

IN THE SUPREME COURT  
 STATE OF NORTH DAKOTA

Casey Voigt and Julie Voigt,	)	
	)	
Appellants,	)	
	)	
vs.	)	Supreme Court Case No.: 20170025
	)	Mercer County District Court Case
Mercer County Board of County	)	No.: 2016-CV-00054
Commissioners and Coyote Creek Mining	)	
Company, L.L.C.,	)	
	)	
Appellees.	)	

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Appeal from Judgment Entered on November 15, 2016  
 Case No. 29-2016-CV-00054  
 County of Mercer, South Central Judicial District  
 The Honorable John Grinsteiner, Presiding

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**BRIEF OF APPELLANTS CASEY VOIGT AND JULIE VOIGT**

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## **I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

[¶ 1] Whether Mercer County’s decision to close the only road adjacent to the Voigts’ residence, resulting in up to a 21-mile round-trip detour to the Voigts’ home, violated N.D.C.C. § 38-01-07.1’s mandate that counties only close public roads for mining if “readily accessible alternate routes of travel” exist;

[¶ 2] Whether Mercer County’s decision to make an alternate route available through an industrial coal mine on mine roads that all parties agree are dangerous for travel, and to further make this option available only to a limited number of landowners and not the public, complies with N.D.C.C. § 38-01-07.1’s requirement for “readily accessible alternate routes of travel.

[¶ 3] Whether Mercer County’s Resolution and Road Closure Agreement unlawfully delegates the County’s decision-making authority to Coyote Creek Mine.

## **II. STATEMENT OF THE CASE**

[¶ 4] This case stems from an agreement between Coyote Creek Mining Company (“CCMC”) and Mercer County to close a portion of County Road 25<sup>1</sup> immediately adjacent to Casey and Julie Voigts’ house. The road is oriented approximately east-west, connecting State Road 49 to the east of Coyote Creek with County Road 13 to the west of Coyote Creek. County Road 25 includes an improved bridge to cross Coyote Creek directly adjacent to the Voigts’ home.

[¶ 5] Mercer County closed this road pursuant to N.D.C.C. § 38-01-7.1, which allows a road to be closed for coal mining only if “the road is not required due to readily accessible alternate routes of travel and the closing or relocation does not deprive adjacent

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<sup>1</sup> Throughout this brief, the road at issue in this case is referred to as County Road 25. The road may also be referred to on some maps as 17<sup>th</sup> St. SW.

landowners access to their property.”As a pre-requisite to closing this road, Mercer County required CCMC to develop and agree to an access agreement that would provide certain local landowners affected by the road closure use of a substitute route of travel through the active coal mine. In other words, Mercer County recognized that closing this road would cause hardship on local landowners and the traveling public, and therefore required CCMC to develop a substitute to the closed road. Ostensibly, this was to ensure compliance with N.D.C.C. § 38-01-7.1, which does not allow closure of a road unless there is a “readily accessible alternate route[] of travel” and “the closing...does not deprive adjacent landowners of access to their property.”

[¶ 6] The Voigts appealed Mercer County’s road closure resolution, the related road closure agreement, and the plan set forth within that agreement because they fall far short of the requirements of N.D.C.C. § 38-01-7.1. No public road will remain, and the substitute route through the coal mine is dangerous, burdensome, and unavailable for use by most members of the public, including the Voigts’ employees/contractors and visitors.

[¶ 7] On April 14, 2016, the Voigts appealed Mercer County’s decision to the district court. The district court issued its order for judgment upholding Mercer County’s decision on November 15, 2016. On January 13, 2017, the Voigts appealed the district court’s decision to this Court.

### **III. STATEMENT OF FACTS**

[¶ 8] On May 18, 2016, the Mercer County Commission finalized a resolution to “temporarily close[]” the road at issue in this case, provided “[t]hat Coyote Creek provide certain affected landowners access to their lands for farming and ranching

purposes.” Resolution, ROA 103.<sup>2</sup> The Commission’s Resolution was explicitly made “subject to [the Road Closure Agreement] by and between Mercer County and Coyote Creek dated May 18, 2006, attached hereto and made a part hereof.” *Id.* The Agreement, in turn, “designated Casey Voigt and Julie Voigt; Shawn Unruh and SheVele Unur; Austin Jensen and Dstinee Jensen; Sharon Unruh; Mardee Reich; Him Swenson; Trent Martin; Jason Erickson; Richard Scheid; and Nancy Scheid as landowners needing to use the Access Trails to access their properties.” ROA 104. The Agreement explicitly called these individuals “Affected Landowners.” *Id.* The Agreement stated that “[p]rior to accessing and using the Access Trails, the Affected Landowners must agree to, complete and comply with the safety requirements established by Coyote Creek as set forth on Exhibit C attached hereto and made a part hereof,” that this Exhibit C “may be changed, modified or amended at any time or from time to time at the sole discretion of Coyote Creek,” and that “[i]f the safety requirements are changed, modified or amended by Coyote Creek, the County and Coyote Creek shall execute an amendment to this Agreement.” *Id.*

[¶ 9] In other words, the Resolution incorporates by reference the Agreement, the Agreement incorporates by reference Attachment C, and Attachment C can be changed anytime, at Coyote Creek’s “sole discretion,” after which “the County and Coyote Creek shall execute an amendment to th[e] Agreement” incorporating the changes. Under this arrangement, Mercer County approved a Resolution and signed an agreement that can be changed at any time by the mine without any findings of necessity or evaluation of alternatives.

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<sup>2</sup> All citations to the certified record in this brief are in the format of ROA followed by the page number. The entire Record on Appeal is available at Doc. IDs 100 and 101, and all pages in the record are consecutively paginated.

[¶ 10] Several of the Safety Requirements in Exhibit C, as currently approved, include the following requirements:

- a. “MSHA training will be required for the Affected Landowners that will use the Access Trails more than five times per year. This is a 24 hour MSHA class...An 8 hour refresher class will also be required annually thereafter.” Individuals must be “18 years old or older to receive training.” ROA 109, ¶ 1.
- b. A “half hour” “[a]nnual hazard training is required for all Affected Landowners.” *Id.* ¶ 2.
- c. “Properly trained Affected Landowners with MSHA and hazard training will be allowed to travel on the Access Trails without an escort. If an untrained person is riding with them an escort will be required” and the Affected Landowner will “need to call Coyote Creek Mine Security to arrange for [the] escort.” The mine may approve travel without an escort at its sole discretion. *Id.* ¶ 3.
- d. “Affected Landowners that only need to use the Access Trails less than five times per year can do so with only hazard training and with an escort,” and must arrange for the escort by calling “Mine Security.” *Id.* ¶ 4.
- e. Finally, the “[t]rails will be closed to traffic...approximately 6 times per year.” The agreement contains requirements to follow all traffic signs, and notes that “any infractions of traffic signs or the safety requirements will result in the loss of unescorted access privileges.” *Id.* ¶¶ 5-8.

[¶ 11] To use the mine's access trails, the Agreement requires Mr. and Mrs. Voigt to each take a three-day MSHA training in Bismarck, renew that training with a full additional day of training every year, and participate in an additional half hour hazard training every year at the mine. Having to leave the ranch for the MSHA training in particular is disruptive to the Voigts' ranch, which requires nearly constant attention.

[¶ 12] As it relates to the Voigts' family, relatives, friends, and hired hands, the Agreement lists *only* Casey Voigt and Julie Voigt as "Affected Landowners." "[T]he mention of one thing implies the exclusion of another," (*expressio unius est exclusio alterius*). *Zueger v. North Dakota Workers Comp. Bureau*, 1998 ND 175, ¶ 11, 584 N.W.2d 530. The maxim *expressio unius est exclusio alterius*, "although more frequently applied in the construction of statutes, is also applicable to the construction of contracts." *Park View Manor, Inc. v. Housing Authority*, 300 N.W.2d 218, 225 (N.D. 1980). Here, by listing only Casey Voigt and Julie Voigt, the Agreement excludes any other friends, relations, and contractors/employees of the Voigts from using the mine's access trails as a substitute for the closed road. For example, the Agreement would prevent any hired hand of the Voigts, including veterinarians rendering emergency assistance, from entering the access trails because they are not listed as "Affected Landowners." Agreement, ROA 104-05, ¶ 2 ("Affected Landowners will be allowed to use the Access Trails"). Similarly, even if it could be implied that hired hands, employees, contractors, and visitors of the Voigts' are "Affected Landowners," those individuals would still first have to take a thirty minute hazard training and then obtain a mine escort prior to using the access trail substitute to the closed road. Exhibit C, ROA 109, ¶ 2.



[¶ 13] This is a tremendous hardship on the Voigts, and it will change their daily life. Further, these impacts will persist until 2040, which is when Coyote Creek intends to re-open the closed road to the public. ROA 105, ¶ 6.

#### **IV. STANDARD OF REVIEW**

[¶ 14] “Th[e] Court’s function is to independently determine the propriety of the [Commission’s] decision ... The [Commission’s] decision must be affirmed unless the local body acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence supporting the decision. A decision is not arbitrary, capricious, or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation.” *Hale v. City of Minot*, 2015 ND 216, ¶ 5, 868 N.W.2d 870, 873. “[A] governing body’s failure to correctly interpret and apply controlling law constitutes arbitrary, capricious, and unreasonable conduct.” *Hagerott v. Morton Cty. Bd. of Comm’rs*, 2010 ND 32, ¶ 7 (internal citations omitted). Here, this case requires application of N.D.C.C. § 38-08-07.1 and principles of non-delegation. Thus, if this Court concludes that Mercer County mis-applied N.D.C.C. § 38-08-07.1 or improperly delegated its authority, the decision is arbitrary, capricious, and unreasonable and must be reversed.

#### **V. ARGUMENT**

[¶ 15] Mercer County’s Resolution and the related Road Closure Agreement were an arbitrary, capricious, and unreasonable action because the Resolution and Agreement are not in accordance with law. First, the Resolution and Agreement do not comply with the requirements of N.D.C.C. § 38-01-07.1. Second, Mercer County unlawfully delegated its decision-making authority to Coyote Creek Mine by providing the mine with unilateral authority to update Attachment C to this agreement at the mine’s

sole discretion, which has the capability of further limiting the Voigts' already impaired access without any further process.

**A. The Resolution and Road Closure Agreement are unlawful under N.D.C.C. § 38-01-07.1**

[¶ 16] N.D.C.C. § 38-01-07.1 allows a public road to be temporarily closed to allow coal mining in the road's location only if the road is "not required due to readily accessible alternate routes of travel and the closing or relocation does not deprive adjacent landowners access to their property." (emphasis added). Here, Mercer County's decision to close County Road 25 deprives the Voigts of access to their own property and further leaves the Voigts, their employees/contractors, and visitors without a readily accessible alternative route of travel to the closed road.

*i. Closure of this road will Deprive the Voigts of Access to their Property*

[¶ 17] Mercer County implicitly recognized that closure of County Road 25 would deprive the Voigts of access to their property, and therefore required CCMC to agree to allow the Voigts access through the mine. However, when the details of this plan are added together, they are so onerous that they amount to an unreasonable deprivation of access.

[¶ 18] Here, the details are primarily contained in Attachment C to the Road Closure Agreement, which lists safety requirements for access.<sup>3</sup> First, both Casey Voigt and Julie Voigt must take a three day MSHA training, and then supplement this with an additional full day of training every year. ROA 109, ¶ 1. Second, the Voigts also would be unable to bring firearms onto their property to protect their livestock because the Road

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<sup>3</sup> This is also the same document that can be revised unilaterally by Coyote Creek Mine, at the mine's discretion.

Closure Agreement bans firearms. *Id.* ¶ 6. Third, the Voigts would be unable to work on horseback, even though horses are often necessary for daily activities on their ranch. Email from Casey Voigt to County Auditor, ROA 71. Fourth, six times a year the road will completely closed. ROA 109, ¶ 7. And finally, the Voigts' right to unescorted access can be revoked by CCMC. *Id.* ¶ 8.

[¶ 19] Perhaps these demanding requirements are necessary for traveling through a coal mine, and indeed Coyote Creek Mine's own representatives told Mercer County that "no location through the mine is safe for public access." Minutes, ROA 68. But each individual safety standard chips away at the Voigts' right of access guaranteed by N.D.C.C. § 38-01-07.1, and taken together, they amount to a substantial deprivation of access. The case *Filler v. City of Minot*, 281 N.W.2d 237, 240-43 (N.D.1979), is largely on-point. There, the Court held that substantial interference with rights of access are a compensable taking. In that case, the state's improvements to U.S. 83 blocked direct access to the property, forcing individuals accessing the property to "take a circuitous route of approximately 1060 feet." *Id.* at 243. The court concluded that this was a triable question of fact as to whether the property owner's right of access had been substantially interfered with. *Id.* at 242-244. The Court further explained, "a property owner is entitled to damages arising from interferences with his property rights of ... access caused by the lawful improvement of a street in a manner which could not have been reasonably anticipated at the time of the dedication of the street." *Id.* at 241.

[¶ 20] Here, this case goes well beyond the mere improvement of a street limiting access to a property, as occurred in *Filler*. In this case, the only road through the middle of the Voigts' ranch will be completely closed. The next best detour is not 1,060

feet, as in *Filler*—it is 10.7 miles (or 21.4 miles roundtrip). Letter to Mercer County, ROA 50. “[C]ircuity of travel ... is a factor to be considered in determining the reasonableness of access.” *Filler* at 243. Any remaining access provided by the substitute access through the mine is a substantial impairment to the Voigts’ constitutional and statutory rights of access because the Voigts must take hours of training simply to use this access, the access is not available to others needing access to the Voigts’ property, the access will be completely closed six days a year, and the method of travel is severely restricted (no horses, no firearms). ROA 109. This is a taking in a constitutional sense. It also “deprive[s]” the Voigts of “access to their property” in violation of N.D.C.C. § 38-01.07.1, a statute intended to protect landowners from deprivation of rights of access caused by coal mining.

[¶ 21] The closure of this road, even with the road closure agreement in place, deprives the Voigts of access to their property, and therefore the County’s final action in this matter was unlawful and must be reversed.

*ii. There are No Readily Accessible Alternate Routes of Travel*

[¶ 22] N.D.C.C. § 38-01-7.1 also does not allow closure of this road unless there is a “readily accessible alternate route[] of travel.” Here, there are no readily accessible routes of travel to serve as a substitute for the closed road. This is in large part because the road closure area is immediately adjacent to the only bridge over Coyote Creek in the area. The minutes show that Commissioner Gunsch stated “it is a long way to drive around” the road closure area. Commission Minutes, ROA 58 (emphasis added). Commissioner Entze agreed, stating “it does add a huge amount of extra expense...” *Id.* Jason Erickson, a member of the public, explained that “he uses the road two to three times a week to check

his cattle, and it would be a long way around with a lot of hills.” *Id.* (emphasis added). “Shawn Unruh stated he has seen the flooding over the years, and this access road is the Voigts [sic] only way out while it is flooding. Unruh added this is a desolate area and emergency vehicles may need this road.” *Id.* (emphasis added). Gary Gierke, a member of the public, “stated he uses this road to seed because he cannot take his equipment down ND HWY 49.” *Id.*

[¶ 23] The plain language of the statute requires “readily accessible alternate routes.” N.D.C.C. § 38-01.07.1. By using the word “readily,” the legislature heightened the burden that must be met in order to close a road for purposes of mining. One dictionary definition of “readily” is “easily.” *See* dictionary.com (last accessed March 24, 2017). For example, closure of a section line road would likely preserve “readily accessible alternate routes” because a traveler could simply drive one mile in either direction and use the next section line road. But here, County Road 25 has a bridge over Coyote Creek and traverses rugged land. A readily accessible alternate route in this instance is not available, as shown by 21.4 mile round trip detour to move from one end of the road closure area to the other end of the road closure area and the extensive testimony indicating the length of this detour. Letter to Mercer County, ROA 50; Minutes, ROA 58. 21.4 miles of travel can amount to hours when operating ranch equipment, especially if multiple trips are required. *Id.*

[¶ 24] For the numerous reasons stated *infra*, the series of access trails through the mine is not a “readily accessible alternate route.” But even assuming *arguendo* that it could be considered such a route, it is available only to the thirteen individuals explicitly listed as “Affected Landowners” in the Road Closure Agreement. Agreement, ROA 104, ¶

2. The rest of the public will have no choice but to detour around. ROA 105, ¶ 2 (limiting travel on access trails to “Affected Landowners”).

[¶ 25] Although the Voigts believe that the language of N.D.C.C. § 38-01-7.1 is plain and that the County violated this statute’s plain language by allowing closure of County Road 25, the legislative history of this statute is also informative. In introducing this law in 1991, Senator Keller stated that this law “gives the authority to county commissioners to allow coal companies to mine through sections [sic] lines and roads that are not being used.” 1991 Senate Standing Committee Minutes on SB2303, Jan. 25, 1991 (emphasis added). Here, all relevant evidence in the record shows that County Road 25 is used by the Voigts and the public. The intent of the legislature was to preserve public roads and prioritize them over mining operations through such roads when the road is used by the public due to lack of other readily accessible alternatives.

**B. Mercer County’s Resolution and Road Closure Agreement unlawfully delegates the County’s decision-making authority to Coyote Creek Mine.**

[¶ 26] Mercer County’s Road Closure Resolution (for purposes of this section, “Document A,” ROA 102) incorporates by reference the Road Closure Agreement between Mercer County and Coyote Creek Mine (“Document B,” ROA 104). The Road Closure Agreement, in turn, incorporates by reference attachment C to the Agreement (“Document C,” ROA 108). The Road Closure Agreement states “[i]t is understood and agreed that the safety requirements identified on Exhibit C may be changed, modified or amended at any time or from time to time at the sole discretion of Coyote Creek. If the safety requirements are changed, modified or amended by Coyote Creek, the County and Coyote Creek shall execute an amendment to this Agreement to replace the existing

Exhibit C.” ROA 105, ¶ 3. In other words, Document A incorporates Document B, Document B incorporates document C, and Document C can be unilaterally changed at any time. The changes then are incorporated by reference into the County’s Resolution through operation of these documents’ incorporation clauses.

[¶ 27] The County has illegally delegated its legislative authority to Coyote Creek Mine. “The law is well settled that the Legislature cannot delegate legislative power to private citizens.” *Enderson v. Hildenbrand*, 52 N.D. 533, 204 N.W. 356, 359 (1925). In another case, the Court stated:

[t]he petitioners are expressly given the right to specify the ‘kind, character, and extent of the improvements desired, specifying the width and the material of paving, if any, the size and nature of any lateral sewers or water mains, the number and location of manholes and catch basins, the number and location of fire hydrants,’ etc., and section six of the act expressly makes it the duty of the board upon the filing of such petition to construct the improvements prayed for. The board has no discretionary powers in the matter, and is made the mere instrument of the law to carry out the will of such favored individuals. This is clearly, in effect, an unwarranted delegation of legislative power to individuals, and hence the law is unconstitutional and void.

*Morton v. Holes*, 17 N.D. 154, 115 N.W. 256, 258 (1908). The instant case is no different. The safety requirements to the Road Closure Agreement may be “changed, modified or amended at any time at the sole discretion of Coyote Creek,” a private entity. Those requirements are then incorporated by reference directly into the County Commission’s resolution. The County has no discretionary authority in the matter—the arrangement allows a private entity to revise the resolution of a County Board of Commissioners at will.

[¶ 28] There are immediate, practical reasons that this arrangement is concerning. Mainly, the existing safety requirements in Attachment C are very

burdensome on the Voigts and other individuals who are allowed to use the mine's access roads provided as a substitute to County Road 25. This arrangement allows the mine to unilaterally change the safety requirements, including amendments that could make these safety requirements even more burdensome, without having to go through a proper process with the County (i.e., one subject to notice, participation, and right of appeal).

[¶ 29] The County has effectively treated Coyote Creek as an executive agency or political subdivision—it has delegated the authority to fill in regulatory gaps and enforce its decisions. It is plainly impermissible for a public legislative body to abdicate its authority to a private, unelected, and unaccountable entity. This is not an example of a legislative body setting forth a standard for a regulatory body to follow in enacting its regulations. *Cf. Stutsman Cnty. v. State Hist. Soc. of N. Dakota*, 371 N.W.2d 321, 327 (1985) (delegation to state agency), *Ralston Purina Co. v. Hagermeister*, 188 N.W.2d 405, 410 (1971) (delegation to state agency). Here, the Commission has effectively delegated a legislative and executive function to a private entity that is neither charged nor trusted with the public interest.

## **VI. CONCLUSION**

[¶ 30] The Voigts respectfully request that this Court reverse the trial court's judgment.

DATED this 24<sup>th</sup> day of March, 2017.

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## CERTIFICATE OF SERVICE

/s/ JJ England  
JJ England