

STATE OF MINNESOTA
IN COURT OF APPEALS

A06-1422

A06-1440

CITY OF DULUTH,

Appellant/Respondent,

and

TODD GLASS,

Appellant/Respondent,

vs.

MICHAEL AND DEBORAH BOLEN and
JOSEPH ZAJAC,

Respondents.

APPELLANT CITY OF DULUTH'S REPLY BRIEF

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and

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ARGUMENT

Respondents' Reliance Upon Common-law Dedication Jurisprudence Is Not Material To This Action Which Involves A Right-of-way Dedicated In A Plat.

In their brief Respondents confuse the issue of whether a public easement exists with the issue of whether the public easement is open. They argue that there are two ways to open a street to public use: (1) the city can officially open it; or (2) a common law dedication can occur. *Respondent's Brief* pg. 26. This argument fails to distinguish two separate and distinct issues. The first issue is whether a public easement exists. The second issue is whether the easement is open for public use. Respondents' argument suggests that the existence of the easement is dependent upon whether it has been opened. Respondents then proceed to argue that because the easement is not open under a common law dedication analysis, the easement somehow does not exist unless the City takes official steps to open it. This argument misstates the factual context of this case. The issue here is not whether the easement exists, the issue is whether the easement is open because of use or whether the City, using its procedures, had the right to grant Glass a permit to build a driveway in the public easement.

Public easement rights can be created in many ways. As noted by Respondents they can be created by common law dedication. See Keiter v Berge, 219 Minn. 374, 18 N.W. 2d 35 (1945). They can also be created by statute or by plat. In re Maintenance of Road Areas, Etc., 311 Minn. 446, 250 N.W. 2d 827,

830-31 (Minn. 1977). The filing of a plat operates to convey to the public “such estate or interest in the streets as is necessary to accomplish the purpose of the dedication and no acceptance by the governing body is necessary.” *Id* at 831. Dedication of an easement in a plat is separate and distinct from common law dedication. “A common-law dedication is accomplished otherwise than by plat executed and recorded as required by statute.” *Keiter*, 219 Minn. at 378, 18 N.W. 2d at 37.

Here, there is no dispute that the easement was dedicated in a plat. Therefore, the 40th Street easement exists. Respondents’ discussion of common law dedication is immaterial to this matter because the easement at issue was dedicated in the plat.

The issues are whether the easement was opened by use, a circumstance which authorizes the City to allow its improvement. *See, Matter of Request of Lafayette Dev. Corp.*, 567 N.W. 2d 743 (Minn.App. 1997). Or, even if it wasn’t opened by use, whether the City was authorized to allow its improvement pursuant to its charter and ordinance process.

The City Did Not Covey Its Rights Or Exceed Its Rights By Granting A Driveway Permit.

Respondents argue that the City is prohibited from granting or permitting uses of public property for purposes other than those for which it was dedicated. Respondents cite to *Zumbrota v Strafford Western Emigration Co.*, 290 N.W. 2d

621, 623 (Minn.1980). The City does not argue with this general proposition of law. However, Zumbrota and the other cases cited by Respondent are inapposite to this matter because, unlike the cases cited by Respondents, the issuance of the driveway permit did not result in the grant of a permit inconsistent with the purposes for which the easement was dedicated.

Zumbrota involved a challenge to the city's intent to sell land dedicated in a plat as a public square to a private entity for the development of a senior citizen residence. The Court held that because the city did not own the fee, it could only use the land for purposes consistent with the dedication and a private senior residence was not such a purpose. Here, the City has not conveyed any right to Glass nor has it allowed Glass to use the easement for a purpose inconsistent with the purposes for which the street easement was dedicated. The City retains the option to publically improve the easement and assess the abutting property owners.

Burnquist v Marcks, 228 Minn. 129, 36 N.W. 594, 597 (Minn. 1949) involved an effort by the State to require the defendant to move a building that had been constructed on a platted street. The issue was whether the city had abandoned its easement rights to the platted street. The Court concluded that a city could abandon an easement by its action and had done so; therefore, the State was estopped from asserting any easement rights. Here, the City has taken no action that could constitute an abandonment. It maintains a curb cut, bituminous apron

and street sign. In granting Glass the permit, it expressly reserved the right to publically improve the easement in the future. *Ex. 26.*

In Kendrick v St. Paul, 213 Minn. 283, 6 N.W. 2d 449 (1942), an abutting owner to a small piece of land which was a remainder parcel after construction of a street improvement, attempted to claim that the city abandoned the land; therefore, plaintiff was the fee owner. The basis for the claim of abandonment was the fact that the city allowed another abutting owner to improve the property with a rock garden that the public could visit during the daytime only. The Court held that the use of the parcel for a rock garden was not inconsistent with the public uses for which the larger parcel had been condemned and that such use did not constitute an abandonment. Just as a rock garden is not inconsistent with the public's interest in the street, the Glass driveway does not deprive the City of the ability in the future to publically improve the right of way.

The proposition advanced by the cases cited by Respondent is that the easement is held in trust for the public and the City cannot grant a right to use the easement in a manner inconsistent with that trust. Here, the Glass driveway is not inconsistent with that trust. Use of the easement for vehicular traffic is the exact use for which a street easement is given. Use of an easement for lot access is the precise use for which the easement was dedicated in the plat.

By permitting a use consistent with the public trust, the City has not exceeded its authority.

CONCLUSION

For the reasons set forth above and in the City's opening brief, the City requests that the judgment of the district court be reversed.

Dated this 4th day of December, 2006.

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CERTIFICATION AS TO LENGTH

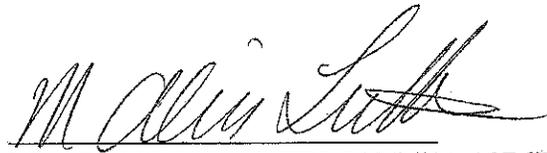
I hereby certify that this brief conforms to the requirements contained in Rule132.01, Subd. 3(a)(1) , MN.R.App.P. for a brief using a proportional font.

This brief has been prepared with Word Perfect 11. The length of the brief is 1106 words.

Dated this 4th day of December, 2006.

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