

STATE OF MICHIGAN
COURT OF APPEALS

PLEASANT COMMUNITY CIRCLE and
HELEN HACKMAN, Trustee of the HELEN
HACKMAN TRUST,

Plaintiffs-Appellees,

v

TOWNSHIP OF CASCO,

Defendant-Appellant,

and

DEPARTMENT OF TREASURY,
DEPARTMENT OF TRANSPORTATION, and
DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellees,

and

ALLEGAN COUNTY DRAIN COMMISSION,
ALLEGAN COUNTY ROAD COMMISSION,
AMERITECH SERVICES, INC., MICHIGAN
GAS UTILITIES COMPANY, AT&T
MICHIGAN, INC., MCI WORLDCOM
NETWORK SERVICES, INC., CONSUMERS
ENERGY COMPANY, SPRINT
COMMUNICATIONS COMPANY, L.P.,
VILLAGE BANK AND TRUST, ABN AMRO
MORTGAGE GROUP, INC., FEDERAL HOME
LOAN MORTGAGE CORPORATION,
WILLIAM J. PETTER, Trustee of the WILLIAM
J. PETTER Trust, JOYCE R. PETTER, Trustee of
the JOYCE R. PETTER Trust, ARTHUR J.
HAYES, Trustee of the ARTHUR J. HAYES
Trust, MARCI HAYES, Trustee of the MARCI
HAYES Trust, BEN Z. SOSEWITZ, Personal
Representative of the Estate of ROCHELLE

UNPUBLISHED
July 21, 2009

No. 280231
Allegan Circuit Court
LC No. 06-039927-PZ

SOSEWITZ, JOYCE KING, EUGENE B.
WEISMAN, Trustee of the EUGENE B.
WEISMAN Trust, MIRIAM WEISMAN, Trustee
of the MIRIAM WEISMAN Trust, BEN Z.
SOSEWITZ, Trustee of the SOSEWITZ
DESCENDANTS Trust, JUNE TURBOV,
MARILYN BARTLETT, BONNIE JACOBSON,
DAVID BARTLETT, PHYLLIS BARTLETT,
STEVEN BARTLETT, MARA HAUSER, Trustee
of the MARA HAUSER Trust, SAM S. KING,
Trustee of the SAM S. KING Trust, RYAN G.
O'DESKY, LAUREN M. O'DESKY, GARY J.
GREENSPAN, DEBORAH GREENSPAN,
RICHARD LACHMAN, DIANE LACHMAN,
MASHA T. SILVERMAN and MICHAEL L.
SILVERMAN, Co-Trustees of the MASHA T.
SILVERMAN Trust, SHELDON CAREF, personal
Representative of the Estate of JACOB CAREF,
ANNE H. CAREF, VICTORIA TURBOV,
MINDY TURBOV, RAE NAN HAHN, a/k/a RAE
HAHN, PERETZ A. KATZ, REVA S. WHITE,
REVA S. WHITE Trust, JAMIE PINES, SAMUEL
PINES, DEBORAH PINES, GARY ALLEN
PINES, VICKIE E. PINES, MARY PINES,
JOSEPH LYNN, RUTH LYNN, IRA DEEMAR,
MICHAEL SCHWARTZ, SHARON DEEMAR
SZACHOWICZ, CARL SCHWARTZ, LOIS
SCHWARTZ, and SOUTH HAVEN /CASCO
TOWNSHIP SEWER AND WATER
AUTHORITY,

Defendants.

PLEASANT COMMUNITY CIRCLE and
HELEN HACKMAN, Trustee of the HELEN
HACKMAN TRUST,

Plaintiffs-Appellees,

v

TOWNSHIP OF CASCO,

Defendant-Appellant,

and

No. 281836
Allegan Circuit Court
LC No. 06-039927-PZ

DEPARTMENT OF TREASURY,
DEPARTMENT OF TRANSPORTATION, and
DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellees,

and

ALLEGAN COUNTY DRAIN COMMISSION,
ALLEGAN COUNTY ROAD COMMISSION,
AMERITECH SERVICES, INC., MICHIGAN
GAS UTILITIES COMPANY, AT&T
MICHIGAN, INC., MCI WORLDCOM
NETWORK SERVICES, INC., CONSUMERS
ENERGY COMPANY, SPRINT
COMMUNICATIONS COMPANY, L.P.,
VILLAGE BANK AND TRUST, ABN AMRO
MORTGAGE GROUP, INC., FEDERAL HOME
LOAN MORTGAGE CORPORATION,
WILLIAM J. PETTER, Trustee of the WILLIAM
J. PETTER Trust, JOYCE R. PETTER, Trustee of
the JOYCE R. PETTER Trust, ARTHUR J.
HAYES, Trustee of the ARTHUR J. HAYES
Trust, MARCI HAYES, Trustee of the MARCI
HAYES Trust, BEN Z. SOSEWITZ, Personal
Representative of the Estate of ROCHELLE
SOSEWITZ, JOYCE KING, EUGENE B.
WEISMAN, Trustee of the EUGENE B.
WEISMAN Trust, MIRIAM WEISMAN, Trustee
of the MIRIAM WEISMAN Trust, BEN Z.
SOSEWITZ, Trustee of the SOSEWITZ
DESCENDANTS Trust, JUNE TURBOV,
MARILYN BARTLETT, BONNIE JACOBSON,
DAVID BARTLETT, PHYLLIS BARTLETT,
STEVEN BARTLETT, MARA HAUSER, Trustee
of the MARA HAUSER Trust, SAM S. KING,
Trustee of the SAM S. KING Trust, RYAN G.
O'DESKY, LAUREN M. O'DESKY, GARY J.
GREENSPAN, DEBORAH GREENSPAN,
RICHARD LACHMAN, DIANE LACHMAN,
MASHA T. SILVERMAN and MICHAEL L.
SILVERMAN, Co-Trustees of the MASHA T.
SILVERMAN Trust, SHELDON CAREF,
personal Representative of the Estate of JACOB
CAREF, ANNE H. CAREF, VICTORIA
TURBOV, MINDY TURBOV, RAE NAN

HAHN, a/k/a RAE HAHN, PERETZ A. KATZ,
REVA S. WHITE, REVA S. WHITE Trust, JAMIE
PINES, SAMUEL PINES, DEBORAH PINES,
GARY ALLEN PINES, VICKIE E. PINES, MARY
PINES, JOSEPH LYNN, RUTH LYNN, IRA
DEEMAR, MICHAEL SCHWARTZ, SHARON
DEEMAR SZACHOWICZ, CARL SCHWARTZ,
LOIS SCHWARTZ, and SOUTH HAVEN
/CASCO TOWNSHIP SEWER AND WATER
AUTHORITY,

Defendants.

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

In Docket No. 280231, defendant Casco Township appeals as of right the trial court's order resolving the parties' cross-motions for summary disposition by vacating the public dedication of Workmen's Circle Park in the Workmen's Circle Lake Shore Subdivision in Casco Township, and vesting title to the park property in plaintiff Pleasant Community Circle and defendants Ira Deemar and Sharon Deemar Szachowicz, as tenants in common. In Docket No. 281836, Casco Township appeals by leave granted the trial court's final judgment granting the same relief in accordance with its prior order. We reverse and remand for further proceedings.

The Workmen's Circle Lake Shore Subdivision was platted in 1925 by the original owners of the property. The plat contained the following dedication of the platted streets and a park to the public:

Know All Men by these Presents: that we Isidor Deemer and Sarah Deemer his wife and Alex N. Schwartz and Anna Schwartz his wife as proprietors have caused the land embraced in the annexed plat to be surveyed, laid out and platted, to be known as Workmen's Circle, Lake Shore Subdivision, Casco Township, Allegan County, Michigan, and that *the streets, avenues and park are hereby dedicated to the use of the public.* [Emphasis added.]

The township board accepted the plat at a township meeting in January 1925.

In 2006, Pleasant Community Circle (the "Association"), an association of homeowners who reside in the Workmen's Circle Lake Shore Subdivision, the Mount Pleasant Lake Shore Subdivision, and the Mount Pleasant Manor Subdivision, and plaintiff Helen Hackman, the trustee of a trust that owns three lots in the Workmen's Circle Lake Shore Subdivision, brought this action to vacate the public dedication of Workmen's Circle Park pursuant to MCL 560.221 *et seq.* The township and plaintiffs filed cross-motions for summary disposition on the issue whether the park dedication was ever accepted by the township. The trial court concluded that there was never any formal or informal acceptance of the park property and, accordingly, vacated the dedication of the park.

A circuit court's decision with regard to a motion for summary disposition is reviewed de novo. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). The parties sought summary disposition under MCR 2.116(C)(10), which tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion under this subrule, a court "must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law." *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

"It is well established that a dedication in a plat of a street, alley, or other land for a public use, whether viewed as a grant or an offer, is ineffectual unless accepted by the public." *Vivian v Roscommon Co Bd of Rd Comm'rs*, 433 Mich 511, 517-518; 446 NW2d 161 (1989). Offers of dedication of property to the public may be accepted by a governmental authority: (1) formally by resolution; (2) informally through the expenditure of public money for repair, improvement, and control of the property; or (3) informally through public use. *Eyde Bros Dev Co v Roscommon Co Bd of Rd Comm'rs*, 161 Mich App 654, 664; 411 NW2d 814 (1987).¹ "[T]he requirement of public acceptance by a manifest act is necessary to prevent the public from becoming responsible for land that it neither wants nor needs, and to prevent the land from becoming waste property." *Marx v Dep't of Commerce*, 220 Mich App 66, 77; 558 NW2d 460 (1996). "A court has jurisdiction to vacate land that has been dedicated for public use but has not been accepted by public authorities." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 113; 662 NW2d 387 (2003).

The township first argues that the trial court erred in concluding that it did not formally accept the public dedication of Workmen's Circle Park when it accepted the plat at a township meeting. We disagree.

In *Marx, supra*, this Court examined whether a township's approval of a plat constituted acceptance of the plat's dedication to the public. In that case, a 1911 plat dedicated a strip of land known as Birch Lane to the public and Bay Township approved the plat. *Marx, supra* at 69. After noting a conflict between this Court's decisions in *Bangle v State Treasurer*, 34 Mich App 287; 191 NW2d 160 (1971), and *Salzer v State Treasurer*, 48 Mich App 34; 209 NW2d 849

¹ This Court additionally held:

[A]cceptance must be made within a reasonable time after the offer. [*Wayne Co v Miller*, 31 Mich 447, 449 (1875)]; *Field v Village of Manchester*, 32 Mich 279, 281 (1875); *Nelson v Roscommon Co Rd Comm*, [117 Mich App 125, 131; 323 NW2d 621 (1982).] What constitutes a reasonable time is largely governed by the surrounding circumstances. As long as the original proprietor or one claiming through him takes no steps to withdraw the offer, it is considered to be continuing. *White v Smith*, 37 Mich [291], 295-296 (1877); *Ackerman v Spring Lake Twp*, 12 Mich App 498[, 501]; 163 NW2d 230 (1968). [*Eyde Bros Dev Co, supra*.]

(1973) (stating that the *Bangle* Court “erroneously equated township approval of a plat with formal acceptance” of a public dedication), the *Marx* Court stated:

[O]ur Supreme Court recently held that the purpose of the requirement of public acceptance by a manifest act is necessary to prevent the public from becoming responsible for land that it neither wants nor needs and to prevent the land from becoming waste property. We believe that the Court’s ruling in *Salzer, supra*, is consistent with this principle. Furthermore, the language found in judicial decisions concerning this issue suggests that a more specific act than approval of a plat is required. In *Kraus [v Dep’t of Commerce, 451 Mich 420, 425; 547 NW2d 870 (1996)]*, the Supreme Court stated that acceptance must be disclosed through a *manifest* act by the public authority either formally *confirming or accepting* the dedication, and ordering the opening of such street, or by exercising authority over it, in some of the ordinary ways of improvement or regulation. The *Eyde* Court held that acceptance of dedicated parcels may be (1) formal by *resolution*; (2) informal through the expenditure of public money for repair, improvement and control of the roadway; or (3) informal through public use. Mere approval of a plat, without any reference to acceptance of property dedicated by the plat, is insufficient under these standards to constitute acceptance. We resolve the conflict by adopting the law of *Salzer*. Accordingly, we conclude that defendant township’s approval of the original plat in the present case does not constitute acceptance of the dedicated land. [*Marx, supra* at 77 (citations and internal quotations omitted).]

In this case, the minutes of the township meeting indicate that the plat of the Workmen’s Circle subdivision was presented for approval, a motion was made that the township board accept the plat, and the motion was granted.² The minutes do not contain any specific reference to acceptance of dedicated land. Therefore, pursuant to this Court’s holding in *Marx*, the trial court properly concluded that the township board did not formally accept the public dedication. On appeal, the township attempts to distinguish this case from *Marx* by pointing out that in *Marx*, Bay Township only *approved* the plat, whereas in this case, the township *accepted* the plat. While the *Marx* Court held that Bay Township’s “approval” of the plat did not constitute formal acceptance of the public dedication, the Court placed no emphasis on whether the township used the term “approve” or “accept.” Instead, the Court emphasized that in order to formally accept dedicated property, a public authority must accept it by a manifest act. The authority must make specific reference to accepting the dedicated property, not merely accepting or approving the plat that dedicates the property. In this case, the township made no reference to the dedicated park. The township further asserts on appeal that under our Supreme Court’s holding in *Kraus, supra*, its acceptance of the plat constituted acceptance of the dedication. See *Kraus, supra* at 429-430 (holding that a McNitt resolution only qualifies as formal acceptance

² The minutes of the township meeting state, “The plat of the Workmen’s Circle was presented for approval by the Township Board. Motion made . . . that the Board accept said plat motion carried.”

where it expressly identifies a platted road or the recorded plat in which the road was dedicated). But, *Kraus* and the other cases cited by the township on appeal all involved McNitt act³ resolutions and are therefore distinguishable from this case. See *Id.* at 429 (stating that “the McNitt act required county road commissions to take over township roads”), and *Marx, supra* at 73 (distinguishing acceptance of a dedicated road by a McNitt resolution from other evidence of acceptance). The trial court properly concluded that there was no formal acceptance in this case.

The township also argues that it is entitled to rely on the statutory presumption of acceptance in § 255b of the Land Division Act, MCL 560.255b, which became effective December 22, 1978. Section 255b provides:

(1) Ten years after the date the plat is first recorded, land dedicated to the use of the public in or upon the plat shall be presumed to have been accepted on behalf of the public by the municipality within whose boundaries the land lies.

(2) The presumption prescribed in subsection (1) shall be conclusive of an acceptance of dedication unless rebutted by competent evidence before the circuit court in which the land is located, establishing either of the following:

(a) That the dedication, before the effective date of this act and before acceptance, was withdrawn by the plat proprietor.

(b) That notice of the withdrawal of the dedication is recorded by the plat proprietor with the office of the register of deeds for the county in which the land is located and a copy of the notice was forwarded to the state treasurer, within 10 years after the date the plat of the land was first recorded and before acceptance of the dedicated lands.

Addressing this statute in *Vivian, supra* at 523, our Supreme Court stated:

We conclude that clause (a) means that a withdrawal before acceptance prior to December 22, 1978, rebuts the presumption of acceptance set forth in § 255b(1). So reading clause (a) avoids a construction of § 255b that would divest property rights that became vested before the enactment of § 255b.

The Court also explained that “[t]he term ‘withdrawal’ in clause (a) means withdrawal in the manner provided by the common law, including use by an adjoining property owner inconsistent with continuation of the offer, recording notice of withdrawal, or commencement of an action against the governing body to vacate the offer of dedication.” *Id.* at 523 n 31. The property owner has the burden of proving withdrawal of the offer to dedicate. *Id.* at 516 n 10; *Kraus, supra*.

³ MCL 247.1 *et seq.*, repealed by 1951 PA 51.

Plaintiffs argue that the public dedication was withdrawn because the property owners used Workmen's Circle Park in a manner inconsistent with the notion of a public dedication. Whether there has been an effective withdrawal by inconsistent use depends on the specific circumstances of each case. *Kraus, supra* at 430. Withdrawal can be found where "the proprietors use the property in a way that is inconsistent with public ownership." *Id.* at 431.

In *Vivian, supra* at 520-521, withdrawal was accomplished where the area in question was entirely blocked off to the public, was thickly overgrown with large trees and underbrush, the lot owner's garage was partially located on the area, and the lot owner cared for and maintained the area for over 40 years. The Court found that those circumstances were inconsistent with the idea that the public had any rights in the property. *Id.* at 520. In *Kraus, supra* at 431, the Court noted that "examples of inconsistent uses have included erected buildings, fenced-in enclosures, and planted trees." In *Marx, supra* at 80, the Court held that the plaintiffs' construction of a private driveway on a parcel "clearly evinced an intent to regard the parcel as their own property," thereby constituting a withdrawal of a dedication. Conversely, in *Higgins Lake, supra* at 116, this Court held that the presumption of acceptance was not rebutted where there was no action to exclude the public and the public continued to use the area.

In this case, plaintiffs presented evidence of various activities by lot owners or the Association with respect to Workmen's Circle Park before 1978, such as the construction of stairs and an elevator allowing for easier access to the beach area of the park. The Association also created an "Indian Trail" leading into the park, and installed a seawall for the purpose of preserving the shoreline. However, many of these activities are not necessarily inconsistent with the notion of public ownership. In addition, although there was evidence of recent attempts to restrict access to the park, the area was not actually blocked off before 1978, and there was evidence showing that the area was accessible to, and used by, the general public before 1978.⁴ Thus, the evidence created an issue of fact whether there was a withdrawal of the dedication due to inconsistent use. Further, given the evidence of regular public use, there is an issue of fact whether there was an informal acceptance by public user. Continued and regular public use by the general public is all that is necessary for there to be acceptance by public use of a park. Municipal involvement with respect to park land is not necessarily required to establish acceptance by user. See *Village of Lakewood Club v Rozek*, 51 Mich App 602, 603-604; 215 NW2d 780 (1974), and *Smith v Auditor Gen*, 380 Mich 94, 99; 155 NW2d 822 (1968).

Accordingly, because the evidence established a genuine issue of material fact regarding acceptance of the public dedication of Workmen's Circle Park, the trial court erred in granting plaintiffs' motion for summary disposition and vacating the public dedication.

⁴Plaintiffs rely on *Schurtz v Wescott*, 286 Mich 691, 695-696; 282 NW 870 (1938), and *Nelson, supra*, to argue that use by Association members and their guests does not constitute public use of the area, because such use is founded on private rights, which is not in the character of public use. However, these cases do not preclude consideration of the use made of the area by residents in the adjacent Mount Pleasant subdivisions in determining whether there was public use of the area.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Kurtis T. Wilder

/s/ Alton T. Davis