

NO. A06-2302

State of Minnesota
In Court of Appeals

C & R Stacy, LLC, et al.,

Respondents,

vs.

County of Chisago,

Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE COUNTY HAS THE STATUTORY AUTHORITY TO REGULATE ITS ROADS WITHOUT AN ORDINANCE.

The County has a statutory duty to regulate its highways. Minnesota Statutes §§ 162.02 and 163.02 are broad delegations of the state's authority to regulate highways for the health and safety of its citizens. Counties have the statutory authority to regulate highway access in particular, pursuant to Minnesota Statutes § 160.18. Section 160.18, subdivision 3, provides in part:

The owner...of property abutting upon a public highway...may provide...means of ingress from and egress to the highway...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.

The Minnesota Legislature has delegated the authority to regulate and maintain state-aid highways to the counties. Section 160.18 makes clear a property owner's right of access is subject to the County's "reasonable regulation" and permit requirement, necessary to ensure the safe use of the highway. The statute does not require the road authority to enact a specific ordinance to exercise the delegated power. The district court erred when it determined the County needed to adopt an ordinance to regulate access to a public road.

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

Minnesota Statutes §§ 160.18, 162.02 and 163.02 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 such a requirement. *See* Minn. Stat. §§ 645.08 and 645.19. A court cannot supply language that the legislature did not include in the statute. *Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001). 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 erred when it imposed that requirement.

B. Respondents' Self-Execution Argument is Unavailing.

Respondents argue § 160.18 is not a self-executing statute, citing to *In re Molly*, 712 N.W.2d 567 (Minn. App. 2006), and necessarily requires enabling legislation. Contrary to Respondents' assertions, an enabling ordinance is not required for a number of reasons.

First, whether a legislative directive is self-executing is a determination reserved for constitutional, not statutory, provisions. *See e.g., Bott v. DeLand*, 922 P.2d 732, 737 (Utah, 1996) (“Courts have developed the concept of self-execution as a means of determining whether a constitutional provision may be enforced without implementing legislation”). Statutory provisions are subject to principles of statutory construction, including, as mentioned, the principle that a court may not supply language the legislature did not include in the statute. In contrast, given the hortatory nature of some constitutional provisions, e.g., “the pursuit of happiness,” constitutional provisions are subject to the court’s determination whether they are self-executing. A constitutional provision is self-executing if it articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers. *Davis v. Burke*, 179 U.S. 399, 403 (1900). To

the extent *In re Molly* invalidates the city's enforcement of the "dangerous dog" statute because the statute is not self-executing, it violates principles of statutory construction and should not be followed here.

Second, if the principle of self-execution is applied here, the statutes at issue should be considered self-executing. The United States Supreme Court set forth the elements and characteristics of a self-executing constitutional provision in *Davis*. A provision is self-executing if it:

'supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law' It is self-executing only so far as it is susceptible of execution.

Davis, 179 U.S. at 403 (quoting Thomas McIntyre Cooley, *Constitutional Limitations* (6th ed. 1890) (emphasis added)).

Here, the statutes are self-executing because the duties imposed in §§ 160.18, 162.02 and 163.02 may be judicially enforced against the counties. In *Johnson v. County of Nicollet*, the Minnesota Court of Appeals held that pursuant to § 163.02, "counties have a statutory duty to construct, reconstruct, improve, and maintain county highways." 382 N.W.2d 209, 211 (Minn. App. 1986). Hence, a county could be liable under the statute if it failed to properly maintain its roads. *Id.* Likewise, if the County were to allow Respondents to construct and utilize an unsafe commercial access from CSAH 19 to Outlot A, the County could be held liable for allowing the unsafe access under § 160.18. Because the County could be found liable under the statutory provisions delegating it authority to regulate its roads, the statutes "suppl[y] a sufficient rule by

means of which...the duty imposed may be enforced,” and they should be considered self-executing. *Davis*, 179 U.S. at 403.

Third, this case is distinguishable from *In re Molly* because it is evident from the face of the statute (§ 160.18) that Respondents needed to obtain a County permit to construct the commercial access. *See* § 160.18 (property owner’s right of access is “subject to reasonable regulation by and permit from the road authority”). In *In re Molly*, the statutes at issue contained no similar language and did not notify Molly’s owners of the City’s authority to regulate or permit “dangerous dogs.” *See* 712 N.W.2d at 570 (rejecting argument Minn. Stat. § 347.53 authorized cities to regulate “dangerous dogs”). Here, the statute notifies a person seeking to construct a commercial access to a county road of the county’s authorization to regulate that access, and therefore the County has the authority to regulate and permit access without adopting an ordinance. *See Jones v. Town of Woodway*, 425 P.2d 904 (1967).

In *Jones*, the Washington Supreme Court held that property owners acquired no right to have their subdivision plans automatically approved merely because, when they filed a plat, the town had not adopted platting regulations. The court decided it was evident from the statute that a platter must seek plat approval from town authorities, and therefore the town council had statutory authority to exercise discretion in the field of platting without adopting an ordinance. *Id.* at 908-09. Similarly, section 160.18 provides that a property owner’s right of access is secondary to the county’s imposition of reasonable regulations and permitting requirements. It is evident on the face of the

statute that a property owner must seek approval from county authorities to construct a commercial access to county state-aid highways.

Moreover, Respondents received actual notice of the permitting requirement in addition to the notice provided in the statute. The County's rules, regulations and permitting requirements were in place prior to the Respondents' construction of the new access. *A-345-50; Trial Court Transcr.* 81-83, 111-12. The County notified Respondents on February 19, 1999, commercial accesses must be a minimum of 32-feet wide and the commercial access proposed from Outlot A did not meet that requirement. *Ex. 14*. Later that month, the County notified Respondents it would not authorize them to construct a commercial access to CSAH 19. *A-328; Trial Court Transcr.* 81, 114. The County repeatedly notified Respondents no access would be allowed from Outlot A. Respondents were fully aware of the County's access regulations and permitting requirements before they constructed the commercial access. This case is therefore distinguishable from *In re Molly*, where the city had not adopted regulations or policies regarding dangerous dogs, and Molly's owners were unaware of the city's authority to regulate them.

In sum, even if the concept of self-execution is applied here, the statutes at issue are distinguishable from the statute analyzed in *In re Molly*. The duties to regulate roads and access may be enforced against the counties and therefore they are self-executing. *See Davis*, 179 U.S. at 403. In addition, Respondents had actual and statutory notice of the County's permit requirement. The statutes are self-executing and the County need not adopt an enabling ordinance to regulate highway access.

C. No Other Authority Requires the County to Adopt an Access Ordinance.

Respondents argue that because the Minnesota Department of Transportation (“MNDOT”) adopted a “Draft Highway Access Management Overlay Ordinance,” the County needed to adopt an access ordinance. Though the County could adopt such an ordinance, it need not. The existence of a draft overlay ordinance does not alter the analysis whether the County needs to adopt an ordinance before it can regulate road access.

Respondents argue the County needs to adopt an access ordinance pursuant to Minnesota Statutes chapter 394. *See Res. Br. p. 14.* As set forth above, Appellant need not adopt an access ordinance, but if it did, it would not have to adopt one as an “official control” pursuant to Minnesota Statute §§ 394.22 and 394.26. An official control is an ordinance that sets forth the objectives of a comprehensive plan. Minn. Stat. § 394.22, subd. 6. As discussed in the Brief of *Amici Curiae*, many local governments choose not to zone or create comprehensive plans because of the complexity involved. More than 1,200 of Minnesota’s towns have not adopted any zoning ordinances whatsoever. *See Amici Br. p. 8.* Even the local governments that have not entered the zoning arena devote a large part of their time and budget to roads and transportation because they have the responsibility to regulate and maintain the transportation systems within their jurisdiction. As discussed by *Amici*, local governments regulate many aspects of property ownership without relying on their authority to zone. *See Amici Br. p. 10.* The characterization of an access ordinance as a “zoning” ordinance that sets forth the

objectives of a comprehensive plan unnecessarily subsumes a local government's authority to zoning law. Instead, local governments have authority to regulate road access pursuant to statutes and their general police power. They need not adopt access ordinances, and even if they did, they need not be adopted as "official controls."

II. THE COUNTY HAS THE AUTHORITY TO REGULATE ITS ROADS PURSUANT TO ITS GENERAL POLICE POWERS.

In addition to the specific statutory authority to regulate its roads, the County has authority to regulate them pursuant to its general police powers. 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). "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). 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, the County has the ability to regulate road access pursuant to its police powers. 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 right

to control access is an exercise of the state's inherent police power.” *Gibson*, 178 N.W.2d at 499.

Here, even if the Court were to find the County could not regulate road access directly under the statutory delegations, the County could still regulate access pursuant to its general police powers without an access ordinance. Respondents' right of access is subject to the County's reasonable regulations, and the district court should be reversed.

III. RESPONDENT HAS NOT PROVED A CLAIM OF SELECTIVE ENFORCEMENT.

Respondents argue the district court erred when it failed to find the County permitted two driveways less than 32-feet wide to access CSAH 30. *See Res. Br. p. 22.* Respondents presumably attempt to state a claim for selective enforcement of the County's permitting requirements. Any such claim is without merit. First, Respondents never plead a claim of equal protection violation or selective enforcement. *See Complaint, A-3.* Respondents have therefore waived such claim and the district court did not err when it did not find the County permitted narrower driveways. Moreover, no evidence of selective enforcement was introduced at trial, and even if it were, Respondents fail to establish a claim of selective enforcement as a matter of law.

A. The District Court Did Not Err When It Failed to Find the County Treated Respondents Unequally.

The district court's findings of fact are accorded great weight and should not be overturned unless clearly erroneous. Minn. R. Civ. P. 52.01. When determining whether a district court's findings of fact are clearly erroneous, an appellate court “takes the view of the evidence which is most favorable to the trial court's findings” and defers to district

court credibility determinations. *Trondson v. Janikula*, 458 N.W.2d 679, 682 (Minn. 1990); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). The court should not rule the finding clearly erroneous unless it is “left with the definite and firm conviction that a mistake [was] made.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quoting *Gjovik v. Strobe*, 401 N.W.2d 664, 667 (Minn. 1987)).

Here, Respondent Mel Aslakson testified he took photos and measured the driveways entering County Road 30 in downtown Stacy, and two driveways measured less than 32-feet wide. *See Tr. Transcr.* pp. 38-40; Exs. 59; 60. Chisago County Engineer Bill Malin, however, rebutted this testimony. He specifically testified one of the driveways in question – the access to Stacy Commons – measured 32-feet wide at the curb. *See Tr. Transcr.* pp. 145-146. The trial court was within its discretion to disbelieve Aslakson’s testimony and credit the testimony of Malin. This Court should not disturb the district court’s credibility determinations. *Trondson*, 458 N.W.2d at 682. Moreover, the only evidence submitted was Aslakson’s testimony and photographs. The district court correctly determined his unofficial measurements were insufficient to establish the County selectively enforced its regulations.

B. Respondents’ Claim for Selective Enforcement Fails as a Matter of Law.

The Fourteenth Amendment’s equal protection clause forbids the intentional, discriminatory enforcement of municipal ordinances. *State v. Vadnais*, 295 Minn. 17, 19, 202 N.W.2d 657, 659 (1972). To prove discriminatory enforcement, Respondents:

bear[] the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against [them], [they

have] been singled out for prosecution, and (2) that the government's discriminatory selection of [them] for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of a constitutional right. [Respondents] must prove discriminatory enforcement by a clear preponderance of the evidence.

State v. Hyland, 431 N.W.2d 868, 872-73 (Minn. App. 1988) (quoting *State v. Russell*, 343 N.W.2d 36, 37 (Minn. 1984)).

Apart from their contention that the County has permitted two driveways less than 32-feet wide, Respondents offer no evidence the County has selectively enforced its regulations and requirements. In short, the County did not violate Respondents' equal protection of the laws, and any such purported claim should be dismissed.

CONCLUSION

The district court erred in its application of the law. The County has the authority, pursuant to state statutes and its general police power, to regulate the access to its highways. The County did not need to adopt a specific ordinance before it exercised its authority over highway access. Accordingly, this Court should reverse the district court's determination the County is liable for a taking based upon its enforcement of its access regulations and permit requirements.

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