

NO. A10-1339

State of Minnesota
In Court of Appeals

In the Matter of the Verified Petition of
Robert L. Ruikkie and Karen Ann Ruikkie for Certain Relief
Pursuant to Minnesota Statutes Section 508.671, petitioners,

Appellants,

v.

George P. Nall; Leslie S. Nall; Mitchell Shores Homeowners'
Association, Inc.; Anthony Stolfe; Penny Stolfe; Charles W. Carroll;
Lois J. Geist; Gary E. Peterson; Susan L. Peterson; James P. Ritchart;
Judith R. Ritchart; and all other persons or parties unknown claiming
any right, title, estate, lien or interest in the real estate described in the
Petition therein,

Respondents,

v.

Mark Monacelli, as St. Louis County Registrar of Titles;
Thomas J. O'Malley, as St. Louis County Surveyor; Mike Forsman, as
Chairman of the Board of Commissioners for St. Louis County;
Tom Hansen, as Custodian of the State Torrens Assurance Fund; and
each of their successors, third party defendants,

Respondents.

BRIEF OF RESPONDENTS GEORGE AND LESLIE NALL, ET AL.

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LEGAL ISSUES

- 1. In a boundary line case, where all of the subject real property is registered (“Torrens”) property, can a petitioner be awarded a boundary line which would be completely contrary to the irrefutable title ownership established and confirmed in existing Certificates of Title?**

Trial Court concluded that Petitioners (Ruikkies) should not be awarded boundary lines contrary to existing Certificates of Title.

Most apposite case: *In Re Petition of Geis*, 576 N.W.2d 747 (Minn. Ct. App. 1998).

Most apposite statutory provisions: Minn. Stat. Sec. 508.22; Minn. Stat. Sec. 508.71, subd. 2.

- 2. Were the boundaries in this case fixed and established by the doctrine of boundary by practical location?**

Trial Court answered in the affirmative.

Most apposite case: *In re Zahradka*, 472 N.W.2d 153 (Minn. Ct. App. 1991).

Most apposite statutory provision: Minn. Stat. Sec. 508.02.

STATEMENT OF THE CASE

Robert L. Ruikkie and Karen Ann Ruikkie commenced this action pursuant to Minn. Stat. § 508.671 seeking a judicial determination of the boundaries of their land located in a remote area of northern St. Louis County, near the City of Ely.

Defendants and Third-Party Plaintiffs George P. Nall and Leslie S. Nall (“Nalls”) were the owners of registered land located in Government Lots 1 and 6, Section 18, Township 62 North, Range 12 West, St. Louis County, Minnesota, and described in

Certificate of Title No.'s 301382 and 301383. The land described in these Certificates of Title was subdivided and platted by the Nalls into Common Interest Community Number 76, Mitchell Shores (hereinafter referred to as "CIC 76" or "Nall Land"). The plat of CIC 76 was recorded in the Office of the Registrar of Titles in St. Louis County, and new Certificates of Title were issued for each of the lots/units and for the common elements/areas in CIC 76. Some of these newly subdivided lots in CIC 76 have since been conveyed to other individuals who also are named as Defendants/Third-Party Plaintiffs in this lawsuit.¹

Defendants and Third-Party Plaintiffs Anthony Stolfe and Penny Stolfe own registered land located in the subdivision of HOMER'S LOTS and described in Certificate of Title No.'s 285615 and 295632 (hereinafter referred to as "Stolfe Land").

The Petitioners, Robert L. Ruikkie and Karen Ann Ruikkie (hereinafter referred to as "Petitioners" or "Ruikkies"), are the owners of registered land located in Government Lots 1 and 6, Section 18, Township 62 North, Range 12 West, St. Louis County, Minnesota, and in the subdivision of HOMER'S LOTS, all as described in the Ruikkies' Certificate of Title No.'s 301381, 301384, 267235, 278785, and 295631 (hereinafter referred to as the "Ruikkie Land").

¹ Defendants/Third-Party Plaintiffs Mitchell Shores Homeowners' Association, Inc., Charles W. Carroll, Lois J. Geist, Gary E. Peterson, Susan L. Peterson, James P. Ritchart, and Judith R. Ritchart are all owners within the plat of CIC 76. It is assumed that the interests of these parties are the same as the interests of George P. Nall and Leslie S. Nall in this matter and therefore any reference in this Brief to the interests of George P. Nall and Leslie S. Nall or the Nalls' Property or CIC 76 is intended to include the interests of these parties.

The Nall Land described in their Certificates of Title and in the plat of CIC 76 is adjacent to and northerly of the Ruikkie Land. The Stolfe Land is adjacent to and westerly of the Ruikkie Land. Mitchell Lake lies northwesterly of the Ruikkie Land.

Ruikkies commenced this current action pursuant to Minn. Stat. Sec. 508.671 seeking a judicial determination of the boundaries of the Ruikkie Land. In their Petition, the Ruikkies claim that the boundaries of their land are located over and across portions of the Nall Land and the Stolfe Land.

Defendants/Third-Party Plaintiffs filed Answers in opposition to the Ruikkies' Petition. Also, since all of the real property involved in this action is Torrens or Registered property (title to which (based upon a Certificate of Title) is supposed to be indefeasible), Defendants/Third-Party Plaintiffs commenced a third-party action against officials from St. Louis County and against Tom Hanson, Commissioner of Finance, State of Minnesota, as Custodian of the State Torrens Assurance Fund, seeking compensation from the Torrens Assurance Fund pursuant to Minn. Stat. § 508.76, in the event that Defendants/Third-Party Plaintiffs were to suffer a loss of any of their real property as a result of the action commenced by the Ruikkies.

This matter was tried before the District Court ("Trial Court"), sitting without a jury, on November 12, 13, and 16, 2009. On April 6, 2010, the Trial Court issued its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment, denying the Ruikkies' Petition. With the denial of the Ruikkies' Petition in its entirety, the Trial Court also determined that the third-party action against the St. Louis County officials and the State Torrens Assurance Fund was rendered moot.

Ruikkies then brought a post-trial Motion for Amended Findings. In their Motion, Ruikkies were essentially requesting that the Trial Court completely reverse its own decision and issue a new decision in favor of the Ruikkies and granting Ruikkies the relief sought in their Petition. On June 22, 2010, the Trial Court issued an Order denying Ruikkies' Motion for Amended Findings in its entirety. The Trial Court also issued an Order awarding Defendants/Third-Party Plaintiffs their taxable costs and disbursements totaling \$5,278.81.

This appeal then ensued.

STATEMENT OF FACTS

I. ORIGINAL REGISTRATION OF LAND

On January 31, 1928, Frank H. Crassweller applied to the District Court in St. Louis County, Minnesota, to register the title to the following described land (along with other lands not involved in this boundary dispute) located in St. Louis County, Minnesota: Lots One (1), Five (5) and Six (6) in Section Eighteen (18), Township Sixty-Two (62) North, of Range Twelve (12), West of the Fourth Principal Meridian, according to the United States Government Survey thereof. (Trial Ex. 8.)

The Order and Decree of Registration was issued on March 26, 1929, registering the title to the above-described land in Frank H. Crassweller and thereby bringing the land under the provisions of Minn. Stat. Ch. 508, which is known as the Torrens Act. (Trial Ex. 8.)

II. Original United States Government Survey

The United States Government Survey of March 3, 1885, indicates that Government Lot One (1) lies to the north of Government Lot Six (6), and that Government Lot Five (5) lies to the west of Government Lot Six (6); and this Government Survey from 1885 also depicts all three lots abutting Mitchell Lake. (Trial Ex. 1.)

It is undisputed that the United States Government Survey from 1885 is erroneous because Government Lot 6 never actually abutted Mitchell Lake. This was confirmed by the expert testimony of all three of the licensed, professional surveyors who testified at trial, namely, LaVerne Leuelling (the Ruikkies' surveyor); Thomas O'Malley (St. Louis County Surveyor); and Bruce "Charlie" Chernak (the Nalls' surveyor). (Thomas O'Malley ("T. O'Malley") Test.) (original government survey was substantially off; Government Lot 6 never touched the lake; lake has not changed since original survey); Trial Transcript p.p. 28-31 ("Tr. ___"); (LaVerne Leuelling ("L. Leuelling") Test.) (original government survey quite a bit off; huge bay added that didn't exist) Tr. 369-370, 372-373; (Bruce Chernak ("B. Chernak") Test.) (lakeshore on original government lot survey is substantially different from actual shore and Government Lot 6 was never on the water) Tr. 480-481. The lack of contact between Government Lot 6 and Mitchell Lake is not due to a reliction of the waters of Mitchell Lake. (T. O'Malley Test., L. Leuelling Test., and B. Chernak Test.). Id. While Government Lots 1 and 5 do actually abut and have lakeshore frontage on Mitchell Lake, Government Lot 6 never did actually abut or have any lakeshore frontage on Mitchell Lake. The U.S. Government

Survey of March 3, 1885, incorrectly depicted the shoreline of Mitchell Lake as proceeding further in a southerly direction (into Government Lot 6) than the shoreline actually did. This is not a situation where the original Government Survey from 1885 correctly depicted the actual shoreline of Mitchell Lake in relation to Government Lot 6 and then the water receded over the course of years creating additional lands. Rather, this is a situation where the actual shoreline of Mitchell Lake, as it existed in 1885, was approximately 1,000 feet further to the north than the shoreline as depicted on the Government Survey of March 3, 1885. (T. O'Malley Test., L. Leuelling Test., and B. Chernak Test.). Id.; Trial Exs. 1, 7 and 60.

III. COMMON OWNERSHIP OF GOVERNMENT LOTS 5 AND 6

In 1976, Winston Homer (a/k/a "Harry" Homer) became the owner of both Government Lots 5 and 6, under Certificate of Title No. 206985. (Trial Ex. 18.)

Harry Homer undertook efforts to subdivide and plat a portion of Government Lot 5, which said plat, known as Homer's Lots, was recorded in the office of the Registrar of Titles for St. Louis County, Minnesota, on August 16, 1982. (Trial Ex. 2.). At the time of the recording of the Plat of Homer's Lots, both Government Lots 5 and 6 were still under the common ownership of Harry Homer. (Trial Ex. 18.)

The Plat of Homer's Lots, as recorded in the office of the Registrar of Titles for St. Louis County, depicts and establishes the actual east boundary line of Homer's Lots (i.e., the west boundary line of Government Lot 6 or, stated another way, the boundary line between the Plat of Homer's Lots and Harry Homer's Government Lot 6), as Harry Homer decided to have that boundary line fixed and located. (Trial Ex. 2.)

In addition, during the course of Harry Homer's ownership of Government Lot 6, he conveyed an easement for roadway purposes across Government Lot 6 by a Deed of Appurtenant Easement, dated May 22, 1992, and recorded in the office of the Registrar of Titles for St. Louis County on June 4, 1992, as Document No. 549302. (Trial Ex. 12.) The recorded Deed of Appurtenant Easement included a survey depicting the north line of Government Lot 6 as extending in a straight line to the east line of the Plat of Homer's Lots, and that north boundary line did not touch or in any manner deflect to Mitchell Lake. (Trial Exs. 3 and 12.)

IV. Purchase and Use of Government Lot 6 by Ruikkies

In February of 1992, Ruikkies became aware that Government Lot 6 was listed for sale. Tr. 195-196. The real estate agent listing the property described Government Lot 6 as having deeded lake access. Tr. 260. When the real estate agent brought the Ruikkies to Government Lot 6 (in the winter of 1992), the agent drove them down a plowed road and they stopped at one point on the road. They did not walk around the property or explore the property. Tr. 259-260. During this visit to Government Lot 6, the real estate agent informed the Ruikkies that the boundary of Government Lot 6 did not actually go all the way down to Mitchell Lake. Tr. 260. It was represented to the Ruikkies that they would still have access to Mitchell Lake by way of a deeded lake access. Tr. 260.

However, during subsequent discussions/negotiations regarding the Ruikkies' interest in purchasing Government Lot 6, there was a disagreement and confusion between the realtor and Winston Homer about the boundaries of the property. Tr. 261.

It was determined that Government Lot 6 did not have deeded lake access. Tr. 261. Rather, Winston Homer represented to the Ruikkies that Government Lot 6 actually had a point of contact (i.e., lake shore) on Mitchell Lake. Tr. 197-198, 261. However, even though the property supposedly had lakeshore on Mitchell Lake, the asking price had been reduced from \$23,500 to \$10,500. Tr. 261-262.

The Ruikkies went ahead and signed a purchase agreement with Mr. Homer to purchase Government Lot 6 for \$10,500. Tr. 262. The purchase agreement contained a written contingency that the Ruikkies would be allowed to come back to look at and inspect the property at a later point in time before proceeding to closing. Tr. 196-197, 261.

After leaving Ely and traveling back to their home in the Twin Cities, the Ruikkies discussed the real estate transaction with Robert Ruikkie's brother-in-law who, at the time, was a real estate agent in the Twin Cities. Tr. 268-269. The Ruikkies showed the brother-in-law the map that they had been provided by Mr. Homer and also discussed the lake access/frontage issues and purchase price. Based upon the information that the Ruikkies presented to him, the brother-in-law told the Ruikkies that he thought it was a steal and recommended that they go ahead with the purchase. Tr. 269. The Ruikkies believed that the property they were purchasing from Mr. Homer abutted on the actual shoreline of Mitchell Lake. However, the Ruikkies did not bother to conduct any follow-up investigation or research on whether or not Government Lot 6 had an actual point of contact or any actual frontage on the shore of Mitchell Lake, even though they had received conflicting information from the real estate agent and Mr. Homer on this

particular issue. Tr. 267-269. Also, the Ruikkies did not bother to do any follow-up research or investigation as to why they would only be paying \$10,500 for approximately 37 acres of land which, as it was represented to them, had actual shore frontage on Mitchell Lake. Tr. 262-265.

Furthermore, before closing on the purchase of the property (Government Lot 6) from Harry Homer, the Ruikkies decided to not exercise their right (under the contingency) to conduct another site visit to the property. Tr. 267-269. Instead, the Ruikkies decided to go ahead with the purchase of the property and closed on the purchase of the property from Mr. Homer in April of 1992, without any additional site visits to the property and without any additional research or investigation to determine or confirm whether or not the boundary of this property (Government Lot 6) actually went all the way to the shore of Mitchell Lake. Tr. 196-197, 267-269. With their closing on the purchase of Government Lot 6 from Harry Homer, the Ruikkies were issued Certificate of Title No. 257849 on June 4, 1992. Certificate of Title No. 257849 includes a memorial for the above-referenced Roadway Easement recorded as Document No. 549302. Trial Ex. 21.

V. Ruikkies Discover That The North Boundary Line of Their Property is Not Where They Thought It Would Be

In May of 1993, Robert Ruikkie attempted to locate his boundary lines by use of a compass. Tr. 199. Ruikkie had walked down to a point at the lake with a compass and he believed that, from that point, their boundary line went straight east. By using the compass to look due east from the point by the lake, he observed that there was an old

cabin which appeared to be located on the southside of the boundary line (i.e., Ruikkie believed the cabin appeared to be on his property.) Ruikkie assumed that the cabin was affiliated with the Northernaire Resort located on Government Lot 1 to the north of Ruikkies' Government Lot 6. Tr. 199-200.

Upon observing that this cabin was possibly on their property, Robert Ruikkie then approached Francis Fitzgerald, who was the owner of Northernaire Resort at that time. Tr. 200. Mr. Ruikkie discussed with Francis Fitzgerald the concern about this cabin possibly being located on the Ruikkies' property. At that time, Mr. Fitzgerald informed Mr. Ruikkie that the Ruikkie property does not actually go all the way down to the lake, but that the northwest corner of Ruikkies' Government Lot 6 actually is approximately 85 feet back from the lake. Tr. 200-201. To confirm this information, Mr. Fitzgerald showed Mr. Ruikkie a survey map from some survey work that had been done by the previous owner of Northernaire Resort. The survey map showed that the northwest corner of Ruikkies' Government Lot 6 was in fact 85 feet back from Mitchell Lake and that Government Lot 6 did not have a point of contact on Mitchell Lake. Tr. 201.

Upon learning from Mr. Fitzgerald that they did not have any actual frontage or any point of contact on Mitchell Lake, but that the northwest corner of their property was in fact 85 feet back from the lake, the Ruikkies were shocked and very upset. Tr. 201-202.

Mr. Fitzgerald recommended that the Ruikkies actually go and talk to the surveyor in Ely who had done the survey work which Mr. Fitzgerald had shown to Mr. Ruikke during their discussion. Within a couple of weeks after his discussion with Mr. Fitzgerald, Mr. Ruikkie did meet with the surveyor in Ely. Mr. Ruikkie reviewed the

survey map with the surveyor who confirmed Mr. Fitzgerald's understanding that the northwest corner of Ruikkies' Government Lot 6 was 85 feet back from the lake. Tr. 201-202.

Mr. Ruikkie then went to visit Harry Homer about this issue, since Mr. Homer is the person who sold the Ruikkies the land based upon the representation that Government Lot 6 had an actual point of contact on Mitchell Lake. Tr. 202-203. During this meeting, Mr. Homer was still adamant that the property line went all the way down to the lake. Tr. 203. At the conclusion of the meeting with Mr. Homer, it was agreed that they would meet Mr. Homer out on the property so that he could show them his understanding of where the northwest corner of Government Lot 6 was located. Tr. 271.

However, when the Ruikkies went out with Mr. Homer to visit the property again, they were not able to proceed very far because Mr. Homer had a bad knee and could not make it all the way to the lake. They attempted to walk through the brush to find the corner post, but Mr. Homer had to turn back before they got to the lake because of his bad knee. When they got back to their vehicles, Mr. Homer indicated that he would do some additional research on the issue and get back to the Ruikkies. Tr. 271-273.

Some time after this site visit with Mr. Homer, the Ruikkies did hear back from Mr. Homer on the follow-up he was going to do regarding this issue. Mr. Homer informed the Ruikkies that he [Homer] apparently was wrong about the property abutting or having an actual point of contact on Mitchell Lake. Tr. 203, 273.

In order to try to remedy the situation, the Ruikkies then began to have discussions with Mr. Homer about possibly granting the Ruikkies some sort of easement or deeded

boat access. There was deeded boat access for some of the subdivided back lots in the neighboring Plat of Homer's Lots (in Government Lot 5) and Mr. Ruikkie pressed Mr. Homer to give the Ruikkies the same easement or deeded boat access that those property owners had. Tr. 204.

However, the problem that they encountered was that Mr. Homer no longer owned any more property on Mitchell Lake, as all of his property was now owned by his children. Mr. Homer indicated to the Ruikkies that he would attempt to obtain the same deeded boat access to Mitchell Lake that the back lot owners in Homer's Lots had. However, in the end, Mr. Homer's children would not sign the necessary documents to grant the Ruikkies the deeded boat access or easement that the Ruikkies were seeking. Tr. 204-205.

VI. Ruikkies Purchase Additional Neighboring Land Which Gives Them Deeded Access And, Eventually, Actual Lakeshore Frontage on Mitchell Lake

Upon learning that the boundary of their property did not actually abut or go all the way down to the shore of Mitchell Lake, and after failing to obtain any subsequent easement or deeded lake access from the Homer family, the Ruikkies did not pursue any legal action against Harry Homer for the previous misrepresentations that he had made to the Ruikkies that Government Lot 6 actually abutted the shoreline of Mitchell Lake; nor did the Ruikkies pursue any legal action at that time to determine the actual boundary lines of their property. Rather, the Ruikkies decided to pursue other options to obtain access to Mitchell Lake. Tr. 205.

In the mid-1990's, the Ruikkies approached the Kindamo family about purchasing one of their back lots in the Plat of Homer's Lots. The back lots (in Homer's Lots) which were owned by the Kindamos had deeded access to Mitchell Lake. Tr. 205-206.

The Kindamos did sell to the Ruikkies one of their back lots (Lot 4, Block 2, Homer's Lots), and it was a back lot directly adjacent to Ruikkies' Government Lot 6. For this back lot (Lot 4, Block 2, Homer's Lots), Certificate of Title No. 267235 was issued to the Ruikkies on March 8, 1995. Trial Ex. 22. With the acquisition of this back lot from the Kindamos, the Ruikkies now had the right to access Mitchell Lake by way of a deeded access to a boat landing located on Government Lot 4. Tr. 205.

In 1998, Ruikkies' neighbor immediately to the west, Steve Saari, put up for sale two lake lots he owned on the eastern end of the Plat of Homer's Lots. One of these lake lots (Lot 5, Block 1, Homer's Lots) was directly adjacent to part of Ruikkies' Government Lot 6. Therefore, in 1998, Ruikkies purchased from Mr. Saari the easterly 50 feet of Lot 5, Block 1, Homer's Lots (as measured parallel to the easterly boundary of said Lot 5), and were issued Certificate of Title No. 278785 on November 5, 1998. Tr. 208-209; Trial Ex. 23. Ruikkies paid \$15,000 for this 50 ft. strip of property on Mitchell Lake. Tr. 209.

Subsequently, Ruikkies purchased an additional forty (40) feet of lake frontage property (in Lot 5, Block 1, Homer's Lots) from Anthony and Penny Stolfe, who previously had purchased the property from Mr. Saari. Tr. 210-211. This forty (40) additional feet of lake frontage (that Ruikkies purchased from Stolfes) was directly adjacent to the 50 feet that the Ruikkies had previously acquired from Mr. Saari. Tr. 210.

Ruikkies paid \$18,500 for this additional 40 ft. strip of property on Mitchell Lake. Tr. 265-266. For this additional 40 feet of lake frontage property (legally described as the West 40 feet of the East 90 feet of Lot 5, Block 1, Homer's Lots, as measured parallel to the easterly boundary of said Lot 5), the Ruikkies were issued Certificate of Title No. 295631 on July 7, 2003. Trial Ex. 25.

VII. Nalls' Use And Purchase of The Northeraire Resort (Government Lot 1)

In August of 2003, George and Leslie Nall purchased the Northernaire Resort which was on property legally described as Government Lot 1 in Section 18, Township 62 North of Range 12 West. With the Nalls' purchase of Government Lot 1, they were issued Certificate of Title No. 295994 on August 7, 2003. Trial Ex. 27.

The Nalls had obtained financing through a lending institution to purchase the Northernaire Resort. As part of acquiring the loan to purchase the resort, and to satisfy the loan requirements, the Nalls were required to produce a detailed boundary survey (also known as an "ALTA Survey") of the real property that they were purchasing. Tr. 530.

The Nalls hired Bruce "Charlie" Chernak (hereinafter referred to as "Chernak") to complete the necessary ALTA Survey for the financing package being obtained by the Nalls to purchase the resort property. Tr. 530. Chernak is a registered land surveyor with Bear Island Surveying in Ely, Minnesota. Tr. 393.

Chernak is the principal owner and operator of Bear Island Surveying. He is the third generation surveyor to have owned Bear Island Surveying, with the company previously being owned by Cal Lindbeck (from whom Chernak had bought the surveying

company) and before Cal Lindbeck, the company had been owned by Dick Floyd. Tr. 398. As the third generation owner of this particular surveying company, Chernak had access to considerable historic survey data and information from prior survey work performed in the area of Government Lots 1, 5, and 6 (Section 18) by Chernak's predecessors. This historic survey information and data constituted proprietary business information owned by Bear Island Surveying, to which other surveys would not necessarily have had access. Tr. 398-399, 403-404, 407-408, 440.

Prior to purchasing the Northernnaire Resort (Government Lot 1), George Nall had looked at, researched, and considered a number of other resort properties. In looking at a resort purchase, Nall's business plan was not necessarily to buy a resort property to operate it as a resort, but, rather, he was interested in buying a resort property for the purpose of eventually converting the resort property into a condominium/time share type of a property. Converting the property into condominiums would include the requirement of platting or subdividing the property into what is known as a common interest community. Tr. 528-529.

Nall decided to purchase the Northernnaire Resort because that particular resort property had certain features and a physical layout which Nall was looking for in terms of eventually being able to implement his business plan to convert the property into condominiums by way of the creation of a common interest community. Tr. 529-530.

After the Nalls closed on the purchase of the Northernnaire Resort (Government Lot 1), the Nalls proceeded with their business plan to eventually have the resort converted into a condominium-style property by way of the creation of a common interest

community. The Nalls had Chernak proceed with additional survey work for eventually platting/subdividing the resort into a common interest community. Tr. 532-533.

In 2003 and 2004, Chernak conducted extensive survey work, both office work and work in the field, to create the proposed plat or subdivision of what eventually became known as Common Interest Community No. 76, Mitchell Shores ("CIC 76"). The CIC 76 plat would eventually have to be submitted to and approved by St. Louis County. Tr. 415-422.

In creating the proposed Plat of CIC 76, Chernak surveyed, set and established what would eventually become the boundaries for the various separate units of property to be located within CIC 76 and also surveyed, confirmed and set the perimeter boundaries and corners of the Plat of CIC 76 (which said plat was to encompass all of the Nalls' Government Lot 1). Id. In surveying and confirming the perimeter boundaries and corners of the proposed Plat of CIC 76, Chernak utilized standard and accepted survey methodologies, including the use of historical, proprietary survey data in his office from prior survey work in this area conducted by his business predecessors. Specifically, Chernak relied upon boundaries, corners and monuments set, established and confirmed for this location in 1979 and 1982 by one of Chernak's predecessors (Surveyor Dick Floyd); as well as boundaries, corners and monuments set, established and confirmed in 1986 by another one of Chernak's business predecessors (Surveyor Cal Lindbeck). Tr. 398-399, 403-404, 407-408, 440. Also, in creating the perimeter boundaries and corners for the Plat of CIC 76, Chernak relied upon his professional observations of the historic occupancy and use of the subject area and the neighboring parcels, including the fact that

the old cabin located on what eventually would become Unit No. 6 in CIC 76, was always treated as though and considered to be located within the perimeters of Government Lot 1. This also was confirmed by the boundaries (specifically, the south line of Government Lot 1/north line of Government Lot 6) which had been established and confirmed by the prior survey work in the area, as referenced above. Finally, and significantly, in establishing the perimeter boundaries for the Plat of CIC 76 (particularly the boundary between CIC 76 and the Ruikkies' Government Lot 6 to the south), Chernak relied upon a boundary line which had been clearly agreed to and established by way of a land swap transaction in 2004 between the Nalls and the Ruikkies, which will be discussed in more detail below. Tr. 433-439, 443-445; Trial Exs. 4 and 15.

VIII. The 2004 Land Swap Between Ruikkies and Nalls Which Results in Them Agreeing Upon The Established Boundary Line Between Their Properties

When the Nalls were in the process of purchasing the Northernnaire Resort, they learned from the previous owner that the Ruikkies had been utilizing and traversing across a part of the Northernnaire Resort property in order to access Mitchell Lake. This area was located in the southwest corner of the Northernnaire Resort property (Government Lot 1). Tr. 544-545.

In 2003, after purchasing the Northernnaire Resort, George Nall talked to the Ruikkies about their traversing across the Northernnaire Resort property to access the lake. This led to further discussions about the possibility of the Nalls deeding that small area of property (which, essentially, was a triangular piece of property located in the southwest corner of Government Lot 1), to the Ruikkies, in exchange for the Ruikkies possibly

deeding some of their Government Lot 6 to the Nalls. Tr. 545-549. Prior to reaching an agreement on which land they would exchange, George Nall and Robert Ruikkie actually walked the boundaries of the land that they were contemplating for the exchange/swap. Tr. 546-547.

Initially, Ruikkies had proposed to Nalls that they would be willing to deed the Nalls approximately 3.7 acres in the northerly part of Government Lot 6 in exchange for the triangular piece in the southwest corner of Government Lot 1. Tr. 547-548. Nalls made a counter proposal that they would deed the triangular piece of property in the southwest corner of Government Lot 1 in exchange for the Ruikkies deeding approximately 10 acres in the northerly part of Government Lot 6 to the Nalls. Tr. 550. The Ruikkies rejected the Nalls' counter proposal. Tr. 552. Eventually, George Nall decided that the 3.7 acres that the Ruikkies were willing to deed to the Nalls as part of the land swap would be of potential use to the Nalls in their CIC project as the additional 3.7 acres could serve as possible septic expansion area. Tr. 552-553.

Consequently, the Nalls and Ruikkies did eventually agree upon, finalize and close on the land swap transaction whereby the Nalls deeded to Ruikkies a triangular piece of property in the southwest corner of the Nalls' Government Lot 1, in exchange for the Ruikkies deeding 3.7 acres in the northerly part of Government Lot 6 to the Nalls. Tr. 553-554. The Ruikkies and the Nalls hired Surveyor Charlie Chernak, and split the fees charged by Charlie Chernak, to conduct the necessary survey work and draft the required legal description and diagram of this agreed-upon land exchange. Tr. 554.

In finalizing this land swap transaction with the Nalls, the Ruikkies signed a Quit Claim deed to the Nalls for the 3.7 acres that the Ruikkies were conveying to Nalls. Trial Ex. 15. This Quit Claim deed signed by the Ruikkies included a Certificate of Survey which clearly shows and depicts the agreed-upon south line of Government Lot 1 and the north line of Government Lot 6, and that line, as depicted and agreed-upon on the Certificate of Survey, extends in a straight line to the southwest corner of Government Lot 1, without deflecting in any manner out into Mitchell Lake. Trial Ex. 15. This Certificate of Survey also clearly shows and depicts the agreed-upon and acknowledged southwest corner of Government Lot 1 and the northwest corner of Government Lot 6, as being a number of feet off of and away from the actual shore line of Mitchell Lake. Trial Ex. 15. This Certificate of Survey clearly shows the boundary line between the Nalls' land and the Ruikkies' land which was being agreed to and established through this land swap transaction. Trial Ex. 15. Under cross examination at trial, Robert Ruikkie admitted and acknowledged that this Certificate of Survey document was attached to the Quit Claim Deed which he and his wife signed. Tr. 289-290.

As a result of this land swap transaction between the Ruikkies and the Nalls, the Ruikkies were issued Certificate of Title No. 301381 on December 10, 2004, for the triangular piece of land that they had acquired from the Nalls. Trial Ex. 28. Also, on December 10, 2004, the Ruikkies were issued Certificate of Title No. 301384, for the land remaining in their Government Lot 6 after the land swap transaction with the Nalls. Trial Ex. 31.

As a result of the land swap transaction with the Ruikkies, the Nalls were issued Certificate of Title No. 301383 on December 10, 2004, for the 3.7 acre piece of land that they had acquired from the Ruikkies. Trial Ex. 30. Also, on December 10, 2004, the Nalls were issued Certificate of Title No. 301382, for the land remaining in the Nalls' Government Lot 1 after the land swap transaction with the Ruikkies. Trial Ex. 29.

IX. Approval Of The Plat of CIC 76

With the land swap transaction complete, the Nalls continued with the process of creating and platting CIC 76. The Plat of CIC 76 would now include the additional 3.7 acres of land that the Nalls had acquired from the Ruikkies in the land swap transaction. Tr. 556-557. The land swap transaction had solidified the boundaries of the Nalls' proposed Plat/CIC. (Chernak Test.) Tr. 444, 448.

In order to finalize the creation of CIC 76, the Nalls had to obtain a conditional use permit from St. Louis County Planning and Zoning and also had to obtain approval of their proposed Plat of CIC 76. Tr. 557-558.

Chernak, on behalf of the Nalls, continued with the survey work to determine and establish the perimeter boundaries and corners of CIC 76 and now incorporated into the Plat of CIC 76 the additional 3.7 acres and boundary information agreed upon and established by the Ruikkies and Nalls in their land swap transaction. Tr. 444, 469. As indicated above, Chernak, in establishing the south boundary of CIC 76, relied upon the boundary information that had been agreed to and established between the Ruikkies and Nalls as part of the land swap transaction, including, specifically, the Certificate of Survey that had been attached to the Quit Claim deed from the Ruikkies to the Nalls. Tr.

434-438, 444, 448, 469; Trial Ex. 15. In addition, in preparing the final draft of the proposed Plat of CIC 76 for submission to St. Louis County, Chernak relied upon the historical, proprietary survey information in his possession and the historical occupancy in the area, as referenced and described above. Tr. 398-408.

Eventually, the Nalls submitted their application to St. Louis County Planning and Zoning for a conditional use permit for the creation of CIC 76. Tr. 444. The conditional use permit application materials submitted to St. Louis County included a number of copies of the proposed Plat of CIC 76, as prepared by the Nalls' surveyor, Charlie Chernak. Tr. 447, 535-536. In order for the creation of CIC 76 to occur, the proposed Plat of CIC 76 would eventually have to be approved by the County Surveyor, Thomas O'Malley, and then officially recorded with the St. Louis County Registrar's office. Tr. 445-447, 558.

After the Nalls submitted their application for a conditional use permit, St. Louis County Planning and Zoning established a date for a hearing on the CUP application and sent out notices of the date, time and location of the hearing to the neighboring property owners, which included a notice of hearing being sent out to the Ruikkies. Tr. 216-217, 537.

Ruikkies never made or forwarded any written or verbal communications to St. Louis County in any manner objecting to or opposing the creation of CIC 76 or the proposed Plat of CIC 76. Tr. 284-285.

At the conclusion of a hearing held on September 9, 2004, the St. Louis County Planning and Zoning Commission approved the Nalls' conditional use permit application for CIC 76. Tr. 541; see Trial Ex. 13.

Even though the Nalls had obtained a conditional use permit for CIC 76, they still had to obtain from St. Louis County final approval of the proposed Plat of CIC 76. Tr. 557-558.

Through the end of 2004 and into 2005, the Nalls' surveyor, Charlie Chernak, and his staff, continued to work with the staff from the County Surveyor's office regarding additional follow-up information that was needed for the County Surveyor's review and consideration of the proposed Plat of CIC 76. Tr. 416-418, 445-446. This required extensive survey work, both in the office and in the field, by Chernak and his staff, to provide the County Surveyor's office with various corner certificates, which were required by the County Surveyor's office as part of the plat approval process. Id.

Then, by letter dated May 27, 2005, the County Surveyor, Thomas O'Malley, notified Chernak that he [O'Malley] had a concern that the boundary line between Government Lots 1 and 6, as depicted on the proposed Plat of CIC 76, would eliminate potential riparian rights for Government Lot 6. See Trial Ex. 60.

George Nall and Chernak then had subsequent communications with the County Surveyor regarding what needed to be done to address the County Surveyor's stated concerns regarding the riparian rights of Government Lot 6. Tr. 447-450, 559-561. Since the riparian rights issue raised by the County Surveyor involved a question as to whether or not the Nalls even had title to all of the property that they were proposing to

plat in CIC 76 (as the purported riparian rights of Government Lot 6 would potentially give Ruikkies title to part of the Nalls' property), the St. Louis County Title Examiner, David Adams, also eventually became involved in these discussions about how to address this riparian rights issue. Tr. 109-110.

As a result of these communications with the County Surveyor's office and the St. Louis County Title Examiner on how to address the concern over the riparian rights of Government Lot 6, the County notified George Nall and Chernak that if they were able to obtain a Quit Claim deed or a written waiver/release from the Ruikkies, in which the Ruikkies expressly waived and released any potential riparian rights that they may have, then the County would allow the proposed Plat of CIC 76 to move forward for final approval. Tr. 561, 563.

During this same time frame, in approximately June 2005, George Nall also had an in-person meeting with Robert Ruikkie. During that meeting, Nall explained to Ruikkie what Nall had been able to learn and understand about riparian rights. During this meeting, Nall asked Ruikkie if Ruikkie intended to actually pursue any riparian rights that he may have. Ruikkie responded by stating to Nall that he [Ruikkie] had been aware of this riparian rights issue long ago, shortly after he purchased his property, and that, at that time, they had decided to resolve the issue through other means (by purchasing lake frontage from neighboring property owners) instead of attempting to obtain lake frontage through a legal action. Tr. 564-565.

Consequently, Nall had his real estate attorney, Bill Defenbaugh, prepare a proposed Waiver and Release document that would eventually be submitted to the Ruikkies for their consideration and possible signature. Tr. 565.

In order to make sure that the proposed Waiver and Release document drafted by Bill Defenbaugh was acceptable to County officials, Chernak's office forwarded the draft Waiver and Release document to the County officials, including Dave Adams, for the County officials to review, comment and provide any proposed revisions to the Release and Waiver document before the final draft of the document was forwarded to the Ruikkies for their consideration. Tr. 122, 565-566; Trial Ex. 69.

The St. Louis County Title Examiner, David Adams, did respond with some proposed revisions to the draft Waiver and Release document, and his proposed revisions were incorporated into the final draft of the document. Tr. 122; Trial Exs. 54 and 69.

Once the final draft of the proposed Waiver and Release document was agreed to between Nall and the St. Louis County officials involved in this matter, Nall proceeded to contact Robert Ruikkie to present the Waiver and Release document to him and to explain the reasons why Nall needed the signed Waiver/Release document from the Ruikkies. This would have been in the time frame of June 2005 when the proposed Waiver and Release document was first presented to Robert Ruikkie. Tr. 567-568.

In subsequent discussions between George Nall and Robert Ruikkie regarding the Waiver/Release document and whether or not the Ruikkies intended to sign it, Ruikkie expressed to George Nall that he was concerned about signing the Release/Waiver document because Ruikkies were having issues with St. Louis County on whether the

Ruikkies had a buildable parcel of property under St. Louis County Planning and Zoning regulations and the location of where on their property St. Louis County would allow the Ruikkies to build. Tr. 224-225, 569.

After receiving the Waiver/Release document from Nall, Robert Ruikkie also consulted with Eldon Hall, who is an attorney in Ely. Eldon Hall advised Ruikkie that he should not sign the proposed Waiver/Release document. Tr. 226. Subsequent to his consultation with Eldon Hall, Robert Ruikkie retained the services of Charles "Huck" Andresen, who is a real estate attorney in Duluth. Tr. 230.

Robert Ruikkie had expressed to George Nall that he [Ruikkie] supported the Nalls' proposed CIC 76, but Ruikkie also informed Nall that the Ruikkies would not sign the proposed Waiver/Release document because he didn't want such a document to adversely impact the Ruikkies' position relative to their ongoing struggles with the St. Louis County Planning and Zoning Department over whether or not they had a buildable parcel of land and the location of where they would eventually be able to construct a residential structure on their land. Tr. 179, 569. George Nall indicated that he completely agreed with and understood Ruikkies' rationale for withholding their signatures from the proposed Waiver and Release document. Tr. 180. In order to assist Ruikkies with the issues that Ruikkies were having with the St. Louis County Planning and Zoning Department, George Nall, and his attorney, Bill Defenbaugh, undertook efforts to communicate, on Ruikkies' behalf, with the St. Louis County Planning staff to see if they could resolve the buildable parcel issues between the Ruikkies and the St. Louis County Planning and Zoning Department. Tr. 569-575. George Nall and his

attorney, Bill Defenbaugh, also worked in tandem with Ruikkies' real estate attorney, Huck Andresen, and continued to communicate and negotiate with the St. Louis County Planning and Zoning staff to see if they could achieve a satisfactory resolution of the buildable parcel and building location issues involving the Ruikkies' property. Tr. 183-184.

As a result of these efforts, George Nall was able to obtain for the Ruikkies a letter dated June 30, 2005, from St. Louis County Planning staff person, James Plummer, in which Mr. Plummer confirmed, on behalf of St. Louis County, that the Ruikkies' property is recognized by St. Louis County as a buildable parcel and that no variance would be required to build on Government Lot 6, only a standard land use permit would be required. Tr. 569-570; Trial Ex. 63.

George Nall then approached Robert Ruikkie again to inquire as to whether or not the Ruikkies would sign the proposed Waiver and Release document in light of the correspondence from James Plummer dated June 30, 2005. At this point, Robert Ruikkie informed George Nall that the Ruikkies still would not sign the Release/Waiver document because they also wanted written confirmation from St. Louis County that the County also would let them build a structure in the area of the lakeshore property that the Ruikkies' had previously acquired within the Plat of Homer's Lots. Tr. 570-571.

Since Ruikkies still were not willing to sign the Waiver/Release document, George Nall requested a meeting with the key County officials involved in this matter to discuss ideas on how to resolve this issue so that his proposed Plat of CIC 76 could move forward for final approval. Tr. 574-575.

The meeting requested by George Nall was held on July 20, 2005. George Nall attended the meeting with his real estate attorney, Bill Defenbaugh, and his surveyor, Charlie Chernak. The County Surveyor, Thomas O'Malley, the County Registrar of Titles, Cathy Racek, and the St. Louis County Title Examiner, David Adams, participated in the meeting on behalf of St. Louis County. Tr. 575. One of the issues discussed during this meeting was the concern over the purported riparian rights of Government Lot 6, as raised by the County Surveyor, Thomas O'Malley. In explaining his position on this issue, Nall's surveyor, Charlie Chernak, explained that he did not believe it was his job (as a surveyor hired to do a surveying job for a private client) to assert and determine the potential riparian ownership rights of a neighboring property owner. Chernak explained that, if he expanded the scope of his work to include determining and establishing the riparian ownership rights of a neighboring property owner, the boundaries so established by that expanded survey work could have far reaching adverse impacts on the boundary lines of property owners down the shore of Mitchell Lake depending upon what riparian deflection method was selected for determining and establishing the potential riparian rights of Government Lot 6. Chernak explained that he just did not believe that it was his job to arbitrarily determine those matters, considering that it was far beyond the scope of the specific work that he was retained by George Nall to perform, and that it also would not be right for the Nalls to have to pay their surveyor a considerable additional sum of money for survey work to determine the riparian ownership rights of a neighboring property owner. Tr. 469-471. During this meeting with the County officials on July 20, 2005, the two surveyors present, O'Malley and

Chernak, also discussed a technical survey issue with the proposed Plat of CIC 76, having to do with a call or reference in the proposed plat to the boundary line between Government Lots 1 and 6. Tr. 472-473. Despite Chernak's explanations of why he did not feel that, in this context, it was the role of himself or his client to determine the riparian ownership rights of a neighboring property owner, the County officials stood their ground and indicated that they still would require the signed Waiver/Release document from the Ruikkies before the County would grant final approval of the proposed Plat of CIC 76. Tr. 473-474. At the conclusion of the meeting, George Nall, Charlie Chernak, and Bill Defenbaugh all believed and understood that they had to accomplish two items before St. Louis County would approve the proposed Plat of CIC 76. They would have to obtain and submit to the County the signed Waiver/Release document from the Ruikkies; and, as requested by Thomas O'Malley during the meeting, Charlie Chernak would have to revise the proposed plat to remove the call or reference to the boundary line between Government Lots 1 and 6. (Nall Test., Chernak Test., Defenbaugh Test.) Tr. 576-577; 474-475; 182-185.

With the understanding that they still had to obtain the signed Waiver/Release document from the Ruikkies. George Nall and his real estate attorney, Bill Defenbaugh, continued to work on attempting to resolve Ruikkies' buildable lot issues with the County, with the hopes that, in resolving those issues, Ruikkie would be willing to sign the Waiver/Release document. In August 2005, Bill Defenbaugh met with Ruikkies' real estate attorney, Huck Andresen, in Duluth to discuss strategy in working together to resolve Ruikkies' buildable issues with the County. Tr. 183-184.

In the meantime, Charlie Chernak, made the technical survey revision on the proposed Plat of CIC 76 which said revision had been requested by the County Surveyor, Thomas O'Malley, during the meeting on July 20, 2005. With that revision being made, Chernak forwarded the revised plat to O'Malley for his review. Tr. 475-477.

Unexpectedly, O'Malley approved the proposed, revised Plat of CIC 76 by signing the Plat, indicating his approval, on September 8, 2005, even though the Ruikkies had not signed any Waiver/Release document relative to the possible riparian rights of Government Lot 6. Tr. 59, 185, 478, 579.

Upon receiving the proposed Plat of CIC 76 with Thomas O'Malley's signature of approval, David Adams and Cathy Racek discussed the proposed plat and ultimately decided to allow the Plat of CIC 76 to be officially recorded with the Registrar's office, without confirming whether or not the Ruikkies had signed the Waiver/Release document. Tr. 115-116, 124.

The official, approved Plat of CIC 76 was then officially filed with the St. Louis County Registrar's office on November 3, 2005, as Document No. 807943, as encompassing all of the property identified on Certificate of Title Nos. 301382 and 301383. Trial Ex. 6.

George Nall, Charlie Chernak, and Bill Defenbaugh were all completely surprised by the fact that the proposed Plat of CIC 76 had been approved by St. Louis County and allowed for recording with the office of the St. Louis County Registrar of Titles because, all along, Nall, Chernak, and Defenbaugh were of the belief and understanding that they

had to obtain the signed Waiver/Release document from the Ruikkies before the proposed Plat would be approved and allowed for recording. Tr. 185, 478, 579.

On November 2, 2005, the St. Louis County Title Examiner, David Adams, issued a directive that, based upon the recording of the Plat of CIC 76, the Nalls' previous Certificate of Title Nos. 301382 and 301383 be cancelled; that new Certificates of Title be issued to the Nalls for all of the separate units/lots located within CIC 76; and that a new Certificate of Title be issued to the Mitchell Shores Homeowner's Association for the title ownership of the common elements/areas located within CIC 76. Said directive from the St. Louis County Title Examiner was recorded with the office of the St. Louis County Registrar of Titles on November 3, 2005, as Document No. 807945. Trial Ex. 17.

Even though George Nall did not expect to have his Plat of CIC 76 approved and recorded without the signed Waiver/Release document from the Ruikkies, Nall was very happy with this unexpected development because it now allowed him to proceed with his business plan for developing and selling the various units/ lots within CIC 76 as a condominium-style property. With the new Certificates of Titles in hand, showing and confirming that he and his wife, Leslie, were the title owners of all of the various units/lots within CIC 76, George Nall was now free to develop, market, and sell the various units/lots within CIC 76, which is exactly what he proceeded to do. Tr. 579-581.

Subsequently, Nalls sold and conveyed lots in CIC 76 to Charles Carroll and Lois Geist; Gary and Susan Peterson; and James and Judith Richart, and Certificates of Title were issued to them for the lots they purchased from Nalls. See Trial Exs. 51-53.

Upon learning that St. Louis County had approved the Plat of CIC 76 and allowed it to be officially recorded with the office of the St. Louis County Registrar of Titles, the Ruikkies were incensed that St. Louis County would approve the plat without the Ruikkies signing a Waiver/Release of their potential riparian based ownership rights of property located within the Plat of CIC 76. Tr. 247; Trial Ex. 70.

In September of 2007, the Ruikkies commenced this legal action in the form of a Torrens Petition to determine judicial boundary lines and landmarks. The Ruikkies' Petition in this action was accompanied by a Certificate of Survey prepared by Surveyor Laverne Leuelling, dated March 29, 2007. Ruikkies' Petition.

The Ruikkies claim that, based upon the riparian ownership rights associated with their Government Lot 6, they are entitled to a determination of the boundary line between their property and the Nalls' property that would, in essence, give and vest title and ownership of most of Unit 6, CIC 76 (including the structure currently located on Unit 6), to the Ruikkies instead of the Nalls. This would include approximately 155 feet of shore frontage on Mitchell Lake associated with Unit 6, CIC 76. Tr. 355-357; Trial Ex. 68.

Lot 4 and Lot 5, Block 1, Homer's Lots (with the exception of the Easterly 90 feet of Lot 5 previously conveyed to the Ruikkies) are owned by Anthony Stolfe pursuant to Certificate of Title Nos. 285615 and 295632. Trial Exs. 24 and 26.

In their Petition, and the accompanying Certificate of Survey from their surveyor, Laverne Leuelling, the Ruikkies also seek a determination of the boundary line on the west side of their property that (based upon the purported riparian rights associated with Government Lot 6) would, in essence, give and vest title and ownership of a significant

part of Lot 4 and most of the remainder of Lot 5, Block 1, Homer's Lots, to the Ruikkies instead of Stolfe. Tr. 357; Trial Ex. 68.

However, prior to trial, Ruikkies had reached an agreement with Stolfe whereby the Ruikkies agreed that, if the Court granted the boundary line determination which the Ruikkies are seeking in this action, then the Ruikkies would immediately deed and convey back to Stolfe any of Stolfe's property granted to the Ruikkies in such a boundary line determination, without Stolfe having to pay Ruikkies any consideration for the land to be deeded back to Stolfe. Tr. 297-298.

The Ruikkies were not willing to enter into any such understanding or agreement with the Nalls because, based upon the evidence presented at trial, it is apparent that, at one point, Robert Ruikkie was of the completely erroneous and mistaken belief and understanding that George Nall and Charlie Chernak had somehow fraudulently duped the County into approving the Plat of CIC 76 without the signed Waiver/Release document from the Ruikkies. Tr. 297-298.

ARGUMENT

I. STANDARD OF REVIEW

In an action to determine boundary lines, the district court's determination of a boundary line is a finding of fact, which will not be disturbed unless it is clearly erroneous. *Allred v. Reed*, 362 N.W.2d 374, 376 (Minn. Ct. App. 1985) (stating that determination of boundary lines "is awarded the same deference as any other factual determination"), *review denied* (Minn. Apr. 18, 1985); *see also Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (stating that factual findings are

reviewed only for clear error). A district court's factual findings are clearly erroneous "only if they are not reasonably supported by the evidence," *Fletcher*, 589 N.W.2d at 102, which must be viewed in the light most favorable to the prevailing party. *Theisen's, Inc. v. Red Owl Stores, Inc.*, 309 Minn. 60, 66, 243 N.W.2d 145, 149 (1976).

II. THE TRIAL COURT'S DENIAL OF RUIKKIES' PETITION IS CORRECT BECAUSE THE PETITION IS AN IMPERMISSIBLE ATTACK ON THE EXISTING CERTIFICATES OF TITLE.

The Trial Court properly determined that the appropriate and correct boundaries were those already set, determined and confirmed by the existing Certificates of Title because, to do otherwise, would constitute an impermissible attack on the Certificates of Title of the various parties involving in this action.

Because all of the property in this case is registered land, the provisions of Minn. Stat. Ch. 508 ("Torrens Act") must be followed in determining the location of the boundaries. The Torrens Act provides:

Except as herein otherwise provided, every decree of registration shall bind the land described in it, forever quiet the title to it, and be forever binding and conclusive upon all persons***. The decree shall not be opened, vacated or set aside *** by any proceeding at law or in equity for opening, vacating, setting aside or reversing judgments and decrees, except as herein especially provided.

Minn. Stat. § 508.22. "The purpose of the registration act is to insure to the one to whom a certificate of title is issued, and to his vendees, an absolutely perfect and indefeasible title free from all claims of every kind and nature except those expressly noted upon the certificate, and to put such title beyond attack." *Shevlin-Mathieu Lumber Co. v. Fogarty*, 130 Minn. 456, 461, 153 N.W. 871, 873 (1915). Accordingly, title to registered land may

not be set aside except as provided in the Torrens Act. *Park Elm Homeowner's Ass'n. v. Mooney*, 398 N.W.2d 643, 646 (Minn. Ct. App. 1987) (citations omitted). To do otherwise constitutes an impermissible collateral attack on a Torrens judgment. *Id.* Even the Court's equitable powers are restrained by the Torrens System. *Murphy v. Borgen*, 148 Minn. 375, 377, 182 N.W. 449, 450 (1921). The Torrens Registration Act states that "nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser who holds a certificate of title for value and in good faith . . . without written consent of the purchaser . . ." Minn. Stat. § 508.71, subd. 2.

"A court may not, in a proceeding subsequent to the initial registration of land, determine boundary lines, if that determination alters the legal description of the land as stated in the certificate of title, and thereby attacks the torrens certificate." *In Re Petition of Geis*, 576 N.W.2d 747, 750 (Minn. Ct. App. 1998) *review denied* (Minn. May 28, 1998).

Ruikkies argue that the boundaries of their property should be located in different locations than that which is described in existing Certificates of Title. Ruikkies erroneously argue that their Petition is not an attack on existing Certificates of Title.

The Court must look to the legal descriptions contained within the Certificates of Title for the Nall property, the Ruikkies' property, and the Stolfe property to determine the proper location of the boundary lines, and then set the boundary lines according to the legal descriptions found in those Certificates of Title.

The evidence in this case shows that the two surveyors, LaVerne Leuelling and Bruce R. Chernak, were both able to provide surveys which depict the boundary between

the property described in the Ruikkies' Certificates of Title, the property described in the Nalls' Certificates of Title and the property described in the Stolfes' Certificates of Title. Mr. Leuelling's survey depicts the units in CIC No. 76 and the line between the Ruikkies' property and the Nalls' property using an orange colored line. (Trial Ex. 68.) Mr. Leuelling's survey also depicts the lot lines within Homer's Lots and depicts the line between the Ruikkies' property and the Stolfe property using a light chartreuse colored line. Mr. Chernak's survey is the plat of CIC No. 76. Because the legal descriptions contained in the various Certificates of Title are capable of being located by survey, the Trial Court properly confirmed and located the boundary lines in accordance with the legal descriptions contained in the existing Certificates of Title. To do otherwise would have constituted an impermissible attack on the Certificates of Title. *Geis*, at 750.

Ruikkies attempt to argue that their legal action would not have to result in the alteration of existing Certificates of Title. That is simply incorrect. By way of Certificate of Title Nos. 305142 and 305143, George and Leslie Nall are the title owners of Units 6 and 7 in CIC 76. The actual physical location of Unit 6 and 7, CIC 76, is based upon the official Plat of CIC 76, which was approved by St. Louis County and officially filed of record with the office of the St. Louis County Registrar of Titles. In other words, based upon the information on the official, recorded plat, a person could go out and physically locate the actual boundaries of Units 6 and 7 on the ground. The title ownership of that actual physical real property is vested to George and Leslie Nall by way of their Certificates of Title for that property. In this court action, Ruikkies seek a boundary determination which would, in essence, transfer and vest ownership to them of

most of Unit 6 and a small part of Unit 7, CIC 76. This simply cannot be allowed because it would conflict with and be an impermissible attack on the Nalls' Certificates of Title for Units 6 and 7. Further, what Ruikkies seek by way of their Petition would be completely contrary to the Torrens system of establishing and proving title to real property. The proper and indefeasible boundaries between Government Lot 6 and CIC 76 (Government Lot 1) are those boundaries depicted and confirmed in the recorded Plat of CIC 76 and the recorded Certificate of Survey from the land swap transaction between Nalls and Ruikkies. On the basis of those documents, the parties were issued various Certificates of Title under the Torrens system confirming their respective title ownership of the real property depicted and defined in those survey documents.

Moreover, the legal description in the Ruikkies' Petition is an acknowledgement that the land described in the Petition includes land that is already included in the existing Certificates of Title. The legal description proposed by the Ruikkies includes: "All that part of Government Lots 1, 5 and 6..." If the Ruikkies' claim is that Government Lot 6 encompasses the land shown on their survey, then the legal description should be Government Lot 6 and no other. By definition, the legal description in the Petition describes land in Government Lot 5 that is currently described as part of Homer's Lots and for which Certificates of Title have been issued to Anthony Stolfe. The legal description in the Petition also includes land in Government Lot 1 that is currently described as part of CIC 76 and for which a Certificate of Title has been issued to George P. Nall and Leslie S. Nall. As such, the legal description in the Petition describes more than Government Lot 6 and includes land that is already included in other

Certificates of Title. The Ruikkies' own surveyor acknowledges that the land described in the Petition includes land described in Certificate of Title No.'s 285615 and 295632, is occupied by a screen house, shed and privy and is *owned* by Anthony Stolfe. (Trial Ex. 55.) The Ruikkies' surveyor also acknowledges that the land described in Certificate of Title No. 305142, is occupied by a cabin, and is *owned* by George P. Nall and Leslie S. Nall. (*Id.*) In this case, it is inescapable that the northerly and westerly boundaries of Government Lot 6, as described and proposed in the Ruikkies' Petition, would require altering the legal descriptions set forth in existing Certificates of Title. Because the Ruikkies' Petition seeks to include/obtain land that is already included in other Certificates of Title, it is an impermissible attack on the existing Certificates of Title. Therefore, the Trial Court properly denied Ruikkies' Petition.

III. THE TRIAL COURT CORRECTLY DETERMINED THAT THE TRUE AND ACCURATE BOUNDARY BETWEEN RUIKKIES' PROPERTY AND CIC 76 IS THAT DEPICTED IN THE PLAT OF CIC 76 AS WELL AS THE RECORDED CERTIFICATE OF SURVEY FROM THE LAND SWAP TRANSACTION BETWEEN RUIKKIES AND NALLS. THE TRIAL COURT PROPERLY LOCATED THE BOUNDARIES ACCORDING TO THE EXISTING CERTIFICATES OF TITLE BECAUSE THOSE BOUNDARIES ALSO HAVE BEEN ESTABLISHED BY THE COMMON LAW DOCTRINE OF PRACTICAL LOCATION OF BOUNDARIES.

In 2008, the Minnesota Legislature enacted Minn. Stat. Sec. 508.02, confirming that the common law doctrine of practical location of boundaries applies to registered land whenever registered. Minn. Stat. § 508.02 . Minnesota has recognized three ways in which the practical location of a boundary may be established. *In re Zahradka*, 472 N.W. 2d 153, 156 (Minn. Ct. App. 1991). One way is practical location by acquiescence in which the boundary location relied upon must have been acquiesced in for a sufficient

length of time to bar a right of entry made under the statute of limitations.² *Id.* Another way requires that the boundary be expressly agreed upon by the parties on both sides and afterward acquiesced in. *Id.*

For practical location by agreement, the agreement must be more than a unilaterally assumed, unspoken and unwritten mutual agreement, corroborated by neither word nor act. *Slindee v. Fritch Investments, Inc.*, 760 N.W. 2d 903, 909 (Minn. Ct. App. 2009). A boundary by express agreement is established if there is a specific boundary-related action that clearly proves that the parties have agreed to a specific boundary. *Id.* at 910.

For practical location by acquiescence, the acquiescence required is conduct or lack thereof from which assent may be reasonably inferred. *Pratt Investment Co. v. Kennedy*, 636 N.W. 2d 844, 849 (Minn. Ct. App. 2001) (citing *Engquist v. Wirtjes*, 243 Minn. 502, 507-08, 68 N.W.2d 412, 417 (1955)). The acquiescence of the previous owners to the boundary may be considered when determining whether the 15 year period has been met. *See, e.g., In re Zahradka* 472 N.W. 2d at 155. (considering the ownership of the current and former owners in determining whether there was acquiescence for the required 15 year period.) “[A]cquiescence entails affirmative or tacit consent to an action by the alleged disseizor, such as construction of physical boundary or other use...” *Pratt Investment Co. v. Kennedy*, 636 N.W. 2d 844, 849 (Minn. Ct. App. 2001) (quoting *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. Ct. App. 1987)). “Implicit in the case law is

² The statute of limitations that applies in a boundary determination is 15 years. Minn. Stat. § 541.02.

the notion that the disseizor must claim, by way of some action, that a boundary has existed for the statutory period and the disseized has acquiesced to that boundary.” *Pratt Investment Co. v. Kennedy*, 636 N.W. 2d at 849; *see also In re Zahradka* 472 N.W. 2d at 156 (finding boundary was established by acquiescence when disseizor built parking lot on disseized land and disseized made no claim to ownership of land for more than 15 years.)

The law in Minnesota is very clear that a boundary line established by practical location prevails over a boundary line set forth in an original government survey. A boundary line which may have been established by an original survey loses its quality as the established boundary if the adjoining property owners or their predecessors in interest agreed upon a different boundary line. Steven J. Kirsch, 6A Minnesota Practice Series, Methods of Practice, Sec. 54.26 (3d ed.). When such an agreement is entered into, the line agreed upon becomes the true boundary. Id.

Such an agreement may arise by acquiescence. It is immaterial whether or not the agreed line is the true line or whether the parties did or did not know the correct location of the true line. Otherwise such an agreement would be useless. **Moreover the agreement need not be express but may be implied from the acts of the parties.**

Id. (emphasis added) citing, inter alia, Dunkel v. Roth, 211 Minn. 194, 300 N.W. 610 (1941); Neill v. Hake, 254 Minn. 110, 93 N.W.2d 821 (1958); Phillips Petroleum Co. v. Selnes, 223 Minn. 518, 27 N.W.2d 553 (1947); and Fishman v. Nielsen, 237 Minn. 1, 53 N.W.2d 553 (1952).

Ruikkies assert that applying Sec. 508.02 to the present lawsuit would constitute an impermissible retroactive application of the law. Ruikkies’ argument on that point is

incorrect. The wording of the statute, wherein it states that the statute “applies to registered land whenever registered” (emphasis added), reveals that the legislature clearly intended the amended statute to apply to all registered land, whether registered before or after the effective date of the amended statute. If the legislature had intended the statute to apply only to property registered after a certain date, etc..., the legislature would have included such language. It did not. Instead, the statute states very clearly on its face that it applies to registered land “whenever registered.” That is a clear statement by the legislature that the statute was to apply, broadly and retroactively, even to property that had been registered before the statute was enacted.

With respect to the boundary between Ruikkies’ property and Nalls’ property, that boundary has been expressly agreed upon by the Ruikkies and the Nalls and acquiesced in. As discussed above, the Nalls and the Ruikkies owned Government Lots 1 and 6, respectively. The Nalls and the Ruikkies exchanged land in each of their government lots via deeds which included a Certificate of Survey depicting the location of the South line of Government Lot 1 and the North line of Government Lot 6. The location depicted in the Certificate of Survey shows the South line of Government Lot 1 and the North line of Government Lot 6 as a straight line, without any deflection to the shores of Mitchell Lake. Mr. Ruikkie and Mr. Nall had met and walked around on the subject property and discussed the property to be exchanged in general terms. The Ruikkies and the Nalls then shared in the costs of hiring a surveyor (Chernak) to survey their properties and prepare legal descriptions for both of the tracts of land to be exchanged. Mr. Chernak prepared a Certificate of Survey (“Chernak Survey”) that depicted both of the tracts to be exchanged

and clearly labeled the south line of Government Lot 1, the north line of Government Lot 6, the west line of Government Lot 1 and the southwest corner of Government Lot 1. The legal description of each of the tracts to be exchanged describes the boundaries of each tract. There is no evidence that either of the parties disagreed with the location of the boundary as shown on the Chernak Survey or the corresponding legal descriptions of the tracts. This evidence shows that the Ruikkies and the Nalls agreed upon the location of the boundary as shown in the Chernak Survey, and acquiesced in that location, by exchanging land using the Certificate of Survey and legal descriptions prepared by Mr. Chernak and attaching a copy of the Chernak Survey to the deeds.³ The deeds were then recorded in the St. Louis County Registrar of Titles Office and new Certificates of Title were issued to both parties based on the recorded deeds.

These facts show that the Nalls did not unilaterally determine the boundary between their property and the Ruikkies' property. Rather, the Nalls worked with the Ruikkies to determine the location of the boundary between their properties so that they could legally describe the boundaries of the tracts to be exchanged between them. These facts also show that the Chernak Survey and the deeds are written evidence of their mutual agreement as to the location of their boundary line. Finally, the exchange of land between the Ruikkies and the Nalls, using the legal descriptions depicted in the

³ The Certificate of Survey was not attached to the recorded deed from the Nalls to the Ruikkies, although the legal description in the deed refers to an attached sketch. The Certificate of Survey was attached to the recorded deed from the Ruikkies to the Nalls and the Certificate of Survey was attached to that deed when it was signed by the Ruikkies.

Certificate of Survey, is a specific boundary related action that clearly proves the parties have agreed to a specific boundary.

In exchanging these deeds, the Ruikkies and the Nalls expressly agreed upon the location of the South line of Government Lot 1 and the North line of Government Lot 6; they expressly agreed upon the boundaries of their respective properties.

The Ruikkies and the Nalls acquiesced in this agreed upon boundary. The Ruikkies acquiesced by using the triangular piece of land (that they acquired from the Nalls) to access the lake and the Nalls by incorporating the 3.7 acres (that they acquired from the Ruikkies) into their plat of CIC No. 76. Given these facts, the Trial Court correctly concluded that the 2004 land exchange was an express agreement between the Ruikkies and the Nalls as to the boundary between their properties.

Ruikkies attempt to refute the impact that the land swap transaction had on the outcome of this litigation by erroneously relying upon Benz v. City of St. Paul, 89 Minn. 31, 93 N.W. 1038 (1903). Relying upon Benz, Ruikkies seem to be arguing that the Certificate of Survey prepared by Charlie Chernak for the land swap transaction was somehow erroneous, and that the land swap transaction is now essentially nullified on that basis. Ruikkies' arguments and reasoning here are fundamentally flawed, as there are critical differences between Benz and the facts in this case. First, the real property involved in Benz was not registered ("Torrens") property. Therefore, the court in Benz did not have to struggle with or somehow resolve the issue of Certificates of Title creating indefeasible title to real property based upon practical boundary lines agreed to and acquiesced in by the parties. Second, the Benz case did not involve an extensive

prior 15+ year period of acquiescence. In the case at bar, when the extensive period of prior acquiescence in this boundary line is coupled with the fact that Ruikkies actually signed an instrument (i.e., the land swap deed with the Certificate of Survey attached) acknowledging and consenting to that historic, practical boundary location, the evidence clearly supports the Trial Court's findings of boundary line by practical location. While Ruikkies may have a different interpretation or spin on the meaning and impact of this evidence, that does not warrant or justify overturning the Trial Court's decision, as all of this evidence has to be viewed in the light most favorable to the prevailing party.

Moreover, the established boundary between Government Lots 1 and 6 has been acquiesced in (for more than 15 years) by the prior owner of Government Lot 6 and by the Ruikkies since they purchased Government Lot 6 in 1992. The previous owners of Government Lot 1 operated Northernaire Resort on the property and located a cabin on what would plainly be Government Lot 6 if (according to the Leuelling/Ruikkie Survey) the Northerly line of Government Lot 6 deflected at the meander corner to Mitchell Lake. The previous owner of Government Lot 6 was Winston Homer. There is no evidence that Mr. Homer ever claimed that that the cabin was located on Government Lot 6 or requested that it be moved. In fact, there is evidence that Mr. Homer expressly agreed that the North line of Government Lot 6 extends in a straight line without any deflection to the lake by depicting the line that way in the roadway easement. The location of the cabin and the depiction of the North line of Government Lot 6 in the roadway easement document constitute clear evidence of acquiescence by the previous owner of

Government Lot 6 that the common boundary between Government Lots 1 and 6 extends in a straight line without deflection to the lake.

Since the time Ruikkies purchased Government Lot 6, they also have acquiesced to the boundary between Government Lots 1 and 6 in a location that extends in a straight line without deflection to the lake. Immediately after purchasing Government Lot 6, Mr. Ruikkie discovered the deteriorated cabin that had been there for awhile located on what he thought was his property. Mr. Ruikkie told the owner of Government Lot 1, Francis Fitzgerald, that he thought the cabin was located on his property. Mr. Fitzgerald responded by informing Mr. Ruikkie that the cabin was not located on the Ruikkies' Property and that the Ruikkies' Property was 85 feet back from Mitchell Lake. Mr. Fitzgerald showed Mr. Ruikkie a survey of the resort property which showed that Government Lot 6 did not have a point of contact on Mitchell Lake and that the Ruikkies' property corner was 85 feet back from the lake. Mr. Ruikkie attempted unsuccessfully to obtain deeded lake access from Mr. Homer, and otherwise did nothing in response to Mr. Fitzgerald's description of the boundary line.

Mr. Fitzgerald conveyed Northernaire Resort to Grant and Cathy Young. Due to the terrain along the lake, the Ruikkies used a trail that is located on the resort property to access Mitchell Lake. While using the trail, Mr. Ruikkie encountered Mr. Young on the trail. Mr. Young informed Mr. Ruikkie that the trail was located on the resort property, but the Ruikkies could continue to use the trail for access to the lake. Mr. Ruikkie did not disagree with Mr. Young nor did he do anything further to assert that the trail was on his [Ruikkies'] property.

The Ruikkies' acquiescence during their ownership since 1992, combined with the many prior years of Mr. Homer's acquiescence, clearly meet the required 15 year period.

Ruikkies erroneously argue that they could not have acquiesced at all because they claim there is no visible indication of the boundary line between Government Lots 1 and 6. In this case, there absolutely are visible indicators of the boundary line. There was/is a very visible cabin and trail on what would plainly be Government Lot 6 if (according to the Leuelling/Ruikkie Survey) the Northerly line of Government Lot 6 deflected at the meander corner to Mitchell Lake.⁴ In using his compass to look due east back in 1992, Mr. Ruikkie believed that the cabin was located on his property. The cabin and trail demonstrate a claim of boundary by action and use by the past and present owners of Government Lot 1 up to the South line of Government Lot 1 (and the North line of Government Lot 6), as has been depicted in the numerous maps and surveys mentioned in this case, without objection from the owners of Government Lot 6. The location of the cabin and the trail, coupled with the failure of the owners of Government Lot 6 to object to the location of the cabin and the use of the trail by the owners of Government Lot 1, show that the owners of Government Lot 6 acquiesced in a common boundary between Government Lots 1 and 6 that extends in a straight line without deflection to Mitchell Lake.

⁴ The location of the cabin is noted on the Leuelling Survey. (Trial Ex. 68.) The trail is located in the southwest corner of Government Lot 1 and is on the triangular piece of property that was conveyed to the Ruikkies. (See Trial Ex. 14.) Mr. Ruikkie testified that the prior owners of the Northernnaire Resort informed him that the trail was located on the resort property, but the Ruikkies could continue to use the trail for access to the lake.

Thus, the Trial Court correctly determined that the Ruikkies' northerly boundary was established by practical location by acquiescence in the location described in the plat of CIC No. 76 and the Chernak Survey from the 2004 land exchange.

IV. THE TRIAL COURT'S DETERMINATION THAT THE RUIKKIES' BOUNDARY IS LOCATED ACCORDING TO THE EXISTING CERTIFICATES OF TITLE IS A FAIR AND JUST RESULT.

The Trial Court's determination that the boundaries are located according to the existing Certificates of Title is fair and just for many reasons. First, Government Lot 6 never abutted Mitchell Lake and the prior owner defined the boundaries of Government Lot 6 to exclude frontage or a point of contact on Mitchell Lake. At trial, all of the surveyors agreed that the original U.S. Government Survey from 1885 was in error and that Government Lot 6 never actually abutted Mitchell Lake. The prior owner of Government Lot 6, Winston Homer, treated Government Lot 6 as if it were not riparian to Mitchell Lake and defined the boundaries in such a way that Government Lot 6 did not have frontage or a point of contact on Mitchell Lake. Winston Homer platted the adjoining Government Lot 5 as Homer's Lots and depicted the common boundary between the Plat of Homer's Lots and Government Lot 6 as running in a straight line without any deflection into Mitchell Lake. At about the same time, Winston Homer conveyed a roadway easement over and across Government Lot 6. This recorded easement includes a survey that depicts the North line of Government Lot 6 as extending in a straight line to the East line of the plat of Homer's Lots, without deflecting toward Mitchell Lake. Both the plat and the roadway easement show that Mr. Homer did not define the boundary of Government Lot 6 as abutting Mitchell Lake. Further, when

Mr. Homer listed Government Lot 6 for sale, it was advertised as property with deeded lake access, not actual lake access. Because Government Lot 6 has never abutted Mitchell Lake and the boundaries of Government Lot 6 have been defined and acknowledged by the prior owner to exclude any frontage or point of contact on Mitchell Lake, it is fair for the boundaries to be located where the documents of record and the Certificates of Title indicate the boundaries to be.

It also is fair for the Trial Court to have determined that the Ruikkies' boundaries are located according to the documents of record and Certificates of Title because the Ruikkies did not pay for land that abutted Mitchell Lake. Mr. Ruikkie testified that, when he first learned about Government Lot 6, he was told by the realtor that the property had deeded lake access. During discussions about the property, there was disagreement between the realtor and Mr. Homer about the boundaries of the property and the issue of deeded lake access versus actual lake frontage. At some point, the asking price was reduced from \$23,500 to \$10,500. Ruikkies did not exercise their contingency rights – they did not conduct any research or due diligence on whether the property actually abutted Mitchell Lake. If Ruikkies' boundaries are located as described in their Petition and the Leuelling Survey, Ruikkies will be rewarded with a significant windfall of lakeshore property, which would be grossly unfair and inequitable considering that they obviously did not pay for lakeshore property when they purchased this property for only \$10,500.

Finally, a determination that the boundaries of Ruikkies' property are located according to the existing documents of record and the Certificates of Title maintains the

integrity of the Certificates of Title and the Torrens system. One of the main purposes of the Torrens system is to create conclusive and indefeasible titles that can be relied upon by real property owners. *Hersh Properties, LLC v. McDonald's Corporation*, 588 N.W.2d 728, 734 (Minn. 1999). All of the property in this case has been registered ("Torrens") land for a long time. The boundaries of Ruikkies' property have always been treated as if they extended in straight lines rather than deflecting to Mitchell Lake. Many documents have been recorded in the office of the St. Louis County Registrar of Titles, including: the plat of Homer's Lot's; deeds conveying land located within Homer's Lots; the roadway easement across Government Lot 6; the land exchange deeds between Ruikkies and Nalls, along with the related Certificate of Survey; the plat of CIC 76; and deeds conveying land located within CIC 76; all of which indicate that the boundaries of Ruikkies' property extend in straight lines rather than deflecting to Mitchell Lake. In addition, many Certificates of Title have been issued in reliance on the documents submitted for recording. A determination that the boundaries of Ruikkies' property are located differently than what has been historically recognized, placed of record and relied upon, is detrimental to the Torrens system.

CONCLUSION

For the foregoing reasons, Respondents George and Leslie Nall, et al., respectfully request that the Court of Appeals affirm the decision of the District Court.

Dated: 11/11/10

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