
NO. A08-1921

State of Minnesota
In Supreme Court

John Kennedy,

Respondent,

v.

Pepin Township of Wabasha County,

Petitioner.

**REPLY BRIEF OF PETITIONER
PEPIN TOWNSHIP OF WABASHA COUNTY**

Mary D. Tietjen (#279833)
Troy J. Gilchrist (#228849)
KENNEDY & GRAVEN, CHARTERED
470 U.S. Bank Plaza
200 South Sixth Street
Minneapolis, MN 55402
(612) 337-9300

Attorneys for Petitioner

Peter D. Ekstrand (#26293)
EKSTRAND LAW OFFICE, PLC
100 Main Street West
Wabasha, MN 55981
(651) 565-4548

Attorney for Respondent

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INTRODUCTION

Petitioner Pepin Township of Wabasha County (“Township”) submits this Reply Brief in response to Respondent John Kennedy’s Brief (“Kennedy”). This case involves the interpretation of Minnesota Statutes, section 164.08, subdivision 2(a), yet Kennedy fails to cite to the statute even once in his brief to this Court. Instead, he relies on an unpublished decision from the Minnesota Court of Appeals and a 71-year-old Attorney General’s opinion to support his argument that the Township erred in choosing the alternative cartway route. The record reflects that the Town Board members knew exactly what the statute says and applied its requirements accordingly. Kennedy’s failure to address the statute head-on is not surprising as nothing in it supports the conclusion that the Town was required to grant cartway access to a “buildable” or “useable” portion of his property. Thus, the Town’s selection of the alternative route—which was fully supported by the evidence and based on a sound theory of law—must be upheld.

ARGUMENT

I. Similar to *Rose*¹, the *Schacht*² Decision is Distinguishable and Does Not Control the Outcome of this Case.

Not only is *Schacht* an unpublished decision and not binding on this Court, but its facts are distinguishable from this case. In *Schacht*, the property owners petitioned the Hyde Park town board to establish a cartway providing access to their property. The

¹ *State ex. Rel. Rose v. Town of Greenwood*, 20 N.W.2d 345 (Minn. 1945).

² *Schacht v. Town of Hyde Park*, 1998 WL 202655, unpublished opinion (Minn. Ct. App., April 28, 1998) (R.App. 12)

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.*) The court of appeals agreed and ruled against the township.

Rose and *Schacht* are distinguishable for many of the same reasons.³ Like *Rose*, *Schacht* dealt with the petitioners’ initial entitlement to a cartway under the statute. The town board took the position that the Schachts were not eligible for a cartway because their property already had access to a public road. The court of appeals, however, disagreed that the petitioners had “access” due to certain physical characteristics of the property 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. In fact, the Township concluded that Kennedy is entitled to a cartway and agreed to grant his petition. The Township did not deny Kennedy’s petition on the basis that Kennedy already had access to a public road. Again, like *Rose*, another important distinction is that *Schacht* did not involve the issue of a town’s consideration of several possible cartway routes and their impact on an adjoining property owner.

³ The Township distinguished *Rose* in its main brief and will not repeat those arguments here.

In this case, the Township Board was faced with several alternative cartway routes, in addition to the one preferred by Kennedy. It needed to weigh all of the alternatives and consider their potential impacts on neighboring properties and the public's interest. Ultimately, the Township selected the Nielson route, concluding that it was the least disruptive. That decision is fully supported by the evidence and the law.

Another distinction with *Schacht* is that it did not discuss the meaning of a "tract of land" in the cartway statute, which is an issue the Court of Appeals called into question in this case when it ruled that the term can essentially mean any five-acre portion of a parcel as defined by the property owner. For the reasons explained in the Township's main brief, the plain meaning of "tract of land" is Kennedy's entire 26.6 acre parcel. This 26.6 acre parcel is the "property" described by Kennedy in his cartway petition and is indeed the property to which he is seeking access. ("[T]his property is approximately 26.6 acres and therefore it exceeds five acres in size." (P. App. 3)) Nevertheless, Kennedy seems to argue that because he designated a specific route (through the Orchard) in his petition, that the Township was obligated to approve that route. However, this contention is inconsistent with the Township's statutory authority to select an alternative route and it is contrary to the evidence supporting the Town's decision. Moreover, Kennedy cites to no authority for the notion that a "tract" of land can be legally defined based on the land's physical characteristics.

This Court need go no further than the plain meaning of the statute in deciding whether the Township complied with its provisions. The Township complied because it granted legal access connecting Kennedy's land with a public road.

II. Kennedy Cannot Now Argue the Township Failed to Comply With a Prior District Court Order.

Kennedy contends that the Township's selection of the alternative cartway route is contrary to an Order issued by District Court Judge Deborah A. Jacobson dated May 1, 2006. Although Kennedy raised this issue in previous written submissions, neither the district court nor the court of appeals ruled on it or addressed it. Presumably, those courts either believed the argument had no merit or thought it was irrelevant to deciding the case. Moreover, even if certain legal impediments prohibit Kennedy from building a road that ascends the bluff, it is beside the point. The Township approved a cartway route that grants legal access to Kennedy's land at the base of the bluff and, therefore, the Township complied with the requirements of section 164.08, subd. 2a. Also, the Township complied with Judge Jacobson's Order because it did not consider "access via adjoining properties which ascends up the sides of the bluff" Kennedy's argument on this point is irrelevant and without merit.

CONCLUSION

Kennedy has made no persuasive arguments why the plain language of the cartway statute should be disregarded. If the Legislature intended that townships must grant cartway access to a "buildable" or "useable" portion of a tract of land -- however that "tract" might be randomly defined by the property owner -- then the Legislature should amend the statute to reflect that intention. Because the Township's selection of the alternative route was not clearly against the evidence, based on an erroneous theory of law or arbitrary and capricious, it should be affirmed.

Respectfully submitted,

Dated: November 16, 2009

KENNEDY & GRAVEN, CHARTERED

By: 

Mary D. Tietjen (#279833)

Troy J. Gilchrist (#228849)

470 U.S. Bank Plaza

200 South Sixth Street

Minneapolis, MN 55402

Telephone: (612) 337-9300

**ATTORNEYS FOR PETITIONER
PEPIN TOWNSHIP**