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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1525**

In re Amended Cartway Petition of
Edward John Harri, Jr., et al.

**Filed May 7, 2018
Affirmed
Stauber, Judge***

Lake County District Court
File No. 38-CV-16-520

Charles H. Andresen, Robin C. Merritt, Holly E. LaBoone-Haller, Hanft Fride, P.A.,
Duluth, Minnesota (for appellants Edward Harri, Jr., et al.)

Douglas R. Peterson, General Counsel, Dan Herber, Associate General Counsel,
University of Minnesota, Minneapolis, Minnesota (for respondent Board of Regents of the
University of Minnesota)

Nancy A. Roe, Virginia, Minnesota (for respondent Fall Lake Township)

LRB Properties LLC, Edina, Minnesota (respondent)

Joellyn Wichts, Rogers, Minnesota (pro se respondent)

Michael Mavetz, St. Cloud, Minnesota (pro se respondent)

Donald Hill, Bossier City, Louisiana (pro se respondent)

Joanne Rauschenberg, Cumming, Georgia (pro se respondent)

Marlene Eubanks, Sautee Nacoochee, Georgia (pro se respondent)

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

Mark Majerle, Milaca, Minnesota (pro se respondent)

Nancy Lakner, Ely, Minnesota (pro se respondent)

Considered and decided by Cleary, Chief Judge; Hooten, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

Appellant-landowners challenge the district court's order affirming a town board's denial of their petition to establish a cartway across the University of Minnesota's land under Minn. Stat. § 164.08, subd. 2(a) (2016). Because the district court properly determined that the town could not exercise eminent domain over the University's land to establish a cartway under the following circumstances, we affirm.

FACTS

Appellants Edward John Harri, Jr., Elizabeth K. Thorn, and James E. Harri own property near the Boundary Waters that they have used as a family vacation home for the past five decades. Because the property is not accessible over land, appellants must use a boat to access their property. Appellants now want access to their property by road because they are aging and have experienced challenging conditions during their commutes over the waterway, including windy boat rides and difficulties loading their belongings on and off the boat. Appellants filed an amended cartway petition with the town board of Fall Lake Township pursuant to Minn. Stat. § 164.08, subd. 2 (2016), requesting a cartway that would cross eight separately owned properties. The United States owns one of these parcels and respondent Board of Regents of the University of Minnesota (University) owns

another.¹ The proposed cartway would extend across the Hubachek Wilderness Research Center (HWRC), an area gifted to the University in 2005 to “be used for the ecological and forestry research education, with a focus on the forests of northeastern Minnesota.”

The town board held a hearing on the cartway petition. The University argued the cartway would require road construction that would result in forest fragmentation and affect land contours, soil hydrology, water flow, plant ecology, and invasive plant and animal species. The town board denied the petition, reasoning that (1) a township cannot establish a cartway over state land when the state land has been put to public use and the cartway’s use would be inconsistent with the state’s use, and (2) no clearly implied or expressly conferred authority exists that allows the township to exercise eminent domain over state land. Appellants appealed the town board’s denial to the district court, arguing the town board’s actions were arbitrary, capricious, unreasonable, against the evidence, and that it erroneously interpreted Minn. Stat. § 164.08, subd. 2(a).

Appellants later moved the district court for summary judgment. The district court denied appellants’ motion for summary judgment and dismissed their appeal. Appellants now challenge the district court’s order, arguing the district court erred in determining that the town board of Fall Lake did not have authority to establish a cartway over the University’s land when no other route existed.

¹ LRB Properties LLC, Fall Lake Township, Joellyn Wichts, Michael Mavetz, Donald Hill, Joanne Rauschenberg, Marlene Eubanks, Mark Majerle, and Nancy Lakner are also respondents in this case. The University is the only respondent that filed a brief for this appeal.

DECISION

A town board acting on a petition to establish a cartway “acts in a legislative capacity and will be reversed on appeal only when (1) the evidence is clearly against the decision, (2) an erroneous theory of the law was applied, or (3) the town board acted arbitrarily and capriciously, contrary to the public’s best interest.” *Horton v. Twp. of Helen*, 624 N.W.2d 591, 595 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). We review a legislative determination narrowly, and will generally affirm although we may have reached a different conclusion. *Id.*

Whether the district court and the town board erroneously determined that the town board lacked legal authority to establish a cartway over the University’s land under Minn. Stat. § 164.08, subd. 2(a) involves statutory interpretation, which is a question of law that we review de novo. *Zurich Am. Ins. Co. v. Bjelland*, 710 N.W.2d 64, 68 (Minn. 2006). Minn. Stat. § 164.08, subd. 2(a), provides:

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.

Here, appellants (1) petitioned the town board, (2) owned at least five acres of land, and (3) cannot access their land except over a navigable waterway. Because appellants satisfy the statutory requirements to establish a cartway, we must next consider whether the town

board can establish a cartway over the University's property, which appellants concede, and we agree, constitutes state-owned land. *See City of Minneapolis Comm'n on Civil Rights v. Univ. of Minn.*, 356 N.W.2d 841, 842 (Minn. App. 1984) (“[T]he university is, in the ordinary and functional sense, plainly an agency of the state.”) (quotation omitted). Therefore, we must determine whether the town board could establish a cartway over state-owned land.

We have previously considered whether a county board could establish a cartway over state-owned land under Minn. Stat. § 164.08, subd. 2(a). *See Silver v. Ridgeway*, 733 N.W.2d 165, 167-68 (Minn. App. 2007). We first explained that establishing a cartway under Minn. Stat. § 164.08 (2016) “is an exercise of eminent domain, the inherent power of a governmental entity to take privately owned property and convert it to public use, provided the owner is compensated.” *Id.* at 169. We determined that a lesser subdivision of government may not exercise eminent domain over state-owned land absent authority expressly conferred by the legislature or clearly implied from a statutory provision. *Id.* at 170. The appellant in *Silver* argued that implied authority existed and asserted that the state had “not put its land to public use [and] the condemnor’s use was not substantially inconsistent with that of the owner of public land.” *Id.* We rejected that argument and determined that the state put the land to public use and that the cartway would be inconsistent with the state’s use of the land. *Id.* We concluded:

On this record . . . [the] authority to take state . . . land for the cartway cannot be clearly implied, and the district court erred by holding that the board has authority to establish a cartway over the [land]. We are not insensitive to the impact of this holding on private landowners in areas where the state owns

large tracts of land, but given the controlling caselaw, any change would involve matters of public policy for the legislature or the supreme court.

Id.

Appellants contend that implied authority exists here, unlike in *Silver*, because this matter is factually distinguishable. First, appellants argue that because the district court determined that a cartway “would likely not destroy or impair the essential value of the existing public use,” this case is different from *Silver*, in that the requested cartway would have been inconsistent with the state’s use of the land. Second, appellants point to the fact that the town board cannot establish an alternative route, whereas the town board in *Silver* was able to establish an alternative route that did not require it to take state land.

Although we acknowledge that some facts here are distinguishable from those in *Silver*, we do not agree that *Silver* should be read as narrowly as appellants suggest. *Silver* did not include any language limiting its holding only to those situations in which a landowner has no available alternative route to establish a cartway. Instead, *Silver* broadly held that Minn. Stat § 164.08, subd. 2 did not provide a lesser subdivision of government with implied authority to establish a cartway over state-owned land that was being put to public use. *Id.*

Moreover, our previous discussion of a general grant of eminent domain supports this conclusion. In *Town of Fayal v. City of Eveleth*, we discussed that:

[L]egislative power to condemn public land under a general grant of eminent domain may be implied when the condemnee has not put its land to public use. But, when the land is already dedicated by the state or one of its governmental agencies for a specific public use and is actually used for the specified

purpose, the rule is that mere general authority to condemn is insufficient to interfere with authorized public uses.

587 N.W.2d 524, 528 (Minn. App. 1999), *review denied* (Minn. Mar. 16, 1999) (quotations omitted). A town board exercises “a general grant” of eminent domain when it establishes a cartway pursuant to Minn. Stat. § 164.08, subd. 2(a). *Silver*, 733 N.W.2d 165 at 170. Here, the University put its land to public use because it uses the land as a wildlife research area. Under *Town of Fayal*, the town board’s general authority to condemn under Minn. Stat. § 164.08, subd. 2 is insufficient to interfere with the University’s use of the land.

The University’s constitutional status within the state also supports the conclusion that Minn. Stat. § 164.08, subd. 2 did not provide the town board with implied authority to exercise eminent domain over the University property:

The University of Minnesota is a unique constitutional corporation, established by territorial act in 1853 and perpetuated by the state constitution in 1857. The people of Minnesota thereby conferred the entire control and management of the University’s affairs and property upon the board of regents, leaving no such power to be exercised by the legislature.

Winberg v. Univ. of Minn., 499 N.W.2d 799, 801 (Minn. 1993). The legislature recognizes the University’s status in most of the laws that it passes by “expressly includ[ing] or exclud[ing] the University or its board of regents as subject to or not subject to the law.” *Id.* at 801. “[I]f the legislature had intended [a statute] to apply to the University of Minnesota, it most likely would have included the University by specific reference.” *Id.* at 802. Here, the legislature did not expressly refer to the University in

Minn. Stat. § 164.08, subd. 2, which further demonstrates that the statute does not provide the town board with implied authority to take the University's land.

We agree with the district court's conclusion that, under these circumstances, the town board did not have implied authority to exercise eminent domain over the University's land. Although we are sympathetic to appellants' difficulties in accessing their land, we cannot say that the district court misapplied Minn. Stat. § 164.08, subd. 2(a) or our previous holding in *Silver* by affirming the town board's denial of appellants' cartway petition. As we have said before, "given the controlling caselaw, any change would involve matters of public policy for the legislature or the supreme court." *Silver*, 733 N.W.2d at 170.

Affirmed.