

NO. A06-2302

State of Minnesota
In Court of Appeals

C & R Stacy, LLC, et al.,

Respondents,

vs.

County of Chisago,

Appellant.

RESPONDENTS' BRIEF

Paul D. Reuvers (#217700)
Jason J. Kuboushek (#0304037)
Amber S. Lee (#0342178)
IVERSON REUVERS
9321 Ensign Avenue South
Bloomington, MN 55438
(952) 548-7200

Attorneys for Appellant

Daniel J. Greensweig (#0238454)
Edgewood Professional Building
P.O. Box 267
St. Michael, MN 55376
(763) 497-2330

*Attorneys for Amicus Curiae
Minnesota Association of Townships*

Susan L. Naughton (#259743)
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1232

*Attorneys for Amicus Curiae
League of Minnesota Cities*

Barry L. Blomquist (#9040)
BARRY L. BLOMQUIST
LAW OFFICE
P.O. Box 578
6356 Elm Street
North Branch, MN 55056
(651) 674-7830

Attorneys for Respondents

Scott Simmons (#244983)
Association of Minnesota Counties
Intergovernmental Relations Mgr.
125 Charles Avenue
St. Paul, MN 55103
(651) 224-3344

*Attorneys for Amicus Curiae
Association of Minnesota Counties*

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STATEMENT OF LEGAL ISSUES

1. DOES A COUNTY HAVE AUTHORITY TO REGULATE A PRIVATE ACCESS TO COUNTY ROADS WITH OUT ADOPTING AN ORDINANCE?

The District Court held that a county may not regulate access to county roads without adopting an ordinance.

2. MUST A COUNTY ORDINANCE REGULATING ACCESS TO COUNTY ROADS BE ADOPTED PURSUANT TO CHAPTER 394 OF MINNESOTA STATUTES?

The District Court held that a county must comply with Chapter 394 of Minnesota statutes when adopting such an ordinance.

3. DID THE COUNTY TREAT PLAINTIFFS EQUALLY IN IMPOSING A MINIMUM WIDTH ON PLAINTIFF'S DRIVEWAY ACCESS?

The District Court made no finding on this issue. Plaintiffs filed a Notice of Review on this issue.

STATEMENT OF THE CASE

This is an appeal from a 2-day trial court decision by the Honorable Douglas G. Swenson in Chisago County District Court entered July 176, 2006, supplemented by an Order awarding attorney fees, dated November 1, 2006.

It involves a commercial driveway access to County State Aid Road 19 (CSAR 19) from a large commercial parcel located in the northeast quadrant of the intersection of CSAR 19 with I-35 in the City of Stacy, involving 3 owners. After obtaining the required permits, C&R began construction of a convenience store and carwash. The County had previously notified the original fee owner that the driveway access did not meet county standards, and could not be used as an access. Construction continued, and the County placed barricades across the access.

Plaintiffs commenced this action, asserting, et al., that they had a right to the continued use of this driveway, that the County did not have authority to close it, that the County had recognized or acquiesced in Plaintiff's claimed rights, and requested a Writ of Mandamus commencing a condemnation proceeding.

Following a 2-day trial, the Court held in favor of the Plaintiffs, and issued the Writ of Mandamus.

The county moved the Court for amended findings of fact and conclusions of law; Plaintiffs moved the Court to add "C&R Properties, Ent" as a party to the proceeding. By Order on June 16, 2006, the Court denied the County's motion, and granted that of Plaintiffs. After the parties stipulated to the amount of attorney fees to be awarded Plaintiffs, on December 7, 2006, the County filed its Notice of Appeal; Plaintiffs served a Notice of Review of the Court's failure to find that the County had permitted two narrow commercial driveways on S.S.A.H. 30 in the city of Stacy after barricading Plaintiff's access.

STATEMENT OF FACTS

For the purpose of this statement Trial Exhibits are designated as (TE-__); the Trial Transcript as (MATT-__ refers to Mel Aslakson, other witness will be duly noted with name and (TT-__); Appendix Exhibits as (AE-__), the list of these exhibits, which are submitted given the volume of the County's Appendix, also cite their corresponding trial exhibit numbers.

The history of this driveway access traces back to 1904, when the parcel it served was acquired by the Methodist Episcopal Church (TE-2) reproduced as AE-1). It was acquired by Charles King, et ux., in 1955. (TE-2)

In 1956, the Kings conveyed a portion of their parcel to the State of Minnesota, for the I-35 Right-of-Way, that deed provided in part that:

"the abutting owner retain the right of access Easterly of a point distant 173.6 feet East of the point of beginning", as stated in AE-1. Additionally, the State acquisition severed the Beck farm shown on AE-1; thereafter the remnant farm parcel lying east of I-35 was accessible only by way of the driveway through the former church parcel. Indeed, there were no driveway accesses to the north except through the church parcel.

(MATT-26)0

By 1959, the entire north boundary of CSAH 19 in the city was developed into small, mixed use lots. (AE-2).

In 1986, Plaintiff AMW, Inc (AMW) purchased all of the SE1/4 of the SW1/4 of Sec. 29 lying north of the developed area along CSAH 19 shown on AE-2. Mel Aslakson, an accountant and part owner of AMW, has lived in Stacy his entire life. In the 1970's he served as Mayor of the city for four years, and as a councilman for 12 years; in the late 1980's and early 1990's as a councilman for 7 years; a position to which he was recently re-elected. (MATT-12)

In 1991, AMW rented a major part of Outlot A (see AE-3) to Bauerly Bros., a road contractor, for the reconstruction of I-35 from Forest Lake to Stacy. Bauerlys set up an asphalt plat on Outlot A, hauled in, processed and hauled out all of the black-top for this project by semi belly-dumps. From this site Bauerlys also purchased some 33,000 yards of fill, and hauled it to the project, using these trucks to do so. They all used this drive-way for access from Outlot A to CSAH 19. (MATT-23) Additionally, Mndot had a construction trailer on site for the entire project and inspected all of the loads that went in and out. (MATT-14) AMW never received a complaint from the county, nor anyone else about the numerous heavy semi-trucks using this access to CSAH 19. (MATT-29) After that the condition and location of this driveway is shown on the photograph at AE-4. (TE-4)

In 1994, AMW leased two areas of Outlot A to Lamar Companies for the erection and maintenance of freeway billboards (AE-5), located approximately as shown on AE-3. They remain in place today, and have been maintained and resigned ever since, by this access to CSAH 19.

In April, 1997, AMW leased a part of Outlot A, just east of and abutting Outlot B (shown on AE-3), to Mary Berg, who placed an office on this parcel. Chisago County, by a contract with Stacy, administered the State Building Code for the city. Ms. Berg applied to the county for a building permit, which the county approved. Her application for this permit clearly showed the access to this office was off CSAH 19. (AE-6) Having issued this permit, the county must have inspected the building for her to get an occupancy permit. (MATT-30) No complaints were received regarding this use of the property or this access. (MATT-30)

Ms. Berg's permit cited an address of "5580 Stacy Trl". This was the address given this driveway by Chisago County when it previously adopted its Geographic Information System. (AE-7).

In 1994, AMW platted the southerly portion of that land into SHERMAN OAKS, PLAT 3, the relevant part of said plat shown on AE-3; Outlot A was previously zoned for General Business on the Stacy Zoning Map (AE-8). Since it was located on a CSAH 19,

the county highway department reviewed this plat, and responded merely that it had "no comments" regarding same, even though the plat dedicated the access to CSAH 19 (AE-9).

As part of the platting process A&W entered into a Developers Agreement with the city, which provided, in part, that Sherman Oaks Road, intersecting the east line of Outlot A (see AE-3) would be developed as a "bituminous commercial city street", but that if A&W provided another commercial access, Sherman Oaks Road could be developed as a commercial street. (TE-10, p 2).

At the time this road was being constructed, the city, by agreement with AMW, placed barricades at the west end of it, on the east line of Outlot A; "the city wanted to be sure that it was a dead-end street". (MATT-18) They remained in place until November, 1999, when the county barricaded the access to Outlot A. (MATT-18,19; AE-10 shows the location of these barricades; AE-11 is a photograph of them)

AMW applied for and received a Conditional Use Permit from the city for Plaintiff C&R's project. (AE-12). C&R then applied for and received a building permit from the county for this project, which stated on its face that it was "on proposed street off Co. Rd. 19" (AE-13), as shown on C&R's cite plan. (AE-14).

In 1999, Mr. Aslakson had exchanged numerous letters with county officials, in which the county denied that this access to CSAH 19 was a commercial driveway, asserted that it did not meet the minimum 32 feet width requirements for commercial driveways, and that it had not issued a permit for its use, all of which Mr. Aslakson contested. The last letter received by Plaintiffs was from an Assistant County Attorney, of November 8, 1999, threatening legal action "including a court injunction should any attempt be made to disregard this letter and proceed with direct access". (AE-15).

After C&R received its building permit from the county, it commenced construction on its project. (AE-16). Without any notice whatsoever, the county placed the barricades across this access to CSAH on November 11, 1999, (see AE-17), following which the city barricades were removed from the west end of Sherman Oaks Road. The counties barricades were removed after the District Court issued its June 6, 2006 decision .

A few years after the county erected these barricades, the county permitted two commercial driveways accessing onto CSAH 30, within and which runs north and south through Stacy, one for a new post office, having a width of 20 feet 10 inches, the second for a new office building, having a width of 22 feet 9 inches - both some 10 feet less than the county insisted was

mandated for Respondent's access to CSAH 19. (AE-18, and AE-19; See MATT-28, et sec.)

STANDARD OF REVIEW

An appeal court will not disturb a district court's determination unless it was clearly erroneous, unsupported by reasonable evidence, and the court is left with the definite impression that a mistake has been made. *Fletcher v. St. Paul Pioneer Press*, 589 N.S.2d 96 (Minn. 1999) at 101.

The interpretation of a statute is a question of law, which an appeal court reviews de novo. *Hibbing Educ. Ass'n v. Public Employment Relations Bd.* 369 N.W.2d 527, 529 (Minn. 1985).

SUMMARY OF ARGUMENTS

The District Court found and correctly held that the county must adopt a local ordinance to enforce the provisions of Minn. Stat. § 160.18, to regulate private accesses to county roads.

The District Court found and correctly held that an ordinance adopted to enforce Minn. Stat. § 160.18 must comply in the adoption of that ordinance with the requirements of Chapter 394 of Minnesota statutes.

The District Court failed to find that the County permitted 2 commercial driveway accesses onto CSAH 30 after it barricaded

Plaintiff's driveway access; evidence of the selective application of the county of its supposed regulation.

ARGUMENTS

1. DOES A COUNTY HAVE AUTHORITY TO REGULATE A PRIVATE ACCESS TO COUNTY ROADS WITH OUT ADOPTING AN ORDINANCE?

The county cites a number of decisions suggesting that it has "inherent ability" and "wide discretion" from its police powers to regulate its roads, concluding by citing *Gibson v. Commissioner of Highways*, 178 N.W.2d 727, selectively quoting "The right to control access is an exercise of the state's inherent police power", neglecting to recite the rest of that sentence: "which, if reasonably asserted, does not give a property owner the right to compensation by reason of the diversion of traffic", in a condemnation proceeding.

The county ignores the "reasonable asserted" requirement. Rather than beginning with broad, sweeping conclusions, the better approach seems to begin with a review of county powers.

COUNTY POWERS

Counties, like cities and towns, have no inherent powers; they are creatures of the legislature and have only those powers conferred by statute or are implied as necessary in aid of those powers expressly conferred. *Village of Brooklyn Center v. Rippen*, 96 N.W.2d 585, 255 Minn. 334 (1959).

The Minnesota Constitution provides in relevant part:

"Private property shall not be taken, destroyed or damaged for public use without just compensation, first paid and secured". *Article 1, Sec. 13, Minnesota Constitution.*

Minn.Stat. 117.025 Subd. 2 defines "taking", and states:

Taking and all words and phrases of like import include every interference, under the right of eminent domain, with the possession, or value of private property.

Minn.Stat. 117.01 provides, in relevant part, that:

All bodies, public and private, which have the right of eminent domain, when exercising that right, shall do so in the manner prescribed by this chapter, even though charter provisions, ordinance or statute...may provide a different procedure.

In *Burnquist v. Cook*, 220 Minn. 48, 19 N.W.2d 394 (Minn.

1945), the Court stated:

Under these provisions, we have held that an 'easement' is 'property' and may be taken, within the meaning of the constitution, and that a "private right of way" is land, and that its destruction by the state for public purposes is authorized, provided the owner of the dominant estate to which it is attached is compensated therefore. *19 N.W2d 394, at 397.*

The county argues that this is not a taking; it is merely "regulating" this access; it can do so by it's police power, and act directly under the delegation from the state legislature.

(Appellant's Brief, page 14.)

The District Court held that it could do so, but that first it was obligated to adopt an ordinance, as required by Minnesota Statutes, § 160.18, Subdivision 3, which states:

The owner or occupant of property abutting upon a public highway, having a right of direct 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 the 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 added)

The County admitted that it had not adopted any ordinances to address private accesses to county roads. (TE 63, Admission No. 1.).

SELF-EXECUTING / NON-SELF-EXECUTING STATUTES

The County nevertheless cites this statute as sufficient in and of itself as authority for regulating such accesses. However, that ignores the distinction of whether or not this statute is self-executing. *In Re Molly*, 712 N.W.2D 567 (Minn. App. 2006) addressed this issue (from the citations, a case of first impression in Minnesota). There, a city attempted to enforce Minn. Stat. c. 347, obtaining a court order that a dog that had mauled another small dog on its owners property was a "dangerous dog".

Minn. Stat. §§ 347.50 to 347.56 addressed "dangerous dogs; § 347.53 provided merely "that any...city, town or county may regulate potentially dangerous dogs". The city cited *City of St. Paul v. Whidby*, 259 Minn. 129, 712 N.W.2d 567, which held:

"...that municipalities' legislative authority is conferred upon them by the constitution and the laws of the state

:and, 'as to matters of municipal concern they have all the legislative power possessed by the Legislature of the state, save as such power is expressly or impliedly withheld' (712 N.W.2d, at 570);

The city in *Molly* argued that this language alone empowered it to enforce the dangerous dog statute.

The *Molly* court cited *Davis v. Burke*, 179 U.S. 399, 21 S.Ct. 210, and stated :

self-executing provisions supply 'a sufficient rule by means of which the right given may be enjoyed and protected or the duty may be enforced' and that provisions that 'merely indicate []principles, without laying down rules by means of which those principles may be given the force of law' are not self-executing. It is undisputed that [the city] has not incorporated or adopted the dangerous-dog statute or otherwise promulgated a procedure for its enforcement by ordinance... (*Molly*, at 570).

Molly's owner argued, and the Court held that this was a non-self-executing statute; that the city had the requisite authority to regulate dangerous dogs, but only if it first adopted the statute and a procedure that complies with due process. *Molly*, at 570 and 571.

Section 160.18, subdivision 3 is a non-self-executing statute. It clearly requires the County to adopt the required, reasonable regulations as;

"...necessary to prevent interference with the construction, maintenance, and safe use of the highway and its appurtenances and the public use thereof, complying with due process. Minn. Stat. 160.18.

Nor, as suggested, would the Minnesota Department of Transportation be "shock[ed]" to find it did not control access to its highways (*Amici*, p. 11). Indeed, it obviously concurs with requirement of a zoning ordinance, having adopted, promulgated and then recommending the adoption by local political units of its "Draft Trunk Highway Access Management Overlay Ordinance" (TE-67), the purpose of which is to "regulate the location and general design of public and private access to Trunk Highway ____...", indicating that it may be used by any county, city or township "with authority to regulate land use." (AE-20, p. 3) With little modification, it is easily adoptable by counties, and cities for that matter.

The County failed to adopt such an ordinance complying with the requirements of § 160.18; therefore it did not have authority to regulate, let alone, barricade Plaintiff's driveway access.

2. MUST A COUNTY ORDINANCE REGULATING ACCESS TO COUNTY ROADS BE ADOPTED PURSUANT TO CHAPTER 394 OF MINNESOTA STATUTES?

The District Court held that an ordinance implementing the provisions of Minn. Stat. 160.18 was an "official control", as defined in Minn. Stat. § 394.22, Subd. 6, which provides in relevant part:

"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 the means of translating into ordinances all or any part of the comprehensive plan...And may include but are not limited to ordinances establishing zoning, subdivision controls, site plan rules...and official maps. (emphasis added).

A "site plan" commonly addresses the access to a subject parcel. (See C&R's site plan, AE-14) *Advantage Capital v. City of Northfield*, 664 N.W.2d 421 (Minn.App. 2003). There, after a fire destroyed a three-unit dwelling, the owner submitted an application for a building permit and subsequently a revised site-plan review. The city rejected this site-plan for a number of reasons, one being the proposed access might be illegal.

On the issue of whether these two applications were governed by Minn. Stat. 15.99 (the 60-day rule) the court held that the site-plan related to zoning and was subject to this statute, but that a building permit and the State Building Code were not.

The approval of a site-plan granting full access to a public road, can be at issue in a condemnation proceeding. *Finke v. State*, 521 N.W.2d 371. (Minn.App. 1994).

The cost of preparing site-plans is lienable for architectural services under Minn. Stat. § 514.01. *Phillips-Klien v. Tiffany Partnership*, 474 N.W.2d 370 (Minn.App. 1991).

Under this reasoning, every privately owned parcel of land in Minnesota is a potential site-plan. Under the county's Access Permit process, "any change in use or alteration" must be by permit; the application must include "...a sketch of the property showing exact location of proposed access, any existing access and any other pertinent information." (AE-20, p. 1). Does this not require a site-plan?

While all zoning ordinances affect the use of private property in some manner or another, there are few factors that have a universal affect on every property owner and the development of every owned parcel - the access to a public road.

Most cities and towns in Minnesota are traversed by one or more county roads. Given the 123,000 miles of town, city and county roads in Minnesota (*Amici*, p.8) and the state highways (some 8,000 more) and the thousands, if not millions, of privately owned parcels abutting and accessing these roads, these presently unregulated accesses may well be one of the more critical issues in land use in the immediate future.

STAND ALONE ORDINANCES / ZONING ORDINANCES.

In adopting a stand-alone county ordinance under Minn. Stat. 375.51, a county is required only to publish notice of the hearing on that ordinance once in the designated official newspaper. Property owners are not made aware of the implica-

tions of such an ordinance regulating driveway accesses. Under Minn. Stat, 394.26, governing the adoption of county land use ordinances, copies of the notice of hearing must be sent to the "governing bodies of all towns and municipalities located within the county". What better way to alert the affected property owners without giving individual notice?

Additionally, with a stand-alone ordinance, once adopted, what is the recourse of an owner if he is mistreated under its provisions? If he has an established driveway 60 feet in width, and the ordinance permits a driveway width of only 40 feet, or he has used the driveway for commercial purposes, and the ordinance only allows for residential purposes, or his driveway is located on a hill, which might/should be addressed by line-of-sight requirements; his only recourse is to challenge the ordinance in court. See *Press v. City of Minneapolis*, 553 N.W.2d 80 (Minn.App 1996) (Where it is unclear whether a city official's interpretation complies with an ordinance, a remand is necessary).

Given the vast number, size and varied uses of the driveways accessing every public road in Minnesota, such ordinances would prompt numerous court challenges.

Most county ordinances, and those of cities, not regulating land use are enforceable by penal provisions. See, for example,

the Procedures and Specifications for Access Permits of Chisago County, (TE-50), and its one-half page Application for an Access Permit (TE-51), which apply to any change or alteration in the use of a driveway (TE-50, 1), which do not begin to address the issue of due process.

If an owner applies for a permit and the county denies it, his only recourse is a court action. If he changes his driveway without a permit, will the county charge him with a crime? If he applies for a permit and the county "sits" on it, he can then argue the 60 day rule! This should be a viable defense to a criminal proceeding. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604 (Minn. 1980) (because zoning ordinances restrict common law rights, they should be construed strictly against the governmental unit and in favor of property owners).

If the ordinance were required to comply with Minn. Stat. § 394.26, both the property owner and the county would benefit from the protections and procedures of the non-conforming use and variance provisions of Chapter 394; more importantly, the matter would be administered and resolved at the local level, without an unnecessary court challenge.

Mndot should be credited for recognizing these distinctions. In its "Draft Trunk Highway Access Management Overlay

Ordinance", cited above (AE-20), it recommends this ordinance as an "Overlay Zone":

to supplement the requirements of the City/County/Town of _____ zoning, subdivision, and other regulations that govern the use and development of property... (AE-20), p. 4, Sec. 2.3)

It addresses a "Non-conforming Access" (Sec. 4.4), "Conditional Uses", (Sec. 4.5), provides a wide array of standards, then adopts a procedure for the modification of those standards,

"to allow reasonable economic use of property as permitted by the underlying zoning and to provide reasonably convenient and suitable access to every legal lot or parcel of record. (Sec. 9.1, *emphasis added*).

This Model Ordinance reflects an understanding that the regulation of private accesses to highways, streets and roads affects a property owners use of the parcel; that to regulate it requires an ordinance complying with the statutory provisions of Chapters 394 and 462 of Minnesota laws.

COUNTY ZONING AND TOWNS.

Amici suggests that requiring a county to comply with Chapter 394 would impose an undue burden on Minnesota counties if they were required to adopt an ordinance to regulate private access driveways.

First, some 70 counties now have zoning ordinances in place, which must comply with Minn. Stat. Chapter 394. Those counties which do not are otherwise mandated by Minn. Stat.

§ 103F.215 to adopt the minimum standards of the model Shoreline Management Ordinance (applicable to all lands within 1000 feet of any lake or pond, or within 300 feet of any river or stream) in Minnesota. This model ordinance includes provisions for Variances, Conditional Uses and Nonconformities (Minn. Rule 6120.3900), as required for ordinances adopted under Minn. Stat. Chapters 462 (cities and towns) and 394 (counties); there should be little difficulty coordinating the two. See Minn. Rules, 6120.2500 to 6120.3900.

Amici states that "more than...1,200 towns have not adopted any zoning ordinances whatsoever". (*Amici*, p 8.) That is of little consequence; first, because, as noted, all of the counties have a land use ordinance in place, and second, even if a town adopts a zoning ordinance, the controls may not be "inconsistent with or less restrictive than" the controls in the county ordinance (Minn. Stat. 394.33, Subd. 1.). However, if a town were to regulate driveway accesses, with stricter regulations, that would only mean that the town and not the county would administer and implement them.

COUNTY ZONING AND CITIES.

There is no requirement that ordinances of a county be recorded with the county recorder; they need be only published once and recorded in the county ordinance book. If they are

lengthy, as most zoning ordinances are, a summary may be published, complying with Minn. Stat. §331A.01, noticing that a copy is available for inspection at the office of the county auditor. Minn. Stat. § 375.51. A property owner is otherwise completely unaware of its adoption or ramifications.

On the other hand, certified and complete copies of every county and city zoning ordinance must be recorded with the County Recorder, placing each property owner, lender and any prospective purchaser on notice of their adoption, and contents; notice of their recording will appear in every abstract and registered property certificate! (Minn. Stats. 394.35 and 462.36 respectively).

Minn. Stat. 394.32 permits a county to adopt a highway access ordinance and contract with any municipality for its implementation and enforcement with each affected city, the same as the Mndot model access ordinance, which seeks the cooperation of all counties, cities and towns. It is in the interests of each city and county to coordinate and cooperate in addressing this common, statewide concern, in the manner posed by MNdot.

3. DID THE COUNTY TREAT RESPONDENTS EQUALLY IN IMPOSING A MINIMUM WIDTH ON RESPONDENT'S DRIVEWAY ACCESS?

The District Court made no finding on this issue; Plaintiffs filed a Notice of Review on this issue.

The single issue relied upon by the County, aside from whether it had to adopt an ordinance to enforce Minn. Stat. § 160.18, was its insistence that Plaintiffs had to meet a 32 foot minimum width to have a commercial driveway. See letter from County Engineer of February 19, 1999, citing and containing parts from the State Aid Manual, setting forth this required width (TE-14), the State Aid Manual in its entirety (TE-53), and the County's Memorandum of Law in Support of its Motion for Summary Judgment, page 4, (County Appendix, page 88, et seq.). The Trial Court found, and correctly held that neither this Manual, nor the other policies and procedures relied upon by the County "had the force and affect of law to implement their contents". Court's Order for Judgment, entered June 16, 2006, Findings 9 and 10.

The county admitted that Plaintiffs driveway was 25.84 feet in width. (TE-14). After the county barricaded Plaintiff's driveway, the county permitted two new commercial driveways, accessing CSAH 30 in the city of Stacy, one being 20 feet, 10 inches in width, the second 22 feet, 9 inches in width, which were subject to the same supposed standards the county attempted to impose on Plaintiff's driveway.

While these permits were authorized after the county barricaded Plaintiff's access, they were also after the county

initially threatened legal action against Plaintiffs, and then, and without any notice whatsoever, unilaterally and arbitrarily, erected those barricades, evidence of the county's selective impositions.

ORDINANCES / RESOLUTIONS

In the event any merit is given to the discussion of ordinances/resolutions in *Amici's* brief (pp. 2 to 6), implying little difference, Plaintiffs address that discussion here.

In apparent support of its contention that an ordinance is not required to implement Minn. Stat. § 160.18, the brief of *Amici curiae* suggests that every municipal action does not require an ordinance; many actions require a simple resolution. One of its citations is misleading, and emphasizes the issue. Minn. Stat. § 163.11 does not contain a Subd. 11 (assuming the reference is to Subd. 1), it does indeed state that county roads maybe established by a resolution by the county board. However, that ignores the requirements of Chapter 117 of these statutes, requiring the county to commence a condemnation proceeding, thus complying with the requirement of due process. (*Amici*, pp 4).

The same is true for the citation to Minn. Stat. 160.08, Subd. 3, (controlled access, *Amici*, p. 5), but this section

makes no reference to any resolution; it is also governed by Chapter 117 of Minnesota Statutes requiring condemnation.

This brief then states, "...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". (Amici, p. 6) Plaintiffs agree.

Not to belabor the argument, but there are critical distinctions between an ordinance and a resolution.

1. Resolutions do not require a recording of the ye and nay votes. *Renner v. New Ulm Police Relief Assn.* 282 Minn. 411 (1969), at 416, 165 N.W.2d 225. Ordinances of all counties, cities and towns require the recording of these votes, to confirm that they received a majority of the votes (§s 375.51, 412.191 and 365.125 respectively; some statutes require an extra-majority vote). Additionally, each of these sections leaves no doubt whether the document is an ordinance or a resolution; each ordinance must have a preface stating "The [county/town board, or city council of ordains". There is no format whatsoever for resolutions.
2. Each ordinance must be published and recorded in that body's ordinance book within 20 days after its publication. See statutory references in next preceding paragraph. As *Amici* admit, "a resolution need not even be in writing to

be affective". (*Amici*, p. 4, footnote 2.)

3. "A "resolution is something less formal than an 'ordinance' and, generally speaking, is a mere expression of the opinion or mind to the council concerning some matter administration coming within its official cognizance (cite omitted), and no set form of words is essential if the requirement which calls for such expression is met". *Sawyer v. Weise*, 149 Iowa, 87, 127 N.W. 1091, cited in *Renner, supra*, at 416.
4. Perhaps the most critical distinction is that an ordinance must comply with the due process requirements cited in *In Re Molly*, *supra*. Indeed, the test may be that if a action by a local government body addresses or affects the rights or property of an individual, then it must be drafted to provide for due process.
5. It is apparently these distinctions that underlie the courts taking judicial notice of and admitting a properly presented, published ordinance of any municipality; if three years have passed since its publication, that is "conclusive proof of the regularity of [is] adoption and publication". Minn. Stat. § 599.13. This section also includes "resolutions", but since they are not commonly published they do not qualify for the benefit of the "conclusive proof" provision. If they are merely the "expressed opinions or mind" of the governing body, they will not likely be admitted in any event.

In conclusion, the county is expressly empowered to regulate private accesses to county roads, but only if it complies with the provisions of Minn. Stat, 160.18, which mandates the adoption of an ordinance to do so.

CONCLUSION

The District Court ruled correctly that the county could not regulate Plaintiff's driveway access onto CSAH 19 under Minn. Stat. §160.18 without first adopting an ordinance, and any such ordinance must comply with due process.

The District Court ruled correctly that an ordinance regulating driveway accesses to county roads was an "Official Control" under Minn. Stat. § 394.22, Subd. 6 and any such ordinance must comply with Chapter 394.

The District Court erred in failing to find that the county treated Plaintiffs unequally in the enforcement of its unfounded, minimum driveway standard, which evidenced an omission by the county to enforce its ordinances consistently.

Dated: January 29, 2007.

Barry L. Blomquist Law Office


Barry L. Blomquist #9040
Attorney for Plaintiffs/Respondents
PO Box 578 6356 Elm St.
North Branch, MN 55056
651-674-7830 FAX-7428