

“RESOLVING ACCESS PROBLEMS”
SCOTT M. LUCAS AND SHAUN D. REDFORD
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INTRODUCTION

Landowners facing problems with access to their property and/or access to water are not without recourse. These materials focus on seven means of establishing access: (1) express easements; (2) prescriptive easements; (3) implied easements; (4) statutory dedication; (5) common law dedication; (6) easement by estoppel; and (7) cartways.

I. EXPRESS EASEMENT.

A. Writing Requirement.

Express easements must be in writing. The Statute of Frauds, Minn. Stat. § 513.04, renders oral easements unenforceable. *See Berge v. Carlstrom*, 347 N.W.2d 809, 812 (Minn. 1984) (“the statute of frauds applies to grants of easements”).

B. Type of Document.

1. Deed: 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.
 - a. A caution about deeds: 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. *See Soukup v. Topka*, 55 N.W. 824, 824-825 (Minn. 1893).
2. Written Agreement: Easements are also often created by a written agreement, which can address issues such as sharing maintenance costs.

C. Scope.

1. Scope is determined by the language of the document:

“The language of the deed expresses the final, binding agreement between the grantor and the grantee...The scope of an easement created by express grant depends entirely upon the construction of the terms of the grant...The extent of an easement should not be enlarged by legal construction beyond the objects originally contemplated or expressly agreed upon by the parties.” *Larson v. Amundson*, 414 N.W.2d 413, 417 (Minn. Ct. App. 1987).
2. Therefore, the scope should be explicitly defined, using precise terms.

D. Specific Terms: Examples. Though this presentation is not intended as a comprehensive drafting guide for easements (see SUMMARY GUIDE TO EASEMENTS, Hugh M. Maynard and Dana M. Sonbol, Minn CLE 2009, for a drafting guide), some examples follow:

1. The parties to be benefitted and burdened by the easement;
2. Legal descriptions of the benefitted parcel, the burdened parcel, and the easement parcel;
3. The word “easement” itself;

4. The scope of the easement;
5. The duration; and
6. Whether the easement runs with the land (is appurtenant) or is an easement in gross.

E. Special Considerations in Drafting Easements for Riparian Access.

1. Riparian rights include the right of access to the water; the right to install and use a dock; and other rights of value.

“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 Resources*, 309 N.W.2d 767, 772 (Minn. 1981).

2. Riparian rights are rights incident to an estate in land which adjoins a body of water such as a lake:

“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).

3. 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 (emphasis added), quoted with approval in *Farnes v. Lane*, 161 N.W.2d 297, 299 (Minn. 1968); see also *McLafferty v. St. Aubin*, 500 N.W.2d 165, 167 (Minn. Ct. App. 1993) to same effect.

4. Generic “Access” Easements May Be Insufficient to Protect Riparian Rights.

Riparian rights do not necessarily run to the holder of an access easement:

A private easement appurtenant affording access to a lake over land adjacent to the water does not make the grantee of the easement a riparian owner entitled to exercise riparian rights.

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).

What riparian rights the holder of an access right does or does not have is dependent on 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.

Example: *Nelson v. City of Birchwood*, 2009 WL 3426792, 1 (Minn. Ct. App. 2009) is a case involving 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.

Riparian rights are the rights to reasonably use the surface of waters abutting a parcel of real property. *Johnson v. Seifert*, 100 N.W.2d 689, 696-97 (Minn. 1960). 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. *Pratt v. State, Dep't of Natural Res.*, 309 N.W.2d 767, 772 (Minn. 1981). Riparian rights include the right to build and maintain docks and landings that extend into the water from the property owner's land. *State by Head v. Slotness*, 185 N.W.2d 530, 532-33 (Minn. 1971); *Farnes v. Lane*, 161 N.W.2d 297, 299 (Minn. 1968). Without dispute, the riparian rights to the lot were held by the original owners, who first granted the easement that the appellants now hold and who then dedicated the lot to the city for use as a park. So the primary question is whether the riparian rights followed the dedicating of the land to the city or the granting of the easement to the appellants.

Nelson v. City of Birchwood, 2009 WL 3426792, 5 (Minn. Ct. App. 2009). “An owner of lakeshore property who divests himself of the right of possession by a dedication to a public entity thereby also grants the riparian rights.” *Id.* (emphasis added)

Example: *McLafferty v. St. Aubin*, 500 N.W.2d 165, 168 (Minn. Ct. App. 1993). In this case, the Court of Appeals decided that 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:

The city has not established that it is presently exercising its riparian rights. Riparian rights are generally positive rights, fostering use of the water for navigation, recreation, or harvest. At this point, the city does not intend to build a beach, a public dock, or make any other use of the shoreline that will accommodate public access to or use of the lake. Thus, the city is attempting to impede the property owner's exercise of traditional riparian rights, but not by purposeful use of its own valid riparian rights. Under these circumstances, the property owner's lakeshore improvements do not unreasonably interfere with the city's exercise of riparian rights, although the improvements may frustrate some nascent thoughts of zoning.

5. Access Easements Will be Strictly Construed – Typically.

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).

6. Riparian rights may be shared. See, *McLafferty v. St. Aubin*, 500 N.W.2d 165, 167 (Minn. Ct. App. 1993).

F. Recording.

Express easements should be properly recorded. See Minn. Stat. §§ 507.34; 508.25.

II. PRESCRIPTIVE EASEMENT.

A. Definition.

“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 (Minn. Ct. App. 2006).

B. 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).

C. Distinctions Between Adverse Possession and Prescriptive Easements.

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

“[T]he inherent difference between the two doctrines revolves around the fundamental difference between possessing land (adverse possession) and using land (prescriptive easement).” *Claussen v. City of Lauderdale*, 681 N.W.2d 722, 727 (Minn. Ct. App. 2004).

“A prescriptive easement requires the same elements, but a difference exists ‘between *possessing* the land for adverse possession and *using* the land for a prescriptive

easement.” *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 230 (Minn. 2008), quoting *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000) (emphasis added).

2. The claim does not arise from expiration of a statute of limitations:

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

D. First Element: Actual Use.

1. What constitutes actual use or possession will generally be obvious: Use of a gravel driveway may constitute actual use, *Nordin vs. Kuno*, 287 N.W. 2d 923 (Minn. 1980); as will use of a farm road, *Block v. Sexton*, 577 N. W. 2d 521 (Minn. Ct. App. 1998); and the use of a footpath, *Mehrkens v. Ryan*, 2003 WL 21694568 (Minn. Ct. App. 2003). A drainage ditch can satisfy the requirement. *Naporra v. Weckwirth*, 226 N.W. 569 (Minn. 1929).
2. The noise of gunfire will not constitute actual use to qualify: *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.* 624 N. W. 2d 796 (Minn. Ct. App. 2001). 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. . . . As stated in *Swan v. Munch*, 65 Minn. 500, 503, 67 N.W. 1022, 1024, 35 L.R.A. 743, 60 Am.St.Rep. 491:

‘There was no trick or artifice on the part of the defendant, but an open and notorious taking possession of the premises by the defendant for her use and needs, and whereby the public were also benefited. These acts were notice to the owners that defendant was occupying the premises under a claim of right.

Hildebrandt v. Hagen, 38 N.W.2d 815, 818-819 (Minn. 1949).

“The claim of right must be exercised with the knowledge of the owner of the servient estate, i. e., actual knowledge or a user on the part of the claimant of such character that knowledge will be presumed.” *Naporra v. Weckwerth*, 226 N.W. 569, 571 (Minn. 1929).

F. Third Element: Hostile Use.

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:

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

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

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

4. 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).

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

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

“Respondents, their renters, and their employees have accessed their property four to five times a year via the south drive since their family acquired the property in 1950. . . *This use was consistent with the act of farming and is sufficient to constitute continuous use. See Rogers*, 603 N.W.2d at 657 (“[C]ontinuity of use will vary depending on the type of use, and accordingly the court should not view continuity of use in the context of a prescriptive easement as strictly as in the context of adverse possession.”); *see also Block v. Sexton*, 577 N.W.2d 521, 523-25 (Minn. ct. App. 1998) (granting prescriptive easement based on use of farm road several times per month during summer months).”

Michel v. Lambrecht, 2004 WL 2857361, 1 (Minn. Ct. App. 2004) (emphasis added).

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

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

1. 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).

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

“[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).

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

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

the presumption' that the use is permissive. See *Wojahn*, 297 N.W.2d at 306.” *Boldt v. Roth*, 618 N.W.2d 393, 396-97 (Minn. 2000).

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

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

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

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

4. The Court of Appeals has held in one unpublished opinion that, where the initial entry was by close friends who are *like* family, the presumption of hostility is rebutted.

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

J. Public Land.

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.
 - a. If the claimant can show that a prescriptive easement arose before the property was acquired by the public body, he may be entitled to impose the prescriptive easement.

Heuer, supra (reversing a summary judgment and remanding for trial on that basis); see also *Anderson v. State*, 2007 WL 2472359, 3 (Minn. Ct. App. 2007) (“[t]he evidence in this record supports the district court’s finding that respondents’ adverse use of the trails in section 25 extended for 15 or more years before the state’s ownership of the land.”).

- b. “[W]hen the state takes title because of tax forfeiture, the prescriptive easement must be established prior to the tax assessment for which the property was forfeited.” *Wasiluk v. City of Shoreview*, 2005 WL 1743746, 2 (Minn. Ct. App. 2005).
- c. Also, a claimant may acquire a prescriptive easement over formerly public property where a street has been vacated:

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

- d. “Quasi-public” property may also be claimed.

“Assuming the waterfront is properly characterized as “quasi-public,” there is no authority for the proposition that it cannot be adversely possessed . . . the plain language of Minn. Stat. sec. 541.01 limits the prohibition on adverse possession to property dedicated to public, not quasi-public, use.” *Denman v. Gans*, 607 N.W.2d 788, 794 (Minn. Ct. App. 2000).

K. 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).

L. Trial Considerations.

- a. Clear and Convincing Evidence Standard.

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

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

- b. No Right to Jury Trial.

When landowners discovered that an access roadway encroached onto their property, they dug up that portion which crossed into their land. The families who used the roadway sought a prescriptive easement over the portion of the road that ran across

landowners' property. The landowners requested a jury trial. Their request was denied and the court found in favor of the prescriptive easement. The landowners appealed, again seeking a jury trial. On appeal, the court held that the district court did not erroneously deprive landowners of a right to jury trial *because the claim for a prescriptive easement is an equitable one*:

“The Minnesota Constitution guarantees a jury trial in all “cases at law,” including actions for the “recovery of ... real ... property.” But it is well-established that “[n]o right to a jury trial attaches to claims for equitable relief.” Actions to quiet title and determine adverse claims, such as claims for prescriptive easements, are equitable actions. And although a party has a right to a jury trial in an ejectment action where the recovery of real property is sought, there is no such right when the party has not been ousted from his property.”

McDonald v. Christian, 2012 WL 34053 (Minn. Ct. App. 2012) (Citations omitted).

M. 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).

Thus a prescriptive easement may be used to obtain access to water.

N. 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).

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

O. 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.

III. 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.

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 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 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.
- 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. Details are contained in the statute.

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

E. 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.

IV. IMPLIED EASEMENT.

A. Generally.

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

“An easement created by implication arises as an inference of the intention of the parties to a conveyance of land. The inference is drawn from the circumstances under which the conveyance was made rather than from the language of the conveyance. To draw an inference of intention from such circumstances, they must be or must be assumed to be within the knowledge of the parties. The inference drawn represents an attempt to ascribe an intention to parties who had not thought or had not bothered to put the

intention into words, or perhaps more often, to parties who actually had formed no intention conscious to themselves. In the latter aspect, the implication approaches in fact, if not in theory, crediting the parties with an intention which they did not have, but which they probably would have had had they actually foreseen what they might have foreseen from information available at the time of the conveyance.” *Olson v. Mullen*, 68 N.W.2d 640, 646 (Minn. 1955), *citing* Restatement, Property, § 476, Comment (a).

Access easements are an easement that may be inferred, and implied easements typically 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).

B. Types of Implied Easements.

1. Quasi-Easements / Implied Easements

“The doctrine of implied grant of easement is based upon the principle that where, during unity of title, the owner imposes apparently permanent and obvious servitude on one tenement in favor of another, which at the time of severance of title, is in use and is reasonably necessary for the fair enjoyment of the tenement to which such use is beneficial, then, upon a severance of ownership, a grant of the dominant tenement includes by implication the right to continue such use. That *right* is an easement appurtenant to the estate granted to use the servient estate retained by the owner. Under the rule that a grant is to be construed most strongly against the grantor, all privileges and appurtenances that are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor are included in the grant. . . . Prior to the severance and while there is unity of title, the use is generally spoken of as a quasi-easement appurtenant to the dominant tenement.” *Romanchuk v. Plotkin*, 9 N.W.2d 421, 424 (Minn. 1943) (emphasis added)

Note use of the term “right!”

2. Easement of Necessity.

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

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

3. These Terms Are Used Interchangeably, at Times.

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

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

“The language in *Bode* suggests a distinction, recognized by some jurisdictions and commentators, between implied easements and easements of necessity. . . .

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

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

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

C. Factors.

1. There are three factors which are typically examined.

"An easement by implication is created if the following factors exist:

(1) a separation of title;

(2) the use which gives rise to the easement shall have been so long continued and apparent as to show that it was intended to be permanent; and

(3) that the easement is necessary to the beneficial enjoyment of the land granted." *Romanchuk v. Plotkin*, 9 N.W.2d 421, 424 (Minn. 1943); *see also Pickthorn v. Schultz*, 2008 WL 5335118, 2 (Minn. Ct. App. 2008).

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

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

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

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

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

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

D. Factor One: Separation of Title.

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

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

E. Factor Two: Continued and Apparent Use.

The Court of Appeals stated in *Lake George Park, L.L.C.* that, unless the party claiming an implied easement is claiming against the person who was the owner at the time of severance, the use must have been continuous and apparent:

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

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

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

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

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

F. Factor Three: Necessity.

1. Only reasonable necessity need be shown.

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

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

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

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

G. Can an Implied Easement be Established for Riparian Rights?

Implied easements are not limited to access to the property, and can be created for the types of uses for which other easements exist – including, for example, lateral support of land. *Swedish-American Nat. Bank of Minneapolis v. Connecticut Mut. Life Ins. Co.*, 86 N.W. 420 (Minn. 1901). And, one has an implied easement for light and air on public streets; in fact, there is a constitutional right to ownership of easements of this type. These rights can give rise to takings claims:

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

The critical factor is requirement of reasonable necessity. Can access to water meet this standard?

In 2006, the Minnesota Court of Appeals found that an implied easement for riparian access could be established for the purpose of dredging a channel in the lake: “The district court found that there is no other access to the north bank of the east channel *for purposes of dredging and removing soil* other than the haul road . . . Consequently, the district court did not err in concluding that the easement *was necessary*.” *Magnuson v. Cossette*, 707 N.W.2d 738, 746 (Minn. Ct. App. 2006).

An unpublished Court of Appeals decision from 1989 implies that access to a dock can be reasonably necessary for the beneficial enjoyment of property, though the Court did not hold an implied easement was established in that case. The reason was not because dock access is not necessary, but instead because alternate dock access was available in that case. The terminology “beneficial enjoyment” is important:

“Although the easement need not be indispensable in order to be necessary, a reasonable necessity must be found to exist . . . The east-west dock does not appear to be even reasonably necessary for the Cowgills' *beneficial enjoyment* of their land. We believe the trial court based its decision on the erroneous belief that the DNR would not allow the Cowgills to build a new dock. Construction of other docks has been permitted by the

DNR, however, and the Cowgills *may also derive access to the water from the use of another existing dock which they own*. The judgment of the trial court, granting the Cowgills' counterclaim and denying Barnes' request that she be declared owner of the docks and waters within the riparian borders of lots three and four, is reversed.” *Barnes v. Cowgill*, 1989 WL 145414 *2 (Minn. Ct. App. 1989) [citations omitted, emphasis added].

H. Equitable Doctrine.

The courts will examine the equities in determining whether an implied easement has been established:

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

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

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

I. Location of Implied Easement.

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

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

J. Duration of Implied Easement.

An easement of necessity will cease to exist when alternate access is established:

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

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

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

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

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

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

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

M. Torrens Property.

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.

N. Practice Tip: Join All Necessary Parties.

Be sure to join all necessary parties, including neighboring property owners over whose property alternate easements may run:

“The trial court found appellants have not openly and notoriously used an easement across parcel "A" in favor of "E." Further, there has been no long, apparent nor continued use of an easement across "A" in favor of "E" for all relevant time periods at issue. The trial court further concluded that owners of adjacent lands over which a road easement could be prescribed were not joined in the action, and that these parties were "necessary for a fair and complete resolution of the plaintiffs' claim for an easement by necessity." We agree. The record demonstrates that at least one survey indicated an easement across

parcel "F" which is located immediately east of the appellants' parcel and the owners of parcel "F" are not parties to this lawsuit." *Nunnelee v. Schuna*, 431 N.W.2d 144, 147 (Minn. Ct. App. 1988).

IV. STATUTORY DEDICATION.

A. Definition

Statutory dedication occurs where a governmental entity takes possession of property and maintains a roadway located upon it for at least six years. 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. Statutory Dedication Can Be Found Even Where the Government Opposes It:

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

"The city argues that its activities in the turnaround cannot be characterized as the type of repair work contemplated by the statute because it was merely doing what was necessary to access public utilities it maintained in the turnaround for which the city has an easement. . . . Viewing the evidence in this case in the light most favorable to [the property owner], we conclude that she has raised a sufficient issue of fact regarding the city's maintenance of the turnaround to withstand summary judgment on her action to declare the turnaround public." *Rixmann v. City of Prior Lake*, 723 N.W.2d 493, 496-98 (Minn. Ct. App. 2006).

C. Because Statutory Dedication is a Form of Adverse Possession, it Does Not Apply to Torrens Property.

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. . . .”

In 2010, the Minnesota Court of Appeals stated unequivocally that statutory dedication was tantamount to adverse possession, and therefore prescribed against Torrens property:

“...because 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).

D. 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)

V. COMMON LAW DEDICATION.

A. Definition.

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

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

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

B. There is No Set Period of Time Which Must Pass for Common Law Dedication to Take Place.

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

C. An Owner’s Intent to Dedicate Can be Inferred, But The Evidentiary Standard is High.

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), *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 convincingly* indicate an intent to dedicate.” *Security Federal Savings & Loan Ass’n v. C & C Investments, Inc.*, 448 N.W.2d 83, 87 (Minn. 1990) (emphasis in original).

The *Sackett* Court noted a predecessor of the plaintiff had testified “that he ‘intended that the roadway be dedicated . . . for the general use of the . . . public.’” 480 N.W.2d at 380.

In *Mueller v. Drobny*, the Court noted that the plaintiffs’ predecessor had acknowledged the right of the public to travel across his property by providing a detour, also on his property, for use in wet weather. 31 N.W.2d 40, 42-43 (Minn. 1948).

D. Public Acceptance.

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. Common Law Dedication of Torrens Property is Restricted.

As with statutory dedication, the Court of Appeals has ruled that common law dedication is a form of adverse possession, where 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).

VI. EASEMENT BY ESTOPPEL.

A. Definition:

Under the doctrine of easement by estoppel, one who induces another to change their position by a representation concerning an easement will be estopped from denying that easement later.

- a. 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. And, the statute of frauds will not prevent application of this doctrine in such a situation.

“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).

- b. A more recent unpublished Court of Appeals decision applies the doctrine to a party other than a seller:

“Application of the equitable estoppel doctrine also takes the agreement out of the statute of frauds. *See Poksyla v. Sundholm*, 259 Minn. 125, 129, 106 N.W.2d 202, 205 (1960) (the statute of frauds does not prevent the application of the doctrine of equitable estoppel). In order to successfully invoke the doctrine of estoppel by conduct, a person must show that they were led to rely on a certain position to their detriment. *Reineke v. Schlinger*, 240 Minn. 478, 483, 61 N.W.2d 505, 508 (1953). Evidence in the record supports the trial court's finding that, ‘by their purchase of Tract B and their actions and expenditures preparatory to the construction of a home on Tract A,’ Ebner materially changed his position in reliance upon his right to use the 1981 road. Both Johnson and Bellamy blocked Ebner's access across the 1969 road while they owned the 3.8 acre tract of land. Johnson attended the variance hearing and therefore knew that Ebner planned to build a home on Tract A. It is apparent that Johnson was aware of Ebner's easement rights in the 1981 road; thus he is equitably estopped from denying Ebner those rights.” *Ebner v. Johnson*, WL 454736, 2-3 (Minn. Ct. App. 1994).

XIII. OTHER RIPARIAN ACCESS ISSUES.

A. Statutory Protection from Creation of Certain Easements.

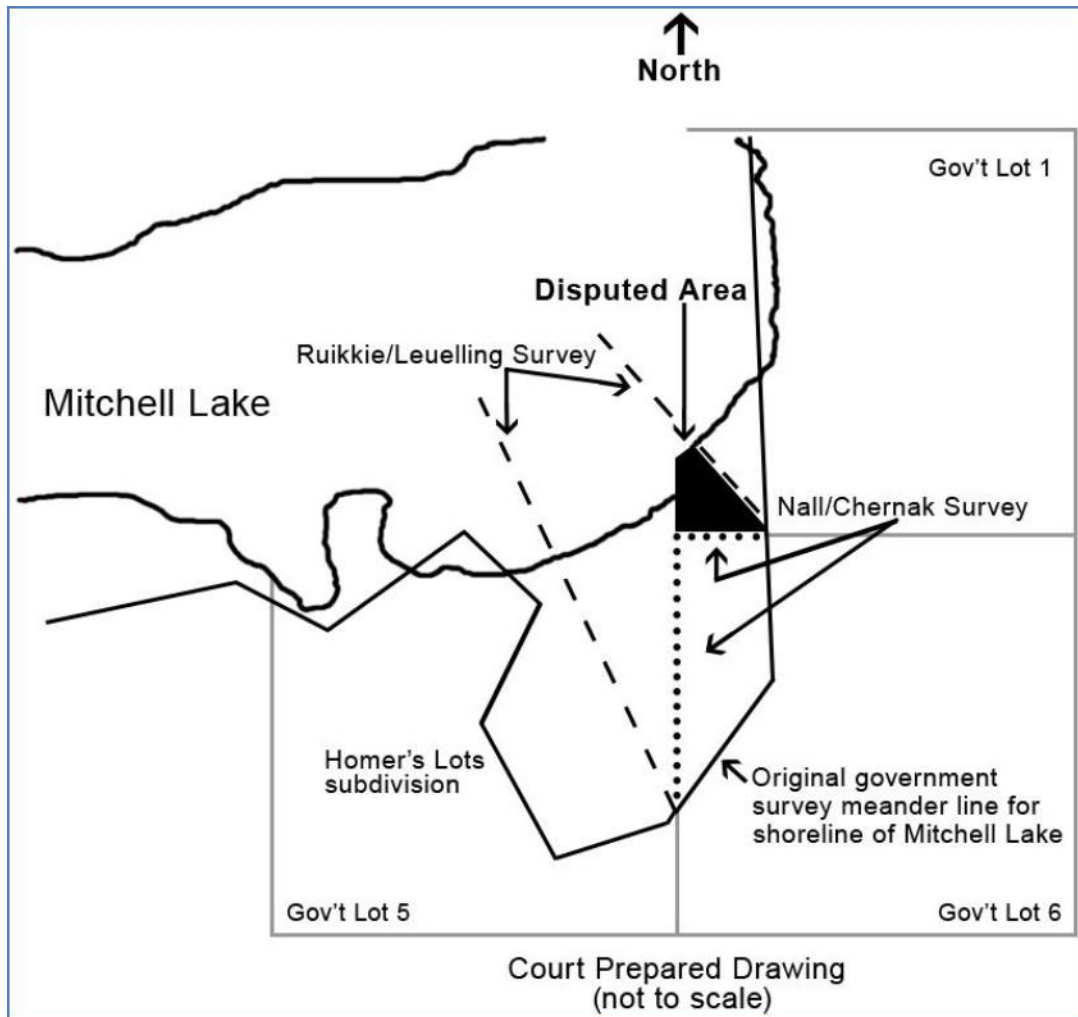
There is a statutory provision protecting those who give permission for recreational uses from having an assertion of prescriptive easement made against their property:

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

Minn. Stat. § 604A.27.

B. Ruikkie v. Nall: Another Means of Establishing Access?

In *Ruikkie v. Nall*, the Court of Appeals considered a case wherein a land owner argued for access based on an erroneous government survey. *Ruikkie v. Nall*, 798 N.W.2d 806 (Minn. Ct. App. 2011). The issue was as is depicted below:



Source: <http://www.lawlibrary.state.mn.us/archive/ctappub/1105/opa101339-0509.pdf>

The key issue in this case was whether the subject lot (Lot 6) had frontage on a lake. The issue was created by an erroneous government survey which depicted a bay of a lake in the wrong place. The Ruikkies had a new survey done (the “Leuelling Survey”), *in which their surveyor bent the lot lines to preserve the waterfront access.*

In contrast, Nalls’ surveyor ran the government lot lines straight over the place that the original government survey had incorrectly depicted the bay. Because this was registered Torrens property, “the Ruikkies filed a petition to initiate a proceeding subsequent to the initial title registration in St. Louis County District Court, requesting a judicial determination of the boundary lines of Gov’t Lot 6 in accordance with the Leuelling survey.” *Id.*, at 813.

In reaching its decision, the *Ruikkie* Court first noted that the U S Government Survey controls, even when it is inaccurate:

The original government survey is the governing frame of reference even when it is inaccurate. Neither the courts nor a subsequent surveyor may correct an erroneous government survey by simply setting new section or subdivision lines. . . (Citations omitted).

The *Ruikkie* Court then noted that the District Court had resolved the boundary line issue based on boundary by practical location. Specifically, the District Court had modified the lot lines on the US Government Survey pursuant to this doctrine, and therefore the question before the *Ruikkie* Court was “whether the practical-location doctrine may be used to resolve the error in the original government survey.” *Id.*, at 816.

The *Ruikkie* Court found this was improper, unless the boundary line was hopelessly ambiguous, and no other federal or state surveying standard applied:

The practical-location boundary does not alter or shift the location of the original government subdivision or a plat. . . . Only if a government survey, plat, or metes-and-bounds description is so flawed that there is a hopeless ambiguity in locating a boundary and if there is not a federal or state standard, caselaw principle, or surveyor's analysis available to resolve the ambiguity, a practical location of the ownership line between neighboring landowners may be a basis for resolving the problem. . . Parties cannot, by their conduct or stipulation, override the location of the boundary set by the original survey any more than they can stipulate that a statute is unconstitutional.

Id., at 816-17 [emphasis added].

So, the attempt by the Plaintiffs in *Ruikkie* failed. But the point should be taken that adjustment may put another tool in the toolbox of the property owner seeking to establish access.