

No. A-06-0252

STATE OF MINNESOTA
IN THE COURT OF APPEALS

Mary E. Rixmann,

Appellant,

vs.

City of Prior Lake,
a Minnesota municipal corporation,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF LEGAL ISSUES

1. Did the District Court properly hold that the City of Prior Lake ("City") has not maintained the driveway of Kathleen Spielman and Cyril Schweich for the purpose of public use and in the quality and character appropriate to already existing public roads in the City for a period of six years as required under Minnesota Statutes Section 160.05?

Ruling: Minn. Stat. § 160.05, Subd. 1. *Shinneman v. Arago Township*, 288 N.W.2d 239, 242 (Minn. 1980); *Foster v. Bergstrom*, 515 N.W.2d 581, 585-86 (Minn. Ct. App. 1994).

STATEMENT OF THE CASE

This action arises out of Plaintiff-Appellant Mary Rixmann's ("Plaintiff-Appellant") effort to force the City of Prior Lake ("City") to allow her continued access to her neighbors' driveway (the "driveway"). Plaintiff-Appellant has evidently used this driveway, which belongs to her neighbors, Kathleen Spielman and Cyril Schweich, and which lies at the end of Breezy Point Road, to turn around. Plaintiff-Appellant brought this action to have her neighbors' driveway declared to be a public road pursuant to Minnesota Statutes Section 160.05, against the wishes of her neighbors and the City itself. Plaintiff-Appellant first raised this issue in a motion for a temporary restraining order, seeking to forestall the City's efforts to repair damage done to her neighbor's driveway in the course of a repair project. The District Court rejected Plaintiff-Appellant's request for a temporary restraining order, concluding that Plaintiff-Appellant had not met the requirements of Minnesota Statutes Section 160.05 and that the driveway therefore was not a public road. Plaintiff-Appellant elected not to appeal this decision. The parties conducted discovery, and the City then brought a motion for summary judgment, arguing, *inter alia*, that the City had not maintained the driveway for the purpose of public use and in the quality and character appropriate to already existing public roads in the City. The District Court held, once again, that the City had not maintained the driveway for the purpose of public use and in the quality and character appropriate to already existing public roads in the City, and therefore dismissed Plaintiff-Appellant's claims at summary judgment. Plaintiff then brought this appeal.

STATEMENT OF FACTS

A. Background Regarding Project 04-11.

The City undertakes a number of road and utility improvement projects each year. One of the City's 2004 projects was Project 04-11 (the "Project"). The Project is a standard City road and utility improvement project for Breezy Point Road. The Project upgraded Breezy Point Road, improving the state of the surface, improving sewer and water service, and adding curb and gutter to the road. R-App., p. 1 (Affidavit of Bud Osmundson ("Osmundson Aff."), ¶ 2). The Project was designed to improve the safety of the road, and serve the public's need for transportation, water and appropriate drainage. *Id.* The Project also improved the environment, and protected Prior Lake from inappropriate runoff. *Id.*

Two of the properties impacted by the Project are owned by Plaintiff-Appellant and Kathleen Spielman and Cyril Schweich. *See* R-App., p. 5 (Osmundson Aff., Ex. A (Ms. Spielman and Mr. Schweich own Lot 16 and Plaintiff-Appellant owns Lot 15)). Plaintiff-Appellant's lawsuit revolves around these two properties.

B. Spielman/Schweich Driveway.

Plaintiff-Appellant's Brief repeatedly refers to a "cul-de-sac" at the end of Breezy Point Road. There is no such cul-de-sac at the end of Breezy Point Road. A-App., p. __ (Osmundson Aff., ¶ 3). Instead, the road ends at the Spielman/Schweich driveway. *Id.* Plaintiff-Appellant's Brief refers to this driveway as a cul-de-sac. This reference is inaccurate. *See* R-App., pp. 5-6 (Osmundson Aff., ¶ 3, Ex. A (plans for the Project, demonstrating that the road ends at the Spielman/Schweich property line); Ex. B (original plat for this area, which includes Breezy Point Road, and which reflects a termination of the Road without any cul-de-sac)).

C. **The City Has Not Maintained the Spielman/Schweich Driveway.**

Plaintiff-Appellant first alleged in generic terms that “the City has regularly plowed and maintained all of Breezy Point Road, including the cul-de-sac, for many years.” Complaint, ¶ 9. In fact, the City has regularly plowed and maintained Breezy Point Road, but not the Spielman/Schweich driveway. R-App., p. 2 (Osmundson Aff., ¶ 5. In fact, the City’s only interest in the Spielman/Schweich driveway is an easement for utilities. R-App., pp. 2, 7-9 (Osmundson Aff., ¶ 5, Ex. C (easement agreement)).

The City’s activities on the Spielman/Schweich driveway have been limited to facilitating the City’s use of the easement, and repairing damage to the Spielman/Schweich driveway as a result of the City’s activities. R-App., p. 2 (Osmundson Aff., ¶ 5). In particular, the City has never maintained the Spielman/Schweich driveway, except to repair damage done by City equipment in using the easement. *Id.* The City has not filled potholes on the driveway, blacktopped the driveway, graded the driveway, or undertaken any other similar activity, such as the City might take in a conventional street. *Id.* The City has plowed snow from the area sufficient to use the easement, and has plowed that snow away from the door (so as to avoid boxing Spielman/Schweich into their garage due to the plowing), but the City has not undertaken a general plowing of the driveway. *Id.* The City has not kept the driveway “in repair” except to repair damage done by City vehicles. *Id.*

Plaintiff-Appellant has conceded during discovery that she had no evidence that the City conducts maintenance on the Spielman/Schweich driveway other than plowing snow away from the fire hydrant and repairing damage done by the City. R-App., pp. 24-25 (M. Rixmann Tr., pp. 12-13). *See also* R-App., pp. 62-63 (Schmitt Aff., Ex. D, pp. 2-3 (listing all alleged maintenance)). Plaintiff-Appellant first listed two types of “maintenance” done by the City:

plowing of snow and flushing the fire hydrant. R-App., pp. 24-25 (M. Rixmann Tr., pp. 12-13). Plaintiff-Appellant then added that the City moved the fire hydrant and repaired the damage done as a result of the move. *Id.* Plaintiff-Appellant has expressly acknowledged that she had no information that the City had filled potholes in the Spielman/Schweich driveway, put down gravel on the Spielman/Schweich driveway, put down oil on the Spielman/Schweich driveway, or conducted any other maintenance normally done on a public road. R-App., pp. 26-27 (M. Rixmann Tr., pp. 14-15). Mr. Rixmann later confirmed this testimony, and acknowledged that he has no evidence of any other City maintenance of the Spielman/Schweich driveway. R-App., pp. 42-45, 48-49 (W. Rixmann Tr., pp. 7-10, 14-15).

D. Public Use of the Spielman/Schweich Driveway.

Plaintiff-Appellant testified that she, and other members of the public, use the Spielman/Schweich driveway as a turn-around. However, there is no evidence that any members of the public park in the Spielman/Schweich driveway. R-App., p. 46 (W. Rixmann Tr., p. 11 (“I don’t think anyone’s ever parked in that area”)). Plaintiff-Appellant even affirmatively testified that she does not believe that members of the public should be allowed to park in the Spielman/Schweich driveway:

Q. [I]f that area is deemed to be a public road, are you also arguing that individuals should have the right to park their vehicles in that area?

A. Not at all.

...

Q. And it’s your position that this should be a public road only for purposes of turning around but not for purposes of parking.

A. Right.

R-App., p. 37 (M. Rixmann Tr., p. 34).

E. Plaintiff-Appellant's Earlier Lawsuit Against Ms. Spielman.

This is not the first lawsuit in which Plaintiff-Appellant asserted a right to the Spielman/Schweich driveway. Plaintiff-Appellant earlier commenced an action styled *Mary E. Rixmann v. Kathleen M. Spielman*, File No. 00-001197, in Scott County District Court. Plaintiff-Appellant claimed that certain property belonged to her and not to Ms. Spielman. R-App., p. 22 (M. Rixmann Tr., p. 9). Plaintiff-Appellant testified that one of her claims in the previous lawsuit was that “the public road should go to the lake, but that [Mr. Schweicht’s] got his garage at the end of that public road.” R-App., p. 35 (M. Rixmann Tr., p. 30). Ms. Rixmann explained:

- Q. Okay. And where did that lawsuit decide that the public road ended?
- A. He claims it’s right at the beginning of the cul-de-sac.
- Q. Okay. And is that what the court held in that lawsuit?
- A. I believe so.

Id. The District Court rejected this argument, and held that Ms. Spielman owned the property in Lot 16. R-App., p. 75 (Schmitt Aff., Ex. G, p. 3). The District Court specifically held that the public road terminated at Lot 16. R-App., p. 74 (Schmitt Aff., Ex. G, p. 2).

Plaintiff-Appellant first testified that she did not appeal the opinion of the Scott County District Court. R-App., p. 23 (M. Rixmann Tr., p. 10 (“Did you appeal that decision of the judge? A. No.”)). When confronted with the opinion of the Minnesota Court of Appeals, *see* R-App., pp. 79-88 (Schmitt Aff., Ex. H), Plaintiff-Appellant changed her testimony, and said that she was unaware of her appeal. R-App., p. 40 (M. Rixmann Tr., p. 41). The Court of Appeals affirmed the District Court’s decision, and specifically held that the driveway was not a public road. R-App., p. 84 (Schmitt Aff., Ex. H, p. 6). Plaintiff-Appellant testified that the lawsuit is over, and that the decisions of the Court of Appeals and District Court are now final. R-App., p. 23 (M. Rixmann Tr., p. 10).

F. Motion for Temporary Restraining Order.

Plaintiff-Appellant brought a motion for temporary restraining order in this matter in November 2004. Plaintiff-Appellant argued that the City should not be allowed to complete its project and repair the damage done to the Spielman/Schweich driveway. Plaintiff-Appellant contended that the Spielman/Schweich driveway was a public road pursuant to Section 160.05. Plaintiff-Appellant argued that the City had plowed snow from the driveway and repaired damage done by the City in moving the hydrant.

The District Court rejected Plaintiff-Appellant's arguments and refused to issue a temporary restraining order. R-App., pp. 15-18 (November 4, 2004 Order, pp. 1-4). The Court held that Plaintiff-Appellant was not likely to succeed on the merits because the City had not performed the requisite maintenance on the Spielman/Schweich driveway to satisfy the requirements of Section 160.05. R-App., p. 18 (November 4, 2004 Order, p. 4). The Court also held that the balance of harms favored the City and not Plaintiff-Appellant. R-App., pp. 17-18 (November 4, 2004 Order, pp. 3-4). Plaintiff-Appellant elected not to appeal this decision.

The parties then conducted discovery. At the conclusion of discovery, the City asked the District Court for summary judgment on several grounds, including the City's contention that the City had not maintained the driveway for the purpose of public use and in the quality and character appropriate to already existing public roads in the City. The District Court addressed only the public maintenance argument, and concluded that the City had not maintained the driveway for the purpose of public use and in the quality and character appropriate to already existing public roads in the City. The District Court therefore dismissed Plaintiff-Appellant's claims at summary judgment. Plaintiff then brought this appeal.

ARGUMENT

A. Introduction.

Plaintiff-Appellant contends that the City has maintained her neighbors' driveway, and thus created a public road pursuant to Minnesota Statute Section 160.05. In fact, the City merely has an easement in the use of the driveway for providing sewer, water and power, and the City has not maintained the driveway in any way, except to allow access to the easement and to repair damage done by City equipment. Indeed, Plaintiff-Appellant has now conceded that the only work performed by the City on the driveway is plowing snow (which is obviously necessary to allow access to the fire hydrant), flushing the hydrant (which is not maintenance of the driveway) and repairing the damage done by City equipment. Minnesota courts have held that far more public work is necessary to satisfy the demands of Section 160.05. Moreover, the courts have also held that public work that was not intended to create a public road does not satisfy Section 160.05. Given that the City has expressly stated that it did not maintain the driveway for purposes of creating a public road, any snowplowing done on the driveway cannot satisfy Section 160.05.

Plaintiff-Appellant also argues that the District Court should not have granted summary judgment because several City personnel could not identify work performed on other streets that was not performed on the driveway. As the District Court expressly recognized, however, none of these City staff worked at the City for more than a few years prior to their deposition. These staff each noted that they are unaware of what work was performed on the driveway or elsewhere prior to their arrival at the City. In sharp contrast, Bud Osmundson, the former City Engineer, who worked at the City for over six years prior to the commencement of this litigation, specifically identified a number of types of maintenance that the City normal performs on streets

but did not perform on the driveway. Plaintiff-Appellant could not challenge Mr. Osmundson's testimony before the District Court and does not attempt to do so on appeal. The District Court correctly concluded that summary judgment is appropriate in light of this record.

B. 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).

C. The District Court Properly Held That Plaintiff-Appellant Could Not Satisfy the Requirements of Minn. Stat. § 160.05.

1. Standard Under Section 160.05.

Plaintiff-Appellant contends that the driveway has become a public road pursuant to Minn. Stat. § 160.05. This statute provides in part:

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 . . . whether it has ever been established as a public highway or not.

Minn. Stat. § 160.05, Subd. 1 (emphasis added). Minnesota courts have required that a party show (1) use by the public; (2) maintenance by an appropriate government agency; (3) for purposes of a public highway; that (4) occurred over a continuous period of at least six years to satisfy this statutory requirement. *Foster v. Bergstrom*, 515 N.W.2d 581, 585-86 (Minn. Ct.

App. 1994). *See also Shinneman v. Arago Township*, 288 N.W.2d 239, 242 (Minn. 1980). In this case, the District Court properly concluded that Plaintiff-Appellant could not establish (1) maintenance by an appropriate government agency (2) for purposes of a public highway; (3) that occurred over a period of at least six years.¹

2. The District Court Properly Analyzed Public Maintenance as a Legal Issue.

Plaintiff-Appellant suggests that the issue of public maintenance “is a question of fact.” Appellant’s Brief and Appendix, p. 8. Plaintiff-Appellant next argues that because this is a question of fact, the District Court’s grant of summary judgment “improperly deprived Rixmann of her right to have these factual issues decided by a jury.” This argument is incorrect on a number of levels. First, Plaintiff-Appellant’s suggestion that a grant of summary judgment is intrinsically inappropriate when addressing a factual issue is incorrect. It is entirely appropriate to grant summary judgment on such an issue if the nonmoving party fails to introduce sufficient evidence to raise a dispute regarding a material issue of fact. Second, Plaintiff-Appellant can cite no authority for the proposition that this issue would be tried to a jury, instead of to a District Court Judge (precisely as the issues of temporary restraining order and summary judgment were presented).

Similarly, Plaintiff-Appellant’s contention that the trial court “appears to have improperly weighed the evidence” is false. Appellant’s Brief and Appendix, p. 8. Plaintiff-Appellant cannot

¹ The District Court did not address the issue of public use. Plaintiff-Appellant’s extensive discussion of the evidence of public use is therefore a red herring. *See* Appellant’s Brief and Appendix, pp. 10-12. Plaintiff-Appellant’s assertion that “evidence of actual public use of the Turnaround . . . creates a reasonable inference that the Turnaround was in fact ‘kept in repair’ for the purposes of public travel,” *Id.*, p. 13, merely serves to confirm the absence of any evidence of public maintenance, particularly in light of actual evidence from the City staff that they did not maintain the driveway for this purpose. *See* R-App., pp. 1-9 (Osmundson Aff.).

identify any “evidence” that the trial court “weighed” in any way, either in this section of her Brief, *see Id.*, p. 9, or anywhere else.

3. The City of Prior Lake Has Not Maintained the Driveway Over a Continuous Period of At Least Six Years.

Minnesota courts have held that “statutory dedication also requires clear and convincing evidence of continuous city maintenance for six years.” *Foster*, 515 N.W.2d at 586. Plaintiff-Appellant must show that the maintenance in question “was of the ‘quality and character appropriate to an already existing public road.’” *Skow v. Town of Denmark*, 1991 Minn. App. Lexis 600, *3 (Minn. Ct. App. 1991) (*quoting Shinneman*, 288 N.W.2d at 242). The District Court correctly held that Plaintiff-Appellant could not satisfy this standard in the instant case. At deposition, Plaintiff-Appellant identified only three types of maintenance: (1) flushing the fire hydrant that the City maintained in the center of the driveway; (2) plowing of snow; and (3) paving done in connection with the movement of the fire hydrant from the driveway to a nearby location. *See M. Rixmann Tr.*, pp. 12-13; *Schmitt Aff., Ex. D*, pp. 2-3. Plaintiff-Appellant’s spouse identified the same three types of maintenance. *W. Rixmann Tr.*, pp. 7-10, 14-15. On appeal, Plaintiff-Appellant identifies the same three pieces of evidence, and also cites the sewer and water lines on the Turnaround as evidence of public maintenance. *See Appellant’s Brief and Appendix*, pp. 13-14. The District Court correctly held that this evidence is insufficient to meet the requirements of Minnesota Statutes Section 160.05 for several reasons.

Initially, at deposition and on appeal, Plaintiff-Appellant acknowledges that the City has not performed additional work typical of other public roads, including oiling of the road, placement of gravel, sweeping of the road, repairing of potholes (except those created during the movement of the fire hydrant), or installation of curb and gutter. *Appellant’s Brief and Appendix*, pp. 13-14; *R-App.*, pp. 24-26 (*M. Rixmann Tr.*, pp. 12-14; *W. Rixmann Tr.*, pp. 7-10,

14-15). *See also* R-App., pp. 42-45, 48-49 (Osmundson Aff. (distinguishing City work on the Spielman/Schweich driveway from actions taken on public roads)). All of these are actions that the City normally performs on public roads. R-App., p. 2 (Osmundson Affidavit, ¶ 5).

Plaintiff-Appellant has essentially conceded that the City did not maintain the driveway as required by Minn. Stat. § 160.05. As previously noted, Ms. Rixmann must demonstrate that the City's maintenance was of the "quality and character appropriate to an already existing public road." *Shinneman*, 288 N.W.2d at 242. It is undisputed that the City has not performed many of the functions that it would normally perform on a public road on the driveway. For example, the City has not oiled the driveway, put down gravel, installed curb and gutter, repaired potholes, installed road signs, or swept the driveway. R-App., pp. 1-9, 24-27, 42-48, 48 (Osmundson Aff.; M. Rixmann Tr., pp. 12-15; W. Rixmann Tr., pp. 7-10, 14; Osmundson Aff.) Courts examining similar circumstances have held that the property in question did not become a public road under Minn. Stat. § 160.05. *See, e.g., Ravenna Township v. Grunseth*, 314 N.W.2d 214, 218 (Minn. 1981) (reversing trial court decision that Section 160.05 had been satisfied because evidence that a road had been graded on two occasions and graveled on two occasions was insufficient to demonstrate maintenance of a quality and care appropriate to an already existing public road); *Wojahn v. Johnson*, 297 N.W.2d 298, 307 (Minn. 1980) ("the trial court's holding that there was no statutory dedication was based on his conclusion that the town board had not authorized maintenance of the driveway, and that any maintenance performed was merely a favor to the landowners involved"); *Delhi Township v. Minnesota Department of Natural Resources*, 2000 Minn. App. Lexis 942, *3 (Minn. Ct. App. 2000) (Plaintiff-Appellant could not satisfy the requirement of Minn. Stat. § 160.05 because "while the township may have graveled and/or graded the disputed roadway during the late 1920s, no more than four years of maintenance are

substantiated”); *Skow*, 1991 Minn. App. LEXIS 600, *3 (holding that a road did not become a public road under Section 160.05 because, *inter alia*, it had “never been ditched, oiled, paved or fitted with culverts, guard rails or road signs” and therefore “any maintenance performed on the road was not of a quality or character appropriate to an already existing public road”); *Pine City Township v. Blaufuss*, 1991 Minn. App. LEXIS 329, *6 (Minn. Ct. App. 1991) (holding that Plaintiff-Appellant did not satisfy the requirement of 160.05 because “the road was not on the township’s maintenance inventory map, it was not plowed, and was not regularly maintained. The blading and grading of the road by township workers was performed only at times that enabled gravel haulers to access and leave the township’s gravel pit”). In short, Minnesota courts have held that even in situations in which substantially more public maintenance was conducted than in the present case, such maintenance was insufficient to satisfy the requirements of Minn. Stat. § 160.05.

On appeal, Plaintiff-Appellant suggests that the absence of this maintenance is unimportant because the 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. Appellant’s Brief and Appendix, p. 13. This argument ignores the fact that the comparisons drawn by City witnesses are not between the driveway and gravel roads, but between the driveway and paved roads in the City. R-App., pp. 1-9 (Osmundson Aff.). This comparison is precisely the standard set by Minnesota Courts under Section 160.05.

Second, the District Court properly noted that Plaintiff-Appellant was not able to introduce any evidence of maintenance over the six years required by Section 160.05, with the sole exception of snowplowing. Plaintiff-Appellant cites repair work done by the City in 2004, but there is no evidence that any such work was done prior to that point. Although Plaintiff-

Appellant argues that “Rixmann has never claimed that snowplowing, by itself, leads to dedication of a road” Appellant’s Brief and Appendix, p. 14, the fact remains that Plaintiff-Appellant has no evidence that any maintenance was performed over six years other than snowplowing. This Court of Appeals addressed a similar situation in *Foster*, 515 N.W.2d at 586, and held that a City’s actions were insufficient to satisfy Section 160.05, even though the City “regularly removed snow from the road” just as in the present case. In fact, in *Foster*, the City also deposited gravel and sweeping material on at least one occasion, laid blacktop and patched the road upon request. *Id.* Obviously, this maintenance is far more than that conducted by the City of Prior Lake in this case. The Court of Appeals’ decision in *Foster* is therefore particularly on point, and establishes that mere snow plowing, even when combined with other activity, is insufficient to establish public maintenance under 160.05.

Plaintiff-Appellant’s next argument regarding public maintenance involves the presence of public utilities. Appellant’s Brief and Appendix, p. 13. Plaintiff-Appellant argues that the presence of utilities proves that the driveway is a public road, otherwise the City would not have had the authority to place the utilities in the driveway. However, the evidence shows that the City and Schweich/Spielman have an agreement (eventually confirmed in a written easement) permitting placement of the utilities in the driveway. The City has many such agreements with property owners across the City.

Likewise, Plaintiff-Appellant’s artful suggestion that the “placement of *culverts* under a roadway is evidence of public maintenance under Minn. Stat. § 160.05,” Appellant’s Brief and Appendix, p. 14 (emphasis added), ignores the fact that culverts are part of a roadway, while utilities are separate. Culverts are designed to protect a road from flooding and improve drainage; utilities have a separate purpose. Moreover, even if culverts were the equivalent of

utilities, the cases cited by Plaintiff-Appellant to support her argument in this area merely confirm that Plaintiff-Appellant's claim lacks merit. First, *Town of Belle Prairie v. Klibert*, 448 N.W.2d 375, 379 (Minn. Ct. App. 1989), cited by Plaintiff-Appellant for the proposition that "Minnesota courts have recognized that the placement of culverts under a roadway is evidence of public maintenance" actually did not address this issue. The public road authority in *Belle Prairie* actually did not place any culverts below the road, and the Court of Appeals' decision does not address this issue. 448 N.W.2d at 379. The second case cited by Plaintiff-Appellant for this proposition, *Leeper v. Hampton Hills, Inc.*, 187 N.W.2d 765, 767-68 (Minn. 1971), does address the issue of culverts (not utilities) as one of a list of items of maintenance performed by a public road authority. As the Minnesota Supreme Court explained in *Leeper*:

There is testimony in the record that about 1946 the entire length of Juneau Lane was graveled and "crowned up"; that during the winters from 1947 to 1955 snowplow crews worked on the road up to the Winkler property; and that during this period the road was graded, weeds were mowed, and culverts were installed in the area south of the Leeper driveway.

Id. In this case, not only is there no evidence of the installation of culverts, but the other evidence cited by the Court (grading, graveling, crowning, and plant control) are notably absent. Plaintiff-Appellant may not escape her duty of showing public maintenance on the driveway by citing the fact that a sewer line lay underneath the driveway for a period of time.

Finally, Plaintiff-Appellant argues that the driveway must be a public road because Breezy Road is a public road. Plaintiff-Appellant suggests that at some earlier undetermined time Breezy Road became a public road through operation of Minn. Stat. Section 160.05. There is, of course, no evidence whatsoever in the record to support this suggestion, made for the first

time on appeal.² Plaintiff-Appellant may not simply rely on speculation to argue that their neighbors' driveway has become a public road. Section 160.05 sets specific requirements, and Plaintiff-Appellant has not met those requirements.

4. The District Court Properly Concluded That the City Did Not Intend to Create a Public Road in the Driveway.

The District Court also correctly found that summary judgment was appropriate because the City did not intend to create a public road in the driveway. As the Supreme Court observed in *Wojahn*, public maintenance is insufficient if it is not authorized by the City Council. In other words, if the maintenance is “merely a favor to the landowners involved” and not intended by the public body to create a public road, such maintenance cannot satisfy the requirements of Section 160.05. 297 N.W.2d at 307. In this case, there is no dispute that the City did not intend to create a public road over the driveway. In fact, the testimony is undisputed that any maintenance (snow plowing) was done merely to access the fire hydrant and as a favor to Mr. Schweich (in return for allowing the City access to his property). *See generally* R-App., pp. 1-9 (Osmundson Aff.). Given the Supreme Court’s holding in *Wojahn*, Plaintiff-Appellant cannot establish a public road against the City’s will.

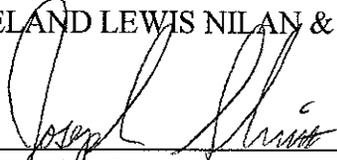
CONCLUSION

The District Court properly held that Plaintiff-Appellant was unable to establish the maintenance requirements of Minn. Stat. § 160.05. This Court should affirm the District Court’s grant of summary judgment for the City.

² Plaintiff-Appellant’s request that the City provide evidence regarding the means by which Breezy Point Road became a public road ignores the fact that this argument was presented for the first time on appeal. There is no evidence in the record (of any type) addressing this transition because Plaintiff-Appellant did not make this argument below.

Dated: April 21, 2006

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ATTORNEYS FOR RESPONDENT
CITY OF PRIOR LAKE

STATE OF MINNESOTA
IN THE COURT OF APPEALS

Mary E. Rixmann,

Appellate Court Case No. A06-0252

Appellant,

vs.

CERTIFICATION OF BRIEF LENGTH:
RESPONDENT'S BRIEF

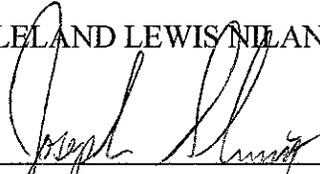
City of Prior Lake,
a Minnesota municipal corporation,

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,760 words, from the Statement of the Issues on Appeal through the Conclusion. This brief was prepared using Microsoft Word.

Dated: April 21, 2006

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