

State of Minnesota  
**In Court of Appeals**

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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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**RESPONDENT CITY OF FIFTY LAKES' BRIEF AND APPENDIX**

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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).

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**STATEMENT OF LEGAL ISSUES**

**I. DOES THE USER STATUTE, MINN. STAT. § 160.05, APPLY TO A PORTION OF A LONG-ESTABLISHED PUBLIC ROAD, WHICH IS TORRENS PROPERTY?**

The District Court found the user statute applied.

Apposite authority:

Minn. Stat. § 160.05, subd. 1

Minn. Stat. § 508.02

*Hebert v. Fifty Lakes*, 744 N.W.2d 226 (Minn. 2008)

*Toth v. Arason*, 722 N.W.2d 437 (Minn. 2006)

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

**II. DOES THE USER STATUTE APPLY TO UNPLATTED PORTIONS OF A CITY STREET DEVIATING FROM THE PLATTED PATH?**

The District Court found the user statute applied.

Apposite authority:

Minn. Stat. § 160.05, subd. 1

*Educ. Minnesota-Osseo v. Indep. Sch. Dist. 279*, 742 N.W.2d 199 (Minn. App. 2007)

**III. HAS THE DISPUTED PORTION OF NORTH MITCHELL LAKE ROAD BEEN ESTABLISHED BY COMMON LAW DEDICATION?**

The District Court did not reach this issue.

Apposite authority:

*Sackett v. Storm*, 480 N.W.2d 377 (Minn. App. 1992)

*Wojahn v. Johnson*, 297 N.W.2d 298 (Minn. 1980)

*Allen v. Village of Savage*, 112 N.W.2d 807 (Minn. 1961)

**IV. DOES THIS COURT HAVE JURISDICTION TO CONSIDER APPELLANTS' LACHES AND TRESPASS ARGUMENTS WHERE THE DISTRICT COURT DETERMINED GENUINE ISSUES OF MATERIAL FACT EXIST PRECLUDING SUMMARY JUDGMENT?**

The District Court found genuine issues of material fact existed.

Apposite authority:

*Carter v. Cole*, 526 N.W.2d 209 (Minn. App. 1995)

*Pahnke v. Anderson Moving & Storage*, 720 N.W.2d 875 (Minn. App. 2006)

## STATEMENT OF THE CASE

This matter is on appeal for the second time. *See Hebert v. City of Fifty Lakes*, 2007 Minn. App. LEXIS 207, A06-215 (Feb. 27, 2007); *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226 (Minn. 2008).

Appellants own registered Torrens property adjacent to Mitchell Lake in the City of Fifty Lakes, Minnesota. Appellants commenced this action in May 2005, against the City of Fifty Lakes (the "City"), alleging North Mitchell Lake Road encroaches upon their property. In 1971, the City "rebuilt" North Mitchell Lake Road, a platted road providing access to the lots along Mitchell Lake. The precise location of the road deviates from the plat, slightly encroaching upon some of Appellants' lots. For the last 38 years, the City has maintained this road at public expense and provided access to Appellants and their predecessors without incident. With this history of uninterrupted public use and maintenance, Appellants commenced this action seeking declaratory judgment, ejectment and trespass damages against the City.

On July 11, 2005, the City brought a Motion to Dismiss asserting Appellants' claims were time-barred under the de facto takings doctrine. Conversely, Appellants brought a Motion for Partial Summary Judgment arguing Torrens properties are never subject to takings when the City did not formally initiate condemnation proceedings. The Honorable Richard A. Zimmerman, Judge of District Court, Ninth Judicial District, granted the City's Motion to Dismiss and denied Appellants' Motion for Summary Judgment.

This Court reversed the District Court's decision, in an opinion filed on February 27, 2007. *Hebert v. City of Fifty Lakes*, 2007 Minn. App. LEXIS 207, A06-215 (Feb. 27, 2007). On January 17, 2008, the Minnesota Supreme Court affirmed, but remanded the matter back to the District Court to further develop the record regarding, *inter alia*, the user statute. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 232 (Minn. 2008).

After further development of the record, the City brought a Motion for Summary Judgment because the disputed portion of the long-established public road was dedicated pursuant to the user statute and, alternatively, common law dedication. Appellants brought a Motion for Partial Summary Judgment seeking declaratory judgment the City lacks any interest in the disputed portion of the road. The Honorable Richard A. Zimmerman granted the City's Motion and denied Appellants' Motion. Judgment was entered on June 9, 2009. Appellants served and filed their Notice of Appeal on July 31, 2009.

#### **STATEMENT OF FACTS**

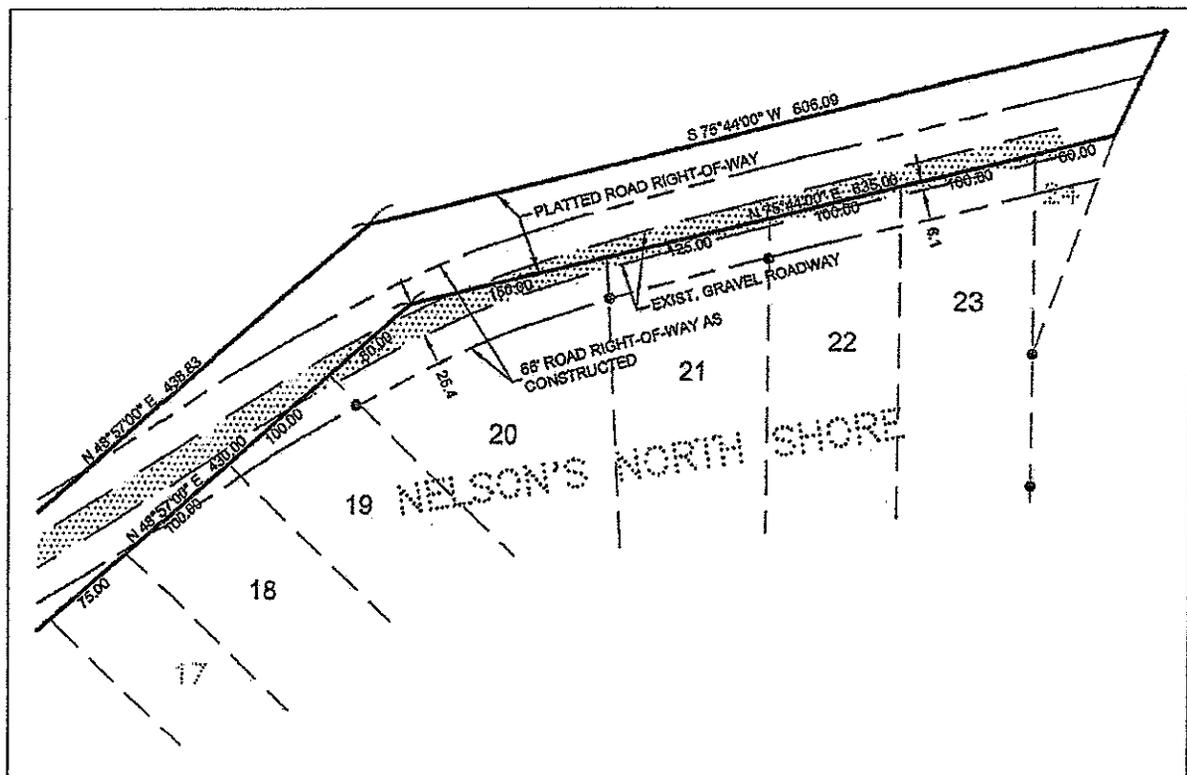
Appellants own real property in the City of Fifty Lakes, collectively known as Lots 18-23 of Nelson's North Shore (collectively "Appellants' property"). A--002-005. Appellants' property was registered as Torrens property in 1953. A--015-026, 036-037, 039-052, 056. A 66-foot-wide roadway was dedicated in 1954 when the plat was recorded. A--014, RA.85. North Mitchell Lake Road runs along the northern portion of Appellants' property, not on the lakeshore. RA.68.

North Mitchell Lake Road existed in some form as far back as the 1940s. RA.2, RA.55. The original road began from a more northerly point where the existing North

Mitchell Lake Road meets the County Road and then dips down south, close to the lake shoreline, through the parcel now known as the Hebert property. RA.2, RA.55. The original road had a sharp turn at its most southerly point and curved back up to approximately where the road is now. RA.2. The original road also had a steep hill at the east end which was difficult for cars to navigate, especially in the winter. RA.2, RA.55. The original road was also very narrow and two cars could not travel the road in opposite directions, without pulling off the road. RA.2.

In 1971, the road was rebuilt to shave the hill and be widened. RA.2, RA.4, RA.41, RA.43, A--005. No residents complained about the road being rebuilt. RA.5, RA.57.

When North Mitchell Lake Road was rebuilt, it encroached upon Appellants' property as depicted below:



*RA.68.*<sup>1</sup>

Since 1971, the City has maintained North Mitchell Lake Road as it has any other road in the City. *RA.7, RA.10, RA.41, RA.51.* The City performs grading, sanding, snow removal, intermittent brush removal, roadside mowing, ditch digging and cleaning, tree removal and power sweeping of the road. *RA.6, RA.9.* The road has been unchanged, aside from routine maintenance, since 1971. *RA.3, RA.5, RA.6.* The road has been regularly and continuously traveled on since 1971. *RA.3, RA.5, RA.6, RA.10.* From October 7, 1998 to October 15, 1998, the City placed a road counter on the road and it showed an average of 67 registrations per day. *RA.10.* The road is the only way lake residents can access their property and also serves as a school bus route. *RA.40, RA.7, RA.10, RA.3, RA.58.* Postal carriers and waste management services travel the road in the normal course of business. *RA.10, RA.7, RA.3, RA.40.*

City maintenance workers did not receive complaints about the road encroaching on Appellants' property. *RA.5, RA.7, RA.9.* Appellants did not complain to the City about this road encroaching on their property until 1998, 27 years after the road was rebuilt. *RA.76.*

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<sup>1</sup> The City has only sought a determination the Court allow the road to remain where it is – nothing more, nothing less. In other words, the City is not seeking a full 66-foot easement from the centerline of the road. For example, there is no encroachment of lot 18 as the existing gravel road is located entirely within the platted road right-of-way at that point. If the City sought to expand the road beyond the established gravel road and existing plat, it would need to acquire that property from Appellants. Appellants have suggested there is a fact dispute concerning the width of the road. *App. Br. p. 7.* The precise width of the existing road, however, is not relevant to the resolution of whether the user statute applies to Torrens property. It is actually only material if this Court were to find the user statute does not apply to Torrens property.

## STANDARD OF REVIEW

When the District Court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, reviewed de novo. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998). Statutory construction is a question of law, reviewed de novo. *Calm Waters, LLC v. Kanabec County Bd. of Comm'rs.*, 756 N.W.2d 716, 719 (Minn. 2008).

## SUMMARY OF ARGUMENT

The Minnesota Supreme Court did not reach the applicability of the user statute, remanding the matter to the District Court for the record to be developed. *Hebert v. City of Fifty Lakes*, 744 N.W.2d at 232.

There is no dispute North Mitchell Lake Road has been used by the public and maintained by the City for decades, sufficient to satisfy the statutory requirements of the user statute. *See* Minn. Stat. § 160.05, subd. 1. Appellants, however, contend Torrens property cannot be subject to the user statute regardless of whether the statutory requirements of use and maintenance have been met.

The plain language of the Torrens statute does not prevent the application of the user statute to registered Torrens property. The Torrens statute specifically provides Torrens property is subject to the same “burdens and incidents which attach by law to unregistered land.” Minn. Stat. § 508.02. Contrary to Appellants’ arguments, the user statute is not a form of adverse possession, which is prohibited by the Torrens statute.

Similarly, under the plain language of the user statute, the unplatted portions of a city street that have deviated from the platted path are subject to the user statute. The user

statute expressly applies to “any road or portion of a road [that] has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority.” Minn. Stat. § 160.05, subd. 1 (emphasis supplied). This Court need not reach the remaining issues in light of the applicability of the user statute.<sup>2</sup>

## ARGUMENT

### **I. THE USER STATUTE IS APPLICABLE TO TORRENS PROPERTY.**

The basis for statutory dedication is codified in Minn. Stat. §160.05, subdivision 1, which provides:

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. Nothing contained in this subdivision shall impair the right, title, or interest of the water department of any city of the first class secured under Special Laws 1885, chapter 110. This subdivision shall apply to roads and streets except platted streets within cities.

In order to establish a prima facie case of statutory dedication, the road must have (1) been used by the public and (2) maintained by the appropriate road authority (3) over a continuous period of six years. *Foster v. Bergstrom*, 515 N.W.2d 581, 585-586 (Minn. App. 1994) (citing *Shinneman v. Arago Township*, 288 N.W.2d 239, 242 (Minn. 1980)).

In the present case, the Minnesota Supreme Court did not reach the applicability of the user statute, in part, because the record was “not developed as to whether the statutory requirements of use and maintenance have been met in this case.” *Hebert v. City of Fifty*

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<sup>2</sup> The City does not claim it “owns” the encroachment parcel, as suggested by Appellants. *App. Br. p. 29*. Rather, the City maintains it has an easement for roadway purposes by application of the user statute and, alternatively, common law dedication.

*Lakes*, 744 N.W.2d at 232. At the outset of this litigation, the City brought a Rule 12 Motion to Dismiss, relying only on the pleadings. As a result, the record did not contain sufficient information for any court to evaluate the statutory criteria. The record now clearly demonstrates there has been regular and uninterrupted public use and maintenance of North Mitchell Lake Road for a period of more than six years, indeed for nearly 40 years. Nonetheless, Appellants contend the user statute does not apply to Torrens property.

Whether the user statute applies to Torrens property is an issue of first impression.

The District Court stated:

The Minnesota Supreme Court did not squarely address this issue, in part, because the factual record was not developed concerning the statutory requirements of public use and maintenance. Significantly, however, whether the user statute applies to Torrens property involves a question of law, not fact.

*Add. p. 5.* By remanding this case for development of the factual record following the Rule 12 Motion, the Supreme Court's opinion strongly suggests the user statute is applicable to Torrens property. The District Court agreed. Otherwise, it would have been unnecessary to more fully develop the record concerning a question of law.

By way of background, Minnesota adopted the Torrens system in 1901 as an alternative to abstract property ownership, "to create a title registration procedure intended to simplify conveyancing by eliminating the need to examine extensive abstracts of title by issuance of a single certificate of title free from any and all rights or claims not registered with the registrar of titles." *Hebert v. City of Fifty Lakes*, 744 N.W.2d at 230 (citing *Hersh Properties, LLC v. McDonald's Corp.*, 588 N.W.2d 728, 733 (Minn. 1999)). However, after registration, Minn. Stat. § 508.02 expressly provides, other than adverse possession

claims, registered Torrens land becomes subject to the same “burdens and incidents which attach by law to unregistered land” including, but not limited to, eminent domain. *See generally* Minn. Stat. § 508.02; *Hebert*, 744 N.W.2d at 230 (holding pursuant to Minn. Stat. § 508.02, the government may acquire title to Torrens property pursuant to an exercise of its eminent domain authority). Statutory dedication does not represent an adverse possession claim within the meaning of the Torrens statute.

**A. The Plain Language of the User Statute Makes it Applicable to Torrens Property.**

The plain language of Minn. Stat. § 160.05, subd. 1 makes it applicable to Torrens property. The object of statutory interpretation “is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16. In ascertaining the legislative intent, courts consider “the occasion and necessity for the law, the mischief to be remedied by it, the object to be attained by it, the circumstances of its enactment, and the consequences of a particular interpretation.” *Toth v. Arason*, 722 N.W.2d 437, 447 (Minn. 2006) (citing *Hersh Props., LLC v. McDonald’s Corp.*, 588 N.W.2d at 736). Additionally, a statute should be construed to make it effective, rather than to nullify it. *Toth*, 722 N.W.2d at 447 (citations omitted). Finally, statutes should be construed to avoid absurd or unjust consequences. *Id.* (citing *Hince v. O’Keefe*, 632 N.W.2d 577, 582 (Minn. 2001)).

The user statute applies to “any road or portion of a road” with three exceptions: (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, subd. 2). The statute does not contain an exception for Torrens property.

In 2008, the legislature modified Minn. Stat. § 508.02. The only change to this section was to add the following language:

but the common law doctrine of practical location of boundaries applies to registered land whenever registered. Section 508.671 shall apply in a proceedings subsequent to establish a boundary by practical location for registered land.

Minn. Stat. § 508.02. If the legislature intended to exempt Torrens property from the user statute, it would have expressly provided this exception in 2008. It did not. To the contrary, the legislature provided Torrens property is subject to the same “burdens and incidents which attach by law to unregistered land.”

The District Court was correct in relying on the Marketable Title Act and finding it analogous to this situation. *Add. p. 7. In Hersh Properties, LLC v. McDonald’s Corp.*, the Minnesota Supreme Court held the plain language of the Marketable Title Act made it applicable to Torrens property stating:

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. Further, the MTA also requires that a notice to preserve an interest within 40 years of its creation must be filed in the office of the county recorder, which handles abstract property, *or* the office of the registrar of titles, which handles Torrens property exclusively. *The language that specifically provides for the recording of notice in the office of the registrar of titles would be unnecessary if the legislature did not contemplate that the MTA would be applicable to Torrens property.* Consequently, the plain language of the MTA leads us to hold that the MTA applies to property registered pursuant to the Torrens Act.

*Id.* at 735. (The language relied on by Appellants is emphasized above.) Because the MTA references recording of notices in the offices of registrar, it actually supports the

City's position the plain language of the user statute makes it applicable to Torrens property because there is no exception for Torrens property listed. Accordingly, because there is no exception for Torrens property in the user statute, Torrens property is subject to statutory dedication.

The only attorney general opinion addressing the applicability of the user statute to Torrens property also supports the City's position. In 1959, the Town of Minnetonka sought an advisory opinion whether the user statute applied to Torrens property. *RA.109*. The Town of Minnetonka inquired whether Minn. Stat. § 160.19 (the predecessor to Minn. Stat. § 160.05) applies when "the registration of the land and the construction of the road as it actually exists occurred at or about the same time." The Town of Minnetonka inquired if there was any conflict between Minn. Stat. § 160.19 and Minn. Stat. § 508.02 that would prevent that application of statutory dedication 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 becomes a public road by user if the requirements of the 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.

*RA.110.*

To the extent there is a conflict between the two statutes, the user statute should govern because it is more specific. Canons of statutory construction dictate that specific

provisions prevail over general provisions. *In re Welfare of J.M.*, 574 N.W.2d 717, 721 (Minn. 1998); see Minn. Stat. § 645.26, subd. 1 (when two laws conflict, the more specific prevails). The Torrens Act does not specifically address roads and indicates “registered land shall be subject to the same burdens and incidents which attach by law to unregistered land.” Minn. Stat. § 508.02. Under the circumstances, the user statute should prevail over the Torrens Act.

The application of statutory dedication to Torrens property protects the public’s interest in long-established public roads. The Court should presume in analyzing these statutes “the legislature intends to favor the public interest as against any private interest.” Minn. Stat. § 645.17 (5).

Cities incur substantial expense in designing 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 [out of 123,000] 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-limitation in the user statute must apply to these deviations to protect the public’s interest in these long-established public roads.

*A--076-077*. Public policy supports the protection of public roads which have been used by the public and maintained at public expense for decades.

**B. Statutory Dedication is not a Form of Adverse Possession Prohibited by the Torrens Act.**

Acquisition of property by statutory dedication is significantly different from acquisition of property by adverse possession; and therefore, these terms cannot be considered synonymous for several reasons. First, Minn. Stat. § 160.05 provides a

statutory method of establishing a public road easement, whereas claims of prescription and adverse possession are governed by common law. *Gubb v. State*, 433 N.W.2d 915, 918 (Minn. App. 1988) (discussing the five common-law elements of adverse possession). Second, claims for prescription and adverse possession have a 15-year statute of limitations where the user statute has a significantly shorter 6-year statute of limitations. *See* Minn. Stat. § 541.02 and Minn. Stat. § 160.05, subd. 1. Third, the beneficiary of statutory dedication is the public, whereas the beneficiary in a claim of prescription or adverse possession is generally a private party. *Fischer v. Sauk Rapids*, 325 N.W.2d 816 (Minn. 1982) (discussing adverse possession).

Fourth, the requirements for statutory dedication are significantly different from those required to support a claim for adverse possession. As noted above, the user statute only requires public use and maintenance by the appropriate road authority over a continuous period of six years. In contrast, “[t]he elements necessary to prove adverse possession are well established and require a showing that the property has been used in an actual, open, continuous, exclusive, and hostile manner for 15 years.” *Hebert v. Fifty Lakes*, 744 N.W.2d 226, 230, fn 2 (Minn. 2008) (citing *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999)). For these reasons, statutory user does not equate to adverse possession.

Appellants’ reliance on several cases which describe the user statute as a substitute for prescriptive acquisition of property is unavailing. Significantly, none of these cases involved the precise issue in this case; namely, whether the user statute applies to Torrens property. For instance, in *Shinneman v. Arago Township*, 288 N.W.2d 239, 242 (Minn. 1980), the Supreme Court held the user statute did not result in a method for the

government to “take” property. In dicta, the court went on to describe the user statute not as a tool to “take” property, but as a “substitute for the common-law creation of highways by prescription or adverse use.” *Id.* The court, however, was not addressing the specific issue of the applicability of the user statute to Torrens property. In referencing “adverse use,” the court did not discuss adverse possession or that the property has been used in an actual, open, continuous, exclusive and hostile manner. The road in *Shinneman* was used by numerous people, “members of the public who could naturally be expected to enjoy it.” *Id.* at 242. Therefore, it obviously did not meet all the elements necessary for adverse possession – exclusive and hostile use.

In *Barfnect v. Town Bd. of Hollywood Township*, 232 N.W.2d 420 (Minn. 1975), the issue was whether statutory dedication “if construed to extend public dedication of a road to a width of 4 rods and not simply to the extent of actual use, results in a taking of private property without due process of law.” *Id.* at 422. The Supreme Court found the user statute does not authorize a township to widen a road acquired by adverse public use beyond that width actually acquired by such adverse use. *Id.* at 423. The *Barfnect* Court did not determine statutory dedication was a form of adverse possession as suggested by Appellants. *App. Br. p. 16.*

Since statutory user and prescriptive use involve some type of property use adverse to the fee owner, it is not surprising cases analyzing these methods of acquiring property have borrowed terms from each other. However, reliance on cases that reference “adverse use” in discussing statutory dedication is not appropriate because the cases do not discuss the statute’s application to Torrens property. If the Supreme Court

had made a determination “adverse use” is synonymous with adverse possession, the *Hebert* Court could have determined, as a matter of law, the user statute does not apply to Torrens property. Instead, the *Hebert* Court remanded this matter back to the District Court on the basis: “the record therefore is not developed as to whether the statutory requirements of use and maintenance have been met in this case.” *Hebert*, 744 N.W.2d 226 at 232.

More importantly, Appellants’ interpretation of the dicta in the above cases is contradicted by the plain language of the Torrens Act which provides: “Registered land shall be subject to the same burdens and incidents which attach by law to unregistered land.” Minn. Stat. § 508.02. The user statute does not contain an exception for Torrens property. Therefore, the District Court was correct in determining statutory dedication is not a form of adverse possession prohibited by the Torrens Act. *Add. pp. 8-9.*

**C. The Application of the User Statute to Torrens Property is Supported by Decisions from Other Jurisdictions.**

Other states have upheld unrecorded easements on Torrens property which supports the City’s position the user statute applies to Torrens property. For example, in *Duddy v. Mankewich*, 75 Mass. App. Ct. 62 (2009), property owners were issued a certificate to title under the registration system. Subsequently, they subdivided their property and created a road. However, in a few of the subdivisions, the landowners either neglected to include an express right of way in the deed or neglected to state an encumbrance for owners of the remainder of the right of way. The plaintiff sought a declaratory judgment that the property owners of subdivided property had no interest in

the rights over a portion of the road that fronted their property. *Id.* at 64. The court noted the theories to impose an easement on registered land are limited, as the registration system was designed to protect against such actions. *Id.* at 66. The court stated: “[h]olders of a certificate of title take ‘free from all encumbrances except those noted on the certificate.’” However, the court found the landowners intended an easement for the benefit of the lots and vacated the order finding the lots do not enjoy a right of way or easement. *Id.* at 71. The chronology of the easement, coming after registration, is significant since the court found exceptions to state registration systems not listed under statute.

The Illinois Supreme Court also upheld an implied easement over Torrens property. *See Carter v. Michel*, 87 N.E.2d 759 (Ill. 1949). In *Carter*, the original owner registered two properties under Torrens law, and later transferred them to plaintiff and defendant. *Id.* at 763. After the transfer, defendants registered the land under the Torrens Act. *Id.* at 761. The original owner’s action of selling both pieces of land gave rise to an implied easement in favor of plaintiffs. *Id.* at 763. The only potential obstacle to the easement was the Torrens registration. Since the plaintiffs were not parties to the original registration and did not gain a property interest until six years after the registration, the Torrens Act did not bar “an implied grant arising under implication of law which came into existence at the moment of severance and registration by the defendants and which ripened for a subsequent period of ten years.” *Id.* at 764. Accordingly, the Court upheld the easement on the Torrens property even though it was not mentioned in the certificate

of registration. *See also, Hooper v. Haas*, 164 N.E. 23 (Ill. 1928) (dedication effective although not listed on Torrens registration).

As set forth above, the plain language of the user statute demonstrates it is applicable to Torrens property. Because the record now establishes uncontroverted continuous public use and maintenance of the road, the District Court correctly determined the disputed portion of the road has been dedicated to the public pursuant to Minn. Stat. § 160.05, subd. 1.

## **II. THE USER STATUTE APPLIES TO UNPLATTED PORTIONS OF A CITY STREET DEVIATING FROM THE PLATTED PATH.**

The plain language of the user statute and the legislative history support the application of this statute to this case and unplatted portions of a city street that deviate from the platted path.

### **A. 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 District Court was correct in finding the plain language of the user statute makes it applicable to unplatted portions of a city street that have deviated from the platted path. *Add. p. 9*. The object of statutory interpretation “is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16. Courts must give effect to the plain meaning of statutory text when it is clear and unambiguous. *Educ. Minnesota-Osseo v. Indep. Sch. Dist.* 279, 742 N.W.2d 199, 201 (Minn. App. 2007). Courts will only engage in statutory construction if the plain meaning of the statute is ambiguous. *Id.* Only when the words of the statute are ambiguous does “the intent of the

legislature controls.” *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003); see Minn. Stat. §§ 645.08, 645.16. Applying strict construction does not require the narrowest possible interpretation to the statute. *State v. Zacher*, 504 N.W.2d 468, 473 (Minn. 1993). “A statute is ambiguous if it is reasonably susceptible to more than one interpretation.” *Harris v. County of Hennepin*, 679 N.W.2d 539, 728 (Minn. 2004) (citing *Current Tech. Concepts, Inc. v. Irie Enter., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995)).

The user statute applies to “any road or *portion* of a road” with the exception of “*platted streets* within cities.” Minn. Stat. § 160.05, subd 1 (emphasis added). Thus, the plain language of the statute allows statutory dedication of deviations from plats because the portions of the road that deviated from the platted path, by their very nature, are not platted.

Given this is an issue of first impression for this Court, it is helpful to look at other sources on this issue. Statutory dedication applying to portions of a road that deviate from the platted path is consistent with a 1965 attorney general opinion requested by the City of Fergus Falls. The city requested an advisory opinion about whether this statute applied to the unplatted half of a city road even though the other half of the road was platted. The City of Fergus Falls stated:

We 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 the 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?

*RA.103.* There was not a question about the length of time the street was used because it exceeded the six years by 20 or 30 years. The attorney general advised Minn. Stat. § 160.05 applies to this situation stating:

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.

*RA.105-106.*

Therefore, the user statute applies to unplatted portions of a city street that have deviated from the platted path. Additionally, using the plain language to interpret the user statute does not render the exception for “platted streets within cities” meaningless. Appellants claim the City’s interpretation of the user statute makes “the platted streets exception mere surplusage, language of no effect.” *App. Br. p. 25.* However, the user statute would not apply to those platted streets within a city that are designated as private streets. Appellants argue this interpretation contradicts the statute stating, “[t]he statute reads: ‘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 . . .’ Minn. Stat. § 160.05 subd 1. A ‘private street’ cannot be a ‘public highway.’” Appellants misread the statute because the user statute applies to all streets within a city’s jurisdiction. Minn. Stat. § 160.01, subd. 2 states, “[t]he provisions of chapters 160 to 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.”

Therefore, by including the last sentence, “[t]his subdivision shall apply to roads and streets except platted streets within cities,” the user statute applies to roads and streets within the jurisdiction of the city, which includes private streets. Additionally, the user statute would not apply to streets within a city that are dedicated to the public.

Appellants claim this exception is meaningless. It is not meaningless; it means what it says -- the user statute does not apply to platted streets within a city. According to Minnesota Statutes § 160.01, subd. 2, the language is not a mere “surplusage.” *See* Minn. Stat. § 465.17, subd. 17 (“the legislature intends the entire statute to be effective and certain.”)

**B. The Legislative History of the User Statute Supports its Applicability to Unplatted Portions of a City Street that have Deviated from the Platted Path.**

Only when the words of the statute are ambiguous does “the intent of the legislature controls.” *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003). Although it is unnecessary to look beyond the plain language of the user statute, the legislative history supports the user statute’s applicability to unplatted portions of a city street that deviate from the platted path. The motivation for adding the sentence, “[t]his subdivision shall apply to roads and streets except platted streets within cities” was to make the user statute applicable in cities. The language was not added because of a concern about city streets deviating from the platted path.

In 1977, the attorney general reviewed the legislative history of this statute finding:

A brief review of the 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 the 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 limitations imposed by section 160.01, subd. 2 (1974).

*RA.107.* Therefore, the legislative history indicates that the last sentence of Minn. Stat. §160.05, subd. 1 was added to make the statute applicable in cities and not because of a concern about city streets deviating from the platted path.

Additionally, applying the user statute to unplatted portions of a city street that deviated from the platted path is good public policy. In ascertaining the intent of the legislature, this Court is guided by the presumption that “the legislature intends to favor the public interest as against any private interest.” Minn. Stat. § 645.17(5). If the District Court’s decision is not upheld, many more cities could face the dilemma faced by the City in this case: either incur the expense and deal with the impracticality of moving a long-established road or initiate eminent domain proceedings and pay the current fair

market value for property that was acquired many years ago. Instead, this Court should uphold the District Court's decision and protect cities and their tax-paying citizens from spending time and resources to defend or pursue claims based on long-established public roads.

**III. THE DISPUTED SECTION OF NORTH MITCHELL LAKE ROAD HAS BEEN ESTABLISHED BY COMMON LAW DEDICATION.**

This Court need not address common law dedication, because the disputed portion of the road was dedicated pursuant to the user statute. However, in the event this Court does not find the user statute applies, the disputed portion of North Mitchell Lake Road has been established by common law dedication. To prove common law dedication, one “must show the landowner’s intent, express or implied, to have his land appropriated and devoted to a public use, and an acceptance of that use by the public.” *Barth v. Stenwick*, 761 N.W.2d 502, 511 (Minn. App. 2009); *see also Sackett v. Storm*, 480 N.W.2d 377, 379 (Minn. App. 1992) (citing *Wojahn v. Johnson*, 297 N.W.2d 298, 306-07 (Minn. 1980)). This dedication is not subject to revocation. *Daugherty v. Sowers*, 68 N.W.2d 866, 868 (Minn. 1955). “Thus, an owner’s dedication binds his or her successors in interest.” *Sackett*, 480 N.W.2d at 380 (citing *Daugherty*, 68 N.W.2d at 868-69). Similar to the user statute, common law dedication applies to Torrens property. *See Hooper v. Haas*, 164 N.E. 23 (Ill. 1928) (common law dedication effective although not listed on Torrens registration).

**A. Intent to Dedicate.**

Intent to dedicate may be an implied or expressed intention to devote land for a public use. *Wojahn*, 297 N.W.2d at 307. “An intent to dedicate need not be a conscious intent but may be inferred from the owner’s unequivocal conduct.” *Sackett*, 480 N.W.2d at 380. “Acquiescence, without objection, in the public use for a long time, is such conduct as proves and indicates to the public an intention to dedicate.” *Klenk v. Town of Walnut Lake*, 53 N.W. 703, 704 (Minn. 1892). See *Sackett*, 480 N.W.2d at 380. “Any act of the dedicating owner, or of any person acting for him and with his knowledge and consent, from which an intention may be clearly and unequivocally inferred, is sufficient to constitute a common-law dedication.” *Anderson v. Birkeland*, 38 N.W.2d 215, 219 (Minn. 1949). The Minnesota Supreme Court commented “[t]he knowledge and assent of the owner . . . may be presumed from long-continued, uninterrupted use by the public, and the use might be for so long a period that his assent would be conclusively presumed.” *Klenk*, 53 N.W. at 704. The Minnesota Supreme Court explained:

Long acquiescence in the use of property by the public may establish an intent to dedicate and an acceptance by the public . . . . In *Dickinson v. Ruble*, 211 Minn. 373, 375, 1 N.W.2d 373, 374 [1941] we said: “. . . From the fact that for more than 15 years prior to the time of plaintiff’s ownership the use had been ‘open,’ it may be inferred that the public had used the [road] in a manner that was manifest, obvious, observable, and unmistakable. If the use was of this character for that length of time, it is reasonable to conclude either that it was known to the prior owner, . . . or if not, the owner was negligent in not knowing and cannot be relieved from its ignorance. . . . Under our decisions, only ‘long-continued, uninterrupted use by the public’ need be proved to establish the owner’s acquiescence from which the intention to dedicate is inferred.”

*Allen v. Village of Savage*, 112 N.W.2d 807, 812 (Minn. 1961) (quotation omitted).

Appellants claim the City failed to establish a prima facie case by not showing their intent to devote land to public use. *App. Br. p. 27*. In the present case, the fact the road has stood uncontested by any owner for decades is sufficient to demonstrate an intent to dedicate the disputed section of road by “long acquiescence.” Appellants rely on *Security Federal Sav. & Loan Ass’n v. C & C Investments, Inc.*, 448 N.W.2d 83, 87 (Minn. App. 1989). *Security Federal* involved a section of a parking lot that patrons of commercial business used. This case is distinguishable on several grounds. In *Security Federal*, the owner of the parking lot was a business that allowed other businesses’ customers to use the parking lot. Here, a municipality constructed a road for the benefit of the public and Appellants. It allowed Appellants better and safer access to their property. In *Security Federal*, it was the landowner who sought to prevent other business owners from benefiting from their parking lot. Here, Appellants and their predecessors seek compensation from the City although they benefited from traveling on a safe and maintained road for decades.

The public has used the road in a manner that was manifest, obvious, observable, and unmistakable with no action from Appellants or predecessor property owners. The first conversation Appellants had with the City alleging the road encroached on their property was in 1998, but this was long after the road was established and maintained for the benefit of the public and at taxpayer expense. This long period of acquiescence, without objection, demonstrates an intent to dedicate, as a matter of law.

**B. Public Acceptance.**

“Public acceptance may be shown by public use of the dedicated property, and this use may be established by a relatively small number of people. Public use is considered the strongest evidence of acceptance.” *Sackett*, 480 N.W.2d at 380-81 (citing *Flynn v. Beisel*, 102 N.W.2d 284, 292 (Minn. 1960) and *Keiter v. Berge*, 18 N.W.2d 35, 38 (Minn. 1945)). Even occasional use by members of the public, such as visitors, is a sufficient public use. See *Daugherty v. Sowers*, 243 Minn. 572, 574-76, 68 N.W.2d 866, 868-69 (1955) (affirming District Court’s finding that common-law dedication occurred). Public acceptance may also be inferred from public officers improving and maintaining the dedicated property, “although the maintenance need not be publicly funded.” *Sackett*, 480 N.W.2d at 381. See *Anderson v. Birkeland*, 38 N.W.2d 215, 220 (Minn. 1949). See also *Daugherty*, 68 N.W.2d at 866-69. “The longer the time of public use the stronger is the presumption of dedication.” *Anderson*, 38 N.W.2d at 220. Accord *Dickinson v. Ruble*, 1 N.W.2d 373, 375 (Minn. 1941) (“Proof of some particular period of public use is not a prerequisite to dedication though the weight that will be attached to such public use as evidence of acquiescence will vary proportionally with its length).

Here, it is uncontested North Mitchell Lake Road has been used constantly by all members of the general public for decades. Clearly, the long period of continuous and uninterrupted public maintenance and use supports the conclusion the road has been accepted by the public. Accordingly, the disputed portion of the road has also been dedicated to the public by operation of the doctrine of common law dedication.

**IV. THIS COURT LACKS JURISDICTION TO CONSIDER APPELLANTS' LACHES AND EJECTMENT ARGUMENTS.**

This Court lacks jurisdiction to address Appellants' laches and ejectment arguments, as the District Court found there were genuine issues of material fact with respect to these issues. *Add. p. 12.*

The trial court's finding of a genuine fact issue constitutes a determination that the plaintiff has produced sufficient evidence on the merits of his lawsuit to survive a motion for summary judgment. And the decision that claims are sufficiently proven to create a genuine fact issue is ordinarily not an appealable order.

*Carter v. Cole*, 526 N.W.2d 209, 213 (Minn. App. 1995); *see also, Pahnke v. Anderson Moving & Storage*, 720 N.W.2d 875, 885 (Minn. App. 2006) (finding the district court's conclusion that whether a contract existed and whether promissory estoppel is appropriate are fact questions for the jury and was not appealable). Accordingly, this Court does not have jurisdiction to consider these issues.

To the extent the Court determines it has jurisdiction, the District Court properly determined there are genuine issues of material fact precluding summary judgment.

**A. There is a Genuine Issue of Material Fact Whether Appellants' Claim for Ejectment is Barred by Laches.**

The District Court was correct in finding there were genuine issues of material fact whether Appellants' claim is barred by laches. *Add. p. 12.* The Minnesota Supreme Court held, "[t]he inapplicability of section 541.02 to Torrens property does not however preserve an ejectment action in perpetuity. An action for ejectment seeks equitable relief, and as such may be subject to the equitable defense of laches." *Hebert*, 744 N.W.2d at 233 n. 6. *See Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999) ("[I]t is a maxim of

equity that he who seeks equity must do equity”) (internal quotation omitted)). The Supreme Court stated, “[w]e have recognized that “a party is barred by laches when the delay is so long and the circumstances of such character as to establish a relinquishment or abandonment of rights.” *Id.* (citing, *Corah v. Corah*, 246 Minn. 350, 357, 75 N.W.2d 465, 469 (1956)). The Court has “also applied the doctrine of laches in circumstances when there is no statute of limitations expressly applicable to the particular claim.” *Id.* (See, e.g., *Lindquist v. Gibbs*, 142 N.W. 156 (1913) (“There is no statute of limitations that applies to such cases. \* \* \* A party who comes into a court of equity must act with reasonable diligence, under all the circumstances, or he is chargeable with laches.”)). Additionally, laches has been applied to “equitable principles to disputes involving Torrens property.” *Id.* (See *In re Collier*, 726 N.W.2d 799, 808 (Minn. 2007) (noting “that we have applied principles of equity when a result under the Torrens Act violates notions of justice and good faith.”); *Finnegan v. Gunn*, 292 N.W. 22, 23 (1940) (“Nothing in the Torrens system indicates that the ancient concepts of equity are not applicable \* \* \* .”).

The doctrine of laches prevents one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay. *Klapmeier v. Town of Center*, 346 N.W.2d 133, 137 (Minn. 1984). It is designed to promote vigilance and to discourage delay in enforcing rights and cuts off stale claims of those who have procrastinated unreasonably and without excuse. *State ex rel. Sawyer v. Mangni*, 43 N.W.2d 775, 781 (Minn. 1950). Laches applies to land use claims. *Shortridge v. Daubney*, 425 N.W.2d 840, 842 (Minn. 1988) (holding delay of

approximately four years in challenging a special assessment precludes relief from the assessment based upon a technical defect in the notice of assessment as to the length of time within which an appeal to District Court may be taken).

The application of the defense of laches involves a factual inquiry, which is not amenable to summary resolution. Viewing the facts in a light most favorable to the City, the District Court correctly found there are genuine issues of material fact concerning (1) whether Appellants unreasonably and inexcusably delayed filing this litigation and (2) whether the City was prejudiced from the delay.

Since the 1976 and 1989 surveys depicted the road encroaching on Appellants' property, a reasonable fact-finder could find the delay in bringing suit until 2005 was unreasonable and inexcusable. Furthermore, Appellants first complained about the disputed portion of North Mitchell Lake Road in 1998 (*RA. 76*) but waited another seven years to initiate this litigation. Appellants knew or should have known about the issues raised in their Complaint long before they brought this action. The City incurred costs in maintaining this road for decades and undoubtedly the price of lake shore for this property has risen substantially since the road was constructed – both of which represent prejudice to the City. Appellants should not be afforded an unlimited amount of time to challenge the construction of the public road on their property in 1971 which, by their own admission, significantly and detrimentally affected the value of their property when built. *A--005-006*. To allow otherwise would result in a lack of finality and subject very small municipalities like the City of Fifty Lakes (population 392) to unknown potential liabilities for actions that may have occurred decades ago. Viewing the facts in a light

most favorable to the City, the District Court was correct in finding there was a material issue of fact whether laches applies.

**B. There is a Genuine Issue of Material Fact Whether the Disputed Portion of the Public Road Represents a Permanent or Continuing Trespass.**

The District Court was also correct in finding there is a genuine issue of material fact whether the disputed portion of the public road represents a continuing trespass. Minnesota Statutes § 541.05, subdivision 1(3) -- Minnesota's trespass statute -- limits actions for trespass upon real property to six years from the time the trespass occurs. The Minnesota Supreme Court found, "[u]nless the roadway operates as a continuing trespass, the limitations period lapsed after 1977 and the landowners are time-barred from seeking damages for trespass." *Hebert*, 644 N.W.2d at 234.

In *Ziebarth v. Nye*, 44 N.W. 1027, 1028 (Minn. 1890), the Minnesota Supreme Court found a 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 level of the land, and neither defendant nor plaintiff could lawfully go thereon and restore the same to its former condition." *Id.* In discussing *Ziebarth*, the Minnesota Court of Appeals in *Equitable Life Assurance Soc'y v. Erin, Inc.*, C3-98-2070, 1999 Minn. App. LEXIS 541 (Minn. App. May 18, 1999) (*RA.134*) stated:

[t]he 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. 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.

*Id.* at \*6-7, RA.135.

The Minnesota Supreme Court clarified the factual inquiry:

The test to determine whether the claimed trespass resulting from the construction of the road is permanent or continuing is "whether the whole injury results from the original wrongful act"-- the construction of the gravel road in 1971-- "or from the wrongful *continuance* of the state of facts produced by such act."

*Hebert*, 644 N.W.2d at 234 (citation omitted) (emphasis in original). "The problem of whether the trespass is continuing, or a single permanent trespass as plaintiff contends, depends on the character of the invasion and the structures erected; and this problem, as well as the problem of the measure of damages to be applied is essentially one of proof."

*Northern States Power Co. v. Franklin*, 122 N.W.2d 26 (Minn. 1963).

A permanent injury to real property, as distinguished from a temporary or continuing injury, is one of such a character and existing under such circumstances that it will be presumed to continue indefinitely. A temporary, or continuing injury is one that may be abated or discontinued at any time, either by the act of the wrongdoer, or by the injured party.

*Hebert*, 644 N.W.2d at 234 (citing *Worden v. Bielenberg*, 128 N.W. 314, 315 (1912)).

In *Worden*, defendant excavated Livingston Avenue and removed therefrom all the limestone to a depth of about eighteen feet. Thereafter, the city council re-established

the grade of that street to correspond substantially with defendant's excavation. *Worden*, 128 N.W. at 331. In finding the trespass continuing, the Supreme Court stated:

The injury here complained of is the act of defendant in making the excavations in the street; not in acts committed from day to day in doing the work, but the wrong resulting from the completed act. . . . This is permanent, at least presumably permanent, from the facts disclosed. *It is not at all probable that the grade of the street will ever be restored to the natural level of the land, and neither defendant nor plaintiff could lawfully go thereon and restore the same to its former condition.* The contention of plaintiff that defendant could be compelled to do this is clearly not sound.

*Id.* at 333 (emphasis added). In *Worden*, it was critical that "it is not probable that the grade will ever be restored to the natural level of the land" in finding the injury complained of permanent. See *City of Shawnee v. AT&T Corp.*, 910 F.Supp. 1546, 1561 (D. Kansas 1995) (where placement of cable is a permanent trespass as it required earthmoving equipment); *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623 (2003) (poles or electric lines on property held to be permanent in nature), *Devenish v. Phillips*, 743 So.2d 492 (Ala. App. 1999) (trespass from a retaining wall found to produce a "permanent injury to the land.").

The resolution of the nature of the trespass involves questions of fact and law. *Id.* at 235 (citing *Starrh & Starrh Cotton Growers v. Aera Energy LLC*, 153 Cal. App. 4th 583 (Cal. App. 2007)). The District Court was correct in denying Appellants' Motion for Partial Summary Judgment because a reasonable jury could conclude the whole injury resulted from original construction of the road, not its continued maintenance by the road authority and use by the public. The movement of a road, even a "mere" gravel road is no easy task. This is complicated further by the existence of wetlands to the north of

Appellants' properties on North Mitchell Lake Road, which would necessarily involve potential wetland mitigation issues. *RA.118, RA.112*, Minn. Stat. § 103G.222, Subd. 1 (a) provides, "wetlands must not be drained or filled, wholly or partially, unless replaced by restoring or creating wetland areas of at least equal public value under a replacement plan."

In *Heath v. Minneapolis, S. P. & S. S. M. R. Co.*, 126 Minn. 470 (Minn. 1914), the landowners complained about a railroad constructing an embankment for a road bed that resulted in a large quantity of water flowing over their land and also carried large quantities of sand into the springs which buried the owner's trout. In finding a continuing trespass, the Minnesota Supreme Court stated:

*The evidence suggests that future injury is preventable. That the embankment was constructed in the usual way does not signify. The gist of the complaint against defendants is that they so arranged their materials upon the right of way that they continuously escape and fall upon plaintiff's land. Unless defendants have taken steps to avoid a recurrence, it is plain that were the springs and ponds of plaintiff now emptied of the sand, which came from defendants' embankment, they will again be filled at the next heavy rain. If defendants need plaintiff's premises, or any part thereof, as support for their road bed, the same must be taken under the eminent domain statute. The invasion of plaintiff's premises was in the nature of separate, recurring acts of trespass.*

*Id.* at 474-75 (emphasis added) (citing *Bowers v. Mississippi & Rum River Boom Co.*, 81 N.W. 208, 209 (1899)). Unlike the railroad in *Heath*, here, the City is not placing materials on Appellants' property beyond the road. Even if they stopped maintaining the road and stopped travel, the road still encroaches on Appellants' property and has since 1971. The rebuilding of the road in 1971 was done so "part of it was constructed Southerly of the Southerly boundary line of the Platted Street, so that it encroaches onto

Appellants' Property." A--005. Because simple inaction by the City (i.e. not maintaining the road) would not cure the encroachment, viewing the facts in a light most favorable to the City, the District Court was correct in denying Appellants' Motion for Partial Summary Judgment.

**CONCLUSION**

The District Court properly determined the disputed portion of North Mitchell Lake Road was dedicated pursuant to the user statute, Minn. Stat. § 160.05. The plain language of the Torrens statute does not prevent the application of the user statute to registered Torrens property. Accordingly, the District Court's decision should be affirmed.

IVERSON REUVERS

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