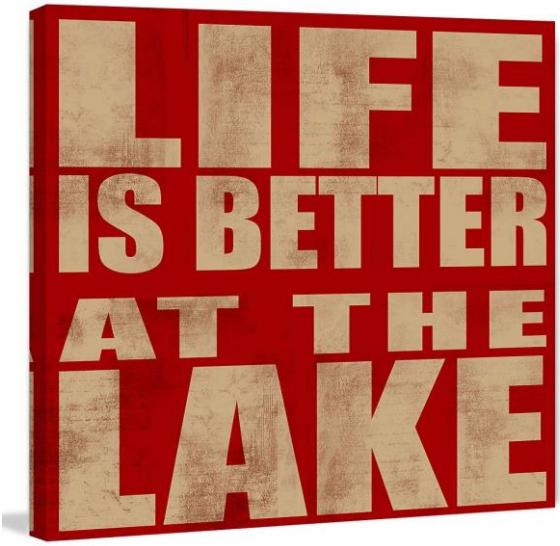


(*AT LEAST IT SHOULD BE.)

By attorneys Tom Olson & Katie Wahlberg

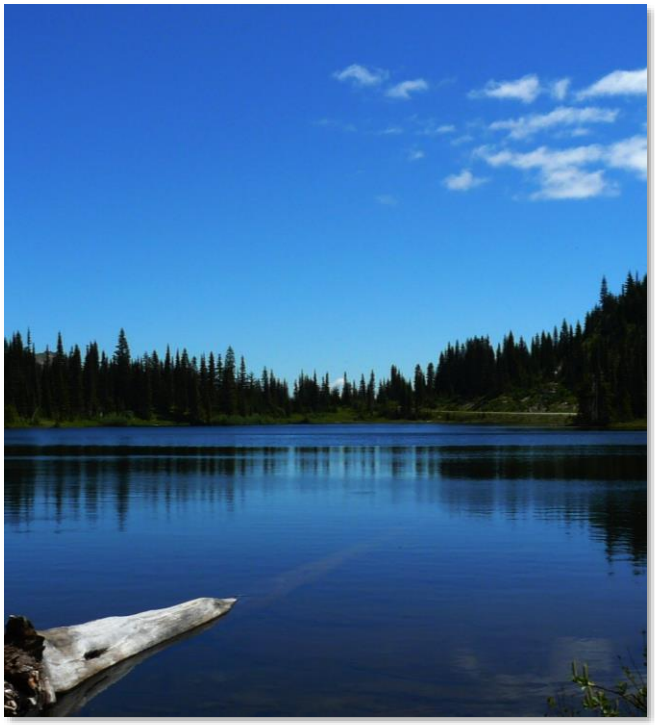
Lake living means enjoying weekends on the water; exaggerating the size of the fish that got away; and convincing yourself on Sunday that it's probably best to stay another day just to avoid that cabin traffic, of course. While cabin life can mean afternoons on the lake and s'mores for dinner, anyone who's owned lakeshore property has also had to deal with the other side of cabin ownership. "How do we handle ownership now that our folks are getting older?" "I think Jerry put his dock in too far over again this year and onto our property?" "Why do these new neighbors' think they have the right to walk through our front yard to get to the lake?"

Thousands of Minnesotans own lake homes and wonder about the rights and obligations of cabin ownership. Whether faced with a challenging neighbor or municipality, or considering your options to protect your property rights, cabin ownership is not always free of challenges.

Owning Lake Property

When you buy a lake home, should you own as individuals, in a trust, as joint tenants, tenants in common, or in a limited liability company or other entity? And while it can be a great thing for a parent to pass a cottage over to their kids, it can be complicated. Should you deed the children the cabin? Wait and pass it at death by will through probate proceedings? Or put it into an LLC or into a trust? How can you preserve the cabin for those who want to use it? How do you share expenses? Can you protect rights to use in return for paying the expenses for now? These are just a few of considerations when thinking about ownership of your lake home. In the era of life longevity, second marriages, and multiple children (with spouses) inheriting, it's important to understand the significance of the different types of ownership and their pros/cons.

Passing to the Next Generation



We have had a couple cases this past year involving multiple brothers and sisters who individually inherited ownership of a home or cabin and have seen the challenges that come up in these cases.

Consider the scenario where, for example, six children inherited the cabin after both parents have passed away.

- With multiple owners, what happens to the cabin?
- What happens when some of the siblings decide it best to sell the cabin and split the proceeds?
- Even assuming all (or most) siblings are on board, what if one of the siblings has a creditor's money judgment against him? If they want to sell the house, will the closing company require that judgment be paid off at closing?

Just when you think you've dealt with all the issues, another hurdle surfaces—one of the siblings who originally inherited a 1/7 interest has died during the proceedings leaving heirs and no Will.

- What if one of the siblings recently got divorced?
- How did the dissolution decree handle their limited interest in the cabin?
- Did the ex-spouse have a marital interest that needs to be resolved?

If the dissolution decree did not address whether the family member spouse got the ownership of the cabin, the title to the real estate is clouded by this and all the other items.

Parents might choose to stay in title (outright ownership (in fee) or to retain a life estate), or they might give a Transfer on Death Deed (Minn. Stat. 507.071) to avoid or limit probate expense. Owners should also consider transferring ownership into a trust or an LLC. Persons with an Owner Policy of Title Insurance should also review the policy before any transfer as a transfer may result in a termination of coverage under the title policy. You made need to request an endorsement of the policy to cover the new owner, whether the conveyance is to the kids, to an LLC, etc.

Life Estate. Parents can create a life estate ending at the death of the last parent. No probate, just file an Affidavit of Identity and Survivorship with a certified copy of the death certificate. Pretty simple. But there are some issues to study and circumstances to consider. The parent can no longer sell without agreement of the children. What about the situation and financial status of the children (and their spouses) named as owners? Responsibilities of maintenance and liability? Mortgage and tax obligations?

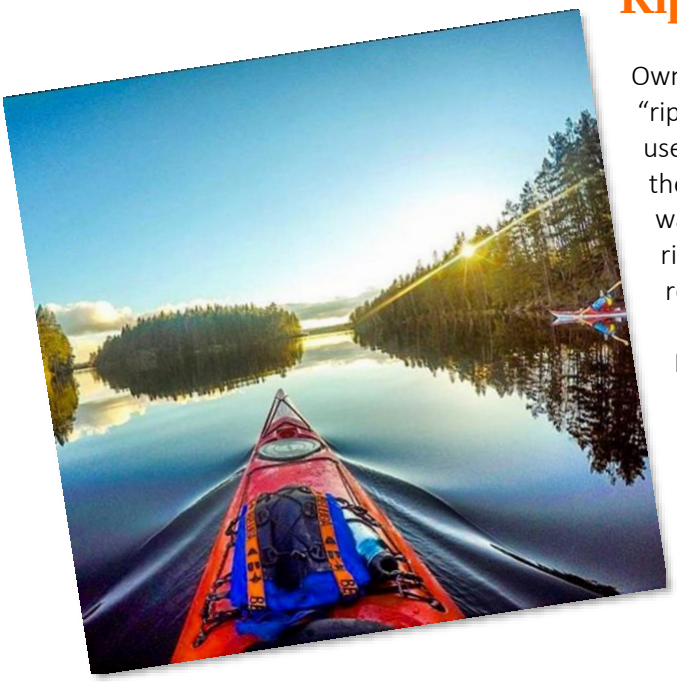
Transfer on Death Deed. Minnesota allows what are called Transfer on Death Deeds, known as TODDs. In using a TODD, the cabin owner designates a beneficiary who will become the owner at the owner's death. If Grandpa wants to designate more than one beneficiary, the TODD should identify how the multiple beneficiaries will take title (i.e. tenants in common or joint tenants). TODDs can be used to avoid probate. TODDs can be revoked if you change your mind and the owner can designate a different beneficiary, so it isn't set in stone "until death do us part." If you want a TODD to be effective, RECORD IT. An unrecorded TODD is not effective if the owner dies without recording in the county where the property sits.

LLC. Another possible solution is to consider contributing the cabin to a limited liability company and issue membership in the LLC. It's more than just filing documents to form the LLC with the Secretary of State and paying the filing fee. A deed must be drafted and filed from the owners to the LLC. Same goes if you opt to hold the family cabin in a trust. There are advantages and disadvantages. The chief manager can sell and borrow against without securing the signature of every owner, and their spouses. (This doesn't mean the manager can ignore member rights, but title is cleaner). An operating agreement is advisable to set out basic management rights and duties. A statement about the authority to transfer the property may be filed in the County Recorder office.

Mortgage. When considering a transfer of the cabin, it is important to understand what mortgage interests might exist and the ramifications for a transfer of the property. Is there still a mortgage or home equity line of credit (HELOC) on the cabin? Remember before you file a deed to see if a transfer would violate the terms of mortgage and trigger a due on sale clause. Most mortgages have "due on sale" clauses. The definition of sale includes almost any transfer of title, even when there is no actual sale in exchange for money. This might result in the Promissory Note being called because the ownership was transferred. Sometimes the lender will consent to these transfers for estate planning purposes. And sometimes they won't act if ownership is moved as long as loan payments continue. But, there is risk.

Medical Assistance Lien. Some owners are motivated to transfer ownership earlier fearing that they may require expensive medical care and wanting to avoid the five year look back with a health care lien being imposed on the lake home property. An owner is allowed to remain in his home (if able); so will his spouse and a child if the child is still a minor. But MA gets a lien for payments it makes which lien has priority over heirs' inheritance.

Legal advice is needed to properly create a life estate or a transfer on death deed. It's wise to use a lawyer to create an LLC, to write a Will or a Trust, too; even though there are forms available on the web. Law varies in important ways from state to state so beware of what can be found on the google machine.

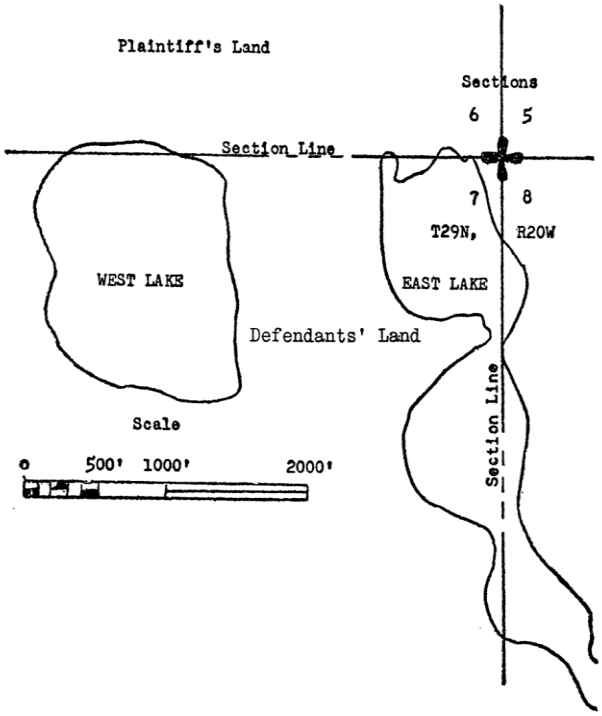


Riparian Rights

Owners whose property touches the water line have "riparian rights." Riparian rights are the rights to reasonably use waters abutting your property. Cabin owners don't own the water; instead, they own the right to use and enjoy the water. Riparian rights are subordinate, or junior, to the rights of the public and subject to reasonable control and regulation by the state.

Riparian rights include the right to build and maintain docks and landings that extend into the water. However, docks and lifts are subject to regulatory activities, e.g. municipalities, Conservation Districts, therefore property owners should consult with the rules and regulations of their local town or conservation district.

In one unusual case, an owner owned most, but not all of a small lake. Ownership in Johnson v. Seifert looked like the graphic to the right. The section line divides Johnson & Seifert's land. The defendant blocked off the lake south of the section line from use by the plaintiff. The court ruled that plaintiff whose land abutted the north side of West Lake and East Lake had the right to boat over and use the entire lake, not only the small part located north of the section line.



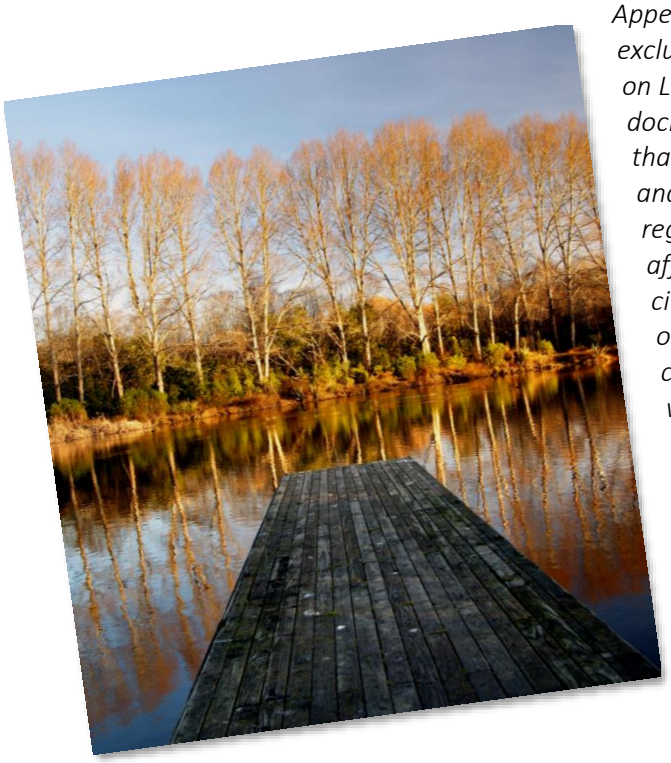
Docks

Docks are regulated as to size, shape and location. The Minnesota Department of Natural Resources (DNR) creates rules and regulations. DNR does not require a permit generally as long as the dock is not more than 8 feet wide; isn't combined with other structures; the dock is no longer than needed and should not interfere with navigation, for example. It must allow free flow of water beneath it. There are more regulations and information available at DNR's website. (http://www.dnr.state.mn.us/waters/watermgmt_section/pwpermits/docks.html)

Conservation Districts are created by statute to regulate bodies of water. Lake Minnetonka and White Bear Lake are examples of popular lakes with conservation districts. Conservation District's use of legal authority is sometimes challenged. They are involved in regulation of docks and other structures located on the lake. In one case, LMCD charged an individual for maintaining a storage boat in violation of an LMCD ordinance:

LMCD "may adopt rules and regulations to effectuate the purpose of its establishment and the powers granted to [it]." Minn. Stat. § 103B.641, subd. 1(a) (1998). One such power is "to regulate the types of boats permitted to use the lake." Minn. Stat. § 103B.611, subd. 3(1) (1998). LMCD may enforce its ordinances through injunctions and misdemeanor criminal penalties. Minn. Stat. § 103B.641, subds. 1(c), 3 (1998). Hawks v. Lake Minnetonka Conservation Dist., C6-98-1608, 1999 WL 138731, at *1 (Minn. Ct. App. Mar. 16, 1999).

However, a Conservation Districts' authority is subject to challenge in the Courts. In one case, the City of Minnetonka properly ordered removal of a dock as a recreational accessory structure despite the existence of the Lake Minnetonka Conservation District.



Appellant contends that the conservation district has exclusive authority to regulate docks on Lake Minnetonka. He argues that maintaining a dock floating on the surface of a lake is no different than dredging a lakebed. ….But a dock abuts land and is located within a particular city that may regulate it, whereas the dredging of the lakebed affects the entire lake. Appellant further argues, citing Welsh, that municipal authority extends only to regulation of the shoreline of a lake. This contention is also incorrect. Welsh dealt solely with the issue of lakebed dredging and stated only that city dredging authority was limited to control of dredge soil deposits on the shoreland. Id. Finally, the trial court correctly determined that the express statutory authority of the city to regulate docks defeats appellant's proposition that the conservation district has exclusive authority. City of Minnetonka v. Wartman, C6-97-1291, 1998 WL 62002, at *2 (Minn. Ct. App. Feb. 17, 1998).

The LMCD (Lake Minnetonka Conservation District) could grant and could continue a variance to allow multiple docks. This case involving Gray's Bay on Lake Minnetonka had the LMCD authorize 44 boat storage units on five docks. Staff was concerned over the number of slips with limited navigability. There was also concern that, in order to approve the permit, land had been impermissibly transferred from inlet property to

the Grays Bay property for density calculation. Demonstrating the deference granted to administrative bodies, the Court affirmed the LMCD decision permitting the 44 units.

An owner on the lake or river can extend a dock to reach the water:

> *The riparian owner may, to facilitate access to the water, build and maintain wharves, piers, landings, and docks on and in front of his land and extend the same into the water, even beyond low-water mark, to the point of navigability.* State by Head v. Slotness, 185 N.W.2d 530, 532–33 (Minn. 1971).

An owner can create new dry land placing soil "even beyond the low-water mark, to the point of navigability."

> *The issue narrows to whether or not the taking of riparian land for highway purposes is one of the public purposes for which the state holds the lake bed in trust for the public. We hold that it is not.* Id. at 33.
> *Though the State can permit draining of a lake and mining the lake bed temporarily, it is held in trust for the public and could be done only on a temporary basis. State v. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657, upon which the state places principal reliance, is not authority for the state's position. Longyear did hold that the state, in the exercise of its trust, could issue mining leases and permit the temporary draining of a lake…We will not, however, extend the holding in Longyear beyond the unique situation upon which it was decided.* In re EOF Investments, LLC, A14-2176, 2015 WL 4715357, at *2 (Minn. Ct. App. Aug. 10, 2015) (Slotness, 185 N.W.2d 530, 533 (Minn. 1971)).

But in another case, the Court determined that a municipality's right to control gave way to the conservation district:

> *An owner bought a boat larger than the City of Birchwood allowed but within permitted size set out by the White Bear Lake Conservation District. White Bear Lake Conservation District's rules took precedence…Absent express preemption, Minnesota courts apply the "occupation of the field" doctrine, to decide if state law impliedly preempts local ordinances….* City of Birchwood Village v. Simes, 576 N.W.2d 458, 460 (Minn. Ct. App. 1998).

Other decisions have found that a city and conservation district may each have jurisdiction in resolving a marina's rights:

> *After entering into the lease, the marina applied for a conditional use permit ("CUP") from the city and a special density and variance permit from the LMCD. The city denied*

> *the marina's initial CUP application. …based on the LMCD decision, the city denied the marina's application for a CUP…..Thus, the lease cannot be read to require the city to grant the marina's CUP application or to support the marina's reconfiguration plans before the LMCD.* St. Alban's Bay Marina & Yacht Club, Inc. v. Lake Minnetonka Conservation Dist., C9-92-942, 1992 WL 314990, at *2 (Minn. Ct. App. Nov. 3, 1992).

When is a dock a marina on White Fish Lake in Crow Wing County? When can backlot owners get lake access that serves their specific lots, as distinguished from a public access? Where a structure is only a dock (not a multi dock marina type structure), the property owner has greater freedom from government control or supervision. This one, however, was proposed for 13 boat slips. The Minnesota Supreme Court agreed that this was a marina using layman's terms; but reversed the Court of Appeals' decision on reasonableness saying that the decision must be made first by the Trial Court:

> *A dispute arose as to whether the structure could be defined as a "marina," governed by the Crow Wing County Zoning Ordinance or a "dock" not requiring intervention by the Planning Commission or the Board of Adjustment. Ultimately, the board concluded that the structure was a "marina" and thereafter denied the desired conditional use permit.* Appeal of Brine, 460 N.W.2d 53, 54 (Minn. 1990).

In a recent case out of southern Minnesota, plaintiffs Mr. and Mrs. Docks sued their homeowner's association concerning the association's installation and maintenance of two docks on property next to the Docks' property. Dock v. Waconia Landing Homeowners Association, Inc., 2017 WL 5985389 (Minn. Ct. App. 2017). Six of the homes on the lake were unable to maintain docks on their own properties due to the marshy conditions of their shorelines and utilized the docks installed by the HOA.

The Docks' claim was that the HOA had installed two docks at a sharp angle in such a manner that the docks crossed over and encroached on that portion of Lake Waconia located in front of the Docks' property. The Docks alleged the docks created a safety hazard; interfered with the Docks' riparian rights; violated the declaration because it unreasonably interferes with, annoys, and disturbs them; and violates Minnesota law and the DNR published dock installation guidelines.

The court dismissed the Docks' complaint and reasoned that the Docks did not have exclusive possession of Lake Waconia and had not shown that they had a legal right that had been trespassed upon. The district court found that the Docks' breach-of-contract claim based on a DNR publication did not state a viable claim for relief because the publication's installation guidelines were not rules or regulations and therefore did not have the force of law. The district court also dismissed the Docks' other breach-of-contract claims because they failed to explain how allegedly annoying or offensive activity that occurs in Lake Waconia's public water could constitute annoying or offensive activity that occurs on association's that would be subject to the declaration.

SHORELINE, WATER USE

People draw water for use. Farmers, cities, use water: "The right to draw a supply of water for the ordinary use of cities in their vicinity is such a public use, and has always been so recognized." Mitchell v. City of St. Paul, 31 N.W.2d 46, 51 (Minn. 1948). Some owners take water

from the lake, river or stream in order to sprinkle lawns and to water crops. Reasonable use is allowed. But the State wants to regulate pollution and run off. In an article in the Pioneer Press on October 28, 2015, farmers criticized Gov. Mark Dayton's efforts to create a 50' buffer zone around waterways. "At a hearing at the state Capitol, two major farm groups announced they oppose Dayton's ambitious proposal, which would require 50-foot buffer zones along every river, stream and ditch in Minnesota to protect against farm runoff, pollution and erosion." On its website, the DNR reports it is now charged with enforcement and mapping:

> *Minnesota's buffer law establishes new perennial vegetation buffers of up to 50 feet along rivers, streams and ditches that will help filter out phosphorus, nitrogen and sediment. The law provides flexibility and financial support for landowners to install and maintain buffers. The DNR's role in Minnesota's buffer law is to produce and maintain a map of public waters and public ditch systems that require permanent vegetation buffers. The DNR released the buffer protection map in July 2016.*

There is a distinction between ditches and waters. A ditch requires 16.5' while a waterway requires 50'.

In a recent case involving White Bear Lake, a judge ruled that the DNR violated state statute by mismanaging groundwater appropriation permits near the lake, causing the lake's water levels to drop significantly. The trial court found that the DNR's management of White Bear Lake violated the Public Trust Doctrine by causing continuing decline in the water levels that diminished the size of the lakebed and adversely impacted the public's use of the lake and in failing to take action to protect the lake.

The court issued an ordering that, amongst other things, prohibits the DNR from issuing appropriation permits for new groundwater wells or increasing amounts in existing permits within 5 miles of the lake until the DNR complies with a number of requirements, including enforcing irrigation bans; amending existing permits; review and reopen permits as necessary to comply with sustainability standards set forth by statute. The state is appealing the decision.

BOATING, FISHING

Violation of a no wake zone can be sufficient cause to stop and search a boat leading to arrest for boating while intoxicated. See State v. Turkowski, C2-01-757, 2002 WL 47197, at *1 (Minn. Ct. App. Jan. 15, 2002).(See also Weckman ex rel. Weckman v. Weckman, C0-99-1663, 2000 WL 781292, at *2 (Minn. Ct. App. June 20, 2000) (*Appellant also testified that he was going 15 miles per hour in a no-wake zone, in which boats may travel no faster than five miles per hour.*

The Supreme Court of Minnesota protects the "sanctity" of an ice fishing house expressing in the noblest of terms the protection afforded to an ice house sitting on a lake near a public access and reached by pickup truck. This occupant committed the crime of smoking grass with three lines in the water. The State charged him with possession of a controlled substance and illegal fishing (2 line max). The Supreme Court wrote a search was illegal:

> *The right to be free from unauthorized entry into one's abode is ancient and venerable. As William Pitt, Earl of Chatham, so vividly put it in 1766: The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter, the rain may enter—but the King of England cannot enter; all his force dares not cross the threshold of the ruined tenement!* State v. Larsen, 650 N.W.2d 144, 147 (Minn. 2002).

ZONING ISSUES

Counties, cities and towns have considerable authority and discretion to apply zoning law when their ordinance has changed. They may opt to apply the ordinance in effect when an application was filed, or when it comes on for consideration. The entities have much discretion:

> *…as long as the provisions of a zoning ordinance are not incompatible with the state law and are supported by a rational basis related to promoting the public health, safety, morals or general welfare; counties have broad legislative discretion regarding the content of the ordinances.* Eagle Lake of Becker County Lake Ass'n v. Becker County Bd. of Com'rs, 738 N.W.2d 788, 792 (Minn. Ct. App. 2007).

A case involved a Conditional Use Permit application for a recreational campground which was opposed by a lake association but approved by Becker County after it first required an EIS (environmental impact statement). The case involved an application made in 2004 but not acted on until 2006, Becker County was permitted to choose what version of its ordinance to apply; the landowner applicant did not have a right to require the county to apply the version applicable in 2005.

> *No reported Minnesota appellate decision or statute addresses whether a local unit of government, in considering an application for a conditional use permit, has discretion to apply the zoning ordinance that was in effect when that application was filed, even though the ordinance was changed before action was taken.* Id. at 793.

In another case, a lakeowner association opposed a proposed planned unit development (PUD) on the lake: "…group of landowners opposed to the development, challenged the County's grant of the CUP, arguing that the County lacked authority to grant the permit because the shoreland at issue was not properly zoned for a PUD." Dead Lake Ass'n, Inc. v. Otter Tail County, 695 N.W.2d 129, 130 (Minn. 2005). The sole issue was "whether counties may establish mixed use commercial and clustered residential developments on natural environment lakes without first utilizing the land use zoning process contemplated by the Shoreland Regulations. Id. at 135. The Court held that decisions by local governmental bodies are legislative usually, not judicial so that owners must go to District Court first; they cannot go straight to the Court of Appeals.

Lake Access for Non-Lakeshore Lots; Legal Access for Lakeshore Lots

Lake lots are more valuable by definition than lots without lake access. Some land abuts a lake while some is close to but does not touch the lake. It is common to have back lots off the lake with "deeded access" or with an easement grant. An easement may be given to get to a lake, but what right does that include? Does it include the right to swim, to boat, to dock? Often times, the sale of property to say, a new neighbor with 12 new jet skis, for example, can prompt discussions around the lake. When owners are concerned about a lake being too busy with activities some don't like, pressure grows to limit access.

Easement Creation. The grant of an easement by way of an Easement Agreement must be put in writing, signed, acknowledged by a notary public and recorded against the land effected. A written easement can set out terms such as who does what maintenance and what expenses are shared. The easement location can be defined to a limited space and its location described. Its purpose can be stated, and what is not allowed can also be set out.

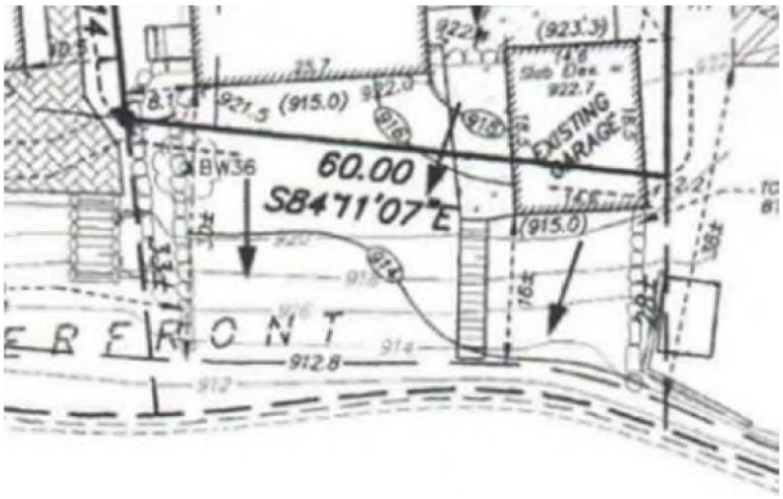
Prescriptive Easement. Many accesses exist without a written easement and have been established by historic use. In some cases where an access has existed and been used for a long time without any formal consent, a legal easement may come into being. A prescriptive easement is not a written easement. It is a right a court will confirm to someone who has used a road, an alley, a driveway, a path, for at least 15 years, generally. The statute of limitations for possession and ownership of real estate is 15 years. Minn. Stat. § 541.02.

In a Wisconsin case, a couple had owned a cabin in the family over 40 years. Wisconsin adverse possession and prescriptive easement requires 20 years possession. Our client's legal access was almost straight up hill. There was no written, recorded easement for the route driven for 40 years. Photo to the left shows the normal route they drove until the new owners' construction of this barrier. The lawsuit was settled by neighbor removing the fence and paying for a more workable alternate route without the same steep grade.

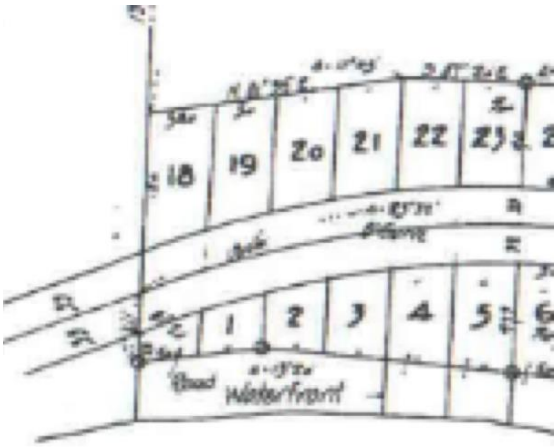
Right-of-Way vs. Riparian Rights. Just because there is a right-of-way easement to access and use the lake, DOES NOT mean the holder of that easement has riparian rights such as the right to build and maintain docks and landings that extend into the water. The Minnesota Supreme Court has held that an

easement granting another access to the lake over another's land does not give the easement holder riparian rights unless the easement specifically conveys riparian rights.

Tom Olson was involved as a mediator on a case where a discussion took place over marketing materials which said "lake view" versus "lake front" or "lake shore." One side claimed "you knew you weren't getting shore; the ad says "lake view." With some cabins and lake homes, there is no issue. The lake lot fronts on the lake; no one else has rights between the buildings and the water.



To the right is a survey excerpt of the disputed parcel between the lake and cabin parcel. The heavy black line is the border separating the two. Note the garage straddled the line. In this case we were able to establish ownership to the water line dealing with vacation of an old street or public way.



Platted Road. As shown in the plat in another case, there was a 66-foot wide road dedicated to the public. When a street is vacated, neighboring landowners generally own to the middle of the vacated street or alley. The fact that a street was never opened does not necessarily mean that the town or city can't claim it. Even a town's failure to use a platted street and failure to deal with obstacles placed by adjoining land owners does not constitute abandonment of the platted street.

A city has the power to continue to claim a street yet refuse to physically open it. While a road may be platted a "municipality is under no legal duty to open a dedicated street." Lafayette Land Co. v. Vill. of Tonka Bay, 234 N.W.2d 804, 806 (Minn. 1975).

In this particular instance, we got city cooperation and were successful quieting title to the vacated waterfront in favor of the parcel adjoining.

Easement Termination, Abandonment. Does an easement ever go out of existence? In one case we handled, the owner of a back lot or interior property had historical access to their property over another's property and was abruptly denied access after many years of use. We confirmed an easement was recorded that traveled over a road just off a lake when the owner with road access abruptly denied the easement after many years of ownership. The owner of the "servient estate" (i.e. the land the easement cross over or burdens) claimed the easement hadn't been used and that the original grantor told him it would never be

used. The Trial Court ruled and the Court of Appeals affirmed there must be very clear proof of an abandonment of an easement in order to terminate it.

> *A claim of abandonment can be upheld only where nonuse is accompanied by affirmative and unequivocal acts indicative of an intent to abandon and is inconsistent with the continued existence of the easement." Richards Asphalt Co. v. Bunge Corp., 399 N.W.2d 188, 192 (Minn. Ct. App. 1987) (citation omitted). Whether an easement has been abandoned is generally a question of fact. Simms v. William Simms Hardware, 216 Minn. 283, 293, 12 N.W.2d 783, 788 (1943).* Smida v. Isanti Pines Tree Farm, LLC, A15-0437, 2015 WL 7693536, at *6 (Minn. Ct. App. Nov. 30, 2015).

It's interesting to point out that though abandonment is a fact issue generally, here the trial court and court of appeals approved summary judgment without a trial.

Ancient Easement Rights?

Certain ownership rights do expire due to passage of a long time period. Our firm had a lawsuit with the Minnesota Department of Transportation over the location of a highway. A highway was constructed near a lake in the 1920s. It was surveyed including the description of its centerline; it was legally described with survey language. In the 1940s, MnDOT moved its highway a distance from the lake. However, MnDOT didn't change the centerline of its described road. Homes were built years later. The old trunk highway description ran through several homeowners' lots. Title objections were raised.

The State refused to release the lots without payment of a substantial sum of money. We sued for a declaratory judgment to determine the Highway Department's rights were expired as MnDOT had not re-filed to claim its highway rights within 40 years of original filing and because, we claimed, the highway department was not in "actual possession" of the road as described in its legal description.

The Trial Court granted summary judgment in favor of the property owners; the case settled without an appeal. Certain rights that are less than outright ownership must be re-filed within 40 years of their creation if the holder is not in possession of the property. This rule applies to the government.

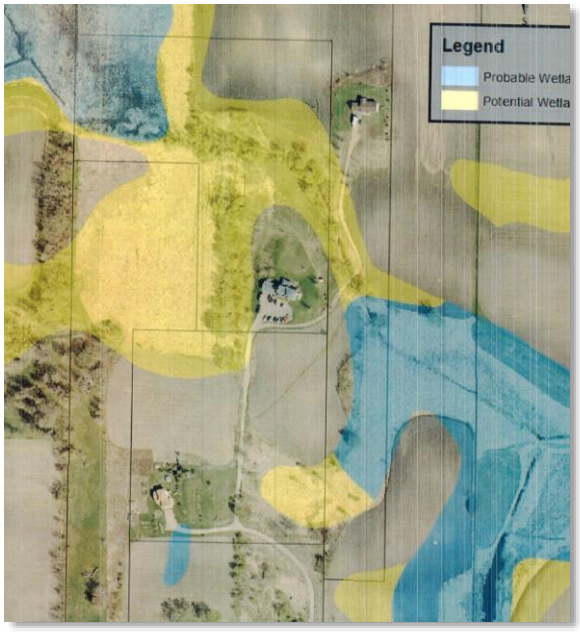
Expanding Easement Rights?

We defended a lawsuit in southern Minnesota where a lender foreclosed a mortgage on a campground and the lender wanted a 66' roadway established over what was historically a 12-foot wide traveled road. The lender brought a lawsuit claiming a prescriptive easement not for a 12-foot easement, but rather a 66-foot easement. First, we said there was an easement recorded which gave the bank only the road as traveled. The picture to the left indicates it was not 33' wide, let alone 66'; it was closer to 12' in most areas. Second, we said the bank could not enforce a prescriptive easement when there is a recorded easement. There could not be a claim of hostile use, and the physical evidence established the use was confined to the actual use. The case was settled with confinement of the legal description to the traveled road.

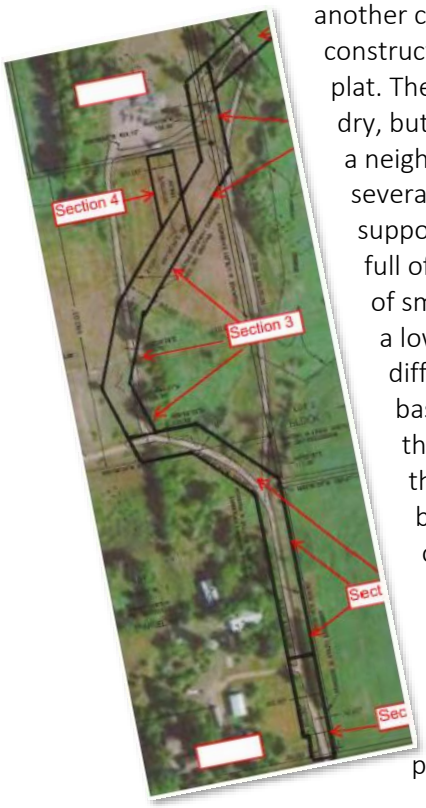
ACCESS TO A PUBLIC ROAD

It is common to discover the location of a road is different on the ground when compared to its location on a plat or survey. We have been involved in many cases looking to confirm legal access when someone challenges the route or the location. We've litigated ownership of land which has been driven as public road but sits within our client's survey legal description. Title insurance policies typically will insure a right of access to the insured parcel, with limited exceptions. We are often hired by title insurers if our client's access is restricted.

Landlocked. We tried one case representing a lender where the legal description of the 35-acre parcel left out the driveway to a homestead and agricultural land. The acreage was landlocked without it. Landlocked is a term meaning that the lot or parcel in question does not touch a public road and does not have legal access. In that case, we had to sue a borrower who denied she meant to mortgage the road along with her house and land for the bank. We claimed that the legal description (survey language describing the property) was mistaken. But mistake is often hard to show, especially when you are a bank who prepared the legal documents now claiming that you made a mistake. However, the court agreed and we were able to reform the mortgage to add the driveway. Reformation means a legal document is re-written by the Court to agree with what the parties had intended.



Paper Road vs. Road as Traveled. Our firm tried another case where the road was constructed off its location on the plat. The platted road was high and dry, but it was built in low land and a neighbor planted crops for several years where the road was supposed to be. The actual road, full of ruts and potholes the size of small ponds was graded into a lower spot. The elevations differed by as much as 10' based on survey testimony. The city involved had inspected but failed to notice the road being built far off the platted line. The lawsuit required testimony by the platting surveyor, city officials, wetlands delineator, fire chief, and road builders, to establish the road belonged in the platted position. One party put on testimony that family members moved the road out of respect for Feng Shui energy which pointed the road on a different route. The aerial to the right shows how the road running north hit "Potential wetland."



An excerpt from the as-built survey to the left shows the farming family moved the road over to cultivate the better ground and showed how we proposed the road move. The Trial Court agreed.

Land Records. We were recently able to resolve a case where clients had historically driven on a neighbor's land. We were skeptical of winning a prescriptive easement claim as our clients said they understood they were using the road via permission from the neighbor. Our clients believed that their lot had no public road access itself. However, a painstaking review of historic documents, surveys, and legal descriptions was able to establish the clients did in fact have an easement for use of the driven road.

Judges have some discretion or leeway to interpret easements in favor of access when the easement or other contract is vague or ambiguous.

> *The fact that the parties cannot agree does require that the court decide for them, but the court is not free to create any reasonable easement when the agreement does not permit such flexibility. Under Ingelson the equitable powers of the court are called into play only when the description of the easement is sufficiently vague as to permit the inference that any reasonable easement was intended. That is not the case here.* Highway 7 Embers, Inc. v. Nw. Nat. Bank, 256 N.W.2d 271, 277 (Minn. 1977).

In another case our firm tried where the signed easement was left in a drawer at city hall and not recorded for 15 years, the Trial Court in a 75-page opinion with 248 Findings of Fact, held that when a right-of-way is created by express grant, "its extent depends entirely upon the construction of the terms of the grant." *Lien v. Loraus,* 403 N.W.2d 286, 288 (Minn. Ct. App. 1987), *review denied* (Minn. June 9, 1987). A court looks first to a deed's plain language when construing its meaning. *Danielson v. Danielson,* 721 N.W.2d 335, 338-39 (Minn. Ct. App. 2006). "Only when ambiguities exist may the circumstances surrounding the grant be considered." *Lien,* 403 N.W.2d at 288. Nelson v. City of Birchwood, 2009 WL 3426792, at *4 (Minn. Ct. App. 2009).

Unwelcome Water. We brought suit where a road was flooded by a neighbor blocking drainage of the road. The road traversed the flooding neighbor's land so we sued to establish a prescriptive easement, alternatively order a cartway, and obtain an injunction to stop the flooding. The neighbor allowed the pipe shown in the photo to remain plugged flooding the road.

The existing drive was saturated with water making it impassable. Ultimately, the suit was settled by the award to our clients of a cartway and an agreement to drain the drive.

Cartways. In rural settings with sufficient acreage, a township can enforce a cartway to certain landlocked parcels but the owner must pay damages to the owner of the cartway.

(a) Upon petition presented to the town board by the owner of a tract of land containing at least five acres, who has no access thereto except over a navigable waterway or over the lands of others, or whose access thereto is less than two rods in width, the town board by resolution shall establish a cartway at least two rods wide connecting the petitioner's land with a public road. A town board shall establish a cartway upon a petition of an owner of a tract of land that, as of January 1, 1998, was on record as a separate parcel, contained at least two but less than five acres, and has no access thereto except over a navigable waterway or over the lands of others. The town board may select an alternative route other than that petitioned for if the alternative is deemed by the town board to be less disruptive and damaging to the affected landowners and in the public's best interest.

Minn. Stat. Ann. § 164.08 (West). An award of a cartway is not free; the winner must normally pay compensation. This is not true with prescriptive easements.

CONCLUSION

While lake life is often filled with making family memories and relaxing with friends, it can present a host of legal challenges. However, just because a particular challenge may involve the law, it does not necessarily mean you'll find yourself in the court room instead of on the pontoon. Preparation, forethought and creative solutions can help get past the angst of a particular challenge and back to enjoying life on the lake.

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