"ESTABLISHING ACCESS TO REAL PROPERTY"
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I. PRESCRIPTIVE EASEMENTS.

A. Definition.

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

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

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

C. Distinctions Between Adverse Possession and Prescriptive Easements.

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

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

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

> "Statutes of limitation *do not by their terms apply to actions involving incorporeal hereditaments such as easements*. An easement by prescription rests upon the fiction

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> of a lost grant. By analogy to title by adverse possession, an adverse user of an easement for the statutory period is held to be evidence of the prescriptive right." *Romans v. Nadler*, 14 N.W.2d 482, 485 (Minn. 1944) (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Acquiescence is distinguished from permission:

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

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

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

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

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

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

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

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

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

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

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

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

> "Respondents, their renters, and their employees have accessed their property four to five times a year via the south drive since their family acquired the property in 1950. . . *This use was consistent with the act of farming and is sufficient to constitute continuous use*.

See Rogers, 603 N.W.2d at 657 ("[C]ontinuity of use will vary depending on the type of use, and accordingly the court should not view continuity of use in the context of a prescriptive easement as strictly as in the context of adverse possession."); *see also Block v. Sexton*, 577 N.W.2d 521, 523-25 (Minn. 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)

I. Fifth Element: Exclusive Use.

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

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

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

J. Presumptions Made In Prescriptive Easement Cases:

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

"The general rule is that where the claimant of an easement by prescription shows open, visible, continuous and unmolested use for the statutory period, inconsistent with the rights of the owner and under circumstances from which the owners' acquiescence may be inferred, the use is presumed to be adverse or hostile." *Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn. 1980).

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

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

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

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

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

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

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

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

4. The Court of Appeals has recently 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)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The 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).

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

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

P. Impact of Torrens Status of Property.

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

> "No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession. . ." Minn. Stat. § 508.02.

II. IMPLIED EASEMENTS.

A. Definition.

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).

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

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

B. Types of Implied Easements.

1. Quasi-Easements / Implied Easements

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

2. Easement of Necessity.

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

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

3. These Terms Are Used Interchangeably, 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 defendants land and remove pine "included whatever was reasonably necessary to make it effective" including right to construct and use logging road across land retained by defendant); 28A C.J.S. § 91a (easement by necessity for access may be claimed only by immediate parties to transaction). Compare 4 Richard Powell & Patrick Rohan, Powell on Real Property § 34.07 (easement may be found despite many intervening conveyances); Pencader Assoc., Inc. v. Glasgow Trust, 446 A.2d 1097, 1100 (Del.Super.1982) (easement of necessity cannot be terminated by mere nonuse, remanding to determine fact issue of existence of easement of necessity 170 years after severance of property)." *Lake George Park, L.L.C. v. IBM Mid America Employees*, 576 N.W.2d 463, 466 (Minn. Ct. App. 1998) (emphasis added; former emphasis deleted).

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

C. <u>Factors.</u>

1. There are three factors which are typically examined.

> "An easement by implication is created if the following factors exist:
> (1) a separation of title;
> (2) the use which gives rise to the easement shall have been so long continued and apparent as to show that it was intended to be permanent; and

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

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

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

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

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

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

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

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

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

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

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

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

1. Only reasonable necessity need be shown.

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

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

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

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

G. <u>Equitable Doctrine</u>.

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

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

Mid America Employees Federal Credit Union, 576 N.W.2d 463, 466 (Minn. Ct. App. 1998); *see also Rajkowski v. Christensen, et al*., 2008 WL 4394675 (Minn. Ct. App. 2008).

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

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

H. <u>Location of Implied Easement</u>.

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

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

I. <u>Duration of Implied Easement</u>.

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

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

J. <u>Uses for Which an Implied Easement May be Created</u>:

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

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

Remember the requirement of reasonable necessity, however.

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

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

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

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

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

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

M. 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 be an unregistered claim.

N. Practice Tip: Join All Necessary Parties.

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

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

We agree. The record demonstrates that at least one survey indicated an easement across parcel "F" which is located immediately east of the appellants' parcel and the owners of parcel "F" are not parties to this lawsuit." *Nunnelee v. Schuna*, 431 N.W.2d 144, 147 (Minn. Ct. App. 1988).

III. STAUTORY DEDICATION.

A. Definition

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

The process is created by statute**:**

DEDICATION OF ROADS.

"Subdivision 1. Six years**.** When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not. Nothing contained in this subdivision shall impair the right, title, or interest of the water department of any city of the first class secured under Special Laws 1885, chapter 110. This subdivision shall apply to roads and streets except platted streets within cities." Minn. Stat. § 160.05.

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

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

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

C. 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 User Statute, first enacted in 1877, were based on a claim of adverse possession:

> "The first paragraph of this section, that which specially relates to the width of roads laid out by supervisors, or county commissioners, was enacted in its present form in 1873, with a proviso authorizing the establishment of cartways two rods wide. In 1877 the legislature remodeled and amended this section, [including] a complete sentence, relating to the acquiring of public ways by user,- a statute of limitations, in effect, predicated, and only justifiable, upon a claim of actual *adverse possession*, occupation, and improvement for the period of six

continuous years." *Marchand v. Town of Maple Grove*, 51 N.W. 606, 607 (Minn. 1892).

In 1912 the Minnesota Supreme Court held that the requirement of public improvement provided notice to a property owner of an adverse claim, or a "statutory adverse user," at a time when public travel was not confined to roads that had been improved:

> "It is obvious, from a reading of the [User S]tatute and a consideration of the decisions of this court construing it, that mere use of premises for public travel is not sufficient to put the statute in motion. *Such use is only one of the essential conditions of adverse possession by the public*. The other is that some portion at least of the alleged highway must have been worked or repaired at least six years before a highway by statutory adverse user can be successfully asserted." *Minneapolis Brewing Co. v. City of East Grand Forks*, 136 N.W. 1103, 1103-1105 (Minn. 1912) (emphasis added).

The statutory dedication statute:

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

Very recently, the Minnesota Court of Appeals stated unequivocally that statutory dedication was tantamount to adverse possession:

> "…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. <u>The Property Taken is the Property Used</u>.

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

E. <u>Exceptions</u>.

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

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

IV. COMMON LAW DEDICATION.

A. <u>Definition</u>.

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

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

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

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

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

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

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

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

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

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

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. <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>Because Common Law Dedication Based on Implied Intent is a Form of Adverse Possession, it Does Not Apply to Torrens Property</u>.

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

> "…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).

V. EASEMENT BY ESTOPPEL.

A. <u>Definition</u>:

Note that under a similar doctrine called easement by estoppel, one who induces another to change their position by a represention concerning an easement will be stopped from denying that easement later.

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: . "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 the grantor:

> 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).

VI. 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.

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

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

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

    and

    b. There is lack of access to said land except over water, the land of others, or access is less than two rods wide. Note that *In re Daniel*, 656 N.W.2d 543 (Minn. 2003) held that access by navigable water was sufficient access to land, and the owner did not qualify for a cartway. The legislature changed this result by amending the statute in 2004 to clarify that water access did not make an owner ineligible for a cartway.

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

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

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

C. Establishing a Cartway in a City.

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

D. Cartway Procedure.

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

E. Additional Details: See Statute.

VII. DE FACTO TAKINGS.

A. Definition.

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

> "The general rule as to the rights acquired through physical condemnation combined with the construction of valuable improvements for the public benefits is stated in 2 Nichols, Eminent Domain (Rev. 3 ed.) s 6.21, as follows:
>
> > 'Where an entity, vested with the power of eminent domain, enters into actual possession of land necessary for its purposes, with or without the consent of the owner, and the latter remains inactive while valuable improvements are being constructed thereon, the use of which require a continued use of the land, the appropriation is treated as equivalent to title by appropriation. * * * Such taking is frequently referred to a 'common law' taking or a 'de facto' taking.'
>
> * * *
>
> It is well settled that a de facto taking creates in the condemnor a protectable legal interest in the property which is equivalent to title by condemnation; the condemnor can be forced to compensate to the original owner of the property, but the owner cannot eject the condemnor nor can he require discontinuance of the public use."

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

B. The Effect of Brooks is Unclear.

In evaluating *Brooks* as a precedent, it is important to remember that the city of Bloomington took ownership in that case not by appropriation, but through a condemnation action. As the Minnesota Supreme Court noted, the former property owner "commenced a mandamus action against the city, seeking to compel inverse condemnation of the strip . . . [t]he city thereafter decided to proceed with the condemnation voluntarily." *Id.* at 912 (emphasis added). 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 [?]"). 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 entitites cannot acquire Torrens property through de facto takings, because de facto takings are too similar to adverse possession:

> "[A]llowing the City to acquire the land at issue here by de facto taking would operate in the same way as if the City acquired the land by adverse possession in that in both situations, a landowner is deprived of rights to land due to actions of another. *See Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn.1999) (listing elements of adverse possession). Adverse possession, however, is an exception to the general proposition that Torrens property is subject to the same "burdens, liabilities, or obligations created by law" as unregistered property, because acquisition by adverse possession is specifically disallowed by the Torrens Act. Minn. Stat. § 508.02. We cannot ignore this legislative prohibition. *See* Minn.Stat. § 645.17(2) (2006) (noting that "the legislature intends the entire statute to be effective")." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 231-232 (Minn. 2008).