

TITLE XI.

Highways and Bridges, Drains and Fences.*

CHAPTER 80.

LAYING HIGHWAYS.

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80.01 Creation, alteration and validation of highways. (1) VALIDATION OF HIGHWAYS, RECORDING. All highways laid out by the town supervisors, the county board or by a committee of the board, or by commissioners appointed by the legislature, or by any other authority, and recorded, any portion of which has been opened and worked for 3 years are legal highways so far as they have been so opened and worked. The filing of an order laying out any highway or a certified copy thereof in the office of the clerk of the town or the county in which the highway is situated is a recording of such highway within the meaning of this section.

(2) UNRECORDED HIGHWAYS VALIDATED, EXCEPTION; GRANTS FOR HIGHWAY PURPOSES, PRESUMPTIVE WIDTH. All highways not recorded which have been worked as public highways 10 years or more are public highways, except that roads and bridges built upon the bottoms and sloughs of the Mississippi river by citizens or municipalities of any other state shall not become legal highways or a charge upon the town in which they are situated unless upon petition they are legally laid out by the town supervisors; nor shall any grant of lands for highway purposes, which has not become a legal highway prior to the first day of July, 1913, become effective for such purposes, unless the grant is accepted by the town board or by the town meeting of the town wherein the lands and proposed highway are situated, and until a resolution of such acceptance is recorded in the office of the town clerk; and in case any such laid out highways have not been fully and sufficiently described or recorded or if the records have been lost or destroyed the presumption shall be that they were laid 4 rods wide.

(3) LANDS HELD FOR HIGHWAY PURPOSES, INJURING TREES, SHRUBS OR VEGETATION. No lands abutting on any highway, and acquired or held for highway purposes, shall be deemed discontinued for such purpose so long as they abut on any highway. All lands acquired for highway purposes after June 23, 1931 may be used for any purpose that the public authorities in control of such highway shall deem to conduce to the public use and enjoyment thereof. Such authorities may improve such lands by suitable planting to prevent the erosion of the soil or to beautify the highway. The right to protect and

*Revisor's Note: See pages 1296 to 1300 of the 1943 Statutes for notes on ch. 334, laws of 1943, revising the highway laws.

to plant vegetation in any highway laid out prior to said date may be acquired in any manner that lands may be acquired for highway purposes. It shall be unlawful for any person to injure any tree or shrub, or cut or trim any vegetation, or make any excavation in any highway laid out after said date or where the right to protect vegetation has been acquired, without the consent of the highway authorities and under their direction.

(4) HIGHWAYS, STREETS AND ALLEYS, PIERS, PLATS, CURATIVE PROVISIONS. Every street, highway and alley, pier and slip, dedicated or attempted and intended to be dedicated in any plat or laid out, altered, vacated or discontinued, or attempted or intended to be laid out, altered, vacated or discontinued by the authorities of any county, town, city or village shall be held to have been lawfully so dedicated, laid out, altered, vacated or discontinued from and after the expiration of 5 years from the date of the deed, instrument, plat, order, resolution or other final proceeding had or taken to effectuate such purpose. No defect, omission or informality in the execution of any plat or deed of dedication or in any proceedings, order or resolution on the part of such authorities for the purposes aforesaid shall affect or invalidate such plat, deed, order or resolution or proceeding, after the expiration of 5 years from the date of the plat, deed, proceeding, order or resolution; provided, the street or alley laid out, or altered by such defective, or informal plat, deed, proceeding, order or resolution, shall be limited in length to the portion actually worked and used thereunder. [1931 c. 295 s. 2; 1943 c. 334 s. 16, 17]

Note: The dedication of lands for a public highway to be complete must be accepted in some form. *Whitehead & Matheson Co. v. Jensen*, 203 W 12, 233 NW 546.

See note to 192.29, citing *Langer v. Chicago, M., St. P. & P. R. Co.*, 220 W 571, 265 NW 851.

Where the proceedings to lay out a town highway in 1858 were ineffective as having been abandoned, only the existence of a highway by user with the defendants' fence as one boundary thereof was established under the facts shown as to actual use of certain land as a highway for 80 years, and as to possession by the defendants and their predecessors in title of additional land now claimed by the plaintiff town as part of the highway, and as to existence of the defendants' fence for over 50 years. Where acts relied on by a town to show the dedication of land to a highway are of a doubtful character and the use and possession of that land over a period of years by a private individual is acquiesced in by the town, the private use is considered conclusive as against the dedication for public purposes. *Buchanan v. Wolfinger*, 237 W 652, 298 NW 176.

After 5 years from the making and filing of an order of a town board laying out a highway, the order is not subject to invalidation for not being accomplished by an assessment of damages or releases, but such highway must then be treated as a lawfully established highway so far as the portion thereof worked and used is concerned, with the duty in the town board to maintain the

roadway in a condition proper for travel. *Zblewski v. New Hope*, 242 W 451, 8 NW (2d) 365.

Where the proprietors, after platting land and recording the plat, sold lots with reference to the streets therein described, such proprietors and their grantees are estopped to deny the legal existence of such streets, and hence will not be heard to assert that the village board committed a trespass on their premises in improving an abutting street at the request of another lot owner. *Kennedy v. Barnish*, 244 W 137, 11 NW (2d) 682.

Land formerly used for highway purposes abutting on relocated highway does not revert to private ownership. Right to plant vegetation on such lands does not necessarily exist in all cases, but may be acquired by appropriate proceedings. 22 Atty. Gen. 416.

Road laid out and constructed by state on hospital grounds owned by state is not public highway even though within past seven years town in which it is located as accommodation to hospital and to town residents accustomed to use road resurfaced same and it has been used generally by those going to and from hospital. 28 Atty. Gen. 289.

A town highway may be created by grant from the owner and acceptance by the town board or town meeting through resolution adopted and filed with the town clerk under (2). Such a resolution need not be drawn with legal nicety, but it should fairly indicate an intention to accept the particular grant. 34 Atty. Gen. 35.

80.02 Town highways; petition to lay, alter or discontinue. When 6 or more resident freeholders or homesteaders under the laws of the United States wish to have a highway laid out, widened, altered or discontinued in their town, they may make application in writing to the supervisors of said town for that purpose. The application may be delivered to any supervisor or to the town clerk. In case the application is for the discontinuance of all or of a part of any highway, and it is desired, as permitted by section 80.05, to omit from the notice the description of the lands abutting upon such highway which will be benefited, injured or damaged by the discontinuance of such highway or any part thereof, the application shall contain the description of the lands abutting upon such highway which will be benefited, injured or damaged by the discontinuance of such highway or any part thereof and shall be delivered to the town clerk with a request in writing that such application remain on file with him until the time set for hearing for reference and inspection by any parties concerned. When all the owners of lands abutting on the part of a highway sought to be altered, desire such alteration, and the supervisors are of the opinion that the public will not be materially affected by such alteration, the board may make the same, and may take into consideration donations of money, land or services for the making of such alterations. When the laying out of a highway would require the construction of a bridge costing more than \$1,000, exclusive of donations, the order of the supervisors laying out such highway shall not be effective unless approved by the electors of the town, and an estimate by the state highway commission shall be conclusive of the cost of such bridge for the purposes of this section. No town board shall discontinue any

part of a state trunk or county trunk highway, nor discontinue any highway when such discontinuance would deprive the owner of lands of access therefrom to a highway. [1935 c. 428; 1943 c. 334 s. 18]

Note: Injunction will not lie to restrain a town board from hearing and acting on an application for laying out a highway, because, until the board has acted and has ordered a highway to be laid out, no injury or harm can be said to be threatened, since the board might in its discretion decide against the application, and equity should not interfere with the duties of the board to decide on the application. *Florsheim v. Patterson*, 208 W 590, 243 NW 759.

Where state trunk highway is relocated former route retains its status as town road and may be discontinued upon application to town board. 20 Atty. Gen. 981.

Status of certain portions of roads abandoned as parts of state trunk system is discussed. 24 Atty. Gen. 51.

80.025 [Renumbered section 81.43 by 1943 c. 334 s. 83]

80.03 Restrictions on condemning for town highways. (1) In counties having a population of less than 500,000 no town highway shall be laid out through or upon any cemetery without the consent of those having the control of the cemetery; or through or upon any structure, yard or enclosure used for educational or charitable purposes.

(2) Without the consent of the owner no town highway in such counties shall be laid out through or upon any garden or orchard or any building or fixture used for trade or manufacture or any other building or fixture or the yard or enclosure necessary to the use thereof, when the damage thereby caused thereto, exclusive of the damage to the land, exceeds \$300.

(3) In counties having a population of 500,000 or more, no town highway shall be laid out through or upon any building, fixture, yard or enclosure used for educational or charitable purposes without the consent of the owner, or through any cemetery without the consent of the officers having the control thereof.

(4) The limitations in this section upon the power to condemn for highway purposes applies solely to highways laid out by town authority pursuant to this chapter. [1941 c. 110; 1943 c. 334 s. 19]

80.04 When supervisor disqualified; vacancies. (1) No supervisor shall act in laying out, altering, widening or discontinuing any highway in which he may be personally interested. If one supervisor is interested the other two shall act; if two are interested the third supervisor shall act in the matter.

(2) Whenever there shall be less than two supervisors in any town, the petition authorized by section 80.02 may be made to the county board, which shall thereupon appoint a committee of three of its members. Said committee shall proceed and act upon such petition in the same manner and with the same powers in every respect as the supervisors of such town might do. [1943 c. 334 s. 20]

80.05 Notice of meeting; service and publication. On application made to supervisors for laying out, widening, altering or discontinuing any highway they shall make out a notice fixing therein a time and place at which they will meet and decide upon such application. The applicants shall, at least 5 days previous to such time, cause such notice to be given to all occupants of the lands through which such highway may pass; and in case such application shall be for the discontinuance of the whole or any portion of the highway such notice shall be given to the occupants of all the lands abutting or touching on such highway the whole or any part of which is sought to be discontinued, which notice shall be served personally or by copy left with or at the usual place of abode of such occupant of such lands, and such notice shall also be posted up in 3 public places in said town at least 10 days before the time of such meeting of the supervisors. If any such lands are unoccupied, such notice shall be published in a newspaper published or having a general circulation in such town at least 10 days before the time of such meeting, or in lieu of publication may be served upon the owner or owners of such unoccupied land in the manner provided above for service on occupants. Every such notice shall specify as near as practicable the highway proposed to be laid out, widened, altered or discontinued and the several tracts of land through which the same may pass. In case the application is for the discontinuance of all or of a part of any highway such notice shall contain a description of the lands abutting upon such highway which will be benefited, injured or damaged by the discontinuance of such highway or any part thereof, or when such descriptions shall in the aggregate exceed 5 folios in length, the notice may state that such descriptions are contained in the application, as provided in section 80.02, and shall give the name and address of the town clerk to whom such application has been delivered. [1935 c. 428; 1943 c. 334 s. 21]

80.06 Proceedings after notice. The supervisors shall meet at the time and place stated in their notice, and upon being satisfied that the notices required in section 80.05 have been duly given, proof of which may be shown by affidavit or otherwise as they may require, shall proceed to examine personally such highway, and shall hear any reason that may be offered for or against laying out, widening, altering or discontinuing the same,

and shall decide upon the application and shall grant or refuse the same as they shall deem best for the public good; and they may adjourn from time to time, not exceeding in all 30 days from the time of the first meeting, giving public notice of the time and place of such adjournment when made, and by forthwith filing notice of such adjournment in the office of the town clerk. [1943 c. 334 s. 22]

80.07 Order; survey; award; recording; presumptions. When the supervisors lay out, alter, widen or discontinue any highway they shall make and sign an order therefor, incorporating therein a description of the highway and cause survey thereof to be made when necessary. The order shall be filed and recorded in the office of the town clerk, who shall note in the record the time of recording. The order, together with the award of damages shall be so filed within 10 days after the date fixed by their notice or adjournment for deciding upon the application. In case the supervisors fail to file the order and award within the 10 days aforesaid they shall be deemed to have decided against the application. When an order has been filed for more than 30 years and no award of damages or agreement or release has been filed and when the highway, or a part thereof, has been used by the public and public money has been expended thereon, for at least 5 years, it shall be presumed that a release was given by the owners of the lands over which the highway was laid out and the public shall be entitled to use the full width of the highway, as laid out, without further compensation. [1941 c. 277; 1943 c. 334 s. 23]

Note: The provision in 80.07 that the supervisors of a town shall be deemed to have decided against an application for laying out a highway where an order and accompanying award of damages is not filed, does not prevent the operation of curative section 80.63 where an order laying out a highway, defective for not being accompanied by an award of damages or releases, has been filed. *Zblewski v. New Hope*, 242 W 451, 8 NW (2d) 365.

The only purpose and effect of the amendment made to 80.07 by ch. 277, laws of 1941 is to create the presumption of a release which will entitle the municipality to the full width of the road without further compensa-

tion to the present owners. *Zblewski v. New Hope*, 242 W 451, 8 NW (2d) 365.

Under the statutes then existing and applicable to validate a highway laid out and opened in 1871 under an order of a town board of supervisors duly filed but not accompanied by an award of damages, and under the facts as to the opening and working of and public travel on such highway, it became a legal highway after 3 years, and the town was entitled to open it to its full width as determined by the order laying it out, as against landowners who had erected fences encroaching on it. [*Buchanan v. Wolfinger*, 237 W 652, distinguished.] *Jacobosky v. Ahnapee*, 244 W 640, 13 NW (2d) 72.

80.08 Width of highways. Except as otherwise expressly provided by section 80.13, highways shall be laid out at least three rods wide, and when no width is specified in the order the highway shall be four rods wide. [1943 c. 334 s. 24]

Note: There is no presumption as to the width of a highway by user. The limits of a highway by user are determined by the limits of the use, but the traveled track does not necessarily determine the limits of the user, and the highway by user includes such portion as goes with the traveled track for the purposes of a highway. *Nicolai v. Wisconsin Power & Light Co.*, 227 W 83, 277 NW 674.

80.09 Damages; agreement, award. The damages sustained by any person upon whose land any highway shall be laid out, widened, altered or discontinued may be fixed by an agreement signed by the owner and the supervisors and be filed in the town clerk's office. Such agreement and every release of damages given shall bar any further claim for damages by the owner and all persons claiming under him. If any owner, other than this state or the United States, does not so agree with the supervisors as to his damages or does not deliver to the supervisors a written release of all claims for damages, the supervisors shall, at the time of making the highway order, assess the damages which he will sustain by reason of laying out, widening, altering or discontinuing the highway and shall make a written award specifying the sum awarded by them to each owner; and if any owner of land is unknown, the supervisors shall specify the damages awarded to him, and describe his land in their award. The award shall be signed by the supervisors and be filed in the town clerk's office with the order laying out, widening, altering or discontinuing the highway. [1939 c. 476; 1943 c. 334 s. 25]

80.10 Considerations affecting damages. If any part of a highway is discontinued at the time a new or altered highway is laid out, the benefits which any landowner derives from the discontinuance may be considered in fixing the damages sustained by him in laying out the new or altered highway; and in fixing the damages sustained by any person in laying out, altering, widening or discontinuing any highway the benefits which he receives thereby shall be taken into consideration. [1943 c. 334 s. 26]

80.11 Highways on and across town lines. (1) Whenever it shall be deemed necessary to lay out, alter, widen or discontinue a highway upon the line between two towns, or extending from one town into an adjoining town, it shall be done by the supervisors of said towns acting together, and if such highway is laid out or altered it may be either upon the town line or as near thereto as the situation of the ground will admit; and they may vary the same either on one side or the other of such line as they may deem necessary.

(2) The application therefor shall be in duplicate, addressed to the supervisors of both towns, and be signed by at least 6 resident freeholders or applicants for homesteads

in each town; and be delivered to a supervisor or the clerk of each town. Upon receipt of such application the supervisors shall promptly fix a time and place for deciding thereon, and give notice thereof. The notices of the time and place of meeting shall be signed by a majority of the supervisors of each town, and posted in each of said towns, and served in the manner required by section 80.05; a majority of the supervisors of each town shall meet jointly at the time and place named in the notice to decide upon such application and sign the order and the award of damages, and in all other things the proceedings shall be the same as are required by law in laying out, altering, widening or discontinuing highways wholly within a town; the orders, awards, notices and all papers shall be in duplicate, and one duplicate shall be filed with each town clerk, and the order shall be recorded in each town clerk's office.

(3) The said supervisors, upon laying out, altering or widening such highway may determine, in the order, what part of such highway shall be made and kept in repair by each town, and what share of the damages, if any, shall be paid by each; and each town shall have all the rights and be subject to the liabilities in relation to the part of such highway to be made or repaired by it as if it were wholly located in such town.

(4) If by any change of the boundaries of either or both such towns the territory of either shall be increased or diminished, or in the event a portion of said town line highway is or has been taken over by the state or county under the state or county highway system, or if a new town or village be formed out of a part of the territory of either or both of said towns, having a portion of such town line highway within its borders, that part of such order fixing their liabilities shall be deemed vacated, and a majority of the supervisors of each such town shall, before the time for making the next tax roll, meet together with a majority of the supervisors of such new town or, with the president of such village, and all of them when so convened shall, if they can agree, make a new order apportioning the liabilities on account of such highway, which shall be filed as hereinbefore provided.

(5) If they fail to make such order, or if the order laying out, altering or widening such highway shall not have apportioned the liability of the towns or village on account of such highway, the supervisors of either town or the president of said village, after ten days' notice of the time and place of so doing served on the clerk of each town and village to be affected, may apply to the circuit judge of the county in which such towns and village or the town or village on whose behalf such notice is given, for the appointment of three commissioners to apportion the liabilities of such towns and village on account of such highway.

(6) Upon proper application such judge shall appoint three residents of such county as commissioners. They shall proceed, on not less than five days' notice in writing to the town and village clerks, to make such apportionment, and their determination shall be made in writing and filed with the clerk of each town and village affected, and shall have the same force and effect as an order of the supervisors, and the village president.

(7) Any bridge on a highway between two towns, or between a town on one side and a village or a town and village on the other side, which highway has become such by reason of having been used and worked as provided in section 80.01 (2), which bridge has not been assigned to either of the adjoining towns or village, shall be repaired and maintained by such towns and village, and the cost of repairs and maintenance shall be paid by them in proportion to the valuation of the property therein as equalized by the county board or boards at the last equalization.

(8) Unless otherwise provided by statute or agreement every highway bridge on a town, village or city boundary shall be maintained by the municipalities in which it is located, each contributing to the expenses thereof in proportion to the last assessment of taxable property therein. Provided, however, that any bridge, or bridges, over any stream or river forming the boundary line between two counties erected or maintained solely by one of the adjoining municipalities, may be closed or discontinued by such municipality so maintaining the same when such adjoining municipality shall fail to co-operate in such maintenance in proportion to the amount of the cost thereof borne by said municipality, if erected at the joint expense of the two adjoining municipalities; or, if not so erected, then in the proportion of one-half the cost of such maintenance. [1943 c. 275 s. 34; 1943 c. 334 s. 27]

Note: Town boards have no implied powers to apportion town line highways. This section furnishes the only authority which they have to apportion such highways. *Whitewater v. Richmond*, 204 W 383, 235 NW 773.

The status of a town line road not legally laid out, but having its origin in user and becoming a public highway by virtue of 80.01 (2), and the relations existing for more

than fifty-five years between two towns respecting the maintenance of parts thereof and the bridges thereon, may not be disturbed by the court. Towns have implied or inherent power, recognized by (7) and (8), to arrange for the convenient maintenance of such a highway. A town may ratify the contract of commissioners respecting such maintenance if such ratification is with full knowledge of the facts, and it may be rati-

fed formally at a town meeting or by acquiescence. *Town of Eau Galle v. Waterville*, 207 W 389, 241 NW 377.

In absence of statutory provision therefor town board has no power to spend money on road or bridge lying wholly within limits of another town. 19 Atty. Gen. 483.

Where two boards have met and taken necessary steps under this section to lay out town line highway, construction may proceed though no further action has been taken for two years. 24 Atty. Gen. 359.

Maintenance agreement made by two towns for town line road laid out pursuant to statute must be made in accordance with statutory requirements. In absence of valid

agreement each town in which bridge on town line highway is located shall contribute to expense thereof in proportion to last assessment of taxable property within each town under (8). 26 Atty. Gen. 234.

Provisions of this section relating to county aid for construction or repair of bridges apply to bridges jointly maintained by adjoining towns on town line highway. 26 Atty. Gen. 234.

Cost of rebuilding bridge on highway between town of Doyre, Barron county, and town of Auburn, Chippewa county, should be apportioned between respective towns and counties pursuant to 80.11 and 87.01 (81.88, Stats. 1943). 27 Atty. Gen. 53.

80.12 Highways on and across town and municipal boundaries. Whenever it shall be deemed necessary to lay out, alter, widen or discontinue a highway upon the line between a town and city or village or discontinue a highway or any part thereof extending from a town to a city or village proceedings therefor may be had under section 80.11. The application therefor shall be in duplicate, addressed to the supervisors of the town and the common council of the city or the board of trustees of the village, and be signed by at least six freeholders of the town and six freeholders of the city or village. Thereupon such common council or board of trustees shall appoint three commissioners on the part of such city or village, who shall be duly sworn to faithfully discharge their duties as such commissioners before entering on the same. Such commissioners and town supervisors shall then give notice and proceed in all respects as provided in section 80.11; and such city or village shall be in like manner as a town responsible for that part of such highway determined to be made and kept in repair by the same and for the share of damages assigned to the same. The cost of repairs, improvement and maintenance of any highway laid out on a line between a city and a town or village or located on one side or other of the line may be at the expense of such adjoining municipalities and the apportionment may be made as provided in subsections (3), (4), (5) and (6) of section 80.11. The town board, village board and city council may cause any such highway or any part of such highway not less than sixteen rods in length to be graded, paved, macadamized or otherwise improved, including the establishment of the grade and the construction of the curbs and gutters, and installation of water and sewer mains and service pipes, or either, and may levy special assessments for the whole or any part of the cost thereof as a tax upon such property as they shall determine as especially benefited thereby, in the manner provided in section 81.43. All proceedings and orders required to be filed and recorded shall be filed and recorded in the office of the city or village clerk as well as in the office of the town clerk. [1939 c. 416; 1943 c. 334 s. 28]

80.13 Land excluded from highway. (1) When any person shall present to the supervisors of any town an affidavit satisfying them that he is the owner or lessee of real estate (describing the same) within said town, and that the same is shut out from all public highways, other than a waterway, by being surrounded on all sides by real estate belonging to other persons, or by such real estate and by water, or that he is the owner or lessee of real estate (describing the same) and of a private way or road leading from said real estate to a public highway but that such road or way is too narrow, giving its width, to afford him reasonable access to and from said real estate to said public highway, that he is unable to purchase from any of said persons the right of way over or through the same to a public highway, or that he is unable to purchase from the owner or owners of land on either or both sides of his way or road land to make such way or road of sufficient width, or that it cannot be purchased except at an exorbitant price, stating the lowest price for which the same can be purchased by him, the said supervisors shall appoint a time and place for hearing said matter, which hearing shall be after ten days and within thirty days of the receipt of said affidavit.

(2) Notice of the time and place of meeting shall be served, published and posted and proof thereof made and filed as required by section 80.05.

(3) The supervisors shall meet at the appointed time and place and shall then in their discretion proceed to lay out such highway of not more than three nor less than two rods in width to such real estate, or shall add enough land to its width to make it not less than two nor more than three rods in width, and shall assess the damages to the owner or owners of the real estate over or through which the same shall be laid or from whom land shall be taken and the advantages to the applicant.

(4) But the damages assessed by the supervisors shall in no case exceed the price stated in the affidavit of the applicant; upon laying out such highway, or in adding to the width of a former private way or road, they shall make and sign an order describing the same and file the same with the town clerk together with their award of damages, which order shall be recorded by said clerk; provided, that the amount assessed as advantages to

the applicant shall be paid to the town treasurer before the order laying out such highway shall be filed. [1943 c. 334 s. 29]

Note: The statute vests the town board with discretion to deny or grant an application to lay out a highway to premises excluded from highways. Backhausen v. Mayer, 204 W 286, 234 NW 904.

80.14 Highway from shut-off land through adjoining town. When the owner of land that is shut out from all highways by being surrounded by lands belonging to other persons, and it is impracticable to lay out a road from his land to a public highway in the town where the land is situated, and it is practicable to lay out a highway from said land to a highway in an adjoining town, he may execute an affidavit in duplicate and present one copy to a supervisor of the town where the land is situated and one copy to a supervisor of the town where the proposed highway is to be laid out. The affidavit shall set forth the facts above stated, together with the facts required in the affidavit provided under section 80.13. The supervisors of the 2 towns shall proceed as provided under said section 80.13, except that all orders and notices shall be signed by the supervisors of both and all papers required to be filed shall be made in duplicate and filed with each town clerk. The amount assessed as advantages to the applicant shall be paid by him to the town treasurer of the town where his land is situated before the order laying out the highway is filed, and all damages assessed shall be paid by the town where the land of the applicant is situated. [1943 c. 334 s. 30]

80.15 Highway to islands in Mississippi river. The owner of an island in the bottoms of the Mississippi river which is shut out from the bank of said river and from a highway by islands and sloughs and by the lands of others, and a right of way through the same cannot be purchased at a reasonable price, may present to the supervisors of the town an affidavit setting forth such facts and describing his land. The said supervisors shall then proceed according to the provisions of section 80.13 and the provisions of said section shall apply to proceedings under this section. The town shall not be liable for want of repair or for defects in any highway laid out pursuant to this section nor for any accident or injury thereon. [1943 c. 334 s. 31]

80.16 Shut-off school buildings; how laid. Whenever a public school in any town is shut off from all public highways, the supervisors of the town shall lay out a highway to the site thereof. No application for such highway shall be necessary, but in every other respect the procedure for laying out an ordinary town highway shall be pursued. No highway shall be discontinued when the effect of such discontinuance shall be to exclude a public school from access to the public highways. Section 80.22 shall not apply to proceedings under this section. [1943 c. 334 s. 32]

80.17 Appeal from highway order. Any person aggrieved by any order of the town supervisors laying out, altering, widening or discontinuing any highway, or refusing so to do may, within 30 days after such determination, appeal therefrom to the county or circuit judge for the appointment of commissioners to review the order or determination. Failure of the supervisors to file their decision upon any application to lay out, alter, widen or discontinue any highway within 60 days after the application is made shall be deemed a refusal of the application. The appeal shall be in writing and shall briefly state the grounds upon which it is made, and whether it be made to reverse entirely the order or determination or only a part, and in the latter case it shall state what part. In case of highways upon a line between 2 counties the appeal may be made to the county or circuit judge of either county. [1943 c. 334 s. 33; 1945 c. 105]

Note: Failure of a town board within sixty days after the filing of a petition for laying out a highway to take final action is a denial of the application, regardless of interim proceedings. State ex rel. Thompson v. Egen, 206 W 651, 238 NW 404, 240 NW 839.

80.18 Bonds; service of notice. Upon filing such appeal and a bond executed to the town or towns, or town, city or village, as the case may require, with sufficient sureties to be approved by the judge conditioned to pay all costs arising from such appeal, provided such order or determination appealed from shall not be reversed, such judge shall issue a notice specifying therein a time and place for the appointment of commissioners which shall be served on two or more of the supervisors of each town and on two or more commissioners of the city or village, in a proper case, at least six days before such time. [1943 c. 334 s. 34]

80.19 Commissioners, how selected. (1) At the time and place named and upon proof of service of such notice the judge shall make a list of 18 disinterested resident freeholders of the county, and each party may strike 6 names from the list, and from the names not struck off the judge shall by lot select 3 as such commissioners; and shall thereupon annex to the appeal a warrant under his hand, directed to the persons so selected, requiring them to appear personally at a time and place fixed therein, not more than 10 days from the date thereof, and directing them to view and examine the highway

described, and review the order or determination appealed from, and make return of their decision thereon to the town, city or village clerk within 20 days after the date thereof.

(2) Such warrant shall be served at least 3 days before the time fixed therein for their meeting by reading the same to each of said commissioners and delivering it to one of them. If for any reason any of said commissioners shall fail or decline to act, the judge shall, on receiving notice of such failure or declination, by lot and without notice to either party, select from the names not struck off or drawn from said list commissioners to fill the vacancies in the commission.

(3) In case said list is exhausted before 3 commissioners who can and will act are obtained, the judge shall, without notice to either party, summon in the manner provided in section 302.10 a sufficient number of persons having the qualifications above required to complete the commission.

(4) Whenever a new commissioner is so drawn or summoned the time for the commissioners to appear, view and examine the highway may be enlarged by the appointing officer, not exceeding 10 days, and the time for making return of their decision, not more than 20 days from the date of filling such vacancy. Any commissioner may be excused from acting by the judge for good cause; and, if any commissioner, after due service upon him of the warrant and not so excused, shall, without good cause, refuse to act, he shall forfeit \$10, and shall also be liable to the party having the costs of the appeal to pay for the additional costs made in consequence of such refusal. [1943 c. 334 s. 35]

Note: Highway commissioners, appointed to review determinations of town boards relating to highways, constitute a tribunal of special and limited jurisdiction, and must act in substantial accord with the statutes or order of the judge. Commissioners so appointed can acquire and retain jurisdiction of the proceedings only by complying with the statutes. Where the commissioners, appointed to review a determination of town boards refusing to lay a certain highway across the town line, made their decision and made return thereof to the town clerks within the 20 days required they had no jurisdiction to make a second decision in the same matter 22 months after the first decision. *State ex rel. Zemlicka v. Baker*, 243 W 606, 11 NW (2d) 364.

80.20 Commissioners; fees; papers where filed. Before proceeding to act under said warrant said commissioners shall be duly sworn justly and impartially to discharge their duties as such commissioners; they shall meet at the time and place mentioned in such warrant and proceed to examine such highway; they shall hear the parties interested therein and any proofs offered by them; the entire record of the proceedings before the commissioners inclusive of all appearances, petitions, notices, testimony which may be taken only under oath, exhibits, findings, decisions, and other orders relating thereto, shall be so prepared and certified. The review of such order of determination by the commissioners shall where such record contains a transcript be confined to the basis of such record. Their decision shall be reduced to writing, signed by them, annexed to the warrant, and, together with the same, be filed with the town, city or village clerk, as the case may require, within the time directed in such warrant. Each commissioner shall receive \$5 per day and 5 cents per mile for his actual travel and the judge \$2 for his fees, to be paid by the party appealing; and if the order or determination appealed from be reversed he shall be reimbursed such expenses by the town, city or village, or if it be a town line road the same shall be reimbursed equally by such towns or by the town and city or village. The judge shall cause to be filed with the town clerk all the other papers and proceedings relating to such appeal, duly certified by him. If such highway be on a line between 2 towns or between a town, city or village they shall make a duplicate of their decision with a copy of the warrant and application [appeal] annexed, which shall be filed with the town clerk of the other town or of the city or village as the case may be. [1943 c. 334 s. 36; 1945 c. 105]

80.21 Proceedings on reversal. When an appeal has been taken from an order or determination refusing to lay out, widen, alter or discontinue a highway, and such determination shall be reversed, the commissioners shall make and file the order and agreements and awards, which in the judgment of the commissioners should have been made by the highway authorities whose order or determination has been appealed from. [1943 c. 334 s. 37]

80.22 Determination final for a year unless appealed. The determination refusing to lay out, alter, widen or discontinue any highway shall be final, unless appealed from, for the term of one year after the making of such determination; and no other application for laying out, widening, altering or discontinuing any such highway shall be acted upon within said term of one year. [1943 c. 334 s. 38]

80.23 Removal of fences from highway; notice. (1) Whenever pursuant to this chapter, any highway is laid out, widened or altered through inclosed, cultivated or improved lands and the determination has not been appealed from, the highway authorities shall give the owner or occupant of such lands notice in writing to remove his fences within such time as they shall deem reasonable, not less than 30 days after giving such

notice; and if the owner or occupant does not remove his fences within the time required in such notice the highway authorities shall cause the fences to be removed and shall direct the highway to be opened; but if the determination has been appealed from, the notice shall be given after the final decision of the appeal.

(2) This section does not authorize the opening of a highway through such lands or the removal of fences between May 15 and September 15, except in cases of emergency to be determined by the highway authorities. [1943 c. 334 s. 39]

80.24 Appeal from award of damages by owner. If the owner of lands through which a highway is laid out, widened, altered or discontinued is not satisfied with his award of damages, within 30 days after the filing of the award, (and if within said 30 days an appeal has been taken from the order laying out, widening, altering or discontinuing the highway, then within 30 days after the final order on such appeal affirming the same) he may appeal to the county or circuit judge for a jury to assess his damages as provided by section 83.07 (5) and (6). His appeal shall be in writing, describing the premises, and any number of persons claiming damages on account of such highway may join in the appeal. The appellant shall serve on 2 of the supervisors of the town in which the highway is situated, or upon 2 or more of the supervisors or commissioners of the town, city or village to which shall have been assigned the duty of paying the damages for such land, at least 6 days before he makes his appeal, a notice in writing, specifying therein the name of the judge to whom and the time and place the appeal will be made. If more than one appeal be taken from the award of damages on account of any highway, the appeals shall be consolidated by the county or circuit judge, and only one jury shall be impaneled to reassess the damages. [1943 c. 334 s. 40; 1945 c. 105]

80.25 Taxpayer may appeal; service of notice. Any taxpayer of a town or other municipality in which a highway is laid out, altered or discontinued or any part thereof is situated, and which is required to pay damages resulting therefrom, may appeal within 30 days after the award or agreement determining such damages has been filed with the town, city or village clerk, to the county or circuit judge for a jury to assess the damages sustained by the persons to whom damages were awarded or are to be paid. Such appeal shall be in writing, describing the premises and naming the persons to whom damages are to be paid, and the amount awarded to each, and shall specify the particular award from which he appeals in case he does not appeal from all and as otherwise provided by section 83.07 (5) and (6). The appellant shall serve upon 2 of the supervisors of the town or upon 2 of the commissioners of the city or village to which has been assigned the duty of paying the damages and upon the persons whose awards are appealed from, at least 6 days before making application, a notice in writing specifying therein the name of the judge to whom and the time and place the appellant will apply for the selection of such jury. [1943 c. 334 s. 41; 1945 c. 105]

80.26 Appeal bond. The appellant shall execute to the proper town, city or village and file with the judge a bond with one or more sureties to be approved by such judge. In case the appeal is by a landowner, the bond shall be conditioned to pay all costs arising from such appeal if the jury shall not award him an increase of damages. In case of an appeal by a taxpayer as such, the bond shall be conditioned that the appellant shall pay all costs arising from such appeal if the amount of damages in the aggregate of the items appealed from shall not be diminished upon the appeal. [1943 c. 334 s. 42]

80.27 Selection of jury; penalty for refusal to serve. Upon filing such bond and notice, with proof of service thereof, such judge shall make out a list of 15 disinterested resident freeholders of his county, not of kin to the owner or occupant of said lands; each party shall strike 5 from such list, and if none of the proper supervisors or commissioners or other appellee shall be present, the judge shall strike off the 5 names for them, and the judge shall thereupon issue an order to the sheriff or some constable of his county to summon the 5 persons named in such list and not stricken off to meet at a time and place to be specified in such order to appraise the damages, the award of which has been appealed from. In case any juror fails to appear at the time and place fixed for their meeting another juror shall be summoned in his place in the manner provided by section 302.10. Any juror may be excused for good cause, and if any juror has been duly summoned and not so excused shall fail to serve he shall forfeit not to exceed \$10, and shall be liable to the party having the costs of the appeal to pay for additional costs made in consequence of such failure. [1943 c. 334 s. 43; 1945 c. 33]

80.28 Proceedings before jury; costs. The jury shall be sworn by the judge justly and impartially to make such appraisal, and shall proceed to view such highway, and hear the statements and proofs of the parties, and such jury may increase or diminish the amount awarded, and they shall make return of their appraisal to the judge signed by them; and in case of appeal by a landowner if the jury shall increase the award the costs

and expenses shall be paid by the proper town, city or village; but if the jury shall not increase the award the costs and expenses shall be paid by the appellant, and in case of an appeal by a taxpayer if the award appealed from is diminished the costs and expenses shall be paid by the town, city or village, otherwise by the appellant. In case of cross appeals if the damages involved therein are unchanged each appellant shall pay half of said costs and expenses. If the jury shall fail to agree and be discharged by the judge for that reason he shall immediately proceed to make another list of such freeholders, and further proceedings shall be had thereon in all respects as in the case of a first jury. When the jury shall have made a return of their appraisal to the judge he shall adjust the costs and expenses of such proceedings, and within 10 days thereafter return such appraisal to the town clerk, together with all the other papers relating to such appeal, a statement of the proceedings had before him, and of the cost and expenses in detail, duly certified by him, which shall be forthwith filed by the clerk; and if two towns or a town and city or village be interested he shall make and file a certified copy of the appraisal papers and statements with the clerk of such other town, city or village. [1943 c. 334 s. 44]

80.29 Appeal costs; judges' and jurors' fees. Each juror shall receive \$3 for his services and 10 cents a mile for his actual and necessary travel in going to and returning from the place of meeting, and the judge shall receive \$5 for his fees and 10 cents a mile for his actual travel; all payable in advance by the party appealing, and to be a charge against the party finally liable for the costs. [1943 c. 334 s. 45]

80.30 Highway damages; when payable, referendum to town meeting. (1) All damages awarded against a town, city or village upon laying out, widening or altering any highway shall not be paid until the highway is opened by lawful order. No liability for such damages shall exist for any highway discontinued before being opened.

(2) When the total amount of damages chargeable to one town, consequent upon one order laying out, widening or altering a highway, is more than one-tenth of one per cent on the taxable property of the town, as shown by the last assessment, and exceeds \$2,000, the highway shall not be opened, widened or altered nor liability for damages exist, unless the order and the award of damages are approved, and the highway is accepted by a majority of the electors of the town voting thereon at the next annual town meeting or some special town meeting sooner called therefor.

(3) All costs and fees and damages for which any town, city or village is liable under this chapter shall be audited and paid and may be sued for and collected as other debts against the town, city or village.

(4) When any order is given pursuant to this section and there is no available money in the treasury to pay the order, the clerk of the municipality shall place the same on the next tax roll with interest thereon from the date of the order in the same manner as a tax to pay a judgment, and the same shall be in like manner collected and paid to the party entitled thereto.

(5) When any damages are awarded, pursuant to an order laying out, widening or altering a highway, lying wholly within a town whose population is 8,000, or over, or wholly within a county having a population of 300,000, or over, the order or award need not be approved or the highway accepted by the electors. [1943 c. 334 s. 46]

80.31 Unclaimed awards; mortgage and lien interest. (1) If the damages awarded to an owner of land shall not be claimed by him within one year after the same becomes payable such damages shall be paid and delivered by the town, city or village treasurer to the treasurer of the county, and he shall give duplicate receipts therefor, one to be filed by such paying treasurer and the other immediately mailed by him to the state treasurer.

(2) Any money so paid to the county treasurer which shall remain unclaimed by the person entitled thereto for 5 years after receipt thereof, shall escheat to the state and shall thereupon be paid by the county treasurer to the state treasurer.

(3) In case any lands taken by contract or condemnation for highway purposes shall be incumbered, and the owners of the fee and of the incumbrance shall not agree upon the division to be made between them of any damages to be paid on account of such taking, said damages may be paid to the clerk of the circuit court of the county, and when so paid may be apportioned among the parties entitled thereto by said court upon the application of any party interested upon not less than 5 days' written notice to the other party. [1943 c. 334 s. 47]

80.32 Discontinuance of highways; reversion of title. (1) Any unrecorded road or any part thereof which has become or is in the process of becoming a public highway by user in any town may be discontinued in the manner hereinbefore provided. Any proceedings taken therefor shall not be evidence of the acceptance at any time by the town of such road or any part thereof.

(2) Every highway shall cease to be a public highway at the expiration of 4 years from the time it was laid out, except such parts thereof as shall have been opened, trav-

eled or worked within such time, and any highway which shall have been entirely abandoned as a route of travel, and on which no highway funds have been expended for 5 years, shall be considered discontinued.

(3) When any highway shall be discontinued the same shall belong to the owner or owners of the adjoining lands; if it shall be located between the lands of different owners it shall be annexed to the lots to which it originally belonged if that can be ascertained; if not it shall be equally divided between the owners of the lands on each side thereof.

(4) Whenever any public highway or public ground has been vacated or discontinued the easements and rights incidental thereto acquired by or belonging to any county, school district, town, village or city or to any utility or person in any underground or overground structures, improvements or services and all rights of entrance, maintenance, construction and repair of the same shall continue, unless written consent to the discontinuance of such easements and rights by the owner thereof is a part of the vacation or discontinuance proceedings and reference thereto is made in the vacation or discontinuance resolution, ordinance or order, or discontinued by failure to use the same for a period of 4 years from the time that the public highway or public ground was vacated or discontinued. Upon the failure of the interested parties to reach an agreement permitting discontinuance of such easements and rights or upon refusal of the owner of such easements and rights to give written consent to the discontinuance thereof, such easements and rights may be discontinued in the vacation or discontinuance proceedings in any case where benefits or damages are to be assessed as herein provided. Damages for the discontinuance of such easements and rights, in the amount of the present value of the property to be removed or abandoned, plus the cost of removal, less the salvage thereon, or in such other amount as may be agreed upon between the interested parties, shall be assessed against the land benefited in the proceedings for assessment of damages or benefits upon the vacation or discontinuance of the public highway or public ground. The owner of such easements and rights, upon application to the treasurer and upon furnishing satisfactory proof shall be entitled to any payments of or upon such assessment of damages. Any person aggrieved by such assessment may appeal therefrom in the same time and manner as is provided for appeals from assessments of damages or benefits in vacation or discontinuance proceedings in the town, village or city.

(5) Subsection (2) does not apply to state or county trunk highways. [1937 c. 216; 1939 c. 209; 1943 c. 334 s. 48; 1945 c. 415]

Note: Abandonment of highway by virtue of statute can occur only when it has been entirely abandoned as route of travel and when no highway funds have been expended on it for 5 years. *State v. Maresch*, 225 W 225, 273 NW 225.

A bridge on a discontinued highway belongs to the adjoining landowners. *Carpenter v. Town of Spring Green*, 231 W 72, 285 NW 409.

80.33 Highway papers, where filed. All applications, orders, awards, bonds and other papers relating to the laying out, altering, widening or discontinuing of highways shall be promptly filed in the office of the town, city or village clerk, except as otherwise specifically provided in this chapter. [1943 c. 334 s. 49]

80.34 Highway orders; presumptions; limitation of actions. (1) Every order of the supervisors or the supervisors and commissioners or of the county board or a committee thereof laying out, widening, altering or discontinuing any highway, or restoring the records thereof, and the order of any commissioners reversing or affirming the same on appeal, and the record or certified copy thereof shall be presumptive evidence of the facts therein stated and of the regularity of all the proceedings prior to the making of such order.

(2) The validity of any such order if fair on its face shall not be open to collateral attack, but may be tested by certiorari or other proper action or proceeding brought directly for that purpose at any time within three months after such order is made but not thereafter. This subsection shall not apply to orders made prior to July 22, 1923. [1943 c. 334 s. 50]

Note: Action of a town board after acquiring jurisdiction by the filing of a petition for laying out a highway, however irregular and erroneous, is not void; and where the board entertains such a petition within one year after denying a former petition, notwithstanding 80.22 prohibiting it, and proceedings on appeal eventuate in an order by commissioners, fair upon its face, laying out the highway, the order can never be attacked after three months. [Roehrborn v. Ladysmith, 175 Wis. 394, 185 NW 170, so

far as in conflict overruled.] *State ex rel. Thompson v. Eggen*, 206 W 651, 238 NW 404, 240 NW 339.

A return filed before motion to quash the writ of certiorari must be taken as a verity and the matter involved decided on the assumption that the facts stated in the return are true. A landowner cannot reach by certiorari questions as to defects, not disclosed by the return to the writ, in the proceedings to lay out a town road. *State ex. rel. Paulson v. Town Board*, 230 W 76, 283 NW 360.

80.35 Oaths. The several supervisors and commissioners authorized to lay out highways are authorized to administer and certify to any oaths or affidavits required by the provisions of this chapter. [1943 c. 334 s. 51]

80.36 [Repealed by 1943 c. 334 s. 52]

80.37 **Lost records; how restored; effect of thereof.** Whenever the record of the laying out of any highway has been or shall be lost or destroyed the supervisors of the town in which such highway is situated may make a new record thereof by a written order, which shall be entered on the town records. Whenever the supervisors shall contemplate making such new record they shall make a notice and fix therein a time and place at which they will meet and decide upon the same, which notice shall specify as near as may be the highway as to which they propose to make such record. Such notice shall be served and posted in the manner provided by section 80.05; but notice need not be given to such persons as waive the same or consent to the making of the order either before or after it is entered. The supervisors shall meet pursuant to the notice given and hear any arguments or evidence that may be offered for or against the proposed new record, and thereupon decide as they deem proper. They may adjourn from time to time, and an entry of each adjournment shall be made in the record by the town clerk. If they find that the highway is a legal one the record whereof is lost or destroyed, they shall make an order determining such facts and specifying the course, width and other pertinent description of the highway, and such order shall be filed and recorded in the office of the town clerk, who shall note the time of recording it in the record. Any number of highways may be included in one such notice or order, and a failure or refusal to make a new record for any highway shall not preclude a subsequent proceeding for that purpose. Any person through whose land such highway shall pass may appeal from such order on the ground that the highway described therein was not theretofore a legal highway in fact in the time and manner provided for appealing from orders laying out highways, and like proceedings, as near as may be, shall be had thereon as in case of appeals from such orders. The regularity of such proceedings shall not be called in question by any person except owners of land on whom such notice should have been served but on whom it was not in fact served, and persons claiming under such owners. [1943 c. 334 s. 53]

80.38 **Changing streets into highways.** The town board of any town within which may be situated any village or other plat duly certified and recorded and not included within the limits of any incorporated village, may make an order to be recorded by the town clerk declaring such streets and alleys in such village or other plat as they may deem necessary for the public use to be public highways, without any other survey or description than that made in such recorded plat; provided, that when any 6 or more freeholders residing within the limits of such village or other plat shall wish any street or streets in such plat to be so declared public highways and opened to public use, such freeholders may apply to the town board of the town for that purpose in the manner provided in section 80.02, upon which application such town board shall make and file an order, within 10 days, declaring such streets to be public highways or refusing so to do; and in either case any person considering himself aggrieved by such order may appeal to the circuit court for the same county by filing with the town clerk of such town a notice of appeal, specifying the grounds of appeal, within 20 days from the filing of the aforesaid order, together with a written undertaking of the appellant, with one or more sufficient sureties, to be approved by said town clerk for the payment of all costs that may be awarded against the appellant, and paying to such clerk \$1 for state tax and \$1 for making return to the appeal. Within 20 days thereafter such town clerk shall deliver to the clerk of the circuit court of the same county all the papers in the case, together with the notice of appeal, with the date of service indorsed thereon, and pay to him \$1 state tax; whereupon such clerk of the circuit court shall enter an action in his court record in which the appellant shall be plaintiff and the town shall be defendant. The issues as shown by the papers and the appeal aforesaid shall be tried without further pleading, the same as in personal actions in such circuit court, and judgment rendered and enforced as in other actions in which persons and municipal corporations are parties. [1943 c. 334 s. 54]

80.39 to 80.45 [Renumbered 80.39 by 1943 c. 334 s. 55]

80.39 **County board power to lay, alter and discontinue town highways. (1)**
COUNTY BOARDS' POWERS. (a) The county board may lay out highways in the county, and may widen, alter or discontinue any highway or part thereof laid out by it (but may not discontinue any part of a state trunk highway) upon the petition of not less than 10 resident freeholders of each town in which the highway or any part thereof is proposed to be laid out, widened, altered or discontinued. All the powers herein granted may be exercised by a committee of not less than 3 members of the board. Whenever the supervisors of adjoining towns in different counties cannot agree in laying out a highway extending from one town into the other and the supervisors of one town lay out a highway up to the line of the adjoining town, the county board of the county in which such latter town lies may, upon like petition, lay out such highway in continuation as the public interests may require.

(b) In every county having a population of at least 150,000 the county board, upon a vote of two-thirds of its members, may exercise the powers conferred by this section, without any petition therefor, and shall proceed thereafter in that behalf as in cases of petition duly made.

(2) NOTICE. Upon such petition the county board or the commissioners appointed by the board shall give notice of the time and place they will meet to decide thereon, which notice shall be published in some newspaper published in the county at least 3 weeks previous to the time so fixed, and in case there be no newspaper so published, by posting the notice in at least 3 public places in each town at least 3 weeks before the time so fixed; and if the board appoints a committee to act the notice shall state the fact and the notices shall be signed by the commissioners, otherwise by the chairman of the board.

(3) PROCEEDINGS; HEARING; ORDERS, FILING; APPEALS. At the time and place mentioned in the notice and upon proof by affidavit of the publication or posting thereof the board or its committee shall examine the highway and hear any reasons that may be offered by parties interested therein, and for that purpose may adjourn, as town supervisors are authorized to do in similar cases. If a committee acts, it shall report its determination and award of damages. Upon the receipt of the report or, when the board shall act without a committee, upon its determination, it shall make an order laying out, altering, widening or discontinuing such highway or refusing so to do, which order shall be signed by the chairman and county clerk and filed and recorded in the county clerk's office. The order shall describe any highway which is laid out, altered, widened or discontinued, and when necessary the board may cause a survey to be made for that purpose, and shall also cause a copy of the order to be filed in the office of the town clerk of each town in which any part of the highway laid out, altered, widened or discontinued lies within 10 days after the making of the order. Any person who considers himself aggrieved by the determination refusing to lay out, alter, widen or discontinue the highway may appeal in the same manner and subsequent proceedings shall be had thereon the same as provided by this chapter in cases where the town board of supervisors refuse to lay out, alter, widen or discontinue any highway.

(4) DAMAGES, HOW FIXED AND PAID; FILING AWARD. The damages sustained by any person through whose land any such highway is laid out, altered, discontinued or widened may be ascertained by agreement between the county board or its committee and the owner. Every such agreement shall be in writing signed by him and the chairman of the board or by its committee and filed in the office of the county clerk, and shall bar the owner and all persons claiming under him from further claim for damages. In case of failure to agree, the damages shall be assessed by the county board or by its committee, and the award shall be filed in like manner. The damages so assessed shall be paid by the town in which the land is situated or by such town and other towns in such proportion as the county board shall direct at the time of making the order laying out, altering, discontinuing or widening the highway if the board shall deem other towns benefited thereby. The county clerk shall make and file a copy of every agreement for damages and of the assessment therefor with the town clerk of each town liable for the payment of the same or any portion thereof within 10 days after the order laying out, altering, discontinuing or widening the highway is made.

(5) APPEAL; VOTE BEFORE LIABILITY ATTACHES; COLLECTION OF DAMAGES. Appeals from the award of damages may be taken, heard and conducted in all respects as appeals taken from similar awards by town supervisors; but whenever the total amount of damages chargeable to any town in consequence of any such order shall be \$1,500 or more the highway shall not be opened, widened, discontinued or altered unless the order be approved and the highway or the discontinuance thereof be accepted by a majority of the electors of the town liable for such damages voting thereon at the next annual or some special town meeting called therefor. Every town chargeable with such damages or any part thereof shall be liable for payment thereof, and the same shall be collected and paid as provided in section 80.30.

(6) COMPENSATION TO COUNTY BOARD MEMBERS. For services performed in laying out, widening, altering or discontinuing any highway every member of the county board or of its committee shall receive the per diem and mileage allowed them by sections 59.03 and 59.06.

(7) HIGHWAY OPENED. Highways so laid out by county boards shall be opened and repaired in the respective towns in the same manner as other highways; but if the town board neglects or refuses to open the highway the county board may open the same. [1943 c. 334 s. 55]

Cross Reference: See 281.04, requiring applicant for change in highway to file lis pendens.

80.40 Control of highways laid by county. When the county board lays out, opens, alters or widens a highway, it reverts to the sole control of the town, village or city in

which it lies, except county trunk highways, where control shall rest with the county. The town, city or village shall keep the highway in good repair, and, if deemed necessary, the town board, village board or common council may annually levy a special tax sufficient for that purpose, and the town, village or city may alter or discontinue such highway the same as though it had originally laid it out. [1943 c. 334 s. 56]

80.46 [Renumbered 80.40 by 1943 c. 334 s. 56]

80.47 **Rights of abutting owners.** The owners of land abutting on any highway, street or alley shall have a common right in the free and unobstructed use thereof to its full width, and no town, village, city, county, company or corporation shall close up, use or obstruct any part of the highway, street or alley so as to materially interfere with its usefulness as a highway or so as to damage property abutting thereon, or permit the same to be done, without due compensation being made for any damage resulting therefrom to the owners of land upon either side of such highway, street or alley. This section does not impose liability for damages to property on both sides of any street, highway or alley arising from the use, maintenance and operation of tracks or other public improvement legally laid down, built or established in any street, highway or alley prior to April 7, 1889. All rights of property which would entitle the owners to damages for injury thereto under the foregoing provisions may be condemned and permanently appropriated by any corporation authorized to use or obstruct any highway, street or alley in the same manner that other property may be condemned and appropriated by such corporation. [1943 c. 334 s. 57]

Note: City constructing shelter for pedestrian subway across street may be liable to abutting property owners for consequential damages in so far as shelter will obstruct street. *Randall v. Milwaukee*, 212 W 374, 249 NW 73.

80.48 **Highways and streets to cemeteries and fairgrounds.** (1) **PETITION FOR.** Whenever any cemetery or agricultural or industrial association owning land in any city, village or town shall file a petition signed by the managing officers, board of trustees or directors thereof with the clerk of such city, village or town, setting forth that it owns land therein (and describing it), which land is used or intended to be used by such cemetery association for the burial of the dead or by such other association for fairgrounds or industrial expositions, that there is no laid out street or highway giving access thereto and praying that such city, village or town lay out a street or highway thereto from the nearest street or highway which can be used as a convenient means of approach, the common council, trustees or supervisors so petitioned shall make out a notice which shall be served on the owner or occupant of the land through which the proposed street or highway is to be laid and posted in the manner provided in section 80.05, and which shall contain a copy of such petition and state the time when and place where such council, trustees or supervisors will meet to take action upon said petition, which time shall be within ten days after such notice is served. If the proper council, trustees or supervisors shall find the recitals in the petition to be true they shall, within five days after the meeting to take action thereon, make an order for the impaneling of a jury to pass upon the necessity of taking for the public use the land through which the proposed street or highway is to be laid.

(2) **DEPOSIT OF FUNDS; NOTICE OF HEARING.** Such order shall require the petitioners to deposit with the treasurer of the proper municipality such sum as the authorities who made it deem necessary to pay the costs and expenses of such proceedings, and no further action shall be had on such petition until such deposit is made; when it is made the common council, trustees or supervisors shall make a further order fixing the time when (not less than ten days thereafter) and place where a jury will be impaneled to pass upon the necessity for taking such land. Notice of such time and place shall be served upon the occupants of such land, if any there be, in the manner provided in section 80.05 not less than six days before the time so fixed; if any portion of such land shall not be actually occupied such notice, which shall contain a description, as near as may be, of the premises to be taken, shall be published in some newspaper of general circulation in such city, village or town, to be designated in the order, for at least once in each week for three weeks successively, and shall state that at the time and place therein named a jury will be impaneled for the purpose of passing upon the necessity for taking for the public use the land described therein.

(3) **JURORS.** At the time and place specified in such notice the county judge of the county, the municipal judge of the city, the president of the village or the chairman of the town in which the land sought to be taken lies shall issue his precept directed to the sheriff of such county or to any constable, naming him, which precept shall direct such officer to write the names of thirty-six freeholders of said county who are qualified to serve as jurors in the circuit court and to return the same to him. After being sworn to perform the duties required of him to the best of his ability, without partiality, such officer shall immediately write such names and deliver the list thereof to the officer who issued

the precept; and from such list each party, in person or by an agent or attorney, commencing with the petitioner, shall strike out alternately, twelve names, and if either party is absent or refuses to strike out, the officer who issued the precept shall appoint some person to strike twelve names for such absent person. Such officer shall then issue a venire requiring the officer who served the precept to summon the twelve men whose names remain on said list to appear at the time and place mentioned therein for the purpose of determining the necessity of taking for the public use the land described in the petition; if any of the persons summoned fail to attend others may be drawn in the same mode to fill the vacancy, and for that purpose the proceedings may be adjourned from time to time. When twelve persons are thus secured they shall be sworn by the officer who issued the precept to faithfully and impartially discharge the duties imposed upon them, which oath shall be filed with the city, village or town clerk.

(4) FINDING AS TO NECESSITY OF TAKING; DAMAGES. After such jurors are sworn the said county or municipal judge, president or chairman shall issue his precept directed to them and requiring that within ten days they shall view the land specified therein and make return to him under their hands as to whether it is necessary to take it for public use as described in the petition; the jurors shall, at a time to be fixed by them, view said premises; the parties interested shall have notice of such time and may offer any evidence pertinent to the inquiry; after taking such view and hearing the evidence the jury shall determine whether a necessity exists for taking the land and shall return their verdict to the officer who issued such precept. On the receipt thereof such officer shall, as soon as may be, submit the same to the council, trustees or supervisors, and for that purpose may call a meeting of either body and deliver such verdict to them; the body to which it is so delivered shall, if in their judgment the public good requires it, immediately make an order laying out a street or highway from the nearest street or highway which can be used as a convenient means of approach to such cemetery, fairground or land used for industrial expositions, which street or highway so laid shall not be less than three nor more than four rods in width, and in said order they shall appoint three disinterested freeholders of the county as commissioners who shall, after notice to the owners or occupants of said land and after being sworn to support the constitution of the United States and the constitution of this state and faithfully discharge their duties to the best of their ability, assess adequate damages to the owners of the land through which such street or highway is laid. The award of damages shall be signed by the commissioners and be returned to the city, village or town clerk.

(5) OPENING HIGHWAY. The street commissioner of such city or village or the superintendent of highways of such town, after the order laying out such street or highway has been filed with the city, village or town clerk, shall forthwith open the street or highway so laid, provided that the petitioner shall have paid to the city, village or town treasurer the damages awarded.

(6) APPEAL; COSTS. If any person through whose land such street or highway is laid or the petitioner shall be dissatisfied with the damages awarded either may appeal to the circuit court of the county in which the land is situated by serving a notice of appeal and undertaking upon the opposite party, with at least two sureties, conditioned for the payment of all costs and damages which may be incurred if the appellant shall not succeed; such notice and undertaking shall be filed with the city, village or town clerk, who shall be entitled to receive two dollars for his fees in making return to the clerk of the circuit court as hereinafter required; provided, that such appeal shall not impair the right of the public to use such street or highway for the purpose of travel. Within ten days after such papers are filed and such payment made the clerk with whom they are filed shall transmit the papers pertaining to the subject matter of the appeal to the clerk of the circuit court, who shall file them in his office, and upon such filing the appeal shall be considered an action pending in such court, subject to a change of the place of trial and an appeal to the supreme court as in other actions. The appeal shall be entered upon the records by making the party who took it plaintiff and the other party defendant; it shall be tried by a jury unless such mode of trial is waived, and costs shall be allowed the successful party, and if he shall be the landowner shall be added to the judgment, and if he shall be petitioner be deducted therefrom. [1943 c. 334 s. 58, 149]

80.49 to 80.62 [Repealed by 1943 c. 334 s. 59]

80.63 [Renumbered section 80.01 (4) by 1943 c. 334 s. 17]

80.64 Widening of highways; establishment of excess widths. With the approval of the governing body of the municipality in which a street or highway or part thereof, is located, the county board may, to promote the general welfare, establish street and highway widths in excess of the widths in use; and likewise may adopt plans showing the location and width proposed for any future street or highway, which shall not be subject to section 80.32 (2). Such streets or highways or plans therefor shall be shown on

a map (showing present and proposed street or highway lines and also property lines and owners except in counties having a population of 500,000 or more) then filed in the office of the register of deeds, and notice of such filing shall be published in a newspaper of general circulation in the territory in which such streets or highways are located once each week for 3 successive weeks, and shall be posted in at least 3 public and conspicuous places along each such street or highway. The notice shall briefly set forth the action of the county board. The county board, upon like approval, publication and notice, may from time to time supplement or change the same, and such supplements or changes shall be similarly filed in the office of the register of deeds. The excess width for streets or highways in use, or the right of way required for those planned, may be acquired at any time either in whole or in part by the state or county or municipality in which located; but no part shall be acquired in less than the full extent, in width, of the excess width to be made up of land on the same side of the street or highway, nor for less than the full length of such excess width lying within contiguous land owned by the same owner. Any land so acquired, whether the excess width is acquired for the full length of the street or highway or not, shall at once become available for highway purposes. The power to acquire such right of way or additional width in portions as provided herein may be exercised to acquire the land on advantageous terms. [1931 c. 303; 1943 c. 334 s. 6, 55, 60; 1945 c. 556]