

No. A08-0646

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STATE OF MINNESOTA

IN COURT OF APPEALS

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Dean Oliver and Delores Oliver,

Appellants,

vs.

State of Minnesota, by its Commissioner of Transportation,

Respondent.

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RESPONDENT'S BRIEF AND APPENDIX

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ZENAS BAER  
Atty. Reg. No 0120595

Zenas Baer and Associates  
P.O. Box 249  
Hawley, MN 56549  
(218) 483-3372

ATTORNEYS FOR APPELLANT

LORI SWANSON  
Attorney General  
State of Minnesota

ERIK M. JOHNSON  
Assistant Attorney General  
Atty. Reg. No. 0247522

Bremer Tower, Suite 1800  
445 Minnesota Street, Suite 1800  
St. Paul, Minnesota 55101-2134  
(651) 296-6673

ATTORNEYS FOR RESPONDENT

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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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## LEGAL ISSUES

1. Under Minnesota law, to obtain a prescriptive easement, a party must use another's property in a way that is "exclusive" against the community at large. Here, a gravel drive ran from the east side of the Oliver Parcel to T.H. 10. The Olivers testified that they drove various motor vehicles north and south on the gravel drive and that their neighbors and other members of the public drove motor vehicles north and south on the gravel drive. Did the Olivers acquire a prescriptive easement from their property along the gravel drive to Highway 10?

*No. Where even the Olivers confirmed that their uses of the gravel drive were "the same" as the uses of the gravel drive by the general public, there was no evidence in the record, even viewed in the light most favorable to the Olivers, to allow a finding that the Olivers could satisfy the 'exclusive' element.*

*Hendrickson v. State*, 127 N.W.2d 165 (Minn. 1964)

*Merrick v. Schleuder*, 228 N.W. 755 (Minn. 1930)

*Caroga Realty Co. v. Tapper*, 143 N.W.2d 215 (Minn. 1966)

*Wheeler v. Newman*, 394 N.W.2d 620 (Minn. Ct. App. 1986)

2. Under Minnesota law, to obtain a prescriptive easement over another's property, a party must openly assert "hostile" title. And where the original entry is permissive, the prescriptive period does not begin to run against the owner until an adverse holding is declared to the knowledge of the owner. Here, Olivers used the State's easement over the gravel drive permissively until it expired in 1980. The record does not show that the Olivers expressed a hostile assertion of rights against any underlying fee owners as they continued to use the gravel drive any earlier than 1993. Accordingly, when the opening was closed in 2005, the 15-year period required for a prescriptive easement had not run. Could the Olivers satisfy the 'hostile' element?

*No. There was no evidence in the record, even viewed in the light most favorable to the Olivers, to allow a finding that Olivers could satisfy the 'hostile' element for 15 years.*

*Hendrickson v. State*, 127 N.W.2d 165 (Minn. 1964)

*Meyers v. Meyers*, 368 N.W.2d 391 (Minn. Ct. App. 1985), *rev. denied* (Minn. Jul. 17, 1985)

*O'Boyle v. McHugh*, 69 N.W. 37 (Minn. 1896)

3. Under Minnesota law, if a property abuts a roadway, the owner only suffers compensable damage for loss of access to the roadway when the owner is left without reasonably convenient and suitable access to the roadway. After the State closed the opening between highway 10 and the gravel drive, the Oliver's property still had access from a township road that leads directly to Highway 10 from the west side of their property. Are the Olivers entitled to compensation for loss of access to Highway 10?

*No. As a matter of law, the Olivers still have reasonably convenient and suitable access to and from their property.*

*Grossman Invs. v. State*, 571 N.W.2d 47 (Minn. Ct. App. 1997), *rev. denied* (Minn. Jan. 28, 1998)

*Dale Properties, LLC v. State*, 638 N.W.2d 763 (Minn. 2002)

4. Under Minnesota law, to obtain a prescriptive easement, a party must join as parties all owners of land across which the claimed easement is alleged to run. Here, the Olivers claimed an easement that would lay across land owned by three of their neighbors. The Olivers did not join any of those neighbors as parties to this case. Can the Olivers maintain their claim for an easement?

*No. The Olivers did not join necessary parties.*

*Nunnelee v. Schuna*, 431 N.W.2d 144 (Minn. Ct. App. 1988), *rev. denied* (Minn. Dec. 30, 1988)

## STATEMENT OF THE CASE

This inverse condemnation mandamus case, brought pursuant to Minn. Stat. § 586.01, et seq. (2006), arose from MnDOT's closing of an opening between a gravel road and state trunk highway 10. Appellants Dean Oliver and Delores Oliver alleged that they had a property right in access to highway 10 that was 'taken' by closing of the opening. The District Court for Clay County, Seventh Judicial District, the Honorable Galen J. Vaa, granted MnDOT's motion for summary judgment, dismissing the Olivers' action. The Olivers have appealed from summary judgment.

## STATEMENT OF FACTS

In 1951, petitioners Dean Oliver and Delores Oliver purchased a parcel of real property ("Oliver Parcel") in Clay County. A.A.<sup>1</sup> 19. The Oliver Parcel has street address 532 250th Street North. A.A. 18. At the time of the Olivers' purchase of the Oliver Parcel, the Oliver Parcel had access on its West side from state trunk highway 10 ("T.H. 10") via 250th Street North. A.A. 20, A.A. 28.

In 1954, the Olivers entered into an agreement with the State of Minnesota whereby the State would mine gravel from a pit on the East side of the Oliver Parcel and would pay the Olivers eight cents for each yard of gravel. A.A. 76-79. The agreement shows that the Olivers also provided the State an easement over the Southeast corner of the Oliver Parcel for that purpose. A.A. 76-79.

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<sup>1</sup> "A.A." = "Appellants' Appendix."

Dean Oliver has testified that he wanted ten cents per yard but agreed to accept eight cents instead in exchange for the State putting in an access road to the East side of the Oliver Parcel. A.A. 19. He acknowledges that this purported deal is not reflected in the written agreement or in any other written agreement, but rather states that when the deal was reached, the parties "shook hands." A.A. 21.

In 1955, the State obtained a strip of easements from owners of that land that separated the Oliver Parcel from highway 10. A.A. 82-84. A gravel drive was built in the strip of easements. A.A. 20. As a result, the Oliver Parcel could then use two routes to get to T.H. 10: 250th Street North and the gravel drive. The easements, by their terms, expired January 1, 1980. A.A. 82-84.

In 1978, Laurence Aakre purchased the parcel of land that had been owned by Conrad Swenson, which was, at that time, still subject to an easement in favor of the State. A.A. 32. Aakre had used the drive to get his tractor, combine, and other equipment to farm the West side of the Aakre Parcel. A.A. 32. In 1981, Aakre exchanged letters with the State confirming that the State would not seek to renew its easement. A.A. 34-35.

In November 1993, Aakre sold to Jose Santoyo and Ernie and Doris Larson a portion of Aakre's property ("the Santoyo Parcel") in the Northeast quarter of section 5, township 139 North, range 44 West in Clay County that contained a gravel pit. A.A. 36-37. The remaining portion of Aakre's property that Aakre did not sell ("the Aakre Parcel") abutted T.H. 10. The Santoyo Parcel did not abut or have access to T.H. 10 or any other road and so Santoyo also obtained an express right from Aakre to use a gravel

drive South across the Aakre Parcel to get access to his property from T.H. 10; the right of use of the gravel drive was memorialized in the Santoyo Parcel deed. A.A. 36-37. The drive was not maintained by any government entity (as specifically disclaimed by Eglon Township) and so Aakre required Santoyo to maintain it, which Santoyo did by blading the drive and occasionally adding gravel to the drive. A.A. 33, R.A.<sup>2</sup> 08. Aakre also allowed the Olivers to use the gravel drive. A.A. 33. In fact, Aakre permitted anyone to use the gravel drive across his property. A.A. 33.

The Oliver Parcel does not physically abut T.H. 10 — a fact that both of the Olivers admit to in their answers to the State’s interrogatories. A.A. 25, A.A. 27, R.A. 04. In 2005, MnDOT closed the opening from the gravel drive to T.H. 10. A.A. 38-40. The Oliver Parcel continued to be able to have its original access route to T.H. 10 from 250th Street North. A.A. 28.

In January 2006, the Olivers brought this mandamus action. A.A. 3-5. They allege that MnDOT’s closing of the opening from the gravel drive onto T.H. 10 was a taking of a property right of access from them for which they should receive monetary compensation. A.A. 3-5.

MnDOT brought a motion for summary judgment dismissal of their action. In response to MnDOT’s motion, the Olivers alleged (for the first time) that they abutted T.H. 10 by virtue of an easement that they asserted ran from the Oliver Parcel along the

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<sup>2</sup> “R.A.” = “Respondent’s Appendix.”

gravel drive to T.H. 10. A.A. 11-12. The district court denied the motion, finding fact issues as to the easement. A.A. 42-54.

As a result of the fact that the Olivers did not disclose their easement theory in response to discovery requests, the Court amended the scheduling order to allow discovery on the easement issue and to permit a dispositive motion. Depositions taken after that hearing provided the following evidence.

Delores Oliver testified as to multiple uses of the gravel drive by members of the community. She testified about use of the gravel drive by members of her family. The Olivers would drive a car or pickup onto the gravel drive and stop to pick wild flowers growing along the side of the drive. R.A. 19. The Olivers' daughter would drive from T.H. 10 onto the gravel drive and stop to pick wild flowers. R.A. 19. For a scenic drive, the Olivers would occasionally drive their pickup truck from the East end of their property, head South down the gravel drive, and then out onto T.H. 10. R.A. 19, 28. The Olivers drove onto the gravel drive from T.H. 10 to pick up some sticks for a bonfire. R.A. 20. When the Olivers wanted to add gravel to their driveway on the West side of their property, they would drive a gravel truck to T.H. 10 and then onto the gravel drive from T.H. 10. R.A. 21. After putting some gravel in the truck, they would drive back down the gravel drive, out onto T.H. 10, and then return to their property. R.A. 21.

Delores Oliver testified as to uses of the gravel drive by members of the community for hunting. The Olivers would drive a pickup onto the gravel drive from T.H. 10 to hunt deer. R.A. 19-20. Shane Sorenson drove his pickup onto the gravel drive from T.H. 10 to hunt deer. R.A. 20. Laurence Aakre's son-in-law, Grandbois, would

drive a pickup from T.H. 10 onto the gravel drive and North to the Santoyo Parcel to bow hunt. R.A. 26. Laurence Aakre's son, Steve Aakre, would drive a van or Jeep from T.H. 10 onto the gravel drive and North to the Santoyo Parcel to hunt. R.A. 27. "[M]any hunters" would annually drive from T.H. 10 onto the gravel drive and North to the river bottom to hunt. R.A. 26. Dean Oliver would drive up the gravel drive to go hunting. R.A. 28.

Delores Oliver testified about gravel trucks using the gravel drive. Gravel contractors Markowitz, Asplin, and Frank Sharon would drive trucks from T.H. 10 onto the gravel drive and North to the Oliver Parcel and then back South along the gravel drive and out onto T.H. 10. R.A. 22-23. Jose Santoyo would drive trucks from T.H. 10 onto the gravel drive and North to the Oliver Parcel and then back South along the gravel drive and out onto T.H. 10. R.A. 23. Trucks owned by contractor PCI would drive from T.H. 10 onto the gravel drive and North to a batch plant on the Oliver Parcel and then haul cement back South along the gravel drive and out onto T.H. 10. R.A. 23. Dean Oliver would drive gravel trucks up and down the length of the gravel drive. R.A. 28.

Delores Oliver testified about a beekeeper using the gravel drive. From April to October, Larry Babolian would drive a two-ton truck from T.H. 10 onto the gravel drive and drive to the East side of the Oliver Parcel, to tend to the bee hives that the Olivers allow him to maintain there. R.A. 21-22. When he finished, he would drive back South out along the gravel drive and onto T.H. 10. R.A. 21. He made the trip onto and off of the Oliver Parcel to tend bees approximately three times per week during the April-to-October period. R.A. 21.

Delores Oliver testified about Santoyo using the gravel drive. Santoyo would drive a pickup truck from T.H. 10 onto the gravel drive and North to the Santoyo Parcel and then back South along the gravel drive and out onto T.H. 10. R.A. 24.

Delores Oliver testified about farmers using the gravel drive. Neighboring landowner Eugene Jetvig's tractor (driven either by Jetvig or a hired helper) drove down the gravel drive onto T.H. 10. R.A. 25-26. Delores Oliver saw a combine drive from Aakre's property onto the gravel drive and then South onto T.H. 10. R.A. 27.

Delores Oliver testified about maintenance of the gravel drive. Santoyo would do maintenance work on the gravel drive; he would use the edge of his loader to wedge the drive so excess water could run off of it. R.A. 28. Contractors that removed gravel from the gravel pit on the Oliver Parcel would, on occasion, add gravel to the gravel drive and blade it to maintain the drive. R.A. 28. Dean and Delores Oliver did not maintain the gravel drive. R.A. 28.

Delores Oliver testified as to signs at the intersection of T.H. 10 and the gravel drive. From sometime in the 1990s until the T.H. 10 project closed the access point between the gravel drive and T.H. 10, a street sign stood at the access point. R.A. 24-25. But no one ever put a sign at the access point between the gravel drive and T.H. 10 that said "private drive." R.A. 24.

Dean Oliver heard Delores' testimony and did not disagree with it. R.A. 09. Dean Oliver testified as to his uses of the gravel drive. Until 1989, Dean Oliver drove gravel trucks on the gravel drive. R.A. 09. From 1980 through 1997, Dean Oliver drove a pickup truck on the gravel drive for hunting. R.A. 10. If Dean Oliver wanted to drive

East on T.H. 10 with a tractor, four-wheeler, or a mower, he would drive South on the gravel drive to T.H. 10 and then proceed East on T.H. 10. R.A. 10.

Dean Oliver testified as to uses of the gravel drive by contractors. When asked whether he told gravel contractors to use the gravel drive, Dean Oliver testified:

I never told them anything. They just assumed that was the way to go. That's what everybody used, the public used. Any and everybody used it, so I didn't tell them where to go. They just -- that was a road and they used it.

R.A. 12. Dean Oliver did not ask contractors to add gravel to the gravel drive; they did so on their own initiative. R.A. 14-15.

Dean Oliver testified as to uses of the gravel drive by hunters. Dean Oliver has seen "lots of" hunters driving up the gravel drive "[e]very fall at deer hunting time."

R.A. 13.

Dean Oliver testified as to uses of the gravel drive by farmers. Dean Oliver saw grain trucks, combines, and farm machinery use the gravel drive from Aakre's land. R.A. 14.

Delores Oliver testified as to signs at the intersection of T.H. 10 and the gravel drive. He remembered the street sign at the opening of the gravel drive onto T.H. 10, "I'm not sure, but if I remember correctly, it was 250 and a half street or something like that." R.A. 12, 16.

Dean Oliver clarified that people all used the gravel drive the same way:

Yeah. It was just a public road that everybody used. Travelers would drive down there and sleep, you know, get away from the traffic. Anybody and everybody, there was no restrictions on it up until they took the approach out.

R.A. 14. Oliver agreed that he was part of the public and that he “used it the same way everybody else did.” R.A. 14. When asked to clarify a general statement about the public using the gravel drive, Deal Oliver testified, “[w]ell, yes, everybody used it.” R.A. 14.

Timothy Fox owns real property that abuts both T.H. 10 and the gravel drive. R.A. 31. With regard to the gravel drive, Timothy Fox testified that, “[i]t’s not just the gravel haulers that use it, it’s the farmers, too.” R.A. 31.

Fox testified as to his uses of the gravel drive. Fox drove a combine, a tractor, farm trucks, a pickup truck, and a swather from T.H. 10 onto the gravel drive and then turned off the gravel drive onto his property. R.A. 32.

Fox testified as to other people’s uses of the gravel drive. Fox sometimes saw hunters drive down the gravel drive or kids going to “have a beer once in a while.” R.A. 32. Fox saw gravel trucks driving back and forth on the gravel drive, either to Olivers’ property or to Santoyo’s property. R.A. 33.

Fox testified as to maintenance of the gravel drive. Fox saw Santoyo do maintenance on the gravel drive -- grading it and adding gravel. R.A. 32. He clarified that he was not sure if it was Santoyo grading. R.A. 33, 34.

Fox considered the gravel drive, “a township road. I thought it was free for anybody to use it.” R.A. 32.

Eugene Jetvig owns real property that abuts both T.H. 10 and the gravel drive. R.A. 37. Jetvig testified as to his uses of the gravel drive. Jetvig used to use the gravel drive to “go in and out of there to my field.” R.A. 37. He would use a farm grain truck

for hauling grain or a pickup truck. R.A. 38. Jetvig drove a tractor on the gravel drive. R.A. 38.

Jetvig testified as to other people's uses of the gravel drive. He saw gravel trucks going between T.H. 10 and the gravel drive, either to or from Olivers' or Santoyo's property. R.A. 39.

Jetvig testified as to maintenance of the gravel drive. He testified that only Santoyo did maintenance on the gravel drive with a grader, although he could not be certain that the grader came from Santoyo. R.A. 40.

Laurence Aakre owns real property that abuts both T.H. 10 and the gravel drive. R.A. 43. Aakre testified as to his uses of the gravel drive. He drove trucks onto the gravel drive from T.H. 10, continue the entire length of the gravel drive beyond Olivers' property. R.A. 43. Aakre drove tractors on the gravel drive. R.A. 43. Aakre drove his pickup on the gravel drive to go hunting. R.A. 43, 44. Aakre drove a swather on the gravel drive. R.A. 44.

Aakre testified as to other people's uses of the gravel drive. Aakre occasionally saw gravel trucks driving on the gravel drive, either to or from Olivers' pit. R.A. 44. Aakre knew that Santoyo used the gravel drive for trucks to haul gravel, like the Olivers did. R.A. 45.

Aakre recalls that when he sold a portion of his property to Santoyo, Dean Oliver said that he was going to charge Santoyo for use of the gravel drive. R.A. 44. Aakre then responded to Oliver, "[w]ait a minute, whose road is this?" R.A. 44. Oliver did not answer. R.A. 44. And then Oliver walked away. R.A. 47.

When asked if he had ever had a conversation with Laurence Aakre that “in any way related to or involved the gravel drive,” Dean Oliver testified, “[n]ot with Laurence, no.” R.A. 13.

After depositions, MnDOT brought a motion for summary judgment dismissal. The district court, in a 25-page opinion, granted the motion, dismissing the Olivers’ petition. A.A. 92. The Olivers appealed to this Court. A.A. 117.

## LEGAL ARGUMENT

### I. STANDARD OF REVIEW.

An appellate court’s “standard of review for summary judgment is de novo.” *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 827 (Minn. 2000). The reviewing court asks “(1) whether there exists a genuine issue of material fact; and (2) whether the district court erred in its application of the law.” *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007). As to the first question, this Court “reviews de novo whether a genuine issue of material fact exists.” *Deutsche Bank Nat. Trust Co. v. Petersen*, 748 N.W.2d 306, 308-09 (Minn. Ct. App. 2008); *see also Spanier v. TCF Bank Svs.*, 495 N.W.2d 18, 20 (Minn. Ct. App. 1993) (stating, “[w]hether the evidence is sufficient to raise a fact question for the jury’s determination is a question of law to be decided de novo by the reviewing court.”), *rev. denied* (Minn. Mar. 22, 1993).

This Court “will affirm the [district court’s] grant of summary judgment if it can be sustained on any ground.” *In re Welfare of S.N.R.*, 617 N.W.2d 77, 85 n.5 (Minn. Ct. App. 2000), *rev. denied* (Minn. Nov. 15, 2001).

“In order to successfully oppose a motion for summary judgment [on the basis of a genuine issue of disputed material fact], a party cannot rely upon mere general statements of fact but, rather, must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial.” *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986). An adverse party may present specific facts by affidavits, depositions, and “[s]worn or certified copies of all papers or parts thereof.” Minn. R. Civ. P. 56.05. A party “must extract *specific*, admissible facts from the voluminous record and particularize them for the trial judge.” *Kletschka v. Abbott-Northwestern Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn. Ct. App. 1988), *rev. denied* (Minn. Mar. 30, 1988). “Evidence offered to support or defeat a motion for summary judgment must be such evidence as would be admissible at trial.” *Hopkins by LaFontaine v. Empire Fire & Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. Ct. App. 1991).

The standard for ruling on a motion for summary judgment is codified in the governing rules of civil procedure, which provide that:

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is [1] no *genuine* issue as to any [2] *material* fact and that [3] either party is entitled to a judgment as a matter of law.

Minn. R. Civ. P. 56.03 (emphasis added).

For the first requirement, that an issue be a “genuine” issue of material fact, the evidentiary record must contain conflicting evidence on the issue. *See PMH Properties v. Nichols*, 263 N.W.2d 799, 803 (Minn. 1978) (stating, “when the evidence is

conflicting, [an issue] presents a question of fact for the trier of fact”); *Alexander v. Eilers*, 422 N.W.2d 312, 315 (Minn. Ct. App. 1988) (stating, “[c]onsidering the conflicting evidence on this question, it cannot be said, as a matter of law, that there is no genuine issue of material fact”). Absent conflicting evidence, any alleged issue as to a fact is not “genuine” and will not prevent entry of summary judgment.

A mere scintilla of evidence will not create a genuine issue:

there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.

*DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Instead, to establish that a “genuine” issue exists as to a material fact, the party opposing the motion must be able to point to evidence in the record that would “permit reasonable persons to draw different conclusions.” *Id.* In other words, to avoid summary judgment, the record must contain conflicting evidence.

For the second requirement, “[a] fact is material if its resolution will affect the outcome of a case.” *O’Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

The rules also establish that a party opposing summary judgment on the basis that a genuine issue exists as to a material fact must rely on evidence, and not mere allegations:

When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party’s pleading but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not

so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Minn. R. Civ. P. 56.05.

**II. DISMISSAL OF APPELLANT'S INVERSE CONDEMNATION ACTION WAS WARRANTED BY GOVERNING LAW FOR ANY ONE OF THREE REASONS.**

The Minnesota Constitution provides that compensation must be paid when a public entity takes private property for a public use. *See* Minn. Const. art. 1, § 13 (stating “[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured”). “Property owners who believe the state has taken their property in the constitutional sense may petition the court for a writ of mandamus to compel the state to initiate condemnation proceedings.” *Dale Properties, LLC v. State*, 638 N.W.2d 763, 765 (Minn. 2002). When property owners seek such mandamus relief, they are asserting a claim for “inverse condemnation.” *See City of Mpls. v. Meldahl*, 607 N.W.2d 168, 172 (Minn. Ct. App. 2000) (stating “[m]andamus is the proper vehicle to assert a claim for inverse condemnation”).

“The mandamus court must determine first whether there has been a taking or damage in the constitutional sense that it may compel the State to initiate condemnation proceedings.” *Id.*, 607 N.W.2d at 172. “Whether a taking has occurred is a question of law.” *Chenoweth v. City of New Brighton*, 655 N.W.2d 821, 824 (Minn. Ct. App. 2003).

“Minnesota [law] treats access to a public highway from abutting property as a [property] right which may not be denied without compensation.” *Hendrickson v. State*, 127 N.W.2d 165, 169-70 (Minn. 1964). The Olivers assert that they possess a property right of access to T.H. 10. They allege that MnDOT’s closing of the opening at the

intersection of the gravel drive and T.H. 10 amounted to a 'taking' of that property right as would entitle them to seek compensation by inverse condemnation.

If a change in access to a public roadway does not amount to a 'taking' then an inverse condemnation claim seeking compensation for such change is properly dismissed. See *Finke v. State*, 521 N.W.2d 371, 375-76 (Minn. Ct. App. 1994) (affirming district court's dismissal of inverse condemnation case arising from claim that change in access at intersection was taking from nearby property, on basis that "as a matter of law, [the owner] has no compensable right of convenient access to [the roadway] from [non-abutting property] for the state to invade."), *rev. denied* (Minn. Oct. 27, 1994). "Those who are not abutting owners have no right to damages merely because access to a conveniently located highway may be denied, causing them to use a more circuitous route." *Hendrickson*, 127 N.W.2d at 170-71. Thus, if the Oliver Parcel does not abut T.H. 10, the Olivers have no property right of reasonably convenient and suitable access to T.H. 10 as a matter of law, and their inverse condemnation claim should be dismissed as a matter of law, just like the claim at issue in *Finke*.

For any one of three reasons, the district court's dismissal of appellant's inverse condemnation action was correct as a matter of law and should be affirmed. First, the Oliver Parcel does not physically abut T.H. 10 and does not have an easement extending to and abutting T.H. 10. Second, the Oliver Parcel continues to have reasonably suitable and convenient access to T.H. 10 from 250th Street, notwithstanding the closing of the opening between T.H. 10 and the gravel drive. Third, the Olivers did not join all necessary parties.

**III. MNDOT'S CLOSING OF THE OPENING BETWEEN T.H. 10 AND A GRAVEL DRIVE THAT LEADS TO THE OLIVER PARCEL WAS NOT A "TAKING" AND DOES NOT ENTITLE THE OLIVERS TO RECEIVE COMPENSATION BECAUSE THE OLIVER PARCEL DOES NOT ABUT T.H. 10.**

The Olivers argue that they are entitled to receive compensation for MnDOT's closing of an opening between T.H. 10 and a gravel drive. They allege that they had a property right of access to T.H. 10 and that the closing of the opening constituted a 'taking' from them of a property right of access to T.H. 10.

The Olivers concede that the Oliver Parcel does not physically abut T.H. 10, and so, without more, their mandamus petition would necessarily be dismissed. *See Hendrickson v. State*, 267 Minn. 436, 442, 127 N.W.2d 165, 170-71 (1964) (stating, "[t]hose who are not abutting owners have no right to damages merely because access to a conveniently located highway may be denied, causing them to use a more circuitous route.") The Olivers asserted that the Oliver Parcel nonetheless abutted T.H. 10 by virtue of an alleged easement that they alleged extended from the east side of the Oliver Parcel along the gravel drive over neighboring properties to T.H. 10.

The Olivers admit that no such easement in their favor that has been recorded in county property offices or recognized by prior judicial decision. They asserted in this case in opposition to summary judgment that they had obtained such easement by adverse possession.

"To establish title by adverse possession, the adverse possessor must show by clear and convincing evidence an actual, open, hostile, continuous, and exclusive possession for 15 years." *Meyers v. Meyers*, 368 N.W.2d 391, 393 (Minn. Ct. App.

1985). “All five elements are equally necessary.” *Id.* Without any one of the elements, the “claim must fail.” *Id.*

In the abstract, “[w]hether the adverse possession elements have been established is a question of fact.” *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. Ct. App. 2003). But, “[w]hether the evidence is sufficient to raise a fact question for the jury’s determination is a question of law to be decided de novo by the reviewing court.” *Spanier, supra*, 495 N.W.2d at 20. The district court held that there was no genuine issue of material fact as to the ‘exclusive’ element and no genuine issue of material fact as to the ‘hostile’ element. In other words, the district court concluded that the record did not contain sufficient evidence to establish either the ‘exclusive’ or the ‘hostile’ element. Accordingly, this Court reviews de novo the legal question of whether the record contains sufficient evidence to establish either the ‘exclusive’ or the ‘hostile’ element.

**A. Evidence Not Sufficient To Establish ‘Exclusive’ Element.**

The district court ruled correctly: the evidence in the record demonstrates that there is no *genuine* issue of fact as to whether the Olivers’s use of the gravel drive was “exclusive” for a period of 15 years, and so their claim that they acquired a prescriptive easement must fail as a matter of law. With regard to a prescriptive easement, the term ‘exclusive’ does not mean “that the easement must be used by one person only.” *Merrick v. Schleuder*, 228 N.W. 755, 756 (Minn. 1930). Instead, “[a]ll that is required is that the right shall not depend for its enjoyment upon a similar right in others; it must be exclusive against the community at large.” *Id.*

In *Merrick*, the court examined the 'exclusive' element and found a prescriptive easement by holding that the use by the plaintiffs was *different* from the use by the community at large. The plaintiffs in *Merrick* had built their building 8 feet out onto defendant's property. *Id.* at 756. And the plaintiffs in *Merrick* used "a route running eastwardly across the disputed area; whereas the user by others was simply that of occasional travel north and south across the property." *Id.* at 757. The community at large used the area for north-south travel which was different from the plaintiffs' easterly use of the area.

In a later case, *Caroga Realty Co. v. Tapper*, the supreme court refused to find a prescriptive easement in favor of a bus company on an existing alley and recognized that, as a general rule:

[w]here the owner of land opens a way across it for his own use, the fact that he sees his neighbor or other parties use it, under circumstances that do not tend to injure it, or interfere with his own use of it, will not justify the inference that he is yielding anything of his ownership, or that the other users are proceeding adversely, or in hostility, to his own right.

*Caroga*, 143 N.W.2d 215, 225 (Minn. 1966). In *Caroga*, the court did not find a prescriptive easement where the bus company put in evidence that it used the alley for its buses and that its customers used the alley for loading and unloading cars, because that sort of use was the same as use by the community at large. The court noted that, "[n]either plaintiffs nor any of their predecessors in title ever built any structure abutting onto the right-of-way." *Id.*

The case *Hartman v. Blanding's, Inc.*, 181 N.W.2d 466 (Minn. 1970), involved a prescriptive easement for one landowner to maintain a driveway across a neighbor's

parcel. *Hartman* cited the familiar language from *Merrick* that “[a]ll that is required is that the right shall not depend for its enjoyment upon a similar right in others. It must be exclusive against the community at large.” *Hartman*, 181 N.W.2d at 468 (citing *Merrick*, 228 N.W. 755). In *Hartman*, a parcel of land serviced by one driveway opening had been split in two parcels and the owner of a grocery company, which company maintained a warehouse on the parcel without the opening, used the driveway to get back and forth from the adjoining highway. *Id.* at 467. The traffic to and from the warehouse consisted solely of employees and customers of the grocery company *Id.* at 467-68. The *Hartman* court did not discuss any use by the community at large. Also, in *Hartman*, the evidence demonstrated that the grocery company maintained the driveway “by spreading cinders and grading when necessary.” *Id.* at 468. *Hartman* is distinguishable from the facts at issue in this case. Unlike the driveway in *Hartman*, the gravel drive at issue here was used by the community at large. Also, unlike the owners of the grocery parcel, the Olivers did not maintain the gravel drive.

The case *Nordin v. Kuno*, 287 N.W.2d 923 (Minn. 1980), also addressed (like *Hartman*) a parcel that was split into two parcels. *Id.* at 925. One parcel contained a house; the other parcel contained a store. *Id.* The house parcel had its own driveway. *Id.* at 925 n.2. The driveway that serviced the store “encroache[d] on [the house parcel] approximately 25 feet.” *Id.* at 925 n.1. The store parcel owners sought an easement for unimpeded use of the driveway and the court affirmed the district court’s conclusion that the exclusivity element was satisfied: other than persons making deliveries to the store, the only other users of the driveway were tenants of the house and representatives of the

county. *Id.* at 926. Also, the owners of the store parcel “plowed and maintained the driveway since 1971.” *Id.* at 926. Accordingly, *Nordin* is just as distinguishable as is *Hartman*. Unlike the driveway in *Nordin*, the gravel road at issue here was used by the community at large. Also, unlike the owners of the store parcel, the Olivers did not maintain the gravel drive.

The case *Wheeler v. Newman*, 394 N.W.2d 620 (Minn. Ct. App. 1986), involves a shared driveway located on only one of two lakefront parcels. In *Wheeler*, there was an allegation that the plaintiff’s use of the driveway was not ‘exclusive’ because the public generally had used the same driveway to access the lake. *Id.* at 623. The court noted that testimony that the driveway was “once used heavily by the public” did not control because that public use occurred “prior to the past fifteen years.” *Id.* The court added that in the fifteen years preceding the action, the public use was “too sporadic” to defeat the ‘exclusivity’ element. *Id.*

*Wheeler* supports MnDOT’s position that the Olivers cannot establish the ‘exclusivity’ element because their use of the gravel drive was so indistinguishable from the uses of it by the community at large. The *Wheeler* court’s language supports the conclusion that if the general public’s use of the driveway had continued, the plaintiffs in *Wheeler* would not have been able to establish the ‘exclusivity’ element.

Here, all of the evidence in the record fits the general rule recognized in *Caroga*: there is a way opened across other land, and various parties used it but did not interfere with anyone else’s use of it. The evidence in the record does not conflict: all of the evidence supports and reinforces a conclusion that the Olivers’ use of the gravel drive

was the same as the general use of the gravel drive by the community at large. There is evidence that, like others, the Olivers drove motor vehicles on the gravel drive, to and from T.H. 10: they drove cars, pickup trucks, and gravel trucks. There is evidence that the Olivers, their neighbors, and many other members of the public drove pickups, vans, and Jeeps on the gravel drive to and from T.H. 10 for hunting. There is evidence that contractors drove gravel trucks on the gravel drive to and from T.H. 10. There is evidence that a beekeeper regularly drove a two-ton truck on the gravel drive to and from T.H. 10. There is evidence that farmers drove pickup trucks, tractors, grain trucks, and other farm machinery on the gravel drive. There is evidence that Tim Fox saw kids driving up the gravel drive from T.H. 10 to drink beer. There is evidence that Dean Oliver saw a traveler pull a car off T.H. 10 onto the gravel drive to stop for a rest. None of that evidence is disputed by conflicting evidence. All of the evidence in the record is cumulative of only one conclusion: that the gravel drive was used by the community like any other rural gravel road and that there was nothing about the Olivers' use of it that would have put the owners of the underlying land on notice that the Olivers use was exclusive, and so might create an easement in favor of the Olivers. *See Caroga*, 143 N.W.2d at 225 (stating that, to create an easement by prescription, the claimant's possession "must be of a character which would put a prudent person on inquiry.").

The only evidence of "exclusive" use of the gravel drive is the evidence of maintenance. And that evidence only allows findings that maintenance was performed by Santoyo or by independent gravel contractors acting on their own initiative. The Olivers testified unequivocally that they did not perform any maintenance on the gravel

drive and they did not direct the independent gravel contractors (or anyone else) to perform maintenance on the gravel drive. As a result, the evidence as to maintenance of the gravel drive could potentially support conclusions that Santoyo or various independent gravel contractors could satisfy the 'exclusive' element. But that evidence would not support a conclusion that the Olivers could do so.

Dean Oliver's own testimony perhaps best characterizes the uses of the gravel drive by the community at large, when he emphasized that "it was just a public road that everybody used," and that he "used it the same way everybody else did." R.A. 14. The evidence does not conflict and the Olivers themselves testify that their uses were not exclusive, but rather were the same as the uses expected by any members of the general public.

In their brief, the Olivers argue generally that, with respect to its conclusion on the 'exclusive' element, the district court "had to weigh conflicting evidence." (App. Br. 20). The Olivers do not, however, identify any evidence on the issue of how the gravel drive was used by the community at large that is arguably in conflict. The actual record only supports the opposite conclusion: all of the witnesses agree that the gravel drive was used by various community members. Although some of them provide different examples of uses, none of them disputes the examples of uses offered by the others, and the described uses are not inherently mutually exclusive. Accordingly, there is no disputed genuine issue of fact for a jury to resolve and a court has a responsibility to answer the question at issue as a matter of law. Without a genuine issue on the element of 'exclusive' use, the entire claim for a prescriptive easement must fail, as a matter of

law for the court. *See Meyers*, 368 N.W.2d at 393 (stating, “[a]ll five elements are equally necessary, . . . [without any one] . . . , claim must fail.”).

The Olivers acknowledge that they had an agreement to sell gravel to the State. They argue now that there is a fact issue as to whether their original agreement with the State obligated the State to convey to them a perpetual roadway to T.H. 10 or merely allowed them to use any roadway that the State acquired. That alleged fact issue is not “material,” and so does not prevent affirmance because it does not establish that the Olivers’ use of the gravel drive was ‘exclusive’ (or ‘hostile’). Additionally, there is no evidence that the State ever owned rights over the gravel drive, and “one cannot convey what one does not own.” *Prosch Bros., Inc. v. Walker*, No. C2-01-1374, 2002 WL 206397, \*2 (Minn. Ct. App. Feb. 12, 2002) (citing *Mitchell v. Hawley*, 83 U.S. 544, 550 (1873) (expressing the general property principle that one can not convey what one does not own)). Furthermore, under the statute of frauds, a conveyance of real property or an agreement to convey real property is invalid unless it is reduced to writing. *See Minn. Stat. § 513.04* (2006) (stating, “[n]o estate or interest in lands, other than leases for a term not exceeding one year, . . . shall hereafter be created . . . unless by act or operation of law, or by deed or conveyance in writing.”). Furthermore, the Olivers allege that the promise to convey them land was part of an agreement for the purchase by the State of gravel from the Olivers. All state procurement contracts must be in writing. *Minn. Stat. § 16C.05* (2006). Here, no written agreement obligated the State to convey a roadway strip to the east side of the Oliver Parcel in fee. The alleged fact dispute as to the oral

negotiations between Dean Oliver and the State in 1954 is not material to the issues in dispute and so does not prevent affirmance.

The evidence in the record as to whether or not the Olivers' use of the gravel drive was 'exclusive' is not conflicting, and so this Court must determine the question as a matter of law. See *PMH Properties v. Nichols*, 263 N.W.2d 799, 803 (Minn. 1978) (stating, "when the evidence is conflicting, [an issue] presents a question of fact for the trier of fact"); *Sauter v. Sauter*, 70 N.W.2d 351, 354 (Minn. 1955) ("summary judgment may be entered where the material facts are undisputed and as a matter of law compel only one conclusion."). Accordingly, there is no 'genuine' issue of fact for a fact-finder to resolve. On de novo review, this Court should conclude that the district court held correctly that the evidence in the record was not sufficient to establish that the Olivers' use of the gravel drive was 'exclusive' as a matter of law, and so could not establish by adverse possession an easement running from the Olivers Parcel to T.H. 10. Without the easement, the Oliver Parcel does not abut T.H. 10 and so the Olivers have no property right of access to T.H. 10. See *Finke v. State*, 521 N.W.2d at 375-76 (Minn. Ct. App. 1994) (affirming district court's dismissal of inverse condemnation case arising from change in access, on basis that "as a matter of law, [the owner] has no compensable right of convenient access to [the roadway] from [non-abutting property] for the state to invade."). Accordingly, the closing of the opening was not a 'taking' of a property right from the Olivers, and this Court need go no further, but can affirm the dismissal on that basis alone, consistent with the affirmed dismissal in *Finke*. This Court should affirm the district court.

**B. Evidence Not Sufficient To Establish ‘Hostile’ Element.**

The district court ruled correctly: the evidence in the record demonstrates that there is no *genuine* issue of fact as to whether the Olivers’s use of the gravel drive was “hostile” for a period of 15 years, and so their claim that they acquired a prescriptive easement must fail as a matter of law.

“Where the original entry is permissive, the statute does not begin to run against the legal owner until an adverse holding is declared and notice of such change is brought to the knowledge of the owner.” *Meyers v. Meyers*, 368 N.W.2d 391, 394 (Minn. Ct. App. 1985) (citing *Johnson v. Raddohl*, 32 N.W.2d 860, 861 (Minn. 1948)), *rev. denied* (Minn. Jul. 17, 1985).

“To make [permissive] possession adverse, there must be some open assertion of hostile title, and knowledge thereof brought home to the owner of the land.” *O’Boyle v. McHugh*, 69 N.W. 37, 38 (Minn. 1896). “While it is true that assertion of adverse title need not be always expressly or affirmatively declared, but may be shown by circumstances, proof of inception of hostility must in all cases be clear and unequivocal.” *Meyers*, 368 N.W.2d at 394 (citing *Johnson v. Raddohl*, 32 N.W.2d at 861).

The State maintained an easement over the gravel drive from 1954 to 1980. The Olivers indicated that they negotiated the creation of the gravel drive as part of their initial agreement with the State, and so their use of the gravel drive from 1954 to 1980 was permissive: the State allowed the Olivers to use the easement. When the State’s easement expired in 1980, the 15-year adverse possession period would begin to run only

when the Olivers made a subsequent open assertion of hostility to all of the owners of the land over which the gravel drive ran.

The evidence is undisputed that Dean Oliver stopped driving gravel trucks on the gravel drive in 1989. The evidence does not show any clear and unequivocal inception of hostility before an alleged conversation between Dean Oliver and Laurence Aakre, which Aakre asserts occurred sometime after 1993 and Oliver denies occurred at all. If the conversation did not occur, there is no evidence of any inception of hostility before the closing of the opening in 2005, and so Oliver could not establish the 'hostile' element as a matter of law. Alternatively, if the conversation occurred in 1993, and amounted to a clear and unequivocal inception of hostility as against Aakre, and so began the running of the 15-year period, the opening was closed 12 years later, and so before Olivers would have acquired an easement by adverse possession. Accordingly, the district court's analysis was correct, that the evidence in the record was not sufficient to create a genuine issue of fact on the 'hostile' element, which defeats the assertion that the Olivers obtained an easement by adverse possession. *See Meyers*, 368 N.W.2d at 393 (stating, "[a]ll five elements are equally necessary, . . . [without any one] . . . , claim must fail.>").

Without the easement, the Oliver Parcel does not abut T.H. 10 and so the Olivers have no property right of access to T.H. 10. *See Finke v. State, supra*, 521 N.W.2d at 375-76. Accordingly, just as with the 'exclusive' element issue, this Court need go no further, but can affirm the dismissal on that basis alone, consistent with the affirmed dismissal in *Finke*. This Court should affirm the district court.

**IV. IF OLIVERS ABUT T.H. 10, MNDOT'S CLOSING OF THE OPENING BETWEEN THE GRAVEL DRIVE AND T.H. 10 IS NOT A TAKING BECAUSE THE OLIVERS CONTINUE TO HAVE REASONABLE ACCESS TO T.H. 10 AS A MATTER OF LAW.**

If the Court decides that the Oliver Property does abut T.H. 10, and so has a right of access to that roadway, that right is not a right to any specific means or route of access to the roadway, but rather only a right to have reasonably suitable and convenient access to it. *See Grossman Invs. v. State*, 571 N.W.2d 47, 50 (Minn. Ct. App. 1997) (stating “[a]n abutting property owner suffers compensable damage for loss of access only when the owner is left without reasonably convenient and suitable access to the main thoroughfare in at least one direction.”), *rev. denied* (Minn. Jan. 28, 1998). “The imposition of even substantial inconvenience has not been considered tantamount to a denial of reasonable access.” *Grossman*, 571 N.W.2d at 50 (citing *Johnson v. City of Plymouth*, 263 N.W.2d 603, 607 (Minn. 1978)).

Generally, and in the abstract, “[t]he existence of reasonable access is . . . a question of fact.” *Johnson v. City of Plymouth*, 263 N.W.2d 603, 607 (Minn. 1978). Nonetheless, in some cases, courts may determine that the remaining access after a change in access is reasonably convenient and suitable as a matter of law. *See Hendrickson*, 127 N.W.2d at 173 n.19 (stating, “[w]e do not suggest that in particular cases the trial court may not have the duty of determining as a matter of law that property has or has not been damaged. In the instant case, for example, had the temporary crossovers been made permanent we would have little hesitation in sustaining a ruling that the remaining access was reasonably convenient and suitable as a matter of law.”); *see also Grossman*, 571 N.W.2d at 51 (stating that “this court must determine, as a matter

of law, whether [the] remaining access is reasonably convenient and suitable in at least one direction,” and holding “that no compensable taking has occurred because [the] remaining access is reasonably convenient and suitable in at least one direction.”)

In *Grossman*, a landowner owned property that abutted T.H. 12 in Hennepin County. 571 N.W.2d at 49. The landowner in *Grossman* had two points from which access could be obtained to T.H. 12. First, an access point on the northeast corner of the property accessed local street Florida Avenue, which intersected with T.H. 12. *Id.* A second access point on the northwest corner of the property “was approximately one-half mile from Louisiana Avenue,” another local street that also intersected with T.H. 12. *Id.* The State “eliminated the Florida Avenue intersection and converted the Louisiana Avenue intersection into a diamond interchange.” *Id.* The district court concluded that the closing of access did not result in a compensable taking and denied the landowner’s petition for mandamus as a matter of law. *Id.* In affirming the district court, this Court reasoned:

While it is clear from the record that appellants lost direct access to their property through closure of Florida Avenue, the remaining access to the property via Louisiana Avenue is not changed substantially. Even though closure of the Florida Avenue access increased travel time off the freeway to appellants’ property from seconds to minutes, the remaining access at Louisiana Avenue is not unreasonable.

*Id.*, at 51.

On the assumption that they have a legal right of access to T.H. 10, the Olivers argued that determining whether the remaining access is reasonably convenient and suitable involves consideration of the owner’s potential expense to alter the interior of

the property to continue a particularized use of the property. MnDOT argued that whether the remaining access is legally sufficient involves consideration of only whether there remains reasonably convenient and suitable access to the property itself. The district court agreed with MnDOT and rejected the legal standard proposed by the Olivers. A.A. 115.

A trial court's determination as to the proper standard for analysis of an issue is a question of law, subject to de novo review. *See Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 802 (Minn. Ct. App. 2001) (stating, "[w]e review the trial court's determination of questions of law de novo."); *see also Razink v. Krutzig*, 746 N.W.2d 644, 649 (Minn. Ct. App. 2008) (stating, "[o]n appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law.").

The district court was correct: in resolving the question of whether a property has reasonably convenient and suitable access to an abutting roadway, Minnesota law asks only whether there is reasonably convenient and suitable access *to the property itself*. *See State v. Northwest Airlines, Inc.*, 413 N.W.2d 514, 519 (Minn. Ct. App. 1987) (stating, "regulation of access and design consonant with traffic conditions and uniform police requirements is a proper exercise of the state's police power and does not affect the certainty of *access to NWA's property*") (emphasis added), *rev. denied* (Minn. Nov. 24, 1987). Potential impacts that a change in access may have on the interior of a property are not relevant to whether the property still has reasonably suitable and convenient access.

The 2002 supreme court decision in *Dale Properties* supports this conclusion. See *Dale Properties, LLC v. State*, 638 N.W.2d 763 (Minn. 2002). In *Dale Properties*, the owner of a parcel of undeveloped land had a direct access opening on a shared boundary between its property and T.H. 5 (unlike the Landowners here). *Id.* at 764. The state placed a median between the eastbound and westbound lanes of T.H. 5. *Id.* The owner alleged that the change rendered access by commercial trucks and development of the property more difficult. *Id.* at 765. The court held that there was no taking as a matter of law, concluding that the change resulted merely, “in circuity of route, as opposed to substantial impairment of the right of access.” *Id.* at 767. The concurrence argued that such a change should not be held ‘no taking’ as a matter of law, but rather that the court should still perform an analysis of whether the remaining access after the change was reasonably suitable and convenient. *Id.* at 767-69. But the court did not examine the effect that the change had on the landowner’s uses of the interior of the parcel in reaching its holding. Instead, the majority only considered whether the landowner could get to and from the highway.

Similarly, in a case that was decided after the supreme court decided *Dale Properties*, this Court denied an inverse condemnation claim for the vacation of a city street that altered a landowner’s access. *J&L Prop. Inv., Inc. v. City of Mpls.*, No. C4-01-1988, 2002 WL 859572 (Minn. Ct. App. May 7, 2002). In *J&L*, the appellants’ property had access to 27th Avenue via an easement across property owned by Discount Steel. *Id.* at \*1. Notably, and unlike the case involving the Olivers, it was undisputed that appellants had an easement. *Id.* at \*2. Twenty-seventh Avenue allowed access on

the East to Second Street and on the West to Washington Avenue. *Id.* at \*1. The City of Minneapolis vacated 27th Avenue. *Id.* at \*1. As a result, appellants could still get to Washington Avenue from the former 27th Avenue, but could no longer get to Second Street via the former 27th Avenue. *Id.* at \*2.

In *J&L*, in denying the appellants' mandamus claim for inverse condemnation, this Court emphasized that, despite the change in access, the *J&L* appellants continued to have access to their property. *Id.* at \*3. The court stated that, "[w]here the vacation of a road deprives an abutting landowner of right of access *to his land*, it causes him damage distinct from his right to use the road for travel as one of the public." (emphasis added) (quoting *Underwood v. Town Bd. Of Empire*, 217 Minn. 385, 388, 14 N.W.2d 459, 461 (1944)). *J&L*, 2002 WL 859572 at \*2. This Court also noted that, "[i]t is well settled that an owner of land abutting a street cannot be deprived of all access *to his premises* without compensation by the vacation of the street." *Id.* at \*2. In reaching its conclusion, this Court stated, "[b]ecause the record shows that J & L and Aris are still able to access the vacated street via their easement and reach Washington Avenue via the vacated street, no taking occurred." *Id.* at \*3. Finally, this Court added that, "[t]here is no evidence in the record, however, that J & L and Aris are currently denied access *to their properties*." *Id.* at \*4 (emphasis added). Again, this Court's analysis did not involve any discussion as to how the change in access affected the landowners' use of the interior of their property. Instead, it focused solely on the landowners' ability to get to and from the property.

Further, in *City of Anoka v. Esmailzadeh*, 498 N.W.2d 58 (Minn. Ct. App. 1993), *rev. denied* (Minn. May 28, 1993), a gas station at the corner intersection of T.H. 65 and

C.S.A.H. 12 had one access opening onto T.H. 65 that only allowed access from the gas station to T.H. 65. *Id.* at 59-60. Traffic from T.H. 65 that wanted to get to the gas station needed to turn first onto C.S.A.H. 12 and then from C.S.A.H. 12, turn into the gas station. *Id.* at 60. When a median was installed on C.S.A.H. 12, traffic from T.H. 65 was required to travel down C.S.A.H. 12, make a U-turn, and return on C.S.A.H. 12 to get to the gas station. *Id.* The court noted that the gas station introduced uncontroverted evidence that vehicles that had “generated the bulk of its patronage” such as “recreational vehicles with trailers” could “not make the U-turn.” *Id.* at 62. Accordingly, as a result of the access change, a significant number of the gas station’s customers could not get access to the gas station at all. Accordingly, *Esmailzadeh* also supports the conclusion that the relevant inquiry involves examining only whether a property continues to have reasonably convenient and suitable access to a roadway after a roadway is changed.

Only the case *Johnson v. City of Plymouth*, 263 N.W.2d 603 (Minn. 1978), discusses the interior use of the property in a discussion of whether the property retains reasonably suitable and convenient access. In *Johnson*, the property owner bus company owned property at the intersection of two streets, and so abutted both streets. *Id.* at 604. Neither street had curbs and so the owner’s buses could travel to and from the property from all points along the property’s shared borders with both streets. *Id.* The City of Plymouth installed curb and gutter along both streets, installing one curb cut to the property on one street and three curb cuts to the property on the other street. *Id.* at 607. The court held that the owner was not entitled to compensation because the property continued to have reasonable access. *Id.* The court noted that “the curb cuts . . . did not

so interfere with access *to the property* as to be deemed a ‘taking’ of private property.” *Id.* (emphasis added).

In holding that the owner retained reasonable access, the court noted, in *dicta*, that one curb cut served the parking area, one curb cut was aligned with garage doors, and one curb cut served the fuel pump area. *Id.* at 607. That observation was *dicta* because the court did not indicate that the remaining access would *not* have been reasonable if the curb cuts were not situated in that manner. After all, the owner did argue that two of the “curb cuts . . . are too narrow to allow [the owner’s] buses to enter from the routes most convenient for them.” *Id.* But the supreme court found that argument irrelevant, noting that “the imposition of even substantial inconvenience has not been considered tantamount to a denial of the right of reasonable access.” *Id.* In construing *Johnson*, this Court has concluded that “[i]f . . . access has been made so inconvenient as to be nearly impossible, there would not be reasonable access.” *City of Anoka*, 498 N.W.2d at 61-62. Accordingly, no Minnesota decision, including *Johnson*, requires an analysis of the effect of a change in access on the interior use of property; whether a property retains reasonable access after a change in access is determined by whether the property still has access to the roadway, or whether access to the roadway has become nearly impossible.

There is no fact dispute: the Olivers concede that they reach T.H. 10 from their property via 250th Street North. In fact, their route of travel is more direct than the remaining after situation which was at issue in *Grossman*. The law weighs even more heavily toward concluding that Olivers continue to have reasonably convenient and suitable access. If the Court finds that Olivers abut T.H. 10 and so have a legal right of

reasonably suitable and convenient access to T.H.10, there is no evidence in conflict, no genuine issue material of fact, and the Court can resolve the issue as a matter of law.

The Olivers assert, however, that there are fact questions as to whether the existing, private interior roads on their property are capable of withstanding heavy gravel truck traffic, and, even if it is, whether such traffic will harm their house. They argue that this prevents a legal determination that the remaining access is reasonably suitable and convenient. App. Br. 28-30. Neither of those are questions of “material” fact. Those alleged facts only relate to the reasonableness of gravel trucks driving on the private interior roads within their property. They do not have any relevance to whether or not the Olivers continue to have reasonably suitable and convenient access from T.H. 10 “to their property.” The facts that the Olivers allege to be in dispute would only be material if the adequacy of the legal right of access was dependent on an owner’s particularized uses and internal roadway configuration of its property. Obviously, that would greatly expand the concept of access rights and impose an extraordinary burden on road authorities to respond to changing land uses and private road configurations. But the governing legal analysis only asks whether an owner has reasonably suitable and convenient access to the property. Accordingly, the evidence that the Olivers point to is not material, and does not prevent the courts from addressing the reasonableness of the access as a matter of law.

There is no conflicting evidence as to the route of travel to the Oliver Parcel from T.H. 10. Accordingly, there is no factual dispute: if Olivers abut T.H. 10 as required to have a legal right of access to T.H. 10, MnDOT has not taken that right even if the private, interior route on the Olivers’ property is not the route that they would prefer. On

de novo review, this Court should conclude that the district court applied the correct legal standard; that under that standard, there are no facts in dispute; and that the remaining access is reasonably suitable and convenient as a matter of law. Accordingly, this Court should affirm the district court.

**V. THE OLIVERS CANNOT ASSERT A PRESCRIPTIVE EASEMENT WITHOUT NECESSARY PARTIES.**

Although the Olivers assert that they have an easement along the length of the gravel drive to T.H. 10, no such easement has been recorded or established judicially. They seek to establish an easement for the first instance in this case. The easement that they seek to establish would run across real property owned by Laurence Aakre, Timothy Fox, and Eugene Jetvig, the owners of the intervening properties. The Olivers did not join Aakre, Fox, or Jetvig as defendants.

This issue was argued to the district court, but the district court did not reach it because its conclusions on the other issues already warranted entry of summary judgment. But this Court “will affirm the [district court’s] grant of summary judgment if it can be sustained on any ground.” *In re Welfare of S.N.R.*, *supra*, 617 N.W.2d at 85 n.5.

The Olivers cannot establish an easement across lands owned by persons whom they have not joined as parties. In *Nunnelee v. Schuna*, 431 N.W.2d 144 (Minn. Ct. App. 1988), *rev. denied* (Minn. Dec. 30, 1988), this Court affirmed a district court’s dismissal of a claim for an easement when the owners of the alleged servient estate were not joined as parties. *Id.* at 148. This Court stated, “owners of adjacent lands over which a road easement could be prescribed were not joined in the action, and . . . these parties were

necessary for a fair and complete resolution of the plaintiffs' claim for an easement by necessity. We agree." *Id.* Similarly here, because the Olivers have not joined Aakre, Fox, or Jetvig as defendants, their easement claim should be denied as a matter of law. Just like in *Nunnelee*, the Olivers' lawsuit here could prejudice their neighbors to the extent that it adjudicates an easement across their property in favor of Olivers. For this additional reason, the district court's summary judgment should be affirmed.

### CONCLUSION

The district court's analysis of the record under governing Minnesota law was correct, and so this Court should affirm. The Olivers do not abut T.H. 10 as required to have a property right in access to T.H. 10. They concede that their property does not physically abut T.H. 10. And the evidence in the record does not allow them to establish any easement from their property to T.H. 10. Further, they did not join the parties needed for adjudication of an easement by adverse possession. Accordingly, this Court can affirm the district court's conclusion that the Olivers' property does not abut T.H. 10 and so does not have a property right of access to T.H. 10, such that the closing of the opening was not a 'taking' of a property right.

Additionally, even if the Olivers' property did somehow abut T.H. 10, the closing of the opening between the gravel drive and T.H. 10 did not amount to a 'taking' of any right of access. The right of access is not a right in any particular access, but only the right to have reasonably suitable and convenient access. After the closing of the opening, the Olivers' property continues to have reasonably suitable and convenient access to T.H. 10 via the abutting street. The Olivers concede that the street provides them with access

to their property and so this Court can affirm the district court's conclusion that the closing of the opening was not a taking of any right of reasonably suitable and convenient access. The district court should be affirmed.

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Respectfully submitted,

LORI SWANSON  
Attorney General  
State of Minnesota



ERIK M. JOHNSON  
Assistant Attorney General  
Atty. Reg. No. 0247522  
445 Minnesota Street, Suite 1800  
St. Paul, Minnesota 55101-2134  
(651) 296-6673 (Voice)  
(651) 282-2525 (TTY)

ATTORNEYS FOR RESPONDENT