Volume #33 Number 1

February 2023

Official Publication of the South Dakota Society of Professional Land Surveyors
Affiliate of the National Society of Professional Surveyors

BACKSIGHTS & FORESIGHTS

2023 Photo Contest Winner - John Gale

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The Land Surveyor's Guide to the Supreme Court of South Dakota Part 40

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PUBLICATION DEADLINES

Material Cutoff	*Publication*
January	February
April	May
July	August
October	November

Backsights and Foresights

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Greeting to the members of SDSPLS and hopefully, everyone is having a good start to 2023. First I would like to thank Jody Van Beek and the Big Sioux Chapter for making the convention a success. Since this is the first time the convention has been held in Sioux Falls it took a lot of planning. Next year we head west back out to Deadwood.

Since the convention, we have been active with the DPC following the legislative action. There have been several proposed bills we kept our eye on. Below I have listed the bills with a brief description:

SB76 AN Act to provide for licensure by endorsement for certain licensed professionals and occupations: This bill came down from the Governor's office, I believe she referenced this in her State of the State address. with some minor changes to the existing

HB1023 (Fresh Start Legislation): The bill pertains to the potential licensure of folks that have had some type of criminal record. In short, the legislation proposes that a person with a past record, would not be given an automatic 'no' to licensure and that a variety of factors would be considered before barring a person from licensure

HB1089: There were numerous bills related to utilities as that has been a hot topic this past year or so. This bill is related to utilities, as it pertains to location and topographical surveys performed on projects on private land that will be for public use. The bill did not change access to boundary surveys.

The land survey program director at Southeast Tech has still not found a replacement for Rod. ACEC, SDSPLS along with Southeast have been looking for a qualified candidate for a year or so. ACEC and SDSPLS both agreed to offer $7500/each for 3 years to help entice a candidate. At some point Southeast Foundation up the ante with an additional $15,000 making the total stipend $30,000 for 3 years. The program still has not gotten a qualified candidate. So, if anyone has any interest or knows someone please get in touch with the school.

I would like to congratulate Randy Deibert on getting elected to the SD Senate representing District 31. So, with Randy's election to the Senate, he stepped down as our DPC representative, so we are looking for someone to fill this role. For some not-so-good news, Jody Van Beek has informed me that she will resign as our executive director in May. The board and I will be working on finding some qualified candidates to fill this position. If anyone is interested or knows anyone that would be interested be sure to reach out to the board.

Lastly, I would like to thank Kary Gregoire (2022 President) for all his hard work this past year. I would also like to welcome Paul Letsche to the board as our President-elect.

Hope everyone has a safe and prosperous year.

Todd Schlunsen

2023 SDSPLS President

Paul Letsche – President Elect

My name is Paul Letsche, and I am a Sioux Falls native graduating from Washington High School in 1995. After working a few years in construction after high school I was looking for something more fulfilling and heard about land surveying through a friend who worked with a surveyor. After enrolling in the Civil Engineering Technology program at Southeast Technical Institute in 2002 I knew from day one that surveying was for me. I graduated in 2004 with an Associate of Applied Sciences Degree in Civil Engineering Technology. Starting out working for the engineering firm Howard R. Green Company after graduation I then moved to a position with Midwest Land Surveying in 2006. In 2010 I started with East River Electric in Madison SD where I am currently employed as a Land survey Coordinator. I have been a registered Land Surveyor in South Dakota since 2015 and hold an FAA Part 107 Remote Pilot Certificate. It is a privilege to have the opportunity to serve the SDSPLS membership as a board member and representative.

Open South Dakota Society of Professional Land Surveyors Committee Chairpersons Position:

Design Professionals Coalition (DPC) Representative – Serve the SDSPLS alongside Dana Edwards as a DPC Representative.

SDSPLS – Board of Directors Meeting
(The Holiday Inn-City Centre, Sioux Falls, SD)
Wednesday, January 11, 2023 – 8:00 A.M. (CST)

In Attendance: President Kary Gregoire, Past President Jon Collins, President-Elect Todd Schlunsen, NSPS Director Linda Foster, Treasurer Cory Biegler, Secretary Andrew Kangas, West River Chapter President Adam Thompson, Big Sioux Chapter President Beau Koopal, Executive Director Jody Van Beek, Legislation Committee Jon Nelson (Absent), Education Kristi Goehring (absent), Design Professionals' Coalition Committee Randy Deibert (Absent), Public Information Committee Ruthie Wetzel, Trig Star Committee Chad Dodds (Absent), Young Surveyors Committee Jon Geffre, Membership Andy Scott, Dean Scott, Paul Letsche

1. Meeting called to order at 8:01 A.M. (Central) by Kary Gregoire.

2. Acceptance of Agenda: Motion by Schlunsen to approve the agenda as presented, 2nd by Biegler - Motion approved.

3. Secretary's Report – presented by Andrew Kangas: Written minutes from the Board of Directors Meeting on October 5, 2022 were submitted. Motion by Koopal to approve meeting minutes, 2nd by Schlunsen - Motion approved. Minutes are attached.

4. Treasurer's Report – presented by Biegler: Written report submitted. Motion by Kangas to approve treasurer's report, 2nd by Schlunsen - Motion approved. Treasurer's report is attached.

5. President's Report – Kary Gregoire: Report not submitted.

6. Committee Reports:

   a) Education – Kristi Goehring (absent): No report was submitted.

   b) Legislation – Jon Nelson (absent): No report was submitted.

   c) Design Professionals' Coalition – Randy Deibert stepped down as he was elected to the legislature, Dana Edwards (absent): Report was submitted and is attached.

   d) Professionalism & Practice – Dean Scott: No report submitted. No updates.

   e) Public Information – Ruthie Wetzel: No report was submitted. Working on cleaning up the website.

   f) Membership – Andy Scott: No report was submitted.

   g) NSPS – Linda Foster: Report was submitted. The main focus this past year was on the lack of workforce. Linda has been involved with workforce development committee. Linda was elected Vice President and it's a 4-year commitment.

   g) Young Surveyors – Jon Geffre: No report was submitted. Working on recruiting young surveyors. Trying to plan a date in the spring to setup on benchmarks and capture data.

   h) Trig Star – Chad Dodds (absent): No report submitted.

7. Chapter Reports

   a) West River – Adam Thompson: No report was submitted. Plan to meet within the next month to start planning 2024 convention. Have some names for key presenters.

   b) Big Sioux – Beau Koopal: Report was submitted. Met twice this year. Second meeting centered around the open position at Southeast Tech. Discussion on Western Dakota Tech possibly starting a surveying program. 24 credits are required to get licensure.

   c) Missouri River – No report submitted. Discussion on what to do with the Chapter and what action to take at the annual meeting. Discussion on transferring Chapter to a Young Surveyors Chapter. This would mostly involve current members of the Big Sioux Chapter.

8. Old Business

   a) 2023 Annual Budget – Currently operating in a deficit. Need to generate more income. Possible solution is to increase convention fees. More discussion under new business.

   b) Southeast Tech Open Position: Discussion on increasing the amount of funds to contribute to Southeast Tech to incentivize the position.

   c) Board of directors' positions for 2023: Discussion on DPC position. Need to find someone to support Dana Edwards.

   d) SDBOTP Position: Cory Biegler is willing to run for the position that will be open once Steve Peters steps down and the board supports this nomination.

The Board has prepared a letter of endorsement for Cory Biegler.

9. New Business:

   a) Surveyor of the Year: There was discussion on who should be in charge of making the nominations and who should vote on the nominations. Currently the Board of Directors selects the winner. For this year the Chapters were asked to submit 2 nominations. Motion by Koopal and 2nd by Kangas to remove the verbiage that board members are not eligible from the form. Motion approved.

   b) Outstanding Contribution to the Land Surveying Profession: There was discussion on possible candidates. For this year the Chapters were asked to submit 2 nominations and the Board will select a winner. Motion by Koopal and 2nd by Kangas to remove the verbiage that board members are not eligible from the form. Motion approved.

   c) Pricing of membership and convention: There is a need to increase fees to operate. Motion was made by Koopal and 2nd by Biegler to increase fees for full members by $30 to $225, out of state members fees increase by $30 and all other membership fees increase by $15. Motion approved. Convention fees can be evaluated at the next meeting and raised to cover costs.

   d) President Elect Position: Paul Letsche is willing to be nominated for the position.

   e) Discussion on the location of the 2025 Convention and planning the convention.

10. Next Board of Directors Meeting will be in April, date and time to be determined.

11. Meeting adjourned at 10:26 A.M. (CST). Motion by Schlunsen, 2nd by Kangas – Motion approved.

Respectfully Submitted

By: Andrew Kangas, Secretary

Special Thank You...... Steve Peters for your time served on the South Dakota Board of Technical Professions. Thank you from the SDSPLS!!!!

Congratulations to South Dakota Senator Randy Deibert on being elected to serve District 31.

SDSPLS – Annual Meeting
(Holiday Inn-City Centre – Sioux Falls, SD)
Thursday, January 12, 2023 – 4:30 P.M. (CST)

1. Meeting called to order at 4:28 P.M. (Central) by Kary Gregoire.
2. Acceptance of Agenda: Motion by Koopal to approve the agenda with items added under new business, 2nd by Andy Scott - Motion approved. The three agenda items added under new business are 1) Recognition of Steve Peters for his 9 years of service on SDBOTP. 2) DPC Update from Nancy Hoines.
3. Secretary's Report – presented by Andrew Kangas: Written minutes are submitted with the Annual Report. Motion by Bielger to approve meeting minutes, 2nd by Wade Lunders – Motion approved.
4. Treasurer's Report – presented by Cory Biegler: Written report is submitted with the Annual Report. Motion by Dean Scott to approve treasure's report, 2nd by Rod Brietling - Motion approved.
5. President's Report – presented by Kary Gregoire: Written report is submitted with the Annual Report.
6. Committee Reports:

   a) Education – Kristi Goehring: Report is submitted with annual report.

   b) Legislation – Jon Nelson: Report is submitted with the annual report.

   c) Design Professionals' Coalition – Dana Edwards (absent): No report submitted. Randy Deibert stepped down in September as he was elected to the SD Legislature.

   d) Professionalism & Practice – Dean Scott: No report submitted. Dean is working on updating the standards on easements.

   e) Public Information – Ruthie Wetzel: Report is submitted with the Annual Report.

   f) Membership – Andy Scott: No report submitted.

   g) NSPS – Linda Foster: Written report submitted. Tim Burch gave an update.

   g) Young Surveyors – John Geffre: Report was submitted with the Annual Report. Any younger members please give John your contact information so he can keep you informed.

   h) Trig Star – Chad Dodds: Report is submitted with the annual report. Trig-star resumed in 2022 but numbers were way down. Goal is to try increase numbers and generate interest on the east half of the state.

7. Chapter Reports

   a) West River – Adam Thompson: Report is submitted with the Annual Report.

   b) Big Sioux – Beau Koopal: Report is submitted with the Annual Report.

   c) Missouri River – (absent): No report submitted.

8. Old Business

   a) 2022 Quarter 3/End of Year and 2023 Operating Budget. Report is included in the annual report.

   b) Future of surveying education at Southeast Technical College. Authorization was voted on last year to donate from the Raymond James account until the account is reduced to $100,000 in the account. ACEC is willing to donate $7500 per year for the next 3 years. STC foundation will match up to $15,000 for the next 3 years. Discussion on alternative incentive options. Beth K. gave an update and answered questions.

   c) LDR and 2022 Datum Update: Jon Collins stated that a few minor comments were received from NGS and those comments will be addressed.

9. New Business:

   a) Scholarship Recipients:

   $4000: Maria Hofer, Harrisburg, SD
   $2000: Carson Popkes, Sioux Falls, SD
   $1000: Jaden Wendland, Alexandria, SD
   $1000: Hayden Bahmuller, Sioux Falls, SD
   $500: Kayden Kummer, Sioux Falls, SD
   $500 Alex Andersen, Sioux Falls, SD
   $500 Dustyn Fish, Sioux Falls, SD
   $500 Joshua Riibe, Rock Rapids, IA
   $500 Rodney Francis, Sioux Falls, SD

   b) Future of Missouri River Chapter: Discussion on moving the Chapter to the Young Surveyor Group. Need 5 members to submit petitions to the Board. Motion by Travis Jacobsen to dissolve the Missouri River Chapter and 2nd by Cory Biegler.

   c) Election of Officers: President-Elect (nominations). Gregoire nominated Paul Letsche

for President Elect. Nominations ceased and unanimous ballot was cast for Letsche.

d) Committee openings: Design Professionals Coalition. President shall appoint Chairs for the committees.

e) DPC Update: Nancy Hoines gave an update. Senate Bill 87 was a major item last year. This year during the State of the State Address the Governor announced that she is making a move on licensure. The bill has not dropped yet. This will be monitored going forward.

f) Recognition of Steve Peters for service on the SDBTP. Leonard N made a motion to recognize Steve and 2nd by Jon Collins. Cory Biegler is willing to be appointed to the position and letters of endorsement have been sent to the Governor.

10. Next Annual Meeting: Thursday, January 11, 2023 at The Lodge at Deadwood, Deadwood, SD

11. Meeting adjourned at 5:25 P.M. (CST) by Kary Gregoire.

Respectfully Submitted

By: Andrew Kangas, Secretary

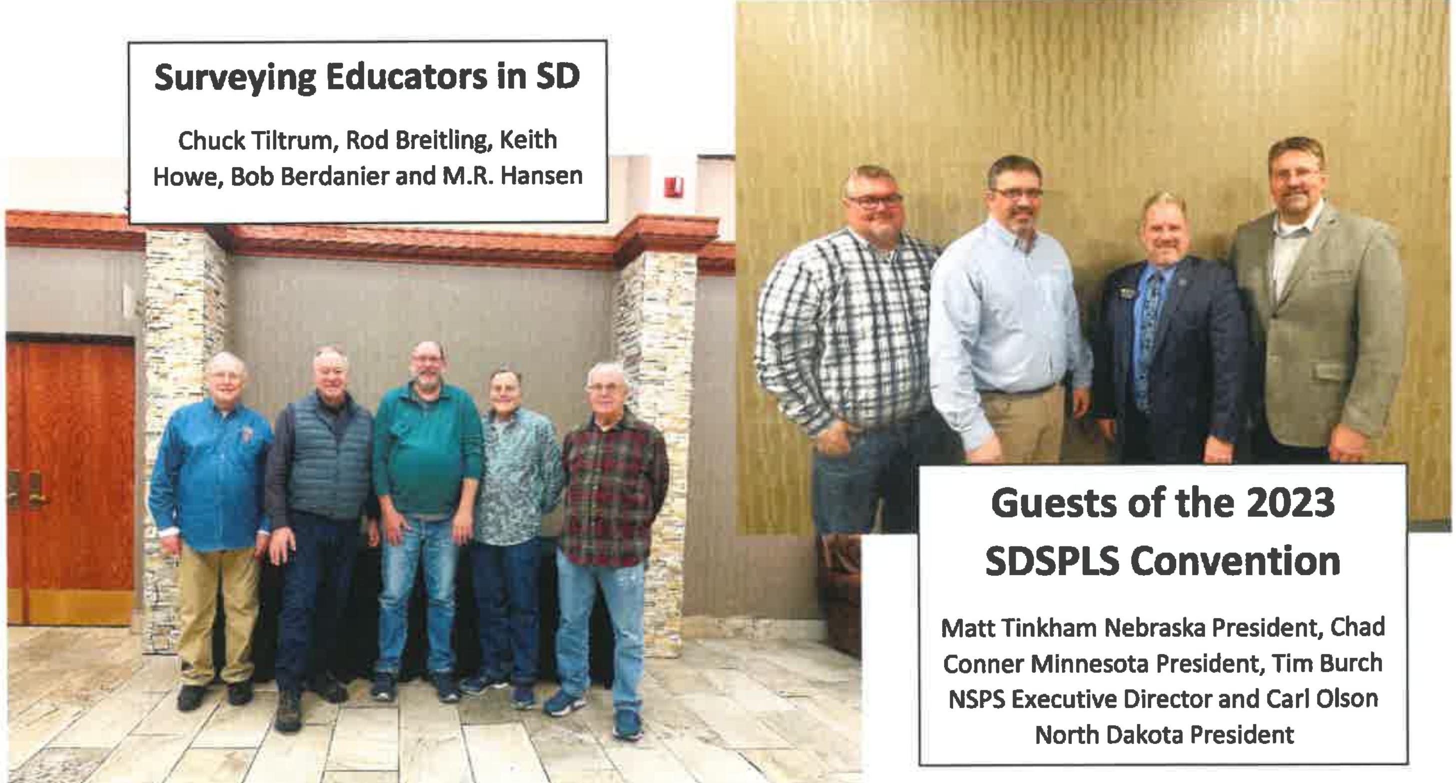
A huge thank you to -

A special congratulations to the new NSPS Vice President Linda Foster!!!

Congratulations 2022 Scholarship Winners

Back Row: Kayden Kummer, Dustyn Fish, Hayden Bahmuller, Carson Popkes and Alex Andresen

Front Row: Rodney Francis, Jaden Wendland, Joshua Riibe and Marie Hofer



Surveying Educators in SD

Chuck Tiltrum, Rod Breitling, Keith Howe, Bob Berdanier and M.R. Hansen

Guests of the 2023 SDSPLS Convention

Matt Tinkham Nebraska President, Chad Conner Minnesota President, Tim Burch NSPS Executive Director and Carl Olson North Dakota President

2022 SDSPLS Scholarship Auction

The Scholarship Auction - $4,920

Donations - $80

The Gun Raffle - $3,145

Total = $8,145

2023 South Dakota Society of Professional Land Surveyors Board of Directors

Cory Biegler – Treasurer, Adam Thompson – West River Chapter President, Linda Foster – NSPS Director, Andrew Kangas – Secretary, Kary Gregoire – Past President, Todd Schlunsen – President and Paul Letsche – President Elect

Not pictured Beau Koopal – Big Sioux Chapter President

Rod Breitling

2022 Surveyor of the Year

Chadwick Martinson

2022 Outstanding Contribution to the Land Surveying Profession

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Thank You!!!

SDSPLS 40TH ANNUAL CONVENTION PHOTO CONTEST WINNERS

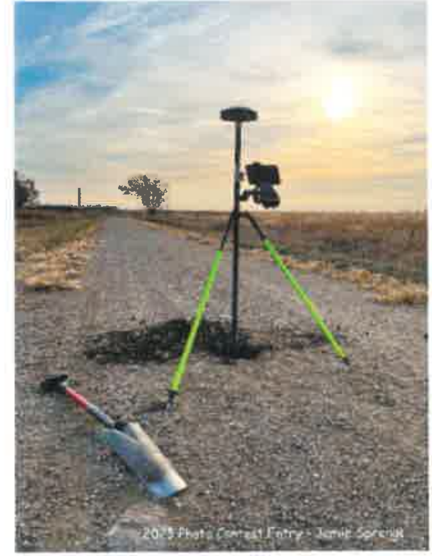
2023 Photo Contest
Winner - John Gale

2023 Photo Contest 2nd Place - Chad Dodd

2023 Photo Contest -
3rd Place - Chad Dodds

SDSPLS 40th Annual Convention

Photo Contest



2023 Photo Contest Entry - Jamie Sprenk

2023 Photo Contest Entry - Brian Ernst

2023 Photo Contest Entry - Jacob Under Baggage

2023 Photo Contest Entry - Ruthie Wetzel

2023 Photo Contest Entry - Chad Dodds

2023 Photo Contest Entry - John Gale

2023 Photo Contest Entry - Dalton Snow

2023 Photo Contest Entry - Chase Watley

2023 Photo Contest Entry - Chase Watley

2023 Photo Contest Entry - Brian Ernst

The Land Surveyor's Guide to the Supreme Court of

South Dakota – Part 40 – 1985 to 1987

This article represents the fortieth in a series of excerpts from a book prepared by South Dakota licensee Brian Portwood. The complete book can be obtained in PDF form at no charge, either from SDSPLS or directly from the author (bportwood@mindspring.com). It covers 120 years of historic South Dakota cases, answering fundamental land rights questions of potential interest to land surveyors, which are being presented in chronological order here in Backsights & Foresights.

Can an unrecorded parking easement be legally binding?

Townsend v Yankton Super 8 Motel (1985)

Returning to the subject of easements, here we examine another case focused upon the essential relationship between a grantor and grantee, and specifically in this instance a successor of the grantee, which again illustrates that the principle of inquiry notice applies in the context of easements, just as well as it does to boundaries, while also highlighting the fact that an easement can be created without ever being expressly identified as an easement. We have previously reviewed cases in which a grantee mistakenly believed that an easement existed, such as the 1942 First Church case and the 1968 Dolan case, and also cases in which a grantee mistakenly believed that no easement existed, such as the 1955 Homes case and the 1981 Steele case, noting that the fundamental error of all such grantees is their failure to exercise genuine diligence in ascertaining the significance of the various land uses they observed, and the status of any land rights associated with those uses of land. The case we are about to review joins the latter group, as here a grantee again fails to recognize the potential importance of a clearly visible land use of yet a different variety, thereby exhibiting the same kind of negligent conduct with respect to land rights that the Court has so often pointed out as a vital factor, relevant to all conveyances of land or land rights. While this controversy is centered upon the existence of an easement, rather than it's location, the Court on this occasion expressly indicates that a failure to take proper notice of the existence of a plat of the subject property, at the appropriate time, represents a key element acting against the party who neglected to view the plat and to acknowledge it's value as a form of notice. In addition, the outcome of this dispute clearly demonstrates that the presence of physical notice of an existing land use is always a potentially important factor in resolving land rights issues, having been codified into statute law, with the power to validate land rights that were not documented well enough to provide constructive notice of their existence to subsequent parties. The Court was confronted with a comparable conflict involving easement and title issues in Hammerquist v Warburton in 1990. In that case, Hammerquist was the owner of an unspecified but substantial amount of rural residential land, and he deeded a tract comprising an unspecified portion of that land to Porter in 1971, retaining most of the adjoining land. Hammerquist and Porter had entered a contract for deed in 1970, which contained certain covenants, and although no reference was made to the 1970 contract in the 1971 deed, Porter understood that the property conveyed to him was subject to the covenants. The subject property was soon sold by Porter however, and it was then conveyed on numerous additional occasions, before eventually being deeded to Warburton, and none of the deeds conveying the subject property made any reference to the 1970 document containing the covenants. Warburton was aware that certain covenants existed and were applicable to his property, nevertheless he proceeded to violate some of them, leading Hammerquist to file an action against him in 1988, seeking enforcement of the covenants, some of which related to access rights while others placed various typical residential use restrictions on Warburton's property. Warburton did not argue that the covenants had not created any easements, he simply argued that none of the covenants were legally binding upon him, because they were not referenced in any manner in his deed, nor anywhere else in his chain of title, so he had no form of notice that any specific covenants or easements relating to his property existed. Noting that Warburton's actions had revealed that he was aware that certain covenants existed, and confirming that such covenants can create legally binding easements, the Court fully upheld a lower court decision in favor of Hammerquist, which required Warburton to honor all of the covenants created in 1970, despite the fact that they appeared in no subsequent documents, on the basis that every typical grantee bears a burden of diligent inquiry, which includes the responsibility to properly determine the true nature and extent of all easements associated with any land he acquires.

> 1975 - Townsend owned an undeveloped rectangular tract containing about 5 acres, which was bounded on the north by Highway 50 and on the west by a Yankton County road, and this tract had several hundred feet

of frontage on each of these roadways, making it prime commercial property. Townsend had specific plans for the development of this property, so he subdivided it into 3 parcels at this time, and a plat was recorded, showing the manner in which he had divided his tract, which was intended to suit his plans for the use of the land. The plat showed the boundaries of Lots A, B & C, with Lot A being a small square parcel fronting only upon the county road about 100 feet south of the highway, while Lot B covered the rest of the northwestern portion of the tract, surrounding Lot A on the north, east and south, and Lot C was simply the remainder, which included the southern and eastern portions of Townsend's tract. Townsend then conveyed Lot B to Brown and Rivett, who were evidently franchisees with plans to build and operate a Super 8 Motel on that lot, and Townsend apparently reserved no right to make any use of Lot B when he made this conveyance. Shortly thereafter however, Townsend realized that he would need to have the right to make use of the motel parking lot, once it was built, to serve as a parking area for the restaurant that he intended to build on Lot A, since Lot A had only enough room for the restaurant building and little or no room for any parking spaces. Super 8 and Townsend then entered a written but unrecorded agreement outlining the anticipated construction of utilities for the mutual benefit and use of these adjoining properties, and also concerning the paving of the planned parking area, and in this document Super 8 agreed to share the use of the parking lot that was to be built on Lot B with Townsend and the patrons of his restaurant, once the two projects were both completed.

1976 to 1984 - The motel and restaurant projects were both constructed as planned, presumably during the early portion of this period, both businesses were put into operation, and no issues arose over the mutual use of the parking lot, which evidently contained 78 parking spaces, adjacent to the restaurant on the west and the motel on the east. At an unspecified date, Unverzagt acquired Lot B, and the harmonious relations between the owners of Lots A & B continued, but Unverzagt apparently owned that lot for only a few years or less, before conveying it to Stratman, presumably toward the end of this period. Stratman visited this site before he acquired the motel property, so he had an ample opportunity to observe that the people patronizing the restaurant and the motel were all using the same parking lot, and in fact he ate at the restaurant himself, while he was parked in one of the spaces located on the motel property. Only after acquiring the motel property however, did Stratman realize that the entire parking lot was on Lot B, at which point he decided to challenge the right of Townsend's customers to park on the motel property. Townsend presumably informed Stratman about the parking clause in the contractual agreement that he had made with Super 8, to facilitate the construction of the two adjoining projects, but Stratman evidently insisted that Townsend had never properly acquired any legal right to use the motel property for the benefit of Townsend's property, and he demanded that Townsend's customers stop parking in the motel parking lot. Townsend was therefore compelled to file an action against Super 8 and Stratman, seeking a judicial declaration that a parking easement existed in favor of his lot, covering the entire parking area situated on Stratman's property.

Townsend argued that he had acquired an easement by implication, enabling the employees and customers of his restaurant to legally park in the motel parking lot, when he conveyed Lot B while retaining Lot A, even though he had neglected to state his intention to create such an easement in the document conveying Lot B. Townsend further argued, alternatively, that an easement had been created by the language that had been included in his construction agreement with Super 8, even though that document made no explicit reference to any easement, and it was not identified as a document of conveyance, and it was created after Townsend had already sold Lot B, which was the allegedly servient property. Stratman argued that no easement had ever been legally created upon Lot B in favor of Lot A, because Townsend had failed to properly reserve any easement when he conveyed Lot B, and no easement could legally be created by the subsequent construction agreement that Super 8 had made with Townsend, because that document was not in the chain of title pertaining to the subject property, and it had never been recorded, so that document failed to provide any legal notice of any such land rights allegedly created therein. The trial court held that the easement being claimed by Townsend had been legally created by virtue of the construction agreement, despite the fact that the easement was not identified as such in that document, since that document clearly indicated an intention to create such a right, and Stratman was legally bound to honor the parking easement, because he had direct physical notice of it's existence, through his personal observation of the actual use that was being made of the easement at the time he acquired Lot B. Super 8 initially participated in this litigation, but dropped out of the case and did participate on appeal, choosing instead to accept defeat and concede that the easement asserted by Townsend was legitimate, leaving Stratman alone to continue to fight the existence of the alleged parking easement before the Court.

A parking easement may seem to be a relatively insignificant thing to some, but without it Townsend would be essentially out of business, so Stratman supposed that he had discovered an opportunity to profit greatly from

Townsend's failure to reserve a parking easement when Townsend had sold Lot B, and Stratman would have been right about that, if Townsend had not realized his omission and addressed it in his utility and paving agreement with Super 8. Townsend was carrying a heavy burden of proof, since he was in the position of a grantor who had neglected to properly reserve all the land rights that he needed when conveying part of his land, and not enough time had passed to enable him to successfully claim a prescriptive parking easement. The Court first negated Townsend's claim that he had acquired the easement in question by implication, on the basis that no parking was taking place yet, at the time when Townsend had conveyed Lot B. An implied easement, the Court pointed out, represents the product of an existing activity involving some portion of the subject property, and the implication doctrine simply serves to mandate that any established and legitimately valuable existing land use must be presumed to have been intended to continue following a conveyance dividing that property. Therefore no implied easement can come into existence, the Court indicated, if no such established use was being made of the land at issue when it was divided by conveyance, marking the initial separation of title between two formerly unified tracts. The fact that Townsend intended to use Lot B for parking in the future, the Court stated, was of no consequence, no easement had been created by implication, because no parking had yet taken place when Townsend legally parted with Lot B. Moreover, the doctrine of implication exists primarily to prevent grantees from being cheated by grantors, who could otherwise prey upon innocent grantees, by deliberately excluding important easement rights, such as access to the land being conveyed, from their deeds, so a grantor such as Townsend seeking to benefit from the equitable concept favoring implied conveyances, by claiming an implied reservation, has an elevated burden of proof, which Townsend had clearly failed to meet. Therefore, Townsend was forced to rely on the 1975 agreement language to support his easement claim, which simply read "it is hereby agreed ... that said restaurant shall have the use of 78 parking spaces ... for it's customer and employee parking", raising the question of whether or not that language was legally sufficient to create an easement. Any right to make use of the land of others for a certain purpose or purposes can represent an easement, and in fact easements can and do very often come into existence without being enumerated in writing at all, so the fact that the parking clause specified both the purpose and the location of the intended land use, the Court recognized, made it legally sufficient to create an easement. Stratman had neglected to obtain a copy of the recorded plat before making his acquisition, presumably because like many buyers of buildings he was so focused on the building itself that he apparently never gave any serious thought to the rest of the property that he was acquiring, including exactly where it's boundaries were located or how the land was being used. When the plat eventually came to Stratman's attention, he realized that the entire parking lot was on his property, and only then did he begin to think about the possible legal implications of that situation, so focusing exclusively on the conduct of Stratman, who it viewed as a negligent grantee, and quoting in part from it's decision in the Wiege case of 1980 that we have recently reviewed, the Court found that Stratman's failure to uphold his duty as a grantee outweighed any omissions made by Townsend:

> "Stratman made no inquiry concerning the lot lines of the lot; he did not request or inspect any plat of the premises; he did not request or inspect an abstract of title ... he did not determine the area of the property ... He was aware that the motel and the restaurant were in close proximity, having been in the restaurant ... He was aware that the parking lot ... was one continuous lot that had no outward physical markings or characteristics that might indicate the line between Lot A and Lot B ... had he looked at the plat ... he would have known that there must have been some parking arrangement ... Stratman made no inquiry about the size of Lot A or the parking facilities or arrangements ... Stratman did not act as a reasonably prudent purchaser and therefore was not a good faith purchaser without notice of the existing easement ... 17-1-4 provides: Every person ... who omits to make such inquiry ... is deemed to have constructive notice ... want of diligence in making such inquiry is equivalent to a want of good faith ... where the easement is open and visible, the purchaser will be charged with notice ... The grantee is bound, where a reasonably careful inspection of the premises would disclose the existence of the easement ... Stratman ... knew from personal observation that customers of the restaurant were parking in the common area that lay between the restaurant and the motel ... a parking easement on Lot B existed for the benefit of Lot A."

The position taken here by the Court, approving an easement that had been created in such an unconventional way, without ever even being expressly identified as an easement, illustrates that easements can be created in a practically infinite variety of ways, for virtually any purpose involving land use, and it also demonstrates that any land use can represent a permanent right, by whatever name it may be identified. Neither the fact that the agreement document was unrecorded, nor the fact it was not originally or primarily intended to serve as a document of conveyance, were of any significance in the eyes of the Court, because the controlling factor was the powerful

principle of notice, which stipulates that all visible uses of the land of others represent potential easements. No easement can ever be created of course, by the mere words of any party who has no ownership interest in the land to be thus burdened, since only a land owner has the authority to intentionally burden his own property, and Townsend had sold Lot B before entering the agreement containing the disputed parking clause, so Townsend was at that time legally incapable of creating any easement on Lot B through his own words alone. In this instance however, even this presented no obstacle to the creation of the easement in controversy, because sufficient privity existed between Super 8, as a franchisor, and Brown and Rivett, as it's franchisees, to require the franchisees to be legally bound by any agreement that had been entered by their franchisor, so Super 8 was the grantor of the easement held by Townsend, acting in effect on behalf of the actual lot owners. Nevertheless, the agreement entered by Super 8 would not have been binding upon Stratman, if no actual use of the parking area had been made by the restaurant patrons and employees, since Stratman was correct, the Court acknowledged, that the agreement document alone did not constitute adequate notice to him, not being entitled as a document of conveyance, not being in his chain of title, and not being recorded. Stratman's error was his belief that he was entitled to rely solely upon documentary evidence to provide notice of land rights, what he did not initially understand, but learned from the Court, was that no one is ever entitled to ignore the elements of the physical world, that can be seen with one's own eyes, and anyone having notice arising from physical objects or events is obligated to pursue inquiry, with reasonable diligence, or become subject to the consequences of failing to do so. Stratman's mistake was typical of grantees who either act in haste, or simply do not understand the possible consequences of failing to rigorously discern and examine all possible land rights associated with the property they are buying, and the long honored equitable concept of inquiry notice was codified into statute law, as observed by the Court, to make that fundamental duty clear to all grantees. When the lower court decision in his favor was fully upheld by the Court, Townsend became one of the relatively few grantors fortunate enough to prevail in a dispute of this nature, and in reality he had prevailed only due to a lack of diligence on the part of Stratman, yet Townsend was not fully satisfied, because the Court had also ruled that his easement would cease, if his building should ever cease to be used as a restaurant. Townsend had no one but himself to blame for this however, since he could easily have chosen language that would have made the parking easement appurtenant to Lot A, instead of carelessly limiting it as he had done, by making reference to Lot A only as "the restaurant", thus both litigants had learned stern lessons from the Court, which had again shown that it is always inclined to uphold easement agreements that have been put into productive use, making the existence of such an agreement apparent to all the world.

What evidence is required to confirm an implied dedication?

Smith v Sponheim (1987)

Public use of private property is once again the focal point of our next case on the topic of dedication, which demonstrates the great importance of understanding how readily public rights can accrue through even very modest or limited use of private land, which is a matter that escapes the attention of many private property owners until long after the proverbial horse has left the barn, and their land has been legally encumbered. The long and acrimonious dispute that plays out here is quite typical of the sort of conflict that frequently results from carelessness and negligence in the documentation of land rights, which is particularly common in the context of access rights, because the value of access is often overlooked and under appreciated, due to the fact that it presents a highly transient use of land, until a minor access route develops into a regular thoroughfare, in use at essentially all times. One vital point driven home by this case, worthy of note by all professionals dealing with land rights, is the fact that subdivision approval under modern platting standards and statutes regarding dedication represents valid evidence of public acceptance of any previously unaccepted dedications, emphasizing the significance of actions taken by local officials on behalf of the public, and the potential impact that such acts can have on private land rights. As a corollary to the case we are about to review however, the 1986 case of Holida v Chicago & Northwestern Transportation (CNT) is also worthy of note in the context of dedication, since it provides valuable insight into the true role and meaning of dedication, and important illumination regarding the interaction between dedication and boundaries. In that case, CNT was the owner of a 4.5 acre tract in Canistota, which was situated directly across Warehouse Street from a tract of unspecified size that was owned by Holida. Warehouse Street was evidently a typical public right-of-way, which had been platted and dedicated as such, and never vacated or abandoned, although it was apparently unused, having never been opened as a street, and Holida's property was described by metes and bounds, which followed the right-of-way of Warehouse Street and did not reach the centerline thereof. Holida wanted to buy the CNT tract, but CNT sold it to another party, without offering Holida any chance to bid on it, so Holida filed an action seeking to have the conveyance made by CNT struck down, as a violation of the statutory requirement that any railroad property must be offered to abutting land owners before being sold to any other party. In response, CNT maintained that Holida had no basis upon which to make any such charge, because Holida's property was separated from the CNT tract by a dedicated public right-of-way, that was owned in fee

by Canistota, so Holida was not an abutting owner and CNT was not legally required to deal with Holida at all. Citing the 1903 Sweatman case, in which the Court had approved the statutory concept that ownership of platted lots is presumed to extend to the center of all platted streets, the Court fully upheld a lower court ruling in favor of Holida, confirming that CNT and Holida were indeed abutting land owners, because their respective properties both extended in fee to the center of the public street, regardless of how their boundaries were described. In so holding, the Court explained that the basis for the extention of private boundaries into a platted public right-of-way lies in the fact that a subdivider is not presumed to intend to retain ownership of any platted land, so all platted land is conveyed to the grantees of the various platted lots, including any dedicated right-of-way adjoining each lot conveyed, and the dedicated right-of-way is presumed to represent only an easement passing through the platted lots, unless it can be definitively shown to have been dedicated in fee. Thus it can clearly be seen that while the Court strongly upholds dedication as a valuable public asset, it upholds the fee ownership of the underlying land by the adjoining land owners with equal intensity.

1940 - A certain dirt road first came into vehicular use, running about 1800 feet in a westerly direction off Highway 79 in an unspecified location in Meade County. Nothing is known about the use of the road prior to this time, it may have been in use as a footpath or horse trail for many years, or it may never have had any previous existence at all, and been created at this time simply by people driving over the same ground repeatedly. Nothing is known about either the configuration of the road or the terrain through which it ran, it may have been straight or curving, steep or flat, and how or why the location of the road was chosen is also unknown, but no portion of it was located within any section line right-of-way. Who it was that first used this route to access their property is unknown as well, but the roadway crossed the properties of at least 4 unspecified private land owners, who evidently either silently allowed it to be used, or were unaware of it's use. Whether the tracts that were crossed by the road were occupied or vacant at this time is also unknown.

1946 - The road location had evidently become physically well defined and established by this time, since there was apparently no variation in the route that was being driven, although how many people were using it to access their properties is unknown. Smith and her husband owned an unspecified amount of land situated at or near the west end of the road, and they were among the earliest of the road users. At this time, Smith's husband became the first party ever to do any repair work on the road, presumably grading work of some kind, and no one objected to the work done by Smith, although he may not have been observed by anyone while doing it.

1957 - Steady though minimal use of the road having continued for many years, at this time Meade County began maintaining the road, by grading, gravelling and widening it, and the county also dug a ditch along the south side of the road and installed an unspecified number of culverts along the road. The 4 property owners whose land the road crossed raised no objection to this work, in fact they all moved their existing fences an unspecified distance to the south, in order to provide room for the ditch to be dug. Whether or not any or all of these 4 land owners were using the road themselves is unknown.

1972 - Moderate use of the road continued until a flood seriously damaged it at this time, but it was promptly rebuilt in the same location by the county, and restored to it's previous condition, so the former use of the road resumed and continued, after only a brief period of disuse.

1977 - Meade County approved a subdivision of unspecified size, which was located at the west end of the road, and the plat of this subdivision evidently indicated that this road represented the sole public access to the subdivision, although exactly how the road was shown or labeled on this plat is unknown.

1978 - An overhead power line was installed along the north side of the road, and a buried telephone cable was installed along the south side of the road, presumably to serve the new subdivision, and the owners of the land crossed by the road made no objection, although no easements for either roadway or utility purposes had ever been acquired from any of them or their predecessors. For unknown reasons, Meade county ceased to maintain the road at this time, and that work was taken over by the road users.

1979 - By this point in time, Albrecht, Sponheim and others had become the owners of the 4 tracts crossed by this road, and when construction of homes in the subdivision began, the use of the road ramped up dramatically, causing great consternation among the owners of the properties bearing the road. A community meeting concerning the use of the road was attended by most if not all of these land owners, and many of the road users as well, at which they argued over whether the road was public or private, without reaching any conclusions or any agreement.

1980 - Meade County apparently took no definite or official position on the matter of whether the road was

public or private, presumably some of the county personnel thought it was public and some did not. The county proposed however, that a new road should be built within a nearby section line right-of-way, to provide access to the subdivision, but whether or not this road was being proposed as a replacement for the existing road was unclear, and who would bear the cost of building the proposed section line roadway was also unclear. Nevertheless, the county declined to grant any more permits to build homes in the subdivision unless or until the proposed roadway was built.

1981 to 1983 - The proposed road was built in the section line right-of-way, and upon it's completion, all of the users of the old road, including Smith and others residing outside the subdivision, as well as the subdivision lot owners, had viable legal access to their properties by means of the new road, so the former necessity for the old road to remain in use had ceased to exist. Most if not all of the subdivision lot owners apparently abandoned their use of the old road and used only the new section line road, but Smith, whose husband had evidently died at an unspecified time, and some of her neighbors, evidently went on using the old road, presumably because it represented a shorter route to their properties, and the land owners whose properties were crossed by the old road evidently never blocked it, presumably because they were using it themselves. Albrecht eventually became aggravated with the ongoing use of the road by Smith and her neighbors however, and apparently threatened to close the old road, so the Smith group filed an action against Albrecht, Sponheim and the others whose land was traversed by the road, seeking a judicial declaration that the old road was public and must be kept open. Near the end of this period, the Smith group prevailed in this action, as the trial court declared that the old road was public, but the Albrecht group chose to appeal that result.

1985 - The controversy over the legal status of the old road came to the Court for the first time, and the Court reversed the lower court ruling, on the grounds that Meade County had not taken any part in the litigation, therefore it was impossible to conclusively determine the legal status of the old road, since no opportunity had been provided for input from the county, making it necessary for Smith and her group to try again. In accord with this directive announced by the Court in Smith v Albrecht, the Smith group proceeded to file their action once again, this time against Meade County, as well as the same group of servient land owners.

Smith and her fellow users of the old road did not claim that it had ever been formally dedicated or officially accepted in any express terms, they argued instead that the historical evidence constituted sufficient proof of a valid implied dedication of the old road, by the predecessors of all of the parties whose land it traversed, and also proof of acceptance of that dedication by both Meade County and the public in general, so the old road had become public decades earlier, and remained public, despite the construction of the section line road. Sponheim, serving this time as the leader of the same group of land owners who had previously opposed the Smith group, argued that the evidence was insufficient to support either an implied dedication of the old road or any kind of public acceptance of that road, and he maintained that even if the road had become public at some point in the past, it was no longer necessary, since the section line road had effectively replaced it, thus it had been abandoned by the county and was now subject to closure, at the discretion of the owners of the land that it burdened. Meade County did not make any arguments and did not actively contest any of the assertions made by either of the opposing groups, apparently being content to simply accept the outcome of the litigation, whatever the result might be. The trial court once again declared the road to be public, just as it had in 1983, based on the same evidence that had been originally presented, triggering a second appeal by the now twice defeated group of defendants.

Smith was either unusually wise, or very well advised, or both, because her evidentiary material was rock solid, right on target, and completely in line with the many previous holdings of the Court on implied dedication, which left Sponheim and the other defendants in an exceedingly difficult position. Before moving on to the results of the Court's second review of this conflict, some aspects of it's decision upon first reviewing this scenario are worthy of note. As noted above, the Court declined to address the merits of Smith's argument in 1985, not because any evidence was lacking, but because the participation of the county was mandatory, making the county an indispensible party to the action, so Smith's only mistake in filing her first action was failing to recognize that the county had to be given an opportunity to present an argument, either favoring or contesting the argument presented by her own group. This was true, the Court explained, because the road would be under county jurisdiction, if deemed to be public, so the presence of the county as a trial participant was equivalent to participation by the public itself, and since the public could view any road such as the one at issue as either a benefit or a burden, the public had to have an opportunity to take a stand, one way or the other. So Smith and the other road users could not prevail, the Court indicated, by merely bypassing the county, as they had originally done, they were legally required to essentially invite the county to participate, by

implicating the county as a defendant, regardless of whether the county had any desire to participate or not. As it turned out however, quite unfortunately for Sponheim and his group of land owners, Meade County evidently had no desire to play any meaningful part in this legal battle, and made no real effort to either support or attack any of the positions taken by either group. The testimony given by the county personnel who appeared as witnesses tended to strengthen the case being made by Smith's group, by confirming that the county had performed work on the road in question on numerous occasions, so the presence of the county was in no way helpful to Sponheim's group, and in fact it handicapped Sponheim's efforts to minimize the value of the evidence set forth by the Smith group. There was naturally no specific evidence of exactly how the use of the road in question had begun, well over 4 decades earlier, since few if any of the parties involved in this litigation had been present at the time of the road's origin, and such an absence of evidence of either permission or objection to the original use of such a road supports the concept of implied dedication, in the view of the Court, by allowing subsequent acts to illustrate the intent of the original parties. Unlike prescription, dedication requires no passage of any certain amount of time to become binding, being based on intent, rather than upon any statutory time limits, but like prescription, no words at all, either written or spoken, are necessary to signify or validate a dedication, so the acts of the predecessors of the defendants, who had owned their properties during the 1940s and 1950s, were directly in focus, and the Court found their voluntary relocation of their fences, 30 years before, to be crucial evidence. Citing several of the many previous dedication cases that we have reviewed, the Court observed that the evidence presented by Smith was highly persuasive, making the outcome undeniable:

> "In an implied common law dedication, the use of land by the public as a street, with the knowledge of, and without objection by, the owner of the fee for a number of years, is evidence of such dedication ... public use must exist, but ... for a period much shorter than that required to show title by prescription ... intention to dedicate ... may be shown by deed, words, or acts ... Since 1940 the road has been used by residents ... also by hunters, woodcutters, U. S. Forest Service employees, S. D. Department of Game, Fish & Parks employees, as well as business people ... and other members of the general public ... predecessors ... moved their respective roadside fences to allow ... widening and improving the road ... The landowners did not merely acquiesce to this road work, they actively participated by removing their fences ... these findings are sufficient to support ... implied dedication ... appellants predecessors ... demonstrated conduct which clearly expressed the intention to dedicate ... appellants ... manifested their intent to impliedly dedicate their property as a public road ... the Meade County Commission approved and accepted a plat for a new subdivision ... the only public access to the subdivision was via the road ... The conduct of Meade County ... accepted the road on behalf of the public ... the evidence positively and unequivocally manifested the appellants intention ... an implied dedication existed and was accepted."

Although the Court had originally been reluctant to place the burden of accepting an unwanted or unintended public road upon Meade County, once the county had been given the opportunity to directly address the matter as a trial participant, the Court recognized that the county was unable to overcome the overwhelming evidence of both dedication and acceptance of the road at issue as a public thoroughfare, and in fact the acts of the county had provided the critical element of acceptance. The substantial work done on the road in controversy by the county in 1957 had been fully sufficient to mark the county's acceptance of it on behalf of the public, the Court concluded, and the even more comprehensive restoration work done in 1972 reinforced the notion that the county had considered the road to be public throughout the intervening 15 years. Though no further repetition of it's prior acceptance of the road was legally necessary, the county had yet again treated the road as being implicitly public in 1977, by approving the subdivision plat, which provided no other means of public access to the subdivision being proposed at that time, and would presumptively have been rejected by the county for that reason, if the road that was being relied upon to access the new lots had not been acknowledged by the county as being public in character. Plat approval constitutes public acceptance of dedications just as effectively as actual public use, because the public officers and employees charged with performing the plat review are presumed to have done their duty properly, and that duty includes fully upholding the public interest in all respects, by verifying that any relevant public rights are correctly depicted on the plat. The plat review process provides such officials with the opportunity to question and reject anything that runs contrary to the interests of the public, which may appear on any given plat, such as an absence of public access, so their approval can represent an expression or validation of existing public land rights. Even if the county's failure to reject the plat had been a mere oversight, based upon a hasty or careless review of the potential weaknesses and problems embodied in the plat, the owners of the newly created lots were entitled to rely on the promise of public access to their property that had been provided by the plat, so once the county approved it and allowed the development to go forward, the county was in no position to reverse itself by declaring that the road had never been public. There can be little doubt that the

wiser personnel employed by Meade County understood this, and they knew the possible legal ramifications of such a denial for the county, which explains the county's reluctance to support the position taken by Sponheim and the other defendants who were maintaining that the road had always been private. The evidence presented by Smith was quite convincing, easily meeting even the high "unequivocal" standard of proof that had been established as a requirement for implied dedication by the Court in the First Church case of 1942, which we have previously reviewed, leading the Court to fully uphold the lower court ruling that a public road existed in the disputed location, and in fact it had already been in existence for a full 3 decades by the time of the Court's resolution of this prolonged controversy. The lack of necessity for the old road, which had been created by the presence of the new road, was irrelevant, since a typical existing access easement is not terminated by the mere absence of absolute necessity, regardless of whether the route is public or private, making it unnecessary to determine whether the new road had been intended to replace the old road or not, and failing to understand this may have been the greatest error made by the Sponheim group. The major lesson taught by this case is simply that conduct itself can and does create land rights, including easements that are both affirmative and burdensome in nature, with respect to multiple properties, so an absence of documentation relating to any given roadway does not mean that it is not a valid public right-of-way.

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