

NO. A06-2302

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State of Minnesota  
**In Court of Appeals**

C & R Stacy, LLC, et al.,

*Respondents,*

vs.

County of Chisago,

*Appellant.*

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**APPELLANT'S BRIEF**

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**TABLE OF CONTENTS**

Page

Table of Authorities .....ii

Statement of Legal Issues .....1

Statement of the Case .....2

Statement of Facts .....3

Standard of Review .....9

Summary of Argument .....9

Argument .....10

    I.    A ROAD AUTHORITY, PURSUANT TO MINNESOTA  
          STATUTES AND ITS GENERAL POLICE POWER,  
          HAS THE POWER TO REGULATE ACCESS TO A  
          PUBLIC ROAD, WITH OR WITHOUT AN ORDINANCE .....10

    II.   RESPONDENTS ARE SUBJECT TO THE COUNTY’S  
          REASONABLE REGULATIONS AND PERMIT  
          PROCEDURE .....19

    III.  NO TAKING OCCURRED WHERE RESPONDENTS  
          CONSTRUCTED A NEW ACCESS IN VIOLATION OF  
          THE COUNTY’S REASONABLE ACCESS  
          REGULATIONS AND PERMIT PROCEDURE .....25

Conclusion .....27

## TABLE OF AUTHORITIES

	<u>Page</u>
38 Am. Jur. 2d <i>Highways, Streets, and Bridges</i> §§ 178-9 (1968)	22
Minn. Const. art. 1, § 13	25
Minn. Stat. § 28A.075 (2006)	16
Minn. Stat. § 160.18 (2006)	1, 2, 13, 14, 18, 19, 20
Minn. Stat. § 162.02 (2006)	1, 12, 14
Minn. Stat. § 163.02 (2006)	1, 12, 13, 14
Minn. Stat. § 394.22 (2006)	14, 19
Minn. Stat. § 394.26 (2006)	14
Minn. Stat. § 505.02 (2006)	23
Minn. Stat. § 645.08 (2006)	15
Minn. Stat. § 645.19 (2006)	15
Minn. R. 8820 (2006)	12
<i>AFSCME, Council No. 14 v. City of St. Paul</i> , 533 N.W.2d 623 (Minn. App. 1995)	9
<i>Alexander Co. v. City of Owatonna</i> , 24 N.W.2d 244 (Minn. 1946)	11
<i>Anderson v. McOskar Enterprises, Inc.</i> , 712 N.W.2d 796 (Minn. App. 2006)	9
<i>Beaver Meadows v. Bd. of Commrs.</i> , 709 P.2d 928 (Colo. 1985)	20, 22
<i>Buynak v. Wilkes-Barre Police Pension Fund Ass'n, Inc.</i> , 173 A.2d 114 (Pa. 1961)	15
<i>City of Duluth v. Cervený</i> , 16 N.W.2d 779 (Minn. 1944)	11, 13
<i>City of Miami v. Girtman</i> , 104 So. 2d 62 (Fla. 3 Dist. App. 1958)	22, 25

	<u>Page</u>
<i>Commonwealth v. Henley</i> , 909 A.2d 352 (Pa. 2006)	15, 16, 17
<i>Commonwealth v. Thurman</i> , 872 A.2d 838 (Pa. 2005)	17
<i>Frederick v. Pickett</i> , 897 A.2d 228 (Md. 2006)	15
<i>Frost-Benco Elec. Assn. v. Minnesota Pub. Utils. Commn.</i> , 358 N.W.2d 639 (Minn. 1984)	9
<i>Gibson v. Commr. of Highways</i> , 178 N.W.2d 727 (Minn. 1970)	11
<i>Goss v. City of Globe</i> , 883 P.2d 466 (Ariz. App. Div. 2 1994)	10
<i>Grossman Invs. v. State by Humphrey</i> , 571 N.W.2d 47 (Minn. App. 1997)	24, 25
<i>Hansen v. City of St. Paul</i> , 214 N.W.2d 346 (Minn. 1974)	1, 10
<i>Hendrickson v. State</i> , 127 N.W.2d 165 (Minn. 1964)	1, 24, 26
<i>In re 1994 and 1995 Shoreline Imp. Contractor Licenses of Landview Landscaping, Inc.</i> , 546 N.W.2d 474 (Minn. App. 1996)	10
<i>Jewett v. Luau-Nyack Corp.</i> , 291 N.E.2d 123 (N.Y. 1972)	16
<i>Johnson v. City of Plymouth</i> , 263 N.W.2d 603 (Minn. 1978)	1, 11, 24, 26
<i>Jones v. Town of Woodway</i> , 425 P.2d 904 (Wash. 1967)	15
<i>Kirschbaum v. Village of Homer Glen</i> , 848 N.E.2d 1052 (Ill. App. 3 Dist. 2006)	10
<i>LaChapelle v. Mitten</i> , 607 N.W.2d 151 (Minn. App. 2000)	9
<i>LaRoque v. Bd. of Commrs.</i> , 196 A.2d 902 (Md. 1964)	15, 16, 20
<i>Lopes v. Rostad</i> , 45 N.Y.2d 617 (N.Y. 1978)	10
<i>Ord v. Kitsap County</i> , 929 P.2d 1172 (Wash. App. Div. 2 1997)	15
<i>Otten v. Big Lake Ice Co.</i> , 270 N.W. 133 (Minn. 1936)	11

	<b><u>Page</u></b>
<i>Semler Const., Inc. v. City of Hanover</i> , 667 N.W.2d 457 (Minn. App. 2003)	23
<i>Spannaus v. Northwest Airlines, Inc.</i> , 413 N.W.2d 514 (Minn. App. 1987)	11
<i>State v. Crabtree, Co.</i> , 15 N.W.2d 98 (Minn. 1944)	11, 13
<i>State v. Edwards</i> , 177 N.W.2d 40 (Minn. 1970)	11
<i>State v. Gannons, Inc.</i> , 145 N.W. 2d 321 (Minn. 1966)	24
<i>Thomsen v. State by Head</i> , 170 N.W. 2d 575 (Minn. 1969)	24
<i>Underwood v. Town Bd. of Empire</i> , 14 N.W.2d 459 (1944)	25
<i>United States v. Abbott</i> , 584 F.Supp. 442 (W.D. Pa 1984)	17
<i>Village of Medford v. Wilson</i> , 230 N.W.2d 458 (Minn. 1975)	11, 13

## STATEMENT OF LEGAL ISSUES

**I. DO ROAD AUTHORITIES HAVE THE POWER TO REGULATE ACCESS TO PUBLIC ROADS WITH OR WITHOUT AN ORDINANCE?**

*The district court held a road authority may only regulate access through an ordinance.*

Apposite Authority:

*Hansen v. City of St. Paul*, 214 N.W.2d 346, 348 (Minn. 1974)  
Minnesota Statutes § 160.18, Subd. 3 (2006)  
Minnesota Statutes § 162.02 (2006)  
Minnesota Statutes § 163.02 (2006)

**II. ARE RESPONDENTS SUBJECT TO THE COUNTY'S REASONABLE ACCESS REGULATIONS AND PERMIT PROCEDURE?**

*The district court held in the negative.*

Apposite Authority:

Minnesota Statutes § 160.18, Subd. 3 (2006)

**III. DID A TAKING OCCUR WHERE RESPONDENTS CONSTRUCTED A NEW ACCESS IN VIOLATION OF THE COUNTY'S REASONABLE ACCESS REGULATIONS AND PERMIT PROCEDURE?**

*The district court held in the affirmative.*

Apposite Authority:

*Hendrickson v. State*, 127 N.W.2d 165, 170 (Minn. 1964)  
*Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978)

## STATEMENT OF THE CASE

This matter involves a disputed access to County Road 19, a County State-Aid Highway (“CSAH 19”) in the City of Stacy in Chisago County. In 1999, Respondents obtained a conditional use permit from the City of Stacy to construct a gas station on property that abuts CSAH 19 and Sherman Oaks Road, a city street. Before construction of the station, the County repeatedly notified Respondents there was insufficient space for a commercial access from the property to CSAH 19. In complete disregard of the County’s warnings, Respondents constructed a street to provide commercial access from their property to CSAH 19. On November 11, 1999, the County barricaded the illegal commercial access. After that, Respondents utilized Sherman Oaks Road to access the convenience store.

Respondents challenged the County’s actions years later, in 2004. Respondents asserted claims of trespass and inverse condemnation against the County. After the district court denied the County’s Motion for Summary Judgment, a court trial was held before the Honorable Douglas G. Swenson in Chisago County on May 16 and 17, 2005. Although the court found the County had the authority to regulate access to County roads under Minnesota Statutes § 160.18, subdivision 3, it could not exercise that authority because it never adopted an access ordinance.

The County subsequently moved for amended findings of fact and conclusions of law, and alternatively, for a new trial. Respondents moved to add C&R Properties, Ent., Inc. (“C&R Properties”), as an additional Plaintiff. On June 16, 2006, the court denied the County’s motion and granted Plaintiffs’ motion to add C&R Properties. The court

issued amended findings of fact and again found the County did not have the authority to regulate access to CSAH 19 because it never adopted a road access ordinance. As such, the court granted Respondents' claim for inverse condemnation. The court dismissed Respondents' trespass claim, finding the barricades were not placed on Respondents' property, but in the County's road right-of-way.

The County appealed on August 30, 2006, and a transcript was delivered on November 13, 2006. This Court dismissed the appeal as taken from a non-final, partial judgment on October 17, 2006, because the issue of attorney's fees remained outstanding. Thereafter, the parties stipulated to the amount of attorney's fees due Respondents, and the district court issued an Order for Entry of Judgment on November 11, 2006.

On December 7, 2006, the County filed a Notice of Appeal. Respondents served and filed a Notice of Review on December 13, 2006.

### **STATEMENT OF FACTS**

#### **A. The Plat.**

In 1964, part of the property in question was transferred to the State for the Interstate 35 right-of-way. *A-105, 283, 294*. Respondent AMW, Inc. ("AMW"), owned in part by Mel Aslakson, acquired the property containing Outlots A and B and the Sherman Oaks Development in 1986. *A-6*. In 1995, AMW platted a residential subdivision, Sherman Oaks Plat 3, and Outlots A and B. *A-6; Trial Court Ex. 100*. Outlot A abuts the north line of CSAH 19.

In the 1995 plat, Aslakson, on behalf of AMW, dedicated Stacy Trail, Sherman Oaks Road, Foley Avenue, and Ferris Trail to the public. *Trial Court Exs. 100, 101*. The

plat does not depict access from Outlot A onto CSAH 19. Rather, the plat shows the controlled access purchased by the Minnesota Department of Transportation (“MNDOT”), and only 25.84 feet remained for any potential access from Outlot A to CSAH 19. *A-294; Trial Court Ex. 100; Trial Court Transcr. 60*. The plat shows commercial access for Outlot A to CSAH 19 via Sherman Oaks Road and Foster Avenue. The County reviewed the plat and issued no objections thereto. *A-299*.

The State plans to construct a median and 300-foot turn lane onto Interstate 35 in the area south of Outlot A on CSAH 19. *See Trial Court Transcr. 119-120*.

**B. Historical Use of Field Access.**

The County has never permitted or authorized any type of access from Outlot A to CSAH 19. The field access that connected Outlot A to CSAH 19 was never widely used. *A-291-293*. The field access was used briefly in 1971, when Bauerly Brothers, a road contractor, leased Outlot A from AMW, and hauled fill from Outlot A to resurface Interstate 35. The field access was also used to access billboards located on Outlot A. In 1994, AMW leased billboard spaces along Outlot A, and the sign company used the field access to maintain the signs. *Trial Court Transcr. 22-24*.

**C. Development Agreement and CUP.**

On March 15, 1995, AMW entered into a development agreement with the City of Stacy. *A-300*. Pursuant to the agreement, the City allowed AMW to develop Sherman Oaks Road to provide commercial access to Outlot A. *A-300; Trial Court Transcr. 17*.

After it was platted, Outlot A was divided into Parcels A and B. In 1998 or 1999, AMW sold Parcel A to Respondent C&R Properties. *A-284*. As a condition of the

agreement, AMW agreed to apply for and obtain a conditional use permit ("CUP") from the City of Stacy for a convenience store on Parcel A. The City issued a CUP on March 18, 1999. A-7. Access to CSAH 19 was not a condition of granting the CUP. In considering the CUP application, the City Council discussed the access to Outlot A at length at its meeting on March 9, 1999. A-316-317. Aslakson specifically represented to the City Council that Sherman Oaks Road would provide the commercial access for Outlot A, not CSAH 19. A-325. Later, in 2000, the City Council confirmed Sherman Oaks Road was developed pursuant to the development agreement in 1995 to provide access to Outlot A for commercial purposes. A-318.

**D. County's Notice of Unauthorized Access.**

Prior to the issuance of the CUP, the County notified Aslakson and C&R Properties numerous times there was no commercial access from Outlot A to CSAH 19. On February 19, 1999, a month before the CUP was issued by the City, the Chisago County Department of Public Works sent C&R Properties a letter notifying it that Outlot A had no direct access to CSAH 19:

[D]irect access to County Road 19 will not be allowed. The North 91.93 feet (as shown on the plat) is in the State of Minnesota Limited Access Right of Way. The remaining 25.84 feet is not adequate road frontage for a commercial access. Minnesota Department of Transportation access dimensions must be followed on any state-aid highway.

A-329.

The same month, the Department of Public Works also notified Mel Aslakson that Outlot A had no authorized access to CSAH 19 and instructed him to remove the driveway:

'Outlot A' has no direct authorized access to County Road 19. The County asks that this unauthorized driveway be removed. Remove culvert (if one exists) and restore ditch to original cross section. Build a berm or provide alternative to prevent future use of this area. We ask that this work be completed with-in 60 days from date of this letter. Failure to comply with-in 60 days will result in the County completing the required work and billing the accrued expense to you.

*A-328, see also Trial Court Transcr. 81, 114.*

The County again advised Aslakson the pre-existing gravel driveway was not sufficient for a new commercial access for a convenience station by letter dated March 16, 1999. Emil Dahlberg, Chisago County Engineer, advised Aslakson: "there is no authorized driveway at the location in question and therefor[e] we continue to make the demand to remove what drive exists. No access for a driveway will be approved at this location." *A-332.* Aslakson ignored the County's warnings.

**E. Building Permit and Construction of Commercial Access.**

On October 6, 1999, C&R Properties applied for a building permit to construct the Stacy Amoco gas station. *A-327.* The County reviewed the application and the City issued the permit on October 25, 1999. *A-106.* On November 8, 1999, Assistant Chisago County Attorney Ted Alliegro wrote C&R Stacy, advising it not to construct commercial access at the site. He wrote:

Our office has been advised by the Chisago County Highway Department that as the developer for the proposed Amoco Station in Stacy, Minnesota, you may be planning direct access to the station from County Road 19. Please be advised that Chisago County has never authorized such an access, and will not authorize a commercial access at that site. This position has previously been made to the prior owner of the parcel being developed and is being made to you now before you commence any improvements to the property that anticipate direct access off of 19.

A-335.

In complete disregard of the County's warnings, in early November 1999, C&R Stacy commenced construction of the project, including a street connecting Outlot A and the rest of the plat to CSAH 19. A-334. The access actually was illegally built partially into MNDOT's right-of-way. A-200-02. On November 11, 1999, the County barricaded the access from Parcel A to CSAH 19.<sup>1</sup> A-336. On January 11, 2000, in response to his complaints, Assistant County Attorney Alliegro wrote Aslakson, explaining that since the beginning of the development of Parcel A, C&R Stacy was aware the County was not going to grant a commercial access permit for the site because commercial access from Parcel A posed a serious safety hazard, and therefore the barricades would remain in place. A-337. After the barricades were erected, C&R Stacy utilized Sherman Oaks Avenue to access Outlot A, as set forth in the plat and development agreement. A-108.

On March 30, 2000, the Chisago County Attorney's Office sent Aslakson another letter in response to his additional complaints. Attorney Alliegro explained the County

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<sup>1</sup> The district court's finding "the County admits it did not give Plaintiffs notice that it was going to barricade Plaintiffs' access to the driveway" is clearly erroneous. See A-244. The district court cited to the County's Response to Requests for Admissions (Exhibit 63, No. 12), but the County actually denied the request:

12. That Defendant did not give Plaintiffs, or any of them, notice that it was going to barricade Plaintiffs' access to Co. Rd. 19 on November 11, 1999.

**RESPONSE:** Deny. Plaintiffs were notified prior to construction that they did not have access to Co. Rd. 19.

Exhibit 63, No. 12. Moreover, the November 8, 1999, letter from the Chisago County Attorney's Office specifically advised "any and all action necessary to protect the public" would be utilized if Respondents sought to construct a direct access to CSAH 19. A-335.

had denied his request in 1999 for commercial access to CSAH 19 because the proposed access was too close to the freeway and because the area was not wide enough to meet state standards for a commercial access. *A-339*.

**F. Permit Procedures and Access Regulations.**

Prior to the construction of the access to CSAH 19, the County had in place regulations and a permit procedure governing access to County roads. *A-345-50; Trial Court Transcr. 81-83, 111-12*. The County had a policy and practice of following the MNDOT Road Design Manual, which recommends commercial access driveways be 32-feet wide. *A-366*. In addition, for state-aid highways, the County adhered to the requirements in the State Aid Manual, which also recommends a commercial access driveway be 32-feet wide. *A-331*. The County would jeopardize its state funding if it did not follow state standards for a county state-aid highway. *Trial Court Transcr. 142*. Pursuant to these recognized standards, Respondents' property does not meet the requirements to construct a new commercial access.

Moreover, the County requires any person working within the right-of-way to obtain written permission. The County's "Permit Procedures and Specifications" for "Access Permits" provides that "[a]ny work within the County right-of-way requires written permission from the Chisago County Public Works Department. This includes any change in use or alteration to an existing access." *A-345; Trial Court Transcr. 83*. It is undisputed, none of Respondents ever applied for a permit to construct the commercial access to CSAH 19. *Trial Court Transcr. 37*. According to the County Engineer, a

commercial access from Outlot A to CSAH 19 would drastically increase the previous usage of the field access and pose a significant traffic hazard. *Trial Court Transcr. 126.*

### **STANDARD OF REVIEW**

This Court reviews the district court's findings of fact under the "clearly erroneous" standard. *AFSCME, Council No. 14 v. City of St. Paul*, 533 N.W.2d 623, 626 (Minn. App. 1995). A finding is clearly erroneous if the reviewing court is "left with the definite and firm conviction that a mistake has been made." *LaChapelle v. Mitten*, 607 N.W.2d 151, 160 (Minn. App. 2000) (quotation omitted).

This Court reviews questions of law de novo. *Anderson v. McOskar Enterprises, Inc.*, 712 N.W.2d 796, 800 (Minn. App. 2006) (citing *Frost-Benco Elec. Assn. v. Minnesota Pub. Utils. Commn.*, 358 N.W.2d 639, 642 (Minn. 1984)).

### **SUMMARY OF ARGUMENT**

The district court erred in its application of the law. A road authority, pursuant to Minnesota Statutes and its general police power, has the power to regulate accesses to county highways, with or without an ordinance. In particular, Chisago County did not need a specific ordinance to regulate access to CSAH 19. The County has promulgated appropriate regulations for accesses and requires a permit for any work performed within its right-of-way, consistent with the standards set forth in the MNDOT Road Design Manual and the State Aid Manual.

Respondents were advised, on multiple occasions, of the County's access regulations and no commercial access would be allowed from Outlot A to CSAH 19. Nonetheless, Respondents constructed a commercial access onto CSAH 19 without any

permit or authorization from the County. Because the access violated the County's regulations and no permit was obtained, and because the access posed a legitimate safety hazard to travelers on CSAH 19, the County barricaded the access. Respondents have reasonable, alternate access to Outlot A from CSAH 19, and they are not entitled to construct a new access to CSAH 19. The district court erred in determining the County did not have authority to regulate its highways without a duly enacted ordinance, and its decision should therefore be reversed.

### ARGUMENT

**I. A ROAD AUTHORITY, PURSUANT TO MINNESOTA STATUTES AND ITS GENERAL POLICE POWER, HAS THE POWER TO REGULATE ACCESS TO A PUBLIC ROAD, WITH OR WITHOUT AN ORDINANCE.**

**A. The County Has the Authority to Regulate Its Roads Pursuant to Its General Police Power.**

Courts have long recognized local governments have an inherent ability to regulate highways pursuant to their general police powers, and local governments have a common law duty to maintain public roads in a safe condition. *See Hansen v. City of St. Paul*, 214 N.W.2d 346, 348 (Minn. 1974); *Lopes v. Rostad*, 45 N.Y.2d 617 (N.Y. 1978); *Kirschbaum v. Village of Homer Glen*, 848 N.E.2d 1052, 1058 (Ill. App. 3 Dist. 2006) (citation omitted); *Goss v. City of Globe*, 883 P.2d 466, 469-70 (Ariz. App. Div. 2 1994) (citations omitted).

A municipality's "police power" is the power to "impose such restraints upon private rights as are necessary for the general welfare." *In re 1994 and 1995 Shoreline Imp. Contractor Licenses of Landview Landscaping, Inc.*, 546 N.W.2d 474, 750 (Minn.

App. 1996) (quoting *Alexander Co. v. City of Owatonna*, 24 N.W.2d 244, 250 (Minn. 1946) (overruled in part by *Johnson v. City of Plymouth*, 263 N.W.2d 603, 608 (Minn. 1978))). When supervising and maintaining its streets, a municipality's police powers are "extensive and drastic." *Alexander*, 24 N.W.2d at 251-52. "Public highways have long been recognized as an appropriate subject of the police power, and regulations may be established governing the use and users of highways." *State v. Edwards*, 177 N.W.2d 40, 44 (Minn. 1970) (citations omitted). A municipality's general police powers must be liberally construed. See *City of Duluth v. Cervený*, 16 N.W.2d 779, 783 (Minn. 1944) ("a city exercises police power within its jurisdiction to practically the same extent as the state itself"); *State v. Crabtree, Co.*, 15 N.W.2d 98, 100 (Minn. 1944) ("the state and its municipalities have a wide discretion in resorting to [the police power] for the purpose of preserving public health, safety, and morals, or abating public nuisances") (citation omitted). The discretion of the municipality is wide, and courts are not inclined to restrict the powers of municipalities over their streets and public ways. *Village of Medford v. Wilson*, 230 N.W.2d 458, 459 (Minn. 1975).

In particular, municipalities have the ability to regulate accesses to public roads. A "right of access is subject to reasonable regulations in the public interest." *Spannaus v. Northwest Airlines, Inc.*, 413 N.W.2d 514, 519 (Minn. App. 1987) (citing *Gibson v. Commr. of Highways*, 178 N.W.2d 727, 730 (Minn. 1970)). The supervision and control of highways is not limited to the traveled portion but extends to the entire right of way. *Otten v. Big Lake Ice Co.*, 270 N.W. 133, 135-136 (Minn. 1936). "The right to control access is an exercise of the state's inherent police power." *Gibson*, 178 N.W.2d at 499.

Here, the County has the authority to regulate access to CSAH 19 pursuant to its general police powers, and Respondents' right of access is subject to the County's reasonable regulation.

**B. The County Has the Statutory Authority to Regulate Its Roads.**

The County also has a statutory duty to regulate its highways. In 1957, the legislature established a state-aid highway and street system. *See* Minn. Stat. ch. 162 (2006). Under the act, counties are authorized to establish, construct, and maintain county state-aid highways. Minn. Stat. § 162.02 (2006). To effectuate the system, the statute vests counties "with the rights, title, easements, and their appurtenances, held by or vested in any of the towns or municipal subdivisions...prior to the time a road or portion of a road [was] taken over by the county as a county state-aid highway. Minn. Stat. § 162.02(1). Section 162.02, subdivision 2, authorizes the Commissioner of the Department of Transportation to promulgate rules governing county state-aid projects. *See* Minn. R. 8820 (2006).

Minnesota Statutes § 163.02 (2006) also grants the County authority to regulate the highways. Section 163.02, subdivision 1, provides:

County highways shall be established, located, relocated, constructed, reconstructed, improved, maintained, revoked, or vacated by the several counties. The several county boards shall have general supervision over county highways, including those highways other than cartways within their respective counties established by judicial authority, and they may appropriate and expend sums of money from their respective county road and bridge funds as they deem necessary for the establishment, location, construction, reconstruction, improvement and maintenance, or vacation of such highways.

By its very terms, Minnesota Statutes § 163.02 is a broad delegation of the state's inherent authority to regulate highways for the health and safety of its citizens.

Finally, Minnesota Counties have the statutory authority to regulate highway access, in particular, pursuant to Minnesota Statutes § 160.18 (2006). Section 160.18, subdivision 3, provides:

The owner or occupant of property abutting upon a public highway, having a right of direct private access thereto, may provide such other or additional means of ingress from and egress to the highway as will facilitate the efficient use of the property for a particular lawful purpose, subject to reasonable regulation by and permit from the road authority as is necessary to prevent interference with the construction, maintenance and safe use of the highway and its appurtenances and the public use thereof.

(Emphasis supplied.) Section 160.18 makes clear a property owner's right of access is subject to the County's "reasonable regulation" and "permit," as necessary to ensure the safe use of the highway. The statute, however, does not require the road authority to enact a specific ordinance.

The Minnesota Legislature has delegated the authority to regulate and maintain state-aid highways to the counties. The counties can also regulate roads pursuant to their general police powers, which must be liberally construed. *See City of Duluth*, 16 N.W.2d at 783; *Crabtree, Co.*, 15 N.W.2d at 100; *Village of Medford*, 230 N.W.2d at 459.

Consequently, the County had the authority to regulate access onto CSAH 19.

**C. The County Has the Power to Regulate Access to Its Roads Through Reasonable Regulation and Permit.**

The district court erred when it held the County could not regulate access to its roads without first adopting an access ordinance. Specifically, the district court held:

The County has statutory authority to regulate access to County Roads under Minn. Stat. § 160.18 Subd. 3. However, in order to exercise that authority, the County must adopt regulation (i.e. ordinances) to do so.

An ordinance regulating driveway accesses to public roads is an “official control” under Minn. Stat. § 394.22 Subd. 6, and can only be adopted in accordance with the public hearing requirements found in Minn. Stat. § 394.26.

Without such an ordinance, the County has no authority to regulate or control accesses to county roads. Minn. Stat. § 160.18 Subd. 3.

*A-345.* The district court erred by determining an ordinance was necessary to regulate access to a public road and erred by determining access regulations, under Minnesota Statutes § 160.18, Subdivision 3, are “official controls.”

As discussed below, the statutes that empower the County to maintain its roads do not require the County to enact an enabling ordinance. Instead, the County can exercise its police powers and act directly under the delegation from the state legislature. The County has promulgated regulations and a permitting process to regulate highway access, and Respondents were aware of the County’s requirements. The County applied the regulations uniformly and did not act arbitrarily in its enforcement of the regulations against Respondents. Consequently, the County’s exercise of its police powers must be affirmed and the district court’s decision overturned.

**1. The Statutes Delegating the County Authority Do Not Require the County to Adopt an Enabling Ordinance.**

The statutes that empower the County, as the road authority, to maintain and regulate its roads, do not require the County to enact an ordinance to exercise that power. Minnesota Statutes §§ 162.02, 163.02 and 160.18 empower the County to regulate its

roads to provide for the public welfare. None of the statutes require the County to adopt an ordinance before it can exercise the powers set forth in the statutes. If the legislature intended to require the passage of an ordinance for the road authority to exercise these powers, it would have expressly stated so. *See* Minn. Stat. §§ 645.08 and 645.19.

Because the legislature did not require counties to adopt specific ordinances regarding road access, the County could act directly under the statutes. *See Frederick v. Pickett*, 897 A.2d 228, 240 (Md. 2006); *Commonwealth v. Henley*, 909 A.2d 352, 364-65 (Pa. 2006); *Ord v. Kitsap County*, 929 P.2d 1172, 1174 (Wash. App. Div. 2 1997); *Jones v. Town of Woodway*, 425 P.2d 904, 904 (Wash. 1967); *LaRoque v. Bd. of Commrs.*, 196 A.2d 902, 906 (Md. 1964); *Buynak v. Wilkes-Barre Police Pension Fund Ass'n, Inc.*, 173 A.2d 114, 116 (Pa. 1961).

For example, in *Frederick*, the Maryland Court of Appeals held, under the principles of statutory construction, a city was not required to have an enabling ordinance in effect before exercising its statutory powers to condemn a landowner's property. The court reasoned:

The express language of Article 23A...does not enumerate the enactment of an enabling ordinance among the conditions precedent to the municipality exercising its authority to condemn a blighted property.... Because the General Assembly did not expressly require that the municipality enact an enabling ordinance in Article 23A...we conclude that an enabling ordinance is not required to utilize the powers explicated in that statute.

Where the legislature intends to include a particular provision within a statute, it generally does so expressly. *See* Minn. Stat. §§ 645.08 and 645.19. The Minnesota Legislature has expressly required local governing bodies to adopt enabling ordinances or

resolutions in some instances. *See e.g.*, Minn. Stat. § 28A.075(b) (2006) (“A local board of health must adopt an ordinance...for all its jurisdiction to regulate grocery and convenience stores and the ordinance...must not be in conflict with standards set in law or rule”). Yet, the legislature included no such requirement in any of the statutes delegating the authority to regulate highways to the counties. Because the legislature delegated the authority to regulate to the counties and did not require the counties to adopt ordinances before exercising that authority, the district court was wrong to impose that requirement. The plain language of the statute provides the county may regulate access through reasonable “regulation” and “permit,” which is precisely what the County did in this matter.

## **2. The County Can Exercise its Police Powers and Act Directly Under the Statutory Delegation.**

Because there is no statutory requirement for the County to adopt an ordinance, the County can exercise its police powers directly under the statute. *See Henley*, 909 A.2d at 364-65. When a municipality acts directly under a lawful delegation of police power it is not necessary that the municipality first enact an ordinance pursuant to the statute granting it police power before it may proceed. *See LaRoque*, 196 A.2d at 906 (citations omitted); *see also Jewett v. Luau-Nyack Corp.*, 291 N.E.2d 123, 126 (N.Y. 1972) (where a statutory grant of power is complete within itself, providing standards, procedures and penalties, the statute is self-executing, and no other legislation is required). Though the municipality must exercise its delegated power impartially and not arbitrarily, it need not enact an enabling ordinance to exercise its power. *See id.*

Two cases from Pennsylvania demonstrate this principle well. In *Commonwealth v. Thurman*, 872 A.2d 838 (Pa. 2005), the Superior Court of Pennsylvania reversed a drug conviction after finding a statute did not grant municipal police officers the ability to tow defendant's vehicle because it was unregistered. The court held that though the state legislature had adopted an enabling statute permitting a township to tow a vehicle for the failure to have proper registration, the police department had no right to carry out the towing on its own through a General Order absent an enabling ordinance. *Id.* at 838-39.

One year later, the Superior Court of Pennsylvania overruled *Thurman* in *Henley*. The court ruled regardless if a municipality adopted an ordinance setting forth the procedures in the statute, a police officer could impound the vehicle pursuant to his traditional care-taking function. *Henley*, 909 A.2d at 365. The court reasoned "the statute was not intended to trump the traditional community care-taking functions of the police," and judges were in no position to second-guess a police officer's decision to tow a vehicle, which in the officer's opinion, created a traffic hazard. "To do so would seriously handicap legitimate traffic-control activities." *Id.* at 364 (citing *United States v. Abbott*, 584 F.Supp. 442, 448 (W.D. Pa 1984)). In short, the County can exercise its authority directly under the statutes and regulate the highways pursuant to its police powers without adopting an ordinance.

**3. To Impose an Ordinance Requirement for Every Exercise of Police Power Would Paralyze Road Authorities.**

The authority to regulate private property that jeopardizes the safety of county highways is an essential police power necessary to protect the health and well-being of

the general public. The authority is limited to instances where the use of private property impacts the safety of public highways. Absent such authority, a County or any political subdivision would be unable to regulate conduct that threatens highway safety unless it first adopted a zoning ordinance that specifically prohibited such behavior. Under Respondents' theory, a private property owner could construct and maintain a condition regardless of the dangers it posed to the traveling public. Private property owners could have accesses that severely hamper the flow of traffic or create unsafe intersections and the County could do nothing about them. Such a position is unsustainable.

Local government is responsible for a myriad of matters. Here, the County did not have ordinances in place that set forth its policies and procedures for such things as snowplowing, sight lines or road maintenance. Nonetheless, no one would challenge the County's ability to act in these areas without an ordinance. The County's authority to regulate unpermitted work in the right-of-way and the construction of an unsafe access onto a busy highway should be entitled to the same treatment. This Court should not require municipalities to adopt specific ordinances before exercising their general police powers, especially in this case, where the legislature has granted the County authority to use "reasonable regulations" and require permits to regulate access to the highways. *See* Minn. Stat. § 160.18.

**4. Reasonable Regulations Pursuant to Minnesota Statutes § 160.18, Subdivision 3 Are Not Official Controls.**

Contrary to the reasoning of the district court, the regulation of the public right-of-way is not an “official control.” Minnesota Statutes § 394.22, subdivision 6, provides:

‘Official control’ means legislatively defined and enacted policies, standards, precise detailed maps, and other criteria, all of which control the physical development of a municipality or a county or any part thereof or any detail thereof, and are the means of translating into ordinances all or any part of the general objectives of the comprehensive plan. Such official controls may include but are not limited to ordinances establishing zoning, subdivision controls, site plan rules, sanitary codes, building codes, housing codes, and official maps.

An official control is an ordinance that sets forth the objectives of the comprehensive plan. A road authority, however, need not enact a comprehensive plan to regulate its roads. There are many municipalities that do not regulate zoning and, therefore, do not have a comprehensive plan or official controls. Nonetheless, these municipalities, as road authorities, are still charged with the responsibility and obligation to regulate and maintain their roads. To hold road authorities can only regulate access through an “official control” (i.e., access ordinance), would necessarily mean those road authorities that do not regulate zoning would be powerless to regulate access to the roads under their jurisdiction. This would be an absurd result, unintended by the legislature. Accordingly, access regulations are not official controls and need not be adopted by ordinance.

**II. RESPONDENTS ARE SUBJECT TO THE COUNTY’S REASONABLE REGULATIONS AND PERMIT PROCEDURE.**

As a preliminary matter, the County’s rules, regulations and permitting requirements were in place prior to the construction of Respondents’ new access. A-345-

50; *Trial Court Transcr. 81-83, 111-12*. To the extent the district court's order can be read to suggest anything to the contrary (see Finding of Fact No. 23(b)), this finding is clearly erroneous. County highway officials testified the regulations were in place in 1999 and Exhibit 50 was merely revised in 2004, not adopted in 2004. *A-345-50; Trial Court Transcr. 81-83, 111-12*.

Moreover, there is no dispute Respondents were fully aware of the County's position. The County advised Respondents, verbally and in writing, of the noncompliance with State Aid Highway regulations. *A-329-33*. Pursuant to these recognized standards, Respondents' property does not meet the requirements to construct a new commercial access.

**A. The County Requires Landowners Meet Certain Requirements and Receive a Permit Before Constructing a Road Access.**

Though the municipality need not enact an enabling ordinance to exercise its delegated power, it must exercise that power impartially and not arbitrarily. *See LaRoque*, 196 A.2d at 906. Delegation principles are satisfied if the standards and requirements outlined in the state statutes, when coupled with county regulations, are sufficiently detailed to provide all users and potential users of land with notice of the particular standards and requirements imposed by the County. *See Beaver Meadows v. Bd. of County Commrs.*, 709 P.2d 928, 936 (Colo. 1985) (en banc).

Here, the State and County regulations are sufficiently detailed so that all landowners have notice of the requirements necessary to obtain access to county state-aid highways. Minnesota Statute § 160.18, subdivision 3, specifically provides access to

public highways is “subject to reasonable regulation by and permit from the road authority” necessary to ensure the safe use of the highway. Because CSAH 19 is a county state-aid highway, the County has an obligation to maintain it consistent with state standards. The State Aid Manual, which the County provided to Respondents on February 19, 1999, provides a commercial access driveway must be, at a minimum, 32-foot wide. *Ex. 14.* The MNDOT Road Design Manual also mandates commercial access driveways must be 32-foot wide. The County follows the Road Design Manual to determine access points to a county road, and requires any property owner desiring access to comply with the state regulations. If the County did not implement these regulations, it would jeopardize its state transportation funding.

Landowners who wish to obtain access, or alter an existing access, must submit an application for an access permit. Section 1 of the County’s permit specifications for County Road access mandates anyone working within the right-of-way must first obtain a permit: “Any work within the County right-of-way requires written permission from the Chisago County Public Works Department. This includes any change in use or alteration to an existing access.”

Prior to construction, Respondents were aware of the access requirements imposed by the County, including the requirement that commercial accesses be 32-foot wide. Respondents were also aware a permit was required to alter the use of an existing access. Instead of complying with the requirements and permit procedure, Respondents ignored them. Their blatant disregard for the County requirements and procedures should not be allowed where the standards outlined in the state statutes and county regulations were

sufficiently detailed to notify Respondents of the requirements for highway access imposed by the County. *See Beaver Meadows*, 709 P.2d at 936. The County imposed uniform state access standards, and did not exercise its delegated power impartially or arbitrarily when it barricaded the access to CSAH 19. Consequently, the district court's decision must be reversed.

**B. The Access to CSAH 19 Poses a Hazard to the Travelers on CSAH 19.**

The County properly barricaded the unsafe access to CSAH 19 because of legitimate safety concerns. Any right of access an individual may have is subject to regulation through the state's police power. 38 Am. Jur. 2d *Highways, Streets, and Bridges* §§ 178-9 (1968). The right of access must yield to regulations necessary for the safety of the traveling public. *City of Miami v. Girtman*, 104 So. 2d 62, 67 (Fla. 3 Dist. App. 1958). Where alternate access from property is available, a municipality may deny a particular access to a highway or street if the denial of access has a reasonable relationship to the health, safety and welfare of the public. *Id.*

Here, the direct access from Outlot A to CSAH 19 poses significant safety concerns. Outlot A's frontage to CSAH 19 is too small to allow an access that complies with state and county standards. Additionally, the access is located where a future MNDOT 300-foot turn lane and median are to be constructed. The former and current County Engineers and the Mayor of Stacy testified an access at this location is a threat to public safety and interferes with the flow of traffic on CSAH 19. The access is a threat to public safety and interferes with the safe operation of the platted road. Respondents'

right to access is secondary to the public's right to safe highways. *See id.* The County is within its police powers to disallow this unsafe access.

**C. Respondents Have No Property Right to Construct a New Commercial Access Without a Permit.**

Respondents have no property right to build a new commercial access to CSAH 19. Respondents constructed the commercial access to Outlot A without a permit, and in direct contravention of the County's warnings and regulations. Respondents have no vested property right to transform the unauthorized and undersized driveway into a new commercial access. The convenience store drastically increased the use of Outlot A. Before the construction of a gas station, only a small, gravel driveway existed from Outlot A to CSAH 19. The old field access was never permitted or approved by the County. More importantly, Respondents do not seek to merely continue to use the unpermitted, unapproved, field access, but propose to attach a new street to CSAH 19. Any right Respondents may have had to use the field access does not authorize the construction of a street access for a gas station and development. Because Respondents constructed the access without any permit and in violation of the County's access regulations, the County properly barricaded it.

**D. The Proposed Access Violates the Plat.**

The disputed area was not shown on the city plat, which the County reviewed. To allow the construction of an access that is not shown on the plat would make a mockery of the platting process. *See generally* Minn. Stat. § 505.02, subd. 1 (plat must set forth and name all thoroughfares); *Semler Const., Inc. v. City of Hanover*, 667 N.W.2d 457,

462-63 (Minn. App. 2003). Under Respondents' theory, any developer could construct additional accesses, after the platting process, and the County would have no authority to stop it. Such an interpretation entirely usurps the County's authority and renders the platting process meaningless. In short, Respondents cannot construct an access that is not shown on the plat.

**E. Respondents' Access Is Reasonable.**

Respondents have reasonable access to Outlot A via Sherman Oaks Road.

Property owners have a right of reasonably convenient and suitable access to a public street or highway that abuts their property. *Grossman Invs. v. State by Humphrey*, 571 N.W.2d 47, 50 (Minn. App. 1997) (citing *Hendrickson v. State*, 127 N.W. 2d 165, 173 (Minn. 1964)). When a municipality alters an abutting property owners' access to a road, that owner may be entitled to compensation. *Id.* (citing *Thomsen v. State by Head*, 170 N.W.2d 575, 578 (Minn. 1969)). "[N]ot every denial of immediate or convenient access will support a claim for damages." *Grossman*, 571 N.W. 2d at 50 (citations omitted). "An abutting property owner suffers compensable damage for loss of access only when the owner is left without 'reasonably convenient and suitable access to the main thoroughfare in at least one direction.'" *Id.* (citing *State v. Gannons, Inc.*, 145 N.W.2d 321, 329 (Minn. 1966)). "[T]he 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, 607 (Minn. 1978).

Here, Respondents have reasonable access to Outlot A via Sherman Oaks Road. In the development agreement between the City of Stacy and AMW, the parties expressly

agreed Sherman Oaks Road would provide access to Outlot A: “Sherman Oaks Road...shall be developed as a bituminous commercial city street to specification approved by the City’s engineer...to provide access to Outlot A for commercial purposes.” *Ex. 10.* Aslakson specifically advised the City Council that “Sherman Oaks Road would be used as the commercial access to Outlot A.” *Ex. 11.* The County barricaded the access to CSAH 19 in November 1999, but Respondents did not initiate this action until 2004. For almost five years, Respondents used Sherman Oaks Road to access Outlot A. Respondents have reasonable access, and they are not entitled to direct access to CSAH 19 because of the dangers it poses. *See City of Miami*, 104 So. 2d at 67 (right of access must yield to regulations necessary for the safety of the traveling public). Respondents’ right to alternate access must yield to the public’s right to safe highways.

**III. NO TAKING OCCURRED WHERE RESPONDENTS CONSTRUCTED A NEW ACCESS IN VIOLATION OF THE COUNTY’S REASONABLE ACCESS REGULATIONS AND PERMIT PROCEDURE.**

The district court erred when it held the County’s actions constituted a taking. The Minnesota Constitution provides that “[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation.” Minn. Const. art. I, § 13. A taking can arise out of the state’s interference with the ownership, possession, enjoyment, or value of private property. *Grossman Invs.*, 571 N.W.2d at 50.

A landowner abutting a street or road has an easement of access, or a right to ingress and egress, which is a property right protected by the Minnesota Constitution. *Underwood v. Town Bd. of Empire*, 14 N.W.2d 459, 461 (1944). Thus, access to a public highway from abutting property is considered a right that may not be taken without

compensation. *Hendrickson*, 127 N.W.2d at 170. Government regulation or physical changes to the roadway system that deprive an owner of “reasonable” or “reasonably convenient and suitable access” constitute a taking, for which compensation must be paid. *Johnson*, 263 N.W.2d at 605. The existence of reasonable access is a question of fact and depends on the unique circumstances of each case, including the character of the property involved. *Id.* at 607. But “[t]hose who are not abutting owners have no right to damages merely because access to a conveniently located highway may be denied, causing them to use a more circuitous route.” *Hendrickson*, 127 N.W.2d at 170-71.

Here, the district court erred when it held the County’s actions constituted a taking of Respondents’ property. First, it is undisputed the County did not physically take Respondents’ property. The pertinent section of CSAH 19 was dedicated to the County for roadway purposes. Because the right-of-way was conveyed to the County in the platting process, none of Respondents were authorized to conduct any work within the public right-of-way without written permission from the County. Their failure to obtain any permission is fatal to any takings claim.

Second, Respondents were never deprived of reasonable access, so they are not entitled to compensation. Respondents at all times have been able to access Outlot A via Sherman Oaks Road. Respondents were told before the beginning of construction that they did not have commercial access to CSAH 19. Though Respondents may have to use a more circuitous route to access their property, they are not entitled to compensation for an unlawful taking. The district court erred, and its order directing the County to initiate an action for eminent domain must be reversed.

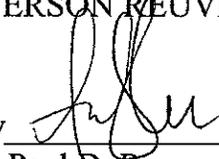
## CONCLUSION

The district court erred in its application of the law. The County has the authority, pursuant to Minnesota Statutes and its general police power, to regulate the access to its highways. As a result, the County did not need to adopt a specific ordinance before it exercised its authority over highway access. Respondents disregarded the County's warnings that no commercial access would be allowed from Outlot A to CSAH 19 and built a new commercial access in violation of the County's reasonable regulations and without any permit. Accordingly, this Court should reverse the district court's determination the County is liable for a taking.

Dated: January 8, 2007.

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