway by dedication or adverse possession. The DNR denied the Sidhus' application.[3] An administrative law judge (ALJ) upheld this ruling at an ensuing contested case hearing. Upon further judicial review, Dane County Circuit Judge Michael Nowakowski affirmed the ALJ's ruling.

¶6 Undeterred, the Sidhus next brought an action in the Walworth county circuit court seeking to vacate the portion of Lake Road running between lots 1 and 9. This action was titled ***In Re: Vacation of a part of Lake Road in Cooper's Mid-Lakes Subdivision***. Although the Town was not formally named as a party in the action, the Sidhus served the Town with their pleading, posted notice of the hearing, and published a copy of the notice pursuant to WIS. STAT. § 236.41(1)-(3). However, they did not provide mailed notice to any of the owners of record in the subdivision as contemplated by subsec. (4) of the statute.

[2] The Sidhus' pier also violated the Town's pier head ordinance.

[3] The DNR further ordered the Sidhus to reduce the size of their existing pier to conform to the DNR regulations.

¶7 On July 13, 2000, Walworth County Circuit Judge Robert Kennedy granted the Sidhus' request and entered an order vacating the portion of Lake Road running between lots 1 and 9. The order recites that the court heard all the interested parties in the action and that the notice required by WIS. STAT. § 236.41 had been provided.[4]

¶8 Armed with Judge Kennedy's order, the Sidhus next petitioned the Walworth county zoning administrator for permission to reconfigure and expand their existing four lots by adding fifteen feet to each lot. The added fifteen feet per lot represented an allocation to each lot of the sixty-foot width of the vacated portion of Lake Road. The zoning administrator granted the Sidhus' request. The

[4] The Sidhus claim that the town "joined in the application for vacation of the road via a letter signed by the town clerk." True, a letter to this effect was submitted by the town clerk to Judge Kennedy. However, the relevant minutes of the town board meeting on this matter reflect no such resolution, and the deposition testimony of the town chairman confirmed this. Moreover, while the clerk acknowledged that her signature appears on the letter, she had no recollection of composing the letter. Thus, the circumstances surrounding the production of the letter are suspect.

We also observe that the Sidhus' brief in support of their motion for summary judgment in this case overstated the Town's role in the vacation proceedings before Judge Kennedy. The brief stated:

> [A]ttorney Paul E. Kremer appeared before the Town Board on June 12, 2000 to fully advise the Town Board of the application. The proposal was smiled upon by the Town Board. No objections to the application were noted. *The Town caused a resolution to be executed by its Clerk on July 3, 2000, a copy of which was filed in the original court file concerning the road vacation and is attached hereto as Exhibit No. 2.* (Emphasis added.)

This statement deftly infers that the Town passed a resolution approving of the Sidhus' request for vacation of the disputed portion of Lake Road. In fact, the Town never passed any such resolution. Furthermore, a municipal clerk has no authority to adopt or enact such a resolution.

Town appealed this decision to the Walworth County Board of Adjustment, which denied the challenge.

¶9 That brings us to the instant cases, both of which were assigned to Walworth County Circuit Judge John Race. On July 15, 2002, the Town commenced a certiorari action against the Board of Adjustment seeking review of the Board's ruling allowing the Sidhus to reconfigure and expand their four lots. The Town contended that the Board had acted beyond its jurisdiction and that its decision was unreasonable and contrary to law because "the vacation of Lake Road by which the Sidhus purportedly acquired the additional 15' per lot is invalid and contrary to law …." Thus, even though this action on its face challenged the Board of Adjustment's ruling, the core issue was the validity of the vacation proceedings before Judge Kennedy. Judge Race permitted the Sidhus to intervene in this action.

¶10 On August 20, 2003, Lauderdale commenced a declaratory action against the Sidhus, the Town and Walworth County seeking to vacate Judge Kennedy's prior ruling vacating the disputed portion of Lake Road. In support, Lauderdale relied on the law of issue preclusion and judicial estoppel. Lauderdale pointed out that Judge Nowakowski had ruled in the judicial review proceedings in Dane county that Lake Road had been dedicated as a public access roadway. As such, Lauderdale contended that the Sidhus were precluded from claiming that Lake Road was a private road in the later action before Judge Kennedy. In addition, Lauderdale argued that the DNR had not approved any vacation of Lake

Road as required by WIS. STAT. § 66.1006,[5] which requires DNR approval of any governmental action discontinuing any roadway or right of way that provides public access to any navigable lake or stream.

¶11 Given that the validity of Judge Kennedy's prior order was at the core of both cases, Judge Race consolidated the actions. All parties moved for summary judgment. Following briefing and a hearing, Judge Race issued a written decision. At the outset, the judge ruled that Lake Road was not a public road. The judge then addressed WIS. STAT. § 236.41, which sets out the notice requirements in an action seeking to vacate or alter a plat. The judge ruled that all of the owners of record of the subdivision were entitled to mailed written notice of the vacation proceeding before Judge Kennedy pursuant to subsec. (4) of the statute. Since the Sidhus had failed to provide such notice, Judge Race vacated Judge Kennedy's order.

¶12 The Sidhus appeal. We will recite additional facts as we discuss the issues.

DISCUSSION

Lauderdale's Theory on Appeal

¶13 As noted, the Town and Lauderdale presented different theories to Judge Race in support of their challenges to Judge Kennedy's order vacating the disputed portion of Lake Road. Their arguments are similarly divergent on appeal.

[5] Lauderdale cites to WIS. STAT. § 80.41 (2001-02), which was the predecessor statute to the current WIS. STAT. § 66.1006. The language of both statutes is identical and therefore we will cite to the current statute.

¶14 Lauderdale takes issue with Judge Race's ruling that Lake Road is a private road. Instead, Lauderdale contends that Lake Road is a public road. In support, Lauderdale cites to WIS. STAT. § 236.16(3), which provides, "All subdivisions abutting on a navigable lake or stream shall provide public access at least 60 feet wide to the low water mark …." However, this statute did not exist at the time the original plat of Cooper's Mid-Lakes Subdivision was recorded in 1926. Instead, the applicable statute at that time was WIS. STAT. § 236.09 (1925), which stated, in relevant part,

> The owner of any lands … bordering on any lake, desiring to divide the same into lots or blocks by the platting thereof, shall, in the platting of such lands, cause the highways to such lake shown on the map thereof, to be laid out and extended to low-water mark of such lake ….

Notably, and unlike the current § 236.16(3), this statute did not use the word "public" when describing the highways to be platted.

¶15 In addition, the certification accompanying the original plat of the subdivision stated the following:

> We hereby certify that we caused the land described in the foregoing certificate … to be surveyed and mapped as represented on the within map. The roads as shown on the plat are private roads for the use and enjoyment of the owners of the lots within this addition only.

In apparent reliance on this certification, the Town Board resolution accepting the plat stated, "The roads shown on the plat are *private* roads, for the use and enjoyment of owners of lots within the addition only and said map or plat is approved by said Town Board." (Emphasis added.)

¶16 This undisputed summary judgment evidence well supports Judge Race's conclusion that Lake Road was platted and recorded as a private road for the benefit and use of the owners of Cooper's Mid-Lakes subdivision.

¶17 We also reject Lauderdale's reliance on the law of judicial estoppel as it pertains to the prior proceedings before Judge Kennedy. Lauderdale argues that in those proceedings the Sidhus contended that Lake Road had been dedicated for street purposes whereas they now contend that the road is private and that they have complied with the statutory requirements for vacating such a roadway. Lauderdale contends that the Sidhus should not be heard to assert these inconsistent arguments in the two cases.

¶18 However, Lauderdale's brief fails to provide citations to the record telling us where these portions of the proceedings before Judge Kennedy are located in the appellate record.[6] WISCONSIN STAT. RULE 809.19(1)(d) & (3) requires a party to document its facts with appropriate references to the record. Our duties do not require us to forage through a lengthy and complicated record in these consolidated cases in order to assure the accuracy of the facts relied upon in support of an argument. *See* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964). The only document in the appellate record that we have located on this point is Judge Kennedy's final order, which says nothing about the arguments proffered by the Sidhus. If we have missed something on this point, it is not our fault—rather, it is Lauderdale's for failing to abide by the rules of appellate procedure.

[6] This assumes that these materials are included in the appellate record.

¶19 We also reject Lauderdale's issue preclusion and judicial estoppel arguments based on the earlier judicial review proceedings before Judge Nowakowski where the Sidhus challenged the DNR's rejection of their application for an expanded pier permit. On this issue, Lauderdale has included Judge Nowakowski's written decision in the record and we therefore address the issue on the merits.

¶20 The principle factors that bear on issue preclusion are: (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and (5) are matters of public policy and individual circumstances involved that would render application of issue preclusion fundamentally unfair. ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 687-89, 495 N.W.2d 327 (1993). As to judicial estoppel, a party will not be heard to argue one position that is inconsistent with a position taken in an earlier proceeding. ***Sea View Estates Beach Club, Inc. v. DNR***, 223 Wis. 2d 138, 162-63, 588 N.W.2d 667 (Ct. App. 1998). However, both of these doctrines are not unyielding. Even when the elements of preclusion or estoppel are present, their ultimate application depends on fairness, which is to be decided on a case-by-case basis. *See* ***Michelle T.***, 173 Wis. 2d at 698.

¶21 While certain of these factors arguably support the application of issue preclusion or judicial estoppel against the Sidhus, on balance we conclude that application of these doctrines would be unfair to the Sidhus. True, the status of Lake Road as a private or public road was part of the dispute in the

administrative review proceeding before Judge Nowakowski. However, in answering that question, Judge Nowakowski was required to consider whether the Town was estopped from denying the Sidhus' claim of ownership of the roadway, whether the legal description of the Sidhus' property as stated in various documents included the roadway, whether the roadway had been dedicated to the public, and whether the Sidhus had acquired ownership of the roadway by adverse possession.

¶22 None of those considerations are present in the instant consolidated cases. Instead, the crux of the issue before Judge Race was the validity of the vacation proceedings before Judge Kennedy—a proceeding that occurred after Judge Nowakowski's judicial review of the administrative proceedings. In addition, the crucial issue before Judge Race was the interpretation of WIS. STAT. § 236.41, a matter that was not even at issue before Judge Nowakowski. On this fundamental and threshold basis, we reject Lauderdale's issue preclusion and judicial estoppel arguments. In short, the DNR review before Judge Nowakowski and the vacation proceedings before Judge Kennedy were too dissimilar to fairly allow for the application of these doctrines.

WISCONSIN STAT. § 236.41(4)

¶23 We therefore address the appellate issue on the same basis as did Judge Race in the circuit court—the interpretation and application of the notice provisions of WIS. STAT. § 236.41(4) to the undisputed facts of the case.

¶24 As noted, Judge Race resolved this case on the basis of the parties' cross-motions for summary judgment. Although the Town and the Sidhus disagree as to whether the Sidhus complied with the notice provisions of WIS. STAT. § 236.41(4), neither party argues that the question was not proper grist for

summary judgment. Therefore, we will not repeat the well-known methodology for summary judgment in detail. Suffice it to say that summary judgment is proper where there are no disputed issues of material fact and the only question is whether the movant is entitled to judgment as a matter of law. ***Kabes v. School Dist. Of River Falls***, 2004 WI App 55, ¶6, 270 Wis. 2d 502, 677 N.W.2d 667, *review denied,* 2004 WI 50, 271 Wis. 2d 110, 679 N.W.2d 546 (No. 03-0522). Our review of a summary judgment ruling is de novo. ***Id.*** In addition, this case presents a question of statutory construction, a matter which we also review de novo. *See* ***id***.

¶25 WISCONSIN STAT. § 236.41 sets out how notice of an application for the vacation or alteration of plat must be given. In addition to requiring the posting of a written notice, the publication of a copy of the notice, and service of the notice on the municipality or town in which the subdivision is located, § 236.41(1)–(3), the statute additionally requires at subsec. (4):

> [m]ailing a copy of the notice to the owners of record of all the lots in the subdivision *or the part of the subdivision proposed to be vacated or altered* at their last-known addresses. (Emphasis added.)

¶26 The Sidhus rely on the portion of the statute that we have highlighted. Since their lots are the only properties that abut the portion of Lake Road proposed for vacation, they reason that they were the only owners of record of "that part of the subdivision proposed to be vacated" and, therefore, only they were entitled to notice.

¶27 We reject the Sidhus' interpretation of WIS. STAT. § 236.41 as too restrictive. The Sidhus' argument overlooks that the entirety of Lake Road, including that portion proposed to be vacated, was platted to provide access to

Middle Lake and the Lauderdale Lakes chain for *all* the lot owners in the subdivision. Thus, Lake Road provides a significant benefit running to *all* the owners in the subdivision. From that it follows that all of the owners of record are very much "part of the subdivision proposed to be vacated" and were therefore entitled to the requisite notice under § 236.41(4). The Sidhus' restrictive interpretation produces an unreasonable result because it cancels out important property rights of the other owners in Lake Road without fair and proper notice.[7] We are to avoid an unreasonable interpretation of a statute. ***Kabes***, 270 Wis. 2d 502, ¶11.

CONCLUSION

¶28 We hold that WIS. STAT. § 236.41(4) required the Sidhus to provide written mailed notice of their vacation action to the other owners of record in the prior proceeding before Judge Kennedy. Having failed to do so, Judge Race correctly ruled that the vacation order was of no legal effect. We affirm the award of summary judgment to the Town and Lauderdale.

[7] We also observe that were we to agree with the Sidhus that WIS. STAT. § 236.41(4) does not require mailed notice to the other owners of record, a potential constitutional question could arise as to whether the other generic forms of notice set out in the statute suffice to protect the due process rights of the other owners against the taking of a property interest without adequate notice. *See* ***Schramek v. Bohren,*** 145 Wis. 2d 695, 704, 429 N.W.2d 501 (Ct. App. 1988).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.