REAL PROPERTY LAW UPDATE[1]

This presentation is a general review of recent developments in case law and legislation over the last few years which impact on the use and ownership of real property. If you have further questions about these recent developments, please feel free to contact the authors.

I. CONVEYANCE OF THE MARITAL HOMESTEAD: HOT TOPIC IN REAL ESTATE LAW.

A. Introduction.

You may have heard this common phrase in the real estate industry: "It takes one to buy, and two to sell." Like all such phrases, there is some truth to the statement but there is much more to the story than that. In Minnesota, a husband and wife can only convey (i.e., sell or mortgage) their marital homestead if both spouses sign the conveyance document (i.e., the deed or mortgage). If one of the spouses does not sign, the conveyance is void. Obviously, the implications here are huge. For example, if a bank lends money to a couple to refinance their home, and only one spouse signs the mortgage, the mortgage is void and cannot be enforced.

The Minnesota law regarding the signature requirements of a conveyance of the homestead is found in Minn. Stat. § 507.02. The statute isn't exactly a model of clarity and has been the topic of a handful of recent cases in Minnesota. One case in particular, *Marine Credit Union v. Detlefson-Delano*, was among the most talked-about cases at the annual Real Estate Institute, the big annual conference for real estate lawyers, and is now before the Minnesota Supreme Court.

This section is intended to briefly introduce you to Minn. Stat. § 507.02 and the recent case law updates that affect how the law applies in practice. The goal is to give you a sense of one of the hot topics that real estate lawyers are talking about.

B. The Statute.

Minn. Stat. § 507.02. Conveyances by spouses; powers of attorney

> If the owner is married, no conveyance of the homestead, except a mortgage for purchase money under section 507.03, a conveyance between spouses pursuant to section 500.19, subdivision 4, or a severance of a joint tenancy pursuant to section 500.19, subdivision 5, shall be valid without the signatures of both spouses. A spouse's signature may be made by the spouse's duly appointed attorney-in-fact.
>
> A husband and wife, by their joint deed, may convey the real estate of either. A spouse, by separate deed, may convey any real estate owned by that spouse, except the homestead, subject to the rights of the other spouse therein; and either spouse may, by separate conveyance, relinquish all rights in the real estate so conveyed by the other spouse. Subject to the foregoing provisions, either spouse may separately appoint an attorney-in-fact to sell or convey any real estate owned by that spouse, or join in any conveyance made by or for the other spouse. Use of a power of attorney is subject to section 518.58, subdivision 1a. A minor spouse has legal capacity to join in a conveyance

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of real estate owned by the other spouse, so long as the minor spouse is not incapacitated because of some reason other than that spouse's minor age.

In summary, the statute says that both husband and wife must sign any conveyance of their homestead (such as a deed or a mortgage); otherwise the conveyance is void (not just voidable).

But there are some exceptions in the statute. For example, if the conveyance is a "purchase money mortgage" or a severance of a joint tenancy, it is not void. Similarly, one spouse can convey to the other without the need for both signatures on the conveyance.

C. Case Law Update.

Recent cases have further refined the marital homestead law:

- *Karnitz v. Wells Fargo Bank, N.A.*, 572 F.3d 572 (8th Cir. 2009)

This Eight Circuit Federal Court of Appeals case came out of Minnesota and applied Minnesota law. Husband signed the mortgage, but wife did not. But the Court held that the mortgage was valid and that wife was estopped from challenging the validity of the mortgage because it was undisputed that she knew of and intended the mortgage prior to its execution, she retained the benefit of the transaction, and the bank sufficiently changed its position in reliance on the validity of the mortgage lien by loaning husband and wife over $130,000.

- *National City Bank v. Engler*, 777 N.W.2d 762 (Minn. Ct. App. 2010)

Husband signed the mortgage, but wife did not. Wife instead signed a line on the mortgage that said she was signing not as a borrower, but solely for the purpose of waiving her homestead rights. The Court held that the mortgage was valid even though wife hadn't technically signed the mortgage the purpose of the statute—to protect the non-singing spouse from an unknowing conveyance of the homestead—was fulfilled: she actively and knowingly participated in the transaction and she intentionally waived her homestead rights.

- *Larson v. Wells Fargo Bank, N.A.*, 799 F.Supp.2d (D. Minn. 2011)

Husband signed the mortgage, but wife did not. Even though husband and wife had been separated for 20 years, wife maintained homestead rights by virtue of the marriage. Plus, wife never knew of, consented to, or received any benefits from the mortgage so as to be equitably estopped from asserting protections of the statute.

- *HSBC Mortg. Services, Inc. v. Graikowski*, 812 N.W.2d 845 (Minn. Ct. App. 2012)

Husband signed the mortgage, but wife did not—is this sounding familiar? Husband had stated on his loan application that he was single, but in fact he got married two days before signing the loan documents and did not inform the lender of his new marriage prior to the signing. The Court held that husband should be estopped from challenging the validity of the mortgage because he had misrepresented his marital status to the bank. Moreover, the Court noted that it could not find a single Minnesota case in which the signing spouse alone was able to challenge the validity of the mortgage where the non-signing spouse does not join in the challenge.

- *Marine Credit Union v. Detlefson-Delano*, 813 N.W.2d 429 (Minn. Ct. App. 2012)

This time, wife signed the mortgage but husband did not. Husband was on the road a lot as a truck driver and was unavailable to sign. Husband had previously signed a quitclaim deed conveying his interest in the homestead to wife. Wife then signed the mortgage alone. The Court held that husband effectively conveyed all of his interest in the homestead when he signed the quitclaim deed to wife and therefore the mortgage was valid. Wife has appealed the decision to the Minnesota Supreme Court and a decision is currently pending.

II. CARTWAYS: STATUTORY AND CASE LAW UPDATE

A. Introduction.

"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 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. Until recently, only townships (or counties in unorganized territories) could establish cartways. Minn. Stat. § 164.08.

B. Statutory Update.

In 2007, Minn. Stat. § 435.37 was passed, which permits cities to establish cartways. The conditions are similar to Minn. Stat. § 164.08, subd. 2, with some distinctions. For example, there is no exception for two acre parcels—the petitioning property must be at least five acres.

In 2009, Minn. Stat. § 435.37 was amended by adding a new subd. 4, which provided that proceedings of the city council for the establishment of a cartway in a city must be in accordance with the procedures in section 164.07 (i.e., the town road statute). Previously, there were no procedural provisions under section 435.37.

C. Cartway Case Law Changes.

- *Kennedy v. Pepin Township of Wabasha County*, 784 N.W.2d 378 (Minn. 2010)

Kennedy owned a 26-acre landlocked parcel consisting of bluffs with a five-acre level area at the top. The five-acre level area was the only buildable portion of the property. Kennedy petitioned Pepin Township for a cartway pursuant to Minn. Stat. § 164.08, and in his petition specified a route across an adjoining orchard leading to the level area of the Kennedy property. The town board agreed that the Kennedy property was landlocked and that Kennedy was entitled to a cartway. The board concluded, however, that a cartway across the orchard property would be too disruptive, and instead granted a cartway across another neighboring parcel. The cartway as granted provided access to the lower portion of the Kennedy property, from which the five-acre level area was inaccessible. The Court of Appeals reversed the board's decision and held that when a usable portion of a landlocked property cannot be accessed due to the nature of the property, the cartway statute's purpose is not satisfied when access is provided to another portion of the property. The cartway statute requires more than a technical determination of whether a proposed route will provide access to the property. Investigation must also be made as to whether the *usable* portion of the property can be accessed by the cartway. On further appeal, the Minnesota Supreme Court agreed that the township acted upon an erroneous theory of law when it selected a cartway route that did not provide meaningful access to Kennedy's land. The Supreme Court did, however, reverse the Court of Appeal's mandate that the township accept Kennedy's requested route. Instead, the Supreme Court remanded the case to the town board so that it could exercise its discretion under Minn. Stat. § 164.08, subd. 2(a) and determine whether there might exist an alternative route that

would be less disruptive and damaging to neighbors, and in the public's best interest. Such a decision, the court said, is a decision for the town board and not the court.

III. OTHER SIGNIFICANT CASES UPDATE

- *Barth v. Stenwick*, 761 N.W.2d 502 (Minn. Ct. App. 2009)

Barth held record title to platted lots near Lake Pepin, and claimed adverse possession to a beach between the lots and the lake. In Barth's title registration action, Wacouta Township filed an answer alleging that the beach was public property through common law dedication or public use giving rise to a prescriptive easement. Barth moved for summary judgment, arguing that the township should be collaterally estopped from contesting the registration because it had not answered or defended against three previous claims involving ownership of other portions of the same beach. In one of the earlier registration actions, Barth pointed out, the township had adopted a specific resolution disclaiming any interest in the portion of beach at issue in that proceeding. For its part, the township argued that it was Barth who should be collaterally estopped, since in another prior registration action the township *had* argued for recognition of a public interest in the portion of beach at issue in that registration, in which the applicants eventually withdrew their claims to the beach. The district court granted summary judgment to Barth, concluding that the township was collaterally estopped and further concluding their there was no public dedication of the beach, no prescriptive easement existed, and the township had no interest or title in the beach.

The township appealed and the Court of Appeals reversed. Following a thorough discussion of the doctrine of collateral estoppel, the court rejected the argument that prior registrations bound the township when those registrations dealt with different land and different issues. Noting that the law treats real property as unique, the court approached, but ultimately sidestepped, the issue of whether collateral estoppel can ever be used when the subject of a legal action is real property not identical to the real property at issue in the previous action. The court also rejected the township's collateral estoppel argument, noting that Barth was not a party to any of the previous registrations. Finally, the court noted that questions raised in the examiner of titles' report and in several filed affidavits created genuine issues of material fact, precluding summary judgment.

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

Crablex foreclosed a mortgage by action but (1) had previously subordinated the mortgage to certain easements, and (2) failed to name the holders of certain easements. The district court entered a decree of foreclosure and Crablex was the successful bidder at the sheriff's sale. Crablex petitioned the court for a new certificate of title following foreclosure, and asked that the new certificate show the property to be free and clear of all encumbrances registered subsequent to registration of the foreclosed mortgage. The easement holders objected. Despite the fact that the easements had been registered subsequent to registration of the mortgage, the district court concluded that the easements could not be extinguished because the holders had not been named parties to the foreclosure action. Crablex appealed. The Court of Appeals affirmed the district court's ruling against Crablex. While a recorded mortgage ordinarily has priority over all interests subsequently recorded, a mortgagee may by declaration or agreement subordinate its interest to what would otherwise be junior interests. The court concluded that Crablex had effected such a subordination as part of a settlement agreement entered with the holders of the easements during the foreclosure proceedings. The court also rejected Crablex's argument that the easement holders need not have been named in the foreclosure action because they did not have statutory rights of redemption. Concluding that the holders of the easements did in fact hold redemption rights, the court found Crablex's failure to join those holders in the foreclosure proceeding fatal and they were not extinguished by the foreclosure action to which they were not parties.

- *City of Jordan v. The Church of St. John the Baptist of Jordan*, 764 N.W.2d 71 (Minn. Ct. App. 2009)

The City filed an eminent domain petition to acquire an easement over church land for sidewalk and traffic signal purposes. Minn. Stat. § 315.42 provides that no roads or streets shall be laid through the property of a religious corporation without the consent of the corporation's governing board. Much of the church's argument is based on the assumption that the definitions Chapter 169, "[s]treet or highway" means the entire width between boundary lines of any way or place when any part thereof is open to the use of the public, as a matter of right, for the purposes of vehicular traffic." Minn. Stat. § 169.011, subd. 81. A "sidewalk" is "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines intended for the use of pedestrians." Minn. Stat. § 169.011, subd. 75. The relevant part of the definition of "roadway" is "that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder." Minn. Stat. § 169.011, subd. 68. Applying the technical definitions of Chapter 169, the church asserts that a sidewalk is a part or subset of a street and therefore the prohibition in Minn. Stat. § 315.42 on taking church lands for street purposes precludes taking church lands for sidewalk purposes. The district court ruled that sidewalks and signal lights were not roads or streets and granted the city's condemnation petition.

The court cited the 1892 case of Graham v. City of Albert Lea, 48 Minn. 201, 205, 50 N.W. 1108, 1109 (1892), in which the Minnesota supreme court then noted that a "sidewalk" was "ordinarily" understood to refer to part of a street. Further, this ordinary understanding of "sidewalk," as that term was used in 1892, is consistent with the definition of "sidewalk" currently set out in Minn. Stat. § 169.011, subd. 75. The court continued looking at other sections of Chapter 169, noting that "[l]ocal authorities in their respective jurisdictions shall place and maintain such traffic-controlled devices upon highways . . . ." Minn. Stat. § 169.06, subd. 2. Therefore, despite the fact that the substance of this case involves Minn. Stat. § 315.42 rather than Chapter 169, use of the provision in Chapter 169 defining "sidewalk" would not be inappropriate here. Thus, the court held that a sidewalk and an area for traffic signals are a part of a street and cannot be taken under Minn. Stat. § 315.42 without the consent of the church's governing board.

V. VARIANCES: THE LEGISLATURE "GIVETH" WHAT THE COURTS "TAKETH AWAY."

A. Introduction.

When local zoning ordinances create practical difficulties unique to a property, the property owner may get a variance, or exception, to those ordinances. A landowner will apply for a variance—perhaps, for example, so he can build a shed closer to the property line than the city setback requirement allows—with a local government zoning enforcement official. If the landowner is unhappy with the decision he receives, he can appeal to a board of adjustment. The next stage of appeal is the court system—the appeal would leave the oversight of city officials and go to district court. Variance law depends heavily on ordinance and statute. Counties and cities provide the ordinances which initiate a landowner's desire for a variance, as well as the requirements of an application. Minnesota statutes govern the county or city in reviewing that variance application. Minn. Stat. § 394.27 deals with counties (typically applicable in counties with smaller populations), while Minn. Stat. § 462.357 pertains to municipalities. The variance application process can be daunting, and the skills of a surveyor are often required at some point before or within this process. These materials briefly describe some of the main issues arising under variance law and will bring you up to speed on the fairly significant changes to Minnesota variance law that have come up over the last few years.

B. Adoption of the Practical Difficulties Standard.

The big change that had people talking in the world of variance law was the change to Minn. Stat. § 462.357, subd. 6. This section formerly allowed a city to grant a variance from an ordinance only where its "strict enforcement would cause undue hardship…" Until June of 2010, undue hardship been interpreted a bit loosely by the courts: they asked if the landowner's proposed use was reasonable (albeit prohibited).

In 2010, however, the Supreme Court held that this interpretation was incorrect (see discussion below of *Krummenacher v. City of Minnetonka*). Instead, the correct interpretation of "undue hardship" was whether the property could be put to *any* reasonable use that was not prohibited by the ordinance. This ultra-strict interpretation of the statute effectively tied the hands of cities in granting ordinances, and the granting of city variances halted. The Minnesota Legislature responded in May of 2011 by changing the statutory requirement, striking the undue hardship standard and replacing it with "practical difficulties." The new test for practical difficulties under the statute is:

1) Landowner must propose to use the land in a reasonable manner not permitted by ordinance;

2) Landowner's plight must be due to circumstances unique to the property and not created by the landowner; and

3) The variance, if granted, will not alter the essential character of the locality.

Recent case law enhances our understanding of this most recent development as well as other aspects of variance law.

C. Recent Variance Cases.

- *In re Hubbard*, 778 N.W.2d 313 (Minn. 2010) and *In re Haslund*, 781 N.W.2d 349 (Minn. 2010)

In these cases the Supreme Court made it quite clear that the DNR lacks statutory authority to certify local government variance decisions. If the city grants a variance, the DNR's refusal to certify it has no effect: the variance is valid.

- *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721 (Minn. 2010):

This is the case discussed in the section above. A homeowner had a garage, which was a permissible nonconformity, which she wanted to add a level to. She was interested in using the second story as space for yoga and crafts. She applied for a variance with the City of Minnetonka. When her variance request was approved, her neighbor (Krummenacher) appealed the decision. The city's decision was upheld through the Court of Appeals. The Supreme Court reversed and remanded the decision, though, holding that the lower Court interpreted "undue hardship" under an improper standard. The proper standard to establish the "undue hardship" required for a variance is if "the property in question cannot be put to a reasonable use" without the variance.

- *City of N. Oaks v. Sarpal*, 797 N.W.2d 18 (Minn. 2011):

This case highlights the importance of accurate documents in the variance process, particularly the survey. When Dr. Sarpal sought to build a pool house on his property, the City of North Oaks requested an "as-built survey" showing the location of the proposed structure. Dr. Sarpal was unhappy with a $2500 estimate for a new survey and asked the city if it had an as-built survey on file for his property. A city employee handed him an old survey, done before even the home was built, and stated that it was the type of survey he needed. In fact, it was not. Dr. Sarpal drew in the proposed location of the pool house. As drawn, it did not encroach upon the 30-foot setback, and his plans were approved.

The pool house was built with much expense, and it extended into the setback. About a year later, the city sent a letter to Dr. Sarpal demanding that he relocate the structure. He applied for a variance and was denied. He did not appeal the denial, but instead waited to fight the city when it tried to enforce its order to relocate the pool house. Dr. Sarpal claimed that the city was at fault as its employee supplied him with false information. Because of its wrongful conduct, he argued, the city should be estopped from enforcing the ordinance.

In the end, though, the buck stopped with the landowner. The Minnesota Supreme Court held that the city employee made a simple mistake which did not constitute wrongful conduct and the employee did not have a duty to provide the correct survey. The city, on the other hand, was entitled to rely on the accuracy of the documents the landowner provides.

- *Ortell v. City of Nowthen*, 814 N.W.2d 40 (Minn. Ct. App. 2012):

This case looks at subdivision 1e(a)(2) of the municipality statute. Under that section, any nonconformity may be continued unless:

> any nonconforming use is destroyed…to the extent of greater than 50 percent of its estimated market value…and no building permit has been applied for within 180 days of when the property is damaged. In this case, a municipality may impose reasonable conditions upon a zoning or building permit...

Minn. Stat. Ann. § 462.357 (West).The Court found the plain language here ambiguous, but determined that it meant that upon the 50% value destruction, if a building permit is applied for within 180 days, the municipality may impose reasonable conditions on the building permit. If it is not applied for, the nonconformity must end and subsequent use or occupancy must be conforming. Otherwise, at this point, a variance can be obtained.

The homeowner here had been previously denied a variance, but his application was looked at under the strict "undue hardship" standard. The Court noted that because of the statutory change to "practical difficulties," he may now qualify for a variance.

- *Mutsch v. County of Hubbard*, A11-725, 2012 WL 1470152 (Minn. Ct. App. Apr. 30, 2012)

This unpublished case is included to add to our understanding of the new "practical difficulties" standard under section 462.357, subd. 6. In deciding this case, the Court used factors established under the practical difficulty standard that was in place already for counties (see Minn. Stat. § 394.27). Consider the following factors when applying the "practical difficulties" standard:(1) how substantial the variation is in relation to the requirement; (2) the effect the variance would have on government services;

(3) whether the variance will effect a substantial change in the character of the neighborhood or will be a substantial detriment to neighboring properties; (4) whether the practical difficulty can be alleviated by a feasible method other than a variance; (5) how the practical difficulty occurred, including whether the landowner created the need for the variance; and (6) whether, in light of all of the above factors, allowing the variance will serve the interests of justice.

- *In re Skyline Materials, Ltd.*, 819 N.W.2d 183 (Minn. Ct. App. 2012), review granted (Oct. 16, 2012):

This is a procedural case. The issue here was who must be served when a variance decision is being appealed under Minn. Stat. § 394.27. The Court held that an appeal under this section is part of an ongoing action rather than the commencement of new action. Therefore, an aggrieved party must serve the represented party's attorney unless service on the party is ordered by the district court.

IV. CHANGES TO BOUNDARY AND ACCESS LAW FOR TORRENS PROPERTY.

A. Introduction.

Minnesota law specifically prohibits establishing rights against Torrens property by use, over time, under the doctrines of adverse possession (where one *possesses* property for fifteen years and thereafter may claim *ownership* of it), and easement by prescription (where one *uses* property in a non-possessory way for the same period of time, and thereafter may claim the right to *continue the use*).

> "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.

Although the Torrens statute is over 100 years old, and the common law doctrines concerning boundaries, ownership, and use are much older than that, the laws of boundary and access law for Torrens Property have proven surprisingly fluid in the last few years.

B. Background of Torrens Law.

The purchaser of Torrens property does not have to pay for an expensive abstract to ascertain the quality of title, but may simply consult the Certificate of Title:

> Under the Torrens system, time-consuming and expensive title searches, which characterize the abstract system, are alleviated because the purchaser of Torrens property may, subject to limited exceptions, determine the status of title by inspecting the certificate of title.

In re Collier, 726 N.W.2d at 804. For such a system to work, property purchasers and owners must be able to rely on their certificates of title:

> 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).

Thus, when one purchases Torrens property, then, they take subject only to "the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar." Minn. Stat. § 508.25. And, the Minnesota Supreme Court has held that "*mere possession* of Torrens property will *never* ripen into title against the owner." *Moore v. Henriksen*, 165 N.W.2d 209, 218 (Minn. 1968) (emphasis added).

C. Recent Decisions Limiting Use of De Facto Takings, Statutory Dedication, Common Law Dedication.

Beginning in 2008, the Court of Appeals and the Minnesota Supreme Court have expanded the prohibition against adverse possession to specifically apply to other doctrines in which ownership is established by possession. The first of these was de facto takings, a doctrine which provides that where government takes possession of property and makes improvements to it, it cannot be divested of the property. As the Minnesota Supreme Court observed in *Brooks Investment Company v. City of Bloomington:*

> 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). However, the Minnesota Supreme Court recently held that governmental entities cannot establish a protectable interest in Torrens property through de facto takings. The basis for the ruling was that de facto takings functioned similarly 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. . . . 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.

Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 231-32 (Minn. 2008) (emphasis added). It is worth noting that the Minnesota Supreme Court limited its ruling concerning de facto takings to Torrens property, thereby implying the doctrine may yet be valid for abstract property

Of course, this ruling had implications for other doctrines where ownership of Torrens property was established by possession. And, in a second appeal of the same case, the Minnesota Court of Appeals explicitly broadened the principle to apply to statutory dedication, and one type of common law dedication. By statutory dedication, a government can establish ownership of property by possessing and maintaining it for 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.

Minn. Stat. § 160.05. The Minnesota Supreme Court found that statutory dedication was sufficiently analogous to adverse possession that it, too, was prohibited:

> Thus, our analysis is similarly focused on the operation of statutory dedication compared to adverse possession. [R]ecently, the supreme court characterized the user statute as a "substitute" relief for an adverse-possession claim. *Barfnecht v. Town Bd. of Hollywood Twp.*, 304 Minn. 505, 505, 232 N.W.2d 420, 422 (1975). . . . The supreme court held that "[a]s a substitute for common-law creation of highways by prescription or adverse use, the [user] statute provides [a] method for acquisition of highways by adverse public use." *Id.* The city argues that these cases analogize statutory dedication to adverse possession only in dicta and cites instead to authority from other jurisdictions. *See, e.g., Carter v. Michel*, 403 Ill. 610, 87 N.E.2d 759, 764 (1949) (concluding that an easement was valid despite not appearing on the certificate of title); *Duddy v. Mankewich*, 75 Mass.App.Ct. 62, 912 N.E.2d 1, 5-6 (2009) (concluding that Torrens landowners intended to give an easement in a subdivided lot for the benefits of the other subdivisions despite the easement not appearing on the certificate of title), *review denied* (Mass. Oct. 29, 2009). Because recent supreme court precedent *in this case* instructs us to look to the operation of an action when comparing it to adverse possession prohibited by the Torrens Act, and 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, 784 N.W.2d 848, 853 -855 (Minn. Ct. App. 2010) (italics in original; underline added).

Common-law dedication provides for dedication of land to the public if two showings are made: The demonstration of "the landowner's intent, express or implied, to have his land appropriated and devoted to a public use," and "acceptance of that use by the public." *Id., citing to Barth v. Stenwick*, 761 N.W.2d 502, 511 (Minn.App.2009). The *Hebert* Court ruled that if the owner's intent is merely implied from the owner's conduct– and not expressly stated – it is another example of establishing ownership through possession of Torrens property, and also sufficiently analogous to adverse possession that it is prohibited:

> But *if statutory dedication is tantamount to adverse possession, common-law dedication based on an implied intent to dedicate is prohibited under the Torrens Act as well*. As the supreme court held in *Moore v. Henricksen*, "[s]ince, by [Minn.Stat. §] 508.02, possession may not ripen into title against the holder of a registration certificate, a purchaser has no reason to assume that possession is adverse to the registered title." 282 Minn. 509, 520, 165 N.W.2d 209, 218 (1968). Thus, even if a landowner is aware of another's possession or use of his Torrens property-which is the nature of an implied intent to dedicate-this awareness does not diminish the owner's interest in the Torrens property. *See id.* (concluding that use of the property by another for 30 years did not diminish the owner's property interests). The city's assertion that common-law dedication occurred is unavailing, and the district court's grant of the city's summary-judgment motion was erroneous.

784 N.W.2d at 855 (emphasis added).

D. The Doctrine of Boundary by Practical Location Has Been Expanded Via Statutory Change.

In marked contrast, the Minnesota legislature recently expanded the applicability of the doctrine of boundary by practical location to Torrens law. Boundary by practical location is another means of establishing ownership based on use, where parties have abided by some definite location of a boundary line, such as a fence or tree line. There are three specific means of claiming boundary by practical location – by acquiescence, agreement, and estoppel:

> Ordinarily, in order to establish a practical location of a boundary line it must appear (1) the location relied on was acquiesced in for the full period of the statute of limitations; or (2) the line was expressly agreed upon by the parties and afterwards acquiesced in; or (3) the party barred acquiesced in the encroachment by the other, who subjected himself to expense which he would not have done if there had been a dispute as to the line.

Romanchuk v. Plotkin, 9 N.W.2d 421, 427 (Minn. 1943).

Though all three means involve possession, the Minnesota Supreme has noted that boundary by practical location is "independent of adverse possession." *Enquist v. Wirtjes*, 68 N.W.2d 412, 417 (Minn. 1955). For Torrens property, the doctrine of boundary by practical location was historically applied only in limited instances. The Minnesota Court of Appeals once held it applied only where a boundary line dispute existed at the time the property was registered, or when there was an ambiguity with respect to the legal description of the boundary line:

> [T]he doctrine of boundary by practical location has been applied in limited instances to determine boundaries to registered property. *See Minneapolis & St. Louis Ry. v. Ellsworth*, 237 Minn. 439, 444-45, 54 N.W.2d 800, 804 (1952) (doctrine applied where original registration proceeding did not determine boundary lines, basis for boundary dispute existed at time of registration, and dispute is not collateral attack on Torrens proceeding); *In re Zahradka*, 472 N.W.2d 153, 155-56 (Minn.App.1991) (doctrine applied to resolve conflict between two certificates of title with ambiguous property descriptions that could include same property), *pet. for rev. denied* (Minn. Aug. 29, 1991). *In a recent case, this court recognized that adverse claims have only affected registered property where there was an ambiguous description in the certificate of title or the dispute existed at the time the property was registered*. *In re Building D, Inc.*, 502 N.W.2d 406, 408 (Minn.App.1993), *pet. for rev. denied* (Minn. Aug. 24, 1993). Here, there is no ambiguity in Lot 66's certificate of title, nor was there a dispute over the location of boundaries when Lot 5 was registered in 1914. The boundaries of Lots 1 and 66 were delineated by the July 7, 1915 plat which was filed with the registrar of titles on January 15, 1917. Both Williams and McGinnis' predecessors in title signed the 1915 plat as owners of the platted property, affirming the location of the boundaries at that time. As there was no boundary disagreement at the time of the 1914 registration, Williams cannot now assert that the failure to establish boundaries during the registration proceeding provides a basis for an adverse claim. *Cf. Ellsworth*, 237 Minn. at 445, 54 N.W.2d at 804.

Petition of McGinnis, 536 N.W.2d 33, 36 (Minn. Ct. App. 1995).

In 2008, however, the Minnesota legislature modified the wording of the Torrens Act by adding the following italicized language:

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

Minn. Stat. § 508.02. The added language stated the "common law doctrine" of boundary by practical location applied to Torrens, but did not explicitly state its application was limited to situations where there the factors referenced in *McGinnis* were present, i.e., an ambiguity or pre-registration dispute.

And, in *Britney v. Swan Lake Cabin Corp.*, heard after the modification of Minn. Stat. § 508.02 took effect, the change to the statutory language was very important: The *Britney* Court did not analyze

the case to see whether "there was an ambiguous description in the certificate of title," or a "dispute which existed at the time the property was registered." Instead, the *Britney* Court simply analyzed the doctrine in light of the use put to the property, and distinguished between practical location and adverse possession. The acquiescence theory of boundary by practical location reviewed by the *Britney* Court is a direct analogue of adverse possession, and the basis for it is Minn. Stat. § 541.02:

> "To acquire land by practical location of boundaries by acquiescence, a person must a show by evidence that is clear, positive, and unequivocal that the alleged property line was "acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations." *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn.1977). The statute of limitations is 15 years. Minn.Stat. § 541.02 (2000); *see Allred v. Reed*, 362 N.W.2d 374, 376 (Minn.App.1985) (citing Minn.Stat. § 541.02 in practical-location case), *review denied* (Minn. Apr. 18, 1985).

Pratt Inv. Co. v. Kennedy, 636 N.W.2d 844, 850 (Minn. Ct. App. 2001). The Minnesota Supreme Court has called Minn. Stat. §541.02 "the adverse possession statute," and has found that it cannot apply to Torrens property:

> City asserts that the landowners' claim for ejectment is time-barred by the 15–year statute of limitations set forth in Minn.Stat. § 541.02(2006), which provides: "No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff * * * was seized or possessed of the premises in question within 15 years before the beginning of the action." Section 541.02 is the adverse possession statute in Minnesota. . . As such, *it cannot operate against Torrens property*.

Hebert, 744 N.W.2d at 233 (emphasis added). Previously § 508.02 specifically *prohibited* adverse possession claims, and the *Hebert* Court held this proscription extended to analogues of adverse possession.

However, the *Britney* Court noted that the type of acquiescence required to establish boundary by practical location must be something beyond mere passive conduct on the part of the owner of the property being claimed. Some conduct evidencing assent was required:

> In the present case, appellant argues only that it has established a boundary by practical location by way of acquiescence. The acquiescence required *is not merely passive consent but conduct from which assent may be reasonably inferred*. *Engquist v. Wirtjes*, 243 Minn. 502, 507–08, 68 N.W.2d 412, 417 (1955) (affirming no-practical-location finding absent evidence that disseized or predecessors recognized or treated a fence as a division line, or that disseizor or predecessors used the disputed land); *LeeJoice v. Harris*,404 N.W.2d 4, 7 (Minn.App.1987) (no practical location by acquiescence when disseizor does not use disputed area for statutory period, even though disseized "tacitly consented" to boundary by failing to dispute a sightline).

Britney v. Swan Lake Cabin Corp., 795 N.W.2d 867, 872 (Minn. App. 2011) . The *Britney* court went on to note that conduct implying assent is typically shown through physically marking the boundary line, most often with a fence; something that did not occur in the *Britney* case:

> Typically, practical location by acquiescence "occurs when neighbors attempt to establish a fence as close to the actual boundary as possible, or when the disseizor unilaterally marks the boundary, and the disseized neighbor thereafter recognizes that line as the actual boundary." *Pratt*, 636 N.W.2d at 851; *see also Fishman v. Nielsen*, 237 Minn. 1, 5–6, 53 N.W.2d 553, 555–56 (1952) (finding practical location by acquiescence when parties and their predecessors in title built dividing fence as close as possible to actual boundary and remained satisfied with fence's

location for statutory period); *Allred*, 362 N.W.2d at 376–77 (finding practical location by acquiescence when disseizor built fence with intent to be as close to boundary as possible and when disseized treated fence as boundary). Appellant, both before the district court and now on appeal, points to a number of actions that it and its predecessors in interest took in seeking to determine the location of the boundary between Lots Four and Five, most notably constructing a fence that ran in the approximate vicinity of the boundary line. But appellant points to no evidence of respondents or their predecessors in interest acquiescing to such actions constituting the boundary between Lots Four and Five other than its statement that respondents "never assert[ed] ownership to the questioned land." Assent may not be reasonably inferred from this passive conduct. *See Engquist*, 243 Minn. at 507–08, 68 N.W.2d at 417 (requiring more than passive consent to establish a practical-location boundary by acquiescence).

Id., 795 N.W.2d at 872-73. The *Britney* Court went on to further distinguish the acquiescence theory from adverse possession by stating that case law from adverse possession cases would not apply, due to the prohibition of adverse possession of Torrens property:

> *Appellant's theory relies on outdated cases addressing the doctrine of adverse possession, which the legislature has explicitly precluded in the Torrens Act*. *See* Minn.Stat. § 508.02 (providing that no title to registered land in derogation of that of the registered owner may be acquired by adverse possession). The district court therefore did not err by concluding that appellant had failed to establish the practical location of the boundary line between Lots Four and Five by acquiescence.

Id., 795 N.W.2d at 873 (emphasis added).

The distinction between acquiescence and merely allowing possession to continue to exist is subtle. Although the Britney court stated "[a]ssent may not be reasonably inferred from this passive conduct," the Court of Appeals has noted, in a boundary by practical location case, that "[a]cquiescence entails affirmative *or tacit* consent to an action by the alleged disseizor, such as construction of a physical boundary or other use . . . " *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 849 (Minn. Ct. App. 2001); *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. Ct. App.1987). Actual knowledge may be a means of distinguishing between abiding a trespass and acquiescing to it.

The *Britney* Court also provided a practice pointer concerning the modified statute: One seeking to change the boundary line contained in a certificate of title must comply with the procedural requirements of Minn. Stat. § 508.671, even though one opposing a boundary by practical location claim by bringing an ejectment action does not:

> Because the procedural requirements of Minn. Stat. § 508.671 were not followed, the district court properly dismissed appellant's counterclaim. . . The procedure for seeking a judicial determination of a boundary line of one or more Torrens properties is set forth in Minn. Stat. § 508.671: . . A proceeding under section 508.671 must follow several steps, including filing a certified copy of the petition with the registrar of titles and providing notice to all interested parties.. . .Appellant also argues on appeal that the district court was without authority to consider respondents' claim, as respondents' action similarly did not follow the procedural requirements of Minn. Stat. § 508.671. We disagree. The statute governs the procedural steps that must be followed by a party seeking to have "all or some of the common boundary lines judicially determined." Minn. Stat. § 508.671, sub. 1. Respondents' claim, however, was not one seeking a judicial determination of a boundary line. Instead, respondents' complaint sought a judgment that they were the "owner[s] in fee of the entirety of Lot Five (5), Block Two (2), Plat of Swan Lake" and were entitled to recovery of possession "of the whole thereof." Because respondents'

> complaint sought a judicial determination of ownership—rather than a judicial determination of the boundary—and the Northern Lights survey accurately described the boundary as platted, the procedural requirements of Minn. Stat. § 508.671 do not apply to respondents' claim.

Id., 795 N.W.2d at 870-71.

And finally, in *Ruikkie v. Nall,* the Court of Appeals observed that use of the doctrine to alter a legal description stated in a certificate of title was previously prohibited, but now allowed:

> The Nalls argue that the district court properly denied the Ruikkies' petition because the district court's determination of boundaries would require an alteration in the legal descriptions of Gov't Lot 1 and Gov't Lot 6. They cite to this court's *Geis* decision for the proposition that "a court may not, in a proceeding subsequent to initial registration of land, determine boundary lines, if that determination alters the legal description of the land as stated in the certificate of title, and thereby attacks the Torrens certificate." 576 N.W.2d at 750. This statement from *Geis* does not reflect the present state of the law. *Geis* was decided before *the amendment of Minn. Stat. § 508.02, which overrules Geis by expressly allowing judicial proceedings to establish boundaries by practical location.* Regardless, the majority in *Geis* recognized that the decision was based on "unique facts." *Id.* at 751. Most importantly, the Ruikkies' petition does not seek to alter the legal description of the Nalls' or the Ruikkies' land; rather, it seeks merely to establish the correct location of the boundary between Gov't Lots 1 and 6. Acceptance of the Nalls' plat and issuance of certificates of title are not a shortcut or proper back-door strategy for avoiding a proceeding subsequent to determine boundaries pursuant to Minn. Stat § 508.671.

Ruikkie v. Nall, 798 N.W.2d 806, 821(Minn. Ct. App. 2011).

V. *RUIKKIE V. NALL* AFFIRMS THE IMPORTANCE OF US GOVERNMENT SURVEYS – EVEN WHEN THEY ARE WRONG.

The key issue in *Ruikkie v. Nall,* a case the Minnesota Court of Appeals considered in 2011, was whether the subject lot had frontage on a lake. 798 N.W.2d 806, 810 (Minn. Ct. App. 2011). The issue was created by an erroneous survey which depicted a bay of a lake in the wrong place:

> The genesis of this conflict is the 1885 United States government survey of the area. The original government survey depicts a bay in the southeast portion of Mitchell Lake that covers a substantial area in what is Gov't Lots 1, 5, and 6. Testimony in this case revealed that this bay did not exist in 1885 and does not exist today. The bay did not gradually disappear over time as a result of ecological succession; the bay has simply never been there. The original government survey is therefore erroneous.

Id., at 811.

The Ruikkie's surveyor had the Lot Lines for Lots 1, 5 and 6 bend towards the lake to preserve the waterfront access:

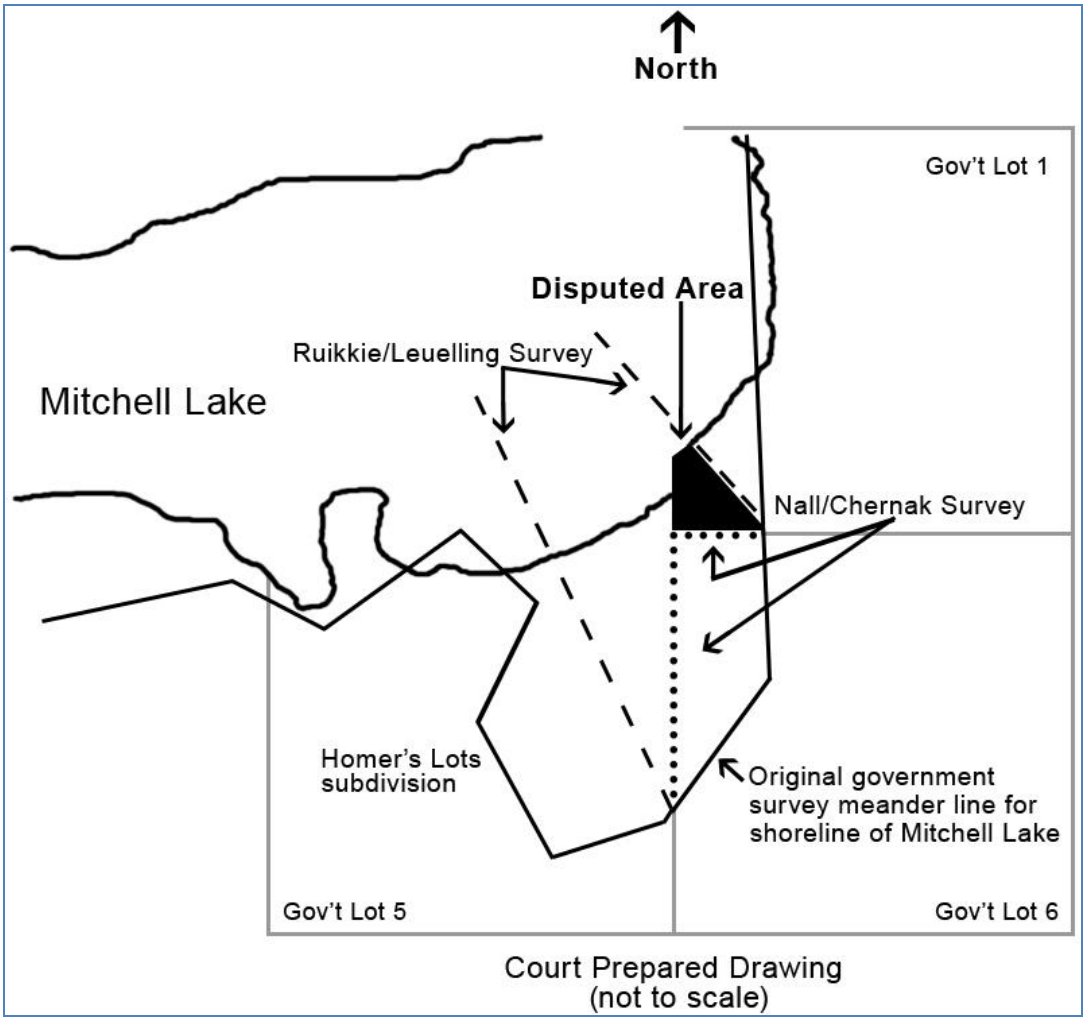
> In the summer of 2005, the Ruikkies sought advice from [Ruikkie's Surveyor] about Gov't Lot 6's boundaries. [Ruikkie's Surveyor] showed the Ruikkies a copy of the original government survey, pointed out that it clearly shows Gov't Lot 6 abutting the lake, and explained that surveying principles required the preservation of Gov't Lot 6's access to the "shrinking lake." [Ruikkie's Surveyor] created a diagram of Gov't Lot 6, using an aerial photo of the property, and superimposed angled lot lines that would, in his opinion, comply with the government survey.

> These angled lines start at the points at which the boundaries of Gov't Lot 6, as set by the United States government survey, reached the meander line for the bay on Mitchell Lake and then run northwesterly toward the lake's center line. This results in Gov't Lot 6 having lake frontage.

Id., at 812. In contrast, Nalls' surveyor ran the government lot lines straight over the place that the original government survey had incorrectly depicted the bay.

> [In the drawing above t]he dotted lines represent the disputed portion of [Nall's surveyor's] proposed boundaries while the dashed lines represent the disputed portions of [Ruikkie Surveyor's] proposed boundaries.

Id.



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

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 United States government survey subdivides real estate in Minnesota and establishes the framework for its identification. The boundaries established by the original government survey controls the judicial determination of boundaries. . . . County surveyors must make surveys "in strict conformity to the original survey made by the United States." Minn.Stat. § 389.04 (2010). When a survey is made of property that was subject to a United States government survey, "the aim of the resurvey must be to retrace and relocate the lines and corners of the original survey." . .
>
> 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. . . *Anderson v. Johanesen*, 155 Minn. 485, 486, 193 N.W. 730, 730 (1923) ("A government corner is where the government surveyors correctly *or mistakenly* place it...." (emphasis added)). For the subsequent survey "to be of any use in determining" the true boundary lines, the survey "must agree with the old survey and plat." . . .

Id., at 815 [some 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 *Ruikke* Court was "whether the practical-location doctrine may be used to resolve the error in the original government survey." *Id*., at 816. The *Ruikke* Court found this was 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]. The *Ruikke* Court found the District Court erred because it implemented boundary by practical location to adjust the US Government Survey lot lines before undertaking this analysis:

> Here, the district court did not determine that there is no federal or state rule or caselaw principle. . . . [I]t was error to resort to the doctrine of boundary by practical location to set the boundary between Gov't Lots 1 and 6 before considering federal and state standards or judicial precedents.

Id.

That said, the *Ruikkie* Court went on to analyze the case under boundary by practical location principles to determine whether it could adjust the boundary line between the parties' properties, as a separate matter from the government lot line: "The next issue is whether the doctrine of boundary by practical location may be used to establish a boundary between the Ruikkies and the Nalls, regardless of the location of the boundary between Gov't Lots 1 and 6 in the original government survey." *Id*., at 817.

But, upon applying the law of practical location of boundaries to the facts, the Court of Appeals found that each type failed. Boundary by practical location by agreement failed because there was "not sufficient evidence of acquiescence." *Id*., at 818. Boundary by practical location by acquiescence failed for multiple reasons, including the fact that plaintiffs could not show possession for the requisite 15 year period: "The record demonstrates that the [Ruikkies] did not own Gov't Lot 6 long enough to run out the statutory period required to establish acquiescence in a boundary by practical location." *Id*., at 819. Lastly, boundary by practical location by estoppel could not be established on appeal – as "the district court did not find estoppel, [the Court of Appeals did] not consider it." *Id*., at 820.

So the Court of Appeals sent the case back to the District Court, to:

> determine whether any federal or state rule, regulation, or judicial precedent determines how to establish the boundary . . . consistent with the original 1885 government survey. If there is no such applicable rule, the district court shall determine which survey should govern resolution of this dispute. If necessary, the district court shall also evaluate the opinions of the two surveyors. The district court may open the record to receive evidence of federal and state rules and for such other matters as it determines necessary or appropriate. Finally, if the district court determines that the parties' focus on the boundary between Gov't Lot 1 and 6 so affected the parties' presentation and its consideration of the doctrine of practical location on the boundary between the Ruikkies' and the Nalls' property, we remand, allowing the district court in its discretion to reopen the record for further consideration of the doctrine of boundary by practical location.

Id., 821 -822.

VI. UPDATES TO MCIOA

The following statutory provisions of Minnesota's Common Interest Ownership Act are included in the portions of that chapter which have been changed recently. These changes are highly technical a general description would be insufficient to provide you with direction to assure compliance. If the following provisions are relevant to your work, you should review the statutes themselves.

- Minn. Stat. § 515B.2-102 (changed effective August 1, 2010): Affects unit boundaries.
- Minn. Stat. § 515B.2-109 (changed effective August 1, 2010): Affects common elements and limited common elements.
- Minn. Stat. § 515B.2-110 (changed effective August 1, 2010): Affects common interest community plats.
- Minn. Stat. § 515B.2-112 (changed effective August 1, 2010): Affects the subdivision, combination, or conversion of units.
- Minn. Stat. § 515B.2-113 (changed effective August 1, 2010): Affects the alteration of units.
- Minn. Stat. § 515B.2-114 (changed effective August 1, 2010): Affects the relocation of boundaries between adjoining units.

VII. CONCLUSION.

The foregoing is a brief summary regarding changes in the status of the real property law in Minnesota over the last few years. If you have questions regarding the specifics, please feel free to contact the authors. Thank you very much.