

Nos. A06-1422 and A06-1440

State of Minnesota
In Supreme Court

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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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).

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STATEMENT OF THE LEGAL ISSUES

1. Was 40th Street “open” to public use?

The District Court failed to make a finding as to whether the public use of 40th Street was sufficient to open the dedicated 40th Street right-of-way as a public street. The decisions of the District Court and the Court of Appeals nonetheless implicitly or directly held in the negative.

Most apposite cases and other authorities: *In re Lafayette Dev. Corp.*, 567 N.W.2d 743, 745 (Minn. Ct. App. 1997); *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. Does the owner of a property abutting on a platted and dedicated street (e.g., 40th Street) have a right of reasonable access to that street?

The Court of Appeals: Did not address this issue directly, other than to state that Glass had a right of access to a different street (Minnesota Avenue) and he therefore did not need to use 40th Street.

Most apposite cases and other authorities: *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).

3. Does an owner of a lot within a plat have a right to use a street that was dedicated as part of the same plat?

The Court of Appeals held: in the negative.

Most apposite cases and other authorities: *Bryant v. Gustafson*, 230 Minn. 1, 40 N.W.2d 427 (1950); *Etzler v. Mondale*, 266 Minn. 353, 123 N.W.2d 603 (1963); *Gilbert v. Emerson*, 60 Minn. 62, 61 N.W. 820 (1895).

4. Did the City of Duluth have the authority, pursuant to its City Charter and City Code, to grant Glass a permit to extend the existing driveway in 40th Street?

The Court of Appeals held: in the negative.

Most apposite cases and other authorities: *In re Layfayette 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.

STATEMENT OF THE CASE

Appellant Todd Glass applied to Appellant City of Duluth (the "City") for a permit to extend an existing driveway within a dedicated street (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, along with 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 40th Street, be added as a plaintiff.

Glass and the City both appealed to the Minnesota Court of Appeals. The two appeals were consolidated, and on September 4, 2007, the Court of Appeals filed its opinion affirming and modifying the decision below. Glass petitioned this Court for further review, and on November 13, 2007, the petition for further review was granted.

STATEMENT OF FACTS

The Parties and the Properties.

This matter relates to a dispute regarding the use of the 40th Street right-of-way, which is a dedicated public street 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”). An illustrative map depicting 40th Street and the abutting properties is attached at App. A-30.

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, which is 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 which are 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) Said 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.*

Dedicated 40th Street.

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) Significantly, the front part of 40th Street is already improved with a gravel driveway leading to the rear of 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 "wee house." (Tr., pp. 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., pp. 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, David and Steven Wakefield, testified at trial. 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. (Tr., p. 51) He also testified that he had seen Zajac access the lake via 40th Street. (Tr., 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 usage 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 Metzko, visited the Glass Property and inspected 40th Street three times in connection with his review of the Glass permit application. (Tr., p. 248) Mr. Metzko 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 and 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 such as this, the reviewing 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 also reviewed *de novo*.

Three of the issues raised on this appeal are questions of law and thus subject to *de novo* review (namely, a property owner's right of access to an abutting street, the right of an owner of a lot in a plat to use the streets dedicated in the plat, and the right of a municipality to issue a driveway permit to allow an abutting property owner to extend a driveway to his property). The fourth issue (whether or not dedicated 40th Street was "open" to public use) is either a question of fact or a mixed question of law and fact, and therefore subject to review under a "clearly erroneous" or *de novo* standard.

ARGUMENT

This appeal raises the question of whether a property owner has a right to extend an existing driveway in a platted and dedicated city street to access his or her abutting property. The appeal involves three issues of law and one issue of fact (or possibly a mixed issue of law and fact). Appellant Glass respectfully submits that the District Court and the Court of Appeals decided the three legal issues erroneously, and that no findings were made with respect to the one issue of fact. Accordingly, Glass requests this Court to reverse the decision below and to hold that he is entitled to access his property by extending the pre-existing gravel driveway in 40th Street in accordance with the permit issued by the City Engineer.

I. The Evidence Presented At Trial Established Sufficient Public Use To Render 40th Street “Open.”

A platted and dedicated street 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 743, 745 (Minn. Ct. App. 1997) As noted in *Lafayette*, use by even a small number of people is sufficient to establish public use. *See also Anderson v. Birkeland*, 229 Minn. 77, 82, 38 N.W.2d 215, 219 (1949). The lone factual issue at trial was whether or not 40th Street had been opened by virtue of public use, and the evidence in this case was more than sufficient to demonstrate that it had.

A. The District Court Failed To Make Any Findings As To Whether Or Not 40th Street Was “Open.”

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 evidence presented at trial established 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.

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? However, in its Findings of Fact, Conclusions of Law and Order, the District Court ignored this question. To the extent the District Court addressed the issue of whether 40th Street is open at all, it did 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.

(App. 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 missed the point. Once 40th Street has been “opened” by public use (as set forth below, the evidence shows that it has been so opened), 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 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.¹

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

¹ 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).

has failed to make *any factual conclusions at all*, at least with respect to the critical factual issue in the case. This constitutes clear error for which we request this Court to reverse the decisions below.

B. The Evidence At Trial Demonstrated That 40th Street Was “Open.”

At trial, Glass and the City presented substantial evidence of public use of 40th Street stretching back for more than a century. This evidence is summarized in detail at pages 7 to 10, *supra*, and it 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.

The undisputed evidence of public use of platted and dedicated 40th Street in this case was even more extensive than the evidence of public use in *Lafayette, supra*, in which platted and dedicated 18th Avenue was found to be “open” by virtue of public use. We therefore respectfully request that the decision below be reversed on the ground that 40th Street was indeed legally open to public use. Alternately, we request that the case be remanded to the District Court for a new trial to determine whether 40th Street has in fact been “opened” by virtue of the historic public use of the street, since the trial court made no findings on this issue in the first place.

II. Abutting Property Owners Possess A Constitutionally Protected Right Of Access to the Streets on Which Their Property Abuts.

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. Accordingly, 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). The abutting owner’s 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.”).

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 little more than the right to back in and out of his driveway, without being able to access the city’s inter-connecting street system.

In this case, Glass’s Lot 1 abutted on 40th Street and he therefore had a right of reasonable access to that street. The Court of Appeals “side-stepped” the issue of Glass’s right of access to 40th Street by simply stating that Glass “has direct access to Minnesota Avenue already...,” and that he therefore has “no need to rely on 40th Street.” In other words, the Court of Appeals concluded that Glass’s constitutionally-protected right of access to 40th Street was rendered null or meaningless because one of Glass’s other lots (Lot 16) had access to a different street. This decision represents an unprecedented departure from the long-established principle that a property owner has a right of reasonable access to *every* roadway on which his or her property abuts.

The effect of the Court of Appeals’ decision, which it may or may not have recognized, is to say that Glass has *no right* to drive or travel on a street which his property abuts, even where, as here, the City has granted a permit authorizing him to do

so. To the best of our knowledge, there are no appellate decisions in this state that have ever so held.

In addition, the Court of Appeals attempted to justify its decision by stating that the merger doctrine somehow extinguished Glass's easement of access to 40th Street because Glass owns Lots 1, 2 and 16, and Lot 16 abuts on Minnesota Avenue. 737 N.W.2d at 866. This is patently incorrect. The merger doctrine (to the extent it retains validity in light of Minn. Stat. § 507.47) simply eliminates an easement that benefits dominant Tract A and burdens servient Tract B when the owner of Tract A acquires Tract B, or *vice versa*, in which case the easement becomes superfluous. In this case, however, Lot 1's right of access to 40th Street arises independently by operation of law as an appurtenance to the Lot so long as it abuts on the street. As noted above, it is a constitutionally protected property right, and it cannot be eliminated except through condemnation upon payment of just compensation.

Glass's property abuts on 40th Street and because of that fact he has a right of reasonable access to 40th Street. The fact that Glass's property also abuts on Minnesota Avenue and thus has a right of reasonable access to that street as well is irrelevant to the issue raised on this appeal. The decision below held that, because Glass had access to Minnesota Avenue, his neighbors had an absolute legal right to deprive Glass of any right to use 40th Street to access his property, which right "trumped" Glass's constitutionally protected right of access to an abutting street and the City's right to give him a permit to extend a driveway in the street. There is no legal justification or support for that

unprecedented decision, and we respectfully request that the Court of Appeals' decision on this issue be reversed.

III. Owners of Lots In A Plat Have A Right To Use the Streets Dedicated In the 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). Indeed, in its decision in this case the Court of Appeals acknowledged that this Court has recognized that general rule. 737 N.W.2d at 864. The Court of Appeals, however, then proceeded to explain that this rule does not really mean what it says (namely, that owners of lots in a plat have a right to use the streets in the plat), and that the rule actually "applie[s] only to entitle the owners in a plat to notice of vacation proceedings" if a street in the plat is to be vacated. *Id.* That determination was erroneous.

A review of the Minnesota appellate decisions on this issue demonstrates the error of the Court of Appeals' decision on this issue:

- In *Gilbert v. Emerson*, 60 Minn. 62, 61 N.W. 820 (1895), this Court held that "Each purchaser of a lot is entitled to the benefit of the plat as it appears when he purchases it. If there are public streets, they inure to his benefit. If there are public alleys, he cannot be deprived of the privilege of enjoying them. 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.” 60 Minn. at 66. *Gilbert* had nothing to do with the possible vacation of a street, and the Court clearly stated that owners of the lots in the plat have the right to use and enjoy all of the streets in the plat.

- In *Bryant v. Gustafson*, 230 Minn. 1, 40 N.W.2d 427 (1950), this 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).² In addition, the Court cited to *Gilbert* to support its position that owners of lots in a plat have the right to use all of the streets and easements in the plat. 230 Minn. at 8. The Court of Appeals attempted to distinguish *Bryant* on the grounds that the plat in that case dedicated the streets to the owners of the lots in the plat rather than to the public, but the Court in *Bryant* rejected that distinction, stating “No distinction is made between a use dedicated to the public and one dedicated to a lesser

² Interestingly, the *Gilbert* and *Bryant* decisions make a point of stating that the lot owner’s right to use the platted streets extends “not merely” to the streets on which the owner’s lot abuts, but to the other streets in the plat as well. This suggests that a lot owner’s right to use the streets that abut his or her lot—as 40th Street abuts one of Glass’s lots—is even more fundamental than is the right to use other, non-abutting streets in the plat.

group... It follows that in construing a plat the same legal principles apply whether the dedication is to the use of the public or to the use of a more restricted group of beneficiaries.” *Id. at 7.*

- As noted above, in *Etzler* the Court held that “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.” 266 Minn. at 364. The Court of Appeals in this case stated that the holding in *Etzler* was limited to merely requiring that owners of lots in a plat are entitled to notice if a street may be vacated, but there is nothing in *Etzler* itself suggesting any such limitation. On the contrary, the reason that owners of lots in a plat are entitled to notice of a potential vacation of a street in the plat is presumably *because of* their right to use such streets.
- Most recently, this issue arose in *Petition to Vacate Portions of Streets in the Plat of Pottstown*, 2005 WL 703869 (Minn. App.) (unreported decision, copy attached at App. A-25). This decision involved a proposed vacation of a street in a plat, but the Court attached no significance to that fact. On the contrary, the Court explained that under *Etzler* and *Bryant* “all landowners within a plat have a right to rely on and use all platted roads represented in the plat.” *Id. at *3* (emphasis added).

In other words, for over 100 years the courts in this state have consistently held that a person who owns a lot in a plat possesses “the right to use” the streets laid out in that plat. Similarly, purchasers of lots in a plat such as the Bolens and Zajac “must be deemed to have purchased with a full knowledge” of the plat and its legal effect, *Gilbert*, 60 Minn. at 66, meaning that they have no right to prevent another lot owner from enjoying the benefits—which they share—conveyed by ownership of a lot in a plat. Accordingly, Glass possesses the clear legal right, repeatedly affirmed by this Court, to use all of the platted streets within the plat, including 40th Street. The decision below by the Court of Appeals was erroneous, and for this reason, too, we respectfully request the Court to reverse that decision.

IV. The City Of Duluth Had Sufficient Authority To Grant Glass A Permit To Extend the Existing Driveway on 40th Street.

Even if this Court were to determine that 40th Street had *not* been “opened” to public use, and that Glass does *not* possess a right of access to 40th Street, and that Glass does *not* possess a right, as an owner of a lot in the Oatka Beach Addition, to use the streets dedicated in that plat, the fact remains that cities have almost plenary powers to control the use and development of their streets, and the City of Duluth acted well within its discretion in allowing Glass to extend the existing driveway on 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).

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.”). Similarly, 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).

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.

In this case, the City has specifically chosen to authorize the use of 40th Street for an extension of the existing driveway. 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. In addition, the evidence in this case showed 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) By concluding that the City acted unlawfully in making this determination, the Court of Appeals failed to give proper deference to the legislative discretion of municipalities to make determinations related to the establishment and use of public streets. Accordingly, for this final reason we respectfully request the Court to reverse the decision below.

CONCLUSION

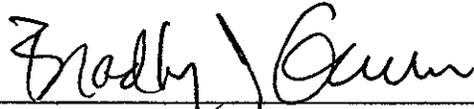
Glass has never disputed the fact that the Bolens and Zajac hold the underlying fee title to “their halves” of the 40th Street right-of-way. However, their interests are subservient to the public’s interest in 40th Street as a public right-of-way. *Haeussler v. Braun*, 314 N.W.2d 4, 7 (Minn. 1981). In addition, their interests in 40th Street are also subservient to Glass’s constitutionally-protected right of access to 40th Street, and to his right as an owner of a lot in the plat that dedicated 40th Street to the public to use and enjoy 40th Street. Finally, the rights of the Bolens and Zajac are also subservient to the City’s legislative authority to issue permits in accordance with City Charter and City Code provisions it adopted for the establishment, maintenance and use of its public streets, authority with which the courts traditionally do not interfere in deference to the broad rights of municipalities to manage their streets.

The decision below misapplies the applicable law and creates a dangerous precedent under which property owners whose only means of access to their properties is over an undeveloped, or only partially developed, platted street will no longer be able to use that street to access their properties, at least without the consent of their neighbors. For all of reasons set forth above, Glass respectfully requests this Court to reverse the decision below.

Respectfully submitted,

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**STATE OF MINNESOTA
IN SUPREME COURT**

Michael Bolen, Deborah Bolen,
and Joseph Zajac,

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

Respondents,

vs.

Todd Glass,

**CERTIFICATION OF BRIEF LENGTH:
REPLY BRIEF OF APPELLANT
TODD GLASS**

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 7,882 words. This brief was prepared using Microsoft® Word 2000.

Respectfully submitted,

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