

NO. A09-1414

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State of Minnesota
In Court of Appeals

John Wesley Hebert, Linda W. Hebert, John Wallace Hebert,
Jennifer E. Arbuckle, Brian J. Arbuckle, William F. Schoenwetter,
Barbara Schoenwetter, Lewis J. Schoenwetter, Claire Schoenwetter,
and Helen H. Weber by Robert M. Weber, her attorney in fact,
Appellants,

vs.

City of Fifty Lakes,

Respondent.

APPELLANTS' BRIEF AND ADDENDUM

OLSON & LUCAS, P.A.
Scott M. Lucas (#291997)
Shaun D. Redford (#390127)
One Corporate Center I
Suite 575
7401 Metro Boulevard
Edina, MN 55439
(952) 224-3644

Attorneys for Appellants

IVERSON REUVERS
Paul D. Reuvers (#217700)
Susan M. Tindal (#330875)
9321 Ensign Avenue South
Bloomington, MN 55438
(952) 548-7200

Attorneys for Respondent City of Fifty Lakes

LEAGUE OF MINNESOTA CITIES
Susan L. Naughton (#259743)
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1232

*Attorneys for Amicus Curiae
League of Minnesota Cities*

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

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LEGAL ISSUES

Issue 1: Can the City claim ownership of Landowners' Torrens property via statutory dedication, which is a form of adverse possession, when establishing ownership of Torrens property by adverse possession is prohibited under Minn. Stat. § 508.02?

District Court's Ruling: The District Court held that Minn. Stat. § 160.05, statutory dedication, applies to Torrens property.

Relevant Authorities:

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

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

Marchand v. Town of Maple Grove, 51 N.W. 606 (Minn. 1892)

Shinneman v. Arago Township, 288 N.W.2d 239 (Minn. 1980)

Minn. Stat. § 160.05

Minn. Stat. § 508.02

Issue 2: Can the City establish statutory dedication of a platted city street, when Minn. Stat. § 160.05 explicitly states that statutory dedication does not apply to platted city streets?

District Court's Ruling: The District Court held that statutory dedication applies to portions of a city street that deviate from the platted path.

Relevant Authorities:

Cohen v. Gould, 225 N.W. 435 (Minn. 1929)

Minn. Stat. § 160.05

Issue 3: Can the City claim common law dedication of Landowners' Torrens property where the only evidence of Landowners' supposed intent to dedicate is inferred from the City's possession of the encroachment parcel over time?

District Court's Ruling: Although the issue was argued below, the District Court's opinion did not directly address the issue of common law dedication, instead granting summary judgment to the City on the issue of statutory dedication. Appellants address this issue in their appeal of the denial of their motion for summary judgment

Relevant Authorities:

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

Moore v. Henriksen, 165 N.W.2d 209 (Minn. 1968)
Security Federal Sav. & Loan Ass'n v. C & C Investments, Inc., 448 N.W.2d 83 (Minn. Ct. App. 1989)
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Issue 4: Did the District Court err in holding that issues of material fact remain regarding whether a continuing trespass has occurred, where the City has admitted all the facts necessary to establish a continuing trespass,?

District Court's Ruling: The District Court held that there are issues of material fact whether the public road represents a permanent or continuing trespass.

Relevant Authorities:

Forsythe v. City of St. Paul, 225 N.W. 816 (Minn. 1929)
Northern States Power Co. v. Franklin, 122 N.W.2d 26 (Minn. 1963)
Bowers v. Mississippi R.R. Boom Col, 81 N.W. 208 (Minn. 1899)
Nye v. Ziebarth, 44 N.W. 1027 (Minn. 1890)

Issue 5: Did the District Court err in denying partial summary judgment to Appellants and holding that there remain issues of material fact regarding whether Appellant's claim of ejectment is barred by laches, where Respondent has failed to establish certain necessary elements of laches, including unreasonable delay and prejudice?

District Court's Ruling: The District Court held that there remain genuine issues of material fact as to whether Appellants' claim of ejectment is barred by laches.

Relevant Authorities:

Brown-Mitchell v. Kansas City Power & Light Co., 267 F.2d 825 (8th Cir. 2001)
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STATEMENT OF THE CASE

I. INTRODUCTION

This is the second time this case comes on appeal to this Court from the Crow Wing County District Court, the Honorable Richard A. Zimmerman presiding. Appellants John Wesley Hebert, Linda W. Hebert, John Wallace Hebert, Jennifer E. Arbuckle, Brian J. Arbuckle, William F. Schoenwetter, Barbara Schoenwetter, Lewis J. Schoenwetter, Claire Schoenwetter, and Roger M. Weber (collectively the “Landowners”) own registered, Torrens property in the City of Fifty Lakes, Crow Wing County, Minnesota (the “Landowners’ Property”). The Landowners’ Property is platted, and the plat includes a city street. Respondent, the City of Fifty Lakes (the “City”), constructed a roadway which went off of the platted street, and onto the Landowners’ Property. The City has never brought an eminent domain action, or otherwise compensated Landowners for the property.

II. PROCEDURAL HISTORY

The Landowners initiated this action in 2005, bringing claims for declaratory judgment, ejectment, and trespass, seeking a determination that the Landowners were entitled to possession of the disputed property, to have the City ejected from the property, and for damages for trespass. The City moved to dismiss, alleging among other things that its actions constituted a de facto taking and that the Landowners’ claims were time barred. The Landowners simultaneously brought a motion for partial summary judgment, seeking to eject the City from the Landowners’ Property. The District Court granted the

City's motion to dismiss, and denied the Landowners' motion. The Landowners appealed to this Court and this Court reversed the District Court and remanded. *Hebert v. City of Fifty Lakes*, 2007 WL 582956 (Minn. Ct. App. 2007). The City appealed to the Minnesota Supreme Court, which affirmed this Court's decision. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226 (Minn. 2008). The Supreme Court rejected the City's argument that it owned the property by de facto taking, reasoning that de facto taking was analogous to adverse possession and therefore inapplicable to Torrens property. The Supreme Court then remanded to the District Court.

On remand to the District Court and after further development of the record, the parties filed cross motions for summary judgment. The Landowners' motion for partial summary judgment sought a declaratory judgment that they own the property, an injunction ejecting the City from the property, and a determination that the City is committing a continuing trespass, which would have left only the issue of trespass damages for trial. The City simultaneously moved for summary judgment claiming ownership of the property by virtue of statutory dedication and common law dedication. Calling it "an issue of first impression," the District Court held that statutory dedication applied to Torrens property. The District Court further held that there were issues of material fact as to the issues of continuing trespass and ejectment. The District Court granted the City's motion for summary judgment and denied the Landowners' motion for partial summary judgment. The Landowners now appeal the District Court's decision.

STATEMENT OF FACTS

The Property

The Landowners own real property in the City of Fifty Lakes, respectively described as Lots 18 through 23 of Nelson's North Shore, according to the plat of Nelson's North Shore (the "Plat") recorded in Crow Wing County, Minnesota (collectively the "Landowners' Property"). (A015-026; 036-037; 039-052; 056.) The Landowners' Property is registered Torrens property, and was so registered on May 14, 1953. (A015-026; 036-037; 039-052; 056.) The Plat was accepted by the City on June 4, 1954 and recorded in the Office of the Crow Wing County Recorder on July 23, 1954. (A014.) As the name of the Plat implies, the Landowners' Property is lakefront property, situated on Mitchell Lake. (A014.)

North Mitchell Lake Road

North Mitchell Lake Road is a platted street, within the limits of the City of Fifty Lakes. (A014; 118 at ¶ 15.) The portion of North Mitchell Lake Road that is relevant to this case, i.e., the section of the platted street that is adjacent to the Landowners' Property, was first created in the Plat; it is shown on the Plat as a "*new* 66 foot dedicated roadway" (the "Platted Roadway"). (A014.) (Emphasis added). The relevant part of North Mitchell Lake Road wasn't constructed until 1971 at the earliest—approximately eighteen years after Landowners Property was registered Torrens, and seventeen years after the Plat was accepted by the City and recorded. (A134-135 at ¶ 12.)

When it was constructed, North Mitchell Lake Road deviated south from the Platted Roadway and onto the Landowners' Property lots, which lots lay adjacent to one

another and immediately south of the Platted Roadway. (A065 at ¶ 4.) At present, the right-of-way line—which is thirty three feet southerly of the center line—is south of the boundary line of the Landowners’ Property by between 29.97 feet and 32.44 feet, taken at the easterly boundary line of each parcel. (A068 at ¶¶ 7-8; 070-071.) This is a large encroachment, especially considering the depth of the lots. (A014.)

No Eminent Domain Proceeding

The City acknowledges that it has never conducted an eminent domain proceeding for that portion of North Mitchell Lake Road which encroaches onto the Landowners’ Property (the “Encroachment Parcel”). (A103 at ¶ 11.) The Landowners have never been compensated for, and have never consented to, the location of North Mitchell Lake Road as constructed. (A057 at ¶ 4; A061 at ¶ 5; A063 at ¶ 5.) The City admits that the Landowners have demanded removal of the road from the Encroachment Parcel, but the City refused to do so. (A118 at ¶ 10.) The City has produced no evidence that it ever made a decision to deviate from the Plat or that it ever made a finding of public purpose or necessity to deviate from the Plat.

Continuing Trespass

With regard to the continuing trespass on the Landowners’ Property, the City admits the following undisputed facts: (1) the presence of North Mitchell Lake Road on the Landowners’ Property has caused and continues to cause automobile, truck, and other traffic to enter upon the Encroachment Parcel; (2) the public has continuously entered upon and used the Road, including the Encroachment Parcel, since at least January 1, 1999; and (3) the public’s entering onto and traveling upon the Encroachment Parcel is

regular and ongoing, has not been interrupted at any time since construction of the Road, and is continuous. (A120 at ¶ 27; 117 at ¶¶ 4, 7-9.) The amount of traffic is substantial: in 1998, a traffic counter showed an average of 67 registrations per day on North Mitchell Lake Road. (A147.) Further, the City admits that it could prevent the public from travelling on the Landowners' Property, specifically on the Encroachment Parcel, but that it has not done so. (A120 at ¶¶ 25-26.) The City continues to place materials on the street and grade it, presumably including the Encroachment Parcel. (A148-150.)

Property Tax

The Landowners pay property tax on the Landowners' Property, including the Encroachment Property. (A229 at ¶ 3; 232 at ¶ 3; 236 at ¶ 3.) In other words, Landowners pay property tax on the very property that now City claims it has owned for years. (A229 at ¶ 3; 232 at ¶ 3; 236 at ¶ 3.) The City apparently derives benefit from the taxes collected on the Encroachment Parcel, which lies within the City of Fifty Lakes taxing district. (A229 at ¶ 3; 232 at ¶ 3; 236 at ¶ 3.)

There is an Issue of Fact Regarding the Location of the Road

At the summary judgment hearing, counsel for the City acknowledged that there was a material issue of fact remaining that precluded summary judgment being entered for the City on the issue of statutory dedication:

[Counsel for Landowners] did indicate that he thought there was a fact issue if—you know, if the Court found there was statutory dedication applied. He's right in the sense that there would be an issue as to the width of the road. So to that extent, if the Court finds statutory dedication applies, I agree that there would be an issue as to the width if we could not stipulate to that. I believe we would be able to, but if not, that would be an issue that would need to proceed to trial.

(A273, ll. 8-16). There is no stipulation in the record regarding this issue.

SUMMARY OF ARGUMENT

Five issues are raised in this appeal. First, the City may not establish ownership of the Landowners' registered Torrens property via statutory dedication. Taking ownership of registered property by adverse possession is prohibited by the Torrens statute, and statutory dedication is a form of adverse possession. Further, the Torrens statute prohibits claims of ownership which *operate in the same way* as adverse possession – and statutory dedication is one such claim. Second, statutory dedication cannot be established in the present case because the User Statute, Minn. Stat. § 160.05, provides statutory dedication does not apply to a certain type of roadway: platted city streets. North Mitchell Lake Road is a platted city street, and is therefore excepted from the statute.

Third, the City may not appropriate the Landowners' registered Torrens property by common law dedication. Common law dedication, based on mere acquiescence as alleged by the City, operated in the same way as adverse possession and is therefore prohibited. Moreover, there is no evidence of intent on the part of the Landowners to dedicate. Such an intent can be inferred from a property owner's actions, but the actions must not be susceptible of any interpretation other than the intent to dedicate, and must unequivocally and convincingly establish that intent. A Torrens property owner is always free to eject a trespasser, and possession by a third party of Torrens property does not put one on notice of an adverse claim. Therefore, allowing possession by a stranger to record title certainly does not unequivocally establish intent to dedicate.

Fourth, the City is committing a continuous trespass on the Landowners' property as a matter of law, and the City has admitted to all of the facts necessary to establish a continuing trespass. Fifth, the City's defense of laches fails as a matter of law because the City has failed to show two of the elements required to show laches, to wit: prejudice and undue delay.

The Landowners therefore respectfully request that this Court reverse the District Court by granting the Landowners' motion for partial summary judgment, deny the City's motion for summary judgment, and remand for trial on the issue of damages.

STANDARD OF REVIEW

The standard for granting summary judgment is set forth in Minn. R. Civ. P. 56.03, which provides that summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." "On an appeal from summary judgment, [the Court] ask[s] 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). A "material fact is one that will affect the outcome of the case." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). On appeal from summary judgment, this Court applies a *de novo* standard of review to the district court's decision, viewing the evidence in the light most favorable to the non-moving party. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). And, a district court's reading of a statute is reviewed de

novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 609 N.W.2d 868, 874 (Minn. 2000).

ARGUMENT

I. TORRENS TITLE IS INDEFEASIBLE, AND OWNERSHIP OF REGISTERED PROPERTY IS JUDICIALLY DETERMINED.

The City's trespass cannot mature into ownership because the Landowners' Property is registered Torrens. Torrens title is not determined by a review of documents of record, or adverse use of the property itself. Instead, title to Torrens property is determined by a court, wherein abstract property becomes Torrens property through a registration proceeding:

Under the abstract system, documents evidencing marketable title may be found in recorded documents or by material outside the recording system. . . . the prospective purchaser of real property looks at recorded documents to determine marketable title of record The purpose of the Torrens system was to create a title registration procedure intended to simplify conveyancing by eliminating the need to examine extensive abstracts of title by issuance of a single certificate of title, free from "any and all rights or claims not registered with the registrar of titles." . . . Unlike the abstract system, where evidences of title are recorded, under the Torrens system there is a judicial proceeding whereby title itself is registered.

Hersh Properties, LLC v. McDonald's Corp., 588 N.W.2d 728, 733-34 (Minn. 1999); see also Minn. Stat. § 508.10 (2004). In passing the Torrens statute in 1901, "the goal of the legislature was 'to clear up and settle land titles.'" *Hersh Properties*, 588 N.W.2d at 733 (citations omitted). Property owners derive significant benefit from the Torrens system; the purchaser of Torrens property does not have to pay for an expensive abstract to ascertain the quality of title, but may simply consult the certificate of title:

Under the Torrens system, time-consuming and expensive title searches, which characterize the abstract system, are alleviated because the purchaser of Torrens property may, subject to limited exceptions, determine the status of title by inspecting the certificate of title.

In re Collier, 726 N.W.2d 799, 804 (Minn. 2007). For the system to work, property purchasers and owners must be able to rely on their certificates of title:

Registered land stands on a different footing than unregistered land: The purpose of the Torrens law is to establish an indefeasible title free from any and all rights or claims not registered with the register of titles, with certain unimportant exceptions, to the end that anyone may deal with such property with the assurance that the only rights or claims of which he need take notice are those so registered.

Mill City Heating and Air Conditioning Co. v. Nelson, 351 N.W.2d 362, 364 (Minn. 1984). It is therefore necessary that the property become encumbered only with registered rights and claims. *Petition of McGinnis*, 536 N.W.2d 33, 35 (Minn. Ct. App. 1995).

The Torrens statute provides that every person “who receives a certificate of title in good faith and for a valuable consideration shall hold it free from *all encumbrances and adverse claims.*” Minn. Stat. § 508.25 (2004) (emphasis added). There are two exceptions to this rule. First, “the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar.” *Id.* Second, “certain rights or encumbrances subsisting against,” or existing at the time of the issuance of, the certificate of title. *Id.* These are the “seven exceptions that encumber Torrens property in spite of their failure to appear on the last certificate of title.” *In re Collier*, 726 N.W.2d at 802, n. 1. A reference on the Certificate of Title to the plat offers further assurance. The Minnesota Supreme Court has held that a “reference to the plat, without question,

incorporates into the certificate the physical location of the property and undoubtedly would be held to refer to those matters which go to identifying land and *locating streets, alleys, etc.*” *Kane v. State*, 55 N.W.2d 333, 336-37 (Minn. 1952) (emphasis added).

Another key characteristic of Torrens property is that there is no statute of limitations barring ejectment actions. If ownership could be established by the passage of time, certificates of title would be unreliable, and the Torrens system would be undermined. Therefore, “*merè possession* of Torrens property will *never* ripen into title against the owner.” *Moore v. Henriksen*, 165 N.W.2d 209, 218 (Minn. 1968) (emphasis added) . “Once property is registered, no one acquires rights in registered land by going into possession.” *Abrahamson v. Sundman*, 218 N.W. 246, 247 (Minn. 1928). Consequently, “[n]o title to registered land in derogation of that of the registered owner shall be acquired by prescription, or by adverse possession.” Minn. Stat. § 508.02 (2004). This is true even if decades pass with the adverse party in possession. *See, e.g., Moore*, 165 N.W.2d at 218 (holding that a party in possession of property for over thirty years did not have a claim of ownership).

An owner of Torrens property, therefore, has the peace of mind of knowing he or she may eject a trespasser at any time. The Minnesota Supreme Court has held that even when owners of Torrens property become aware that another is in possession of it, they are not charged with notice of an adverse claim against their property:

Moreover, *Abrahamson* appears to hold that possession does not, under the Torrens Act, put a purchaser on notice even if it be assumed that the possessor has a valid claim. Since, by [Minn. Stat. §] 508.02, *possession may not ripen into title* against the holder of a registration certificate, a

purchaser has no reason to assume that possession is adverse to the registered title.

Id. at 218 (citing *Abrahamson*, 218 N.W. at 247). It follows that the statute of limitations for the recovery of real estate never bars the registered owner of Torrens property from ejecting a trespasser. The Landowners' Property is registered Torrens property, and therefore no statute of limitations bars an ejectment claim:

The City asserts that the landowners' claim for ejectment is time-barred by the 15-year statute of limitations set forth in Minn.Stat. § 541.02 (2006), which provides: "No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff * * * was seized or possessed of the premises in question within 15 years before the beginning of the action." Section 541.02 is the adverse possession statute in Minnesota. As such, it cannot operate against Torrens property. *See* Minn.Stat. § 508.02.

Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 233 (Minn. 2008) (citations omitted).

Applying this rule of law to the instant matter, the City would have had to be in possession of the Encroachment Parcel since at least 1938—15 years prior to the registration of the Landowners' Property in 1953—to claim ownership.

II. THE CITY MAY NOT APPROPRIATE THE LANDOWNERS' REGISTERED TORRENS PROPERTY VIA STATUTORY DEDICATION.

The City claims it owns the Encroachment Parcel by virtue of statutory dedication under Minn. Stat. § 160.05 (the "User Statute"). The District Court held that the User Statute is applicable to Torrens property under the plain language of Minn. Stat. § 160.05 and that statutory dedication is not a form of adverse possession prohibited by the Torrens statute. This Court should reverse the District Court and hold that the City may

not appropriate the Landowners' registered Torrens property by possession, via statutory dedication or otherwise.

A. Statutory Dedication is a Form of Adverse Possession, and Therefore Does Not Apply to Torrens Property.

In *Hebert*, the Minnesota Supreme Court didn't reach the question of whether statutory dedication applied to Torrens property because the issue was not timely raised. The issue is now before this Court. Like de fact takings, statutory dedication is analogous to and operates in the same way as adverse possession, and therefore does not apply to Torrens Property. Indeed, statutory dedication is even more like adverse possession than de facto takings. The District Court distinguished statutory dedication from adverse possession by comparing and contrasting their respective elements, such as the limitations period. Notably, however, the Minnesota Supreme Court did not employ such an analysis when it held in *Hebert* that Torrens property was protected from de facto takings. Rather, the Court focused on the operation of the doctrine: an informal appropriation which deprived a landowner of her rights to land due to the actions of another. *Id.* at 231-32. This is precisely what the City seeks to do via statutory dedication of the Landowners' Property.

In 1892, in *Marchand v. Town of Maple Grove*, the Minnesota Supreme Court described the acts required to establish statutory dedication as involving "actual adverse possession":

In 1877 the legislature remodeled and amended this section, interpolating and incorporating into it the clause in respect to roads which had been used and kept in repair and worked for six years continuously. The manner of laying out cartways was also changed, somewhat. It is true that the section

was made to read as an entirety, but this does not indicate that a portion of a distinct and complete sentence, prescribing that ways secured through an exercise of the right of eminent domain shall be four rods wide, should be carried forward and made to render similar and important service in another, distinct, and complete sentence, relating to the acquiring of public ways by user,-*a statute of limitations*, in effect, predicated, and only justifiable, *upon a claim of actual adverse possession*, occupation, and improvement for the period of six continuous years.

51 N.W. 606, 607 (Minn. 1892) (emphasis added). In fact, the User Statute is best understood as statutory adverse possession in which the statute of limitations is reduced to six years. In 1912, the Court so held, noting that the requirement of public improvement provided notice to a property owner of an adverse claim, or a “statutory adverse user,” at a time when public travel was not confined to roads that had been improved:

The first [issue] involves the construction, as applied to the facts of this case, of section 1197, R. L. 1905, which reads as follows: ‘Whenever any road or portion thereof shall have been used and kept in repair and worked for at least six years continuously as a public highway, the same shall be deemed dedicated to the public, and be and remain, until lawfully vacated, a public road, whether the same has ever been established as a public highway or not.’

* * *

It is obvious, from a reading of the statute and a consideration of the decisions of this court construing it, that mere use of premises for public travel is not sufficient to put the statute in motion. *Such use is only one of the essential conditions of adverse possession by the public.* The other is that some portion at least of the alleged highway must have been worked or repaired at least six years before a highway by statutory adverse user can be successfully asserted. . . . mere use for travel, in view of the custom of the country, would not have been sufficient to advise the landowner that the public authorities had appropriated his land for a public highway; but, when the public appropriates land for a highway by opening and working it, the owner has constructive notice, and must act, or his right to contest such taking will be barred by the statute in six years.

Minneapolis Brewing Co. v. City of East Grand Forks, 136 N.W. 1103, 1103-1105 (Minn. 1912) (emphasis added).

That line of cases is continued through recent times. In *Barfnecht v. Town Bd. of Hollywood Township*, the Court made the same essential holding, that the User Statute was a statutory form of adverse possession:

As a substitute for the *common-law* creation of highways by prescription or adverse use, the *statute provides [a] method* for acquisition of highways by *adverse public use*.

232 N.W.2d 420, 422 (Minn. 1975) (citation omitted, emphasis added). It is for this very reason that, in a case involving abstract property, the Court ruled that a governmental entity establishing ownership by statutory dedication does not have to pay the disseized landowner any compensation:

The trial court ruled that establishing a road pursuant to s 160.05, subd. 1, constituted a taking of property that required compensation. As a result plaintiff was awarded damages and Arago Township was charged with costs incurred in fixing damages. The award of damages was not warranted. Section 160.05, subd. 1, provides no method by which government can take property. The statute, rather, provides a substitute for the common-law creation of highways by prescription or adverse use.

Shinneman v. Arago Township, 288 N.W.2d 239, 243 (Minn. 1980) (citing *Barfnecht*, 232 N.W.2d at 422). In both forms of adverse possession, the encroaching party enters as a trespasser, and can be ejected by the rightful owner:

During the running of the six-year statute, the township and the public are *adverse users* and, at any time during that period, the landowner may seek *damages for trespass, he may bar users from the property*, or he may force the township, if it wishes to continue to use his property, to condemn it and pay compensation.

Id. And, as is the case with common law adverse possession, title passes because of forfeiture when the time has run out under a statute of limitations. That limitations period is six years instead of fifteen:

After six years have passed, however, [the landowner] is estopped from asserting those rights. The township and the public acquire rights not because they take them, but because the landowner forfeits them by failing to act within the prescribed period.

Id. As was the case in *Shinneman*, the City's trespass onto the Encroachment Parcel is appropriately characterized as "adverse use" -- as the City has acknowledged by claiming ownership under the doctrine of statutory dedication. However, a key distinction between the present case and *Shinneman* is that the Landowners's Property is Torrens. And, as was discussed above, there is no statute of limitations barring ejectment actions for Torrens property. *Hebert*, 744 N.W.2d at 233.

B. The Torrens Statute Prohibits Claims of Ownership Which Are Analogous to Adverse Possession.

The District Court distinguished statutory dedication from adverse possession by noting that the respective elements of the two doctrines, such as the limitations period, were not identical. However, when the Minnesota Supreme Court held in *Hebert* that Torrens property was protected from de facto takings, it examined the *operation* of the doctrine of de facto takings, an informal appropriation which deprived a landowner of her rights to land due to the actions of another:

[A]llowing the City to acquire the land at issue here by de facto taking *would operate in the same way* as if the City acquired the land by adverse possession *in that in both situations, a landowner is deprived of rights to land due to actions of another. . . .* Adverse possession, however, is an exception to the general proposition that Torrens property is subject to the

same “burdens, liabilities, or obligations created by law” as unregistered property, because acquisition by adverse possession is specifically disallowed by the Torrens Act. Minn. Stat. § 508.02. We cannot ignore this legislative prohibition. *See* Minn. Stat. § 645.17(2) (2006) (noting that “the legislature intends the entire statute to be effective”). For all of these reasons, we hold that the City did not acquire an interest in the land at issue by de facto taking

Hebert, 744 N.W.2d at 232 (emphasis added, citations omitted). Taking land by possession is contrary to the stated purpose of the Torrens system. *Id.* The Court ultimately held that “allowing the City to acquire the land at issue here by de facto taking would operate in the same way as if the City acquired the land by adverse possession in that in both situations, a landowner is deprived of rights to land due to actions of another.” *Id.* at 231-32 (citing *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999)). Recognizing that the Torrens statute prohibits adverse possession, the Court stated, “[w]e cannot ignore this legislative prohibition,” and held that the City could not take the Landowners’ Torrens Property by de facto taking. *Id.* at 232.

Therefore, even assuming for the sake of argument that statutory dedication is not adverse possession, statutory dedication nevertheless “operate[s] in the same way.” *Id.* Certainly, statutory dedication is more similar to adverse possession than is de facto takings. Under both statutory dedication and adverse possession, the claimant takes possession of the property in question and holds it for a requisite period of time, during which—as the *Shinnemann* court noted—it is an adverse user, a trespasser, and may be ejected. In contrast, under a de facto taking, there is no requisite period of possession, and as soon as the government constructs improvements, it can no longer be ejected:

*“Where an entity, vested with the power of eminent domain, enters into actual possession of land necessary for its purposes, with or without the consent of the owner, and the latter remains inactive while valuable improvements are being constructed thereon, the use of which require a continued use of the land, the appropriation is treated as equivalent to title by appropriation. * * * Such taking is frequently referred to a ‘common law’ taking or a ‘de facto’ taking.” . . . It is well settled that a de facto taking creates in the condemnor a protectable legal interest in the property which is equivalent to title by condemnation; the condemnor can be forced to compensate to the original owner of the property, but the owner cannot eject the condemnor nor can he require discontinuance of the public use.*

Brooks Investment Company v. City of Bloomington, 232 N.W.2d 911, 920 (Minn. 1975) (quoting 2 Nichols, Eminent Domain (Rev. 3 ed.) s 6.21). Claims other than de facto takings which are analogous to adverse possession, such as statutory dedication, should be, logically, subject to the analysis in *Hebert*.

C. Minn. Stat. § 160.05 Is Not Applicable to Torrens Property.

The District Court also held that the plain language of the User Statute makes it applicable to Torrens property. It observed that the User Statute does not contain an exception for Torrens property and states that the most recent enactment of Minn. Stat. § 160.05 occurred over 50 years after the most recent enactment of the Torrens Act. (A284.) The District Court concluded that “[i]f the legislature had intended to exempt Torrens property from the user statute, it would have expressly provided this exception in the Torrens statute.” (A282.)

Respectfully, this is incorrect. The Torrens statute is actually more recent. The Torrens system was adopted in Minnesota in 1901. *Hersh Properties*, 588 N.W.2d at 733. At that time, the User Statute had been in place for decades. See *Marchand*, 51 N.W. at 607 (referencing the User Statute amendment as existing in 1877). If the

legislature had intended that statutory dedication was to be a form of adverse possession to which Torrens property nonetheless would be subject, it could have created a statutory exception at some point within the last one hundred and seven years since the Torrens statute was passed in 1902. It certainly could have when the Torrens statute was modified in 2008. Minn. Stat. § 508.02 (2009). By contrast, the User Statute was last revisited in 1984. Minn. Stat. § 160.05 (2009).

The District Court also held that because the User Statute contains no specific exception for Torrens property, it must apply to Torrens property. It cited the following passage from *Hersh Properties* and analogized this case to the Marketable Title Act:

In construing the MTA, we first must look at the specific language to determine its meaning...Here, the language of the MTA clearly and unambiguously states that it applies to “any real estate.” See Minn.Stat. § 541.023, subd. 1. While the MTA provides several exceptions to this mandate, it noticeably fails to exempt Torrens property.

Respectfully, this line of reasoning is mistaken. Unlike the User Statute, the language of the MTA actually specifically provided it *would* be applicable to Torrens property. The sentences in *Hersh Properties* immediately following the one quoted above go on to recognize that the MTA contained language referencing Torrens property:

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

Hersh Properties, 588 N.W.2d at 735 (emphasis added). Therefore, the MTA did contain a specific provision for Torrens property. The User Statute does not.

Finally, the District Court cites an attorney general opinion, introduced by the City below, which purportedly suggests that the User Statute applies to Torrens property. (A283.) Of course, such “Opinions of the Attorney General are not binding on the courts.” *Star Tribune Co. v. University of Minnesota Bd. of Regents*, 683 N.W.2d 274, 289 (Minn. 2004). Moreover, the cited opinion arose in 1959, and has since been contradicted by opinions of the Minnesota Supreme Court, including *Barfnecht* (Minn. 1975) and *Shinneman* (Minn. 1980), *supra*, both of which acknowledge that User Statute provides a statutory means of taking ownership by adverse use.

For the foregoing reasons, this Court should reverse the District Court and hold that the City may not appropriate the Landowners’ Torrens Property via statutory dedication.

III. EVEN IF STATUTORY DEDICATION APPLIES TO TORRENS PROPERTY, MINN. STAT. § 160.05 DOES NOT APPLY TO THE LANDOWNERS’ PROPERTY BECAUSE NORTH MITCHELL LAKE ROAD IS A PLATTED CITY STREET.

This Court need not even reach the issue of statutory dedication applying to Torrens property, as Minn. Stat. § 160.05 by its terms does not apply to the Landowners’ Property. The User Statute reads, in pertinent part:

Subdivision 1. Six years. When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not. Nothing contained in this subdivision shall impair the right,

title, or interest of the water department of any city of the first class secured under Special Laws 1885, chapter 110. *This subdivision shall apply to roads and streets except platted streets within cities.*

(Emphasis added). In other words, the statute does not apply to a certain type of street, a platted city street. Here, it is undisputed that North Mitchell Lake Road is that type of street. The City has acknowledged that North Mitchell Lake Road is platted street, located within the City of Fifty Lakes. In fact, North Mitchell Lake Road is on the same plat as the Landowners' Property.

The District Court held, however, that the plain language of the User Statute makes it applicable to “unplatted portions of a city street that have deviated from the platted path.” (A285.) The Court emphasized the language “any road or *portion* of a road” and held, “the plain language of the statute allows statutory dedication of deviations from plats because the portions of the road that deviated from the platted path, by their very nature, are not platted.” (A286.) (Emphasis in original). Respectfully, the District Court erred for several reasons.

First, the City's argument relies on a reading of the User Statute which immediately pairs the statement—found in the first sentence of Subdivision 1—that the statute applies to “any road or portion of a road [that] has been used and kept in repair” with the broad exception for platted city streets, which is found in the last sentence of the Subdivision. In doing so, the District Court ignores the intervening sentences. The words “any road or portion of a road” in that first sentence relate to the words in the same sentence which require the road to be “used and kept in repair.” “When any road or portion of a road has been used and kept in repair and worked for at least six years

continuously as a public highway by a road authority, it shall be deemed dedicated to the width of the actual use..." Minn. Stat. § 160.05, subd. 1. In other words, the statute applies whether an *entire* road, or just a *portion* of it, has been used and kept in repair.

The exception, however, indicates that the User Statute does not apply at all to platted city streets as a *type*, no matter whether an entire street or merely a portion of the street is at issue. The final sentence reads: "This subdivision shall apply to roads and streets except platted streets within cities." *Id.* In other words, it excepts the entire category of platted city streets. The City's argument seeks to recast the statute to read thus: "This subdivision shall apply to roads and streets except platted streets within cities, unless statutory dedication is only being used for certain portions of said streets, in which case statutory dedication may apply to said portions." But, the User Statute simply does not say that.

If the City were correct, and the platted city streets exception applied only to those portions of city streets constructed on the street dedicated in the plat, then the exception would apply only to streets that the City already owned. Prohibiting the use of statutory dedication only where the City already owns the property in question is not only unnecessary, it is illogical. Such a reading is invalid under Minnesota law because it renders the platted streets exception mere surplusage, language of no effect and therefore no meaning. *See Cohen v. Gould*, 225 N.W. 435, 438 (Minn. 1929) ("[w]e must, if possible, avoid an interpretation which renders a complete sentence of the statute surplusage and so in effect amends the law by striking out that sentence.").

In fact, the second reason that the District Court's reading of the statute is incorrect is because if the platted street exception does not apply here, it would never apply. This point is illustrated by the City's arguments below, which provide a list of situations in which the platted street exception *does not* apply. Of course, it is axiomatic that the platted street exception does not apply to (1) non-platted streets, or non-city streets. It also does not apply to (2) non-platted city streets. (A166.) The exception also does not apply to (3) those halves of streets which are off the plat when half the street is contained in the plat and the other half is not. (A164-165.) The City also cited to the amicus brief of the League of Minnesota Cities. Taking the foregoing exceptions into account, and applying its line of reasoning to the User Statute, the League was able to point out only two situations in which the platted streets exception to the User Statute might apply. The first was the case of a private road:

Interpreting the user statute according to its plain language does not make the exception for "platted streets within cities" meaningless. The exception would have meaning in two situations: First the user statute would not apply to those platted streets within a city that are designated as private streets.

(A080.) That reasoning is mistaken, however, because the platted street exception would not be necessary to prevent application of the User Statute to private streets. It already does not apply, because it applies only to public streets: "When any road or portion of a road has been used and kept in repair and worked for at least six years continuously *as a public highway* by a road authority..." Minn. Stat. § 160.05 subd. 1. A "private street" cannot be a "public highway."

That leaves only one situation: the platted city street itself. The League conceded that there would be no need for such a statutory exception for the platted street:

Second, the user statute would not apply to platted streets within a city that are dedicated to the public. In the second situation, the exception is not meaningless, it means what it says – the user statute does not apply to platted streets within a city. It is true, however, that in the second situation, there is no *need* for the user statute to apply because this type of public street has already been dedicated to the public; but this fact does not make the statutory language meaningless.

(A080.) Of course, this interpretation would render the platted streets exception as surplusage, as it would be of no practical effect. Such a result is not permissible under *Gould*.

Additionally, the District Court erred because North Mitchell Lake Road may have deviated from the demised roadway, but it cannot be called “unplatted.” As a matter of fact, because it is not disputed herein that the “deviating portion” of the road is still on the Plat of Nelson’s North Shore. (A014.) In fact, the Landowner’s Property, the Encroachment Parcel, and North Mitchell Lake Road are all on the *same* plat. (A014.)

Moreover, applying the platted city street exception to North Mitchell Lake Road serves public policy. On platted streets, as is the case here, the City is involved in reviewing and approving the plat. (A014.) The Plat was recorded on July 23, 1954. (A014.) It is not too much to ask, then, that the City *actually place the street on the sixty-six foot wide right-of-way that has been given to it*. The District Court dismisses this view, saying “the legislative history indicates that the last sentence of [the User Statute] was added to make the statute applicable in cities and not because of a concern about city streets deviating from the platted path.” (A287.) However, if that were actually the

legislature's intention, why did it not simply make the user statute applicable to municipal streets? No platted street exception would have been necessary. And, the Attorney General opinion cited to by the City and District Court below states that "Addition of that sentence [providing for the platted city streets exception] permits application of the user statute to city streets, *other than platted streets...*" (A287.) (emphasis added).

Because the plain meaning of the User Statute creates an exception for platted street with in cities, and because the platted city street exception must apply to situations like this one or it will be rendered surplusage, the platted city street exception applies to North Mitchell Lake Road. Therefore, this Court should reverse the District Court and hold that North Mitchell Lake Road is a platted city street excepted from Minn. Stat. § 160.05.

IV. THE CITY MAY NOT APPROPRIATE THE LANDOWNERS' REGISTERED TORRENS PROPERTY VIA COMMON LAW DEDICATION.

The issue of whether common law dedication may be asserted against Torrens property appears to be an issue of first impression in Minnesota. However, for the same reasons that de facto takings and statutory dedication fail, the City's claim of common law dedication also fails. Once again, the City is claiming ownership of Torrens property based on possession over time.

This is in part because the City cannot cite to any affirmative act on the part of the Landowners evidencing the intent to dedicate. The City argues below that: "In the present case, the fact the road has stood uncontested by any owner for decades is

sufficient to demonstrate an intent to dedicate the disputed section of road by ‘long acquiescence.’” (A167.) Therefore, the City’s claim operates in the same way as adverse possession. Under the Minnesota Supreme Court’s prior ruling in this case, such a claim of ownership is not allowed against Torrens property:

[A]llowing the City to acquire the land at issue here by de facto taking *would operate in the same way* as if the City acquired the land by adverse possession *in that in both situations, a landowner is deprived of rights to land due to actions of another.* . . . Adverse possession, however, is an exception to the general proposition that Torrens property is subject to the same “burdens, liabilities, or obligations created by law” as unregistered property, because acquisition by adverse possession is specifically disallowed by the Torrens Act. Minn. Stat. § 508.02. We cannot ignore this legislative prohibition.

Hebert, 744 N.W.2d at 232.

Additionally, the City has failed to establish a prima facie case of common law dedication, let alone the showing required to support a motion for summary judgment. The City has the burden of proof on the issue of intent to dedicate: “The one seeking to prove a common-law dedication must show the landowner's intent, express or implied, to have his land appropriated and devoted to a public use.” *Barth v. Stenwick*, 761 N.W.2d 502, 511(Minn. Ct. App. 2009) (citation omitted). “There can be no dedication without the landowner's intent.” *Security Federal Sav. & Loan Ass'n v. C & C Investments, Inc.*, 448 N.W.2d 83, 87 (Minn. Ct. App. 1989). The intent to dedicate can be inferred from the property owner’s actions, but only if those actions are not susceptible of any interpretation other than the intent to dedicate. Such actions must “*unequivocally and convincingly* indicate an intent to dedicate.” *Id.* (emphasis in original). The “acts and declarations of a landowner must be unmistakable in purpose and decisive in character”

for a court to determine that intent to dedicate exists. *Id.*, quoting *In re Stees*, 172 N.W. 219, 221 (Minn. 1919), which cited to *Village of White Bear v. Stewart*, 41 N.W. 1045 (1889); see also *Anderson v. Birkeland*, 38 N.W.2d 215, 220 (Minn. 1949) (noting the landowner's unequivocal expression of an intent to dedicate a road to public use is like the making of an offer to enter into a contract.).

The owner of Torrens property knows that mere possession of Torrens property will never ripen into title against the owner. *Moore*, 165 N.W.2d at 218. The owner knows further that once property is registered, "No one acquires rights in registered land by going into possession." *Abrahamson*, 218 N.W. at 247. And, the owner knows that this is true even if decades pass. Once again, a party can be in possession of a parcel for thirty years and still not have a claim of ownership. See *Moore*, 165 N.W.2d at 218. Consequently, the Minnesota Supreme Court has held that even when owners of Torrens property become aware that another is in possession of it, they are not charged with notice of an adverse claim against their property:

Since, by [Minn. Stat. §] 508.02, possession may not ripen into title against the holder of a registration certificate, *a purchaser has no reason to assume that possession is adverse to the registered title.*

Moore, 165 N.W.2d at 218.

Mere inaction by one who, not on notice of an adverse claim, merely abides a trespasser, cannot constitute a showing of "unequivocal" and "convincing" evidence of intent to dedicate. Because said use can never mature into ownership, it is not inconsistent with the assertion of ownership by the record title holder, and can be fairly characterized as a permissive use. "Accordingly, mere permissive use of land as a street

or the like, where the user is consistent with the assertion of ownership by the alleged dedicator, does not of itself constitute a dedication nor demonstrate a dedicatory intention.” *Security Federal Sav. & Loan Ass'n*, 448 N.W.2d at 88 (citing 11 E. McQuillan, *The Law of Municipal Corporations* § 33.32, at 717 (3d ed.1983)) (footnote omitted). The Landowners have also continued to pay tax on the encroachment parcel which is consistent with permissive use, and inconsistent with the City’s claim of dedication. (A229 at ¶ 3; 232 at ¶ 3; 236 at ¶ 3.)

Said payments also raise the issue of whether the City can meet the second element of common law dedication, that is, acceptance by the public. The Minnesota Supreme Court has acknowledged that evidence of the assessment of taxes was inconsistent with the claim of ownership by the public via common law dedication:

The offer to prove the assessment of taxes on the premises as private property, and the payment of the same, was also admissible, as showing the light in which the parties assessed regarded the property, and also as affecting the question of acceptance by the public; the *weight* to be attached to this evidence was for the jury to determine, but we think the plaintiff was entitled to the benefit of the testimony, whatever it might be.

Case v. Favier, 1866 WL 4747, *6 (Minn. 1866) (unpublished, courtesy copy in Appendix at A290) (emphasis in original). The City claims it owns the encroachment parcel, apparently that it has owned it for some period of time. Yet it continues to derive benefit from the taxation of the parcel, which is within its taxing district. The City cannot have it both ways.

As with de facto takings and statutory dedication, common law dedication by acquiescence alone fails as a matter of law because it operates “in the same way as if the

City acquired the land by adverse possession in that in both situations, a landowner is deprived of rights to land due to actions of another,” and in all three situations “no court action or formal process [is] initiated by the City.” *Hebert*, 744 N.W.2d at 231. Moreover, the City’s possession of the Encroachment Parcel is not inconsistent with the Landowners’ ownership, because it will never mature into ownership. Therefore, it does not unequivocally establish dedicatory intent, but is indicative of permissive use. Finally, the City has acted in a manner inconsistent with acceptance of a common law dedication. Therefore, this Court should hold that the City may not appropriate the Landowner’s Torrens Property via common law dedication.

V. THE CITY IS COMMITTING A CONTINUING TRESPASS ON THE LANDOWNERS’ PROPERTY AS A MATTER OF LAW.

Previously in this case, the Minnesota Supreme Court addressed the issue of continuing trespass but ultimately remanded to the District Court for a determination of whether the trespass is permanent or continuing. The distinction is significant to this case. An action arising from a permanent trespass is subject to a static statute of limitations period. Conversely, there is no statute of limitations prohibiting the Landowners from seeking damages for a continuing trespass, though they are limited to the six years prior to the filing of their claim:

Defendant concedes that plaintiff is entitled to recover such damages as accrued within six years before the suit was commenced. There appear to have been recurring injuries continuing during that time. For such continuing injuries it is well established in this state that damages may be recovered within the six-year period.

Forsythe v. City of St. Paul, 225 N.W. 816, 818 (Minn. 1929); *see also Northern States Power Co. v. Franklin*, 122 N.W.2d, 26, 30-31 (Minn. 1963) (holding “[a] vendee in possession may recover damages or abate such a continuing trespass and the statute of limitations does not run from the initial trespass”). In fact, the Minnesota Supreme Court has held that a continuing trespass constantly refreshes the time period within which a claim can be brought, and will even give rise to successive suits for trespass damages for successive periods of trespass:

If the use and occupation of this street were unlawful, it was a continuing trespass, for which *repeated actions to recover damages will lie as long as the trespass is continued*, until the occupancy ripens into title by prescription...The payment of the verdict or judgment would give defendant no right to continue its use of the street...

Lamm v. Chicago, St. P., M. & O. Ry. Co., 47 N.W. 455, 457 (Minn. 1890) (emphasis added); *see also Bowers v. Mississippi R.R. Boom Co.*, 81 N.W. 208, 209 (Minn. 1899) (holding “where the injury is in the nature of a continuing trespass or nuisance, successive actions may be maintained for the recovery of damages as they accrue”). Here, of course, the City’s “occupancy” will never ripen into title by prescription because the Landowners’ Property is Torrens. Minn. Stat. § 508.02.

Upon remand, the Landowners and the City conducted discovery and fully developed the record on the issue of continuing trespass. On the Landowners’ motion for partial summary judgment, the District Court simply held that “there are issues of material fact whether the public road represents a permanent or continuing trespass” and denied the motion. (A288.) Landowners respectfully request that this Court reverse the District Court, hold that the City is committing a continuing trespass on the Landowner’s

Property as a matter of law because the City is a trespasser and it has admitted all of the facts necessary to establish a continuing trespass, and remand for trial on the issue of damages.

A. The City is a Trespasser.

A prima facie case for trespass requires two elements: “a rightful possession in the plaintiff and unlawful entry upon such possession by the defendant.” *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 792-93 (Minn. Ct. App. 1998). It is long established that cities that encroach upon property without compensation are trespassers. *See Forsythe*, 225 N.W. at 817. The fact that the City may be cloaked with the power of eminent domain does not, in and of itself, mean the City is not a trespasser, as the Minnesota Supreme Court has held:

Plaintiff’s counsel contends that, because the defendant is a municipal corporation with power to condemn property . . . it had the right to enter upon or damage Plaintiff’s property even without any condemnation proceeding, and was not a trespasser or wrongdoer, hence there was no tort. It is then further argued that damages for these injuries should be treated as damages arising in an inverse condemnation proceeding.

Id. Ultimately, the Court held “[i]t seems quite clear that under [the takings clause in the Minnesota constitution] any such taking or injury is a trespass or tort, unless compensation is first paid or secured.” *Id.*

Thus, the power of eminent domain does not distinguish a governmental entity from any other trespasser unless that power is lawfully exercised through an eminent domain proceeding, which would provide for the payment of compensation. And, in an inverse condemnation action, the Minnesota Supreme Court acknowledged that entities

with the power of eminent domain can and do trespass: “Moreover, the [inverse condemnation proceedings action here arises] out of a limitation of access, not a continuing trespass or nuisance.” *Beer v. Minnesota Power and Light Co.*, 400 N.W.2d 732, 735 (Minn. 1987). Here, the Landowners hold certificates of title to the Property. (A015-026; 036-037; 039-052; 056.) The City has encroached on the Property without compensating the Landowners. (A057 at ¶ 4; 061 at ¶ 5; 063 at ¶ 5.) The Landowners have therefore established a prima facie case of trespass as a matter of law.

B. The City has Admitted All of the Necessary Facts to Establish a Continuing Trespass.

A trespass is permanent, i.e., non-continuing, only if the whole wrong is suffered at the time of the original entry:

The test, whether an injury to real estate by the wrongful act of another is permanent in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury, but *the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act.*

Bowers, 81 N.W. at 209 (emphasis added; citations omitted). The Minnesota Supreme Court said in this case, “[i]f the wrong complained of is the act of the City in constructing the gravel road, the trespass is permanent...On the other hand, if the wrong complained of is some *continuing or recurring intrusion* onto the landowners' property, the trespass is continuing.” *Hebert*, 744 N.W.2d at 234 (emphasis added). The City has admitted to facts establishing a recurring intrusion.

The Minnesota Supreme Court also previously said in this case that the trespass would be a continuing one if the Landowners could establish that they had demanded removal of the road from the Encroachment Parcel:

Because of the procedural posture of *Franklin*, coming to us on a motion to dismiss the trespass counterclaim without a developed “factual foundation,” we held that we could not resolve the issue of continuing trespass...Critical to our conclusion was the landowner's allegation that it had “alleg[ed] a demand for removal of the structures.”...With this demand, the landowner “consent[ed] to an entry upon the land” and because of that consent, “the failure to remove the structures, rather than the original entry, characterizes the wrong and supports [a] theory of a continuing trespass.”

Id. at 235-236 (emphasis added, citations omitted); *accord Franklin*, 122 N.W.2d at 30-31 (noting “Defendant, by alleging a demand for removal of the structures, consents to an entry upon the land for that purpose. In view of such consent the failure to remove the structures, rather than the original entry, characterizes the wrong and supports defendant's theory of a continuing trespass or a nuisance”). Demand for removal of the road is no longer an open issue in this case. The City admitted in discovery that “[P]rior to initiating this lawsuit, some or all of the [Landowners] demanded that the City move the Road from [the Landowners’ Property], but the City refused to do so.” (A118)

The second reason that the trespass is continuing is that the public travels across the Landowners’ Property on a continuous basis. In *Alevizos v. Metropolitan Airports Commission of Minneapolis and St. Paul*, the Minnesota Supreme Court held that travel across property constitutes a recurring trespass, observing that property owners near the Minneapolis airport, subject to over flights, were subject to a continuing tort:

Where the overflights and near-flights constitute a taking, the court below might wish to consider them as continuing torts. This court has indicated

that the statute of limitations does not run from the initial trespass. We would think that MAC *would prefer inverse condemnation to an injunction against future trespasses.*

216 N.W.2d 651, 666, n. 6 (Minn. 1974) (emphasis added, citation omitted). Similarly, the Minnesota Supreme Court in this case cited *Harrington v. St. Paul & Sioux City R.R. Co.*, 17 Minn. 215, 224-25 (1871), which held that continuous operation of trains over railroad tracks placed on the plaintiff's property constituted a continuing trespass.

Here, the City admitted that the “the public has continuously entered upon [the Landowners’ Property] since at least January 1, 1999”; “that the public’s entering onto and traveling upon the Encroachment Parcel is regular and ongoing”; that “the public’s entering and traveling onto the Encroachment Parcel has not been interrupted at any time since construction of the Road”; and that “the public’s entering onto and traveling upon the Encroachment Parcel is continuous.” (A117 at ¶¶ 4, 7-9.) In addition, the City itself has repeatedly entered onto the Landowners’ Property to perform maintenance on the road. (A148-150.) Continuous public travel on the road across the Encroachment Parcel, similar to that in *Alevizos* and *Harrington*, shows that the City’s trespass is continuing.

Third, the trespass is a continuing one because the City could prevent continuing travel. The Minnesota Supreme Court held in this case that where future injuries are preventable, the trespass is a continuing one: “If the future injury is preventable but the trespasser fails to take steps to avoid a recurrence, our jurisprudence confirms that the invasion constitutes “separate, recurring acts of trespass.” *Hebert*, 744 N.W.2d at 234 (citing *Heath v. Minneapolis, St. P. & S.S.M.R. Co.*, 148 N.W. 311, 312 (Minn. 1914)). During discovery the City admitted that it “could take action to prevent the public from

continuing to travel upon the Encroachment Parcel” but that it “has not taken any action to prevent the public from continuing to travel upon the Encroachment Parcel.” (A120 at ¶¶ 25-26.)

The fourth reason that the trespass is continuing is because the City has continually maintained the road. The Minnesota Supreme Court has found that where one places materials on the property of another on an ongoing basis, the placement constitutes a continuing trespass:

[S]ome time thereafter, when heavy rains set in, it clearly appeared that, with the cut, old roadway, and culvert in the condition constructed and maintained by defendants, every subsequent heavy rain would cause a new deposit of sand upon plaintiff's land and a corresponding erosion of the embankment, which would have to be again replenished by defendants. The trespass was a continuing one within the case of *Bowers v. Miss. & R. R. Boom Co.*, . . . wherein Chief Justice Start states: ‘The test whether an injury to real estate by the wrongful act of another is permanent, in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury; but the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act.’ The evidence suggests that future injury is preventable. . . . Unless defendants have taken steps to avoid a recurrence, it is plain that, were the springs and ponds of plaintiff now emptied of the sand, which came from defendants' embankment, they will again be filled at the next heavy rain. If defendants need plaintiff's premises, or any part thereof, as support for their roadbed, the same must be taken under the eminent domain statute. *The invasion of plaintiff's premises was in the nature of separate, recurring acts of trespass.*

Heath, 148 N.W. at 312 (emphasis added) (citation omitted). The City periodically places additional Category V gravel material on the street where it runs across the Encroachment Parcel, as reflected in the City's maintenance records. (A148-150.) In addition, the City specifically argued below that it has continuously maintained the road.

(A158-159.) The City's continuous maintenance of the road evidences the trespass is continuing.

Fifth, the trespass is a continuing one because it is a fluid, changing situation. The Minnesota Supreme Court noted herein that a "temporary, or continuing injury is one that may be abated or discontinued at any time, either by the act of the wrongdoer, or by the injured party." *Hebert*, 744 N.W.2d at 234 (quoting *Worden v. Bielenberg*, 138 N.W. 314, 315 (Minn. 1912)). The Supreme Court also held in this case that the "'salient feature' of a continuing trespass 'is that its impact may vary over time.'" *Hebert*, 744 N.W.2d at 234-235 (citing *Field-Escandon v. DeMann*, 204 Cal.App.3d 228, 251 Cal.Rptr. 49, 53 (1988)). Here, each of the factors above is subject to change. The gravel road can be moved, as this Court previously observed: "[I]logically, a gravel road by its very nature would be much easier to physically move than a paved street with curbing and sewer and water lines, thereby making the gravel road more akin to a temporary and unintended, as opposed to a permanent, intrusion." *Hebert v. City of Fifty Lakes*, 2007 WL 582956, *4 (Minn. Ct. App. 2007) (unpublished, courtesy copy in Appendix at A297) (emphasis added). Further, the City admits that it can prevent travel on the parcel; the traffic level and travel of vehicles across the Landowners' Property varies, as it must; materials are deposited on the road; and so on. Surely, if the Landowners sued for *prospective* damages in trespass, the City would rightly claim that such damages are speculative for the very reason that the situation is subject to change.

Finally, in determining whether the trespass is a continuing one, it is helpful to contrast the City's continuing trespass with a trespass found to be permanent. Citing *Nye*

v. *Ziebarth*, 44 N.W. 1027 (Minn. 1890), the City argued below that the construction of a road on property constitutes only one wrong, all of which was suffered at the time of the original entry. (A177.) That would be true only if, as was the case in *Ziebarth*, no one used the road after it was constructed:

The issues in the case were very simple, being - First, the existence or non-existence of a highway; and, second, if there was no highway, the amount of plaintiff's damages; and the determination of a very few general propositions will dispose of every question raised on this appeal. The appellants attempted to prove the laying out of a highway under the statute, but utterly failed, and there is now no claim that any road was ever legally laid out. . . . *While there was some travel in the proximity of the locus in quo, it does not appear that there ever was a fixed or definite route upon the line of what is now claimed as a highway.* On the contrary, whatever travel there was seems to have been to the north of it.

44 N.W. at 1028. In *Ziebarth*, the sole trespass consisted of the installation of a ditch on the plaintiff's property some years before. *Id.* Notably, *Ziebarth* did not involve a claim of ownership being made pursuant to the completed construction project. *Id.*

The City would be right, and the trespass in the instant matter would be permanent and non-continuing, if the only harm suffered by the Landowners was the construction of a road in 1971. If that were so, the Landowners could not bring this action now, but they could put the parcel in question to use for any number of things, as the property owners in *Ziebarth* could have done with the embankment. Here, however, the City's continuing trespass differs substantially from the isolated trespass in *Ziebarth*. For example, the Landowners could only use the Encroachment Parcel for recreational purposes at their mortal peril because of the traffic travelling on it, some sixty-odd vehicles per day.

(A147.) That peril is merely one of the ongoing harms to the Landowners, but illustrates the fact that the trespass is a continuing one, as a matter of law.

Taken together, these undisputed facts establish that the City's trespass on the Landowners' Property constitutes a continuing trespass as a matter of law. This Court should therefore reverse the District Court and hold that the City is committing a continuing trespass on the Landowners' Property and remand to the District Court for trial on the issue of damages.

VI. THE CITY'S DEFENSE OF LACHES FAILS AS A MATTER OF LAW.

In response to the Landowner's motion for partial summary judgment, the City raised the defense of laches. The City has the burden of persuading the court that laches applies: "For laches to apply, the defendant must persuade the court that (1) the plaintiff unreasonably and inexcusably delayed filing the lawsuit and (2) prejudice to the defendant resulted from the delay." *Brown-Mitchell v. Kansas City Power & Light Co.*, 267 F.2d 825, 827 (8th Cir. 2001). The City recognized below that the purpose of laches is to prevent recovery by a plaintiff who unreasonably and inexcusably delays a lawsuit, "at the expense of one who has been prejudiced by the delay." (A175.) The City has failed to meet its burden of showing that any delay in filing the lawsuit herein was unreasonable or inexcusable, especially where the property in question is registered Torrens. There are no material facts in dispute regarding whether the Landowners unreasonably and inexcusably delayed filing the lawsuit, or whether the City has been prejudiced by any such delay.

On the Landowners' motion for partial summary judgment, the District Court simply held that "[t]here remain genuine issues of material fact as to whether [the Landowners'] claim of ejectment is barred by laches" and denied the motion. (A288.) This Court should reverse the District Court and hold that the City's defense of laches fails as a matter of law because the City has failed to show an unreasonable delay and has failed to show prejudice.

A. The City has Failed to Show an Unreasonable Delay.

There are no material facts in dispute regarding whether the Landowners unreasonably and inexcusably delayed filing the lawsuit. The seminal fact that this court must bear in mind is that this case involves Torrens property. The Legislature intended to create a property registration system that allows parties to rely upon their certificates without concern that ownership claims—whether by governments or individuals—will arise that don't appear on the registration. As set out repeatedly above, "[r]egistered land stands on a different footing than unregistered land." *Nelson*, 351 N.W.2d at 364. Mere possession of Torrens property will never ripen into title and once property is registered. Unless a party is in possession for fifteen years prior to the time the property is registered as Torrens property, no amount of time would be enough to mature into ownership.

Applying this rule of law here, the City would have had to be in possession of the Encroachment Parcel since at least 1938—15 years prior to the registration of the Landowners' Property in 1953—to claim ownership. The City states that "[The Landowners] first complained about the disputed portion of North Mitchell Lake Road in 1998, but waited another seven years to initiate this litigation." (A176.) The

Landowners' Property is Torrens property, which unlike abstract property, is indefeasible. Yet, even for abstract property, the statute of limitations for ejectment is 15 years. Minn. Stat. § 541.02 provides: "No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff . . . was seized or possessed of the premises in question within 15 years before the beginning of the action." Of course, that statute does not limit the Landowners' action. "Section 541.02 is the adverse possession statute in Minnesota." *Hebert*, 744 N.W.2d at 232-33. "As such it does not apply to Torrens property." *Id.* Yet, the City would hold owners of Torrens property to a shorter time to bring an action for ejectment than they would allow to owners of abstract property. In *Aronovitch v. Levy*, the Minnesota Supreme Court held, "[a] court of equity will not bar a claim, enforceable in an action at law, *for a delay of less than the statutory period*, at least, unless it be shown that the enforcement of the claim will result in substantial injury to innocent parties." 56 N.W.2d 570, 574-575 (Minn. 1953). The undisputed record here shows that the Landowners' action for ejectment was timely and there was no unreasonable delay.

B. The City has Failed to Show Prejudice.

In addition to its failure to show unreasonable delay, the City has similarly failed to show the other critical component of its laches defense: that it has been prejudiced by the alleged delay. In order to prove laches, the person asserting the defense must show inexcusable delay in asserting a right and that the delay caused undue prejudice to the party asserting laches. See *Funchie v. Packaging Corporation of America*, 494 F.Supp. 662, 666 (D. Minn. 1989); *Steenberg v. Kaysen*, 39 N.W.2d 18, 23 (Minn. 1949). The

Minnesota Supreme Court has held that prejudice is an “important circumstance” in determining whether a plaintiff has been guilty of laches. *Aronovitch*, 56 N.W.2d at 574-75.

The City argued below that it met its burden of proving prejudice for two reasons: (1) “[t]he City incurred costs in maintaining this road for decades,” and (2) “undoubtedly the price of lake shore for this property has risen substantially since the road was constructed.” (A176.) Neither reason supports a finding of true prejudice as suggested by the case law above. Moreover, both reasons fail as they are either not relevant or not supported by evidence in the record.

The City’s argument regarding road maintenance costs is irrelevant; the road would have to be maintained regardless of where it was located. The City argues, apparently, that had the road been placed in the correct location, it would not have maintained it. In fact, the record shows that the City has maintained the road as late as 2008—*after this case was filed*. (A150.) Furthermore, the City could have discontinued its maintenance at any time. *See Fetsch v. Holm*, 52 N.W.2d 113, 115-116 (Minn. 1952) (no laches where both parties were in as good a position to discover problem and remedy it, and nothing was done to mislead). Here, if anything, the City actually benefitted from having a road on land that it did not own in the first place and did not have to pay for.

Likewise, the cost of lakeshore property does not constitute prejudice. The Landowners have not brought an action for inverse condemnation; they have always simply wanted the road moved. The City already owns a sixty-six foot right-of-way on which the roadway can and should be located, and will not have to buy that property now.

(A014.) Therefore, the cost of real estate is irrelevant. Thus, whether the value of the land on which the City mistakenly put its road has risen or fallen has no impact on this case and does not prejudice the City in any way.

Ironically, the only party prejudiced by any delay is the Landowners, who have continued to pay taxes on the land covered by North Mitchell Lake Road. (A229 at ¶ 3; 232 at ¶ 3; 236 at ¶ 3.) Clearly, the City itself has known about this issue since at least 1998, if not earlier. Yet, the City has continuously collected tax payments from the land at issue. *See Knox v. Knox*, 25 N.W.2d 225, 231 (Minn. 1946) (finding no laches despite an 8-year delay before commencement of action to re-acquire real property, where both parties jointly possessed the property, plaintiff paid taxes on the property the entire time, no unfairness to defendant or third party resulted).

Because neither unreasonable delay nor prejudice have been shown, the defense of laches fails as a matter of law. Therefore, this Court should reverse the District Court, and remand for trial on the issue of damages.

CONCLUSION

For all the foregoing reasons, the Landowners respectfully request that this Court reverse the District Court's order granting the City's Motion for Summary Judgment and denying the Landowners' Motion for Partial Summary Judgment, and remand to the District Court for trial on the issue of damages.

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Scott M. Lucas, #291997
Shaun D. Redford, #390127
Olson & Lucas, P.A.
One Corporate Center I
7401 Metro Blvd., Suite 575
Edina, MN 55439
(952) 224-3644
Attorneys for Appellants