

Nos. A06-1422 and A06-1440

State of Minnesota
 In Court of Appeals

Michael Bolen, Deborah Bolen,
 and Joseph Zajac,

Respondents,

vs.

Todd Glass,

*Appellant (A06-1422),
 Respondent (A06-1440),*

vs.

City of Duluth,

*Respondent (A06-1422),
 Appellant (A06-1440).*

BRIEF AND APPENDIX OF APPELLANT TODD GLASS

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STATEMENT OF THE LEGAL ISSUES

1. Were the past acts of the City and/or the historic public use of 40th Street sufficient to “open” the dedicated 40th Street right-of-way as a public street?

The District Court failed to make any finding as to whether the historical public use of 40th Street was sufficient to open the dedicated 40th Street right-of-way as a public street.

Most apposite cases and other authorities: *Anderson v. Birkeland*, 229 Minn. 77, 38 N.W.2d 215 (1949); *Flynn v. Beisel*, 257 Minn. 531, 102 N.W.2d 284 (1960).

2. Did the City of Duluth act within its discretion and authority when, pursuant to its City Charter and City Code, it granted Todd Glass permission to use and improve the 40th Street right-of-way?

The District Court held that the City of Duluth exceeded its authority because the City had never accepted the dedication of 40th Street.

Most apposite cases and other authorities: *In re Lafayette Dev. Corp.*, 567 N.W.2d 743 (Minn. Ct. App. 1997); City of Duluth Charter, Chapter XIII, Section 100(d); City of Duluth City Code, Chapter 45, Sections 84 - 91.

3. Does Todd Glass, as the owner of a lot within the Oatka Beach Plat, have the right to use 40th Street, a right-of-way dedicated as part of the same plat?

The District Court concluded that Todd Glass does not have a right to use 40th Street.

Most apposite cases and other authorities: *Etzler v. Mondale*, 266 Minn. 353, 123 N.W.2d 603 (1963).

4. Did the District Court err by ordering Todd Glass to remove all materials and improvements from the entire platted 40th Street right-of-way and to restore the right-of-way to its previous condition?

The District Court ordered Glass to remove all materials and improvements from the entire platted 40th Street right-of-way and to restore the right-of-way to its previous condition, including those parts of the platted 40th Street right-of-way in which Glass is the underlying fee owner.

Most apposite cases and other authorities: *Kochevar v. City of Gilbert*, 141 N.W.2d 24 (Minn. 1966).

5. Did the District Court abuse its discretion by, without conducting a hearing or otherwise receiving oral or written argument from Defendants, adding Joseph Zajec as a Plaintiff after the trial had been completed and the existing parties had submitted post trial-briefs to the District Court?

The District Court concluded that Joseph Zajec was a vital and indispensable party and ordered him named as a Plaintiff.

Most apposite cases and other authorities: Minn. R. Civ. P. 15.01.

STATEMENT OF THE CASE

Appellant Todd Glass applied to Appellant City of Duluth (the "City") for a permit to construct improvements within a dedicated public street right-of-way easement (40th Street) for the purpose of providing adequate public street access to his property. After extensive consultation with Glass, the adjacent property owners and City staff, the City Engineer issued Glass the requested permit pursuant to the applicable provisions of the Duluth City Charter and City Code. Glass constructed the improvements, namely an extension of the pre-existing gravel driveway, in accordance with the permit.

Glass's neighbors, Respondents Michael and Deborah Bolen, brought an action against Glass and the City alleging that the City had exceeded its authority in granting Glass the permit, and that the construction of the driveway extension in 40th Street constituted trespass onto property to which the Bolens held the underlying fee title. The matter initially came before the District Court on the Bolens' *ex parte* motion for a TRO on June 16, 2005, which was granted by the Court on that date, and which made various findings and conclusions adverse to Glass.

After a two-day trial commencing on February 28, 2006, the Saint Louis County District Court, the Honorable John T. Oswald presiding, ordered judgment in favor of the Bolens. The District Court enjoined Glass and the City from further improvement of the 40th Street right-of-way and further ordered Glass to restore the 40th Street right-of-way to its previous condition. The District Court also ordered that Joseph Zajac, who also owns property abutting the 40th Street right-of-way easement, be added as a plaintiff.

Glass and the City have both appealed, and the two appeals have now been consolidated.

STATEMENT OF FACTS

The Parties And Properties.

This matter relates to a dispute regarding the use of the 40th Street right-of-way, which is a dedicated public street easement that abuts three adjoining properties in the “Point Park” area of Duluth. The three abutting properties are owned by Appellant Todd Glass (“Glass”), Respondents Michael and Debra Bolen (the “Bolens”), and Respondent Joseph Zajac (“Zajac”).

The Bolens are the owners of a parcel of real property (the “Bolen Property”) abutting the 40th Street right-of-way with a street address of 3955 Minnesota Avenue, consisting of six lots legally described as follows:

Lots Nine (9), Ten (10), Eleven (11), Twenty-two (22), Twenty-three (23), and Twenty-four (24), in Block One (1), OATKA BEACH ADDITION TO DULUTH, according to the recorded plat thereof, on file and of record in the office of the Register of Deeds in and for St. Louis County, Minnesota.

(Tr. Ex. 2) Lots 11 and 24 abut 40th Street. *Id.* The Bolans have lived on the Bolen Property since 1987 and in the immediate vicinity since 1981. (Tr., p. 50)

Zajac is the owner of a single lot (the “Zajac Property”) abutting the 40th Street right-of-way with a street address of 4002 Minnesota Avenue, legally described as follows:

Lot Fifteen (15), in Block Two (2), OATKA BEACH ADDITION TO DULUTH, according to the recorded plat thereof, on file and of record in the office of the Register of Deeds in and for St. Louis County, Minnesota.

(Tr. Ex. 2) Zajac purchased the Zajac Property from the Bolens in 1987, and stayed there on weekends until approximately 1997 and permanently thereafter. (Tr., p. 152)

Glass is the owner of a parcel real property (the "Glass Property") abutting the 40th Street right-of-way with a street address of 4006 Minnesota Avenue, consisting of three lots legally described as follows:

Lots One (1), Two (2), and Sixteen (16), in Block Two (2), OATKA BEACH ADDITION TO DULUTH, according to the recorded plat thereof, on file and of record in the office of the Register of Deeds in and for St. Louis County, Minnesota.

(Tr. Ex. 2) Lot 1 abuts 40th Street. *Id.* Glass purchased this property in 1998. (Tr., p. 292) Between 1998 and 2003, Glass rented out the single-family home located on Lot 2. (Tr., p. 297) From 2003 to the present, Glass has used the home on Lot 2 on a seasonal basis. *Id.*

The Dedicated 40th Street Public Street Right-of-Way Easement.

The 40th Street right-of-way is a public street easement dedicated as part of the plat of the Oatka Beach Addition which was approved by the City and filed on December 31, 1902. (Tr. Ex. 2) 40th Street was originally named Interlachen Street, but was subsequently renamed. (Tr., p. 18) 40th Street runs between Minnesota Avenue, an improved street maintained by the City, and Lake Avenue, a platted but unimproved street easement that runs parallel to the Lake Superior shoreline. (Tr. Ex. 2) There is an improved pathway, consisting of concrete sections and steps, that led from the 40th Street right-of-way to the two homes that had been historically located on the Glass property, namely 4001 Minnesota Avenue (Lot 1) and 4006 Minnesota Avenue (Lot 2). (Tr. Exs. 43-47, 53, 62, and 63)

At some point after accepting the plat of Oatka Beach Addition in 1902, the City improved 40th Street by installing a street sign and constructing a curb cut and bituminous apron. (Tr., p. 257) 40th Street is otherwise improved with a gravel driveway leading to the Zajac Property. *Id.* (The gravel driveway also provides access to the Bolen Property, but the Bolens do not use it for vehicular access.) Although the City does not plow or sweep 40th Street, the City Engineer testified that the curb cut and apron are an integral part of the City's street and gutter system and that the City would replace them as necessary. *Id.* The Duluth telephone directory includes a map informing the public as to the existence and location of 40th Street. (Tr. Ex. 28)

The Historical Public Use Of 40th Street.

The history of the area, dating back to the early 1900s, demonstrates that it was extensively developed and used by the public as part of "White City" and "Joyland Amusement Park." (Tr. Ex. 56) The Welbank Atlas map and the Sandborn Insurance map depict numerous attractions in this immediate area (including a band stand, restaurant, shooting gallery "giggle joint," etc.), all of which indicate early public use of the 40th Street right-of-way. *Id.*

Beginning in the 1920s and continuing until the mid-to-late 1990s, 40th Street historically provided public street access to the Zajac Property and a small white house previously located on Lot One (1), Block Two (2), Oatka Beach Addition, commonly known as the "little house" (or the "wee house"). (Tr., p. 61, 83, 84, 85, 101, 102, 138-40, 144-45, 178-79, 181, 204, 205) At various times, the "wee house" had a street address of either 4001 Lake Avenue or 4001 Minnesota Avenue. (Directory Excerpt, Tr.

Ex. 54; Tr. pp. 61, 178) The “wee house” faced 40th Street and, as previously noted, had a pathway with concrete steps leading from its doorway to 40th Street. (Tr. Exs. 43-47, 53, 62, and 63) The City condemned the home in 1996, and it was then demolished by Pamela Wakefield Haugen Eden, who later sold the property to Glass. (Tr. Ex. 42; Tr., p. 55)

Excerpts from the City of Duluth Polk Directory show that the “wee house” house was occupied through the years by the following individuals: Oscar Ericson (1934); Ray Hein (1935); Cecil Whitsitt (1938); Melvin Wakefield (1942); Wilbert Zimpel (1943); Wallace Abbot (1944 and 1946); Chas Gardner (1948); Earnest James (1950); Dennis Johnson (1951); Harry O’Donnell (1952); Gerald Carlson (1960); Rumar Gustafson (1962); Steve Wakefield (1978). (Directory Excerpt, Tr. Ex. 54)

Long-time Point Park resident Margaret McGillis testified that the “wee house” was more-or-less continually occupied by owners or tenants from the 1930s until approximately 1980. (Tr., p. 139) She also testified that residents of the “wee house” accessed it using 40th Street, parking near what is now Zajac’s garage and walking along the concrete pathway that led to the home. (Tr., pp. 138-39, 144)

Harriet Meagher, who has resided in the Point Park neighborhood since 1951 and resided on the Zajac Property from approximately 1957-69, testified that she and her husband used 40th Street to access her property by automobile as did milk deliverymen and other service personnel. (Tr., p. 95) Ms. Meagher also testified that she remembers that the “wee house” was occupied by tenants and that the tenants received guests who accessed the “wee house” by vehicle using 40th Street. (Tr., p. 100-101)

The Glass Property was previously owned by Harry O'Donnell, who also owned and resided on what is now the Zajac Property. (Tr., p. 66, Tr. Ex. 34) Two of Mr. O'Donnell's grandchildren testified at trial: David and Steven Wakefield. David Wakefield testified that he personally had parked on 40th Street, that he recalled tenants occupying the "wee house," and that he recalled at least one set of tenants (the Gardners) using 40th Street to access 4001 Minnesota Avenue by automobile. (Tr., p. 77-78) Steven Wakefield lived in the "wee house" from approximately 1976 to 1978. (Tr., p. 178) Mr. Wakefield testified that he used 40th Street to access Lot 1 via the path leading from 40th Street to the house, and that his guests also used 40th Street to access the property. (Tr., p. 17-183) Steven Wakefield also testified that the mail carrier would use 40th Street to deliver mail to the "wee house" as well as to the residents of 4002 Minnesota Avenue, 4006 Minnesota Avenue, and Ms. McGillis. (Tr., p. 183)

Michael Bolen testified that he had seen a previous owner of the Glass Property, Pamela Wakefield Haugen Eden, use 40th Street. (Trans., p. 51) He also testified that he had seen Zajac access the lake via 40th Street. (Trans., p. 57) Zajac admitted as much on videotape in 1998, when he stated that he regularly used 40th Street to access the lake. (Tr. Ex. 63) Zajac also stated on videotape that Ms. Wakefield Haugen Eden would drive up 40th Street to her property when she had to move something. (Tr. Ex. 63) The same videotape (created by Gary Glass, Glass's father, in 1998) shows footage of the immediate area, including footage of the path and concrete steps leading from 40th Street to the remaining foundation of the "wee house" at 4001 Minnesota Avenue. (Tr. Ex. 63)

Glass himself testified as to repeated usages of 40th Street by he and his contractors after he purchased the property in 1998, including the delivery of topsoil to fill in the foundation of the demolished home at 4001 Minnesota Avenue, several deliveries and pickups of dumpsters to remove the demolition debris from 4001 Minnesota Avenue, tree service access to 4006 Minnesota Avenue to remove storm damaged trees, contractor access to 4006 Minnesota Avenue to replace the roof, contractor access for miscellaneous repairs at 4006 Minnesota Avenue, contractor access to install a temporary driveway at 4006 Minnesota Avenue, and his personal vehicular and pedestrian access over 40th Street. (Tr., pp. 302-05)

Public use of 40th Street continued after the “wee house” ceased to be occupied as a residence. An aerial photograph from 1988 depicts a car parked next to the house at 4001 Minnesota Avenue (Lot 1), in a position that indicates it was driven up from 40th Street. (Tr. Ex. 46) An aerial photograph from 2002 clearly shows a pathway through the beach grass from 40th Street down to Lake Superior, which indicates that people were using the right-of-way to access the lake. (Tr. Exs. 47, 62, and 63)

The Permit Issued By The City.

Glass applied for a building permit to construct a garage on Lot 1 of the Glass Property. (Tr. Ex. 17) In connection with that permit application, the City determined that certain improvements to 40th Street were needed in order to provide the garage with access that satisfied the City fire code (which requires a width of 20 feet to facilitate access by emergency vehicles). (Tr., pp. 198, 244) The City Planning Department determined that there had been sufficient public use of 40th Street to make it an open

public right-of-way (Tr., p. 208), and in fact it was already partially improved with a gravel driveway that led to the entrance of Zajac's garage and beyond. Accordingly, the City required Glass to submit a "private improvement application" in order to construct the necessary improvements to the 40th Street right-of-way easement area. (Tr., p. 199) In short, the "private improvements" consisted of a short extension of the gravel driveway that already served the Zajac property and provided access to the Zajac garage.

Prior to deciding to issue Glass the "private improvement" permit (*i.e.*, the driveway permit), the City discussed the permit application at a "Development Review Meeting" attended by staff representatives of all the City's departments. (Tr., p. 200) Development Review Meetings are open to the public, and the Bolens were in attendance. (Tr., p. 200)

According to Assistant City Planner, James E. Mohn, the City staff devoted "more attention" to the Glass permit application than it does to a typical application. (Tr., p. 202) The City Engineer, Michael Metzo, visited the Glass Property and inspected 40th Street three times in connection with his review of the Glass permit application. (Tr., p. 248) Mr. Metzo considered the impact of the improvements proposed by Glass on the other property owners abutting 40th Street. (Tr., p. 247) Indeed, one reason for approving the Glass application was to minimize the potential impact on Zajac, who would be required to remove his encroaching garage and other improvements from the 40th Street right-of-way if the City had chosen to develop it as an improved public street of ordinary width. (Tr., p. 247)

On June 14, 2005, the City Engineer approved Glass's application issued a permit to Glass to improve 40th Street as follows:

Construct private improvements within the platted right of way of 40th Street South to provide access to the driveway to Lot One (1), Block Two (2), Oatka Beach – to include the excavation of the existing surface to a depth of approximately 12 inches and the placement of Class 5 granular aggregate base material to insure a nominal width of 12 to 16 feet and a minimal depth of 12 inches.

(Tr. Ex. 24) Upon issuance of the permit, a contractor hired by Glass extended the pre-existing gravel driveway in 40th Street to connect to the Glass Property in the vicinity of Glasses' future garage site. (Tr., p. 312)

STANDARD OF REVIEW

On appeal from a bench trial, this Court is to review the factual findings of the District Court to determine whether those findings were clearly erroneous. *River City Morg. Corp. v. Baldus*, 695 N.W.2d 375, 377 (Minn. Ct. App. 2005). This Court is also to review whether the District Court erred in its application of the law and apply a de novo standard to the District Court's legal conclusions. *Alpha Real Estate Co. v. Delta Dental*, 671 N.W.2d 213, 217 (Minn. Ct. App. 2003). Mixed questions of law and fact are reviewed *de novo*.

ARGUMENT

This appeal relates to the District Court's decisions on several questions of law and one question of fact. Glass respectfully submits that the District Court decided the legal issues incorrectly and did not decide the factual issue at all.

The District Court conducted a two-day trial during which the parties presented evidence primarily related to the factual issue of whether there had been sufficient public use of 40th Street to satisfy the minimal standard for establishing that a dedicated public street has been "opened" by public use. Only a small amount of public use is necessary for a dedicated public street to become "open," and the testimony and evidence presented at trial established without question that a sufficient amount of public use had occurred. However, despite receiving two days of evidence on the issue, the District Court inexplicably did not even make a finding or reach a conclusion on whether the historic public use of 40th Street "opened" the right-of-way easement as a public street. The District Court made no determinations regarding the probative value of any of the evidence presented by the parties or regarding the credibility of the numerous witnesses who testified. Indeed, the District Court essentially treated the matter as a motion for summary judgment, addressing the legal issues but not resolving any of the disputed issues of fact.

Even assuming, *arguendo*, that 40th Street had not been "opened" by past actions of the City or by historic public use, the City nonetheless acted properly and within the scope of its lawful discretion in issuing a permit for Glass to use and improve the 40th Street right-of-way easement area to access the Glass Property. The City acted in

accordance with duly adopted provisions of its City Charter and City Code for the purpose of providing constitutionally-sufficient public street access to the Glass Property, which the City had determined to be lacking. In concluding that the City had exceeded its authority in issuing the permit, the District Court failed to give proper deference to the legislative discretion of municipalities to make determinations related to the establishment and use of public streets.

Accordingly, this Court should reverse the decision of the District Court and find that Glass is entitled to use 40th Street to access his property and to improve the 40th Street right-of-way easement area, by extending the pre-existing gravel driveway, in accordance with the permit issued by the City Engineer. At worst, this Court should remand this matter to the District Court for a new trial to determine whether 40th Street is an open public street due to historic public use.

I. 40th Street Is An Open Public Street, And Glass Shares The Right To Use It As A Member Of The Public.

The procedural posture of this case is an appeal from the judgment of the District Court after a 2-day bench trial. The parties presented evidence at the trial primarily for the purpose of resolving a single factual inquiry: Has the dedicated 40th Street right-of-way been “opened” as a public road, either through past action by the City or by historic public use?¹ However, in its Findings of Fact, Conclusions of Law and Order, the District

¹ The other issues presented to the Court (*e.g.*, the scope of the City’s authority to control its streets, whether the City has a constitutional obligation to provide adequate public street access to the Glass property, etc.) were primarily of a legal nature. Aside from the status of 40th Street as an “open” public street, the relevant facts presented at trial (relating to the ownership of the various properties, the procedure by which the City

Court inexplicably ignores this question. To the extent the District Court addressed the issue of whether 40th Street is open at all, it does so by essentially concluding that the issue is meaningless, stating in relevant part as follows:

Defendants also argue that the 40th Street Corridor is an ‘open’ street as even a small level of public use is sufficient to ‘open’ a dedicated street. Both cases cited in support of this argument ... concern existing roadways which were built and maintained by the municipality, and the level of public use was necessary for determining if there was a common law dedication of the roads to public use. Here, the easement is dedicated to public use and the City of Duluth lacks authority to delegate development of an easement it holds in trust for the public to a private individual for private use.

(A – 9)

In other words, the District Court appears to have concluded that 40th Street has not been “opened” by past action of the City or by historic public use because the City did not have the authority to “delegate” a public easement to Glass through the issuance of a “private improvement” permit.

The District Court misses the point. Once 40th Street has been “opened” by past City action or historic public use (and, as set forth below, the evidence clearly shows that it has), then all members of the public (including Glass) have the right to travel on 40th Street because it is an open public street. It then becomes irrelevant whether the City has the authority to “delegate” the easement to Glass’s “private use” because Glass (along with everybody else) *already has* the right to use 40th Street. The permit issued by

issued Glass the permit, the location and characteristics of the improvements constructed by Glass, etc.) were generally not disputed.

the City to Glass therefore had no effect, except to the extent it allowed Glass to construct improvements on public property at his own expense.²

The District Court's factual conclusions are subject to a clearly erroneous standard of review by this Court. *State v. Johnson*, 713 N.W.2d 64, 65 (Minn. Ct. App. 2006), citing *State v. Critt*, 554 N.W.2d 93, 95 (Minn. Ct. App. 1995). Here, the District Court has failed to make *any factual conclusions at all*, at least with respect to the critical factual issue in the case. There is no question but that this constitutes clear error and that this Court must reverse the District Court's decision.

At worst, Glass is entitled to an order remanding this matter to the District Court for a new trial. However, the evidence presented at trial so clearly establishes the minimal actions necessary to "open" a street that no reasonable trier-of-fact could conclude otherwise. More to the point, the evidence presented at trial is clearly insufficient to establish that 40th Street is *not* open by a preponderance of the evidence, the standard the Bolens were required to meet as the party alleging trespass. Accordingly, this Court should hold that 40th Street is "open," that Glass's actions did not constitute trespass, and that Glass has the authority to use 40th Street to access his property and to improve the 40th Street easement area in accordance with the permit issued by the City.

² Although this issue has not been squarely addressed by Minnesota Appellate courts, the Minnesota Attorney General has published an opinion stating that municipalities have the authority to allow private individuals to improve public rights-of-way. Minn. Att'y Gen. Op. 434a-6 (October 11, 1990).

II. The City's Acceptance Of The Oatka Beach Addition Plat And Its Subsequent Improvement To The 40th Street Easement, Along With the Public Use, Were Sufficient To Make 40th Street "Open."

Glass is aware of no statutory or common-law requirement that municipalities must "open" public streets through formal action by the municipal governing body, as the District Court seems to believe. There are not normally parades and ribbon-cutting ceremonies to commemorate the opening of a city street. Although the City currently has an ordinance that provides for street-opening by vote of the City Council, 40th Street was dedicated as a public street more than a century ago when the City accepted the Oatka Beach Addition plat in 1902. The Bolens presented no evidence at trial establishing that there was any ordinance or charter provision in effect at that time which would have required the City to take formal City Council action to "open" 40th Street. The City subsequently constructed a curb cut and bituminous apron for 40th Street, and also erected a street sign. The City's telephone directory depicts 40th Street on its map of public streets within the City. The aerial photographs demonstrate the existence of walking paths from 40th Street to Lake Superior and the presence of a car that had obviously been driven from 40th Street to the home on Lot 1. There was considerable testimony describing the historic use of 40th Street to access both Lot 1 and Lot 2.

The above-summarized evidence is sufficient to establish that, even if it does not plow, sweep or otherwise maintain 40th Street today, the City at some point acted to open 40th Street to the public. Indeed, given that the area was used as an amusement park in the early 1900s, and that the "wee house" constructed in the 1920s was accessible only via 40th Street, had a sidewalk leading from 40th Street, and was occupied for more than a

half century, it is somewhat absurd to suggest that 40th Street was *not* an open public street.

III. The Evidence Presented At Trial Clearly Establishes Historic Public Use Sufficient To Make 40th Street “Open.”

A public right-of-way may be “opened” by public use, even if the governing road authority has taken no action to improve or maintain the right-of-way. *In re Lafayette Dev. Corp.*, 567 N.W.2d at 745. Use by even a small number of people is sufficient to establish public use. *Anderson v. Birkeland*, 229 Minn. 77, 82, 38 N.W.2d 215, 219 (1949).

At trial, Glass and the City presented a substantial amount of evidence of public use of 40th Street stretching back for more than a century. This evidence is summarized at pages 7 to 10, *supra*, and includes the use of 40th Street by the many residents of the “wee house” and their guests and others (such as the mailman and the milkman); the path and concrete steps leading from 40th Street to 4001 and 4002 Minnesota Avenue; the many residents of 4001 and 4002 Minnesota Avenue depicted in the City’s Polk Directory; the aerial photographs showing paths leading from 40th Street to Lake Superior and a car that had accessed 4001 Minnesota Avenue from 40th Street; the historic use of 40th Street as part of White City/Joyland Amusement Park; and the City’s installation of a curb cut, concrete and bituminous street apron, and street sign at 40th Street.

Accordingly, Glass could not have committed trespass because he shares a right with the general public to use 40th Street and he extended the pre-existing gravel driveway within 40th Street pursuant to a permit from the City of Duluth. This Court

should reverse the District Court's order on this basis. Alternately, this Court should remand this case to the District Court for a new trial to determine whether 40th Street has in fact been "opened" by the City's acceptance of the street dedication in the original plat and by the historic public use of the street.

IV. The City Of Duluth Acted Properly Within The Scope Of Its Discretion And Authority When It Granted Glass A Permit To Use And Improve 40th Street.

As set forth above, it is unnecessary for this Court to decide whether the City lawfully issued Glass a permit to use 40th Street because 40th Street has been opened as a public street by historic public use, and the City unquestionably has the authority pursuant to its City Charter and City Code to permit a private party to construct improvements within an open public right-of-way easement. *See* Minn. Att'y Gen. Op. 434a-6, *supra*. However, should this Court choose to address the City's issuance of the permit, it should reverse District Court's conclusion that the City exceeded its lawful authority. In concluding that the City does not have the authority to grant Glass a permit to extend the existing driveway, the District Court improperly "second-guessed" the decision of a municipal government body on an issue (the management of public roads) regarding which the courts have traditionally accorded municipalities a great deal of discretion. The City acted pursuant to duly adopted City Charter and City Code provisions, and there was unquestionably a rational basis for its issuance of the permit: Its constitutional obligation to provide Glass with reasonable and convenient public street access to his property. Indeed, the evidence in this case shows that the City has *never*

denied access to an abutting lot owner from the side streets (like 40th Street) on Park Point. (Tr. p. 256)

A. **Glass Possesses A Constitutionally-Protected Right Of Public Street Access to His Property.**

It is undisputed that Glass, as the owner of Lot 1, is an “abutting property owner” on 40th Street. As such, he has a constitutionally protected right of access to that street. *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978); *Hendrickson v. State*, 267 Minn. 436, 127 N.W.2d 165 (1964); *State v. Northwest Airlines, Inc.*, 413 N.W.2d 514 (Minn. Ct. App. 1987). An abutting owner’s easement of access, or the right of ingress and egress, is regarded as “property,” or a property right, within the meaning of the Constitution. As such, it cannot be taken or damaged for a public use without payment of just compensation. *Burnquist v. Cook*, 220 Minn. 48, 19 N.W.2d 394, 397-98 (1945); *Underwood v. Town Board of Empire*, 217 Minn. 385, 14 N.W.2d 459 (1944).

An abutting owner has the right to use the right-of-way in any manner that is not inconsistent with the public right of travel over the right-of-way. *Foote v. City of Crosby*, 306 N.W.2d 883, 885 (Minn. 1981). This private right of access is separate from the public’s right of travel over a street: “An abutting landowner has, *in addition* to the public right of travel, the separate and distinct right of access to his property.” *Underwood v. Town Board of Empire*, 217 Minn. 385, 14 N.W.2d 459, 461 (1944) (emphasis in original). *See also Black’s Law Dictionary*, 14 (6th ed.) (“An easement of access is the right which an abutting owner has of ingress to and egress from his premises, in addition to the public easement in the street.”).

In a decision interpreting an abutting owner's right of access, the Minnesota appellate courts held that the City of South St. Paul unlawfully prevented a property owner from using a platted and dedicated street that abutted his property. *Request of Lafayette Development Corp. to Open 18th Ave. S.*, 567 N.W.2d 743 (Minn. Ct. App. 1997), *aff'd* 576 N.W.2d 740 (Minn. 1998). In that case, the City of South St. Paul paid extensive damages for denying a property owner's attempt to access a platted and dedicated road on which its property abutted, and it was rational and proper for the City of Duluth to avoid making that same mistake in this case.

Importantly, the right of access possessed by Glass includes not only the right of access to 40th Street, on which Glass's property abuts, "but also over and on the street to the next intersecting street." 11 McQuillan, *Municipal Corporations*, § 32.33 (1999). *See also Vanderburgh v. City of Minneapolis*, 98 Minn. 329, 108 N.W. 480 (1906) (holding that city was liable for taking of abutting owner's right of access where the city's vacation of part of a street deprived the abutting owner of access to the next intersecting street); *Church of Sts. Peter & P. v. Township of Lake George*, 252 Minn. 209, 89 N.W.2d 708, 711 (1958). In other words, Glass's right of access includes the right to use 40th Street to access Minnesota Avenue and, from it, the rest of the City's streets. Indeed, an abutting owner's right of access would be rendered meaningless if it consisted of nothing more than the right to back in and out of his driveway, without being able to access the city's inter-connecting street system.

B. To Fulfill Its Constitutional Obligation To Provide Glass With Access To His Property, The City Properly Acted Within Its Discretion In Granting Glass A Permit To Use And Improve 40th Street.

Decisions related to the creation and use of city roads are legislative decisions. *Lafayette Land Co. v. Village of Tonka Bay*, 305 Minn. 461, 234 N.W.2d 804, 805-06 (1975); see also *Bengston v. Village of Marine on St. Croix*, 310 Minn. 508, 511, 246 N.W.2d 582 (1976) (“determinations of when and how highways should be constructed, improved, or repaired are in essence a legislative function...”). It is axiomatic in Minnesota that municipal governing bodies are entitled to great deference from the judiciary when making legislative decisions relating to the management of municipal affairs. See *SuperAmerica Group, Inc. v. City of Little Canada*, 539 N.W.2d 264, 266 (Minn. App. 1995), *rev. denied* (Minn. Jan. 5, 1996), (“[municipal] decisions are entitled to great deference and will be disturbed on appeal only in instances where the city's decision has no rational basis.”); see also *White Bear Docking and Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982) (“The mere fact that a court might have reached a different conclusion, had it been a member of the council does not invalidate the judgment of the City officials if they acted in good faith and within the discretion accorded them by statute and ordinance.”); and *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 258 (Minn. Ct. App. 2004). When a legislative decision by a municipal governing body is at least doubtful or fairly debatable, a “court will not interject its own conclusions as to more preferable actions.” *Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980).

The Duluth City Charter specifically provides that the City Council may adopt an ordinance that allows the City to allow a limited use of dedicated public streets. Duluth

City Charter, Chapter XIII, Sec. 100(d). Pursuant to this authority, the City Council has adopted ordinances providing the City Engineer with authority to “issue special permits to private parties to make local improvements in, upon or under the public highways and public grounds of the city...” Duluth City Code §§ 45-84 – 45-86.

As noted above, Glass has a constitutional right as a property owner abutting a public right-of-way to reasonable and convenient access to 40th Street and, from 40th Street, to the City’s other public roads. *In re Lafayette Dev. Corp.*, 567 N.W.2d 743 (Minn. Ct. App. 1997). *State v. Northwest Airlines, Inc.*, 413 N.W.2d 514 (Minn. Ct. App. 1987). In the present case, pursuant to the authority conferred upon him by the City Council, the City Engineer determined Lot 1, Block 2 of the Oatka Beach Addition to be without reasonable and convenient access to the City’s public streets and granted Glass a permit to improve and use the 40th Street right-of-way to access his property.

Why is this unlawful? If a municipality determines that it is constitutionally obligated to provide access to private property that abuts a dedicated public right-of-way (as the City has here), but also determines that it is not necessary or desirable to improve the right-of-way with full bituminous paving, curb and gutter, and drainage, why is it beyond the discretion of the municipality to allow the owner of private property to access his or her parcel via an extension of a pre-existing gravel driveway? Neither Respondents nor the District Court cite any authority for the proposition that “opening” a public right-of-way must be an “all or nothing” event, or that a public right-of-way must

be “opened” by “proper legislative action” rather than by delegation to the City staff.³ There is no basis in Minnesota law for these conclusions, and the District Court’s attempt to impose such requirements severely constrains the City’s authority to manage its public streets and is an unwarranted abrogation of the City’s legislative discretion.⁴

Once a street has been dedicated to the public by plat, a municipality has the discretion to manage that street as it sees fit. *Pierro v. City of Minneapolis*, 139 Minn. 394, 395, 166 N.W. 766 (1918) (“When a street is dedicated by plat, the city may choose its own time to occupy, open and use the street.”) In this case, the City has specifically chosen to open, or to authorize the use of, 40th Street for the extension of an existing driveway in order to fulfill its constitutional obligation to provide sufficient public street access to the Glass property. It has done so pursuant to properly adopted provisions of its City Charter and City Code that delegate decision-making authority to the City Engineer, and that decision was extensively reviewed by numerous City departments. By concluding that the City acted unlawfully in making these determinations, the District Court has exceeded the scope of its authority to intrude into municipal affairs. Accordingly, this Court should reverse the order of the District Court.

V. Todd Glass Has A Right To Use 40th Street As An Owner Of A Lot Within The Oatka Beach Plat.

³ Indeed, there is no statutory authority for the proposition that a municipality must “open” a public street by formal act *at all*.

Although the District Court and the Plaintiffs below both characterize the City’s action as granting Glass a “private driveway” or a “private easement,” the City’s permit does nothing to change the fact that 40th Street would remain subject to the right-of-way easement of the general public.

The District Court failed to acknowledge the fundamental principle that a person owning a lot within a plat has a right to use the streets laid out within that plat. Under Minnesota law, “one purchasing a lot within a plat may rely upon the dedication of streets and alleys shown therein, and possesses the right to use the same.” *Etzler v. Mondale*, 266 Minn. 353, 364, 123 N.W.2d 603 (1963). In other words, under Minnesota law a person who owns a lot in a plat possesses “the right to use” the streets laid out in that plat. Similarly, in *Bryant v. Gustafson*, 230 Minn. 1, 40 N.W.2d 427 (1950), the Court held that:

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 the roads and streets of advantage or utility to the platted area as a whole.

230 Minn. at 8 (emphasis added). *See also Gilbert v. Emerson*, 60 Minn. 62, 61 N.W. 820, 822 (1895) (holding that the dedication of streets in a plat creates an easement in those streets in favor of the buyers of lots within the plat).

Here, it is fundamental and undisputed that: owners of lots in a platted subdivision or addition have a right or easement to use the streets dedicated in the plat, and that Glass is the owner of a lot in the Oatka Beach Addition. Accordingly, Glass possesses the clear legal right, repeatedly affirmed by the Minnesota Supreme Court, to use all of the platted streets within the plat, including 40th Street and Minnesota Avenue. For this reason, this Court should reverse the District Court’s decision.

VI. The District Court Abused Its Discretion In Adding Joseph Zajac As A Plaintiff.

Pursuant to a request by the Bolens in their post-trial brief, and without holding a hearing or otherwise soliciting argument from Glass, the District Court ordered that Joseph Zajac be added as a Plaintiff as part of its Findings of Fact, Conclusions of Law, and Order.

In his Answer herein, Glass alleged the Bolens' failure to join Zajac as a party as an affirmative defense. In response, the Bolens could have amended their complaint adding Zajac as a plaintiff within 20 days of service of the answer in accordance with Minn. R. Civ. P. 15.01. They could have requested to add Zajac as a plaintiff by consent of the other parties or with the permission of the Court prior to the trial. Instead, the Bolens waited until *after* the trial to make this request, characterizing their request as a motion to amend the complaint to conform to issues tried by consent of the parties in accordance with Minn. R. Civ. P. 15.02. One can only speculate as to what the reasons for the Bolens' actions might be.

Although Zajac testified at the trial and was subject to cross-examination by counsel for Glass, this in no way constituted "consent" by Glass to add Zajac as a plaintiff at such a late date sufficient to satisfy Minn. R. Civ. P. 15.02. Indeed, Glass expressly *refused* to grant the Bolens' post-trial request to add Mr. Zajac as a party, for reasons Glass would have happily explained to the District Court had the District Court bothered to have a hearing on the matter before it made its decision. Glass's reasons for not consenting to the post-trial addition of Zajac as a plaintiff include, but are not limited

to, the following: (1) Zajac's testimony at trial would have been understood to have been from an interested party, with potential biases and prejudices, rather than from a seemingly disinterested witness, (2) as a party, Zajac's testimony would have been subject to less restrictive rules of evidence, and (3) the scope of Glass's liability is broader than he could have anticipated with only the Bolens as plaintiffs. Glass has suffered substantial prejudice as a result of the District Court's *sua sponte*, post-trial decision to add Zajac as a plaintiff. Accordingly, Glass requests this Court to reverse the District Court's post-trial decision to add Zajac as a Plaintiff or, alternately, to remand the case for a new trial.

VII. The District Court Erred In Ordering Glass To Restore All Of The 40th Street Corridor To Its Previous Condition.

An underlying fee owner may use and improve a dedicated public right-of-way so long as there is no interference with the public's use of its easement. *See Foote v. City of Crosby*, 306 N.W.2d 883, 885 (Minn. 1981); *Kochevar v. City of Gilbert*, 272 Minn. 274, 277, 141 N.W.2d 24, 27 (Minn. 1966) (holding that a public entity may not require removal of an improvement that does not obstruct the public right-of-way). Indeed, the reasoning of the District Court's order is premised on this very principle, though it misunderstood the respective roles of the public and private interests. Even assuming, *arguendo*, however, that Glass did not have the right to improve those parts of the 40th Street right-of-way to which the Bolens and Zajac hold the underlying fee, the District Court ordered Glass to remove *all* of the improvements from the 40th Street right-of-way and to restore *all* of the 40th Street right-of-way to its previous condition,

including that part of the 40th Street right-of-way to which *Glass* holds the underlying fee. In other words, the District Court held that the Bolens' and Zajac's underlying fee interests were sufficiently strong to "trump" the City's and Glasses' interests (and to apparently allow Zajac to maintain part of his garage within the 40th Street easement), but that Glasses' underlying fee interest was meaningless, in the sense that he was ordered to remove the gravel that he had placed within "his" half of 40th Street.

Even the Bolens never requested that the District Court order Glass to remove the improvements he constructed on property *he* owned in fee (which obviously does not constitute trespass, which is the primary claim the Bolens asserted in their complaint). Indeed, this would be an odd request for them to make, since the record clearly shows that the Bolens' and Zajac's "portion" of 40th Street already has a gravel driveway as well as part of a garage within the 40th Street right-of-way easement area. The District Court had no authority to order Glass to remove the driveway extension he lawfully constructed on his own property. Accordingly, even if this Court does not grant Glass the other relief he requests, this Court should at the very least reverse that part of the District Court's order that requires him to remove that portion of the driveway extension from the part of 40th Street that he owns in fee.

CONCLUSION

As abutting property owners, it is true that the Bolens hold underlying fee title to the 40th Street centerline, a point to which the District Court devotes an inordinate amount of attention but which Glass has never disputed. However, the Bolens' interest is subservient to the public's interest in 40th Street as a public right-of-way. *Haeussler v. Braun*, 314 N.W.2d 4, 7 (Minn. 1981). Simply put, that public interest is the right to travel in the public street, yet the District Court erroneously concluded that the public right is "trumped" by the Bolens' underlying fee interest. In addition, the Bolens' interest in 40th Street is also subservient to Glass's constitutionally-protected right of access to 40th Street, and to the City's legislative authority to issue permits in accordance with City Charter and City Code provisions it adopted to establish and maintain public streets, authority with which the courts traditionally do not interfere out of respect for the discretion of municipalities to manage their own affairs.

In the present case, the District Court failed to accord sufficient deference to the City's authority to govern its public streets; it failed to recognize fundamental principles related to the right of platted lot owners to use right-of-way easements dedicated within the same plat; and it failed to even consider, much less correctly evaluate, factual evidence that overwhelmingly establishes that the 40th Street right-of-way easement has been "opened" by the past actions of the City and by historic use by the public. For these reasons and the additional reasons set forth above, Glass respectfully asks that this Court reverse the decision of the District Court.

Respectfully submitted,

MALKERSON GILLILAND MARTIN LLP

Dated: October 23, 2006

By:  _____

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STATE OF MINNESOTA
IN COURT OF APPEALS

Michael Bolen, Deborah Bolen,
and Joseph Zajac,

Appellate Court Case Nos.: A06-1422
A06-1440

Respondents,

vs.

Todd Glass,

**CERTIFICATION OF BRIEF LENGTH:
APPELLANT'S BRIEF**

Appellant (A06-1422),
Respondent (A06-1440),

vs.

City of Duluth,

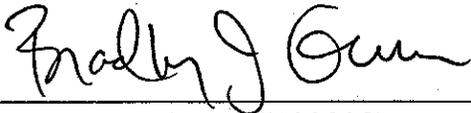
Respondent (A06-1422)
Appellant (A06-1440),

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 8968 words. This brief was prepared using Microsoft® Word 2000.

Respectfully submitted,

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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).