

**STAFF MEETING MINUTES
LANCASTER COUNTY BOARD OF COMMISSIONERS
COUNTY-CITY BUILDING, ROOM 113
THURSDAY, JUNE 23, 2011
8:30 A.M.**

Commissioners Present: Deb Schorr, Chair
Larry Hudkins
Jane Raybould
Brent Smoyer

Commissioners Absent: Bernie Heier, Vice Chair

Others Present: Kerry Eagan, Chief Administrative Officer
Gwen Thorpe, Deputy Chief Administrative Officer
Dan Nolte, County Clerk
Cori Beattie, Deputy County Clerk
Ann Taylor, County Clerk's Office

Commissioner Hudkins opened the meeting at 8:30 a.m.

AGENDA ITEM

**1 APPROVAL OF THE MINUTES OF THE THURSDAY, JUNE 16, 2011
STAFF MEETING**

MOTION: Raybould moved and Smoyer seconded approval of the minutes of the June 16, 2011 Staff Meeting. Raybould, Smoyer and Hudkins voted aye. Schorr and Heier were absent from voting. Motion carried 3-0.

2 ADDITIONS TO THE AGENDA

Raybould encouraged other members of the Board to attend the Community Mental Health Center (CMHC) Planning Committee meetings. The next meeting is tentatively scheduled for Wednesday, July 13th. The Committee also plans to tour the facility on Monday, July 11th.

NOTE: A formal motion was not made to add this item to the agenda.

3 PETITION FOR ACCESS ROAD TO ISOLATED PARCEL - Mike Thew, Chief Deputy County Attorney; Doug Pillard, Design Division Head, County Engineering

Mike Thew, Chief Deputy County Attorney, discussed a petition from Dorothy K. Maher for an access road to an isolated parcel on her property on Agnew Road (Exhibit A). Maher states the parcel cannot be reached except by a road that runs through property to the north (see aerial maps in Exhibits B & C). That property recently changed ownership and the new owners, John and Bridget Pacovsky, are not comfortable with the arrangement Maher had with the previous owner's tenant that allowed her to use the road. Maher indicates she tried to negotiate purchase but it was only available at an exorbitant price (not specified in the petition). Thew said there are provisions in State Statutes that allow the County to exercise its powers of eminent domain to provide access to isolated land, assessing the costs to the person who made the request. He noted the Board is scheduled to hold a public hearing on the petition at the June 28th County Board of Commissioners Meeting. Thew said there is also pending litigation in District Court regarding the property which is the subject of the petition and said the Court will decide the issue of whether Maher had a prescriptive easement (an easement upon another's real property acquired by continued use without permission of the owner for a period provided by state law to establish the easement).

Raybould asked why the Board is getting involved in a court case.

Thew said the Board is required to hold a hearing once an affidavit (petition) is presented that meets the provisions outlined in Nebraska Revised Statute §39-1713. He said the purpose of the hearing is to determine whether the allegations of the affidavit are true and whether other conditions are met. Thew noted both parties have requested 30 minutes to present their case.

Board consensus was to alter the order of the agenda to take care of other business first.

Thew said other issues that might be raised in the public hearing are:

- Is the road in question less than 2 rods (33 feet) wide?
- Was the price that was quoted to Maher to acquire access exorbitant?
- Could Maher have done something to prevent the parcel from becoming isolated?
- Is access necessary or for convenience?
- Could Maher build a low-water crossing on her property to service the parcel?

The Chair arrived at the meeting at 9:07 a.m. and assumed direction of the meeting.

In response to a question from Raybould, Thew said the Board can either take action on the petition following the hearing or wait until the District Court case is decided.

The Board requested the following information: 1) Cost to acquire the road access; 2) Cost to build a low-water crossing that would service the parcel; and 3) Topography information.

NOTE: Thew provided copies of court pleadings and pre-trial orders related to the district court case and the Nebraska Supreme Court opinion in the case of Teadtke v. Havranek to the Board following the meeting (Exhibit D).

4 POTENTIAL LITIGATION - Mike Thew, Chief Deputy County Attorney

MOTION: Smoyer moved to enter Executive Session at 9:20 a.m. for the purpose of protecting the public interest with regards to potential litigation.

The Chair suggested that the Board address Item 10E first.

Smoyer withdrew his motion.

ADMINISTRATIVE OFFICER REPORT

E. Correspondence Regarding Road Vacation

Kerry Eagan, Chief Administrative Officer, noted the law firm of Seacrest & Kalkowski has submitted a request, on behalf of Craig and Lori Gana, that the County Engineer conduct a study to initiate vacation of a piece of county right-of-way that is bordered entirely by property owned by the Gana's (Exhibits E & F). He said the road was plotted as alternative right-of-way in 1881. The road has never been opened and is not needed for road purposes. Eagan said the County may need additional right-of-way along West Panama Road and could try to negotiate a trade.

Mike DeKalb, Planner, appeared and said road vacation requests are normally by petition. He said the Board can initiate the process but would advise it ask the Planning Department and County Engineering to report on the possible ramifications of the road vacation.

Doug Pillard, Design Division Head, County Engineering, appeared and said his office declined the request to initiate the process but does not object to vacation of the right-of-way.

There was general consensus to initiate the road vacation process as outlined.

4 POTENTIAL LITIGATION - Mike Thew, Chief Deputy County Attorney

MOTION: Smoyer moved and Raybould seconded to enter Executive Session at 9:27 a.m. for the purpose of protecting the public interest with regards to potential litigation and labor negotiations.

The Chair restated the motion for the record.

ROLL CALL: Raybould, Smoyer, Hudkins and Schorr voted aye. Heier was absent from voting. Motion carried 4-0.

Smoyer exited the meeting.

MOTION: Raybould moved and Hudkins seconded to exit Executive Session at 10:14 a.m. Hudkins, Raybould and Schorr voted aye. Smoyer and Heier were absent from voting. Motion carried 3-0.

5 LABOR NEGOTIATIONS - Mark Koller, Personnel Director; John Cripe, Classification and Compensation Manager; Nicole Gross, Compensation Technician

See Item 4.

6 MANDATORY ALCOHOL SERVER TRAINING - Captain Joy Citta, Lincoln Police Department (LPD); Tonya Peters, Assistant City Attorney

Captain Joy Citta, Lincoln Police Department (LPD), said the ordinance the City passed in 2010 to allow bars to remain open until 2:00 a.m. included mandatory server training for anyone who does point-of-sale or serves alcoholic beverages. That requirement goes into effect on October 1, 2011. She said information and training to obtain a professional liquor service permit will be available on the Lincoln-Lancaster County Health Department's (LLCHD's) website and LLCHD will enforce the permits. The database would be merged with the Nebraska Liquor Control Commission's database so information would be available to both entities.

Smoyer returned to the meeting at 10:15 a.m.

Tonya Peters, Assistant City Attorney, asked whether the County would also be interested in participating in the program. She said she could work with the County Attorney's Office to get regulations in place.

In response to a question from Schorr, Peters said the \$20.00 fee would be paid up-

front and would be used to pay for the program, maintenance and technology upgrades.

Hudkins asked whether there has been an increase in the number of citations issued since the later closing time went into effect.

Captain Citta said they have not been able to analyze that yet as they lack sufficient data. She said a report will be provided to the City Council and the Internal Liquor Committee in October and said she would be willing to provide that report to the County Board as well.

MOTION: Hudkins moved and Raybould seconded to direct the County Attorney's Office to work with the City Attorney's Office to draft the necessary regulations for the County to participate in the mandatory alcohol server training. Smoyer, Raybould, Hudkins and Schorr voted aye. Heier was absent from voting. Motion carried 4-0.

7 AMUSEMENT LICENSE AMENDMENTS - Cori Beattie, Deputy County Clerk

Cori Beattie, Deputy County Clerk, said the Clerk's office recently received a request for an amusement license renewal and an amendment . She said she is working with the County Attorney's Office to develop forms to address those situations. Both would require feedback from the relevant departments and would come before the Board at a regular County Board of Commissioners meeting.

8 ACTION ITEMS

There were no action items.

9 CONSENT ITEMS

There were no consent items.

10 ADMINISTRATIVE OFFICER REPORT

A. Equal Employment Coordinator

MOTION: Smoyer moved and Hudkins seconded to appoint Gwen Thorpe, Deputy Chief Administrative Officer, to serve as the County's Equal Employment Coordinator. Smoyer, Hudkins, Raybould and Schorr voted aye. Heier was absent from voting. Motion carried 4-0.

B. Lincoln Airport Authority Improvement Fund Grant

Eagan said the Lincoln Airport Authority has asked the Board to waive the requirement that the County be listed as an additional insured party on their insurance.

The Board declined the request to waive the requirement.

C. County Representative for Voice over Internet Protocol (VoIP) Request for Proposals (RFP)

Board consensus was to appoint Dennis Meyer, County Budget and Fiscal Officer, to serve as the County's representative.

D. Staff Meeting on August 4, 2011

Board consensus was to cancel the Staff Meeting scheduled for August 4th, due to the lack of a quorum. It was noted it will no longer be necessary to cancel the August 11th Staff Meeting as a quorum will be present on that date.

Discussion took place with Cori Beattie, Deputy County Clerk, regarding the Board of Equalization (BOE) schedule, with general consensus to reserve the following dates/times for BOE hearings on an as needed basis:

- August 3rd 8:00 a.m. to 5:00 p.m.
- August 8th 8:00 a.m. to 12:00 p.m.
- August 9th 10:30 a.m. to 1:00 p.m. (a continuation of the regular BOE Meeting)
- August 10th 8:00 a.m. to 12 p.m. (wrap-up BOE hearings and final action)

E. Correspondence Regarding Road Vacation

Item was moved forward on the agenda.

F. Food Distribution Night at the Center for People in Need

Board consensus was to observe Food Distribution Night at the Center for People in Need, 3901 North 27th Street, on July 26th at 4:30 p.m.

G. Continuity of Operations Contract for Southeast Region

The Board appointed Gwen Thorpe, Deputy Chief Administrative Officer, to serve as the contact.

There were no pending items.

12 DISCUSSION OF BOARD MEMBER MEETINGS

- A. Lincoln Independent Business Association (LIBA) Budget Monitoring Committee - Smoyer

Smoyer said they discussed the City's budget and the Planning Department gave a presentation on proposed changes to the Future Land Use Map.

- B. General Assistance (GA) Monitoring Committee - Hudkins, Raybould

Eagan said they discussed the impact of Legislative Bill (LB) 465 (Eliminate provisions relating to eligibility of non-United States citizens for public assistance). He said a proposal to revise the GA guidelines to address the situation will be brought forward.

Raybould said they also discussed how to qualify individuals for the Supplemental Security Income (SSI)/Social Security Disability Insurance (SSDI) Outreach Access and Recovery Program and the lab charges from Quest Diagnostics.

- C. Community Mental Health Center (CMHC) Advisory Committee - Raybould

Raybould said discussion focused on the budget and reductions in block grant funding. She also reported on CMHC's plans to partner with the Seniors Foundation and St. Elizabeth Regional Medical Center on a grant to assist elderly patients as they transition from their hospital stay. CMHC's focus will be on mental health issues.

3 EMERGENCY ITEMS AND OTHER BUSINESS

There were no emergency items or other business.

The Chair recessed the meeting at 10:55 a.m.

The Chair reconvened the meeting at 11:47 a.m. at the Youth Services Center (1200 Radcliff Street). Sheli Schindler, Youth Services Center (YSC) Director, and Annette Thompson, Deputy Director, led a tour of the facility.

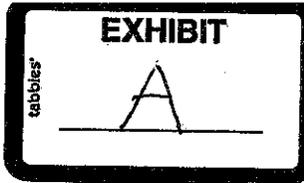
14 ADJOURNMENT

By direction of the Chair, the meeting was adjourned at 1:27 p.m.



Dan Nolte
Lancaster County Clerk





BEFORE THE BOARD OF COMMISSIONERS
FOR LANCASTER COUNTY, NEBRASKA

In the Matter of)
Certain Isolated Lands Within) **LANDOWNER'S AFFIDAVIT**
Lancaster County, Nebraska) **AND PETITION.**
)

Dorothy K. Maher, being first duly sworn upon oath, deposes and states as follows:

1. I am over 21 years of age and am competent to testify in all matters contained herein.

2. I am the owner of real estate described as (hereinafter the "Property"):

The Southeast Quarter of Section 8, Township 12, Range 8, East of the 6th Principal Meridian, Lot 12, Irregular Tracts, Lancaster County, Nebraska, more particularly described as all of the Southeast Quarter of Section 8, Township 12, Range 8, East of the 6th Principal Meridian, Lancaster County, Nebraska, EXCEPT:

That part of the Southeast Quarter of Section 8, Township 12, Range 8 East of the 6th Prime Meridian, now known as Lot 11, Irregular Tracts, Lancaster County, Nebraska, more particularly described as follows:

Beginning at the Northeast corner of Lot 11, Irregular Tracts, said point being the Northeast corner of the Southeast Quarter of said Section 8; thence on the East line of said Southeast Quarter, on an assigned bearing of South 00 degrees 00 minutes 00 seconds West, a distance of 845.26 feet; thence South 90 degrees 00 minutes 00 seconds West, 241.11 feet; thence South 00 degrees 00 minutes 00 seconds West, 60.07 feet; thence South 71 degrees 52 minutes 06 seconds West, 147.71 feet; thence South 47 degrees 33 minutes 02 seconds West, 24.12 feet; thence North 89 degrees 50 minutes 39 seconds West, 501.21 feet; thence North 05 degrees 27 minutes 24 seconds West, 15.88 feet; thence North 44 degrees 56 minutes 29 seconds West, 179.17 feet; thence North 33 degrees 34 minutes 52 seconds West, 333.19 feet; thence North 06 degrees 35 minutes 08 seconds West, 536.89 feet, to a point on the North line of said Southeast Quarter; thence on said North line, North 89 degrees 25 minutes 51 seconds East, 1274.50 feet, to the Point of Beginning.

3. A portion of the Property located generally in the northwest corner of the Property and measuring approximately 10.1 acres (hereinafter the "Isolated Parcel") is shut out from all public access, other than a waterway, by being surrounded on all sides by real estate belonging to other persons and by water. Alternatively, the Isolated Parcel is accessible only an established public road less than two rods in width.

4. The Isolated Parcel was not isolated at the time it was purchased by myself and my late husband in 1941.

5. The isolation of the Isolated Parcel was not caused by me or by another other person with my knowledge or consent.

6. Access is necessary for the existing utilization of the Isolated Parcel, namely, the cultivation of soybeans and participation in the United States Department of Agriculture's Conservation Reserve Program.

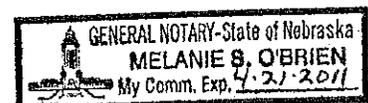
7. I am unable to purchase from any persons a right-of-way from the Isolated Parcel over or through their real estate to a public road, or such cannot be purchased except at an exorbitant price.

8. I ask that the Board of Commissioners of Lancaster County, Nebraska, provide an access road in accordance with **Neb. Rev. Stat. § 39-1716.**

Dorothy K. Maher
Dorothy K. Maher

SUBSCRIBED AND SWORN to before me this ^{4th} 4 day of August, 2010.

Melanie S. O'Brien
Notary Public



Westlaw

Neb.Rev.St. § 39-1713

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West's Revised Statutes of Nebraska Annotated Currentness

Chapter 39. Highways and Bridges

- ▣ Article 17. County Roads. Land Acquisition, Establishment, Alteration, Survey, Relocation, Vacation, and Abandonment

- ▣ (b) Establishment, Alteration, and Survey

- 39-1713. Isolated land; access; affidavit; petition; hearing before county board; time; terms, defined

(1) When any person presents to the county board an affidavit satisfying it (a) that he or she is the owner of the real estate described therein located within the county, (b) that such real estate is shut out from all public access, other than a waterway, by being surrounded on all sides by real estate belonging to other persons, or by such real estate and by water, (c) that he or she is unable to purchase from any of such persons the right-of-way over or through the same to a public road or that it cannot be purchased except at an exorbitant price, stating the lowest price for which the same can be purchased by him or her, and (d) asking that an access road be provided in accordance with section 39-1716, the county board shall appoint a time and place for hearing the matter, which hearing shall be not more than thirty days after the receipt of such affidavit. The application for an access road may be included in a separate petition instead of in such affidavit.

(2) For purposes of sections 39-1713 to 39-1719:

(a) Access road means a right-of-way open to the general public for ingress to and egress from a tract of isolated land provided in accordance with section 39-1716; and

(b) State of Nebraska includes the Board of Educational Lands and Funds, Board of Regents of the University of Nebraska, Board of Trustees of the Nebraska State Colleges, Department of Roads, Department of Aeronautics, Department of Administrative Services, and Game and Parks Commission and all other state agencies, boards, departments, and commissions.

CREDIT(S)

Laws 1957, ch. 155, art. IV, § 13, p. 544; Laws 1982, LB 239, § 1; Laws 1999, LB 779, § 4.

LIBRARY REFERENCES

Private Roads  2.
Westlaw Topic No. 311k2.

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Neb.Rev.St. § 39-1714

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Chapter 39. Highways and Bridges

- ▣ Article 17. County Roads. Land Acquisition, Establishment, Alteration, Survey, Relocation, Vacation, and Abandonment

- ▣ (b) Establishment, Alteration, and Survey

- 39-1714. Isolated land; access by private road only; affidavit; petition; hearing before county board

Whenever all the other conditions prescribed by section 39-1713 are present and, instead of being entirely shut off from all public roads, the only access by any owner of real estate to any public road is by an established private road less than two rods in width, the county board shall, upon the filing of an affidavit or affidavit and petition asking that an access road be provided in accordance with section 39-1716, substantially in the manner set forth in section 39-1713, setting forth such facts, appoint a time and place and hold a hearing thereon in the manner set forth in section 39-1713.

CREDIT(S)

Laws 1957, ch. 155, art. IV, § 14, p. 545; Laws 1999, LB 779, § 5.

LIBRARY REFERENCES

Private Roads  2.
Westlaw Topic No. 311k2.

NOTES OF DECISIONS

In general 1
Injunctive relief 2
Mandamus 3

1. In general

Landowner's right to obtain access in form of public road for his allegedly isolated real estate was governed by statutes existing when landowner and his wife created and recorded subdivision. Neb.Rev.St. §§ 39-1713, 39-1714, 39-1716. *Lewis v. Board of Com'rs of Loup County*, 1995, 247 Neb. 655, 529 N.W.2d 745. Private Roads  2(1)

Establishment of a public road upon satisfaction of statutory requirements for establishment of a public road for access to isolated real estate is a ministerial duty within power of a county board. Neb.Rev.St. §§ 39-1713,

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West's Revised Statutes of Nebraska Annotated Currentness

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- ▣ Article 17. County Roads. Land Acquisition, Establishment, Alteration, Survey, Relocation, Vacation, and Abandonment

- ▣ (b) Establishment, Alteration, and Survey

- 39-1715. Isolated land; access; hearing; notice; service; posting

When a hearing is to be held as provided in sections 39-1713 and 39-1714, the county board shall cause notice of the time and place of the hearing to be given by posting notices thereof in three public places in the county at least ten days before the time fixed therefor. At least fifteen days' written notice of the time and place of the hearing shall be given to all of the owners and occupants of the lands through which the access road may pass. The notice shall be served personally or by leaving a copy thereof at the usual place of abode of each occupant of such lands and, whenever possible, by either registered or certified mail to the owners of such lands.

CREDIT(S)

Laws 1957, ch. 155, art. IV, § 15, p. 545; Laws 1982, LB 239, § 2; Laws 1999, LB 779, § 6.

LIBRARY REFERENCES

Private Roads ↪ 2.
Westlaw Topic No. 311k2.

Neb. Rev. St. § 39-1715, NE ST § 39-1715

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▣ Article 17. County Roads. Land Acquisition, Establishment, Alteration, Survey, Relocation, Vacation, and Abandonment

▣ (b) Establishment, Alteration, and Survey

→ 39-1716. Isolated land; access road; damages; powers of county board; costs; maintenance

(1) The county board shall, if it finds (a) that the conditions set forth in section 39-1713 or 39-1714 exist, (b) that the isolated land was not isolated at the time it was purchased by the owner or that the owner acquired the land directly from the State of Nebraska, (c) that the isolation of the land was not caused by the owner or by any other person with the knowledge and consent of the owner, and (d) that access is necessary for existing utilization of the isolated land, proceed to provide an access road and, if it finds that the amount of use and the number of persons served warrants such action, may lay out a public road to such real estate.

(2) The county board shall appraise the damages to be suffered by the owner or owners of the real estate over or through which the access road will be provided. Such damages shall be paid by the person petitioning that the access road be provided. For any real estate purchased or otherwise acquired after January 1, 1982, for which public access is granted pursuant to sections 39-1713 to 39-1719, the person petitioning for such access shall also reimburse the county for all engineering and construction costs incurred in providing such access.

(3) Notwithstanding any other provisions of law, an access road provided in accordance with this section shall not be subject to Chapter 39, article 20 or 21. The designation of such an access road shall not impose on the State of Nebraska or any political subdivision any obligation of design, construction, or maintenance for the access road nor give rise to any cause of action against the state or any political subdivision with respect to the access road.

CREDIT(S)

Laws 1957, ch. 155, art. IV, § 16, p. 545; Laws 1982, LB 239, § 3; Laws 1999, LB 779, § 7.

LIBRARY REFERENCES

Private Roads ↪ 2.
Westlaw Topic No. 311k2.

NOTES OF DECISIONS

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Neb.Rev.St. § 39-1717

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▣ Article 17. County Roads. Land Acquisition, Establishment, Alteration, Survey, Relocation, Vacation, and Abandonment

▣ (b) Establishment, Alteration, and Survey

→ 39-1717. Isolated land; location of access road

Whenever possible, an access road provided in accordance with section 39-1716 shall be along section lines. When the most practicable route for the access road is adjacent to a watercourse, the land to be taken for the access road shall be measured from the edge of the watercourse.

CREDIT(S)

Laws 1957, ch. 155, art. IV, § 17, p. 546; Laws 1982, LB 239, § 4; Laws 1999, LB 779, § 8.

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- ▣ Article 17. County Roads. Land Acquisition, Establishment, Alteration, Survey, Relocation, Vacation, and Abandonment

- ▣ (b) Establishment, Alteration, and Survey

- **39-1718. Isolated land; access road; order of county board; award of damages; payment; filing of order**

If the county board decides to provide an access road in accordance with section 39-1716, the county board shall make and sign an order describing the same and file it with the county clerk, together with its award of damages which order shall be recorded by the clerk, except that the amount assessed as damages to the owner or owners of the real estate shall be paid to the county treasurer before the order providing for the access road is filed.

CREDIT(S)

Laws 1957, ch. 155, art. IV, § 18, p. 546; Laws 1982, LB 239, § 5; Laws 1999, LB 779, § 9.

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Private Roads ↪ 2.
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Neb. Rev. St. § 39-1718, NE ST § 39-1718

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▣ (b) Establishment, Alteration, and Survey

→ **39-1718.01. Isolated land; changes in law; applicability**

Sections 39-1713 to 39-1719 shall not apply if public access has been granted prior to July 17, 1982.

CREDIT(S)

Laws 1982, LB 239, § 6; Laws 1999, LB 779, § 10.

Neb. Rev. St. § 39-1718.01, NE ST § 39-1718.01

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Chapter 39. Highways and Bridges

- ▣ Article 17. County Roads. Land Acquisition, Establishment, Alteration, Survey, Relocation, Vacation, and Abandonment

- ▣ (b) Establishment, Alteration, and Survey

- 39-1719. Isolated land; access road; award; appeal; procedure

Any party to an award as provided by section 39-1718 may, within sixty days after the filing thereof, appeal therefrom to the district court of the county where the lands lie. The appeal shall be taken by serving upon the adverse party a notice of such appeal and filing such notice and proof of service thereof with the clerk of the court within the sixty days. Thereupon the appeal shall be set down for hearing at the next term of the court. It shall be heard and determined in like manner as appeals from awards in condemnations as provided in sections 76-704 to 76-724. Such appeal shall not affect the right or authority of the petitioner to the use of the access road under the award of the appraisers.

The applicant shall in case of appeal file such additional security as may be required by the county board for such costs and damages as may accrue against him or her by reason of such appeal. If on appeal the appellant does not obtain a more favorable judgment and award than was given by the appraisers, such appellant shall pay all the costs of such appeal. Either party to such suit may appeal from the decision of the district court to the Court of Appeals, and the sum deposited as provided in this section shall remain in the hands of the county treasurer until a final decision is had.

CREDIT(S)

Laws 1957, ch. 155, art. IV, § 19, p. 546; Laws 1961, ch. 189, § 8, p. 583; Laws 1991, LB 732, § 99; Laws 1999, LB 779, § 11.

LIBRARY REFERENCES

- Private Roads ↪ 2.
- Westlaw Topic No. 311k2.

NOTES OF DECISIONS

- Availability of mandamus, generally 1
- Ministerial duties 2

1. Availability of mandamus, generally

Westlaw

1985 WL 168579 (Neb.A.G.)

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1985 WL 168579 (Neb.A.G.)

Office of the Attorney General
State of Nebraska

Opinion No. 74

May 1, 1985

SUBJECT: County roads.

Randall L. Rehmeier
Otoe County Attorney
1010 Central Avenue
Nebraska City, Nebraska, 68410

QUESTION:

When a tract of land is isolated from all public roads by a flowing stream, and assuming the stream is of sufficient size to prevent the landowner from crossing it to gain access to the tract of land, when is said tract land considered to be isolated or landlocked under the provisions of Neb.Rev.Stat. § 39-1713 et seq. (Reissue 1984)?

CONCLUSION:

When, at the hearing provided for in Neb.Rev.Stat. §§ 39-1714 and 39-1715 (Reissue 1984), the county board makes all the findings required by sections 39-1713 and 39-1716.

If an affidavit, or an affidavit and petition meeting all the requirements of section 39-1713 is formally presented to the board, the board has no discretion in setting the hearing. Thus, the board, at the same board meeting at which the petition is received, should appoint the time and place for the hearing within 30 days thereof, and the board shall also cause the notice to be given in accordance with section 39-1715, by posting the public notices and mailing the written notices within the required time frame of the section. The only time that the board can decline to set the hearing is when the affidavit or affidavit and petition does not make all the allegations required by section 39-1713.

At the hearing, the first duty of the board is to hear the evidence supporting the petition, and then any evidence opposing. It is up to the applicants to prove that the four allegations required by section 39-1713 are true. If the board or hearing officer finds that any one of those allegations has not been proven by a preponderance of the evidence, it may so find and adjourn the hearing, and in such event the subject land will have been determined not to be isolated land within the meaning of the statute, unless the board's finding is reversed on appeal.

If, however, the board finds that all of the allegations required by section 39-1713 are true, then it must satisfy itself pursuant to section 39-1716, that the isolated land was not isolated at the time it was purchased by the owner, that the isolation of the land was not caused by the owner or done with his knowledge and consent, and that access is necessary for existing utilization of the isolated land.

1985 WL 168579 (Neb.A.G.)

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If the board finds these additional things, then the land is isolated land within these statutes.

The next decision the board wants to make then, is whether the road to be provided to the isolated land will be a public or nonpublic road. The language of the statute, as amended by LB 239, Eighty-seventh Nebraska Legislature, Second Session (1982), together with the legislative history of the bill, indicate that all of the accesses are to be considered public accesses, even if serving only one person or family, to alleviate any question about the public nature of the taking, but that this public access can be via either a public or a private road. Whether the road is public or private, would depend in part on the declaration of the county board, but most importantly, whether it met the construction specifications of the Board of Classifications and Standards rules and regulations. In other words, if the board thought that the road was important enough to the general public, it could incorporate the road into the county road system, and build it to the full required standards. On the other hand, if it did not wish to make the road a part of the county road system, economy would probably indicate that it be built to a lesser standard and width, in which case it should not be declared to be a public road.

*2 There is an implication in the legislative history of this bill that the board should give the benefit of the doubt to finding that such tracts of land are isolated, thus enabling the access to be provided, since it is the petitioner who now pays the damages to the intervening owner, including the cost of acquiring the land needed for the road, and if public access was not granted prior to 1982, the petitioner must also pay all engineering and constructing costs in building such access road. And, if the county board's decision is that the road will not be added to the county road system, the petition must pay for all future maintenance of the road. Thus, since the county is relieved of financial burden in connection with providing such a road, it should, upon application, be liberal in finding the land to be isolated.

Very truly yours,
Robert M. Spire
Attorney General

Warren D. Lichty, Jr.
Assistant Attorney General

1985 WL 168579 (Neb.A.G.)

END OF DOCUMENT

Little Salt Rd

EXHIBIT
B

Pacovsky

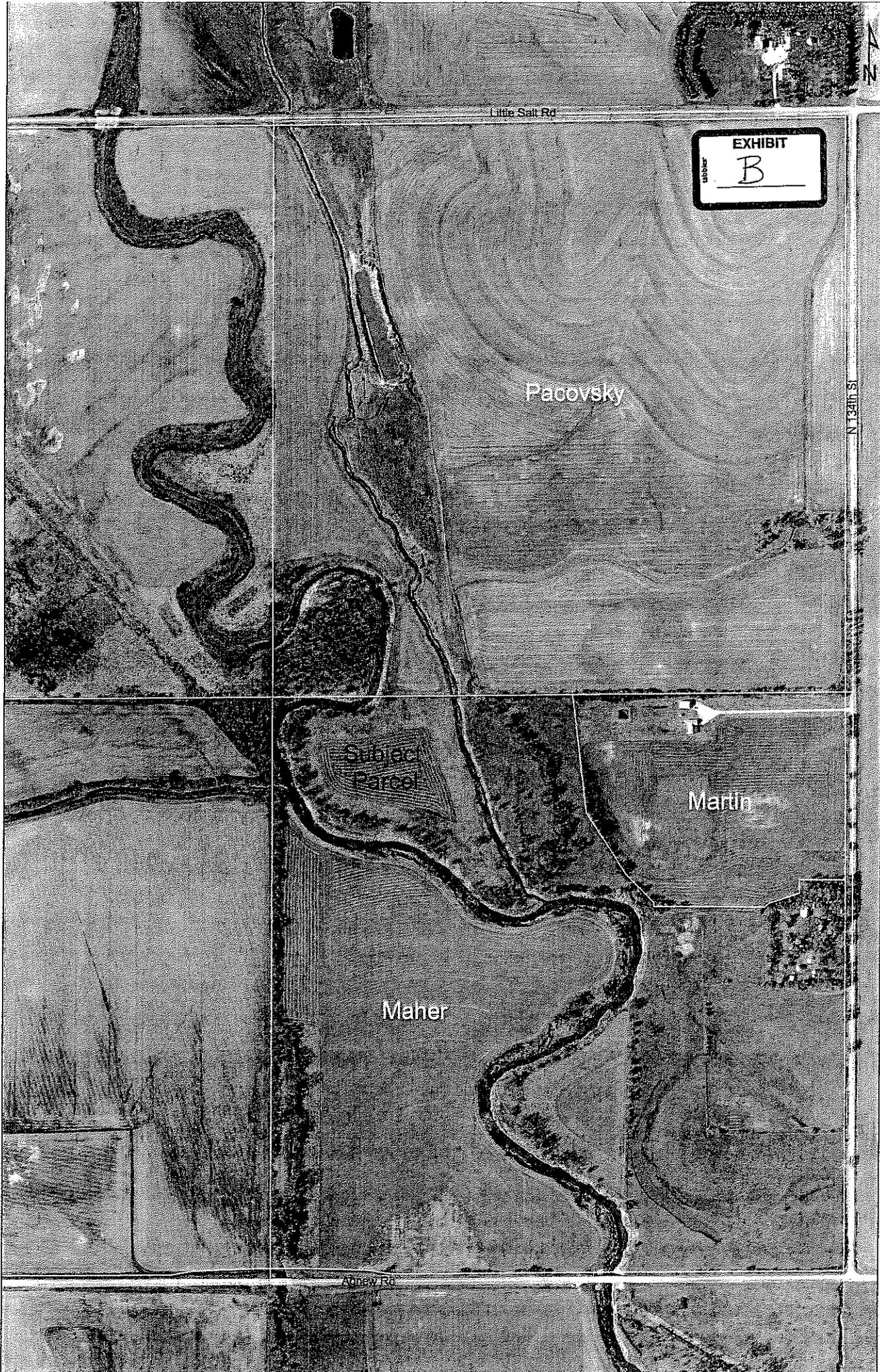
Subject Parcel

Martin

Maher

Adams Rd

N 134th St



Little Salt Rd.

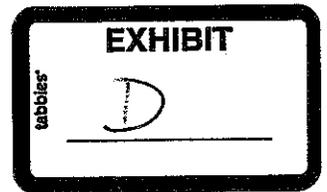
Subject
Parcel

N. 130th St.

Agnew Rd.

11

JOE KELLY
LANCASTER COUNTY ATTORNEY
575 South 10th Street
Lincoln, NE 68508-2810
402.441.7321/FAX 402.441.7336



June 23, 2011

Board of County Commissioners of Lancaster County
County-City Building
555 South 10th Street
Lincoln, NE 68508

RE: Hearing on Maher Petition

Dear Members of the Board,

Pursuant to your request we have enclosed herewith copies of the Pretrial Memoranda filed by the parties in the pending district court litigation regarding the property which is the subject of the petition. Also enclosed is a copy of the opinion of the Nebraska Supreme Court in Teadtke v. Havranek, 279 Neb. 284, 777 N.W.2d 810 (2010). If you have any further questions, or if we can be of any further assistance, please contact our office.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael E. Thew". The signature is written in a cursive, flowing style.

Michael E. Thew
Deputy County Attorney

cc: County Clerk

Westlaw

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C

Supreme Court of Nebraska.
 Willard TEADTKE and Lola Teadtke, husband and
 wife, as Trustees of the Willard and Lola Teadtke
 Trust, appellees and cross-appellants,

v.

E.D. HAVRANEK, also known as Eddie Dean
 Havranek, and Karen K. Havranek, husband and
 wife, appellants and cross-appellees,

and

Town of Lynch, Boyd County, Nebraska, also
 known as Lynch Township, et al., appellees.

No. S-09-165.

Jan. 22, 2010.

Background: Landowners brought action seeking declaration of a roadway easement on adjoining property and injunctive relief. The District Court, Boyd County, Mark D. Kozisek, J., found that a public prescriptive easement existed across adjoining landowners' property and defined the extent and nature of the easement. Both parties appealed.

Holdings: The Supreme Court, Miller-Lerman, J., held that:

- (1) landowners were not required to exhaust statutory remedies before filing equitable action;
- (2) landowners established a public prescriptive easement;
- (3) trial court did not exceed scope of actual use when assigning widths to various portions of easement; and
- (4) trial court acted within its discretion in declining to tax as costs the expense landowners incurred for a survey of road.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪842(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(1) k. In general. Most Cited Cases

When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the trial court.

[2] Appeal and Error 30 ↪893(2)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate Court

30k893(2) .k. Equitable proceedings. Most Cited Cases

Appeal and Error 30 ↪895(2)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k895 Scope of Inquiry

30k895(2) k. Effect of findings below. Most Cited Cases

Easements 141 ↪61(1)

141 Easements

141II Extent of Right, Use, and Obstruction

141k61 Actions for Establishment and Protection of Easements

141k61(1) k. Nature and form of remedy in general. Most Cited Cases

A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district

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court and, on appeal to the Supreme Court, is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, Supreme Court will consider that the trial court observed the witnesses and accepted one version of the facts over another.

[3] Appeal and Error 30 ⚡984(1)

30 Appeal and Error
 30XVI Review
 30XVI(H) Discretion of Lower Court
 30k984 Costs and Allowances
 30k984(1) k. In general. Most Cited Cases

The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.

[4] Private Roads 311 ⚡2(1)

311 Private Roads
 311k2 Establishment
 311k2(1) k. In general. Most Cited Cases
 Landowners were not required to exhaust statutory remedies provided in statute providing owners of isolated land the right to obtain access to the land by an access or public road before filing equitable action seeking declaration that public road existed over adjoining property; landowners did not allege that their land was shut out from all public access, and as such, statutory remedy was not available to them. West's Neb.Rev.St. §§ 39-1713 to 39-1719.

[5] Equity 150 ⚡43

150 Equity
 150I Jurisdiction, Principles, and Maxims
 150I(B) Remedy at Law and Multiplicity of Suits
 150k43 k. Existence of remedy at law and effect in general. Most Cited Cases
 Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before one may resort to equity.

[6] Equity 150 ⚡46

150 Equity
 150I Jurisdiction, Principles, and Maxims
 150I(B) Remedy at Law and Multiplicity of Suits
 150k45 Adequacy of Legal Remedy
 150k46 k. In general. Most Cited Cases
 An "adequate remedy at law" means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

[7] Highways 200 ⚡17

200 Highways
 200I In General; Establishment
 200I(B) Establishment by Prescription, User, or Recognition
 200k17 k. Evidence as to existence of highway. Most Cited Cases
 Landowners established a public prescriptive easement across adjoining property for purposes of a road; landowners alleged the existence of a public easement, evidence established that the easement was public, and adjoining landowners did not provide sufficient evidence to overcome the presumption of adverse use and a claim of right.

[8] Easements 141 ⚡5

141 Easements
 141I Creation, Existence, and Termination
 141k4 Prescription
 141k5 k. In general. Most Cited Cases

Highways 200 ⚡6(1)

200 Highways
 200I In General; Establishment
 200I(B) Establishment by Prescription, User, or Recognition
 200k6 Duration and Continuity of Use
 200k6(1) k. In general. Most Cited Cases

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Highways 200 ↪7(1)

200 Highways

200I In General; Establishment

200I(B) Establishment by Prescription, User, or Recognition

200k7 Adverse Character of Use in General

200k7(1) k. In general. Most Cited Cases

To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land.

[9] Easements 141 ↪36(3)

141 Easements

141I Creation, Existence, and Termination

141k36 Evidence

141k36(3) k. Weight and sufficiency. Most Cited Cases

To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence.

[10] Easements 141 ↪5

141 Easements

141I Creation, Existence, and Termination

141k4 Prescription

141k5 k. In general. Most Cited Cases

The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate.

[11] Easements 141 ↪5

141 Easements

141I Creation, Existence, and Termination

141k4 Prescription

141k5 k. In general. Most Cited Cases

Use and enjoyment which will give title by prescription to an easement must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period.

[12] Easements 141 ↪36(1)

141 Easements

141I Creation, Existence, and Termination

141k36 Evidence

141k36(1) k. Presumptions and burden of proof. Most Cited Cases

The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under claim of right.

[13] Easements 141 ↪36(1)

141 Easements

141I Creation, Existence, and Termination

141k36 Evidence

141k36(1) k. Presumptions and burden of proof. Most Cited Cases

If a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right for purposes of a prescriptive easement, and the burden is on the owner of the land to show that the use was by license, agreement, or permission.

[14] Easements 141 ↪36(1)

141 Easements

141I Creation, Existence, and Termination

141k36 Evidence

141k36(1) k. Presumptions and burden of proof. Most Cited Cases

The presumption of adverse use and claim of right for purposes of a prescriptive easement, when applicable, prevails unless it is overcome by a preponderance of the evidence.

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[15] Easements 141 ↪8(4)

141 Easements

141I Creation, Existence, and Termination

141k4 Prescription

141k8 Adverse Character of Use

141k8(4) k. Exclusiveness of use.

Most Cited Cases

The word "exclusive" in reference to a prescriptive easement does not mean that there must be use only by one person, but, rather, means that the use cannot be dependent upon a similar right in others.

[16] Highways 200 ↪14

200 Highways

200I In General; Establishment

200I(B) Establishment by Prescription, User, or Recognition

200k11 Operation and Effect

200k14 k. Extent of highway. Most

Cited Cases

Trial court did not exceed scope of actual use when assigning widths to various portions of public prescriptive easement; court ordered that the easement was 20 feet wide through much of its length, rather than the 40 feet requested by landowners for the entire length, but the court found that additional width was needed for landowners and others to negotiate the turn onto the easement from a highway.

[17] Easements 141 ↪36(3)

141 Easements

141I Creation, Existence, and Termination

141k36 Evidence

141k36(3) k. Weight and sufficiency.

Most Cited Cases

The nature and extent or scope of an easement must be clearly established.

[18] Easements 141 ↪41

141 Easements

141II Extent of Right, Use, and Obstruction

141k39 Extent of Right

141k41 k. By prescription. Most Cited Cases

The extent and nature of an easement is determined from the use made of the property during the prescriptive period.

[19] Dedication 119 ↪51

119 Dedication

119II Operation and Effect

119k49 Extent of Dedication

119k51 k. Width of highways or other public ways. Most Cited Cases

Highways 200 ↪14

200 Highways

200I In General; Establishment

200I(B) Establishment by Prescription, User, or Recognition

200k11 Operation and Effect

200k14 k. Extent of highway. Most

Cited Cases

The width of a public highway acquired by prescription or dedication must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use.

[20] Highways 200 ↪14

200 Highways

200I In General; Establishment

200I(B) Establishment by Prescription, User, or Recognition

200k11 Operation and Effect

200k14 k. Extent of highway. Most

Cited Cases

If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path, but the right extends to such width as is reasonably necessary for public travel.

[21] Costs 102 ↪16.5

102 Costs

102I Nature, Grounds, and Extent of Right in General

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102k16.5 k. Actions for declaratory relief in general. Most Cited Cases

Highways 200 ↪15

200 Highways

200I In General; Establishment

200I(B) Establishment by Prescription, User, or Recognition

200k15 k. Ascertainment and entry of record of highway by user. Most Cited Cases

Trial court acted within its discretion in declining to tax as costs the expense landowners incurred for a survey of road in their equitable action seeking declaration of the road as public prescriptive easement on adjoining property, where court taxed some costs to adjoining landowners and ordered that each party was to pay their remaining costs.

[22] Costs 102 ↪12

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k11 Discretion of Court

102k12 k. In general. Most Cited Cases

In equity actions, taxation of costs rests in the discretion of the trial court.

***813 Syllabus by the Court*

***284 1. Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the trial court.

2. Easements: Adverse Possession: Equity: Jurisdiction: Appeal and Error. A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court and, on appeal, is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court will consider that the trial court observed the witnesses and accepted one version of the facts over

another.

3. Costs: Appeal and Error. The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.

4. Statutes: Equity: Jurisdiction. Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before one may resort to equity.

5. Equity: Words and Phrases. An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

6. Easements: Adverse Possession: Highways: Time. To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land.

7. Easements: Adverse Possession: Proof. To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence.

8. Easements: Adverse Possession. The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. Such use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period.

9. Easements: Adverse Possession: Presumptions. Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time *285 sufficient to acquire an easement by

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adverse user, the use will be presumed to be under claim of right.

10. Adverse Possession: Presumptions: Proof. If a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right, and the burden is on the owner of the land to show that the use was by license, agreement, or permission.

11. Adverse Possession: Presumptions: Proof. The presumption of adverse use and claim of right, when applicable, **814 prevails unless it is overcome by a preponderance of the evidence.

12. Easements: Adverse Possession: Words and Phrases. The word "exclusive" in reference to a prescriptive easement does not mean that there must be use only by one person, but, rather, means that the use cannot be dependent upon a similar right in others.

13. Easements: Highways: Abandonment. In the case of public roads, the fact that only a few members of the public still use the road does not mean that the road has been abandoned.

14. Easements: Proof. The nature and extent or scope of an easement must be clearly established.

15. Easements: Adverse Possession: Highways. The extent and nature of an easement is determined from the use made of the property during the prescriptive period. The width of a public highway acquired by prescription or dedication must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use. If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path, but the right extends to such width as is reasonably necessary for public travel.

16. Equity: Costs. In equity actions, taxation of costs rests in the discretion of the trial court.

Shannon L. Doering for appellants.

Tom D. Hockabout, of Egley, Fullner, Montag & Hockabout, for appellees Willard Teadtke and Lola Teadtke.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERARD, STEPHAN, McCORMACK, and MILLER- LERMAN, JJ.

MILLER- LERMAN, J.

NATURE OF CASE

This case was initiated by appellees, Willard Teadtke and Lola Teadtke, by the filing of a complaint seeking the declaration of a roadway easement and injunctive relief. E.D. Havranek and Karen K. Havranek appeal from the orders of *286 the district court for Boyd County, which exercised its equity jurisdiction and found that a public prescriptive easement exists across the Havraneks' property and defined the extent and nature of the easement. The Havraneks assert that the court erred by exercising its equity jurisdiction in this action, because the Teadtkes failed to avail themselves of the statutory remedy dealing with isolated land provided under Neb.Rev.Stat. §§ 39-1713 through 39-1719 (Reissue 2008) prior to filing this action. The Havraneks also appeal from the district court's decision on the merits. The Teadtkes cross-appeal the denial of their request for the cost of their road survey. Finding no error, we affirm.

STATEMENT OF FACTS

The Havraneks and the Teadtkes own adjoining properties located in Boyd County, Nebraska. The Teadtkes' 80-acre parcel is located directly south of the Havraneks' land. The only access to the Teadtkes' property is a road that runs south across the Havraneks' property from Nebraska Highway 12.

On November 26, 2007, the Teadtkes filed a complaint against the Havraneks and certain other parties. This appeal involves only the Teadtkes and the Havraneks. The complaint sought a declaration

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that there exists a public road across the Havraneks' property or a declaration that the Teadtkes own a private easement over the Havraneks' property from Highway 12 to the Teadtkes' property. The Teadtkes ****815** also sought an injunction preventing the Havraneks from obstructing the road within its 40-foot width and requiring the Havraneks to remove any existing obstructions. The Teadtkes asserted that the Havraneks had encroached on the right-of-way by constructing a fence that prevented the Teadtkes from moving implements and machinery along the road.

In their response, the Havraneks asked the district court to dismiss the Teadtkes' complaint for the reason, *inter alia*, that §§ 39-1713 through 39-1719 provide an adequate statutory remedy for the Teadtkes' alleged inadequate access to their property. The Havraneks argued that the court lacked equity jurisdiction because the Teadtkes failed to exhaust this statutory remedy dealing with isolated land.

***287** At trial, the Teadtkes presented the testimony of residents of the area who testified regarding their recollections of the use of the land now owned by the Teadtkes. One longtime resident testified that the road that runs through the property now owned by the Havraneks had been used to access lands south of the Havraneks' property as far back as the 1930's and continuing through the 1940's. Other residents testified that at various times since the 1960's, the road had been used to access land south of the property for hunting, agricultural, and construction purposes. The Teadtkes presented the testimony of a member of the Lynch Township Board. He testified that he had been a member of the board since 1997 or 1998 and that in that time, the board had authorized maintenance of the road "once or twice a year" and had paid for a culvert to be installed.

The Teadtkes testified regarding their personal use of the road since the mid-1950's to access their property, which was then owned by Willard Teadtke's father. The Teadtkes have owned the land

since 1993. They testified that other people had also used the road for various purposes over the years. Willard Teadtke testified that in order to accommodate the types of equipment that have traversed the road, the road needed to be 35 to 40 feet wide. He also testified that he paid a surveying firm \$2,707.71 to perform a survey of the road. The Teadtkes presented the testimony of the land surveyor who had performed the survey. In connection with the surveyor's testimony, the court received into evidence the surveyor's drawing depicting an easement for the road with a width of 40 feet.

After the Teadtkes presented their evidence, the court stated that at the Teadtkes' request, the court intended to "personally view the property in question," which would entail "just driving down the road, making observations," accompanied by counsel for the parties. The court later noted for the record that the court had "had an opportunity to go out and observe the real estate in question."

In the Havraneks' defense, E.D. Havranek testified that in 2006, he put up a gate at the Highway 12 entrance to the road after obtaining the Teadtkes' approval. After the gate was ***288** removed, E.D. Havranek began installing a fence along the east side of the road in June 2007. E.D. Havranek testified that the fence he constructed ran along only a part of the property and that other fencing had been there since at least 1965. He also testified that he had measured the width of the road as it entered from Highway 12 and that the width from the outer edges of the wheel tracks was 10 feet 6 inches.

Following trial, the court entered a decree on February 4, 2009. The court first rejected the Havraneks' argument that the court should not exercise its equity jurisdiction. The court indicated that ****816** §§ 39-1713 through 39-1719 provide a remedy for an owner of land that is "shut out from all public access" and noted that such remedy exists so that the landowner may petition the county board to establish and provide an access road. The court stated that the purpose of the present action as alleged by the Teadtkes was to determine whether the

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Teadtkes had access to their land by an established public road or by a prescriptive private easement. The court reasoned that the statutory remedy was not appropriate unless and until it was determined in this case that the land was shut out from all public access. If the result of this action were adverse to the Teadtkes, then they could allege that they have no public access to their property and could seek redress from the county board pursuant to §§ 39-1713 through 39-1719. If the court in this action declared that a public road existed or that the Teadtkes held a prescriptive easement, then the land would not be shut out from all public access and there would be no remedy under the statutes. The court therefore concluded that the statutory remedy provided in §§ 39-1713 through 39-1719 did not prevent the court from exercising its equity jurisdiction in this case.

The court then considered the substance of the complaint to determine whether a prescriptive easement existed. The court found the following from the evidence: As early as the 1930's, the road was used to access properties to the south of the Havraneks' property. The Teadtkes began occupying their property in the mid-1950's and bought the property in 1993; during that time, they had, for the most part, used the road without restriction. During a period in 2006, the Havraneks *289 placed a gate across the road near Highway 12 during pasture season, but the Havraneks sought the Teadtkes' permission to place the gate, which was removed when the need for its use no longer existed.

The court concluded that the Teadtkes had established the existence of a prescriptive easement by clear, convincing, and satisfactory evidence. The court determined that the Teadtkes and their predecessors in title had used and enjoyed the road since at least the mid-1950's. The court noted that because use of the road was uninterrupted and open for the required 10-year period, the presumption was raised that the use was adverse and under claim of right. The court further noted that the Havraneks did not overcome that presumption, because they

adduced no evidence that the Teadtkes' or the public's use of the road was by license, agreement, or permission.

Referring to the evidence, the court further concluded that the prescriptive easement was public in nature. The court acknowledged that at the time of trial, use of the road was generally limited to the Teadtkes and their employees, contractors, and business associates. However, the court noted considerable evidence that from the 1930's through the 1950's, other persons used the road to access property south of the Havraneks' property because they lived on such property or they used the property for agricultural or hunting purposes. The court further noted that since at least 1997, the Lynch Township Board annually authorized grading of the road and, in 1998, installed a culvert under the road.

With regard to the extent of the easement, the court rejected the Teadtkes' request for an easement 40 feet in width along the entire length of the road. The court noted that the evidence established that the Teadtkes and others used a 35- to 40-foot-wide strip to negotiate the turn onto the road from Highway 12 and the first two curves of the road south of Highway 12; however, the court determined **817 that the Teadtkes failed to establish that the road was 40 feet wide throughout its length.

Given the evidence, the court ordered and decreed that the public held a public prescriptive easement for ingress and egress over and across the Havraneks' property. The easement *290 was declared to be 40 feet wide at the entrance from Highway 12 and through the first two curves and 20 feet wide for the remainder of the easement. The court entered an injunction prohibiting the Havraneks from interfering with the public easement and requiring them to remove any existing encroachments they had placed on the property. The court taxed costs of \$201.39 to the Havraneks and ordered all parties to pay their own remaining costs. The court overruled and denied any other claims for relief by either party, including the Teadtkes' request to be awarded the cost of their road survey.

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The Havraneks appeal, and the Teadtkes cross-appeal.

ASSIGNMENTS OF ERROR

The Havraneks assert that the district court erred when it (1) exercised its equity jurisdiction in this action; (2) granted a public prescriptive easement; and (3) defined the scope of the easement, which exceeded the boundaries of what had been used by the Teadtkes or their predecessors.

For their cross-appeal, the Teadtkes assert that the court erred when it failed to tax as costs the expense they incurred for a survey of the road.

STANDARDS OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the trial court. *Miller v. Regional West Med. Ctr.*, 278 Neb. 676, 772 N.W.2d 872 (2009).

[2] A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court and, on appeal to this court, is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another. *Gerberding v. Schnakenberg*, 216 Neb. 200, 343 N.W.2d 62 (1984).

[3] The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion. See *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980).

*291 ANALYSIS

Appeal: The District Court Properly Exercised Its Equity Jurisdiction.

[4] The Havraneks first assert that the district court improperly exercised its equity jurisdiction in this case. They argue that the Teadtkes had an adequate statutory remedy under §§ 39-1713 through

39-1719 but failed to avail themselves of such remedy prior to seeking equitable relief. Given the allegations in the complaint and the relief sought, we conclude that the court properly exercised its equity jurisdiction.

In this action, the Teadtkes sought as relief a declaration that a public road existed over the Havraneks' property or a declaration that the Teadtkes owned a prescriptive easement over the property. The Teadtkes also sought injunctive relief to prevent the Havraneks from encroaching upon the road and to require the Havraneks to remove existing encroachments. An adjudication of rights with respect to an easement is an equitable action, **818 *Homestead Estates Homeowners Assn. v. Jones*, 278 Neb. 149, 768 N.W.2d 436 (2009), and an action for injunction sounds in equity. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

[5][6] Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before one may resort to equity. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001). An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006).

The Havraneks claim that the district court should not have entertained this action in equity, because the Teadtkes did not exhaust the statutory remedy under §§ 39-1713 through 39-1719. These statutes generally provide owners of isolated land the right to obtain access to the land by an access road or a public road. The owner of isolated land may apply to the county board as set forth in § 39-1713. If the board finds that certain conditions are present, the board is required to provide an access road or a public road to the land; the board is also required to appraise the damages to the owner of the land over *292 which access is to be provided, and such damages are to be paid by the person petitioning for access. See § 39-1716.

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It is important to note that the relief available under §§ 39-1713 through 39-1719 is limited to owners of "isolated" lands. Under § 39-1713(1), a person seeking relief under the statutes must allege, inter alia, that "such real estate is shut out from all public access, other than a waterway, by being surrounded on all sides by real estate belonging to other persons, or by such real estate and by water." Such an assertion is inconsistent with the allegations made by the Teadtkes in this case.

The Teadtkes did not allege that their land was shut out from all public access; to the contrary, the gravamen of their complaint was that a road existed over the Havraneks' property and that the road provided access to their property. The Teadtkes sought a declaration that a public road existed and an injunction preventing the Havraneks from interfering with use of the road. Because the Teadtkes claimed the existence of a public road that provided access to their property, it would have been inconsistent for them to have alleged that their land was isolated or "shut out from all public access," as required for relief under §§ 39-1713 through 39-1719. See *Burton v. Annett*, 215 Neb. 788, 789, 341 N.W.2d 318, 319 (1983) (noting that land-owner in action under § 39-1713 had "unsuccessfully sought judgment ... for declaration of a prescriptive right-of-way" prior to pursuing statutory remedy under § 39-1713).

Because it was the Teadtkes' position that a public road provided access to their land, the statutory remedy provided under §§ 39-1713 through 39-1719 was not available to them and they were not required to exhaust such remedy prior to bringing this equitable action. We conclude that the district court's analysis to the same effect was correct and that the district court did not err by exercising its equity jurisdiction in this case.

Appeal: The District Court Did Not Err by Granting a Public Prescriptive Easement and Defining the Scope Thereof.

The Havraneks next assert that the district court erred by granting a public prescriptive ease-

ment. They argue as a general *293 matter that the Teadtkes failed to establish a prescriptive easement by clear and convincing evidence, and they argue in particular that the Teadtkes failed to establish **819 or even allege the existence of a public, as opposed to a private, easement. The Havraneks further claim that the court erred by granting an easement that exceeded in scope what had been used by the Teadtkes or their predecessors.

[7] We first address the Havraneks' assertion that the Teadtkes failed to allege the existence of a public, as opposed to a private, easement. In their complaint, the Teadtkes alleged that a road existed across the Havraneks' property between Highway 12 and the Teadtkes' property and that "said road is a public road used by [the Teadtkes and others] and the public in general." They also alleged that the road had been maintained by the town of Lynch "for many years." For their prayer for relief, the Teadtkes asked that the court "declare there exists a public road" across the Havraneks' property or, in the alternative, that the court declare that the Teadtkes owned a private easement over the Havraneks' property. The Teadtkes did not fail to allege the existence of a public easement, and we therefore consider whether the evidence established the existence of such public easement.

[8][9] To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land. *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001). To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence. *Id.*

[10][11] The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real es-

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tate. Such use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period. *Id.*

*294 The district court found that all the elements of a public prescriptive easement existed. The court noted testimony regarding use of the road as early as the 1930's by prior landowners and others to access both the land now owned by the Teadtkes and other real estate. The court also noted testimony regarding use of the road since the 1950's by the Teadtkes and their associates. Such use extended for a period exceeding the 10 years required to establish a prescriptive easement.

[12][13][14] The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under claim of right. *Harders v. Odvody, supra*. If a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right, and the burden is on the owner of the land to show that the use was by license, agreement, or permission. *Id.* The presumption of adverse use and claim of right, when applicable, prevails unless it is overcome by a preponderance of the evidence. *Id.* The Havraneks did not provide sufficient evidence to overcome the presumption of adverse use and a claim of right.

[15] The word "exclusive" in reference to a prescriptive easement does not mean that there must be use only by one person, but, rather, means that the use cannot be **820 dependent upon a similar right in others. *Werner v. Schardt*, 222 Neb. 186, 382 N.W.2d 357 (1986). The Teadtkes showed that their use of the property was not dependent on a similar right in others.

The evidence also established that the easement was public. According to the record, the road had

been used by various persons for various purposes since the 1930's. In more recent years, the road had mainly been used by the Teadtkes and their associates. However, in the case of public roads, the fact that only a few members of the public still use the road does not mean that the road has been abandoned. *Sellentin v. Terkildsen*, 216 Neb. 284, 343 N.W.2d 895 (1984). The evidence also showed that the Lynch Township Board had authorized maintenance of the road and had installed a culvert. In *295 view of the evidence, we conclude that the district court did not err in concluding that the public held a prescriptive easement over the Havraneks' property.

[16] With regard to the extent and scope of the easement, the Havraneks argue that by declaring an easement that was 40 feet wide in certain areas, the court exceeded the scope of actual use that had been proved by the Teadtkes. The court ordered that the easement was 20 feet wide through much of its length, rather than the 40 feet requested by the Teadtkes for the entire length of the easement. However, the court ordered that the easement was 40 feet wide for a portion of the easement that was near Highway 12. The court found that the additional width was needed for the Teadtkes and others "to negotiate the turn onto the road from Highway 12 and the first two curves south of Highway 12."

[17][18][19][20] The nature and extent or scope of an easement must be clearly established. *Werner v. Schardt, supra*. The extent and nature of an easement is determined from the use made of the property during the prescriptive period. The width of a public highway acquired by prescription or dedication must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use. If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path, but the right extends to such width as is reasonably necessary for public travel. *Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976).

We conclude that the district court did not err

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in the widths it assigned to the various portions of the easement. We note that Willard Teadtke testified regarding the difficulties of negotiating the turn from Highway 12 and the curves in the road near Highway 12. Willard Teadtke also testified that the road was used to transport farm machinery and other large equipment for farming operations on the Teadtkes' property. We note further that the court in this case stated on the record that it "had an opportunity to go out and observe the real estate in question." In determining that the court did not err in the widths it assigned to the easement, we consider the fact that the court actually observed the road and the surrounding area and from such observation determined that a width of 40 feet was *296 necessary in certain areas so that the Teadtkes and others could transport machinery and equipment over the road.

We conclude that the district court did not err in concluding that the public held a prescriptive easement over the Havraneks' property and did not err in declaring the easement to have a width of 40 feet in certain areas.

Cross-Appeal: The District Court Did Not Err When It Declined to Tax as Costs the Expense for the Road Survey.

[21] In their cross-appeal, the Teadtkes assert that the district court **821 erred when it declined to tax as costs the expense they incurred for a survey of the road. We conclude that the court did not abuse its discretion by deciding not to tax as costs the \$2,707.71 the Teadtkes incurred for the survey.

[22] In equity actions, taxation of costs rests in the discretion of the trial court. *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980). The Teadtkes assert that this action was necessitated by the Havraneks when they encroached upon the Teadtkes' use of the road and that therefore the Havraneks as the unsuccessful party should bear some of the costs the Teadtkes' incurred to help the court make an accurate ruling.

In its order, the court taxed costs in the amount

of \$201.39 to the Havraneks and ordered that "each party shall pay their remaining costs." Given our standard of review, we determine that the district court did not abuse its discretion in the taxation of costs, and we reject the Teadtkes' assignment of error on cross-appeal.

CONCLUSION

We conclude that the district court properly exercised its equity jurisdiction in this case and that the court did not err by declaring a public prescriptive easement and did not err in determining the scope of the easement. We further conclude that the court did not err when it declined to tax as costs to the Havraneks the expense the Teadtkes incurred for a road survey. We therefore affirm the orders of the district court.

AFFIRMED.

Neb.,2010.
 Teadtke v. Havranek
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IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

JOHN R. PACOVSKY and BRIDGET A. PACOVSKY
Plaintiffs,
vs.
JERRY J. MAHER, JANICE K. MAHER, and DOROTHY K. MAHER,
Defendants.

Case No. CI 09-4881

PLAINTIFFS' PRETRIAL CONFERENCE MEMORANDUM

Plaintiffs John R. Pacovsky and Bridge A. Pacovsky, submit the following as a pretrial conference memorandum as ordered by the Court on December 9, 2010.

1. THE NATURE OF THE CASE AND THE CONTENTIONS OF THE PARTIES

A. Plaintiffs' Claims and Burden of Proof

This is an action brought in equity to quiet title to Plaintiff's real estate described as The Northeast Quarter of Section 8, Township 12, Range 8, East of the 6th P.M., Lancaster County, Nebraska [Hereinafter "Property"]. Plaintiffs John and Bridgett Pacovsky purchased the Property in February 2009 from Brett and Patricia Jones. In May 2009, Plaintiffs received a letter from an attorney for Defendants asserting an easement by adverse possession to cross the Property lengthwise to farm a 10.6 acre plot of land. After investigation, Plaintiffs concluded that any prior use of the crossing was consensual, granted in 2001 by the tenant Bill Bundy. Therefore, being unable to resolve the matter, in the Fall of 2009 Plaintiffs filed this action to quiet title from adverse

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claims of Defendants and, in a second count, to enjoin the Defendants' from trespassing across the Property.

Based upon the pleadings, the issues in dispute on Plaintiffs' claims upon which Plaintiffs' have the burden of proof by a preponderance for evidence are:

1. Whether all claims of Defendants of some right, title, or interest in the Property adverse to the interests of Plaintiffs are invalid and without merit.

2. Whether the Defendants, or one or more of them, have from time to time in the past entered upon the Property with consent of the prior owners or their tenants.

3. Whether if Defendants are not enjoined and restrained from entry upon or use of the Property, then such entry and use of the Property may in fact ripen into some right, title or interest in the Property.

4. Whether Plaintiffs have no adequate remedy at law to protect their Property from unlawful entry and trespass by Defendants and the rights which might thereafter arise therefrom.

5. Whether Plaintiffs will be irreparably harmed if the Defendants are not restrained from trespassing on the Property by rights which might thereafter arise from such entry or use.

B. Defendants' Defenses and Counterclaims asserting an Easement.

By amended answer and counterclaims, the three Defendants admitted certain allegations of the Complaint and denied others. Dorothy K. Maher owns property known as Lot 12, Irregular Tracts, in the Southeast Quarter of Section 8, Township 12, Range 8 East of the 6th P.M. ["Mahrer's Property"], which adjoins the Property. They assert under various theories an easement to use Plaintiffs' Property. By counterclaim,

the Defendants have affirmatively alleged that a portion of Defendant Dorothy K. Maher's land is isolated tract cut off by a natural drainage way and that therefore they had an easement by necessity, an easement by implication or prescriptive private easement across the property, prescriptive public easement.

The evidence will show that there is an erosion created ditch that crosses the Property from north to south and onto the Mahrers Property ending in Rock Creek, a winding watercourse lying on the west side of both properties. The ditch is wide and about ten feet deep. It creates a triangle of property on Maher's Property of about 10.6 acres between the ditch and Rock Creek which can be easily crossed if a crossing is built on Mahrers Property.

Pacovsky attempted to address the continued erosion in 2010 by constructing a retention pond but a record rain storm damaged the newly built high crossing. After discussions with governmental bodies, Pacovsky removed the high crossing and built a low water crossing to allow farm implements and vehicles to safely cross the ditch on Plaintiffs' Property without any restriction or alteration on water drainage.

Although labeled as "affirmative defenses", the Defendants have actually brought several counterclaims as to theories upon which they have the burden of proof to establish the right of adverse use of a 3.6 acre path across Plaintiffs' Property. Each theory is discussed below

(1). EASEMENT OF NECESSITY

Defendants have alleged that they are entitled to use 3.6 acres of Plaintiffs' Property to access their 10.6 acres of ground near Rock Creek under a theory of

Easement by Necessity. An easement by necessity generally arises by implied grant when one tract is divided into two parcels. Reasonable necessity is required. Under the Pleadings and as stated in Defendant's Pleadings, the issues for trial are as follows and Defendants' have the burden of proof:

a. Whether an additional natural drainageway and statutory watercourse (the "Creek Channel") diverges from Rock Creek and flows generally north to south across Plaintiffs' property and onto Defendant Dorothy K. Maher's property.

b. Whether a portion of Defendant Dorothy K. Maher's property totaling 10.6 acres is isolated from reasonable access by the Plaintiffs' property, the property of other third parties, and by Rock Creek and the additional Creek Channel.

c. Whether the only reasonable access to the isolated portion of Defendant Dorothy K. Maher's property is by crossing Plaintiffs' property.

d. Whether at the time Defendants' and Plaintiff's land was subdivided, it was necessary to cross Plaintiffs' property to reach or in any way access the northwest corner of Defendant Dorothy K. Maher's property.

e. Whether there is not now, nor has there ever been, any way to reach or access the northwest corner of Defendant Dorothy K. Maher's property other than by crossing Plaintiff's Property.

The legal issue is whether Defendants have established an easement by necessity. Defendants have the burden of proof on all elements.

(2). EASEMENT BY IMPLICATION

Defendants have alleged that they are entitled to use 3.6 acres of Plaintiffs' Property to access their 10.6 acres of ground near Rock Creek under a theory of Easement by Implication. Closely related to Easement by Necessity, Easement by Implication must generally arise only when the use at issue is in existence at the time a parcel is divided into and that continued use is necessary for the enjoyment of the Estate conveyed. *Hengen v. Hengen*, 211 Neb. 276, 318 N.W. 2d 269 (1982); *In Re State Fire Marshal*, 175 Neb. 66, 120 N.W. 2d 549 (1963). Under the Pleadings the issues for trial as stated in the Defendants' pleading are as follows and Defendants' have the burden of proof:

a. Whether at the time Defendants' and Plaintiffs' properties were subdivided, the northwest corner area of Defendant Dorothy K. Maher's property was reached or accessed by crossing Plaintiffs' property.

b. Whether Plaintiffs' property has been used to access the northwest corner of Defendant Dorothy K. Maher's property for so long and in such a continued and obvious manner that shows such use was meant to be permanent.

c. Whether access over Plaintiffs' property is reasonably necessary for the property and reasonable enjoyment of the Defendant Dorothy K. Maher's property.

d. Whether such has never been abandoned by Defendants or their predecessors in interest.

(3) PRESCRIPTIVE PRIVATE EASEMENT

Defendants have alleged that they are entitled to use 3.6 acres of Plaintiffs' Property to access their 10.6 acres of ground near Rock Creek under a theory of Prescriptive Private Easement. To acquire a prescriptive easement a claimant must prove virtually the same elements required for adverse possession, namely, the claimant must show that the use and enjoyment of the land is exclusive, adverse, continuous, open, and under claim of right for 10 years. *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983).

First, the claimant's use must be Continuous and Uninterrupted for the required period of time. *Cannot v. Bowden*, 189 Neb. 97, 200 N.W.2d 126 (1972).

The second element required to be established by the claimant is that the use was Open and Notorious so that the owner will learn of the use, assuming that he keeps himself informed about the condition of his property.

The third element to be proved is that claimant's use was Exclusive. In *Jurgensen v. Ainscow*, *Supra*, we stated that: "The term 'exclusive use,' however, does not mean that no one has used the driveway except the claimant of the easement. It simply means that his right to do so does not depend upon a similar right in others.

.

The fourth element required to prove a prescriptive easement is that the claimant's use was under a Claim of Right, such that there is no recognition of the right of the owner of the servient tenement to stop the use.

.

The fifth element which must be established in order to create an easement by prescription is that the claimant's use was Adverse. In *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977), we stated: "As long ago as 1912, this court stated in *Marjerus v. Barton*, 92 Neb. 685,

139 N.W. 208 (1912), that if a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is Adverse and under claim of right, and the burden is on the owner of the land to show that the use was by license, agreement, or permission. The presumption of adverse use and claim of right, when applicable, prevails unless it is overcome by a Preponderance of the evidence.

Svoboda v. Johnson, 204 Neb. 57, 63-66, 281 N.W.2d 892,897 - 899 (1979). Under the Pleadings the issues for trial are as follows and Defendant's have the burden of proof by clear and convincing evidence:

a. Whether for more than 10 years, Defendants have used Plaintiffs' property to reach and access the northwest corner of Defendant Dorothy K. Maher's land continuously and without interruption.

b. Whether that use was Open and Notorious so that the owner would have known of its use.

c. Whether that use was exclusive.

d. Whether that use was under a claim of right.

e. Whether that use was adverse to Plaintiffs and Plaintiffs' predecessors in interest.

(4). PRESCRIPTIVE PUBLIC EASEMENT

Defendants have alleged that they are entitled to use 3.6 acres of Plaintiffs' Property to access their 10.6 acres of ground near Rock Creek under a theory of Prescriptive Public Easement. Under the Pleadings the issues for trial are as follows and Defendant's have the burden of proof by clear and convincing evidence

a. Whether for more than 10 years, Defendants have used Plaintiffs' property to reach and access the northwest corner of Defendant Dorothy K. Maher's land continuously and without interruption.

b. Whether that use was Open and Notorious so that the owner would have known of its use.

c. Whether that use was used by the public generally.

d. Whether that use was under a claim of right.

e. Whether that use was adverse to Plaintiffs and Plaintiffs' predecessors in interest.

(5). DEFENDANTS' COUNTERCLAIM FOR ALTERATION OF THE DRAINAGE

Further, the Defendants allege that in April 2010 Plaintiffs altered the natural drainage in the erosion ditch caused damage to the Defendant's property. Defendants' have the burden of proof as to the following issues:

a. Whether, Plaintiffs negligently and intentionally re-placed the culverts, poured concrete over them, and then re-placed dirt on top of them causing the rain waters to dislodge the culverts and washed away much of the dirt covering them

b. Whether altering the natural elevation and drainage of their property accelerated the flow in erosion ditch of water flow by passing the area where the culverts were installed and flowing onto Defendant Dorothy K. Maher's property;

directing large amounts of surface water in an unnecessary and negligent fashion onto Defendant Dorothy K. Maher's property;

c. Whether such acts caused an area of Defendant Dorothy K. Maher's property to be "washed away" in a manner that was previously not likewise affected by Rock Creek or erosion ditch.

d. Whether Plaintiffs continue to negligently and intentionally maintain the alterations made and further alter the natural elevation and drainage of their property.

e. Whether if Plaintiffs do not cease and desist from such action and take further action to reverse the alterations already effected, Defendant Dorothy K. Maher's property will be seriously, permanently, and irreparably damaged.

f. Whether Plaintiffs' alteration of the natural elevation and drainage of their property, and the effects thereof, proximately caused substantial damage to said Defendant's property in an amount to be determined at trial.

g. Whether said damages were a direct and proximate result of Plaintiffs' negligent and intentional altering the natural elevation and drainage of their property.

h. If so the nature and amount of such damages; and

i. Whether injunctive relief is also appropriate to avoid multiplicity of suits and because there is no adequate remedy at law.

C. Plaintiff's Reply to Counterclaims

First, by Reply filed October 5, 2010, Plaintiff's generally deny the allegations of the counterclaim. Thus the Defendants have the burden of proof by a preponderance of the evidence on all elements of its claim.

Second, there are no allegations of any interest that Jerry and Janice Mahrer have in the Mahrer Property. As to the claims of easements and of damage to the Property Jerry and Janice Mahrer have not stated any causes of action or claims.

1. Whether the counterclaims as set forth herein do not state a claim for relief on behalf of Jerry Maher or Janice K. Maher.

2. Whether Defendants Jerry Maher and Janice Maher have no standing to bring any of the counterclaims as they have no fee interest in the property at issue.

3. Whether the allegations in the Counterclaim do not state a counterclaim in favor of Dorothy K. Maher.

Third, in reply to the affirmative claims of prescriptive easements, Pacovskys allege and will prove that the use was consensual granted in 2001 by the tenant farmer Bill Bundy without knowledge of the owner's of the property. The Plaintiffs have the burden of proof on the following issues. The permissive use of property can never ripen into title by adverse possession unless there is a change in the nature of the possession brought to the attention of the owner or plain and unequivocal notice to the owner that the person in possession is claiming adversely. *Young v. Lacy*, 221 Neb. 511, 378 N.W.2d 192 (1985); *Messersmith v. Klein*, *750 89 Neb. 471, 203 N.W.2d 443 (1973)

Walsh v. Walsh, 156 Neb. 867, 871-72, 58 N.W.2d 337, 340 (1953). The issues for Trial are:

1. Whether access and use to the portion of the property owned by Dorothy D. Maher was first granted by consent of the tenant, William (Bill) Bundy in approximately 2001.
2. Whether and when the claim of right of adverse use was brought to the attention of the owner.

2. ELEMENTS OF DAMAGES CLAIMED.

Plaintiffs' seek an order quieting title to the Plaintiffs' Property and permanent injunctive relief to prevent trespass by Defendants. Plaintiffs seek an award of costs.

Defendants seek damages for alleged surface erosion from runoff in their Counterclaim. In order to recover damages, the Defendants must prove by a preponderance of the evidence that:

1. Plaintiff's acts were negligent;
2. Plaintiffs' acts proximately caused damages to Defendant's property;
3. Whether or not the Plaintiff's property can be restored to substantially the same condition it was before it was damaged;
4. If it can be, the amount of money equal to the reasonable cost of such repairs plus loss of value of its use while being repaired, being either the actual rental paid for replacement property or the cost do renting similar property for the amount of time to complete the repair;

5. However, if the property cannot be restored to the substantially the same condition then the Defendants are entitled to recover the Property's market value prior to the damages minus its market value after it was damaged.

See NJI 2d Civ. 4.23.

3. EXHIBIT LIST

See attached Exhibit List. Plaintiffs reserve the right to use any exhibits identified by Defendants without waiving any objections thereto.

4. WITNESS LIST

See attached Witness List.

5. MATTERS FOR STIPULATION:

The following are matters admitted in the pleadings which stand as conclusive proof of each such matter:

- a. Plaintiffs are John R. Pacovsky and Bridget A. Pacovsky, who are husband and wife residing in Omaha, Douglas County, Nebraska ["Plaintiffs"].
- b. Defendants are Jerry J. Maher and Janice K. Maher, who are husband and wife and are residents of Lancaster County, Nebraska.
- c. Defendant Dorothy K. Maher is an individual residing in Lancaster County Nebraska.
- d. Plaintiffs own real estate described as The Northeast Quarter of Section 8, Township 12, Range 8, East of the 6th P.M., Lancaster County, Nebraska [Hereinafter "Plaintiffs' Property"].

e. Dorothy Maher owns real property directly south of the Plaintiff's Property and abutting the Plaintiffs' Property and the full legal description as:

The Southeast Quarter of Section 8, Township 12, Range 8, East of the 6th Principal Meridian, Lot 12, Irregular Tracts, Lancaster County, Nebraska, more particularly described as all of the Southeast Quarter of Section 8, Township 12, Range 8, East of the 6th Principal Meridian, Lancaster County, Nebraska, EXCEPT:

The part of the Southeast Quarter of Section 8, Township 12, Range 8 East of the 6th Prime Meridian, now known as Lot 11, Irregular Tracts, Lancaster County, Nebraska, more particularly described as follows:

Beginning at the Northeast corner of Lot 11, Irregular Tracts, said point being the Northeast corner of the Southeast Quarter of said Section 8; thence on the East line of said Southeast Quarter, on an assigned bearing of South 00 degrees 00 minutes 00 seconds West, a distance of 845.26 feet; thence South 90 degrees 00 minutes 00 seconds West, a distance of 845.26 feet; thence South 00 degrees 00 minutes 00 seconds West, 60.07 feet; thence South 71 degrees 52 minutes 06 seconds West, 147.71 feet; thence South 47 degrees 33 minutes 02 seconds West, 24.12 feet; thence North 89 degrees 50 minutes 39 seconds West, 501.21 feet; thence North 05 degrees 27 minutes 24 seconds West, 15.88 feet; thence North 44 degrees 56 minutes 29 seconds West, 179.17 feet; thence North 33 degrees 34 minutes 52 seconds West, 333.19 feet; thence North 06 degrees 35 minutes 08 seconds West, 536.89 feet; to a point on the North line of said Southeast Quarter, thence on said North line, North 89 degrees 25 minutes 51 seconds East, 1274.50 feet, to the Point of Beginning.

f. Defendants Jerry J. Maher, Janice K. Maher, either of them or both of them, claim some right, title, or interest in the Plaintiffs' Property adverse to the interests of Plaintiffs.

g. Dorothy K. Maher may claim some right title or interest to or in the Property as appurtenant to her property adjacent and abutting to the Plaintiffs' Property to the south thereof.

h. Plaintiffs have revoked any consent to any Defendants and do not consent to entry upon or use of their Plaintiffs' Property for any purpose by Defendants, or any one of them.

i. Defendants, or one or more of them, intend to and will enter upon the Plaintiffs' Property in an effort to establish some right title or interest in or to use the Plaintiffs' Property.

j. Rock Creek, a natural drainageway and statutory watercourse, flows generally north to south across Plaintiffs' Property and onto Defendant Dorothy K. Maher's property.

k. In April 2010, Plaintiffs designed, constructed, and reconfigured the natural elevation and drainage of their property by constructing a pond, installing concrete culverts, and pushing dirt on top of the culverts.

l. This case does not involve the delivery of irrigation water as defined in Neb. Rev. Stat. §26-1062 to 25-1080 but instead involves the discharge of surface waters.

6. Amendment to Pleadings

Plaintiffs request that Paragraph 24 of their reply be stricken and the following substituted therefor:

24. Plaintiff admits so much of Paragraph 38 that alleges that they constructed a high water crossing over the drainage area with culverts and dirt on top in April 2010 but denies the balance of said paragraph 38.

7. Pending Motions

Plaintiffs may move the Court to inspect the properties at issue as a part of trial.

8. Estimated Length of Trial

One to two days.

9. Additional Matter for Discussion

Stipulations of admission of the following exhibits will eliminate the need to call several witnesses:

Lien Affidavit of Brett and Pat Jones

Title Commitment

Title Policy

Letter by J. Michael Rierden

Public Records of the Lancaster County Register of Deeds.

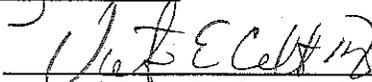
John R. Pacovsky and
Bridget A. Pacovsky, Plaintiffs



Victor E. Covalt III
Ballew Covalt, PC, LLO
P.O. Box 81229
Lincoln, NE 68501-1229
Tel. (402) 436-3030, Fax: (402) 436-3031
e-mail: vcovalt@ballewcovalt.com
Plaintiff's Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing by United States First Class mail, postage prepaid and properly addressed upon J. L. Spray & Patricia L. Vannoy, 134 S. 13th Street, Suite 1200, Lincoln, NE 68508 on this 4th day of February, 2010.



Victor E. Covalt III #16539

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

JOHN R. PACOVSKY and BRIDGET A. PACOVSKY)

Plaintiffs,)

vs.)

JERRY J. MAHER, JANICE K. MAHER,)
And DOROTHY K. MAHER,)

Defendants.)

CASE No. CI 09-4881

PLAINTIFF'S EXHIBIT LIST

	Description	Exh. #	Offer	Objections	Rec
1	J. Michael Rierden Letter				
2	Survivorship Warranty Deed February 9, 2009				
3	Letter from Dodge County Title & Escrow May 10, 2009				
4	Lien Affidavit February 9, 2009				
5	AgriSon Purchase Agreement January 29, 2009				
6	Title Commitment January 30, 2009				
7	Photograph 10/09 tracks by corn (looking north)				
8	Photograph 10/9 tracks and Rock Creek (looking south)				
9	Photograph 10/09 tracks onto Maher property (looking south)				
10	Photograph 10/09 tracks going onto Maher property (looking SE)				

	Description	Exh. #	Offer	Objections	Rec
11	Photograph 10/09 Maher soybean patch (looking south)				
12	Photograph 10/09 ditch on Pacovsky property (looking south)				
13	Photograph 10/09 ditch on Maher property (looking south)				
14	Photograph 4/29j/10 high crossing on Pacovsky property (looking south)				
15	Drawing – Section 8, T12N, R8E				
16	USDA Farm 872 2-23-10 Section 8, T12N R8E				
17	Drawing – Property of Plaintiff				
18	Photograph low water crossing 11/10 (looking east)				
19	Photograph low water cross 11/10 (looking north)				
20	Land Owner Affidavit				
21	Ariel Photograph of Pacovsky Farm				
22	Numerical Index, Lancaster County, Nebraska Section 8, T12N, R8E				
23	Instrument No. 86-1028 – Certified Copy of Deed of Distribution by Personal Representative				
24	Instrument No. 85-18453 – Certified Copy of Note re: pending probate action in Lancaster County Court on the Estate of Helen M Jones				
25	Instrument No. 77-5009 Certified Copy of Warranty Deed				
26	Instrument No. 75-10673 Certified Copy of Executor's Deed				
27	Instrument No. 75-483 Certified Copy of Certificate dated January 14, 1975				
28	Instrument No. Book 346 Page 510 Certified Copy of Warranty Deed				
29	Instrument No. 2007-18792 Certified Copy of Permanent Easement				

	Description	Exh. #	Offer	Objections	Rec
30	Instrument No. 2003-122381 Certified Copy of Certificate of Death				
31	Instrument No. Book 586 Page 301 Certified Copy of Warranty Deed				
32	Corp of Engineers Permit & Correspondence				
33	Any Exhibits marked by Defendant (reserving all objections)				

John R. Pacovsky and Bridge A. Pacovsky,
Plaintiffs

By

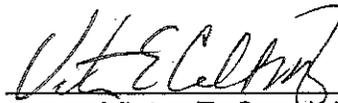


Victor E. Covalt III #16539
Ballew Covalt, PC LLO
P.O. Box 81229
Lincoln, NE 68501-1229
(402) 436-3030
(402) 436-3031

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via U.S. Mail, postage prepaid, on the 4th day of February, 2011, on the following named parties or their attorneys:

J. L. Spray and Patricia L. Vannoy, 134 South 13th Street, Suite 1200, Lincoln, NE 68508



Victor E. Covalt III #16539

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

JOHN R. PACOVSKY and BRIDGET A.)
PACOVSKY)

CASE No. CI 09-4881

Plaintiffs,)

vs.)

PLAINTIFF'S WITNESS LIST

JERRY J. MAHER, JANICE K. MAHER,)
And DOROTHY K. MAHER,)

Defendants.)

Plaintiffs endorse the following persons as witnesses for the purposes of trial herein:

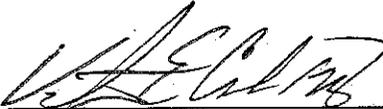
1. Brent D. Jones
3500 Old Field Road
Columbia, MO 65023
2. Pati Jones
3500 Old Field Road
Columbia, MO 65203
3. Kathie Nathan, Manager
Dodge County Title & Escrow Co., LLC
549 No. Main Street
Fremont, NE 68025
4. Bill Bundy
2170 No. 112th Street
Waverly, NE 68462
5. Marlene M. Hull
Dodge County Title & Escrow Co., LLC
549 No. Main Street
Fremont, NE 68025

6. John Pacovsky (expert)
6005 S. 48th Street
Omaha, NE 68117
7. Tom Weidner (expert)
T & R Excavation, Inc.
6139 O Street
Omaha, NE 68117
8. J. Michael Rierden
645 M Street, Suite 200
Lincoln, NE 68508

Any witness listed by Defendants.

John R. Pacovsky and Bridge A. Pacovsky,
Plaintiffs

By



Victor E. Covalt III #16539
Ballew Covalt, PC LLO
P.O. Box 81229
Lincoln, NE 68501-1229
(402) 436-3030
(402) 436-3031

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via U.S. Mail, postage prepaid, on the 9th day of February, 2011, on the following named parties or their attorneys:

J. L. Spray and Patricia L. Vannoy, 134 South 13th Street, Suite 1200, Lincoln, NE 68508



Victor E. Covalt III #16539

D

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

JOHN R. PACOVSKY and
BRIDGET A. PACOVSKY,

LANCASTER COUNTY)
Case No. CI-09-4881
2011 FEB 4 PM 4 13

Plaintiffs,

CLERK OF THE
DISTRICT COURT)

PRETRIAL CONFERENCE
MEMORANDUM

vs.

JERRY J. MAHER, JANICE K. MAHER,
and DOROTHY K. MAHER,

Defendants.

Pursuant to the Court's Order Scheduling Pretrial Conference dated December 9, 2010,
Defendants Jerry J. Maher, Janice K. Maher, and Dorothy K. Maher (hereinafter "Mahers")
submit the following:

(a) The nature of the case and the contention(s) of the parties.

Plaintiffs John R. and Bridget A. Pacovsky (hereinafter "Pacovskys") allege that the Mahers have trespassed on their land, which borders Dorothy Maher's land, and request an injunction restraining the Mahers from entering their property. The Pacovskys also ask the court to quiet title to the subject land in them. The Mahers deny the allegations and affirmatively allege that they have an easement over the Pacovskys' land by necessity, implication, or prescription. The Mahers also assert a counterclaim for damage to their land caused when the Pacovskys altered a watercourse that flows southward from the Pacovskys' land onto Dorothy Maher's land.

(b) Elements of damages claimed

All claims are for equitable relief except the Mahers' counterclaim for damages.

(c) A numbered listing of all exhibits which may be introduced, except those solely for impeachment or rebuttal purposes.

See attached Exhibit List. All exhibits listed by Plaintiffs. Discovery is not completed and additional exhibits may be identified.

(d) The names and addresses of all witnesses who may be called to testify at trial, except those testifying solely for impeachment or rebuttal purposes. The area of expertise of each expert witness shall be set forth.



000960409D02

Jerry J. Maher
2630 Ashland Road
Valparaiso, NE 68065

Janice K. Maher
2630 Ashland Road
Valparaiso, NE 68065

Dorothy K. Maher
2630 Ashland Road
Valparaiso, NE 68065

Mark Mainelli
Mainelli Wagner & Associates, Inc.
6920 Van Dorn Street, Suite A
Lincoln, NE 68506

A representative of the Lower Platte South Natural Resource District with knowledge of their records and findings as well as a custodian for foundation purposes.

A representative of the United States Army Corps of Engineers with knowledge of their records and findings as well as a custodian for foundation purposes.

Bill Bundy
21701 N 112th Street
Waverly, NE 68462

Lowell Bundy
21701 N 112th Street
Waverly, NE 68462

Michael Bundy
14440 Heywood Street
Waverly, NE 68462

All witnesses listed by Plaintiffs. Discovery is not completed and additional witnesses may be identified.

All witnesses necessary to lay foundation or for rebuttal or impeachment testimony.

(e) Matters for stipulation.

The parties have not completed discovery and therefore have not determined matters that might be suitable for stipulation. The parties have, however, been engaged in discussions about matters suitable for stipulation.

(f) Amendments to pleadings.

Discovery is not complete and it may be necessary to amend the pleadings based upon evidence as yet undisclosed.

(g) Pending motions.

The parties have not completed discovery and therefore various pre-trial motions including those related to discovery may be necessary. The Mahers also anticipate filing a motion for Summary Judgment when discovery is complete.

(h) Estimated length of trial.

Defendants anticipate trial will last 2-3 days.

(i) Any additional matters for discussion.

It would be appropriate to discuss a progression order related to discovery, amendments to pleading, disclosure of experts, and expert-related reports, prior to trial.

FOR DEFENDANTS,

MATTSON, RICKETTS, DAVIES,
STEWART & CALKINS

134 South 13th Street, Suite 1200

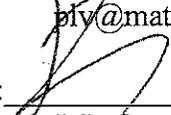
Lincoln, Nebraska 68508-1901

Telephone No.: (402) 475-8433

Facsimile No.: (402) 475-0105

E-mail: jls@mattsonricketts.com

ply@mattsonricketts.com

By: 

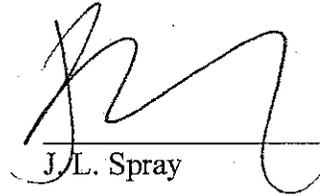
J. L. Spray, #18405

Patricia L. Vannoy, #24264

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via United States mail, postage prepaid, on the 4th day of February, 2011, on the following named parties or their attorneys:

Victor E. Covalt III
Ballew Covalt, PC, LLO
P.O. Box 81229
Lincoln, NE 68501-1229
Counsel for Plaintiffs

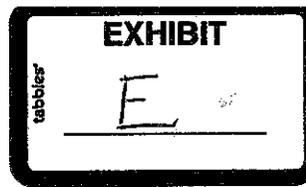


J.L. Spray

SEACREST & KALKOWSKI, PC, LLO

1111 LINCOLN MALL, SUITE 350
LINCOLN, NEBRASKA 68508-3910

TELEPHONE (402) 435-6000
FACSIMILE (402) 435-6100



KENT SEACREST
E-MAIL: kent@sk-law.com

DANAY KALKOWSKI
E-MAIL: danay@sk-law.com

RECEIVED

JUN 20 2011

LANCASTER COUNTY
BOARD

June 17, 2011

Kerry P. Eagan
Lancaster County Commissioners
555 S. 10th Street, Suite 110
Lincoln, NE 68508

RE: Request for Right-of-Way Vacation

Dear Kerry:

Our office represents Craig and Lori Gana. Yesterday, we sent the enclosed letter to Don Thomas on behalf of the Ganas requesting the County Engineer's office to initiate the vacation of a piece of County right-of-way that is bordered entirely by property owned by the Ganas. Please forward a copy of the enclosed letter to the County Commissioners so they are aware of our request.

Thanks for your help. If you have any questions regarding the above or need any additional information, please give me a call.

Very truly yours,

A handwritten signature in blue ink that reads "Danay".

DANAY KALKOWSKI

For the Firm

Enclosure

SEACREST & KALKOWSKI, PC, LLO

1111 LINCOLN MALL, SUITE 350
LINCOLN, NEBRASKA 68508-3910

TELEPHONE (402) 435-6000
FACSIMILE (402) 435-6100

KENT SEACREST
E-MAIL: kent@sk-law.com

DANAY KALKOWSKI
E-MAIL: danay@sk-law.com

June 16, 2011

Don Thomas
Lancaster County Engineer
444 Cherrycreek Road, Building C
Lincoln, NE 68528

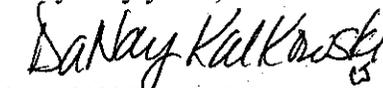
RE: Request for Right-of-Way Vacation

Dear Don:

Our office represents Craig and Lori Gana. The Ganas own property located north of West Panama Road that abuts Lot 2, Irregular Tracts in the Southwest Quarter of Section 4, Township 7 North, Range 6 East of the 6th P.M., Lancaster County, Nebraska ("Lot 2") on the north and south sides. Lot 2 is owned by the County. It appears to have been used in the past as right-of-way, but is not being used today. The Ganas are requesting that the County Engineer's office initiate the vacation of Lot 2 by the County, and is transferred to them as the adjacent property owners.

If you have any questions regarding the above request or need any additional information, please give me a call.

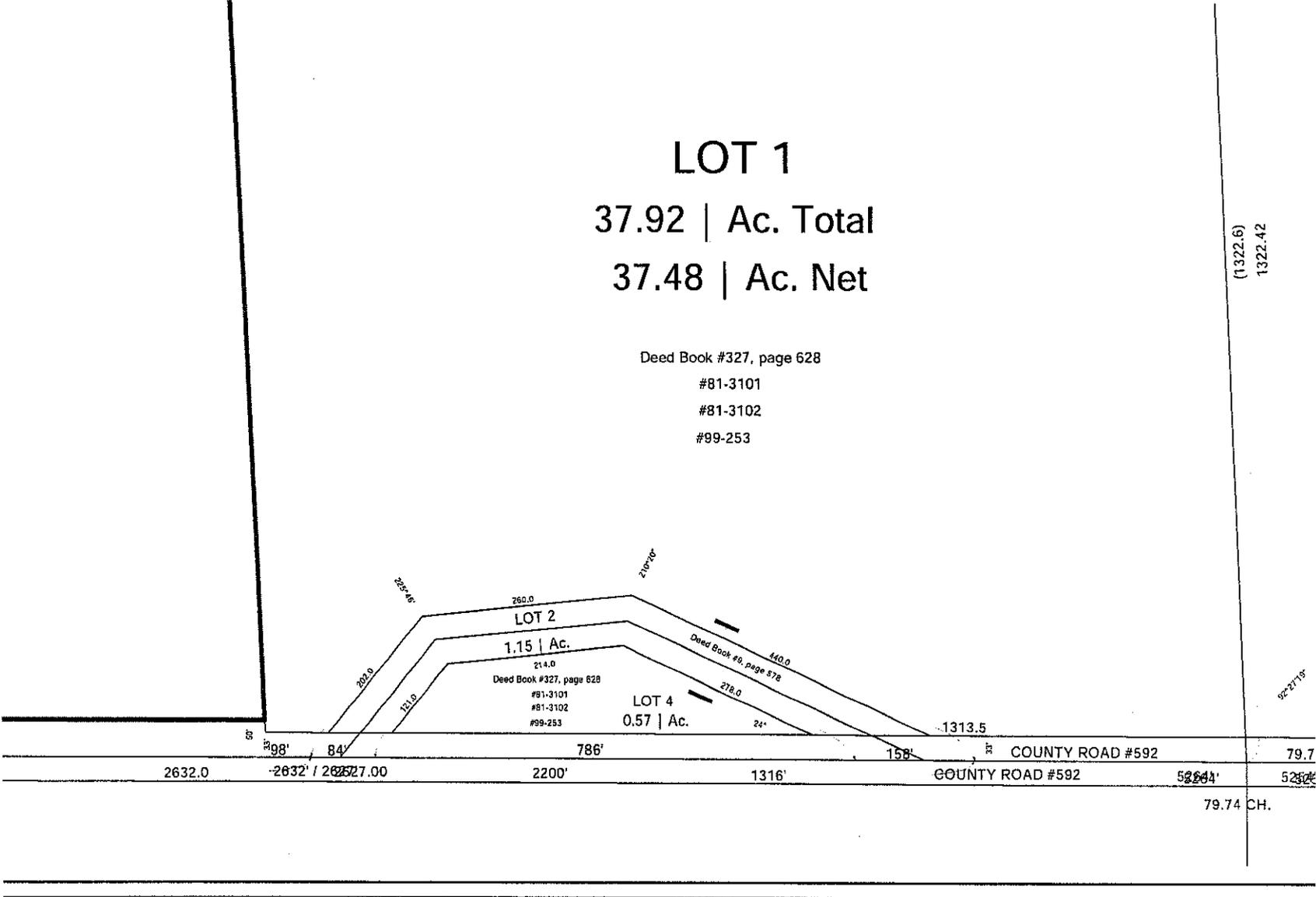
Very truly yours,



DANAY KALKOWSKI
For the Firm

LOT 1
 37.92 | Ac. Total
 37.48 | Ac. Net

Deed Book #327, page 628
 #81-3101
 #81-3102
 #99-253



(1322.6)
1322.42

LOT 2

1.15 | Ac.

Deed Book #327, page 628
 #81-3101
 #81-3102
 #99-253

LOT 4

0.57 | Ac.

COUNTY ROAD #592

COUNTY ROAD #592

79.74 CH.

2632.0

2632' / 2632.00

2200'

1316'

5264'

5264'

87'

898'

84'

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210°00'

Deed Book #8, page 578

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278.0

24'

1313.5

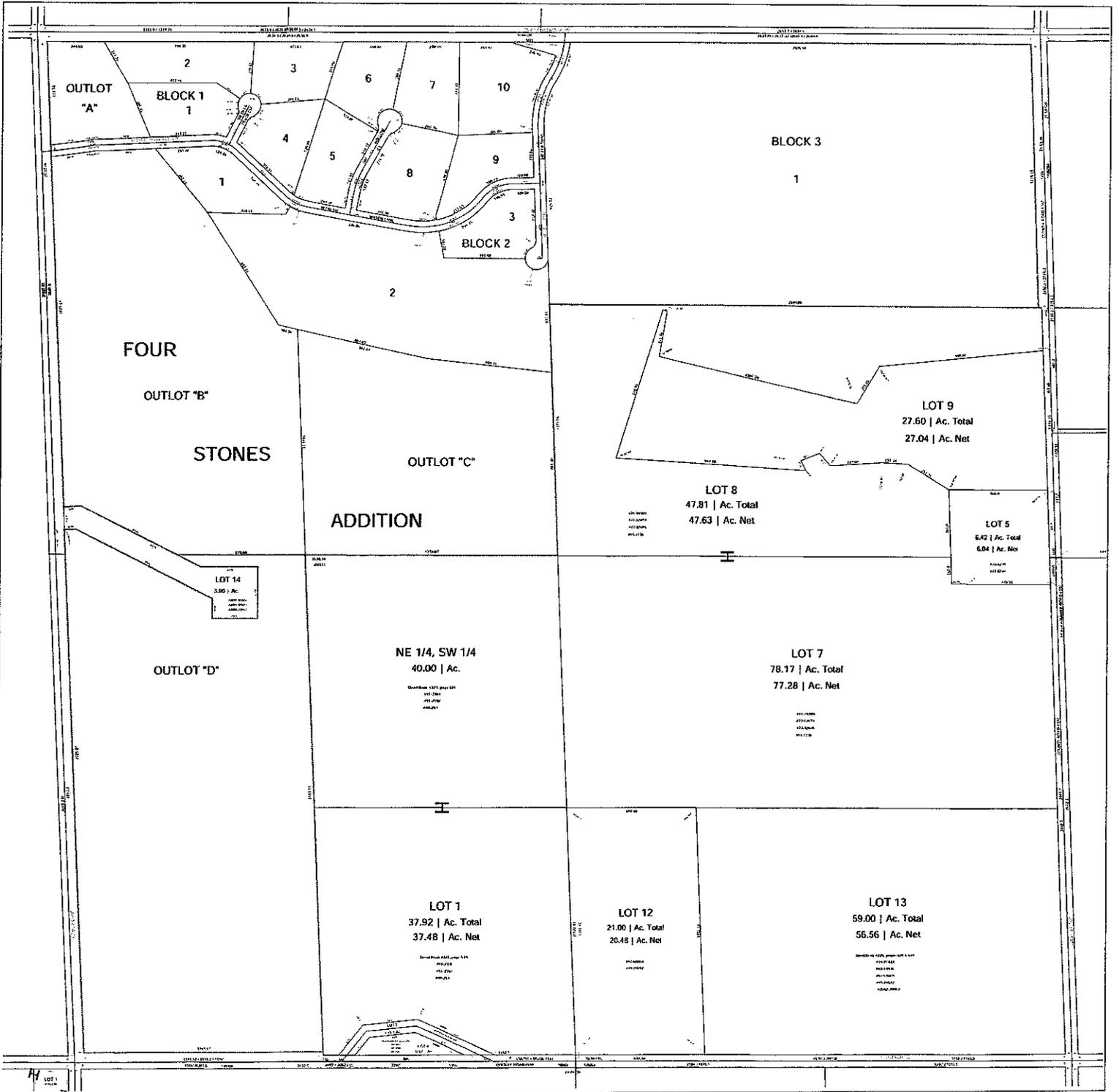
158'

92°27'15"

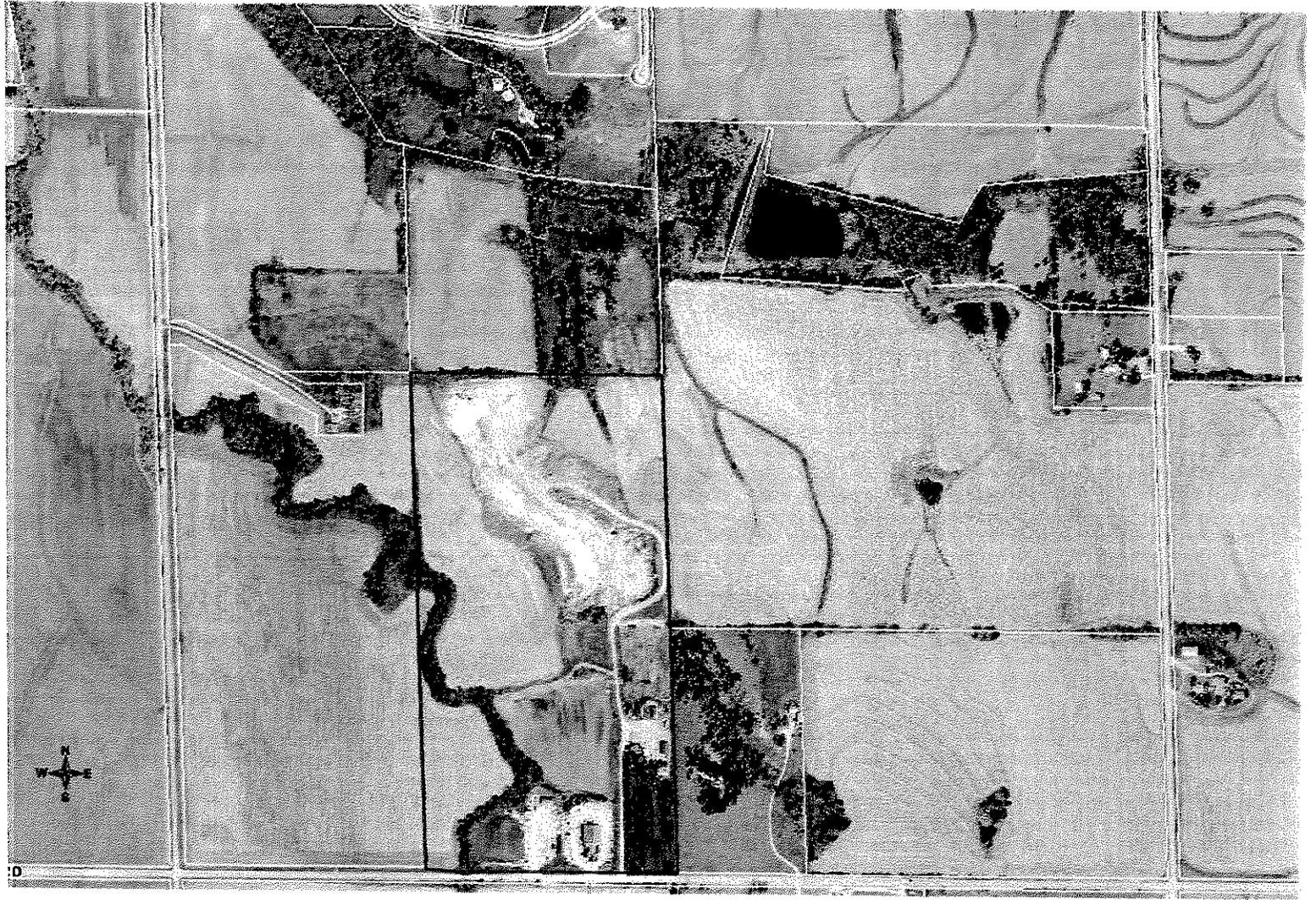
04-07-06
Jul 03, 2006

Lancaster County Engineering Department
Don R. Thomas - County Engineer Larry V. Worrell - County Surveyor

This map is intended to show as accurately as possible the relationship of tracts of land, but it is not intended to be construed as survey accurate in any manner.



City of Lincoln/Lancaster County GIS Map



Printed on Wed Jun 22 2011 11:03:43 AM.

WARRANTY DEED RECORD.

Henry Ciffield & wife

Received for Record the

Warranty Deed.

A.D. 1881 at 2 o'clock

Lancaster County

July

L. C. Grospey Notary

John and wife

Know all Men by these Presents:

That Henry Ciffield & Joaga Ciffield, his wife

of the County of Lancaster and State of Nebraska

consideration of the sum of Twenty DOLLARS

in hand paid, do hereby GRANT, BARGAIN, SELL, CONVEY, AND CONFIRM unto Lancaster County Nebraska

the following described Real Estate situated in Lancaster County, and State of Nebraska

Commencing at a point on the south line of section Four (4) town Seven (7) Range Six (6) East of the Sixth (6) M. Seventy-two hundred (200) feet east of the South West corner of said section and on line to the S.E. corner of said section thence N. 65° 20' W. four hundred and fifty (450) feet thence S. 50° 20' W. two hundred and sixty feet (260 ft) thence S. 28° 34' W. two hundred and two (202) feet to a point on the south line of said section Fourteen hundred and fourteen (1414) feet east of S.W. corner, thence east on section line Eighty-four (84) feet thence N. 81° 20' E. One hundred and fourteen (114) feet thence S. 65° 20' E. One hundred and seventy eight (178) feet to the south line of section Two thence East on section line One hundred and fifty eight feet (158 ft) to place of beginning containing 1.1100 acs more or less

And we do hereby covenant with the said Lancaster County and its heirs and assigns that we are lawfully seized of said premises; that they are free from incumbrance, that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said Joaga Ciffield hereby relinquishes all rights of dower in and to the above described premises. Signed this 5th day of July A.D. 1881.

IN PRESENCE OF

L. C. Grospey

Henry Ciffield Joaga Ciffield

The State of Nebraska

Lancaster County On this 5th day of July A.D. 1881

before me, L. C. Grospey Notary Public

duly Commissioned and qualified for and residing in said County, personally came

Henry Ciffield & Joaga Ciffield

to me known to be the identical person described in and who executed the foregoing conveyance as granted and acknowledged the said instrument to be their voluntary act and deed.

In witness whereof I have hereunto set my hand and Notarial seal the day and year last above written.

L. C. Grospey Notary Public

of the County of Lancaster in hand of John and wife