

NO. A09-1414

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State of Minnesota  
**In Court of Appeals**

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 Robert M. Weber, her attorney in fact,  
*Appellants,*

vs.

City of Fifty Lakes,

*Respondent.*

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**APPELLANTS' REPLY BRIEF**

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## INTRODUCTION

The User statute does not apply to Torrens property. This determination is consistent with the plain language of both the User Statute and the Torrens Act and the Supreme Court's ruling in *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226 (Minn. 2008). Regardless, North Mitchell Lake Road—the entire road—is excepted from the User Statute because it falls within the statute's platted city street exception. The City's tortured reading of Minn. Stat. § 160.05 suggesting that the encroaching portion of the road is “unplatted” renders the exception meaningless. Similarly, common law dedication does not apply to this case because abiding a trespass does not establish an unequivocal intent to dedicate where the Landowners' Property is Torrens. And, contrary to the City's position, this Court has jurisdiction to hear the laches and ejectment issues, for which the factual records are sufficiently developed and this Court can decide as a matter of law. Finally, public policy favors the inapplicability of the User Statute to Torrens property, especially in this case. This Court should reverse the District Court and remand for trial on the issue of damages.

## REPLY ARGUMENT

### **I. THE USER STATUTE DOES NOT APPLY TO TORRENS PROPERTY.**

Whether Minn. Stat. § 160.05 applies to Torrens property is an issue of first impression.<sup>1</sup> Yet the well-developed Torrens law in Minnesota and the statutory structure are consistent with the inapplicability of the User Statute to Torrens property.

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<sup>1</sup> The City argues that the Minnesota Supreme Court “strongly suggests” the user statute applies to Torrens property in *Hebert*. Respondent's Brief at 9. This is inaccurate. The

**A. A determination that statutory dedication does not apply to Torrens property is completely consistent with the plain language of both the User Statute and the Torrens Act.**

The City first argues that the “plain language” of the User Statute makes it applicable to Torrens property because Minn. Stat. § 160.05 does not contain an exception for Torrens property, and repeats the District Court’s analogy to the Marketable Title Act. This time the City quotes the additional language from *Hersh Properties, LLC v. McDonald’s Corp.*, 588 N.W.2d 728 (Minn. 1999), as previously emphasized by the Landowners, but in doing so apparently misses the point. That the MTA does not exempt Torrens is inapposite. The additional quoted language clarifies that the MTA applies to Torrens property because the statute refers to the “office of registrar” (which handles Torrens property exclusively, as opposed to abstract property which is handled by the office of the recorder). In other words, *the MTA itself specifically provides that it applies to Torrens property.* In contrast, the User Statute *does not* specifically provide that it applies to Torrens property. The analogy to the MTA fails.

The City also relies heavily on language in the Torrens statute providing that Torrens property is “subject to the same burdens and incidents which attach by law to unregistered land.” Minn. Stat. § 508.02. Of course, the statute itself provides that adverse possession and prescriptive easements do not apply to Torrens property. *Id.* But

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Supreme Court in *Hebert* declined to decide the issue and remanded because it was not raised below in the District Court. The Supreme Court does not make a ruling—even on a question of law—that is not properly before the Court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Only now is the issue properly before this Court on *de novo* review from the District Court.

this is not an exhaustive list and the fact that Minn. Stat. § 508.02 does not specifically except out statutory dedication is inapposite. As the City well knows, Minnesota case law further provides that the doctrine of de facto taking does not apply to Torrens. *See Hebert*. Also, implied easements do not apply to Torrens property, as discussed in more detail below. And, as is stated in Appellant's principal brief, there are multiple Minnesota Supreme Court cases, over a long period of time, holding that statutory dedication is a statutory form of adverse possession. See, e.g., *Minneapolis Brewing Co. v. City of East Grand Forks*, 136 N.W. 1103, 1103-1105 (Minn. 1912) (characterizing statutory dedication as "adverse possession by the public."). This case law preempts opinions from the Attorney General, which are not binding on this Court. *Star Tribune Co. v. University of Minnesota Bd. of Regents*, 683 N.W.2d 274, 289 (Minn. 2004). Especially in light of the *Hebert* decision, a determination that statutory dedication does not apply to Torrens property is completely consistent with the plain language of both the User Statute and the Torrens Act.

**B. Statutory dedication operates in the same way as adverse possession.**

Moreover, this Court need not hold that statutory dedication is completely synonymous with adverse possession, nor must the elements to establish each doctrine be identical, to rule that statutory dedication is prohibited under Minn. Stat. § 508.02. Rather, when the chain of case law is examined together with the *Hebert* decision holding that the City may not appropriate the Landowners' Property by de facto taking because "allowing the City to acquire the land at issue here by de facto taking *would operate in the same way* as if the City acquired the land by adverse possession *in that in both*

*situations, a landowner is deprived of rights to land due to actions of another,”* the result is inescapable: statutory dedication operates in the same way as adverse possession to divest property owners of their rights to their property, and is therefore inapplicable to Torrens property.<sup>2</sup>

**C. Implied easements do not apply to Torrens property in Minnesota.**

The City argues that the application of the User Statute to Torrens property is supported by decisions from other jurisdictions. Specifically, the City cites to two implied easement cases in Massachusetts and Illinois which upheld unrecorded easements on Torrens property, *Duddy v. Mankewich*, 75 Mass. App. Ct. 62 (2009) and *Carter v. Michel*, 87 N.E.2d 759 (Ill. 1949). However, this Court has specifically addressed this issue and found that the Torrens Act bars implied easements:

[W]e do reject appellants' argument that easements by implication were created. The district court was correct when it concluded that *the Torrens Act generally bars easements by implication*. Under the Torrens Act, “[n]o title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession.” Minn.Stat. § 508.02 (1996). In addition, Minn.Stat. § 508.25 (1996) provides that: “Every person receiving a certificate of title pursuant to a decree of registration and every subsequent purchaser of registered land \* \* \* shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title \* \* \*.”

Here, it is undisputed that each of the claimed easements lies, in whole or in part, across registered Torrens property. None of the easements were registered on the certificates of title. The purpose of the Torrens Act is to

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<sup>2</sup> The City argues that the Supreme Court in *Hebert* could have determined as a matter of law that the User Statute does not apply to Torrens property and, since it did not so rule, the Statute must apply. Respondent’s Brief at 16. But the issue is only now properly before this Court. See *supra*, n. 1.

“establish an indefeasible title free from any and all rights or claims not registered with the registrar of titles, with certain unimportant exceptions, to the end that anyone may deal with such property with the assurance that the only rights or claims of which he need take notice are those so registered.” *Mill City Heating & Air Conditioning Co. v. Nelson*, 351 N.W.2d 362, 364 (Minn.1984) (quoting *In re Juran*, 178 Minn. 55, 58, 226 N.W. 201, 202 (1929)).

*Crablex, Inc. v. Cedar Riverside Land Co.*, WL 729210, 4-5 (Minn. Ct. App. 1997) (emphasis added).<sup>3</sup> Applying Minnesota law to the facts here, no easement can be created over the Encroachment Parcel because the Torrens Act prohibits it.

Finally, the City attempts to draw a distinction between a claim of ownership to the Encroachment Parcel and an easement to the Parcel. Respondent’s Brief at 8, n.2. As discussed above, the distinction is not meaningful here, since Minnesota law provides that easements do not attach to Torrens property. Minn. Stat. § 508.02 prohibits both ownership interests which would result from adverse possession and easements which would result from prescription. Moreover, in denying the City’s previous claim of de facto taking, the Supreme Court focused on the fact that “a landowner is deprived of rights to land due to the actions of another”—precisely what the City hopes to accomplish here by statutory dedication, be it ownership or easement.<sup>4</sup> *Hebert*, 744 N.W.2d at 232. This Court should therefore reverse the District Court and hold that the User Statute does not apply to Torrens property.

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<sup>3</sup> “Easement by implication” is synonymous with “implied easement.” See Black’s Law Dictionary, 8th Ed.

<sup>4</sup> Moreover, the City itself has referred to “acquiring” the Landowners’ Property. See, e.g., Respondent’s Brief at 23.

**II. NORTH MITCHELL LAKE ROAD—THE ENTIRE ROAD—IS A PLATTED CITY STREET EXCEPTED FROM THE USER STATUTE.**

The City contends that the plain language of the User Statute and the legislative history support their tortured reading of Minn. Stat. § 160.05 that the statute applies to the encroaching portion of North Mitchell Lake Road. But the plain meaning of Minn. Stat. § 160.05 is not obtained by cutting and pasting the statute and reading it out of context. Read as a whole, the plainest reading of the User Statute is that statutory dedication can be established by a road or portion of a road, but platted streets within cities are excepted. North Mitchell Lake Road is a platted street within the City of Fifty Lakes and is therefore excepted from Minn. Stat. § 160.05.

The City's reliance on the 1965 Attorney General opinion for the City of Fergus Falls is misplaced. Again, opinions from the Attorney General are not binding on this Court. *Star Tribune Co.*, 683 N.W.2d at 289. Additionally, this opinion can be distinguished on its facts. In that instance, the portion of the road that deviated from the platted path was "unplatted." Here, the deviating portion of North Mitchell Lake Road is still found on the plat—the same plat that the City approved prior to its recording. The opinion does not address a case, such as this, where the road deviates from a platted path onto someone's land that is also on the plat. And, because the Landowner's Property is on a plat, the Landowners are entitled to rely on the plat; it is incorporated into their certificates of title. A "reference to a plat, without question, incorporates into the certificate the physical location of the property and undoubtedly would be held to refer to

those matters which go to identifying land and locating streets, alleys, etc.” *Kane v. State*, 55 N.W.2d 333 (Minn. 1952).

Further, the City states that the Landowners claim the exception is meaningless. Respondent’s Brief at 21. Actually, it is the City’s reading of Minn. Stat. 160.05 that renders the exception meaningless, as detailed in Appellants’ Brief. The Landowners completely agree with the City’s statement that “it means what it says—the user statute does not apply to platted streets within a city.” Respondent’s Brief at 21. As a platted street within a city, with a deviation that is found on the plat, North Mitchell Lake Road is excepted from the User Statute.

Finally, this Court need not determine that the driving legislative purpose of the platted city street exception was to encourage cities to build within the plat. Even if the primary concern was to make the statute applicable in cities—which general application is not contested here—encouraging cities to actually build roads within the area provided in the plat is completely consistent with the legislative intent and is a valid public policy concern. Nothing in the legislative history contradicts the application of the platted city street exception to North Mitchell Lake Road. Indeed, the legislative history need not even be consulted here because Minn. Stat. § 160.05 is plain and unambiguous. *See Auto Owners Ins. Co. v. Perry*, 749 N.W.2d 324, 328 (Minn. 2008) (recognizing that the Court need not rely on the legislative history of an unambiguous statute).

### III. COMMON LAW DEDICATION DOES NOT APPLY IN THIS CASE.

Like statutory dedication, common law dedication does not apply to the Landowners' Torrens Property because the City's claim to the Encroachment Parcel is based on adverse use and passage of time. Mere abidance of a trespasser on Torrens property cannot unequivocally show intent to dedicate. The City's arguments relating to "long acquiescence" are unavailing because the cases on which the City relies did not involve Torrens property. Indeed, the City cites only an Illinois case, *Hooper v. Haas*, 164 N.E. 23 (Ill. 1928), to support its argument that common law dedication applies to Torrens property. But in *Hooper*, the owner had intentionally dedicated the property to the public. *Id.* at 26.

Thus, the City correctly notes that "[a]ny act of the dedicating owner...from which an intention [to dedicate] may be clearly and unequivocally inferred, is sufficient to constitute a common-law dedication." Respondent's Brief at 24 (citation omitted). Here, however, the City cannot cite to any "act" on the part of the Landowners showing an intent to dedicate. Rather, all that has happened is that the City has taken possession of the property in question. And, under Minnesota law, "*mere possession* of Torrens property will *never* ripen into title against the owner." *Moore v. Henriksen*, 165 N.W.2d 209, 218 (Minn. 1968) (emphasis added). And, "[o]nce property is registered, no one acquires rights in registered land by going into possession." *Abrahamson v. Sundman*, 218 N.W. 246, 247 (Minn. 1928). For the same reasons that statutory dedication does not apply to Torrens property, the City's claim of common law dedication likewise fails.

**IV. THIS COURT HAS JURISDICTION TO HEAR THE LACHES AND EJECTMENT ISSUES.**

The City's primary position on the issues of laches and ejectment is that this Court lacks jurisdiction because the District Court determined there were genuine issues of material fact. The City cites *Carter v. Cole*, 526 N.W.2d 209 (Minn. 1995), a police brutality case, for the proposition that such an order is not appealable. But in *Carter*, the Court noted specific findings by the trial court that identified unknown facts necessary to a determination that the officers were the cause of the plaintiff's injuries. *Id.* at 212.

Here, in contrast, the City and the District Court failed to identify any specific disputed facts for either issue. Moreover, while each issue involves both fact and legal questions, the facts relevant to both laches and ejectment are undisputed in the record and both issues should be resolved as a matter of law.

**A. The City's defense of laches fails as a matter of law.**

The City correctly argues that the defense of laches involves a factual inquiry. Respondent's Brief at 29.<sup>5</sup> In 1998, the Landowners communicated with the City demanding that the road be moved, and numerous discussions with the City followed. (RA.76.) Under Minnesota law, such communication is sufficient to overcome laches, even where the actual lawsuit is filed later. *See, e.g., Osgood v. Stanton*, 2009 WL 1586943, 8 (Minn. Ct. App. 2009) (holding that an eleven-year delay in filing lawsuit

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<sup>5</sup> The City incorrectly states, however, the District Court's "findings" on laches. The District Court did not specifically find genuine issues of material fact concerning whether the Landowners unreasonably and inexcusably delayed filing this litigation and whether the City was prejudiced from the delay. The District Court simply held, "[t]here remain genuine issues of material fact as to whether Plaintiffs' claim of ejectment is barred by laches." (A288.)

was not unreasonable delay where letter attempting to enforce rights was sent closer to the time of the offense). Here, the lawsuit filing in 2005 is not the controlling date. As a matter of law based on the undisputed facts, the City has failed to show unreasonable delay.

Similarly, the City cannot show prejudice as a matter of law. That the City incurred costs in maintaining the road for decades is irrelevant, as it would have incurred the same maintenance costs had the road been built in the correct location. The “price of lake shore” is also irrelevant as to prejudice since the City still owns a sixty-six foot right-of-way in which it can build the road; it need not acquire additional land to do so. Based on these undisputed facts, the City has failed to show both unreasonable delay and prejudice, and therefore the defense of laches fails as a matter of law.

**B. The City is committing a continuing trespass as a matter of law.**

The City cites case law and ultimately makes a legal argument that the trespass is permanent, comparing the facts here to the various cases. Respondent’s Brief at 30-33. Significantly, the City does not dispute any of the facts relevant to trespass, as developed in discovery and discussed in detail in Appellants’ Brief at 33-39. Indeed, the City has admitted all of the necessary facts to establish a continuing trespass. Unlike *Carter*, there are no unknown facts necessary to make this determination. That the Landowners and the City disagree on how the law applies to these admitted, undisputed facts does not create a “genuine issue of material fact.”

Ultimately, whether the City’s trespass here is permanent or continuing is a question of law. The relevant facts are not in dispute. This Court should reverse the

District Court and hold that the City is committing a continuing trespass as a matter of law, grant the Landowners' request for ejectment requiring the City to remove the deviating portion of North Mitchell Lake Road from the Landowners' Property, and remand for trial on the issue of damages.

**V. PUBLIC POLICY FAVORS THE INAPPLICABILITY OF THE USER STATUTE TO TORRENS PROPERTY.**

At various times throughout their briefs, the City and the League have raised policy concerns regarding the costs and potential costs of a determination that statutory dedication does not apply to Torrens property. Specifically, the City argues it has "incurred costs in maintaining this road for decades." Respondent's Brief at 29.<sup>6</sup> But the City fails to recognize that it would have incurred the same costs had the road been built in the correct location. Similarly, the League argues the importance of public roads for police, emergency vehicles to save lives, etc. Amicus Brief at 5. But this case is not about the *existence* of the road—it's about the *location* of the road. The City still owns a sixty-six foot right-of-way on which it can build and maintain a road to serve the cited public policy concerns. North Mitchell Lake Road will continue to exist. All the City needs to do here is move a mere gravel road, a task that this Court previously recognized is much easier than a paved and curbed street with sewer drainage. *See Hebert v. City of Fifty Lakes*, 2007 WL 582956, 4 (Minn. Ct. App. 2007). This is not "impractical" as

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<sup>6</sup> The City suggests that North Mitchell Lake Road existed in some form as far back as the 1940s. Respondent's Brief at 4. But this claim is irrelevant. The City admitted in discovery that the portion of North Mitchell Lake Road which is relevant to these proceedings was constructed in 1971. (A134-135.)

suggested by the City, Respondent's Brief at 22, and when presented with the opportunity to declare that the cost would exceed \$30,000, the City did not do so. (A119.)

When considering public policy, this Court should also be mindful of private property rights. Private property rights mean something, and this is a good thing. When a city needs to take or use private property, even Torrens, it can do so via formal eminent domain proceedings—an option the City has had here all along. In *Hebert*, the Supreme Court noted how eminent domain proceedings result in “a formal adjudication of rights to the land, with all interested parties receiving notice and an opportunity to be heard.” 744 N.W.2d at 231. In contrast, less formal attempts to acquire Torrens property are “at odds with the notice principles that underlie the Torrens system” and are therefore rejected. *Id.* The City's informal appropriation of the Landowners' Torrens Property here results in a windfall that this Court should likewise reject.

**CONCLUSION**

For the foregoing reasons, the Landowners respectfully request that this Court reverse the District Court's order granting the City's motion for summary judgment, grant the Landowners' motion for partial summary judgment, and remand for trial on the issue of damages.

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