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NO. A08-1921

State of Minnesota
In Supreme Court

John Kennedy,

Respondent,

v.

Pepin Township of Wabasha County,

Petitioner.

**BRIEF, ADDENDUM AND APPENDIX OF PETITIONER
PEPIN TOWNSHIP OF WABASHA COUNTY**

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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).

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STATEMENT OF LEGAL ISSUE

Was the Township's determination, under Minnesota Statutes section 164.08, subdivision 2(a), to select an alternative route for Kennedy'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 Township's decision.

Court of Appeals' ruling: The Court of Appeals reversed and held that because the cartway route chosen by the Township does not give Kennedy access to the "buildable portion" of his property, the Township's decision was arbitrary and capricious and based on an erroneous theory of law. Substituting its own legislative judgment for that of the Township's, the Court of Appeals remanded the matter to the Township with an order to establish the cartway over the route proposed by Kennedy.

STATEMENT OF THE CASE

On December 6, 2004, John Kennedy (“Kennedy”) petitioned Pepin Township of Wabasha County (“Township”), under Minnesota Statutes §§ 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 (“Board”) issued its Findings of Fact, Conclusions of Law and Order on Kennedy’s petition. (Petitioner’s Addendum, hereinafter “P.Add.”, pp. 2-7) 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.” (Petitioner’s Appendix, hereinafter “P.App.”, p. 2) 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. Ct. App.), that states that the cartway must provide access to the entire parcel.” (P. Add., p. 1)

Kennedy appealed. (P.App., p. 1) The Minnesota Court of Appeals reversed and held, by decision issued on June 23, 2009, that because the cartway route chosen by the Township does not give Kennedy access to the “buildable portion” of his property, the Township’s decision was arbitrary and capricious and based on an erroneous theory of

law. The Court of Appeals remanded the matter to the Township with an order to establish the cartway over the route proposed by Kennedy concluding that the evidence established this was the most reasonable route to the “useable portion” of Kennedy’s property.

This Court accepted review of the case by Order dated September 16, 2009.

STATEMENT OF FACTS

The Kennedy Property. Kennedy owns approximately 26.6 acres of property in the Township (the "Property"). (P.App., p. 3) The Property is an undeveloped tract of land directly abutting Highway 61. (P.Add., p. 2) The Property includes bluffland. (*Id.*) The 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 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. (P.App., p. 5; P.Add., p. 5) At the public hearing on March 14, 2008, Kennedy stated, for the first time, that it was his intention not to subdivide the land, but to keep it in his family for the use of his children. (*Id.*)

The Cartway Petition and Possible Routes. Kennedy's petition to the Township requested the establishment of a cartway that would provide access to the Property. His preferred route would bisect the Pepin Heights' property in order to provide access to the portion of his Property situated on the top of the bluff. (P.Add., pp. 4-5) His requested

cartway route would not provide access to the portion of his Property situated below the bluff. (*Id.*, p. 4)

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. (P.Add., pp. 2-3) 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. (P.Add., p. 3) 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 field path through Pepin Heights' property; and 3) access from route around perimeter of Pepin Heights' property. (P.Add., p. 3; P.App., p. 9) 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. (P.Add., pp. 3-4; P.App., p. 9)

Engineer Flesch advised the 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. (P.App., p. 9) 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.” (P.Add., pp. 3-4; P.App., p. 9) 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. (P.Add., pp. 4-5; P.App., pp. 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 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.” (P.Add., p. 5)

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. (P.Add., p. 6; P.App., p. 50)

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”). (P.App., p. 54) The Orchard was founded in 1949 and is the largest apple producer in the upper Midwest. (*Id.*, pp. 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. (*Id.*, p. 54) 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.” (*Id.*, p. 46)

Pepin Heights’ legal counsel attended the public hearing and submitted into the record his factual and legal analysis of the proposed cartway routes. (P.App. pp., 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. (P.App. pp., 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. (*Id.*, pp., 44; 54-56) 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 (*Id.*, p., 44-45; 56-57)

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. (P.App. p., 9) 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." (*Id.*, p., 60)

Board Discussion of Cartway Routes. During the public hearing, Township Boardmember Evers addressed Mr. Warfield and stated that he (Evers) had reviewed the cartway law. (P.App. p., 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. (P.App. pp., 50-51)

On April 1, 2008, the Township issued its detailed Findings of Fact, Conclusions of Law and Order on Kennedy’s cartway petition. (P.Add., pp. 2-7) 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. 7)

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*, 96 N.W.2d 1, 5-6 (Minn. 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. *Silver*, 733 N.W.2d at 169. A court should affirm the Township’s decision even though it may have reached a different conclusion. See *Horton v. Twp. of Helen*, 624 N.W.2d 591, 595 (Minn. Ct. App. 2001) (emphasis added).

This case also involves the application of Minn. Stat. § 164.08, subd. 2(a), to undisputed facts, which is a question of law reviewed by this Court *de novo*. See *In re Daniel*, 656 N.W.2d 543 (Minn. 2003).

The Court of Appeals erred in its application of the cartway statute and did not give the proper deference to the Township's decision to establish an alternative route for the Kennedy cartway. Its decision not only essentially re-writes the cartway statute, but it misconstrues prior holdings by this Court and improperly substitutes its legislative judgment for that of the Township's by concluding that the evidence supported Kennedy's proposed cartway route. Therefore, the Township respectfully requests that this Court reverse the Court of Appeals and affirm its decision to establish the alternative cartway route.

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 argued on appeal that the Township's decision to select the 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 asked the Court of Appeals 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. The Court of Appeals granted the relief requested by Kennedy. In doing so, however, it ignored the plain language of the statute, which says nothing about establishing a cartway to a "buildable" or "useable" portion of a tract of land. The Township's decision to establish the alternative route was fully supported by the evidence in the record and should be affirmed.

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.

Minnesota appellate courts have, on several occasions, reviewed challenges to townships' decisions on cartway petitions and have shown the appropriate deference when the evidence in the record supports the township's decision. For example, in *Silver*, 733 N.W.2d 165, 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 the court of appeals 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", the court affirmed the township's denial of a cartway petition where the evidence supported the township's determination); *Kranz v. Twp. of Mantrap*, 2005 WL 2130269 (Minn. Ct. App., Sept. 6, 2005), unpublished opinion (P.App. pp., 61-65) (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 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. 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.” (P.Add. p., 7)

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 failed to show, and the Court of Appeals failed to support its decision, that the evidence in the record “is practically conclusive against” the Township’s decision or that the Township acted arbitrarily and capriciously. 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 what the Township did in this case. Therefore, this Court should reverse the Court of Appeals and affirm the Board’s selection of the location for the Kennedy cartway on this basis alone.

B. The Township’s decision to select an alternative route complied with the cartway statute.

The Court of Appeals also erred when it determined that the Township proceeded on an erroneous theory of law. The Court of Appeals basically had two grounds for its decision: 1) the phrase “tract of land” in the cartway statute can mean something “less than the total quantity of contiguous land owned by one person;” 2) an inference can be drawn from this Court’s decision in *State ex. Rel. Rose v. Town of Greenwood*, 20

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 was 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.

N.W.2d 345 (Minn. 1945), that an owner of landlocked property is entitled to cartway access connecting a “buildable” portion of the property to a public road. Both grounds are inconsistent with the law.

1. **The Township connected Kennedy’s “tract of land” to a public road.**

The cartway statute provides in relevant part: “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 . . . the town board by resolution shall establish a cartway . . . connecting the petitioner’s land with a public road. . .” Minn. Stat. § 164.08, subd. 2(a) (emphasis added).

The Court of Appeals decided that “tract of land” means something less than the 26.6 acre parcel owned by Kennedy. Significantly, this 26.6 acre tract is the property described in Kennedy’s cartway petition and is the “tract of land” to which he is seeking access. The Court of Appeals admonishes the Township for citing to Minn. Stat. § 272.03, subd. 6(a), as an example of a definition of “tract of land,” but then relies only on *Black’s Law Dictionary* for its conclusion that “tract” means something less than an entire parcel. Moreover, the definition in *Black’s*—“a specified parcel of land”—actually supports the Township’s interpretation. 1499 (7th ed. 1999).

For “parcel” to mean something other than, or less than, a legally defined and discrete piece of land seems incongruous. To illustrate this point, consider that it would be impermissible to file a deed for a portion of a lot or parcel claiming it is a “tract.” The definition of “tract” in Minn. Stat. § 272.03, subd. 6(a), while not binding on this Court’s interpretation of that term in the cartway statute, provides guidance to the commonly-

accepted and used definition of the term, which is any “contiguous quantity of land in the possession of, owned by, or recorded as the property of, the same claimant of person.”²

Not only does the Court of Appeals’ conclusion that a “tract” is a random and undefinable portion of a parcel of land make no sense, but it creates potential circumstances that would be inconsistent with the cartway statute. For example, landowners would essentially have the right to a cartway for every owner-defined five-acre “parcel” of land. And, because the Court of Appeals set no parameters for how such a “tract” might be defined, the landowner could presumably pick and choose portions of the property that would be included. Also, adopting the Court of Appeals’ definition of “tract” would allow for multiple cartways to one parcel, something that is not expressly provided for or contemplated by the cartway statute.

The cartway route selected by the Township provides access to Kennedy’s 26.6 acre “tract of land.” Thus, this Court should reverse the Court of Appeals and affirm the Township’s selection of the alternative cartway route.

² When the words of a law are not explicit, the intention of the legislature may be ascertained by considering other laws upon the same or similar subjects. *See* Minn. Stat. § 645.16. The use of the term “tract” in other Minnesota statutes suggests that it means an entire or complete parcel and not something less than that. *See, e.g.*, Minn. Stat. §§ 429.071; 116A.18 (“When a tract of land against which a special assessment has been levied is thereafter divided or subdivided . . .”); 117.016 (“Whenever the state or any of its agencies or political subdivisions thereof is acquiring property for a public purpose and it is determined that a portion or a part of a tract of land is necessary . . .”); 281.11 (“Any person holding an interest in a tract of land, which forms a part less than the whole of a tract of land . . .”).

2. **The cartway statute does not require access to a “buildable” or “useable” portion of a tract of land.**

Kennedy argued, and the Court of Appeals agreed, that he is entitled to a cartway giving him access to a “buildable portion” of his property. However, the cartway statute requires only that a town board “establish a cartway . . . connecting the petitioner’s land with a public road.” Nothing in the plain language of the statute expressly requires or even implies that cartway access must be provided to a “buildable” or “useable” portion of land. *See Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 274 (Minn. 1995) (holding that “[w]here the intention of the legislature is clearly manifested by plain unambiguous language . . . no construction is necessary or permitted.”)

It was also evident during the public hearing that the Board members had read the cartway statute and understood this issue. They questioned Kennedy’s and Warfield’s conclusion that the cartway must provide access to a buildable part of the property. One Board member correctly noted that that is not what the statute says. (P.App. p., 40) 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.

The only basis for the Court of Appeals’ decision that cartway access must be provided to a “buildable” or “usable” portion of property is an “inference” from this Court’s holding in *Rose*, 20 N.W.2d 345. *Rose*, however, is distinguishable.

Unlike this case, *Rose* dealt with the issue of the petitioners’ initial entitlement to a cartway under the statute. The town board in *Rose* denied a cartway petition because it believed the petitioner already had access to a public road. This Court, however,

disagreed and held that the petitioner did not have access due to an intervening lake. *See Rose*, 220 Minn. at 514.

This case does not deal with the issue of Kennedy's initial entitlement to a cartway. Unlike the town in *Rose*, the Township here concluded that Kennedy is entitled to a cartway and, in fact, established 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.

Rose is distinguishable for several other reasons as well. It did not involve the issue of a town's consideration of alternative cartway routes and the issue of disruption to adjacent properties, nor did it involve the possibility of establishing a route off an already-existing driveway—all issues that were in front of the Pepin Township Board and not present in the *Rose* case.

Also, the nature of the property in *Rose* is a significant distinction. In this Court's decision in *Rose*, the facts suggest that the relator had at least three separate lots. One of the lots, which was only ½ acre, had access to the town road, but the other two lots, which were 92 acres in size and included relator's farm, did not because of the intervening lake. This Court noted that the 92 acres constituted "the bulk of relator's land."

In this case, Kennedy sought access to his entire 26.6-acre tract, not to several distinct parcels like the situation in *Rose*. Kennedy's preferred *route* was to the bluff-top area of his property, but he sought access to the entire piece. The cartway route selected by the Township established access from the "bulk" of Kennedy's property to Highway

61, a public road. Thus, to the extent that *Rose* applies, it supports the Township's selection of the alternative route providing access to the "bulk" of Kennedy's property. Moreover, in *Rose*, this Court acknowledged that the town board may still "exercise a reasonable discretion in varying the route proposed as the public interest may require. . . ." 220 Minn. 508, 514-15.

C. The Township's decision to select an alternative route for the Kennedy cartway was not against public interest.

The Court of Appeals completely disregarded the fact that the Township's selection of the alternative route was the least disruptive and damaging to the affected landowners (Pepin Heights) and in the public's best interest. ("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(a)). In fact, the Township's decision promotes the public interest and the public purpose behind the statute.

Requiring the establishment of a cartway to a particular area within a parcel, as the Court of Appeals held, creates 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.

Allowing the Court of Appeals decision to stand would create other, even more significant, policy concerns. When towns establish cartways, they “take” land. That can only be done for a public purpose. The cartway statute, as a practical matter, allows the taking of the neighbor’s land and gives it to the petitioner as a driveway. Since 1912, this Court has held that the establishment of a cartway creates a public road and therefore does not violate the constitutional prohibition against taking private property for a private use. See *Powell v. Town Bd. of Sinnott Twp.*, 221 N.W. 527, 528 (Minn. 1928); *Mueller v. Supervisors of Town of Courtland*, 135 N.W. 996, 998 (Minn. 1912).

The Court of Appeals’ holding in this case, however, has confused “access” with “buildability.” The cartway statute only deals with the former and not the latter. A landowner may seek cartway access for all sorts of reasons—hunting, fishing, camping, hiking or other recreational pursuits—with no intention of ever building. The Court of Appeals essentially held that “building” trumps “access.” Such a holding would turn the cartway statute into a protector of private interests over public interests, a purpose that was never intended.

The cartway statute provides owners a means to obtain access to property by the laying out of a public road. It was not intended to be a process by which an owner can force the creation of a tailored access to a particular portion of property to facilitate its use for a particular private 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. Long ago in *Mueller*, this Court upheld the establishment of a cartway as a “public use” and rejected the notion that a cartway was solely for private ingress and egress purposes:

[W]hen a road like the one in question is regarded from the public’s viewpoint, it would seem that the mere immediate convenience thereof to the person most directly benefited thereby, as distinguished from the public at large, is not conclusive of its private and against its public character, so as to render the taking of another’s property therefore a taking for a private use; for the public undoubtedly has an interest, in too many ways to recite, in having access to each and every one of the members thereof.

135 N.W. at 997.

The Court of Appeals ordered the Township to take the Orchard’s land even though it creates the less desirable public access so that Kennedy could achieve his private goal of building. That decision is contrary to not only the plain language of the cartway statute, but usurps its public purpose as well. The Township’s decision in this case was the least disruptive and damaging to the affected landowners and in the public’s best 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 supports its decision. In this case, the evidence overwhelmingly supports the Township’s decision. Moreover, the

Court of Appeals clearly erred in its interpretation and application of the cartway statute. Thus, the Township respectfully requests that this Court reverse the Court of Appeals and uphold the Township's selection of the alternative cartway route.

Respectfully submitted,

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