8 REAL PROPERTY PROBLEMS AND 8 SOLUTIONS USING EASEMENTS
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I. INTRODUCTION.

Easements are a non-possessory interest in real property; a right of use, distinguishable from ownership of the property. "A private easement appurtenant is not an estate in land. It is an incorporeal hereditament which permits use of the land of another in a way fixed by the scope and nature of the easement granted or otherwise acquired." *Farnes v. Lane*, 281 Minn. 222, 224 (Minn. 1968).

Easements are also a flexible tool that can be used to solve problems, or accomplish objectives, in a variety of litigation and transaction contexts. These materials will discuss eight applications of easements to solve problems, based on the experience of the presenters. Please note that this presentation is not intended to be a comprehensive drafting guide; instead, the situations presented are used as a basis to discuss issues arising in the negotiation, litigation, and drafting of easements.

II. EASEMENTS IN GENERAL.

The following principles apply to all easements.

A. Easements Must be in Writing.

The statute of frauds renders oral easements unenforceable:

> No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the parties creating, granting, assigning, surrendering, or declaring the same, or by their lawful agent thereunto authorized by writing. This section shall not affect in any manner the power of a testator in the disposition of real estate by will; nor prevent any trust from arising or being extinguished by implication or operation of law.

Minn. Stat. § 513.04.

> "The statute of frauds applies to grants of easements." *Berg v. Carlstrom*, 347 N.W.2d 809, 812 (Minn. 1984), *quoting Alstad v. Boyer*, 37 N.W.2d 372 (Minn. 1949).

Therefore, express easements must be in writing. Note that this requirement does not apply in the case of easements created by use, such as prescriptive easements and implied easements.

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B. Type of Document.

When the parties have reached an agreement, easements can be created by granting a deed. This is the most common method, and quit claim deeds are most often used. Easements are also often created by a written agreement, which can address issues such as a sharing maintenance costs. SUMMARY GUIDE TO EASEMENTS, HUGH M. MAYNARD AND SHANNON HOAGLAND (Minn. CLE, 2007) .

C. Scope.

1. The scope of the easement is determined by the language of the easement itself:

> The language of the deed expresses the final, binding agreement between the grantor and grantee. *Hubachek v. Brown,* 126 Minn. 359, 362-63, 148 N.W. 121, 122 (1914). . . The scope of an easement created by express grant depends entirely upon the construction of the terms of the grant. *Highway 7 Embers, Inc. v. Northwestern National Bank*, 256 N.W.2d 271, 275 (Minn.1977). The extent of an easement should not be enlarged by legal construction beyond the objects originally contemplated or expressly agreed upon by the parties. *Minneapolis Athletic Club v. Cohler*, 287 Minn. 254, 258, 177 N.W.2d 786, 789-90 (1970).

Larson v. Amundson, 414 N.W.2d 413, 417 (Minn. Ct. App. 1987).

"The process which creates an easement necessarily fixes its extent and therefore the extent of the easement created by a conveyance is fixed by the terms of the conveyance." *Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786, 789 (Minn. 1970).

"Generally, an easement grant is to be strictly construed against the grantor." *Scherger v. Northern Natural Gas Co*., 575 N.W.2d 578, 580 (Minn. 1998).

2. The possibilities are therefore very flexible. For example, an easement can provide for recreation-specific uses such as "boating and bathing." *Nelson v. City of Birchwood*, 2009 WL 3426792, 1 (Minn. Ct. App. 2009).

D. Recording.

Express easements should be properly filed of record. *See* Minn. Stat. §§ 507.34; 508.25.

E. Consent of Mortgagee.

A subordination, or consent, to an express easement should be obtained from the grantor's mortgagee. Otherwise, if said mortgage is foreclosed, the purchaser at the sheriff's sale will own free of the easement:

> Minnesota case law has not directly addressed whether easements receive the same treatment as other encumbrances recorded after the recorded mortgage, but we are unable to discern a reason to treat them differently. . . [W]e conclude that a valid foreclosure of a mortgage terminates all easement interests in the

foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified in the foreclosure action.

In re Crablex, Inc., 762 N.W.2d 247, 253 (Minn. Ct. App. 2009).

III. PROBLEM ONE: NEGOTIATING ACCESS TO REAL PROPERTY.

A. Problem.

Client owns a landlocked parcel, which does not have access to an open and public highway. This can be because the parcel is simply not contiguous to a roadway, or due to the topography of the property – wetlands, a steep grade, etc – that makes direct access impractical. Often in such situations, access over neighboring property can be obtained – for a price.

Related problem: Because of the configuration of the properties, neighbors need to share access.

B. Solution: Negotiate an Express Easement.

1. Generally. For access by a benefitted property, a/k/a dominant tenement, over a burdened property a/k/a servient tenenement, use either a quit claim deed or easement agreement, depending on the circumstances. Where arrangements need to be made for issues such as shared maintenance expenses (see below), an agreement will be a better fit.

2. Title Insurance. If access is by an easement, it is advisable to obtain title insurance to protect the rights provided for in the easement. *See* ALTA Endorsement Form 17.0, the Indirect Access and Entry endorsement.

3. Maintenance costs.

    a. Particularly in the case of a shared driveway arrangement, an easement agreement is likely to be a better fit than a quit claim deed, so that provisions can be made for items including shared maintenance costs.

    b. Costs include factors such as (1) resurfacing pavement, laying gravel, and seasonal grading; (2) taking measures to prevent erosion; (3) trimming tree branches and/or roots; and (4) snow removal.

    c. Should costs be shared equally? Should they be shared based on some other formula? Should periodic maintenance be required? Should parties have rights of maintenance, or instead an obligation to maintain?

    d. You may wish to include a provision that if any party, their guests, invitees or licensees causes any harm to the easement parcel or the improvements located thereon, they shall be responsible to pay for repairs necessitated by said damage.

    e. Note that there is case law in Minnesota standing for the proposition that one benefitting from an appurtenant ingress and egress easement may keep it in

repair, and that the owner of the burdened parcel has no obligation to do so: "Plaintiff concedes that the one possessed of a right of way easement may put it in proper condition for use and keep it in repair, and that the owner of the servient estate is under no obligation to do so." *Bruns v. Willems*, 172 N.W. 772, 774 (Minn. 1919), *citing with approval to Reed v. Board of Park Commissioners*, 110 N. W. 1119 (Minn. 1907).

4. Scope. The scope of the easement should be defined.

    a. Is vehicular or pedestrian traffic intended?

    b. At times, the parties will wish to provide for parking, the placement of trash containers, even leisure activities such as biking or skateboarding on the ingress-egress area. If such uses are intended, they should be explicitly provided for.

5. How Long Will the Solution Last? Effect of the Marketable Title Act. Once the easement is established, how long will it last? The Marketable Title Act ("MTA") provides that claims of interests against real property based on documents, events or transactions forty years old or older are invalid against sources of title which are at least forty years old:

> **Commencement.** As against a claim of title based upon a source of title, which source has then been of record at least 40 years, *no action affecting the possession or title* of any real estate shall be commenced . . . *to enforce any* right, claim, *interest*, *incumbrance*, or lien founded upon *any instrument*, event or transaction which *was executed or occurred more than 40 years prior to the commencement of such action*."

Minn. Stat. § 541.023, subd. 1 (emphasis added). "Easements are among the property interests that can be eliminated under the MTA." *Sampair v. Village of Birchwood*, 784 N.W.2d 65, 69 (Minn. 2010).

Under the MTA, abandonment of the interest is presumed after passage of time:

> Any claimant under any instrument, event or transaction barred by the provisions of this section shall be conclusively presumed to have abandoned all right, claim, interest, incumbrance, or lien based upon such instrument, event, or transaction . . . it being hereby declared as the policy of the state of Minnesota that, except as herein provided, ancient records shall not fetter the marketability of real estate.

Minn. Stat. § 541.023, subd. 5. Further:

> [F]or the MTA to operate in a particular case to extinguish any interest, two requirements are necessary: (1) "the party desiring to invoke the statute for his own benefit must have a requisite 'claim of title based upon a source of title, which source has then been of record at least 40 years'"; and (2) "the person against

> whom the [MTA] is invoked must be one who is 'conclusively presumed to have abandoned all right, claim, interest * * * ' in the property.

Hersh Properties, LLC v. McDonald's Corp., 588 N.W.2d 728, 735 (Minn. 1999), *quoting from Wichelman v. Mesnner*, 83 N.W.2d 800, 819 (Minn. 1957):

Among the exceptions to the MTA are the following:

a. Where a Notice of Claim is Filed. The MTA applies

> unless within 40 years after such execution or occurrence there has been recorded in the office of the county recorder in the county in which the real estate affected is situated, a notice sworn to by the claimant or the claimant's agent or attorney setting forth the name of the claimant, a description of the real estate affected and of the instrument, event or transaction on which such claim is founded, and stating whether the right, claim, interest, incumbrance, or lien is mature or immature.

Minn. Stat. § 541.023.

b. Registered, Torrens property: Minn. Stat. § 541.023, subd. 2(a): "[T]his section does not apply to real property while it remains registered according to chapter 508 or 508A." Note, however, that Subd. 2(b) provides narrow exceptions to this rule.

c. Possessory Interests. The interest of one in possession of real property is not barred by operation of the MTA. "This section shall not . . . bar the rights of any person, partnership, or corporation *in possession* of real estate." See, Minn. Stat. § 541.023, subd. 6 (emphasis added).

The Torrens and notice exceptions could readily apply to easements, but can the possession exception apply to non-possessory interests like easements? Yes, because Minnesota courts have held that "[e]ven though easements are not possessory estates, the possession exception of the MTA may be invoked by easement holders." *Sampair v. Village of Birchwood*, 784 N.W.2d 65, 69 (Minn. 2010).

Minnesota courts have applied a standard for establishing possession which takes into consideration the scope of the easement, and notice to the servient tenement owner of a claim:

> We conclude that the Marketable Title Act possession standard for easements is a more flexible possession standard than the standard urged by Fasting and that due regard must be given to the nature of the easement. After all, occasional-use easements do not prevent all use of the easement premises by the owner of the servient estate. Such easements are by definition less than fee

> title. It would be illogical to insist that possession sufficient to protect such easements be the same intensity of possession as required to establish or maintain fee title or an intensively used easement like a road. However, the use must be sufficiently obvious so that a prudent person would be put on inquiry regarding the existence of the easement. *Lindberg v. Fasting*, 667 N.W.2d 481, 486-487 (Minn. Ct. App. 2003)

The party asserting the possession exception must show evidence that would "put a prudent person on notice of the asserted interest in the land, giving due regard to the nature of the easement at issue." *Sampair v. Village of Birchwood*, 784 N.W.2d 65, 70 (Minn. 2010).

IV. PROBLEM TWO: ENFORCING ACCESS TO REAL PROPERTY.

A. Problem.

Your client has a parcel that does not have access. Unlike the situation described above, however, the neighbor is unwilling to allow access. Can you force the issue and compel the neighbor, through the litigation process, to allow access? In many situations, you can. Keep in mind, though, that such litigation is expensive and stressful for the parties.

B. Solution: Lawsuit to Establish an Easement.

1. Litigation, Generally. Obviously, litigation is not to be entered into lightly. Similar to boundary litigation, litigation to impose access is fact sensitive, expensive, and often emotionally charged. And, the outcome of litigation is necessarily uncertain to a degree.

2. Prescriptive Easements.

   a. Generally. Defined as 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." *Magnuson v. Cossette*, 707 N.W.2d 738, 745 (Minn. Ct. App. 2006).

   b. Compared to Adverse Possession. Prescriptive easements are analogous to, and 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); *see also 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). "[T]he 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. Ct. App. 2006).

"A prescriptive easement requires the same elements [as adverse possession], 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).

Because *use* is at issue instead of *possession*, the element of continuity will differ from that required to establish adverse possession. "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).

The meaning of the term "exclusive use" also differs as compared to adverse possession, as multiple parties can make use of the same easement. "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).

c. The Public. The public can also obtain an easement by prescription. *See Quist v. Fuller*, 220 N.W.2d 296 (Minn. 1974). Generally, one cannot obtain a prescriptive easement over any public lands. Minn. Stat. § 541.01.

d. Torrens Exception. 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.

3. Implied Easements:

a. Generally. Implied easements often 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. *Olson v. Mullen*, 68 N.W.2d 640, 646 (Minn. 1955), *citing* Restatement, Property, § 476, Comment (a).

b. Types of Implied Easements.

i. 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." *Romanchuk v. Plotkin*, 9 N.W.2d 421, 424 (Minn. 1943).

ii. Easements 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).

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. *Lake George Park, L.L.C. v. IBM Mid America Employees*, 576 N.W.2d 463, 466 (Minn. Ct. App. 1998).

iii. This is an equitable doctrine, and whether the servient tenement is still owned by the grantor in the severing transaction bears on the equities. *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).

c. Factors Considered. There are three factors which are typically examined in implied easement cases:

"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).

Although those three factors 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).

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).

The purpose of examining the factors is to determine whether an intention to create the easement could be implied 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).

The factors are examined as of the time of the severing transaction: E.g., "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).

Exception: 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).

Note: There is no minimum time which must pass 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).

d. Effect of Torrens Status: The Court of Appeals has held, in an unpublished decision, that implied easements cannot be obtained against Torrens property: "The district court was correct when it concluded that the Torrens Act generally bars easements by implication." *Crablex, Inc. v. Cedar Riverside Land Co*., WL 729210, 4-5 (Minn. Ct. App. 1997). Minnesota law provides that Torrens property will not be subjected to unregistered claims: "Registered land stands on a different footing than unregistered land: The purpose of the Torrens law is to establish an indefeasible title free from any and all rights or claims not registered with the register of titles, with certain unimportant exceptions, to the end that *anyone may deal with such property with the assurance that the only rights or claims of which he need take notice are those so registered*." *Mill City Heating and Air Conditioning Co. v. Nelson*, 351 N.W.2d 362, 364 (Minn. 1984) (emphasis added). An implied easement would, of course, be an unregistered claim.

e. Easement By Estoppel. Under a similar doctrine called easement by estoppel, one who induces another to change their position by a represention concerning an easement will be stopped from denying that easement later.

For example, a seller who represents to a buyer that the buyer will have access over seller's property is later estopped from denying said access: . "As an inducement to the purchase of these lots by plaintiffs, or their predecessors,

defendants represented to them that they would have an adequate road for ingress to and egress from their property, and they actually assisted plaintiffs in locating such road, which was constructed partly over defendants' land. By such representations, plaintiffs not only were induced to purchase these lots but improved the same by erecting buildings of substantial value. Defendants should now be estopped to deny their right to use such road. The statute of frauds does not prevent the application of the doctrine of equitable estoppel." *Poksyla v. Sundholm*, 106 N.W.2d 202, 204 - 205 (Minn. 1960).

A more recent unpublished Court of Appeals decision applies the doctrine to a party other than the grantor. *Ebner v. Johnson*, WL 454736, 2-3 (Minn. Ct. App. 1994).

4. Cartways.

   a. Generally: "Cartway" is not a statutorily defined term, but is perhaps best described as a combination of a public road and a private driveway. In the classic scenario, the owner of a landlocked parcel petitions to the township, county, or city for the establishment of a cartway over another owner's land in order to allow access to the landlocked parcel.

   b. Establishing a Cartway in a Township: Until recently, only townships (or counties in unorganized territories) could establish cartways. The process for establishing a cartway in a township is provided in Minn. Stat. § 164.08.

      i. There are two possible approaches under the statute: First, under Subd. 1, which permits establishment of cartway two rods wide and not more than ½ mile in length if: (a) Petition is signed by at least five voting landowners of the town; (b) Requested cartway is on a section line; and (c) Benefitting land is at least 150 acres, of which at least 100 acres are tillable.

      ii. Subd. 2 provides for the mandatory establishment of cartway by a town board, which is to be at least two rods wide, if:

         (a) Benefitting land is at least five acres; or at least two acres if the tract was on record as of January 1, 1998 as a separate parcel. Note, however, that multiple landowners may aggregate parcels to meet five acre requirement. *Watson v. Board of Supervisors of Town of South Side*, 239 N.W. 913 (Minn. 1931). And, submerged land is counted toward acreage requirement. *Slayton Gun Club v. Town of Shetek, Murray County*, 176 N.W.2d 544 (Minn. 1970);

         and

         (b) There is lack of access to said land except over water, the land of others, or access is less than two rods wide. Note that *In re Daniel*, 656 N.W.2d 543 (Minn. 2003) held that access by navigable water was sufficient access to land, and the owner did not qualify for a cartway. The legislature changed this result by

amending the statute in 2004 to clarify that water access did not make an owner ineligible for a cartway.

Owners with only impractical access to their property (e.g., steep terrain) may also be eligible for a cartway. *State Ex. Rel. Rose v. Town of Greenwood*, 20 N.W.2d 345 (Minn. 1945); *Schacht v. Town of Hyde Park*, 1998 WL 202655 (Minn. Ct. App. 1998)

(c) Damages must be paid by petitioner to town before cartway is opened. Damages include compensation to servient landowner(s) and cost of professional and other services and administrative costs and fees (Ex: board's attorneys' fees, surveys, appraisals, recording fees). Board may require petitioner to post bond before it acts on petition.

(d) Regarding construction and maintenance, no town road or bridge funds may be used on the cartway unless the board determines that the expenditure is in the public interest.

c. Establishing a Cartway in a City: Minn. Stat. § 435.37, which went into effect in 2007, permits cities to establish cartways. The conditions are similar to Minn. Stat. § 164.08, subd. 2, with some distinctions, including that there is no exception for two acre parcels—the petitioning property must be at least five acres.

d. Cartway Procedure: Upon finding that the petitioner meets the cartway criteria, the town board, county commissioners, or city council must follow the procedure provided in Minn. Stat. § 164.07 to establish (or vacate, if under 164.08) the cartway. The procedure has three main components: the petition, notice, and the hearing.

e. See the statutes for additional details.

5. Statutory Dedication.

a. Definition. Similar to easement by prescription, statutory dedication occurs where a governmental entity takes possession of property and maintains a roadway located upon it for six years. The process is created by statute, to wit:

> **DEDICATION OF ROADS.** Subd. 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. The Property Taken is the Property Used. "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).

c. Impact of Torrens Status: Statutory dedication of Torrens property is prohibited. In 2010, the Minnesota Court of Appeals concluded that, "because statutory dedication operates fundamentally similar to adverse possession, it is prohibited by the Torrens Act." *Hebert v. City of Fifty Lakes,* 784 N.W.2d 848, 855 (Minn. Ct. App. 2010).

6. Common Law Dedication.

a. Generally: Common law dedication occurs where a landowner expresses an intent to dedicate property to a governmental entity, and the entity accepts.

b. Elements: 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." *Sackett v. Storm*, 480 N.W.2d 377, 379 (Minn. Ct. App. 1992). "Unlike statutory dedication, no specific "waiting" period is required." *Id.* at 380.

c. The Elements Can be Implied: "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. 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).

d. Impact of Torrens Status: In 2010, the Minnesota Court of Appeals concluded that common law dedication of Torrens property is impermissible if the landowners' intent to dedicate a roadway is implied: "[C]ommon-law dedication based on an implied intent to dedicate is prohibited under the Torrens Act as well. As the supreme court held in *Moore v. Henricksen,* "[s]ince, by [Minn.Stat. §] 508.02, possession may not ripen into title against the holder of a registration certificate, a purchaser has no reason to assume that possession is adverse to the registered title." 282 Minn. 509, 520, 165 N.W.2d 209, 218 (1968). Thus, even if a landowner is aware of another's possession or use of his Torrens property-which is the nature of an implied intent to dedicate-this awareness does not diminish the owner's interest in the Torrens property. *See id.* (concluding that use of the property by another for 30 years did not diminish the owner's property interests)." *Hebert v. City of Fifty Lakes*, 784 N.W.2d 848, 855 (Minn. Ct. App. 2010).

7. Title Insurance. Finally, keep in mind that title policies may guarantee access. For example, The ALTA Owner's Policy "insures, as of Date of Policy . . . against loss or

damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of: . . . [n]o right of access to and from the Land." ALTA Owner's Policy 2006, "Covered Risks." Therefore, if your client has purchased property which you later determine lacks legal access, investigate whether a title claim may be tendered.

V. PROBLEM THREE: RESOLVING AN ADVERSE POSSESSION OR BOUNDARY BY PRACTICAL LOCATION CLAIM.

A. Problem.

Your client has had a survey done and they have learned that a neighbor has an encroachment located on the client's property that may result in a claim for adverse possession or boundary by practical location. They are reluctant to sue the neighbor.

The neighbor admits to the encroachment, and is not concerned with owning the subject property, but doesn't want to move the offending object (e.g., driveway, fence, retaining wall, etc.). Your client does not want to surrender ownership of the encroachment parcel.

B. Solution.

1. Generally. Consider a facility easement agreement. It is a way to allow an encroaching object to remain, subject to terms which may be negotiated. "Facility easements allow placement of a building or other structure on a burdened parcel. May be short term, i.e., temporary signage easement, but most are long term, i.e. retaining walls, fences, electrical substations." SUMMARY GUIDE TO EASEMENTS, HUGH M. MAYNARD AND SHANNON HOAGLAND (Minn. CLE, 2007).

2. Duration. Consideration should be given to a provision for the termination of the easement.

    a. For example, the easement can be terminable upon the modification of the encroaching object. "The Easement shall run with the land and shall be binding upon Grantor and Grantor's heirs, successors and assigns and shall be for the benefit of Grantee, their heirs, successors and assigns, except that the Easement shall terminate upon the removal or demolition of the building that is located on the Easement Parcel as of the date of the granting of this easement."

    b. It can also be terminable at the end of a set period of time.

    c. Another possibility is to grant a license that is personal to the owner of the benefitted property, but will terminate at such time as said owner sells the benefitted property.

3. Purpose: Similarly, the easement can provide that its scope, or purpose, is specific to the encroachment: "The Easement shall be for the following purposes and uses of the Easement Parcel: To maintain a building presently existing on said Easement Parcel."

4. Adverse Possession /Boundary By Practical Location Issues.

    a. Granting a facility easement, in and of itself, probably will not be enough to overcome an adverse possession or boundary by practical location claim, particularly if this is done after the encroachment has existed for some time. *See Naporra v. Weckwerth*, 226 N.W. 569, 571 (Minn. 1929) (holding, "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").

b. Note that a boundary by practical location claim is a possibility even for Torrens property. Minn. Stat. § 508.02.

c. To prevent an adverse possession or boundary by practical location claim, it will be advisable to get a release or waiver of such claims from the owner of the benefitted parcel in exchange for the easement.

5. Enforcement Provisions. Another term that can be included in an easement agreement is a term providing for enforceability of the agreement, such as through imposition of attorney's fees in case of violation of the easement.

6. Benefits to Client.

a. Your client will retain ownership of the parcel in question. This could affect setback lines, minimum lot size requirements for building entitlements or splitting out parcels, and so forth.

b. Further, your client will retain the right to use the parcel subject to the limitation that said use cannot interfere with the easement: "Generally, the grant of an easement over land does not preclude the grantor from using the land in a manner not unreasonably interfering with the special use for which the easement was acquired." *Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786, 789–790 (Minn. 1970).

VI. PROBLEM FOUR: RESOLVING BOUNDARY LINE ISSUES.

A. Problem.

Your client has had a survey done for commercial property they are planning to sell, which indicates a problem. Neighbors, who own adjacent, residential property, have structures which encroach across the property line.

One frequently used solution for such encroachments is a quit claim deed exchange, in which the parties swap deeds to the respective properties with a corrected legal description to create a new boundary line. In this situation, that solution won't work because the City has indicated that a transfer of title will require rezoning the encroachment parcels from residential to commercial. The process will be expensive and could delay the closing.

Your client, and the buyer, do not care about the small encroachments. They want to proceed to closing. But the encroachment issue must be resolved.

B. Solution.

1. Generally. Consider a facility easement done in the form of a quit claim deed. It is a way to allow an encroaching object, or facility, to remain. And, while it will not necessarily prevent

a claim of ownership by the encroaching party, it can be an expedient means of resolving a title issue.

2. Closing Issues. Any time you are making an arrangement that will affect the title to real property when a sale is pending, you will want to:

    a. Communicate with buyer or buyer's counsel, and buyer's title services provider, to make sure the proposed solution is acceptable.

    b. Review the purchase agreement and consider a formal amendment to the purchase agreement accounting for the arrangement.

    c. Check to see if the title company adds additional requirements for buyer to comply with prior to closing.

    d. Consider whether to modify the deed to include an exception from the warranties of title for the easement in question.

3. Make Sure Not to Grant Fee Simple Title By Accident. If a deed is used to convey an easement, and the term "easement" is not used to reflect that a limited interest is being granted, it may be determined that fee simple title has been granted, as the Minnesota Supreme Court held in 1893, for a deed that read: "'[S]aid parties of the first part do hereby also grant to the said party of the second part a strip of land described as follows, to wit, [then follows description of a tract 183 feet long, from north to south, and 12 feet wide, from east to west,] *for a road to and from said premises first above described*.' The question is whether, in view of the clause italicized, this deed conveyed an absolute fee, a conditional fee, or a mere easement, in the tract last described. . . . There is nothing in the deed reserving to the grantor any use of, or dominion over, the land; and the rule is that, if the grant be of the uses of and dominion over land, it carries the land itself. . . . According to all the authorities this deed would be held to convey the fee." *Soukup v. Topka*, 55 N.W. 824, 824-825 (Minn. 1893) (emphasis original; citations omitted).

VII. PROBLEM FIVE: EXPANDING ACCESS AND PARKING FOR AN OUTLOT.

A. Problem .

Your client is negotiating the purchase of an outlot in a retail development. They have access to a public road in the front. However, they would like better access, from two access points instead of one, to facilitate a drive-through, and to improve traffic flow. They would also like to add additional parking. There is adjacent parking in the commercial development. There are no pre-existing easements that would address these issues.

B. Solution.

1. Generally. Enter into a reciprocal easement agreement for parking and ingress/egress, by agreement with the owner of the other lot with which access and parking are to be shared.

2. Timing: Often times, such deals are one-sided. Therefore, if you are giving little, you need to secure the agreement for an easement prior to purchasing; here, the only leverage we had was seller's desire to get the lot sold.

3. Describing the Easement Parcel:

    a. In a perfect world you would obtain legal descriptions for the parking area and ingress/egress area. At times, however, such descriptions can be impractical.

    b. Though not preferable, terms such as "an easement for parking 50 automobiles in the parking lot south of the office building on the Burdened Parcel" can be used. SUMMARY GUIDE TO EASEMENTS, HUGH M. MAYNARD AND SHANNON HOAGLAND (Minn. CLE, 2007).

    c. The language should be precise: The extent of an easement by express grant "depends entirely upon the construction of the terms of the grant. . .. Only when ambiguities exist may the circumstances surrounding the grant be considered. As the language of the grant becomes less precise, the circumstances of the grant grow in importance as an interpretive aid." *Highway 7 Embers, Inc. v. Northwestern Nat. Bank*, 256 N.W.2d 271, 275 (Minn. 1977) (citations omitted, emphasis added). Litigating such issues is unpredictable and expensive.

    d. Graphic depictions of the parking easement areas are sometimes used. "The lease agreement's legal property description included Bradley's easement to use parking facilities at the Terrace Mall owned by Montgomery Ward. The description of common facilities in section 5 of the lease agreement included the parking facilities owned by Montgomery Ward. Specifically, section 5.1 granted North Memorial "the non-exclusive right to use the parking facilities of the Shopping Center, shown on the plan attached as Exhibit A." *Brown v. Bradley Real Estate Trust*, 1998 WL 887473, 3 (Minn. Ct. App. 1998).

    e. Be sure to avoid "blanket easements" which can restrict what your client does with their property down the road (no pun intended).

4. Some Terms to Consider in a Reciprocal Easement Agreement.

    a. Indemnification/Insurance Requirement. Where owners are allowing use of their property by others, liability for personal injuries and the like is an issue. *See, e.g., Brown v. Bradley Real Estate Trust*, 1998 WL 887473, 2 (Minn. Ct. App. 1998).

    An agreement by the parties to indemnify each other may appear to be an attractive option. However, such an agreement could create an uninsured obligation for the indemnifying party, due to the "contractually assumed liability" exclusion in some policies. *See, e.g., Acceptance Ins. Co. v. Ross Contractors, Inc*., 2005 WL 1870688, 3 (Minn. Ct. App. 2005) (noting, "the contractually-assumed liability exclusion applies where the insured has contractually assumed the liability of a third party, as in an indemnification or hold harmless agreement,", quoting from *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65, 81 (Wis.2004)).

    An alternative is to simply require insurance coverage by the benefitting parcel owner, and mandate that proof of insurance be provided periodically.

    b. Maintenance. It may or may not make sense to have the parties share maintenance costs, depending on the use that the easement parcel will be put to. Each party can

simply maintain that part of the easement parcel that each owns fee title to; or, another option is to divide the maintenance obligation for the easement parcel on a per capita basis, such as the respective square footage of the parties' retail space.

c. Reasonable Use. A provision can be inserted to clarify that respective owners shall not interfere with the others' use of the easement parcel, e.g., "The easements granted herein shall be used and enjoyed by each owner and their employees, agents, contractors, customers, invitees and licensees in such a manner so as not to unreasonably interfere with, obstruct or delay the conduct and operations of the business of any other owner and their respective employees, agents, contractors, customers, invitees and licensees conducted at any time on its parcel, including, without limitation, public access to and from said business, and the receipt or delivery of merchandise in connection therewith." Such a provision can also expressly prohibit any obstruction of the easement area by structures, plantings, and so on.

d. Exclusions. Provisions can be inserted:

i. To allow the parties to maintain control of the parcel in question by indicating that no implied easements are created by the agreement in question,

ii. providing that no rights in the public at large are created by the easement agreement, and/or

iii. disallowing undesirable uses of the parcel, such as heavy equipment traffic across pavement.

VIII. PROBLEM SIX: UTILITY EASEMENT ISSUES.

A. Problem.

Due to space needs, the client wishes to builds a retaining wall on the city's platted utility easement to expand the building envelope.

Or, you may have a blanket utility easement that needs to be confined so the rest of the property can be used. "A 'blanket' easement is an easement granted over a large defined area of property." *Scherger v. Northern Natural Gas Co*.,575 N.W.2d 578, 579 (Minn. 1998).

B. Solution.

1. Enter into an agreement with the party holding the easement permitting the use in question.

a. Improvements located within the easement can include electric lines, gas lines, sanitary sewer, municipal water and storm water pipes, conduits, water collection mechanisms, drainage facilities, and other utility appurtenances.

b. Here, in the retaining wall scenario, the City required that we agree to remove the improvements as needed for them to access easement facilities, and to pay them any extra expenses incurred due to the location of the retaining wall.

2. Request confinement of easement by utility. Minn. Stat. § 301B.03(a) provides that "public service corporations . . .must definitely and specifically describe the easement being acquired, and may acquire an easement in a width necessary for the safe conduct of their business."

   That statute further provides:

   > When a question arises as to the location, width, or course of an easement across specific property and the recorded description of the easement does not include a definite and specific description of the location, width, or course of the easement by a method identified in paragraph (b), clause (1) or (2), the public service corporation holding the easement shall, upon written request by the specific property owner, produce and record in a timely manner an instrument that provides a definite and specific description . . . The definite and specific description *must be the minimum width necessary* for the safe conduct of the business of the public service corporation with respect to the language of the original easement.

   Minn. Stat. § 301B.03(c) (emphasis added).

   "In the partial release or other instrument, a public service corporation may reserve: (1) the right of reasonable ingress and egress over and across the released property, provided that it shall agree to pay any damages caused by the exercise of such rights; and (2) additional conditions and restrictions permitted in the original easement." Minn. Stat. § 301B.03(c).

   This section applies to every easement over private property acquired by a public service corporation, regardless of when the easement was acquired or created. Minn. Stat. § 301B.03(d).

IX. PROBLEM SEVEN: NEGATIVE AND CONSERVATION EASEMENTS.

A. Problem.

There is a need to preserve a view, to keep trees in an area, and so on. In one case, we negotiated a complex property dispute down to one last discussion point – the other landowner did not want to allow construction of a dock that would obstruct the lake view.

B. Solution.

Negative easement for light, air, lateral support, water flow.

C. Discussion Points.

1. A negative easement bans or restricts a particular use on the burdened land. It does not allow the owner of the dominant estate to make some direct use of the burdened land. They have long been recognized in Minnesota. An easement for air for example being mentioned in 1882, *Johnson v. Skillman*, 12 N.W. 149, 150 (Minn. 1882).

A negative easement may include an easement for light; for air; for lateral support or water flow as examples.

Easements can be taken to secure to one property owner lateral support of his own property. In one reported decision, the State obtained an easement by way of condemnation first. That easement was for lateral support for the city street and abutting property. However, in the construction process, plaintiff homeowner's lot was damaged because of excavation. The city having acquired an easement by condemnation for support of the City property, proceeded to remove support from the burdened property causing collapse, a certain amount of irony there. The City was held liable for damages. The earlier condemnation did not include an award for the ultimate collapse of the owner's land; that issue was not tried or decided, only the city's taking for its own support. *Brewitz v. City of St. Paul*, 99 N.W.2d 456, 461 (Minn. 1959)

The right to lateral support is an absolute right. *McCullough v. St. Paul, M. & M. Ry. Co.*, 53 N.W. 802, 802 (Minn. 1892).

2. Negative easements won't generally be implied. Negative easements must be consciously, intentionally created, at least generally. They will seldom be found via inference so a drafter must be explicit. A negative easement remains an interest in land governed by the statute of frauds; thus, it "must" be created by a writing.

   Land purchased by the Department of Natural Resources as a public water access site was not encumbered by a negative reciprocal easement restricting its use to single family residences, where the purchased land and all adjacent property was at one time owned by grantor, grantor sold some of the land, unencumbered, to developer which platted it and restricted its use, grantor then purchased one lot in the developed property joining it with adjacent unencumbered property he owned, and then sold the unencumbered property, which he had never sold to developer, to the Department with no encumbrances. *Stony Ridge and Carlos View Terrace Ass'n, Inc. v. Alexander*, 353 N.W.2d 700 (Minn. Ct. App. 1984).

   It is generally accepted that a fee owner owns the right to make use of his property to the fullest extent possible; thus a negative easement won't be implied normally. *Mission Covenant Church v. Nelson*, 91 N.W.2d 440, 443 (Minn. 1958).

3. Negative Easement for View Implied? One of the regularly cited decisions on interpretation of negative easements is *Highway 7 Embers, Inc. v. Northwestern Nat. Bank*, 256 N.W.2d 271, 277 (Minn. 1977). The court states that it won't engage in much interpretation that results in any expansion of negative easements. Does that rule hold up? *Johnson v. Skillman* also indicates that an easement allowing an owner to maintain a pond or reservoir on another's property cannot be inferred but must be express.

4. Must a holder "use" a negative easement? It is possible to lose an easement right by non-use. But there is no duty to use an easement, generally. How would the holder of a negative easement abandon it? In this case, an alley used to make deliveries to a hamburger shop was transformed over time to a covered walkway, then to a hamburger shop. Alternate parking for delivery trucks was arranged. The Supreme Court found that even an easement created by an express grant such as this one was, could be lost by abandonment. Obvious affirmative act was the acquisition of alternate parking. *Simms v. William Simms Hardware (State Report Title: Simms v. Fagan)*, 12 N.W.2d 783, 788 (Minn. 1943).

The clearest case for the abandonment of a negative easement would seem to be established if there was proof of abandonment of the benefited estate. Then it seems plain that the negative easement could be found to be abandoned.

5. Easements for view, light, air. A decision from 1882 presumes existence of easements for light, air and view:

> In cases, however, of what are sometimes called negative easements, which are extended on the land of the licensee, a different rule prevails; as, where a man has an easement of light and air upon or over an adjacent lot, he may abandon the same, and license the erection by his neighbor of a building, which shall extinguish right, and the license become irrevocable. Morse v. Copeland, 2 Grey, 302; Goddard, Easem. 472. Nor is it material that a mere license is or is not in writing, or upon a consideration.

Johnson v. Skillman, 12 N.W. 149, 150 (Minn. 1882).

There is a right to light and to air, but it is not, obviously, unlimited. Why do homes get built that obstruct or reduce other's views?

> Not every diminution in the value of property caused by public improvement entitles the owner to recover. The damage must be to the property itself. That sum of rights which is the property must be damaged in substance, or rendered intrinsically, rather than esthetically, less valuable. 'The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself so much as an influence affecting its use for certain purposes; but whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation.' *Eachus v. Los Angeles Consolidated Electric Ry. Co.*, 103 Cal. 614, 617, 37 P. 750, 751, 42 Am.St.Rep. 149, 152, quoted in I Lewis, Eminent Domain (3 ed.) 669.

It all comes back to the point, on this phase of the argument, that no easement appurtenant to plaintiffs' lot entitled them to a view, limited only by human vision, over the whole reach of the boulevard in front of their lot. *McCarthy v. City of Minneapolis*, 281 N.W. 759, 761 (Minn. 1938).

D. Conservation Easements.

1. Generally. A conservation easement is another type of negative easement, to restrict use of land in a natural form, at the behest of government or private landowners. And once granted, the restriction on use must be considered in its valuation.

In one case, a landowner sold an easement right into the RIM program for preservation as a wetland in return for a one time payment. He asked the assessor to re-assess the land burdened by the conservation easement. The assessor declined. The tax court ordered re-assessment as wetland recognizing the restriction on use in perpetuity. *Oberlin v. County of Nobles*, 1999 WL 436791, 2 (Minn. Tax 1999).

2. Creation of Conservation Easement under Minn. Stat. § 84C. Statutory language regarding drafting of a conservation easement:

> (a) Except as otherwise provided in this chapter, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.
> (b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.
> (c) Except as provided in section 84C.03, clause (b), a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.
> (d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

Minn. Stat. § 84C.02. See also Minn. Stat. § 103F.903 regarding wetland establishment.

3. A negative easement is a property right subject to taking by condemnation and resulting damage award. A negative easement generally is an obligation running with the land where a promise is made not to use property in a particular fashion, rather than authorizing its use by another. A negative easement is a right in real property and carries compensable value. *Burger v. City of St. Paul*, 64 N.W.2d 73, 78 (Minn. 1954).

X. PROBLEM EIGHT: LAKE ACCESS EASEMENTS.

A. Problem.

Your client is selling lakefront property, and wants to retain access to the lake, including riparian rights (see below).

B. Solution.

Retain an easement – but there are wrinkles (see below).

C. Discussion Points.

1. The Nature of Riparian Rights. An owner of property adjoining water has an extra "stick" in their bundle of rights: Riparian rights. Riparian rights are rights incident to an estate in land which adjoins a body of water such as a lake. Riparian rights include the right of access to the water; the right to install and use a dock; and other rights of value. *Farnes v. Lane*, 161 N.W.2d 297, 299 (Minn. 1968); *see also Nelson v. DeLong*, 7 N.W.2d 342, 346 (Minn. 1942).

   "A riparian right-holder does not own the water; rather, a person who owns a lakeshore or lake bed has the riparian right to use and enjoy the water." *Nelson v. City of Birchwood*, 2009 WL 3426792, 5 (Minn. Ct. App. 2009), *citing Pratt v. State, Dep't of Natural Res.*, 309 N.W.2d 767, 772 (Minn. 1981). Those rights depend on a fee simple interest in the shore land:

   > There are certain interests and rights vested in the shore owner which grow out of his special connection with such waters as an owner. These rights are common to

> all riparian owners on the same body of water, and they rest entirely upon the fact of title in the fee to the shore land.

Sanborn v. People's Ice Co., 84 N.W. 641, 642 (Minn. 1900).

One authority asserts that the land must touch the water to attach riparian rights:

> Riparian land is land so situated with respect to the body of water that, because of such location, the possessor is entitled to the benefits incident to the use of the water. The land must touch upon the water and be under one ownership and within the watershed. If there is a severance of ownership, the land that does not touch upon the water ceases to be riparian.

BURBY, REAL PROPERTY (3 ed.) § 19a, quoted with approval in *Farnes v. Lane*, 161 N.W.2d 297, 299 (Minn. 1968); s*ee also McLafferty v. St. Aubin*, 500 N.W.2d 165, 167 (Minn. Ct. App. 1993) to same effect:

> At least one case holds that in this situation, a street easement carries with it *no* riparian rights. *Tolchester Beach Improvement Co. v. Boyd*, 161 Md. 269, 156 A. 795, 798 (Ct.App.1931). Further, a treatise on the subject asserts that riparian rights depend on the owner's property touching the water.

Riparian rights do not run to the holder of an access easement. *Thompson v. Enz*, 379 Mich. 667, 154 N.W.2d 473, quoted with approval in *Farnes v. Lane*, 161 N.W.2d 297, 299 (Minn. 1968).

Riparian rights may be shared; the fact that the city had a dedicated street easement abutting the lake did not give it exclusive rights. *McLafferty v. St. Aubin*, 500 N.W.2d 165, 167 (Minn. Ct. App. 1993).

A holder of an access right does not have the bundle of rights held by a fee owner; but what rights he does or does not have becomes a case by case testing. An access easement will not give the benefitted party other rights – such as the right to construct a dock on the water – unless the easement can fairly be interpreted to provide for it.

One case, *Nelson v. City of Birchwood*, 2009 WL 3426792 (Minn. Ct. App. 2009), involved a dispute between lot owners and a city that had competing interests in a small lakefront triangular lot. The individuals were each granted a "Right of Way" over the triangle for boating and bathing. They argued that this should include a right to build docks. The Court stated it was necessary to review the law of riparian rights to interpret the easement grant.

In another decision, the city's present limited use of a beach area could not bar the individual property owners from maintaining docks on the lake. It seems important here that the road in question did not even appear to be public; and that observers would believe the land was privately held. *McLafferty v. St. Aubin*, 500 N.W.2d 165, 168 (Minn. Ct. App. 1993).

The question there may be what happens when the City wishes to expand its use. In dicta, the Court remarked the individuals' rights may have to yield if the City wishes to change its use in the future.

Cities still hold municipal power of regulation:

> Even if appellants gained riparian dock-installation rights under the easement, those rights are "qualified, restricted, and subordinate to the paramount rights of the public." *Nelson,* 213 Minn. at 431, 7 N.W.2d at 346.

Nelson v. DeLong, 7 N.W.2d 342, 346 (Minn. 1942), cited by *Nelson v. City of Birchwood*. In *City of Birchwood*, the Court states the city may impose reasonable regulations where it has rights overlapping those of private owners.

2. Ownership of riparian rights is in common with others. A holder is not permitted to drain a river or lake, or remove the shore line. (Though all my lake neighbors water the lawns with lake water). And the fact that damages may be available for the loss may not be adequate compensation due to uniqueness of waterways, so an injunction against draining away water may be authorized. *Petraborg v. Zontelli*, 15 N.W.2d 174, 183 (Minn. 1944).

   In another conflict between public and private use, a lake was non-navigable, very shallow, full of wild rice and marsh, and best suited for duck hunting. It contained no fish. (Like my lake). One former owner conveyed by deed to the public a right to travel over the lot for access to the lake reciting: "grant, convey, bargain and sell unto the public a perpetual easement for road purposes over and across the lands." *Bartlett v. Stalker Lake Sportsmen's Club*, 168 N.W.2d 356, 359 (Minn. 1969). The Court recognized a common law dedication; and required little on the part of the public to accept the dedication.

3. Easements for access will be strictly construed (sometimes). Some decisions involve interpretation of the easement. Three illustrative decisions reach distinct results when walking access to a lake or river is granted and the holder wants to build a dock out onto the lake. In these decisions, an easement which expressly authorized pedestrian access to a lake, did not expressly authorize the holder to put in a dock. The cases on point add that a negative easement is to be construed consistent with the stated intent and shall begin with a presumption of the right to the broadest use consistent with its grant:

   > [There will be an] assumption that the grantor intended to permit a use of the easement which was reasonable under the circumstances and the grantee expected to enjoy the use to the fullest extent consistent with its purpose.

   Farnes v. Lane, 161 N.W.2d 297, 300 (Minn. 1968). The Supreme Court in *Farnes* remanded to the trial court for consideration of the burden construction and use of a dock on the lake would cause to the burdened estate.

   Twenty years later the Court of Appeals ruled that a similar easement providing pedestrian access did not allow dock construction, after the respondent conceded they would allow a railing and other accommodations to tie up a boat and for handicapped access; but would bar construction of a dock. *Lien v. Loraus*, 403 N.W.2d 286, 287-291 (Minn. Ct. App. 1987).

   For these same reasons, the referee had the authority to determine the size of the "bathing beach" on Christmas Lake in Excelsior. The evidence showed that all of the recreational activities took place in the area designated by the referee and that the designated area would be required to continue those activities. Sixty percent of the servient lot would remain free for appellant's own use. *Ahern v. Larson*, 1993 WL 71532, 5 (Minn. Ct. App. 1993).

Similar to the preceding cases, a fee owner of a servient estate may also build a dock though the easement holders have a right of access over the property if the dock does not interfere with access. In this case, the dock did not restrict access. *Chabot v. Paradise*, 272 N.W.2d 251, 254 (Minn. 1978).

Scenic Easements may be statutorily created along rivers under Minn. § Stat. 103F.311, Subd. 6; and along highways under Minn. Stat. § 173.04, Subd. 3 (Summary Guide to Easements, Maynard & Hoagland, Minn. CLE, 2007); Easements in Minnesota, Rice and others, (Minn. CLE, 2009).