

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0450**

In re the Matter of
Michael Wartman, et al.,
Appellants,

and

the Commissioner of Crystal Bay Township,
Respondent,

Janet Rothbart,
Respondent.

**Filed October 10, 2022
Affirmed
Bratvold, Judge**

Lake County District Court
File No. 38-CV-21-47

Patrick Dinneen, Silver Bay, Minnesota (for appellants)

Tyson Smith, Richard T. Furlong III, Smith Law, PLLC, Grand Marais, Minnesota (for
respondent commissioner)

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Considered and decided by Bratvold, Presiding Judge; Cochran, Judge; and
Wheelock, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

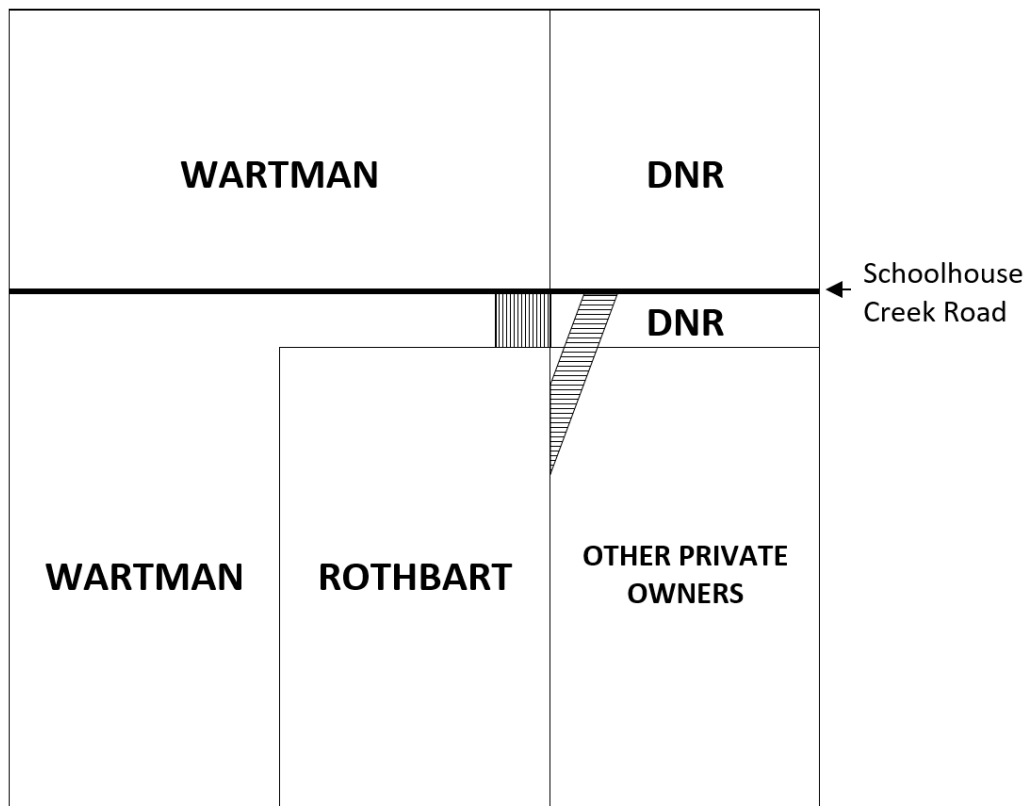
After a jury trial awarding damages, appellants challenge the district court's summary-judgment decision affirming a town board's order granting a petition for a cartway across appellants' land. Appellants concede that respondent, who owns a landlocked parcel adjacent to appellants' land, presented the necessary conditions for mandatory establishment of a cartway under Minn. Stat. § 164.08, subd. 2 (2020).

Still, appellants raise two issues. First, appellants argue that the town board erred by disregarding an alternative route and that the district court should have reversed the town board's order. Because the town board exercised its quasi-legislative authority in granting the cartway petition, we apply a narrow scope of review and conclude that the town board was not required to consider, much less select, an alternative cartway route. Second, appellants seek a new trial on damages, arguing the district court abused its discretion by excluding expert testimony and related exhibits. Appellants did not provide a transcript of the jury trial, so we are unable to determine whether any evidentiary error was prejudicial. Even so, we conclude that the district court's in limine ruling tracks the applicable law on damages for a cartway petition. Thus, we affirm.

FACTS

Appellants Michael Wartman and Cindy Wartman (the Wartmans) own property in Crystal Bay Township. Respondent Janet Rothbart owns property adjacent to the Wartmans' property. In July 2020, Rothbart petitioned respondent Crystal Bay Township (township) for a cartway over the Wartmans' land to provide access to Schoolhouse Creek

Road. The petition alleged that Rothbart's property was "landlocked" and included a sketch. The Wartmans opposed the petition, noting an "existing trail" over Minnesota Department of Natural Resources (DNR) land provided access to the Rothbart property. The Wartmans asked the township to establish the cartway over that "existing trail," arguing the alternative route would be less disruptive than the route proposed by Rothbart. Below is an approximate rendering of the parties' lands.¹ The cartway route described in Rothbart's petition is marked with vertical lines. The alternative cartway route proposed by the Wartmans is marked with horizontal lines:



¹ This image is not exact or to scale and is offered as an illustration only.

Town-board members inspected the properties and held a meeting in September 2020. According to the meeting minutes, Michael Wartman questioned, “Why can’t the access be across the DNR land and via the historic trail that has served as current access?” Rothbart’s attorney replied, “You cannot attain easement rights across state land which includes the DNR land. Access was attempted from the DNR but given that there is no directly adjacent property they had no solutions for legal access.” The town board issued an interim cartway order finding Rothbart had no access to her land “except over the land of others,” granting Rothbart’s petition, and awarding damages to the Wartmans in an amount “as determined by the professional appraiser” (interim order).

The Wartmans subsequently asked the township to reconsider the interim order. The Wartmans “vigorously object[ed]” to Rothbart’s cartway and alleged that Rothbart had made “no attempt . . . to have the existing driveway access [over the DNR land] legally recognized.”²

At a January 2021 meeting, the town board amended the interim order and awarded \$1,950 to the Wartmans based on an appraisal report (final order). According to the minutes, the town board found “no merit” to the Wartmans’ claims and denied their request

² The Wartmans’ letter to the township explained that, in October 2020, Michael Wartman contacted DNR’s regional office and learned DNR denied being contacted about a cartway request. The Wartmans emailed Rothbart’s attorney, asking for “any and all letters, correspondence, emails and contact information regarding [their] communications with” DNR about Rothbart “being allowed access over the driveway that [she has] always used to access [her] property.” Rothbart’s attorney denied having said that “DNR denied the continued use of that access.”

for reconsideration. The final order found Rothbart's proposed cartway route to be "the least disruptive or damaging route for the cartway."

The Wartmans appealed the township's determination to the district court. After hearing the parties' cross-motions for summary judgment, the district court granted Rothbart's and the township's motions, affirming the township's final order. The district court recognized the Wartmans were entitled to a trial de novo on damages.

The Wartmans filed witness and exhibit lists. Relevant to the issues on appeal, the Wartmans submitted exhibits showing costs associated with (1) tree replacement; (2) gate relocation, brush removal, and installation of a culvert; and (3) ongoing maintenance of the portion of their property affected by the cartway. The Wartmans sought to call expert witnesses to introduce these exhibits. Rothbart moved in limine to exclude some exhibits and to limit expert testimony.

The district court granted Rothbart's in limine requests either in whole or in part. The district court's order first stated that the Wartmans could offer evidence of damages equal to "the amount to reimburse [them] for the land taken" plus "the amount, if any, to reimburse [them] for any damages to the remainder of the land not taken." The district court then concluded that the proposed documentary and witness evidence related to tree replacement, brush removal, culvert installation, and ongoing maintenance was irrelevant to the legal measure of damages. The district court allowed the Wartmans to offer evidence of their costs to relocate a gate, among other things.

Following the trial, the jury awarded the Wartmans \$950 for "just compensation for the property actually taken," \$2,500 for "severance damages to the property remaining after

the taking,” and \$1,565 for “just compensation for relocation of the Wartmans’ gate due to the taking,” for a total of \$5,015. The Wartmans moved for a new trial, arguing the district court had erred in excluding the evidence in limine. The district court denied the motion and directed entry of judgment. This appeal follows.

DECISION

On appeal, the Wartmans raise two issues. First, they contend that the township erred in granting Rothbart’s cartway petition and that the district court erred in granting summary judgment to respondents and thereby affirming the cartway route over the Wartmans’ land. Second, they argue the district court erred in denying the Wartmans’ motion for a new trial and in failing to correct the erroneous exclusion of damages evidence. We discuss each issue in turn.

I. The district court did not err by granting summary judgment affirming the township’s order granting Rothbart’s cartway petition.

This court reviews the grant of summary judgment *de novo* to determine “whether there are any genuine issues of material fact and whether the district court erred in its application of the law.” *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted); *see* Minn. R. Civ. P. 56.01 (standard for summary judgment in district court).

A township’s decision on a cartway petition is a quasi-legislative action. *Horton v. Township of Helen*, 624 N.W.2d 591, 593 (Minn. App. 2001), *rev. denied* (Minn. June 19, 2001). The town board acts on behalf of the township “and [is] accountable to its constituents.” *Silver v. Ridgeway*, 733 N.W.2d 165, 171 (Minn. App. 2007). “The officers

elected need not have the unbiased attitude of jurors, nor are they elected as judges.” *Id.* (quotation omitted). Thus, the scope of judicial review of a cartway order “must necessarily be narrow,” and courts should generally affirm the township board’s decision even if the court may have reached a different conclusion. *Horton*, 624 N.W.2d at 595 (quotation omitted). A township’s cartway order “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.” *Id.* (citing *Lieser v. Town of St. Martin*, 96 N.W.2d 1, 5-6 (Minn. 1959)).

The legislature allows a petitioner to seek mandatory establishment of a cartway order under certain conditions. Minnesota law 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 . . . 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.

Minn. Stat. § 164.08, subd. 2(a); *see also Horton*, 624 N.W.2d at 594 (“The settled construction of the statute is that it is the mandatory duty of a town board to establish a cartway upon petition of a landowner where the statutory conditions exist.” (quotation omitted)).

Here, the township’s interim and final orders included the findings necessary for mandatory establishment of a cartway. The township found that Rothbart “owns more than

five (5) acres of land,” she “has no access to [her] land, except over the lands of others,” and the route Rothbart proposed was “the least disruptive or damaging route for the cartway.” In district court and on appeal, the Wartmans do not challenge the township’s decision to establish a cartway for Rothbart. Rather, they challenge the township’s decision to select the route stated in the petition instead of the alternative route proposed by the Wartmans.

The Wartmans make four arguments about the township’s cartway order, any one of which, they contend, should have led to summary judgment against respondents. The Wartmans argue the cartway order (A) is arbitrary and capricious, (B) “does not serve the public’s interest only that of Rothbart,” (C) should be overturned because “access is already established pursuant to statutory definition of the existing forest road,” and (D) followed “procedural irregularities.” We discuss each argument in turn.

A. Arbitrary and capricious

The Wartmans’ brief to this court acknowledges that the township was “not required to select alternate routes.” At the same time, they argue that the township failed to “give due consideration” to the proposed alternative route over the DNR land and relied on Rothbart’s attorney’s statement that the DNR “had no solutions for legal access.” The Wartmans contend, “The board elected to approve the most disruptive route because it believed it had no other choice than to do so.”

The district court rejected the Wartmans’ argument, reasoning that “a township is prohibited from granting a cartway across state-owned land” and concluding that establishing a cartway along the existing trail over the DNR land “would be an

impermissible exercise of eminent domain by a lesser subdivision of government.” The district court relied on *Silver*, 733 N.W.2d 165. The Wartmans argue that the district court misread *Silver*. This is essentially an argument that the board and the district court erroneously applied the law. *See Horton*, 624 N.W.2d at 595 (stating a town board’s order “will be reversed” for “an erroneous theory of the law”).

Even though the Wartmans correctly state the essential holding of *Silver*, the district court’s error was harmless. In *Silver*, we examined the county’s order granting a cartway over Silver’s land to provide access to Ridgeway’s landlocked parcel. 733 N.W.2d at 167-68. Silver asked the county to establish a cartway for Ridgeway’s parcel over a separate tract of land, a portion of which DNR owned. *Id.* The district court reversed the county’s cartway order, remanding with an instruction to consider the alternative route proposed by Silver. *Id.* at 168. We reversed the district court’s decision and upheld the county’s cartway order, stating that the county “did not act under an erroneous legal theory” when it rejected the alternative route. *Id.* at 171.

We first noted that “eminent domain cannot be exercised by a lesser subdivision of government to take state-owned lands absent [express] authority.” *Id.* at 170. But we also noted that “the authority to condemn public land under a general grant of eminent domain can be implied . . . when the condemnor’s use is not substantially inconsistent with that of the owner of the public land.” *Id.* Because Silver’s alternative route crossed DNR land that was a wildlife-management area, and DNR “notified the board that a public road would be inconsistent with that use,” we concluded the county did not have implied authority to establish a cartway on the DNR land. *Id.*

Here, the district court erred by reading *Silver* to hold that the township was “prohibited” from establishing a cartway for Rothbart’s property over DNR land. But this error was harmless, and we disregard harmless error. *See* Minn. R. Civ. P. 61 (“The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”). As the Wartmans acknowledge, the township was not required to select an alternative route in response to Rothbart’s petition. Under the relevant statute, “[t]he town board *may* select an alternative route other than that petitioned.” Minn. Stat. § 164.08, subd. 2(a); *see also* Minn. Stat. § 645.44, subd. 15 (2020) (“‘May’ is permissive.”).

The Wartmans, though, argue that “in cases where an alternate route is proposed by an interested party or a member of the public, the town should give due consideration to which option best serves the public’s needs.” Because the township acts in a quasi-legislative capacity when considering a cartway petition, we are not convinced. *Horton*, 624 N.W.2d at 594. Even so, the record reflects that the town board considered the Wartmans’ alternative route two times—at the September 15, 2020 and January 19, 2021 town-board meetings—and rejected it both times, determining that the route over the Wartmans’ land was “the least disruptive or damaging route for the cartway.” Though the Wartmans argue the township’s decision was wrong, our review of a town board’s cartway order is “narrow,” and “[g]enerally, this court will affirm even though [it] may have reached a different conclusion.” *Id.* at 595.

Finally, the Wartmans emphasize that the town board erroneously believed DNR refused to approve legal access based on the statements of Rothbart’s attorney and that

DNR was unaware of the cartway petition. Even if we accept these facts as true, they are not material to our review. The township need not consider any alternative routes before granting a cartway petition. *See* Minn. Stat. § 164.08, subd. 2(a). Indeed, the party seeking an alternative route in response to a cartway petition has the burden of justifying their proposed alternative. *See Kennedy v. Pepin Township*, 784 N.W.2d 378, 384-85 (Minn. 2010) (holding that Minn. Stat. § 164.08, subd. 2(a), requires that “a township establish the route requested by the petitioner unless the township determines both that an alternative route will be less disruptive and damaging to neighbors *and* that the alternative route is in the public’s best interest”). Thus, Rothbart did not have to investigate alternative routes for the proposed cartway.

Because the township properly exercised its quasi-legislative authority and did not act under an erroneous legal theory, the cartway order was not arbitrary and capricious.

B. The public’s interest

The Wartmans argue that the town board selected a route that “does not serve the Public’s Interest, only that of Rothbart.” A town board’s order establishing a cartway may be arbitrary and capricious if the town board acted in a manner “contrary to the public’s best interest.” *Horton*, 624 N.W.2d at 595. But a cartway order that allows a landowner to establish “meaningful and usable access” to landlocked property benefits “the public’s best interest,” even if it only benefits one individual landowner. *Kennedy*, 784 N.W.2d at 385. Thus, the township’s order allowing Rothbart to access her property is in the public’s interest.

C. “Existing forest road”

The Wartmans contend that “[t]he actual use of the existing roadway has always historically provided access to the Rothbart parcel.” The Wartmans cite Minn. Stat. § 89.71, subd. 1 (2020), which establishes how “state forest roads” are designated. We understand this argument to imply that Rothbart’s parcel is not landlocked because the Wartmans claim that “[n]o new road would be created.”

The Wartmans’ argument is unavailing. Even if we assume the existing trail over the DNR land is a state forest road, the township did not err in determining that Rothbart’s parcel is landlocked. Minn. Stat. § 164.08, subd. 2(a), provides that a parcel is landlocked if it “has no access thereto except over a navigable waterway or over the lands of others.” It is undisputed that Rothbart’s property lacks access except over property owned by the Wartmans or DNR. Even if the Wartmans contend that the existing trail over the DNR land is a better route for the cartway, we reject that position for the reasons already stated.

D. Procedural irregularities

The Wartmans argue that the town-board proceedings were “rife with irregularities” and identify two irregularities. First, the Wartmans contend that the “plain language” of the cartway order refers to the “existing route,” which the Wartmans urge means the existing trail over the DNR land. It is true that the findings of fact in the interim and final orders state that “the existing route” is the least disruptive route. And we acknowledge that the sketch attached to the Rothbart petition labels a route over the DNR land as “existing trail.”

We are not persuaded by the Wartmans’ argument, however, because the interim and final orders also state that the “existing route” is shown in the “survey” attached to the

Rothbart petition. Also, both cartway orders provide, “The cartway shall follow the path described in the attached survey and legal description.” Rothbart’s petition identified the proposed cartway route with a legal description, a sketch of the proposed route, and a satellite image of the lands involved. Thus, both the interim and final orders grant a cartway over the Wartmans’ property and *not* over the DNR land.

Second, the Wartmans contend the relevant town-board meetings lacked a quorum. This claim appears to lack any support in the record. Both the interim and final orders are signed by two of the three town-board members, and minutes for the September and January town-board meetings show attendance by two of the three town-board members. Even assuming a quorum was lacking, the Wartmans provide no legal authority for their argument. Claims based on “mere assertion of error” that are unsupported by argument or legal authority are waived. *Buscher v. Montag Dev., Inc.*, 770 N.W.2d 199, 210 (Minn. App. 2009) (citing *State by Humphrey v. Mod. Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997)), *rev. denied* (Minn. Oct. 28, 2009).

Thus, we reject the Wartmans’ four arguments challenging the township’s cartway order and conclude the district court did not err by granting summary judgment to respondents, thereby affirming the location of the cartway as stated in the township’s final order.

II. The district court did not abuse its discretion by excluding evidence or by denying the Wartmans’ motion for a new trial.

The Wartmans argue the district court erroneously excluded their expert witnesses and related exhibits on damages and abused its discretion in denying their motion for a new

trial. We review evidentiary rulings, *Johnson v. Washington County*, 518 N.W.2d 594, 601 (Minn. 1994), and the denial of a motion for new trial, *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018), for abuse of discretion. “Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party’s ability to demonstrate prejudicial error.” *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 62 (Minn. 2019) (quotation omitted). “An evidentiary error is prejudicial if it might reasonably have influenced the jury and changed the result of the trial.” *Id.* (quotation omitted).

Respondents point out that the Wartmans have failed to provide a transcript of the jury trial. Failure to provide a trial transcript precludes appellate review of factual questions. *Gabler v. Fedoruk*, 756 N.W.2d 725, 729 (Minn. App. 2008) (stating a trial court’s findings were “unchallenged” as a result of the appellant’s failure to “provide a transcript to facilitate . . . review of the factual basis for the finding”). Without a transcript, we are unable to determine whether the excluded evidence “might reasonably have influenced the jury and changed the result of the trial.” *Kedrowski*, 933 N.W.2d at 62 (quotation omitted).

Even so, we discern no error in the district court’s exclusion of witnesses and exhibits during in limine proceedings for three reasons. First, the district court based its evidentiary rulings on the legal measure of damages. As the district court stated in its written in limine order, an appeal to the district court from a town board’s order granting a cartway is tried like an eminent-domain appeal under Minnesota Statutes Chapter 117. Minn. Stat. § 164.07, subd. 8 (2020) (“The appeal . . . shall be tried in the same manner as an appeal in eminent domain proceedings under chapter 117.”). Eminent-domain damages

reimburse a landowner “for the land taken and . . . damages to the remainder tract not taken.” Minn. Stat. § 117.175, subd. 1 (2020). When the township’s cartway order amounts to a partial taking, as here, “the measure of damages is ordinarily the difference between the market value of the entire tract before the taking and the market value of what is left after the taking.” *Alexandria Lake Area Serv. Region v. Johnson*, 295 N.W.2d 588, 590 (Minn. 1980).

The district court’s order describes the excluded evidence the Wartmans offered as testimony about “expenses for removal of brush/trees and for installation of a culvert” as well as the cost of gravel that had been used to maintain the existing roadway on the Wartmans’ property, the total cost of which had been approximately \$23,000. The Wartmans’ brief to this court does not explain the relevance of the excluded evidence, and we discern no abuse of the district court’s discretion in determining that this evidence is irrelevant to the measure of damages.

Second, the district court denied a new trial, in part, based on two key concessions the Wartmans made: (1) “the contractors and arborist [identified as expert witnesses] were not qualified to opine on the market value of real property,” and (2) “even if a new trial was granted, [the Wartmans] would not seek to use the contractor estimates that they offered at trial.” The Wartmans do not challenge these determinations on appeal; therefore, we accept them as true. *See Gabler*, 756 N.W.2d at 729.

The Wartmans’ brief to this court argues that because Rothbart’s appraiser was allowed to testify as to “the value of the portion of the cartway route that is already built,” the Wartmans’ contractors should have been allowed to testify. Because the contractors

“were not qualified” to testify on market value, the Wartmans’ argument is unavailing. Thus, the Wartmans have failed to show the district court’s exclusion of damages evidence about brush/tree removal or gravel was an abuse of discretion.

Third, the Wartmans’ arguments about the arborist’s evidence are similarly unpersuasive. The Wartmans accurately point out that “at trial, [an] appraiser testified that the view from a property can and does affect value.” Testimony from the arborist, the Wartmans contend, “including the ‘after’ photos of what the view into the Rothbart parcel will look like once [a] mature stand of trees that provide privacy screening are removed,” would have been helpful to the jury.

But the district court’s order explicitly did *not* exclude this testimony by the arborist.

In its in limine order, the district court stated:

[T]he exhibit containing Mr. Mortenson’s estimate, and his testimony regarding the value of tree replacement, shall be excluded. *This does not prohibit Mr. Mortenson, however, from providing testimony as to the nature of the loss of real property value due to the loss of trees, if qualified to give such an opinion.* Testimony regarding the cost of tree replacement, however, is excluded.

(Emphasis added.) The district court, in its order denying the Wartmans’ motion for a new trial, stated that the Wartmans sought to introduce the arborist’s “written bid as to the replacement value of the affected ornamental trees.” The Wartmans did not contend that the arborist would testify about the before-and-after value of their property because of tree loss due to the cartway. Thus, the Wartmans fail to show any prejudice or error in the district court’s ruling on the arborist’s evidence.

In sum, the district court did not abuse its discretion in denying the Wartmans' motion for a new trial on the damages issue.

Affirmed.