

STATE OF MINNESOTA
IN COURT OF APPEALS

A06-1422

A06-1440

CITY OF DULUTH,

Appellant/Respondent,

and

TODD GLASS,

Appellant/Respondent,

vs.

MICHAEL AND DEBORAH BOLEN and
JOSEPH ZAJAC,

Respondents.

**APPELLANT CITY OF DULUTH'S BRIEF,
ADDENDUM AND APPENDIX**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF LEGAL ISSUES	1
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	6
ARGUMENT	11
1. Standard Of Review	11
2. The Owner Of A Lot In A Plat Abutting A Platted Right Of Way Enjoys A Right Of User For The Owner's Private Use.	11
3. The City Did Not Exceed Its Charter Authority By Issuing Glass A Permit To Privately Improve The Platted Right Of Way	16
CONCLUSION	23
CERTIFICATION AS TO LENGTH	24
INDEX TO ADDENDUM	25
APPENDIX	

TABLE OF AUTHORITIES

	<u>Page</u>
 CASES	
<u>Alpha Real Estate Co. v Delta Dental</u> , 671 N.W.2d 213 (Minn.App.2003)	11
<u>Anderson v Birkeland</u> , 220 Minn. 77, 38 N.W. 2d 215 (Minn. 1949)	2, 20
<u>Bryant v Gustafson</u> , 40 N.W. 2d 427 (Minn. 1950)	1, 14, 18, 21
<u>Etzler v Mondale</u> , 226 Minn. 353, 123 N.W.2d 603 (Minn. 1963)	1, 13
<u>In re the Petition To Vacate Portions Of Streets In The Plat Of Pottstown</u> , 2005 WL 703869 (unpublished opinion Minn.App. 2005)	14
<u>In the Matter of the Request of Lafayette Development Corporation To Open 18th Ave. S.</u> , 567 N.W.2d 743(Minn. App. 1997) <i>affirmed by</i> 576 N.W.2d 740 (Minn.1998)	1, 20
<u>Kochevar v City of Gilbert</u> , 141 N.W. 2d 24 (Minn. 1966)	1, 12, 13
<u>River City Mortg. Corp.v Baldus</u> , 695 N.W.2d 375 (Minn.App.2005)	11
<u>Sanborn v Van Duyne</u> , 96 N.W. 41 (Minn. 1903)	17, 18
<u>Smith v Barry</u> , 219 Minn. 182, 187, 17 N.W.2d 324 (1944)	19
<u>Underwood v Town Board of Empire</u> , 14 N.W. 2d 459 (Minn. 1944) . . .	1, 13, 14
<u>West v Village of White Bear</u> , 119 N.W. 1064 (Minn.1909)	12
<u>Yeh v County of Cass</u> , 696 N.W.2d 115 (Minn.App. 2005)	19
 STATUTES	
Minn.Stat. § 645.16	19

OTHER AUTHORITIES

1990 WL 596921 (Minn.A.G.) 19

Charter of the City of Duluth Sections 62 & 100(d) 2, 16, 17, 19, 20

Duluth Legislative Code, Chapter 45, Sections 84, 86 & 88 2, 17, 19

STATEMENT OF LEGAL ISSUES

1. Does the owner of a lot in a plat abutting a dedicated and platted right of way enjoy a right to improve the right of way?

The district court held that the owner of a lot abutting a dedicated right of way could not privately improve the right of way for the owner's use.

Bryant v Gustafson, 40 N.W. 2d 427 (Minn. 1950)

Kochevar v City of Gilbert, 141 N.W. 2d 24 (Minn. 1966)

Etzler v Mondale, 226 Minn. 353, 123 N.W.2d 603 (Minn. 1963)

Underwood v Town Board of Empire, 14 N.W. 2d 459 (Minn. 1944)

2. Did the City exceed its Charter authority when it issued a permit authorizing a private improvement to a platted and dedicated right of way to an owner of a lot abutting the right of way?

The district court held that the City did not have the authority to authorize a private improvement to the street easement by an abutting property owner and that improvement could only occur through the City's formal process for the opening and public improvement of street easements.

Bryant v Gustafson, 40 N.W. 2d 427, 11 (Minn. 1950)

In the Matter of the Request of Lafayette Development Corporation To

Open 18th Ave. S., 567 N.W.2d 743(Minn. App. 1997) *affirmed by* 576

N.W.2d 740 (Minn.1998)

Anderson v Birkeland, 220 Minn. 77, 38 N.W. 2d 215, 219 (Minn. 1949)

Charter of the City of Duluth Sections 62 & 100(d)

Duluth Legislative Code, Chapter 45, Sections 84, 86 & 88

STATEMENT OF THE CASE

On February 25, 2005, Appellant Todd Glass ("Glass") applied for a building permit to construct a garage on a parcel of land legally described as Lot 1, Block 2, Oatka Beach Addition to Duluth. Lot 1 abuts the 40th Street easement, (*fna Interlachen*) ("40th St."). 40th St. is a platted and dedicated easement. In a May 3, 2005 letter to then City Engineer Mike Metso, Glass advised Appellant City of Duluth ("City") that he would be willing to make a private improvement to 40th St. to provide access to the garage. The public improvements to the street consist of a curb cut, bituminous apron and street sign. Appellees Michael and Deborah Bolen ("Bolen") and Appellee Joseph Zajac ("Zajac") along with Glass are the three owners whose properties abut 40th St.

On June 14, 2005, the City of Duluth granted the permit to construct a private improvement in 40th St.

Initially this action was commenced by Bolen and only against Glass. At the same time that Bolen commenced this action they also asserted a motion for temporary restraining order in which they sought an order restraining Glass from making the permitted improvements. In its Order filed on June 16, 2005, the Court granted Bolen's motion and further directed Bolen to add the City as a party defendant. Thereafter, Bolen amended the complaint by adding the City as a party defendant.

The matter proceeded to trial to the district court without a jury on February 28 and March 1, 2006, before the Honorable John T. Oswald.

On May 1, 2006, Bolen filed a motion pursuant to Rule 15.02, MN.R.Civ.P. seeking to add Zajac as a party plaintiff. This motion was subsequently granted.

The district court issued its Finding of Fact Conclusions of Law, and Order on June 1, 2006. The district court reached two conclusions of law which are the subject of this appeal. In Conclusion of Law No. 1, the district court held that the City exceeded its authority by granting the disputed permit and “attempted to overlay a public easement with a private easement, thus creating property rights and property burdens without authority to do so.”

In Conclusion of Law No. 2, the district court held that Glass cannot, by virtue of the City permit, “acquire rights in a dedicated public easement in derogation of the public’s ultimate easement rights or which burdens the adjoining servient estates in excess of the burden imposed by the plat dedication.”

In its order the district court enjoined Glass and the City from developing 40th Street except by “legislative enactment and subsequent development of a public thoroughfare.” It further ordered that Glass remove all improvements placed within 40th St. and restore the property to its prior condition

Judgement was entered on July 25, 2006.

On July 31, 2006, the City filed its appeal which was assigned Appeal No. A06-1440. On the same date Glass filed a separate appeal which was assigned Appeal No. A06-1422.

These appeals were consolidated for briefing, oral argument and decision in an Order filed August 11, 2006.

STATEMENT OF FACTS

Many of the facts of this case were undisputed. No party asserted a post trial motion for amended findings of fact. It is the district courts conclusions of law that forms the basis of the City's appeal.

The district court found, and it is undisputed that 40th St. is a dedicated street easement contained within the plat of the Oatka Beach Addition to Duluth platted in 1902. *Ex. 2.*¹ The street was originally named Interlachen Street and subsequently changed to 40th St. by city council action. *Ex. 32.* The City has not formally opened the street pursuant to its charter authority. *App. Pg. 5; Finding of Fact ("FOF") No. 6.* The easement terminates at the beach. *T. Pg. 246.*

Glass is the owner of real property located at 4006 Minnesota Ave., which is legally described as: Lots 1, 2, and 16, Block 2, Oatka Beach Addition to Duluth. *Ex. 2; App. Pg.5, FOF 3.* Lot 1 abuts 40th St. *Ex. 2; App. Pg. 5, FOF 4.*

Bolen owns real property located at 3955 Minnesota Ave., which is legally described as: Lots 9, 10, 11, 22, 23 and 24, Block 1, Oatka Beach Addition to Duluth. *Ex. 2; App. Pg. 4, FOF 1.* Lots 11 and 24 abut 40th St. *Ex. 2; App. Pg. 5 FOF 5.*

¹ This area is a part of the city commonly referred to as Park Point.

Zajac owns real property located at 4002 Minnesota Ave., which is legally described as: Lot 15, Block 2, Oatka Beach Addition to Duluth. Lot 15 abuts 40th St. *Ex. 2; App. Pg. 5 FOF 2 & 5.*

The public improvements to the easement consist of a street sign, curb cut and short bituminous apron. *T. Pg. 257.* Otherwise the street is privately improved as a driveway to the Zajac property. *Id.* Other than constructing the curb cut and apron, and installing the street sign, the City does not maintain the easement. *Id.; Ex. 6*

Lots 1, 2 and 16, which are now owned by Glass were once owned by Harry O'Donnell. *T. Pg. 66; Ex. 34.* O'Donnell also owned Lot 15. *Id.* O'Donnell lived in the home located on Lot 15. *T. Pg. 68. (This is now the Zajac home.)* His grandson David Wakefield, who provided trial testimony, lived with his parents in a home located on Lot 2. *T. 68. (This home is now the Glass home).* At some point in time O'Donnell moved from the home on Lot 15 to the home on Lot 2. *T. 86.* After Wakefield's grandparents died, Wakefield's sister (*Pam Haugen*) became the owner of Lots 1, 2 and 16. (*The Glass property*). *T. Pg. 69.*

Historically a small home was located on Lot 1. *T. Pg. 61, T. Pg. 83; T. Pg. 204, 205; Ex. 43.* During O'Donnell's ownership of this home he rented it and the tenants accessed the home via 40th St. *T. Pg. 83, 84, 85.* During a period of time when the Lot 2 home was being remodeled, O'Donnell lived in the Lot 1

house. *T. Pg. 86.* This house was assigned the street address of 4001 Lake Ave. for a period of time. *Ex. 54 (Polk Directories).* It was also identified as 4001 Minnesota Ave. *T. Pg. 61, T. Pg. 178.*

Mrs. Harriet Meagher provided testimony as to the historic use of the Lot 1 house. Meagher lived in the Lot 15 home. *T. Pg. 92. (The Zajac home)* She lived there between 1957-1969. *T. Pg. 93.* When she moved into the home a young couple lived in the Lot 1 house and used 40th St. for access. *T. Pg. 101.* They would park their cars in 40th St. *T. Pg. 102.*

Margaret McGillis also provided testimony about the historic use of the Lot 1 house. At the time of trial, Ms. McGillis was 83 years old and was born on Park Point. She has lived at 4010 Minnesota Ave. her entire life. *T. Pg. 126.* She testified that she could remember people living in the Lot 1 house as far back as the 1930's. *T. Pg. 138-39.* She recalled that the Lot 1 house was present when she was a child. *T. Pg. 143.* She also testified that the people residing in the Lot 1 house accessed it from 40th St. *T. Pg. 139-40.* The residents would park their cars near what is now the Zajac garage and then walk of a set of stairs and along a footpath to access the home. *T. Pg. 144.* This was the only means of egress to the Lot 1 house. *T. Pg. 145.*

Steve Wakefield testified that he lived in the Lot 1 house over a two year period between 1976-78. *T. Pg. 178.* To access the house he used 40th St. and

parked next to what is now the Zajac garage. *Id.* He would then use a sidewalk and steps located behind the Zajac garage to walk to the house. *T. Pg. 179.* He also testified that his guests accessed the house using the same route. *T. Pg. 181.*

Exhibit 54 consists of pages from the City of Duluth Polk Directory. These records are for various years during the period 1934 to 1993. These directories identify occupancy of the Lot 1 house as follows: 1934 by Oscar Ericson; 1935 by Ray Hein; in 1938 by Cecil Whitsitt; 1942 by Melvin Wakefield; 1943 by Wilbert Zimpel; 1944 & 1946 by Wallace Abbot; 1948 by Chas Gardner; 1950 by Ernest James; 1951 by Dennis Johnson; 1952 by Harry O'Donnell; 1960 by Gerald Carlson; 1962 by Runar Gustafson; 1978 by Steve Wakefield.

This house was condemned by the City in 1996 (*Ex. 42*) and demolished by Pam Haugen. *T. Pg. 55.*

This historical testimony and documentation demonstrates that the Lot 1 house was occupied periodically as a separate residence from 4002 or 4006 Minnesota Ave. from at least 1934 through at least 1978 and that the residents of this home used 40th St. as their access.

On February 25, 2005, Glass applied for a building permit to construct a garage on Lot 1. *Ex. 17.* The City required that Glass provide access from 40th St. to meet building code requirements. *T. Pg. 196; T. Pg. 239; T. Pg. 244.* In a May 3, 2005 letter to then City Engineer Mike Metso, Glass advised the City that

he would be willing to make a private improvement in 40th St. to provide access to his proposed garage. *Ex. 19.* The City issued its permit for the private improvement on June 14, 2005. *T. Pg. 250; Ex. 24.* The City did not require Glass to develop the street to full city standards because the easement was only 30 feet wide, an existing structure encroached into the easement, and it was unlikely the City would further improve the easement towards the beach. *T. 246.* The encroaching structure is the Zajac garage. *T. Pg. 43; T. Pg. 247.*

ARGUMENT

1. Standard Of Review

In a bench trial the reviewing court determines whether the district court's findings are clearly erroneous and whether the court erred in its application of law.

River City Mortg. Corp. v Baldus, 695 N.W.2d 375, 377 (Minn.App.2005).

Questions of law are reviewed *de novo*. Alpha Real Estate Co. v Delta Dental, 671 N.W.2d 213, 217 (Minn.App.2003).

In this appeal the City is challenging the district court's conclusions of law. The City did not assert a motion for a new trial. Such a motion is not required for appellate review when a genuine issue of law is properly raised and considered by the district court. Id.

2. The Owner Of A Lot In A Plat Abutting A Platted Right Of Way Enjoys A Right Of User For The Owner's Private Use.

In Conclusion of Law No. 2, the district court held that Glass "cannot, by grant from a public authority, acquire rights in a dedicated public easement in derogation of the public's ultimate easement rights or which burdens the adjoining servient estates in excess of the burden imposed by the plat dedication." *App.* Pg. 6. This conclusion of law is an erroneous application of the law. The district court failed to recognize that Glass did not acquire a right from the City that he did not already enjoy. The permit did not limit or harm the public's ultimate easement rights nor did the permit burden Bolen and Zajac any more than already imposed

by the plat dedication. The court failed to apply the law that regardless of the fee interests of Bolen and Zajac, Glass also had an interest in the easement and the right to exercise that interest.

The general rule regarding the rights of the fee owner whose property is subject to a platted street easement is set forth in Kochevar v City of Gilbert, 141 N.W. 2d 24 (Minn. 1966). The Court said:

“The rule appears to be elemental that any abutting landowner owns to the middle of the platted street or alley and that the soil and its appurtenances, within the limits of such street or alley, belong to the owner in fee, subject only to the right of the public to use or remove the same for the purpose of improvement.”

Kochevar, 141 N.W. 2d at 26.

As a consequence of the general rule, the public has no rights with respect to an unused street easement unless the municipality has taken proper steps to improve the easement. West v Village of White Bear, 119 N.W. 1064 (Minn.1909).

The issue presented in this appeal does not involve the public’s right to use an unimproved street easement. The City is not arguing that the general public has the right to use unimproved street easements. The issue here is what right of user does an abutting lot owner enjoy. Bolen, relying upon the general rule stated in Kochevar, argued in the district court that as an abutting owner to 40th Street he has the right to deprive another abutting owner of a right to make a private

improvement to the dedicated easement. The district court also relied upon Kochevar in concluding that Glass did not have a right to obtain city permission to privately improve the right of way. To the extent Bolen and the district court relied upon Kochevar the reliance is misplaced. Kochevar did not involve balancing the access rights among various abutting landowners in a plat. Kochevar involved the government's unilateral removal of a retaining wall that encroached into the public alley easement. After citing to the general rule, the court held that the government did not have the right to unilaterally remove encroachments where such encroachments did not constitute an obstruction to the improved right of way. Kochevar, 141 N.W. 2d at 27. Kochevar does not serve as supporting precedent to the proposition advanced by Bolen and Zajac that they may deny Glass access to his property via 40th St.

The Kochevar decision does not to fully state the law applicable to the fact situation presented here. There is an additional body of law involving the rights of owners of lots in a plat. One who purchases a lot within a plat is entitled to rely on the dedication of streets, alleys, and parks shown on the plat and possesses the right to use them. Etzler v Mondale, 226 Minn. 353, 123 N.W.2d 603, 611 (Minn. 1963). An abutting landowner has a separate and distinct right that differs from the right granted to the public. Underwood v Town Board of Empire, 14 N.W. 2d 459, 461 (Minn. 1944). In Underwood, the town board vacated a street easement

and as a result the plaintiff whose land abutted the street lost access to this property. The Court recognized that while the public's right is that of passage, an abutting landowner has the additional right of access to his property. Id. This right exists regardless of the frequency of use. Id.

This principle was applied to the use of an undeveloped street easement in Bryant v Gustafson, 40 N.W. 2d 427 (Minn. 1950). Bryant involved an owner of some lots in a plat who attempted to cut off access to an unimproved street easement used by other owners of lots within the plat. The Court held that all of the lot owners had a right of user over the entire length and width of the dedicated road. It reasoned as follows:

He who purchases a lot with reference to a plat is deemed to have thereby purchased, as appurtenant to the lot, all the advantages, privileges, rights, and easements which the plat represents as belonging to the lot and as belonging to the owner thereof as a resident of the platted area, and this principle is applicable not merely to the roads and streets upon which the purchased lot abuts, but to all roads and streets of advantage or utility to the platted area as a whole. *** Each purchaser of a lot is entitled to the benefit of the plat as it appears when he purchases it. *** It is not merely the street or alley upon which the purchased lot may abut that the purchaser has the privilege of using or enjoying, but all the easements, rights, privileges, and advantages which the plat represents.

Bryant, 40 N.W.2d at 432 (internal citations omitted).

The rule that owners of lots within a plat enjoy greater rights to the easements within the plat than the general public was most recently reiterated in In

re the Petition To Vacate Portions Of Streets In The Plat Of Pottstown, 2005 WL 703869 (unpublished opinion Minn.App. 2005). *Addendum Pg. 36*. This case involved a challenge to the adequacy of the public notice of a petition to vacate a portion of a road. The Court held that all owners of lots within the plat must be notified because all owners have a right in all of the easements within a plat.

The case law clearly recognizes that Glass has a right of user in the dedicated street easement that is different and distinct from the public's right and such right exists by virtue of the fact that he is the owner of a lot in the Oatka plat. In fact, he has even a stronger claim because Lot 1 abuts 40th St. and 40th St. serves as the direct street access to Lot 1.

The fact that Glass already had alternative access to Lot 1 via Lot 16 and Lot 2 is not determinative. Certainly the alternative route is relevant to whether he has been deprived of access to his land in a constitutional sense, but that is not the issue here. The issue is whether as owner of Lot 1, he has a right to rely upon 40th St. for access. The case law discussed above makes it clear that Glass has the right to use 40th St. to access Lot 1. The City's recognition of that right did not burden Bolen or Zajac more than they were already burdened by the existence of the 40th St.

In granting Glass the permit, the City did not deprive itself of the right to make a public improvement to 40th St. and open the street to general public use. In

fact, as part of the permit, Glass was required to designate the City as his agent in any future petition to publicly improve the street and to pay his share of any assessment. *Ex. 26*. Certainly the City could publicly improve the street and assess Bolen, Zajac and Glass. However, such an improvement and cost to Bolen and Zajac was not necessary in order to grant to Glass the ability to exercise his separate and distinct right as the owner of Lot 1 to use 40th St. to access his lot.

The district court's Conclusion of Law No. 2, in which it concluded that Glass enjoyed no such right is wrong and should be reversed.

3. The City Did Not Exceed Its Charter Authority By Issuing Glass A Permit To Privately Improve The Platted Right Of Way.

a. The City Charter and Legislative Code Authorized The City To Permit Glass's Private Improvement.

Because the law recognizes Glass's right of user as an owner of a lot in a plat, the next question is what process applies to effectuate the exercise of that right. In Conclusion of Law No. 1, the district court held that the City exceeded its power and attempted to overlay a public easement with a private easement. *App. Pg. 6*. This conclusion is erroneous and should be reversed.

The City Charter provides two methods for exercising the right to use right of ways. Chapter XIII, Section 100 (d) of the Charter recognizes the rights of plat owners to make use of easements not physically being used or occupied by the public as follows:

The council may by ordinance permit abutting owners to make use of portions of public highways not physically being used or occupied by the public upon such terms and conditions and by such procedure as the council, in each such ordinance, may provide.

Addendum Pg. 28, City Charter, Sec. 100 (d).

Pursuant to the Charter authority, the City Council enacted Ordinance No. 7055 codified in the City's legislative code as Chapter 45, Sections 84-91.

Addendum Pg. 29. This ordinance authorizes the city engineer to issue special permits to private parties to make local improvements upon the public highways of the city. *Addendum Pg. 29, DCC 45-84.* Such improvements must be made at the expense of the applicant and in accordance with the specifications required by the City. *Addendum Pgs. 29-30, DCC 45-86 & 88.*

The district court ignored Section 100(d) and Chapter 45 of the code. Instead, the court relied upon Section 62 of the Charter which provides the process for the public improvement of streets. *Addendum Pg. 26.* The district court concluded that Section 62 provided the only method by which a dedicated street could be improved. The district court further concluded that by granting Glass a permit to make a private improvement, the City was attempting to overlay a private easement over the public easement.

In its memorandum the district court cited to Sanborn v Van Duyne, 96 N.W. 41 (Minn. 1903). Sanborn involved a dispute over a levee easement and the scope of use granted to the city of St. Paul as a result. The property owner had

given the city an easement which permitted the construction of a levee. The city never built the levee. Instead, it lobbied the Legislature which passed a special law allowing the city to lease the property. In reliance upon the special law, the city leased the property. The defendant lessee built a manufacturing facility on the property. The plaintiff landowner objected to the use of the property for the lessee's private purposes. The Court concluded that the special law was an unconstitutional taking because it diverted an interest in land granted for a public purpose to a private purpose unauthorized by the landowner. Id at 42. The Court reasoned that the easement did not deprive the landowner of the fee interest, it only granted to the city a limited right to use the property for a specific public purpose. The Court further concluded that by leasing the property to a private party the city had exceeded the authority granted under the easement and diverted a public use to a private purpose. Id.

Here, the district court misapplied Sanborn because the City did not divert the public's right to a private purpose that is inconsistent with the public purpose. The street easement was dedicated for the uses associated with a street. These uses clearly include access by owners of lots within the plat to their land. Bryant, 40 N.W.2d at 432 . In granting a permit for a private improvement pursuant to its Charter and ordinance authority, the City was not granting to Glass a right he did

not already possess. The City was simply implementing one method authorized by the Charter by which such a right may be exercised.

By ignoring the alternative methods authorized by the Charter for authorizing use of rights of way the district court has violated basic tenants of statutory interpretation. It is contrary to Minnesota law to fail to give effect to all provisions of a statute. *Minn.Stat. § 645.16*. (“Every law shall be construed, if possible, to give effect to all its provisions.”) “[A] statute is to be construed as a whole so as to harmonize and give effect to all its parts.” Yeh v County of Cass, 696 N.W.2d 115, 128 (Minn.App. 2005) *quoting*, Smith v Barry, 219 Minn. 182, 187, 17 N.W.2d 324,327 (1944). The district court failed to give effect to all of the provisions of the laws applicable to the improvement of rights of way.

The Attorney General has also recognized the government’s right to allow private persons to make improvements to rights of way. 1990 WL 596921 (Minn.A.G.). *Addendum Pg. 32*. In this opinion the Attorney General opined that the municipality had the authority to allow the owners of lots within a subdivision to pay the cost of paving a town road.

The district court failed to recognize that the Charter provides two separate and distinct methods for improvements. Section 62 is the method used when the City intends to make the public improvement. Section 100 (d), and the provisions of Chapter 45 of the Code, provides the alternative method for use of an easement

by an abutting property owner. Clearly the district court erred when relying only upon Section 62 when it concluded that the City exceeded its authority.

b. 40th Street Was Open To The Public

In its decision the district court failed to consider the fact that the evidence presented at trial demonstrated that 40th St. was historically used by the residents of Lot 1 to access the property. This history of use establishes that the street was open for public use. Because it is open for public use the City had a right to authorize Glass's private improvement.

A street may be deemed opened for public purposes by use of the easement. In the Matter of the Request of Lafayette Development Corporation To Open 18th Ave. S., 567 N.W.2d 743, 745 (Minn. App. 1997) *affirmed by* 576 N.W.2d 740 (Minn.1998). Use by even a small number of people will be sufficient to establish public use. Anderson v Birkeland, 220 Minn. 77, 38 N.W. 2d 215, 219 (Minn. 1949) (seasonal usage by abutting owners, along with visitors and tradesman provided sufficient evidence to support a conclusion of public use for purposes of statutory dedication). Alternatively, the mere non-use of the easement will not terminate the public right. “[L]ong continued nonuser of the street will constitute abandonment only if accompanied by some affirmative or unequivocal acts of the trustee which are indicative of an intent to abandon and which are inconsistent

with a continuance of the easement.” Bryant v Gustafson, 40 N.W. 2d 427, 11 (Minn. 1950). The trustee is the municipality. Id.

Here, there was no evidence presented which supports a conclusion that the City abandoned the easement. The City erected a street sign and constructed a curb cut and bituminous apron to provide access. The plaintiffs did not argue to the district court that the City had abandoned the easement. The plaintiff did not deny the existence of the public easement.

The evidence at trial also revealed that the residents of the house previously located on Lot 1 and their guests used 40th St. to access the house. Polk Directory records identified occupants of this house as early as 1934. Ms. McGillis also confirmed that the home was occupied and its residents used 40th St. as access. Ms. Meagher, David Wakefield and Steven Wakefield also confirmed the occupancy of the home and the use of 40th St. as access. The home may not have been continuously occupied from 1934 to its demolition in the late 1990's but it is clear that 40th St. served as the access when it was occupied.

The historic use of 40th St., the existence of the street sign, curb cut and apron all support the conclusion that the street is open street and the City had the authority to grant Glass permission to make a private improvement.

The City issued the permit because Glass is the owner of Lot 1. Lot 1 abuts 40th St. 40th St. is a properly dedicated street and so identified by road signage,

curb cut and bituminous apron. 40th St. is the only street access from Minnesota Avenue to Lot 1. The street is also utilized by Zajac to access his lot which fronts upon Minnesota Ave. 40th St. is open by virtue of its historic use as access to the home previously located on Lot 1. Glass simply wants to make the same use of the street as Zajac to access his property.

The district court's Conclusion of Law No. 1 should be reversed because the City did not exceed its authority by granting the permit.

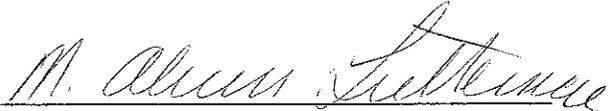
CONCLUSION

The judgment of the district court should be reversed because the court erred in its application of the law. The owner of a lot in a plat has a right to use the dedicated easements in the plat. This right is separate and distinct from the public's right. The City Charter grants to the City the authority to authorize private improvements to the public easements. By granting the permit for the private improvement the City did not exceed its authority. By granting the permit the City did not grant a private easement over a public easement. Its permit reserves the public right to formally open the easement. By granting the permit the City did not burden the servient estates. These estates were already burdened by the existence of 40th St. and the historic use of 40th St.

Dated this 17th day of October, 2006.

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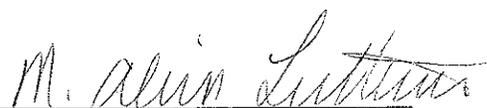
CERTIFICATION AS TO LENGTH

I hereby certify that this brief conforms to the requirements contained in Rule132.01, Subd. 3(a)(1) , MN.R.App.P. for a brief using a proportional font. This brief has been prepared with Word Perfect 11. The length of the brief is 5,061 words.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).