

NO. A08-1921

State of Minnesota
In Court of Appeals

John Kennedy,

Appellant,

v.

Pepin Township of Wabasha County,

Respondent.

**BRIEF AND APPENDIX OF RESPONDENT
PEPIN TOWNSHIP OF WABASHA COUNTY**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF LEGAL ISSUE.....	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS.....	3
STANDARD OF REVIEW.....	8
LEGAL ARGUMENT	9
I. THE TOWNSHIP BOARD’S DECISION TO ESTABLISH AN ALTERNATIVE ROUTE FOR THE KENNEDY CARTWAY IS NOT CLEARLY AGAINST THE EVIDENCE, BASED ON AN ERRONEOUS THEORY OF LAW OR ARBITRARY AND CAPRICIOUS AND AGAINST PUBLIC INTEREST	9
CONCLUSION	17
APPENDIX	

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

	<u>PAGE</u>
STATUTES:	
Minn. Stat. § 164.07	2
Minn. Stat. § 164.08	1, 2
Minn. Stat. § 164.08, subd. 2(a)	2, 9
Minn. Stat. § 272.03, subd. 6.....	15
 CASES:	
<i>Horton v. Township of Helen</i> , 624 N.W.2d, 591 (Minn. Ct. App. 2001).....	8, 10
<i>Kranz v. Township of Mantrap</i> , 2005 WL 2130269, unpublished decision (Minn. Ct. App., Sept. 6, 2005)	10
<i>Lieser v. Town of St. Martin</i> , 255 Minn. 153, 96 N.W.2d 1 (1959).....	8
<i>Phelps v. Commonwealth Land Title Ins. Co.</i> , 537 N.W.2d 271 (Minn. 1995)	13
<i>Schacht v. Town of Hyde Park</i> , 1998 WL 202655, unpublished opinion (Minn. Ct. App., April 28, 1998).....	2, 13, 14, 15
<i>Silver v. Ridgeway</i> , 733 N.W.2d 165 (Minn. Ct. App. 2007)	8, 10
<i>State ex. Rel Rose v. Town of Greenwood</i> , 200 Minn. 508, 20 N.W.2d 345 (1945).....	13, 14, 15
<i>Thiele v. Stich</i> , 425 N.W.2d 580 (Minn. 1988)	12

STATEMENT OF LEGAL ISSUE

Was the Town Board's determination, under Minnesota Statutes section 164.08, subdivision 2(a), to select an alternative route for Appellant's cartway supported by the evidence, based on a sound theory of law, and in the public interest?

Trial Court's ruling: The trial court held that it was and affirmed the Town Board's decision.

STATEMENT OF THE CASE

On December 6, 2004, Appellant John Kennedy (“Kennedy”) petitioned Respondent Pepin Township of Wabasha County (“Township”), under Minnesota Statutes sections 164.07 and 164.08, for the establishment of a cartway to access his property. On March 13, 2008, the Township held a public hearing on Kennedy’s cartway petition. On April 1, 2008, the Township Board issued its Findings of Fact, Conclusions of Law and Order on Kennedy’s petition. Pursuant to the authority in Minn. Stat. § 164.08, subd. 2(a), the Board selected a cartway route other than the route sought by Kennedy because the Board deemed the alternative route to be less disruptive and damaging to the affected landowners and in the public’s best interest.

On May 7, 2008, Kennedy appealed the Township’s decision to the district court on the basis that the Township’s Order granted “a cartway over an alternate route than was originally petitioned for and which alternate route does not provide appellant with reasonable access to his bluff top property.” On July 21, 2008, the Wabasha County District Court heard arguments on the appeal. On September 12, 2008, the trial court issued an Order affirming the Township’s decision and finding that “the Court can find no authority, including the unpublished case of *Schacht v. Town of Hyde Park*, 1998 WL 202655 (Minn.App.), that states that the cartway must provide access to the entire parcel.”

This appeal followed.

STATEMENT OF FACTS

The Kennedy Property. Kennedy owns approximately 26.6 acres of property in the Township (the “Property”). (A.A., p. 1) The Property is an undeveloped tract of land directly abutting Highway 61. (A.A., p. 7) The Property includes bluffland. (*Id.*) The lower portion of the Property below the bluff) is the portion that directly abuts Highway 61 and is located adjacent to land owned by Larry Nielson (“Nielson”). (*Id.*) The upper portion of the Property (on top of the bluff) includes approximately five acres of relatively level land and abuts land owned by Pepin Heights II, a limited partnership, whose general partner is Pepin Heights Orchards, Inc. (collectively “Pepin Heights”). (*Id.*) Pepin Heights operates an apple orchard on its property. (*Id.*)

Prior to the public hearing on the cartway petition, Kennedy consistently represented to the Township that he desired access to the blufftop portion of his Property because he intended to subdivide the land into lots for a residential development. (A.A., pp. 3, 10) At the public hearing on March 14, 2008, Kennedy—for the first time—stated that it was his intention not to subdivide the land, but to keep it in his family for the use of his children. (*Id.*, p. 10)

The Cartway Petition and Possible Routes. Kennedy’s petition to the Township requested the establishment of a cartway that would bisect the Pepin Heights’ property in order to provide access to the portion of his Property situated on the top of the bluff. (A.A. pp. 9, 10) His requested cartway route would not provide access to the portion of his Property situated below the bluff. (*Id.*, p. 9)

On November 11, 2007, the following individuals viewed the Property in order to determine possible routes for the cartway: Kennedy and his representatives; Township Board members and the Township Clerk; Nielson; and, representatives of Pepin Heights. (A.A., pp. 7-8) The site viewings were extensive and included both driving and walking tours of the Kennedy Property, the Pepin Heights property, the Nielson land and the Marx land. (*Id.*)

Wabasha County Engineer Dietrich Flesch also viewed the Property in early November 2006. (A.A., p. 8) In a letter dated November 6, 2006, to Township Chairman Paul Schmidt, Engineer Flesch identified several possible routes for establishing access to the Property: 1) access from the Nielson driveway; 2) access from current driveway to and [sic] field path through Pepin Heights property; and 3) access from route around perimeter of Pepin Heights property. (A.A., p. 8; R.A.-1) Engineer Flesch concluded that the first option—access from the Nielson driveway—was the “[m]ost desirable access to Kennedy tract of land” despite not providing access to the area on the top of the bluff. He stated this option would require “minimal construction . . . with little disturbance to current landowners” and estimated a construction cost to be between \$5,000 and \$10,000. (A.A., pp. 8-9; R.A.-1)

Engineer Flesch advised the Township Board that a cartway directly through the Pepin Heights property—while providing access to the area on the top of the bluff—would require construction of over a one-half mile long road. (*Id.*) He further advised that this construction would be “very disruptive to and divide current property.” (*Id.*) Engineer Flesch noted that construction cost for this route “could be expected to be very

high” and estimated it at \$100,000. (R.A.-1) Engineer Flesch further noted that a cartway around either side of the perimeter of the Pepin Heights’ property—again, while providing access to the top of the bluff—would require construction of over 1.5 miles of “rough terrain with steep slopes and requiring large culverts.” (A.A., pp. 8-9; *Id.*) Engineer Flesch stated that this option would be “very disruptive to current land” and would result in “very high” damages to the current property owners, with estimated construction costs in the amount of \$300,000. (*Id.*)

At the public hearing on the cartway petition, Kennedy presented testimony and exhibits—his personal testimony and the testimony of his appraiser, Mr. Jeffrey Warfield—concerning five proposed cartway routes. (A.A., pp. 9-10; R.A.-23-28) Two of those five potential routes crossed different portions of the Nielson property and three traversed different portions of the Pepin Heights’ property. (*Id.*) Kennedy advocated for the route that would bisect the Pepin Heights and Marx land and provide access to the portion of his land on the top of the bluff. (*Id.*) In addition to giving a valuation opinion on the property that would be taken for the cartway, Mr. Warfield – despite not being an engineer – also provided an opinion about cartway access to the Kennedy property. Mr. Warfield testified at the public hearing and opined that “the only reasonable access to a buildable portion of [Kennedy’s] property are the access routes over the Pepin Heights II property.” (A.A., p. 10)

Some residents of the area also attended the public hearing on the cartway petition. Health and safety concerns were raised about the establishment of the cartway in an area

in which there would be spraying of chemicals as part of the apple orchard operation. (A.A., p. 11; R.A.-41)

The Pepin Heights Property. The Pepin Heights property, located to the south of the Kennedy Property, is approximately 289.33 acres in size and is currently used for agricultural purposes, including the operation of an apple orchard (the “Orchard”). (R.A.-4) The Orchard was founded in 1949 and is the largest apple producer in the upper Midwest. (R.A.-45-46) The Orchard contains several thousand apple trees of different varieties and ages. The Orchard is also a research facility that has an exclusive license agreement with the University of Minnesota to develop a new variety of apple (MN 1914), which is the intellectual property of the University. (R.A.-4, 46) Pepin Heights is contractually bound to prevent patent piracy or other improper public exposure of the MN 1914 apple. (*Id.*) At the cartway hearing, and in written submissions from its counsel, Pepin Heights testified that it believed that a cartway down the center of the Orchard—thereby opening up the research facility to the general public—would “greatly increase the possibility of piracy or other improper public exposure.” (R.A.-46)

Pepin Heights’ legal counsel attended the public hearing and submitted into the record its factual and legal analysis of the proposed cartway routes. (R.A.-42-46, 49-50) During the hearing, Pepin Heights advocated for the Nielson driveway as the cartway route because it would be less disruptive and less damaging to the Orchard’s operations. (*Id.*) Pepin Heights’ counsel also explained to the Board that the cartway statute does not require the Board to establish a cartway that provides a petitioner with access to some specific portion of a tract of land. (R.A.-42-43) Counsel also noted that he believed

taking a portion of the Pepin Heights property for the cartway would violate Minnesota eminent domain laws because it would be for private development and not for a public purpose. (R.A.-4-6, 43-44) Finally, counsel objected to Mr. Warfield's "opinion" regarding access because Warfield did not apply the proper legal standard under the cartway statute (the statute does not require access to a "buildable" portion of a tract of land) and because Warfield is not qualified to offer such an opinion (R.A.-6-7, 44-45)

The Nielson Property. The Nielson property is located to the east of the Kennedy Property. One of the potential routes for the cartway—identified by both County Engineer Flesch and by Appraiser Warfield—was from the Nielson driveway near its intersection with Highway 61 to the lower portion of the Kennedy Property. (R.A.-1) In a letter to the Township Board dated February 1, 2008, Nielson indicated he was "agreeable to selling Kennedy an easement for that route for a price to be negotiated between the two of us." (R.A.-57)

Board Discussion of Cartway Routes. During the public hearing, Town Board member Evers addressed Mr. Warfield and stated that he (Evers) had reviewed the cartway law. (R.A.-40) Mr. Evers commented that the law does not say anything about [a cartway] going to a buildable site. (*Id.*) When Mr. Warfield responded that [a cartway] needs to go to a "useable area of the property", Mr. Evers responded: "[The law] doesn't say that either." (*Id.*) At the end of the hearing, after hearing all of the testimony, a Board Member offered his opinion that the Nielson driveway option is the "less disruptive" access to the Kennedy property. (R.A.-50-51)

On April 1, 2008, the Town Board issued its detailed Findings of Fact, Conclusions of Law and Order on Kennedy's cartway petition. (A.A., pp. 7-12) The Board found that Kennedy is entitled to "a cartway for access to his tract of land," but selected an alternative cartway route "off the switchback of the driveway of Larry Nielson." (*Id.*, p. 12) This is the route that was recommended by Engineer Flesch.

STANDARD OF REVIEW

"It is well established in this state that a town board acting on a petition for the establishment of a town road acts in a legislative capacity; all questions in respect to the propriety and necessity of the particular improvement are legislative in character and the determination thereof by the local tribunal is final and will be set aside by the court on statutory appeal 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 and capriciously against the best interests of the public." *Lieser v. Town of St. Martin*, 255 Minn. 153, 158-59, 96 N.W.2d 1, 5-6 (1959); *Silver v. Ridgeway*, 733 N.W.2d 165, 168-69 (Minn. Ct. App. 2007). The scope of judicial review of a legislative determination is necessarily narrow. *Id.* at 169. This Court should affirm the Township's decision even though it may have reached a different conclusion. *See Horton v. Township of Helen*, 624 N.W.2d 591, 595 (Minn. Ct. App. 2001).

LEGAL ARGUMENT

I. The Township Board's Decision to Establish an Alternative Route for the Kennedy Cartway is Not Clearly Against the Evidence, Based on an Erroneous Theory of Law or Arbitrary and Capricious and Against Public Interest.

The Board's consideration of Kennedy's cartway petition is governed by Minnesota Statutes § 164.08, subd. 2(a) ("the cartway statute"):

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.

(emphasis added).

Kennedy argues that the Township's decision to select an alternative route (rather than the route he petitioned for) was not supported by the evidence and was arbitrary and capricious. The reason, he contends, is that the route chosen by the Township does not provide access to a "buildable" or "useable" part of his property. Thus, Kennedy is asking this Court to order the Township to grant his preferred cartway route through the Pepin Heights property, which would provide access to a "buildable" portion of his property. Granting such relief, however, would not only be contrary to the evidence in the record, but would contravene the deference this Court must give the Township for such legislative decisions.

A. The evidence in the record supports the Township's decision that the alternative route was less disruptive and damaging to the affected landowners and in the public's best interest.

This Court has, on several occasions, reviewed challenges to townships' decisions on cartway petitions and has shown the appropriate deference when the evidence in the record supports the township's decision. For example, in *Silver, supra*, a landowner brought an action to challenge a county board's decision to establish a cartway over her land rather than over an alternative route through a state wildlife management area. After considering information from all of the affected property owners, holding several meetings and conducting a site visit, the board established the cartway on Silver's land. The district court vacated the county's decision, but this Court reversed and remanded, finding that the board had not acted arbitrarily and capriciously:

[T]here is no evidence in the record that the board failed to properly balance the interests of all of the affected landowners, failed to consider or weigh Silver's objection to the cartway, or failed to consider Silver's proposed alternate route. . . . Because the record does not support a finding that the board acted 'against public policy' or arbitrarily or capriciously in establishing the cartway, the district court's finding to the contrary is clearly erroneous.

Silver, 733 N.W.2d at 171; see also *Horton*, 624 N.W.2d 591 (acknowledging the "deference to the township's decision in these matters", this Court affirmed the township's denial of a cartway petition where the evidence supported the township's determination); *Kranz v. Township of Mantrap*, 2005 WL 2130269 (Minn. Ct. App., Sept. 6, 2005), unpublished opinion (R.A.-52-56) (affirming township's selection of a cartway route where the board held hearings to determine the appropriate location for the cartway and thoroughly examined three alternatives).

In this case, the Township Board had before it evidence related to several possible routes for the Kennedy cartway. Wabasha County Engineer Flesch advised the Board regarding three possible routes and concluded that the Nielson Driveway route—the route eventually selected by the Township—was the most desirable access to Kennedy’s tract of land. His reasoning was that this option required minimal construction and the least cost. Engineer Flesch also opined that the alternative routes both through and around the perimeter of the Pepin Heights property were much more disruptive to abutting properties and would require expensive construction through rough terrain. In particular, Engineer Flesch advised the Board that not only would these options “divide current property” but they could result in high damages to the property owners.

The Board also considered testimony and evidence from Kennedy and his appraiser, Mr. Warfield, about five possible cartway routes. Their testimony advocated for the route that would bisect the Pepin Heights property because this route would provide access to the area on the top of the bluff, which they asserted is the only “buildable” or “useable” part of the Kennedy property.

Finally, the Board considered statements from Pepin Heights’ counsel who outlined the Orchard’s concerns with intellectual property rights, piracy, vandalism and the disruption and potential damage to the Orchard’s operations. A comment was also made during the public hearing related to health and safety concerns about a road in an area where chemicals would be sprayed.

Based on all of the documentary evidence, the site visits, and the public hearing testimony by all affected landowners and the public, the Board granted the cartway

petition, but selected an alternative route than the one preferred by Kennedy. The Board did so because it was concerned about the damages and disruption that establishing a cartway through the Pepin Heights property would cause. Thus, it concluded, consistent with the observations of County Engineer Flesch, that the most desirable access to Kennedy's land is an access off the Nielson driveway because that cartway would "require the most minimal construction, the least cost and the least disruption to innocent adjoining property owners."

The Board issued detailed Findings and Conclusions supporting its decision. The evidence in the record supports those Findings. Other than the fact that Kennedy disagrees, he has provided no evidence that the Board failed to properly balance the interests of all of the affected landowners, failed to consider or weigh his objections to the Nielson access, or failed to consider the alternate routes proposed by Kennedy and his appraiser.¹ Kennedy has failed to show that the evidence in the record "is practically conclusive against" the Township's decision or that the Township acted arbitrarily and capriciously.² Moreover, the Board has express authority under the cartway statute to select an alternative route when it deems the alternative route to be less disruptive and damaging to the affected landowners and in the public's best interest. That is exactly

¹ Although the Board heard Mr. Warfield's testimony regarding access, Mr. Warfield is admittedly not an engineer and has no expertise beyond the valuation opinion offered in his appraisal. Thus, it would have been appropriate for the Board to give Mr. Flesch's opinion more weight. Further, the issue of damages or the valuation of property was not before the Board and was premature because the Board had not yet selected the cartway route.

² Kennedy's contention that the Township's selection of the cartway route was contrary to the Order of Judge Jacobsen, dated May 1, 2006, should not be considered by this Court. This issue was not addressed or raised in the trial court before Judge Walters. Kennedy, therefore, may not raise this issue for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (holding appellate court may not consider matters not produced and received in evidence below).

what the Township did in this case. Therefore, this Court should affirm the trial court and the Board's selection of the location for the Kennedy cartway.

B. The Township's decision to select an alternative route complied with the cartway statute. The statute does not require the Township to establish a cartway providing access to a "buildable portion" of a tract of land.

Kennedy has also failed to show that the Township proceeded on an erroneous theory of law. He argues, essentially, that he is entitled to a cartway that will provide him with access to a "buildable portion" of his property. However, the cartway statute requires only that a town board "establish a cartway at least two rods wide connecting the petitioner's land with a public road." The statute also provides that a cartway be established "[u]pon petition presented to the town board by the owner of a tract of land containing at least five acres. . . ." Nothing in the plain language of the statute expressly requires or even implies that cartway access must be provided to a "buildable" portion of a tract of land. The cartway route selected by the Township Board provides access to Kennedy's 26.6 acre "tract of land." *See Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 274 (Minn. 1995) (holding that "Where the intention of the legislature is clearly manifested by plain unambiguous language . . . no construction is necessary or permitted.") Thus, the Township complied with the statutory requirements and its decision should be upheld.

Kennedy relies on two opinions to support his argument that he is entitled to his preferred cartway route: this Court's unpublished opinion in *Schacht, supra*, and the Supreme Court's decision in *State ex. Rel. Rose v. Town of Greenwood*, 220 Minn. 508,

20 N.W.2d 345 (1945). Neither case applies, however, because their facts are entirely different from this case. In *Schacht*, the property owners (Schachts) petitioned the Hyde Park town board to establish a cartway providing access to their property. The town board denied the petition on the basis that the Schachts already had access to a highway through their own land and, thus, they were not entitled to a cartway under the statute. The Schachts disagreed and argued that they could only gain access from the public road by constructing an access road up a “steep and rocky hillside at a prohibitive cost.” *Schacht*, at *2. The district court reversed the town board’s decision and stated it was “unreasonable to characterize the Schacht’s property as having access to a highway.” (*Id.*) This Court agreed and ruled against the township.

Similarly, in *Rose*, the town denied a cartway petition because it believed the petitioner already had access from his land to a public road. The Supreme Court disagreed and held that petitioner did not have access where “the evidence showed that it was a muddy lake and that it was impracticable to build a road across it.” *Rose*, 220 Minn. at 514.

The difference between *Schacht* and *Rose* and the present case is that those cases dealt with the issue of the petitioners’ initial entitlement to a cartway under the statute. The town boards in those cases took the position that the petitioners weren’t eligible for a cartway because their respective properties already had access to a public road. (“Upon petition presented to the town board by the owner of a tract of land . . . who has no access . . .”) The courts, however, disagreed that the petitioners had “access” due to certain

physical characteristics of the properties that made access to a public road impossible or impracticable.

This case, however, does not deal with the issue of Kennedy's initial entitlement to a cartway. Unlike the towns in *Schacht* and *Rose*, the Township here concluded that Kennedy is entitled to a cartway and, in fact, agreed to establish a cartway in response to Kennedy's petition. This is not a situation where the Township denied Kennedy's cartway petition on the basis that Kennedy already had access to a public road. *Schacht* and *Rose* are distinguishable for several other reasons as well. Neither case dealt with a town's consideration of several possible cartway routes, nor did they involve the possibility of establishing a route off an already-existing driveway—which was the situation in front of the Pepin Township Board.

Finally, neither *Schacht* nor *Rose* involved the issue of the meaning of a “tract of land” in the cartway statute. The plain meaning of “tract of land” is Kennedy's entire 26.6 acre parcel.³ This Court need go no further than the plain meaning of the statute in deciding whether the Township complied with its provisions. Clearly, the Township did comply because it established a cartway connecting Kennedy's land with a public road.

It was also evident during the public hearing that the Board members had read the law dealing with cartways and understood their duty to establish a cartway. They questioned Kennedy's and Warfield's conclusion that the cartway must provide access to a buildable part of the property. The Board correctly noted that that is not what the

³ For example, the legislature has defined “tract of land” as “any contiguous quantity of land in the possession of, owned by, or recorded as the property of, the same claimant or person.” Minn. Stat. § 272.03, subd. 6.

statute says. The Board understood the plain meaning of the statute and rendered a decision consistent with its requirements. Because the Board did not proceed on an erroneous theory of law, its decision should be affirmed.

C. The Township's Decision to Select an Alternative Route for the Kennedy Cartway was not Against Public Interest.

Kennedy has also not demonstrated that the Township's decision to select an alternative route was against public interest. In fact, the Township's decision promotes the public interest. Requiring the establishment of a cartway to a particular area within a parcel, as Kennedy argues, would create a significant public policy concern over the scope of the statute. In adopting the cartway statute, the legislature created a process through which an owner can seek the establishment of a legal access to property when, for practical purposes, the owner is otherwise unable to acquire access. If a petitioner could somehow require, despite the plain language of the statute, that a cartway provide access to a particular location on the parcel to promote a desired use of the property, it would seem to follow an owner could seek multiple cartways to the same parcel. If, for example, a parcel contained "dry" areas separated by sections of wetland, could an owner seek multiple cartways? Making the adjacent owners subject to what could be a series of cartways to provide access to different portions of a single parcel would be unreasonably burdensome on the affected owners and against public policy.

In this case, Kennedy sought a cartway to his property and that is what the Township provided, consistent with its statutory duty and within the discretion provided it by law. The cartway statute simply provides owners a means to obtain access to their

property. It is not intended to be a process by which an owner can force the creation of a tailored access to a particular portion or portions of their property to facilitate its use for a particular purpose. Nothing in the statute provides for this type of tailored access and, in fact, the discretion allowed a town board to alter the requested location of the cartway is contrary to such an interpretation. If the law were otherwise, what would prohibit Kennedy from simply petitioning for another cartway for access to the top of the bluff? Furthermore, if the bluff was bifurcated by a ravine could he also petition for a third cartway to the other portion of the bluff on the same parcel? It is not difficult to contemplate the variety of scenarios that could result if the statute is interpreted to require anything except the establishment of an access to property along the route determined by the town board to be the less disruptive and damaging, and in the public's interests.

The Township's decision in this case was not against public interest and should be upheld.

CONCLUSION

The Township's decision to establish an alternative route for the Kennedy cartway is not clearly against the evidence, based on an erroneous theory of law or arbitrary and capricious. Even if this Court may have reached a different conclusion, the standard requires deference to the Township if the evidence in the record support its decision. In this case, it clearly does. Thus, the Township respectfully requests that this Court affirm the trial court and uphold the Township's selection of the cartway route.

Dated: December 23, 2008

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