MINNESOTA STATE LAW LIBRARY

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).

REPLY BRIEF OF APPELLANT TODD GLASS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. ARGUMENT 1

A. The District Court Erred By Not Determining Whether 40th Street Has Been Opened By Historical Public Use 1

B. Respondents Fail To Understand The Nature Of Glasses' Constitutionally-Protected Right Of Access 7

C. Respondents Fail To Distinguish The Cases Holding That Owners Who Purchase Lots In A Plat Have The Right To Use The Dedicated Streets In The Plat 8

D. The City Acted Within Its Authority To Govern The Use Of Public Streets By Issuing A Permit Allowing Glass To Use And Improve 40th Street 10

E. The District Court Erred In Adding Zajac As A Plaintiff After The Trial 12

F. The District Court Erred In Ordering Glass To Remove Improvements From "His" Half Of The 40th Street Right-Of-Way 12

III. CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Anderson v. Birkeland,
229 Minn. 77, 82, 38 N.W.2d 215, 219 (1949) 3

In re Lafayette Dev. Corp.,
567 N.W.2d 743, 745-46 (Minn. Ct. App. 1997) 3, 5, 6

Hendrickson v. State,
267 Minn. 436, 440, 120 N.W.2d 165 (1964) 7

Henly v. Chisago County,
370 N.W.2d 920, 923 (Minn. Ct. App. 1985) 3

Johnson v. City of Plymouth,
363 N.W.2d 603, 605 (Minn. 1978) 7

State v. Northwest Airlines,
413 N.W.2d 514 (Minn. Ct. App. 1987) 7

Trebnick v. Gordon,
259 Minn. 164, 167, 106 N.W.2d 622, 624 (1960) 3

Underwood v. Town Board of Empire,
217 Minn. 385, 14 N.W. 459, 461 (1955) 9

SECONDARY AUTHORITIES

Duluth City Charter, Chapter XIII, Sec. 100(d) 1

Duluth City Code Chapter 45, Sections 84-91 1

13 McQuillan, *Municipal Corporations,* § 30.31 (3rd ed.) 10

McQuillan, *Municipal Corporations,* § 30.64. (3rd ed.) 8, 11

I. INTRODUCTION

With the express permission of the governing road authority (appellant City of Duluth), appellant Todd Glass ("Glass") constructed a gravel driveway within the dedicated 40th Street right-of-way easement. As a result of Glass's construction of this driveway, respondents Michael and Deborah Bolen ("Respondents" or the "Bolens") brought an action in District Court alleging trespass on that part of the 40th Street right-of-way easement to which they held underlying fee title.

For the reasons set forth below and for the additional reasons set forth in Glass's principal brief, Glass respectfully requests that this Court reverse the decision of the District Court in its entirety.

II. ARGUMENT

For all of the reasons set forth below, Glass respectfully asserts that the decision below must be reversed.

A. The District Court Erred By Not Determining Whether 40th Street Has Been Opened By Historical Public Use.

The District Court inexplicably failed to address the issue of whether 40th Street has been "opened" by historical public use despite the fact that the Court had just presided over a two-day bench trial devoted primarily to that issue. *In re Lafayette Dev. Corp.*, 567 N.W.2d 743 (Minn. Ct. App. 1997). Respondents essentially argue that one may somehow infer from the District Court's Findings of Fact, Conclusions of Law, and Memorandum of Law that the District Court implicitly resolved this issue in Respondents' favor.

After a two-day trial regarding a single factual issue, it should not be necessary to infer the trial court's determination on that issue from the it's treatment of other issues in its ten-page Findings of Fact, Conclusions of Law, Memorandum of Law and Order for Judgment (collectively, the "Order"). For this reason, respondents' argument that the District Court decided the issue of whether 40th Street has been "opened" by historical use by the public in respondents' favor is unpersuasive and unsupported by the Order. To the contrary, it is clear from the Order that the District Court failed to make a determination on this issue at all.

It is clear from the Order that the trial court confused the factual issue of whether 40th Street has been "opened" by historic public use with the legal issue of whether the City has the authority to delegate the development of a public street right-of-way to a private individual. See Order, pp. 8-9 (App. A-8 to A-9) (attempting to distinguish *In re Lafayette Dev. Corp.* by noting that the developer was seeking to compel a municipality to improve a right of way for public use, whereas Glass asked "to privately develop the easement for private use") (emphasis in original); and Order, p. 9 (App. A-9) ("the easement is dedicated to the public use and the City of Duluth lacks the authority to delegate development of an easement...."). It is equally clear that the District Court confused the principle of common-law *dedication* with the principle that is relevant here, the "opening" by historic public use of a street right-of-way (like 40th Street) that has already been properly dedicated. In particular, the District Court distinguished cases cited by Glass on the basis that those cases related solely to common law dedication, even though those cases are equally relevant to the "opening" of public streets by historical

public use. See Order, p. 9 (App. A-9) (attempting to distinguish cases cited by Glass by noting that "the level of public use was necessary for determining if there was a common law dedication of the roads to public use.").

The District Court apparently did not recognize that a dedicated public right-of-way may be "opened" by historic public use regardless whether the governing municipality has the authority to "delegate" its control of public streets or not. Indeed, the historical public use of 40th Street is sufficient to "open" 40th Street independent of any action (or lack thereof) by either the City or Glass.

The District Court apparently also did not recognize that historic public use is a concept common to both the principle of common-law dedication of public street rights-of-way (which is not an issue in this case) and to the opening of public street rights-of-way after they have been properly dedicated (which is the primary factual issue in this case). The amount of historic public use sufficient to "open" a dedicated public street is identical to the amount of historic public use that that is sufficient to effect a common law dedication under *Layfayette*, in which this Court adopted the standards set forth in cases related to common law street dedication and applied them to the rule that a dedicated public street may be "opened" by historic public use. *In re Lafayette Dev. Corp.*, 567 N.W.2d at 745-46, citing *Anderson v. Birkeland*, 229 Minn. 77, 82, 38 N.W.2d 215, 219 (1949); *Henly v. Chisago County*, 370 N.W.2d 920, 923 (Minn. Ct. App. 1985); and *Trebnick v. Gordon*, 259 Minn. 164, 167, 106 N.W.2d 622, 624 (1960). Most importantly, this Court applied the principle from these cases that only a small amount of historic public use is necessary for a dedicated public street to become "open." This

Court concluded that the same small amount of public use that is necessary to effect a common law dedication is sufficient to "open" a public street that has already been properly dedicated. *Id.*

As this Court has stated, there is "no authority to support the proposition that a road is not open until there occurs some resolution or ceremony that signifies a governmental will that the road be opened." *Id.* at 746. Moreover, "if the roadway is duly dedicated, neither logic nor precedent permits the conclusion that the road is not 'open' when opening occurs as a matter of fact, as is demonstrated by public use...." *Id.* at 745. As noted above, only a small amount of public use is necessary to make a street "open," and Glass's initial brief presented ample evidence to the District Court that this minimal standard had been satisfied and exceeded.

Respondents contest the sufficiency of this evidence, claiming that "Glass failed to present competent, credible evidence" that 40th Street has been opened by historic public use. (Resp. Br. at 19) However, it is the District Court's responsibility to determine whether the evidence presented is credible and competent, and the District Court failed to do so. In support of their claim that the historic public use of 40th Street was not sufficient to "open" 40th Street, respondents repeatedly draw inferences from the evidence presented to the District Court. For example, respondents state that it is "more likely than not" that the "stepping stones" (i.e. sidewalk) leading from 40th Street to Lots One (1) and Fifteen (15) are not evidence of public use of 40th Street because the stones have a placement that "would be consistent" with the two lots being under common ownership or that the stones "may also represent a path for permitted use between" the two lots.

(Resp. Br. at 21) Respondents state that the testimony at trial evident of use that "would have been consistent with common ownership of the lots adjoining the 40th street corridor or permitted use between friendly neighbors" and, regarding the "wee" house, of use "that would have been permitted use by the owner of the property." (Resp. Br. at 8)

Glass respectfully suggests that the evidence and testimony presented at trial "would be consistent" more with the small amount of historic public use that is necessary to "open" a dedicated public street right-of-way in accordance with *Layfayette*, *supra*, than with "permitted use by the owner of the property" or "between friendly neighbors." However, the relevant point here is that inferences of this sort are to be made *by the trier-of-fact*, not by the parties or this Court. The District Court did not do so here because it did not recognize the issue of whether 40th Street was "opened" by historic public use was a factual issue that it was obliged to resolve. Accordingly, this Court should reverse the District Court's decision.

In attempting to distinguish *Lafayette*, respondents observe that the road at issue in that case provided the only access to the developer's property and suggest that this is a "predicate" for a dedicated public street right-of-way to become "open" by historic public use. (Resp. Br. at 30) Respondents also observe that the developer in *In re Lafayette Dev. Corp.* sought a determination that the street at issue was "open" for the purpose of compelling the defendant municipality to improve and maintain that street, whereas here Glass seeks a determination that 40th Street has been "opened" for the purpose of providing driveway access to his property.

There is no suggestion in *Lafayette* (or inany other case) that a "predicate" for a dedicated street to be opened by historic public use is that private property would otherwise be completely deprived of public street access. Likewise, Glass is not arguing (as respondents seem to suggest) that, had the District Court determined 40th Street to be an open public street, Glass would then be able to use and maintain 40th Street as a private driveway. Rather, Glass acknowledges that he would share a right to use 40th Street with the public at large.

Lafayette establishes as a matter of law that a small amount of use by the public is sufficient to "open" a dedicated public street right-of-way even in the absence of a formal legislative act by the governing road authority. The respondents twice argue, erroneously, that the evidence in the *Lafayette* case involved, *inter alia,* 248 tenants regularly using the right-of-way. (Resp. Br. at 30, 31) In reality, the issue was whether the developer could use the right-of-way to construct a 248-unit residential development, which was not built until long after the trial and the appeal were over. The evidence submitted at trial establishes that a more than sufficient amount of public use has historically occurred on 40th Street. Accordingly, this Court should reverse the decision of the District Court and conclude that 40th Street is "open," or at a minimum, the Court should remand this matter to the District Court so that it may resolve the factual issue of whether 40th Street has been opened by historic public use.

B. Respondents Fail To Understand The Nature Of Glasses' Constitutionally-Protected Right Of Access.

Respondents argue that Glass already has a means of access to his property, via Lot 16 and Minnesota Avenue, and that he therefore has no right of access to 40th Street. (Resp. Br. at 34-36) This argument is erroneous in four respects.

First, what respondents appear to regard as some kind of generic "access" is not the kind of constitutionally-protected right of access that exists under Minnesota law. The right of access is a right of access to an *abutting* roadway. As discussed more fully in Glasses' initial brief, under Minnesota law "Property owners have a right of 'reasonably convenient and suitable access' to a public street or highway which abuts their property." *Johnson v. City of Plymouth*, 363 N.W.2d 603, 605 (Minn. 1978); *Hendrickson v. State*, 267 Minn. 436, 440, 120 N.W.2d 165 (1964). In the present case, it is undisputed that Glasses' property abuts on 40th Street, yet the respondents argue that Glass has *no right* of access to 40th Street because he has access to Minnesota Avenue. This argument is plainly contrary to over 100 years of Minnesota law.

Second, Lot 1 of Glass's property is a legal lot of record. It abuts on 40th Street, and on no other street or roadway. Contrary to the respondents' assertion, it has been owned on several occasions separate from the ownership of Lots 2 and 16. In addition, Glass has the right to sell Lot 1 to whomever he chooses, and the buyer of Lot 1 would then have no right of access other than via 40th Street (which is how the occupants of the "wee house" historically accessed Lot 1 for many years). Accordingly, as the owner of

Lot 1, Glass possesses the same right of access that any owner of Lot 1 would possess, namely, the right of access to 40th Street.

Third, the fact that 40th Street has not been improved all the way to Glass's property is irrelevant to Glasses' right of access. On the contrary, in *State v. Northwest Airlines*, 413 N.W.2d 514 (Minn. Ct. App. 1987), a cul-de-sac terminated 65-feet from the owner's property line, across a steep drainage ravine. The Court held that the owner had a constitutionally-protected right of access to the cul-de-sac, notwithstanding the fact that the physical obstacles in that case, unlike the present case, were significant.

Fourth, "in many instances courts have determined that the denial, refusal, or revocation of a permit for a driveway was an unwarranted impairment of an abutter's right of access..." McQuillan, *Municipal Corporations,* § 30.64. (3rd ed.) In other words, abutting owners possess a right of access to the abutting roadway, and a city may be found to have unconstitutionally "taken" that right by denying a requested driveway permit.

For all of these reasons, the respondents' argument concerning Glasses' constitutionally-protected right of access to 40th Street is misplaced.

C. Respondents Fail To Distinguish The Cases Holding That Owners Who Purchase Lots In A Plat Have The Right To Use The Dedicated Streets In The Plat.

As set forth in Glasses' initial brief, persons buying lots within a plat are deemed to possess the right to use the property dedicated within the plat, as part of the rights defined by the plat itself. Respondents argue that owners of lots within a plat have no rights beyond the rights possessed by members of the public (Resp. Br. at 36-38), and

that, under their interpretation of the law, the lot owners therefore have no right to use an unopened street.

As set forth above, Glass denies that 40th Street is "unopened." But even assuming, *arguendo*, that it is unopened, the respondents' argument still misses the point. The respondents apparently equate "lot owners" (under the cases defining the rights of persons owning a lot in a plat) with "abutting owners" (under the cases defining the property rights of abutting owners), and they then argue that "*Underwood* does not stand for the proposition that an abutting landowner enjoys rights greater than the public in general." (Resp. Br. at 37) This approach is flawed in two respects.

First, "lot owners" are not the same as "abutting owners." A plat may contain multiple streets, and a lot owner within the plat is unlikely to abut on more than one (or two) of those streets, yet he or she still possesses the rights of a lot owner with respect to all of the streets dedicated in the plat.

Second, *Underwood* most definitely *does* stand for the proposition that abutting owners possess rights that the general public does not. "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. 459, 461 (1955) (emphasis added).

The point is that both abutting owners and owners of lots within a plat have separate and distinct rights that go beyond the rights of the general public. In the case of owners of lots within a plat, that right is the right to use the dedicated streets within the plat (such as 40th Street, in the present case). The respondents' comment that "no person

can lawfully monopolize the use of a public street" (Resp. Br. at 38) is ironic, given the fact that the respondents are attempting to do exactly that.

D. The City Acted Within Its Broad Authority To Govern The Use Of Public Streets By Issuing A Permit Allowing Glass To Use And Improve 40th Street.

The respondents argue that the City's granting of a "private" driveway permit in this case was unlawful and perhaps unconstitutional. (Resp. Br. at 39-41) This argument is misplaced for three reasons.

First, as set forth in Glass's and the City's initial briefs, cities possess broad authority with respect to the improvement and the use of their streets. Indeed, it has been said that:

> A city has plenary power to open, widen, and keep open and free from obstructions, all streets, alleys, public ways... The exercise of this discretion will not ordinarily be interfered with by the courts.

13 McQuillan, *Municipal Corporations,* § 30.31 (3rd ed.). In other words, cities have almost absolute powers with respect to the opening and the use of their streets, and it is not the duty of the courts to second guess those determinations.

Second, while a city's authority to regulate driveways is extremely broad, it does not include the right to deprive an abutting owner (such as Glass) of a driveway to his or her property. "[E]ven though a permit is required by law to construct a driveway onto a street, this does not mean that there can be an absolute denial to an abutting owner of the right to construct a driveway to a street..." *Id.* at § 30.64. In short, the respondents' argument is premised upon the supposition that they are the only ones who possess any

rights in 40th Street, but the City of Duluth's decision to grant the driveway permit correctly recognized that Glass also possesses certain rights in connection with 40th Street.

Third, while the permit form used by the City was referred to as a private improvement permit, Glass believes, for all of the reasons set forth above, that 40th Street is open to the public and to other members of Oatka Beach Addition for purposes of travel. The driveway Glass constructed is entirely consistent with the concept of "travel," which is the paramount use of all public streets. If Glass had constructed a wall to prevent all travel, the respondents might well have reason to complain. But the extension of the pre-existing gravel driveway is hardly inconsistent with the idea of a public street.

In summary, the City acts as trustee for the public to determine the best way to use its streets, and in this case it extensively studied the issue and determined that the various competing interests would best be served by allowing Glass to extend the gravel driveway, while also allowing Zajac to retain his garage within the right-of-way. This was a reasonable solution, and it protected the constitutional rights of Glass and minimized any intrusion on the interests of the respondents. It also had the effect of facilitating travel in 40th Street, which is the primary purpose of roadways and which should not come as a surprise to anyone (like the respondents) who purchases a home located next to a dedicated public street.

E. The District Court Erred In Adding Zajac As A Plaintiff After The Trial.

As Glass explained in his principal brief, the parties did not simply "consent" to the post-trial addition of Zajac as a plaintiff, and the District Court abused its discretion by ordering that Zajac be made a plaintiff without conducting a hearing or otherwise soliciting input from Glass. The respondents largely ignore the arguments advanced by Glass, and they misstate the one argument they do address when they declare that "In support of that claimed error, Glass alleges that had he known Zajac was a party, he would have understood that Zajac's testimony at trial was from an interested party." (Resp. Br. at 42) What Glass actually argued was that if the *finder of fact* had known that Zajac was a party when he testified at trial, his testimony would have been recognized as being less disinterested than it than appeared. For the reasons set forth in Glasses' initial brief, it was error for the District Court to *sua sponte* add Zajac as a party after the trial.

F. The District Court Erred In Ordering Glass To Remove Improvements From "His" Half Of The 40th Street Right-Of-Way.

Having premised all of their arguments on the principle that abutting property owners retain underlying fee title to street easements, respondents then request this Court to repudiate that principle by affirming the District Court's order compelling Glass to remove the improvements from that part of 40th Street to which Glass holds the underlying fee title. Respondents' request appears to be based on the following reasoning: The driveway improvements on Glass's property, in connection with the driveway improvements on respondents' property and Zajac's property, create the *appearance* of an open public street. (Resp. Br. at 44)

As set forth above, 40th Street *is* an open public street because of the historical use of 40th Street by the public. However, even if this were not the case, the District Court had no authority to order Glass to remove improvements he made to *his own* property. If respondents are concerned with the appearance of 40th Street to the traveling public, they can remove their own driveway improvements to the 40th Street right-of-way.

III. CONCLUSION

For the reasons set forth above, in addition to the reasons set forth in Glass's principal brief, Glass respectfully asks that this Court reverse the decision of the District Court in its entirety.

Respectfully submitted,

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

CERTIFICATION OF BRIEF LENGTH: REPLY BRIEF OF APPELLANT TODD GLASS

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 4092 words. This brief was prepared using Microsoft® Word 2000.

Respectfully submitted,

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