

NO. A06-0252

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State of Minnesota  
**In Court of Appeals**

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Mary E. Rixmann,

*Appellant,*

v.

City of Prior Lake, a Minnesota municipal corporation,

*Respondent.*

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**APPELLANT'S BRIEF AND APPENDIX**

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## LEGAL ISSUES

1. Was the City of Prior Lake entitled to summary judgment determining that the cul-de-sac at the end of Breezy Point Road had *not* been dedicated to the public under Minn. Stat. § 160.05?

*The trial court:* held in the affirmative.

*See*, Minn. Stat. § 160.05; Barfnecht v. Town Bd. Of Hollywood Twp., 304 Minn. 505, 232 N.W.2d 420 (1975); Anderson v. Birkeland, 229 Minn. 77, 38 N.W.2d 215 (1949).

## STATEMENT OF THE CASE

In 2004, the City of Prior Lake (the “City”) took certain actions by which it intended to prevent the public from using the cul-de-sac at the end of Breezy Point Road. Appellant Mary Rixmann (“Rixmann”) commenced this proceeding seeking a declaration that the cul-de-sac had been deemed dedicated to the public under the “six year” rule set forth in Minn. Stat. § 160.05, and that the City therefore had no right to prevent the public from using the cul-de-sac. On November 22, 2005, the City brought a motion for summary judgment alleging that, as a matter of law, the cul-de-sac had not been opened for public use within the meaning of Minn. Stat. § 160.05. On December 2, 2005, the Honorable Michael A. Young, First Judicial District, County of Scott, issued an Order granting the City’s motion for summary judgment. Judgment was subsequently entered on December 5, 2005. This matter now comes before the Minnesota Court of Appeals on Rixmann’s appeal from the judgment entered below.

## STATEMENT OF FACTS

The Breezy Point Addition is a residential subdivision in Prior Lake, Minnesota. The subdivision is located on Prior Lake, and approximately the northwest half of the subdivision consists of a peninsula that extends into Prior Lake. Second Affidavit of Bradley J. Gunn § 5. The plat of the Breezy Point Addition, in 1923, created 17 lots and a private driveway that ran the length of the peninsula and provided access to all 17 lots. *Id.* at §§ 4 and 6.

Appellant Mary Rixmann is the owner of Lots 14, 15 and part of Lot 17 in the Breezy Point Addition. *Id.* at § 2. Her property is the second-to-the-last home on the peninsula, while the property at the very “tip” of the peninsula is owned by Kathleen Speilman and/or Cyril Schweich.

For years, there has been a cul-de-sac, or “Turnaround,” at the end of Breezy Point Road. *Id.* at § 8. The Turnaround is paved and roughly “doughnut” shaped, and the City has maintained a fire hydrant and a manhole for access to sewer and water lines in the “hole” of the doughnut. *Id.* at § 8; Fourth Gunn Aff. Ex. A at 10. The Turnaround is widely used by the residents of the Breezy Point Addition, and by many other members of the public, in order to turn around at the end of the peninsula. *See*, Section I.C.1., *infra*.

In 2004, the City began an improvement project to re-pave and otherwise upgrade Breezy Point Road. Fourth Gunn Aff. Ex. C at 13; Second Gunn Aff. § 13. This project was intended in part to eliminate the Turnaround. *Id.* at § 14. The City took the position that all of Breezy Point Road *except for* the Turnaround was a public street (although the

City repaved and made other improvements to the Turnaround as part of the 2004 project). The City apparently believed that the Turnaround was the private driveway of the homeowners at the end of the peninsula (Schweich/Speilman). Fourth Gunn Aff. Ex. A at 8 and Ex. C at 10.

Appellant Rixmann, who lives next door to the cul-de-sac, commenced this action seeking a declaration that the Turnaround, along with the rest of the Breezy Point Road, has been deemed dedicated to the public under the so-called “six year rule” in Minn. Stat. § 160.05. (This rule provides, very generally, that private property will be deemed dedicated to the public as a public street if it used and maintained by the public for six years.) The evidence in this case disclosed that:

- Many of the residents of the Breezy Point Addition regularly use Breezy Point Road, including the Turnaround at the end. *See*, Section I.C.1., *infra*.
- Breezy Point Road and the Turnaround are also regularly used by guests and invitees of the residents of the Breezy Point Addition. *Id.*
- The Turnaround, along with the rest of Breezy Point Road, is used by service and delivery vehicles. *Id.*
- Other members of the public occasionally use the Turnaround when out driving around or looking for a public access point on Prior Lake. *Id.*
- The City maintained a fire hydrant, a manhole and sewer and water lines in the Turnaround for many years, without any kind of private easement.

When this dispute arose, however, the City proceeded to obtain a utility

easement in the Turnaround from Mr. Schweich in October 2004. Affid. of Bud Osmundson, Ex. C.

- The City regularly performs maintenance work on the utility lines located in the Turnaround. *See, Section I.C.2., infra.*
- The City has for years performed the snowplowing in the Turnaround, plowing 360-degrees all around the Turnaround. *Id.*
- The City repairs the blacktop in the Turnaround when it has been damaged. *Id.*
- The City included the Turnaround in its 2004 project for the improvement of Breezy Point Road, and as part of that project the City relocated the fire hydrant and repaved the Turnaround. *Id.*
- The City's own ordinances express a preference or a requirement for cul-de-sacs at the ends of streets: "Dead-End Streets Prohibited. Dead-end streets (temporary or permanent) without cul-de-sac turnarounds are prohibited unless otherwise provided for in this Subdivision Ordinance." Prior Lake City Code 1004.414. The City's Public Works Design Manual, adopted January 2002, Section 5.12, also specifically provides that "cul-de-sacs are required on all 'dead-end' public streets." Similarly, the International Fire Code, § 503.2.2 requires that dead-end streets over 150 feet in length be provided with an approved area for turning around fire apparatus.

## STANDARD OF REVIEW

This is an appeal from a summary judgment entered in favor of the City and against Rixmann. On appeal, it is the function of the reviewing court to determine whether there are any issues of material fact or whether the trial court erred as a matter of law. Offerdahl v. University of Minn. Hosps. & Clinics, 426 N.W.2d 425, 427 (Minn. 1988). These are questions of law, which the appellate court will review *de novo*. Dairyland Ins. Co. v. Starkey, 535 N.W.2d 363, 364 (Minn. 1995). In making its determination, the appellate court shall review the evidence in the light most favorable to the nonmoving party. Vlahos v. R & I Construction of Bloomington, Inc., 676 N.W.2d 672 (Minn. 2004). Similarly, all doubts and inferences must be resolved in favor of the nonmoving party. Ingram v. Syverson, 674 N.W.2d 233 (Minn. Ct. App. 2004).

## ARGUMENT

This action raises the question of whether the cul-de-sac, or Turnaround, at the end of Breezy Point Road has been deemed dedicated to the public by operation of Minn.

Stat. § 160.05. This statute provides as follows:

### **Dedication of roads.**

Subdivision 1. **Six years.** When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.

Minn. Stat. § 160.05. In short, the statute provides that private property shall be deemed dedicated to the public when it is used and maintained by the public as a roadway for six years.

The question on appeal is whether the City was entitled to summary judgment on its claim that there had *not* been sufficient public use and maintenance of the Turnaround to trigger a public dedication under Minn. Stat. § 160.05. Appellant Rixmann respectfully submits that the weight of the evidence demonstrates that there *was* sufficient public use and maintenance for the Turnaround to be deemed dedicated to the public, and that, more directly on point, the evidence clearly was not so conclusive as to support a summary judgment *against* such a dedication as a matter of law.

**I. THE CITY WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF WHETHER THE TURNAROUND HAD BEEN DEEMED DEDICATED TO THE PUBLIC.**

As noted above, the grant of summary judgment in this case shall be reviewed *de novo* on appeal, Dairyland, *supra*, 535 N.W.2d at 364, and all doubts and inferences shall be resolved in favor of the nonmoving party (Rixmann). Ingram, *supra*, 674 N.W.2d at 235. For the reasons that follow, the City was not entitled to summary judgment in this case.

**A. The Sufficiency of the Public Use and Maintenance Is A Question of Fact.**

Under Minnesota law, the sufficiency of public use and maintenance under Minn. Stat. § 160.05 is “a factual question.” Foster v. Bergstrom, 515 N.W.2d 581, 586 (Minn. Ct. App. 1994). *See also* Barfnecht v Town Bd. Of Hollywood Twp., 304 Minn. 505, 509, 232 N.W.2d 420 (1975) (“[t]he boundary of a public highway acquired by public use is a question of fact to be determined by the appropriate finder of fact...”). The question of “[w]hat is a sufficient user depends on the circumstances of each case.” Anderson v. Birkeland, 229 Minn. 77, 82, 38 N.W.2d 215 (1949).

In the present case, the trial court's decision to grant the City summary judgment, as a matter of law, improperly deprived Rixmann of her right to have these factual issues decided by a jury.

**B. The Trial Court Appears To Have Improperly Weighed the Evidence.**

On a motion for summary judgment, it is fundamental that it is not the function of the trial court to weigh the evidence or to resolve the factual disputes, but only to

determine whether or not such factual disputes exist. DLH, Inc. v. Russ, 566 N.W.2d 60, 70 (Minn. 1997); Albright v. Henry, 285 Minn. 452, 464, 174 N.W.2d 106, 113 (1970).

A “court may not weigh evidence or make factual determinations in reviewing a summary judgment motion,” and it “may not examine the quantum of evidence in deciding a summary judgment motion...” 2 *Herr and Haydock*, Minnesota Practice, Civil Rules Annotated, § 56.22 (2004), citing Fairview Hospital & Health Care Services v. St. Paul Fire & Marine Ins. Co., 535 N.W.2d 337 (Minn. 1995); Murphy v. Country House, Inc., 307 Minn. 344, 240 N.W.2d 507 (1976).

In Fairview, *supra*, the trial court concluded that some of the evidence submitted on a motion for summary judgment was “speculative,” and it ordered summary judgment in favor of the insurer. The Minnesota Supreme Court reversed, holding that the trial court had improperly weighed the evidence in making the determination that some of it was speculative. 535 N.W.2d at 341. Similarly, in the present case the trial court appears to have improperly weighed the evidence, stating that “evidence presented by plaintiff of maintenance of the turnaround is *weak...*” (App. A-5) (emphasis added).

**C. The Trial Court Mistakenly Concluded that the City Was Entitled to Summary Judgment.**

Under Minn. Stat. § 160.05, private property will be deemed dedicated to the public, as a road or a portion of a road, if it “has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority...” The statute “operates to declare public those roads which have been used and kept in repair for a period of 6 years continuously.” Leeper v. Hampton Hills, Inc., 290 Minn. 143, 146, 187

N.W.2d 765 (1971). Appellant Rixmann respectfully submits that the evidence of public use and maintenance in this case was more than sufficient to defeat the City's motion for summary judgment, for the reasons set forth below.

**1. There was strong evidence of public use of the Turnaround.**

“Public use may be established by showing that a comparatively small number of persons used the road for six years continuously.” Town of Belle Prairie v. Kliber, 448 N.W.2d 375, 379 (Minn. Ct. App. 1989) (citing Leeper, *supra*, 187 N.W.2d at 768).

Indeed, “ample evidence of continuous public use” under Minn. Stat. § 160.05 was found to exist when the record disclosed that farmers and hunters used a road seasonally and local residents used it sporadically, except for the winter when the road was closed.

Northfork v. Joffer, 353 N.W.2d 216, 218 (Minn. Ct. App. 1984). The Minnesota

Supreme Court has explained that:

It is the right of travel by all the world, and not the exercise of the right, which constitutes a road a public highway, and the user by the public is sufficient if those members of the public – even though they be limited in number and even if some are accommodated more than others – who would naturally be expected to enjoy it do, or have done so, at their pleasure and convenience.

Anderson v. Birkeland, 229 Minn. 77, 82, 38 N.W.2d 215 (1949) (interpreting predecessor statute to Minn. Stat. § 160.05). The decision in Foster, *supra*, indicates that proof of the public use shall be by clear and convincing evidence, 515 N.W.2d at 586, but the large majority of the other decisions on this subject do not appear to apply this standard.

There was extensive evidence of public use of the Turnaround in the present case, including:

- Affidavits from numerous current residents of the Breezy Point Addition, some of whom have resided there for 20 or 30 years, who have personally used the Turnaround and witnessed various guests, trash haulers, delivery people and others using the Turnaround (Neil Akemann, Ken and Carol Boyles, Heather Parris, Harry Schulz, Annie and Ted Westall, and Susan Westin). Fourth Affid. of Bradley J. Gunn, Ex. F.
- Affidavits from previous residents of the Breezy Point Addition who personally used the Turnaround and also witnessed its use by mail trucks, delivery vehicles, disposal service vehicles, and people who were driving around (Doug and Linda Thielbar). *Id.*
- Affidavits from current residents of the Breezy Point Addition who have not personally used the Turnaround but who have observed others using it (Barbara and Carlton Anderson and Daniel Wagner). *Id.*
- Affidavits from persons who do not live on Breezy Point Road but who have personally used the Turnaround and seen it being used by both private vehicles and commercial vehicles (Amy Regnier and Paul Rixmann). *Id.*
- Affidavit from a landscaper and snow remover who has used the Turnaround almost every week when doing groundskeeping work and also when removing snow, and who has witnessed City vehicles using the Turnaround to turn their vehicles for years (Jeffrey Fales). *Id.*

- Affidavit from a former sanitation truck driver who used the Turnaround to turn sanitation vehicles around, and who states that the practice is ongoing today (Richard Morcomb). *Id.*
- Transcripts from the depositions of various City officials who admit that they have driven their vehicles on the Turnaround (Larry Popler, Frank Boyles, and Stephen Albrecht). Fourth Gunn Aff. at Ex. A at 17, Ex. C at 13, and Ex. D at 15-17.

In summary, the evidence in this case clearly, if not overwhelmingly, demonstrates that the public use requirement of Minn. Stat. § 160.05 has been satisfied. The trial court did not reach this issue in its order granting summary judgment to the City.

2. **There was significant evidence that the City “worked” and kept the Turnaround “in repair.”**

In addition to the showing of “public use,” a roadway dedication under Minn. Stat. § 160.05 also requires evidence that “the road was kept in repair and worked” by a road authority for at least six years. Minn. Stat. § 160.05; Trebnick v. Gordon, 259 Minn. 164, 166, 106 N.W.2d 622 (1960). The governmental maintenance “must be of the quality and character performed on an already existing public road.” Foster, *supra*, 515 N.W.2d at 586. It is “not necessary that every part of a road be worked at government expense or that any particular part receive attention every year of the six year period.” Belle Prairie, *supra*, 448 N.W.2d at 379. In Northfork, *supra*, the Court held that the public maintenance requirement was met where the evidence disclosed that “[m]aintenance was performed when necessary.” 353 N.W.2d at 218.

At the outset, it is worth noting that the Turnaround, and the rest of Breezy Point Road, was paved and that it therefore did not require the kind of regular maintenance performed on gravel roads in order to be "kept in repair" under Minn. Stat. §160.05. Notwithstanding this fact, there was considerable evidence of public maintenance of the Turnaround in the present case, as follows:

- The extensive evidence of actual public use of the Turnaround, as set forth in the preceding section, creates a reasonable inference that the Turnaround was in fact "kept in repair" for the purpose of public travel.
- The City repaired the blacktop in the Turnaround when it was damaged by utility work. Fourth Gunn Aff. Ex. B at 20.
- For more than 10 years, the City maintained sewer and water lines in the Turnaround, as well as a fire hydrant and a manhole to access the utility lines, and the City flushed the hydrant twice a year and cleaned the sanitary sewer line every three years. *Id.* at 6, 9-10, 11. This is significant for two reasons. First, the mere presence of the utility lines and other public improvements indicates that the Turnaround was part of a public street, because otherwise the City would have had no right to place those improvements in the middle of it. Second, while the trial court believed that the City's maintenance of the utilities was not relevant to the maintenance of the street, App. A-1, n. 1, the Minnesota courts have recognized that the placement of culverts under a roadway *is* evidence of

public maintenance under Minn. Stat. § 160.05. *See, Belle Prairie, supra*, 448 N.W.2d at 379; *Leeper, supra*, 290 Minn. at 147.

- The City has regularly snowplowed the Turnaround for more than six years. Fourth Gunn Aff. Ex. F (Theilbar affidavits); *Id.* Ex. B at 16, 23; Affidavit of Joseph Schmitt, Ex. B at 7-10. The City plows the Turnaround approximately 20 times a year, and it is plowed 360-degrees all around the Turnaround. Fourth Gunn Aff. Ex. B at 16. The trial court in this case stated that “case law does not support the proposition that mere snow plowing is sufficient as a matter of law to constitute ‘maintenance’ for purposes of Minn. Stat. § 160.05,” citing *Shinneman v. Arago Township*, 288 N.W.2d 239, 242 (Minn. 1980). App. A-4. In point of fact, *Shinneman* does not stand for that proposition. More importantly, Rixmann has never claimed that snowplowing, *by itself*, leads to the dedication of a road pursuant to Minn. Stat. § 160.05. On the contrary, her position has been that all of the public use and maintenance of the Turnaround, viewed as a whole, are sufficient to meet the requirements of the statute. And the Minnesota courts have recognized that snowplowing is one of the factors that contributes to a finding of sufficient public maintenance under Minn. Stat. § 160.05. *Belle Prairie, supra*, 448 N.W.2d at 379-80 (stating that snowplowing was part of the evidence that constituted public maintenance in an earlier case, and that the failure to plow snow had contributed to a finding of insufficient public maintenance in another case); *Leeper, supra*

290 Minn. at 147 (recognizing that work by the “snowplow crews” was part of the evidence that supported the finding of a dedication under Minn. Stat. § 160.05).

- In 2004, the City repaved all of Breezy Point Road, including the Turnaround. Fourth Gunn Aff. Ex. C at 13; *Id.* Ex. A at 15-16. As part of this project, the City also did utility work in the Turnaround, including moving the fire hydrant and manhole work. *Id.* at 12. Finally, the City constructed a concrete spillway in the Turnaround to provide for surface water drainage into Prior Lake. *Id.* at 14.

In summary, if the issue of “public maintenance” had come before this Court following a trial on the merits, we believe that a reversal would be warranted because the evidence of such maintenance is more than sufficient to establish a public dedication under Minn. Stat. § 160.05 and the cases interpreting that statute. Since this matter comes before the Court on an appeal from a grant of summary judgment to the City, however, without an opportunity for Ms. Rixmann to have her day in court, the need for a reversal is even more compelling.

## **II. THE CITY’S ACKNOWLEDGMENT THAT BREEZY POINT ROAD IS A PUBLIC STREET IS FURTHER EVIDENCE THAT THE TURNAROUND IS ALSO PART OF THE PUBLIC STREET**

As noted above, the original plat of the Breezy Point Addition in 1923 dedicated a private driveway for the use of the residents of that subdivision. That driveway is now known as Breezy Point Road, and the City admits that it is a public street. While the City does not explain how it became a public street, the most reasonable explanation is that the

public use and maintenance led to a public dedication pursuant to Minn. Stat. § 160.05. If the City has some other explanation, we respectfully invite it to provide that rationale.

This fact is relevant to the Court's analysis because the evidence in this case showed that the City's own witnesses were not able to demonstrate any way in which the Turnaround was used or maintained differently from the rest of Breezy Point Road. Indeed, the evidence demonstrated that: (1) both Breezy Point Road and the Turnaround were regularly used by the public, (2) both Breezy Point Road and the Turnaround had City sewer and water lines, manholes and fire hydrants, Fourth Gunn Aff. Ex. B at 14, (3) the City snowplowed both Breezy Point Road and the entire Turnaround in the same manner, *Id.* at 16, and (4) the City officials acknowledged that they were not aware of any way in which the Turnaround's pavement or utilities were maintained in any different manner from the rest of Breezy Point Road. Fourth Gunn Aff. Ex. B at 11-14 and Ex. D at 18-19.

Moreover, it is undisputed that the City maintained a fire hydrant, a manhole, and underground sewer and water utilities in the middle of the Turnaround (as it did in the rest of Breezy Point Road). If the Turnaround was actually a private driveway, as the City now alleges, then the City would have had no right to construct and maintain those utilities on that property.

In summary, the evidence in this case demonstrates that the City, as well as the public in general, regarded the Turnaround as being part and parcel of the rest of Breezy Point Road. If Breezy Point Road is a public street – as the City admits – then so is the Turnaround.

## CONCLUSION

For all of the reasons set forth herein, Mary Rixmann respectfully requests this Court to reverse the summary judgment below and to remand this matter for a trial on the question of whether the Turnaround has been sufficiently used and maintained by the public to be deemed to the public pursuant to Minn. Stat. § 160.05.

Respectfully submitted,

Dated: March 22, 2006.



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STATE OF MINNESOTA  
IN COURT OF APPEALS

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Mary Rixmann,

Appellate Court Case No.: A06-0252

Appellant,

vs.

**CERTIFICATION OF BRIEF LENGTH:  
APPELLANT'S BRIEF**

City of Prior Lake, a Minnesota municipal corporation,

Respondent.

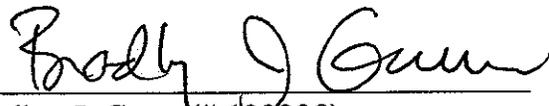
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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,639 words. This brief was prepared using Microsoft® Word 2000.

Respectfully submitted,

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Dated: March 22, 2006.



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).