

NO. A10-1622

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State of Minnesota  
**In Court of Appeals**

Kent L. Henricksen Re: Duquette Schoolhouse Property,  
*Appellant,*

v.

Town Board of Kerrick, Mn.,  
Mark Sagvold, Chairman,  
Cheryl Ashmore,

*Respondents.*

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**RESPONDENTS TOWN BOARD OF KERRICK AND  
MARK SAGVOLD'S BRIEF, ADDENDUM AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF LEGAL ISSUE .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF THE FACTS .....	3
STANDARD OF REVIEW .....	5
LEGAL ARGUMENT .....	5
I.    KERRICK TOWNSHIP PROPERLY VACATED THE NORTHEASTERN SECTION OF THIRD STREET .....	5
II.   KERRICK TOWNSHIP IS ENTITLED TO THE AFFIRMATIVE DEFENSES OF LACHES AND STATUTORY IMMUNITY .....	8
CONCLUSION .....	11
ADDENDUM .....	12
APPENDIX .....	13

**TABLE OF AUTHORITIES**

	<b>Page</b>
Minn. Stat. § 164.06, subd. 1 .....	6
Minn. Stat. § 164.07 .....	1, 6, 9
Minn. Stat. § 365.10, subd. 11 .....	1, 7
Minn. Stat. § 466.02 .....	10
Minn. Stat. § 466.03, subd. 6 .....	1, 10
Minn. Stat. § 541.01 .....	8
Minn. R. Civ. P. 56.05 .....	5
<i>Cairl v. State</i> , 323 N.W.2d 20 (Minn. 1982) .....	10
<i>Christopherson v. City of Albert Lea</i> , 623 N.W.2d 272 (Minn. App. 2001) .....	10
<i>Christopherson v. Fillmore Twp.</i> , 583 N.W.2d 307 (Minn. App. 1998) .....	5, 7
<i>Clark v. Pawlenty</i> , 755 N.W.2d 293 (Minn. 2008) .....	8
<i>Davis v. Hennepin County</i> , 559 N.W.2d 117 (Minn. App. 1997), review denied (Minn. May 20, 1997) .....	10
<i>Fisher v. County of Rock</i> , 596 N.W.2d 646 (Minn. 1999) .....	10
<i>Hebert v. Fifty Lakes</i> , 744 N.W.2d 226 (Minn. 2008) .....	9
<i>In re Appeal Rescinding the Resolution Approved on November 15, 2005</i> , 2010 Minn. App. LEXIS 524 (Minn. App. June 8, 2010) .....	5
<i>In re Hanlon</i> , 2010 Minn. App. LEXIS 605 (Minn. App. June 29, 2010) rev. denied, 2010 Minn. LEXIS 570 (Minn. Sept. 21, 2010) .....	7
<i>Larson v. Independent Sch. Dist. No. 314</i> , 289 N.W.2d 112 (Minn. 1979) .....	1, 10
<i>Larson v. Linwood Twp.</i> , 1999 Minn. App. LEXIS 1239 (Minn. App. Nov. 23, 1999) .....	10

<i>Lindquist v. Gibbs</i> , 122 Minn. 205, 208, 142 N.W. 156 (1913) .....	9
<i>Nusbaum v. Blue Earth County</i> , 422 N.W.2d 713 (Minn. 1988) .....	1, 10
<i>Padrnos v. Nisswa</i> , 409 N.W.2d 36 (Minn. App. 1987) .....	8
<i>Rochester v. North Side Corp.</i> , 211 Minn. 276, 1 N.W.2d 361 (Minn. 1941) .....	8
<i>Roemer v. Eversman</i> , 304 N.W.2d 653 (Minn. 1981) .....	8
<i>Schacht v. Town of Hyde Park</i> , 1998 Minn. App. LEXIS 462 (Minn. App. April 28, 1998) .....	7
<i>State by Cooper v. French</i> , 460 N.W.2d 2 (Minn. 1990) .....	5
<i>Strouth v. Town of Lorain</i> , 2010 Minn. App. LEXIS 232 (Minn. App. Mar. 23, 2010) .....	5
<i>Travelers Indem. Co. v. Bloomington Steel &amp; Supply Co.</i> , 718 N.W.2d 888 (Minn. 2006) .....	5
<i>Valspar Refinish, Inc. v. Gaylord's, Inc.</i> , 764 N.W.2d 359 (Minn. 2009) .....	5
<i>Villard v. Hoting</i> , 442 N.W.2d 826 (Minn. App. 1989) .....	1, 7
<i>Winters v. Kiffmeyer</i> , 650 N.W.2d 167 (Minn. 2002) .....	8, 9

## STATEMENT OF LEGAL ISSUE

### **I. DID KERRICK TOWNSHIP PROPERLY VACATE THE NORTHEASTERN PORTION OF THIRD STREET?<sup>1</sup>**

#### **How the Issue was Raised and Preserved:**

Respondents Kerrick Township and Mark Sagvold raised this issue in their Motion for Summary Judgment. *See Kerrick Township and Mark Sagvold's Mem. in Supp. of Summ. J. pp. 7-9.*

#### **How the District Court Ruled:**

The district court granted Respondents' Motions for Summary Judgment holding Appellant was not entitled to personal notice of the hearing on the vacation petition because his property does not abut the road and he has other access to the property. *See R. Add. 4-5.*

#### **Apposite Authority:**

Minn. Stat. § 164.07

Minn. Stat. § 365.10, subdivision 11

*Villard v. Hoting*, 442 N.W.2d 826 (Minn. App. 1989)

### **II. DO THE DOCTRINES OF LACHES AND STATUTORY IMMUNITY BAR APPELLANT'S CLAIMS?**

#### **How the Issue was Raised and Preserved:**

Respondents Kerrick Township and Mark Sagvold raised this issue in their Motion for Summary Judgment. *See Kerrick Township and Mark Sagvold's Mem. in Supp. of Summ. J. pp. 9-12.*

#### **How the District Court Ruled:**

The district court did not reach this issue.

#### **Apposite Authority:**

Minn. Stat. § 466.03, subd. 6

*Larson v. Independent Sch. Dist. No. 314*, 289 N.W.2d 112 (Minn. 1979)

*Nusbaum v. Blue Earth County*, 422 N.W.2d 713 (Minn. 1988)

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<sup>1</sup> Appellant did not appeal the dismissal of his claims against Town Board Chair Mark Sagvold. *See Appellant's Stmt. of the Case; Appellant's Brief.*

## STATEMENT OF THE CASE

This appeal arises from Respondent Kerrick Township's ("Township") approval of a road vacation petition. Respondent Cheryl Ashmore and seven other residents of Kerrick Township presented the road vacation petition to the Town Clerk on February 7, 2003 and to the Town Board on February 20, 2003. The petition requested the northeastern section of Third Street be vacated because it bisected Ashmore's properties and was being used by patrons to access Jackie Berger Memorial Park instead of the specifically designated park entrance. In the past, park patrons had walked through Ashmore's land, urinated in her yard, and displayed other disruptive behaviors.

The road vacation petition public hearing was held on June 12, 2003. Notice of the hearing was posted, published and personally served on affected land owners. Appellant owns property in Kerrick Township just north of Third Street. He was not personally served because his property did not abut Third Street. Furthermore, Third Street did not provide access to Appellant's property.

On June 12, 2003, the Town Board approved the petition and found vacation of the road was in the public's interest after discussing safety and liability issues along with Ashmore's concerns. On November 12, 2009, Appellant initiated this lawsuit claiming he should have been personally served with notice of the road vacation hearing and alternative access routes to his property are too overgrown to use.

Respondents brought Motions for Summary Judgment. On July 14, 2010, the district court granted Respondents' Motions for Summary Judgment. Appellant filed his notice of appeal on September 16, 2010.

## STATEMENT OF THE FACTS

Duquette Town was platted around 1900, but never incorporated and now lies within the jurisdiction of Kerrick Township. *R. App. 1.* Plaintiff's family owns a property just north of Duquette where an old dilapidated schoolhouse is located ("the Property"). *Id. 2, 7.* The Property is located between County Road 47 and Jackie Berger Memorial Park ("the Park"). *Id. 2, 8.* The Property currently has access from Wild Oak Loop in the west, the Highway 23 frontage road in the south and from Range Line Road in the east. *Id. 2, 9-11.* Until 2003, the Property could also be accessed through a trail which began at the northeast corner of Third Street and ran straight north past the Property ("Schoolhouse Road"). *Id. 2-3, 13-14.* The Township has not maintained any of the accesses to the Property or any of the platted Duquette Town Site Roads since at least 1983. *R. App. 3, 44-54; Kent Henricksen Aff. Exhs. Ka, Kb, Kc, Kd.* On February 7, 2003, eight area residents submitted a petition to vacate a portion of Third Street to the Kerrick Township Town Clerk. *R. App. 3, 42-45.*

The petition was then presented to the Town Board at its regular meeting on February 20, 2003. *Id. 7, 42-45.* Later that night, the Town Board set a public hearing on the petition for June 12, 2003. *Id.* Notice of the hearing was posted in the Duquette Store, Kerrick Town Hall and the Kerrick post office and bank. *Id. 3-4, 20-21.* The Notice was also published in a newspaper circulated in Kerrick as well as Hinckley, Minnesota where Plaintiff lives. Finally, the notice was personally served on affected landowners. *Id.* The Property was not considered an "affected" property because it was not adjacent to Third Street and was accessible via other routes. *Id. 4.*

On June 12, 2003, the public hearing on the petition was held. *Id.* 4, 22-24. The petition, which was signed by eight individuals, requested the Town Board vacate a portion of Second and Third Streets and an alley. *Id.* 4, 42-43. Specifically, the petition requested the portion of Third Street which ran in front of the Ashmore home be vacated because it ran through the middle of Ashmore's properties -- blocks 6 and 7. *Id.* Additionally, people were using Third Street to access the Park instead of the specifically designated Park road. *Id.* Park patrons using Third Street often wandered onto Ashmore's property. *Id.* Ashmore had previously reported to the Board people using the Park were interfering with her use of her property by: taking a boat tire; urinating in her yard; removing a property stake; walking through her yard; parking in her yard; and entering her yard to interrupt family events. *Id.* 25-27. In addition to Ms. Ashmore, other members of the public were in favor of the petition. *Id.* 23.

As part of the petition process, the Town Board discussed the safety concern of motorized vehicle traffic on Schoolhouse Road. *Id.* 4. This was an issue because a pavilion for picnics and other family activities was built close by. *Id.* Ultimately, the Board determined it was in the public's interest to vacate the northeast portion of Third Street. *Id.* They then issued a Resolution and Order vacating the road. *Id.* 4-5, 28-37. On February 3, 2004, the Town Clerk recorded the documentation including the Petition, Resolution and Order to vacate Third Street at the Pine County Recorder's Office. *Id.* 4-5, 15-21, 28-37.

## STANDARD OF REVIEW

On an appeal from summary judgment, the Minnesota Court of Appeals asks two questions: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). While the Court views all evidence in a light most favorable to the nonmoving party, judgment is appropriate for the moving party when the nonmoving party fails to show specific facts exist to create a genuine issue for trial. Minn. R. Civ. P. 56.05; *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 368 (Minn. 2009); *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006). A *de novo* standard is used when reviewing cases involving the vacation of a road. *In re Appeal Rescinding the Resolution Approved on November 15, 2005*, 2010 Minn. App. LEXIS 524, \*3-4 (Minn. App. June 8, 2010); *Strouth v. Town of Lorain*, 2010 Minn. App. LEXIS 232, \*6 (Minn. App. Mar. 23, 2010); *Christopherson v. Fillmore Twp.*, 583 N.W.2d 307, 309 (Minn. App. 1998).

## LEGAL ARGUMENT

### **I. KERRICK TOWNSHIP PROPERLY VACATED THE NORTHEASTERN SECTION OF THIRD STREET.**

On appeal, Appellant argues the Township's vacation of Third Street was unlawful because he was entitled to personal service of notice of the public hearing and his predecessor in title gained rights to Schoolhouse Road by "usurp[ing the] land," adverse possession or "abandonment by estoppel." *Appl.'s Brief pp. 10-14*. Appellant's arguments are inadequate because Minnesota case law shows the term "affected

landowner” means abutting property owners and there is no evidence Appellant had any rights in Schoolhouse Road.

Town boards are authorized to vacate platted town roads. Minn. Stat. § 164.06, subd. 1. To vacate a town road, a township must receive a petition signed by not less than eight town voters who own or occupy real estate within three miles of the road. Minn. Stat. § 164.07, subd. 1. The petition shall be filed with the town clerk who shall present it to the town board. *Id.* subd. 2. Within 30 days, the town board shall make an Order fixing the time and place for acting upon the petition. *Id.* Notice of the Order must be personally served upon “affected landowners” and publicly posted at least 10 days before the meeting. *Id.* Once a town board approves the petition and issues an Order to vacate, the town clerk certifies the Order is correct and records the same. *Id.* subd. 11. Importantly, the certified and recorded Order “shall be received in all courts as competent evidence of facts therein contained and be prima facie evidence of the regularity of the proceedings prior to the making thereof.” *Id.*

Kerrick Township followed all proper procedures in vacating the northeast portion of Third Street. A petition was submitted by eight voters who lived within three miles. Within 30 days of receipt, the Town Board set a date to consider the petition. Notice of the date for consideration was posted for at least 10 days and all affected owners were personally served. The Town Board granted the petition because it was in the public’s interest given the disruption to Ms. Ashmore’s property, confusion about where to enter the Park and safety risk to Town residents and possible liability exposure to the

Township. Finally, the recorded final Order stands as prima facie evidence of the regularity of the proceedings.

Despite this undisputed evidence, Appellant contends the Township's procedure was defective because he was an "affected landowner" and was not personally served with notice. "[A]ffected landowner" is not defined in the Minnesota Statutes. However, when considering the related issue of road and cartway establishment, the Minnesota Court of Appeals has used "affected landowner" to describe and give notice to those people who own land over which the cartway or road would be established, not every person who may benefit from such road. See *Villard v. Hoting*, 442 N.W.2d 826, 827-28 (Minn. App. 1989); *Schacht v. Town of Hyde Park*, 1998 Minn. App. LEXIS 462, \*2 (Minn. App. April 28, 1998) (*R. Add. 7-8*); *In re Hanlon*, 2010 Minn. App. LEXIS 605, \*8-10 (Minn. App. June 29, 2010) *rev. denied*, 2010 Minn. LEXIS 570 (Minn. Sept. 21, 2010) (*R. Add. 9-12*). Here, the Property does not abut Third Street and Appellant can gain access through other routes. Furthermore, all accesses to the Property, including Schoolhouse Road, are seasonal, non-platted roads which have not been maintained in at least 25 years. While Schoolhouse Road may have been the most convenient to Appellant, this is not the proper standard. Instead, the evidence shows other routes still provide Appellant access. *Christopherson*, 583 N.W.2d at 310 (holding the fact a second access was not as wide as the access being vacated was of no consequence); see also Minn. Stat. § 365.10, subd. 11 (stating a Township may not maintain a town road under its jurisdiction that has not been maintained in 25 years or more).

Additionally, there is no record evidence Appellant or any of his predecessors in title gained any kind of special rights over Schoolhouse Road by purchase; actual, open, hostile, continuous and exclusive possession; or equitable estoppel. *Padrnos v. Nisswa*, 409 N.W.2d 36, 38 (Minn. App. 1987) (citing *Roemer v. Eversman*, 304 N.W.2d 653 (Minn. 1981)); see also Minn. Stat. § 541.01 (stating no occupant of a public way dedicated to public use shall acquire, by reason of occupancy, any title thereto); *Rochester v. North Side Corp.*, 211 Minn. 276, 1 N.W.2d 361 (Minn. 1941) (holding municipality abandoned its claim to property which had been encroached upon by buildings for 40 years without complaint). The Township's choice to not maintain Schoolhouse Road did not give Appellant any kind of enforceable ownership rights.

The district court properly determined the Township followed all proper procedures and Appellant was not an affected landowner within the meaning of the statute. Therefore, Kerrick Township requests the Court affirm the district court's decision and dismiss Appellant's appeal.

## **II. KERRICK TOWNSHIP IS ENTITLED TO THE AFFIRMATIVE DEFENSES OF LACHES AND STATUTORY IMMUNITY.**

### **A. Appellant's Claims Must Be Dismissed Under The Doctrine Of Laches.**

"Laches is an equitable doctrine applied to 'prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay.'" *Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008) (quoting *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002)). When evaluating laches as an affirmative defense "the practical question in each case is whether there has been such

an unreasonable delay in asserting a known right resulting in prejudice to others, as would make it inequitable to grant the relief prayed for.” *Id.* (quoting *Winters*, 650 N.W.2d at 170). Laches has been applied where there is no statute of limitations expressly applicable to a particular claim. *Hebert v. Fifty Lakes*, 744 N.W.2d 226, fn 6 (Minn. 2008) (citing *Lindquist v. Gibbs*, 122 Minn. 205, 208, 142 N.W. 156, 158 (1913)).

Minnesota Statute Section 164.07 does not provide an appeal period for the grant of a road vacation. This claim, however, was brought over six years after the Town Board voted to vacate Third Street in June 2003. Appellant knew about the Township’s action since at least December 2006 when he began complaining to the Town Board. *R. App. 39-40*. He then waited nearly three years to bring this matter before the court and has given no good reason for his delay. Meanwhile, the northeastern portion of Third Street has belonged to Ms. Ashmore for almost seven years. She has no doubt adopted the property as her own and would be greatly prejudiced if the vacation petition process started all over. Likewise, the Park ingress and egress culture has changed over the last seven years and reinstating the use of Third Street would lead to great confusion. *R. App. 5*. In sum, Appellant unreasonably delayed his claims and granting him relief now would be inequitable to the Township and Ms. Ashmore.

**B. Appellant’s Claims Must Be Dismissed Under The Doctrine Of Statutory Immunity.**

Under the Minnesota Tort Claims Act, a township is “subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function.”

Minn. Stat. § 466.02. However, a town enjoys “statutory immunity” for “[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.” Minn. Stat. § 466.03, subd. 6. The exception to the general rule that municipalities are liable for their torts is based on the recognition the judiciary is not an appropriate forum to review and second guess the acts of government which involve “the exercise of judgment and discretion.” *Cairl v. State*, 323 N.W.2d 20, 23 (Minn. 1982); *Larson v. Independent Sch. Dist. No. 314*, 289 N.W.2d 112, 121 (Minn. 1979).

Pursuant to statutory immunity, a town’s conduct is protected when the town produces evidence showing the conduct at issue was of a “policy-making nature involving social, political, or economic considerations.” *Nusbaum v. Blue Earth County*, 422 N.W.2d 713, 722 (Minn. 1988). Furthermore, if the relevant conduct at issue involves a combination of policy-making and operational decisions, then the town is still entitled to immunity. *Christopherson v. City of Albert Lea*, 623 N.W.2d 272, 276 (Minn. App. 2001); *Fisher v. County of Rock*, 596 N.W.2d 646, 652 (Minn. 1999); *see Larson v. Linwood Twp.*, 1999 Minn. App. LEXIS 1239, \*6-7 (Minn. App. Nov. 23, 1999) (holding township was not entitled to statutory immunity where the decision to grade a road was made by engineers exercising their professional judgment and was not debated by a Town Board or opened to public comments), *appeal denied* 2000 Minn. LEXIS 248 (Minn. April 25, 2000). The applicability of discretionary immunity is a question of law. *Davis v. Hennepin County*, 559 N.W.2d 117, 120 (Minn. App. 1997), review denied (Minn. May 20, 1997).

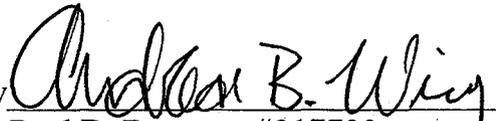
The Town Board had complete discretion over whether to vacate the northeast section of Third Street and, in its consideration, weighed a number of issues and held a hearing for public discussion. Ashmore reported Third Street split her properties and her use and enjoyment was diminished by people walking through her yard to and from the Park. Additionally, the Town Board discussed safety and liability risks of having people driving into the Park by way of Third Street because of activities close to Schoolhouse Road. Furthermore, Appellant's Property is vacant and other access routes exist. The Town Board determined it was in the public's interest to vacate that portion of Third Street and re-direct all Park traffic to the designated Park access. Thus, the Township's decision is statutorily immune from liability and Appellant's claim must be dismissed as a matter of law.

**CONCLUSION**

For the foregoing reasons, Respondents Kerrick Township and Mark Sagvold respectfully request this Court affirm the district court's decision dismissing Appellant's claims with prejudice.

Dated: December 14, 2010

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