"HOW ROADS AND RIGHTS OF WAY ARE CREATED AND TERMINATED, AND HOW THE DIFFERING METHODS IMPACT YOUR CLIENTS"

SCOTT M. LUCAS, SHAUN D. REDFORD, AND JACKIE RUBI
MSBA REAL ESTATE INSTITUTE
NOVEMBER 13, 2014

INTRODUCTION

This presentation will discuss the common-law and statutory methods by which the right of travel by the public is established, and how such rights are terminated. It will also review the implications of each from the perspective of the public and landowners.

THE CREATION OF ROADWAYS.

I. EMINENT DOMAIN AND INVERSE CONDEMNATION

A. Definitions

Eminent domain is an "inherent and essential" right of the state to take private property for public use without the owner's consent. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 875 (Minn. 2010). This sovereign power is limited by the United States and Minnesota Constitutions:

> "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." Minn. Const. art. I, § 13, *accord* U.S. Const. Amend. V ("nor shall private property be taken for public use, without just compensation").

Inverse Condemnation "is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted…" *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 111 (Minn. 2003). "To prevail in an inverse-condemnation action, the plaintiff must establish that the government actor interfered with ownership, possession, or enjoyment of a property right." *Rochester City Lines, Co. v. City of Rochester* 846 N.W.2d 444, 451-52 (Minn. Ct. App., 2014), citing *Oliver v. State ex rel. Comm'r of Transp.*,760 N.W.2d 912, 915 (Minn. Ct. App. 2009).

B. Procedure

Minn. Stat. § 117 provides the procedural framework for exercising the eminent domain power in Minnesota which all condemning authorities must comply with. The failure to follow the procedures in § 117 may mean that the taking was not authorized by law.

A condemning authority can act under a "traditional" condemnation rubric, but this is rarely done in Minnesota. In a traditional condemnation, a condemning authority must record a final certificate under § 117.205 once the eminent domain proceeding is complete. Only then does title to the property transfer to the condemning authority.

Most eminent domain proceedings in Minnesota are completed under the "quick-take" statute, that is, Minn. Stat. § 117.042. The quick-take statute allows the petitioner to take title and possession of the property prior to the filing of an award whenever "the petitioner shall require

title and possession of all or part of the owner's property prior to the filing of an award by the court appointed commissioners…" Minn. Stat. § 117.042.

On the other hand, an inverse condemnation action is a mandamus action appropriate where a property owner can show a condemning authority intrudes, takes, or interferes with property rights, or a regulatory taking in which regulations of private property cause "a direct and substantial invasion of [the owner's] property rights." *See, e.g.*, *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 111 (Minn. 2003).

C. Just Compensation

Private property owners have constitutional rights to just compensation when their property is subjected to a taking. The meaning of "just compensation" was recently discussed by the Minnesota Supreme Court:

> In explaining the meaning of just compensation, the United States Supreme Court has said that a condemning authority must put a property owner "in as good a position pecuniarily as if his property had not been taken." We have also held that the property owner must receive "a full and exact equivalent for the property taken," and that the equivalent "is usually the market value of the property at the time of the taking contemporaneously paid in money.". But, while "condemnation awards are usually based on the fair market value of the property ... the constitutional standard ... is just compensation. Courts can be fluid in the standards they apply to determine just compensation when fairness so requires."

City of Moorhead v. Red River Valley Co-op. Power Ass'n, 830 N.W.2d 32, 37 (Minn. 2013) (citations omitted).

Additionally, a private property owner may be entitled to relocation benefits such as moving costs and reestablishment expenses under 49 U.S.C. §§ 4601-4655 and Minn. Stat. § 117.52.

D. Challenging an Eminent Domain Petition

1. Statutory Challenge

An eminent domain petition can be challenged on the grounds that the condemning authority failed to follow the procedural requirements of Chapter 117, or of the specific statute that authorizes the governmental action.

2. Public Purpose Challenge

Under the United States and Minnesota Constitutions, a governing authority is only authorized to take private property for "public use." In *Kelo v. City of New London*, "public use" was interpreted to include economic redevelopment, subject to some limits. 545 U.S. 469 (2005) (property was taken from one private party to transfer to another where purpose of taking was furtherance of economic development).

The Minnesota Court of Appeals also held that economic redevelopment satisfied the Minnesota constitutional requirements of public purpose. *Hous. & Redevelopment Auth. in & for the City of Richfield v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 669 (Minn. Ct. App. 2001) *aff'd sub nom. Hous. & Redevelopment Auth. ex rel. City of Richfield v. Walser Auto Sales, Inc.*, 641 N.W.2d 885 (Minn. 2002). Upon an even division of the Supreme Court Justices, the finding stood on appeal.

In 2006, the Minnesota Legislature moved to limit the definition of "public use", with the following statutory language: The "public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or purpose." § 117.025, subd. 11(b).

E. Attorney's Fees

Attorney's fees are available in eminent domain proceedings and inverse condemnation actions:

1. Eminent Domain. Minn. Stat. § 117.031:

(a) If the final judgment or award for damages, as determined at any level in the eminent domain process, is more than 40 percent greater than the last written offer of compensation made by the condemning authority prior to the filing of the petition, the court shall award the owner reasonable attorney fees, litigation expenses, appraisal fees, other experts fees, and other related costs in addition to other compensation and fees authorized by this chapter. If the final judgment or award is at least 20 percent, but not more than 40 percent, greater than the last written offer, the court may award reasonable attorney fees, expenses, and other costs and fees as provided in this paragraph…

(b) In any case where the court determines that a taking is not for a public use or is unlawful, the court shall award the owner reasonable attorney fees and other related expenses, fees, and costs in addition to other compensation and fees authorized by this chapter.

2. Inverse Condemnation. Minn. Stat. § 117.045 "entitles landowners to petition for reimbursement of attorney fees upon successfully compelling eminent domain proceedings against real property omitted from any current or completed eminent domain proceeding. That language has been held to include compelling condemnation proceedings where no current or completed eminent domain proceeding was brought." *Thompson v. City of Red Wing*, 455 N.W.2d 512, 518 (Minn. Ct. App. 1990).

F. Case Law Examples

State closed down a "haul road" that it had constructed 50 years prior in Clay County in order to link to Highway 10 to a gravel pit on a parcel belonging to the Olivers. When the road closed, the Olivers brought a mandamus action to compel the state to condemn the Olivers' property interest in the road. The court held that "the issue in an access-taking case is whether there is a reasonably convenient and suitable point of access connecting the perimeter of landowners' property to a public roadway." Here, the state's action did not constitute a taking because the Olivers still had the appropriate access to Highway 10 (albeit not at the access point they preferred). *Oliver v. State ex rel. Com'r of Transp.*, 760 N.W.2d 912 (Minn. Ct. App. 2009).

Where a proposed public roadway would take the property of one private property owner in order to give access to another private property owner, this is not conclusive of taking for private use: "the mere immediate convenience [of the road] to the person most directly benefited thereby, as distinguished from the public at large, is not conclusive of private and against…public character…the public undoubtedly has an interest…in having access to each and every one of the members thereof." *Mueller v. Supervisors of Town of Courtland*, 117 Minn. 290, 135 N.W. 996 (1912).

In a case where a sand and gravel company lost its tunnel system when the state brought condemnation proceedings to obtain a highway easement over the company's land, the court found that said loss was a taking and evidence regarding its value was appropriate when

determining "just compensation" under the Minnesota constitution: "Evidence of the different advantageous uses to which the property is adapted in its present condition is admissible, and likewise any use to which the property might be put in the future ought to be considered, if such use is sufficiently practicable and probably as to be likely to influence the price which a present purchaser would give for it." *State by Lord v. Casey*, 263 Minn. 47, 115 N.W.2d 749 (1962).

G. <u>Impact of Torrens Status</u>.

Torrens property is subject to taking, but the taking must be done in a manner consistent with Chapter 117.

> A strict construction of the eminent domain authority in section 508.02 points to the conclusion that an intention to take Torrens property should not be implied from the circumstances, but that the government should express its intention to acquire Torrens property through initiation of formal proceedings under the eminent domain provision in Minnesota Statutes chapter 117 (2006).

Hebert v. City of Fifty Lakes 744 N.W.2d 226, 231 (Minn. 2008) (finding that taking ownership of Torrens property via the doctrine of de facto takings was not permitted).

H. Governmental Entities That Exercise Eminent Domain.

Of course, the federal government can create roadways. See Titles 23 and 49, United States Code. For a history of the creation of the Interstate Highway System, see EARL SWIFT, THE BIG ROADS: THE UNTOLD STORY OF THE ENGINEERS, VISIONARIES AND TRAILBLAZERS WHO CREATED THE AMERICAN SUPERHIGHWAYS (2011).

Minnesota law, specifically Chapters 160 to 165, governs "trunk highways, county state-aid highways, municipal state-aid streets, county highways, and town roads." Minn. Stat. § 160.01. "'Road authority' means the commissioner, as to trunk highways; the county board, as to county state-aid highways and county highways; the town board, as to town roads; and the governing bodies of cities when the governing bodies or city streets are specifically mentioned." Minn. Stat. § 160.02, subd. 25.

Of course, cities may also create streets: See, e.g., Minn. Stat. § 440.08: "Each city of the first class in this state. . . is hereby authorized and empowered to acquire by purchase, gift, devise, or condemnation any lands or property and any rights and easements therein which may be needed or required by the city for public street and highway uses or purposes. . . "

"'County highways' includes those roads which have heretofore been or which hereafter may be established, constructed, or improved under authority of the several county boards, including all roads lying within the county or on the line between counties established by judicial proceedings, except those roads established, constructed, or improved by the counties that have been maintained by the towns for a period of at least one year prior to July 1, 1957. All roads heretofore designated prior to July 1, 1957 as county-aid highways shall be county highways until abandoned or changed in accordance with law." Minn. Stat. § 160.02, subd. 17.

"'County state-aid highways' includes all roads established . . . as county state-aid highways." Minn. Stat. § 160.02, subd. 18. They are governed by Minnesota Statutes, Chapter 162: "There is created a county state-aid highway system which must be established, located, constructed, reconstructed, improved, and maintained as public highways by the counties under rules not inconsistent with this section made and promulgated by the commissioner as provided in this chapter. The counties are vested with the rights, title, easements, and their appurtenances, held by

or vested in any of the towns or municipal subdivisions or dedicated to the public use prior to the time a road or portion of a road is taken over by the county as a county state-aid highway." Minn. Stat. § 162.02.

"'Town roads' includes those roads and cartways which have heretofore been or which hereafter may be established, constructed, or improved under the authority of the several town boards, roads established, constructed, or improved by counties that have been maintained by the towns for a period of at least one year prior to July 1, 1957." Minn. Stat. § 160.02, subd. 28.

"'Trunk highways' includes all roads established or to be established under the provisions of article 14, section 2 of the Constitution of the state of Minnesota." Minn. Stat. § 160.02, subd. 29. To wit: "There is hereby created a trunk highway system which shall be constructed, improved and maintained as public highways by the state. The highways shall extend as nearly as possible along the routes number 1 through 70 described in the constitutional amendment adopted November 2, 1920, and the routes described in any act of the legislature which has made or hereafter makes a route a part of the trunk highway system." Minn. Const., Art. 14, § 2. See also Minn. Stat. § 161.114, subd. 1; *and see* Minn. Stat. §§ 161.115, 161.117, and 161.12 for additional routes.

Finally, the Court of Appeals has recognized the existence of private streets. *Hebert v. City of Fifty Lakes,* 784 N.W.2d 848, 852 (Minn.App.,2010) (noting "'appellants mistakenly read 'platted streets within cities' to include solely *public* streets; as the city points out, the exception [to Minn. Stat. §160.05] still applies to a private, platted street within a city.") Such streets, however, would not appear to be created by eminent domain.

II. STATUTORY DEDICATION

A. Definition

Statutory dedication occurs where a governmental entity maintains a roadway located upon a parcel for at least six years, and the public makes use of it. This doctrine is, as the name suggests, a creation of 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. . . . This subdivision shall apply to roads and streets except platted streets within cities." Minn. Stat. § 160.05.

B. The Maintenance Required to Establish Statutory Dedication.

"The maintenance must be of a quality and character appropriate to an already existing public road." *Shinneman v. Arago Tp*., 288 N.W.2d 239, 242 (Minn. 1980). Thus:

> A trial court's finding of sufficient maintenance was affirmed where a city laid gravel, leveled, graded, removed weeds, and installed culverts within an eight-year period. *Leeper v. Hampton Hills, Inc.*, 290 Minn. 143, 147, 187 N.W.2d 765, 768 (1971). A finding of sufficient maintenance was also affirmed where the city dragged a road every year in the spring. *Kliber,* 448 N.W.2d at 379-80.

Foster v. Bergstrom, 515 N.W.2d 581, 586 (Minn. Ct. App. 1994).

But sporadic maintenance is insufficient to qualify:

> The supreme court reversed a trial court's finding of sufficient maintenance where a city engaged in four instances of grading and graveling in 24 years. *Ravenna Township v. Grunseth,* 314 N.W.2d 214, 218 (Minn.1981). The court found maintenance "substantially less" than that required by Minn. Stat. § 160.05.

Id. Thus, the *Foster* court found that even where the city had laid blacktop on a parcel, it would not be error to find that the work done did not qualify as sufficient maintenance:

> Pine City performed some maintenance on the disputed road. Gravel and sweeping material were deposited on at least one occasion. The city laid blacktop on the disputed road at least once and patched the road upon request. The city regularly removed snow from the road, but plowed between the Bergstrom vehicles rather than issuing citations or towing the vehicles, as is customary practice on other city streets. The evidence is ambiguous as to whether Pine City pushes snow beyond the disputed portion of Third Avenue to maintain the road, or merely as a convenience for the city and the Bergstroms. The trial court could properly find that the quality and nature of city maintenance on the disputed road falls short of that done on already existing public roads. The trial court did not clearly err in denying the Fosters' statutory dedication claim.

Id.

C. <u>The Use Requirement</u>.

As to the use requirement, "[c]ontinuous use by as few as three people may constitute public use." *Foster v. Bergstrom*, 515 N.W.2d 581, 586 (Minn. Ct. App. 1994) *citing to Town of Belle Prairie v. Kliber,* 448 N.W.2d 375, 379 (Minn. C. App. 1989).

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

Only the property *actually used* will be dedicated pursuant to Minn. Stat. 160.05: "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) (emphasis added).

E. <u>Statutory Dedication Can Be Found Even Where the Government Opposes It:</u>

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).

F. <u>Because Statutory Dedication is a Form of Adverse Possession, it Does Not Apply to Torrens Property</u>.

In 1892, the Minnesota Supreme Court noted that claims under the predecessor of Minn. Stat. 160.05, the User Statute, were based on 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).

Keep in mind that the Torrens Statute states, at § 508.02, that "[n]o title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession. . . ." So, in 2010, the Minnesota Court of Appeals stated unequivocally that statutory dedication was tantamount to adverse possession, and therefore prescribed against Torrens property. "[B]ecause statutory dedication operates fundamentally similar to adverse possession, we conclude that statutory dedication is prohibited by the Torrens Act." *Hebert v. City of Fifty Lakes*, 748 N.W.2d 848, 855 (Minn. Ct. App. 2010).

III. COMMON LAW DEDICATION

A. <u>Definition</u>.

Common law dedication occurs where a landowner expresses an intent to dedicate property to a governmental entity, and the entity accepts. Thus, 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), citing to *Wojahn v. Johnson*, 297 N.W.2d 298, 306-7 (Minn.1980).

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. *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).

"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), *quoting Wojahn*, 297 N.W.2d at 307.

But, 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 Minnesota Supreme 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).

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).

E. <u>Common Law Dedication of Torrens Property is Restricted</u>.

As with statutory dedication, the Court of Appeals has ruled that common law dedication is a form of adverse possession, *if* the intent to dedicate is *inferred*: "…if statutory dedication is tantamount to adverse possession, common-law dedication based on implied intent to dedicate is prohibited under the Torrens Act as well." *Hebert v. City of Fifty Lakes*, 784 N.W.2d 848, 855 (Minn. Ct. App. 2010).

IV. PRESCRIPTIVE EASEMENT

A. Definition.

"A prescriptive easement grants a right to use the property of another based on prior continuous use by a party." *Magnunson v. Cossette*, 707 N.W.2d 738 (Minn. Ct. App. 2006).

B. Public Claims for Easement by Prescription.

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

C. Elements of Claim for a Prescriptive Easement Are Similar to Adverse Possession Requirements.

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). "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).

D. First Element: Actual Use.

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

But, 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). Natural water flow does not satisfy the requirement: "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).

E. Second Element: Open Use.

Open use means visible use. This is so the owner is made aware of the claim of an interest by another:

> "'[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. . .

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).

F. <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 . . ." *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:

> 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 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) (emphasis added).

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).

4. 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)

G. Fourth Element: Continuous Use.

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).

2. The use required depends on the use customary for the area, such that more frequent use is 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).

3. 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).

4. As with adverse possession, 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).

H. Fifth Element: Exclusive Use.

Exclusivity, for the purposes of establishing a prescriptive easement, means only 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.")

I. <u>Presumption of Hostility Made In Prescriptive Easement Cases</u>:

Often proof of the character of the original entry into the property is problematic because it will have occurred long before litigation commences. 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, via a presumption:

> 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).

This means that, in effect, once the other elements are shown, the burden of proof regarding hostility shifts to the defendant: "[O]nce 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).

J. <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 either before or after the property was owned by the public: "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 vs. County of Aitkin*, 645 N. W. 2d 753, 757 (Minn. Ct. App. 2002) (reversing a summary judgment and remanding for trial on that basis); *see also Anderson v. State*, 2007 WL 2472359, 3 (Minn. Ct. App. 2007)

3. A prescriptive easement can be claimed over "quasi-public" property: "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).

K. Scope of the Easement.

The use to which a prescriptive easement is put not only establishes the right to said easement, it defines the scope of it, 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).

L. Restrictions on Use of Property Subject to Easements.

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. As the Court of Appeals has held in one unpublished decision:

> [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); s*ee 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.").

M. 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.

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.

Brooks Investment Company v. City of Bloomington, 232 N.W.2d 911, 920 (Minn. 1975).

B. <u>The Effect of Brooks is Somewhat Unclear</u>.

Three facts are critical to an understanding of *Brooks*: First, the city of Bloomington took ownership in that case not by appropriation, but *through a condemnation action*. 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 [?]").

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. <u>De Facto Takings Does Not Apply to Torrens Property</u>.

As to Torrens property, the Minnesota Supreme Court has explicitly concluded that governmental entities 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 -32 (Minn. 2008).

Interestingly, the *Hebert* court could have found that de facto takings was not a proper mechanism for governmental entities to assert ownership of land, generally; but instead, it limited its holding to Torrens property. This may leave open the question of whether the doctrine can be asserted against abstract property.

VII. 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. Cartway as a Form of Eminent Domain.

Establishment of a cartway under Minn. Stat. § 164.08 is an exercise of eminent domain. *Silver v. Ridgeway*, 733 N.W.2d 165 (Minn. Ct. App. 2007).

C. 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.

There are two possible approaches under the statute:

1. Subd. 1 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.

2. Subd. 2 provides for the mandatory establishment of cartway by a town board, which cartway 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 State 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). A cartway must lead to a usable portion of the property. *Kennedy v. Pepin Township of Wabasha County*, 784 N.W.2d 378 (Minn. 2010)

PRACTICE TIP: Personally visit your client's property. If your client's property is less than 5 acres, determine whether neighboring parcels would benefit from the cartway and aggregate the land to meet the 5 acre requirement. Also, observe the terrain to determine whether existing access to the land is impractical.

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. Damages can be waived by agreement between the parties.

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.

D. 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.

E. Where/When Cartway Cannot be Established.

A town board cannot establish a cartway over State land. *Silver v. Ridgeway*, 733 N.W.2d 165 (Minn. Ct. App. 2007)

A landowner who has an express easement is not entitled to a cartway. *Roemer v. Board of Supervisors of Elysian Township*, 167 N.W.2d 497 (Minn. 1969).

F. 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. Details are contained in the statute.

PRACTICE TIP: Look for local ordinances that give further instructions and guidance regarding the cartway petition procedure in that particular locale. For example, Itasca County passed such an ordinance, found at http://www.co.itasca.mn.us/Admin/Policy%20Manual/Cartway%20Ordinance.pdf.

G. Appeals

Two main categories of appeals: damage awards (including challenges to the public purpose or necessity of the cartway), and appeals of the board/council's refusal to establish the cartway. The statutes set out the appeal deadlines. Appeal is filed at district court.

PRACTICE TIP: If you are challenging the public purpose or necessity of the cartway, file your appeal within 10 days of the filing of the damage award in order to delay construction of the road. Otherwise, the board/council is authorized by statute to commence construction.

THE TERMINATION OF ROADWAYS.

I. VACATION

One method of terminating a roadway is a formal vacation procedure. The exact procedure varies depending on the type of roadway, i.e., town roads, city streets, and county highways.

A. Town Roads.

A township has the ability to vacate a town road. Minn. Stat. § 164.02, subd. 1.

The actual vacation procedure is found in Minn. Stat. § 164.07. The key elements include:

(1) A petition signed by at least 8 landowning voters of the town owning land within 3 miles of the road to be vacated (can be fewer if less than 8 such owners exist)
(2) The petition is filed with the town clerk, and the town board has 30 days to make an order describing the road to be vacated and setting a time and place for a meeting to decide on the petition
(3) The petitioner must serve a copy of the order and the petition on "each occupant of the land" and post notice at least 10 days before the meeting
(4) Damages may be awarded for vacating a road
(5) An appeal of the town board's decision must be filed at the district court within 40 days
(6) The order to vacate must be recorded with town clerk and at the county recorder

If a town has adopted urban town powers under Minn. Stat. § 368.01, it may use the vacation procedure contained in Minn. Sta. § 368.01, subd. 25.

B. City Streets.

Vacation of city streets is generally governed by a city's own ordinances.

If a city does not have a street vacation ordinance, Minn. Stat. § 505.14 provides the procedure by which a landowner can apply to vacate a city street. An owner of platted land on which a street lies must bring an application before the district court. The court must hear anyone owning or occupying land that would be affected by the vacation and may award damages. The statute prescribes the notice requirements, including special rules if the street provides access to public water. Note the last sentence of the statute, which states that the statute has no effect if the city "provides a method or procedure for the vacation of streets." Look first at the city ordinances to determine the street vacation procedure. If none exists, only then can a landowner proceed under Minn. Stat. § 505.14.

C. County Highways.

County highways can be vacated by the county board. Minn. Stat. § 163.11, subd. 1. When a new county highway has been established to replace another county highway, the county board may vacate the old county highway by resolution. Minn. Stat. § 163.11, subd. 4. See the statute for hearing requirements.

A county board can also revoke a county highway, which then reverts to the town or city in which it is located (provided that, in the case of a city, the highway becomes a city street). The town or city can then vacate the road or street following the usual vacation procedures outlined above. Minn. Stat. § 163.11, subd. 5. The statute contains additional details regarding the revocation procedure. See Minn. Stat. § 163.11, subd. 5(a) for hearing requirements.

D. Limitation on Vacation of Town Roads and Highways—Sole Access.

If a county highway or town road is the sole access to a parcel of at least 5 acres, the highway or road cannot be vacated without the consent of the landowner unless other means of access are provided. Minn. Stat. § 160.09, subd. 3.

II. ABANDONMENT

Roadways can also be terminated by abandonment, a less formal procedure than a vacation.

A. Abandonment of a Roadway Requires More Than Mere Non Use.

In *Norton v. Duluth Transfer Ry. Co*., the Minnesota Supreme Court considered the requirements for divestiture of title by abandonment: "To have the effect of divesting title and reinvesting the same in the grantor of the easement the abandonment must amount to something more than mere nonuser, for there must appear to have been an intentional relinquishment of the rights granted." 151 N.W. 907, 909 (Minn. 1915).

Similarly, nonuse and failure to remove improvements or obstructions placed by the private party (acquiescence) alone are not enough to constitute abandonment by the municipality (the context was wrongful death of a child). *Stadtherr v. City of Sauk Center*, 231 N.W. 210 (Minn. 1930). And, where a street was platted in 1857 but never opened, no affirmative act sufficient to support a finding of abandonment could be shown. *Rein v. Town of Spring Lake*, 145 N.W.2d 537, 540 (Minn. 1966).

In *State by Burnquist v. Marcks*, however, the Supreme Court of Minnesota found abandonment, where the city's affirmative acts treated the parcel as if it were no longer a street.

> Here, however, there is much more positive evidence of abandonment than mere nonuser. Many affirmative unequivocal acts of the city indicate an intent to abandon this property for highway purposes. At one time the city had *used such premises as a place for storage of gravel* and other materials. A few years prior thereto, it *had sunk a test well in the center of the platted street* and, no doubt, would have maintained the same had water been found therein. *It had placed telephone poles thereon* in such a way as to block the free use thereof as a highway. After the erection of defendant's structure, *it had placed the property on its tax rolls and furnished defendant with light and water from its plants*. Sewer connections thereto were then completed. It *designated substitute highways*, including the Bingham Lake road and its extension into First avenue in Hutton & Collins' Addition, as 'First Avenue' by suitable markers.

36 N.W.2d 594, 597-98 (Minn. 1949) (emphasis added).

B. <u>Abandonment Pursuant to Statute</u>.

1. A township can affirmatively abandon a roadway, in a process less formal than a vacation, if the factors laid out in Minn. Stat. § 164.06 subd. 2 are met:

> **Subd. 2. Extinguishing interest in abandoned road.**
> (a) After providing notice as required in paragraph (c), the town board may by resolution disclaim and extinguish a town interest in a town road without action under subdivision 1 [which provides for establishment, alteration, or vacation of the road] if:
> (1) the extinguishment is found by the town board to be in the public interest;
> (2) the interest is not a fee interest;
> (3) the interest was established more than 25 years earlier;
> (4) the interest is not recorded or filed with the county recorder;
> (5) no road improvement has been constructed on a right-of-way affected by the interest within the last 25 years; and
> (6) no road maintenance on a right-of-way affected by the interest has occurred within the last 25 years.
> (b) The resolution shall be filed with the county auditor and recorded with the county recorder.
> (c) Not less than 30 days before the first meeting at which a resolution to disclaim and extinguish a town interest in a town road under this subdivision is discussed, the town board shall provide notice of the meeting by certified mail to each property owner abutting the road to be extinguished. A notice must also be posted as provided undersection 366.01, subdivision 8.

2. There is a similar procedure in place for county highways at Minn. Stat. § 163.11, subd. 7:

> **Subd. 7. Extinguishing interest in abandoned highway.** (a) The county board may by resolution and without other action pursuant to this section or other law disclaim and extinguish a county interest in a county highway if:
> (1) the interest is not a fee interest;
> (2) the interest was established more than 40 years earlier;
> (3) the interest is not recorded with the county recorder;
> (4) no highway improvement has been constructed on a right-of-way affected by the interest; and
> (5) no highway maintenance on a right-of-way affected by the interest has occurred within the last 40 years.
> (b) The resolution shall be filed and recorded with the county auditor and recorder, and with the local governing body of any organized township or municipality.

3. Abandonment can be established under the Marketable Title Act on a showing of nonuse, or even a showing of sporadic use, under certain circumstances.

   a. 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.

b. If the interest is not so documented, than abandonment is presumed:

> Subd. 5. Abandonment presumed**.** 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.

c. Once this presumption is established, only a strong showing of use will overcome it. Sporadic use is insufficient.

> *Pine City has never recorded an interest in the disputed extension of Third Avenue. There is therefore a presumption that the city abandoned this road.* . . . The presumption of abandonment could be overcome by a showing of possession by the city. Possession must be present, actual, open, and exclusive. . . . A strong showing of possession is required to overcome the presumption of abandonment. A trial court may properly find that "some minimal grading" and "some slight ditching" is not enough to establish possession of a road. . . . In *B.W. & Leo Harris Co. v. City of Hastings,* 240 Minn. 44, 50, 59 N.W.2d 813, 817 (1953), the supreme court reversed the trial court and found that cleaning every spring, removing weeds annually, and occasionally hauling dirt to a disputed tract is "far from sufficient" for possession under the Act. Evidence of possession by Pine City *consisted solely of minimal and sporadic maintenance*. The city deposited fill or other material on the road on a few isolated instances. Snow was removed, but in a manner consistent with Bergstroms' possession of the road rather than that of the city. Possession cannot be equivocal or ambiguous, and must place a prudent person on inquiry that the road is a public road.. . . Based on the evidence, the trial court reasonably concluded that the presumption of abandonment was not overcome.
>
> *Foster v. Bergstrom,* 515 N.W.2d 581, 587 (Minn.App.,1994) (emphasis added, citations omitted).

d. The statute can not be used, however, where the party invoking the statute does not have a documented interest in the property. *See, Padrnos v. City of Nisswa,* 409 N.W.2d 36, 38 (Minn.App.,1987) (not finding abandonment where claimant had no "claim of title based upon a source of title which has been of record at least 40 years").

C. <u>Effect of Abandonment</u>.

Once a city has abandoned a roadway, it can be estopped from later asserting an interest therein:

> It is contended by the state that under our decisions the city cannot be estopped from asserting its right to the premises for highway purposes, and that the state,

> as successor to the city, stands in a like position. It is true that the doctrine of estoppel is not applied as freely to municipal corporations as to private individuals. *See, The Alexander Co. v. City of Owatonna*, 222 Minn. 312, 24 N.W.2d 244; *W. H. Barber Co. v. City of Minneapolis*, 227 Minn. 77, 34 N.W.2d 710. The cited cases, however, do not relate to instances where highway property has been abandoned by a municipality by positive and affirmative acts. The decisions cited merely involve the right of a city to rescind orders or permits issued by it under a mistake of fact or contrary to law, notwithstanding a third party's reliance thereon. They do not relate to instances where legal rights of a municipality have terminated by abandonment and property has reverted to abutting owners or reversionary interests. When such facts appear, there is no reason why a city may not be estopped to assert rights thus abandoned after third persons, in reliance thereon, have changed their position to their detriment.

State by Burnquist v. Marcks, 36 N.W.2d 594, 597-98 (Minn. 1949).