

NO. A06-1600

STATE OF MINNESOTA
IN COURT OF APPEALS

DIANE SILVER, *Respondent*,

v.

PAUL RIDGEWAY, SR. , *Appellant*, and
LAKE COUNTY, *Respondent*.

APPELLANT'S
BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

Did the trial court err in vacating the Lake County Board of Commissioner's Order establishing a cartway in favor of Appellant over the lands of Respondent Diane Silver?

1. The trial court held that the Lake County Board of Commissioners applied an erroneous theory of law in granting the cartway to Appellant.
2. The trial court held that the Lake County Board of Commissioners acted against the public's best interest.

STATEMENT OF THE CASE

This appeal is taken from an appealable Order of the District Court, under Minnesota Rules of Civil Procedure 103.03(g), vacating the Order of the Lake County Board of Commissioners, establishing a cartway over Respondent Diane Silver's property. The Order of the Court was signed by the Honorable Kenneth A. Sandvik, dated June 19, 2006 and filed June 27, 2006.

STATEMENT OF THE FACTS

Appellant is the owner of two 40 acre tracts of land located in Lake County, Minnesota, which property is "land locked". As Appellant was unable to secure voluntary easement rights to access the property, Appellant filed a petition in Lake County, Minnesota to have the Lake County Board of Commissioners (hereinafter, "County Board") grant a cartway pursuant to Minnesota Statutes Section 164.08. Prior to filing his petition for the establishment of a cartway, Appellant sought information from Lake County Land Commissioner Thomas Martinson (hereinafter, "Martinson"). Martinson gave Appellant certain information, including furnishing Appellant with an application form and certain legal descriptions to be used in the filing of the petition.

Appellant's petition sought a cartway over an existing roadway, a large portion of it located upon the land owned by Respondent Diane Silver (hereinafter, "Respondent"). After several meetings of the County Board, the Commissioners established the cartway on the existing road over Respondent's property and issued an award for damages in the amount \$30,000.00 to Respondent at the County Board meeting on April 28, 2005. Other alternative routes other than that over Respondent's property were discussed by the County Board, including one route offered by Respondent and a possible route over property owned by the State of Minnesota, which property is part of a designated Wildlife Management Area (hereinafter, "WMA"). The County Board, based on information furnished to them by Martinson, and letters received by Martinson from the Minnesota Department of Natural

Resources (hereinafter, "DNR"), established the road over the requested location sought by Appellant.

Respondent, pursuant to Minnesota Statutes Section 164.07, subd.7, filed an appeal with the District Court of Lake County, Minnesota. Subsequently, Appellant filed a motion with the District Court for Summary Judgment, which motion was denied. The matter came before the Honorable Judge Kenneth A. Sandvik on April 24, 2006, at which time counsel for Appellant and counsel for Respondent agreed that the Court could make it's decision on Respondent's appeal based upon the record and the testimony set forth in the submitted Depositions of Martinson and County Commissioner Clair Nelson (hereinafter, "Nelson").

The Court issued it's Order on June 19, 2006, which Order was filed on June 27, 2006, wherein the Court concluded that the County Board erroneously applied a legal theory that the DNR could prevent the establishment of a cartway over lands owned by the State of Minnesota within a WMA and that the County Board acted against the public's best interest by not preventing Martinson from advocating for Appellant and selecting a cartway route that only regarded the needs of the County and Appellant. The Court's Order vacated the County Board's resolution in establishing the cartway, dated May 26, 2005, and remanded the matter back to the County Board. Subsequent to the issuing off the Court's Order, Appellant brought a Motion for the Court to reconsider it's Findings of Fact, Conclusions of Law and Order, which Motion was denied be Order of the Court dated August 11, 2006.

Appellant filed it's appeal to the Court on August 23, 2006.

STANDARD OF REVIEW

This case presents mixed questions of law and fact. When reviewing the determination of a mixed question of fact and law, the court will affirm if the findings of fact are supported by the evidence and if the conclusion based on those facts is consistent with the statutory mandate. Colburn v. Pine Portage Madden Bros., Inc., 346 N.W.2d 159, 161 (Minn. 1984).

ARGUMENT

- 1. THE LAKE COUNTY BOARD OF COMMISSIONERS DID NOT APPLY AN ERRONEOUS THEORY OF LAW; THE COUNTY BOARD MAY NOT GRANT A CARTWAY OVER LANDS OWNED BY THE STATE OF MINNESOTA AND MANAGED BY THE DEPARTMENT OF NATURAL RESOURCES WITHOUT PERMISSION FROM THE STATE OF MINNESOTA. A CARTWAY PROCEEDING UNDER MINN. STAT. 164.08 IS AN EMINENT DOMAIN PROCEEDING.**

Minn. Stat. §164.08, subd.2, sets forth the mandatory conditions for the establishment of a cartway for “the owner of a tract of land containing at least five acres, who has no access thereto except over a navigable waterway or over the land of others...” Said subdivision further provides that “The town board may select an alternative route other than that petitioned for if the alternative is deemed by the town board to be less disruptive and damaging to the affected landowners and in the public’s best interest.”

Minn. Stat. §164.08, subd.2(b), provides that in an unorganized territory the County Board of Commissioners of the county in which the tract is located shall act as the Town Board. The land involved in this matter is located within an unorganized township. Said subdivision further provides that the proceeding shall be in accordance with Minn. Stat. §164.07.

The public nature of a cartway is set forth in Powell v. Town Board of Sinnot TP., Mashall County, 175 Minn. 395, 221 N.W. 527. In Powell, the Minnesota Supreme Court stated that the the establishment of a cartway creates a public road. The Court cited Mueller v. Supervisors of Town of Courtland, 177 Minn. 290, 135 N.W. 996, stating, “it was there determined that such taking was for a public purpose, as the public as well as the landowner

had the lawful right to use the cartway.” (p.398). The Court further went on to say, “Whether a way is public or private does not depend on the number of people who use it. It is public if everyone who desires to use it may lawfully and of right to do so.” In its concluding sentence, the Court stated, “When this cartway is established and opened, everyone desiring to use it will have the legal right to do so.

The establishment of a cartway, pursuant to Minn. Stat. §164.08, is an eminent domain proceeding. To believe otherwise would violate the Minnesota Constitution by the taking of private property by one for the private use by another.

Further, Minn. Stat. §164.07, subd. 8, provides that any appeal of a cartway to the district court “shall be tried in the same manner as an appeal in eminent domain proceedings under Chapter 117.”

A cartway cannot be established over lands owned by the State of Minnesota without the State’s consent.

Eminent domain is the right of the state to appropriate property for a public use, with or without the owner’s consent. The authority to condemn is limited by various constitutional and statutory provisions. The state may delegate its authority to condemn. In Minnesota, the Legislature has delegated the eminent domain power to various agencies and political subdivisions of the State, including but not limited to: Cities (Minn. Stat. § 465.01); Housing and Redevelopment Authorities (Minn. Stat. § 469.012, subd.1(g)); Port Authorities (Minn. Stat. § 469.055, subd. 8); and Economic Development Authorities (Minn. Stat. § 469.101, subd. 4). The Legislature has also delegated the eminent domain power to various

non-governmental entities, including but not limited to: Utilities (Minn. Stat. § 116C.63); and Railroads (Minn. Stat. § 222.27).

The scope of express authority to condemn is often limited in some way by the authorizing statute or legislation, and the condemning authority may not exceed these limits. The recipient of a delegation of the eminent domain power may not exercise it “unless it is able to show legislative authority to do what it is seeking to do... The power must be clearly granted, and every presumption is in favor of the individual landowner.” Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 435, 107 N.W. 405, 407 (1906).

Although this operates as a general power to condemn, the cartway statute does not include specific authority from the Legislature to condemn state lands. The cartway statute does not include express language granting town and county boards the right to condemn state lands in establishing cartways.

According to the Minnesota Supreme Court:

“[i]t is well settled that property owned by the state cannot be taken under the right of eminent domain, except under authority expressly conferred by the Legislature or clearly implied from statutory provisions. A general power to condemn lands is not sufficient.” Minnesota Power & Light Co. v. State, 177 Minn. 343, 344, 225 N.W. 164, 165 (1929). see also State by Head v. Christopher, 284 Minn. 233, 170 N.W.2d 95 (1969) (noting that “[i]t is not correct to equate the sovereign right of the state to condemn land for a public purpose with rights of lesser subdivisions of the government of public or private utility corporation to exercise the right of eminent domain.”).

The Minnesota Supreme Court has rejected attempts by entities expressly authorized to use the power of eminent domain to take public land. In Minnesota Power v. State, the Court held that there was no express or implied statutory authority for a public utility to

condemn a perpetual easement over state-owned lands (Jay Cook State Park). In its decision the Court also noted that:

“[a]s interference with parks, cemeteries, public buildings, and property segregated and devoted to the use of public institutions can generally be avoided by a deviation in route, authority to encroach upon such property will not be implied. *Minnesota Power & Light Co. v. State*, at 166, 348, citing *Rockport, etc., R. Co. v. State* (Tex. Civ. App.) 135 S.W. 263; *State v. Kittitas County*, 107 Wash. 326, 181 P. 698; *St. Louis, etc. R. Co. v. Trustees*, 43 Ill. 303; *Matter of Boston & A.R. Co.* 53 N.Y. 574.”

The Minnesota Supreme Court has also found that both express and implied authority to condemn public land has been delegated by the Legislature, thereby enabling a governmental entity to condemn state land. In *State by Head v. Christopher*, 284 Minn. 233, 170 N.W.2d 95 (1969), the state highway department attempted to condemn property within Minnehaha State Park for trunk highway purposes. The Court held that the highway commissioner has broad authority in determining what land is necessary to establish and maintain a highway system and that the power of the state to condemn land for public purpose was superior to the rights of lesser subdivisions of government or of public or private utility corporations in exercise of eminent domain. The Appellant contended that where land has been devoted to a public use it may be condemned for another public purpose only when expressly authorized by law or authorized by necessary implication of the controlling statute. The Court agreed but found the Legislature has, by both express and implied authority, given the commissioner the right to appropriate lands already devoted to public use. Minn. Stat. § 160.08, subd. 4 (stating that for controlled-access highways “[p]roperty rights ... may be acquired by ... road authorities with respect to both private and

public property....”)). In its discussion, the Court noted that “not all condemners in the hierarchy of entities having the power of eminent domain enjoy the same rights and powers.” State v. Christopher, at 238, 99. The Court also stated that “[i]t is not correct to equate the sovereign right of the state to condemn land for a public purpose with rights of lesser subdivisions of the government or public or private utility corporations to exercise the right of eminent domain.” Id. at 99, 238-239.

In the Appellant’s matter, the cartway statute neither expressly nor by implication authorizes a town or county board to take state-owned land for cartways. To allow a town or county board such broad power would result in the town and county boards having greater power of eminent domain than utilities, railroads, and all other entities specifically granted the power of condemnation by the Legislature. Although it is true that the cartway statute operates to allow the town and county boards eminent domain power, it is also clear from Minnesota case law that not all eminent domain power is equal and that there is a hierarchy of rights among subdivisions.

The general condemnation authority of the cartway statute is insufficient to enable the county board to establish a cartway over state land already dedicated for a specific public use.

In addition to the general rule that property owned by the state cannot be taken under the right of eminent domain, except under authority expressly conferred by the Legislature or clearly implied from statutory provisions, the Court has differentiated between state land in “actual use and those not in use and subject to sale.” The Court has held that as to the latter, those lands might be appropriated in condemnation proceedings. In re Condemnation of

Lands in St. Louis County. Independent School Dist. Of Virginia v. State, 124 Minn. 271, 144 N.W. 960 (1914) (general power of eminent domain granted to public service corporations allows condemnation of school or university lands or other lands belonging to the state pursuant to statute providing for notice to the state in such cases and pursuant to the constitution which provides that no school land held by the state shall be disposed of otherwise than at public sale where disposal of state lands in condemnation proceedings is substantially the same as a public sale due to the appraisal process) , see also University v. Railway Co., 36 Minn. 447, 31 N.W. 936 (1887).

Moreover, the Court has noted:

“[w]hen the land is already dedicated by the state or one of its governmental agencies for a specific public use and is actually used for the specified purpose, the rule is that mere general authority to condemn is insufficient to interfere with already recognized public use.” *Id.* at 345, 165; see also Northwestern Tel. Exch. Co. v. Chicago, Milwaukee & St. Paul Ry., 76 Minn. 334, 347, 79 N.W. 315, 318 (1899) (preventing condemnation when taking would extinguish or materially interfere with prior use); In re Condemnation of Lands in St. Louis County. Independent School Dist. Of Virginia v. State, 124 Minn. 271, 144 N.W. 960 (1914); Minneapolis & St. L.R. Co. v. Village of Hartland, 5 Minn. 76, 88 N.W. 423 (1901) (“There is in this state no express legislative authority empowering municipal authorities to take or appropriate land already appropriated for a public use, and apply it to another and inconsistent public use.”); Williams Pipeline Company v. Soo Line Railroad Company, et al., 587 N.W. 2d 340 (Minn.App. 1999); In the Matter of Condemnation by Suburban Hennepin Regional Park District of Certain Lands in the County of Hennepin, 561 N.W.2d 195 (Minn.App. 1997); University of Minnesota v. St. Paul & N. P. Ry. Co. and Others, 36 Minn. 447, 31 N.W. 936 (1887).

The cartway statute grants only an implied general authority to condemn land. Such general authority is not sufficient to enable the County Board to condemn the state land in question. Moreover, because the WMA land is already dedicated by the state (through the

DNR) for a specific public use (WMA), and the land is actually used for such specified purpose, the established rule is that mere general authority to condemn is insufficient to interfere with already authorized public use. Therefore, the County Board may not legally establish a cartway over state owned WMA lands. The County Board, through Martinson, sought permission from the DNR to use the WMA land for a cartway. Through testimony and the DNR letter in response to Lake County's request, it is evident the DNR did not give permission to Lake County to establish a cartway over the DNR WMA land. In fact, according to the letter,

“Caribou Falls WMA is managed primarily for white-tailed deer. The WMA is part of an important wintering area for deer. Wintering areas are generally compromised by roads, which provide, open, snow-packed or bare surfaces for predator access.”

Therefore, a cartway over DNR WMA land would destroy or essentially impair the State's existing use of the property. Even if the Court considers the County Board to have the necessary statutory authority to condemn state land in this case, such authority would be rendered useless because the cartway would materially interfere with the existing WMA use.

Without the State's permission, then, no cartway can be established on the DNR land by the County Board. In order for the County Board to establish a cartway over such land, the DNR would have to grant the County Board permission to do so. The DNR did not give such permission. Therefore, the cartway cannot legally be established over the DNR WMA land.

2. THE LAKE COUNTY BOARD DID NOT ACT IMPROPERLY IN OBTAINING INFORMATION FROM MARTINSON AND DID ACT IN THE PUBLIC'S BEST INTEREST IN ESTABLISHING THE CARTWAY.

Minn. Stat. §164.08 provides that the town board, this case the county board, “may select an alternate route other than that petitioned for if the alternative is deemed by the town board to be less disruptive and damaging to the affected landowners and in the public’s best interest.” The County Board is not required to select alternate routes. However, it is clear that the County Board considered alternate routes (Deposition of Nelson, p.7). Nelson further stated, that he reviewed a route suggested by respondent’s attorney and visited the site, (Nelson Depo., p.12-13). In fact, Nelson stated that if the County Board could have found an alternate route, that’s the way they would have gone (Nelson Depo., p.17). When asked by Respondent’s attorney whether the route picked was the least disruptive and damaging route that could have been picked, Nelson stated, “As far as with all of the facts and figures that we received as a County Board, I think it’s the only route that we could legally pick.” (Nelson Depo., p.21). When asked by Respondent’s attorney whether Martinson made a recommendation to the County Board as to where the cartway should go, Nelson stated “no” (Nelson Depo., p.21-22). Martinson’s role in the cartway proceeding was to furnish information to the County Board (Nelson Depo., p.22).

The actions by Martinson and the information provided to Appellant by Martinson were no different than that which would have been provided to any other individual. The assistance and information furnished was the same he would provide to anybody (Deposition of Thomas Martinson, p.25-27, 37). He gave his information even though it could negatively

affect the County. (Martinson Depo., p.37). While Martinson forwarded an application for the cartway, which he received from the clerk of County Board, to Appellant (Martinson Depo., p.27 and Exhibit 6) and provided help with the legal descriptions to be used by the Appellant for the cartway petition (Martinson Depo., p.29 and Exhibit 8), there is nothing in the record to indicate that Martinson took any position favoring Appellant's request for a cartway. The fact that Appellant copied Martinson on correspondence to the County Board cannot be a reflection on Martinson's conduct in this matter.

When asked in his deposition, Martinson testified that the same information that he gave to Appellant would be given to anyone else who sought assistance and that there is nothing out of the ordinary in assisting Appellant that he would not have done for anyone else (Martinson Depo., p.26). The information which Martinson furnished to the County Board relating to the refusal of the State of Minnesota to grant access over the property owned by the State of Minnesota and designated as a WMA does not in any way amount to a favoring of Appellant's position over that of Respondent, but was necessary information which the County Board needed to make a determination of the location of the cartway in this matter.

The record in this matter is clear that Martinson did not act in an improper manner in giving information to either the Appellant or the County Board. The County Board walked the proposed route, considered alternate routes and took the time to inform themselves and make their own opinion; Martinson is not on the County Board and even if he acted improperly, which he did not, it should not render the County Board's decision inappropriate.

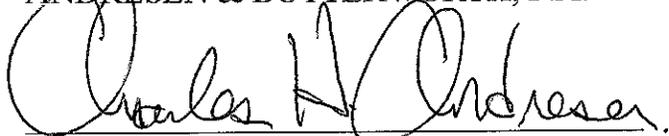
CONCLUSION

For all of the reasons set forth above, Appellant respectfully requests this Court to reverse the District Court's Order and reinstate the Order of the Lake County Board of Commissioners establishing the cartway over Respondent's property.

Dated: December 18, 2006.

Respectfully submitted,

ANDRESEN & BUTTERWORTH, P.A.

A handwritten signature in cursive script that reads "Charles H. Andresen". The signature is written in black ink and is positioned above a horizontal line.

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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).