

CHAPTER 80

LAYING HIGHWAYS

80.01	Creation, alteration and validation of highways.	80.24	Appeal from award of damages by owner.
80.02	Town highways; petition to lay, alter or discontinue.	80.25	Taxpayer may appeal; service of notice.
80.025	Highways abutted by state park lands; discontinuance or relocation.	80.26	Appeal bond.
80.03	Restrictions on condemning for town highways.	80.27	Selection of jury; penalty for refusal to serve.
80.04	When supervisor disqualified; vacancies.	80.28	Proceedings before jury; costs.
80.05	Notice of meeting; service and publication.	80.29	Appeal costs; jurors' fees.
80.06	Proceedings after notice.	80.30	Highway damages; when payable, referendum to town meeting.
80.07	Order; survey; award; recording; presumptions.	80.31	Unclaimed awards; mortgage and lien interest.
80.08	Width of highways.	80.32	Discontinuance of highways; reversion of title.
80.09	Damages; agreement, award.	80.33	Highway papers, where filed.
80.10	Considerations affecting damages.	80.34	Highway orders; presumptions; limitation of actions.
80.11	Highways on and across town lines.	80.35	Oaths.
80.12	Highways on and across town and municipal boundaries.	80.37	Lost records; how restored; effect.
80.125	Highways and bridges on state boundaries.	80.38	Changing streets into highways.
80.13	Land excluded from highway.	80.39	County board power to lay, alter and discontinue town highways.
80.14	Highway from shut-off land through adjoining town.	80.40	Control of highways laid by county.
80.15	Highway to islands in Mississippi River.	80.41	Discontinuing ways to waters.
80.16	Shut-off school buildings; how laid.	80.47	Rights of abutting owners.
80.17	Appeal from highway order.	80.48	Highways and streets to cemeteries and fairgrounds.
80.22	Determination final for a year unless appealed.	80.64	Widening of highways; establishment of excess widths.
80.23	Removal of fences from highway; notice.	80.65	Waste on highways.

80.01 Creation, alteration and validation of highways.

(1) DEFINITION. In this section, "recorded highway" means a highway for which the order laying out the highway, or a certified copy of the order, has been filed in the office of the clerk of the town or the county in which the highway is situated.

(1m) VALIDATION OF HIGHWAYS. Any recorded highway that has been 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, any portion of which has been opened and worked for 3 years is a legal highway to the extent that it has been opened and worked. Any laid out highway that has not been fully and sufficiently described or recorded or for which the records have been lost or destroyed is presumed to be 66 feet wide.

(2) UNRECORDED HIGHWAYS VALIDATED, EXCEPTION; GRANTS FOR HIGHWAY PURPOSES, PRESUMPTIVE WIDTH. (a) Except as provided in pars. (b) and (c), any unrecorded highway that has been worked as a public highway for 10 years or more is a public highway and is presumed to be 66 feet wide.

(b) No road or bridge built upon the bottoms and sloughs of the Mississippi River by citizens or a municipality of any other state shall become a legal highway or a charge upon the town in which the road is located unless upon petition the highway is legally laid out by the town supervisors.

(c) No lands granted for highway purposes that did not become a legal highway prior to July 1, 1913, shall become a legal highway unless the grant is accepted by the town board or by the town meeting of the town wherein the lands and proposed highway are located, and until a resolution of acceptance of the grant is recorded in the office of the town clerk.

(3) BEAUTIFICATION AND PROTECTION. 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 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 but such authorities shall remove, cut or trim or consent to the removing, cutting or removal of any tree, shrub or vegetation in order to provide safety to users of the highway.

(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.

(5) EFFECT OF RESERVATION OR EXCEPTION IN CONVEYANCE. Whenever a deed, land contract or mortgage of lands abutting on an existing public street, highway or alley or a projected extension thereof hereafter executed and recorded contains language reserving or excepting certain lands for street, highway or alley purposes, such reservation or exception shall constitute a dedication for such purpose to the public body having jurisdiction over such highway, street, alley or projected extension thereof, unless the language of such reservation or exception plainly indicates an intent to create a private way. Such dedication may be accepted by resolution of the governing body having jurisdiction over such street, highway, alley or projected extension thereof.

History: 1999 a. 97.

When a governmental unit shows public use of a road for 20 years or public maintenance for 10 years, a landowner claiming that the road is private has the burden of proving permissive use. *Ruchti v. Monroe*, 83 Wis. 2d 551, 266 N.W.2d 309 (1978).

Municipalities may incur liability under sub. (3) for failure to trim vegetation obstructing the view at an intersection. *Walker v. Bignell*, 100 Wis. 2d 256, 301 N.W.2d 447 (1981).

When a highway was established by user, the existence of ancient fences within 2 rods of either side of the center of the highway was sufficient to rebut the sub. (2) presumption that the highway was 4 rods in width. *Threfall v. Town of Muscodia*, 190 Wis. 2d 121, 527 N.W.2d 367 (Ct. App. 1994).

The test under sub. (2) for whether a highway has been “worked” is whether the work demonstrates the public’s ownership of the road so that the public use of the road is not merely permissive. Continuous work on a road by a public entity is more likely to demonstrate ownership than sporadic work. *County of Langlade v. Kaster*, 202 Wis. 2d 449, 550 N.W.2d 722 (Ct. App. 1996).

When documents indicate an intent to dedicate roadways to the public, in the absence of official acceptance by the municipality, prior acceptance by the general public users prevents revocation of the offer to dedicate. Nothing prevents the acceptance of the ongoing offer by a municipality. Upon formal acceptance the municipality becomes liable for maintenance and for damages that might result from defects. *Cohn v. Town of Randall*, 2001 WI App 176, 247 Wis. 2d 118, 633 N.W.2d 674.

Although sub. (3) mandates that governmental authorities “remove, cut or trim or consent to the removing, cutting or removal of any tree, shrub or vegetation in order to provide safety to users of the highway,” it has not also created a private cause of action for damages caused by a failure to comply with that mandate. *Estate of Wagoner v. City of Milwaukee*, 2001 WI App 292, 249 N.W.2d 306, 638 N.W.2d 382.

Rights-of-way boundaries of nondedicated roads are discussed. 69 Atty. Gen. 87.

80.02 Town highways; petition to lay, alter or discontinue. When 6 or more resident freeholders 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 s. 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 the clerk 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 department of transportation 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.

History: 1977 c. 29 s. 1654 (8) (c); 1977 c. 273.

80.025 Highways abutted by state park lands; discontinuance or relocation. Any part of a highway lying wholly within state park lands may be discontinued or relocated by the state agency having jurisdiction over such abutting lands by filing written notice of such discontinuance or relocation with the town clerk or county clerk and upon approval by the supervisors after holding a hearing as provided in s. 80.05 unless such discontinuance or relocation would deprive any other owner of lands access thereto from a highway. This section does not apply to state trunk highways or connecting highways.

History: 1977 c. 29 s. 1654 (3).

80.03 Restrictions on condemning for town highways.

(1) 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 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.

(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.

80.04 When supervisor disqualified; vacancies.

(1) No supervisor may act in laying out, altering, widening or discontinuing any highway in which the supervisor may be personally interested. If one supervisor is interested the other 2 supervisors shall act. If 2 supervisors are interested the 3rd supervisor shall act in the matter.

(2) Whenever there are fewer than 2 supervisors in a town, the application authorized by s. 80.02 may be made to the county board, which shall promptly appoint a committee of 3 of its members. The committee shall act upon the application in the same manner and with the same powers in every respect as the supervisors of the town might do.

History: 1991 a. 316; 1999 a. 97.

80.05 Notice of meeting; service and publication.

(1) On application made to supervisors for laying out, widening, altering or discontinuing any highway the supervisors shall prepare a notice fixing therein a time and place at which they will meet and decide upon the application. The notice shall specify, as near as practicable, the highway proposed to be laid out, widened, altered or discontinued and the tracts of land through which the highway passes or, if the application is for discontinuing the whole or any portion of the highway, the tracts of land abutting on the highway which will be benefited or injured by such discontinuance. When the description in the aggregate exceeds 200 words in length, the notice may state that such descriptions are contained in the application as provided in s. 80.02, and shall give the name and address of the town clerk to whom the application has been delivered.

(2) The applicants shall:

(a) At least 10 days prior to the date of hearing give notice by registered mail to all occupants and owners of record of lands through which the highway may pass or, if the application is for discontinuance, to the occupants and to the owners of record of all lands abutting on the highway.

(b) Give notice by registered mail to the department of natural resources and to the county land conservation committee in each county through which the highway may pass.

(c) Publish a class 2 notice, under ch. 985.

History: 1971 c. 323 s. 27; 1981 c. 346, 391; 1983 a. 27.

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 s. 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.

80.07 Order; survey; award; recording; presumptions.

(1) 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.

(2) Whenever the supervisors lay out, alter or discontinue any highway the town clerk shall transmit a certified copy of the order therefor to the county highway commissioner.

80.08 Width of highways. Except as provided in s. 80.13, highways shall be laid out at least 49.5 feet wide, and when no width is specified in the order the highway shall be 66 feet wide.

History: 1999 a. 97.

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 the owner. If any owner, other than this state or the United States, does not so agree with the supervisors as to 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 the owner 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 the owner, and describe the owner's 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.

History: 1991 a. 316.

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 the landowner 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 the person receives thereby shall be taken into consideration.

History: 1991 a. 316.

80.11 Highways on and across town lines. (1) Whenever it is considered necessary to lay out, alter, widen or discontinue a highway upon the line between 2 towns, or extending from one town into an adjoining town, it shall be done by the supervisors of the 2 towns acting together. If the highway is laid out or altered it may be either upon or as near to the town line as the situation of the ground will admit. The supervisors of the 2 towns acting together may vary the location on either side of the town line as they consider to be necessary.

(2) (a) An application under sub. (1) shall be all of the following:

1. In duplicate.
2. Addressed to the supervisors of both towns.
3. Signed by at least 6 resident freeholders in each town.
4. Delivered to a supervisor or the clerk of each town.

(b) Upon receipt of an application under par. (a), the supervisors shall promptly fix, and give notice of, the time when and place where the application will be decided. The notice shall be all of the following:

1. Signed by a majority of the supervisors of each town.
2. Published as a class 2 notice, under ch. 985, in each of the towns.

3. Served as required by s. 80.05.

(c) A majority of the supervisors of each town shall meet jointly at the time and place named in the notice under par. (b) to decide upon the application and to sign the order and the award of damages. The proceedings shall be the same as in laying out, altering, widening or discontinuing highways located wholly within one town. The orders, awards, notices and all papers shall be in duplicate, and one duplicate of each shall be filed with each town clerk. The order shall be recorded in each town clerk's office.

(3) (a) The order under sub. (2) (c) may designate the part of the highway that shall be made and kept in repair by each town, and the share of the damages, if any, that shall be paid by each town. Each town shall have all of the rights and be subject to the liabilities in relation to the part of the highway to be made or repaired by it as if it were wholly located in that town.

(b) 1. A majority of the supervisors of each town, meeting together, may make an order in accordance with par. (a) apportioning or reapportioning a town line highway or any part of the highway that they consider advisable, if any of the following conditions exists:

a. No apportionment has been made in an order laying out, altering or widening the highway or a part of the highway.

b. The highway or a part of the highway had its origin in user.

c. In the judgment of the supervisors circumstances have been so altered since the last apportionment of the highway or part of the highway that the apportionment or reapportionment has been rendered inequitable or impracticable.

2. An order made under this paragraph shall be filed as provided in sub. (2) (c) and shall have the same effect as an order made in connection with the original laying out of the highway.

(c) Any written order or agreement made before August 27, 1947, by a majority of the supervisors of each town concerned, acting together, apportioning or reapportioning a town line highway has the same effect as though made on or after August 27, 1947.

(4) (a) The part of an order fixing the liabilities of towns in regard to a town line highway is vacated if any of the following occurs:

1. The territory of either town is increased or diminished by a change of the boundaries of either town including a change caused by flowage.

2. A portion of the town line highway is taken over by the state or county under the state or county highway system.

3. A new town or village is formed out of a part of the territory of either or both of the towns, having a portion of the town line highway within its borders.

4. A portion of a town line highway is crossed and covered by flowage.

(b) 1. In the event that an order or part of an order is vacated under par. (a) 1., 2. or 4., a majority of the supervisors of each town that is party to the order shall, before the time for making the next tax roll, meet together and attempt to make a new order apportioning the liabilities on account of the highway, which shall be filed as provided in sub. (2) (c).

2. In the event that an order or part of an order is vacated under par. (a) 3., a majority of the supervisors of each town that is party to the order shall, before the time for making the next tax roll, meet together with a majority of the supervisors of the new town or with the president of the new village and attempt to make a new order apportioning the liabilities on account of the highway, which shall be filed as provided in sub. (2) (c).

(5) If no agreement is reached under sub. (4) (b), or if an order laying out, altering or widening a town line highway has not apportioned the liability of the towns or village on account of the highway, the supervisors of an affected town or the president of an affected village, after 10 days' notice of the time and place of hearing served on the clerk of each town and village to be affected, may apply to the circuit judge of the county in which the affected

town or village is located, for the appointment of 3 commissioners to apportion the liabilities of each affected town and village on account of the town line highway.

(6) Upon application under sub. (5), the circuit judge shall appoint 3 residents of the county as commissioners. The commissioners shall, on not less than 5 days' notice in writing to the clerk of each town and village affected, apportion the liabilities of each affected town and village on account of the highway. The commissioners shall make the determination in writing and shall file the determination with the clerk of each town and village affected. The commissioners' determination has the same effect as an order made under sub. (2), (3) or (4).

(7) Any bridge on a highway that became a highway under s. 80.01 (2) as a result of having been worked, that is between 2 towns, or between a town on one side and a village or a town and village on the other side, and that has not been assigned to either of the adjoining towns or village, shall be repaired and maintained by the adjoining towns and village. The cost of repairs and maintenance shall be paid by the adjoining towns and village in proportion to the valuation of the property in the adjoining towns and village as equalized by the county board or boards at the last equalization.

(8) (a) Except as provided in par. (b) and sub. (7) or 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 the bridge is located, each contributing to the expenses thereof in proportion to the last assessment of taxable property therein.

(b) Any bridge over any stream or river forming the boundary between 2 counties erected or maintained solely by one of the adjoining municipalities may be closed or discontinued by the municipality maintaining the bridge if the other adjoining municipality fails to contribute towards the maintenance of the bridge in the following proportion:

1. In proportion to the amount of the cost of erecting the bridge borne by the adjoining municipality that does not maintain the bridge, if the bridge was erected at the joint expense of the 2 adjoining municipalities.

2. In the proportion of one-half the cost of maintenance, if the bridge was not erected at joint expense.

History: 1999 a. 97.

80.12 Highways on and across town and municipal boundaries. (1) Whenever it is considered necessary to lay out, alter, widen or discontinue a highway upon the line between a town and city or village or to lay out, alter, widen or discontinue a highway or any part of a highway extending from a town to a city or village, the proceedings therefor may be had under s. 80.11. The application to lay out, alter, widen or discontinue the highway or any part of the highway 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 6 freeholders of the town and 6 freeholders of the city or village.

(2) Upon receipt of an application under sub. (1), the common council or board of trustees shall appoint 3 commissioners on the part of the affected city or village. The commissioners shall be duly sworn to faithfully discharge their duties as commissioners before entering upon those duties. The commissioners and town supervisors shall then give notice and proceed in all respects as provided in s. 80.11.

(3) The city or village shall be responsible for that part of the affected highway that, under s. 80.11 (3) (a) shall be made and kept in repair by the city or village and for the share of damages assigned to the city or village under s. 80.11 (3) (a). 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 or the other side of the line may be at the expense of the adjoining municipalities and the apportionment may be made as provided in s. 80.11 (3) to (6).

(4) The town board and village board or city council may cause any highway or part of a highway subject to the provisions of this section, which is not less than 264 feet in length, to be graded, paved, macadamized or otherwise improved, including the establishment of the grade, construction of curbs and gutters and installation of water and sewer mains and service pipes. The town board and village board or city council may levy special assessments for the whole or any part of the cost of the improvements as a tax upon the property that they determine is especially benefited by the improvements, in the manner provided in s. 66.0703.

(5) All proceedings and orders required to be filed and recorded shall be filed and recorded in the office of the clerk of the affected city, village or town.

History: 1991 a. 32; 1999 a. 97; 1999 a. 150 s. 672.

80.125 Highways and bridges on state boundaries. A town or county board of any town or county bounded in part by a river, or by a highway, either of which is also a state boundary line may enter into agreement with the adjoining municipality in such other state for the maintenance and construction of boundary line bridges and for the maintenance and reconstruction of any boundary line highway including its bridges, by appropriation therefor not exceeding 50% of the total costs assignable to the boundary line facility.

80.13 Land excluded from highway. (1) When any person presents the town board with an affidavit that meets the requirements under sub. (1m), the town board shall set a time and place to conduct a hearing regarding the laying out or widening of a highway. The hearing shall be held after 10 days and within 30 days of the receipt of the affidavit by the town board. Notice of the time and place of the hearing shall be served as required by s. 80.05 and published as a class 2 notice under ch. 985.

(1m) The affidavit required under sub. (1) shall be executed by the owner or lessee of real estate located within the town, shall contain a description of the affected real estate and shall contain facts that satisfy the supervisors that any of the following circumstances exists:

(a) The real estate described in the affidavit is shut out from all public highways by being surrounded on all sides by real estate owned by other persons, or by real estate owned by other persons and by water, and that the owner or lessee is unable to purchase a right-of-way to a public highway from the owners of the adjoining real estate or that such a right-of-way cannot be purchased except at an exorbitant price, which price shall be stated in the affidavit.

(b) 1. The owner or lessee is the owner of a private way or road, whose width shall be stated in the affidavit, that leads from the described real estate to a public highway but the way or road is too narrow to afford the owner or lessee reasonable access from the described real estate to the public highway; and

2. The owner or lessee is unable to purchase a right-of-way from the described real estate to a public highway, or is unable to purchase land on either or both sides of the owner's or lessee's way or road to make the way or road of sufficient width or that the right-of-way or additional land cannot be purchased except at an exorbitant price, which price shall be stated in the affidavit.

(3) (a) The town board shall meet at the time and place stated in the notice given under sub. (1) and shall in their discretion lay out a highway of not less than 33 feet nor more than 49.5 feet in width from the public highway to the real estate described in the affidavit under sub. (1m) (a) or (b) either by laying out a new highway across the surrounding land or by adding enough land to the width of the existing way or road described in the affidavit under sub. (1m) (b) to make it not less than 33 feet nor more than 49.5 feet in width.

(b) The town board shall assess the damages to the owner or owners of the real estate over or through which the highway shall be laid or from whom land shall be taken and the advantages to the

applicant. The town board may not assess damages in any amount exceeding the price stated in the affidavit of the applicant.

(4) Upon laying out a highway under sub. (3), the town board shall make and sign an order describing the laid out highway and file the order with the town clerk together with its award of damages. The order shall be recorded by the clerk; provided, that the amount assessed as advantages to the applicant under sub. (3) is paid to the town treasurer before the order laying out such highway shall be filed.

(4m) The following costs may be assessed to the applicant:

(a) Attorney fees reasonably incurred by the town under subs. (3) and (4).

(b) The cost of any survey or fee of any expert on valuation, or both, reasonably incurred by the town under subs. (3) and (4).

(5) Whenever a parcel of land in any town which is accessible, or provided with a right-of-way to a public highway, is subdivided and the owner transfers any part of the subdivided parcel by metes and bounds that would otherwise be shut out from all public highways by reason of being surrounded on all sides by real estate belonging to other persons or by real estate belonging to other persons and by water without an adequate right-of-way to a public highway, the seller shall provide a cleared right-of-way at least 50 feet in width that shall be continuous from the highway to the part of the subdivision sold. In case the seller fails to provide the required right-of-way, the town board may, pursuant to proceedings under this section, lay out a road from the inaccessible land to the public highway over the remaining lands of the seller without assessment of damages or compensation to the seller.

History: 1989 a. 33; 1991 a. 316; 1993 a. 490; 1999 a. 97; 2001 a. 38.

A board loses jurisdiction to order the laying out of a highway when it orders damages to be paid in 60 days, because s. 80.07 requires the order and award to be filed in 10 days and under s. 80.13 (4) the damages must be paid before the order is filed. *Northern States Power Co. v. Town of Hunter*, 57 Wis. 2d 118, 203 N.W.2d 878 (1973).

A town board of supervisors lost jurisdiction to hear an application under s. 80.13 (1) and was considered to have denied the application by adjourning for more than 30 days in contravention of s. 80.06. The trial court properly refused to review the merits on certiorari under s. 80.34. An aggrieved party's proper remedy was appeal for appointment of reviewing commissioners under s. 80.17. *Berschens v. Town of Prairie du Sac*, 76 Wis. 2d 115, 250 N.W.2d 369 (1976).

When a town board chooses to act on a petition under sub. (1), it need not lay the road over land of the seller under sub. (5) but may lay the road over land of another under sub. (3). *Gaethke v. Town of Clay Banks*, 86 Wis. 2d 495, 273 N.W.2d 764 (1979).

In the exercise of the discretion provided for under sub. (3), the town board may elect not to lay out a town road at all. *Tagatz v. Township of Crystal Lake*, 2001 WI App 80, 243 Wis. 2d 108, 626 N.W.2d 876.

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 that owner's 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, that owner 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 s. 80.13. The supervisors of the 2 towns shall proceed as provided under said s. 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 the applicant to the town treasurer of the town where the applicant's 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.

History: 1991 a. 316.

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 that owner's land. The said supervisors shall then proceed according to the provisions of s. 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.

History: 1991 a. 316; 1993 a. 490.

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.

80.17 Appeal from highway order. Any order of the town supervisors laying out, altering, widening or discontinuing any highway, or refusing so to do, is subject to judicial review under s. 68.13, except that only a person aggrieved by the order or determination may seek review. 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. In case of highways upon a line between 2 counties the appeal may be made to the circuit court of either county.

History: 1977 c. 449; 1995 a. 186.

The judge's role is administrative and not judicial. Entry of judgment is beyond a circuit judge's jurisdiction under this section. *Town of Taycheedah v. Webb*, 118 Wis. 2d 362, 348 N.W.2d 591 (Ct. App. 1984).

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.

80.23 Removal of fences from highway; notice.

(1) Whenever pursuant to this chapter any highway is laid out, widened or altered through enclosed, cultivated or improved lands and the determination has not been appealed from, the highway authorities shall give the owner or occupant of the lands written notice to remove the fences located on the highway within a time determined by the highway authorities to be reasonable, but not less than 30 days after giving the notice. If the owner or occupant does not remove the fences within the time required by the notice, the highway authorities shall remove the fences and direct the highway to be opened. 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 enclosed, cultivated or improved lands or the removal of fences between May 15 and September 15, except in cases of emergency to be determined by the highway authorities.

History: 1991 a. 316; 1999 a. 97.

80.24 Appeal from award of damages by owner.

(1) Except as provided in sub. (2), an owner of lands through which a highway is laid out, widened, altered or discontinued who is not satisfied with the award of damages under s. 80.09 may, within 30 days after the filing of the award, appeal to the circuit court of the county for a jury to assess the damages.

(2) An owner of lands through which a highway is laid out, widened, altered or discontinued who has appealed under s. 80.17 from the order laying out, widening, altering or discontinuing the highway and who is not satisfied with the award of damages under s. 80.09 may, within 30 days after the entry of a final order on the appeal affirming the order, appeal to the circuit court of the county for a jury to assess the damages.

(3) An appeal under this section shall be in writing, describing the premises.

(4) An appeal under this section may be joined in by any number of persons claiming damages on account of the highway.

(5) At least 6 days before making an appeal under this section, the appellant shall serve written notice 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 responsible for paying the damages for the land. The notice shall state the name of the judge to whom the appeal will be made and the date, time and place at which the appeal will be heard.

(6) If more than one appeal is taken from the award of damages on account of any highway, the appeals shall be consolidated by the circuit judge, and only one jury shall be selected to reassess the damages.

History: 1977 c. 449; 1995 a. 225; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); 1999 a. 97.

80.25 Taxpayer may appeal; service of notice. (1) Any taxpayer of a 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 from the laying out, alteration or discontinuation, may, within 30 days after the award or agreement determining the damages has been filed with the municipal clerk, appeal to the circuit court of the county for a jury to assess the damages sustained by the persons to whom damages were awarded or are to be paid.

(2) The appeal under this section 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, unless appealing from all of the awards, shall specify the particular award from which the taxpayer appeals. The appellant shall serve written notice of the appeal upon 2 of the supervisors of the town or 2 of the commissioners of the city or village that is responsible for paying the damages and upon the persons whose awards are appealed from.

(3) The notice under sub. (2) shall be served at least 6 days before the appellant makes the application for the jury to assess damages. The notice shall state the name of the judge who will hear the application and the time and place of the hearing.

History: 1977 c. 449; 1999 a. 97.

80.26 Appeal bond. The appellant under s. 80.24 or 80.25 shall execute to the proper town, city or village and file with the circuit court a bond with one or more sureties to be approved by the circuit court. In case the appeal is by a landowner, the bond shall be conditioned to pay all costs arising from the appeal if the jury does not award the appellant an increase of damages. In case of an appeal by a taxpayer under s. 80.25, the bond shall be conditioned that the appellant shall pay all costs arising from the appeal if the amount of damages in the aggregate of the items appealed from is not diminished as a result of the appeal.

History: 1991 a. 316; 1999 a. 97.

Substantial compliance with this section is not sufficient. Providing a signature bond rather than a surety bond was grounds for dismissal. *Breuer v. Town of Addison*, 194 Wis. 2d 617, 534 N.W.2d 634 (Ct. App. 1995).

80.27 Selection of jury; penalty for refusal to serve.

(1) Upon the filing of the bond required under s. 80.26 and notice of the appeal with proof of service of the notice, the jury shall be selected and summoned in the following manner:

(a) The judge shall make out a list of 15 disinterested resident freeholders of the county, not of kin to the owner or occupant of the lands.

(b) Each party in turn shall strike 5 persons from the list, and if none of the proper supervisors or commissioners or other appellee is present, the judge shall strike 5 names for any missing party.

(c) The judge shall issue an order to the sheriff or a constable of the county to summon the 5 persons whose names were not stricken under par. (b) to meet at a time and place specified in the

order to appraise the damages, the award of which has been appealed from.

(2) In case any juror fails to appear at the time and place fixed for the meeting under sub. (1) (c), the judge shall summon another juror in the missing juror's place.

(3) Any juror may be excused for good cause. Any juror who is summoned under sub. (1) (c), is not excused and fails to serve shall forfeit not to exceed \$10 and shall be liable to the party having the costs of the appeal to pay for additional costs resulting from the juror's failure to serve.

History: 1991 a. 316; 1999 a. 97.

80.28 Proceedings before jury; costs. (1) The jury selected under s. 80.27 shall be sworn by the judge to justly and impartially appraise the damages, the award of which is appealed from. The jury shall view the highway, subject to the appealed order, and hear the statements and proofs of the parties. The jury may increase or decrease the amount awarded and shall sign and return the jury's appraisal to the judge.

(2) (a) In case of appeal by a landowner under s. 80.24, the costs and expenses of the proceedings shall be paid by the proper town, city or village if the jury increases the amount awarded or by the appellant if the jury does not increase the amount awarded.

(b) In case of an appeal by a taxpayer, the costs and expenses of the proceedings shall be paid by the town, city or village if the jury decreases the amount awarded or by the appellant if the jury does not decrease the amount awarded.

(c) In case of cross-appeals if the damages involved are unchanged, each appellant shall pay 50% of the costs and expenses of the proceedings.

(3) If the jury fails to agree and is discharged by the judge for that reason, the judge shall immediately select another jury under this section and s. 80.27 (1) and further proceedings shall be had on the appeal under s. 80.27 and this section in all respects as in the case of a first jury.

(4) (a) When the jury has returned its appraisal to the judge, the judge shall adjust the costs and expenses of the proceedings, and within 10 days thereafter return the appraisal to the town clerk, together with the following, which shall be filed by the clerk:

1. All papers relating to the appeal.
2. A statement of the proceedings had before the judge.
3. A detailed statement of the cost and expenses of the proceedings certified by the judge.

(b) If 2 towns or a town and a city or village are interested, the judge shall make and file a certified copy of the appraisal papers and statements with the clerk of each interested town, city or village.

History: 1991 a. 316; 1999 a. 97.

80.29 Appeal costs; jurors' fees. Each juror who serves under s. 80.28 shall receive \$3 for services and 10 cents a mile for actual and necessary travel in going to and returning from the place of meeting. Costs under this section are payable in advance by the party appealing and are a charge against the party finally liable for the costs of the proceeding.

History: 1991 a. 316; 1999 a. 97.

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 dam-

ages 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 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.

80.31 Unclaimed awards; mortgage and lien interest.

(1) If the damages awarded to an owner of land are not claimed within one year after they become payable, the damages shall be paid by the town, city or village treasurer to the county treasurer who shall provide the town, city or village treasurer with a receipt.

(2) The county treasurer shall report and deliver the unclaimed damage awards as provided under ch. 177.

(3) In case any lands taken by contract or condemnation for highway purposes shall be encumbered, and the owners of the fee and of the encumbrance 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.

History: 1983 a. 408; 1995 a. 225.

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) Except as provided in sub. (5), 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, traveled 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) (a) Whenever any public highway or public ground has been vacated or discontinued, any easements and rights incidental thereto acquired by or belonging to any county, school district, town, village or city or to any utility or person and relating to any underground or overground structures, improvements or services and all rights of entrance, maintenance, construction and repair of the structures, improvements or services shall continue, unless one of the following applies:

1. The owner of the easements and incidental rights gives written consent to the discontinuance of the easements and rights as a part of the vacation or discontinuance proceedings and the vacation or discontinuance resolution, ordinance or order refers to the owner's written consent.

2. The owner of the easements and incidental rights fails to use the easements and rights for a period of 4 years from the time that the public highway or public ground was vacated or discontinued.

(b) The easements and incidental rights described in par. (a) may be discontinued in vacation or discontinuance proceedings in any case where benefits or damages are to be assessed as provided in par. (c), if one of the following applies:

1. The interested parties fail to reach an agreement permitting discontinuance of the easements and incidental rights.

2. The owner of the easements and incidental rights refuses to give written consent to their discontinuance.

(c) Damages for the discontinuance of the easements and rights described in par. (a) 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 amount of the damages shall be the present value of the property to be removed or abandoned, plus the cost of removal, less the salvage value of the removed or abandoned property, or any other amount that may be agreed upon between the interested parties. The owner of the easements and incidental rights, upon application to the treasurer and upon furnishing satisfactory proof shall be entitled to any payments of or upon the assessment of damages.

(d) Any person aggrieved by the assessment of damages under this subsection may appeal the assessment 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 or to any highway, street, alley or right-of-way that provides public access to a navigable lake or stream.

History: 1997 a. 172; 1999 a. 97.

Whether a highway has been entirely abandoned for a discontinuance to occur under sub. (2) depends on whether the highway has remained open to all who had occasion to use it. Even if a single family and their guests used the highway, that could be sufficient to keep it from being abandoned. *Lange v. Tumm*, 2000 WI App 160, 237 Wis. 2d 752, 615 N.W.2d 187.

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.

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 if commenced within the time after the order is made provided by s. 893.73 (2).

History: 1979 c. 323.

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.

80.37 Lost records; how restored; effect. (1) Whenever the record of the laying out of any highway is lost or destroyed, the supervisors of the town in which the highway is located, upon notice being served on all interested parties in accordance with s. 80.05, may make a new record of the highway. The notice shall fix the time when and place where the supervisors will decide

upon making the new record. The notice shall specify as near as may be the highway for which the proposed record will be made. Notice need not be given to persons who waive the notice or consent to the making of the order either before or after it is entered.

(2) The supervisors shall meet pursuant to the notice given under sub. (1) and hear any arguments or evidence that may be offered for or against the proposed new record and make a new record as they consider proper. The supervisors may adjourn from time to time, and an entry of each adjournment shall be made in the record by the town clerk. If the supervisors find that the highway is a legal highway the record of which is lost or destroyed, they shall make a written order stating those facts and specifying the course, width and other pertinent description of the highway. The order shall be filed and recorded in the office of the town clerk, who shall note the time of recording the order in the record. Any number of highways may be included in one notice or order under this section. A failure or refusal to make a new record for any highway does not preclude a subsequent proceeding for that purpose.

(3) Any person through whose land a highway described in an order entered under sub. (2) passes may appeal from the order on the ground that the highway described in the order was not a legal highway in fact. The appeal shall be made in the time and manner provided for appealing from orders laying out highways, and proceedings shall be had on the appeal as in case of appeals from orders laying out highways. No person may call into question the regularity of proceedings under this section except owners of land on whom notice should have been served but in fact was not and persons claiming under those owners.

History: 1999 a. 97.

80.38 Changing streets into highways. (1) The town board of any town within which is situated any village or other plat duly certified and recorded and filed 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 the village or other plat as they deem necessary for the public use to be public highways, without any other survey or description than that made in the recorded and filed plat.

(2) If 6 or more freeholders residing within the limits of the village or other plat wish any streets in the plat to be so declared public highways and opened to public use, they may apply to the town board for that purpose in the manner provided in s. 80.02. Upon that application, the town board shall make and file an order, within 10 days, declaring the streets to be public highways or refusing so to do. In either case, any person considering himself or herself aggrieved by the order may appeal to the circuit court for the same county by filing with the town clerk a notice of appeal, specifying the grounds of appeal, within 20 days from the filing of the order, together with a written undertaking of the appellant, with one or more sufficient sureties, to be approved by the town clerk for the payment of all costs that may be awarded against the appellant, and paying to the clerk the fee prescribed in s. 814.61 (8) (am) 1. Within 20 days thereafter the town clerk shall deliver to the clerk of the circuit court all the papers in the case, together with the notice of appeal, with the date of service endorsed thereon, and pay the fee prescribed in s. 814.61 (8) (am) 1.; whereupon the clerk of the circuit court shall enter an action in the court record in which the appellant is the plaintiff and the town is the defendant. The issues as shown by the papers and the appeal shall be tried without further pleading, the same as in personal actions in circuit court, and judgment rendered and enforced as in other actions in which persons and municipal corporations are parties.

History: 1981 c. 317; 1993 a. 16; 1995 a. 27; 1999 a. 96.

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 the board 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, except that the board may not discontinue any part of a state trunk highway. 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 on the petition. The notice shall be published as a class 2 notice, under ch. 985. The notice shall also be given to the department of natural resources by serving a copy upon the secretary of natural resources either by registered mail or personally. If the board appoints a committee to act, the notice shall state the fact and the notice shall be signed by the commissioners, otherwise by the chairperson 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 chairperson 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 feels 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 the owner and the chairperson 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 the owner 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 s. 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 ss. 59.10 and 59.13.

(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.

History: 1971 c. 323 s. 27; 1981 c. 346; 1983 a. 27; 1991 a. 316; 1993 a. 184; 1995 a. 201, 225.

Cross-reference: See s. 840.11, requiring applicant for change in highway to file notice of pendency of the application.

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.

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

History: 1971 c. 164; 1993 a. 490; 1997 a. 172.

Cross Reference: See also s. NR 1.92, Wis. adm. code.

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.

This section does not authorize the recovery of damages for a loss of business due to the temporary closing of a street for construction purposes. *Weinandt v. Appleton*, 58 Wis. 2d 734 (1973).

80.48 Highways and streets to cemeteries and fairgrounds. (1) PETITION FOR. (a) Any cemetery, agricultural or industrial association owning land to which there is no laid out street or highway giving access to the land may file a petition with the clerk of the city, village or town where the land is located, praying that the city, village or town lay out a street or highway to the

association's land from the nearest street or highway which can be used as a convenient means of approach.

(b) The petition shall:

1. Be signed by the managing officers, board of trustees or directors of the association.

2. Set forth that:

a. The association owns land in the city, village or town which is used or intended to be used by a cemetery association for the burial of the dead or by an agricultural or industrial association for fairgrounds or industrial exhibitions; and

b. There is no laid out street or highway giving access to the association's land.

3. Contain a description of the land.

(bm) Whenever a petition is filed under par. (a) the common council, trustees or supervisors of the city, village or town 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. The notice shall be published as provided in s. 80.05. The notice shall contain a copy of the petition and state the time when and place where the council, trustees or supervisors will meet to take action upon the petition, which time shall be within 10 days after the notice is served.

(c) If at the meeting to take action on the petition the proper council, trustees or supervisors shall find the recitals in the petition to be true, they shall, within 5 days after the meeting, 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. (a) An order made under sub. (1) (c) shall require the petitioners to deposit with the treasurer of the proper municipality such sum as the authorities who made the order consider necessary to pay the costs and expenses of the proceedings to be held pursuant to the order. No further action shall be had on the petition until the deposit is made. When the deposit is made, the common council, trustees or supervisors shall make a further order fixing the time, not less than 10 days thereafter, when and place where a jury will be selected to pass upon the necessity for taking the land through which the proposed street or highway is to be laid.

(b) Notice of the time and place the jury will be selected shall be served upon the occupants of the land through which the proposed street or highway is to be laid, if any, as provided in s. 80.05 not less than 6 days before the time so fixed. If any portion of the land through which the proposed street or highway is to be laid is not actually occupied, the notice shall be published as a class 2 notice, under ch. 985, in the city, village or town where the land is located. The notice shall contain a description, as near as may be, of the premises to be taken and state that at the time and place named in the notice a jury will be selected for the purpose of passing upon the necessity for taking for the public use the land described therein.

(3) JURORS. (a) At the time and place specified in the notice given under sub. (2), the circuit judge of the county, the president of the village or the chairperson of the town in which the land sought to be taken lies shall issue a precept directed to the sheriff of the county or to any constable, naming the sheriff or constable. The precept shall direct the sheriff or constable to make a written list containing the names of 36 freeholders of the county who are qualified to serve as jurors in the circuit court and to return the list. After being sworn to perform the duties required to the best of his or her ability, without partiality, the sheriff or constable shall immediately make and deliver the list to the officer who issued the precept.

(b) From the list made under par. (a), each party, in person or by an agent or attorney, commencing with the petitioner, shall in turn strike a name from the list until each has stricken 12 names. If either party is absent or refuses to strike out the names, the officer who issued the precept shall appoint some person to strike 12 names for the absent or nonparticipating person. The officer shall

then summon the 12 persons whose names remain on the list in the manner prescribed under s. 756.05 to appear at the time and place mentioned in the summons 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 selected in the same manner to fill the vacancy, and for that purpose the proceedings may be adjourned from time to time.

(c) When 12 persons have been secured in accordance with par. (b), they shall be sworn by the officer who issued the precept to faithfully and impartially discharge the duties imposed upon them. The oath shall be filed with the city, village or town clerk.

(d) The number of persons listed and summoned shall be proportionately reduced if the jury is to consist of a number less than 12.

(4) FINDING AS TO NECESSITY OF TAKING; DAMAGES. (a) After the jurors selected under sub. (3) are sworn, the circuit or municipal judge, president or chairperson shall issue his or her precept directed to them and requiring that within 10 days they shall view the land specified in the precept and issue a decision, signed by each juror, as to whether it is necessary to take the land for public use as described in the petition. The jurors shall, at a time to be fixed by them, view the premises. The parties interested shall have notice of the time of, and may offer to the jury any evidence pertinent to, the inquiry. After viewing the premises and hearing the evidence the jury shall determine whether a necessity exists for taking the land and shall return its verdict to the officer who issued the precept.

(b) On receipt of the jury's verdict, the officer shall, as soon as possible, submit the verdict to the council, trustees or supervisors, and for that purpose may call a meeting of either body and deliver the verdict to them. The body to which the verdict is delivered shall, if in its 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 the cemetery, fairground or land used for industrial expositions. The street or highway so laid shall not be less than 49.5 feet nor more than 66 feet in width.

(c) The body issuing the order under par. (b) shall, in the order, appoint 3 disinterested residents of the county as commissioners. The commissioners shall, after notice to the owners or occupants of the land and after being sworn to support the U.S. constitution 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 the 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 the city or village or the superintendent of highways of the town who made the order under sub. (4) laying out the street or highway, upon the filing of the order with the city, village or town clerk, shall immediately open the street or highway, provided that the petitioner shall have paid to the city, village or town treasurer the damages awarded.

(6) APPEAL; COSTS. (a) Any person through whose land a street or highway is laid or the petitioner may, if dissatisfied with the damages awarded under this section, appeal to the circuit court of the county in which the land is located. The appeal is commenced by serving a notice of appeal and undertaking upon the opposite party, with at least 2 sureties, conditioned for the payment of all costs and damages which may be incurred if the appellant does not succeed. The notice and undertaking shall be filed with the city, village or town clerk, who shall be entitled to receive \$2 for fees in making return to the clerk of the circuit court as required under par. (b). An appeal made under this paragraph does not impair the right of the public to use the street or highway for the purpose of travel.

(b) Within 10 days after the notice and undertaking are filed and payment of the fees is made, the clerk with whom the notice and undertaking 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 the clerk of court's office. Upon filing with the clerk of circuit court, the appeal is considered an action pending in the circuit 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 appellant the plaintiff and the other party the defendant.

(c) The appeal shall be tried by a jury unless the jury is waived.

(d) Costs shall be allowed to the successful party. If the landowner is the successful party, the costs shall be added to the judgment. If the petitioner is the successful party, the costs shall be deducted from the judgment.

History: 1975 c. 94 s. 91 (9); 1975 c. 199; 1977 c. 272, 318, 447; 1977 c. 449 ss. 191, 497; 1979 c. 175 s. 53; 1989 a. 56 s. 258; 1991 a. 316; 1993 a. 184; 1995 a. 225; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997); 1997 a. 35; 1999 a. 97.

80.64 Widening of highways; establishment of excess widths. **(1)** With the approval of the governing body of the municipality in which a street or highway or part thereof is located, the county board, to promote the general welfare, may establish street and highway widths in excess of the widths in use and adopt plans showing the location and width proposed for any future street or highway, which shall not be subject to s. 80.32 **(2)**. Streets or highways or plans therefor established or adopted under this section shall be shown on a map showing present and proposed street or highway lines and, except in counties having a population of 500,000 or more, property lines and owners. The map shall be recorded in the office of the register of deeds. Notice of the recording shall be published as a class 1 notice, under ch. 985, in the territory in which the affected streets or highways are located. 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 recorded in the office of the register of deeds.

(2) The excess width for streets or highways in use for 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.

(3) In counties containing a population of 500,000 or more if, subsequent to the establishment of widths on streets or highways by a county board with the approval of the governing body of the municipality in which the streets or highways lie, in conformity with this section or s. 59.69, any area embracing a street or highway upon which a width has been established under this section is annexed to a city or village or becomes a city or village by incorporation, the city or village shall thereafter adhere to the established width, and shall not, subsequent to any annexation or incorporation, except with the approval of the county board, do any of the following:

(a) Alter or void the established width.

(b) Permit or sanction any construction or development which will interfere with, prevent or jeopardize the obtaining of the necessary right-of-way to such established width.

History: 1993 a. 301; 1995 a. 201, 225; 1997 a. 35.

80.65 Waste on highways. Persons owning or leasing lands abutting on any state, county or town highway, and operating thereon ice cream or custard stands or other like types of business, as a result of which operation the highway is cluttered and strewn with waste materials such as paper napkins, cups and the like, may be required by ordinance of the town or county having jurisdiction

to maintain the highway, to keep such business location clear of such wastes and to clean up such wastes on the highways within 250 feet of such lands, as appear to result from customer use of such lands. Such ordinance may provide a penalty of not to exceed \$200 and costs for each day's violation of the ordinance or imprisonment for not more than 30 days or both. Such ordinance shall be enforced by the county highway commissioner or town superintendent of highways.