

NO. A06-0215

State of Minnesota
In Supreme Court

John Wesley Hebert, Linda W. Hebert, John Wallace Hebert,
Jennifer E. Arbuckle, Brian J. Arbuckle, William F. Schoenwetter,
Barbara Schoenwetter, Lewis J. Schoenwetter, Claire Schoenwetter,
and Helen F. Weber by Roger M. Weber, her attorney in fact,
Respondents,

vs.

City of Fifty Lakes,

Appellant.

BRIEF, ADDENDUM AND APPENDIX OF
APPELLANT CITY OF FIFTY LAKES

Paul D. Reuvers (#217700)
Pamela J.F. Whitmore (#232440)
IVERSON REUVERS
9321 Ensign Avenue South
Bloomington, MN 55438
(952) 548-7200

Attorneys for Appellant

Kirk Schnitker (#235611)
Jon W. Morphew (#287301)
SCHNITKER & ASSOCIATES, P.A.
1330 – 81st Avenue Northeast
Spring Lake Park, MN 55432
(763) 252-0114

Attorneys for Amicus Curiae
The Minnesota Eminent Domain Institute

Susan L. Naughton (#259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1232

Attorneys for Amicus Curiae League of Minnesota Cities

Scott M. Lucas (#291997)
OLSON & LUCAS
One Corporate Center I, Suite 575
7401 Metro Boulevard
Edina, MN 55439
(952) 224-3644

Attorneys for Respondents

Thomas H. Boyd (#200517)
WINTHROP & WEINSTINE, P.A.
Suite 3500
225 South Sixth Street
Minneapolis, MN 55402
(612) 604-6400

Attorneys for Amicus Curiae
Builders Association of Minnesota

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
STANDARD OF REVIEW	4
ARGUMENT	5
I. THE CITY'S CONSTRUCTION OF NORTH MITCHELL LAKE ROAD IN 1971 REPRESENTS A TAKING OF RESPONDENTS' PROPERTY	5
II. RESPONDENTS' CLAIM TO PRESENT, IMMEDIATE AND EXCLUSIVE POSSESSION OF A PORTION OF A LONG-ESTABLISHED PUBLIC ROAD IS TIME-BARRED	11
CONCLUSION	19
ADDENDUM	20
APPENDIX	21

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	5
STATE CASES	
<i>Abbott v. City of Prior Lake</i> , No. C7-02-53, 2002 Minn. App. LEXIS 959 (Minn. Ct. App. Aug. 20, 2002).....	13, 20
<i>Alevizos v. Metro. Airports Comm'n</i> , 216 N.W.2d 651 (Minn. 1974)	1, 5, 9
<i>Barfnecht v. Town Bd. of Hollywood Twp.</i> , 232 N.W.2d 420 (Minn. 1975)	4
<i>Beer v. Minn. Power & Light Co.</i> , 400 N.W.2d 732 (Minn. 1987)	1, 12, 16, 17
<i>Bodah v. Lakeville Motor Express, Inc.</i> , 663 N.W.2d 550 (Minn. 2002)	4, 5
<i>Brooks Inv. Co. v. City of Bloomington</i> , 232 N.W.2d 911 (Minn. 1975)	1, 5, 6, 7, 8, 14, 16, 17
<i>Czech v. City of Blaine</i> , 253 N.W.2d 272 (Minn. 1977)	14
<i>Denman v. Gans</i> , 607 N.W.2d 788 (Minn. App. 2000)	16
<i>Equitable Life Assurance Soc'y v. Erin, Inc.</i> , C3-98-2070, 1999 Minn. App. LEXIS 541 (Minn. Ct. App. May 18, 1999).....	17
<i>Finnegan v. Gunn</i> , 292 N.W. 22 (Minn. 1940).....	15, 16
<i>Johnson v. City of Plymouth</i> , 263 N.W.2d 603 (Minn. 1978)	6
<i>Lucas v. Indep. School Dist. No. 284</i> , 433 N.W.2d 94 (Minn. 1988).....	13
<i>Mill City Heating & Air Conditioning Co. v. Nelson</i> , 351 N.W.2d 362 (Minn. 1984)	13, 16
<i>In re Petition of McGinnis</i> , 536 N.W.2d 33 (Minn. App. 1995)	13

<i>Spaeth v. City of Plymouth</i> , 344 N.W.2d 815 (Minn. 1984).....	1, 5, 9, 10
<i>Stewart v. State</i> , 105 N.Y. 254, 11 N.E. 652 (1887).....	12
<i>Thomsen v. State by Head</i> , 170 N.W.2d 575 (Minn. 1969).....	1, 14
<i>Westling v. County of Mille Lacs</i> , 581 N.W.2d 815 (Minn. 1998).....	5
<i>Ziebarth v. Nye</i> , 44 N.W. 1027 (Minn. 1890).....	1, 17

STATE STATUTES

Minn. Stat. § 117.025 (2006)	11
Minn. Stat. § 117.025, subd. 2 (2006).....	1, 6, 13
Minn. Stat. § 160.05, subd. 5 (2006).....	4
Minn. Stat. § 508.02 (2006)	1, 13, 15, 18
Minn. Stat. § 508.20 (2006)	13
Minn. Stat. § 508.25 (2006)	1, 13
Minn. Stat. § 541.01, et seq.....	15
Minn. Stat. § 541.02 (2006)	1, 3, 11, 12, 17
Minn. Stat. § 541.05 (2006)	17

MISCELLANEOUS

27 Am.Jur.2d, <i>Eminent Domain</i> § 498 (1966).....	12
---	----

STATEMENT OF ISSUES

I. WHETHER A TAKING OCCURS WHEN A MUNICIPALITY CONSTRUCTS A VALUABLE PUBLIC IMPROVEMENT ON PRIVATE PROPERTY THAT SIGNIFICANTLY AND DETRIMENTALLY AFFECTS THE VALUE OF THAT PROPERTY?

The district court held in the affirmative. The court of appeals reversed.

Apposite cases:

Spaeth v. City of Plymouth, 344 N.W.2d 815 (Minn. 1984).
Brooks Inv. Co. v. City of Bloomington, 232 N.W.2d 911 (Minn. 1975).
Alevizos v. Metro. Airports Comm'n, 216 N.W.2d 651 (Minn. 1974).
Thomsen v. State by Head, 170 N.W.2d 575 (Minn. 1969).

Apposite statutes:

Minn. Stat. § 117.025, subd. 2 (2006).
Minn. Stat. § 508.02 (2006).

II. WHAT STATUTE OF LIMITATIONS APPLIES TO CLAIMS MADE AGAINST A MUNICIPALITY FOR THE CONSTRUCTION OF A PUBLIC ROAD ON PRIVATE PROPERTY?

The district court held the 15-year statute of limitations set forth in Minnesota Statutes § 541.02 barred Respondents' 34-year old claims. The court of appeals reversed.

Apposite cases:

Beer v. Minn. Power & Light Co., 400 N.W.2d 732 (Minn. 1987).
Brooks Inv. Co. v. City of Bloomington, 232 N.W.2d 911 (Minn. 1975).
Ziebarth v. Nye, 44 N.W. 1027 (Minn. 1890).

Apposite statutes:

Minn. Stat. § 508.02 (2006).
Minn. Stat. § 508.25 (2006).
Minn. Stat. § 541.02 (2006).

STATEMENT OF THE CASE AND FACTS

Respondent landowners own six adjacent lakeshore lots on or around Lake Mitchell which abut up to the south side of North Mitchell Lake Road in the City of Fifty Lakes, Minnesota. *Appellant's App.* A1-A3 (*Compl.* ¶¶ 1, 3, 5). Respondents refer to their property in the Complaint as the Hebert property, the Schoenwetter property and the Weber property.¹ *Id.* In May 2005, Respondents commenced a declaratory judgment action against the City of Fifty Lakes (the "City") in Crow Wing County District Court, for ejectment and trespass, alleging the City's construction of North Mitchell Lake Road on a portion of their property in 1971 significantly and detrimentally affected the value of their property. *Id.* at A4-A5 (*Compl.* ¶¶ 13, 21). The constructed gravel road encroached onto the Hebert property by over 30 feet; the Schoenwetter property by at least 30 feet (over 49 feet at one point); and the Weber property by over 29 feet at one point. *Id.* at A4, A8-A9 (*Complaint* ¶¶ 14, 15, 16). Since 1971, the City has continuously maintained North Mitchell Lake Road as a public road. *Id.* at A4-A5 (*Compl.* ¶¶ 13, 20, 21).

In lieu of an Answer, the City brought a Rule 12 Motion to Dismiss, asserting (1) a taking had occurred in 1971 when the City built the road on Respondents' property; and (2) the statute of limitations barred their claims. *Id.* at A10-A20. The Honorable Richard A. Zimmerman, Judge of District Court, Ninth Judicial District, granted the City's Motion to Dismiss. *Id.* at A21-A26. The district court entered judgment on December 7, 2005 and Respondents filed a Notice of Appeal on January 27, 2006. *Id.* at A27-A28.

¹ Respondents' property has been registered as Torrens property since 1953. *Appellant's App.* A1-A2.

On February 27, 2007, in an unpublished opinion, the court of appeals reversed the district court's decision. *Id. at* A29-A39. This Court granted the City's petition for further review on May 15, 2007.

SUMMARY OF ARGUMENT

Respondents' claim to present, immediate and exclusive possession of the portion of their property which has been occupied by a public gravel road, constructed in 1971, is time-barred. Minnesota Statutes Section 541.02 provides for a 15-year statute of limitations for the recovery or possession of property taken by a municipality, whether the property is abstract or Torrens. (2006).

The construction of a public road represents a valuable public improvement and the placement of a public road on private property represents a taking. A municipality may take private property through formal eminent domain proceedings or by physically appropriating the property for a public purpose, which occurred here. To judicially limit municipalities' power to take private property for a legitimate public purpose impermissibly interferes with municipalities' police powers and impermissibly deprives those other landowners who prefer compensation for governmental interference with their land.

Public policy requires the resolution of potential claims stemming from the construction of long-established public roads on private property. Of the 135,000 miles of roads in Minnesota, local roads account for 123,000 miles of that total.²

² Minnesota Department of Transportation Office of Transportation Data & Analysis, Frequently Asked Questions, <http://www.dot.state.mn.us/tda/html/faq.html#quiz3#quiz3> (last visited Mar. 29, 2007); A40-A42. There are about 12,000 miles of Interstate, U.S., and Minnesota State highways (9% of the total).

Approximately 70,000 miles of these roads are gravel.³ Nearly all of the 2,700 local units of government in Minnesota manage highways, streets and roads. If not corrected, the court of appeals' decision will make all municipalities susceptible to substantial unknown liabilities, with potentially no statute of limitations, stemming from long-established public roads. Consequently, this Court should recognize a maximum 15-year statute of limitations for claims stemming from the construction of public roads on private property.⁴

STANDARD OF REVIEW

The standard of review is de novo. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2002).

In reviewing cases involving dismissal for failure to state a claim upon which relief can be granted pursuant to Rule 12.02(e), the question before the appellate court is whether the complaint sets forth a legally sufficient claim for relief. . . . The reviewing court must consider only the facts

³ *Id.*

⁴ In addition to the statute of limitations for a taking, statutory dedication provides for a six-year period to establish a public road:

When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not. . . . This subdivision shall apply to roads and streets except platted streets within cities.

Minn. Stat. § 160.05, subd. 5 (2006). The dedication-by-use statute is based on the fact public use “serves to give the owner actual notice that, if he means to dispute the rightfulness of the public use, he must assert his right within a statutory period by physical action or suit.” *Barfnecht v. Town Bd. of Hollywood Twp.*, 232 N.W.2d 420, 422 (Minn. 1975).

alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party.

Id.

ARGUMENT

I. THE CITY'S CONSTRUCTION OF NORTH MITCHELL LAKE ROAD IN 1971 REPRESENTS A TAKING OF RESPONDENTS' PROPERTY.

The determination of whether a taking has occurred represents a question of law.

Alevizos v. Metro. Airports Comm'n, 216 N.W.2d 651 (Minn. 1974). Determination of a taking requires a highly fact specific analysis of the particular circumstances surrounding each case. *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998). The United States Supreme Court also has held “[w]here real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having an artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

This Court has long held the appropriate test for a taking involves examining whether a governmental action substantially interferes with a landowner's use and enjoyment of his land – put another way, the property owner, for all practical purposes, no longer has the use or enjoyment of his land because of the government action. *Brooks Inv. Co. v. City of Bloomington*, 232 N.W.2d 911, 920 (Minn. 1975) (finding a taking when the city built a street across private property since the *use and enjoyment of that part of the property was, for all practical purposes, lost and destroyed*) (emphasis added); *Spaeth v. City of Plymouth*, 344 N.W.2d 815 (Minn. 1984) (holding continual

flooding on landowner's property constituted a taking by the city); *see also*, Minn. Stat. § 117.025, subd. 2 (2006) (defining a taking as "every interference . . . with the possession, enjoyment, or value of private property"). A taking can occur either as a result of the physical appropriation of property or as the result of interference with the ownership, possession, enjoyment or value of property. *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978).

In *Brooks Investment Company*, this Court recognized construction of a portion of a street over private property, prior to the acquisition of a 30-foot easement or the commencement of eminent domain proceedings, constituted a taking. 232 N.W.2d at 920. This Court explained:

The general rule as to the rights acquired through physical condemnation combined with the construction of valuable improvements for the public benefits is stated in 2 Nichols, *Eminent Domain* (Rev. 3 ed.) § 6.21, as follows:

'Where an entity, vested with the power of eminent domain, enters into actual possession of land necessary for its purposes, with or without the consent of the owner, and the latter remains inactive while valuable improvements are being constructed thereon, the use of which require a continued use of the land, the appropriation is treated as equivalent to title by appropriation. * * * Such taking is frequently referred to as a 'common law' taking or a 'de facto' taking.'

Id. This Court explained further:

It is well settled that a de facto taking creates in the condemnor a protectable legal interest in the property which is equivalent to title by condemnation; the condemnor can be forced to compensate to the original owner of the property, but the owner cannot eject the condemnor nor can he require discontinuance of the public use.

Id. This Court concluded:

Applying these principles to the facts of this case, it seems clear that a substantial interference with [respondent's] property, so as to constitute a taking in the constitutional sense, occurred when the city built a street across his property. His use and enjoyment of that part of his property over which the street was built were, for all practical purposes, lost and destroyed.

Id.

Brooks Investment Company is controlling. Similar to the City of Bloomington in *Brooks*, the City of Fifty Lakes constructed a portion of a public road on private property prior to the acquisition of an easement or the commencement of eminent domain proceedings.⁵ The court of appeals attempted to distinguish *Brooks* by describing North Mitchell Lake Road as a “mere” gravel road which was not permanent in nature, did not involve a valuable improvement and represented only a “temporary” intrusion. Gravel roads, however, represent valuable public improvements. A majority of the roads in Minnesota – 70,000 miles out of 135,000 – are gravel and could hardly be considered temporary improvements, as they involve substantial resources to construct, operate and maintain. The court of appeals’ suggestion that a public road that has existed for over 34 years represents a temporary intrusion is contrary to law and common sense. Contrary to the court of appeals’ analysis, the movement of a gravel road along a lakeshore is not a simple task and can involve substantial resources, particularly in view of existing environmental and shoreland rules and regulations. Regardless of the nature and extent of the resources necessary to move a public road, Respondents have been deprived of the

⁵ The extent of the encroachment is also similar – *Brooks* involved an encroachment of 30 feet, whereas the present case involves an encroachment ranging from 29 feet to 49 feet.

use and enjoyment of that portion of their property since the road was built.

Consequently, the Court of Appeals' requirement of proof of a permanent, physical improvement on the property (i.e., paving the street, installing curbs and gutters) before finding a taking must be reversed.

The court of appeals' decision directly contradicts this Court's express holding that the placement of a public road on private property directly interferes with the use of private property and represents a taking. *Brooks*, 232 N.W.2d at 920. As in *Brooks*, the construction of North Mitchell Lake Road involved more than simply spreading some gravel. The construction of any public road involves site preparation and construction of the base and the traveling surface. Since 1971, the public has used North Mitchell Lake Road for travel to access Lake Mitchell and the surrounding areas -- a constant, interference of the use of that portion affected by the road's location.

Additionally, from the perspective of landowners generally, the "interference with use" standard provides the public with a compensatory remedy not only for physical interferences, but also non-physical interferences such as noise, flooding or pollution. To require a permanent, physical improvement before finding a taking would jeopardize the rights of all those other landowners who cannot use their property because of non-physical interferences, such as noise, smell or water, and who, unlike the landowners

here, want monetary compensation.⁶ Common law, as well as the Constitution, recognizes this type of monetary relief for landowners. *Spaeth*, 344 N.W.2d at 815 (flooding); *Alevizos*, 216 N.W.2d at 651 (airplane noise). For instance, in *Alevizos*, property owners alleged the Minneapolis Airport Commission's (MAC's) operation of the Minneapolis-St. Paul Airport generated noise and pollution which interfered with the use and enjoyment of the landowners' property, amounting to a taking. *Id.* at 656. Like the present case, no formal eminent domain proceedings had occurred. *Id.* at 657. Unlike the present case, the governmental entity in *Alevizos* had not physically possessed any of the landowner's land. *Id.* at 661-662. This Court, when reviewing whether airplane noise can "take" property, stated "societal efforts to protect certain land uses from irritating interferences . . . indicate that the use and enjoyment of one's property without unduly irritating noise, vibrations and gaseous fumes have arisen to the status of a property right for which a property owner may demand compensation." *Alevizos*, 216 N.W.2d at 660-662. Even though the interference did not result from a physical dispossession or construction of a "valuable" improvement on the land, this Court found the right to use one's property in relative freedom from irritating noise and interference, along with proof of decrease in market value, to support a takings claim. *Id.*

⁶ The protection afforded by inverse condemnation proceedings acknowledges the reality of physical appropriation of property by the government without the initiation of formal condemnation proceedings. Respondents, however, will likely argue they never "elected the remedy" of inverse condemnation and, without doing so, there cannot be a taking. A taking, however, does not depend on the legal theories asserted by a particular claimant.

This Court consistently has applied the *Alevizos* standard, even in those instances when a governmental actor has not built a permanent physical structure on the affected property. For instance, in *Spaeth*, a landowner whose property consistently flooded as a result of how the City of Plymouth constructed adjoining berms, brought an inverse condemnation action for monetary compensation. *Spaeth*, 344 N.W.2d at 820. The city in *Spaeth* argued against a taking, stating the city had not placed a physical structure on the property and therefore no proof of a taking existed. *Id.* at 821. The Court rejected this argument, holding “[t]hat standard need not be applied to determine whether a compensable taking has occurred where, as here, government physically appropriates property . . . or [w]here government action results in . . . occupation of property, there certainly has been a taking.” *Id.* at 821. This Court further clarified the meaning of permanence related to length of the interference with the use, not to the type, of physical structure. *Id.* at 822 (“[p]ermanent in this context refers to a servitude of indefinite duration, even if intermittent”).

If this Court adopts a permanent structure requirement, rather than permanence in interference with how the landowner uses his or her land, the *Spaeth* and *Alevizos* decisions would carry no precedential value. Such a result is contrary to public policy. Landowners damaged by a governmental action would have no monetary recourse – a clear violation of the Constitution. Municipalities would be hindered in their ability to move forward with improvements which did not involve a physical structure of substantial cost – i.e., constructing all roads with curb/gutter or building concrete holding ponds rather than natural reservoirs – resulting in an increased financial cost to the

public. Moreover, opting for proof of a permanent structure, rather than level of interference, would open the floodgates of litigation against the various local governmental entities charged with the maintenance and operation of the local roads, the majority of which are gravel.

The construction of North Mitchell Lake Road on Respondents' property clearly constituted a common law or *de facto* taking of Respondents' property. Respondents readily admit the City dispossessed them of their land and that the construction of the road "significantly and detrimentally affected the value of their property." *See generally, Appellant's App.* A1 - A6. The record undeniably establishes the City built the road in its current location in 1971 and has continuously maintained it since that time. *Id.* Finally, no one disputes the public continuously has used the road since that time. Simply because the City used gravel to construct North Mitchell Lake Road does not diminish the permanent interference the road has had on the use and enjoyment of their property since 1971. To the contrary, Respondents readily concede the placement of the road on their property has substantially interfered with their property, precisely the reason they initiated this lawsuit. *Appellant's App.* A5 (*Complaint* ¶ 21); *see also* Minn. Stat. § 117.025 (2006). This interference clearly amounts to a taking of Respondents' property.

II. RESPONDENTS' CLAIM TO PRESENT, IMMEDIATE AND EXCLUSIVE POSSESSION OF A PORTION OF A LONG-ESTABLISHED PUBLIC ROAD IS TIME-BARRED.

Respondents' claims are barred by the 15-year statute of limitations set forth in Minnesota Statutes Section 541.02 (2006):

No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff, the plaintiff's ancestor, predecessor, or grantor, was seized or possessed of the premises in question within 15 years before the action.

The 15-year statute of limitations imposed by Minnesota Statutes Section 541.02 "is applicable in cases in which there has been an actual taking of property." *Id.* This Court explained:

It has long been established that a claim for compensation by the owner of property appropriated for public use may be barred by the lapse of time. *E.g., Stewart v. State*, 105 N.Y. 254, 11 N.E. 652 (1887). It is not uncommon for states to provide a special statute of limitations in eminent domain proceedings when the burden of taking the initiative in applying for compensation is thrust upon the owner; and since public policy requires the speedy closing up of such proceedings, so that the expense may be definitely known before further improvements are undertaken, it is customary to provide a much shorter period of limitations than in ordinary civil actions. 27 Am.Jur.2d, *Eminent Domain* § 498 (1966).

Beer v. Minn. Power & Light Co., 400 N.W.2d 732, 736 (Minn. 1987). Because the construction of a public road on a portion of Respondents' property constituted a taking in 1971, the court of appeals erred by failing to hold the statute of limitations bars Respondents' claims.

A. Torrens Property is Subject to a Common Law Taking.⁷

Torrens law establishes a limited right, including a limited time frame, to indefeasible title from adverse claims not registered with the registrar of titles at the time

⁷ The court of appeals recognized Torrens property could be subject to a common law taking, but held "the nature of the damages caused by respondent's action here more readily constitutes a trespass than a de facto taking." *Appellant's App.* A37. As discussed more fully above, the construction of a public road on a portion of Respondents' property constitutes a taking.

of registration. *See generally In re Petition of McGinnis*, 536 N.W.2d 33, 35 (Minn. App. 1995) (citing Minn. Stat. § 508.25). This allows prospective owners of Torrens property, who do not have the benefit of a title search, to take ownership free and clear of unsuspecting liens or claims.⁸

Notwithstanding Torrens registration, however, Minnesota Statutes Section 508.02 (2006) expressly provides, other than adverse possession claims, registered Torrens land becomes subject to the same burdens and incidents which otherwise attach by law to unregistered land including, but not limited to, eminent domain; i.e., a taking by a municipality. *See generally* Minn. Stat. § 508.02 (2006).⁹ Section 117.025, subdivision 2 defines a “[t]aking and all words and phrases of like import include every interference, under the power of eminent domain, with the possession, enjoyment, or value of private property.” Minnesota Statutes Section 508.25 further states Torrens owners are subject to

⁸ The adoption of the Torrens system intended to simplify the transfer of real property by eliminating the need for repeated examinations of land titles upon the sale of the land. *See Lucas v. Indep. School Dist. No. 284*, 433 N.W.2d 94, 96 (Minn. 1988) (stating “[p]rior to 1901, all real property in Minnesota was abstract property). Torrens registration provides a means to determine the state of title through the inspection of a single document, the certificate of title, except for interests enumerated by law and in the statutes. Minn. Stat. § 508.20 (2006); Minn. Stat. § 508.25 (2006); *see also Mill City Heating & Air Cond. Co. v. Nelson*, 351 N.W.2d 362, 364-65 (Minn. 1984). The exceptions include the *power* of a municipality to take property for the public good – whether by statutory eminent domain or *de facto* eminent domain. To expand the breadth of exceptions for Torrens creates a type of immunity from the effects of statutory municipal police power, including its land use planning power.

⁹ This present decision is in conflict with another unpublished court of appeals’ decision regarding Torrens property. *See Abbott v. City of Prior Lake*, No. C7-02-53, 2002 Minn. App. LEXIS 959 (Minn. Ct. App. Aug. 20, 2002) (holding inverse condemnation claim for Torrens property barred by the statute of limitations).

encumbrances created by law or Constitution. Here, the absence of formal eminent domain proceedings does not transform what would otherwise be considered a taking, into a simple trespass. When a municipality appropriates private property for a public purpose, a landowner may seek compensation. *Czech v. City of Blaine*, 253 N.W.2d 272, 274 (Minn. 1977) (denial of rezoning request constituted an unconstitutional taking). Using governmental eminent domain power to take property or access to property for roads, without starting formal proceedings, is not unusual - whether against Torrens or fee property. *Thomsen v. State by Head*, 170 N.W.2d 575, 578 (Minn. 1969) (court found taking by the state when the state altered an abutting property owner's access to a roadway); *Brooks Inv. Co. v. City of Bloomington*, 232 N.W.2d 911, 920 ("de facto" taking occurred where city constructed street across tract of land without first initiating condemnation proceeding).

In this case, the City, as a governmental entity with the power of eminent domain, substantially interfered with the landowners' use of their property by creating a public road in 1971. Interestingly, the court of appeals noted the City could institute eminent domain proceedings in the future to take the property. It is illogical, however, to suggest eminent domain proceedings could be instituted today to affect a formal taking of the property for a public purpose, but that the actual invasion of property in 1971 did not constitute a taking. This effectively means there is no statute of limitations for takings claims against a municipality stemming from the construction of a gravel road on private

property.¹⁰ Such a holding ignores that Respondents have not had the ability to build, play, walk, garden or otherwise use the affected portion of their land since 1971.

Respondents have creatively framed their issues in an attempt to avoid the “taking” label by describing the City’s construction of the road on their property as “adverse possession.” As the district court observed, however, “[a] taking is not a form of adverse possession, it a power of eminent domain.”

Torrens registration does not enable Torrens property owners unlimited, unfettered time to enforce property rights. To hold otherwise would violate notions of justice and finality. *See generally* Minn. Stat. § 508.02 (2006); *Finnegan v. Gunn*, 292 N.W. 22 (Minn. 1940). Imposing a statute of limitations for the construction of public roads on private property, whether the property is abstract or Torrens, is important so that municipalities can properly allocate public resources for public improvements without fear of unlimited potential liabilities. Moreover, not placing time limits on claims by Torrens land owners is contrary to the purpose for having time limitations, particularly as over time memories fade and evidence becomes lost. The various lengths of limitations periods set forth in Chapter 541 of the Minnesota Statutes reflect legislative intent to limit actions. *See* Minn. Stat. § 541.01, et seq. (2006).

¹⁰ Under the court of appeals’ rationale, it would be advantageous for plaintiffs to delay bringing claims allowing their property values to increase for 10, 15 or 35 years as was done here. Instead of valuing property at the date of the taking in 1971, municipalities will be potentially faced with current claims for the acquisition of right-of-way at today’s market values. Such claims could cripple small municipalities that never envisioned the potential exposure created by the construction of “mere” gravel roads decades earlier.

In *Finnegan*, this Court concluded “[n]othing in the Torrens system indicates that the ancient concepts of equity are not applicable.” *Id.* at 23, *see also Mill City Heating & Air Conditioning Co. v. Nelson*, 351 N.W.2d 362, 365 (Minn. 1984) (requiring a subcontractor to provide pre-lien notice of a mechanic’s lien to purchasers of Torrens property who had not yet filed their ownership interest with the registrar of titles, because failure to do so produced an “unfair and unreasonable” result). Both the legislature and this Court have recognized the importance of statutes of limitations to limit liability for old and stagnant claims. As a result, the Court should reaffirm Respondents do not have an unlimited amount of time to enforce their property rights. *Beer*, 400 N.W.2d at 736 (“It has long been established that a claim for compensation by the owner of property appropriated for public use may be barred by the lapse of time.”) Accordingly, a municipality may take Torrens property, but landowners have, at most, 15 years to enforce any property rights.

B. Respondents’ Trespass and Ejectment Claims are Unavailing.

Respondents claim the City represents a continuing trespasser. However, once the taking occurred in 1971, Respondents no longer legally possessed the land. *Brooks Inv. Co.*, 232 N.W.2d at 920. Without legal possession, Respondents cannot maintain either an ejectment or a trespass action against the City. *Id.* Additionally, Minnesota Statutes Section 508.02 prevents adverse possession claims against Torrens. Ejectment actions allow for possible recovery of real property from an adverse possessor. *Denman v. Gans*, 607 N.W.2d 788, 793 (Minn. App. 2000). As such, the Respondents do not have a viable ejectment claim, if the underlying adverse possession claim does not exist with respect to

Torrens property. Regardless, as discussed at length, the City, as a governmental entity with power to condemn, has not adversely possessed Respondents' land, but rather took the land or, at least, access to use the land for public use 34 years ago.¹¹

The applicable statute of limitations for bringing an ejectment action or trespass claim also has lapsed. Specifically, Minnesota Statutes Section 541.02 prohibits real property owners from bringing claims for recovery of real estate or the possession thereof 15 years after the seizure of the property. Minn. Stat. §541.02 (2006); *see also Beer*, 400 N.W.2d at 736. Minnesota Statute Section 541.05, subdivision 1(3) (2006) places additional time limitations for bringing actions for trespass upon real property, limiting those claims to six years from the time the trespass occurs. Minn. Stat. § 541.05 (2006).

The Minnesota Supreme Court specifically has reviewed the issue of trespass involving road cases and municipalities. This Court found the triggering event for trespass from construction of a road occurs at the time the road was built, and does not continue as long as the road is in place. *Ziebarth v. Nye*, 44 N.W. 1027, 1028 (Minn. 1890).¹² In *Ziebarth*, the Court found trespass occurred at the time of construction since “it is not at all probable that the grade of the street will ever be restored to the natural

¹¹ In a de facto taking, this Court expressly held that the condemnor can be forced to compensate the original owner of the property, but the owner cannot eject the condemnor nor can he require discontinuance of the public use. *Brooks Investment Co.*, 232 N.W.2d at 920.

¹² The court of appeals considered *Ziebarth* in connection with the construction of a ring road near a mall in *Equitable Life Assurance Soc’y v. Erin, Inc.*, C3-98-2070, 1999 Minn. App. LEXIS 541 (Minn. Ct. App. May 18, 1999). It held the construction of the road represented a single trespass and the statute of limitations expired. *Id.*

level of the land, and neither defendant nor plaintiff could lawfully go thereon and restore the same to its former condition.” *Id.* The same scenario occurred with North Mitchell Lake Road – the preparations, the grading, the initial construction all occurred in 1971. Thus, because Section 508.02 of the Minnesota Statutes makes Torrens property subject to the same burdens and incidents as other property, including trespass actions, any trespass claim by Respondents now would be barred. Minn. Stat. § 508.02 (2006).¹³

By not recognizing a statute of limitations and allowing ejectment and trespass claims to proceed without any finality, this decision will have the adverse impact of subjecting municipalities to potentially financially devastating claims, particularly for small rural municipalities such as the City of Fifty Lakes, which has a population of only 392 people. Public policy clearly dictates a limitation period for such claims to achieve the goal of finality of decisions. Otherwise, municipalities will be forced to speculate far into the future concerning significant potential liabilities for every public project which may have occurred decades earlier.

¹³ Respondents’ pleading of trespass in their Complaint acknowledges their Torrens land may be trespassed upon – a burden and incident of other property.

CONCLUSION

For the foregoing reasons, the City respectfully requests this Court affirm the trial court's dismissal of this action.

Respectfully submitted,

IVERSON REUVERS

Dated: June 14, 2007

By 

Paul D. Reuvers, #217700

Pamela J. Whitmore, #232440

Attorneys for Appellant City of Fifty Lakes

9321 Ensign Avenue South

Bloomington, MN 55438

Telephone: (952) 548-7200

ADDENDUM

	Page
<i>Abbott v. City of Prior Lake</i> , No. C7-02-53, 2002 Minn. App. LEXIS 959 (Minn. Ct. App. Aug. 20, 2002)	ADD-1
<i>Equitable Life Assurance Soc'y v. Erin, Inc.</i> , No. C3-98-2070, 1999 Minn. App. LEXIS 541 (Minn. Ct. App. May 18, 1999)	ADD-5

2 of 2 DOCUMENTS

Carolyn J. Abbott, petitioner, Appellant, vs. City of Prior Lake, Respondent.

C7-02-53

COURT OF APPEALS OF MINNESOTA

2002 Minn. App. LEXIS 959

August 20, 2002, Filed

NOTICE: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

SUBSEQUENT HISTORY: Petition of Carolyn J. Abbott Review Denied October 29, 2002.

PRIOR HISTORY: Scott County District Court. File No. 200100025.

DISPOSITION: Affirmed.

COUNSEL: Mark J. Kallenbach, Minneapolis, MN (for appellant).

Pierre N. Regnier, Jessica E. Schwie, Jardine, Logan & O'Brien, P.L.L.P., St. Paul, MN (for respondent).

JUDGES: Considered and decided by Schumacher, Presiding Judge, Peterson, Judge, and Minge, Judge.

OPINION BY: PETERSON

OPINION

UNPUBLISHED OPINION

PETERSON, Judge

Carolyn Abbot sought mandamus to compel condemnation of her land, alleging that the City of Prior Lake flooded it. On appeal from summary judgment for the city, Abbott argues that (a) because the land at issue is Torrens property, the district court erred in ruling that the statute of limitations in *Minn. Stat. § 541.02* (2000) precluded her from seeking condemnation based on the city's 1981 construction of a dam; and (b) fact issues exist regarding whether part of the flooding occurred because of respondent's 1999 and 2000 re-grading of nearby public property. We affirm.

FACTS

Abbott petitioned for mandamus to compel inverse condemnation of [*2] her property by the city. She alleged that the city's 1999 and 2000 re-grading of a park near her property caused flooding of her property. Later, Abbott moved to amend her petition to include a claim that the city's 1981 construction of a dam caused flooding of her property. The district court granted the city summary judgment, ruling that Abbott's claim based on construction in 1981 was untimely under *Minn. Stat. § 541.02* (2000) and that there was no admissible evidence supporting the remainder of Abbott's allegations.

DECISION

Mandamus is the proper vehicle for asserting a claim for inverse condemnation. *Stenger v. State*, 449 N.W.2d 483, 484 (*Minn. App.* 1989), *review denied* (*Minn.* Feb. 28, 1990). On appeal from summary judgment, we ask whether (1) there are any genuine issues of material fact and (2) the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (*Minn.* 1990). In addressing these questions, we view the record in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (*Minn.* 1993). [*3] ¹

1 Abbott alleges that district court findings based on documentary evidence may be "disregarded" on appeal, asserting that when findings are based on documentary evidence, an appellate court "is as able as the trial court to determine credibility[.]" This is incorrect. The rules were amended in 1985 to state that findings of fact "whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous[.]" *Minn. R. Civ. P.* 52.01; *see First Trust Co. Inc. v. Union Depot Place Ltd. P'ship*, 476 N.W.2d 178, 181-82 (*Minn. App.* 1991) (explaining 1985 amendment of *Minn. R. Civ. P.* 52.01), *review*

denied (Minn. Dec. 31, 1991). We are not free to "disregard" a district court's findings of fact that are based on documentary evidence.

1. Under *Minn. Stat. § 541.02* (2000), a property owner has 15 years to seek inverse condemnation of property for a *taking* of property, and under *Minn. Stat. § 541.05* (2000), a property [*4] owner has six years to seek inverse condemnation for a *loss of access* to property. *Beer v. Mn. Power & Light Co.*, 400 N.W.2d 732, 736 (Minn. 1987) (citing *Forsythe v. City of South St. Paul*, 177 Minn. 565, 570, 225 N.W. 816, 817 (1929)); see *Reynolds Constr. Inc. v. City of Champlin*, 539 N.W.2d 614, 618 n.2 (Minn. App. 1995) (noting that potential inverse-condemnation claim would be subject to 15-year limitation period of *Minn. Stat. § 541.02*), *review denied* (Minn. Dec. 20, 1995). Here, the district court (a) noted that the parties "agree" that the dam caused at least some of the present flooding of Abbott's land; (b) ruled that flooding caused by the dam was the equivalent of a physical taking; and (c) denied Abbott's motion to amend her mandamus petition to allege a claim based on a taking caused by the dam because the claim was beyond the 15-year limitations period of *Minn. Stat. § 541.02*. Abbott argues that because her property is Torrens property and because *Forsythe*, *Beer*, and *Reynolds* do not explicitly address Torrens property, they are not binding here. [*5] ²

2 Abbott alleges that the district court's failure to explicitly address the Torrens nature of her property means that the district court "likely failed to consider the legal ramifications of Abbott's lots being 'Torrens property.'" We cannot assume that the district court committed such an error. *Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949). Therefore, we must assume that the district court implicitly rejected Abbott's argument.

Beer, *Forsythe*, and *Reynolds* involve the current 15-year limitations statute or its predecessor. Under the statute:

No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff, the plaintiff's ancestor, predecessor, or grantor, was seized or possessed of the premises in question within 15 years before the action.

Minn. Stat. § 541.02. Abbott challenges the district court's application of this statute here, essentially arguing that (a) the city's [*6] conduct upon which she seeks to make a dam-based inverse-condemnation claim is the equivalent of the city adversely possessing her property;

(b) under *Minn. Stat. § 508.02* (2000), the city cannot adversely possess her property because it is Torrens property; and therefore (c) the adverse-possession statute of limitations cannot apply to her inverse-condemnation claim.

But Abbott admits that *Forsythe* and *Beer* did not specify whether they involved Torrens or abstract property. Thus, the only case that definitely does not involve Torrens property is *Reynolds*, a case on which the district court did *not* rely. ³ Also, because none of the cases states that it does not apply to Torrens property, Abbott is asking this court to draw a distinction that neither the supreme court nor this court has drawn, despite three previous opportunities to do so.

3 In arguing that the Torrens nature of her property should produce a result different from that suggested by *Beer*, *Forsythe*, and *Reynolds*, Abbott's attorney included in the appendix to Abbott's brief an affidavit dated *after* this appeal was taken, addressing the property at issue in *Reynolds*. The city wants this court to strike the affidavit as not properly before this court but did not move this court to do so. See Minn. R. Civ. App. P. 127 (stating, unless another form is prescribed by the rules, relief sought from appellate courts is to be sought by motion). On this record, we will take judicial notice that the property in *Reynolds* was abstract property. See *Rogers v. Moore*, 603 N.W.2d 650, 653 n.1 (Minn. 1999) (taking judicial notice that property at issue was abstract property).

[*7] Additionally, even if Abbott correctly reads *Forsythe* and *Beer* to mean that the city's conduct that could prompt an inverse-condemnation claim should be treated as an attempt by the city to adversely possess the property, Abbott's argument assumes that the *only* basis for the rulings in *Forsythe* and *Beer* is the rationale that inverse condemnation is a species of adverse possession. *Beer*, however, indicates otherwise. In response to an argument that there was no limitation period for inverse-condemnation claims, *Beer* states it has long been established that a claim for compensation by the owner of property appropriated for public use may be barred by the lapse of time.

Beer, 400 N.W.2d at 736 (citing *Stewart v. State*, 105 N.Y. 254, 11 N.E. 652, 7 N.Y. St. 358 (1887)). *Beer* then explains that it is not uncommon for states to provide a special statute of limitations in eminent domain proceedings when the burden of taking the initiative in applying for compensation is thrust upon the [property] owner; and since public policy requires the speedy closing up of such proceedings, so that the expense may be definitely

known before further [*8] improvements are undertaken, it is customary to provide a much shorter period of limitations than in ordinary civil actions.

Beer, 400 N.W.2d at 736 (citing 27 Am. Jur. 2d, *Eminent Domain* § 498). While Minnesota has not enacted statutes of limitations specifically applicable to condemnation and inverse-condemnation claims, *Beer* explains that *Forsythe* "endorsed the application of general statutes of limitations in such circumstances" and distinguished cases in which property was damaged from those in which property was actually taken for public use without compensation. *Beer*, 400 N.W.2d at 736. *Beer* then concluded that although the 15-year limitation period imposed by Minn. Stat. § 541.02 (1986) is applicable in cases in which there has been an actual taking of property, we hold that in actions for inverse condemnation or compensation for damages resulting from the limitation of access only, where the public authority is not in adverse possession of the land-owner's property, the six-year statute of limitations is applicable.

Id. (emphasis added).⁴ Thus, *Beer* involved both the supreme [*9] court's recognition that Minnesota lacks legislatively enacted statutes of limitations specific to condemnation and inverse-condemnation claims and its attempt to solve that problem by filling those gaps with generally applicable statutes of limitations. For this reason, adopting Abbott's argument that those statutes of limitations do not apply to cases involving Torrens property would be contrary to the supreme court's attempt to solve the problem presented in *Beer*.

4 Because Abbott's property is Torrens property, it cannot be adversely possessed. Minn. Stat. § 508.02 (2000). Therefore, the city cannot be in "adverse possession" of Abbott's land. Thus, a literal reading of *Beer* could suggest that the six-year statute of limitations is applicable. In that case, Abbott's dam-based claim would be untimely.

2. In an adverse-possession case, Minn. Stat. § 541.02 requires that the plaintiff (or her predecessor) be "seized or possessed of the premises [*10] in question within 15 years before the beginning of the action." Minn. Stat. § 541.02. Also, registered land must be registered as a fee-simple interest. Minn. Stat. § 508.04. Citing these two statutes, Abbott argues that because her property is Torrens property, she has, and always has had, fee-simple title to it, and therefore has been "seized" of the property at all times. Thus, she concludes, she meets the statute's 15-year seizure limit and her inverse-condemnation action is timely under the statute. This, however, is not an action for adverse possession; it is an action for inverse condemnation. Additionally, adopting

this argument would essentially mean that there is no statute of limitations for inverse-condemnation claims involving Torrens property. And such a holding would be inconsistent with the portions of *Beer* indicating that policy favors resolution of inverse-condemnation claims so that the cost of government projects can be determined. *Beer*, 400 N.W.2d at 736; cf. Minn. Stat. § 645.17(1) (2000) (stating, in determining intent of legislature, court must assume [*11] legislature does not intend an absurd result).

3. Citing *Forsythe*, 177 Minn. at 570, 225 N.W. at 818, Abbott argues that where an injury is continuing, she may recover for that portion of the damages incurred during the six years before the action was filed. Abbott's reliance on *Forsythe* to support this "continuing tort" argument is misplaced. In *Forsythe*, the defendant "conceded that plaintiff is entitled to recover such damages as accrued within six years before the suit was commenced." *Forsythe*, 177 Minn. at 570, 225 N.W. at 818. Moreover, under *Beer*, damages in an inverse-condemnation case are to be determined as of the date of the interference with the land and are to be set at the amount by which the market value of the property has decreased:

It is the interference with a property right which gives rise to a right to commence inverse condemnation proceedings. The actionable interference, however, is not-as the respondent contends-the limitation of access to his bait business with damages measured by the reduction in its profitability. The compensable injury is the interference with the right of access to the highway from his [*12] real property measured by the diminution in the market value of the property.

Beer, 400 N.W.2d at 735. Because the diminution of the market value of the property occurred when the dam caused the property to be susceptible to flooding (or susceptible to more flooding than that associated with the wetlands originally on the property), it is not clear that any damages related to construction of the dam were suffered during the six years before this action was commenced.

4. In support of her allegations that re-grading the park caused additional flooding of her property, Abbott submitted a real-estate agent's affidavit. Based on this affidavit, Abbott argues that there is a fact question regarding whether the re-grading caused flooding on her land in addition to flooding caused by the dam. The allegations in the affidavit that the re-grading of the park increased the amount of water on Abbott's land are contrary to the allegations in the affidavits submitted by the city on those points.

For purposes of a summary judgment:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, [*13] and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Minn. R. Civ. P. 56.05. Here, while the district court ruled that the agent could testify regarding the water level on Abbott's land, it ruled that the agent lacks personal knowledge * * * at least based upon the information contained in his affidavit, to render an opinion on the causation of the flooding of [Abbott's] property.

The district court therefore refused to consider the affidavit and, consistent with Abbott's deposition testimony that the dam rather than the re-grading caused the flooding, ruled that no fact question existed regarding whether re-grading the park caused additional flooding.

Generally, lay-witness testimony in the form of "opinion or inferences" is admissible if it is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact issue.

Minn. R. Evid. 701. The agent's affidavit states that (a) he had "significant experience in real estate matters and real estate development;" (b) he first saw Abbott's [*14] land six or seven years ago and is familiar with the water level on Abbott's land; (c) the park "abuts" Ab-

bott's land; (d) after the re-grading of the park, the water level on Abbott's land was higher; and (e) "given that the dam or dike constructed by [the city] in 1981 has not been changed, I have concluded that the only explanation for the additional flooding of Abbott's [land] this spring, is due to [the city's] change of grade of [the park]."

This affidavit reflects personal knowledge that the water level on Abbott's land was higher after the re-grading. But the affidavit contains nothing more than a conclusory opinion that the re-grading caused the higher water level. The affidavit does not even attempt to describe how the re-grading changed the contour of the land or the flow of water across the land. It is undisputed that affidavits must be based on the affiant's personal knowledge. Without some explanation of how the effects of the re-grading observed by the agent increased the water level on Abbott's property, there was no basis for the district court to conclude that the agent's opinion is rationally based on his perceptions. Cf. *Urbaniak Implement Co. v. Monsrud*, 336 N.W.2d 286, 287 (Minn. 1983) [*15] (noting that affidavits opposing summary judgment must be more than affidavits of unsupported conclusory facts). Therefore, we must affirm the district court's determination that the agent's affidavit was insufficient to show that he had personal knowledge of the cause of the flooding.

Affirmed.

1 of 1 DOCUMENT

The Equitable Life Assurance Society of the United States, Respondent, vs. Erin,
Inc., d/b/a Midas Muffler, Appellant.

C3-98-2070

COURT OF APPEALS OF MINNESOTA

1999 Minn. App. LEXIS 541

May 18, 1999, Filed

NOTICE: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

PRIOR HISTORY: Hennepin County District Court. File No. 9710121. Hon. Tanya M. Bransford.

DISPOSITION: Affirmed in part, reversed in part, and remanded.

COUNSEL: Dean C. Eyler, Bricker L. Lavik, Dorsey & Whitney, L.L.P., Minneapolis, MN, (for respondent).

Thomas J. Flynn, Daniel L. Bowles, Larkin, Hoffman, Daly & Lindgren, Ltd., Bloomington, MN, (for appellant).

JUDGES: Considered and decided by Peterson, Presiding Judge, Davies, Judge, and Halbrooks, Judge.

OPINION BY: DAVIES

OPINION: UNPUBLISHED OPINION

DAVIES, Judge

This is an appeal from summary judgment holding appellant liable for breach of a commercial lease. We affirm in part, reverse in part, and remand.

FACTS

On October 7, 1982, appellant Erin, Inc., d/b/a Midas Muffler, signed a 15-year lease for a free-standing building at Southdale Center. The lease was first with Allied Central Stores, Inc., which subsequently sold its interest in the rental property to CPS Realty Partnership, which then, in 1990, sold its interest to respondent Equitable Life Assurance Society (Equitable). About the time

Equitable commenced [*2] this action for payments allegedly owed under the lease during its ownership, it sold the property to yet another owner.

The lease required appellant to pay a common-area maintenance charge and 50% of all property taxes and special assessments on the leased property. Appellant has not, however, paid the taxes or common-area maintenance charge since 1984. And, but for a single letter from respondent in January 1996, it appears that none of the first three landlords (those named above) tried to collect the property taxes or the common-area maintenance charge from appellant after 1984. But then, in June 1997, respondent sued appellant seeking payment of the tax obligation.

Appellant's answer denied liability, claiming the lease had been orally modified to delete the tax obligation. n1 Appellant's answer also raised a counterclaim for recoupment based on respondent's construction of a ring road on the Southdale property. Appellant asserts that the ring road has interfered with its possession of the leased property. On September 8, 1998, the district court entered summary judgment, denying the counterclaim and awarding respondent back taxes, along with costs and attorney fees. This [*3] appeal followed.

n1 Before the 1990 property purchase, appellant gave respondent two estoppel letters. The first letter stated that the common-area maintenance charge and then the tax obligation had been orally deleted from the lease. The second estoppel letter stated that appellant would, beginning in 1991, pay property taxes as the lease specified. The direct estoppel effect of these letters was not reached by the district court, the issue was not raised on appeal, and we express no opinion on the legal effect of the letters.

DECISION

In reviewing summary judgment, this court determines: (1) if there is a genuine issue of material fact; and (2) whether the prevailing party was entitled to judgment as a matter of law. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). All documents and facts must be viewed in the light most favorable to the party against whom judgment was entered. *Id.*

I.

The statute of frauds prevents oral modification of a lease if the lease is [*4] for longer than a year. *Minn. Stat. § 513.05* (1998); *Alexander v. Holmberg*, 410 N.W.2d 900, 901 (Minn. App. 1987). But the statute of frauds does not apply to modification of a lease to the extent the parties have performed as modified. *Alexander*, 410 N.W.2d at 901. In that circumstance, "it remains for the trier of fact to determine if and when the lease was modified, what were the terms, and appropriate damages." *Id.*

This case is similar to *Alexander* in that both cases involve a tenant not paying according to the lease and alleging that the contract had been orally modified. *See id.* at 900 (tenant claimed rent was modified). Here, as in *Alexander*, appellant offers evidence that payments less than the contractual amount were accepted. *See id.* (tenant offered evidence of receipts for monthly payments less than contractual amount). And, as in *Alexander*, whether the lease was orally modified is a question of fact and summary judgment was inappropriate. *Id.* The summary judgment is therefore reversed, and the matter remanded for trial on that question.

We do not reach [*5] the estoppel issues. Appellant asserts the exact same facts for its estoppel claims as for its part-performance claim. If it prevails in establishing these facts and proving part performance, its estoppel claim is superfluous. Similarly, if it cannot establish the facts necessary for its part-performance argument, it cannot prevail in the estoppel argument.

II.

Appellant concedes that the ring road that is the subject of its counterclaim for recoupment was built in 1990 and that the counterclaim was not raised until 1997, but argues that the court erred by concluding the claim was barred by the statute of limitations. The statute of limitations for trespass upon real estate is six years. *Minn. Stat. § 541.05*, subd. 1(3) (1998). The statute of limitations begins to run when a claim becomes actionable. *Capitol*

Supply Co. v. City of St. Paul, 316 N.W.2d 554, 555 (Minn. 1982).

Appellant argues that the ring road is a continuous trespass and the statute of limitations, thus, has not run. But the supreme court has long held that building a road on another's property is a single act and not a continuous trespass. *Ziebarth v. Nye*, 42 Minn. 541, 544, 44 N.W. [*6] 1027, 1028 (1890). The single act of building the road was the end of the offense and only the injury lingers. *Id.*

For the proposition that the ring road is a continuous interference, appellant cites *Northern States Power Co. v. Franklin*, 265 Minn. 391, 397, 122 N.W.2d 26, 30 (1963). But appellant's reliance is misplaced. "The problem of whether the trespass is continuing, or a single permanent trespass * * * depends on the character of the invasion and the structures erected * * * ." *Id.* at 397, 122 N.W.2d at 31. In *Franklin*, the failure to remove two steel towers, as demanded, supported the theory of continuing trespass. *Id.* at 397, 122 N.W.2d at 30. But, here, the character of the invasion is precisely the same as in *Ziebarth*, a road built on the property of the claimant. The *Ziebarth* court decided the road was not in the character of a continuing trespass and we conclude that the same is true for the ring road here. The offense was not "continuous," and the statute of limitations ran from construction of the ring road.

Alternatively, appellant argues that, even if the statute of limitations has run [*7] on its trespass claim, it should be able to bring the claim as one in recoupment. But a recoupment defense is allowed only if the recoupment arises from the same transaction as the claim against which recoupment is asserted. *Household Fin. Corp. v. Pugh*, 288 N.W.2d 701, 704 (Minn. 1980).

Appellant relies on *Hoppman v. Persha*, 190 Minn. 480, 252 N.W. 229 (1934), for the proposition that its claim sounds in recoupment and is not barred by the statute of limitations. But *Hoppman* did not involve the statute of limitations.

"Considerations of basic fairness underlie the special treatment afforded a recoupment defense relative to a limitation period." *Pugh*, 288 N.W.2d at 704. That is why the doctrine is limited to defenses "arising out of some feature of the transaction upon which the plaintiff's action is grounded." *Id.* at 705 (quoting *Bull v. United States*, 295 U.S. 247, 262, 55 S. Ct. 695, 700, 79 L. Ed. 1421 (1935)). Here, the parties' claims arise from distinct transactions--building a road and failing to pay under the terms of a written lease. And applying the statute of limitations works no unfairness. We [*8] affirm the summary judgment on appellant's counterclaim.

1999 Minn. App. LEXIS 541, *

Affirmed in part, reversed in part, and remanded.