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How About A Little Access Here?

By Peter J. Coyle

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In the world of real estate, every successful development project can be summarized by the cliché: "location, location, location." While location remains important, for some developments, property location is giving way to "access, access, access" as the most important factor in determining future success. Access to public roadways is a property right protected by the Minnesota Constitution. Closing access damages a valuable property right.

Unfortunately, Minnesota law does not always require payment of compensation to the owner, even when there is clear damage to the fair market value of property. Government agencies, sensing an opportunity, have been more than willing to force uncompensated access closures in light of the uncertainty.

ACCESS RIGHTS ARE PROPERTY

Minnesota case law has frequently addressed the issue of access. Hendrickson v. State said that property owners have a right to "reasonably convenient and suitable access" to an abutting public street. However, Kick's Liquor v. City of Minneapolis said that the question of what constitutes "reasonably convenient and suitable access" is a question of fact. Closure of a median crossover, which preserves one-way access from a parcel to the roadway, preserves reasonably convenient and suitable access and does not entitle a landowner to compensation. Dale Properties v. State. However, for corner lots with access to two roadways, installing a median on one road that cuts off reasonable access to the other, may be compensable. County of Anoka v. Esmailzdeh. Under Esmailzdeh, the traffic-dependent use of the property for a gas station/convenience store created an issue for trial. Replacing direct access with circuitous frontage road access (Hendrickson) or a cul-de-sac (Kick's Liquor) may also entitle the property owner to compensation.

Recently, the City of Minneapolis was required to pay the owner of a liquor store damages for closing a street without a lawful basis for doing so. The effect of the street closing was to deny reasonable access to the business for its customers. According to the court, the City acted unilaterally to close the street, without credible traffic engineering support or other sufficient police power justification.

SUBDIVISION APPROVALS

When considering a subdivision approval, a municipality may require the dedication of property for public use. In the context of a formal plat application, arguably, a municipality may require the dedication of existing access rights, just as it may require dedication of fee interest in property for utilities or a park, as long as the dedication serves a recognized public purpose. The right to require dedications is not unlimited, however, and a taking may occur if the dedication does not meet standards established by the United States Supreme Court. In Dolan v. City of Tigard, the Supreme Court stated:

> In evaluating petitioner's [takings] claim, we must first determine whether the 'essential nexus' exists between the "legitimate state interest" and the permit condition exacted by the City. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.

The Supreme Court in Dolan adopted a "rough proportionality" test as the second inquiry, which requires a city to make an individualized determination that the required dedication is related both in nature and scope to the impact of the development. If a dedication fails to meet this test, there has been a taking for which just compensation is due.

Minnesota property owners have had to accept the reality that closure of access to their property from one direction does not trigger a sufficient property interest requiring government compensation, notwithstanding objective evidence of substantial financial harm. Now regulatory bodies are attempting to make the jump from median closures to removal of access at the property line.

The Minnesota Department of Transportation (MnDOT) has now taken the position that it is entitled to unilaterally close access to property from a state highway, without compensation, based solely on a one-sided determination that there is a "change in land use." MnDOT relies for its authority on a little-noticed regulation,

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Minnesota Supreme Court Revisits Historic Preservation

By Neal J. Blanchett

The Minnesota Supreme Court recently took up Minnesota's historic preservation law, issuing a ruling with important implications for property owners and local governments in Billy Graham Evangelistic Association v. City of Minneapolis. The case illustrates the reality that neighborhood groups and local governments are using historic preservation in a more sophisticated and coordinated way. So far, Minnesota courts have not taken a hard look at the uses, and potential abuses, of historic preservation power. It remains to be seen whether this relatively free reign for local governments will continue. In the meantime, the decision underscores the importance of planning prudently for the use of property that is, or might someday be considered historic.

HISTORIC PRESERVATION LAW IN MINNESOTA

Minnesota's historic preservation restrictions arise from two state statutes. First, Minnesota's Heritage Preservation Act allows local governments to create Heritage Preservation Commissions, designate historic properties (including large historic districts), and place controls on those properties to preserve their historic character. A city can draft its own standards for historic designation, so long as the standards fit within the broad confines of state law. Once property is designated historic, a city can impose controls over its alteration, demolition, and use. Heritage Preservation Commissions are typical in Minnesota's larger cities, and in long-established cities such as Excelsior and Stillwater.

A second power arises from Minnesota's Environmental Rights Act, or MERA. The MERA generally protects any "resource" of the state, including historic properties. A property can be considered a protected "resource" even if it has not been designated historic. Under MERA, private parties have the power to sue on behalf of the state to protect historic resources. Once such a suit begins, it's up to the court to decide whether or not the property must be protected, based on the evidence the parties bring forward. Typical MERA lawsuits begin when an old property is proposed to be redeveloped. The redevelopment waits while the litigation winds to conclusion. Proper planning is essential to avoid or minimize this delay when redeveloping historically sensitive areas.

BILLY GRAHAM'S PLIGHT

The Billy Graham Evangelistic Association (or Billy Graham) owned three buildings on most of a block of prime real estate in downtown Minneapolis. According to newspaper accounts, city officials and downtown residents desperately wanted a new grocery store downtown. Real estate realities, combined with thin grocery profit margins, made it virtually impossible for a grocer to afford downtown real estate. Grocers simply could not compete with prices offered by business and residential buyers, especially for a large contiguous site like Billy Graham's. In a highly charged political climate where developer subsidies were a hot issue, the City was not willing to subsidize a grocer's purchase. The City's strategy was to remove the possibility of highest and best use by including the site within a historic district.

The problem was that everyone recognized that the Billy Graham buildings were not really historic. Instead, one report characterized some of them as "contributing" to the larger historic district because they had been built in the same decades and had "co-existed" with the district's truly historic buildings. One building was found "non-contributing" but half of it was included within the boundaries of the historic district.

Both the Court of Appeals (who had found for Billy Graham and struck down the historic designation) and the Supreme Court dissenting judges closely examined the City's reasons for placing the historic district boundaries in a particular place, and for including or excluding particular buildings. The Supreme Court majority, however, refused to demand specific findings on each part of the City's decisions to include certain buildings or exclude others. Instead, it asked only whether broad findings could support the district as a whole. Faced with differing views of at least three experts and of City staff, the Supreme Court specifically noted that the City's criteria were "subjective," not objective, and allowed the City to exercise its "judgment" about those subjective factors. The Supreme Court ruled that the city could exercise its individual judgment, using subjective and broadly-defined criteria, without acting arbitrarily or capriciously.

> "The problem was that everyone recognized that the Billy Graham buildings were not really historic."

WHAT SHOULD A PROPERTY OWNER DO?

The Billy Graham decision clearly makes it much more difficult to challenge local historic designation decisions. That makes it more important than ever to thoroughly document and present evidence at the local decision level, rather than in litigation. Property owners can protect themselves by knowing local ordinances and knowing the status and history of their property, as a part of due diligence. The decision also underscores the importance of very specific findings for each part of historic designation. A city may be able to sustain its decision without these specific findings, but without them, a property owner whose property is designated historic against his wishes may be left with nothing to challenge.

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providing as follows: "In the event of a change in land use or major change in the traffic pattern of the existing facility, existing driveways are not automatically perpetuated and new driveway access applications shall be submitted." Minn. Rules 8810.5200.

In promulgating the above regulation, MnDOT relies for statutory support on the following:

> 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 purpose, subject to reasonable regulation by and permit from the road authority. Minn. Stat. 160.18, subd. 3 (emphasis added).

With the stroke of a pen, and without public input, MnDOT has taken on the role of local government zoning administrator, determining the existence of a change in land use without due process or factual support.

Recently, MnDOT rejected a local city council's determination that a proposed drug store, in place of an convenience store with motor fuel sales and a liquor store, was not a change in land use. This conclusion was based on a determination that one form of convenience retail merely was being replaced with another form of convenience retail. The municipality expressly found, after public hearings held for the purpose, the proposed use complied with that municipality's comprehensive plan and zoning ordinance. Public safety arguments were not, by themselves, compelling since the property in question had not been the subject of any accident reports; moreover, the relevant traffic analysis documented that the proposed retail use would reduce traffic to the property, when compared to existing permitted uses. To make it more frustrating for the property owner, MnDOT had no objection to preserving the current access for the existing, more intensive retail uses on the property. Only changing to another, less intensive retail use would, according to MnDOT, trigger the uncompensated access closure.

All owners of property understand that individual interests sometimes must be sacrificed for the collective good. In this regard, zoning and subdivision controls routinely encumber the use of property. Even access closure is accepted when the closure occurs on property under the exclusive control of a public agency, such as is the case when closing cross-over traffic with a median or in the case of a subdivision application. But, when government uses its power to unilaterally force an individual property owner to forfeit established legal access, fair compensation for the taking of valuable property should be awarded. ■

Perhaps the most disturbing aspect of the decision is its failure to examine municipal motives, which here, if newspaper accounts were correct, were directed to depress the property's value, prevent the highest and best use, and frustrate the owner's plans. The benefits of owning unique or historic property can be tremendous. Historic designation can mean the difference between keeping control of that property's future, or giving it up for "the public good" however that good is defined at the moment. More than ever, property with historic potential must be evaluated and planned carefully to preserve the benefits while avoiding the pitfalls of historic character. ■

NEAL J. BLANCHETT *is a member of Larkin Hoffman's Land Use and Real Estate Department. His practice is concentrated in the areas of zoning, development and building approvals, land use and transportation policy, municipal law, and residential real estate. Neal can be reached at 952-896-1553 or nblanchett@larkinhoffman.com.*

Profile

PETER J. COYLE

Working on Behalf of Builders and Developers at the Capitol

PETER J. COYLE is the chair of Larkin Hoffman's Government Relations Department and a member of the firm's Land Use and Real Estate Department. He represents private developers, builders and land owners seeking development entitlements before local units of government, the Metropolitan Council and state agencies. Mr. Coyle also represents private and public clients at the state legislature on issues of importance to firm clients.

Mr. Coyle has developed a specialty practice dealing with land development and building fee issues unique to the residential building industry. His work for builders and developers at the local government level has enabled him to identify and target issues and opportunities to be addressed on behalf of the Builders Association of Minnesota and Builders Association of the Twin Cities at the Minnesota Legislature. Recent examples of success include his work in support of development fee, development moratoria and non-conforming use legislation, which passed the 2004 legislature at the urging of BAM, BATC and other affected trade groups.

Mr. Coyle has served as Staff Director and Chief Counsel to United States Senator Rudy Boschwitz and the U.S. Senate Committee on Small Business in Washington, D.C., with responsibilities for trade, taxation, labor, insurance and banking issues.

Mr. Coyle received his bachelor's degree, *magna cum laude*, from St. Cloud State University in 1979, majoring in public administration and his juris doctor, *cum laude*, from Hamline University Law School in 1984. He serves on Larkin Hoffman's Board of Directors and coordinates hiring of new attorneys. ■

IN BRIEF

GRIFFITH ASSISTS HARTFORD GROUP IN APPROVAL OF LEGACY VILLAGE NORTH

■ Larkin Hoffman attorney **Bill C. Griffith** assisted the Hartford Group in obtaining approval from the City of Apple Valley for Legacy Village North. The 26-acre mixed use project features approximately 500 residential units of various types and 300,000 square feet of commercial uses. Balancing the private development are public park, plaza and pedestrian facilities. Griffith is a shareholder in Larkin Hoffman's Land Use and Real Estate Department.

LARKIN HOFFMAN ATTORNEYS COMPLETE LAND ACQUISITION FOR CITY OF OAK GROVE

■ The City of Oak Grove recently acquired several parcels of land within the West Lake George Redevelopment Project. Blighted and substandard buildings were acquired to make way for a new senior apartment building developed by the Anoka County Housing and Redevelopment Authority. In addition, the City will solicit proposals to develop single family homes as part of a master planned lakeshore community that contains a city park and walking trails. **Bill C. Griffith**, a shareholder in Larkin Hoffman's Land Use and Real Estate Department and **Larry D. Martin**, **James M. Susag**, **C.J. Deike** and **Anne M. Olson**, all members of Larkin Hoffman's Real Estate Litigation Department, assisted with the transaction.

RENNEKE ASSISTS WITH STONEHILL APARTMENTS FINANCING

■ Collateral Mortgage Capital LLC recently funded $10 million in mortgage financing for Stonehill Apartments, a multifamily development in Plymouth. Larkin Hoffman attorney **Gary A. Renneke** assisted with the transaction. Built in 1987, Stonehill Apartments is a 224-unit apartment complex sited on 16.26 acres of land. Renneke is a member of the firm's Land Use and Real Estate Department.

COYLE ASSISTS IN APPROVAL OF GRANDVIEW COMMONS

■ Larkin Hoffman attorney **Peter J. Coyle** represented Stonebridge Acquisition and Development, LLC in securing approval by the City of Burnsville of Grandview Commons, a mixed-use project consisting of residential condominium units and 40,000 square feet of office condominium space. Coyle is a member of Larkin Hoffman's Land Use and Real Estate Department and chair of its Government Relations Department.

LARKIN HOFFMAN WINS FAVORABLE DECISION FOR CHICAGO TITLE AND MM&S INVESTMENTS

■ Larkin Hoffman attorneys **Gary A. Van Cleve** and **C.J. Deike** recently received a favorable decision for their client, Chicago Title Insurance Company and MM&S Investments Corporation (formerly known as Miller & Schroeder Investments Corp.) from the Minnesota Court of Appeals. In this case, the court upheld a decision by the Hennepin County District Court that the client's $4 million mortgage was valid and enforceable. The mortgage was challenged by a group of limited partners who had been defrauded by their general partner out of the real property on which the mortgage was placed. The court held that the limited partners were entitled to recover the property, but their recovery was subject to the client's mortgage, which was required to be repaid. Van Cleve and Deike are members of the firm's Real Estate Litigation Department.

DIETZEN APPOINTED TO ADVISORY COMMITTEE

■ The Minnesota Supreme Court has appointed **Christopher J. Dietzen**, a shareholder in Larkin Hoffman's Real Estate Litigation Department, to the Advisory Committee to the Board on Judicial Standards considering changes to the Rules of the Board on Judicial Standards and the Code of Judicial Conduct. The committee will focus on conduct concerning judicial elections.

LARKIN HOFFMAN WINS REAL ESTATE LITIGATION CASES

■ Larkin Hoffman attorneys **Gary A. Van Cleve** and **C.J. Deike** recently won a summary judgment motion in Dakota County District Court concerning a dispute over the enforceability of two purchase agreements for developable land in Farmington and Rosemount. The court agreed that neither purchase agreement was enforceable, freeing up the land to be sold to other interested purchasers. Van Cleve and Deike also recently won an affirmance from the Minnesota Court of Appeals in a Sherburne County land contract dispute, where the court agreed that the opposing party had failed to properly exercise its option to purchase over 900 acres of developable land. The Minnesota Supreme Court declined to review the case upon the request of the opposing party. Van Cleve and Deike are members of the firm's Real Estate Litigation Department.

KORSTAD APPOINTED TO U.S. POWER SQUADRONS COMMITTEE

■ **Gregory E. Korstad** is one of six lawyers recently appointed to the National Law Committee of the U. S. Power Squadrons, a 60,000 member volunteer organization promoting boating safety and education. Korstad is the Chair of Larkin Hoffman's Land Use and Real Estate Department.

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