

*This opinion is nonprecedential except as provided by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
A24-1593**

Keith J. Unger,
Appellant,

vs.

Crow Wing County,
Respondent,

Nelson Preserve,
Respondent.

**Filed June 30, 2025
Reversed and remanded; motion denied
Slieter, Judge
Concurring in part, dissenting in part, Kirk, Judge***

Crow Wing County District Court
File No. 18-CV-22-3611

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Considered and decided by Cochran, Presiding Judge; Slieter, Judge; and Kirk, Judge.

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

NONPRECEDENTIAL OPINION

SLIETER, Judge

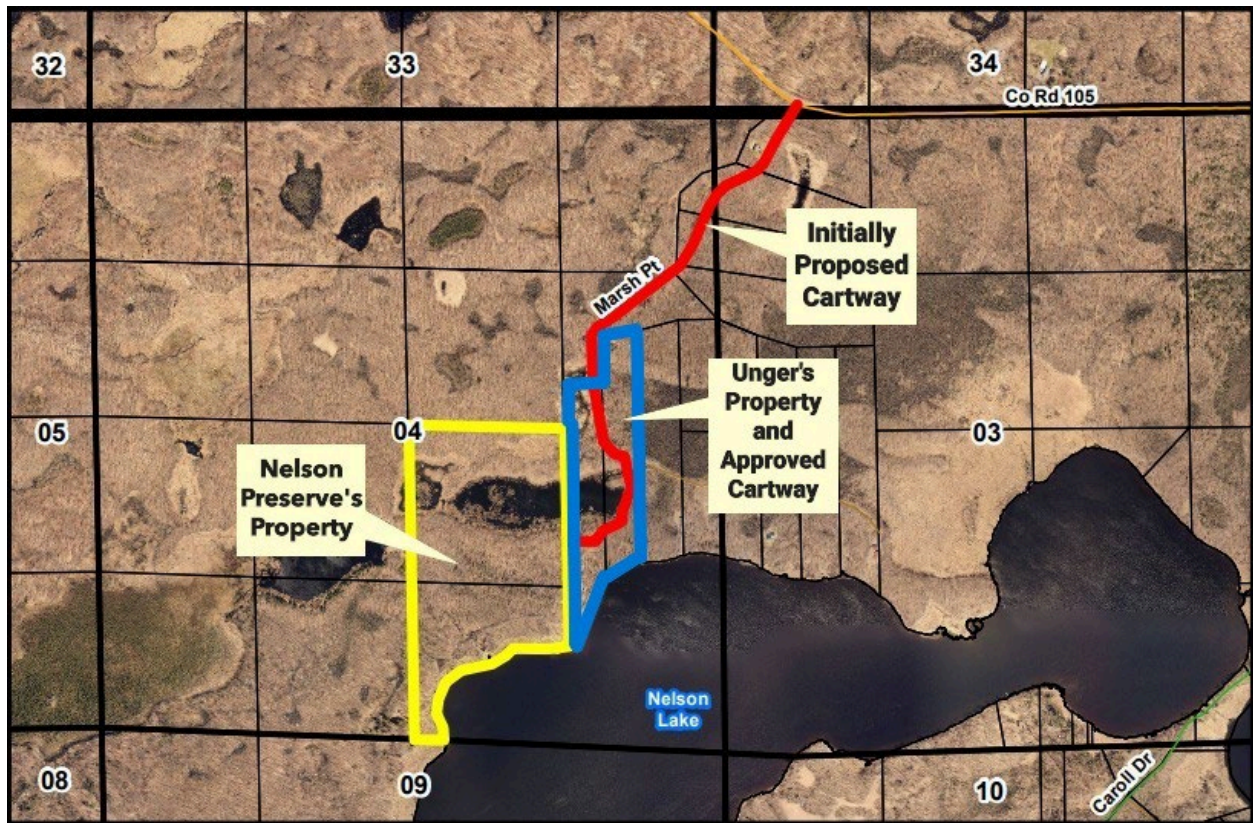
Following a cartway petition and establishment under Minn. Stat. § 164.08, subd. 2 (2024), by respondent-cartway petitioner, the district court affirmed respondent-county's cartway-route selection and denied appellant-landowner's request for attorney fees. Appellant challenges the district court's decisions on appeal. Because respondent-county failed to establish a cartway that complies with the requirements of Minn. Stat. § 164.08 (2024), we reverse and remand for further proceedings and we need not, therefore, address attorney fees.

FACTS

Respondent-cartway petitioner Nelson Preserve is a partnership that owns approximately 63 acres of hunting property located on Nelson Lake. There is no public access to the property, and Nelson Preserve's owners have historically accessed the property by crossing over parcels of land owned by Nelson Preserve's neighbors.

In the spring of 2019, Nelson Preserve petitioned respondent Crow Wing County to establish a cartway under Minn. Stat. § 164.08, across the land of others for access to its landlocked property. The proposed cartway route utilized a private roadway—constructed by and for Nelson Preserve's neighbors—that extends off a county road, until passing over appellant Keith J. Unger's property located along the eastern border of Nelson Preserve's property. The proposed route used part of Unger's private driveway before veering off through his woodland and onto the Nelson Preserve property. The following GIS image

comes from the administrative record and depicts the proposed cartway route and properties at issue.¹



Crow Wing County Board of Commissioners, acting as the town board in the unorganized territory at issue in the cartway petition under Minn. Stat. § 164.08, subd. 2(b), held an on-site meeting to examine the proposed cartway and the available, alternative route proposed by Unger. The cartway petition came before the board in October 2020, when route selection and “[i]ssues of wetland impact, water levels and erosion” were discussed.²

¹ We altered the existing labels, outlined Unger’s property, and labeled Unger’s property to further orient the reader to the general cartway-route dispute.

² The county attorney also advised that, in his opinion, he “s[aw] no public purpose for this cartway” because “[t]here’s no public land that [it] is going to access.”

Thereafter, following multiple continuances, a public hearing concerning the selection of the cartway route occurred in mid-May 2022. To aid in its decision, the board received comments from the county attorney, the county's environmental services supervisor, an owner of Nelson Preserve, Nelson Preserve's attorney, Unger, Unger's attorney, affected landowners located along the private roadway utilized for the proposed cartway route, and other members of the public.

Following the public hearing, the board chose to establish the cartway along Nelson Preserve's petitioned-for route, finding it to be "the happy middle ground" that was "most appropriate" because "[i]t minimizes environmental impacts, minimize[s] the taking of mature trees, provide[s] reasonable and meaningful access to [Nelson Preserve's] property, will be the least disruptive as most of the route already exists; and, [is] in the public['s] interest." The board then directed Nelson Preserve to complete a survey of the route for the damages phase of the proceedings.

The board heard comments and reviewed evidence related to damages in late-May and mid-September. At the September hearing, Nelson Preserve informed the board that they had obtained private easements from the landowners along the private roadway utilized for the cartway route—from the county road to Unger's property. Accordingly, the board's final resolution on September 27, 2022, focused solely on Unger's land, as the private easements "negated the requirement to obtain a cartway over [the easement] land." In the final resolution, the board "reaffirmed the previously selected Route [] as it pertains to and crosses over the land of . . . Unger" and approved damages in the amount of \$17,500, allocating \$2,500 to county staff time and \$15,000 to Unger for damages for taking his

property. No damages were awarded for any portion of the route covered by the private easements.

Two days later, Unger appealed the board's decision to the district court. In response, the board filed a motion concerning the board's selection of the cartway route, and Nelson Preserve formally joined in support. After a motion hearing, the district court granted the board's motion in a June 12, 2023 order, concluding that the administrative record showed "the County Board had ample evidence supporting its [route] choice." Thereafter, the district court held a court trial to address Unger's award for damages. In a March 1, 2024 order, the district court amended the board's award of damages to \$29,730.09. The district court's order also directed that Unger could return to the district court for consideration of an award of attorney fees under Minn. Stat. § 117.031 (2024), because the "final award [was] more than 40% greater than the \$15,000 awarded by [the board]." On March 11, 2024, Unger moved to amend the damages finding and requested an award of attorney fees. The district court held a motion hearing and subsequently denied both of Unger's requests in an August 9, 2024 order.

Unger appealed both the district court's affirmation of the board's cartway-route location and the denial of Unger's attorney fees. Following oral argument on March 11, 2025, we ordered the parties to "jointly file a stipulation clarifying the location of the cartway route selected by respondent-Crow Wing County" and "specify whether the cartway connects to a public road." On March 17, 2025, the parties stipulated that "the cartway is located entirely and exclusively on . . . Unger's two lots" and "does not connect

to a public road.” Thereafter, we ordered the parties to submit supplemental memoranda addressing the following:

(a) Pursuant to Minnesota Statutes section 164.08, subdivision 2(a), may a cartway for a tract of land containing at least five acres be established if the cartway does not connect to a public road?

(b) If the answer to (a) is no, does that impact the proper disposition on appeal?

In response, the parties’ supplemental memoranda agreed that Minn. Stat. § 164.08, subd. 2(a), does not authorize establishment of a cartway that is unconnected to a public road.³ Despite this agreement, the parties disagree as to what this means for the specific disposition of the case.

DECISION

When “reviewing actions by a governmental body,” such as a county board, our “focus is on the proceedings before the decision-making body . . . not the findings of the [district] court.” *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 207 (Minn. 1993); *see also Holstad v. Town of May*, 17 N.W.3d 764, 775-76 (Minn. App. 2025) (reviewing the proceedings of the town board’s cartway decision directly, rather than the findings of the district court), *rev. granted* (Minn. May 28, 2025). “Therefore, we set aside

³ Unger filed a “motion for leave to reply to respondent’s newly introduced argument in supplemental memorandum.” *See* Minn. R. Civ. App. P. 128.02, subd. 4 (“No further briefs may be filed except with leave of the appellate court.”). Because any new argument contained in the supplemental memorandum does not affect our analysis here, we deny the motion. *See, e.g., Waiters v. State*, 14 N.W.3d 279, 282 n.2 (Minn. 2024) (denying motion to file an amended brief because appellant “has not established cause to support this request, and—given our disposition of the case—the proposed amendments would not impact our analysis of the district court’s decision”).

a [county board's] cartway determination only if 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.” *Kennedy v. Pepin Twp. of Wabasha County*, 784 N.W.2d 378, 381 (Minn. 2010) (quotation omitted). But we review questions of law *de novo*. *Id.*

When a cartway petition involves land “[i]n an unorganized territory, the board of county commissioners of the county in which the tract of land is located shall act as the town board” for the proceedings. Minn. Stat. § 164.08, subd. 2(b). Minn. Stat. § 164.08, subd. 2(a), provides in relevant part:

Upon petition presented to the [county] 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 [county] board by resolution *shall establish a cartway at least two rods wide connecting the petitioner’s land with a public road.*

(Emphasis added.) “[E]stablishment of a cartway under [this statute] 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.” *Silver v. Ridgeway*, 733 N.W.2d 165, 169 (Minn. App. 2007). And our caselaw is clear 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.” *Id.* (citing *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)).

Here, the board’s final cartway resolution indicates that it only established the cartway over Unger’s property and it did not connect to the public county road—as Nelson Preserve originally petitioned for. The parties confirmed this cartway location by joint stipulation, agreeing that the cartway is located only on Unger’s land and does not connect to a public road. But the statute clearly requires the board’s cartway resolution to “connect[] the petitioner’s land with a public road.” Minn. Stat. § 164.08, subd. 2(a); *see also* Minn. Stat. § 645.44, subd. 16 (2024) (“‘Shall’ is mandatory”). By failing to connect the cartway to a public road, the board created a cartway inconsistent with the statute’s requirements and thus acted “on an erroneous theory of law.” *See Kennedy*, 784 N.W.2d at 381.

Therefore, because the board failed to establish a cartway in accordance with the requirements of Minn. Stat. § 164.08, we reverse the district court’s decision to affirm the cartway location and remand this case to the board “so that it may properly exercise its discretion under the statute.” *Id.* at 384-85 (remanding cartway decision back to township board with instructions to properly establish cartway route under the statute). On remand, the board must establish a lawful cartway route—that connects to, and becomes, a public road—pursuant to Minn. Stat. § 164.08.⁴ On remand, if a cartway is established, damages

⁴ If the board decides to again utilize the private roadway to create the cartway route, the board must condemn the private roadway and convert it to a public road in order to comply with the statute. *See* Minn. Stat. § 164.08; *Silver*, 733 N.W.2d at 169 (noting that “establishment of a cartway under Minn. Stat. § 164.08 . . . is an exercise of eminent domain, the inherent power of a governmental entity to take privately owned property and convert it to public use,” and the “establishment of a cartway creates a public road”). The board may also reconsider what constitutes just compensation for the landowner. *See* Minn. Const. art. I, § 13; U.S. Const. amend. V; *Minn. Sands, LLC v. County of Winona*,

must be awarded and the board may require Nelson Preserve to post a bond or other accepted security. *See* Minn. Stat. § 164.08, subd. 2(c).⁵

Reversed and remanded; motion denied.

940 N.W.2d 183, 200 (Minn. 2020). Condemnation should not lead to a burdened landowner suffering any uncompensated reasonable expenses or uncompensated damages for any property interests taken. *See Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 876 (Minn. 2010).

⁵ Because we reverse the district court's decision to affirm the board's cartway selection, we do not reach the attorney-fee issue.

KIRK, Judge (concurring in part, dissenting in part)

I concur with the majority opinion on this cartway dispute. I write separately because I disagree with the decision not to decide the attorney fees issue. The county board acted on an erroneous theory of law, *see Kennedy v. Pepin Township of Wabasha County*, 784 N.W.2d 378, 381 (Minn. 2010), and the landowner’s reasonable attorney fees and costs must be paid at all levels of the proceedings.

“With great power comes great responsibility.”¹ In *Moorhead Economic Development Authority v. Anda*, the Minnesota Supreme Court described condemnation as an “awesome power.” 789 N.W.2d 860, 875 (Minn. 2010). And “when the government condemns property, it must put a property owner ‘in as good a position pecuniarily as if his property had not been taken.’” *Id.* at 876 (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *see* U.S. Const. amend. V; Minn. Const. art. I, § 13. This is important and particularly confusing in the case of a cartway proceeding. *Anda* states that a person whose property is burdened in a condemnation proceeding is entitled to be made whole.

The cartway statute is an archaic relic of a simpler time. It can place a township or county in a difficult position with constituents whose emotions can be running high. Unfortunately, the county’s haphazard effort to establish a cartway in this case, has already led to significant financial harm for Unger who may never see any of the compensation

¹ “Perhaps one of the best-known original sources of this phrase is from the comic book, Spider-Man. *See Amazing Fantasy # 15* (Marvel Comics, August 1962). It is also believed to have possibly originated with Voltaire. *See* Voltaire, et al., 48 *Oeuvres de Voltaire* (Lefèvre, 1840).” *United States v. Cortés-Cabán*, 691 F.3d 1, 30 n.34 (1st Cir. 2012).

needed to make him whole, especially if the cartway is never opened. *See e.g., Ratfield v. S. Harbor Twp.*, No. A20-0135, 2020 WL 5507875 (Minn. App. Sept. 14, 2020) (*Ratfield III*) (involving a similar case that reached the court of appeals three times in a period of ten years, and in the end no cartway was opened).²

Unger has requested that he be awarded attorney fees under Minn. Stat. § 117.012-.57 (2024). As outlined in Minn. Stat. § 117.012, subd. 1,

all condemning authorities, including . . . all other political subdivisions of the state, must exercise the power of eminent domain in accordance with the provisions of this chapter, including all procedures, definitions, remedies, and limitations. *Additional procedures, remedies, or limitations that do not deny or diminish the substantive and procedural rights and protections of owners under this chapter may be provided by other law, ordinance, or charter.*

(Emphasis added.) This statute, alongside the Minnesota Constitution’s requirement that a landowner be justly compensated for the property interest taken and costs arising from the eminent-domain proceeding, *see* Minn. Const. art. I, § 13, art. XIII, § 4, indicates the legislature’s intention that the rights of property owners are paramount in these types of proceedings.

² Upon receiving a cartway petition, the townships and counties should also seriously consider whether a bond waiver is warranted, since all parties can be subjected to significant costs and proceedings without the road ultimately being opened and any payment being made. *See* Minn. Stat. § 164.08, subd. 2(c) (2024) (providing the board with the ability to require a bond for the total estimated damages before taking action on the cartway petition); *Ratfield v. Zuckerman*, No. A17-0214, 2017 WL 3863855, at *4-5 (Minn. App. Sept. 5, 2017) (*Ratfield II*) (describing the board’s responsibility in securing just compensation for the landowner, with or without the bond), *rev. denied* (Minn. Nov. 28, 2017).

While Minn. Stat. § 117.012, subd. 3, provides for exceptions to chapter 117, that subdivision requires that the excepted law “expressly provide for the taking and specifically prescribe the procedure.” Here, the cartway statute does not discuss what happens when the established cartway does not have a public purpose or the municipality acts contrary to the law. *See* Minn. Stat. §§ 164.07, subd. 5, .08, subd. 2(b), (c) (2024). Chapter 117 specifically provides for attorney fees and costs in a circumstance such as this. *See* Minn. Stat. § 117.031(b) (“In any case where the court determines that *a taking is not for a public use or is unlawful, the court shall award the owner reasonable attorney fees and other related expenses, fees, and costs in addition to other compensation and fees authorized by this chapter.*” (emphasis added)).

Also, notably, Minn. Stat. § 117.012, subd. 2, echoes the state and federal case law that the taking “only be used for a public use or public purpose.” And the only way you get to a public purpose when creating a cartway is using the legal fiction that initially the cartway is a public road, even though the intention of the parties is to convert it to a private road. *See Silver v. Ridgeway*, 733 N.W.2d 165, 169 (Minn. App. 2007) (“[E]stablishment of a cartway creates a public road.”). Here, the county board failed to condemn a significant portion of the roadway, falling short of this “public use or public purpose,” because it failed to connect to an existing public road. Will the owners of the private roadway be as eager to allow access to their roughly one-half mile of road if it creates a public roadway which might or might not become a private road later? Most importantly, Unger should not suffer any financial loss because of the county’s failures.

The legislative intent is clear from *Anda* and Minn. Stat. § 117.012-.57 that the burdened property owner should be fully compensated as part of a condemnation proceeding. If our court reads the language of attorney fees into the cartway statute to allow the township to recover its own attorney fees by broadly interpreting expert fees to include attorney fees, why would we not or should we not read that language to allow the landowner—who is not supposed to suffer any losses in a condemnation proceeding—to recover their associated attorney fees and costs in this circumstance, as consistent with chapter 117? *See Holstad v. Town of May*, 17 N.W.3d 764, 776-77 (Minn. App. 2025), *rev. granted* (Minn. May 28, 2025).

Therefore, I believe that since the cartway statute does not specifically address this circumstance, Unger should have been awarded attorney fees and costs under Minn. Stat. § 117.031, and I disagree with the majority’s decision not to reach this issue. The financial burden is already great for these parties and what costs are to be paid by the respective parties should be known before they journey down this bumpy road once again.