

APPELLATE COURT CASE NO. A06-2302

STATE OF MINNESOTA
IN COURT OF APPEALS

C & Stacy, LLC, et. al.

Respondents,

vs.

County of Chisago,

Appellant.

BRIEF OF AMICI CURIAE
MINNESOTA ASSOCIATION OF TOWNSHIPS,
ASSOCIATION OF MINNESOTA COUNTIES, AND
LEAGUE OF MINNESOTA CITIES

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INTEREST OF AMICI CURIAE

MINNESOTA ASSOCIATION OF TOWNSHIPS

The Minnesota Association of Townships (MAT) is a nonprofit organization representing 1,785 out of 1,788 Minnesota townships. MAT provides research, training, legislative representation, and a number of other services for these members. The League of Minnesota Cities (LMC) has a voluntary membership of 830 out of 853 cities in Minnesota. LMC represents the common interests of cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, advocacy, and insurance services. The Association of Minnesota Counties (AMC) has a voluntary membership of all 87 counties in Minnesota. It also provides its members with information, education, training, and advocacy services. Collectively, these groups represent all general-purpose local government in the state. This perspective permits *amici* to offer a broad perspective on the significant impact that this case will have on the operations of towns, cities, and counties throughout Minnesota.

STATEMENT OF THE ISSUES, CASE, AND FACTS

Amici concur with Appellant's statement of the issues, case, and facts.

ARGUMENT

I. INTRODUCTION

Appellant has raised a number of legal issues in its brief. *Amici* support those arguments and believes that Appellant has made a convincing case for each of them. Of those, however, the issues relating to the enabling authority required to regulate driveway access is of particular concern to *amici* and will therefore be the focus of this brief.

II. AN ORDINANCE IS NOT NECESSARY TO REQUIRE PERMITS FOR DRIVEWAY ACCESS TO PUBLIC ROADS

Notwithstanding a complete absence of language to this effect in the relevant statute, the district court concluded that a local government must adopt an ordinance in order to implement the driveway permitting system authorized by Minn. Stat. § 160.18 (2006). While the rationale for this conclusion is not entirely clear, it has led to a flawed result with serious potential consequences for municipalities across the state.

Towns, cities, and counties derive their powers from the State Legislature. Minn. Const. art. XII § 3. As creatures of the legislature, “municipalities possess only those powers that are conferred by statute or implied as necessary to carry out legislatively conferred powers.” Breza v. City of Minnetrista, ___ N.W.2d ___, 2006 WL 3755187 (Minn. Dec. 21, 2006). In conferring authority on local governments, the legislature undoubtedly has the ability to require adoption of an ordinance as a precondition to the exercise of a particular local authority. The statutes are replete with examples of where the legislature has imposed this requirement on local governments.

For example, towns may use an “ordinance” to allow the open burning of leaves, to impose a lodging tax, and to establish a heritage preservation commission. Minn. Stat. § 116.082 (2006); Minn. Stat. § 469.190, subd. 1 (2006); Minn. Stat. § 471.193 (2006). Cities may “by ordinance” impose an inspection fee on vending machines, change the year in which their elections are held, and delegate the duties of a city clerk. Minn. Stat. § 28A.09, subd. 1 (2006); Minn. Stat. § 205.07, subd. 1 (2006); Minn. Stat. § 412.151, subd. 2 (2006). Counties may adopt an “ordinance” regulating surface use of lakes, requiring licensing of animals, and mandating review of condominium plats by the county surveyor. Minn. Stat. § 86B.205, subd. 2 (2006); Minn. Stat. § 145A.05, subd. 2 (2006); Minn. Stat. § 389.09, subd. 2 (2006). In fact, a search of the Minnesota Office of the Revisor’s website reveals 185 statutes in which the phrase “by ordinance” is used. http://ros.leg.mn/revisor/pages/search_text/doc_search.php?search=stat (last visited Jan. 4, 2007).¹ In light of this abundant willingness of the legislature to set out procedures for local government, there is no need for a court to read an ordinance requirement into a statute where none exists.

To the contrary, it is well understood that not every municipal action or undertaking necessitates the adoption of a local ordinance. It is actually quite common for local governments to take action without first adopting an enabling ordinance. This is not surprising, given the relative complexity of the procedures governing ordinance adoption. See Minn. Stat. § 365.25 (2006) (establishing town ordinance formalities); Minn. Stat. § 375.51 (2006) (establishing

¹ Notable among these for its comparison to the “ordinance free” legislation involved in this case is a statute requiring a municipality to adopt an ordinance if it intends to regulate telecommunications work in its right-of-way. Minn. Stat. § 237.163, subd. 2 (2006).

county ordinance formalities); Minn. Stat. § 412.191, subd. 4 (2006) (establishing city ordinance formalities). If these procedures had to be followed every time a municipality took action, there would be little time or money left to build roads, equip firefighters and police officers, operate hospitals, or carry out any of the other duties with which local government is charged.

Fortunately, there are other ways for many municipal activities to be accomplished. In a good number of instances, statutes refer to taking action by resolution, as is required to organize a regional rail authority, set gopher bounties, or establish residency requirements for voters. See Minn. Stat. § 398A.03 (2006), Minn. Stat. § 348.12 (2006), Minn. Stat. § 201.016, subd. 2 (2006). The use of resolutions is especially prevalent in the statutes dealing with the creation and management of local roads. To list but a few: Highways are “established, altered, vacated, [and] revoked” by resolution. Minn. Stat. § 163.11, subd. 11 (2006). Roads are barricaded by resolution. Minn. Stat. § 164.152 (2006). Even speed limits can be set by resolution. Minn. Stat. § 169.14, subds. 2, 5-5e (2006). The list goes on.²

In many other situations, the legislature has not mandated *any* particular process that a local government must follow in order to exercise the authority granted by an underlying statute. For instance, boards set water and sewer rates, Minn. Stat. § 444.075, subd. 3 (2006); councils designate official newspapers, Minn. Stat. § 412.831 (2006); and supervisors initiate lawsuits,

² As it does with ordinances, the Minnesota Supreme Court values substance over form when it comes to resolutions. In noting that a resolution need not even be in writing to be effective, the court remarked that “[g]enerally, where the statute requires a resolution, any official action, though not in form a resolution, may be one in legal effect.” Lindahl v. Independent School Dist. No. 306 of Hubbard County, 133 N.W.2d 23, 26 (Minn. 1965) (citations omitted).

Minn. Stat. § 366.05 (2006). Even more relevant to the case at hand, road authorities impose seasonal weight restrictions, Minn. Stat. § 169.87, subd. 1b (2006); cf. id. subd. 1c (2006) (ordinance required to permanently ban commercial vehicles from local road); they erect stop signs, Minn. Stat. § 169.30 (2006); and they adopt parking restrictions. Minn. Stat. § 169.34 (2006). Road authorities are also empowered by Minn. Stat. § 160.08 subd. 3 (2006) to

design any controlled-access highway, and to so regulate, restrict, or prohibit access as to best serve the traffic for which the highway is intended. Such road authorities are authorized to divide and separate any controlled-access highway into separate roadways by the construction of raised curbs, central dividing sections, or other physical separations, or by designating the separate roadways by signs, markers, stripes, or other devices. No person shall have any rights of ingress or egress to, from, or across controlled-access highways to or from abutting lands, except at the designated points or roadways thereof where access is permitted by such road authorities upon such terms and conditions as such road authorities specify.

All of these roadway decisions are authorized without the need for an ordinance, a resolution, or any other particular type of presentation. This power is simply inherent in authority's responsibility to maintain safe highways.

That is not to say that there is no record of the decision making process. At a minimum, all local governments must keep a record of their proceedings that shows the decisions that were made and the actions taken. Minn. Stat. § 13D.01, subd. 4 (2006). Moreover, as a practical matter, many of these local governments reduce their decisions to resolutions or other writings when a more complete written record is desirable. Ultimately, though, the critical inquiry is not

what the record of the decision is called. It is whether the governing body had the power to make the decision in the first place.

Virtually all of the more than 2,700 local governments in the state manage highways, streets, or roads. Of these, a good number, especially towns, have never adopted any kind of ordinance. With transportation as their main focus of responsibility, they have never seen the need because the legislature has never mandated it. If judicial intervention now makes ordinances a precondition to local action, taxpayer costs will increase significantly and municipalities will be forced to fundamentally change the way they operate.

There is no need for this to occur, however. The legislature has given local governments the power to require driveway permits and in doing so it has not referenced ordinances, much less mandated them. Minn. Stat. § 160.18. The district court's decision to superimpose an ordinance requirement on all roadway decisions fails to adhere to precedent or the plain language of the law, and casts a shadow over not only driveway permitting, but over much of what counties, cities, and towns do every day. This is an error that can and should be rectified by this Court.

III. DRIVEWAY ACCESS PERMIT REQUIREMENTS ARE NOT ZONING CONTROLS

In addition to incorrectly concluding that driveway permits cannot be required without an ordinance, the district court compounded its error by deciding that such an ordinance would necessarily have to be an "official control" under Minn. Stat. § 394.22. Such a position is a tortured and unfounded interpretation of the term.

“Official controls,” are defined for counties as including “ordinances establishing zoning, subdivision controls, site plan rules, sanitary codes, building codes, housing codes, and official maps. Minn. Stat. § 394.22, subd. 6 (2006). For cities and towns, “official controls” are similarly defined as “ordinances and regulations which control the physical development of a city, county or town or any part thereof or any detail thereof and implement the general objectives of the comprehensive plan. Official controls may include ordinances establishing zoning, subdivision controls, site plan regulations, sanitary codes, building codes and official maps.” Minn. Stat. § 462.352, subd. 10 (2006). Common examples of official controls include subdivision ordinances; conditional use permits; variance procedures; setback requirements; and, provisions dealing with nonconforming uses. See, e.g., Minn. Stat. §§ 394.30, subd. 5 (2006), 462.358 (2006); 394.301 (2006), 462.3595 (2006); 394.27, subd. 7 (2006), 462.357, subd. 6 (2006); 394.25, subd. 3 (2006), 462.357, subd. 1 (2006); 394.36 (2006), 462.357, subd. 1(e) (2006). Regardless of the form they take, however, all of these are predicated on an underlying set of procedures.

Before official controls can be enacted, some form of comprehensive planning must occur. This, in turn triggers the need for public hearings and coordination with other local units of government. Minn. Stat. §§ 394.23-.24 (2006); 394.26 (2006); 462.357, subd. 2 (2006). Adoption of zoning also presupposes planning commissions and necessitates the creation of boards of adjustment. Minn. Stat. §§ 394.30 (2006) and 462.354 (2006); 394.27 (2006) and 462.354, subd. 2 (2006). Cities must decide whether to extend their zoning ordinances outside their municipal boundaries, and towns and counties must ensure that their respective zoning ordinances relate properly to each other. Minn. Stat. §§ 462.357, subd. 1 (2006) and 394.33 (2006).

In short, zoning is a complex matter. As a result, many local governments choose not to take it on. For example, more than 1,200 of Minnesota's towns have not adopted any zoning ordinances whatsoever.

See http://www.mntownships.org/index.asp?Type=B_BASIC&SEC={F5B50318-BF0A-4C04-8FB2-016B4D197790} (last visited Jan. 3, 2007). One of the reasons that they choose not to enter the zoning arena is because they have other means of controlling those issues of most importance to them.

Among these important issues, transportation surely lands near the top. There are approximately 123,000 miles of town, city, and county roads in the state of Minnesota. See Minn. Dept. of Transp. Office of Transp. Data & Analysis, Frequently Asked Questions at <http://www.dot.state.mn.us/tda/html/faq.html#quiz3> (last visited Jan. 3, 2007). As large as this number is, it pales next to the costs entailed in keeping our local transportation systems functioning.

More than 50% of township expenditures are on roads and bridges. Minn. State Auditor, Minnesota Township Finances, 2005 Revenues, Expenditures, and Debt, 1 (2006). Cities devote approximately 22% of their budgets to streets and transportation. Minn. State Auditor, Minnesota City Finances, 2005 Revenues, Expenditures, and Debt, "The State Auditor's Big Book of Cities", 3 (2006). Even counties, which have primary funding responsibility for human services in Minnesota, spend almost 18% of their budgets on streets and highways. Minn. State Auditor, Minnesota County Finances, 2005 Revenues, Expenditures, and Debt & 2005 and 2006 Summary Budgets, 4 (2006). Collectively, local governments invest more than \$2,000,000,000 per year in local roads, streets, and highways.

Much of this is not discretionary spending in any practical sense. Local government has authority and responsibility for these transportation systems, regardless of whether zoning or any other regulations have been adopted. See, e.g., Minn. Stat. § 163.02 (2006) (“County highways shall be established, located, relocated, constructed, reconstructed, improved, maintained, revoked, or vacated by the several counties.”); Minn. Stat. § 164.02 (2006) (“Town roads shall be established, located, relocated, constructed, reconstructed, improved and maintained, or vacated by the several towns.”); Minn. Stat. § 412.221, subd. 6 (2006) (“The council shall have power to lay out, open, change, widen or extend streets, alleys, parks, squares, and other public ways and grounds and to grade, pave, repair, control, and maintain the same. . . .”) Indeed, a municipality that neglects this responsibility will soon find itself defending against a myriad of claims, ranging from negligence to demands that more funds be spent on maintenance. See, e.g., Christensen v. Mower County, 587 N.W.2d 305 (Minn. Ct. App. 1998) (county liable for failure to post signs warning of road hazard); Gorecki v. County of Hennepin, Dept. of Public Works, 443 N.W.2d 236 (Minn. Ct. App. 1989), pet. for review denied (Minn. Sept. 27, 1989) (county liable for failure to remove snow banks from certain bridges); Minn. Stat. § 163.16 (2006) (town may be directed to improve and maintain road). Given the tight budgets confronting local government in recent times, there are surely some that would have relinquished some of their transportation responsibilities, but even something as simple as vacating right-of-way can lead to damages claims. See, e.g., Minn. Stat. § 164.07, subd. 5 (2006) (property owner may be entitled to damages upon vacation of existing road). In short, while zoning may be optional, road management is not. There is nothing to suggest that the legislature intended to impose an “official control” requirement as a precondition to roadway permitting authority.

In fact, a review of the legislation suggests just the opposite. For example the authority to zone is relatively new compared to local transportation obligations. The Municipal Planning Act, from which towns and cities draw their zoning powers, was not adopted until 1965. Laws 1965 c. 670 § 1. Just the most current version of the driveway permit statute at issue in this case dates back to 1959, with its origins stretching back decades earlier. Laws 1959, c. 500, art. 1, § 18; see generally, Laws 1913, c. 235, § 80. By the time the state zoning statutes were adopted, Minnesota municipalities had over a century of experience in building, regulating, and maintaining roads. There is simply no indication anywhere that the Legislature intended to sublimate local government road authority to zoning law.

Transportation is not unique in this regard. Local government deals with all sorts of things that are related to property ownership without having to rely on its authority to zone. Hazardous buildings can be abated. Minn. Stat. § 463.161 (2006). Toilets and sewer connections can be mandated. Minn. Stat. § 412.221, subd. 31 (2006). Solid waste disposal can be controlled. Minn. Stat. § 400.16 (2006). Adjoining property owners can even be ordered to pay for a partition fence. Minn. Stat. Ch. 344 (2006). All of these things occur regularly around the state, mandated and managed by towns, cities, and counties, and all of them without any reference to or reliance on zoning. If independent statutory authority forms the basis for a municipal undertaking, the existence of zoning and compliance with its procedures is irrelevant.

Additionally, conditioning driveway permitting authority on zoning creates logical impossibilities for some government units. For instance, local government is not alone in relying upon Minn. Stat. § 160.18 to require a driveway permit. The Minnesota Department of Transportation (MnDOT) also uses this statute to justify requiring a trunk highway access permit. Minn. R. 8810.4400; see also Minn. Stat. § 160.02 (2006) (for purposes of Minn. Stat. §

160.18, "road authority" includes state and local government). The state of Minnesota is obviously not involved with zoning and it would undoubtedly be a shock to MnDOT if it found that its lack of authority to zone means that it has lost the ability to control access to its highways.

Similarly, even at the local government level, some entities will find themselves powerless in this regard. Both Ramsey and Hennepin counties require driveway permits. See <http://www.co.ramsey.mn.us/NR/rdonlyres/F840563B-4B9E-4A20-82F0-CB4C29E3D9A8/326/DrivewayPermitApp.pdf> (last visited Jan. 4, 2007) (Ramsey County Driveway Permit Application); http://www.co.hennepin.mn.us/files/HCInternet/Static%20Files/103190623Chapter_10_Recommended_Policies.pdf (Hennepin County Transportation Systems Plan, Chapters 7, 10 (discussing County's driveway permitting process) adopted July 19, 2000 (Resolution No. 00-7-475) (last visited Jan. 4, 2007). Neither county has zoning ordinances, though, as only those counties with populations of less than 300,000 as of the 1950 census may do so. Minn. Stat. § 394.21 (2006); see also Association of Minnesota Counties, For Your Information, Land Use Management, (Revised July 2002) at <http://www.mncounties.org/Publications/FYIs/02%20FYI%20PDFs/Land%20Use02.pdf> (last visited Jan. 4, 2007); cf. generally, Ramsey County Home Rule Charter, <http://www.co.ramsey.mn.us/NR/rdonlyres/D75BABDF-F80D-4336-B0B5-499B250C7BD6/385/CharterChapters.pdf>. It makes no sense to think that the two most populous counties in the state are also the two that cannot control access to their roads.

Even in those counties that do have the authority to zone, those ordinances do not apply within city limits except in very limited situations. See Minn. Stat. § 394.24, subd. 2 (2006)

(county zoning applies within city only upon city's request). In effect, this means that counties would be unable to require driveway permits for the portions of county roads that lie within a city. Again, this results in a situation in which the access points to roads in the most populated areas, which are presumably those most in need of regulation, are the ones over which there is the least control.³

Requiring that driveway permits be based on local zoning will at a minimum threaten the ability of MnDOT and Hennepin and Ramsey counties to regulate driveway access to the highways and other roads under their control. Beyond that, it will force thousands of local governments to choose between adopting or amending zoning ordinances or relinquishing their own control over a significant public safety issue that has long been recognized as being within their purview.⁴ Neither result is good public policy. Neither was intended by the Legislature.

³ Because a city is not the "road authority" for purposes of county roads, the city may also be unable to require permits for access to these roads, leaving driveway access completely unregulated. Cf. Minn. Stat. § 160.18, subd. 3 ("road authority" can require driveway permit); Minn. Stat. § 160.02, subd. 25 (county is "road authority" for county road purposes).

⁴ Access management is of prime concern to traffic engineers. *See, e.g.*, U.S. Dep't of Transp., Fed. Highway Admin., Benefits of Access Management FHWA-OP-03-110 ("An overabundance of driveways also increases the rate of car crashes. An examination of crash data in seven states indicated found a strong linear relationship between the number of crashes and the number of driveways. Rural areas had a similar, but less strong relationship.") (citing Gluck, J., H. S. Levinson, and V. Stover, 1999, *Impacts of Access Management Techniques*, NCHRP Report 420, Transportation Research Board.)

CONCLUSION

If allowed to stand, the district court decision in this case would dramatically alter the ways in which counties, cities, and towns manage public roads in Minnesota. A municipality that wants only to regulate driveway access to a road will not only be forced to enact an ordinance, it will have to create a planning commission, adopt a comprehensive plan, and implement and enforce an entire host of zoning regulations. In many ways, the entire structure of Minnesota's public road management system will have to be reconsidered. For the reasons set forth in this brief, the Minnesota Association of Townships, the League of Minnesota Cities, and the Association of Minnesota Counties respectfully request that this Court reverse the district court's decision.

Respectfully submitted,

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