

Filed in District Court
State of Minnesota
September 7, 2022

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HUBBARD

NINTH JUDICIAL DISTRICT

Tara Houska, Winona LaDuke, AhnaCole
Chapman, Akiing Land Company, LLC, and
Switchboard Trainers Network,

Court File 29-CV-21-1226

Plaintiffs,

vs.

**SUMMARY JUDGMENT
ORDER and
MEMORANDUM**

County of Hubbard, Corwyn Aukes, in his
official capacity; Mark Lohmeier, in his
official capacity,

Defendants.

The above-entitled matter came before the undersigned Judge of District Court on June 15, 2022, for hearing on motions of both parties. This order addresses the parties' cross motions for summary judgment: Defendant's motion for summary judgment, filed May 18, 2022 and Plaintiffs' renewed motion for summary judgment, filed May 19, 2022.

Plaintiffs are represented by Jason Steck, Marco Simons, and Amanda Eubanks, attorneys at law. Defendants are represented by Jay Squires, Elizabeth Vieira, and Marcus Jardine, attorneys at law.

Based upon the record, this Court makes the following:

RELEVANT UNDISPUTED FACTS

1. In the spring of 2018, Plaintiff, Winona LaDuke, was seeking to acquire a parcel of property located at 14814 Big Buck Drive in Hubbard County (hereinafter "the property"). The property is listed in Hubbard County records as Parcel 25.26.01600.

2. The property is accurately depicted in an aerial photograph attached as exhibit 2 to the Declaration of Mark Lohmeier, filed August 24, 2021. The property is bisected by a river that runs from the north to the south of the property. (Lohmeier Decl. Ex 2). There are structures on the eastern side of the property. (Id). The property has historically been accessed via a driveway, approximately 170 feet of which crosses the parcel directly to the south, Hubbard County Parcel 25.35.01.070, which is tax-forfeited land managed by Hubbard County. (Id. at ¶4).
3. The driveway is the only means of accessing the property. (Id. Exs. 9, 15).
4. In anticipation of acquiring the property, Ms. LaDuke sought an easement from Hubbard County to access the property across the tax-forfeited parcel. (Id. at ¶8).
5. On May 15, 2018, Hubbard County passed Resolution No. 05151806, granting Ms. LaDuke an easement. (Id. Ex.9). The resolution reads, in full, as follows:

Resolution No. 05151806

WHEREAS, Winona LaDuke has applied to the County of Hubbard for an easement across unsold tax forfeited land to provide access, ingress and egress, and utility purposes to the following property owned by the applicant:

The East one-half of the Southeast Quarter, Section 26, Township 139 North, Range 35 West of the 5th Principal Meridian, Hubbard County, Minnesota. Subject to any and all easements, restrictions, and reservations of record.

WHEREAS, the requested easement is described as follows:

A 33.00 foot wide easement for ingress, egress, and utility purposes, over, under, and across that part of the Northeast Quarter of the Northeast Quarter, Section 35, Township 139 North, Range 35 West, Hubbard County, Minnesota. The center line of said 33.00 foot wide easement is described as follows: Commencing at the Northeast corner of said Section 35; thence South 89 degrees 08 minutes 33 seconds West along the north line of said Northeast Quarter a distance of 262.18 feet to the POINT OF BEGINNING of the centerline to be described; thence South 30 degrees 32 minutes 51 seconds East, a distance of 118.07 feet; thence southeasterly 51.02 feet, along a tangential curve concave to the southwest, having a radius of 300.00 feet, and a central angle of 09 degrees 44

minutes 37 seconds to the northwesterly right of way of Straight River Township 23 (also known as Big Buck Drive), and said described centerline there terminating. The sidelines of said 33.00 foot wide easement shall be prolonged or shortened to terminate on the North line of said Northeast Quarter as the northerly termination and on said northwesterly right of way as the southern termination.

Said easement contains 0.13 acres more or less.

Whereas, there are no reasonable alternatives to obtain access to the applicants property; and

Whereas, the proposed easement will not cause significant adverse environmental or natural resource management impact; and

Whereas, the appraised value of the easement is as follows: \$192.00

Now, THEREFORE, BE IT RESOLVED, by the County of Hubbard:

1. An easement shall be issued to the applicant upon payment to the County Auditor for the appraised value.
2. The easement shall be non-exclusive.
3. Timber rights are retained by Hubbard County and any timber removed will be charged for at the current rate.
4. The easement shall provide that it will revert to the State of Minnesota in trust for the taxing district in the event of non-use.

Commissioner Smith seconded the motion for the adoption of the Resolution and it was declared adopted upon the following vote:

Ayes: 4 Nays: 1

Commissioners Smith, Massie, Stacey and Christenson in favor, Commissioner Johannsen opposed.

6. On May 22, 2018, Hubbard County issued an easement granting access, ingress and egress between the property and Big Buck Drive. (Lohmeier Decl. Ex 9). The easement includes provisions that were not in the resolution passed by the County Board; those provisions are highlighted below. The easement reads in full as follows:

For valuable consideration, the County of Hubbard, a municipal corporation, grantor, hereby conveys and quitclaims to Winona LaDuke, Grantee/s, and Grantee's heirs and assigns, a non-exclusive easement for access, ingress and egress to the following described property in Hubbard County, Minnesota:

The East one-half of the Southeast Quarter, Section 26, Township 139 North, Range 35 West of the 5th Principal Meridian, Hubbard County, Minnesota. Subject to any and all easements, restrictions, and reservations of record.

The easement is described as follows:

A 33.00 foot wide easement for ingress, egress, and utility purposes, over, under, and across that part of the Northeast Quarter of the Northeast Quarter, Section 35, Township 139 North, Range 35 West, Hubbard County, Minnesota. The centerline of said 33.00 foot wide easement is described as follows: Commencing at the Northeast corner of Section 35; thence South 89 degrees 08 minutes 33 seconds West along the north line of said Northeast Quarter a distance of 262.18 feet to the POINT OF BEGINNING of the centerline to be described; thence South 30 degrees 32 minutes 51 seconds East, a distance of 118.07 feet; thence southeasterly 51.02 feet, along a tangential curve concave to the southwest, having a radius of 300.00 feet, and a central angle of 09 degrees 44 minutes 37 seconds to the northwesterly right of way of Straight River Township 23 (also known as Big Buck Drive), and said described centerline there terminating. The sidelines of said 33.00 foot wide easement shall be prolonged or shortened to terminate on the North line of said Northeast Quarter as the northerly termination and on said northwesterly right of way as the southern termination.

Said easement contains 0.13 acres more or less.

Construction and maintenance of a road on the easement shall be the sole responsibility of the grantee. The easement will revert to the state in trust in the event of non-use. Timber rights are retained by the County and any timber removal will be charged for at current rates.

This easement is conveyed to the owner of the above-described parcel as identified in the Hubbard County tax records on the day the easement is conveyed. Any transference of this easement will require County Board approval.

This easement is germane only to the above-described parcel. Any land, through subdivision or addition to the property to which the easement was originally granted, being added or subtracted, is/are not granted the rights of the easement without first requesting an easement amendment from Hubbard County.

7. The easement, per the above legal description, is 33 feet wide and 169.09 feet long.
8. The easement was granted in accordance with Hubbard County's Policy for Easement on Tax Forfeited Land, which reads as follows (Lohmeier Decl. Ex 3):

Private Easements

The County Board may convey a road easement across unsold tax forfeited land to an individual requesting an easement for access to private property owned by the individual. Such easements may be conveyed by the County Auditor, but only if the County Board has delegated its authority to the Auditor.

The County Board may grant such easements if:

1. There are no reasonable alternatives to obtain access to the individual's property; and
2. The easement will not cause significant adverse environmental or natural resource management impacts.

An individual applying for such an easement must pay the appraised value of the easement to the County Auditor. The appraised value is determined by the County Board.

Requests for easements will not be considered for private parcels that are being considered for a plat.

Easements are issued to the landowner for the parcel(s) as described within the easement. Easements may be transferred with approval from the County Board.

The easement is germane only to the parcel as described in the easement. Any land, through subdivision or addition to the property to which the easement was originally granted, being added or subtracted, is/are not granted the rights of the easement without first requesting an easement amendment from the County.

The landowner requesting the easement is responsible for any costs involved in establishing an appraised value.

The conveyance granting the road easement must provide that the easement reverts to the state in trust for the taxing districts in the event of non-use. The County Board determines what constitutes "non-use" since there is no statutory definition for the term.

Private easements are considered "non-exclusive" and the County retains the right to grant additional easements and/or to allow the general public to use the easement right-of-way.

Timber rights are retained by the County and any timber removed by the easement holder as part of construction or maintenance will be charged at current stumpage rates.

The conveyance granting the road easement will be for thirty-three feet (33') in width and may require a legal description that begins at a public roadway (state, county, CSAH, township, or municipal road) and covers the entire length of the roadway over all tax forfeited lands crossed. The legal description must be of sufficient detail to accurately locate the easement centerline.

All easements must utilize existing roads and trails as much as possible, even if this is not the most direct route possible. The route for any new road construction must be approved by the Natural Resource Management office prior to construction. Road construction and maintenance shall be done to a standard acceptable to the Natural Resource Management office.

Taxes on any and all property in Hubbard County, owned by the requesting party, must be paid in full prior to consideration of an easement request.

9. In granting the easement, the Hubbard County Board found “there are no reasonable alternatives to obtain access to the applicants[‘] property” and “the proposed easement will not cause significant adverse environmental or natural resource management impact.” (Lohmeier Decl. Ex. 9).
10. Ms. LaDuke paid the appraised value of the easement, which was \$192.00. (Id. ¶18). The appraised value of the easement was based upon the approximate value of the land. (Lohmeier Depo. P. 79). The method of calculating the value of Ms. LaDuke’s easement is the same as used for perpetual easements. (Id. at 81-82).
11. On May 30, 2018, Ms. LaDuke recorded the easement.
12. The First Amended Complaint, at paragraph 14, includes an aerial photograph that accurately shows the location of the easement using two dashed green lines. As accurately depicted in the photograph, the easement connects the property to Big Buck Drive.
13. In a letter dated November 1, 2018, Ms. LaDuke requested a transfer of the easement to Akiing Land Company, LLC, (hereinafter “Akiing”) explaining that the parcel was erroneously placed in her name by the title company. (Lohmeier Decl. Ex 12). Ms. LaDuke is a Board Member of Akiing.

14. On November 20, 2018, the Hubbard County Board unanimously approved the transfer of the easement to Akiing Land Company. (Id. at Ex. 15). The language of the easement is identical to the previously issued easement, but with “Akiing Land Company, LLC” substituted for “Winona LaDuke.”
15. In granting the easement, the Hubbard County Board again found “there are no reasonable alternatives to obtain access to the applicants property” and “the proposed easement will not cause significant adverse environmental or natural resource management impact.” (Id. at Ex.15).
16. There was no charge for the transfer of the easement as Ms. LaDuke had already paid the full value of the easement. (Lohmeier Depo. P. 93-94).
17. The easement granted to Akiing was not recorded. (Lohmeier Decl. ¶23).
18. On November 20, 2020, Akiing transferred ownership of the property via quit claim deed to Switchboard Trainers Network (hereinafter “Switchboard”). (Id. at Ex 17).
19. Tara Houska was Ms. LaDuke’s designee with respect to the property. (LaDuke Depo. P. 42).
20. There was no request made to Hubbard County to transfer the easement from Akiing to Switchboard. (Lohmeier Decl. ¶27).
21. Ms. LaDuke and her invitees have used motor vehicles to access the property across the tax-forfeited land since 2018. (First Amended Complaint, ¶40).
22. On March 9 and March 29, 2021, Defendant Hubbard County Sheriff Corwyn Aukes personally observed and photographed ruts on the easement. (Aukes Decl. ¶4, Exs 20, 21).

23. On the morning of June 28, 2021, Hubbard County Sheriff Corwyn Aukes served Ms. Houska the following notice (Amd. Comp. Ex A; Aukes Decl. Ex. 22):

NOTICE

This serves as notice that due to no easement for the current landowner of parcel number 25.26.01600, the trail will be closed to vehicular traffic. This Hubbard County owned trail between Big Buck Dr and the gate at blue number 14814 Big Buck Dr is not open to vehicular traffic per Hubbard County's Land Use Ordinance. The trail will be barricaded beginning on June 28, 2021 at 10:00am. Vehicles will not be allowed to enter for any reason after this time. Vehicles driving on this Hubbard County owned trail are in violation of the Hubbard County Land Use Ordinance and enforcement action will be taken by the Hubbard County Sheriff's Office.

24. The notice was signed by Defendants Aukes and Lohmeier. (Id).
25. On June 28, 2021, a significant number of law enforcement officers appeared on the easement and created a blockade that prevented people from entering or leaving the property. (Amd. Compl. ¶ 49-51; Aukes Decl. ¶ 9). The parties dispute the duration of the blockade. (Id).
26. Beginning on June 28, 2021, law enforcement officers began issuing citations to persons attempting to drive motor vehicles on the roadway. (Aukes Decl. ¶ 8). The citations charged the persons with violating Hubbard County Ordinance # 36. As provided by Hubbard County, through exhibit # 18 of Lohmeier declaration filed August 26, 2021, the full text of Ordinance # 36 is as follows:

Hubbard County Ordinance #36

**An Ordinance regulating the use of off highway vehicles on
County Administered Tax-Forfeited Lands.**

Purpose

An ordinance is to regulate the use of off highway vehicles on county administered lands in order to protect the long term sustainability of these lands and provide management strategies that are consistent with those strategies adopted by the Minnesota Department of Natural Resources to minimize confusion on the part of the users of public lands.

Definitions

Unless specifically defined below, words or phrases used in this Ordinance shall be interpreted so as to give them the same meaning as they have in common usage and so as to give the Ordinance its most reasonable application. For the purpose of this Ordinance, the words "must" and "shall" are mandatory; the word "may" and "should" is permissive. Words used in the present tense shall include the future, and words used in the singular number shall include the plural number as well.

ATV - "All-terrain vehicle" means a motorized flotation-tired vehicle of not less than three low pressure but not more than six tires, that is limited in engine displacement to less than 800 cubic centimeters.

County Administered Tax Forfeited Lands: State owned lands held in trust for the taxing districts which are administered by the County

Designated trails. – Trails that are indicated on maps, and/or signed for specific uses.

DNR: Minnesota Department of Natural Resources

Forest Road: are not public roads like federal, state, county or local highways. Forest roads are typically open to use by both highway –licensed and off highway vehicles but are subject to closure to some or all types of vehicles at various times for safety or resource management reasons. Forest roads are classified as system or minimum maintenance depending on the frequency of use and intended maintenance standards

Highway Licensed vehicles: Any motor vehicle current and duly licensed for public highway/road travel.

Limited Forest – means motorized vehicles may operate only on forest roads and trails that are posted or designated as open.

Minimum Maintenance road – forest roads that are used for forest management access on an intermittent basis. These roads normally are not through roads and may be gated and opened only during certain times of the year. These roads are typically not maintained to the level where low clearance highway vehicle can routinely travel on them and will be signed for specific uses.

Motor Vehicle – Any self-propelled vehicle including, but not limited to , automobiles, trucks, dune buggies, minibikes, motorcycles, trail bikes, and all terrain vehicles (ATVs), but not including snowmobiles.

Non-designated trails – trails that are not designated and signed for a specific use and are therefore generally closed to motorized use in a limited forest.

Non Motorized trail: Trails that are designated and/or signed for recreational use including but not limited to walking, hiking, ski, horse and bicycling.

OHM - “Off-highway motorcycle” means a motorized, off-highway vehicle traveling on two wheels and having a seat or saddle designed to be straddled by the operator and handlebars for steering control, including a vehicle that is registered under chapter 168 for highway use if it is also used for off-highway operation on trails or unimproved terrain.

OHV – Off Highway vehicle - a generic term used to refer to all terrain vehicles (ATV), off-Highway motorcycles (OHM), and off road vehicles (ORV).

ORV - “Off-road vehicle” means a motor-driven recreational vehicle capable of cross-county travel on natural terrain without benefit of a road or trail. Off-road vehicle does not include a snowmobile; an all-terrain vehicle; a motorcycle; a watercraft; a farm vehicle being used for farming; a vehicle used for military , fire, emergency, or law enforcement purposes; a construction or logging vehicle used in the performance of its common function; a motor vehicle owned by or operated under contract with a utility, whether publicly or privately owned, when used for work on utilities; a commercial vehicle being used for its intended purpose; snow-grooming equipment when used for its intended purpose; or an aircraft.

System Forest Road – are more frequently used and will typically be designed and maintained to a higher standard graveled with class five material that allows use by most highway – licensed vehicles

General Provisions and Responsibility :

The County Administered Tax-Forfeited Lands have been classified as limited which means a person may operate a motor vehicle only on forest roads and trails designated and or posted open. This ordinance does not apply to motor vehicles used to carry out silvicultural activities, including timber cruising, harvest and transport of forest products for commercial purposes.

Section I It is unlawful to construct unauthorized permanent trails on County Administered Tax-Forfeited Lands.

Section II OHV operation requirements on Forest Land

(a) It is unlawful to use off highway vehicles for cross country travel off designated roads and trails except during big game and trapping seasons as provided in Mn Statute 84.926 subd. 2 & 4. The designated roads and trails are those included in the Forest Road and Trail Designation Plan for DNR and County Administered forest land in Hubbard County adopted on March 17, 2006, with modifications as warranted. The roads & trails are signed for specific uses.

- (b) No person shall operate a motor vehicle on forest lands on or over the beds of lakes, rivers, or streams when ice is not covering the water body, except on a bridge culvert, or similar structure or designated low water crossing.
- (c) No person shall operate a motor vehicle or snowmobile on forest lands on a designated nonmotorized trail, including ski, foot, horse, or bike trail, unless the trail is also posted open for a motorized use.
- (d) No person shall operate nor shall an owner permit the operation of a motor vehicle or snowmobile on forest lands in such a manner that causes damage, erosion or rutting or injures, damages roads and land, or destroys trees, growing crops or other natural resources.
- (e) No person shall operate motor vehicles or snowmobiles on forest lands within the boundaries of an area that is posted and designated as closed to the operation of motor vehicles or snowmobiles.
- (f) No person, passenger, or operator of a motor vehicle shall travel on or along a forest road that is designated as closed with signs, barricaded, or blocked with a gate.
- (g) A motor vehicle on a forest road shall travel at a speed that is reasonable and prudent. All posted parking and traffic signs and regulations, including but not limited to speed, stop, traffic flow –one way and do not enter shall be obeyed at all times on all forest roads and trails.

Responsibility: The Hubbard County Sheriff or his duly Authorized Representative shall have the right and duty to administer this ordinance. The Sheriff shall have the necessary authority to implement and carry out the provisions of this ordinance.

Variance: Variances to this ordinance may be requested and considered by the County Board of Commissioners for special circumstances.

Enforcement: In the event of violation of this Ordinance the County Board of Commissioners or their designees, in addition to other remedies, may take appropriate actions or proceedings to prevent, restrain, correct or abate such violations and it shall be the duty of the Hubbard County Attorney to institute such action. Whoever is guilty of violating this ordinance or any provisions of this ordinance is guilty of committing a misdemeanor.

Effective Date: This Ordinance shall be in full force and effect from and after its approval, passage, and publication as provided by law.

THIS ORDINANCE ORDAINED AND ENACTED by the Board of County Commissioners of the County of Hubbard, State of Minnesota, on this 21st day of March, 2007.

27. Plaintiffs commenced this action on July 16, 2021 with the filing of a Complaint and an *Ex Parte* motion for a temporary restraining order without a hearing.

28. This Court declined to issue *ex parte* relief and directed that Defendants be notified.
29. On July 22, 2021, Defendants were each personally served with the summons, Complaint and motion for a temporary restraining order.
30. On July 22, 2021, the Court held a hearing on the motion for the temporary restraining order.
31. On July 23, 2021, the Court issued a temporary restraining order enjoining Defendants from (1) barricading, obstructing, or otherwise interfering with access to the property located at 14814 Big Buck Drive, Menahga, Minnesota, including vehicular use of the driveway, except at the specific request of the property owner or its authorized tenants or invitees; (2) stopping vehicles or persons and/or issuing citations and/or arresting or threatening to arrest any person for any violations premised on the person's presence on the driveway or driving a motorized vehicle upon the driveway during the pendency of this action, except at the specific request of the property owner or its authorized tenants or invitees. The order specifically stated that it did not restrict the ability of law enforcement to interfere with access to the property or stop vehicles or persons on the driveway or easement, pursuant to a valid warrant or for criminal conduct and it informed Defendants that they could obtain a date and time for a hearing to show cause why the order should be rescinded or modified.
32. On August 19, 2021, Plaintiffs filed a motion for a temporary injunction.
33. On September 9, 2021, a hearing was held on the motion for a temporary injunction. At that hearing the Court also granted Plaintiffs' motion to file an amended complaint.
34. On September 24, 2021, Plaintiffs filed their First Amended Complaint. The complaint seeks declaratory and injunctive relief in connection with the easement and for the

citations issued to persons in connection with the use of the easement. It does not seek any money damages.

35. On September 24, 2021, Plaintiffs also filed a motion for summary judgment. The hearing on Plaintiffs' summary judgment motion was held on October 21, 2021.

36. On December 3, 2021, this Court issued an order granting Plaintiffs' motion for a temporary restraining order but denying Plaintiffs' motion for summary judgment.

37. On May 18, 2022 Defendants filed their present motion for summary judgment.

38. On May 19, 2022 Plaintiffs filed their present motion for summary judgment.

Based upon the foregoing Relevant Undisputed Facts, this Court makes the following:

ORDER

1. Plaintiffs' request for declaratory relief finding an appurtenant easement exists across the County Parcel serving the property is **GRANTED**. The easement entered into between the parties is an appurtenant easement as a matter of law and therefore runs with the land.
2. Plaintiffs' request for declaratory relief that the Sheriff's notice prohibiting motor vehicle traffic on the easement is null and void is **GRANTED**. Any posted notice shall be removed. Defendants are barred from preventing ingress and egress over the easement based upon any claim or theory that the easement is a trail and not an appurtenant easement.
3. Plaintiffs' request for declaratory relief as to the citations issued for driving on the easement are **GRANTED** as to plaintiffs and **DENIED** as to all other individuals as this Court does not have jurisdiction over those matters.
4. Any injunctive relief sought by Plaintiffs that is not directly addressed herein is **DENIED**.

- 5. Plaintiffs' request for attorney fees is **DENIED**.
- 6. Plaintiffs are entitled to recover their reasonable costs.
- 7. The attached Memorandum is a part of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

**Filed in District Court
State of Minnesota**

Digitally signed by Austad, Jana
 Jana
 Date: 2022.09.07 15:09:27
 -05'00'

Jana M. Austad
 Judge of District Court

Sep 13 2022 8:43 AM

The foregoing Order of the Court
constitutes Judgment of the Court.

Carissa Scholz,
Court Administrator



Sep 13 2022 8:42 AM

Sep 13 2022 8:42 AM

MEMORANDUM

Nature of the Easement

The primary issue before the court is the nature of the easement Hubbard County granted to Ms. LaDuke and Akiing for the property at 14814 Big Buck Drive.

There is no dispute that both parties intended to create an easement. The dispute is over the nature of the easement. Plaintiff LaDuke's asserted intent was that the easement would be appurtenant. Defendant Hubbard County's asserted intent was that the easement would be in gross.

In their respective memoranda in support of their motions for summary judgment and at the pre-trial conference on August 22, 2022, the parties have agreed that there are sufficient undisputed material facts to determine the nature of the easement to access the property at 14814 Big Buck Drive.

The law recognizes two types of easements, appurtenant and in gross. *Lidgerding v. Zignego*, 77 Minn. 421, 424-25, 80 N.W. 360, 361 (1899); *Tiffany Real Property* §758. The law for determining whether an easement is appurtenant or in gross has a long and stable history in Minnesota:

An easement in gross will never be presumed when it can be fairly construed to be appurtenant to some other estate. A right of way is appurtenant to the land of the grantee if so in fact, although not declared to be so in the deed. Whether such an easement is in gross or appurtenant to some other estate may be determined by the relation of the easement to such estate, and in the light of all the circumstances under which it was granted. The facts that such an easement was intended for the benefit of the grantee's land, and to be used in connection with its occupancy, and has been so used, and is useless for any other purpose, will overcome any presumption that it was intended to be in gross that might otherwise arise from the absence of the words 'heirs and assigns.'

Lidgerding, 77 Minn. at 421, 80 N.W. at 360. *Lidgerding* goes on to state:

It is very clear, under all the authorities, that the right of way granted constituted an 'easement.' We do not deem it necessary to discuss the question. We are also of opinion

that it was not an easement in gross,-that is, personal to Youngers,-but an easement appurtenant to the land then owned and occupied by Youngers as a farm. Though an easement, such as a right of way, may be created by a grant in gross, this is never to be presumed, when it can be fairly construed to be appurtenant to some other estate

77 Minn. at 424-25, 80 N.W. at 361 (citation omitted). In holding that an easement is appurtenant if it was granted for the benefit of the land, *Lidgerding* stated “If the way leads to the grantee’s land, and is useless except for use in connection with it, and after the grant was used solely for access to such land, it is appurtenant to it.” *Id.*

The easement in this case leads to the grantees land as demonstrated by every photographic exhibit depicting the property and the tax-forfeited parcel immediately to the south. (First Amended Complaint ¶14; Lohmeier Decl. Ex. 2). The disputed easement is useless except for use in connection with the land. It is a 170’ long, 33’ wide easement which provides the sole means of access between the property and Big Buck Drive and is, as described, a roadway. The easement has no value to Ms. LaDuke, Akiing, or Switchboard other than as a means of access to and from the property. After the easement was granted, it was used solely for access to the property.

The easement required that Ms. LaDuke “pay the appraised value of the easement to the County Auditor.” Ms. LaDuke then paid the full value of the easement. Hubbard County requires persons seeking private easements to *pay for the property* in order to obtain a road easement to their property. The easement language states the easement goes to the grantee, heirs and assigns. The benefitted property pays the taxes for the land. This all shows the easement benefits the land and is appurtenant. *See Alvin v. Johnson*, 63 N.W.2d 22, 25 (Minn. 1954) (discussing that where easement is appurtenant the dominant estate pays property tax on value of easement).

Lidgerding has not been overturned. This easement was created to benefit the land as it provided the sole means of access to the property, something the Hubbard County Board twice found to be the case (Lohmeier Decl. Exs. 9, 15). The easement was issued solely in connection with the occupancy of the land and is useless except in connection with the land. The easement in this case is by definition an appurtenant easement.

This Court recognizes Defendants' argument that the express provision in the easement requiring Board approval for any transfer, if given effect, makes the easement an easement in gross. However, *Lidgerding* answers the question of what affect such a provision has on the determination of the nature of an easement-- the "ground of inference [in favor of an in gross easement] would be overcome if the nature of the right and its apparent use were such as to indicate that it related wholly to the convenience or occupation of real estate." 77 Minn. at 425, 80 N.W. at 361. In this case, the nature of the easement right and the use of the easement relate wholly to the convenience and occupation of the property. Accordingly, any inference that the easement may have been in gross is overcome by the nature of the right and its apparent use.

Scope of the Easement

The determination that the easement is appurtenant does not prevent Hubbard County from protecting its interests as expressed in the language of the easement. The scope of an express easement depends entirely upon the construction of the terms of the easement. *Lindberg v. Fasching*, 6767 N.W.2d 481, 487 (Minn.App. 2003). A grantee of an easement may make "reasonable use" of the easement. See *Minneapolis Athletic Club v. Cohler*, 17 N.W.2d 786, 790 (Minn. 1970); *Giles v. Luker*, 9 N.W.2d 716, 718 (Minn. 1943) (easement holder is limited to reasonable uses of an easement, even under an unrestricted grant of easement). The easement

holder must exercise her rights “reasonably, without doing unnecessary injury to the [County’s] property” *Giles*, 9 N.W.2d at 718.

Hubbard County has enacted a policy governing private easements over tax-forfeited land. (Lohmeier Decl. Ex. 3). It is clear from this policy and the incorporation of the policy language into the easement, that Hubbard County is concerned about the effects of increased traffic on tax-forfeited land and wants to have control over the volume of traffic using easements on tax-forfeited land. This is a legitimate governmental purpose and concern and is one that can be addressed through enforcement of the scope of an easement.

Due Process Claim

Both parties expended significant effort arguing whether Plaintiffs’ First Amended Complaint asserts a due process claim.

In Minnesota, pleadings must provide sufficient notice of all claims, including “a statement of the claim showing the pleader is entitled to relief and a demand for judgment for the relief sought.” Minn.R.Civ.P. 8.01. “The primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based.” *Goeb v. Tharaldson*, 615 N.W.2d 800, 818 (Minn. 2000) (quotation omitted). In *Rios v. Jennie-O Turkey Store, Inc.* 793 N.W.2d 309, 312 (Minn.App. 2011), the court held “limited references [to a potential claim], particularly in light of the otherwise explicit nature of the counts pleaded in the complaint, were not sufficient.” Boilerplate assertions are not sufficient to allege a due process claim. See e.g., *State ex. rel. Hatch v. Allina Health System*, 679 N.W.2d 400, 406 (Minn. App. 2004).

Plaintiffs were on notice early in this matter that Defendants were disputing the existence of a due process claim. Despite this concern, Plaintiffs did not in their First Amended Complaint

clarify whether they were asserting a due process claim and specifically did not plead any relief relating to a due process claim. While the allegations in the First Amended Complaint allege facts that relate to due process, Plaintiffs clearly and explicitly asserted three counts, seeking only declaratory and injunctive relief.

Because the First Amended Complaint did not provide Defendants with fair notice of a due process claim and because all of the relief sought by Plaintiffs is resolved without reference to the alleged due process claim, the Court finds that Plaintiffs did not adequately plead a due process claim.

Other Relief, Including Relief for Non-Parties

Defendants argue that the Court cannot grant relief to non-parties. Plaintiffs argue the Court can grant appropriate relief to non-parties.

Law enforcement strategies and charging decisions do not generally fall under the jurisdiction of this Court. Any person who received a citation for a violation of Hubbard County Ordinance 36 for driving on the easement should, after the appellate process in this case is complete, pursue relief in Hubbard County District Court, if necessary.

This Court also declines to grant Plaintiffs' prayer for relief asking that the court permanently enjoin Defendants by directing they expunge and destroy all copies of identity and other information seized in connection with the seizure and citations of persons coming to and from the property and barring Defendants from sharing any personally identifying information obtained as a result of Defendant's activities with Enbridge or others. The court has no basis to grant this relief.

A party is only authorized to recover attorney fees if authorized to do so by a statute or contract. *Roach v. County of Becker*, 962 N.W.2d 313, 322-23 (Minn. 2021). Plaintiffs are not entitled to recover attorney fees because they did not identify a basis for recovery.

J.M.A.