

STATE OF MINNESOTA  
IN SUPREME COURT

A06-1422

A06-1440

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MICHAEL BOLEN, et al.,

Respondents,

vs.

TODD GLASS,

Appellant,

and

CITY OF DULUTH,

Respondent.

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**RESPONDENT CITY OF DULUTH'S BRIEF AND APPENDIX**

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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 LEGAL ISSUES

### **Does Glass Have A Constitutionally-Protected Right Of Access To 40<sup>th</sup> Street?**

The Court of Appeals held that this case did not involve governmental action implicating a right of access protected by the Federal or State Constitution and that Glass's common law right of access to his property was satisfied.

Johnson v City of Plymouth, 263 N.W. 2d 603, 605-06 (Minn.1978).

C and R Stacy, LLC v County of Chisago, \_\_\_ N.W. 2d \_\_\_\_, 2007 WL 4303760 (Minn.App.).

Hendrickson v State, 267 Minn. 436, 127 N.W. 2d 165 (1964).

Kick's Liquor Store v City of Minneapolis, 587 N.W. 2d 57, 59 (Minn.App. 1998)

### **Does Glass's Status As An Abutting Lot Owner Provide The City With Authority To Issue The Driveway Permit?**

The Court of Appeals held that the City lacked authority to authorize the private improvement and that Glass's status as an abutting owner did not provide him with any special status different from the general public with regard to his right of access.

In re Lafayette Dev. Corp., 567 N.W. 2d 743 (Minn.Ct.App. 1997)(*affirmed without opinion* 576 N.W. 2d 740 (Minn.1998)).

C and R Stacy, LLC v County of Chisago, \_\_\_ N.W. 2d \_\_\_\_, 2007 WL 4303760 (Minn.App.).

Etzler v Mondale, 266 Minn. 353, 123 N.W. 2d 603 (1963).

Bryant v Gustafson, 230 Minn. 1, 40 N.W. 2d 427 (1950).

**Was 40<sup>th</sup> Street Opened By Public Use?**

By implication the district court determined that the historic use of the street was insufficient for it to be considered opened. This determination was affirmed by the Court of Appeals.

Glass has fully argued this position and the City joins in his analysis.

**STATEMENT OF THE CASE**

The City is satisfied with Appellant's Statement of the Case. *See, Rule 128.02, Subd. 2, MN.R.Civ.App.P.*

**STATEMENT OF FACTS**

The City is satisfied with Appellant's factual statement. *See, Rule 128.02, Subd. 2, MN.R.Civ.App.P.*

## ARGUMENT

### 1. Standard Of Review.

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

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

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

Here, the issues discussed by the City involve questions of law and therefore, review is *de novo*.

### 2. Glass's Use of 40<sup>th</sup> Street Is Not Required In Order To Satisfy A Constitutionally Protected Property Right To Access.

Glass asserts that he has a right to use 40<sup>th</sup> Street that is constitutionally protected. In its decision the Court of Appeals analyzed the source of Glass's asserted constitutional right to access. The Court noted that the right to access arises from common law and that property rights are not created by the Constitution. Bolen v Glass, 737 N.W. 2d 856, 865 (Minn.App. 2007) *citing* Bd. of Regents v Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). It then correctly noted that in Minnesota while landowners have a right of access from their property to a public right-of-way, that right is created by common law not by the Constitution. Id., *citing* Johnson v City of Plymouth, 263 N.W. 2d 603, 605-06 (Minn.1978).

In Johnson, the court described the right of access as a right to “reasonably convenient and suitable access.” It did not hold that the source of this right is found in any constitutional provision. Johnson, 263 N.W. 2d at 605. The Johnson court then reiterated the proposition that the government cannot take property rights without just compensation. Id at 606. After stating these principles the Court addressed whether the street project at issue deprived the plaintiff of its right to reasonably convenient access. In reaching its decision the court noted that “[w]hat constitutes reasonable access must, of course, depend to some extent on the nature of the property under consideration. The existence of reasonable access is thus a question of fact to be determined in light of the circumstances peculiar to each case.” Id at 606. Ultimately, the court concluded that the plaintiff had not been deprived of its right of access simply because it wasn’t given its preferred access, because the property right at issue is reasonably convenient access. Since a taking only occurs when the landowner has been deprived of reasonably convenient access, and since the plaintiffs were not deprived of such access, a taking did not occur. Id at 607.

The principal, that the property right in access cases created by common law, and protected by the constitution, is reasonably convenient access, was most recently reaffirmed in C and R Stacy, LLC v County of Chisago, \_\_\_ N.W. 2d \_\_\_, 2007 WL 4303760 (Minn.App.). *Resp. App pg. 1.*

Contrary to Glass's assertion, the Court of Appeals did not ignore the constitutional issue, it simply held that because Glass already enjoyed reasonably convenient access to his property, the City was not constitutionally required to issue a permit for a second access. Glass's reliance on State v Northwest Airlines, 413 N.W. 2d 514 (Minn.App. 1987) to further support his argument is misplaced. Northwest involved an eminent domain action and the damages to a remainder parcel. The issue was whether evidence on access to the remainder from the abutting public right-of-way should have been admitted at trial. In concluding that the evidence should have been admitted, the court noted that owners whose lands abut a public right of way have a property right of access to the right of way. The court did not recognize the source of this right as constitutional in nature. Id at 519. Glass wrongly relies upon Northwest as support for his argument that he has a constitutional right to 40<sup>th</sup> Street access.

Glass's reliance on Foote v City of Crosby, 306 N.W. 2d 883 (Minn.1981) is also misplaced. Glass cites Foote to support his argument that he has a constitutionally protected right to use 40<sup>th</sup> Street as access. *Brief App. at pg. 18*. Foote was not a case involving whether a constitutionally protected right of access existed. It involved an abutting landowner's challenge to the removal of boulevard trees by the city during a road construction project. The Supreme Court reiterated the general rule that the abutting landowner is also the fee owner to the center line

of the easement and may use the land in a manner that is not inconsistent with the public's easement interest. Id at 885. The Court also reiterated the general rule that the abutting landowner's fee interest is subordinate to the public's easement right. Id 885-886. Thus, the city was entitled to remove the trees without compensating the fee owner, because the trees were obstructing the public improvement of the right of way, and such right of improvement was superior to the fee owner's right of use. Id.

Glass also argues that as an owner of a lot in the plat, he has a constitutionally protected right of access to the next intersecting street. Therefore, to deprive him of the right to build a driveway on 40<sup>th</sup> Street serves to deprive him of his right of access to the next intersecting street. *Brief App. at pg. 19*. Glass relies on Vanderburgh v City of Minneapolis, 98 Minn. 329, 108 N.W. 480 (1906) and Church of St. Peter & P. V Township of Lake George, 252 Minn. 209, 89 N.W. 2d 708, 711 (1958). Both of these cases involved the vacation of streets that were in current public use. In Vanderburgh the court concluded that the plaintiff, whose property did not abut the vacated street was still harmed by the vacation because it eliminated a potential access enjoyed by all owners of the plat. The landowner, by virtue of his status as an owner of a lot in the plat, enjoyed a special right different from the right enjoyed by the general public. Id 98 Minn. at 336;

108 N.W. at 481. The Court held that the taking of this special right was compensable. Id.

Vandenburg was subsequently modified by Hendrickson v State, 267 Minn. 436, 127 N.W. 2d 165 (1964), in which the reasonable access rule was established. *See, Kick's Liquor Store v City of Minneapolis*, 587 N.W. 2d 57, 59 (Minn.App. 1998) (recognizing Hendrickson as modifying Vanderburgh and establishing the reasonable access rule).

Church of St. Peter did not include a discussion of the existence of a constitutional right. The dispute involved whether the petitioner for street vacation asserted pursuant to Minn.Stat. § 505.14 had met its evidentiary burden of demonstrating that the street was useless for the purposes for which it was dedicated. While the Court confirmed that an owner of lots within a plat has a special interest in the dedicated public easements that is distinct from the public interest, the Court was not asked to decide a constitutional issue. *See, Church of St. Peter*, 252 Minn. at 213, 89 N.W. 2d at 711.

Because Glass retains his current reasonable access with or without the 40<sup>th</sup> Street access, no constitutional taking will occur if Glass is denied his driveway permit.

**3. The City Properly Exercised Its Police Powers When it Issued The Driveway Permit**

Because Glass was an abutting landowner to 40<sup>th</sup> Street, the issuance of the driveway permit was an appropriate use of the City's inherent police powers.

The Court of Appeals concluded that the City did not have authority to authorize the private improvement because the City ordinances did not grant authority for the driveway permit. Its conclusion that the City does not possess the authority to authorize a private improvement in a dedicated street right-of-way, conflicts with its most recent decision issued on December 11, 2007. *See Respondent's App. A-1, C and R Stacy, LLC*, 2007 WL4303760.

C and R Stacy involved a dispute over the County's ability to regulate access to a county state aid highway. The County had denied permission to the plaintiffs to access their property via the highway and required use of an alternative route. In discussing the county's authority to regulate the highway the Court of Appeals acknowledged the general rule that municipalities "possess extensive and drastic police powers with respect to the care, supervision, and control of streets. *Id* pg. 9. It further recognized that exercising these police powers for the public safety was legitimate. *Id*.

Here, the undisputed evidence at trial was that in order to build a garage, Glass needed to provide access from 40<sup>th</sup> Street in order to comply with the fire code. Clearly, compliance with the fire code is a public safety issue supporting the

City's use of its police powers to permit the construction of a driveway in the public easement.

But the use of 40<sup>th</sup> Street by Glass is further supported by his status as more than a mere member of the public. The Court of Appeals recognized that owners of lots in a plat enjoy a greater right of user than does the general public, but then limited this right to notice of a request to vacate any easement dedicated in the plat. Bolen, 737 N.W. 2d at 864 *citing* Etzler v Mondale, 266 Minn. 353, 123 N.W. 2d 603 (1963). The Court's limitation of a lot owner's right of user is not supported by Etzler. Glass has provided a correct analysis of the lot owner's special status in his brief which the City joins; thus, the City limits its discussion to the related issue of a lot owner's right to make a private improvement of the right of way dedicated in the plat.

The appeals court assumed without any factual support that Glass was arguing that he enjoyed a "right to employ self-help in creating his driveway." Bolen, 737 N.W. 2d at 864. Clearly, such a right does not exist. However, the Appeals Court further concluded that only the public may exercise the right to improve the right of way. Id., *citing* Pierro v City of Minneapolis, 139 Minn. 394, 166 N.W. 766 (1918); Lafayette Land Co. v. Village of Tonka Bay, 305 Minn 461, 234 N.W. 2d 804 (Minn. 1975); In re Maintenance of Road Areas, 311 Minn. 446 ,

250 N.W. 2d 827 (Minn. 1977). These cases do not support the proposition that only the public body may improve a dedicated right-of-way.

In Lafayette Land Co., the issue before the Court was whether the municipality could be forced to expend public funds to open a right of way. The Court affirmed the rule that a municipality is not so obligated. Lafayette Land Co., 305 Minn. at 463 , 234 N.W. 2d at 806.

In Maintenance of Road Areas, the county required a developer to improve the dedicated roads contained in the plat as a condition to the issuance of building permits and to have those roads inspected and approved by the town. Subsequently, the property owners sought to force the township to maintain the roads. The township refused to do so. The county board heard the citizen petition to force the township to maintain the roads. The county ordered the township to maintain the roads. The primary issue before the Court was whether the county board had properly exercised its jurisdiction. The Court held that the board had jurisdiction but the wrong procedures had been used. Id., 311 Minn. 451-452, 250 N.W. 2d 831. In its discussion the Court reiterated the general rule that the government has a right to determine the time and manner for the opening and maintenance of roads. Id. The case does not support the proposition that only the public may improve a public easement.

The right of a property owner to make a private improvement was confirmed in In re Lafayette Dev. Corp., 567 N.W. 2d 743 (Minn.Ct.App. 1997)[*affirmed without opinion 576 N.W. 2d 740 (Minn.1998)*]. In Lafayette, a developer sought a permit from the city to make a private improvement to a street right-of-way. The City denied the permit after concluding that the road was not open. The appellate court, while acknowledging the principal that the city has the right to determine when a public improvement to a right of way will be made, it held that the city could not prohibit a private improvement. While the easement at issue was determined to be open, the proposition that the city was required to permit the private improvement was not dependent upon the fact that the street was open. The case may have resulted in a different outcome had the developer sought public improvement of the right of way.

The power of a municipality to authorize a private improvement to a public easement and to determine the type of improvement has also been acknowledged by the Attorney General. *Minn.Op. Atty. Gen. 434A-6 (October 11, 1990)*.

These precedents support the existence of the City's right to exercise its police power to authorize a private improvement of the dedicated right of way. It is also clear that the City may not be forced to pay for the private improvement or maintain the private improvement.

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

The fact that Glass already had alternative access to Lot 1 via Lot 16 and Lot 2 is not determinative. Certainly, as discussed above, the alternative route is relevant to whether he has been deprived of access to his land in a constitutional sense, but that is not the issue here. The issue is whether as owner of Lot 1, he has a right to rely upon 40<sup>th</sup> St. for access. The case law discussed above and in Glass's brief makes it clear that Glass has the right to use 40<sup>th</sup> St. to access Lot 1. The City's recognition of that right did not burden Bolen or Zajac more than they were already burdened by the existence of 40<sup>th</sup> Street. In fact, the granting of the driveway permit burdens them less. If the City were to require Glass to build a public street to full City standards, more land would be improved and Zajac would be required to remove his encroaching garage from the right-of-way.

Given the City's recognized police powers to regulate its streets and the City's ordinances providing for various methods by which the police power may be exercised, the City in this case did not exceed its powers. Pursuant to City Code

Section 45-14 the city engineer may authorize the construction of a driveway as follows:

No person shall construct a driveway or crossing from a publicly maintained street or highway into private property without having first applied for and obtained a permit so to do from the office of the city engineer. Upon receiving this permit said driveway or crossing shall be constructed according to plans and specifications approved by the city engineer, and such construction shall be carried out under the direction and inspection of such engineer or his representative.

The city engineer shall charge a fee, which shall be set in accordance with Section 31-6(a) of this Code, for each permit issued pursuant to this Section, and in addition shall charge a fee sufficient to cover the actual cost of inspections conducted by the city in connection with the issuance of such permit.

No driveway or crossing from a publicly maintained street or highway into private property shall be constructed or maintained in such a manner that it obstructs the flow of surface water along any gutter or ditch line or causes such water to flow onto, under or across the publicly maintained portion of such street or highway.

*Duluth City Code Chapter 45, Sec. 14.*

The City Code also authorizes private improvements in Chapter 45, Sections 84-91. The code authorizes the city engineer to issue special permits to private parties to make local improvements upon the public highways of the city. *DCC 45-84.* Such improvements must be made at the expense of the applicant and in accordance with the specifications required by the City. *DCC 45-86 & 88.*

Here, the city engineer, concluded that a driveway was sufficient for purposes of satisfying the public need. That need in this case was fire code

compliance. The code specifically grants to the city engineer the discretion to determine the standards of construction. *DCC 45-88*. The City and Glass also agreed that Glass would be responsible for the maintenance of the improvement until such time as the City determined it would take it over, but Glass also agreed not to oppose such public improvement. *Trial Ex. 24*.

As an owner of a lot in the plat, Glass has correctly noted that he enjoys a right to the benefits of all of the easements in the plat. *Brief of Appellant at pgs. 22-23, citing, Bryant v Gustafson, 230 Minn. 1, 40 N.W. 2d 427 (1950); Etzler v Mondale, 266 Minn. 353, 123 N.W. 2d 603 (1963)*. Limiting the lot owner's use of the easement to the area directly abutting the owner's lot would not provide for the exercise of the lot owner's interests. This is so because where there is a "paper street" needed for access to a lot, the need is created because the lot requiring access does not currently abut upon an improved public street. The City may not desire to improve the right of way because the ability to assess property owners may be limited. Thus, the lot owner will need to bear the burden of the improvement. Requiring the lot owner to pay for a full public street that is not currently needed is a waste of resources and discourages home construction. The development of homes increases the property tax base. Providing housing sites and increasing the tax base are both vital public purposes. Thus, a permit

authorizing the driveway is an effective way to support these public purposes and accommodate the needs of the lot owner.

40<sup>th</sup> Street was dedicated for the uses associated with a street. These uses clearly include access by owners of lots within the plat to their land. Bryant, 40 N.W.2d at 432. In granting a driveway permit pursuant to its ordinance authority, the City was simply implementing its inherent police powers.

### CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals affirming the judgment of the district court should be reversed. The district court should be directed to enter judgment in favor of Todd Glass and the City of Duluth

Dated this 11<sup>th</sup> day of January, 2008.

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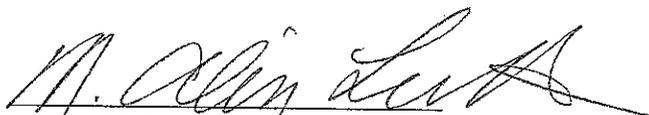
## CERTIFICATION AS TO LENGTH

I hereby certify that this brief conforms to the requirements contained in Rule 132.01, Subd. 3(a)(1), Mn.R.App.P. for a brief using a proportional font. This brief has been prepared with Word Perfect 11. The length of the brief is 3439 words.

Dated this 10<sup>th</sup> day of January, 2008.

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