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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1255**

Martin M. Pomphrey, Jr., et al.,  
Respondents,

vs.

State of Minnesota ex rel. St. Louis County,  
Appellant.

**Filed August 12, 2008  
Reversed and remanded  
Peterson, Judge**

St. Louis County District Court  
File No. 69VI-CV-06-515

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Considered and decided by Peterson, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

**UNPUBLISHED OPINION**

**PETERSON**, Judge

In this boundary dispute, appellant county argues that the district court erred in concluding that respondents established a boundary by practical location by estoppel where respondents did not possess the disputed tract in good faith, the county did not fail

to object to valuable improvements to the disputed tract, and the county did not commit affirmative or unequivocal acts that demonstrate an intent to abandon the disputed tract. We reverse and remand.

## **FACTS**

Respondents Martin and Susan Pomphrey own part of Government Lot 1, Section 10, Township 63 North of Range 18 West of the Fourth Principal Meridian in St. Louis County. At issue is the northern boundary of respondents' property, which is also the southern boundary of a parcel of tax-forfeited property held in trust by the state and managed by St. Louis County. The original boundary was established by government survey in 1883, which located the east quarter corner of section ten in a lake. In 1971, R.L. Floyd completed a private survey and monumented what he believed to be the east quarter corner of section ten at a location north of the lake.

In 1990, Mark and Sally Ludlow purchased the northeasterly portion of government lot one. The property was legally described as all of government lot one except a previously platted subdivision and a two-acre parcel just north of the subdivision. In September 1994, Mark Ludlow applied for a permit to construct a sewage-treatment system on the property. In the application, Ludlow described the property as about four acres in size. The St. Louis County Health Department granted the permit in November 1994.

Respondents purchased the property from the Ludlows in 1995 by contract for deed.<sup>1</sup> A survey that was completed just before the sale indicates that the property is about seven acres in size. A copy of the survey was appended to the contract for deed. The contract for deed amended the legal description of the property to a metes-and-bounds description that describes the location where Floyd placed the monument in 1971 as the northeast corner of the property. The St. Louis County Auditor's Office issued a revised land-description notice that reflected the amended legal description. Respondents have been paying taxes on the basis of that land description, which indicates that the property is seven acres in size.

In 2003, Northern Lights Surveying and Mapping completed a survey that placed the location of the disputed east quarter corner 113.60 feet south of the Floyd monument, which is consistent with the original government survey. The difference between the land description based on the Floyd monument and the description based on the original quarter corner has resulted in a disputed tract of land about two and one-half acres in area and with about 100 feet of shoreline.

When the county surveyor's office declined to certify the Floyd monument as a point of local control, respondents brought an action to judicially determine the northern boundary line of their property, or, alternatively, for a refund of one-third of the property taxes that they have paid. The district court concluded that the east quarter corner of section ten is located at the point determined by the 2003 Northern Lights survey. The

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<sup>1</sup> Although the contract for deed is dated December 31, 1994, it was signed in February 1995, and appended to it is a survey dated January 1995.

district court also concluded that respondents had not established ownership of the disputed tract by adverse possession and that a boundary by practical location had not been established through acquiescence or agreement. But the court found that respondents have established a boundary by practical location by estoppel and that the northeast corner of their property is located at the Floyd monument. This appeal by the county followed.

## DECISION

### I.

In a boundary dispute, the actual boundary as fixed by the original survey must control unless another boundary has been established by practical location. *Benz v. City of St. Paul*, 89 Minn. 31, 36, 93 N.W. 1038, 1039 (1903). A party claiming ownership of a tract of land by practical location has the burden of proof. *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. App. 1987). “Because the effect of a practical location is to divest one party of property that is clearly and concededly his by deed, the evidence establishing the practical location must be clear, positive, and unequivocal.” *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977). The practical location of a boundary line can be established by acquiescence, agreement, or estoppel. *Id.*

“The doctrine of estoppel is not applicable to [government] as freely and to the same extent that it is to individuals.” *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 767 (Minn. 1982) (quotations omitted). This is because “[t]he rights of the public are seldom guarded with the degree of care with which owners of private property guard their rights, and, consequently, acts or omissions which might weigh heavily against

private persons cannot always be given the same force against the public.” *Id.* (quotation omitted). There are five factors that must be established before a governmental body can be estopped from asserting its interest in a parcel of land: (1) long-continued nonuse by the government; (2) possession by a private party in good faith; (3) valuable improvements to the land without objection from the government, having knowledge thereof; (4) great damage to those in possession if the government were permitted to reclaim the land; and (5) affirmative or unequivocal acts of the government that demonstrate an intent to abandon the parcel. *Id.* The county argues that respondents did not possess the disputed tract in good faith, the county did not fail to object to valuable improvements to the disputed tract, and the county did not commit affirmative or unequivocal acts that demonstrate intent to abandon the disputed tract.

*A. Possession in Good Faith*

The district court found that respondents believed in good faith that they had purchased the disputed tract. The county argues that the fact that respondents’ predecessors in interest described the property in the 1994 permit application as about four acres in size demonstrates that respondents lack a good-faith basis for believing that they were purchasing more than seven acres of land. A survey completed just before respondents purchased the property indicates that the parcel contains about seven acres of land. A copy of the survey was appended to respondents’ contract for deed. Because respondents’ belief that they were purchasing the now-disputed tract was based on a certificate of survey completed shortly before they purchased the property, the evidence

supports the district court's conclusion that respondents had a good-faith belief that they owned the disputed tract.

*B. Failure to Object*

Although knowledge of the true boundary line is not an element in establishing a boundary by practical location through acquiescence, “without evidence of knowledge, one of the essential elements to create an estoppel is missing.” *Fishman v. Nielsen*, 237 Minn. 1, 53 N.W.2d 553, 557 (1952) (citing *Benz*, 89 Minn. at 39, 93 N.W. at 1040). “[E]stoppel requires knowing silence on the part of the party to be charged and unknowing detriment by the other.” *Theros*, 256 N.W.2d at 859. “When considering boundary by practical location on the theory of estoppel, the governmental body . . . is required to have knowledge of the true boundary line and to have looked on silently while another made valuable improvements on the property.” *Halverson*, 322 N.W.2d at 769.

In *Benz*, the court considered a boundary dispute that arose as the result of an erroneous survey. 89 Minn. 31, 93 N.W. 1038. Stevens and McMillan were neighboring property owners who commissioned a survey to determine the boundary line between their properties. *Id.* at 35, 93 N.W. at 1038. After a surveyor concluded that Stevens's house encroached on McMillan's land, McMillan executed a deed intended to convey to Stevens the tract of land on which Stevens's house stood. *Id.* After erecting a fence along the line supposed to have been fixed by the deed to Stevens, McMillan sold his property to Benz, who built a house, relying on the fence as marking the boundary line. *Id.* Benz later erected a stable after Stevens pointed out a stake that he believed marked

the boundary line and asked Benz to build the stable on the line. *Id.* at 36, 93 N.W. at 1038. It was later discovered that the survey was incorrect and that Benz's house and stable both encroached on Stevens's land. *Id.*, 93 N.W. at 1038-39. The court reasoned: "If Stevens knew the true boundary line at the time, and had permitted, with that knowledge, [Benz] to erect his house upon his (Stevens'[s]) land, he would be conclusively estopped from now disputing the right of [Benz] to maintain his house where so erected." *Id.* at 39, 93 N.W. at 1040. But because Stevens did not know the location of the true boundary line and was not aware that Benz's house encroached, the court concluded that there was "no evidence in the record upon which to base an estoppel by conduct." *Id.* However, because Benz asked Stevens where the boundary line was before erecting his stable, and acted in reliance on the line pointed out by Stevens, the court held that Stevens was estopped from asserting title to that portion of the lot on which the stable was located. *Id.* at 40, 93 N.W. at 1040.

Similarly, in *LeeJoice*, the plaintiff landowner suspected for many years that his neighbors used a portion of his property, believing it belonged to them. 404 N.W.2d at 5. Although the plaintiff confronted his neighbors about their use of the property, he took no action to prevent them from using it until after a survey confirmed his suspicions about the true property line. *Id.* This court rejected the defendants' boundary-by-estoppel argument, concluding that knowledge of the true boundary line is an element in a claim of estoppel, and the plaintiff lacked actual knowledge of the true boundary line until the survey was completed. *Id.* at 7. In contrast, in *Halverson*, a municipality had knowledge of the boundary, but remained silent while those in possession incurred expenses moving,

remodeling, and improving three cabins on the disputed land, maintained the land, and paid taxes on it. 322 N.W.2d at 769-70. The court concluded that the municipality was knowingly silent while the possessors incurred unknowing detriment and held that the municipality was estopped from denying that the boundary had been established by practical location. *Id.* at 770.

It is undisputed that the Floyd monument was placed erroneously and that the 2003 Northern Lights survey established the true quarter corner. There is no evidence in the record that the county knew of the true boundary line before 2003, when Northern Lights conducted a survey that placed the disputed quarter corner 113.60 feet south of the Floyd monument. The district court found that respondents “have paid taxes and made improvements upon the land. They have built a dock and maintained the property.” But it appears that the dock was constructed before the county or respondents had knowledge of the true boundary line. Because the county and respondents learned the location of the true boundary at about the same time, there is no evidence that the county looked on silently with knowledge of the true boundary line while respondents made valuable improvements to the disputed tract.

### C. *Abandonment*

Abandonment is a question of intention, and nonuser is only an evidentiary fact aiding in its determination. Mere nonuser for any length of time will not operate as an abandonment of [public land]. Nor will nonuser, coupled with failure to remove obstructions erected by abutting property owners or others, constitute abandonment. An intention to abandon is not established by negative or equivocal acts. Long-continued nonuser, in order to constitute abandonment of a [public interest in land] must originate in or be accompanied



by some affirmative or unequivocal acts of the [governmental body] indicative of an intent to abandon, and inconsistent with the continued existence of [a public interest].

*Village of Newport v. Taylor*, 225 Minn. 299, 305, 30 N.W.2d 588, 592 (1948) (footnote omitted) (citations omitted) (discussing abandonment of a platted but undeveloped street).

The district court identified three acts that it concluded are affirmative or unequivocal acts demonstrating that the county abandoned its interest in the disputed tract: issuance of a permit for development of the disputed tract, adoption of the legal description included in respondents' contract for deed, and collection of taxes for the disputed tract from respondents.

In November 1994, the county health department issued respondents' predecessor in interest a permit to install a septic tank on the property.<sup>2</sup> The district court found that the septic system was to be installed on the disputed tract. But neither the permit nor the permit application indicates where on the property the proposed septic tank was to be built.<sup>3</sup> Thus, the record does not support a finding that the septic tank was to be located on the disputed tract. Also, the permit application indicates that the property is about four acres in area, which is the area of the property using the true boundary line. Nothing in the record demonstrates that the county had notice that respondents' predecessor in title was claiming or planning to use the disputed tract. Consequently, issuing the permit was not an affirmative or unequivocal act demonstrating intent to abandon the parcel.

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<sup>2</sup> The septic tank was never installed.

<sup>3</sup> It appears that a site plan was submitted with the application, but it is not part of the record.

Respondents purchased the property in 1995, and as part of the conveyance, the legal description was amended. The new metes-and-bounds description was crafted in reliance on the Floyd monument. On April 20, 1995, the county auditor issued a revised land-description notice, informing respondents that the description of the property had been revised for taxation purposes. The district court concluded that through the revised land-description notice, the county “adopted the legal description of the disputed parcel.”

A county may use a code system to describe lands for taxation purposes when individual parcels can only be described by metes and bounds. Minn. Stat. § 272.191 (2006).

Immediately after a parcel of land has been coded under the county code system, the county auditor shall give notice . . . to the owner . . . . Such notice shall describe the land according to the description used in the instrument of conveyance, of record in the office of the county recorder or registrar of titles, or the description of the land as then carried on the assessment and tax rolls of the county, and shall also give the code number assigned to such parcel of land under the county code system, and shall further state that such parcel of land will thereafter be described, for taxation purposes, by said code number.

Minn. Stat. § 272.194 (2006). The plain language of the statute directs the county auditor to describe the land using either the legal description contained in an instrument of conveyance or the description carried on the assessment and tax rolls of the county. Furthermore, the expressly limited purpose of the statute is to permit land to be identified by a code number, rather than a metes-and-bounds description, for taxation purposes; the purpose of the statute does not extend to determining ownership of property. Thus, the fact that a revised land-description notice was issued is not evidence that the county

affirmatively or unequivocally adopted the legal description found in the contract for deed or abandoned its claim to the disputed tract.

Finally, the record shows that respondents have been paying property taxes based on the legal description found in the contract for deed and the county tax records, both of which include the disputed tract. “However, the mere assessment and collection of taxes has not been deemed a sufficient indication of intent to abandon, absent other affirmative acts.” *Reads Landing Campers Ass’n v. Township of Pepin*, 546 N.W.2d 10, 15 (Minn. 1996).

Although the acts cited by the district court show that the county could have been more diligent in protecting its rights, they do not rise to the level of affirmative and unequivocal acts that demonstrate intent to abandon the parcel, particularly since they all occurred before the county knew the location of the true boundary line.

## II.

Citing *Skelton v. Doble*, 347 N.W.2d 81, 83 (Minn. App. 1984), *review denied* (Minn. July 26, 1984), the county also argues that the district court erred in applying the doctrine of boundary by practical location to a dispute over a tract about two and one-half acres in size. Because we conclude that respondents have failed to establish a boundary by practical location, we decline to consider this argument.

We also decline to reach respondents’ argument that the district court erred in failing to grant them default judgment against the state because the state, rather than the county, is the real party in interest as to the boundary line. Issues raised by a respondent are not properly before this court unless the respondent filed a notice of review. *In re*

*Welfare of Children of S.W.*, 727 N.W.2d 144, 153 (Minn. App. 2007), *review denied* (Minn. Mar. 28, 2007). Respondents did not file a notice of review. Furthermore, this court generally will consider only those issues that the record shows were considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). When a district court's failure to address an issue is not raised in a posttrial motion, there is no ruling for this court to review. *Frank v. Ill. Farmers Ins. Co.*, 336 N.W.2d 307, 311 (Minn. 1983). The district court never ruled on respondents' motion for default judgment, and respondents did not raise this issue in a posttrial motion. Because there is no ruling and respondents failed to file a notice of review, this issue is not properly before this court, and we decline to reach it.<sup>4</sup>

### III

In its order, the district court established the boundary between these properties using the legal description from respondents' contract for deed. This legal description was created in reliance on the Floyd monument, rather than the true quarter corner. Because we reverse the district court's conclusion that respondents have established a boundary line by practical location, we remand so that the district court can issue an order that includes a legal description of respondents' property that reflects the true boundary line. On remand, the district court should also address respondents' claim for a property-

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<sup>4</sup> We also note that the property at issue here is tax-forfeited land held by the state in trust for its taxing districts. State law requires the county attorney to defend an action regarding tax-forfeited land held in trust by the state for its taxing districts. Minn. Stat. § 284.08 (2006).

tax refund. Whether to reopen the record on remand is within the district court's discretion.

**Reversed and remanded.**