



AN OVERVIEW OF THE CREATION AND EXTINGUISHMENT OF TOWN ROADS

TABLE OF CONTENTS

I.	How Town Roads May be Created	2
A.	Formal Establishment Procedure	2
B.	Dedication by Use	2
C.	Dedication by Owner	6
D.	Dedication by Plat	6
E.	County Road Reversion	7
F.	Property Owner Created Road	8
G.	Note on Common Law Dedication	9
II.	How Town Roads May be Extinguished	10
A.	Formal Vacation Procedure	10
B.	Extinguishment of “Abandoned Roads” or Statutory Abandonment.....	11
C.	Abandonment.....	11
D.	Spending Limitations (25-year law)	12
E.	Marketable Title Act (40-year law)	13

Because of the length of this document, only the Appendix information applicable to the request will be sent unless the entire document is specifically requested.

- Appendix A:** Worksheet & Sample Docs for Establishing, Altering, or Vacating Roads (Document #TR4000A)
- Appendix B:** Resolution – Accepting A Dedication of Land for a Town Road (Document #:TR4000B)
- Appendix C:** Resolution – Accepting A Platted Road for Maintenance (Document #:TR4000C)
- Appendix D:** Worksheet for Extinguishing a Town’s Interest in “Abandoned Roads” (Document # TR4000D)
- Appendix E:** Application – Dedication of Land for a Town Road (Document #TR4000E)

Establishing and maintaining roads is one of the most vital functions of town government, and they generate many questions and potential for disagreement. This resource describes the ways town roads are created and extinguished. Knowing these subtle and sometimes confusing distinctions will help towns avoid disputes and reduce potential liability.

I. HOW TOWN ROADS MAY BE CREATED

There are seven methods that can be used to create a township road, but some methods are more common than others.

A. Formal Establishment Procedure

The town board may formally establish a township road by following the procedure in Minn. Stat. § 164.07. This procedure allows a town board to acquire easements for a road through gift, purchase, or eminent domain. Its started by a petition brought by owners, or by the board upon receiving elector authorization at an annual or special town meeting as provided in Minn. Stat. § 164.06, subd.1. The essential elements of the process are notice to the owners, a hearing, award of damages, and an opportunity for appeal. **Appendix A** gives a detailed explanation of the process.

The town board ultimately decides whether to create a road using this process, even when elector authorization is sought to start the process and the public expresses its opinions about the road. Since establishing a road could result in the board taking an owner’s property through eminent domain, it is *very* important to get legal assistance through the process.

B. Dedication by Use

“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 actual use* and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not. . . . If a road authority *fails to give the notice* required by paragraph (b), *this subdivision does not apply*.”¹ This statute is the legal foundation for many town roads in this state but because of recent changes to the statute towns may need to apply the old version of the statute to some roads and the new version to others. Use of the statute focuses on four key elements: (1) use by the public; (2) kept in repair and worked (i.e., maintenance); (3) continually over at least six years; and (4) notification of the landowner.

1. Use by the Public

The amount of public use required is relatively small. For instance, “a few people using a road for seasonal access to recreational areas may be sufficient.”² In one case, the court emphasized the

¹ Minn. Stat. § 160.05, subd. 1 (emphasis added).

² *Foster v. Bergstrom*, 515 N.W.2d 581, 586 (Minn. Ct. App. 1994) (citing *Anderson v. Birkeland*, 38 N.W.2d 215, 219 (Minn. 1949)). See also *Town of Belle Prairie v. Kliber*, 448 N.W.2d 375, 379 (Minn. Ct. App. 1989); *Leeper v. Hampton Hills, Inc.*, 187 N.W.2d 765, 768 (Minn. 1971).

fact a road was open for use by the public, rather than on the amount the public used the road:

It is the right of travel by all the world, and not the exercise of the right, which constitutes a road a public highway, and the user by the public is sufficient if those members of the public - even though they be limited in number and even if some are accommodated more than others - who would naturally be expected to enjoy it do, or have done so at their pleasure and convenience.³

Other courts have been stricter in their application of the use standard. Two families using a road with no use, or reason for use, by the public was found insufficient to constitute use under the statute.⁴ Fortunately, such a rigid analysis is uncommon.

2. *Maintenance by the Township*

The second element of the statute is the maintenance performed by the town. To qualify, the maintenance must be of the quality and character performed on other public roads.⁵ When reviewing this element, the courts have compared the level of maintenance performed with that on similar types of roads.

The courts have found a low level of maintenance qualified when the maintenance was consistent with the road's status as a minimum maintenance road.⁶ "It is not necessary that every part of a road be worked at government expense or that any particular part receive attention every year of the six-year period."⁷ In one case, the court found that the town dragging and leveling off a road once or twice a year was sufficient maintenance under the statute.⁸

3. *Continuous Maintenance for Six-Year Period*

The third element required by the statute is that the use and maintenance occur continuously over at least six years. Continuous maintenance does not mean every portion of the road is maintained each year. Instead, the court is more likely to look at whether the maintenance was consistent with maintenance on similar roads. While the six-year period must still be satisfied, if the character of the road is such that infrequent maintenance during the year is all that is necessary to maintain

Different Name, Same Road:

Roads acquired by Minn. Stat. § 160.05 go by several names, including:

- User Statute Roads
- Statutory Dedication Roads
- Use & Maintenance Roads
- Prescriptive Easements

Qualifying Maintenance

Maintenance that contributes to the width of use may include: grading, tree-cutting, brushing, weed control, snow plowing, the in-slope and out-slope of a ditch, snow storage (meaning the area where snow is thrown when plowed), and other activity by the town on or around the road to maintain or improve its condition.

³ *Anderson v. Birkland*, 38 N.W.2d 215, 219 (Minn. 1949).

⁴ *Foster*, 515 N.W.2d at 586 (Minn. Ct. App. 1994); *Town of Belle Prairie v. Kliber*, 448 N.W.2d 375, 379 (Minn. Ct. App. 1989); *Anderson v. Birkland*, 38 N.W.2d 215, 219 (Minn. 1949).

⁵ *Id.* (citing *Shinneman v. Arago Township*, 288 N.W.2d 239, 242 (Minn. 1980)).

⁶ *Town of Wadena v. Dorholt*, 465 N.W.2d 435, 437 (Minn. Ct. App. 1991).

⁷ *Town of Belle Prairie*, 448 N.W.2d at 379. *But see Ravenna Township v. Grunseth*, 314 N.W.2d 214 (Minn. 1981).

⁸ *Town of Belle Prairie*, 448 N.W.2d at 379.

the road for the purposes for which it is used (like access to a cultivated field), the infrequent maintenance over at least six years will likely be found to satisfy the timing element.

4. Notifying the Landowner

After the “width of actual use” clarification in the 1980’s, Minn. Stat. § 160.05 had remained unchanged for many years. However, in 2020, the Minnesota Legislature passed a law requiring that before any maintenance on a private drive begins, the town must first notify the landowner of any work or repair done to the road. If notice is not sent, the use and maintenance does not count towards the six years of maintenance by the town. This element applies only to roads on which maintenance began after August 1, 2020. Roads maintained by the town before August 1, 2020, are not subject to this notice requirement. This provision is confusing because towns generally do not maintain a road unless they believe its already a town road. Usually, a town maintains a road because they think it already a town road or there is some public purpose in doing so, like to allow buses to reach school children. The old statute recognized that when the public invested time and resources into the road for a long time, it was fair for the public to receive a right to travel upon it. This new element changes that presumption, and no amount of town maintenance or expense will provide a right of public access under this statute unless the town has sent the required notices.

In order to properly notify the landowner the town must send written notice through certified mail to the landowner of the intent to do repairs to the road, the nature of the repairs or road work, and a statement as detailed in Minn. Stat. § 160.05, subd. 1(b).⁹ Any road acquired, or maintenance done according to Minn. Stat. § 160.05 is not affected if began prior to August 1st, 2020. If the town does not send a notice, the town cannot receive the road through use and maintenance.

5. *Amount of Right of Way Determined by Width of Actual Use*

Use and maintenance roads are only established to the “width of actual use.” This restriction resulted from a lawsuit challenging the original language of the statute saying the road was established to the width of two rods on each side of the center line of the road (i.e., 66 feet). In the lawsuit, the landowner claimed the automatic establishment of the road at four rods, when less than that width had been used over the years, constituted an unconstitutional taking of his property without compensation.

Allowing a government unit to acquire a road by use and maintenance is based on the notion that such use and maintenance places the owners on notice the public is claiming their property for a road.¹⁰ The owners must act to dispute the public use within the prescribed statute of limitations (i.e., six years), or they are prohibited from thereafter challenging the public easement. The court held that since the owner was put on notice only to the extent that his property was used and maintained as a road, the road easement created is limited to the width of actual use.¹¹ However, the width of the easement “is not limited to that portion of the road actually traveled; it may include

⁹ Also found in Minn. Laws. 2020, Chapter 100, section 1.

¹⁰ *Barfnecht v. Town Bd. of Hollywood Tp.*, 232 N.W.2d 420, 423 (Minn. 1975).

¹¹ *Id.*

the shoulders and ditches that are needed and have actually been used to support and maintain the traveled portion.”¹²

By limiting the width of these roads to the area used and maintained, the court placed town boards in a position of not being able to accurately determine the width of its roads. When road widths are uncertain, maintenance activities became much more difficult and are deterred out of fear of being sued for trespass by the adjacent owners.

The same concern exists for town boards today. Some boards have responded by undertaking procedures to formally acquire full 66-foot easements, while others have chosen to remain with the easement they acquired through use. To help clarify the width of the roads, some towns make extra efforts to keep detailed maintenance records for each road. The records not only show maintenance activities, they also indicate that the town’s inspection and maintenance activities encompass 33 feet on either side of the road’s center. Performing such activities and keeping detailed records of these activities will help support the town’s claim to a 66-foot right of way.

Record Maintenance Activities
To support the town’s claim to use and maintenance right of way, the town’s road employees and contractors should be required to keep records of the maintenance performed on each road as they perform such maintenance.

6. *Ineffective on Torrens Property*

The Dedication by Use statute is ineffective on Torrens property.¹³ Torrens property, sometimes called “Registered Property”, is an alternative property recording method. Most property is recorded by abstract, which is a document describing the property and a summary of the recordings concerning the property. Abstracts are created and filed by individuals. In contrast, Torrens properties are created when a court issues a certificate of title. The Torrens title contains all records of ownership and legal status in one document. The Torrens system is intended to eliminate unrecorded interests in property, such as statutory or prescriptive easements.

When considering whether the township has right of way under Minn. Stat. § 160.05, the board must learn whether any of the property involved is registered as Torrens property. Where a roadway sits on Torrens property, the town cannot claim right of way by operation of the statute. It is possible, for example, for the property on one side of the road’s centerline to be Torrens and the other side to be recorded by abstract. If so, the town may have right of way on only one-half of a roadway, or the right of way may end at a property line and begin again at the other side of the Torrens property.

¹² *Id.*

¹³ *See Hebert v. City of Fifty Lakes*, 784 N.W.2d 848 (Minn. Ct. App. 2010) (Court of Appeals held Minn. Stat. § 160.05 ineffective to create right of way if the property is registered as Torrens. The Court held the statute ineffective because the Torrens statute says, “Every person receiving a certificate of title . . . shall hold it free from all encumbrances and adverse claims” subject to the exceptions provided in the statute. *See* Minn. Stat. § 508.25. The Court concluded Minn. Stat. 160.05 acted as adverse possession, which the Torrens statute says is an ineffective method of gaining property rights. The Court, however, did not consider one of the exceptions listed in the Torrens statute, which list “rights in public highways” as an exception to the general rule that property interests not listed on the certificate of title are void. It is possible a different court could find Minn. Stat. § 160.05 effective because it creates a right in a public highway.)

C. Dedication by Owner

Landowners may dedicate a portion of their property to the town for road purposes. The procedure for making such a dedication is contained in Minn. Stat. § 164.15 and involves the following steps:

1. The owners must develop a written application describing the land to be dedicated and the purpose of the dedication; *See Appendix E*
2. The owners file the application with the town clerk;
3. The clerk must present the application to the town board (typically at the next board meeting);
4. Within *ten days*, if it chooses to accept the dedication, the board may pass a resolution declaring the described land to be a town road. No damages may be paid to the owners for making the dedication. *See Appendix B*
5. The board records the resolution with the county recorder and files the resolution with the county auditor.

Because of the ten-day limitation, a board interested in accepting a proposed dedication should attempt to work out the details with the owners before a formal application is filed. In that way, the board can be properly prepared to accept the dedication. A road order should be recorded at the county recorder's office to secure the existence of the easement into the future.

D. Dedication by Plat

Land may be dedicated to a town for a public road by plat. When an owner develops a plat, he or she is required to show all roads intended to be dedicated to the public.¹⁴ When a plat is recorded, all lands dedicated for public use are held in trust in the town's name for the purpose indicated on the plat.¹⁵ For roads, this typically means a public road easement is conveyed to the town. Furthermore, the conveyance does not require acceptance by the town board.¹⁶ In other words, the land dedicated for public roads automatically goes into trust in the town's name upon the filing of the plat.

Once the roads are dedicated, the town board decides when or if it will open and maintain the platted roads.¹⁷ The town has no maintenance obligation on a dedicated road until the town board agrees to open and maintain it as a town road. In fact, Minn. Stat. § 164.11 suggests a road dedicated by plat becomes a cartway if it is at least 30 feet wide. If a dedicated road is treated as a cartway under Minn. Stat. § 164.11, then the board would be prohibited from spending any money on it unless the board passes a resolution determining such expenditures to be in the public interest.¹⁸

¹⁴ Minn. Stat. § 505.021 & 505.03.

¹⁵ Minn. Stat. § 505.01.

¹⁶ *Town of Red Rock v. County of Mower*, 250 N.W.2d 827, 831 (Minn. 1977); *Application of Stein*, 99 N.W.2d 204, 206 (Minn. 1959); *Keyes v. Town of Excelsior*, 148 N.W. 501 (Minn.).

¹⁷ *Town of Red Rock*, 250 N.W.2d at 831 (citations omitted); Op. Atty. Gen., 377B-10H, Nov. 16, 1967; Op. Atty. Gen., 377-A-4, June 17, 1957.

¹⁸ Minn. Stat. § 164.08, subd. 2(d).

If the developer or owners within a plat are interested in having the town take over maintenance of a platted road, they must request it at a town board meeting. Some of the factors the board should consider when reviewing such a request are “the cost of maintenance, the number of dwellings abutting the roadways, the condition of the roads, and the degree of hardship suffered by the landowners because of the alleged failure to open or maintain the roads.”¹⁹

Some town boards address the road issue with a developer before the plat is recorded. This can be done through a formal developer’s agreement, or more informally by informing the developer of the board’s policy on such roads and providing him or her with a copy of the town road specifications that must be followed. If an agreement was not reached before the plat was recorded, many town boards address requests to take over a platted road by explaining that the road must be built to town specifications before it will be maintained by the town. Once the specifications are met, and any other requirements associated with accepting such roads are satisfied, the board accepts the road and thereafter maintains it as a town road. It is recommended that such acceptance occur by board resolution. *See Appendix C.*

Town boards need to be aware that in 1977 the Minnesota Supreme Court created what could be considered an exception to the board’s discretion to decide when it will take over the maintenance of a platted road. The potential exception was created when the court found that an impassible road complaint could be filed with a county under Minn. Stat. § 163.16 on a platted road even though the town board had not taken over maintenance of the road.²⁰ In sum, the impassible road procedure allows owners to bring a complaint to the county board claiming that the town’s neglect of proper maintenance has resulted in a road not being reasonably possible. The county holds a hearing on the complaint and may order the town board to maintain the road.

The apparent purpose of holding that the impassible road procedure applies to unaccepted platted roads was to provide relief to owners living on platted roads that have been developed to the point that they are public in nature. However, the holding directly contradicts the rule the court developed, and reaffirmed in the very same decision, regarding the board’s discretion over such matters. It also contradicts the fundamental purpose of the impassible road statute which is to create an opportunity to seek relief when a town fails to adequately perform its *duty* to maintain a road. The board cannot fail to perform a maintenance duty until the duty exists. On platted roads, the duty does not exist until the board has accepted the road for maintenance by the town. Despite the contradictions in the holding, it remains the controlling interpretation of this narrow point.

E. County Road Reversion

A county is statutorily authorized to revoke a county highway.²¹ Once revoked, it reverts to the town in which it is located. While the statute says the town receiving a road in this way may vacate it, this option often is not available due to the restrictions contained in Minn. Stat. § 160.09, subd. 3, which prohibits vacating a road if it will landlock five acres or more without owner consent unless other access is provided.

¹⁹ *Town of Red Rock*, 250 N.W.2d at 831.

²⁰ *Town of Red Rock*, 250 N.W.2d at 831.

²¹ Minn. Stat. § 163.11, subd. 5.

If vacating the road is possible and if it occurs within one year after the county revocation, the *county* is responsible for paying any damages occasioned by the vacation. In these cases, the county board must be involved in determining and awarding the damages.

To revoke a highway, the county must follow a process that includes: (1) notice to the town; (2) hold a hearing; (3) make the repairs or improvements on the highway necessary to meet county standards for a comparable road in the county; (4) record the highway if it is not recorded; and (5) maintain the highway for two years from the *effective date* of the revocation.²² The two-year maintenance period does not begin until all of the required steps, including bringing the road up to specifications, are completed.

F. Property Owner Created Road

A town board may open a road on land the town owns or over which the town acquires easement that allows the creation or alteration of a road. This process relies on the town's ownership of the property as the authority to create the road. Often, this type of road is created when the board wants a minor change or expansion of an existing road and a landowner is willing to give or sell land for the town's use. For example, a landowner may give the town an easement or ownership of land on a dead-end road for the creation of a turn-around. In these situations, the board can exercise its authority to acquire property directly from the owner and avoid using the Formal Road Creation process or the Dedication by Owner process.

Towns are authorized to buy real property,²³ or receive it by gift.²⁴ The town could hold absolute ownership²⁵ (like a homeowner is considered to own property) of the property, or something less than absolute ownership, like an easement or other right of access to property. The town can receive the interest in real property by deed, the same as a private landowner could.

Once the town holds the ownership interest, the board may create improvements like a driving surface and invite others onto the property. When the town is the absolute owner of the property, it may create the road and invite others to use it at the board's discretion. If the town holds only an easement to another person's property, then the town may be limited in its use of the property. The board must use the property consistent with the limits of the easement because failure to follow the conditions of an easement may result in loss of the easement back to the grantor or a legal action challenging the scope of use.

This process serves a different function than the Formal Road Establishment procedure found in Minn. Stat. § 164.07. The Formal Road Establishment process is used when the town does not own the properties it needs for the road and must take land from landowners. The State and Federal Constitutions prohibit taking property without due process and fair compensation, so the

²² Minn. Stat. § 163.11, subd. 5a, 5b, 6.

²³ Minn. Stat. § 365.02.

²⁴ Minn. Stat. § 465.03 (The town board may accept a gift of real or personal property by resolution supported by a two-thirds majority of the town board.).

²⁵ Absolute ownership is traditionally called ownership "in fee simple absolute" or a similar term. Legal documents will use this term or something similar to convey absolute ownership because it was the term used to convey such interests under the English common law system.

Formal Road Creation process is used to provide landowners with due process and fair compensation. The Formal Road Creation process is not needed when the town already owns the property.

This process is also an alternative to the Dedication by Owner process found in Minn. Stat. § 164.15, which allows dedication of property to the town for road purposes. The Dedication by Owner process assumes the property is given to the town for road purposes and sets a limit on the board's time to accept the dedication. Instead of using Dedication by Owner, the board may negotiate receipt of the property by purchase or gift without the time limit imposed by the Dedication by Owner process.

Town using this option should be aware such roads could become Use & Maintenance roads under Minn. Stat. § 160.05, after six years of maintenance and use by the public. Its also possible these roads could be considered dedicated to the public by common law.

G. Note on Common Law Dedication

A public road may also be created by common law dedication.²⁶ However, because a road created by common law dedication may not necessarily be a town road, only a brief overview of the doctrine will be provided.

Common law dedication typically involves an owner intending, either expressly or impliedly, to dedicate his or her land to the public, and acceptance of the dedication by the public. Intent to dedicate may be inferred from the owner's obvious or indisputable conduct. Public acceptance of a dedication can be shown by public use. Neither maintenance by the town or acceptance by the town board is required for public acceptance of the dedication. The dedication is effective immediately upon public acceptance, is not revocable by the owner, and binds all future owners of the property.

A town is not required to maintain roads created by common law dedication unless it has expressly accepted that obligation or has impliedly accepted the obligation through at least six continuous years of maintenance.

Another category of common law dedication exists, but comes about only infrequently. If a developer fails to follow the proper procedure to dedicate the roads within the plat, but the plat has been accepted and filed, courts sometime refer to the dedication as a common law dedication.²⁷ Since the statutory dedication failed, courts may turn to the common law concept to save the dedication.

²⁶ *Sackett v. Storm*, 480 N.W.2d 377 (Minn. Ct. App. 1992); *Bengtson v. Village of Marine on St. Croix*, 246 N.W.2d 582 (Minn. 1976).

²⁰ *Doyle v. Babcock*, 235 N.W. 18, 20 (Minn. 1931).

II. HOW TOWN ROADS MAY BE EXTINGUISHED

There are several ways by which a town may intentionally extinguish, or unintentionally lose, its interest in a road. It is important to understand the distinction between the methods and when they apply.

A. Formal Vacation Procedure

Formally vacating a road refers to the procedure in Minn. Stat. § 164.07, which is the same procedure to establish or alter a town road. Refer to **Appendix A** for information on the procedure. Towns that have adopted urban town powers under Minn. Stat. § 368.01 may use an alternative procedure to formally vacate a road. The urban township process is contained in Minn. Stat. § 368.01, subd. 25, and is more streamlined than the procedure in Minn. Stat. § 164.07. The alternative procedure is not discussed in this paper.

Two important issues to consider when vacating a road are: (1) the prohibition on landlocking property; and (2) the need to determine damages. Under Minn. Stat. § 160.09, subd. 3, a town may not vacate a road without consent of the owners if it is the only means of access to property or properties totaling at least five acres, unless other means of access is provided. This is essentially the only statutory prohibition to a town board exercising its discretion to vacate a road. Even though the statute technically allows the landlocking of less than five acres, do not proceed with a vacation if it will landlock anyone against their wishes unless other access is provided.

Determining damages for vacating a road can be difficult. Often, the owners who want a road vacated will release any claim to damages. However, if any owner is not willing to waive damages, the board is required to determine the amount of damages, if any, that must be paid.²⁸ An owner is only entitled to compensation if the damages sustained by the vacation are of a different kind, not merely degree, as those sustained by the public.²⁹ This typically means that abutting landowners are potentially eligible to receive compensation.³⁰

A claim of compensation is based on the Minnesota Constitutional provision regulating compensation requiring compensation when private property is taken or damaged for public use.³¹ The damage relates to the inconvenience sustained by the loss of or interference with reasonable access and is typically measured by the difference of the property's market value before and after the loss of access.³² This amount is then reduced by the money value of the benefits, if any, which will be conferred by the vacation.³³ Refer to **Appendix A, Attachment 9** for a discussion of reducing

²⁸ Minn. Stat. § 164.07, subd 5.

²⁹ *Underwood v. Town Board of Empire*, 14 N.W.2d 459, 461 (Minn. 1944); *Hendrickson v. State*, 127 N.W.2d 165 (Minn. 1964).

³⁰ *Id.*; *But see Wendt v. Board of Sup'rs. of Town of Minnetrista*, 92 NW 404 (Minn. 1902) (indicating an owner of land at the end of a vacated road may be entitled to compensation).

³¹ Minn. Const. art. 1 ' 13; *See also* Minn. Stat. § 160.03.

³² *Beer v. Minnesota Power & Light Co.*, 400 N.W.2d 732, 735 (Minn. 1987); *Hendrickson*, 127 N.W.2d at 173.

³³ Minn. Stat. § 164.07, subd. 5.

damage awards by the amount of benefit conferred. As with the payment of damages for establishing a road, the amount of compensation must be determined on a case-by-case basis with appropriate legal assistance.

B. Extinguishment of “Abandoned Roads” or Statutory Abandonment

Some town roads may be abandoned using an extinguishment or statutory abandonment process intended to be faster than the formal vacation process.³⁴ The extinguishment procedure can only be used on roads that: (1) were not recorded; (2) were established more than 25 years ago; and (3) have not been improved or maintained in the last twenty years. Refer to **Appendix D** for more detail on the qualifying criteria and procedural requirements of the statute.

This procedure provides town boards a relatively simple method to eliminate a town’s interest in a road. Sometimes, a board will not be certain whether the town has an interest in the road. Often the “road” will be overgrown with brush and trees. The town encounters a problem on these “roads” when someone wants the board to reopen and maintain the road. The board is rarely interested in spending the funds needed to restore and maintain the roads, but they often face claims the board has a duty to reopen the roads. To avoid such disputes before they arise, boards can use the extinguishment procedure to make it clear that the town has no legal interest in the roads.

C. Abandonment

The term abandonment is used in several different contexts when referring to roads. For this section, abandonment means the loss of a town road easement through long-continued non-use accompanied by affirmative or obvious acts by the town that are inconsistent with the continued existence of the road and that indicate an intent to abandon the road.³⁵ Abandonment is a question of intention and “[m]ere nonuser for any length of time will not operate as a abandonment of a public street.”³⁶ “Nor will nonuser, coupled with failure to remove obstructions erected by abutting property owners or others, constitute abandonment.”³⁷ Claims of abandonment usually involve roads that have not been used for years and that the board has said or otherwise indicated it intends to give up the easement for the roads.

When a town tries to assert an interest in a road that a landowner believed abandoned, the landowner will often fight the township’s interest by asserting the doctrine of Estoppel. Estoppel is a fairness concept. In this context, it is a claim that a town should be prohibited from asserting its interest in a road because it would be inequitable (unfair) to an owner who reasonably relied on the affirmative actions of the town indicating an intent to

Uncertainty of Abandonment

The process of formally vacating a road is different than abandoning a road. The advantage of the formal vacation process is the certainty offered to the town at the end of the vacation process. Because abandonment is declared by the town board, not by a court or legal process, it is possible an abandonment is ineffective.

³⁴ Minn. Stat. § 164.06, subd. 2.

³⁵ *Wolfson v. City of St. Paul*, 535 N.W.2d 384, 387 (Minn. Ct. App. 1995) (quoting *Village of Newport v. Taylor*, 30 N.W.2d 588, 592 (Minn. 1948)).

³⁶ *Village of Newport*, 30 N.W.2d at 592 (citation omitted).

³⁷ *Id.* (citations omitted).

abandon the road.³⁸ Estoppel may be asserted against the township when there is: “1) long-continued nonuse by the municipality; 2) possession by a private party in good faith and in the belief that the property’s use as a street has been abandoned; 3) erection of valuable improvements on the property without objection from the city, which has knowledge thereof; 4) great damage resulting to the possessors if the municipality were allowed to reclaim the land; and 5) an affirmative or unequivocal act by the municipality which, in light of all the circumstances, induced a third party reasonably to believe in and to rely upon the act as constituting a representation of the municipality’s intent in fact to abandon the street.”³⁹

One of the initial cases on abandonment provides a good example of the harm the doctrine attempts to avoid. The case involved a platted street dedicated to a city.⁴⁰ The portion of the road in question had not been opened or used as a street in its 83 years of existence. The road that served the area was partially built outside the platted right of way. Over the years, the adjacent owners built several permanent buildings in the unused right of way with building permits from the city. The buildings were kept and maintained in that location for over 40 years. The city filed suit to require the owners to remove the buildings from the platted right of way.

The court upheld the finding that the city was estopped from asserting its interest in those portions of the right of way. Factors such as the long period of nonuse by the city, permission of the city to construct the buildings, and reasonable reliance on the location of the existing road weighed heavily in the finding of abandonment.

As a final note on this issue, it is important to realize that title to public roads and lands may not be acquired by someone through occupancy alone.⁴¹ For instance, a claim of adverse possession that may be brought against a private owner after 15 years of occupancy by the claimant is not available against town property or town road rights-of-way.⁴²

D. Spending Limitations (25-year law)

Occasionally, a town board is asked to reopen and maintain a road or portion of road that has not been maintained for many years. If the road has not been maintained or improved for over 25 years, Minn. Stat. § 365.10, subd. 11 indicates the issue can be submitted to the electors at an annual or special town meeting. At the meeting, the electors may pass a resolution to allow the board to determine whether the road will be opened and maintained. The inference raised by the statute is that if the electors decide not to pass the resolution, the board would be prohibited from spending town funds to maintain the road. In a sense, this section places owners in a position of having to act within 25 years of when a town stops maintaining a road. Failure to do so could result

³⁸ *Id.* at 593.

³⁹ *Reads Landing Campers Ass’n, Inc. v. Township of Pepin*, 533 N.W.2d 45, 49 (Minn. Ct. App. 1995) (quoting *Parker v. City of St. Paul*, 50 NW 247, 248 (Minn. 1891)).

⁴⁰ *Rochester v. North Side Corporation*, 1 N.W.2d 361 (Minn. 1941).

⁴¹ Minn. Stat. § 541.01.

⁴² *See, e.g., Ollgaard v. City of Marshall*, 294 N.W. 228 (Minn. 1940); *McCuen v. McCarvel*, 263 N.W.2d 64 (Minn. 1978).

in the electors either refusing to give the board authority to consider the matter, or the electors authorizing the board to consider the matter and the board deciding not to maintain the road.

What is particularly significant about the section is its statement that the impassible road complaint procedure in Minn. Stat. § 163.16 does not apply to these old roads. This protection allows the board to avoid having to defend against a variety of potential complaints brought on roads that someone may claim were town roads at some time in the past (it is not uncommon for owners to point to maps from the 1800's to support their claim for a town road).

E. Marketable Title Act (40-year law)

The Marketable Title Act (MTA) is contained in Minn. Stat. § 541.023 and is sometimes referred to as the 40-year law. The MTA provides a defense for owners against those who assert a hostile claim to the same property. The purpose of the MTA is to avoid ancient records that impose conditions and restrictions on property from interfering with its marketability.⁴³

The Minnesota Supreme Court specifically found that town roads are *not* exempt from the application of the MTA.⁴⁴ Application of the MTA to town roads usually comes in the form of a defense asserted by an owner against the town's attempt to reopen a road that has not been maintained for over 40 years. In such situations, the MTA creates a presumption that the road easement has been abandoned.⁴⁵

In order to overcome a claimed defense under the MTA, the town needs to demonstrate one of the following: (1) the road was created within the last 40 years; (2) if the road was created over 40 years ago, proper notice of the easement was filed with the county recorder within the last 40 years; or (3) the town is actually in possession of the road.⁴⁶ Typically, the road in question was either never recorded or was only recorded in the county auditor's office which does not constitute sufficient notice of an interest in land.⁴⁷ As such, the town must show that it has been in possession of the road and that the possession was sufficient to place the owner on notice of the town's interest in the road.

To establish possession, the town must show present, actual, open, and exclusive possession that is neither equivocal nor ambiguous, and is of a character that would put a prudent person on inquiry.⁴⁸ When applied to roads, factors such as the amount of use of the road, the amount of work and maintenance performed by the town on the road, the degree of control exercised by the town over the road, whether the road was regularly inspected by the town, and knowledge of the existence of the easement are considered.⁴⁹ Possession may be tied to common law dedication in

⁴³ *Wichelman v. Messner*, 83 N.W.2d 800, 812 (Minn. 1957).

⁴⁴ *Sterling Tp. v. Griffin*, 244 N.W.2d 129, 133 (Minn. 1976); *See also Northford Tp. v. Joffer*, 353 N.W.2d 216 (Minn. Ct. App. 1984).

⁴⁵ Minn. Stat. § 541.023, subd. 5.

⁴⁶ *Sterling Tp.*, 244 N.W.2d at 132.

⁴⁷ *Id.* (citation omitted).

⁴⁸ *Sacket v. Storm*, 480 N.W.2d 377, 381 (Minn. Ct. App. 1992); *Henly v. Chisago County*, 370 N.W.2d 920, 925 (Minn. Ct. App. 1985).

⁴⁹ *Sterling Tp.*, 244 N.W.2d at 134.

that acts sufficient to constitute public acceptance of an owner dedication may also be sufficient to show possession under the MTA.⁵⁰

Possession was found lacking on a portion of town road established in 1889 that was never physically constructed as a road, was not maintained or snow plowed, received only sporadic use by very few people, was not included in the town's road checks, led to a dead end, and there was a lack of knowledge of the claimed easement.⁵¹ In another case, sufficient possession was established on a road that joined to more heavily traveled roads, some degree of regular use and maintenance was shown, and a tax credit was given to the properties subject to the road.⁵²

⁵⁰ *Sackett*, 480 N.W.2d at 382.

⁵¹ *Sterling Tp.*, 244 N.W.2d at 134.

⁵² *Northfork Tp.*, 353 N.W.2d at 218.