RECENT COURT DECISION THAT ARE IMPORTANT FOR SURVEYORS

by David J. Meyers

There have been an unusually large number of Court of Appeals and Supreme Court cases that have come down the past few months that should be of interest to surveyors. I will summarize a few of the cases, and if appropriate, add my personal comments. Anyone wishing to review the entire case should be able to locate it by going to the Minnesota Courts' website and searching the case name.

Cartways

Generally speaking, a cartway must be established by the township or city to provide access to a parcel of land at least five acres in size, and sometimes as small as two acres, if that parcel has no other access. A cartway must also be established if the access is less than two rods wide. For reference, see: Minnesota Statutes Sections 164.07 and 164.08 for townships, and Section 435.37 for cities.

Kennedy v. Pepin Township of Wabasha County, file A08-1921 (Minnesota Supreme Court, July 15, 2010). The petitioner, Kennedy, owned 26 acres of land along Highway 61 in Southeast Minnesota. Only five acres on top of the bluff is buildable, and the remaining 20 acres is a steep slope down to the highway. Kennedy asked for a cartway that would run through a long established orchard to the five buildable acres. This case clarified the cartway laws in a couple of respects.

First, the Court agreed that a cartway must provide "meaningful" access to a usable portion of the petitioner's property. Here, the petitioner had land along the highway, but because of the steep bluff, it was not usable as access to the five acres. The Supreme Court said that a property owner is entitled to a cartway access to the usable portion of his property.

Township cartway law, Section 164.08, gives the town board the right to either accept the petitioner's proposed cartway route or to select an alternative route. The Court of Appeals rejected the township's alternative route and selected its own. The Supreme Court reversed the Court of Appeals, and said that Courts may not substitute their judgment for the judgment of the local road authority. The Supreme Court sent the case back to the town board to exercise its right to select a route that is the "least disruptive and damaging to effected property owners and in the public's interest."

This is important because the Supreme Court is telling District Courts and the Court of Appeals that they may not substitute their judgment for the judgment of the road authority. It is up to the local road authority, a township, city or county, and not the Courts to exercise statutory discretion in road matters.

I foresee a real problem from now on with town boards and cities deciding what is usable land and whether access is meaningful.

Kaster v. Town Board of LaGarde, file A09-1870 (Minnesota Court of Appeals, June 15, 2010). This is a cartway decision that turns on specific facts, and do not necessarily demonstrate an important point of law. The petitioner appealed claiming that the town board was biased and had "preconceived views" about the best cartway path. The Court of Appeals stated that they would not set aside a town board's decision simply because a town board member was related to one of the parties, or because a board member showed actual or sympathetic interest in a specific outcome.

If you do any township work, you know that often someone knows or is related to a town board member. The Court of Appeals is saying that being related and being biased is not enough to set aside a town board's decision. Town board members may be biased and may have already made up their mind by the time they get to the meeting. The Courts will not interfere with the town board's decision.

Ironically, the petitioner argued that one town board member was a cousin of a party who owned land where the petitioner wanted to place the cartway. As the case proceeded through the Appellate Courts, the Court of Appeals found out that the petitioner, himself, was also a cousin of the same town board member. Go figure.

Mechanic's Liens

Premier Bank v. Becker Development, LLC, et al., files A08-1252 and A08-1700 (Minnesota Supreme Court, July 22, 2010). A general contractor was hired to do all of the development work in a residential development consisting of 59 lots. The contractor hired a variety of subcontractors and a surveyor.

Premier Bank placed a development mortgage on all of the property prior to any work being started. Surveyors who are familiar with mechanic's liens know that if a mortgage is filed prior to the first visible improvement, the mortgage is prior to the mechanic's lien claims. During the development process, three individual homes were constructed on lots where the development mortgage was released, and construction mortgages granted. The construction mortgages were placed after work had started, so they were subordinate to the mechanic's liens.

The general contractor filed a single mechanic's lien under Minnesota Statutes Section 514.09 against the entire project. He foreclosed the lien only against the three lots where it was clear that he had priority. The Supreme Court answered two questions.

First, the Supreme Court said that if a lien claimant files a lien under Section 514.09 against the entire development, then it must be foreclosed against the entire development. The lien claimant can not pick and choose lots where the lien claimant believes he has the better chance of winning the priority question.

Second, and most importantly, the Supreme Court made new law by stating that if a mechanic's lien is filed against an entire development, then the lien claimant is forced to accept a pro rata

payment from each lot to release the lien. In this case, since the general contractor filed a mechanic's lien on all 59 lots, his lien claim must be apportioned or divided by 59. The lien claimant received the proportionate share, or only a few thousand dollars for the three lots where his lien was prior.

This, in my view, is the Supreme Court making up law. For over one hundred years that there was no pro rata right under Section 514.09 to release a lot. This puts contractors and surveyors at a severe disadvantage. It is almost impossible for a surveyor to keep a separate record for development work done on each lot, since the surveyor often does work on the entire development.

In this economic environment it is hard to see that surveyors would ever again grant the developer credit terms to survey and engineer an entire development, and then get paid as the first lots were sold. Nevertheless, if those days return, the surveyor will not be in a position to force the developer to pay the surveyor for their work, except on a pro rata lot basis. This means that the surveyor may end up being the developer's partner and get paid only as lots are sold.

Metro Land Surveying and Engineering Company, Inc. v. Matthews, file A09-1533 (Minnesota Court of Appeals, May 18, 2010). A developer entered into a purchase agreement to buy land and then hired a surveyor. The surveyor performed surveying and engineering services on the entire development. The deal did not work out as planned, the developer walked away and the original owner ended up with the property. The surveyor filed a mechanic's lien.

Minnesota Statutes Section 514.06 allows a lien claimant to do work on the land of another and claim a mechanic's lien, if the owner has actual knowledge of the work. The owner may protect themselves by posting a notice on the property that the owner is not responsible for mechanic's liens.

The Trial Court seemed to have sympathy for the property owner and held the lien invalid. On Appeal, the attorneys for the surveyor raised the question of whether Section 514.06 applies. There was evidence that the property owner had actual notice that the surveyor was doing work on the property.

The Court of Appeals reversed the Trial Court and awarded the mechanic's lien. The Court of Appeals stated that since the property owner knew that the surveyor was doing work and failed to post a notice that the property owner would not be responsible, the lien was valid.

The property owner then argued that the lien was not valid due to lack of pre-lien notice. The Court of Appeals correctly stated that since the surveyor did not hire subcontractors or materialmen, that no pre-lien notice was required.

If you are doing survey work and your customer does not own the land, make certain the actual owner knows you are doing the work. It is always helpful to serve the pre-lien notice. This satisfies the pre-lien requirement and give the actual owners notice of your work.

Zoning

Krummenacher v. City of Minnetonka, file A08-1988 (Minnesota Supreme Court, June 24, 2010). This is a very good discussion of the differences between granting a variance under county zoning under Minnesota Statutes Chapter 394 and city and town zoning under Minnesota Statutes Chapter 462.

The city council granted a variance stating that it was a reasonable use to expand an already nonconforming garage. One of the neighbors sued and it ended up in the Supreme Court.

The Supreme Court analyzed the authority of cities to grant a variance under Minnesota Statutes Section 462.35 and determined that in order for a city to grant a variance, the property owner must show "undue hardship," which means that "the property in question cannot be put to a reasonable use" without the variance. That means that a city or town may not grant a variance if a property owner has any reasonable use of the land.

The Supreme Court contrasted that language with Minnesota Statutes Section 394.27, which authorizes a county to grant a variance when the property owner would face "practical difficulties or particular hardship." That means that a county may grant a variance for almost any use if without a variance the use of the property is difficult or somewhat of a hardship. This is far less strict than the city variance requirement.

Johnson v. Cook County, file A08-1501 (Minnesota Supreme Court July, 29, 2010). Minnesota Statutes Section 15.99 requires a zoning body to make a decision on an application within 60 days of the date the complete application is submitted. Up until now, it was understood that not only must the government act, but if they deny the request, they must state in writing within the 60 day period the reasons for denial.

The Supreme Court changed that law and said that all the zoning authority must do in the 60 days is take action. It does not need to give reasons for the denial. The Supreme Court said that if a zoning body denies a request, it should make the reasons known in writing, to form the basis for the denial.

This case reversed a line of cases that required the zoning authority to not only act, but state the reasons for the action. This is a change in the law. Now, all the zoning authority has to do is deny the request within 60 days and not explain why.

Torrens

Hebert v. City of Fifty Lakes, file A09-1414 (Minnesota Court of Appeals July 13, 2010). This case has been in the Trial Courts and Court of Appeals for several years. It involves an old plat where the road that is actually driven is not within the dedicated roadway in the plat. Now, isn't that a surprise?

The property is in the Torrens system. The city argued that the traveled road is a valid roadway under the Minnesota Statutes Section 160.05, which provides that if a government maintains and the public uses the road for six consecutive years, it is a public roadway.

Alternatively, the city argued that the road was established by common law dedication. Common law dedication occurs when an owner, either explicitly or by implication, dedicates a road and the public uses it. Dedication can be as simple as the property owner knowing the public is using the road and not stopping the public.

The Court analyzed both common law dedication and Section 160.05, and determined that these rules do not apply to Torrens property. Under Minnesota law, a Torrens property owner cannot lose their land to adverse possession. Adverse possession occurs when someone else uses your property, without possession, for 15 years.

The Court of Appeals reasoned that since adverse possession claims could not be made against Torrens property, and both Section 160.05 and common law dedication were types of adverse possession, that the city could not establish a roadway across Torrens property under Section 160.05 or common law dedication.

As a side, it seems to me that both the city and the property owner have spent more money on this case than it would have cost for the city to have condemned the property and bought it. The case goes back to the Trial Court, so I am certain we will see it again.

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