

NO. A06-0215

State of Minnesota
In Supreme Court

John Wesley Hebert, et al.,

Respondents,

vs.

City of Fifty Lakes,

Appellant.

Brief of *Amicus Curiae*
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ISSUE

The user statute provides that any road or any portion of a road that has been used and maintained continuously for at least six years as a public highway by a road authority shall be deemed dedicated to the public. The user statute does not apply to “platted streets within cities.” Does the user statute apply to unplatted portions of a city street that have deviated from the platted path?

INTRODUCTION

The League of Minnesota Cities (LMC) has a voluntary membership of 830 out of 854 cities in Minnesota. LMC represents the common interests of cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, advocacy, and insurance services. LMC has a public interest in this appeal as a representative of the hundreds of cities throughout the state responsible for gravel roads.¹ We have a particular interest in clarifying that Minn. Stat. § 160.05 (2006) (“the user statute”) applies to unplatted portions of a city street that have deviated from the platted path.

In this case, Respondents sued seeking trespass damages and ejection of the City from the portion of their properties that the City encroached on in 1971 when it laid a gravel road that partially deviated from the platted path. The trial court granted the City’s Rule 12 motion-to-dismiss holding that a *de facto* taking had occurred in 1971 and the statute of limitations for challenging the taking had long passed. The court of appeals reversed holding that the degree of interference by the gravel road was not substantial enough to constitute a taking, but rather, was more similar to the temporary intrusion of a continuing trespass.

This case will have a significant impact throughout the state. As noted by Appellant, 70,000 of the 123,000 miles of local roads in Minnesota are gravel.

<http://www.dot.state.mn.us/tda/html/faq.html#quiz3#quiz3> (Mar. 29, 2007). Cities incur

¹ Pursuant to Minn. R. Civ. App. P. 129.03, LMC certifies that this brief was not authored in whole or in part by counsel for either party to this appeal, and that no other person or entity made a monetary contribution to its preparation or submission.

substantial expense in designing, laying and maintaining gravel roads, and the public relies on their existence. Many gravel roads – like the road at issue in this case – have existed for decades. And it is likely that surveys of the 70,000 miles of local gravel roads would reveal that a significant number of them have deviated from their platted path to a certain extent because of engineering decisions, accommodations made for the natural terrain, or human error. The six-year statute-of-limitations in the user statute must apply to these deviations to protect the public’s interest in these long-established public roads.

STATEMENT OF THE CASE AND FACTS

The League concurs with Appellant’s statement of the case and facts.

SUMMARY OF ARGUMENT

Appellant’s Brief demonstrates why the court of appeal’s decision was erroneous. The League concurs with Appellant’s legal arguments, which will not be repeated here. Instead, this brief will focus on why the user statute applies to unplatted portions of a city street that have deviated from the platted path.

While the specific issue of the statute-of-limitations in the user statute was not addressed below, the general issue of statutes-of-limitations was addressed. In addition, in its Petition for Review, the City sought and was granted review on the issue of: “What is the applicable statute of limitations for claims arising from the construction of a public road on private property?” Petition for Review at 1.

Application of the user statute in this case, raises two important issues of first impression for this Court: first, whether the user statute applies to unplatted portions of a

city street that have deviated from the platted path; and second, whether the user statute applies to Torrens property.

This Court should hold that the user statute applies to unplatted portions of a city street that have deviated from the platted path because the plain language of the user statute provides it is applicable to “any road or *portion* of a road” with the exception of “*platted streets within cities.*” Minn. Stat. § 160.05 (2006) (emphasis added). Portions of a city street that have deviated from the platted path are not “platted,” and as a result, are not subject to this exception.

This Court should also hold that the user statute applies to Torrens property because the plain language of the user statute and the Torrens Act does not exclude Torrens property from the user statute’s application. Instead, the Torrens Act specifically provides that Torrens property is subject to the same “burdens and incidents” as unregistered land. Minn. Stat. § 508.02 (2006). And although the Torrens Act does provide that Torrens property cannot be acquired by “prescription or adverse possession,” its plain language does not prohibit acquisition by statutory dedication under the user statute. *Id.*

ARGUMENT

I. The plain language of the user statute makes it applicable to unplatted portions of a city street that have deviated from the platted path.

The plain language of the user statute makes it applicable to unplatted portions of a city street that have deviated from the platted path. The user statute provides in relevant part:

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. 1 (2006) (emphasis added). The user statute specifically provides that it applies to “any road or *portion* of a road” with the exception of “*platted streets* within cities.” *Id.* Portions of a city street that have deviated from the platted path are not subject to this exception because these deviations, by their very nature, are not platted.

This interpretation of the user statute is consistent with a 1965 attorney general opinion in which the City of Fergus Falls requested an advisory opinion about whether the user statute could apply to the unplatted half of a city road even though the other half of the road was platted.

We [Fergus Falls] intend to improve a portion of Fir Avenue, which is in the northern part of our city, and half of the said road was dedicated for public use, but the other half is unplatted, and the question arises whether or not § 160.05 in this case applies, namely, may the city under said section claim two rods from the center of said street into the area unplatted?

Op. Atty. Gen. 59a-53 (Apr. 19, 1965). Appendix at A1-A3. The attorney general advised that the user statute could apply in this situation.

If, after July 1, 1957 [effective date of the last sentence of subd. 1 of Minn. Stat. § 160.05] and for a continuous period of at least six years, the conditions prescribed by M.S. § 160.05 have been satisfied, the city may claim such north two rods as dedicated thereto, excepting such portions thereof as are within the area of any platted street. However, no particular problem is presented if such portions are effectively dedicated as a public street by platting.

Id.

Interpreting the user statute according to its plain language does not make the exception for “platted streets within cities” meaningless. The exception would still have meaning in two situations. First, the user statute would not apply to those platted streets within a city that are designated as private streets. Second, the user statute would not apply to platted streets within a city that are dedicated to the public.

In the second situation, the exception is not meaningless; it means what it says -- the user statute does not apply to platted streets within a city. It is true, however, that in the second situation, there is no *need* for the user statute to apply because this type of platted street has already been dedicated to the public; but this fact does not make the statutory language meaningless.

And although it is unnecessary to look beyond the plain language of the user statute, the legislative history behind the statutory language at issue clarifies that the impetus for adding this language was not a concern about city streets deviating from their platted path, but rather, was to make the user statute applicable in cities. *See* Minn. Stat. § 645.16 (4) (2006) (the intention of the legislature may be ascertained by considering the object to be obtained by the legislation).

In a 1977 advisory opinion, the attorney general reviewed the legislative history behind the statutory language at issue.

A brief review of statutory history leaves no doubt that section 160.05, subd. 1 is applicable to municipal streets. Prior to 1913, statutes similar to Minn. Stat. § 160.05, subd. 1 were held to apply to roads within municipalities. In 1913 a comprehensive road law was adopted. This law was the origin of many sections of present Minn. Stat. chapters 160 through 165. Minn. Laws 1913, ch. 235, subsection 1 is a direct forerunner of the present Minn. Stat. § 160.01, subd. 2, which provides:

The provisions of Chapters 160 through 165 do not relate to highways or streets established by or under the complete jurisdiction of cities except when the provisions refer specifically to such highways or streets. On the basis of Minn. Stat. § 160.01 subd. 2, this office had ruled that the dedication by user provisions of Minn. Stat. § 160.05 were not applicable at all to streets in a city or a village. Op. Atty. Gen. 396-C-4, April 13, 1951 (1952 Atty. Gen. Reports No. 117). [FN2]

However, this conclusion was altered when the last sentence of Minn. Stat. § 160.05, subd. 1 (1974) was added by Minn. Laws 1957, ch. 943 subd. 13. Addition of that sentence permits application of the user statute (Minn. Stat. § 160.05, subd. 1) to city streets, other than platted streets, notwithstanding the general limitation imposed by section 160.01, subd. 2 (1974).

Op. Atty. Gen. 59a-53 (Jan. 13, 1977). Appendix at A4-A6.

Applying the user statute to unplatted portions of a city street that have deviated from the platted path is not only consistent with the user statute's plain language and its legislative history; it is also good public policy. It is good public policy because it provides a definite resolution within a reasonable amount of time that protects the public's interest in long-established public roads. *See* Minn. Stat. § 645.17 (5) (2006) (in ascertaining legislative intent, courts should presume the legislature intends to favor the public interest as against any private interest).

If the court of appeals' decision is not reversed, many more cities could face the dilemma faced by the City of Fifty Lakes in this case: either incur the expense and deal with the impracticality of moving a long-established gravel road or – as suggested by the court of appeals – initiate eminent domain proceedings and pay the current fair market value for property that was first acquired many years ago. Instead, this Court should hold that the statute-of-limitations in the user statute applies in situations like that in this case

to protect cities and their tax-paying citizens from expending time and resources to defend or pursue claims based on long-established public roads.

II. The plain language of the user statute and the Torrens Act make the user statute applicable to Torrens property.

The plain language of the user statute makes it applicable to Torrens property.

The user statute applies to “any road or portion of a road” with only three exceptions for:

(1) platted streets within cities; (2) certain property of water departments of first-class cities; and (3) roads on or parallel to railroad right-of-ways. Minn. Stat. § 160.05 (2006).

The user statute does not contain an exception for Torrens property even though the most recent enactment of the current version of the user statute occurred in 1959, well after the most recent enactment of the current version of the Torrens Act.

In 1999, this Court adopted similar reasoning when it held that the plain language of the Marketable Title Act made it applicable to Torrens property.

In construing the MTA, we first must look at the specific language to determine its meaning...Here the language of the MTA clearly and unambiguously states that it applies to “any real estate.” *See* Minn. Stat. § 541.023, subd. 1. While the MTA provides several exceptions to this mandate, it noticeably fails to exempt Torrens property.

Hersh Properties, LLC v. McDonald’s Corp., 588 N.W.2d 728, 735 (Minn. 1999).

In addition, there is nothing in the plain language of the Torrens Act that would exempt Torrens property from the user statute’s application. Instead, the Torrens Act provides that: “Registered land shall be subject to the same burdens and incidents which attach by law to unregistered land.” Minn. Stat. § 508.02 (2006). And although the Torrens Act does provide that Torrens property cannot be acquired by “prescription or by

adverse possession” its plain language says nothing about statutory dedication under the user statute. *Id.*

This interpretation is consistent with a 1959 attorney general opinion in which the attorney general concluded that the user statute is applicable to Torrens property. Op. Atty. Gen. 396g-4 (July 23, 1959). Appendix at A7-A8. The Town of Minnetonka sought an advisory opinion about whether the user statute could apply to Torrens property when the registration of the land and the construction of the road occurred “at or about the same time.” *Id.* The Town of Minnetonka also asked if there was any conflict between Minn. Stat. § 160.19 (the predecessor to the current version of the user statute), and Minn. Stat. § 508.02 (Torrens registration), that would prevent the application of the user statute to registered lands.

The attorney general advised:

The last sentence of M.S. 508.02 which provides that “no title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession” obviously does not apply to roads and streets dedicated by statutory user under § 160.19.

Accordingly, it is our opinion that if the registration of the land and the construction of the road as it actually exists occurred at or about the same time, M.S. 1945, § 160.19 applied so that the road became a public road by user if the requirements of that section were satisfied. There is no conflict between said M.S. 160.19 and M.S. 508.02 which will prevent the application of M.S. 160.19 to registered lands.

Id. Although the attorney general did not explicitly state the rationale for his conclusions, they presumably were based on the plain language of the two statutes.

In addition, acquisition of property under the user statute is significantly different from acquisition of property by prescription or by adverse possession; and therefore,

these terms cannot be considered synonymous. First, the user statute provides a statutory method of acquiring property, while claims of prescription and adverse possession are governed by the common law. Second, the 6-year statute-of-limitations in the user statute is significantly shorter than the 15-year statute-of-limitations for claims of prescription and adverse possession. *See* Minn. Stat. § 541.02 (2006). Third, the beneficiary of the user statute is the public, while the beneficiary in a claim of prescription or adverse possession is generally a private party. Fourth, the user statute provides requirements that are significantly different from those required to support a claim of prescription or adverse possession.²

It is true that even this Court has referred to the user statute as a substitute for prescriptive acquisition of property.

Section 160.05, subd. 1, provides no method by which the government can Take property. The statute, rather, provides a substitute for the common-law creation of highways by prescription or adverse use.

Shinneman v. Arago Township, 288 N.W.2d 239, 242 (Minn. 1980) (citation omitted).

References like these in dicta, however, cannot be interpreted as holding that statutory dedication under the user statute is synonymous with a claim of prescription under the language of the Torrens Act.

² There are three requirements in the user statute: (1) use by the public and (2) maintenance at the expense of an appropriate agency of government (3) over a continuous period of at least six years. *See, e.g., Anderson v. Birkeland*, 38 N.W.2d 215, 218 (1949); Minn. Stat. § 160.05. In contrast, the five essential requirements of claims of adverse possession and claims of prescription are that the use be: (1) actual, (2) open, (3) hostile, (4) exclusive and (5) continuous for a period of at least 15 years. *See, e.g., Gandy Co. v. Freuer*, 313 N.W.2d 576, 578 (Minn. 1981); *Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn. 1980).

First, as already noted, such an interpretation is contradicted by the plain language of the Torrens Act. Second, none of the cases that refer to the user statute as a substitute for prescriptive acquisition of property were considering the precise issue in this case: whether the user statute applies to Torrens property. Third, all three methods of acquiring property involve some type of property use that is adverse to the fee owner, so it is not surprising that cases analyzing these three different methods of acquiring property have borrowed terms from each other.

And finally, even if the plain language of the user statute and the Torrens Act was not clear, the user statute should prevail. First, the user statute is more specific than the Torrens Act and the most current version of the user statute was more recently enacted than the most current version of the Torrens Act. *See* Minn. Stat. § 645.26, subd. 1 (when two laws conflict, the more recent and more specific prevails). And second, application of the user statute to Torrens property protects the public's interest in long-established public roads. *See* Minn. Stat. § 645.17 (5) (courts should presume the legislature intends to favor the public interest as against any private interest).

CONCLUSION

This Court should reverse the court of appeals' decision and affirm the trial court's dismissal of this action. This Court should also hold that the user statute applies to portions of a city road that have deviated from the platted path and that the user statute applies to Torrens property. This holding is consistent with the plain language and legislative history of the statutory language at issue, and it protects the public's interest in long-established public roads.

Dated: June 20, 2007

Respectfully submitted,

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