

NO. A08-1921

State of Minnesota
In Court of Appeals

John Kennedy,

Appellant,

v.

Pepin Township of Wabasha County,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

	Page
Table of Authorities	3
Legal Issue	4
Statement of Facts	5
Argument	11
Conclusion	14

APPENDIX AND ITS INDEX

Petition to Pepin Township for Establishment of Cartway	1
Findings of Fact, Conclusions of Law and Order of Pepin Township on Cartway	
Petition of John Kennedy	7
Notice of Appeal of Town Board Order Establishing Cartway	14
Order of District Court dated September 12, 2008	15
Notice of Appeal to Court of Appeals	16
Statement of the Case of Appellant	17
Complete copy of unpublished opinion in <u>Schacht v. Town of Hyde Park</u> , unpubl'd 1998 WL 202655 (Minn. App.)	20

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).

TABLE OF AUTHORITIES

Statutes

Minn. Stat. § 164.08, Subd. 2(a) (2008)	5
Minn. Stat. § 480A.08 (2008)	12

Cases

<u>Becker v. St. Farm Mut. Auto Ins. Co.</u> , 596 N.W.2d 697 (Minn. App. 1999)	12
<u>Dynamic Air Inc. v. Bolch</u> , 502 N.W.2d 796 (Minn. App. 1993)	12
<u>Leiser v. Town of St. Martin</u> , 255 MN 153, 96 N.W.2d 1 (1959)	10
<u>Schacht v. Town of Hyde Park</u> , unpubl'd 1998 WL 202655 (Minn. App.)	11
<u>State ex. Rel. Rose v. Town of Greenwood</u> , 220 Minn. 508, 20 N.W.2d 345 (1945)	12

Secondary Authorities

Op. Att'y Gen. 3776-1 (June 23, 1983)	13
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LEGAL ISSUE

I. Did the town board act arbitrarily or capriciously against the best interests of the public, or on an erroneous theory of law, when it granted a cartway to an area of Appellant's property that is inaccessible to the only usable portion his property.

Trial court held: That the town board acted appropriately in establishing the cartway in such location.

List of the most apposite cite cases:

Schacht v. Town of Hyde Park, unpubl'd 1998 WL 202655 (Minn. App.)

State ex. Rel. Rose v. Town of Greenwood, 220 Minn. 508, 20 N.W.2d 345 (1945)

STATEMENT OF FACTS

This case is an appeal of a Pepin Township Cartway Order heard by Wabasha County District Court Judge Terrence M. Walters. The trial court found that the township acted appropriately in granting a cartway to an area of the appellant's property located at the base of the bluffs and inaccessible to any usable portion of the appellant's property (Appendix, p. 15).

The Appellant, John Kennedy, filed a Petition to Establish a Cartway (Appendix, p. 1) with Pepin Township requesting that the township provide him a cartway through the middle of property owned by Pepin Heights II and III pursuant to Minn. Stat. § 164.08, subd. 2(a), which reads in part as follows:

Mandatory establishment; conditions. (a) Upon petition presented to the town board by 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 lands of others, or whose access thereto is less than two rods in width, the town board by resolution shall establish a cartway at least two rods wide connecting the petitioner's land with a public road ... 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.

The proposed route of the cartway follows an existing gravel road from the south across property owned by Pepin Heights Orchard, then turning into a wide clearing used as a field road leading directly to the Kennedy property (Warfield Appraisal, p. 3). Appellant filed the Cartway Petition so that he could access more than 5 acres of bluff top property that he owned (this being the only usable portion of his 26 acre parcel), the

balance being steep slopes adjacent to Highway 61. This property is located adjacent to that part of the Mississippi River known as Lake Pepin.

Due to the township's lack of action and failure to proceed with this request, a mandamus action was commenced by Mr. Kennedy against Pepin Township with an Order being issued by District Court Judge Deborah A. Jacobson dated May 1, 2006, which required the township to make an order on or before April 1, 2006, "describing as nearly as practical the road proposed to be established to provide access to Appellant's land", among other things. The order, in paragraph one, required the Respondent to:

"determine whether there were any specific legal impediments which would prohibit providing access to the appellant's property using an access via adjoining properties which ascends up the sides of the bluff which face the Mississippi River in the area of appellant's property. If there are such legal impediments to particular access routes, the Respondent shall not consider those potential access routes in determining which properties will be burdened by the cartway."

Subsequently, the town board held the Cartway hearing on March 13, 2008, following many delays. Witnesses for the appellant included John Kennedy, the appellant, and Jeffery Warfield, a Minnesota certified general real property appraiser.

Five potential access points or routes for the cartway were inspected and investigated by Mr. Warfield. Two of the prospective routes were adjacent to Highway 61 just off the Nielson driveway (a private road accessing Highway 61), since there was no direct access to Highway 61 because of a grade of more than 15% (See Hearing Exhibit 2, a letter from the Department of Transportation, disapproving any residential access on a grade greater than 15% off of Trunk Highway 61, which is where the

Kennedy property is located). Mr. Warfield thoroughly analyzed the two Nielsen routes after discussing the matter with Wabasha County surveyor, David Johnson, registered surveyor, Vince Fangman, among other experts. He also conferred with Tracy Pooler, the Wabasha County Zoning Administrator. His conclusion was that there was no buildable area along the hillside of the Kennedy property, the Nielsen route does not provide access to a buildable portion of the Kennedy property, and because of the steep slopes of the bluffs, it is impractical and economically unfeasible to construct a road up the side of the bluff to reach the bluff top buildable portion of the Kennedy property. Furthermore, the grades did not meet minimum County requirements, and Mr. Warfield rejected these routes since access could not be provided to the bluff top property (Warfield's report, pp. 2 - 4).

The Respondent's decision to ignore this evidence and grant the cartway over the Nielsen driveway is also contrary to the order of Judge Jacobson since, clearly, there were numerous specific legal impediments that would prevent access to the appellant's property on the bluff top, which ascends up the side of the bluff (Warfield's report, p. 2).

The remaining three routes all involved crossing the Pepin Heights property, one running along the east perimeter, one running along the west perimeter, and one going directly through the property over an existing gravel road and field drive (See top photographs on p. VIII and IX of Warfield's report).

The perimeter routes, clearly, would be cost prohibitive and disturb many of the Pepin Height's apple trees, not to speak of the required substantial grading that would be required. Route No. 5 (the route requested in Mr. Kennedy's Petition), being the most

direct route, follows the existing road used to serve the outbuilding in the center of the Pepin Heights property and its agricultural operations. The route leads directly to the Kennedy property and is approximately $\frac{3}{4}$ of a mile in length. No trees would need to be removed since there is an existing path as shown in the photographs, and there would also be minimal disturbance to the agricultural operation (Warfield's report, p. 3). Mr. Warfield's conclusion was also clearly set forth in paragraph 15 of the Township's Findings of Fact which states, "the only reasonable access to a buildable portion of appellant's property are the access routes over the Pepin Heights II property."

The owner of the property, John Kennedy, testified that the State would not permit access off of Highway 61 because of the grade, and that he had no buildable lots on his 26 acres, except approximately 5 acres on top of the bluff. He also testified that it was his intention to use the acreage on top for his family and to construct one single family residence on the bluff for his children's heritage. Without a cartway as requested by him, the only access to the bluff top portion of his property would be by foot up a steep cliff or by helicopter. He went on to state that the requested route for the cartway presently has a gravel road to the farmhouse, and then a grass path out to his property. He wanted to keep the driveway (i.e. cartway) as private as possible for him and his family and agreed that he would construct a deer fence adjacent to the cartway similar to the other fences surrounding the perimeter of Pepin Heights, and would pay for a security gate at the entrance. Although these costs and the other costs that he would incur in obtaining the property as a result of establishment of a cartway are fairly sizable, his property is basically worthless without access. Mr. Kennedy concluded he would agree to pay any

such costs, including those set forth in Mr. Warfield's analysis. Those costs include but are not necessarily limited to the following: \$9,000.00 for gates; \$8,000.00 for fences along the road; \$8,000.00 as a premium for the land taken; \$9,000.00 for the actual land taken, for a total of \$34,000.00 (Warfield's report, pp. 4 – 7).

Mr. Warfield's testimony included not only his analysis of the five routes and the damage estimates, but he also investigated zoning requirements, and met with apple industry experts in coming to his conclusions. According to present zoning ordinance standards for this area, Mr. Kennedy could only build one single family residence on the entire 26 acre tract.

As part of his investigation, Mr. Warfield talked with Mr. Courtier, one of the principal owners of Pepin Heights Orchard, and was told that there was a pole shed located on the property used by migrant workers. Mr. Courtier, furthermore, indicated his concern for security, and that there were no secure fences, other than deer fences, surrounding the entire orchard property. It should be noted that Mr. Courtier did not testify at the hearing and the only evidence received relative to his position is in a letter from his legal counsel to the board, which was received into evidence and marked Exhibit 5. Mr. Warfield testified that he spoke with numerous experts in the apple industry, one being a Ralph Yates and another being Bill Meyer, whom both indicated a deer fence would be appropriate around the orchard itself and that usually no security fences are needed around apple orchard operations.

The only evidence provided to the board from Pepin Heights is, again, the letter of March 11, 2008, from their attorney, marked Exhibit 5. He expressed Pepin Height's

concern that experimental apples might be prematurely exposed to the public and that the orchard is contractually bound to prevent patent piracy. According to his letter, opening up the middle of the research facility to the general public would increase the possibility of piracy. Because of this, Mr. Kennedy agreed to install an electronic privacy gate at the start of the cartway and pay for the cost of fencing the entire cartway as it is presently being fenced along the perimeter of the orchard. He, furthermore, testified that he would only be using this for himself and his family.

Following the submissions and legal arguments of counsel, the two remaining members of the board, Dave Evers and Paul Schmidt stated that the Nielsen driveway was the route that they preferred, and that their attorney would write up the Findings, Conclusions, and Order.

STANDARD OF REVIEW

When a town board acts on a Petition to Establish a Cartway, it acts in a legislative capacity. The town board's determination will be set aside on appeal to the district court only when it appears that the evidence is practically conclusive against it, or that the local board proceeded on an erroneous theory of law, or that it acted arbitrarily or capriciously against the best interests of the public. Lieser v. Town of St. Martin, 255 Minn. 153, 96 N.W.2d 1 (1959).

ARGUMENT

In the unpublished opinion of Schacht v. Town of Hyde Park, 1998 WL 202655 (Minn. App.), (copy attached), the Minnesota Court of Appeals held in a very similar set of circumstances that the town board acted arbitrarily and capriciously and reversed the denial of the petition of the cartway. In Schacht supra., Petitioner's land was inaccessible except over the land of others because, although said property was adjacent to a public road, the Schacht's could only gain access from the public road by constructing an access road up a steep and rocky hillside at a prohibitive cost. That case involved bluffs along the Zumbro River in Wabasha County, Minnesota, which are substantially less steep with much lower elevations than the bluffs along the Mississippi River, as is the case with Kennedy. In Schacht, the township alleged that because Schachts had access to a highway through their own land, they were not entitled to a cartway under the statute. The district court concluded that because Schacht's property had high bluffs bordering the public highway, that it was unreasonable to characterize Schacht's property as having access to a highway. The district court concluded and the appellate court affirmed that it would be impractical to build a road up through Schacht's bluffs, and therefore found that the board acted "arbitrarily and capriciously" and contrary to law in denying Schacht's Petition for a cartway, and ordered the establishment of a cartway over the adjacent landowner's property. The District Court in Schacht made the Petitioner financially responsible for the construction of the cartway and also responsible for the maintenance

thereof. Appellant, Mr. Kennedy, has also agreed to be financially responsible for the construction and maintenance of any cartway established.

Although Schacht is an unpublished opinion, it is very similar to the fact situation of this appeal. Minn. Stat. § 480A.08 states that, “unpublished opinions of the court of appeals are not precedential.” However, they may be of persuasive value. See Becker v. State Farm Mutual Automobile Insurance Company, 596 N.W.2d 697 (Minn. App. 1999). And Dynamic Air, Inc. v. Bolch, 502 N.W.2d 796 (Minn. App. 1993).

Likewise, the Minnesota Supreme Court in the case of State ex. Rel. Rose v. Town of Greenwood, 220 Minn. 508, 20 N.W.2d 345 (1945) held that in a situation where there was a dried up lake on Petitioner’s property located between a public road and the Petitioner’s farmland, the town board was mandated to establish a cartway since the Petitioner had no access to his land except across this “dried up lake.” It was deemed impractical to build a road across this lake. Based on that information, the Supreme Court held that Petitioner was entitled to a cartway over property of another.

The Pepin Township in its Findings of Fact, Conclusions of Law, and Order, ordered that Petitioner was entitled to a cartway, but the route would extend off the switchback of the driveway of Larry Nielson (Appendix, p.6). In effect, by doing so the township provided the appellant with access to his property at the base of the bluff just off of Highway 61, which provides no access to the only usable portion of the Kennedy property (i.e. the five plus acres at the crest of the bluff). As in the case of Schacht, it would be unreasonable to characterize appellant’s property as having access to a highway when the access the township provided was nothing more than a door to the base of the

bluff, from where no road could be built to access his only usable property. Clearly, the access from the Neilson driveway does not provide access to the blufftop five acres of Mr. Kennedy's land. The county engineer in his letter clearly concurs with this conclusion. Mr. Warfield also concluded that the only reasonable access to the blufftop land is through the Pepin Heights property delineated as Route No. 5 (Warfield's report, pp. 3 - 4). There is no evidence to the contrary, and the board clearly acted "arbitrarily and capriciously" on an erroneous theory of law, and the evidence was conclusive against the position taken by the board.

There is a 1938 attorney general's opinion dealing with a similar situation, which opinion states as follows:

Even though a person's land adjoins a public highway we believe that the town board may establish a cartway over another person's land if, because of natural obstacles, said first party does not have "access" to such highway. Op. Att'y Gen. 3776-1 (June 23, 1938).

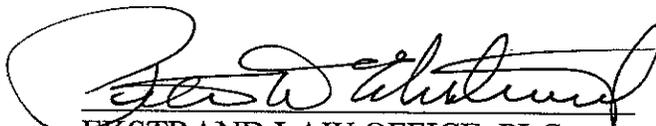
Here as was true with the high bluffs covered with brush in Schacht, supra., it would be "impractical" to build a road up the Kennedy bluffs to access his property at the crest thereof.

CONCLUSION

Pepin Township through the decision of its two supervisors clearly acted “arbitrarily and capriciously” and contrary to the evidence submitted to them. Knowing full well that the route that they chose for a cartway would not give Mr. Kennedy access to his property on the bluff top was contrary to law and “arbitrary and capricious,” and should be overturned by this court. As was done in Schacht, this Court should order that the cartway, as originally proposed by Mr. Kennedy in his township petition, be granted.

Respectfully submitted,

Dated: November 24, 2008



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