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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-2335**

In the Matter of Bryan Hutchinson and Tracy Hutchinson  
for the Establishment of a Cartway  
Within Unorganized Territory in  
St. Louis County, Minnesota.

**Filed September 3, 2013  
Affirmed  
Worke, Judge**

St. Louis County District Court  
File No. 69DU-CV-10-3715

Kenneth D. Butler, Duluth, Minnesota (for appellants Chester Cullen and Robin Cullen)

Kimberly E. Brzezinski, Andresen & Butterworth, P.A., Duluth, Minnesota (for  
respondents Bryan Hutchinson and Tracy Hutchinson)

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Considered and decided by Worke, Presiding Judge; Rodenberg, Judge; and  
Smith, Judge.

**UNPUBLISHED OPINION**

**WORKE**, Judge

Appellants, the owners of land over which respondent county board of  
commissioners approved a cartway, argue that the district court erred by affirming the  
location of the cartway because the county board of commissioners' decision is arbitrary  
and capricious, failing to address the existence of an implied easement, and by not

properly addressing alternative routes that are less damaging and in the public's interest. We affirm.

## FACTS

This dispute concerns a cartway located across land owned by appellants Chester and Robin Cullen, established to provide access to the property owned by respondents Bryan and Tracy Hutchinson. In 2009, the Hutchinsons built a home on their property, and were assured by St. Louis County that access could be achieved over North Triplett Road, which was a public road. North Triplett Road extends north-south, forming the western border of the Hutchinsons' property and the eastern border of the Cullens' property, with the Cullens' property located north-west of the Hutchinsons' property.

In early 2010, the Cullens filed a complaint against the county, alleging that the stretch of North Triplett Road abutting their property was not a public road, but was either established illegally or abandoned pursuant to the Minnesota Marketable Title Act. The district court granted summary judgment in favor of the Cullens, finding that the road had been abandoned for the statutory period and was no longer a public road.

In July 2010, the Hutchinsons and their neighbors, Richard and Susan Coccie, petitioned the county to establish a cartway over the Coccie and Cullen properties under what is now Minn. Stat. § 164.08, subd. 2 (2012) along the former North Triplett Road. On November 9, 2010, the county board held a hearing. Numerous witnesses testified, including two officials from the county's public-works department who presented a report assessing three options for cartway routes. The report indicated that, of the three options, the route proposed by the Hutchinsons required no additional construction and

would not impact area wetlands. The county board voted to adopt a resolution establishing a cartway over old North Triplett Road, and to award the Cullens \$10,700 to compensate them for the taking. On November 30, 2010, the county board entered an order with findings of fact and conclusions of law to this effect.

In December 2010, the Cullens appealed to the district court under what is now Minn. Stat. § 164.07, subd. 7 (2012). On March 22, 2012, the court considered whether the county board's decision was arbitrary and capricious; all other issues were reserved. The district court affirmed the decision, concluding that it "had a reasonable basis in law and fact," and that the "evidence is not practically conclusive against [it]."

### **D E C I S I O N**

"A [county] acting on a petition to establish a cartway acts in a legislative capacity." *Kennedy v. Pepin Twp. of Wabasha Cnty.*, 784 N.W.2d 378, 381 (Minn. 2010) (quotation omitted). "Therefore, we set aside a [county'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." *Id.* (quotation omitted). Determination of these issues requires the interpretation of the cartway statute, which is a question of law that we review de novo. *Id.*; *see also* Minn. Stat. § 164.08, subd. 2.

Section 164.08, subdivision 2 "obligates a [county] to establish a cartway to provide access to an owner of a tract of land who has no access to his or her land from a public road except over the land of others." *Kennedy*, 784 N.W.2d at 382. The county board "may select an alternative route other than that petitioned for if the alternative is

deemed by the [county] board to be less disruptive and damaging to the affected landowners and in the public's best interest." Minn. Stat. § 164.08, subd. 2.

The Cullens argue that the case should be remanded to the county board for findings on whether the Hutchinsons already have an implied easement by which they could access their land. The Cullens assert that the Hutchinsons have an easement by necessity across land owned by John Hutchinson, the grantor of Bryan and Tracy Hutchinsons' parcel of land. The Cullens argue that, if the Hutchinsons have an easement by necessity, they are not entitled to a cartway.

A landowner who has an express easement is not entitled to a cartway. *Roemer v. Bd. of Supervisors of Elysian Twp.*, 283 Minn. 288, 291, 167 N.W.2d 497, 499 (1969). In *Roemer*, the supreme court opined that the purpose of the cartway statute was to expand the doctrine of easements by necessity to those grantees whose grantors no longer held land. *Id.* Therefore, the court concluded that one who has an express easement does not need a cartway, and stated in dictum that when one has "a right to assert an easement of necessity" one is likewise not entitled to a cartway. *Id.*

The county board and the Hutchinsons argue that the existence of an easement by necessity is questionable, and that they were not required to exhaust all other legal avenues before petitioning for a cartway. We agree. The county board and the Hutchinsons correctly assert that the language that the Cullens rely upon in *Roemer* is dictum, and that *Roemer* is distinguishable because the petitioner in *Roemer* had an express easement that provided an existing means of egress and ingress from his

property. *See id.* at 289, 167 N.W.2d at 498 (noting that the petitioner had a permanent easement).

Moreover, on these facts, the existence of an easement by necessity is too doubtful to support the Cullens' argument that the Hutchinsons were required to exhaust other legal remedies prior to petitioning for a cartway. The elements of an implied easement by necessity are: "(1) a separation of title; (2) the use which gives rise to the easement shall have been so long continued and apparent as to show that it was intended to be permanent; and (3) that the easement is necessary to the beneficial enjoyment of the land granted." *Niehaus v. City of Litchfield*, 529 N.W.2d 410, 412 (Minn. App. 1995). There is also a requirement that the implied easement "be determined *at the time of severance*, and a subsequent change of conditions will not defeat or create an implied easement." *Id.* "The party attempting to establish the easement bears the burden of proving necessity existed at the time of severance." *Id.* The county board and the Hutchinsons argue that there can be no implied easement across John Hutchinson's property because, at the time of severance, North Triplett Road was a public road by which the Hutchinsons could, and did, access their property. Therefore, because the Hutchinsons never used John Hutchinson's property as a means of ingress or egress, on this record neither the second nor the third elements of an implied easement were satisfied. We agree.

The Cullens also argue that the county board was required to find that the alternative routes it considered were neither less disruptive and damaging nor in the public's interest. Minn. Stat. § 164.08, subd. 2(a) provides that the county board "may select an alternative route other than that petitioned for if the alternative is deemed by the

[county] board to be less disruptive and damaging to the affected landowners and in the public's best interest." The statute provides that a county board must establish a cartway if the petitioner meets the criteria, but that "the selection of a route is a decision allocated by statute to the [county board] to make in its discretion." *Kennedy*, 784 N.W.2d at 384. "It is not within an appellate court's power to substitute its judgment for that of the [county board] in selecting a route that provides access to the usable portion of petitioner's land." *Id.*

The record demonstrates that the county board followed the findings requirement in Minn. Stat. § 164.08, subd. 2(a). The county board determined that the Hutchinsons were entitled to a cartway, and then granted the cartway over the petitioners' requested route. No additional findings were required. The Cullens argue that because the county board considered other alternatives, they were required to make the findings set forth in subdivision 2(a). However, Minn. Stat. § 164.08, subd. 2(a) requires "that a [county board] establish the route requested by the petitioner unless the [county board] 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." *Id.* Therefore, the county board was not required to make the additional findings requested by the Cullens.

**Affirmed.**