

**STATE OF MINNESOTA**  
**COUNTY OF RAMSEY**

**DISTRICT COURT**  
**SECOND JUDICIAL DISTRICT**

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UNITY CHURCH OF ST. PAUL and WHITE  
BEAR UNITARIAN UNIVERSALIST CHURCH,

Plaintiffs,

and

ADATH JESHURUN CONGREGATION, et al.,

Intervening Plaintiffs,

Court File No. C9-03-9570

and

Judge John T. Finley

THE CITY OF MINNEAPOLIS,

Case Type: Other Civil

Intervening Plaintiff,

and

PEOPLE SERVING PEOPLE, INC., et al.

Intervening Plaintiffs,

v.

STATE OF MINNESOTA,

Defendant.

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**MEMORANDUM IN SUPPORT OF RELIGIOUS INTERVENORS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT ON COUNTS SIX AND FIVE**

**INTRODUCTION**

This lawsuit challenges the constitutionality of the so-called Minnesota Citizens' Personal Protection Act of 2003 ("the Act"), known popularly as the "conceal-and-carry" law.<sup>1</sup>

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<sup>1</sup> Notwithstanding the popular label, the Act does not require that a firearm carried pursuant to permit be concealed.

The Act liberalized the issuance of firearms permits by a “shall issue” test, and reduced dramatically the rights of private property owners to prohibit the carrying and possession of firearms on their properties. The Act was part of a larger law, S.F. No. 842, passed by the legislature and then signed by the Governor on April 28, 2003.

This motion is brought by intervenors Adath Jeshurun Congregation, et al. (collectively, “Religious Intervenors”). Religious Intervenors include congregations of Jewish, Unitarian, United Church of Christ, Lutheran, Episcopal, and Catholic denominations. Religious Intervenors also include an international denomination, Eckankar, a religious order, the Sisters of St. Joseph of Carondelet, and the Minnesota Methodist and UCC Conferences.

Religious Intervenors are owners of private religious property. The standing of religious property owners to challenge the constitutionality of the Act has been recognized by the Minnesota Court of Appeals. See Edina Community Lutheran Church v. State of Minnesota, A03-723 (Jan. 13, 2004) (copy attached).

Religious Intervenors challenge the Act through Religious Intervenors’ First Amended Complaint in Intervention, consisting of six Counts:

- Count One – Freedom of religion, Minnesota Constitution.
- Count Two – Freedom of association, U.S. Constitution.
- Count Three – Freedom of speech and religion, U.S. Constitution.
- Count Four – Religious Land Use Act of 2000.
- Count Five – Taking without compensation, Minnesota and U.S. Constitutions.
- Count Six – Law embracing more than one subject, Minnesota Constitution.

Religious Intervenors move for summary judgment on Counts Six and Five. Separately, two Religious Intervenors, Gloria Dei Lutheran Church and Eckankar, have moved for summary judgment on Count One.

## SUMMARY OF ARGUMENT

1. Religious Intervenors are entitled to summary judgment on Count Six. The Act is part of a larger law, S.F. No. 842, that embraces more than one subject in violation of Article IV, Section 17 of the Minnesota Constitution. S.F. No. 842 began as the “natural resources” technical bill. It contained no reference to firearms and passed the Senate unanimously. Conceal-and-carry provisions on the subject of “public safety” were added by amendment in the House. By the controlling case of Associated Builders & Contractors v. Ventura, 610 N.W.2d 293 (Minn. 2000), the law embraces more than one subject.

2. Religious Intervenors are entitled to summary judgment on Count Five. One provision of the Act, found at Minn. Stat. § 624.714, subd. 17(c) (“Subdivision 17(c)”), commands that private property owners may not exclude from their parking facilities and parking areas persons who carry firearms by permit. A second provision of the Act, found at Minn. Stat. § 624.714, subd. 17(e) (“Subdivision 17(e)”), commands that landlords may not restrict the carry or possession of firearms by tenants or their guests. These provisions constitute the State taking easements for itself and for the benefit of permit holders. The taking of an easement is a physical taking under controlling United States Supreme Court precedent and Minnesota law. As the State has not commenced eminent domain proceedings and paid just compensation, Subdivisions 17(c) & (e) violate the “takings” provisions of Article I, Section 13 of the Minnesota Constitution and the Fifth Amendment to the United States Constitution.

## STATEMENT OF UNDISPUTED FACTS

### **I. S.F. NO. 842, RELATING TO NATURAL RESOURCES, WAS TRANSFORMED BY THE HOUSE'S CONCEAL-AND-CARRY AMENDMENT.**

The statute that changed Minnesota law regarding the carrying and possession of firearms began as a bill having nothing to do with firearms. S.F. No. 842 was introduced as “A bill for an act relating to natural resources.” Affidavit of Nicole M. Moen (“Moen Aff.”), Exhibit 3.<sup>2</sup> S.F. No. 842 was introduced as the “DNR technical bill.” A technical bill is one introduced at the behest of an executive department to correct minor problems in statute. Such bills are also known as “department housekeeping bills.” T. Todd, Overview of the Legislative Process, at 5 (Minnesota CLE Jan. 23, 2004). The 2003 DNR technical bill contained, among others, provisions regarding snowmobiling, fish houses, and littering. Ex. 3.

As is typical of technical bills, identical bills were introduced in the Senate and the House. The Senate sponsors of the DNR technical bill were bipartisan, including the Republican Senator Gen Olson and DFL Senator John Marty, the chair of the Senate Environment and Natural Resources Committee. Ex. 1. An identical “companion” DNR technical bill was introduced in the House, H.F. No. 823. Exs. 9, 10. The lead author was freshman Rep. Tony Cornish. Each bill was titled, “A bill for an act relating to natural resources . . . .” Exs. 3, 10.

The Senate DNR technical bill was referred to the Senate Environment and Natural Resources Committee. Ex. 1. The House DNR technical bill was referred to the Environment and Natural Resources Policy Committee. Ex. 9.

After a committee report, the Senate version of the bill was put on the Senate’s Consent Calendar and then, on March 24, 2003, it passed by a 65-0 vote. Exs. 1, 4. S.F. No. 842 then went to the House of Representatives.

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<sup>2</sup> All references to “Ex.” are to exhibits attached to the Moen Affidavit, submitted herewith.

Also in the House, but on an entirely different track, was H.F. No. 261, a conceal-and-carry bill authored by Rep. Lynda Boudreau. Ex. 11. Among the co-authors were Rep. Cornish and House Speaker Steve Sviggum. Dubbed the Minnesota Citizens' Personal Protection Act of 2003, its title was "A bill for an act relating to public safety." Ex. 12. H.F. No. 261 was introduced on January 30, 2003, by Rep. Boudreau and was referred to the House Civil Law Committee. Ex. 11. Thereafter it was considered by the House Judiciary Policy and Finance Committee and the House Ways and Means Committee. It was placed on the House's Calendar for consideration. Exs. 11, 12.<sup>3</sup>

On April 23, 2003, S.F. No. 842, the DNR technical bill, passed unanimously by the Senate, was brought to the House floor. Exs. 5, 6. The Speaker called on Rep. Cornish, the author of the House companion bill, to explain S.F. 842. Said Cornish: "Mr. Speaker and Members, this bill is the, what's known historically as the DNR technical bill, Senate File, now, 842. . . . It's a lot of technical language . . . ." Ex. 6, p. 1.

Unlike the Senate, the House did not proceed to pass the DNR technical bill. Instead, Representatives Cornish and Boudreau proceeded in two steps to attach to the DNR technical bill, S.F. No. 842, Boudreau's conceal-and-carry bill, H.F. No. 261. First, citing the reference in S.F. No. 842 to snowmobile safety courses completed in another state, Rep. Cornish offered an amendment that would allow the Commissioner of Natural Resources to recognize other states' safety courses for off-highway motorcycling, boating, and hunting. Exs. 5, 6. Cornish's amendment passed by voice vote. Ex. 5. Second, citing the reference in Rep. Cornish's amendment to hunting safety, Rep. Boudreau offered her conceal-and-carry amendment, which was essentially H.R. No. 261. Ex. 5.

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<sup>3</sup> Conceal-and-carry bills were also introduced in the Senate, but the leading bill, S.F. No. 222, was withdrawn by its author after committee hearing.

Objection was made that the Boudreau amendment was not germane.<sup>4</sup> Exs. 5, 6. Rep. Boudreau argued that, because her amendment included references to firearms training and reciprocity with other states, it was germane to the DNR technical bill as changed by the Cornish amendment. Ex. 6.<sup>5</sup>

Speaker Steve Sviggum, himself a co-sponsor of Rep. Boudreau's conceal-and carry bill, H.R. No. 261, confessed that he was "in some doubt" on germaneness, so he referred the question to the members. Ex. 6. By voice vote, the House rejected the objection. Exs. 5, 6.

Rep. Boudreau then introduced her amendment as follows: "Thank you Mr. Speaker and Members. It is my pleasure to stand before you and present this amendment. And as I'm sure you're aware this is the amendment, the Citizen's Personal Protection Act, otherwise known as H.F. 261." Ex. 6.

In the debate that followed, the House rejected most amendments to the Boudreau amendment, but did add one proposed by Rep. Lynne Osterman creating a lifetime ban on firearm possession for violent felons. Ex. 5. The Boudreau amendment passed 88-46. Exs. 2, 5. Thereafter, Rep. Cornish, the House sponsor of the DNR technical bill, quipped: "Members, I just wanted to let you know that I support this simple DNR technical bill and I would encourage you to vote green and next week I will have refreshments in back because this is my first bill. Thank you very much." Ex. 6, p. 89.

The House passed S.F. No. 842 as amended by the same 88-46 vote. Exs. 2, 5.

Neither the Cornish amendment nor the Boudreau amendment designated a new title for the S.F. 842. The Boudreau amendment simply directed, "Amend the title accordingly."

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<sup>4</sup> Minnesota House of Representatives Rule 3.21 provides: "A motion or proposition on a subject different from that under consideration must not be admitted under guise of its being an amendment."

<sup>5</sup> By subpoena duces tecum, Religious Intervenors sought documents and testimony from Rep. Boudreau on this and other subjects. Rep. Boudreau refused to produce documents and be deposed, claiming "legislative immunity." Ex. 15.

Ex. 5, p. 22. Thus, when the House sent S.F. No. 842 back to the Senate, the title still read, “A bill for an act relating to natural resources . . . .” Ex. 7, p. 1389.

On April 28, 2003, S.F. No. 842, now including the Act, returned to the Senate. Under the rules of the Legislature, no amendments were allowed. See Joint Rules of the Senate and House of Representatives 2.04-2.06. Senator Gen Olson moved that the Senate concur in the House amendments. Ex. 7. Senator John Hottinger moved that the Senate not concur but refer the bill to a conference committee. Hottinger’s motion failed, 31-36. Olson’s motion passed, 36-31. Ex. 1, 7. The Senate then repassed S.F. No. 842, including the Act, by a 37-30 vote. Exs. 1, 7.

Because S.F. No. 842, as passed by both houses, contained the instruction, “Amend the title accordingly,” the Revisor of Statutes’ office changed the title of S.F. No. 842 from “A bill relating to natural resources,” to “A bill relating to state government regulation.”<sup>6</sup> The Revisor also divided the bill into three Articles.

- Article 1 was captioned “Natural Resources Regulatory Provisions.” Ex. 8, p. 2. Article 1 contained the provisions of the DNR technical bill and Rep. Cornish’s amendment, and did not specify a date for its provisions to become effective.
- Article 2 was captioned “Public Safety Regulatory Provisions.” Ex. 8, p. 11. Article 2 contained Rep. Boudreau’s conceal-and-carry amendment. Article 2 has its own name, “the Minnesota Citizens’ Personal Protection Act of 2003,” and its own standard of judicial review: “The terms of this section must be construed according to the compelling state interest test. The invalidation of any provision of this section

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<sup>6</sup> The Revisor’s Office counsels that the direction to “amend the title accordingly” should be “used sparingly because the drafter is in the best position to provide all necessary title amendments.” See Minnesota Revisor’s Manual, Chapter 7, at 208-209 (2002 edition). Movants have not seen the Revisor’s Office file because the Office, citing Minn. Stat. § 3C.05, subd. 1(a), apparently contends that the file is not subject to subpoena or other disclosure.

shall not invalidate any other provision.” Article 2 specified that the Act became effective 30 days after final enactment.

- Article 3 was captioned “Lifetime Ban on Firearm Possession for Violent Felons,” Ex. 8, p. 36, and is Rep. Osterman’s amendment. Article 3 specified that it became effective August 1, 2003.

The “enrolled” bill with its new title was then signed by the President of the Senate, the Speaker of the House, the Secretary of the Senate, the Chief Clerk of the House, and the Revisor of Statutes, and presented to Governor Tim Pawlenty for his signature. Ex. 8.

That same night, at 9:10 p.m., Governor Pawlenty signed S.F. No. 842. Ex. 8. By its terms, the Act became effective one month later, May 28, 2003. Ex. 8, Section 36.

## **II. UNDER THE ACT, OWNERS OF PARKING FACILITIES AND LANDLORDS MAY NOT EXCLUDE PERSONS WHO CARRY FIREARMS BY PERMIT.**

The Act not only increases the number of firearms permits, it severely restricts the pre-existing right of private property owners to prohibit firearms from their properties. The Act contains detailed provisions governing the rights of private property owners (defined as “private establishments,” Minn. Stat. § 624.714, subd. 17). These restrictions on property rights are controlling. Subdivision 17 of the Act specifically states that it “sets forth the exclusive criteria” by which private property owners may disallow firearm possession. See Minn. Stat. § 624.714, subd. 17(e).

The Act does allow private property owners, by specific signage and personal notification, to try to exclude from their buildings persons carrying firearms by permit. However, the Act flatly prohibits property owners from excluding such firearms-carriers from parking areas and tenant space. Subdivision 17(c) of the Act is unequivocal: “The owner or operator of a private establishment may not prohibit the lawful carry or possession of firearms in

a parking facility or parking area.” Under Subdivision 17(e), landlords may not exclude firearms carried by tenants and their guests, or even “restrict” such carry or possession.

All Religious Intervenors own parking lots, except the Minnesota Conference of the United Church of Christ, Shir Tikvah, and St. Johns the Baptist Episcopal Church. They have banned firearms from their parking lots, contrary to the command of Subdivision 17(c), or will do so if Subdivision 17(c) is declared to be unconstitutional. They assert that Subdivision 17(c) is an uncompensated taking in violation of the United States Constitution and the Minnesota Constitution.

Several Religious Intervenors are landlords:

- First Unitarian Society of Minneapolis rents space to a Montessori school.
- First United Church of Christ in Northfield rents space to the Northfield Day Care Center.
- Gloria Dei Lutheran Church in St. Paul rents space to Young Christian Nursery.
- Peace United Church of Christ rents space to Cornerstone Day Care and Nursery School.
- Robbinsdale United Church of Christ rents space to Fun and Friends Daycare.
- Spirit of the Lakes Ecumenical Community Church in Minneapolis rents office space to the Catholic Pastoral Committee for Sexual Minorities.
- St. Johns the Baptist Episcopal Church in Minneapolis rents space to the Linden Hills Child Care Center.
- University Lutheran Church of Hope in Minneapolis rents space to PEASE Academy and to University Technology Centers, Inc.

Each of these Religious Intervenors has banned firearms from its tenant space, contrary to the command of Subdivision 17(e), or will do so if Subdivision 17(e) is declared to be unconstitutional. These landlords assert that Subdivision 17(e) is an uncompensated taking in violation of the United States Constitution and the Minnesota Constitution.

### **LEGAL ARGUMENT**

#### **I. THE ACT IS A PART OF A LARGER LAW THAT EMBRACES MORE THAN ONE SUBJECT IN VIOLATION OF THE MINNESOTA CONSTITUTION.**

##### **A. Article IV, Section 17 Is An Important Constitutional Check On The Legislature.**

“Early in Minnesota history the potential for mischief in bundling together into one bill disparate legislative provisions was well known.” Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 299 (Minn. 2000) (“Associated Builders”). To protect against this, Article IV, Section 17 of the Minnesota Constitution provides: “No law shall embrace more than one subject, which shall be expressed in its title.”

The purpose of the single-subject provision is to insure that government is accountable to the public. As the Minnesota Supreme Court explained in State v. Cassidy, 22 Minn. 312, 322 (1875): “The well-known object of this section of the constitution . . . was to secure to every distinct measure of legislation a separate consideration and decision, dependent solely upon its individual merits, by prohibiting the fraudulent insertion therein of matters wholly foreign, and in no way related to or connected with its subject, and by preventing the combination of different measures, dissimilar in character, purposes and objects . . . .” Also, as the Court stated in Johnson v. Harrison, 50 N.W. 923, 924 (Minn. 1891), the single-subject provision requires that “all matters treated of should fall under some general idea, be so connected with or related to

each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject.”

In the early years, the Supreme Court readily struck down laws that contained provisions on different subjects. But, by the middle of this century, the Court became increasingly deferential, allowing disparate provisions loosely connected by only a “mere filament” to be considered part of the same general subject.

However, as the Supreme Court noted recently in Associated Builders, in the last twenty years the Supreme Court has adopted a “different approach.” It “sound[ed] an alarm” that the Legislature has pushed the limits of Article IV, Section 17. 610 N.W.2d at 301. First, in State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777 (Minn. 1986), Justice Yetka, joined by Justice Simonett, expressed concern about an act that included provisions relating to agricultural land, a council of Asian-Pacific Americans, and the establishment of a recycling program. Id. at 784-85.

Similarly, in Blanch v. Suburban Hennepin Regional Park Dist., 449 N.W.2d 150 (Minn. 1989), a law passed pre-Mattson authorized a metropolitan park district to acquire land and develop a park. The law was “relating to the organization and operation of state government.” The Court upheld the law as an appropriations bill in which the provisions were connected by “a mere filament,” id. at 155, but concurring Justices Yetka and Simonett and Chief Justice Popovich again issued a warning, id. at 155-57. The alarm was sounded again in Metropolitan Sports Facilities Comm’n v. County of Hennepin, 478 N.W.2d 487, 491 (Minn. 1991), in which the Court reluctantly rejected a challenge to an omnibus fiscal bill enacted prior to Blanch.

In the year 2000, the warnings finally were enforced as six of the seven Supreme Court Justices, in the case of Associated Builders, determined that a prevailing wage amendment had been inserted unconstitutionally into an omnibus tax bill. The Justices announced a more rigorous test. Associated Builders held that the provisions of a law must be connected by more

than a “mere filament;” instead, the law must “genuinely encompass[] one general subject,” *id.* at 303, with a true “common theme,” *id.* at 307. Associated Builders “informs the legislature that we do not hesitate to declare unconstitutional a statutory provision violating the Single Subject and Title Clause,” *id.* at 307.

In his concurrence and dissent (the latter only on the remedy for the constitutional violation), Justice Paul Anderson explained: “While the ‘mere filament’ test has served this court for many years, its interpretation has now become so deferential as to render Section 17 ineffectual. Part I of the majority opinion correctly reflects the trend of our court’s decisions on Section 17 over the past 15 years and returns our court to its proper role in interpreting this section of our constitution, namely to give each part of the constitution the plain meaning and effect of its language.” *Id.* at 311.

A prominent legislative leader immediately recognized Associated Builders as a landmark decision. In an article in the statewide bar magazine, then-House Minority Leader Tim Pawlenty wrote:

After reviewing prior decisions regarding Article IV, Section 17 that tended to pay great deference to the Legislature, the Court in *Associated Builders* finally drew a line the Legislature should heed. The balance between different branches of government in our democracy is delicate, and the Court gave the Legislature a gentle nudge in *Associated Builders*. We may hope that the Legislature will conduct itself in a manner that is clearly more consistent with constitutional principles in the future. If not, the Court’s gentle nudge may need to become a little firmer.

T. Pawlenty, “Distinguishing Filament from Figment: Minnesota’s Single Subject Rule,” Bench & Bar of Minnesota (July 2000).

**B. As A Matter Of Law, S.F. No. 842 (Including the Act) Embraces More Than One Subject.**

Associated Builders controls this case. Because Rep. Boudreau's conceal-and-carry amendment was attached to the DNR technical bill, S.F. No. 842 as passed does not "genuinely encompass one subject" and has no true "common theme." Therefore, it is unconstitutional.

In rejecting the tenuous "mere filament" connection and in holding in Associated Builders that there was no genuine single subject, the Supreme Court cited five factors, each of which is applicable to this case:

1. There were "disparate provisions in one bill." Associated Builders, 610 N.W.2d at 302. Here, the DNR technical provisions and the Act are almost as disparate as can be imagined.

Article 1 of S.F. No. 842 covers "natural resources" and consists of the DNR technical provisions and the Cornish amendment. Article 2 and 3 were added by the Boudreau amendment. Articles 2 and 3 have absolutely nothing to do with "natural resources." Tellingly, by its own terms, Article 2 is a separate "Act." As Rep. Boudreau herself said on the House floor, Article 2 is the separate conceal-and-carry law she authored, H.F. No. 261. Article 2 contains a different standard of judicial review and specifies its own date to become effective. Clearly, there are "disparate provisions" between the simple DNR technical bill, S.F. No. 842 as first passed by the Senate, on the one hand, and S.F. No. 842 as amended, passed, and signed, on the other hand.

S.F. No. 842 cannot be excused as an omnibus appropriations, tax, or government reorganization bill, which contains a variety of provisions necessary for the smooth and integrated operation of state government. Instead, as passed and signed, S.F. No. 842 is "the combination of different measures, dissimilar in character, purposes and objects," Cassidy, 22 Minn. at 322. The bill's two subjects, "natural resources" and "public safety," are not

“connected with or related to each other, either logically or in popular understanding,” Johnson, 50 N.W. at 924.

2. The amendment did not advance the “purpose of the bill.” “The connection between the amendment and any subject of tax in the Omnibus Tax Act falls far short of even the mere filament test.” To find otherwise “would push the mere filament to a mere figment.” Id. at 303. Here, the initial purpose of S.F. No. 842 was to make technical changes in natural resources law. The Boudreau amendment did not advance that purpose. The stated purpose of Rep. Boudreau’s conceal-and-carry bill, H.F. No. 261, which turned into an amendment, was “public safety,” not “natural resources.”

3. Whether the different provisions were “historically discussed” in the same committees, or whether there was an “unexplained deviation from the history.” Id. at 303. Here, Rep. Boudreau’s own conceal-and-carry bill, titled as “regarding public safety,” was considered, logically enough, in the House public safety committees – Civil Law and Judiciary Policy. By contrast, the DNR technical bill came from the Environment and Natural Resources Committee and its House companion bill was referred to the Environment and Natural Resources Policy Committee.

4. Whether the amendment was part of a “companion bill” or was “inserted” into a bill with “an entirely different legislative theme.” Id. at 304. Here, the DNR technical bill and the Act were not companions – far from it. The companion bill to S.F. 842, the DNR technical bill, was H.F. No. 823, not Rep. Boudreau’s conceal-and-carry bill, H.F. No. 261. Neither the Senate nor the House DNR technical bills referenced firearms. Nor did Rep. Boudreau’s conceal-and-carry bill, H.F. No. 261, reference natural resources.

Plainly, the DNR technical bill that passed the Senate unanimously, on the one hand, and the Act, on the other hand, sound “entirely different legislative themes,” id. at 304. Compare

Defenders of Wildlife v. Ventura, 632 N.W.2d 707, 713 (Minn. Ct. App. 2001) (wolf management plan is part of “natural resources” subject); Masters v. Commissioner, Minn. Dept. of Natural Resources, 604 N.W.2d 134, 138 (Minn. Ct. App. 2000) (in challenge to establishment of vehicle recreation area, “environment, natural resources, and agriculture are closely related to one another and constitute one subject”).

5. Whether there was “obviously a more direct route” to adopting the amendment. 610 N.W.2d at 304. Here, the obvious and direct route was for the House to consider and pass Rep. Boudreau’s H.F. No. 261, which had already passed three committees and been placed on the House calendar. But, instead, the House slapped the provisions of the Act onto the DNR technical bill.

In this respect, the Boudreau conceal-and-carry amendment is even more egregious than the unconstitutional amendment in Associated Builders. In Associated Builders, the bill to which the prevailing wage amendment was attached originated in the House and then went to the Senate and to conference committee, id. at 297, where it could have been removed or amended. Here, rather than call up and consider Rep. Boudreau’s conceal-and-carry bill already on the House calendar, the House inserted the Act into a non-controversial technical bill that had originated in the Senate. When S.F. No. 842, now encumbered with conceal-and-carry, was returned to the Senate, by rule amendments were not allowed. Therefore, even more than the amendment in Associated Builders, the specific strategy pursued by Rep. Boudreau and others diminished legislative accountability, which is the policy behind Article IV, Section 17.

Apparently cognizant of the conflict between their legislative strategy and the Minnesota Constitution, the House proponents of conceal-and-carry attempted to create a paper trail to obfuscate their hijacking of the DNR technical bill. But their attempts failed to meld two distinct subjects into one.

Rep. Boudreau, in cooperation with Rep. Cornish, sought to connect the Boudreau conceal-and-carry amendment to the DNR technical bill by offering the Cornish amendment. But, as discussed above, a “mere filament” between two subjects is not enough; Associated Builders announced that a cosmetic connection between provisions does not produce a law that “genuinely encompasses one general subject,” 610 N.W.2d at 303.

Regardless, the Cornish amendment did not even create even a “mere filament” between the DNR technical bill and conceal-and-carry. The connection was, at best, a “mere figment,” see id. at 303. The mere insertion of a reference to hunting safety in a DNR technical bill does not create a solid connection to conceal-and-carry, nor genuinely encompass disparate provisions in one general subject. The Cornish amendment was a fig leaf designed to cover up the circumvention of the Constitution. But the fig leaf was transparent.

Apparently Rep. Boudreau could not even come up with a title to describe the bizarre hybrid of S.F. No. 842 as amended. Instead, the Reviser’s Office changed the title of S.F. No. 842, originally “A bill relating to natural resources,” to the generic, “A bill relating to state government regulation.” The new title does not rescue the bill. Bestowing a single generic title does not immunize a bill from scrutiny under the single-subject clause of the Constitution. While “[t]he single subject and title provisions of section 17 are often discussed together,” they have different purposes, said the Court in Associated Builders. 610 N.W.2d at 304.

Rather, the title highlights the unconstitutionality of S.F. No. 842. Associated Builders specifically warned the Legislature to stop using “virtually generic” title clauses to try to cover multiple disparate subjects. See id. at 304. The generic title of S.F. No. 842 designed to obscure the disparity between “natural resources” and “public safety” provisions shows that the Legislature ignored the Supreme Court’s message in Associated Builders that a law must “genuinely encompass[] one general subject,” id. at 303.

Under the Minnesota Constitution, the single-subject provision is a check on the Legislature and it is the Court's responsibility to determine whether a bill embraces more than one subject. Nevertheless, given the Legislature's requirements that amendments be "germane," a judicial holding that S.F. No. 842 as passed and signed embraces more than one subject would not be surprising to the legislators. In the case of S.F. No. 842, even the Speaker of the House, a co-author of conceal-and-carry, was "in some doubt" whether the Boudreau amendment was germane under House Rule 3.2 or was "under guise," so he deferred to a House vote. Had the Boudreau amendment been offered in the Senate or in conference committee, it would not have been germane. Under Senate Rule 35.2, an amendment is not germane if it "relates to a substantially different subject, or is intended to accomplish a substantially different purpose, than that of the original bill to which it is proposed." Under Joint Rule 2.06, conference committees use the Senate test for germaneness. Clearly, the Boudreau amendment both "relates to a substantially different subject" and was "intended to accomplish a substantially different purpose" than the DNR technical bill.

**C. Movants Are Entitled to Judgment on Count Six.**

In Associated Builders, the majority opinion, subscribed to by five of the seven Justices, held that, "Where the common theme of the law is clearly defined by its other provisions, a provision that does not have any relation to that common theme is not germane, is void, and may be severed." 610 N.W.2d at 307.

The provisions of the Act are unrelated to the pre-existing natural resources theme of S.F. No. 842. Accordingly, by the holding of Associated Builders, this Court should void and sever the Boudreau amendment from S.F. No. 842.

**II. SUBDIVISIONS 17(c) & (e) OF MINN. STAT. § 624.714 CONSTITUTE AN UNCOMPENSATED TAKING IN VIOLATION OF THE UNITED STATES AND MINNESOTA CONSTITUTIONS.**

**A. Takings Without Just Compensation Are Unconstitutional.**

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 122 (1978).

Minnesota's own constitutional prohibition is even stronger than the Fifth Amendment, as our State prohibits both uncompensated takings and "damage." Article I, Section 13 of the Minnesota Constitution provides, "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid and secured." Further, Article XIII, Section 4 provides that land may not be taken for "public way" without fair and equitable compensation "paid for the land and for the damages arising from taking it." Minn. Stat. § 117.025, subd. 2, explains that a "taking" is "every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property." As the Minnesota Supreme Court has stated, "the clear intent of Minnesota law is to fully compensate its citizens for losses related to property rights incurred because of state actions," State by Humphrey v. Strom, 493 N.W.2d 554, 558 (Minn. 1992).

**B. The Right To Exclude Others Is An Essential Property Right.**

"[T]he right to acquire, possess, and enjoy property" is an "inherent and inalienable right," Theide v. Town of Sandia Valley, 14 N.W.2d 400, 405 (Minn. 1944). Fundamental to that right is the right to exclude others. The right to exclude others from real property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

Minnesota has always recognized that the right to exclude is an essential property right. Such right is enforceable through Minnesota criminal law. A property owner has the right to be free from trespass by the posting of property or the ejection of unwanted intruders. See Minn. Stat. § 609.605, subd. 1(b) (lawful possessor of property has right to demand departure of trespasser). A person in lawful possession of real property has the right to use reasonable force in resisting a trespass or other unlawful interference with real property. See Minn. Stat. § 609.06. The State enforces the law of criminal trespass even when the trespassers claim important rights, such as freedom of speech. See State v. Wicklund, 589 N.W.2d 793 (Minn. 1999) (Mall of America may exclude those claiming to exercise First Amendment rights); State v. Scholberg, 412 N.W.2d 339, 342 (Minn. Ct. App. 1987), rev. denied (Minn. Nov. 13, 1987) (medical building has right to exclude demonstrators).

The right to exclude is also enforceable through an action in tort. A person who enters land without the owner's consent commits civil trespass. Special Force Ministries v. WCCO Television, 584 N.W.2d 789, 792 (Minn. Ct. App. 1998) (citation omitted), rev. denied (Minn. Dec. 15, 1998).

**C. The Act Prevents Private Property Owners From Excluding Others From Private Property.**

Part of the Act, now codified at Minn. Stat. § 624.714, subd. 17(c) (“Subdivision 17(c)”), commands: “The owner or operator of a private establishment may not prohibit the lawful carry or possession of firearms in a parking facility or parking area.” Similarly, Subdivision 17(e) prevents landlords from restricting permit holders -- both the tenants themselves and their guests -- from carrying guns.

Subdivisions 17(c) & (e) take from owners of parking areas and leased space a valuable property right: the right to exclude permit holders carrying guns. Two Minnesota courts have

already recognized this. As the Minnesota Court of Appeals noted in Edina Community Lutheran Church v. State of Minnesota, A03-723 (Jan. 13, 2004) (copy attached), under the Act property owners “are not permitted to control their parking areas or leased areas by prohibiting firearms or by otherwise enforcing such prohibitions under the law of trespass. Minn. Stat. § 624.714, subd. 17(c), (e), subd. 18(c). The right to exclude others is an essential part of general property rights.” Slip op. at 7 (citation omitted).

On remand, the Hennepin County District Court confirmed that “Plaintiffs have property rights which include the right to exclude others. . . . This right is an essential part of general property rights.” See Edina Community Lutheran Church v. State of Minnesota, Court File No. MC 03-008185 (March 16, 2004) (copy attached), Slip op. at 2-3 (citations omitted). Further, said the District Court, “The inability of the religious entity property owners to prohibit a permit holder from entering onto their real property when carrying a firearm affects an essential part of general property rights.” Slip op. at 2. The District Court held (on freedom of religion grounds) that religious property owners may “prohibit or regulate the lawful carry or possession of firearms on their real property, specifically including parking lots [and] leased areas. . . .” Slip op. at 3.

Accordingly, Subdivisions 17(c) & (e) are a radical departure from the pre-existing federal and state constitutional, criminal, and common law of property rights.

**D. Subdivisions 17(c) & (e) Constitute Physical Takings.**

The taking of the right to exclude persons with firearms constitutes a “physical taking” under the United States and Minnesota Constitutions.

In Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992), the United States Supreme Court identified two categories of governmental action that constitute takings under the Fifth Amendment and that must be compensated without additional inquiry into other factors, such as

the public interest served by the regulation. Lucas, 505 U.S. 1003, 1015 (1992). The first category includes regulation that allows a “physical invasion” of property. This requires compensation regardless of the magnitude of the invasion. Id., citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); United States v. Causby, 328 U.S. 256, 265 (1946); Kaiser Aetna v. United States, 444 U.S. 164 (1979). The second category, “land-use regulation,” includes laws or ordinances that restrict an owner’s use of its property, such that the owner is denied all economically beneficial or productive use of its property. Lucas, 505 U.S. at 1015; see also Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 834 (1987).

Subdivisions 17(c) & (e) of the Act fit squarely within the “physical invasion” category. “Physical invasion” occurs when a property owner loses the right to exclude others from its property. A total loss of the right to exclude is not required. Courts have found a physical invasion and taking in a variety of situations, including where a landlord was required to permit the installation of a cable on its property, where a private marina was required to allow public navigation, and where a landowner was required to allow others to travel over its property to the seacoast. Loretto, 458 U.S. at 430 (cable); Kaiser Aetna, 444 U.S. at 179-80 (navigational servitude); Nollan, 483 U.S. at 832 (easement); Dolan v. City of Tigard, 512 U.S. 374, 393 (1994) (same). Physical invasions even include those where there is no physical touching of the owner’s property; for example, where the location of an airport resulted in planes flying low over the property, where the Navy fired guns over the property, or where the property was subjected to gases, smoke, or offensive smells. See Causby, 328 U.S. at 265 (flights); Portsmouth Land & Harbor Hotel Co. v. United States, 260 U.S. 327 (1922) (guns); Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (gases and smoke); Bormann v. Bd. of Sup’rs, 584 N.W.2d 309 (Ia. 1998) (offensive smells), cert. denied, 119 S. Ct. 1096 (1999).

Courts have termed these physical invasions takings of “easements” or “servitudes,” regardless of whether or how the statute or ordinance itself uses those words. See Causby, 328 U.S. at 261-62 (court termed flights over property as “easement of flight”); Griggs v. County of Allegheny, 369 U.S. 85 (1962) (court termed flights over property as “air easement”); Portsmouth Land & Harbor Hotel Co., 260 U.S. at 330 (firing guns across land termed “servitude”); Hendler v. United States, 952 F.2d 1364, 1378 (Fed. Cir. 1991) (installation of wells and entry onto land to service them was a taking; “the Government behaved as if it had acquired an easement”). The mere fact that the government has not announced that it is taking an “easement” is irrelevant. Id.

No particular stranger need be permanently or even frequently on the property for there to be a compensable taking of an easement. It is the right to enter, not the exercise of that right, that must be permanent. As the United States Supreme Court has said:

We think a ‘permanent physical occupation’ has occurred, for purposes of that rule, that individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently on the premises.

Nollan, 483 U.S. at 832.

Finally, in the case of a physical taking, such as the taking of an easement, the owner need not show that the Act denies all economically beneficial use of the property. The Court in Lucas stated, “In general (at least with regard to permanent invasions), no matter how minute the intrusion, no matter how weighty the public purpose behind it, we have required compensation.” Lucas, 505 U.S. at 1015. Once a regulation deprives an owner of the right to exclude, a physical invasion and a taking has occurred. See id.; Dolan, 512 U.S. at 393. For example, in Hendler, 952 F.2d at 1378, the court found the taking of an easement when government employees drove onto land to inspect and service wells, although the intrusion was “temporally intermittent.”

Here, while Subdivisions 17(c) & (e) do not use the term “easement,” they are physical takings. Subdivision 17(c) takes an easement from parking lot owners in favor of permit holders, because it forbids the owners to exclude permit holders with their firearms. Under Subdivision 17(e), a landlord, no matter what the lease says, may not exclude (or even “restrict”) tenants and their guests who carry firearms by permit.

The Act’s taking of easements, unless compensated, violates both the Fifth Amendment and the Minnesota Constitution. For example, in declaring unconstitutional a law that gave landowners immunity from liability for their farm odors, the Iowa Supreme Court in Bormann held that the legislature had taken without compensation an easement on adjacent property; the law “appropriates valuable private property interests and awards them to strangers.” 584 N.W.2d at 322. Similarly, Subdivisions 17(c) & (e) appropriate the valuable right to exclude and awards rights to permit-holders.

By letter dated September 24, 2003, many Religious Intervenors demanded that the State of Minnesota acknowledge its taking and initiate condemnation proceedings. Ex. 13. The Attorney General refused the demand and alleged that the Act was a “nominal constraint” with no economic impact that did not affect the Religious Intervenors’ ability to use their properties. Ex. 14.

The Attorney General is wrong: the test is not the degree of the Act’s “constraint.” Subdivisions 17(c) & (e) are physical takings. They restricts whom the owner may *exclude* from private property. The moment the Act was signed into law, the State took a stick – the right to exclude – from each parking area owner’s and landlord’s bundle of property rights and gave it to persons who carry firearms pursuant to permit.

A more detailed understanding of physical takings may be found by comparing the Supreme Court’s decisions in Dolan v. City of Tigard, 512 U.S. 374 (1994), and PruneYard v.

Robins, 447 U.S. 74 (1980). Both opinions were authored by Chief Justice Rehnquist. In Dolan, the owner of a retail store sought a permit from the city to enlarge her store and pave her parking lot. Dolan, 512 U.S. at 379-80. The city agreed to grant the permit, but only on the condition that the owner convey a public greenway easement. Id. The Court held that the permit conditions constituted a taking. Id. at 391. In reaching this conclusion, the Court emphasized that the conveyance of an easement would deprive the owner of her ability to exclude others:

But the city demanded more – it not only wanted petitioner not to build in the floodplain, it also wanted petitioner’s property along Fanno Creek for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control. *The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’*

Id. at 393 (emphasis added), quoting Kaiser Aetna, 444 U.S. at 176.

Earlier, the Court in PruneYard had held that there was no taking where a major private shopping center was required under the state constitution to provide access to persons exercising their state constitutional rights to distribute pamphlets and ask passers-by to sign petitions.

PruneYard, 447 U.S. at 85. In reaching this determination, the Court noted that the shopping center could restrict expressive activity by adopting time, place, and manner regulations in order to minimize interference with its commercial activity. Id. at 83.

The shopping center’s ability to impose time, place and manner restrictions distinguished the character of limited government interference in PruneYard from the taking in Dolan. Because the shopping center retained most of its power to restrict the expressive activity, it did not convey an easement in favor of the public, and therefore no taking occurred. Id. at 84 (noting that the situation in PruneYard was “quite different” from the situation in Kaiser Aetna, where the government imposed a navigational servitude on a private marina). In Dolan,

however, the Court found that an easement would have to be conveyed in exchange for the permit, and therefore a taking occurred:

By contrast, the city wants to impose a permanent recreational easement upon petitioner's property that borders Fanno Creek. *Petitioner would lose all rights to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated.*

Id. at 394 (emphasis added).

Subdivisions 17(c) & (e) are takings similar to Dolan. Subdivisions 17(c) & (e) expressly destroy pre-existing rights to exclude others. The commands of Subdivision 17(c) & (e) are unequivocal; they leave no room for the property owner to impose time, place, and manner restrictions on permit holders who enter carrying firearms. Under these circumstances, the owner's right to exclude is not "regulated," but is "eviscerated." See Dolan, 512 U.S. at 394.

Additionally, the asserted state right at issue is different than the right asserted in PruneYard, where the exercise of free expression at issue was protected under that state's constitution. PruneYard, 447 U.S. at 85.<sup>7</sup> By contrast, there is no state or federal constitutional right for an individual to carry a firearm onto private property. See Application of Atkinson, 291 N.W.2d 396, 398 (Minn. 1980); United States v. Miller, 307 U.S. 174, 178-79 (1937) (second amendment right is collective rather than individual); Iverson v. City of St. Paul, 240 F. Supp. 2d 1035, 1038 (D. Minn. 2003) ("there is no liberty interest in a right to carry a concealed weapon. Nor is there a constitutionally protected property interest in a permit to carry under Minnesota law."), aff'd per curiam, 2003 WL 21999248 (8<sup>th</sup> Cir. Aug. 25, 2003) (unpublished).

Accordingly, Subdivisions 17(c) & (e) constitute a physical taking. As the State has not paid just compensation, Subdivisions 17(c) & (e) are unconstitutional.

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<sup>7</sup> In Minnesota, there is no corresponding state constitutional right to use shopping center property for speech. See State v. Wicklund, 589 N.W.2d 793 (Minn. 1999) (Mall of America may exclude those claiming to exercise First Amendment rights).

**E. Subdivisions 17(c) & (e) Violate The Pre-Existing Statutory Requirement Of Eminent Domain Proceedings.**

By taking easements on all parking areas and tenant space through the enactment of Subdivisions 17(c) & (e), the State acted in complete disregard of its own statutes that implement the constitutional protection against uncompensated takings. Minn. Stat. § 117.011 states that “[a]ll bodies, public or private, who have the right of eminent domain, when exercising the right, shall do so in the manner prescribed by this chapter, even though a different procedure may be provided by charter provisions, ordinance or statute . . . .”

Chapter 117 provides that the State must exercise its power of eminent domain by commencing a proceeding in the name of the State by the Attorney General. Minn. Stat. § 117.035. Such proceeding is commenced by petition, “describing the desired land, stating by whom and for purposes it is proposed to be taken, and giving the names of all persons appearing of record or known to the petitioner to be the owners thereof . . . .” Minn. Stat. § 117.055. Thereafter, the property owner has various rights and the court will establish what compensation, if any, is due.

By adopting Subdivision 17(c), the State ignored its own pre-existing law banning “different procedures” for taking private property. If the State wished to take an easement in all Minnesota parking areas and tenant spaces, it should have proceeded under Chapter 117.

**F. Movants Are Entitled To Judgment On Count Five.**

In sum, Subdivisions 17(c) & (e) deny owners of parking areas and landlords the right to exclude permit holders carrying firearms. The Act’s denial of the right to exclude constitutes the uncompensated taking of private property, in violation of the Minnesota and United States Constitutions. As the State has not instituted required proceedings in eminent domain, movants are entitled to judgment as a matter of law.

**CONCLUSION**

For all of these reasons, Religious Intervenors should be granted summary judgment on Counts Five and Six. A proposed order is submitted herewith.

Dated: May 5, 2004

Respectfully submitted,

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