Real Property Law Update

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INTRODUCTION

- General review of recent changes in real estate law
- Both case law (court decisions) and statutes
- Focus on impact on the use and ownership of real property

FORECLOSURE: IS FORECLOSURE BY ADVERTISEMENT DEAD IN MINNESOTA?

Ruiz v. 1st Fidelity Loan Servicing, LLC

- 1st Fidelity Loan Servicing recorded an assignment of mortgage against Doris Ruiz's property the same day it started foreclosure proceedings on it by publishing a first notice of foreclosure sale and recording a notice of pendency of foreclosure.
- **Minn. Stat. § 580.02 (3) "Requisites of Foreclosure"**: "To entitle any party to make such a foreclosure, it is requisite… that the mortgage has been recorded and, if it has been assigned, *that all assignments thereof have been recorded*. . . "

Ruiz v. 1st Fidelity Loan Servicing, LLC, cont.

- Looking at the plain meaning of the words in the statute ("make," "requisite"), the MN Supreme Court concluded that all assignments of a mortgage must be recorded *before* the mortgagee begins the foreclosure process
- Since recording an assignment on the same day as the notice of pendency is not recording the assignment *before* the beginning of the foreclosure process, the Court held that the foreclosure was void.
- Further, the Court held that recording requirements *must be strictly complied with*

Ruiz v. 1st Fidelity Loan Servicing, LLC, cont.

- Strict compliance v. substantial compliance – split between fed and state courts.
- Compliance with "requisites of foreclosure" vs. compliance with all aspects of foreclosure law. Court of Appeals had looked at both.
- "Void" vs. "voidable."
- Interaction with corrective statute, Minn. Stat. sec. 580.25. Can a void foreclosure be cured?
- Title issues created by foreclosure uncertainty.

Hunter v. Anchor Bank

- This case was considered by the Court of Appeals after *Ruiz*. It confirms the court's move towards strict compliance with foreclosure by advertisement.
- Margaret Hunter received a mortgage loan to purchase a home for her adult son—the loan was secured by her home and her son's home. Hunter defaulted a few years later. The bank foreclosed by advertisement but sold both homes together at the foreclosure sale.

Hunter v. Anchor Bank, cont.

- **Minn. Stat. § 580.08:** When a mortgage is secured by 2 separate parcels of land, each parcel must be sold separately at a foreclosure sale.
- Guided by *Ruiz*, the Court of Appeals held that the foreclosure sale was *void* because the foreclosure-by-advertisement statutes —all of them, not just the statute discussed in Ruiz—require strict compliance. This sale was held contrary to the manner required under 580.08.
- Not one of the elements listed under the Requisites of Foreclosure statute, Minn. Stat. §580.02

Potential Impact on Foreclosure in Minnesota

- *Ruiz* and *Hunter* may persuade lenders to foreclose by action rather than risk a foreclosure by advertisement.
- This also may deter title companies from issuing clean commitments on foreclosed by advertisement properties
- Will result in increased expense and delay of foreclosure process.

CHANGES TO BOUNDARY AND ACCESS LAW FOR TORRENS PROPERTY

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

Torrens: Background

Minnesota law specifically prohibits establishing rights against Torrens property by use.

- No ownership by adverse possession (where one *possesses* property for fifteen years and thereafter may claim *ownership* of it).
- No easements 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*).

The Certificate of Title Controls Ownership

The purchaser of Torrens property does not have to pay for an abstract; they need only review the Certificate of Title, prepared by the County Examiner of Titles. *In re Collier*, (Minn. 2007).

- "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 [so] 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*, (Minn. 1984) (emphasis added).

So the Certificate of Title Needs to be Reliable

Therefore, the Minnesota Supreme Court has held:

> "*mere possession* of Torrens property will *never* ripen into title against the owner."

Moore v. Henriksen, (Minn. 1968) (emphasis added).

Expansion of Certain Protections of Torrens Property

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 or access are established by possession. . .

De Facto Takings Prohibited

Under the doctrine of De Facto Takings, where government takes possession of property and makes improvements to it, it cannot be divested of the property – even though there has been no eminent domain proceeding.

> "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 . . . but *the owner cannot eject the condemnor [or] require discontinuance of the public use*."

Brooks Investment Co. v. City of Bloomington (Minn. 1975)

The Minnesota Supreme Court recently held that governmental entities cannot claim against Torrens property under the De Facto Takings doctrine.

- "[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. . . . 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, (Minn. 2008).

Statutory Dedication Prohibited

By statutory dedication, a government can establish ownership of property, without an eminent domain proceeding, 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.

But, in 2010, the Court of Appeals found:

- 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.* . . . 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, (Minn. Ct. App. 2010) (italics in original; underline added).

Common Law Dedication Prohibited

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."

Hebert v. City of Fifty Lakes, citing to Barth v. Stenwick, (Minn. Ct. App. 2009).

The Court of Appeals held in 2010:

- 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*. . . . 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* [*Moore v. Henricksen]* (concluding that use of the property by another for 30 years did not diminish the owner's property interests).

Hebert v. City of Fifty Lakes, (Minn. Ct. App. 2010).

BOUNDARY BY PRACTICAL LOCATION EXPANDED AGAINST TORRENS

In marked contrast to the court decisions discussed above, the Minnesota legislature has expanded the applicability of the doctrine of boundary by practical location.

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 types:

> "[T]o 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, (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,* (Minn. 1955).

- For Torrens property, the doctrine of boundary by practical location was historically applied only in limited instances:

  > “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.”

  Petition of McGinnis (Minn. Ct. App. 1995).

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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 whether its application was limited to situations where there the factors referenced in *McGinnis* were present, i.e., an ambiguity or pre-registration dispute.

But, in 2011 in *Britney v. Swan Lake Cabin Corp*., the Minnesota Court of Appeals 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,” but instead simply analyzed the doctrine in light of the use put to the property, and distinguished between practical location and adverse possession.

RUIKKIE V. NALL AFFIRMS THE IMPORTANCE OF US GOVERNMENT SURVEYS

The key issue in *Ruikkie v. Nall* was whether the subject lot had frontage on a lake. 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 [but] the bay has simply never been there. The original government survey is therefore erroneous."

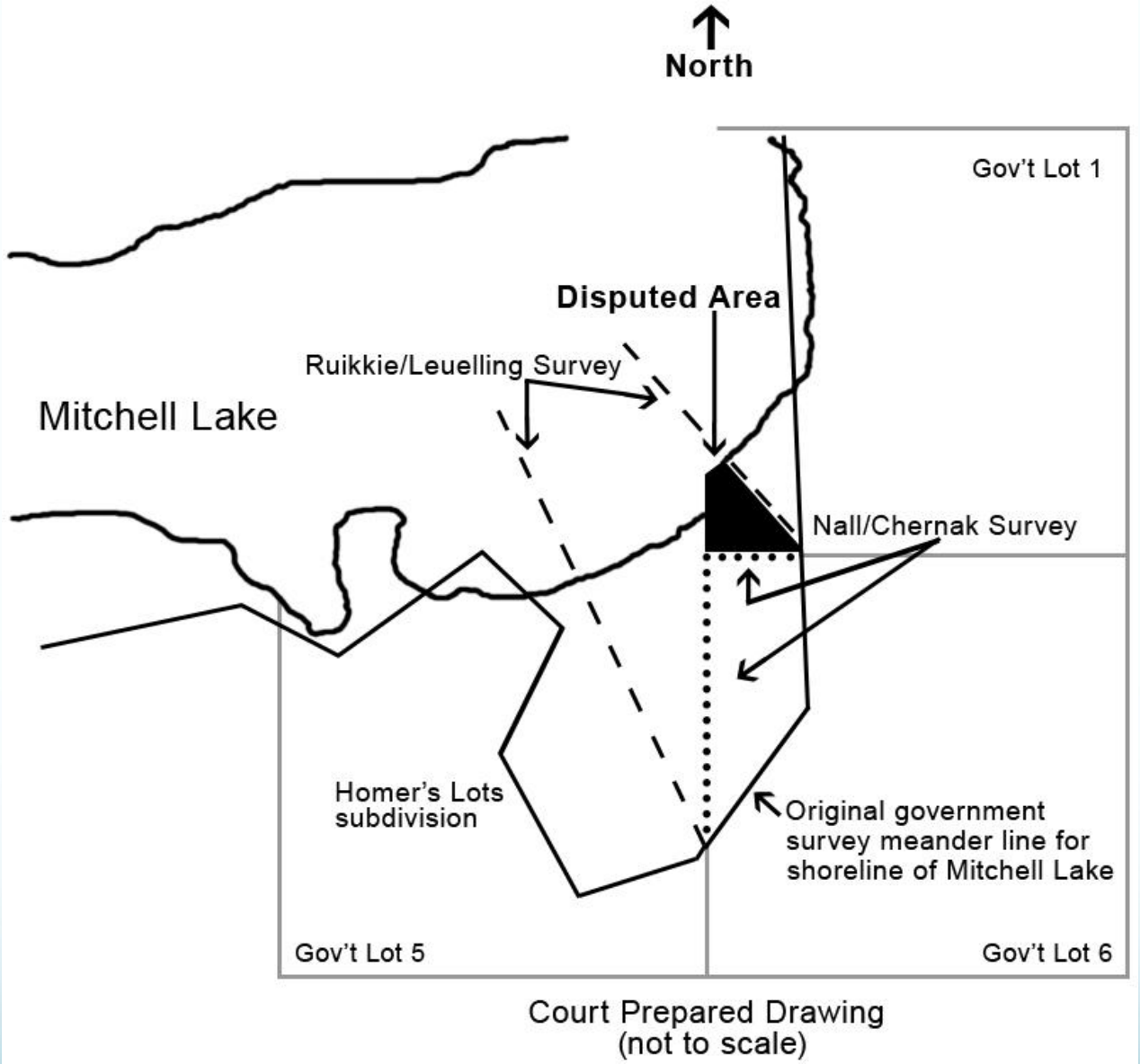
Ruikkie v. Nall, (Minn. Ct. App. 2011)

The Ruikkie's surveyor addressed this issue by having the Lot Lines for Lots 1, 5 and 6 bend towards the lake to preserve the waterfront access:

- "[The 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 . . . [result] in Gov't Lot 6 having lake frontage."

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

> "[I]n the drawing [below] [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."



Court Prepared Drawing
(not to scale)

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’. . .”

- *Ruikkie*

The *Ruikkie* Court then noted that the District Court had modified the lot lines on the US Government Survey pursuant to the Minnesota doctrine of practical location of boundaries:

- 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*.

The *Ruikke* Court next 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.”

However, 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.*

But, upon applying the law of practical location of boundaries to the facts, each of the three types 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.

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 could] 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."

BLURRED (BOUNDARY) LINES: AMBIGUITY AND LEGAL DESCRIPTIONS

Mattson Ridge, LLC v. Clear Rock Title, LLP

- This is a recent Minnesota Supreme Court case regarding marketability of title where a legal description on a deed is ambiguous
- A developer (Mattson Ridge) purchased 64 acres of undeveloped farmland in Chisago City for $1.3 million and obtained a title insurance policy for the same amount
- The legal description on the deed referred to “the intersection of road leading from the county road at or near Charles Magnuson’s place in Sunrise City…”

Mattson Ridge, LLC v. Clear Rock Title, LLP, cont.

- Mattson Ridge found a buyer for $2.9 million, but the prospective buyer could not get title insurance because the title insurer stated that the description “appeared ambiguous and should be surveyed and reformed. Mattson Ridge filed a claim with its title insurer, but the claim was denied

- Mattson hired a surveyor to draft a new legal description and instituted an action to register the land under the Torrens System to correct and clarify the legal. While this was ultimately successful, the registration process finished as the real estate market began to decline and the buyer backed out. Mattson brought a breach of contract suit against its title insurance carrier for its failure to defend and indemnify, seeking consequential lost profit and mechanic’s lien damages.

Mattson Ridge, LLC v. Clear Rock Title, LLP, cont.

- The Supreme Court held that the reference to "Charles Magnuson's place" rendered the legal description of the property ambiguous which made title unmarketable.

- **"Unmarketability of Title"** is defined by the Court as an alleged or apparent defect in title of insured property that would be legally sufficient to justify a buyer's cancellation of a contract to purchase property. A marketable title is free from reasonable doubt or is title that a prudent person, with full knowledge of the facts, would be willing to accept

- Here, to determine whether title is free from "reasonable doubt," the Court sought the opinions of "other competent persons, including title agents and real estate attorneys."

Mattson Ridge, LLC v. Clear Rock Title, LLP, cont.

- The Court did not refer to expert testimony from surveyors, but relied solely on the opinions of title agents and real estate attorneys.

- This may seem like a variation from a history of reliance on a surveyor's opinion when determining whether title is marketable, but it is important to consider the role expert witnesses play in the courts: "expert opinions do not receive conclusive weight in determining whether title to the property in question was marketable…Rather, [the Court] must also evaluate whether the doubts expressed about the title were reasonable."

- Here it seems as though neither side submitted the expert opinion of a surveyor into evidence. Regardless, the Court did conclude, in this particular context, that marketability of title can be determined by relying on the testimony of those "other competent persons," including title agents and real estate attorneys.

Other Cases

- *Erickson v. Symiczek* (Minn. Ct. App. June 3, 2013)

  Dispute over common boundary between two properties. No new boundary was established by boundary by practical location by estoppel.

- *Holthaus v. Fulda*, (Minn. Ct. App. Nov. 13, 2012)

  Legal description on the deed did not match the intent of the parties to the deed. Court reformed the legal description on the deed so it aligned with the intent of the parties.

Miscellaneous Case Law Update

- *Eng'g & Const. Innovations, Inc. v. L.H. Bolduc Co., Inc.* (Minn. 2013)

  Indemnification clauses in a construction contract should be limited to indemnity for the negligent or wrongful acts of the subcontractor.

- *City of Cloquet v. Crandall* (Minn. App. 2012)

  A contract for deed purchaser is not a property “owner” under Minnesota Eminent Domain Statutes which entitle a property “owner” to certain minimum compensation following a taking

Miscellaneous Case Law Update, Cont.

- *Poppler v. Wright Hennepin Co-op Elec. Ass'n* (Minn. Ct. App. 2013) review granted (September 25, 2013)

  Stray voltage is “a phenomenon in which an electrical current—voltage that returns to the ground after powering an appliance—passes through an object not intended as a conductor.” In this case, the “object not intended as a conductor” was the Popplers’ cows.

  While the court concluded that the migration of invisible particles onto land does not constitute trespass, a landowner damaged by stray voltage still may have a cause of action.

CARTWAYS: STATUTORY AND CASE LAW UPDATE

- Cartway = combination of private driveway & public road
- Owner of landlocked parcel petitions to city or township for a cartway over neighboring land
- Minn. Stat. § 164.08 (townships)
- Minn. Stat. § 435.37 (cities)

Cartway Statute Update

- In 2009, Minn. Stat. § 435.37 (cities) updated to follow procedure of Minn. Stat. § 164.08

Cartway Case Law Update

- *Kennedy v. Pepin Township of Wabasha County* (Minn. 2010)

  Only 5 acres of the 26 acre parcel were buildable

  The cartway must give access to a usable portion of the landlocked parcel

- *In re Hutchinson* (Minn. Ct. App. Sept. 3, 2013)

  3 Cartway location options presented to county board

  Board did not act arbitrarily by rejecting alternative routes alleged by the landowner to be less damaging

LEGISLATIVE UPDATE

The Marriage Amendment

- Legislative changes to various statutes regarding same-sex marriage in Minnesota went into effect August 1, 2013
- See summary of the changes in materials (p. 20)
- These changes affect a host of real-estate-related statutes and practices. Minn. Stat. §§ 358.14, 507.02 govern acknowledgments and conveyances by spouses—specifically, husband and wife. These terms will now be interpreted in a gender neutral manner. This also expands spousal rights and protections, such as those rights found under the Uniform Probate Code (e.g., the intestate share of the surviving spouse; the descent of the homestead), to same sex spouses.

Safe at Home

- Address-confidentiality program available to Minnesota residents who fear for their own safety, or a member of their household's safety, because of actual or threatened domestic violence, sexual assault, or stalking
- Went into effect in 2007. 600 households are enrolled in the program; 1,500 individual participants; 12 households are homeowners

Safe at Home, cont.

- 2013 saw the Legislature add a new section to the Minnesota Government Data Practices Act to prevent the dissemination of identity and location data of a Program participant by counties and other government entities.
- While the statutory updates are commendable in their purpose, as enacted, they conflict with and override other Minnesota statutes, including those that require recorders and registrars to index the names of individuals that appear in recordable documents and to make those documents public

CONCLUSION

- The foregoing is a brief summary regarding changes in real property law in Minnesota over the last few years, which are likely to be of interest to surveyors.
- If you have questions regarding the specifics, please feel free to contact the authors, Scott Lucas, Shaun Redford, and Jackie Rubi.

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