DETERMINING BOUNDARIES AND ACCESS BASED ON USE

MATERIALS PREPARED BY
THOMAS B. OLSON, SCOTT M. LUCAS, AND SHAUN D. REDFORD OF OLSON & LUCAS, P.A.

I. ADVERSE POSSESSION.

A. Introduction.

These materials are intended for an overview with some citations to recent decisions which have developed the law in this area. For more detailed materials and appendices, visit www.olson-law.com. Adverse possession is a "common law" action; no statute creates the right to adverse possession. Instead, a statute of limitation terminates one's right to defend such claims after 15 years.

The two theories, adverse possession and boundary by practical location, are distinct, not interchangeable. More than one decision indicates that lawyers had better plead and present proof under both legal doctrines if they wish to maintain both theories. Some cases will better fit adverse possession; and though they're similar, other cases will better meet the practical location rules.

("Although the doctrine of practical location, at least in effect, is similar to acquiring title by adverse possession, the two theories are distinct and require proof of different elements"). *Denman v. Gans*, 607 N.W.2d 788, 796 (Minn. Ct. App. 2000); *see also Engquist v. Wirtjes*, 68 N.W.2d 412, 417 (Minn. 1955) (stating practical location is "independent of adverse possession").

B. Statute of Limitations to Recover Title & Possession of Real Property.

Minn. Stat. § 541.02 sets forth the statutory limitation of time for bringing an action to recover real estate.

> "No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff, the plaintiff's ancestor, predecessor, or grantor, was seized or possessed of the premises in question within 15 years before the beginning of the action.
>
> Such limitations shall not be a bar to an action for the recovery of real estate assessed as tracts or parcels separate from other real estate, unless it appears that the party claiming title by adverse possession or the party's ancestor, predecessor, or grantor, or all of them together, shall have paid taxes on the real estate in question at least five consecutive years of the time during which the party claims these lands to have been occupied adversely.
>
> The provisions of paragraph two shall not apply to actions relating to the boundary line of lands, which boundary lines are established by adverse possession, or to actions concerning lands included between the government or platted line and the line established by such adverse possession, or to lands not assessed for taxation."

Another statute, Minn. Stat. § 559.23, anticipates courts establishing legal boundaries:

> An action may be brought by any person owning land or any interest therein against the owner, or persons interested in adjoining land, to have the boundary lines established; and when the boundary lines of two or more tracts depend upon any common point, line, or landmark, an action may be brought by the owner or any person interested in any of such tracts, against the owners or persons interested in the other tracts, to have all the boundary lines established. The court shall determine any adverse claims in respect to any portion of the land involved …

Minn. Stat. § 559.23

C. <u>Basic Elements of Adverse Possession.</u>

There are five basic elements of possession which a claimant must establish in order to obtain legal confirmation of ownership of land. The claimant must show he had actual, exclusive, open, continuous and hostile possession of the real property in question for a period greater than 15 years. If he has, he has become the owner of the property involved and the court confirms that ownership. *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972); *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. Ct. App. 2003).

As a general rule, adverse possession is unavailable against registered Torrens property. See Minn. Stat. 508.02 and 508.25 specifying a certificate holder's rights against adverse claims.

One decision states: "By affording a method of acquiring a decree of registration and a certificate of title free from all adverse claims and encumbrances not noted on the certificate, the torrens law confers a conclusive title on the holder of a certificate. *Moore*, 165 N.W.2d at 217; *see also In re Petition of Alchemedes/Brookwood, Ltd. Partnership*, 546 N.W.2d 41, 42 (Minn.App.1996) (concluding persons dealing with registered property need look no further than certificate of title for any transactions that might affect land), review denied (Minn. June 7, 1996). *Petition of Geis*, 576 N.W.2d 747, 749 (Minn. Ct. App. 1998).

D. <u>Survey versus Adverse Possession/Practical Location.</u>

Boundaries established by adverse possession or by practical location of boundary will supersede the outcome of an indisputably correct survey. *Wojahn v. Johnson*, 297 N.W.2d 298, 304 (Minn. 1980).

E. <u>Actual Possession.</u>

The claimant must have been in possession of the property for the statutory period. The claimant must have some domination and control over the property. The degree of possession will vary based on the type of property. If its crop land and the claimant tills it for 15 years, and lets it lie fallow during the winter months, this may be sufficient possession even though the claimant is not on the property for months at a time. *See e.g., Voegele v. Mahoney*, 54 N.W.2d 15, 18 (Minn. 1952).

In one case, "substantive and frequent" agricultural and homestead-related uses of the land, including mowing the lawn, was sufficient. *Schauer v. Zellman*, 2001 WL 1530630, *3 (Minn. Ct. App. 2001).

F. Sporadic Use is Not Enough.

But, sporadic use of lake property to store play equipment, mowing the grass and allowing children to play on property has been held to be insufficient by itself. The construction of a utility shed was sufficient to start the running of the statutory period, but that wasn't done more than 15 years before the suit so adverse possession failed.

1. *Stanard v. Urban*, 453 N.W.2d 733, 735 (Minn. Ct. App. 1990; Occasional and sporadic trespasses for temporary purposes, because they do not indicate permanent occupation and appropriation of land, do not satisfy the requirements of hostility and continuity, and do not constitute adverse possession, even where they continue throughout the statutory period. (cit. omitted). This is especially true where, as here, there is nothing about each separate trespass to indicate that it is anything but a trespass, much less an assertion of adverse right likely to be persisted in, citing *Romans v. Nadler*, 14 N.W.2d 482, 485 (Minn. 1944).

2. In a case I tried which was affirmed by the Court of Appeals, my client claimed ownership by way of adverse possession up to a fence line. *Ronning vs. Nikolai*, 2001 WL 799681 (Minn. Ct. App. 2001). The appellant argued that the claimed area was wild, not maintained, and therefore not possessed. We argued successfully that the claimant's possession was appropriate to the area. Owners had gone for walks in the wooded area, children had ridden BMX bikes, and horses had been ridden in this area. The property was bounded by a fence. The District Court and Court of Appeals held the possession was sufficient and appropriate to the area. The presence of the fence undoubtedly helped immeasurably in winning this lawsuit.

3. *See also Blanchard v. Rasmussen*, 2005 WL 2495991, 8 (Minn. Ct. App. 2005). The district court's findings in the present case demonstrate that respondents' activities on the disputed property went well beyond the occasional trespasses on a neighbor's land in cutting grass, trimming hedges, and the like that the supreme court referred to in *Romans*. The district court's findings indicate that respondents took open, undeveloped land and turned it into a yard around their cabin, and a portion of the yard that they created and used is on land that appellant owned. The respondents' activities were not the sporadic, occasional activities that this court relied upon in *Stanard; Brown v. Field*, 2004 WL 2340095, 2 (Minn. Ct. App. 2004).

G. Open Possession.

Where a statute of limitations is operating to bar his rights, the record "legal" owner should be on notice through the claimant's open possession that his property is being seized. It doesn't matter whether he sees it or not, just that the possession is visible.

> "The Hickersons argue that the improvements were not 'open, notorious, and hostile' because the improvements may not have been visible to their predecessors in title from adjoining Green Gables Road. We construe 'open,' however, to mean visible from the surroundings, or visible to one seeking to exercise his rights." *Hickerson v. Bender*, 500 N.W.2d 169, 171 (Minn. Ct. App. 1993).

Same effect, *Holiday House II, LLC v. State*, 2009 WL 1587090, 1 (Minn. Ct. App. 2009).

H. Exclusive Possession.

"The possession was exclusive; no one except Morris used or cared for the Morris driveway and the rest of the land on the south side of the historic fence." *Morris vs. Smith*, 2002 WL 31654983 (Minn. Ct. App. 2002).

"The exclusivity requirement of adverse possession is satisfied if the disseizor possesses "the land as if it were his own with the intention of using it to the exclusion of others." *Ebenhoh*, 642 N.W.2d at 108 (quotation omitted); *Ganje v. Schuler*, 659 N.W.2d 261, 267 (Minn. Ct. App. 2003).

Brief entries into the claimed land by the true owner were insufficient to defeat the plaintiff's claim of exclusive possession. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 109 (Minn. Ct. App. 2002).

You could imagine one of a group of hunters claiming that he had acquired land by adverse possession (setting aside for a moment whether that use is sufficiently continuous); but if he used the land as one of a group of ten hunters, his use is probably not sufficiently exclusive to maintain a claim.

I. Hostile Possession.

Hostile possession simply refers to an intention to claim the property; a use that goes on without permission by the true owner.

> "...the requirement of 'hostile' possession does not refer to personal animosity or physical overt acts against the record owner of the property but to the intention of the disseizor to claim exclusive ownership as against the world and to treat the property in dispute in a manner generally associated with the ownership of similar type property in the particular area involved." *Norgong v. Whitehead*, 225 Minn. 379, 31 N.W.2d 267 (1948); *Thomas v. Mrkonich*, 78 N.W.2d 386 (Minn. 1956); *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972).

J. Acknowledgement of Title Defeats Hostile Element.

Sometimes it is what you say. A claimant defeats his own claim where he admits the ownership of his neighbor. An acknowledgment by the adverse claimant of the owner's title before the statute has run in his favor breaks the continuity of his adverse possession, and it cannot be tacked to any subsequent adverse possession. *Olson v. Burk*, 103 N.W. 335 (Minn. 1905).

In another decision, the claimant defending against an ejectment action admitted he had contracted with the legal owner to purchase the property. This acknowledgment of ownership defeated his claim. A 2008 decision involved an offer to purchase which was a factor defeating a claim of adverse possession. *Siegel v. Nagel*, 2008 WL 668131, 2 -3 (Minn. Ct. App. 2008). A lease defeated a claim in *Sage v. Rudnick*, 69 N.W. 1096 (Minn. 1897); *but see Winfield v. Kasel*, 2009 WL 174211 (Minn. Ct. App. 2009) (an adverse claimant first executed a lease for the disputed land, then prosecuted this suit successfully claiming he owned up to a fence by virtue of adverse possession. The Court relied on the fact the statute of limitations had already expired).

PRACTICE TIP: Carefully denominate any offer of settlement to purchase, take an easement, etc. as protected under Rule 408, Minnesota Rules of Evidence pertaining to offers of compromise.

But in one old case, the Court also recognized that a tenant's possession may actually become adverse to his landlord where he attorns to and pays rent to another. *Hanson v. Sommers*, 117 N.W. 842, 843 (Minn. 1908).

K. Consent.

In order for possession to be adverse, it cannot be commenced or continued with the consent of the legal owner. His consent makes the possession non-hostile.

> …where an occupant's original possession of land was permissive the statute of limitations did not commence to run against the owner until the occupant had subsequently declared or otherwise manifested an adverse holding and notice thereof had been brought to the attention of the owner. *Norgong v. Whitehead*, 31 N.W.2d 267 (Minn. 1948).

L. Inferred Consent.

The Court has implied consent where there was a close family relationship between original owners and the ownership was then separated:

> …existence of a close family relationship between the claimant of land and the record owner, such as existed in the instant case, created the inference, if not the presumption, that the original possession by the claimant of the other's land was permissive and not adverse … and that when such original use was thus permissive it would be presumed to continue as permissive, rather than hostile, until the contrary was affirmatively shown. *Norgong v. Whitehead*, supra; *see also Boldt v. Roth*, 618 N.W.2d 393, 397 (Minn. 2000).

M. Continuous Possession.

That possession must be continuous seems fairly obvious but there are a couple nuances. It must be uninterrupted in any way. *Application of Stein*, 99 N.W.2d 204 (Minn. 1959). An interruption of possession is fatal to the adverse possessor's claim. *Simms v. William Simms Hardware*, 216 Minn. 283, 12 N.W.2d 783 (Minn. 1943). Further, though the possession is subsequently interrupted, if it had continued for 15 years before the period of interruption, title has ripened and should be established.

To maintain a title, acquired by adverse possession, it is not necessary to continue the adverse possession beyond the time when title is acquired. The title once acquired is a new title; a legal title though not a record title is not lost by a cessation of possession, and continued possession is not necessary to maintain it. *Fredericksen v. Henke*, 209 N.W.257 (Minn. 1926). However, a four month absence from the state was not a substantial interruption in the continuity of possession. *Nygren v. Patrin*, 179 N.W.2d 76 (Minn. 1970) (where the use is appropriate to the claimed land (e.g., gardening), an absence during winter months is not a bar.)

N. Tacking of Ownerships

The claimant of adverse possession does not need to show that she or he held possession of the property for 15 years if their predecessors in title can be shown to have possessed the property. *Burns v. Plachecki*, 223 N.W.2d 133, 136, 301 Minn. 445 (Minn. 1974).

> There must be privity between successive owners to allow tacking. Privity is essential. Possession lost by abandonment or lost by disseisin, and possession taken when a prior occupant abandons or is disseised, cannot be tacked. Possession through descent or by transfer of title or possession is in privity. *Fredericksen v. Henke*, 209 N.W. 257, 259 (Minn. 1926).

Tacking was confirmed in 2005 case and somewhat limited in a 2009 case:

> The possession of successive occupants, if there is privity between them, may be [combined] to make adverse possession for the requisite period." *Fredericksen v. Henke*, 167 Minn. 356, 360, 209 N.W. 257, 259 (1926). *Houdek v. Guyse*, 2005 WL 406217, 2 (Minn. Ct. App. 2005).
>
> The Joe Mauer case—not *that* Joe Mauer—narrowly applied tacking, requiring a showing that each former owner was in privity AND maintained hostile possession. *Mauer v. Otter Tail Power Company*, 2009 WL 2225820 (Minn. Ct. App. 2009):
>
> > Landowner could not establish adverse possession by tacking previous owners' adverse use because landowner did not present any evidence that predecessors in title used the land without permission…

An acknowledgment by the adverse claimant of the owner's title before the statute has run in his favor breaks the continuity of his adverse possession, and it cannot be tacked to any subsequent adverse possession. *Olson v. Burk*, 94 Minn. 456, 103 N.W. 335 (Minn. 1905).

See *Forbes v. Kociscak*, 2002 WL 264576 (Minn. Ct. App. 2002), where the Court said there was no showing a corporate predecessor's officers had "possessed" the disputed land:

Osgood v. Stanton, 2009 WL 1586943 (Minn. Ct. App. 2009), involves an unusual but reasonable refusal to allow tacking of possession of a portion of a vacated street, where the claimant seeks to include part of his own period of possession prior to an earlier lawsuit to reach the required 15 years. The parties litigated one adverse possession case in the early 1990's. Appellants Osgood lost the first case. Undaunted, Osgoods simply continued their possession of the vacated street despite Stantons' objections until this new suit came along. The Court ruled that Osgood's possession was interrupted and tolled by the two year period during which the original lawsuit was pending and that only after the decision in *Osgood* did their new adverse possession begin.

> "Once the June 1991-May 1993 suit tolled appellants' period of adverse possession, appellants' possession of Wyoming Street ceased to be continuous. When the continuity of adverse possession is cut off by an action to quiet title, the period of possession prior to the action cannot be tacked on to any post-action possession. Therefore, appellants' possession before and after the June 1991-May 1993 suit cannot be tacked together. *Id*.

at 6, citing *Ford Consumer Fin. Co. v. Carlson & Breese, Inc.*, 611 N.W.2d 75, 77-78 (Minn. Ct. App. 2000).

As these materials were being readied, we were looking for any case which discusses presence or absence of privity following foreclosure, in adverse possession context, or otherwise. There is one old case which sheds some light, i.e., *Hanson v. Sommers*, 117 N.W. 842, 843 (Minn. 1908). In this case, following foreclosures on both sides of a tangled chain of title, Hanson remained in possession, followed by his tenant for the statutory period. The Supreme Court there said: "No doubt can arise that there was here a privity of estate between the successive wrongful holders requisite to enable allowance of the privilege of tacking."

Another decision may imply that when a Mortgagee becomes owner and does not take physical possession, that the actual and continuous possession might be interrupted. The case actually turns on the decision that an earlier quiet title action went uncontested by the defaulting fee owners, whose rights along with that of the lender who was not even named in the action, were forfeited. *Ford Consumer Finance Co., Inc. v. Carlson and Breese, Inc*., 611 N.W.2d 75, 78 (Minn. Ct. App. 2000).

It is not clear how the modern Court might treat some foreclosing lender's succeeding lien holder's subsequent purchaser, but this is some indication that a foreclosure in the chain does not wipe out every vestige of rights.

O. <u>Appropriate Use.</u>

Where use is occasional, the claimant argues his use was typical or appropriate to the property. The Court of Appeal addressed this issue again in 2009 holding that planting gardens, obviously a seasonal use, along with a large boulder and a canoe was enough possession in this instance. *Gelao v. Coss*, 2009 WL 2745833, 6 (Minn. Ct. App. 2009).

P. <u>Public Property May Not Be Adversely Possessed, But…</u>

A private citizen may not adversely possess adjoining public lands even though he would otherwise meet all the tests. Minn. Stat. 541.01. The statute prohibits establishment of a prescriptive easement over public property as well. *Heuer v. County of Aitkin*, 645 N.W.2d 753, 757-58 (Minn. Ct. App. 2002); *Claussen vs. City of Lauderdale*, 681 N.W. 2d 722 (Minn. Ct. App. 2004).

Rupley v. Fraser, 156 N.W. 350 (Minn. 1916) allows one to gain title to an entire tract which includes public streets; just not the streets themselves. One may not acquire a state swamp, *Scofield v. Schaeffer*, 116 N.W. 210 (Minn. 1908), or a public school grounds, *Junes v. Junes*, 196 N.W. 806 (1924).

Q. <u>Exceptions to the No Adverse Possession of Public Land Rule.</u>

A municipality can compromise a disputed boundary location and later be forced to honor it. *Magnuson v. City of White Bear Lake*, 203 N.W.2d 848, 851 (Minn. 1973).

For abandonment of public property to be shown, there must be some affirmative or unequivocal acts of the municipality representing intent to abandon. *Rein v. Town of Spring Lake*, 145 N.W.2d 537, 540 (Minn. 1966).

See also *Denman vs. Gans*, 607 N.W.2d 788 (Minn. Ct. App. 2000), where the Court held that waterfront property which was dedicated to the use of a small, defined group of property owners was not properly dedicated to a public use, and therefore not insulated against a claim of adverse possession by another.

R. Practical Location Exception—Boundary by Practical Location.

Note that a boundary may be determined against a public entity via practical location due to an estoppel; see section pertaining to practical location of boundaries.

S. Payment of Real Estate Taxes Not Prerequisite (usually).

Payment of the real estate taxes on the land is not required in instances where the claim simply involves settlement of the location of a boundary; nor is it required in claims which don't involve an entire separate tax parcel, Minn. Stat. 541.02:

> "..Such limitations shall not be a bar to an action for the recovery of real estate assessed as tracts or parcels separate from other real estate, unless it appears that the party claiming title by adverse possession or the party's ancestor, predecessor, or grantor, or all of them together, shall have paid taxes on the real estate in question at least five consecutive years of the time during which the party claims these lands to have been occupied adversely..."

See *Wagner v. McPhaill*, 2008 WL 4909420 (Minn. Ct. App. 2008) (failure to pay real estate taxes didn't bar adverse possession); *Mellenthin v. Brantman*, 1 N.W.2d 141, 144 (Minn. 1941) (tax payment was not required). If the adverse possessor has paid taxes on the disputed property as physically occupied, even if the property's legal description on the assessment roll is inconsistent with the physical occupation, the requirement of M.S.A. 541.02 is satisfied. *LeGro v. Saterdalen*, 607 N.W.2d 173, 175-76 (Minn. 2000).

Claims relating to boundary lines of lands and claims to lands not assessed for taxation as separate tracts--both of which are presented in this case--are clearly exempt from the statutory provisions requiring the payment of taxes. *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972).

One cannot acquire an entire parcel of land not having paid the real estate taxes on that parcel—but what is the entire parcel?

"In *Skelton*, this court ruled that when a landowner made a legally ineffective sale to neighbors of a 3.47-acre parcel of property encompassing a pond and certain land surrounding it, the doctrine of boundary by practical location was inapplicable because that "doctrine is intended to resolve boundary line disputes, *not* to establish ownership of substantial parcels of land. Expanding the doctrine as [one parcel claimant] urge[s] would undermine the statute of frauds and the recording act. *Id.* at 83 (emphasis in original)." *Ampe v. Lutgen*, 2007 WL 2034381, 2 (Minn. Ct. App. 2007).

T. How to Terminate an Adverse Possession Before it Ripens Into Title.

It is necessary to act; it is normally not necessary to trash someone's shed which is over the line. However, after fair warning is given stating the claim must be resolved or action will taken, and if use continues, you have to act (and/or sue). You cannot stand by while another's possession ripens into title. Suit tolls running of the statute,

"…if the June 1991-May 1993 suit was an action to quiet title and recover the disputed land, the suit tolled appellants' period of adverse possession." *Osgood v. Stanton*, 2009 WL 1586943, 5 (Minn. Ct. App. 2009).

One can sue to eject the other from the property, put up no trespassing signs, or otherwise interrupt the possession. Another approach is to announce your consent to the claimant's permissive use. The problem here is that he may fire back that it's his property to use as he sees fit, or worse he just ignores you leaving the consent in limbo.

Short of property owners getting into violent confrontations guaranteed to make settlement an impossibility, a timely lawsuit for ejectment before the running of the statute of limitations is an effective way to toll (stop the running of) the 15 year statute.

U. Actions for Damage; Nuisance; Punitive Damages.

One possible counter to a claim of adverse possession or practical location is a threat of an action for damages: compensatory, or in rare cases, punitive. You may bring an action for damages for trespass if you can show you have genuinely been hurt, or lost something. Often, there may be little proof of actual damages. The fact that another has occupied property along a 10 foot wide strip for five years may entitle the claimant to some nominal damages. Here is what the Supreme Court has said about damages for trespass:

The general rule is that damages in an action for trespass upon real property may be such as are appropriate to the tenure by which the plaintiff holds. Possession alone will entitle him to recover damages for any injury solely affecting it. If he seeks to recover for the future, he must show that his title gives him an interest in the damages claimed, and he can recover none except such as affect his own right, unless he holds in such relation to other parties interested that his recovery will bar their claim. *Williams v. Lynd Tp.*, 312 N.W.2d 110, 113 (Minn. 1981)

Although the Court commented above regarding future trespass damages, usually the remedy would be the removal of the trespass rather than the award of future damages. Damages may not be based on speculation or guess.

Here, the district court first instructed the jury right out of JIG: "a party asking for damages must prove the nature, extent, duration, and consequences of his or her injury…The jury "…must not decide damages based on speculation or guess" See 4A Minnesota District Judges Association, Minnesota Practice, Jury Instruction Guides--Civil, JIG 90.15 (4th ed.1999). *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002); *Peters v. Independent School Dist. No. 657, Morristown*, 477 N.W.2d 757, 760 (Minn. Ct. App. 1991); *Gelao v. Coss*, 2009 WL 2745833 (Minn. Ct. App. 2009) (Neighbor was found to have created a private nuisance by erecting large steel poles at disputed boundary line which destroyed some of landowner's landscaping. Neighbor was also found liable for damages to a retaining wall.).

1. Nominal Damages

   Without actual provable damages, a claimant may be limited to nominal damages. *Lake Mille Lacs Inv., Inc. v. Payne*, 401 N.W.2d 387, 391 (Minn. Ct. App. 1987). One who commits a trespass must pay at least nominal damages even though no actual damages are shown. *Id*. However, no punitive damages can be awarded for a

trespass if there were no actual damages. *Meixner v. Buecksler*, 13 N.W.2d 754, 757 (Minn. 1944).

2. Punitive Damages.

Rare cases have permitted punitive damages.

Minnesota law provides that punitive damages are allowed in civil actions upon clear and convincing evidence that the defendant's acts show deliberate disregard for the rights or safety of others. Minn. Stat. § 549.20, subd. 1(a) (2000). A defendant acts with deliberate disregard for the rights or safety of others if the defendant acts intentionally in disregard of facts that create a high probability of injury to the rights or safety of others. *Id.* at subd. 1(b)(1), (2) (2000).

Brantner Farms, Inc. v. Garner, 2002 WL 1163559, 2 (Minn. Ct. App. 2002): This case involved a large punitive damages award ($50,000) despite the fact the Jury gave only nominal damages ($800). It seems reasonable to suggest that a good faith claim to adverse possession should bar consideration of punitive damages; or claimants may be unfairly prohibited from bringing such claims for fear of disproportionate punishment.

One Supreme Court decision allows double dipping when a trespass includes damage to trees. The Court there said the claimant could recover <u>both</u> treble damages (under the tree statute) and punitive damages:

> "Appellants argue that treble damages for the destruction of trees, shrubs or bushes are punitive in nature. Therefore, appellants claim permitting both treble damages and punitive damages effectively permits an unfair double recovery for the same injury." *Johnson v. Jensen*, 433 N.W.2d 472, 476 (Minn. Ct. App. 1988).

V. <u>Enforcement of Rights.</u>

Technically, when 15 years have elapsed with the claimant having maintained actual, open, continuous, hostile, exclusive possession of a property, it is the claimant's property. His/her rights are established. A court is merely confirming those rights acquired by way of adverse possession.

In an unusual case, after losing an adverse possession case but ignoring the outcome and refusing to remove improvements, this party <u>almost</u> re-acquired the property by attempting to remain on the property for a new 15 year period. *Osgood v. Stanton*, 2009 WL 1586943 (Minn. Ct. App. 2009): the time during which action is pending might be included in the period of adverse possession. The only time not counted is that time during which a party is prevented by "paramount authority" from seeking recovery of disputed land. However, *Osgood* was ultimately decided on other grounds.

Osgood also makes it clear that commencing an action tolls running of the statute: "…*Holmgren* states the general rule that, in the adverse-possession context, 'the commencement of an action [to quiet title and recover property] interrupts the running of the statute of limitations during its pendency, provided the action is prosecuted to final judgment. 116 N.W. at 206'."

W. Limitation on Equity.

Though equity is said to be flexible, it has its limits as can be seen below. A trial court in fashioning a remedy may not ignore the facts proving a boundary has been established and give the possessor a more limited remedy, or compensate the "disseized" party for his loss.

Gabler v. Fedoruk, 756 N.W.2d 725 (Minn. Ct. App. 2008): Claimant proved a boundary was established by practical location but the trial court only granted a prescriptive easement and gave damages to the losing landowner. The Court of Appeals said a Court's equity powers are not so elastic; that if one is entitled to it, he deserves confirmation of his title, and there is no basis for damages. The decision drew a dissenting opinion.

X. Necessity of Pleading Both Theories.

In one decision, the Court of Appeals inferred that it might bar a party from establishing practical location of a boundary if the party had proceeded solely on an adverse possession theory through the trial without ever mentioning the practical location theory. Though similar, the two theories are not identical and may require different proof. The Court goes on to state: Generally, "relief cannot be based on issues that are neither pleaded nor voluntarily litigated." *Roberge v. Cambridge Co-op. Creamery Co.*, 67 N.W.2d 400, 403 (Minn. 1954).

In *Quast v. Brose*, 2001 WL 1035039, *2 (Minn. Ct. App. 2001), the Court allowed in a seeming close call, practical location to be raised for the first time in post trial memoranda.

In a recent decision, the importance of thorough pleading is evident. The claimant pleaded only practical location by agreement. He did not plead other theories. He was not allowed to argue acquiescence on appeal. *Kaukola v. Menelli*, 2009 WL 1374172, 2 (Minn. Ct. App. 2009).

Remember that though you may not adversely possess public land, practical location of the boundary may work an estoppel against a public entity defendant; reason alone to plead it.

Y. Burden of Proof: Clear & Convincing Evidence.

The burden of proof on a claimant is by clear and convincing evidence. *Stanard v. Urban*, 453 N.W.2d 733, 735 (Minn. Ct. App. 1990). This burden is considerable because "every presumption [is] against [the disseisor]." *Vill. of Newport v. Taylor*, 30 N.W.2d 588, 591 (Minn. 1948); *Houdek v. Guyse*, 2005 WL 406217, 1 (Minn. Ct. App. 2005).

1. Strict construction of evidence

   But the courts are not done making it hard for the claimant. The evidence they offer is also "strictly construed", i.e., looked at more closely than ordinary evidence. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. Ct. App. 2002).

2. Conflicting surveys: question of fact

   The trial judge's decision as to the correctness of two surveyors whose opinions are in conflict is a question of fact. *Ganje v. Schuler*, 659 N.W.2d 261,266 (Minn. Ct. App. 2003).

Z. Trees Extending Over Boundaries.

Another favorite boundary topic is trees which are located "on" the boundary line, and the overhanging branches of trees on another's property. The general rule is that if a tree grows in my backyard, my next door neighbor can trim branches which overhang his home, outbuildings, and yard. CAVEAT: one cannot so trim a tree as to destroy or harm it and the neighbor can be liable for significant damages because of a triple damage provision in the statute. See Minn. Stat. § 561.04.

II. BOUNDARY BY PRACTICAL LOCATION.

A. Introduction.

Another means of establishment of a boundary is "practical location". It is often founded on the location of a fence, not infrequently a fence that has been in place long enough to have wire grown into trees near it. The two distinct theories may be confused because they are used somewhat interchangeably both by litigants and by the courts in boundary line cases. This theory looks to the neighbors' actions and understanding respecting a boundary which may be inferred often through circumstantial evidence.

B. Three Ways to Establish a Boundary by Practical Location.

"Ordinarily, in order to establish a practical location of a boundary line it must appear (1) the location relied on was acquiesced in for the full period of the statute of limitations; or (2) the line was expressly agreed upon by the parties and afterwards acquiesced in; or (3) the party barred acquiesced in the encroachment by the other, who subjected himself to expense which he would not have done if there had been a dispute as to the line." *Romanchuk v. Plotkin*, 9 N.W.2d 421, 427 (Minn. 1943); *Fishman v. Nielsen*, 53 N.W.2d 553, 556 (Minn. 1952).

C. Statute of Limitations.

The statute of limitations requires the boundary to be acquiesced in for 15 years. Minn. Stat. § 541.02 (2006).

While the statute of limitations literally applies to boundaries established via acquiescence, boundaries which can be established either through an express agreement or through an estoppel do not absolutely require passage of the 15 year period: If neighboring landowners expressly agree on a boundary, they do not need to demonstrate acquiescence for the full 15 years to establish a claim. *See Nadeau v. Johnson*, 147 N.W. 241, 242 (Minn. 1914) (finding existence of boundary line by practical location based on express agreement, when landowners measured, located, and staked boundary line, expressly agreed on dividing line between lots, and treated line as boundary for 10 years). *Ampe v. Lutgen*, 2007 WL 2034381, 2 (Minn. Ct. App. 2007); *see also Amato v. Haraden*, 159 N.W.2d 907, 910 (Minn. 1968).

D. Practical Location of Boundary on Registered Torrens Property.

The Torrens Statute was recently amended to make clear that although one may not adversely possess registered property, still a boundary may be established by practical location:

> …No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, but the common law doctrine of practical location of boundaries applies to registered land whenever registered. Section 508.671 shall apply in a proceedings subsequent to establish a boundary by practical location for registered land. Minn. Stat. § 508.02.

E. Practical Location Versus Public Body.

In contrast to adverse possession, in the case of practical location it is possible to estop a city, township, etc. from claiming ownership of property, though the standard is high:

> "We recognize that municipal corporations are afforded an added degree of protection as regards their property: The doctrine of estoppel is not applicable to municipal corporations as freely and to the same extent that it is to individuals. When it is applied, the basis of application is usually not because of the nonaction of the officers of the municipality, but because they have taken some affirmative action influencing another, which renders it inequitable for the corporate body to assert a different set of facts." *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 767 (Minn. 1982).

The Court in one recent case discussed a perceived lack of good faith on the part of the claimant as though it was a requisite element. *Pomphrey v. State ex rel. St. Louis County*, 2008 WL 3288623, 2 (Minn. Ct. App. 2008).

F. Does Practical Location Require Something Affirmative?

Our Court has, on occasion, said that practical location requires some act like possession, building a fence or something comparable. *Pratt Investment Company v. Kennedy*, 636 N.W.2d 844, 849 (Minn. Ct. App. 2001). However, acquiescence by definition is inaction. Webster's defines acquiesce as to "grow quiet, to consent without protest". *Pratt Investment Co.* talks of affirmative or tacit consent. In other words, consent can be inferred through inaction where action would be expected.

One of the more concrete, easy to understand examples is found in *Fishman v. Nielsen*, 53 N.W.2d 553, 555-556 (Minn. 1952): "Acquiescence exists when adjoining landowners, for example, mutually construct a fence with the intention that the fence represents an adequate reflection of the property line." The court found practical location by acquiescence when parties and their predecessors in title built dividing fence as close as possible to actual boundary and remained satisfied with fence's location for the statutory period.

G. Practical Location by Agreement.

One method for establishing a boundary by practical location is for the neighbors to come to an agreement followed by acquiescence for the statutory period. This year the Court made it clear that the express agreement theory requires clear proof of an agreement: "We hold that an 'express agreement' requires more than unilaterally assumed, unspoken and unwritten 'mutual agreements' corroborated by neither word nor act." *Slindee v. Fritch Investments, LLC*, 760 N.W.2d 903, 909 (Minn. Ct. App. 2009).

H. Lack of Conduct Versus Passive Consent.

One of my favorite quotes on this topic comes from *Enquist v. Wirtjes*, 68 N.W.2d 412, 417 (Minn. 1955): "It must be kept in mind that the acquiescence required is not merely passive consent to the existence of a fence or sod strip, but rather is conduct or lack thereof from which assent to the fence or sod strip as a boundary line may be reasonably inferred." The holding in *Engquist* was reaffirmed in *Pratt Investment Co. v. Kennedy*, 636 N.W.2d 844, 849 (Minn. Ct. App. 2001).

I. Resolution of an Overlap via Practical Location.

Practical location may resolve an overlap problem, including where title is Torrens. The claiming owner had constructed a parking lot which then remained without objection. *See Matter of Zahradka*, 472 N.W.2d 153, 154 (Minn. Ct. App. 1991).

J. Judicial Determination of Torrens Boundaries.

The Torrens Act contemplates judicial determination of boundaries. The statute states in relevant part:

> "An owner of registered land may apply by a duly verified petition to the court to have all or some of the boundary lines judicially determined." Minn. Stat. § 508.671.

However, a Court may not rule in such a way as to alter the boundaries set out in a Torrens certificate:

> "Moreover, a court may not, in a proceeding subsequent to initial registration of land, determine boundary lines, if that determination alters the legal description of the land as stated in the certificate of title, and thereby attacks the torrens certificate." *Petition of Geis*, 576 N.W.2d 747, 750 (Minn. Ct. App. 1998); *see also Petition of Building D, Inc*., 502 N.W.2d 406 (Minn. Ct. App. 1993).

> "The purpose of the Torrens law is to establish an indefeasible title which is immune from adverse claims not registered with the registrar of titles and to assure that the property can become encumbered only with registered rights and claims." *Petition of McGinnis*, 536 N.W.2d 33, 35 (Minn. Ct. App. 1995).

K. Expert Opinion.

A good discussion of competing survey testimony is found in *Wojahn v. Johnson* involving attempts to relocate lost government corner lot markers, and claims of adverse possession and practical location. 297 N.W.2d 298, 303 (Minn. 1980). Sometimes persons other than surveyors may be permitted to testify to expert opinions concerning boundary line issues. An expert is basically anyone who by education, training or experience is qualified to render opinion evidence which may be helpful to the finder of fact. A mine engineer technician was allowed to testify although not a surveyor because his evidence was helpful to the Court's understanding. *State v. Larson*, 393 N.W.2d 238, 242 (Minn. Ct. App. 1986).

III. PRESCRIPTIVE EASEMENTS.

A. Definition.

The right to use real property based on prior use for a set period of time, i.e. 15 years:

> "A prescriptive easement grants a right to use the property of another based on prior continuous use by a party. *See Romans v. Nadler*, 217 Minn. 174, 181, 14 N.W.2d 482, 486-87 (1944)." *Magnuson v. Cossette*, 707 N.W.2d 738, 745 (Minn. Ct. App. 2006)

B. Stating a Claim for a Prescriptive Easement Similar to Stating a Claim for Ownership by Adverse Possession.

Prescriptive easements are established in a manner similar to claims of adverse possession:

> "A prescriptive easement claim involves the same elements of proof as an adverse possession claim, subject to the inherent differences between such claims." *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 112 (Minn. Ct. App. 2002); *Mehrkens v. Ryan*, 2003 WL 21694568 (Minn. Ct. App. 2003); *Heuer v. County of Aitkin*, 645 N.W.2d 753 (Minn. Ct. App. 2002).
>
> ''The elements necessary to prove adverse possession are well established and require a showing that the property has been used in an actual, open, continuous, exclusive, and hostile manner." *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999).
>
> "the claimant must prove . . . the use of the property . . . for the prescriptive period of 15 years." *Magnuson v. Cossette*, 707 N.W.2d 738, 745 (Minn. App. 2006).

C. Distinctions Between Adverse Possession and Prescriptive Easements.

1. Right to use, not ownership, is established under doctrine of prescriptive easements.

> "A prescriptive easement grants only a right of use and does not carry with it title or a right of possession in the land itself." *Wasiluk v. City of Shoreview*, 2005 WL 1743746, 2 (Minn. Ct. App. 2005).
>
> "the inherent difference between the two doctrines revolves around the fundamental difference between possessing land (adverse possession) and using land (prescriptive easement)." *Claussen v. City of Lauderdale*, 681 N.W.2d 722, 727 (Minn. Ct. App. 2004).

2. The right to use does not arise from expiration of a statute of limitations:

> "Statutes of limitation *do not by their terms apply to actions involving incorporeal hereditaments such as easements*. An easement by prescription rests upon the fiction of a lost grant. By analogy to title by adverse possession, an adverse user of an easement for the statutory period is held to be evidence of the prescriptive right." *Romans v. Nadler*, 14 N.W.2d 482, 485 (Minn. 1944) (emphasis added).

D. <u>The Elements Required to Show Prescriptive Easements Turn on Use, Not Possession</u>.

"A prescriptive easement requires the same elements, but a difference exists 'between *possessing* the land for adverse possession and *using* the land for a prescriptive easement.'" *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 230 (Minn. 2008), *quoting Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000) (emphasis added).

E. <u>First Element: Actual Use</u>.

1. What constitutes actual use or possession will generally be obvious: Use of a gravel driveway may constitute actual use, *Nordin vs. Kuno*, 287 N.W. 2d 923 (Minn. 1980); as will use of a farm road, *Block v. Sexton*, 577 N. W. 2d 521 (Minn. Ct. App. 1998); and the use of a footpath, *Mehrkens v. Ryan*, 2003 WL 21694568 (Minn. Ct. App. 2003).

2. The noise of gunfire will not constitute actual use to qualify: *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc*. 624 N. W. 2d 796 (Minn. Ct. App. 2001). Nor does natural water flow: "The district court correctly found that Kral's use of the drainage system could not be supported by his prescriptive easement claim." *Kral v. Boesch*, 557 N.W.2d 597, 600 (Minn. Ct. App. 1996).

3. But, a drainage ditch can satisfy the requirement. *Naporra v. Weckwirth*, 226 N.W. 569 (Minn. 1929).

F. <u>Second Element: Open Use</u>.

In order to establish a prescriptive easement, the use must be open. *Nordin v. Kuno*, 287 N.W.2d 923 (Minn. 1980).

Open use, for this purpose, means visible. This is so the owner is made aware of the claim of an interest by another for the statutory period to begin running:

> "'[W]here the claimant has shown an open, visible, continuous, and unmolested use' for the required period inconsistent with the owner's rights and under circumstances from which may be inferred his knowledge and acquiescence, the use will be presumed to be under claim of right and adverse, so as to place upon the owner the burden of rebutting this presumption by showing that the use was permissive. . . . As stated in Swan v. Munch,65 Minn. 500, 503, 67 N.W. 1022, 1024, 35 L.R.A. 743, 60 Am.St.Rep. 491:
>
> > 'There was no trick or artifice on the part of the defendant, but an open and notorious taking possession of the premises by the defendant for her use and needs, and whereby the public were also benefited. These acts were notice to the owners that defendant was occupying the premises under a claim of right.
>
> *Hildebrandt v. Hagen*, 38 N.W.2d 815, 818-819 (Minn. 1949).
>
> "The claim of right must be exercised with the knowledge of the owner of the servient estate, i. e., actual knowledge or a user on the part of the claimant of such character that knowledge will be presumed." *Naporra v. Weckwerth*, 226 N.W. 569, 571 (Minn. 1929).

G. <u>Third Element: Hostile Use</u>.

1. For the purposes of prescriptive easements, hostile means non-permissive.

> "A use is hostile in prescriptive easement cases if it is nonpermissive." *Oliver v. State ex rel. Com'r of Transp*., 760 N.W.2d 912, 919 (Minn. Ct. App. 2009).

> "But in 1983 or 1984, the Lingitzes met the Kruegers and discussed the access to the east side of the island. *The Kruegers gave the Lingitzes permission to use the Disputed Trail when the weather was bad, or when they otherwise needed to use it. Therefore, the Lingitzes' use was permissive*, and appellant cannot show an adverse use of the Disputed Trail for the statutory 15-year period. Because appellant cannot show all the elements required to establish a prescriptive easement, the district court did not clearly err in denying appellant's claim of a prescriptive easement." *Rollins v. Krueger*, 2006 WL 2677833, 6 (Minn. Ct. App. 2006) (emphasis added).

2. However, use which is originally permissive can become hostile. For example, where a utility company entered onto property with permission, but the parcel on which their utility lines were located was described as an easement on a later deed, the requirement of hostility has been found to be satisfied:

> "The Ericksons argue that the city's use of the land did not become hostile because the original use was granted pursuant to a license. . . Where an original use is permissive, it is presumed that the use continues as permissive "until the contrary [is] affirmatively shown." *Norgong v. Whitehead*, 225 Minn. 379, 383, 31 N.W.2d 267, 269 (1948); *see also Johnson v. Hegland*, 175 Minn. 592, 596, 222 N.W. 272, 273 (1928) (noting that transforming a permissive use into a hostile use requires a "distinct and positive assertion of a right hostile to the rights of the owner"). . . . [W]e must inquire whether at some point in time there was notice to the Ericksons or to their predecessors in interest that the city had begun claiming under an assertion of right hostile to their interest in the property, so as to start the prescriptive period running for asserting a claim of a prescriptive easement. We conclude that such a point in time was the notation of a utility easement on the recorded 1985 deed from the elder Tibbetts to the younger Tibbetts family. . . . such a notation was a distinct and positive assertion of hostility to the rights of the servient property owner, transforming the original permissive use into an asserted hostile claim. . . . [W]e conclude that *at least since 1985, the year an easement was noted on their predecessor's deed, the Ericksons had constructive notice of a "distinct and positive assertion" of a hostile right in the form of a utility easement." Erickson v. Grand Marais Public Utilities Com'n*, 2004 WL 1445081, 3-4 (Minn. Ct. App. 2004).

3. Acquiescence is distinguished from permission:

> "License or permissive use on the part of the landowner must be distinguished from mere acquiescence. The one is evidence that claimant did not have the drainage right in the absence of the permission; while the other is evidence that he did." *Naporra v. Weckwirth*, 226 N.W. 569, 571 (Minn. 1929).

Distinguishing one from the other is difficult. The Minnesota Supreme Court distinguished acquiescence from permission as follows:

"'Acquiescence,' regardless of what it might mean otherwise, means, when used in this connection, passive conduct on the part of the owner of the servient estate consisting of failure on his part to assert his paramount rights against the invasion thereof by the adverse user. 'Permission' means more than mere acquiescence; it denotes the grant of a permission in fact or a license." *Dozier v. Krmpotich*, 35 N.W.2d 696, 699 (Minn. 1949).

4. There is a statutory provision protecting those who give permission for recreational uses from having an assertion of prescriptive easement made against their property:

"No dedication of any land in connection with any use by any person for a recreational purpose takes effect in consequence of the exercise of that use for any length of time except as expressly permitted or provided in writing by the owner, nor shall the grant of permission for the use by the owner grant to any person an easement or other property right in the land except as expressly provided in writing by the owner." Minn. Stat. § 604A.27**.**

5. Belated consent will not overcome an initial hostile entry:

"But if the entry was adverse and hostile-not by virtue of Weckwerth's permission sought and given in recognition of his permissory authority but in spite of Weckwerth-it would not matter whether Weckwerth consented thereto or not. His unsought consent could not destroy the adverse entry. Had the entry been made under and by virtue of his recognized right to grant a permission, the situation would have been quite different." *Naporra v. Weckwerth*, 226 N.W. 569, 571 (Minn. 1929)

H. <u>Fourth Element: Continuous Use</u>.

1. One who seeks to establish a prescriptive easement must show that his or her use was continuous. This does not require a constant presence, but sporadic use is insufficient to qualify:

"In cases of easements, the requirement of continuity depends upon the nature and character of the right claimed. It is sometimes said that there must be such continuity of use as the right claimed permits. This statement of the rule, like the one governing cases of title by adverse possession, does not mean that the right can be acquired by occasional and sporadic acts for temporary purposes." *Romans vs. Nadler*, 14 N. W. 2d 482, 486 (Minn. 1944).

In *Romans*, seasonal use occurring about 10-12 times per summer was sufficient. In rural or undeveloped areas, occasional use may give rise to a prescriptive easement. *Block v. Sexton*, 577 N. W. 2d 521 (Minn. Ct. App. 1998).

Use consistent with farming operations has also been held to be sufficient, even meeting the exclusivity requirement discussed below:

"Respondents, their renters, and their employees have accessed their property four to five times a year via the south drive since their family acquired the property in 1950. . . *This use was consistent with the act of farming and is sufficient to constitute continuous use*. *See Rogers*, 603 N.W.2d at 657 ("[C]ontinuity of use will vary depending on the type of use, and accordingly the court should not view continuity of use in the context of a prescriptive easement as strictly as in the context of adverse possession."); *see also Block*

v. Sexton, 577 N.W.2d 521, 523-25 (Minn.App.1998) (granting prescriptive easement based on use of farm road several times per month during summer months)." *Michel v. Lambrecht*, 2004 WL 2857361, 1 (Minn. Ct. App. 2004) (emphasis added).

Greater use is probably required for urban areas. *See Skala v. Lindbeck*, 214 N.W. 271, 272 (Minn. 1927) (holding that actual and visible occupation is more imperative with developed land).

2. If the use is interrupted during the running of the statutory period, the prescriptive easement will be defeated: Continuous possession requires that the occupation of the land be ongoing and without cessation or interruption. *See Rice v. Miller*, 238 N.W.2d 609, 611 (Minn. 1976) (holding that, where the landowner owner took affirmative steps to prohibit use by others, he broke the continuity of adverse use).

3. An owner can "tack on" to their predecessor in title:

> "[A]ppellant must show that his use was continuous. "The possession of successive occupants, if there is privity between them, may be tacked to make adverse possession for the requisite period." *Fredericksen v. Henke*, 167 Minn. 356, 360, 209 N.W. 257, 259 (1926). . . . Minnesota courts generally allow tacking to all successors in privity with the original owner of the dominant estate . . ." *Rollins v. Krueger*, 2006 WL 2677833, 6 (Minn. Ct. App. 2006)

I. Fifth Element: Exclusive Use.

Exclusivity, for the purposes of establishing a prescriptive easement, means exclusive against the community at large.

> "Minnesota law is clear, however, that exclusivity for a prescriptive easement is not as strictly construed as for adverse possession . . . The use need not be exclusive in the sense that it must be used by one person only . . . Rather, the right must not depend upon a similar right in others; it must be exclusive against the community at large." *Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn. 1980).

Use to the exclusion of all other users is not required. So a claim may overcome sporadic use by the public. See, *Wheeler v. Newman*, 394 N.W.2d 620, 623-24 (Minn. Ct. App. 1986). And use by others with similar claims -- see, *Oliver v. State*, 760 N.W.2d 912, 918-919 (Minn. Ct. App. 2009) (where the Court of Appeals found, in reviewing an entry of summary judgment, that exclusivity might be held to exist where there was evidence that "the road was used by the five owners who were either fee holders to the servient estate or who owned those parcels that abutted the easement, not by the general public.")

J. Presumptions Made In Prescriptive Easement Cases:

1. Often proof of the character of the original entry into the property is problematic because it occurred fifty years ago or more. If all the other elements are proven clearly, then the claimant will have the benefit of the doubt on the original entry being hostile, i.e., without consent.

> "The general rule is that where the claimant of an easement by prescription shows open, visible, continuous and unmolested use for the statutory period, inconsistent with the

rights of the owner and under circumstances from which the owners' acquiescence may be inferred, the use is presumed to be adverse or hostile." *Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn. 1980).

2. This presumption can be rebutted, if the property owner of the servient estate has evidence that demonstrates that the original entry was with consent. This means that, in effect, once the other elements are shown, the burden of proof regarding hostility shifts to the defendant.

> "The effect of the presumption articulated in *Dozier* is that once a claimant to a prescriptive easement has established actual, open, continuous, and exclusive use for the required length of time, the burden of proof shifts to the owner of the servient estate to prove permission." *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000).

3. Some cases in the adverse possession arena have inferred consent where the property was owned by family members.

> "We have recognized that this general rule of presumed hostility is modified in cases in which family members own both the dominant and servient estates. *See Wojahn v. Johnson,* 297 N.W.2d 298, 306 (Minn.1980). The reason for this modification is that the nature of close familial relationships is such that mere actual, open, exclusive, and continuous possession is not enough to give notice to a family member that a use is hostile. *See Beitz v. Buendiger*, 144 Minn. 52, 54, 174 N.W. 440, 441 (1919) (explaining the impact of a close familial relationship in an adverse possession case). In these situations, the presence of the close familial relationship gives rise to "the inference, if not the presumption" that the use is permissive. *See* Wojahn, 297 N.W.2d at 306." *Boldt v. Roth*, 618 N.W.2d 393, 396-97 (Minn. 2000).

How close must the family tie be to allow inference of consent? *Nordin vs. Kuno* contains the following discussion:

> "The defendants claim that the presumption should instead be one of permission due to the family relationship between the Kunos. This court has inferred permission where a close family relationship exists. Burns v. Plachecki, 301 Minn. 445, 223 N.W.2d 133 (1974) (parent and child); Lustmann v. Lustmann, 204 Minn. 228, 283 N.W. 387 (1939) (close brothers); Collins v. Colleran, 86 Minn. 199, 90 N.W. 364 (1902) (parent and child). However, the court has refused to infer permission between three unfriendly sisters, Beitz v. Buendiger, 144 Minn. 52, 174 N.W. 440 (1919), and friendly neighbors, Alstad v. Boyer, 228 Minn. 307, 37 N.W.2d 372 (1949)." *Nordin v. Kuno*, 287 N.W.2d 923, 927 (Minn. 1980).

A sale of the property outside the family will end the presumption of consent.

> "We now extend our *Wojahn* analysis to hold that, absent evidence of continued permission, the transfer of the servient estate to a stranger renders hostile a use previously considered permissive due to a close familial relationship and such transfer will commence the 15-year prescriptive easement time period." *Boldt v. Roth*, 618 N.W.2d 393, 398 (Minn. 2000).

4. It now appears that where the initial entry was by close friends who are "like family" the presumption can be overcome.

"[T]he groups had cordial relations for many years, according to them, "like an extended family," . . . This evidence shows that the . . . use of the "Front Lot" was permissive and not hostile. . ." *Mahoney v. Spors*, 2008 WL 2102692, 3 (Minn. Ct. App. 2008)

K. <u>Public Land</u>.

1. Generally, one cannot obtain a prescriptive easement over any public lands. Minn. Stat. § 541.01.

   "The prohibition against acquiring title to public land by adverse possession was added to the Minnesota statutes by 1899 Minn. Laws ch. 65. *Murtaugh [v. Chicago, Milwaukee & St. Paul Ry*], 102 Minn. [52], 54, 112 N.W. [860] 861[(1907)]; See, e.g., *State ex. Rel. Anderson v. Dist. Court of Kandiyohi County*, 119 Minn. 132, 136, 137 N.W.2 298, 300 (1912) (land within high water mark of navigable lake cannot be acquired by adverse possession); *Murtaugh*, 102 Minn. at 55, 112 N.W. at 862 (legislature did not intend to provide for acquisition of title to school lands by adverse possession)." *Heuer vs. County of Aitkin*, 645 N. W. 2d 753, 757 (Minn. Ct. App. 2002).

   It does not matter whether the public land is held in a governmental capacity or in a proprietary one. *Fischer v. City of Sauk Rapids*, 325 N.W. 2d 816 (Minn. 1982).

2. There are exceptions where the claim arises before, or after, the property was owned by the public.

   a. If the claimant can show that a prescriptive easement arose before the property was acquired by the public body, he may be entitled to impose the prescriptive easement. *Heuer*, *supra* (reversing a summary judgment and remanding for trial on that basis); *see also Anderson v. State*, 2007 WL 2472359, 3 (Minn. Ct. App. 2007) ("[t]he evidence in this record supports the district court's finding that respondents' adverse use of the trails in section 25 extended for 15 or more years before the state's ownership of the land.").

   b. "[W]hen the state takes title because of tax forfeiture, the prescriptive easement must be established prior to the tax assessment for which the property was forfeited." *Wasiluk v. City of Shoreview*, 2005 WL 1743746, 2 (Minn. Ct. App. 2005).

   c. Also, a claimant may acquire a prescriptive easement over formerly public property where a street has been vacated:

      "Claimants were entitled to prescriptive easement to access route crossing adjoining owners' property, notwithstanding fact that 60 feet of access route crossed over land which was dedicated as public street but later vacated, where vast majority of access route lay exclusively within boundaries of adjoining owners' property, continuous use of route by claimants and their predecessors for prescriptive period was hostile, and adjoining owners or their predecessors could have taken steps to prohibit or limit use, but chose not to do so." *Lindquist v. Weber*, 404 N.W.2d 884 (Minn. Ct. App. 1987).

   d. "Quasi-public" property may also be claimed.

      "Assuming the waterfront is properly characterized as "quasi-public," there is no authority for the proposition that it cannot be adversely possessed . . . the plain

language of Minn. Stat. sec. 541.01 limits the prohibition on adverse possession to property dedicated to public, not quasi-public, use." *Denman v. Gans*, 607 N.W.2d 788, 794 (Minn. Ct. App. 2000).

L. <u>Public Claims</u>.

The public can also obtain an easement by prescription. *See Quist v. Fuller*, 220 N.W.2d 296 (Minn. 1974).

M. <u>Proof Required</u>.

Like adverse possession, proof of the existence of a prescriptive easement may be made via direct or circumstantial evidence, but the burden of proof is the clear and convincing evidence standard.

> "Under clear and convincing standard, as applied to elements of proof required for a prescriptive easement, circumstantial evidence is entitled to as much weight as any other evidence." *Rogers v. Moore*, 603 N.W. 2d 650 (Minn. 1999).

N. <u>Scope of the Easement</u>.

The scope of a prescriptive easement is determined by the use used to establish the easement itself. So, the use not only establishes the right to a prescriptive easement, it defines the scope of the easement, as well.

> "Rights of prescriptive easement in land are measured and defined by the use made of the land giving rise to the easement." *Romans v. Nadler*, 14 N.W.2d 482, 486 (Minn. 1944).

O. <u>Restrictions on Use of Property Subject to Easements</u>.

The owner of the servient tenement subject to a prescriptive easement, or in modern parlance, the "burdened parcel," cannot put the subject property to any use which would interfere with the use by the party benefitted by the easement.

> "[T]he district court's construction of the north-easement reasonable-use provision to allow Michels to plant grass on the servient land and to maintain and repair the servient land, is consistent with its 2004 findings and judgment. The 2004 judgment granted Michels the right to improve "the north legal easement ... to make it accessible to the equipment used by them." And the district court found that Michels had previously improved the servient land by installing dirt and rocks. The 2008 order allowing Michels to plant grass and to maintain the servient land but preventing Lambrechts from plowing, planting, and harvesting is consistent with Michels' right of improvement under the 2004 judgment. Again, disallowing plowing, planting, and harvesting in an area where Michels are authorized to plant grass is reasonably supported by the record evidence as a whole." *Michel v. Lambrecht*, 2009 WL 2498480, 3 (Minn. Ct. App. 2009).

See also Romans v. Nadler, 14 N.W.2d 482, 487 (Minn. 1944) (finding that Defendants had "the right to erect and maintain . . . a structure which [did] not interfere with plaintiffs' easement.").

P. Impact of Torrens Status of Property.

The rule of law here is very simple -- one cannot obtain a prescriptive easement against Torrens property.

> "No 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.

IV. IMPLIED EASEMENTS.

A. Definition.

Implied easements arise in connection with landlocked parcels.

> "Minnesota courts analyze the rights of an owner of a landlocked parcel under the law of implied easements." *Lake George Park, L.L.C. v. IBM Mid America Employees Federal Credit Union*, 576 N.W.2d 463, 465 (Minn. Ct. App. 1998).

Where parties convey a parcel of land without a necessary easement, the courts may infer the existence of the easement:

> *"*An easement created by implication arises as an inference of the intention of the parties to a conveyance of land. The inference is drawn from the circumstances under which the conveyance was made rather than from the language of the conveyance. To draw an inference of intention from such circumstances, they must be or must be assumed to be within the knowledge of the parties. The inference drawn represents an attempt to ascribe an intention to parties who had not thought or had not bothered to put the intention into words, or perhaps more often, to parties who actually had formed no intention conscious to themselves. In the latter aspect, the implication approaches in fact, if not in theory, crediting the parties with an intention which they did not have, but which they probably would have had had they actually foreseen what they might have foreseen from information available at the time of the conveyance." *Olson v. Mullen*, 68 N.W.2d 640, 646 (Minn. 1955), *citing* Restatement, Property, § 476, Comment (a).

B. Types of Implied Easements.

1. Quasi-Easements / Implied Easements

> "The doctrine of implied grant of easement is based upon the principle that where, during unity of title, the owner imposes apparently permanent and obvious servitude on one tenement in favor of another, which at the time of severance of title, is in use and is reasonably necessary for the fair enjoyment of the tenement to which such use is beneficial, then, upon a severance of ownership, a grant of the dominant tenement includes by implication the right to continue such use. That right is an easement appurtenant to the estate granted to use the servient estate retained by the owner. Under the rule that a grant is to be construed most strongly against the grantor, all privileges and appurtenances that are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor are included in the grant. . . . Prior to the severance and while there is unity of title, the use is

generally spoken of as a quasi-easement appurtenant to the dominant tenement." *Romanchuk v. Plotkin*, 9 N.W.2d 421, 424 (Minn. 1943).

2. Easement of Necessity.

In contrast, easements by necessity do not have specific locations prior to the time they are created by the court.

> "An easement by necessity is unique in that it has no definite location at the time it is created." *Bode v. Bode*, 494 N.W.2d 301, 304 (Minn. Ct. App. 1992).

3. These Terms Are Used Interchangeably.

The Minnesota Court of Appeals has noted that the terms are often used "interchangeably," at least "in dicta." *Bode v. Bode*, 494 N.W.2d 301, 304 (Minn. Ct. App. 1992).

The Court of Appeals has noted that the distinction between the terms is limited to the parties to the transaction in which the property was divided:

> "The language in *Bode* suggests a distinction, recognized by some jurisdictions and commentators, between implied easements and easements of necessity. . . . However, any distinction in Bode was limited to the parties to the severing transaction. "[W]hen a landowner conveys a portion of land that has no access * * * the owner of the purchased portion *has a right of access* across the retained lands of the grantor unless the conveying document explicitly disclaims any right of access." [*Bode v. Bode*] at 303-04 (emphasis added); accord Pine Tree Lumber Co. v. McKinley, 83 Minn. 419, 420, 86 N.W. 414, 415 (1901) (defendant's grant to plaintiff of right to enter defendants land and remove pine "included whatever was reasonably necessary to make it effective" including right to construct and use logging road across land retained by defendant); 28A C.J.S. § 91a (easement by necessity for access may be claimed only by immediate parties to transaction). Compare 4 Richard Powell & Patrick Rohan, Powell on Real Property § 34.07 (easement may be found despite many intervening conveyances); Pencader Assoc., Inc. v. Glasgow Trust, 446 A.2d 1097, 1100 (Del.Super.1982) (easement of necessity cannot be terminated by mere nonuse, remanding to determine fact issue of existence of easement of necessity 170 years after severance of property)." *Lake George Park, L.L.C. v. IBM Mid America Employees*, 576 N.W.2d 463, 466 (Minn. Ct. App. 1998) (emphasis added; former emphasis deleted).

Note that *Bode* court, in the instance of parties to the severing transaction, discusses a "*right* of access." (Emphasis added).

C. <u>Factors.</u>

1. There are three factors which are typically examined.

> "An easement by implication is created if the following factors exist:
> (1) a separation of title;

(2) the use which gives rise to the easement shall have been so long continued and apparent as to show that it was intended to be permanent; and
(3) that the easement is necessary to the beneficial enjoyment of the land granted." *Romanchuk v. Plotkin*, 9 N.W.2d 421, 424 (Minn. 1943); *see also Pickthorn v. Schultz*, 2008 WL 5335118, 2 (Minn. Ct. App. 2008).

2. Although those three are typical, they are not rigidly applied, this is not an exhaustive list; and necessity appears to be the most important factor.

> "It is not always necessary that the existence of all these essentials be present; they are only aids in determining whether such easement exists. . . . Nor are the factors stated exhaustive. . . Practically all the authorities do hold, however, that necessity is an essential factor." *Olson v. Mullen*, 68 N.W.2d 640, 647 (Minn. 1955) (citations omitted).

3. In fact, it has been held that *only* necessity is required.

> "Except the necessity requirement, these factors are only aids in determining whether an implied easement existed." *Rosendahl v. Nelson*, 408 N.W.2d 609, 611 (Minn. Ct. App. 1987), *citing Olson v. Mullen*, 68 N.W.2d 640, 647 (Minn. 1955).

4. The factors are examined to determine whether an intention to create the easement existed at the time of severance, which is a fact-specific process:

> "While an easement will not be implied unless it is necessary, all three elements are used as indicia of the parties' intent to create an easement." *Lake George Park, L.L.C. v. IBM Mid America Employees Federal Credit Union*, 576 N.W.2d 463, 465-466 (Minn. Ct. App. 1998), *citing Olson v. Mullen*, 68 N.W.2d 640, 647 (Minn. 1955).

D. <u>Factor One: Separation of Title</u>.

Separation of title gives rise to the rationale for an implied easement, i.e., an intention to maintain an easement at the time of severance:

> "The Schultzes argue that there was no evidence in the record of severance of title or that the two parcels were ever under common ownership. . . . The district court appears to have assumed that, as neighboring parcels, they were once under common ownership and were severed. The Pickthorns assert that the abstract of title establishes this fact. However, the abstract is not in the record. . . . Equally troublesome, assuming past common ownership of the two lots, there is nothing in the record that could establish that the claimed easement or need for the easement existed at the time of severance. As the claiming party, the Pickthorns had the responsibility for establishing the basis for an easement. . . In sum, we conclude that the record does not establish the elements for an easement by necessity." *Pickthorn v. Schultz*, 2008 WL 5335118, 2-3 (Minn. Ct. App. 2008).

E. <u>Factor Two: Continued and Apparent Use</u>.

Unless the party claiming an implied easement is claiming against the person who was the owner at the time of severance, the use must have been continuous and apparent:

> "Appellant cites no Minnesota case where an easement of necessity was implied for the benefit of a party remote to the severing transaction without a showing of apparent and continued use. This court, as an error correcting court, is without authority to change the law." *Lake George Park, L.L.C. v. IBM Mid America Employees*, 576 N.W.2d 463, 466 (Minn. Ct. App. 1998).

This factor is examined as of the time of the separation of title:"

> "The use must have been 'long continued and apparent' as of the time of the severance." *Pederson v. Smith*, 2000 WL 821682, 3 (Minn. Ct. App. 2000) (citations omitted).

Thus, for a purchaser buying after severance has occurred, the use need not continue to be apparent:

> Appellant further argues that the easement was not known or apparent when he purchased . . . But we consider the use giving rise to an easement by implication of necessity at the time of the severance. Here, the severance in title did not occur in 2000 when appellant entered into a contract for deed . . . Instead, the severance of title occurred in 1991 . . .the haul road was . . . apparent and obvious, and intended to be permanent at the time of severance." *Magnuson v. Cossette*, 707 N.W.2d 738, 746 (Minn. Ct. App. 2006) (citations omitted).

F. <u>Factor Three: Necessity</u>.

1. Only reasonable necessity need be shown.

> "'Necessary' does not require that the use be indispensable; rather a reasonable necessity is sufficient. The party attempting to establish the easement bears the burden of proving necessity." *Olson v. Mullen*, 68 N.W.2d 640, 647 (Minn. 1955).

> "Obstacles such as topography, houses, trees, zoning ordinances, or the need for extensive paving, may create conditions where an easement is necessary." *Magnuson v. Cossette,* 707 N.W.2d 738, 745 (Minn. Ct. App. 2006); *see also Rollins v. Krueger*, 2006 WL 2677833, 4 (Minn. Ct. App. 2006), *quoting Rosendahl v. Nelson*, 408 N.W.2d 609, 611 (Minn. Ct. App. 1987) (upholding the trial court's finding of an implied easement where the land's topography, a city ordinance, and a large tree obstructed access to respondent's garage).

2. Necessity is analyzed as of the time of the separation of title.

> "The correct analysis is as of the time of severance, and the court instead analyzed current necessity." *Pederson v. Smith*, 2000 WL 821682 (Minn. Ct. App. 2000).

G. Equitable Doctrine.

This is an equitable doctrine, so the courts will examine the equities.

> "Moreover, implying an easement is an equitable doctrine and equity does not favor appellant. *See Larson v. Amundson*, 414 N.W.2d 413, 417 (Minn.App.1987) (court has equitable power to determine fair extent of easement). Appellant knew he was buying a landlocked parcel and presumably paid a price that reflected that fact. Further, [the buyer of the burdened parcel] had no notice of an easement when he purchased his parcel. . . . Equity does not favor access at the expense of a good faith purchaser who was not a party to the transaction that landlocked appellant's parcel." *Lake George Park, L.L.C. v. IBM Mid America Employees Federal Credit Union*, 576 N.W.2d 463, 466 (Minn. Ct. App. 1998); *see also Rajkowski v. Christensen, et al*., 2008 WL 4394675 (Minn. Ct. App. 2008).

"Equitable" does not mean, however, that the easement needs to benefit the property to be burdened:

> "Although an implied easement is an equitable doctrine, the elements for an easement by necessity do not include a reciprocal, separate benefit to the servient property." *Magnuson v. Cossette*, 707 N.W.2d 738, 746 (Minn. Ct. App. 2006).

H. Location of Implied Easement.

If the location of the easement was not determined as of the time of severance, the owner of the land over which the easement is to run selects the location of the easement. If that owner fails to do so, then the owner of the property to be benefitted gets to choose:

> Where there is no agreement, the location of the easement is established in this manner: 'When no prior use of the way has been made, and the same is to be located for the first time, the owner of the land over which the same is to pass has the right to choose it, provided he does so in a reasonable manner, having due regard to the rights and interests of the owner of the dominant estate. But, if the owner of the land fails to select such way when requested, the party who has the right thereto may select a suitable route for the same, having due regard to the convenience of the owner of the servient estate." *Bode v. Bode*, 494 N.W.2d 301, 304-05 (Minn. Ct. App. 1992).

I. Duration of Implied Easement.

An easement by necessity will cease to exist when the necessity ceases to exist:

> "An easement by necessity lasts only as long as the necessity and ceases when the owner of the dominant estate obtains a permanent right of public access to his or her property." *Holmes v. DeGrote*, 2000 WL 1146745 (Minn. Ct. App. 2000), *citing Bode*, 494 N.W.2d at 304.

J. Uses for Which an Implied Easement May be Created:

The use can be of the types for which other easements exist– including, for example, lateral support of land. *Swedish-American Nat. Bank of Minneapolis v. Connecticut Mut. Life Ins. Co.*, 86 N.W. 420 (Minn. 1901). One has an implied easement for light and air on *public streets;* in fact, there is a constitutional right to ownership of easements of this type. This can give rise to a takings case:

> "An owner of property abutting a public street has implied easements of light, air, and view over the street. *Haeussler v. Braun*, 314 N.W.2d 4, 7 (Minn.1981). These easements are "property" within the meaning of the Minnesota Constitution. *Castor v. City of Minneapolis*, 429 N.W.2d 244, 245 (Minn.1988)." *Kooiker v. City of Coon Rapids*, 1998 WL 40502 (Minn. Ct. App. 1998).

Remember the requirement of reasonable necessity, however.

K. Exception: Where the Parties Indicate an Intent Not to Provide an Easement:

When the parties indicate in writing at the time of severance of ownership that the parties do not intend to create an easement, the courts will not infer an easement later:

> "Where a land owner conveys a portion of land that is landlocked and has no access to the road, the owner of the purchased portion has a right to access across the retained lands of the Grantor unless the conveying document explicitly provides that they will not." *Bode v. Bode*, 494 N.W.2d 301, 304 (Minn. Ct. App. 1992).

L. There is No Minimum Time Which Must Pass for the Easement to be Created. .

There is no set minimum period of time that must expire for the easement to be created:

> "In any event, this question of fact, length of use, is not essential to the creation of the easement and therefore not material for purposes of the summary judgment motion." *Clark v. Galaxy Apartments*, 427 N.W.2d 723, 726 (Minn. Ct. App. 1988).

M. Practice Tip: Join All Necessary Parties.

Especially where you are claiming an easement by necessity, be sure to join all necessary parties, including neighboring property owners over whose property the easement may run:

> "The trial court found appellants have not openly and notoriously used an easement across parcel "A" in favor of "E." Further, there has been no long, apparent nor continued use of an easement across "A" in favor of "E" for all relevant time periods at issue. The trial court further concluded that owners of adjacent lands over which a road easement could be prescribed were not joined in the action, and that these parties were "necessary for a fair and complete resolution of the plaintiffs' claim for an easement by necessity." We agree. The record demonstrates that at least one survey indicated an easement across parcel "F" which is located immediately east of the appellants' parcel and the owners of parcel "F" are not parties to this lawsuit." *Nunnelee v. Schuna*, 431 N.W.2d 144, 147 (Minn. Ct. App. 1988).

V. DE FACTO TAKINGS.

A. Definition.

Where government takes possession of property and makes improvements to it, even without an eminent domain action or inverse condemnation action, it arguably takes ownership of it. In 1975, the Minnesota Supreme Court issued its opinion in *Brooks Investment Company v. City of Bloomington*, which stated, in pertinent part:

> "The general rule as to the rights acquired through physical condemnation combined with the construction of valuable improvements for the public benefits is stated in 2 Nichols, Eminent Domain (Rev. 3 ed.) s 6.21, as follows:
>
> > '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."

232 N.W.2d 911, 920 (Minn. 1975).

B. The Effect of Brooks is Somewhat Unclear.

Even apart from constitutional issues that are raised, three facts are critical to an understanding of *Brooks*: First, that the city of Bloomington took ownership in that case not by appropriation, but *through a condemnation action*. As the Minnesota Supreme Court noted, the former property owner "commenced a mandamus action against the city, seeking to compel inverse condemnation of the strip . . . [t]he *city thereafter decided to proceed with the condemnation voluntarily*." *Id.* at 912 (emphasis added). Second, the *Brooks* court explicitly limited its holding to the issues before it *in a condemnation action*, namely, which of two successive property owners was entitled to a condemnation award. *Id*. at 915 (stating "the only question we need to decide is: Who is entitled to the condemnation award [?]"). Therefore, the material upon which the City's entire case hinges is dicta, and taken out of its limiting context. Third, the *Brooks* court specifically noted that under Minnesota law, until a condemnation action is brought, the city in possession is a trespasser. "[W]e pointed out . . . an owner of land has a *separate and independent cause of action* to recover damages *that accrued between the original trespass and the condemnation action*." *Id*. at 915-16 (emphasis added).

C. De Facto Takings Does Not Apply to Torrens Property.

As to Torrens property, the Minnesota Supreme Court has explicitly concluded that governmental entitites cannot acquire Torrens property through de facto takings, because de facto takings are too similar to adverse possession:

> "[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. *See Rogers v. Moore,* 603 N.W.2d 650, 657 (Minn.1999) (listing elements of adverse possession). 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")." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 231 - 232 (Minn. 2008).

VI. STAUTORY DEDICATION

A. Definition

Statutory dedication occurs where a governmental entity takes possession of property and maintains a roadway located upon it for at least six years.

The process is created by statute**:**

> **DEDICATION OF ROADS.**
>
> "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." Minn. Stat. § 160.05.

B. Statutory Dedication Can Be Found Even Where the Government Opposes It:

Statutory dedication can be found even over the objection of the governmental entity in question.

> "The city argues that its activities in the turnaround cannot be characterized as the type of repair work contemplated by the statute because it was merely doing what was necessary to access public utilities it maintained in the turnaround for which the city has an easement. . . . Viewing the evidence in this case in the light most favorable to [the property owner], we conclude that she has raised a sufficient issue of fact regarding the city's maintenance of the turnaround to withstand summary judgment on her action to declare the turnaround public." *Rixmann v. City of Prior Lake*, 723 N.W.2d 493, 496, 498 (Minn. Ct. App. 2006).

C. Minnesota Case Law Indicates That Statutory Dedication is a Form of Adverse Possession.

In 1892, the Minnesota Supreme Court noted that claims under the User Statute, first enacted in 1877, were based on a claim of adverse possession:

> "The first paragraph of this section, that which specially relates to the width of roads laid out by supervisors, or county commissioners, was enacted in its present form in 1873, with a proviso authorizing the establishment of cartways two rods wide. In 1877 the legislature remodeled and amended this section, [including] a 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." *Marchand v. Town of Maple Grove*, 51 N.W. 606, 607 (Minn. 1892).

In 1912 the Minnesota Supreme Court held 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:

> "It is obvious, from a reading of the [User S]tatute 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." *Minneapolis Brewing Co. v. City of East Grand Forks*, 136 N.W. 1103, 1103-1105 (Minn. 1912) (emphasis added).

The statutory dedication statute:

> "provides a substitute for the common law creation of highways by prescription or adverse use. During the running of the statute, the township and the public are adverse users." *Shinnemann v. Arago Township*, 288 N.W.2d 239, 243 (Minn. 1980).

D. <u>The Property Taken is the Property Used</u>.

> "Ownership of only that property actually used will pass to the governmental entity by the process of statutory dedication. This will include land used for the roadway, and also the land used for shoulders and ditches." *Barfnecht v. Town Bd. of Hollywood Tp., Carver County*, 232 N.W.2d 420, 423 (Minn. 1975)

E. <u>Exceptions</u>.

Statutory dedication does not apply to platted city streets, which the statute specifically excludes:

> "This subdivision shall apply to roads and streets *except platted streets within cities*." Minn. Stat. § 160.05 subd. 1 (emphasis added).

<u>VII. COMMON LAW DEDICATION</u>

A. <u>Definition</u>.

> "A common-law dedication is one accomplished otherwise than by a plat executed and recorded as required by statute." *Flynn v. Beisel*, 102 N.W.2d 284, 291 (Minn. 1960); *see also Barth v. Stenwick*, 761 N.W.2d 502, 510-511 (Minn. Ct. App. 2009).

Common law dedication occurs where a landowner expresses an intent to dedicate property to a governmental entity, and the entity accepts. The required elements are intent to dedicate and public acceptance.

> "To prove common law dedication, one must show the property owner's express or implied intent to devote land to public use and the public's acceptance of that use. *Wojahn v. Johnson*, 297 N.W.2d 298, 306-7 (Minn.1980)." *Sackett v. Storm*, 480 N.W.2d 377, 379 (Minn. Ct. App. 1992).

B. <u>There is No Set Period of Time which Must Pass for Common Law Dedication to Take Place</u>.

> "Unlike statutory dedication, no specific "waiting" period is required. *Wojahn*, 297 N.W.2d at 306-07 n. 4." *Sackett v. Storm*, 480 N.W.2d 377, 380 (Minn. Ct. App. 1992).

C. <u>An Owner's Intent to Dedicate Can be Inferred, But The Evidentiary Standard is High</u>.

The owner's intention to dedicate can be inferred from the owner's conduct.

> "For example, intent may be inferred from the owner's long assent to, and acts in furtherance of, the public use, from the owner's recognition of the public's need for the use, and from the owner's recognition that the public has a valid claim to the property after using it." *Sackett v. Storm*, 480 N.W.2d 377, 380 (Minn. Ct. App. 1992).

There is a high standard of evidence required for such a showing: Such actions must "*unequivocally* and c*onvincingly* indicate an intent to dedicate." *Security Federal Savings & Loan Ass'n v. C & C Investments, Inc*., 448 N.W.2d 83, 87 (Minn. 1990) (emphasis in original).

The *Sackett* Court noted a predecessor of the plaintiff had testified "that he 'intended that the roadway be dedicated . . . for the general use of the . . . public.'" 480 N.W.2d at 380. In *Mueller v. Drobny*, the Court noted that the plaintiffs' predecessor had acknowledged the right of the public to travel across his property by providing a detour, also on his property, for use in wet weather. 31 N.W.2d 40, 42-43 (Minn. 1948).

However,

> "'Both intent and acceptance can be inferred from longstanding acquiescence in the right of the public' to use the land and 'from acts of public maintenance.'" *Barth v. Stenwick*, 761 N.W.2d 502, 511 (Minn. Ct. App. 2009), *citing Wojahn*, 297 N.W.2d at 307.

D. <u>Public Acceptance</u>.

Public acceptance can also be inferred from the conduct of the parties. It may be established by public use or by public maintenance. "Common user by the public 'is the very highest kind of evidence' of public acceptance of a dedication." *Keiter v. Berge* 219 Minn. 374, 380, 18 N.W.2d 35, 38 (Minn. 1945). Acceptance may also be inferred from the "acts of public officers in improving and maintaining the dedicated property, although the maintenance need not be publicly funded." *Sackett v. Storm*, 480 N.W.2d 377, 380-81 (Minn. Ct. App. 1992).