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Memorandum

To: Mayor and City Council Members
From: Igor Lenzner
Direct Dial: 656-3517
Our File No. : 16642.001
Date: October 27, 2009

The following facts have been explained to us:

In 1997, Duane Willenbring and Diane Willenbring entered into an Agreement with Walter P. Eisenschenk and Diane Eisenschenk titled "Grant of Temporary Easements, Road Maintenance Agreement and Agreement to Plat." A copy of this easement, which was recorded in the office of the Stearns County Recorder as Document No. 838919, is attached to this Memo. This easement is referred to hereafter as the "Recorded Easement." The Recorded Easement created ingress and egress easements, a utility easement, and an easement for a walking path/bicycle trail. In addition, the Recorded Easement anticipated that the property may be platted in the future and created an obligation of the parties to cooperate in the platting of the property and dedication of the easements.

Subsequent to the execution of the Recorded Easement, Willenbrings platted property affected by the Recorded Easement as Countryside Addition 5 and Countryside Addition 6. Both of these plats showed a reference to the location and recording information for the walking/bicycle path easement created by the Recorded Easement; however, neither plat contained additional dedication language concerning the 8 foot walking path/bicycle trail easement.

Since the execution and recording of the Recorded Easement and the finalization of Countryside Addition Plats 5 and 6, a paved path was constructed over the trail easement area. The public has used this path as a public trail for walking and biking purposes since the path's construction, and the developer who constructed the path has expressed his belief that the path was dedicated to the City when the property was developed. For several years, the path has been plowed by the Lions Club, in the same manner as it has plowed other public walks in the City.

The City and the Developer have been under the impression that the path was a public path since the time the property was developed. The City recently began discussions of re-paving the path at which time questions were raised concerning the dedication of the path.

We have been asked to review whether the existing path is a public path. In this review we have considered the above facts, discussions with Denny Kron (the County Surveyor), and electronic copies of the plats and the Recorded Easement. This opinion presumes the accuracy of the information that we have reviewed.

We have been asked to render an opinion as to the status of the walking/bicycle trail easement (“Trail Easement”) described in the Recorded Easement.

It is our opinion that a public easement for the trail has been created by common law dedication and, as such, cannot be blocked or interfered with by adjoining property owners.

Discussion.

Common Law Dedication

It is clear from our review of the applicable documents, the construction of the path on the property, and the public’s use of the path for a period of time in excess of 10 years, that even without the path being dedicated as part of a plat, there is a public easement created by common law dedication.

A common law dedication can occur where a dedication has not been accomplished by plat. A common law dedication requires both an intention of the property owner to dedicate and use and acceptance by the public. With regard to the walking/bicycle path in question, the requirements for a common law dedication have been met.

The language of the Recorded Easement, in both the recitals and in paragraph 6 of the easement grant, demonstrates that the parties intended to dedicate the easement to the public. Further evidence of intent can be found in the fact that the path was constructed when the property was developed, and the developer of the property, who constructed the path, has indicated an intent and belief that the path was dedicated to the public. As to use and acceptance by the public, the City and the public have considered the path public and used the path as a public walk and bike path. In addition, the Lions Club has plowed the path over the years as they have plowed other public walkways within the City.

The intent to dedicate the path to the public as shown by the easement document and the actions of the developer, combined with the public’s use of the path, demonstrates that the path is a common law dedication.

Easement in Effect.

In addition to the common law dedication, the Recorded Easement remains in effect. The Recorded Easement, although referenced as temporary, does not expire until a plat creates a new easement making the temporary easement unnecessary.

In paragraph 5 of the Recorded Easement, Eisenschenks granted a “temporary easement for purpose of a walking path/bicycle trail ... which easement shall be appurtenant to and run with the property owned by Willenbrings ...” Paragraph 6 of the Easement states that the temporary easements for “walking path/bicycle trail purposes shall run with the land and *shall be binding upon the parties hereto and their respective heirs, successors and assigns, including without limitation all subsequent owners of the parcels and all persons claiming under them.*” These two paragraphs and the recording of the document make it clear that during the term of this easement, the easement binds all current and future property owners. The current owners clearly had notice of the path. First, Document 838919 was recorded, which recorded document references the path easement. This document will show up on any abstract or title policy of a lot purchaser. Second, both Countryside Additions 5 and 6 (although not creating a dedication) make reference to the existence of this easement and the recording information as Document No. 838919. Finally, the path was constructed and its physical presence is obvious to a buyer.

As to the term of the easement, the reference to “temporary” is in acknowledgment that it may terminate upon the happening of a certain event, that being if and when “...a walking path/bicycle trail is dedicated to the public for use during the platting process...” Since the platting process did not include a dedicated easement for walking path/bicycle trail purposes, the event which may result in the termination of the easement has not occurred. Absent another document terminating the original temporary easement, it continues to exist.

Existing Owner is Prevented from Objecting to the Easement.

As stated above, the easement binds successors and future owners. Therefore, the obligation to cooperate with the platting and the dedication of the easements runs with the property and binds future owners as it did the original owners. An existing lot owner, being a successor of the grantor, therefore, is legally obligated to cooperate with a plat of the easement if so requested. This obligation puts existing lot owners who object to the public nature of the easement in an unusual predicament. When they purchased their property, they purchased property subject not only to the existence of the path easement, but also an obligation to cooperate in the public dedication of the easement.

Summary

Based upon the above, the purposes and intent evidenced by the Recorded Easement, the construction of the actual path, the statements of the original developer, the belief of the City that the path had been dedicated, and based upon the use and snow removal by the public, the

walking path/bicycle trail has been dedicated to the public by common law. On top of this, the Recorded Easement remains in effect and binds existing lot owners and bars them from arguing against a dedication of the easement since they accepted the obligation to cooperate in that very dedication when they accepted the deed to their property.

Action

Since the path is a public path, the City has the right to treat it as such and remove obstacles or hazards to the public. It may be appropriate, unless such obstacles pose a present danger, to provide notice to adjoining lot owners giving them the opportunity to remove any obstacles prior to the City doing so. If an adjoining landowner seeks to challenge the status of the path as a public path, that owner has the right to initiate court action; however, it is our opinion that such an owner will be wasting his/her money since the clear intention of the parties involved was to dedicate the pathway, which was accepted and used by the public. Furthermore, underlying fee owners are obligated as successors to provide their "full cooperation" in effecting a public dedication of the path.

Although not necessary, the City may also initiate a quiet title action to more formally resolve this matter.

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240-2620

**GRANT OF TEMPORARY EASEMENTS, ROAD MAINTENANCE AGREEMENT
AND AGREEMENT TO PLAT**

This grant of easements, road maintenance agreement and agreement to plat is made this 31st day of January, 1997 by and between Duane Willenbring and Diane Willenbring, husband and wife of Rockville, Minnesota (Willenbrings), and Walter F. Eisenschenk and Diane L. Eisenschenk, husband and wife of Rockville, Minnesota (Eisenschenks).

RECITALS

1. Willenbrings and Eisenschenks own certain real estate described in Exhibit A attached hereto and made a part hereof by reference.
2. Willenbrings desire to allow Eisenschenks to obtain a temporary 66 foot non-exclusive easement for ingress and egress over that part of their property described as follows:

A 66 foot strip of land in Lot 2 of Block 2 of Eisenschenk Addition, Stearns County, Minnesota, said plat being situated in the Northeast Quarter of the Southeast Quarter of Section 17, Township 123, Range 29, the centerline of which is described as follows: Commencing at the southwest corner of said Eisenschenk Addition; thence North 00 degrees 13 minutes 28 seconds West on an assumed bearing along the west line of said Eisenschenk Addition a distance of 165.33 feet to the point of beginning of said centerline; thence North 89 degrees 38 minutes 51 seconds East parallel with the South line of said Eisenschenk Addition a distance of 482.09 feet to the radii of a Cul-de-sac, together with all that part lying within a 60 foot radius of said radii.

3. The parties also desire to establish a maintenance agreement concerning the maintenance and repair of the area contained in the temporary non-exclusive easement for ingress and egress.
4. Eisenschenks desire to allow Willenbrings to obtain a temporary 20 foot easement for utility and drainage purposes over and across that part of their property described as follows:

A 20 foot Utility and Drainage Easement over and across part of said Lot 2 of Block 2 of Eisenschenk Addition and Vacated 141st Avenue as shown in said Eisenschenk Addition, the northerly and northwesterly line of which is described as follows: Beginning at the southeast corner of County Side Addition Plat 4; thence South 89 degrees 38 minutes 51 seconds West on an assumed bearing along the south line of said Plat 4 a distance of 344.12 feet; thence South 22 degrees 57 minutes 17 seconds West a distance of 120.02

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East to the northeasterly right of way line of the Cul-de-sac described in paragraph 2 above and there terminating.

- 5. Eisenschenks also desire to allow Willenbrings to obtain a temporary 8 foot easement for a walking path/bicycle trail over and across that part of their property described as follows:

An 8 foot walking/bicycle trail easement over and across part of said Lot 2 of Block 2 of Eisenschenk Addition and Vacated 141st Avenue, as shown in said Eisenschenk Addition, the northerly and northwesterly line of which is described as follows: Beginning at the southeast corner of County Side Addition Plat 4; thence South 89 degrees 38 minutes 51 seconds West on an assumed bearing along the south line of said Plat 4 a distance of 344.12 feet; thence South 22 degrees 57 minutes 17 seconds West a distance of 120.02 feet to the northeasterly right of way line of the Cul-de-sac described in paragraph 2 above and there terminating.

- 6. Within the next few years, Willenbrings plan to re-plat that portion of Eisenschenk Addition owned by them as Country Side Addition Plat 5. If that happens, the parties hereto would like to see Eisenschenk's property included in the plat of Country Side Addition Plat 5. The easement described above in recital paragraph 2 would then be dedicated to the public and the utility and drainage easement and walking path/bicycle trail easement described in recital paragraphs 4 and 5 respectively would be dedicated to the public for public use as well.

NOW THEREFORE, in consideration of the mutual agreements herein contained, the parties covenant and agree for themselves, and their heirs, successors and assigns, as follows:

- 1. ~~GRANT OF EASEMENT FOR INGRESS AND EGRESS.~~ Willenbrings hereby grant to Eisenschenks a temporary non-exclusive easement for purpose of ingress and egress over the property described in paragraph 2 of the recitals above, which easement shall be appurtenant to and run with the property owned by Eisenschenks described in Exhibit A attached hereto and made a part hereof by reference.

2. MAINTENANCE TERMS FOR EASEMENT FOR INGRESS AND EGRESS. Each party shall maintain the easement area to the extent that they individually deem necessary. The parties agree that each party shall continue to remain individually responsible for such maintenance of the roadway as they desire and shall not undertake any activities to obstruct the roadway except with the agreement of the other parties in writing. In the event any party wishes to make improvements to the easement area, the parties agree to discuss what type of improvements to make and how to share the costs of said improvements. In the event the parties do not agree on sharing the costs of said improvements, each party reserves the right to make improvements to the access easement, but shall not be entitled to seek reimbursement from the other parties. Any party may contract for such regular maintenance of the roadway as such party deems necessary, without requiring the approval of any other parties. As to such maintenance expense, each party shall bear their own costs for any such contracted maintenance. No party may seek reimbursement of any maintenance or improvements from the other parties unless agree to in advance in writing.

3. TERM OF EASEMENT FOR INGRESS AND EGRESS. The temporary easement for ingress and egress and maintenance agreement shall run with the land and shall be binding upon the parties hereto and their respective heirs, successors, and assigns, including without limitation all subsequent owners of the parcels and all persons claiming under them. If Willenbrings plat the property they own in Eisenschenk Addition, Eisenschenks agree to dedicate the easements for ingress and egress herein granted to the public for public use. Eisenschenks hereby acknowledge that this will require them to join in the platting process, which they hereby agree to do, with their full cooperation. In the event the property is platted as planned and the property containing the easements herein granted for ingress and egress is dedicated to the public for public use during the platting process, said easements shall become null and void and of no further force and effect as to such persons as of the date of acceptance of said plat by the proper governing authorities.

4. GRANT OF EASEMENT FOR UTILITY AND DRAINAGE PURPOSES. Eisenschenks hereby grant to Willenbrings a temporary easement for utility and drainage purposes over the property described in paragraph 4 of the recitals above, which easement shall be appurtenant to and run with the property owned by Willenbrings described in Exhibit A attached hereto and made a part hereof by reference.

3
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Page 3 of 7

5. GRANT OF EASEMENT FOR WALKING PATH/BICYCLE TRAIL. Eisenschenks hereby grant to Willenbrings a temporary easement for the purpose of a walking path/bicycle trail over the property described in paragraph 5 of the recitals above, which easement shall be appurtenant to and run with the property owned by Willenbrings described in Exhibit A attached hereto and made a part hereof by reference.

6. TERM OF EASEMENTS FOR UTILITY AND WALKING PATH/BICYCLE TRAIL PURPOSES. The temporary easements for utility and drainage and walking path/bicycle trail purposes shall run with the land and shall be binding upon the parties hereto and their respective heirs, successors, and assigns, including without limitation all subsequent owners of the parcels and all persons claiming under them. If Willenbrings plat the property they own in Eisenschenk Addition as Eisenschenks agree to dedicate the easements for utility purposes and walking path/bicycle trail herein granted to the public for public use. Eisenschenks hereby acknowledge that this will require them to join in the new plat which they hereby agree to do, with their full cooperation. In the event the property is platted as planned and the property containing the easements herein granted for utility and drainage purposes and a walking path/bicycle trail is dedicated to the public for public use during the platting process, said easements shall become null and void and of no further force and effect as to such persons as of the date of acceptance of said plat by the proper governing authorities.

7. ENTIRE AGREEMENT. This agreement represents the entire agreement between the parties hereto. There are no other understandings or agreements between them. Any modification to this agreement must be done in writing, and signed by all parties hereto, or their successors, in interest.

8. GOVERNING LAW. This agreement shall be construed in accordance with and governed by the laws of the State of Minnesota.

IN WITNESS WHEREOF, the parties have signed this agreement as of the above date.

Duane Willenbring
Duane Willenbring

Diane Willenbring
Diane Willenbring

Walter P. Eisenschenk
Walter P. Eisenschenk

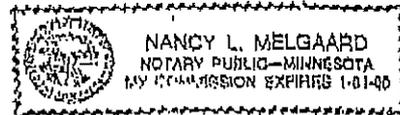
Diane L. Eisenschenk
Diane L. Eisenschenk

STATE OF MINNESOTA)
) SS.
COUNTY OF STEARNS)

The foregoing was acknowledged before me this 31st day of January, 1997, by Duane Willenbring and Diane Willenbring, husband and wife.

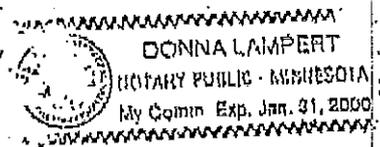
Nancy L. Melgaard
Notary Public

STATE OF MINNESOTA)
) SS.
COUNTY OF STEARNS)



The foregoing was acknowledged before me this 31st day of January, 1997, by Walter P. Eisenschenk and Diane Eisenschenk, husband and wife.

Donna Lampert
Notary Public



THIS INSTRUMENT DRAFTED BY:
Willenbring, Dahl,
Wocken & Zimmermann
Nancy L. Melgaard (230479)
Red River at Main - Box 417
Cold Spring, MN 56320
(320) 685-3678
File No. 2389-003

EXHIBIT A

Real property owned by Duane and Diane Willenbring:

Lots One (1) and Two (2), in Block One (1), EISENSCHENK ADDITION, according to the plat and survey thereof on file and of record in the office of the County Recorder in and for Stearns County, Minnesota. Also: Lot Two (2) in Block Two (2), Eisenschenk Addition, and that part of 232nd Street in said Eisenschenk Addition adjacent thereto, LESS AND EXCEPT all that part of Lot 2 of Block 2 Eisenschenk Addition, City of Rockville, Stearns County, Minnesota, and part of 232nd Street as shown in said Eisenschenk Addition described as follows: Commencing at the southwest corner of Lot 2, of Block 1, of said Eisenschenk Addition; thence South 89 degrees 16 minutes 41 seconds West on an assumed bearing along the south line of said Eisenschenk Addition for 206.00 feet to the point of beginning of the tract to be described; thence continue South 89 degrees 16 minutes 41 seconds West for 155.50 feet; thence North 17 degrees 45 minutes 42 seconds West for 119.77 feet; thence North 29 degrees 41 minutes 38 seconds West for 60.00 feet to the radii of a Cul-de-sac; thence North 24 degrees 01 minutes 45 seconds East for 180.02 feet, thence North 89 degrees 16 minutes 41 seconds East parallel with said south line for 155.50 feet to its intersection with a line which is 140.00 feet west and parallel with the west line of 141st Avenue as shown in said Eisenschenk Addition; thence South 00 degrees 13 minutes 22 seconds East along said parallel line for 330.67 feet to the point of beginning. LESS AND EXCEPT that part thereof lying within 60.00 feet of the above mentioned radii.

Real property owned by Walter P. Eisenschenk and Diane L. Eisenschenk:

That part of Lots One (1) and Two (2) in Block Two (2) of Eisenschenk Addition, Rockville Township, Stearns County, Minnesota, according to the plat and survey thereof on file and of record in the Office of the County Recorder, in and for Stearns County, Minnesota, described as follows, to-wit: Commencing at the southwest corner of said Lot 2 in Block 1 of said Eisenschenk Addition; thence South 89 degrees 16 minutes 41 seconds West on an assumed bearing along the south line of said Eisenschenk Addition for 206.00 feet to the point of beginning of the tract to be described; thence continue South 89 degrees 16 minutes 41 seconds West for 155.50 feet; thence North 17 degrees 45 minutes 42 seconds West for 119.77 feet; thence North 29 degrees 41 minutes 38 seconds West for 60.00 feet to the radii of a Cul-de-sac; thence North 24 degrees 01 minutes 45 seconds East for 180.02 feet, thence North 89

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Page 12 of 17

EXHIBIT A CONTINUED

degrees 16 minutes 41 seconds East parallel with said south line for 155.50 feet to its intersection with a line which is 140.00 feet west and parallel with the west line of 141st Avenue as shown in said Eisenschenk Addition; thence South 00 degrees 13 minutes 22 seconds East along said parallel line for 330.67 feet to the point of beginning. LESS AND EXCEPT that part thereof lying within 60.00 feet of the above mentioned radii.

ALSO LESS AND EXCEPT all that part of Lot Two (2) in Block Two (2) of Eisenschenk Addition, City of Rockville, Stearns County, Minnesota, and that part of 232nd Street as shown in Eisenschenk Addition according to the plat and survey thereof on file and of record in the Office of the County Recorder, in and for Stearns County, Minnesota, described as follows, to-wit: Commencing at the Southwest corner of Lot 2 of Block 1 of Eisenschenk Addition; thence South 89 degrees 16 minutes 41 seconds West on an assumed bearing along the South line of said Eisenschenk Addition for 206.00 feet to the point of beginning of the tract to be described; thence continue South 89 degrees 16 minutes 41 seconds West along said South line for 155.50 feet; thence North 17 degrees 45 minutes 42 seconds West for 119.77 feet; thence North 29 degrees 41 minutes 38 seconds West for 60.00 feet to the radii of a Cul-de-sac as shown in the proposed plat of Willenbring Addition; thence South 78 degrees 53 minutes 03 seconds East for 60.00 feet; thence South 50 degrees 21 minutes 29 seconds East for 48.34 feet; thence North 89 degrees 16 minutes, 41 seconds East parallel with said South line for 139.35 feet; thence South 00 degrees 13 minutes 22 seconds East parallel with the West line of 141st Avenue as shown in said Eisenschenk Addition for 121.72 feet to the point of beginning. Less and Except that part thereof lying within 60.00 feet of the above mentioned radii.

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COUNTY RECORDER
 STEARNS CO. MN
 PATRICIA H. OVERMAN
 BY *D. Ahlert* DEPUTY

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Page 7 of 7

