

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).*

REPLY BRIEF OF APPELLANT TODD GLASS

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ARGUMENT

This appeal raises the question of whether Appellant Todd Glass (“Glass”) has a right to use 40th Street to access his property. The action was commenced by Respondents Michael and Deborah Bolen (referred to, along with Respondent Joseph Zajac, as “Respondents”) for the purpose of preventing Glass from extending the existing gravel driveway in the 40th Street right-of-way to his property. The final party to this appeal is the Respondent City of Duluth (the “City”), which granted Glass a permit to extend the driveway.

As set forth in our initial brief, Glass believes there are four separate, distinct and independent legal principles that authorize him to access his property via 40th Street: (1) that 40th Street has been legally “opened” to his property by virtue of its dedication to the public and its subsequent public use, (2) that since his property abuts on 40th Street he has a constitutionally protected right of access to that street, (3) that since he owns a lot in the plat that originally dedicated 40th Street he has a right to use all of the streets dedicated in that plat, including 40th Street, and (4) that notwithstanding the above, the City acted well within its authority in granting him a permit to extend the existing driveway to his property.

It is somewhat difficult to respond to the Respondents’ arguments on these issues, because, as described below, they tend to confuse and to combine the different legal issues in ways that are not logically consistent. Nonetheless, for the reasons that follow

we hope it will be clear that Glass is indeed entitled to use 40th Street to access his property.

I. 40TH STREET WAS “OPEN” TO GLASS’S PROPERTY.

The seminal case on this issue is *In re Request of Lafayette Dev. Corp. to Open 18th Ave. S.*, 567 N.W.2d 743 (Minn. Ct. App. 1997), *aff’d mem.*, 576 N.W.2d 740 (Minn. 1998). In *Lafayette*, the City of South St. Paul sought to prevent a developer from extending and using the end of 18th Avenue—which the City characterized as a “paper street”—to access its proposed development. This Court, however, by virtue of its 3-to-3 decision, affirmed the decision of the Court of Appeals which held that a platted street will be deemed legally “open” for public use if: (1) the street was dedicated to the public in a plat, and (2) there is sufficient evidence of public use to demonstrate that the street is open in fact. The Court of Appeals explained that “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....” 567 N.W.2d at 745. Finally, the Court concluded that the amount of historic public use sufficient to “open” a dedicated public street is identical to the amount of public use that is sufficient to effect a common law dedication, meaning that use by even a small number of people is sufficient to establish public use. *Id.* at 745-46.

As set forth in our initial brief, Glass and the City presented substantial evidence of public use of 40th Street stretching back for more than a century. This evidence was summarized at pages 7 to 10 of our initial brief, 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 apron and street sign at 40th Street.

The Respondents brief largely pretends that this evidence does not exist, or that such public use was merely “permissive.” (Resp. Br. at 35) This evidence of public use *does* exist however, and it was actually more extensive than was the evidence of public use in the *Lafayette* decision. Moreover, the public use in this case was no more or less “permissive” than was the public use in *Lafayette*. In both cases, the public use of the disputed part of the dedicated street occurred notwithstanding the underlying fee ownership of the disputed part of the road by other parties.

The Respondents’ arguments on this issue are neither persuasive nor accurate, for the reasons that follow:

- The Respondents devote much of their argument on this issue to the claim that “[t]he 40th Street corridor is not open due to a common law dedication.” (Resp. Br. at 34 and more generally at 32-37) We agree. But Glass has not argued that he is entitled to use 40th Street by reason of a common law dedication. The Respondents’ entire discussion of common law dedication is a “straw dog” and it is irrelevant to the issues in this case.

- The Respondents repeatedly refer to 40th Street as a “paper street,” inviting the Court to believe that it remains pristine and undeveloped. The reality is somewhat different. We respectfully direct the Court’s attention to trial Exhibits 11, 12 and 49 (photographs attached hereto in black and white at App. A-1, A-2 and A-3), which depict 40th Street, looking toward Glass’s property, as it existed *before* Glass extended the driveway. The street was clearly improved with a gravel driveway. Also, as noted in our initial brief, the City improved the end of 40th Street (which is not visible in those photographs) with a curb cut, a concrete apron and a street sign.
- Glass does not seek a declaration that *all of* 40th Street has been opened by virtue of public use. Rather, the evidence shows that only a small portion of 40th Street beyond the existing driveway has been used for access to the so-called “wee house” and also for access to Lot 2. The very limited portion of 40th Street that Glass proposed to improve is depicted in trial Exhibit 1, attached hereto in black and white at App. A-4, which is consistent with the evidence of historic public use of 40th Street. In addition, trial Exhibit 10, attached hereto in black and white at App. A-5, is a close-up view of the actual driveway extension that Glass constructed pursuant to the City permit.
- The Respondents argue that Glass contends that the City was required to issue a driveway permit because 40th Street was open in fact. (Resp. Br. at 3, 31) This is erroneous and it confuses the different legal issues in this

case. One of Glass's four legal arguments on appeal is that the street is "open" by virtue of public dedication and use, in which case no permit would be needed from the City. Glass separately argues that, even if the street was *not* legally "open," the City nonetheless possessed sufficient authority to allow him to extend the existing driveway.

- The Respondents argue that "[t]here are two ways to open a street to public use," namely through an official opening under the City Charter or a common law dedication. (Resp. Br. at 32). This is incorrect. Streets may also be opened in a variety of other ways, including the normal statutory dedication process when a plat is approved, "deemed" dedications under Minn. Stat. § 160.05 when a roadway is used and maintained by the public for over six years, openings in fact under *Lafayette*, etc.
- The Respondents argue that their underlying fee ownership of "their halves" of 40th Street are "subject only to an easement in favor of the City to develop the corridor as a street for public use." (Resp. Br. at 30-31) This statement, however, is simply the Respondents' desired outcome on this appeal, and it fails to address the four legal issues raised on this appeal.
- The Respondents argue that "[t]he *Lafayette* decision does not stand for the proposition that that the city was required to grant a permit to Glass", citing *Wasiluk v. City of Shoreview*, 2005 WL 1743746 (Minn. Ct. App. 2005). (Resp. Br. at 37) This argument is erroneous and misleading for two reasons. First, as discussed above, if 40th Street is found to be open under

Lafayette, then Glass does not need a permit from the City; the permit issue is relevant only if 40th Street is *not* open. Second, the *Wasiluk* decision involved the issues of prescriptive easements, easements of necessity and common law dedications, none of which have been raised on this appeal.

- Finally, the Respondents argue that “*Lafayette* has no application to the present case” because: (1) Glass has an alternate means of access to his property, and (2) because the nature and volume of use in the two cases is very different. (Resp. Br. at 37). These arguments are, respectively, misleading and erroneous. First, while Respondents assert that a lack of alternate access is a “predicate[]” for an opening in fact under *Lafayette* (*Id.*), neither *Lafayette* nor any other decision has ever so held. On the contrary, the sole issues raised in connection with an “opening in fact” claim under *Lafayette* are whether the street was dedicated to the public and whether there has been sufficient public use to deem it open to the public. The issue of alternate access is irrelevant. Second, the Respondents argue that there was much greater public use of 18th Avenue in *Lafayette* than there was of 40th Street in this case, since in *Lafayette* “the public, neighbors, and residents of a 248-unit development all freely used the entire [street] easement.” *Id.* In point of fact, the developer in *Lafayette* needed to establish a right of access over 18th Avenue in order to *construct* its proposed 248-unit development; the proposed development was *not* constructed until several years after the Court held that there was sufficient

evidence of public use to declare the end of 18th Avenue “open” to public use.

In summary, the evidence in this case was more than sufficient to establish that 40th Street has been “opened” from Minnesota Avenue to Glasses’ property. We therefore respectfully request that the decision below be reversed on this ground.

II. AS AN “ABUTTING” PROPERTY OWNER, GLASS HAS A CONSTITUTIONALLY PROTECTED RIGHT OF ACCESS TO 40TH STREET.

As set forth in our initial brief, Glass’s property abuts on 40th Street, and he therefore has a right of reasonable access to that street. The Respondents acknowledge this central point. (Resp. Br. at 38) However, the Respondents then proceed to argue that Glass has an alternate means of access to his property (which property consists of three separate lots) via Minnesota Avenue, and that he therefore has no right of access to 40th Street. (Resp. Br. at 38-39) (The Court of Appeals also held that Glass had an alternate means of access and it therefore ignored the legal arguments that Glass raised pertaining to this issue.) This argument, however, is erroneous in four respects.

First, what Respondents appear to regard as a kind of generic “access” to one’s property 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 a particular *abutting* roadway. As discussed more fully in Glass’s initial brief, under Minnesota law “[p]roperty 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). That right of access, possessed by Glass, includes not only the right of access to 40th Street, on which his 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).

In the present case, it is undisputed that Glass’s property abuts on 40th Street, yet the Respondents argue that Glass has *no right* of access to 40th Street whatsoever, because he also has access to Minnesota Avenue. This argument is contrary to over 100 years of Minnesota law. To the best of our knowledge, no appellate decision in this state has ever held that an abutting property owner does not have a right of access to a street that abuts his or her property, unless that right of access had been condemned or did not exist in the first place because a new limited-access highway was constructed or some other unusual situation that is not present in this case.

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 Glass's right of access. On the contrary, in *State v. Northwest Airlines*, 413 N.W.2d 514 (Minn. Ct. App. 1987), *rev. denied* (Minn. Jan. 5, 1996), the State acquired Northwest's pre-existing means of access to its property and purported to provide alternate access via a cul-de-sac that terminated 65-feet from Northwest's property line, across a steep drainage ravine that was subject to numerous governmental controls. Northwest argued that, because of the uncertainties in getting approval for access from the cul-de-sac, it had effectively been deprived of all access to its remaining property. The Court held, however, that Northwest, as an abutting property owner, had a constitutionally protected right of access to the cul-de-sac, notwithstanding the fact that the physical and regulatory obstacles in that case, unlike the present case, were significant. Thus, Glass too has a right of access to abutting 40th Street even though it has not been formally or physically developed all the way to his property.

Fourth, while the Respondents argue that the City erroneously granted Glass a permit to extend the existing driveway to his property (Resp. Br. at 40), "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, it is undisputed that abutting owners possess a right of access to roadways that abut their property, 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' arguments concerning Glass's constitutionally protected right of access to 40th Street are misplaced, and we respectfully request that the decision below be reversed on this ground as well.

III. OWNERS OF A LOT IN A PLAT HAVE A RIGHT TO USE THE STREETS DEDICATED IN THE PLAT.

As set forth in Glass's initial brief, there is a long line of Minnesota case law holding that persons who buy a lot in a plat are deemed to possess the right to use the streets dedicated within the plat, as part of the rights defined by, and included within, the plat itself. The Respondents' brief largely ignores the detailed analysis presented in Glass's initial brief, and it argues instead—contrary to all of the precedents cited in Glass's initial brief—that the owners of a lot in a plat have no greater rights than any other member of the public. (Resp. Br. at 41) The Respondents cite no authority for this proposition, nor could they because it is plainly contrary to Minnesota law. As set forth in our initial brief, the Minnesota Courts have repeatedly and consistently held that owners of a lot in a plat have a right to use the streets dedicated in the plat.

The Respondents then detour into a discussion of *Underwood v. Town Board of Empire*, 217 Minn. 385, 14 N.W.2d 459 (1944). (Resp. Br. at 42) This is a strange detour, because *Underwood* has nothing to do with the rights of owners of lots in a plat, and it instead holds that “[a]n abutting landowner has, *in addition to the public right of travel*, the separate and distinct right of access to his property.” 14 N.W.2d at 461 (emphasis added). In short, *Underwood* reinforces Glass's argument with respect to his

constitutionally protected right of access to 40th Street as an abutting owner, but it says nothing about his rights as an owner of a lot in the plat that established 40th Street.

The Court of Appeals' decision on this issue acknowledged that the applicable case law supports the position that owners of lots in a plat have a right to rely upon and to use the streets dedicated in the plat, citing *Bryant v. Gustafson*, 40 N.W.2d 427 (Minn. 1950) and *Etzler v. Mondale*, 123 N.W.2d 603 (Minn. 1963). The Court concluded, however, that those decisions did not give Glass the right to use dedicated 40th Street because: (1) under Minnesota law municipalities are to decide when a dedicated property will be improved for a particular use, and (2) a private driveway would not increase the amount of public access to the street. We respectfully submit that the Court's analysis was erroneous in these regards because: (1) it did not analyze the issue as carefully as Glass did in his initial brief, (2) because its belief that municipalities are to decide when improvements in dedicated property are to be made is exactly what the City of Duluth did in this case by issuing Glass a permit for the driveway extension, and (3) because its belief that the driveway extension would not increase public access to the street is irrelevant since it is the *private owners* of lots in a plat, and not the public in general, who purchased and possess the legal right to use the platted and dedicated streets in the plat, and virtually every private driveway in the state crosses over public right-of-way (*i.e.*, a "boulevard" or something similar) before reaching the main lanes of the improved streets.

Glass therefore respectfully requests the Court to affirm the longstanding rule in this state that owners of a lot in a plat have a right to rely upon and to use the streets dedicated in the plat.

IV. THE CITY OF DULUTH HAD SUFFICIENT AUTHORITY TO GRANT GLASS A PERMIT TO EXTEND THE EXISTING DRIVEWAY ON 40TH STREET.

As set forth in Glass's initial brief and the City's brief, 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. As noted, this issue is addressed much more fully in the previous briefs.

The Respondents make the peculiar argument that "[t]he Minnesota state constitution defines" the power of a city to grant a permit for an improvement. (Resp. Br. at 43) This is not correct. While the Constitution *limits* the powers of municipalities in some respects, the scope of municipal powers in Minnesota is determined by the enabling legislation in the case of statutory cities, and by the City Charter in the case of Charter cities, like the City of Duluth. In the present case, 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. The City went through a lengthy public process authorized by those provisions, and that process resulted in the City granting Glass a permit to extend the existing driveway in 40th Street. See Glass’s initial brief at 10-12 and City’s brief.

In addition, 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...” 13 McQuillan, *Municipal Corporations*, § 30.64 (3rd ed.). If the City had denied Glass’s request for a driveway permit, it may well have been liable for denying his right of access to 40th Street. 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 and the City also possess certain rights in connection with 40th Street.

Finally, while the Respondents argue that the driveway extension authorized by the City is merely a private use of public land (Resp. Br. at 44-45), 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 concepts of “travel” and “access,” which are the paramount purposes of all public streets even if that travel is limited to a relatively small number of persons. If Glass had constructed a *wall* to prevent all travel, the Respondents might well have had reason to complain. But the extension of the pre-existing gravel driveway is hardly inconsistent with the purposes of a dedicated street, nor is it inconsistent with the fact that virtually every private driveway in the state crosses over public right-of-way before reaching the main-traveled parts of the public streets.

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 be best served by allowing Glass to extend the gravel driveway, while also allowing Zajac to retain his garage which is located in part within the 40th Street right-of-way. This was a reasonable solution, and it protected the constitutional rights of Glass and minimized the intrusions on the interests of the Respondents. It also had the effect of facilitating travel and access in 40th Street, which are the paramount purposes of public roadways and which certainly are not an unreasonable intrusion in the rights of anyone (like the Respondents) who purchases a home abutting on a dedicated public street.

CONCLUSION

Glass has never disputed the fact that the Respondents 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 use and enjoy 40th Street. Finally, the Respondents’ rights are also subservient to the City’s legislative authority to issue permits in accordance with the City Charter and City Code provisions that 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 like the Respondents are allowed to prevent the use of a public street for its normal and customary purposes, to deprive another property owner of his or her right of access to a street, and to foreclose a municipality from managing its own streets in the manner it finds to be most appropriate. For all of reasons set forth above, Glass respectfully requests this Court to reverse the decision below.

Respectfully submitted,

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