

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),

and

CITY OF DULUTH,

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

BRIEF AND APPENDIX OF RESPONDENTS MICHAEL BOLEN,
DEBORAH BOLEN & JOSEPH ZAJAC

Bradley J. Gunn (#132238)
Howard A. Roston (#260460)
Patrick B. Steinhoff (#340352)
MALKERSON GILLILAND MARTIN LLP
220 South Sixth Street, Suite 1900
Minneapolis, MN 55402
(612) 344-1111
Attorneys for Appellant Todd Glass

Stephanie A. Ball (#191991)
FRYBERGER, BUCHANAN,
SMITH & FREDERICK, P.A.
700 Lonsdale Building
302 West Superior Street
Duluth, MN 55802
(218) 722-0861
*Attorneys for Respondents Michael
Bolen & Deborah Bolen*

M. Alison Lutterman
Attorney Registration No. 17676X
Deputy City Attorney
CITY OF DULUTH
410 City Hall
Duluth, MN 55802-1198
Attorney for Appellant/Respondent City of Duluth

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).

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	i
STATEMENT OF LEGAL ISSUES	1
STATEMENT OF THE CASE	3
STATEMENT OF FACTS.....	6
A. The Bolens, Zajac and Glass owns lots abutting the 40 th Street corridor.	6
B. The Oatka Beach Addition to Duluth plat includes a dedication for public use of the streets and avenues shown on the plat.	8
C. The platted, unopened 40 th Street corridor has been treated as owned in fee by the abutting landowners and has not been used by the public in general.	8
D. Consistent with lack of public use of the 40 th Street corridor and the rights of abutting landowners under Minnesota law, the City has recognized that the corridor is not open and is owned in fee by abutting landowners.	14
E. Glass initially uses Lot Sixteen (16) as means of access, conceals that means of access in 2004 prior to his permit application and then claims no means of access other than the 40 th Street corridor in support of obtaining a permit to build a private driveway on the corridor.	16
F. Knowing that the abutting landowners object to his use of the 40 th Street corridor in which they have a fee ownership interest, Glass applies for a permit from the City to build a private driveway on the corridor and in support of the permit application, makes representations regarding public use of the 40 th Street corridor and lack of access to his property	19
G. Glass builds a driveway on portions of 40 th Street corridor owned by other abutting landowners.	22

H. Glass cannot present evidence of an opening in fact of the 40 th Street corridor.	22
STANDARD OF REVIEW	26
ARGUMENT	29
I. THE DISTRICT COURT PROPERLY RECOGNIZED THAT THE BOLENS AND ZAJAC OWN TO THE CENTERLINE OF THAT PORTION OF THE 40 TH STREET CORRIDOR WHICH IS ADJACENT TO THEIR PROPERTY AND, THEREFORE, CONTROL USE OF THAT PROPERTY SUBJECT ONLY TO THE CITY'S QUALIFIED OR TERMINABLE FEE TO DEVELOP THE CORRIDOR AS A PUBLIC STREET.	29
II. GLASS CANNOT RELY UPON AN OPENING IN FACT AS A BASIS FOR OBTAINING A PERMIT FROM THE CITY TO BUILD A PRIVATE DRIVEWAY ON THE 40 th STREET CORRIDOR.	31
III. GLASS HAS FAILED TO ESTABLISH AN OPENING IN FACT OF THE 40 th STREET CORRIDOR.....	32
IV. GLASS DOES NOT POSSESS A CONSTITUTIONALLY-PROTECTED RIGHT TO USE AND IMPROVE THE PLATTED BUT UNOPENED 40 TH STREET CORRIDOR FOR ACCESS TO AND FROM HIS PROPERTY.	38
V. MERE OWNERSHIP OF A LOT WITHIN A PLAT DOES NOT CONVEY THE RIGHT TO TRAVEL ON PLATTED, UNOPENED STREETS SHOWN ON THE PLAT.....	40
VI. THE CITY CANNOT BY SPECIAL LEGISLATION GRANT ITSELF THE POWER TO TAKE ACTION WHICH IS UNCONSTITUTIONAL.	43
CONCLUSION	45

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Anderson v. Birkeland</i> , 229 Minn. 77, 38 N.W.2d 1949)	33
<i>Bengtson v. Village of Marine on St. Croix</i> , 310 Minn. 508, 246 N.W.2d 582 (1976)	34
<i>Bryant v. Gustafson</i> , 230 Minn. 1, 40 N.W.2d 427 (1950)	41
<i>Burnquist v. Marcks</i> , 228 Minn. 129, 36 N.W. 594 (1949)	44
<i>Ebin v. City of St. Paul</i> , 1999 WL 1057549 (Minn. Ct. App.1999).....	36
<i>Ellsworth v. Lord</i> , 40 Minn. 337, 42 N.W. 389 (1889)	34
<i>Flynn v. Beisel</i> , 257 Minn. 531, 102 N.W.2d 284 (1960)	27
<i>Frost-Benco Electric Ass'n v. Minnesota Public Utilities Comm'n</i> , 358 N.W.2d 639, 642 (Minn. 1984)	27
<i>Hensley v. Chisago County</i> , 370 N.W.2d 920 (Minn. 1985)	34
<i>Hoyt v. Brokaw</i> , 359 N.W.2d 310 (Minn. Ct. App. 1984)	28
<i>Hubbard v. United Press Intern., Inc.</i> , 330 N.W.2d 428, 441 (Minn. 1983)	26
<i>Johnson v. City of Plymouth</i> , 263 N.W.2d 603 (Minn. 1978)	39
<i>Kaiser v. St. Paul, S. and T. F. R. Co.</i> , 22 Minn. 149 (1875).....	45

<i>Keiter v. Berge</i> , 219 Minn. 374, 18 N.W.2d 35 (1945).....	32,34
<i>Kendrick v. St. Paul</i> , 213 Minn. 283, 6 N.W.2d 449 (1942).....	44
<i>Kochevar v. City of Gilbert</i> , 273 Minn. 274, 141 N.W.2d 24 (1966).....	<i>passim</i>
<i>Lamm v. Chicago, St. P., M. & O. Ry. Co.</i> , 45 Minn. 71, 47 N.W. 455 (1890).....	44
<i>Railo v. N. Pac. Ry. Co.</i> , 108 Minn. 431, 432, 122 N.W. 489 (1909)	29
<i>In Re Request of Lafayette Dev. Corp.</i> , 567 N.W.2d 743 (Minn. Ct. App. 1997) decision affirmed by 576 N.W.2d 740 (Minn. 1998).....	<i>passim</i>
<i>Rich v. City of Minneapolis</i> , 37 Minn. 423, 35 N.W. 2 (1887).....	29
<i>Security Federal Sav. & Loan Ass'n v. C & C Investments, Inc.</i> , 448 N.W.2d 83 (Minn. Ct. App. 1999), review denied (Jan. 18, 1990).....	33,35
<i>State v. Northwest Airlines</i> , 413 N.W.2d 514 (Minn. Ct. App. 1987), review denied (Nov. 24, 1987).....	38
<i>In re Stees</i> , 142 Minn. 340, 344, 172 N.W. 219, 221 (1919)	33
<i>Underwood v. Town Bd. of Empire</i> , 217 Minn. 385, 14 N.W.2d 459 (1944).....	42
<i>Vanderburgh v. City of Minneapolis</i> , 98 Minn. 329, 108 N.W. 480 (1906).....	38
<i>Village of White Bear v. Stewart</i> , 40 Minn. 284, 287, 41 N.W. 1045, 1046 (1889).....	33
<i>Wasiluk v. City of Shoreview</i> , 2005 WL 1743746 (Minn. Ct. App. 2005), review denied (Oct. 18, 2005).....	37

West v. Village of White Bear,
107 Minn. 237, 119 N.W. 1064 (1909)..... 29,30,32

Zumbrota v. Strafford Western Emigration Co.,
290 N.W.2d 621 (Minn. 1980).....43,44

STATEMENT OF LEGAL ISSUES

I. Whether abutting landowners have a protected property interest in a platted, undeveloped paper street based on their fee ownership to the center line of the street?

The District Court and Court of Appeals held in the affirmative.

Most apposite cases:

Kochevar v. City of Gilbert, 273 Minn. 274, 141 N.W.2d 24 (1966)

Rich v. City of Minneapolis, 37 Minn. 423, 35 N.W. 2 (1887)

West v. Village of White Bear, 107 Minn. 237, 119 N.W. 1064 (1909)

II. Whether a municipality is empowered to grant a permit to an individual to build a private driveway on a street dedicated for public use if a street is deemed to open based on an opening in fact?

The District Court and Court of Appeals held in the negative.

Most apposite cases:

Burnquist v. Marcks, 228 Minn. 129, 36 N.W. 594 (Minn. 1949)

Kaiser v. St. Paul, S. and T. F. R. Co., 22 Minn. 149 (1875)

Kendrick v. City of St. Paul, 213 Minn. 283, 6 N.W.2d 449 (1942)

Newell v. Minneapolis, L. & M. Ry. Co., 35 Minn. 112, 27 N.W. 839 (1886)

III. Whether the 40th Street corridor is open to the public based on an opening in fact?

The District Court and Court of Appeals concluded the 40th Street corridor is not open by virtue of an opening in fact.

Most apposite cases:

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

In Re Lafayette Dev. Corp., 567 N.W.2d 743 (Minn.Ct. App. 1997), *aff'd* (Minn. 1998)

Lafayette Land Co. v. Village of Tonka Bay, 305 Minn. 461, 234 N.W.2d 804 (1975)

Security Federal Sav. & Loan Ass'n v. C & C Investments, Inc., 448 N.W.2d 83 (Minn. Ct. App. 1999)

IV. Whether mere ownership of a lot within a plat creates a right to use a platted, undeveloped paper street within the plat such that an individual lot owner may improve and develop the street for his personal use?

The Court of Appeals held in the negative.

Most apposite cases:

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

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

V. Whether mere ownership of a lot abutting a portion of a platted, undeveloped paper street creates a right to use other portions of the platted, undeveloped paper street in which other abutting landowners have a property interest?

The District Court and Court of Appeals held in the negative.

Most apposite cases:

Kochevar v. City of Gilbert, 273 Minn. 274, 141 N.W.2d 24 (1966)

Rich v. City of Minneapolis, 37 Minn. 423, 35 N.W. 2 (1887)

West v. Village of White Bear, 107 Minn. 237, 119 N.W. 1064 (1909)

VI. Whether Glass possesses a constitutionally protected right to use and improve a platted, undeveloped paper street to build a personal driveway for access to and from his property?

The District Court and Court of Appeals held in the negative.

Most apposite cases:

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

Haeussler v. Braun, 314 N.W.2d 4 (Minn. 1981)

VII. Whether a municipality with a qualified or terminable easement in a platted, undeveloped paper street holds that easement in trust for the public and only has the right to develop such property for its dedicated public use?

The District Court and Court of Appeals held in the affirmative.

Most apposite cases:

Burnquist v. Marcks, 228 Minn. 129, 36 N.W. 594 (Minn. 1949)

Kaiser v. St. Paul, S. and T. F. R. Co., 22 Minn. 149 (1875)

Kendrick v. City of St. Paul, 213 Minn. 283, 6 N.W.2d 449 (1942)

Newell v. Minneapolis, L. & M. Ry. Co., 35 Minn. 112, 27 N.W. 839 (1886)

STATEMENT OF THE CASE

This appeal involves the rights of landowners whose property abuts platted but unopened streets known as paper streets.

Michael and Deborah Bolen and Joseph Zajac own property which borders either side of a paper street known as the 40th Street corridor. Glass owns property which abuts the back half of one side of the 40th street corridor. Glass concedes that under Minnesota law, abutting landowners have property interests in a paper street and own to the center line of a paper street. However, Glass contends the rights of the abutting landowners in this case are subservient to his right to build a private driveway on portions of the paper street owned by the abutting landowners. Glass alleges a constitutional right of access and other rights based merely on his status as an owner of lot within a plat. Glass encourages the court to declare the paper street open by virtue of an opening in fact, perceiving such a declaration then requires the City to grant him a permit to build a private driveway. The abutting landowners contend they have protected property interests in the paper street, subject only to the City's right to develop the street for its dedicated public use, and such rights are not preempted by or subservient to any right claimed by Glass.

The dispute concerning such rights began when Glass purchased a parcel of property, consisting of three lots, one of which abuts the corridor, and one of which is adjacent to a public street which has historically been used as access to the parcel now owned by Glass. Glass inquired about using portions of the corridor, owned by others, for access to his property. The Bolens and Zajac had lived on their property for two decades, treating the property as their own property and not open for public use.

Consistent with their fee ownership of portions of the corridor adjacent to their own property, the abutting landowners objected to Glass using portions of the corridor owned by them. Knowing that the abutting landowners objected to such use, Glass applied for a permit from the City to build a private driveway on the paper street. In support of obtaining a permit, Glass claimed he had no access to his parcel of property, other than the 40th Street corridor, and that corridor had been used by the public in general and by his predecessors in interest to access his property. The City granted the permit in reliance on the representations made by Glass and based on its interpretation of *In re Lafayette Dev. Corp.*, 567 N.W.2d 743, 745 (Minn. Ct. App. 1997), a Court of Appeals decision summarily affirmed by the Supreme Court, without opinion, on an evenly divided court in 1998. The city construed the *Lafayette* decision as requiring it to grant the permit. The City granted the permit even though it had previously concluded that the 40th street corridor is not open to the public and the Bolens and Zajac, as abutting landowners, are fee owners of the corridor, to the center line adjacent to their property, with the right to exclude the public from portions of the corridor owned by them.

When Glass began building his driveway on portions of the corridor owned by the Bolens and Zajac, the Bolens applied for and obtained an order enjoining Glass from using the driveway until a trial on the merits. A court trial on the merits was held before the Honorable John Oswald on February 28 and 29, 2006. Following the trial on the merits, all parties submitted written summations to the District Court. On June 1, 2006, the District Court issued findings of fact, conclusions of law and an order, with an accompanying memorandum, in which the court recognized the rights of abutting landowners and permanently enjoined Glass and the City from taking action to construct

a private driveway on the 40th Street corridor. The June 1, 2006 order required Glass to restore the property to its prior condition on or before July 15, 2006.¹

Glass and the City separately filed notices of appeal of the district court's decision and the appeals were consolidated. On September 4, 2007, the Court of Appeals filed an opinion, affirming, as modified, the district court's decision. On October 4, 2007, Glass filed a petition for review.² On November 13, 2007, an order was filed granting the petition for review.

The primary issue in this case is whether an individual property owner may trump the rights of abutting landowners in a paper street by obtaining a permit to build a private driveway as a secondary means of access to his property. Glass, joined by the City, advances various theories in support of his claimed right to build a private driveway on portions of the 40th Street corridor in which abutting landowners have a fee interest. Glass contends that incidental to his mere ownership of a lot in a plat which abuts a paper street, he has a right to use the paper street and build a driveway for his personal use on the street, that he will be deprived of a constitutional right of access if he is not permitted to use the corridor as access to his property, that he is entitled to personally develop the street by constructing a driveway for his use because the street is open by virtue of an opening in fact and the City has discretion, by special legislation, to grant him a permit to

¹ Glass did not restore the property to its prior condition as of July 15, 2006. Glass's failure to restore the property to its prior condition constitutes a continuing trespass, an issue not before the Supreme Court but reserved for further proceedings at the District Court level.

² The City did not file a petition for review. Thus, it has been designated as a respondent for purposes of Supreme Court review. At the trial court level and on appeal, the city adopted the same positions advanced by Glass. Thus, although the city is designated a respondent, its interests are aligned with Glass.

develop the street for his private use, contrary to the public dedication. None of the theories crafted by Glass and the City are supported by Minnesota law and the record.

STATEMENT OF FACTS

A. The Bolens, Zajac and Glass owns lots abutting the 40th Street corridor.

Michael and Deborah Bolen, Joseph Zajac and Glass all own lots which abut a paper street, known as the 40th Street corridor, located on Park Point in Duluth, Minnesota. The Bolens own two lots which abut the 40th street corridor on one side and Zajac and Glass own lots which abut the 40th Street corridor on its other side. The 40th Street corridor and the lots owned by the Bolens, Zajac and Glass are as shown in the diagram reproduced in the appendix. RA 1.

Property on Park Point between Minnesota Avenue and the beach is typically two lots deep. The front lots abut Minnesota Avenue and the back lots are directly behind the front lots and are directly adjacent to the beach.

Glass owns Lots One (1), Two (2) and Sixteen (16) in Block Two (2) of the OATKA BEACH ADDITION TO DULUTH. Lot One (1) of Todd Glass's property, on its southerly (by Duluth directions) or easterly (by compass directions) abuts the platted 40th Street corridor easement. Lot One (1) is a back lot which abuts the 40th street corridor. Id. Lot Two (2) connects Lot One (1) and Sixteen (16), creating an L-shaped parcel of contiguous lots which opens directly onto Minnesota Avenue, a well traveled, publicly maintained street. T. 90; RA 1. Lot Sixteen (16) has historically provided access to all three lots now owned by Glass, and has also been used by Glass to access his parcel. T. 29, 71, 119, 131, 145, 153, 154, 297.

The Bolens own Lots Nine (9), Ten (10), Eleven (11), Twenty Two (22), Twenty Three (23) and Twenty Four (24). Lots Eleven (11) and Twenty Four (24) owned by the Bolens abut the westerly (by compass directions) side of the 40th Street corridor.

Zajac owns Lot Fifteen (15) which abuts the corridor on its easterly side and is surrounded by lots owned by Glass.

The 40th Street corridor was created when the Oatka Beach Addition to Duluth was platted in 1902. Trial Exhibit 2. The 40th Street corridor is a 30-foot wide platted but unopened and undeveloped street running along the edges of Lots Eleven (11) and Twenty-four (24) of the Bolen Property and the edges of Lot Fifteen (15) of the Zajac Property and Lot One (1) of the Glass Property. On the plat, the 40th Street corridor appears to connect Minnesota Avenue with Lake Avenue, a paper street that is actually located on or directly adjacent to the shoreline of Lake Superior. *Id.*

There is no street on the 40th Street corridor. *Id.* The City has installed a street sign and provided a curb cut on 40th Street, as it has done with other platted but unopened streets on Park Point. T. 257, 317. The City has never exercised the right-of-way, and has acknowledged that it is highly unlikely that any public improvement will ever be made to the corridor. T. 253, 266. The City has never improved or repaired any portion of the 40th Street corridor for use as a public street or otherwise. The City has never plowed, graveled, graded or otherwise maintained 40th Street as a city street. T. 25, 64, 93, 197; Trial Exhibit 6.

B. The Oatka Beach Addition to Duluth plat includes a dedication for public use of the streets and avenues shown on the plat.

The original owners of the property platted as the Oatka Beach Addition made the following plat dedication:

... hereby dedicate to the public use the streets and avenues herein shown.

Trial Exhibit 2 (emphasis added). Although the plat of the Oatka Beach Addition to Duluth, within which all of the affected property lies, was filed of record on December 31, 1902, the City of Duluth, by formal legislative enactment or executive resolution, has never accepted the dedicated easement or taken steps to develop the platted 40th Street corridor easement as a public street or thoroughfare such that the easement in question remains a paper street. District Court's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment, ¶ 6, p. 3; RA-3.

C. The platted, unopened 40th Street corridor has been treated as owned in fee by the abutting landowners and has not been used by the public in general.

At trial, testimony was introduced as to the lack of public use of the 40th street corridor. Such evidence consisted of testimony of former and current Park Point residents establishing the only use of the corridor has been use by abutting landowners having a fee ownership in the corridor with the corresponding right to use the corridor. All witnesses who testified at trial indicated that there has been no use by the public of the 40th Street corridor and abutting landowners have treated the property as private.

For an extended period of time, Lot Fifteen (15) and Lots One (1), Two (2) and Sixteen (16) were held in common ownership and any use of the corridor was use by an owner who owned all lots in common with the right to use the corridor abutting such lots.

Lots One (1), Two (2), Fifteen (15) and Sixteen (16) were owned in common by Henry ("Harry") O'Donnell for an extended period of time. Harry O'Donnell owned Lot Fifteen (15) from 1910 to 1951, when Lot Fifteen (15) was sold to H. Anderson. Trial Exhibit 66. In 1957, Mr. Anderson sold the parcel to the Meaghers. Id. In 1969, the Meaghers sold the parcel to Dolphe Johnson, who sold it to Michael and Deborah Bolen in 1981. Id. In 1986, the Bolens sold the property to Zajac. Id.

Lots One (1), Two (2), and Sixteen (16), contiguous to Lot Fifteen (15), were commonly owned by Harry O'Donnell from 1936 to 1981, when the ownership of these lots were transferred by his estate to his granddaughter, Pamela Haugen. Trial Exhibit 65. In 1998, Glass purchased this parcel from Ms. Haugen. T. 292.

As the above history demonstrates, Lots One (1), Two (2), Fifteen (15), and Sixteen (16) were a single block of property in common ownership prior to 1951. Since at least the early 1900's (and perhaps even earlier), the owner of Lots One (1) and Two (2) also owned Lot Sixteen (16), which directly abuts Minnesota Avenue. Trial Exhibits 1, 2. In light of historical common ownership of Lots One (1), Two (2), Fifteen (15) and Sixteen (16) and the friendly relationship between prior owners of Lot Fifteen (15) and Lots One (1), Two (2) and Sixteen (16), any use of the 40th street corridor would have been use consistent with common ownership of the lots adjoining the corridor or permitted use between friendly neighbors.

Glass has suggested the 40th Street corridor has been historically used by the public because it is the only means of access to his L-shaped parcel. However, the prior owners of this parcel did not use the 40th Street corridor for travel to and from the parcel. Pam Haugen, the prior owner of the three lots now owned by Glass, did not have a

driveway on the 40th street corridor for her use as a means of access to her property. Rather, she had a garage on Lot Sixteen (16) and used Lot Sixteen (16) as a means of access to her property. The testimony at trial universally indicated that Lot Sixteen (16) has been used as a means of access to the L-shaped parcel now owned by Glass and was even used by Glass as a means of access to his parcel until he applied for a permit to use the corridor as a means of access. T. 29, 71, 119, 131, 145, 153, 154. Because Lot Sixteen (16) was used as a means of access, there was no need by any particular owner of that parcel or a member of the public to use the 40th Street corridor for access. Glass presented no evidence at trial that the 40th Street corridor was utilized by any member of the public in general, or by any entity providing goods or services to the resident of that parcel. **Although Glass represented to the City lack of access to his property as a basis for obtaining a permit, at trial, he conceded his use of Lot Sixteen (16) as means of access to his property.** T. 297- 299, 327.

Harry O'Donnell would occasionally rent out the home located on Lot One (1), known as the "wee" house.³ The "wee" house was unoccupied more than occupied. T. 190. David Johnson, who resided on Lot Two (2), testified the "wee" house was uninhabited for an extended period of time. T. 120. Mr. Bolen testified that the "wee" house was unoccupied during the entire 25 years he has lived next door. T. 50. Steve Wakefield grew up on the Glass property when it was owned by Harry O'Donnell, and testified that the "wee" house was occupied more by lawnmowers than people. T. 190.

³ Glass sets forth in the statement of facts portion of his brief certain references to the "wee" house, suggesting that because renters lived in the wee house on the back lot, they necessarily used the 40th street corridor as a means of access, which the record does not support. Moreover, to the extent there was any occasional use of the 40th street corridor by renters of the "wee" house, that use would have been permitted use by the owner of the property, Harry O'Donnell.

Many long-time Park Point residents, who have either lived on the abutting lots or in the vicinity of the 40th Street corridor, testified about the history of the corridor and lack of public use of the corridor. Michael Bolen, who has lived directly adjacent to the corridor for 25 years, testified there has been no use of the corridor by the general public. T. 21, 23, 25.

Joe Zajac has lived on Lot Fifteen (15) next to the 40th Street corridor since 1987. T. 152. He testified that there has been no public use of the 40th Street corridor. T. 153. Consistent with treating the 40th Street corridor as his property and not for use by the public in general, Zajac placed a fence made from timbers and a thick nautical rope across the portion of the 40th Street corridor adjacent to his lot and between Lots Fifteen (15) and One (1) to function as a barrier to public travel. T. 155, 157, 158.⁴ Zajac also testified that the owners of Lots One (1), Two (2), and Sixteen (16) have always used Lot Sixteen (16) for access from Minnesota Avenue to Lots One (1) and Two (2). T. 153. Zajac allowed only his relatives and guests to use the portion of the corridor adjacent to his lot, which he owns in fee, as a private parking area for his home. T. 162, 163.

On a few rare occasions and only with their express permission, the Bolens and Zajac allowed another individual to use the 40th Street corridor. On three or four occasions, the Bolens and Mr. Zajac permitted Pam Haugen, then the owner of Lots One (1), Two (2) and Sixteen (16), to use the corridor. T. 51-56, 169, 171. When Ms. Haugen attempted to use the corridor without permission, it provoked an argument with Zajac. T. 168; Trial Exhibit 61. That dispute resulted in a 1990 opinion from the Duluth City

⁴ In disregard of Zajac's property interests, Glass removed and destroyed the fence, without Zajac's permission, when he built his private driveway.

Attorney stating that the Bolens and Zajac could control use of the corridor. T. 25-27, 168, Trial Exhibit 3, RA4.

Lynn Duncan lived on what is now the Bolen property from 1976 to 1986, and testified that she always understood that the 40th Street corridor was a paper street that was never maintained by the City. T. 107, 108.⁵ She also testified that her family and friends used her driveway, not the corridor, to access the beach on Park Point. T. 115.

David Wakefield has lived on Park Point for 50 years, and spent a substantial portion of his childhood on Lots One (1), Two (2), Fifteen (15) and Sixteen (16). T. 66, 68-70. David Wakefield's parents lived on Lot Two (2). T. 62. Mr. Wakefield explained that his grandfather, Harry O'Donnell, the long time owner in common of Lots One (1), Two (2), Fifteen (15) and Sixteen (16), strongly discouraged public use of the 40th Street corridor and treated it as private and part of his property. T. 71-72, 74, 75. Mr. Wakefield was personally knowledgeable about the actions and intent of his grandfather because he was recruited to help plant trees and bushes, place rocks, and maintain the natural appearance of the corridor. T. 70-72, 74-75. Based on his observations and knowledge acquired over 50 years of living on lots abutting or near the 40th street corridor, Mr. Wakefield offered the "strong" opinion that there has never been public use of the 40th Street corridor. T. 75.

Margaret McGillis was born, raised, and has lived for 84 years on a lot located next to Lot Sixteen (16). T. 125-127. As a life-long Park Point resident living close in vicinity to the 40th street corridor, Ms. McGillis testified regarding the lack of use of the

⁵ At trial, Lynn Duncan testified in her capacity as a Park Point resident. Interestingly, Lynn Duncan is also the City Assessor yet holds an opinion concerning the 40th Street corridor which is contrary to the opinion now advanced by the City.

corridor by the public in general and that any use of the corridor was use by adjoining landowners (consistent with their fee ownership in the corridor) or permitted use. T. 138. She testified that Lot Sixteen (16) was used by prior owners and Glass to access Lots One (1) and Two (2). T. 130-131.

David Johnson rented the house on Lot Two (2) for 5 years. T. 118, 119. He used Lot Sixteen (16) for parking and access. T. 119. During his occupancy of Lot Two (2), he did not observe public use of the corridor. T. 120. He explained that the steps from Lot One (1) to Lot Fifteen (15), which are the basis for Glass claiming public use, were impassible. T. 121.

Harriet Meagher lived on Lot Fifteen (15) from 1957 to 1969, before the Bolens or Zajac. T. 93. She testified that she never used any part of the 40th Street corridor aside from the portion contiguous with her lot, which she used as a private parking area. T. 93, 95-96. She testified that during the brief time the “wee” house on Lot One (1) was occupied while she lived next to it, the residents were evicted within two months by Harry O’Donnell for using the 40th Street corridor. T. 101-102. Ms. Meagher also testified that she used Lots Sixteen (16) and Two (2) to get to the beach, instead of walking on the corridor. T. 98-99.

Steve Wakefield, another grandson of Harry O’Donnell, testified that he lived in the “wee” house for two years during his “impetuous youth”. T. 178, 180. He testified that he primarily parked at the end of the driveway on Lot Fifteen (15) with permission of Dolphe Johnson, the owner of Lot Fifteen (15) at the time. T. 178. He did admit to driving up the 40th Street corridor on two occasions, but “never heard the end of it” from his grandfather as a result of his transgression. T. 182, 189. He also testified that during

the entire time he was on Lots One (1), Two (2), Fifteen (15) and Sixteen (16), both as a boy visiting his grandparents and as a resident, he never saw his grandfather or the general public use the steps between Lots One (1) and Fifteen (15). T. 183.

Since at least the early 1900's (and perhaps even earlier), the owner of Lots One (1) and Two (2) has also owned Lot Sixteen (16), which directly abuts Minnesota Avenue. Lot Sixteen (16) has been historically used as access to Lots One (1) and Lot Two (2), the back lots of the Glass parcel. See, e.g. T. 29, 71, 119, 131, 145, 153, 154, 292 (trial testimony of Joseph Zajac, Michael Bolen, Margaret McGillis, Steven Wakefield, David Wakefield, Harriet Meagher, David Johnson, Lynn Duncan and Glass). Even Glass concedes use of Lot Sixteen (16) as a means of access, although characterizes it as a "temporary" access road. T. 297-299, 327.

The 40th Street corridor has never been used as a street or path of travel by the public in general. It has always been maintained by abutting landowners as their own property. T. 28, 69, 71, 72, 155, 156. Abutting landowners maintained the corridor just as they would maintain their lawn, planting native tall grasses, trees and lilac bushes in the corridor area. *Id.* The natural terrain of the 40th Street corridor does not lend itself to public use. An eight to ten-foot difference in height between the front and back lots created a steep bank that served as a natural barrier to travel. T. 38.

D. Consistent with lack of public use of the 40th Street corridor and the rights of abutting landowners under Minnesota law, the City has recognized that the corridor is not open and is owned in fee by abutting landowners.

In this litigation, the City supports its granting of a permit to Glass based on the theory that the corridor is open due to an opening in fact. In contrast to the position now adopted by the City for purposes of this litigation, the City has previously recognized the

rights of abutting landowners in general and has specifically recognized the rights of the abutting landowners in this case, concluding that the corridor is owned in fee by them with the right to exclude use by the public in general.

More than thirty years ago, in a March 5, 1976 memorandum authored, the City recognized the rights of abutting landowners to control land use to the centerline of platted, unopened rights-of-way like 40th Street:

The rule appears to be elemental that *any abutting landowner owns to the middle of the platted street or alley* and that the soil and its appurtenances, within the limits of such street or alley, belong to the owner in fee, subject *only* to the right of the *public* to use or remove the same *for the purpose of improvement.*" 141 N.W. 2d at 26 (emphasis added).

From this statement it is clear that the only right the "public" has with respect to an unused street easement is the right to improve it for a street or sidewalk or other purpose authorized by law such as a utility easement. In the case of *West v. Village of White Bear*, 119 N.W. 1064, it was held that the municipality could not cut trees on a platted but unused street until they have "taken proper steps to widen that road by condemnation proceedings." 119 N.W. at 1065. It follows that if the municipality itself could not exercise its easement rights without proper condemnation procedures, then certainly a private citizen could not exercise any easement rights unless such condemnation procedures are first followed. Therefore, citizens walking on such platted but unimproved street easements without the consent of the fee owner are trespassers. If the fee owner, on the other hand, allows the public at large to use the land as a street, then the land becomes a street by common law dedication even though the municipality did not go through condemnation procedures. See *Keiter v. Berge*, 18 N.W. 2d 35. Common law dedication of a street can take place even where there is no platted street easement at all as long as the requirements of *Keiter v. Berge*, supra are met.

Trial Exhibit 5 (underlining added); RA 5.

In 1990, Michael Bolen and Joseph Zajac contacted William Dinan, then Duluth's city attorney, requesting his opinion regarding the 40th Street corridor and the rights of

adjoining landowners with respect to the 40th Street corridor. T. 26, 27. In a January 25, 1990 letter from Mr. Dinan to Mr. Zajac, the City Attorney stated:

As I told Mr. Bolen, the law is that street easements that are not improved and maintained by the City for public use are under the control of the owner of the underlying fee title to the property over which the easement runs. Normally the owners of the property on each side of a street own the fee title to one-half of the property underlying the street easement. These adjoining property owners can exclude the public from use of such unimproved street easements until the City takes some action to open them for public use.

In cases such as this the difficult question is often whether the City has taken sufficient action in the way of improvement or maintenance of the street easement such that the easement should be considered open to the public. But from what you and Mr. Bolen have told me about the status of 40th Street, it appears clear that this street should not be considered open for public use, and you have control of the use of the portion of the easement to which you hold fee title.

Trial Exhibit 3 (underlining added); RA 4. Nothing changed in terms of use of the 40th Street corridor or the city's treatment (e.g., maintenance or improvement) of the corridor following the City's issuance of its 1990 opinion letter. T. 25-28, 163.

E. Glass initially uses Lot Sixteen (16) as means of access, conceals that means of access in 2004 prior to his permit application and then claims no means of access other than the 40th Street corridor in support of obtaining a permit to build a private driveway on the corridor.

Glass alleges lack of access to his parcel in support of his argument that the city must grant him a permit to use the corridor so as not to deprive him of a constitutional right to reasonably convenient and suitable access to his property. At trial, Glass offered testimony which belies his claim regarding access to his property.

When Glass first started to occupy his parcel, he, just like prior owners, used Lot Sixteen (16) as a means of access to his parcel. In 2003, in connection with making improvements to his means of access on Lot Sixteen (16), Glass forced his neighbor,

Margaret McGillis, to remove a fence that encroached a small distance onto Lot Sixteen (16), claiming removal of the fence was necessary for him to make improvements. T. 131-34.⁶ In an October, 2003 letter to Ms. McGillis, Glass represented that removal of the fence was necessary to enable him to complete a driveway along the edge of his property on Lot Sixteen (16). Trial Exhibit 16 (Glass states in a letter to Ms. McGillis: "I will be completing my driveway and sidewalk projects along the edge of my property and the fence is in the way."). Based on Glass's represented use of Lot Sixteen (16) as a means of access to his property and need to make improvements to that means of access, Ms. McGillis removed the fence, permitting Glass to move forward with his driveway project. A garage and driveway already exist on Lot Sixteen (16), providing access to Lots One (1) and Two (2). T. 292. At trial, each witness confirmed that Lot Sixteen (16) has historically been used as access to Lots One (1) and Two (2). T. 29, 71, 119, 131, 145, 153, 154, 292. Even Glass conceded his use of Lot Sixteen (16) as a means of access and, remarkably, testified regarding his house plans for a new home which identify Lot Sixteen (16) as a means of access. RA 3.

Glass had gravel placed on Lot Sixteen (16) to improve his access to Minnesota Avenue. T. 134, 299. The gravel extended the driveway up onto Lots One (1) and Two (2). T. 154, 299. Glass admits the gravel driveway gave him access to Lot One (1). T. 327. Glass testified that he "wanted a **secondary vehicular access** so that [he] could drive up to the parking pad using the narrow driveway [the driveway on Lot 16

⁶ Lots on Park Point are not directly perpendicular to Minnesota Avenue. Rather, the lots run at an angle, apparently unknown to many residents, as demonstrated by the location of the McGillis fence and Zajac garage, which were placed based on the assumption that the lots run perpendicular, both of which have been determined by survey as not lying within the boundaries of the McGillis and Zajac property. T. 133.

connecting Minnesota Avenue to Lots 1 and 2], but then exit the property using the 40th Street right-of-way.” T. 300 (emphasis added).

In October of 2004, Glass covered the gravel on Lot Sixteen (16) with sod. T. 135. Glass testified that he removed the driveway because it was not twenty feet wide and did not provide legal access to his property. T. 301. Although Glass claimed that he needed to build a 20 foot wide driveway, others involved in the permitting process, including the city engineer and planner, testified that there is no 20 foot width requirement. See section F. Indeed, the private driveway eventually built by Glass is only 16 feet wide. Glass contradicted his own testimony as to his stated need for a second driveway, explaining that he intended to build a home with three garages and two driveways, both of which would provide access to his home. T. 307; Trial Exhibit 59. In reference to the house plans, introduced as exhibits at trial, Glass explained that he intended to build an additional garage under a remodeled house on Lot Two (2) that lined up directly with the garage and hidden driveway on Lot Sixteen (16), previously utilized as a means of access to his parcel, giving him direct access to Minnesota Avenue from his home on Lots One (1) and Two (2). T. 307; Trial Exhibit 59.

Glass also testified that he removed the Lot Sixteen (16) driveway to comply with impervious surface requirements in the building code. However, the City’s Senior Planner testified that an impervious surface is one that does not absorb water. T. 301, 229. A gravel driveway would allow water to pass through for absorption by the underlying soil and is not an impervious surface, casting suspicion on Glass’ testimony regarding the reason he removed the existing driveway and means of access to Lots One

(1) and Two (2). As the Glass house plans make evident, Glass intends to resurrect and use the driveway on Lot Sixteen (16) as a means of access.

F. Knowing that the abutting landowners object to his use of the 40th Street corridor in which they have a fee ownership interest, Glass applies for a permit from the City to build a private driveway on the corridor and in support of the permit application, makes representations regarding public use of the 40th Street corridor and lack of access to his property.

The Bolens and Zajac objected to Glass using portions of the 40th Street corridor owned by them. Knowing of such objection, Glass applied for a permit from the City to build a private driveway on the 40th Street corridor.

Glass initially applied for a permit to build a garage on Lot One (1). Trial Exhibit 17. James Mohn, the City's Senior Planner, became involved in the permit process after the garage building permit was denied due to a perceived lack of legal access to Lot 1. T. 196.

Glass then applied for a permit to make private improvements to portions of the 40th Street corridor owned by abutting landowners. Trial Exhibit 24. Glass represented to the City that he had no means of access to his back lots other than by use of the 40th street corridor and "40th Street has provided regular access and the necessary minimum 20 foot wide fire safety access to my property dating back to the 1950's . . ." RA 10, 19.⁷ Glass made such representations even though he has no personal knowledge regarding use of the 40th street corridor prior to 2003, when he began occasionally occupied his property.⁸ T. 321-22. Glass also represented that the corridor represented his only means of access

⁷ In contrast to the representations made by Glass to the City, he failed to demonstrate at trial that the private driveway built by him was twenty feet in width, the stated reason for needing to build the driveway on the corridor.

⁸ Glass is a resident of Bethesda, Maryland and occupies his property on an occasional basis.

to his property, neglecting to advise the City that he and his predecessors in interest had used Lot Sixteen (16) as a means of access to the property. In evaluating the permit, the City did not investigate use of the 40th Street corridor or means of access to the property. Rather, the city accepted as true the representations made by Glass when, as noted in section D, the City had previously determined there was lack of sufficient public use to render the street “open.”

On May 27, 2005, the city engineer sent Glass a letter stating:

By way of background documentation – 40th Street is a 30-foot wide right-of-way platted within the above-referenced Oatka Beach Addition to Duluth . . . Although this roadway exists within a platted right-of-way, to my knowledge the City had never exercised that right-of-way; nor does it maintain it as a City street. *None-the-less – this roadway has previously provided and/or currently provides access to both Lot 1 and Lot 15 immediately adjacent to the platted right-of-way.*

Trial Exhibit 6 (emphasis added). The City’s determination regarding the permit is based on the assumption that the roadway has “previously provided and/or currently provides access to both Lot One (1) and Lot Fifteen (15) immediately adjacent to the platted right of way.” The “roadway” referenced in the letter is not a road but a private driveway located in the portion of the corridor adjacent to Lot Fifteen (15), and used by Zajac and the prior owners of Lot Fifteen (15). *Id.* The city engineer’s letter also references an April 2005 city attorney opinion concerning “rights of abutting property owners to unimproved, platted streets rights-of-way” in which the city attorney concluded that the City must grant the Glass permit application to make private improvements in the 40th Street corridor. Trial Exhibit 48. The City Attorney’s conclusion is based on the assumption that the Court of Appeals decision of *In Re Request of Lafayette Dev. Corp.*, 567 N.W.2d 743 (Minn. Ct. App. 1997), summarily aff’d, 576 N.W.2d 740 (Minn. 1998)

(the “*Lafayette* decision”) makes “clear that the government cannot prevent an abutting landowner from improving the street at private expense in order to gain access to property.” *Id.*⁹

Michael Metso, the City Engineer at the time of the permit application, testified that he was unaware that Lot Sixteen (16) had historically provided means of access to Lot One (1). T. 267. Metso also testified that he had no recollection of Glass informing him that Lot Sixteen (16) had ever been used to access Lots One (1) and Two (2).¹⁰ T. 267.

In summary, the City issued a permit to Glass based upon the following assumptions: (a) the permit was made in connection with the building of a detached garage on Lot One (1) (Glass did not provide information to the City regarding any other building plans); (b) Glass had no means of access to his parcel of property other than the corridor; (c) 40th street has historically been used by the owner of Lot One (1) to access Lot One (1); and (d) the *Lafayette* decision required issuance of the permit.

At trial, Glass could offer no personal knowledge as to use of the 40th street corridor. In contrast, numerous long-time Park Point residents testified as to lack of public use of the 40th street corridor and use only consistent with private use by abutting landowners or permitted use granted by abutting landowners. As to Glass’ representation regarding claimed lack of access to his property, he himself had to concede he had means of access other than the 40th street corridor.

⁹ As outlined in section III of the Argument portion of this brief, the *Lafayette* decision does not stand for the proposition stated by the City Attorney in her memorandum.

¹⁰ The City now acknowledges Lot Sixteen (16) has been used as a means of access to the Glass parcels in response to Glass’s argument that he has been deprived of a constitutional right of reasonably convenient and suitable access to his property.

G. Glass builds a driveway on portions of 40th Street corridor owned by other abutting landowners.

On June 16, 2005, a contractor hired by Glass built a driveway on the 40th Street corridor. T. 312. The driveway is on the centerline of the corridor and extends to the top of the hill and Lot One (1), giving the appearance of a street, not a driveway. T. 33, 34. The construction of the driveway altered the grade, condition and appearance of the 40th street corridor by, among other things, placement of 12 inches of gravel, 16 feet in width, and destruction of grass, trees and bushes previously located in that area of the corridor.¹¹ T. 38. As a result of the driveway constructed by Glass, the 40th street corridor changed from that of a private lawn to looking like a public street or boat launch. T. 158, 161.

H. Glass cannot present evidence of an opening in fact of the 40th Street corridor.

Glass and the City primarily rely on the concept of an opening in fact to justify the City's action in granting him a permit to build a private driveway. However, at trial, he failed to present competent and credible evidence of an opening in fact.

At trial, the Bolens and Zajac called numerous witnesses with the requisite foundation to testify regarding use of the 40th Street corridor. Such witnesses included current and prior owners of the lots abutting the 40th Street corridor, a longtime Park Point resident living close in proximity to the corridor and grandchildren of the earliest known occupants of the lots abutting the corridor who frequently visited their grandparents at the lots in question. See Section C. Each of these witnesses testified concerning the manner in which abutting landowners maintained the corridor as private and lack of public use of the corridor. In contrast to this evidence, the only evidence

¹¹ The private driveway eventually built by Glass is only 16 feet in width, not 20 feet in width, as he claimed was necessary for legal access.

presented by Glass of alleged public use consisted of (a) a photograph and letter provided to him by Pamela Haugen (the letter, Trial Exhibit 29, was objected to as hearsay yet admitted over objection); (b) post-1998 photographs and video taken by Gary Glass which only document un-permitted use of the corridor by Glass, Gary Glass and contractors hired by them, T. 321; (c) aerial photographs of the corridor and lots in question (Trial Exhibits 43, 44, 45, 46 and 47) unaided by any testimony from an individual with requisite foundation to testify as to the contents and meaning of the aerial photographs; (d) cross examination of certain witnesses regarding use of the corridor by then abutting landowners (which would be consistent with their fee ownership in the corridor) or occasional use of the corridor by friends or family of abutting landowners, with their permission, consistent with their ownership of the corridor. Glass presented no evidence of use of the corridor by the public in general.¹²

The evidence presented by Glass regarding use of the 40th Street corridor merely constitutes evidence of use by abutting landowners, consistent with their fee ownership interest in the 40th Street corridor, use permitted by the abutting landowners and unpermitted use, i.e. trespass, by Glass himself.

¹² In his brief, Glass makes certain assertions about claimed public use of the 40th Street corridor by making arguments based on various maps and photographs. Although Glass cites such maps and photographs as sources for the statements, the maps and photographs in and of themselves do not support the statements made. Moreover, the maps predate the plat in question. Glass also recites testimony of prior abutting landowners and their use of the 40th Street corridor which is entirely consistent with their rights as abutting landowners. See e.g. Harriet Meeger trial testimony, T. 95, cited on page 8 of appellant's brief. Abutting landowners own to the center line of the corridor and are entitled to use the corridor adjacent to the property. Glass also makes certain inferences from aerial photographs claiming a pathway shown on a photograph indicates the public in general used the 40th Street corridor as a right of way access to the lake. At trial, Gary Glass attempted to offer this testimony and it was objected to on the grounds of foundation. The pathway merely shows use consistent with use by the abutting landowners, not the public in general.

Glass has no personal knowledge of use of the corridor prior to 2003. T. 322. Glass can only testify to his observations of use of the 40th Street corridor on those rare occasions after 2003 when he has been in Duluth. T. 322. Notably, he did not testify as to any use of the 40th Street corridor other than use by himself, his father and contractors hired by them. This use was objected to by the abutting landowners and was without permission.

Glass introduced photographs showing stepping stones located in part on Lots One (1) and Fifteen (15), characterized by some witnesses as a "sidewalk," which, prior to Glass' occupancy of the Glass parcel, was overgrown and impassible. T. 87, 88, 121. Glass surmised that such stepping stones are evidence of public use. The record demonstrates otherwise. It is more likely than not that the stepping stones were placed when Lots One (1), Two (2), Fifteen (15) and Sixteen (16) were all owned by one person, Harry O'Donnell, providing a path from Lot One (1) to Lot Fifteen (15). David Wakefield, Harry O'Donnell's grandson, testified that the stones were there "from time out of mind." T. 88. There are similar stepping stones between Lot One (1) and Lot Two (2) and Lot (2) and Lot Sixteen (16). T. 335.

Two or three of the stepping stones appear, by virtue of a survey stake, to be located on the 40th Street corridor which would be consistent with Lots One (1) and Fifteen (15) being previously owned by one person and, accordingly, that one individual owned to the centerline of the corridor adjacent to both lots, making the placement of the stepping stones on the corridor entirely consistent with his fee ownership interest in the corridor. The stepping stones may also represent a path for permitted use between Lots One (1) and Fifteen (15), not use of the corridor in general. The stepping stones do not

extend all the way to Minnesota Avenue; rather, they extend to the northern half of the back of Lot Fifteen (15). If the stepping stones were intended as a sidewalk for use by the public in general, they would extend the entire course of the corridor, but they do not.

Since 1998, Gary Glass, Glass's father, has taken photographs of unpermitted use of the 40th Street corridor by Glass, Gary Glass or contractors hired by Glass. T. 321, 373. Glass claims the photographs are evidence of public use of the corridor and support the conclusion that the street should be considered open. The Bolens and Zajac put Glass on notice that they objected to use of the corridor by, among other things, verbally stating to him that they objected to any use by him of the corridor and by providing him with a copy of an agreement in which they declared such use trespass. T. 31; Trial Exhibit 4.

One of the exhibits introduced at trial was a packet of materials, including photographs, which Glass testified were provided to him by Pamela Haugen, the former owner of the Glass Property. Trial Exhibit 29. The package included a photograph showing a truck parked on the Zajac driveway, for which no evidence was presented regarding the circumstances as to why the truck was parked on the driveway. The quality of this evidence is questionable because Pamela Haugen did not testify at trial and was not available for cross-examination.

Glass introduced a videotape taken by his father on two days in April of 1998 prior to Glass' purchase of Lots One (1), Two (2) and Sixteen (16). Trial Exhibit 61. The videotape primarily consists of narrative by Gary Glass as he walks along Lots One (1), Two (2) and Sixteen (16), and inspects the inside of the home located on Lot Two (2). Approximately 9 minutes into the video, Glass walks up the 40th Street corridor and introduces himself to Zajac. In the audio portion of the tape, Zajac makes the following

statements: (a) as he testified to at trial, Zajac permitted Ms. Haugen on rare occasions (typically i.e. moving day) to use that portion of the 40th Street corridor, which he owns; (b) during the entire timeframe he has lived on Lot Fifteen (15), he has never had a problem with anyone publicly using the 40th Street corridor other than an older couple one day tried to use the corridor and he told them that it was not a public means of access; and (c) he got into an argument with Ms. Haugen when, on one occasion, she parked her vehicle on his portion of the 40th Street corridor. All of Mr. Zajac's comments captured on videotape by Gary Glass are entirely consistent with the 40th Street corridor *not* being used as a public means of access and excluding public use of the corridor.

At trial, Glass introduced a collection of photographs, Exhibit 27, showing paper streets on Park Point (19th through 42nd Streets). Glass failed to present any evidence as to ownership of front and back lots, the circumstances surrounding the use (parking) depicted in the photographs and whether such use merely reflects use of that portion of the paper street owned by the adjoining landowner or permitted use by the public. Most, if not all, of the photographs show private driveways and cars parked directly adjacent to a home or next to a garage suggesting parking on that portion of the particular street end owned by the adjoining landowner. The photographs depict driveways which terminate at the end of the northern edge of the front lot and show grassy, private areas behind the front lots. Trial Exhibit 27.

STANDARD OF REVIEW

Glass and the City challenge the district court's findings and conclusions of law.

On appeal, a district court's findings of facts are subject to a clearly erroneous standard of review. *Hubbard v United Press Intern., Inc.*, 330 N.W.2d 428, 441 (Minn.

1983). A district court's findings must be upheld unless they are "manifestly and palpably contrary to the evidence." *Flynn v. Beisel*, 257 Minn. 531, 534, 102 N.W.2d 284, 287 (1960). Where the evidence presented on a factual issue is disputed, the issue is one peculiarly for the fact-finder. The district court's findings, as reflected in its formal findings and its memorandum of law, are supported by the evidence.

The district court's conclusions of law are subject to a de novo standard of review. *Frost-Benco Electric Ass'n v. Minnesota Public Utilities Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

The issues raised on appeal primarily present questions of law (the rights of abutting landowners in a paper street, whether mere ownership of a lot within a plat confers a right to use and travel on a platted but undeveloped paper street, whether mere ownership of a lot abutting a platted undeveloped paper street carries with a constitutional right of access to the paper street, whether a city may by special legislation grant itself authority it does not constitutionally possess, and whether a landowner may rely on an opening in fact to compel a municipality to grant him a permit to make improvements on a paper street dedicated for public use). The remaining issue presents a question of fact (whether, assuming Glass can properly rely on an opening in fact as a means of relief, the 40th Street corridor should be deemed open by virtue of an opening in fact).

Glass contends the district court's decision should be set aside because the court failed to make specific findings on use of the 40th street corridor relevant to a determination of an opening in fact.

This challenge fails on two grounds. First, as is permitted by Rule 52.01, the district court's findings of fact and conclusions of law are accompanied by a memorandum of law. Minn. R. Civ. P. 52.01 ("it will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court or in an accompanying memorandum."). In *Lafayette*, the court considered certain factors determinative of an opening in fact, including access, improvements and public use, all of which bear upon the issue of an opening in fact. In the memorandum accompanying the district court's order, the district court concluded *Lafayette* was distinguishable from the present case, necessarily meaning that the court concluded lack of public use. The district court's memorandum recognizes the factors determinative of the issue of an "in fact" opening (including lack of public use, lack of access to his property by means other than a paper street and lack of any maintenance or improvement of the street by the City) which, coupled with the trial testimony universally indicating lack of historic use, only supports a finding and conclusion of lack of public use. *Hoyt v. Brokaw*, 359 N.W.2d 310 (Minn. Ct. App. 1984) (a district court's findings of fact and conclusions of law, even if not in a particular form, may be upheld on appeal if the record is adequate enough to provide meaningful appellate review). The evidence at trial was overwhelming, if not undisputed, on the issue of lack of public use and no appellate relief is necessary merely because the court did not include an express finding of fact using the phrase "lack of public use."

The district court's findings are the only findings which could be made on the record in this case. The district court's conclusions of law are based on elemental, fundamental principles of real estate and municipal law and should be upheld on appeal.

ARGUMENT

The proper starting point for resolving the issues raised on appeal is recognizing that under Minnesota law, abutting landowners enjoy protected property rights in paper streets, subject only to a municipality's qualified or terminable fee to develop the property for public use. Such rights are not preempted by or subservient to an individual property owner's desire to build a private driveway, as a secondary means of access to his property, on the paper street. At the district court level and on appeal, Glass asserts a right to use and access portions of a paper street owned by abutting landowners based on a variety of theories which, as outlined in this brief, are without merit.

I. THE DISTRICT COURT PROPERLY RECOGNIZED THAT THE BOLENS AND ZAJAC OWN TO THE CENTERLINE OF THE 40TH STREET CORRIDOR ADJACENT TO THEIR PROPERTY, SUBJECT ONLY TO THE CITY'S QUALIFIED OR TERMINABLE FEE TO DEVELOP THE CORRIDOR AS A PUBLIC STREET.

An elemental, well recognized principle of law is that an abutting landowner owns to the center line of a platted, undeveloped street, known as a paper street, subject only to a municipality's right to develop the street for use by the public.¹³ *West v. Village of White Bear*, 107 Minn. 237, 119 N.W. 1064 (1909); *Kochevar v. City of Gilbert*, 273 Minn. 274, 141 N.W.2d 24 (1966); *Rich v. City of Minneapolis*, 37 Minn. 423, 424, 35 N.W. 2 (1887) (recognizing ownership of the land underlying a road belongs to the

¹³ A street appearing on the recorded plat but which has never been opened, prepared for use or used as a street, is known as a "paper street." *Railo v N. Pac. Ry. Co.*, 108 Minn. 431, 432, 122 N.W. 489 (1909).

adjacent landowners, and extends from the adjacent lot to the centerline of the roadway, rendering the city liable for unnecessary removal of rock from a roadway adjacent to the plaintiff's land).

In *West v. Village of White Bear*, 107 Minn. 237, 119 N.W. 1064 (1909), the Minnesota Supreme Court recognized that a city council could not cut down trees in the right of way of a street without first taking the appropriate legislative action to gain control of the property. Sixty years after the Supreme Court first pronounced the rights of abutting landowners in the *White Bear* decision, the Minnesota Supreme Court again held in *Kochevar v. City of Gilbert*, 273 Minn. 274, 141 N.W.2d 24 (1966), that the city had to go through the proper administrative procedures before removing material from the plaintiff's land that encroached on an easement for an alley.

The fee ownership interest of abutting landowners in paper streets has been recognized by the Minnesota judiciary for more than a century, with courts pronouncing that right as "well established", "well understood", "elemental" and a "presumption of law". The City has long recognized the rights of abutting landowners as reflected in multiple City Attorney opinions, a letter from the City Attorney to the abutting landowners in this case, and as confirmed by the trial testimony of the City's senior planner and engineer. Importantly, the City Attorney has previously concluded that the 40th Street corridor is not open for use by the public but, rather, is a paper street which abutting landowners own to the center line. RA 4.

Based on more than 100-year-old precedent, the Bolens and Zajac own the land that extends to the centerline of the platted but unopened paper street that is adjacent to their property, subject only to an easement in favor of the City to develop the corridor as

a street for public use. As a matter of law, they have a protected property interest based on their fee ownership to the centerline of the 40th Street corridor. As the fee owners of portions of the corridor, they have the right to exclude others from using those portions of the corridor.

The actions of Glass and the City resulting in the City granting a permit to Glass to build a private driveway on the corridor disregards the important property interests of abutting landowners. Glass now seeks to justify his wrongful conduct by claiming, based on various theories, that he has certain rights and that the rights of abutting landowners are subservient to his rights. Glass also invites a judicial declaration that the 40th Street corridor is open by virtue of an opening in fact based on the mistaken notion that such a determination translates into a personal benefit to him to privately develop the corridor for his own use. None of the theories advanced by Glass and the City have merit.

II. GLASS CANNOT RELY UPON AN OPENING IN FACT AS A BASIS FOR COMPELLING THE CITY TO GRANT HIM A PERMIT TO BUILD A PRIVATE DRIVEWAY ON THE 40th STREET CORRIDOR.

Curiously, Glass relies upon the concept of an opening in fact to support his position that he has a right to build a private driveway on the 40th Street corridor as a means of access to his property and the City must grant him a permit to do so.

Glass and the City fail to recognize that if they are successful in advocating for an opening in fact, it will not translate into the result they desire. If an opening in fact is determined by the court, then the 40th Street corridor is open for public use. An opening in fact does not support issuance of a permit to an individual to privately develop a street for his own use as a private driveway. If the street is deemed to be open due to an opening in fact, this conclusion presents a dilemma for Glass and the City. The 40th Street

corridor would then be open for use by the public in general, which would be detrimental to all abutting landowners, including Glass, and would mean that the City has the burden of developing, maintaining and repairing the street, just like any other public street, an obligation it has not yet undertaken and disavows with respect to the corridor.

Glass cannot avail himself of an opening in fact to obtain the relief he desires. An opening in fact does not translate into a right to build a private driveway on an easement dedicated for public use and does not require the City to grant a permit to Glass to do so.

III. GLASS HAS FAILED TO ESTABLISH AN OPENING IN FACT OF THE 40th STREET CORRIDOR.

Setting aside, for the purposes of argument, the procedural infirmity of relying on an opening in fact as a basis for obtaining a permit to privately develop a street which can only be developed for its dedicated public use, the record does not establish an opening in fact.

There are two ways to open a street to public use. The city can officially open it, or a common law dedication can occur. *See Keiter v. Berge*, 219 Minn. 374, 378, 18 N.W.2d 35 (1945). A city can officially open a platted street by implementing the condemnation procedures referred to in the *White Bear* and *Kochevar* cases. Sections 61 and 62 of the Legislative Code of the City of Duluth lay out the procedures to be followed in order to open a street to public use. Under those sections, the city council can open the street with a seven out of nine vote, or a landowner of 35% of the abutting footage can petition the city council to open the street. The public does not gain use of the easement until that condemnation procedure has occurred. No such vote or petition to

open 40th Street has ever occurred. The City has conceded the 40th street never been opened by official action of the city.

The second way a street may be deemed open to public use is by common law dedication. Common law dedication arises as a result of a landowner's intent, express or implied, to dedicate land for public use and acceptance of that use by the public. In Minnesota, a common law dedication may arise as a result of a showing of intent to dedicate plus an acceptance of that dedication by public use or a municipality exercising control over the property in question by maintaining and improving the property. *Anderson v. Birkeland*, 229 Minn. 77, 38 N.W.2d 215 (Minn. 1949). If a common law dedication is based upon implied intent, such intent must be shown by acts and declarations of a landowner unmistakable in purpose and decisive in character. *In re Stees*, 142 Minn. 340, 344, 172 N.W. 219, 221 (1919); *Village of White Bear v. Stewart*, 40 Minn. 284, 287, 41 N.W. 1045, 1046 (1889) ("the vital principle of a common-law dedication of land for public use is the intention to dedicate and, whenever this is unequivocally manifested, the dedication is complete so far as the landowner in concerned); *Security Federal Sav. and Loan Ass'n v. C & C Investments, Inc.*, 448 N.W.2d 83 (Minn. Ct. App. 1999) (concluding that a landowner's granting of permissive use of property does not evince the requisite intent necessary for a common law dedication). Common law dedication has been established based upon a showing of general public use, lack of objection to such public use by abutting landowners, an abutting landowner's invitation and encouragement of public use and by a municipality taking action to exercise control over property by improving, maintaining and repairing a road. *Anderson v. Birkeland*, 229 Minn. 77, 38 N.W.2d 215 (1949) (common law

dedication established by public use for six continuance years plus governmental action in maintaining and repairing road at its expense, including grading and resurfacing, applying road oil and installation of guard posts); *Bengston v. Village of Marine on St. Croix*, 310 Minn. 508, 246 N.W.2d 582 (1976) (common law dedication established by admitted intent to dedicate for public use and lack of objection by abutting landowners to public use); *Ellsworth v. Lord*, 40 Minn. 337, 42 N.W. 389 (1889) (wagon crossing constituted public road as a result of public use of the crossing and encouraged and invited by an abutting landowner); *Henley v. Chisago County*, 370 N.W.2d 920 (1985) (common law dedication established as a result of use of road by public in general, acts of public officials in grading, working and bridging the road and lack of objection to public use of road by abutting landowners) *Keiter v. Berge*, 219 Minn. 374, 18 N.W.2d 35 (1945) (an intent to dedicate may be inferred from an owner's long acquiescence in public use of land as a highway, his acts in furtherance of such use, his recognition of a need for the highway and his recognition of the validity of a public's claim to the highway after it was used as such). In each of the cases recognizing a common law dedication, there has been some form of road used by the public in general for travel.

The 40th Street corridor is not open due to a common law dedication.

The 40th Street corridor has not been used by the public in general for travel or otherwise. There is no road on the 40th Street corridor which could be utilized by the public as a means of travel. While the city has an easement to develop the street for public use, it has not exercised that right, has taken no action to improve or maintain the street and has pronounced that it will likely never develop the corridor for use as a public street. Abutting landowners have zealously guarded the private nature of the 40th Street

corridor and excluded public use. Abutting landowners have maintained the corridor as private in nature and when faced with claims by others of a right to use the corridor, they have objected to such use. The abutting landowners have not, by their actions and conduct, acquiesced in public use. The evidence at trial established that the only use of the 40th Street corridor is use by abutting landowners consistent with their fee ownership interest in the corridor and permissive use of the corridor by family and friends of the abutting landowners, also consistent with the fee ownership interest of the abutting landowners.

A private driveway exists on the 40th Street corridor for use by an abutting landowner and others with his permission. The owner of Lot Fifteen (15), like any property owner with a driveway, may use the driveway and may permit others to use the driveway. To the extent he has on occasion used portions of the 40th Street corridor which are owned by the Bolens, he has done so with their permission. Permitted occasional use by abutting landowners, coupled with measures taken by such abutting landowners to discourage public use, does not qualify as public use necessary for a common law dedication. *Security Federal Sav. & Loan Ass'n v. C & C Investments, Inc.*, 448 N.W.2d 83, 87 (Minn. Ct. App. 1999). Glass seems to suggest that the use of a private driveway by an abutting landowner, his guests and family members is enough to turn the driveway into a public street. Under that reasoning, every driveway in Minnesota would be rendered a public street.

If the 40th Street corridor was open to the public as claimed by Glass and the City, bathers and other members of the public would have used it as access to the beach. The

trial testimony of all witnesses demonstrated that the public at large has never made such use of the corridor.

Both the City and Glass place much reliance on the concept of an opening in fact as a basis for compelling the City to grant a permit to Glass to build a private driveway on the corridor. The concept of an opening in fact was first recognized by the Court of Appeals in the *Lafayette* decision, summarily affirmed by the Supreme Court in 1998 on an evenly divided court. *In re Request of Lafayette Dev. Corp.*, 567 N.W.2d 743 (Minn. Ct. App. 1997), *aff'd*, 576 N.W.2d 740 (Minn. 1998).

In *Lafayette*, the Court of Appeals concluded, based on the particular facts at issue in that case, that an opening in fact had occurred. In *Lafayette*, the street in question, 18th Avenue South, was the only means of direct access to a parcel, was sixty feet wide and partly improved by a thirty foot wide paved surface and had been graded and graveled by the city. The developer, tenants of its 248-unit townhouse project, and neighboring landowners had used the improved 18th Avenue South to access the property for 30 years. *Id.* at 745.

In this case, the City concluded the *Lafayette* decision modified existing law concerning the rights of abutting landowners and required the City to grant a permit to an individual to privately develop a public street. In granting the permit, the City may have been even more mindful of a post *Lafayette* decision involving an action by the developer involved in the *Lafayette* case against the City of South St. Paul based on its failure to recognize an opening in fact. *Ebin v. City of St. Paul*, 1999 WL 1057549 (Minn. Ct. App. 1999) (Court of Appeals upheld trial court's order denying summary judgment on developer's claim for damages against city); RA 21. *Lafayette* does not overrule or

modify years of precedent establishing rights of abutting landowners. Rather, the Court of Appeals in *Lafayette* concluded a common law dedication, labeled an opening in fact in that case, existed based on the particular facts at issue in that case. The *Lafayette* decision does not stand for the proposition that the city was required to grant a permit to Glass. See *Wasiluk v. City of Shoreview*, 2005 WL 1743746 (Minn. Ct. App. 2005) (city denied a permit to an individual claiming lack of access to his property other than by an unopened alley and desiring to use the alley as access; court rejected the landowner's contention that the city was required to allow him use of the unopened alley to access his property); RA 29.

Lafayette has no application to the present case. This case and *Lafayette* are distinguishable on numerous grounds. Here, in contrast to the developer in *Lafayette*, Glass had a means of access and wanted to utilize an undeveloped street as a secondary means of access. Glass' own testimony belies any claim that he can establish lack of access, one of the predicates for an opening in fact:

I wanted a secondary vehicular access so that I could drive up to the parking pad using the narrow driveway, but then exit the property using the 40th Street right-of-way.

T. 300 (testimony of Glass). There is no street, unimproved or improved, on the corridor. There has been no public use of the corridor. The city has not improved or maintained the corridor and disclaims any intent to ever develop the corridor. The City has never graded, graveled, or paved any portion of the corridor

The nature and volume of use involved in the cases is also very different. In *Lafayette*, the public, neighbors, and residents of a 248-unit development all freely used the entire easement. *Id.* In contrast, there is no evidence in this case that the public in

general freely used the 40th street corridor. The only use of the 40th street corridor is by those with a right to use the corridor (i.e., abutting landowners).

A ruling by this court clarifying the scope and applicability of the *Lafayette* decision, especially in relation to the rights of abutting landowners, may be welcomed by members of the real estate and municipal bar. A ruling by this court confirming that *Lafayette* does not extinguish or modify long existing precedent recognizing the rights of abutting landowners would also be beneficial to other abutting landowners, similarly situated to the landowners involved in this case, who have had their property interests violated and have been forced to defend their property interests based on an erroneous interpretation of the *Lafayette* decision.

IV. GLASS DOES NOT POSSESS A CONSTITUTIONALLY-PROTECTED RIGHT TO USE AND IMPROVE THE PLATTED BUT UNOPENED 40TH STREET CORRIDOR FOR ACCESS TO AND FROM HIS PROPERTY.

Glass contends he has a constitutionally protected right of access to his property which requires the City to grant him a permit to build a private driveway on portions of the 40th Street corridor owned by others. This contention is not supported by Minnesota law and the record establishing Glass has reasonably convenient and suitable access to his property.

Minnesota has recognized property owners have a right, in the nature of a property right, of reasonably convenient and suitable access to a public street which abuts their property. *State v. Northwest Airlines*, 413 N.W.2d 514 (Minn. Ct. App. 1987) (a property owner acquires vested access rights upon dedication and acceptance of a street for public use); *Vanderburgh v. City of Minneapolis*, 98 Minn. 329, 108 N.W. 480 (1906) (in connection with an established public street, recognizing an abutting landowner has a

right of access). The courts have recognized a landowner may rely on a means of access to his property based on an existing public street and may be entitled to compensation if a municipality takes action, in the form of improving or vacating a street, which results in the access being eliminated or impaired. Glass cannot claim such a right in reference to a platted, undeveloped street.

Even assuming a right of reasonably convenient and suitable access extends to a platted, undeveloped paper street, Glass has reasonably convenient and suitable access, foreclosing a claim by him that he has been deprived of a constitutionally protected right.

Minnesota recognizes:

[P]roperty owners have a right of “reasonably convenient and suitable access” to a public street or highway which abuts their property. . . . What 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. . . . *We note, however, that the imposition of even substantial inconvenience has not been considered tantamount to a denial of the right of reasonable access.*

Johnson v. City of Plymouth, 263 N.W.2d 603, 605-607 (Minn. 1978) (emphasis added).

The past, present and future means of access to the parcel in question contradict any claim by Glass that he does not have access to his parcel. The evidence presented at trial included an admission by Glass that he has access and the 40th Street corridor would be utilized by him as a secondary means of access. T. 301 (Glass testimony acknowledging he had a driveway on Lot Sixteen (16) that he utilized for access and removed that driveway in October of 2004). All prior owners of the Glass parcel have used Lot Sixteen (16) as a means of access to the Glass parcel. Glass testified regarding his future house plans which include three garages and two driveways, one of which is on Lot Sixteen

(16) which Glass failed to mention when he applied for the permit from the City. Glass has historically used Lot Sixteen (16) as a means of access, could currently use Lot Sixteen (16) as a means of access and plans in the future to use Lot Sixteen (16) as one of his driveways. The district court correctly determined that “[s]imply because Defendant Glass wants to move his garage, it does not follow that his constitutional right to reasonably convenient and suitable access to the public roadway abutting his property has been violated.” District Court’s Findings of Fact, Conclusions of Law, and Memorandum of Law at 7. No taking of a constitutionally protected right to access has occurred.

The only wrongful taking of property which has occurred is the taking which occurred as a result of Glass’ action in making false representations in support of obtaining a permit from the City, which resulted in the City, based on such representations and an erroneous interpretation of the *Lafayette* decision, granting a permit to Glass to build a private driveway on portions of the 40th Street corridor owned by the Bolens and Zajac.

V. MERE OWNERSHIP OF A LOT WITHIN A PLAT DOES NOT CONVEY THE RIGHT TO TRAVEL ON PLATTED, UNOPENED STREETS SHOWN ON THE PLAT.

Glass contends that he has a right to use the 40th Street corridor as a means of access to his property merely because he owns a lot within a plat which includes platted, unopened streets. Mere ownership of a lot within a plat does not convey the right to travel on platted, unopened streets shown on the plat.

The well-established rule in Minnesota is that

[h]e who purchases a lot with reference to a plat is deemed to have thereby purchased . . . 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 roads and streets of advantage or utility to the platted area as a whole.

Bryant v. Gustafson, 40 N.W.2d 427, 432 (1950) (plat in question provided for dedication of use for all lot owners on island, not a dedication for public use; lot owners, as beneficiaries of specific dedication entitled to rely on dedication in their favor). Applying the principle stated in *Bryant* to the present case, any owner of a lot within the Oatka Beach Addition has the advantages, privileges, rights and easements which are represented on the plat. The plat includes a dedication for public use of all streets shown on the plat for public use. Lot owners, including Glass, can rely upon the dedication for what it is: a qualified or terminable fee in favor of the city to develop the street for public use. A paper street is not a right of access, upon which a lot owner could rely unless and until it is developed by a city. A plat dedication of a street for public use does not translate into a lot owner within the plat having some greater right, i.e., a right to travel on the street as a member of the public in general, unless and until the city owning the easement for public use decides to open the street for public use. Unless and until the city elects to develop the street for public use, the lot owner can claim no right to travel on it because it is owned in fee by abutting landowners. *Kochevar v. City of Gilbert*, 273 Minn. 274, 141 N.W.2d 24, 26 (1966) (emphasis added) (it is elemental that an abutting landowner owns to the middle of the platted street, *subject only to the right of the public to use or remove the same for the purpose of improvement*). If a plat shows an easement in favor of the public (a right which can only be exercised by the public, as set forth in

Kochevar), then owners of lots in the plat have the right that is shared by the public. That right is for the city to improve the platted street for use by the public, not for the city to dedicate the easement for the private, exclusive use of one individual lot owner.

The Court of Appeals recognized that the consequence of adopting the theory of self-help to develop a private driveway advanced by Glass would create an unworkable, inequitable, chaotic result, shifting land use control from a municipality to an individual. *Bolen v. Glass*, 737 N.W.2d 856, 864-865 (“if Glass’s legal theory were correct, the Bolens or Zajac or *any* of the other owners of the 164 lots established by the plat, 1902 *Oatka Beach Addition*, could by right arrive tomorrow with bulldozer and a load of gravel and level 40th Street from Minnesota Avenue to the Lake”).

Underwood v. Town Bd of Empire, 217 Minn. 385, 14 N.W.2d 459, 461 (1944), is relied upon by the City in support of the proposition that an abutting landowner has a right of access beyond that of the public in general. In *Underwood*, the town board vacated one mile of a town road that had been in existence for thirty years. The road had been improved by grading and installing culverts and had been used by the public for travel. Abutting farm owners had used the vacated road for access and sought damages from the town board. In *Underwood*, the Supreme Court recognized that in reference to an open public street, as was involved in the *Underwood* case, an abutting landowner has, in addition to the public right of travel, a separate and distinct right of access to his property which may give rise to a compensable taking. Where the vacating of an existing road deprives an abutting landowner of a right of access to his land, he is damaged in a way distinct from his right to use the road for travel as a member of the public. An abutting landowner’s right of access to an established existing public road which may

give rise to a right to compensation if that access is taken away does not translate into an abutting landowner having a separate and distinct right of access in connection to an platted paper street.

Moreover, any claim by Glass that he has been deprived of a right of access is defeated by his conduct and admission establishing he has a means of access other than the 40th Street corridor. T. 299, 300.

VI. THE CITY CANNOT BY SPECIAL LEGISLATION GRANT ITSELF THE POWER TO TAKE ACTION WHICH IS UNCONSTITUTIONAL.

The City and Glass contend that the city has the authority to grant a permit to Glass to develop a private driveway on an easement dedicated for public use. In support of this contention, the City and Glass claim the City is empowered by the City charter to grant such a permit. This contention is not supported by Minnesota law.

The City's power is only as broad as the constitution permits. The Minnesota state constitution defines that power:

A municipality is not empowered to grant or permit uses of public property for purposes other than those for which it was dedicated, because such uses violate Minn. Const. Art. 1, § 13.

Zumbrota v. Strafford Western Emigration Co., 290 N.W.2d 621, 623 (Minn. 1980). A city cannot by special legislation, such as a statute or ordinance, take action which is not otherwise constitutionally permitted. If it takes such action, such action is ineffective because the legislation is unconstitutional. *Id.*

Glass and the City contend that because great deference is ordinarily granted to a municipality's decision-making, the City's granting of a permit should not be second guessed. The City's discretion to grant a permit is not without limits; its discretion is

circumscribed by the state constitution. The City is not constitutionally empowered to grant a permit to an individual to make private improvements in a public right of way. The City's authority derives from the constitution, a set of rights intended to protect the rights of individuals. Its decision must be second-guessed to protect the constitutional rights of abutting landowners. *Zumbrota*, 290 N.W.2d at 623 (a city cannot pass an ordinance selling or otherwise transferring land dedicated for use as a public roadway to a private person). The City exceeded its constitutional authority by granting a permit to Glass for the sole purpose of creating a private driveway on property dedicated for public use.

The City takes the position that it may delegate development of a street to an individual for private use contrary to the plat dedication granting to the city an easement only to develop the property for public use. Property dedicated for public use as a roadway cannot be sold or otherwise devoted to a private use, *Burnquist v. Marcks*, 228 Minn. 129, 36 N.W. 594, 597 (1949), even where the city has a fee simple absolute interest in the property. Taking action to grant or convey an interest in property held by a municipality for the benefit of the public is ineffective. *Burnquist v. Marcks*, 228 Minn. 129, 36 N.W.2d 594 (1949); *See Kendrick v. St. Paul*, 213 Minn. 283, 6 N.W.2d 449, 451 (1942) (title which municipality acquired was a qualified or terminable fee, a sovereign or prerogative title which it, as an agency of state, holds in trust for the city and which it can neither sell nor devote to a private use). Such property is held in trust for the public and cannot be converted to a private use even if that use serves the public good. *Lamm v. Chicago, St. P., M. & O. Ry. Co.*, 45 Minn. 71, 47 N.W. 455, 456 (1890). Allowing Glass to build and use a continuous trespass over land owned by the Bolens and Zajac

does not serve the public good. It serves only a private desire for a second driveway. A municipality cannot grant to a private party the right to construct a public street. *Id.* (finding city granting of public street of railroad to be improper); *Kaiser v. St. Paul, S. & T. F. R. Co.*, 22 Minn. 149 (1875) (same).

CONCLUSION

For all of the reasons set forth in this brief, respondents Michael and Deborah Bolen and Joseph Zajac request an order from the Supreme Court granting the following relief:

1. Affirming in all respects the district court's findings of fact, conclusions of law, order for judgment and judgment.

2. Clarifying that the *Lafayette* decision does not modify well established precedent recognizing the rights of abutting landowners and does not stand for the proposition that the rights of abutting landowners are subservient to or may be preempted by an individual landowner's desire to privately develop a street for secondary means of access to his property.

Dated this 15th day of January, 2008.

**FRYBERGER, BUCHANAN, SMITH
& FREDERICK, P.A.**


Stephanie A. Ball
Attorney Registration No. 191991
700 Lonsdale Building
302 West Superior Street
Duluth, Minnesota 55802
(218) 722-0861
*Attorneys for Michael and Deborah
Bolen and Joseph Zajac*

STATE OF MINNESOTA
IN SUPREME COURT

MICHAEL BOLEN, DEBORAH BOLEN
AND JOSEPH ZAJAC,

Respondents,

vs.

TODD GLASS,

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

and

CITY OF DULUTH,

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

**CERTIFICATION OF
RESPONDENTS' BRIEF
LENGTH**

I hereby certify that this brief conforms to the requirements of Rule 132.01, subd. 3(a)(1) of the Minnesota Rules of Civil Appellate Procedure for a brief using a proportional font. This brief was prepared using Microsoft Office Word 2003. The length of the brief is 14,123 words.

Dated this 15th day of January, 2008.

**FRYBERGER, BUCHANAN, SMITH
& FREDERICK, P.A.**


Stephanie A. Ball
Attorney Registration No. 191991
700 Lonsdale Building
302 West Superior Street
Duluth, Minnesota 55802
(218) 722-0861
*Attorneys for Michael and Deborah
Bolen and Joseph Zajac*