CARTWAYS

A DISCUSSION OF TOWN BOARD CARTWAY PROCEEDINGS FROM INCEPTION THROUGH CONCLUSION

MINNESOTA ASSOCIATION OF TOWNSHIPS SEMINAR
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This article is an overview of some of the more important aspects of Minnesota law on this subject. It is general and educational, and is not intended as – nor should it be used as a substitute for – legal advice about any particular situation.

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I. Introduction

I first wrote this paper in January, 2004, and what follows is a revision of it. With one exception, the changes in cartway law since early 2004 have not been profound. The exception is that in July 2005 the legislature basically "overruled" the *Daniel* case.

Still, I've made other changes to the original paper, and I suppose it is just more proof that you *can* teach an old dog new tricks. The changes are primarily things that I have learned, re-thought, or reconsidered during the 1½ years since, handling a lot of cartway proceedings.

I noted in the 2004 introduction that we seem to be seeing more and more cartway petitions, and I think that is still true. Development, rising land values, and an occasional lack of neighborliness seem to have a lot to do with it.

The cartway petitions almost always come from "landlocked" owners—landowners who claim to lack access to public roads, and want the town to create access by establishing a cartway across a neighbor's land. Usually, the landowner and the neighbor have failed to work out a private easement agreement. Usually, each claims that the reason is because the other has been totally unreasonable.

The purpose of this paper is to try to walk town board supervisors and town attorneys (and, to a lesser extent, cartway petitioners and respondents) through a "garden variety" cartway proceeding, and discuss the issues that often lurk at each step of the proceeding. After a brief discussion of what cartways are, this paper walks through the typical steps in a cartway proceeding, from the initial inquiry about a cartway to the filing of the final documents establishing it. I've tried to raise the issues that usually come up at each step in the process, and address them as best I can. Sometimes, I've addressed them at two levels—the main text is more for town officials, and contains those things that I think they should know; the footnotes are more for the town attorneys, or for town officials who feel the urge to really dig into this.

The paper focuses on the situation of a "landlocked" owner who seeks a cartway across a neighbor's land to a public road. That's only one way of creating a cartway. There are other ways, but those are quite uncommon. I have not addressed those in the main text except in passing, and only briefly mention them in the footnotes.

A note on terminology. I usually use the term "neighbor" or "affected owner" to mean the person across whose land the cartway is established or is proposed to be established. It's much easier to use those shorthand terms instead of the cumbersome phrase "the person across whose land the cartway is established or is proposed to be established." So when you see the word "neighbor," don't assume it means just any neighbor—it usually means only the neighbor or neighbors who are facing the prospect of having a cartway slapped across their land.

One last thing before beginning. This paper is a general overview of cartway law. It is for educational purposes, and is not intended as and should not be understood as being legal advice for any given situation. The particular circumstances of any cartway proceeding are essentially infinite, and the legal ramifications can change accordingly. If you have a cartway proceeding, get your town attorney involved early and often. Read on, and you will learn how you can get your town attorney to handle your cartway proceedings without it costing the town anything.

II. What is a Cartway?

Neither the courts nor the legislature have offered a comprehensive definition of "cartway."[1] Most people know generally that a cartway is something that towns (or counties) can use to establish access from someone's land to a public road. Beyond that, things get hazy. Just what is a cartway, and what are its key attributes?

I think it is easiest, conceptually, to think of a cartway as something of a hybrid between a private easement[2] and a town road. Let's consider the key features of each, and then turn to my premise, which is that cartways are something of a mix between the two.

Private easements can be created in many ways[3] and can assume almost innumerable forms. Typically, a private easement has the following key characteristics:

1. It is usually created by private agreement. Owners of two or more tracts of land enter into an agreement that gives some of them the legal right to pass over a defined portion of the other's property. In other words, the town does not create the easement.

2. Usually, only parties to the easement agreement (or those who later purchase, inherit or otherwise acquire their land) have the legal right to use the easement. In other words, usually the public has no right to pass.[4]

3. The easement is constructed and maintained by those who have the right to use it, typically in proportion either to their actual or expected use. In other words, the easement is not constructed or maintained at public expense.

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[1] That is not to say that there aren't many statutes discussing cartways. For example, "town roads" include "cartways." Minn. Stat. § 160.02, subd. 28. "Town roads" are then defined in Section 164.02, subd. 1. Cartways can be created through the Cartway Statute's petition process, Minn. Stat. 164.08, or by dedication (offer of a gift) from landowners, Minn. Stat. § 164.15, subd. 1. Cartways that towns have not worked or maintained for 25 years or more may be worked or maintained if the electors at the annual meeting authorize the board to do so. Minn. Stat. § 365.10, subd. 11. An odd statute says, "Land dedicated to public use as a street, road, or cartway, if not less than 30 feet in width, shall be deemed a legal cartway." Minn. Stat. § 164.11. The precise meaning of that statute—or what the legislature had in mind when passing it—can drive a town attorney into something approaching existential angst, but it arguably creates some cartways in some fashion. None of these statutes, though, tell us much about what a cartway *is*. For what it's worth, historically, the term "cartway" meant a rough roadway suitable for carts but not for carriages or other vehicles with spring shocks. *See, Horton v. Township of Helen*, 624 N.W.2d 591 (Minn. App. 2001) (rev. den.).

[2] Here, we mean "easement" in the sense of a right of way or a legally enforceable right to pass. Generally speaking, the owner of the land subject to the easement retains full ownership of the land and can make full use of it, subject to the easement holder's right of reasonable ingress and egress through the defined area. *E.g., Minneapolis Athletic Club v. Cohler*, 287 Minn. 254, 177 N.W.2d 786 (1970).

[3] Although typically private right of ways are created by written agreements, they can be created in other ways. An "easement of necessity" or "easement by implication" may arise when a seller of land conveys a portion of it to a buyer, but does not provide the buyer with access to a public road—the buyer might be able to claim a right of way across the seller's property to the public road, although the seller may, within reason, dictate where that right of way will be located. *E.g, Lake George Park v. IBM Mid-America Employees Fed. Credit Union*, 576 N.W.2d 463 (Minn. App. 1998). An "easement by prescription" or "by use" or "by adverse possession" may arise when a person uses a right of way across another's land for 15 years or more if the use is "actual, open, continuous, and hostile." *See, e.g., Boldt v. Roth*, 618 N.W.2d 393 (Minn. 2000). The details of that are well beyond the scope of this paper.

[4] Owners of land can enter into an easement agreement by which they give the public the right to use the easement, in which case it is a privately created easement that creates a right of public passage.

Town roads can be created in many different ways as well. Typically, town roads have these key characteristics:

1. They are usually created either by (a) someone offering the road to the public, and the public accepting that offer[5] or (b) the town, most often upon a petition, taking a defined portion of private land for public use as a road, then paying compensation for that. In other words, the public either accepts or creates the right to pass.

2. The road is public—the public has the right to use it.

3. The town maintains (and often constructs) the road at taxpayer expense.

Again, my premise is that we can usefully conceptualize cartways as a hybrid between private easements and town roads. Usually—not invariably—cartways have these key characteristics:

1. Like a town road, a cartway is usually created either by someone offering the cartway to the town (and the town accepting it) or, more frequently, by the town acting upon a petition and taking a defined portion of private land for the cartway.[6]

2. Like a town road, the public has the right to use the cartway.[7]

3. Like a private easement, the expense of constructing and maintaining the cartway is usually borne by those who use it, not by town taxpayers.[8]

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[5] This can be either express or implied. For example, the landowners may expressly offer land to a town for roadway purposes and, if the town board follows certain procedures, the land may become a town road. Minn. Stat. § 164.15; see also, Minn. Stat. § 160.04 (additional road right of ways may be acquired by purchase or gift). An example of a landowner implicitly offering a portion of land to the town for road purposes can occur when a landowner fails to object to public maintenance and use for a continuous period of six years or more. Minn. Stat. § 160.05, subd. 1 (a road so used is "deemed dedicated to the public").

[6] For example, under Minn. Stat. § 164.15, subd. 1, landowners may offer land to the town for cartway purposes and the town board, if it follows certain procedures, may accept it as such. Under Minn. Stat. § 164.08, landowners can petition the town board for the establishment of a cartway. The cartway is almost always taken as an easement (a right of passage across the owner's land) rather than as a fee (where the town would actually own the land upon which the cartway is situated).

[7] A cartway is "a public way, open to the free use of the public . . . ." *Carlson v. Elmo Township*, 141 Minn. 240, 169 N.W. 805, 806 (1918).

[8] Minn. Stat. § 164.08, subd. 2 (d) says that town road and bridge funds shall not be expended on a cartway unless the town board by resolution determines that the expenditure is in the public interest. Minn. Stat. § 164.10 allows the town board to spend road and bridge funds for a cartway if the board believes the public interest requires it. That same statute establishes a petition process through which the electors, following certain procedures and by a majority vote at the annual meeting, can "overrule" a town board's refusal to spend town money for a cartway. *See, State ex rel. Rose v. Town of Greenwood*, 220 Minn. 508, 20 N.W.2d 345, 348-49 (1945) (discussing a town board's almost unbridled discretion in refusing to spend town funds on cartways). *But see, Carlson v. Elmo Township*, 141 Minn. 240, 169 N.W.2d 805, 807 (1918) (stating, under earlier statute, that a town has a duty to maintain a cartway to the extent that the public interest requires it). If a cartway has not been worked or maintained by the town for 25 years or more, the voters at the annual election can authorize the town board to open or maintain it. Minn. Stat. § 365.10, subd. 11. There are, to my mind, two implications to that—(1) that it would be opened or maintained at public expense, and (2) that a town board (at least in a "rural" town) cannot open or maintain such a cartway without elector approval.

Thus, in a basic sense, we can conceptualize a cartway as (1) an easement (a right of passage) (2) in favor of the public, (3) created by a town, but (4) usually constructed and maintained at private rather than public expense.

III. The Usual First Salvo—An Inquiry About Getting a Cartway

Towns usually learn they have a cartway issue in one of two ways. Either the town receives a cartway petition (see the following section), or a landowner tells the town, in so many words, "I'm landlocked--how do I go about getting a cartway?" In my experience, towns usually get that question before receiving a petition.

I would encourage towns, if they get that question, to try to educate the landowner about what they are getting into. Most landowners have heard that old phrase: "You can't be landlocked in Minnesota." From that, some of them get the idea that it must be pretty easy to establish access to their land. What they haven't heard is the full phrase: "You can't be landlocked in Minnesota, but it might cost you an arm and a leg to get 'un-landlocked.'"

In other words, I would encourage towns to let landowners know what they might be in for. Cartway proceedings aren't a free ride. They might take considerably more time and involve considerably more expense than getting a private easement from a neighbor. Most of the time, landowners should look at a cartway proceeding as a last resort, not the first step in trying to establish access to their land.

A lot of what the landowner needs to understand from the outset is described in the sections below, and need not be repeated in detail here. But what follows is basically a checklist of the minimum that a landowner should know—or that a clerk or supervisor might want to warn the landowner about—from the start. There are no doubt other relevant considerations, but I think the landowner should be encouraged to understand at least the following ten points:

1. Does the landowner own the appropriate amount of land (usually but not invariably five acres or more)? If not, the town cannot help them.

2. Does the landowner lack "access" to that land from a public road? That is, are they truly landlocked, or do they have some useable legal access from their property to a public road? If they have "access," the town cannot help them.

3. Where does the landowner propose putting the cartway—where will it start, end, and what will its course be?

4. Across which neighbor or neighbors' land will the proposed cartway pass?

5. Does the landowner have a legal description of the land across which the proposed cartway will go, and know who the owners and occupants are?

6. Does the landowner know that, if a cartway is established, the landowner is going to have to pay the neighbors fair compensation if creating the cartway de-values their lands? Does the landowner understand that the town will probably make the landowner put an

estimated amount of this compensation "up front" before taking action on the cartway petition?

7. Does the landowner know that, if a cartway is established, the landowner is probably going to have to pay the town for its expenses in connection with the cartway proceedings, including the town's attorney fees and the cost of any necessary survey? Does the landowner understand that the town will probably make the landowner put that money "up front," before taking action on the cartway petition?

8. Does the landowner understand that he or she is probably going to have to hire an attorney of his or her own?

9. Does the landowner understand that, if a cartway is created, it at least initially (and maybe always) will be a public right of way, and that anyone can travel on it?

10. Does the landowner understand that, if a cartway is created, the landowner (not the town) will have to pay to construct it, and that the landowner (not the town) will probably have to maintain it?

If the landowner understands these things, he or she might be more willing to try to negotiate a private easement with the neighbors. At the very least, any idea that this process is a "free ride" should vanish. The landowner might come to realize that a private easement might well cost less, take less time to create, cause less friction with the neighbors, and perhaps result in a private access that is better than anything the town could provide. It might cause the landowner to try to work harder with the neighbors in agreeing to a private easement. It can also result in the town board avoiding what can become a time-consuming and contentious process.

As a result, I encourage towns, at this initial inquiry phase, to let landowners know what they might be in for.

IV. The Cartway Petition

At other times, the first step in the process is the receipt of a cartway petition.

The Cartway Statute requires a petition for the commencement of cartway proceedings.[9]

[9] Minn. Stat. 164.08. The Cartway Statute provides for two distinct types of cartways, which we might call (1) agricultural cartways and (2) cartways by landlocked owners. Subdivision one provides for agricultural cartways. Basically, it says that a town board has discretion to establish a cartway if there is a petition by at least five voters, freeholders of the town, requesting a cartway on a section line that would serve a tract or tracts of land consisting of at least 150 acres, at least 100 of which are tillable. If granted, the agricultural cartway may not exceed one-half mile in length, and must be two rods wide. I've only found two cases that clearly deal with requests for agricultural cartways. *Rask v. Town Board of Hendrum*, 173 Minn. 572, 218 N.W. 115 (1928); *Powell v. Town Board of Sinnot*, 175 Minn. 395, 221 N.W. 527 (1928). I practice in Northeastern Minnesota, and have never seen a petition for an agricultural cartway. I suspect they are quite rare. As a result, I am going to focus almost exclusively in this paper on cartway petitions from landlocked owners.

The petition is to be filed with the town clerk, who "shall forthwith" present it to the town board.[10] There is no definition of "forthwith," and presumably it means as soon as reasonably possible under the circumstances.

The petition must at a minimum contain several things, in no particular order:

1. A description of the proposed cartway, including its point of beginning, general course, and termination.[11] Although the statute does not expressly say this, the petition should describe how wide the proposed cartway would be; if it doesn't, then presumably a two-rod (33') cartway is being requested;

2. The names of the owners and occupants of the land, if known, over which the cartway is proposed to pass;[12]

3. An allegation (A) that the petitioner owns at least five acres of land (or, alternatively owns a tract of land that, as of January 1, 1998, was on record as a separate parcel and contained at least two but less than five acres) and has no access to it from a public road or (B) has access to a public road, but the access is less than two rods (33') in width.[13] It is vastly preferable, and arguably required, that the petitioner describe his or her own land; and

4. Presumably, the petitioner's signature.

I find no cases that say exactly what happens if a petition does not contain one of these "key" elements. I believe that a proper petition is a jurisdictional prerequisite—that is, that the town board has no power to proceed until it receives a proper cartway petition.[14] If so, it would seem to follow that if a petition lacks any of these "key" elements, the appropriate thing to do would be to return it to the petitioner with an explanation of what was missing and an invitation to re-submit it with the required information.

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[10] Minn. Stat. § 164.07, subd. 2. Note that this language is from the Town Road Statute (Section 164.07) rather than from the Cartway Statute (Section 164.08). The Cartway Statute contains little in terms of procedures, and instead says that cartway proceedings are to be conducted "in accordance with" the Town Road Statute (§164.07). As the court said in *State ex rel. Rose v. Town of Greenwood*, 220 Minn. 508, 20 N.W.2d 345, 347 (1945), the Cartway Statute establishes the right to the cartway, but the proceedings should follow the Road Statute unless the Cartway Statute provides differently. There are some fundamental differences between cartways and roads. The statute says that cartway proceedings are to be "in accordance with" the Road Statute, not "strict compliance with." My view is that a town board, during a cartway proceeding, should try to "track" the procedures in the Road Statute as far as reasonably possible, but has some reasonable discretion to depart from them if they do not make sense in the context of a cartway proceeding. *See, also, Slayton Gun Club v. Town of Shetek*, 286 Minn. 461, 176 N.W2d 544, 546 (1970)(town board must act in accordance with the procedures "outlined" in the Road Statute).

[11] Minn. Stat. 164.07, subd. 1.

[12] Minn. Stat. 164.07, subd. 1.

[13] Minn. Stat. 164.08, subd. 2.

[14] See, *Shinneman v. Arago Township*, 288 N.W.2d 239, 244 (Minn. 1980). A petition to establish a town road was submitted to a town board but, before the town board took any action, several petitioners formally withdrew their signatures. As a result, the petition lacked the required number of signatures. The court said this left the town board "without authority to act" upon the petition.

I also find no cases that say exactly what should happen if a petition is submitted that contains some information that is almost certainly wrong. For example, suppose the town board receives a petition from a petitioner who claims she lacks access, but the supervisors know full well that she has access to a public road. Can the supervisors simply reject the petition? I suspect they can't. I suspect a petition is much like a complaint in a lawsuit, and that the *allegation* gets the petitioner's "foot in the door." I would think a supervisor could certainly call the petitioner, ask some pointed questions, and try to persuade her that it might be best for everyone if the petition was withdrawn but, if she refuses, I suspect she has a right to be heard on the issue at a cartway hearing. Put a little differently, I doubt that a town board can summarily reject a cartway petition that contains the necessary allegations—the truth of those allegations, I suspect, would have to be determined at the hearing stage.

V. Posting Security

When the town board receives a cartway petition, it has thirty days within which to issue an order setting a date for a cartway hearing.[15] Notice that the hearing itself does not have to be within thirty days—the order setting a hearing has to go out within thirty days. We'll get to that shortly, but the "real" next step in a cartway proceeding should be to have the petitioner post security.

I cannot emphasize this step strongly enough. Let me explain the problem first, because I think it highlights why this is so important.

Suppose a cartway petition is submitted to a town. The town gets its attorney involved, the attorney evaluates the petition, finds it proper, and the town board makes an order setting a cartway hearing. The hearing date arrives, but it turns out there are many complicated issues, some legal and some factual. The petitioner gets an attorney, the neighboring landowners get attorneys, there are arguments and discussions back and forth, and soon there have been several hearings to deal with all the problems and uncertainties. The town runs up bills for the supervisors' time, the clerk's time, the town attorney's time, and possibly for a survey. And then the petitioner withdraws the petition. The town has now spent thousands of dollars of taxpayer's money for no particularly useful purpose.

To protect against that, the legislature passed a law allowing towns to get the money from the petitioner "up front," and "cover" itself against this situation. The statute says that the town board may, by resolution, require the petitioner to post a bond or other security acceptable to the town board for the total estimated "damages" *before* the board takes action on the petition.[16] The statute then defines "damages" to mean not only the amount that the petitioner might have to pay to his neighbors as compensation for the cartway crossing their land, but also "the cost of professional and other services, hearing costs, administrative costs, recording costs, and other costs and expenses which the town may incur in connection with the proceedings for the establishment of the cartway."[17] In short, the legislature is giving towns the ability to "cover" themselves for their expected expenses in connection with the cartway proceedings, and allowing towns to require the petitioner to put that money "up front" before the cartway proceeding goes any further.

How best to handle this? There are no appellate court cases interpreting this portion of the statute, so what follows are my ideas, and the procedures that I have been using.

[15] Minn. Stat. § 164.07, subd. 2.
[16] Minn. Stat. § 164.08, subd. 2 (c).
[17] *Id.*

What I have been doing—so far without problems—is that when the town board receives the cartway petition, the first step is to inform the petitioner that the town board wants the petitioner to come to the next town board meeting (or, if needed, a special meeting for the purpose) so that it can discuss the petition and set security for the proceeding. It needs to be emphasized that this is *not* the cartway hearing, just something of an organizational meeting, primarily for the purpose of setting adequate security. It usually makes sense, as well, to get "the word out" about this to the neighbors or others who may be affected by the establishment of the cartway, so they do not feel left out of the process.

At the meeting, it should again be emphasized that this is not the actual cartway hearing, but instead a chance for the board to familiarize itself with the situation and set appropriate security. It needs to be emphasized that the board cannot at this stage accurately predict what the total "damages" (meaning damages to the neighbors, if any, and the town's expenses) will be, but that the town nevertheless needs to make its best estimate. This almost inevitably leads to a discussion about where the cartway is proposed to be located, whose land it is going to cross, the nature of that land, and what issues seem to be lurking. Again, it is important that the town board not decide any of these issues at this point, because it is not the cartway hearing, but the town board needs to inquire to try to estimate what the likely damages may be—without that, it cannot make an intelligent estimate of what an adequate amount of security would be. Put a little differently, the town has to have at least a basic understanding of the total situation in order to set a reasonable amount of security.

After collecting that information, the town board is in a position to make estimates about the amount of security. Usually, the security breaks down into several categories: (1) estimated damages to the neighboring property, (2) estimated costs of the time that the supervisors, clerk, and treasurer will spend at the cartway hearings, as well as their time devoted to the proceedings outside the context of the hearings, (3) the town's attorney fees, (4) surveyor costs (if needed), (5) filing and recording fees, and (6) miscellaneous expenses (such as postage, mileage, etc.). There might be other items, but those are the typical ones. Again, it is not possible at this stage to set these amounts precisely, and a good faith, well-grounded, reasonable estimate is all that can be expected.

The statute says that security "may" be required. That means that a town board does not have to require security, but I would suggest that it would be an unusual situation where a board does not want to "cover" the town for these expenses. Requiring the security also drives home to the petitioner the fact that the proceedings are not a "free ride," and gives the petitioner some idea of what the board thinks the ultimate cost might be. This, in turn, can have the salutary effect of making the petitioner more amenable to try again to work out a private easement agreement if relations with the neighbors have not entirely broken down. The neighbors may now have more reason to agree to a private easement because they may realize that it's likely that a cartway will be established if they do not "cut a deal" with the petitioner.

The statute says that if security is required, it must be by resolution. I strongly encourage that this be a written resolution, and that it break down the categories mentioned above to come to a total estimated amount of damages for purposes of setting security.

The statute says that the petitioner is to "post a bond or other security acceptable to the board." I don't think bonds are very useful in this situation, and question whether the petitioner could find a bonding company to write one. The method I've been advising—again, with no

problems to date—is to have the petitioner deposit (cash or cleared check) the amount of required security into a special fund established by the town treasurer for that purpose. Thereafter, when the supervisors, or town attorney, or surveyor, or anyone else wants to be paid a bill that relates to the cartway proceedings, they must designate that the time was spent on the cartway proceeding, and the treasurer then pays the bill out of that account. The treasurer then keeps a separate record of all money in and out of that account, and all bills paid from that account, which the petitioner can examine at any reasonable time. The resolution setting the security should contain language to that effect, and language saying essentially that if the balance of the account reaches a point where the funds are unlikely to pay for future proceedings, the board can amend the resolution to require additional security. Although the statute does not expressly provide for that, it does not prohibit it either, and such a provision seems entirely consistent with the legislative purpose of protecting against the town getting "stuck" with the cost of a cartway proceeding.

Finally, the statute says that if such a resolution is made, the security must be deposited "before the board takes action on the petition." In other words, after the resolution is made, the cartway proceedings are "stayed" until the petitioner deposits the security.[18]

Again, I'd emphasize that this is a very important part of the proceeding. The last thing you want to find is that the town has spent a lot of time and money on a cartway proceeding and is left "holding the bag."

VI. The Order Setting the Cartway Hearing, and Notice of the Hearing

The cartway petition has been filed with the town clerk, who has "forthwith" forwarded it to the town board. The town board has by resolution required the petitioner to post security (or, in unusual circumstances, decided that security is not required) and security has been posted. The next step is for the town board to issue an order setting a cartway hearing. After that order is made, proper notice of the cartway hearing has to be given. These two things—the order setting the hearing, and notice of the hearing—are intertwined, and it makes sense to discuss them together.

The order setting the cartway hearing is to be made within thirty days after the clerk forwards the petition to the town board (again, subject to the "stay of proceedings" that occurs if the board requires security to be posted).[19] Keep in mind that the requirement is that the *order* setting the hearing must be made within that thirty-day period—the statute does not say that the *hearing* must occur within the thirty-day period. In fact, the statute is completely silent about when the hearing

[18] What about the 60-day rule? Minn. Stat. § 15.99, subd. 2 (a) says that a town "must approve or deny within 60 days a written request relating to zoning, septic systems, or expansion of the metropolitan service area for a permit, license, or other government approval of an action. Failure of [a town] to deny a request within 60 days is approval of the request." A cartway petition does not, in my opinion, fit that bill—it is not a request relating to "zoning, septic systems, or expansion of the metropolitan service area," nor is it a request "for a permit, license, or other government approval of an action." Peter Tiede, who does an excellent job defending many towns against lawsuits, told me that he has at least once received a district court order saying that the 60-day rule does not apply to cartway proceedings.

[19] Section 164.07, subd. 2, requires that the order setting the hearing be made within 30 days after the clerk presents the petition to the town board. Suppose—as I encourage towns to do—the town instead issues a resolution requiring the petitioner to post security before further proceedings occur. The petitioner then deposits the security. At that point, must the order setting the hearing be made (1) within 30 days of the posting of security or (2) within thirty days of the day the clerk submitted the petition to the town board *not counting* the days when the proceedings were stayed? Literally, I suppose, the second option seems more in keeping with the language in the statute. As a practical matter, because most town boards usually meet on a monthly basis, the first option makes more sense.

must occur, and the best one can say is that it should occur within a reasonable time in light of all the circumstances.[20]

What must the order contain? I think it is important here to digress from the order itself to the concept of notice, and then come back to the order. That is because the order, to a great extent, is going to serve as the notice of the cartway hearing. The statute says that the order—together with a copy of the cartway petition—is the item to be served and posted as notice of the hearing. So let's turn to notice, then return to the question of what the order must say.

The petitioner must give notice of the cartway hearing.[21] That's unlike many statutes, where the town must give the notice. The petitioner must attend to two types of notice—personal service, and posted notice.

The petitioner must make "personal service" of both the order and a copy of the petition on each "occupant" of land over which the proposed cartway will go.[22] "Personal service" is a term of art, and books have been written about it—in a nutshell, it means that the order is to be given or handed to that person, or to a person of suitable age and discretion at their house.[23]

We need to make a digression here, and an important one. The statutes seem to use the terms "owner," "occupant," and "owner and occupant" in a haphazard way, at times almost interchangeably, and this creates confusion about who is entitled to notice and who is entitled to damages.[24] Because of this confusion, the safest route would appear to be to give notice to every owner, and to every non-owner occupant (such as an occupying tenant or leaseholder). Whether the non-owner occupant would ultimately be entitled to any damages is full of uncertainty, and probably rests on the facts of any given case.[25] For notice purposes, I'd suggest construing "occupant" to include "owner," and to mean "owners and non-owner tenants or leaseholders."

As noted, the personal service is to be made on each "occupant" of land over which the cartway is proposed to go.[26] That's a troublesome term, as discussed above. There's another troublesome aspect to it. If a large family—say 15 people—live in a single residence on the property, do you have to serve all of them? Presumably, serving one (of appropriate age and

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[20] See footnote 18 above, with regard to the 60-day rule, and why I believe it has no application to cartway proceedings.
[21] Minn. Stat. § 164.07, subd. 2.
[22] Minn. Stat. § 164.07, subd. 2.
[23] *See, generally,* Minn. R. Civ. P. 4.03 (a). The statute says that the petitioner shall "cause" personal service to be made. In other words, the petitioner can hire someone to make the personal service. As long as it is properly done, the petitioner does not have to personally do it.
[24] The Cartway Statute says that the "owner" is entitled to damages. Minn. Stat. § 164.08, subd. 2 (c). The petition for the cartway is to describe the names of the "owners" of the land over which the cartway is proposed. Minn. Stat. § 164.07, subd. 1. The notice of the cartway hearing, though, is to be served upon "each occupant" of that land. *Id.*, subd. 2. The section describing how damages are computed refers to damages incurred by "owners." *Id.*, subd. 5. However, the notification of the award of damages is to be given to each known "owner and occupant." *Id.*, subd. 6. The people who can appeal from the board's decision are "any owner or occupant." *Id.*, subd. 7. As a result, the statute is very unclear about the rights of owners versus the rights of occupants. Owners clearly should receive all pertinent notices and, if the land is devalued, an award of damages. A non-owner occupant's status is less clear. I think, to be safe, non-owner occupants should be given notice of the proceedings and allowed an opportunity to make a claim for damages—whether the non-owner occupant ultimately has any right to damages would have to be carefully considered on a case-by-case basis.
[25] See previous footnote.
[26] Minn. Stat. § 164.07, subd. 2.

discretion) would be enough, with the assumption that the person who was served would notify the others.

The statute says that notice is to be given to each "occupant" of land "through which" the proposed cartway would go. What about "occupants" of land "*adjacent to*" the proposed cartway? The statute does not expressly say that they are entitled to any notice. As a strict legal matter, in most situations, they probably are not entitled to notice.[27] But one can imagine circumstances where they might be affected—perhaps fairly profoundly--by the cartway's establishment. Absent strenuous objection from the petitioner, I think it might be wisest to give notice to "occupants" of land adjacent to the proposed cartway. If there was strenuous objection, then the question of whether adjacent "occupants" are legally entitled to any notice deserves some serious contemplation. More notice is usually better than less notice, and "inviting them to the party" might make good sense. The petitioner should be encouraged to give more notice rather than less notice, perhaps to anyone who might reasonably be expected to be affected by the cartway's establishment.

The statute also says that the petitioner must "cause ten days posted notice to be made."[28] The posting should occur in the town's designated posting places. Because personal service of both the order setting the hearing and the petition is required, presumably both must also be posted at each posting place.

The personal service and the posting must be accomplished at least ten days before the cartway hearing.[29]

If an affected landowner is not given notice of the proceedings, the landowner at least theoretically may be able to set the proceedings aside. Ultimately, this is probably more of a concern for the petitioner than for the town. After all, if a landowner was able to set the proceedings aside, the town probably only has to go back to "step one" and begin the cartway proceedings anew—together with the requirement that the petitioner post new security to cover the town's expected costs and expenses. As between the town and the petitioner, the petitioner is the one who is required to give the notice, and has more to lose if there is a problem with the notice. The

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[27] In the context of town roads, a person who seeks to appeal a town board's decision must be "injuriously affected" in a way not common to other town residents, and this means that (1) if a new road is established, the road goes through the person's property or (2) if an existing road is vacated, the road provided access to the person's property by going through, to, or along it. *Schuster v. Supervisors of Town of Lemond*, 27 Minn. 253, 6 N.W. 802 (1880). The rationale appears to focus on the loss of a cognizable property right—the owner of land through which a new town road is established loses some property, and the person whose land had access that was lost when a road was vacated also loses a property right (access). The road's establishment or vacation would affect that owner in a way not common to town residents in general. See also, *Underwood v. Town Board of Empire*, 217 Minn. 385, 14 N.W.2d 459 (1944); *Wendt v. Board of Supervisors of Town of Minnetrista*, 87 Minn. 403, 92 N.W. 404 (1902); *State ex rel. Williams v. Holman*, 40 Minn. 369, 41 N.W. 1073 (1889); *State ex rel. Board of County Commissioners of Dakota County v. Barton*, 36 Minn. 145, 30 N.W. 454 (1886). It would seem to follow that if a cartway is created alongside but not upon a person's land, that person does not lose any cognizable property right—to the contrary, that person is gaining additional access via the cartway. Thus, it is doubtful that an adjacent property owner has to be notified about the cartway proceedings or has any standing to claim damages or appeal. But, as noted above, it might be wisest to give that person notice anyway, and then deal with the situation as it evolves.

[28] Minn. Stat. § 164.07, subd. 2. Note, again, that the verb "cause" is used, which means that the petitioner can hire or otherwise have someone attend to the posting of the notice, so long as it is properly done. In light of that, I do not believe it would be improper for the town clerk, at the petitioner's request, to do the posting.

[29] Minn. Stat. § 164.07, subd. 2.

petitioner should be careful, then, to make sure that any potentially affected person receives notice and, when in doubt, "too much" notice is better than too little notice.[30]

Finally, as to notice, the petitioner has one more obligation. At (or prior to) the time that the cartway hearing begins, the petitioner needs to give the town an affidavit in which the petitioner swears that the required notices have been given.[31]

With that summary of notice, let's return to what the order—which really forms the notice—should say. I'd suggest that the order include the following, some of which are required, and some of which simply make good sense:

1. A preamble that summarizes the cartway proceedings to date, written with a minimum of legalese, in the hope of giving the people who receive the notice a brief but fair understanding of what has happened and what might be at stake for them during the cartway proceedings;
2. A description, as near as practicable, of (A) the cartway proposed to be established, and (B) each tract of land through which it is proposed to pass—this is a required provision;[32]
3. A time, date, and place for the cartway hearing, indicating that the town board will meet and act upon the petition—this is a required provision;[33]
4. A description, in simple language, of the petitioner's obligations to serve copies of the order and the petition, and to post it, ten days or more before the hearing, and to provide an affidavit showing that this has been done; and;
5. A notice, pursuant to Minn. Stat. § 164.07, subd. 7, that judicial review of the town board's decision can be sought, at least if a cartway is established—this is a required provision.[34]

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[30] When a statute requires notice and notice is not given, jurisdiction may be lost and the proceedings may be void. *E.g, Bruns v. Town of Nicollet*, 181 Minn. 192, 231 N.W. 924, 925 (1930). Keep in mind, though, that if someone receives improper notice—or no notice--but still appears at the hearing and does not object that he or she has been harmed by the lack of notice or participates in the hearing, the court will usually find that defects in notice were waived. *Id.* at 926-26.

[31] Minn. Stat. § 164.07, subd. 3. This, too, would appear to be jurisdictional. My view would be that the cartway hearing cannot go forward without that affidavit. For that reason, it is a good idea to have the petitioner submit the affidavit for review by the town attorney in advance of the hearing to allow an opportunity to correct any mistakes in it.

[32] Minn. Stat. § 164.07, subd. 2.

[33] *Id.*

[34] *Id.* It is also a frustrating provision. Minn. Stat. § 164.07, subd. 7, is a long and fairly confusing rule about how judicial review can be sought. There are various time limits in it, provisions about how bonds must be filed, provisions about who receives notice of the appeal, two different time "deadlines" for appeal, and so forth. Some of those provisions have never been addressed by our appellate courts and are open to interpretation. It is also written expressly in terms of roads, not cartways, and some of its language is inapplicable in the cartway setting. The kicker is that Section 164.07, subd. 6, says that notices are to "include a clear and coherent explanation, written in language using words with common and everyday meanings, of the requirements" for the subdivision 7 appeal. It can be argued, with considerable fairness, that the legislature is basically saying, "We wrote this confusing language in subdivision 7 and now we want you to figure out how to explain it to people in a clear and coherent manner—good luck." This puts a town in a dilemma—(1) if it simply sets out the statute's language, someone might argue that the town did not "include a clear and coherent explanation, written in language using words with common and everyday meanings" of the appeal requirements; but (2) if, instead, it tries to paraphrase or explain the statute, it runs a very real risk of misinterpreting or misstating what the statute requires for an appeal (either literally or as interpreted after the fact by a court). I confess that I don't have any "easy" answer about how a town gets around that one. As the lesser of two evils, I'd lean toward the first option. I don't like either option, but the first strikes me as the less dangerous of the two.

I've attached a sample order that I've used in a number of cartway proceedings.

VII. The Hearing, and Common Issues at the Hearing

We now get to the real "guts" of the thing—the petition has been filed, the security has been deposited, the order setting the hearing has been issued, served, and posted. The time for the cartway hearing has arrived.

There are a number of fairly common issues that arise at most hearings. Basically, what the town board is going to try to do is to determine four primary questions: (1) is the petitioner entitled to a cartway and, if so, (2) where will that cartway be located (and how wide will it be), (3) what damages do the petitioner's neighbors receive (if any) for the cartway's establishment, and (4) what "damages" does the town receive for its costs and expenses in connection with the cartway proceeding? There may be a number of other sub-issues, but those are the four principal ones that arise at most cartway hearings.

Let's discuss those one at a time in this Section.

Is the Petitioner Entitled to a Cartway?

While this issue can be very simple, it at times becomes quite uncertain.

The statute itself is relatively straightforward.[35] The petitioner is entitled to a cartway if:

1. The petitioner owns at least five acres of land and has no access from it to a public road except over the lands of others; or

2. The petitioner owns a tract of land that, as of January 1, 1998, was on record as a separate parcel and contained at least two but less than five acres of land, and has no access from it to a public road except over the lands of others; or

3. The petitioner's access to a public road is less than two rods (33') wide.[36] It is not clear if the "acreage" requirements in 1 and 2 apply in this situation.[37]

Note that if the petitioner meets any one of those three requirements, the petitioner is *entitled* to a cartway. The statute says that the town board "shall" establish a cartway in those situations.[38] If the petitioner can show that one of those three situations exist, it is not a question of whether the

[35] As noted earlier, there are "agricultural cartways" and cartways for landlocked owners. See footnote 9 above. This paper focuses on cartways for landlocked owners, not agricultural cartways.
[36] Minn. Stat. § 164.08, subd. 2.
[37] Literally, the statute says that a cartway is to be established if the petitioner (1) has no access to a parcel of at least five acres, or (2) has access "thereto" (meaning to that five or more acre parcel) but the access is less than two rods wide, or (3) has no access to the 2-5 acre recorded parcel. You could argue, using a literal interpretation, that a petitioner whose existing access is less than two rods wide is entitled to a cartway only if he also owns five or more acres of land. The "less than two rods in width" language appears to only modify the "at least five acres" portion of the statute. *Horton v. Township of Helen*, 624 N.W.2d 591, 594 (Minn. App. 2001) (rev. den. 6/19/01), arguably contains some dictum to the contrary.
[38] *Id.* "Where a petitioner satisfied all the criteria under the cartway statute, a town board must establish a cartway." *Horton v. Township of Helen*, 624 N.W.2d 591, 594 (Minn. App. 2001) (rev. den. 6/19/01).

town board wants to establish a cartway or not—the town board *must* establish a cartway. The opposite is also true—if the petitioner is not in one of those three situations, the town board simply lacks the power to establish a cartway.[39]

These three situations are, at first blush, deceptively simple. In fact, the terms the Cartway Statute uses have spawned a considerable amount of litigation, and will doubtlessly create more as years go by. Who is an "owner?" What does "land" mean? When we say "access to a public road," what is a "public road?" Most important—and most difficult—what does "access" mean?

Let's tackle the first three questions, and then turn to the question of what "access" means.

The Cartway Statute does not define "owner." But "owner" means "owners." Our appellate court has held that owners of tracts of land "which aggregate five acres may join in a petition."[40] An unanswered question is what type of ownership interest is required. There are many types of ownership interests in land—fee interests, life estates, contingent interests. We do not have any appellate court decisions that tell us what to do if petitioner has an ownership interest in the land, but does not have a complete (fee) interest. For the time being, those situations will have to be addressed on a case-by-case basis.[41]

The Cartway Statute does not define "land," and you may be interested to know that "land" can mean "water." In computing the required land acreage, you can include "submerged land," or land that the petitioner owns which is covered by water.[42]

The petitioner must lack access from her land to a "public road." At times, a petition asks that a cartway be established from the petitioner's land to something that may or may not be a "public road." For example, I have handled several cartway petitions where the petitioner asks that a cartway be established from the petitioner's property to a DNR road. It begs the question of whether the DNR road is a public road. The DNR takes the position that it is not a road authority, and that its roads are not "public roads" under the Cartway Statute.

Although statutes define various types of public roads, our appellate courts have not expressly addressed the question of what constitutes a "public road" for purposes of the Cartway Statute. I believe that the term "public road," for purposes of the Cartway Statute, probably means a road (1) upon which the public has a legally-enforceable right of passage, and (2) which is controlled by some public road authority. Our court of appeals has held that even though the DNR was willing to allow a landlocked owner to use its timber management road, the landowner would have no

[39] At least under subdivision two (landlocked owners) of the Cartway Statute. There are some other statutes that empower towns to create cartways. As noted previously, subdivision one of the Cartway statute allows a town, in its discretion, to create an "agricultural cartway" if there is a proper petition involving land that is at least 150 acres, at least 100 of which are tillable. Minn. Stat. § 164.08, subd. 1. If the landowners over which a proposed cartway would pass all agree, they can offer (dedicate) the land to the town as a cartway, and the town board, following certain procedures, has the discretion to accept the "gift." Minn. Stat. § 164.15, subd. 1. There may be other ways to create a cartway. *See, e.g.*, Minn. Stat. § 164.11.

[40] *Watson v. Board of Supervisors of Town of South Side*, 185 Minn. 111, 239 N.W. 913 (1931).

[41] For example, suppose A enters into an agreement with B, in which A agrees to sell her landlocked land to B, contingent on B establishing access to the land. The deed and the purchase price are put in escrow. The escrow will be "triggered" if B obtains access. B then brings a cartway petition. In my opinion, B is probably an "owner" for purposes of the Cartway Statute, as long as A is aware of and does not oppose the cartway petition. I believe B probably has a sufficient ownership interest. But it is not a clear-cut situation.

[42] *Slayton Gun Club v. Town of Shetek*, 286 Minn. 461, 176 N.W.2d 544, 547 (1970).

legally enforceable right to use that road, and therefore it did not constitute access under the Cartway Statute.[43] But the rationale appears to be that there was no legally-enforceable right to pass over the timber management road, and the court seemed to assume that it was not a "public road" under the statute. What is or is not a "public road" under the statute has not been definitively determined. At any rate, the petition must seek a cartway from the petitioner's land to a "public road," and a petition that seeks access to something that is not a "public road" is probably fatally defective.

The fourth term that causes trouble, in terms of entitlement to a cartway, is "access." In order to be entitled to a cartway, the petitioner must lack "access" to a public road except across the lands of others. The meaning of "access" has been extensively litigated but, in light of all the innumerable situations that can arise, can still be somewhat elusive.

I believe that the reported cases can be broken down into several categories.

"Access" means a legally enforceable right to pass. A town cannot grant a cartway petition if the petitioner already has a legally enforceable easement or right of passage to a public road (unless the easement or right of passage is deemed "impracticable," as we will discuss below).[44] Put a bit more simply—if you are not landlocked, you do not get a cartway.

Is permission, as opposed to an enforceable legal right, to cross another's property to reach a public road "access?" I think the answer is "no." The rule appears to be that permissive use is not access under the Cartway Statute and that, instead, access means a legally-enforceable right to cross another's property to a public road.[45] For example, if neighbors said that they would allow the

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[43] *In the Matter of Thomas Daniel for the Establishment of a Cartway*, 644 N.W.2d 495 (Minn. App. 2002) *reversed on other grounds* 656 N.W.2d 543 (Minn. 2003).

[44] *Roemer v. Board of Supervisors of Elysian Township*, 283 Minn. 288, 167 N.W.2d 497 (1969). When the petitioner purchased his property, the seller granted him an easement across the seller's land to a public road, but the easement passed through a swampy area. The cartway petition was rejected because "the statute does not contemplate establishing an alternative right of way where the owner already has means of ingress and egress." 167 N.W.2d at 499. There are two fairly ancient cases that at first glance appear to be contrary to this. In *Mueller v. Supervisors of Town of Courtland*, 117 Minn. 290, 135 N.W. 996 (1912), a landowner asked for a cartway that would traverse 1900 feet of his neighbor's property to reach a public road. The landowner's property was on a different public road, but he would have to construct a ¾ mile driveway to get there, and it would require him to travel an extra 1½ miles to town. The town denied the cartway, an appeal was taken to the district court, and the judge submitted the question of entitlement to the jury. The jury granted the cartway. The Minnesota Supreme Court affirmed on the ground that there was evidence to support the jury's verdict. But it is important to note that, at the time of this decision, the statute did not require a lack of access for a cartway—that requirement was added in 1913. In *Powell v. Town Board of Sinnott*, 175 Minn. 395, 221 N.W. 527 (1928) a town board granted a cartway to a landowner who "already has access to a public highway, though doubtless less convenient than the proposed cartway will be." But this case dealt with an "agricultural" cartway, where no showing of a lack of access is necessary.

[45] *Kroyer v. Board of Supervisors of Spring Lake*, 202 Minn. 41, 277 N.W. 234 (1938) held that a town board must grant a cartway if the petitioner's only access is a right of way that could only be used with the neighbor's consent, and if the neighbor did not consent. The petitioner there reached his property across his neighbor's private road, but used it only with the neighbor's permission, not as a legal right. In *State ex rel. Rose v. Town of Greenwood*, 220 Minn. 508, 20 N.W. 2d 345, 348 (1945), the petitioner used a private road to reach his property, but "such travel was under license or permission revocable at will and . . . the license or permission had been revoked." In *Matter of Thomas Daniel for the Establishment of a Cartway*, 644 N.W.2d 495, 498 (Minn. App. 2002) *reversed on other grounds* 656 N.W.2d 543 (Minn. 2003), the court noted that the DNR's offer to allow the petitioner to use its timber roads was only a "permissive use," rather than something that would be "certain or permanent." It said that this would not constitute access under *Kroyer*. Taken together, these cases lead me to the view that permissive use—even if the permission has not been revoked—is not "certain" and "permanent" and does not constitute access for purposes of the Cartway Statute.

landowner permission to cross their land, but there was no legally-enforceable right to do so, there apparently would be no access.[46]

At times, questions arise about whether a petitioner does or doesn't have a legally enforceable right to pass over an easement to a public road. If a petitioner has no legally established right to pass, but likely could establish that right through a lawsuit against his neighbor, can the town board find that he has access (via the right to claim and try to judicially establish an easement) and deny the petition? Or would uncertainty about whether the lawsuit would succeed justify the town board in finding that there was no access? At least one Minnesota case suggests (but did not hold) that if a petitioner has a right to claim an easement of necessity, he might be precluded from receiving a cartway.[47] That case could be used to support the idea that a petitioner's right to claim an easement (and to try to establish it in court) precludes establishing a cartway. On the other hand, the cases equating "access" with a legally enforceable right to pass cut against that argument—after all, if someone has to bring a lawsuit to establish the right to pass, it is by definition not currently legally enforceable. In my opinion, a town usually should not reject a cartway petition on the ground that if the petitioner sued his neighbor he just might be able to "prove up" a right of legal access in court. But it probably is a question of degree. If it is certain—or very nearly so--that the petitioner, if he brought a lawsuit, would have an easement recognized by a court, a town board might be justified in denying the cartway petition. If, on the other hand, there is uncertainty about whether the petitioner would succeed in court, a town board is probably justified in finding a lack of legally enforceable access. The degree of the "certainty" versus "uncertainty" probably drives the decision, and that would be a case-by-case determination.

An unpublished court of appeals case suggests that a petitioner may be entitled to a cartway even if the petitioner, by selling off his property, landlocked himself.[48] That's questionable social policy because, if so, an unscrupulous person might cunningly divide up his land in such a way that he could essentially force a town board to impose a cartway across his neighbor's land. Nonetheless, there is nothing in the Cartway Statute that expressly says that the means by which someone became landlocked should influence whether they are or are not entitled to a cartway.

It is not uncommon for cartway petitioners to have to cross state or county land. The state and county, in my experience, invariably take the position that towns, as subordinate units of government, cannot establish cartways across state or county land without their consent. The solution to that problem, at least when it has reared its ugly head in the cartway proceedings I have

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[46] *Matter of Thomas Daniel for the Establishment of a Cartway*, 644 N.W.2d 495, 498 (Minn. App. 2002) *reversed on other grounds* 656 N.W.2d 543 (Minn. 2003). As discussed in the previous footnote, the DNR's willingness to allow the petitioner to use its timber road was only "permissive," not "certain or permanent," and the court did not believe it constituted access under the Cartway Statute.

[47] *Roemer v. Board of Supervisors of Elysian Township*, 283 Minn. 288, 167 N.W.2d 497, 499 (1969). An easement of necessity may arise when A sells B land, but B's land does not connect to a public road. Under certain circumstances, B may have the right to an easement across A's land to the public road. In *Kroyer v. Board of Supervisors of Spring Lake*, 202 Minn. 41, 277 N.W. 234 (1938), the court noted that a cartway petitioner did not have an easement of necessity. In *Roemer*, the court took this a bit further, noting that *Kroyer* suggested that if a petitioner has an easement of necessity, "the petition would properly have been denied." 167 N.W.2d at 500. The *Roemer* court did not hold that the right to claim an easement of necessity prohibits a town board from granting a cartway petition, but the suggestion that it might is there.

[48] *Ullrich v. Newberg Township Board*, 2002 WL 31553853 (Minn. App. 2002). The court said that the Cartway Statute "does not condition the right of a cartway on whether the party seeking it created the need."

handled, is that the state or county work with the cartway petitioner to create a leased easement across the state or county land.

A legally enforceable right to pass across land might not be "access" if it would be "impracticable" to attempt to cross there. A number of cases stand for the proposition that purported access to a public road is, under the circumstances, so "impracticable" that it does not constitute "access" for purposes of the Cartway Statute. But the circumstances from case to case are so different that it is hard to draw any "bright line" between what is or isn't sufficiently "impracticable" access. About the best one can say is that potential or theoretical access might, under the circumstances, be so impracticable that the town board might be justified in saying that there is no access under the Cartway Statute.

I'll summarize those cases here, but only after cautioning you that these seem to be case-by-case determinations, and do not necessarily lend themselves to any hard and fast rules:

--The petitioner was a farmer who could (1) build a ¾ mile road on his own property to connect to a public road, which would then result in a 1½ mile detour every time he went to town or (2) establish a 1900' cartway across his neighbor's property. The town board refused the petition, the district court submitted it to a jury, the jury allowed the petition, and the Minnesota Supreme Court concluded that there was enough evidence to support the jurors' decision. This case[49] is interesting from a historical perspective, but should be of no validity today. First, it was decided in 1912, before the widespread use of automobiles, when a 1½ mile detour for a farmer was a more substantial impediment than it would be today. Second, more to the point, it was not until 1913 that the cartway statute was amended to require that owners have "no access" to their properties as a condition for obtaining a cartway.[50]

--The petitioners lived on a peninsula, and could build a 300-foot bridge over a channel to a public road on the northern shore or cross their neighbors' land to the south to a public road. The court held that building the bridge would be impracticable, and that the option did not constitute "access" for purposes of the Cartway Statute.[51]

--The petitioner's farmland had one-half acre on a public road, and a lake separated that from the remaining 92 acres. There was some evidence that during low water it might be possible to cross the lakebed but, even then, the lake bottom was muddy. The court believed that it would have been impracticable to build a road across it and held that it was not "access" under the Cartway Statute.[52]

--The petitioner had an easement to a public road, although it was noted that the easement passed through a swampy area and could only be built "at great expense." The court considered this to constitute access under the Cartway Statute, but the case is of limited value because the court did not discuss why it was or was not a practicable route.[53]

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[49] *Meuller v. Supervisors of Town of Courtland*, 117 Minn. 290, 135 N.W. 996 (1912).
[50] Act of April 15, 1913, Ch. 235, § 55, 1913 Minn. Laws. 314, 314-15; *see, In the Matter of Daniel*, 656 N.W.2d 543, 545 (Minn. 2003).
[51] *Watson v. Board of Supervisors of Town of South Side*, 185 Minn. 111, 239 N.W. 913 (1931).
[52] *State ex rel. Rose v. Town of Greenwood*, 220 Minn. 508, 20 N.W.2d 345 (1945).
[53] *Roemer v. Board of Supervisors of Elysian Township*, 283 Minn. 288, 167 N.W.2d 497 (1969).

--The petitioner owned land bordered by a public road but, in order to reach her back forty, she had to cross a stream. Her neighbors argued that she had access across her own land to the back forty because (1) the former owner of her land had crossed the stream to get to the back forty, (2) a previous crossing could be re-established without much effort, (3) they were able to cross the same stream on their properties, (4) the petitioner had never really tried to ford the stream with her vehicles, and (5) she had never asked the DNR or Corps of Engineers for a permit to build a bridge. The petitioner argued that she did not have access because (1) she could not get her farm machinery across, (2) she could only get her pick up across the stream with great difficulty, (3) the DNR and Corps of Engineers had advised her against trying to bridge it. The town board found that she had sufficient "access" to the back forty, and the court of appeals eventually affirmed, concluding that the evidence supported the town board's decision.[54]

--The petitioner's land bordered a public road, but the only way to reach it from their house was to traverse steep bluffs. They offered uncontradicted testimony that it would cost some $75,000-100,000 to connect to the public road. The town board denied the cartway petition, believing that this constituted "access." The court of appeals reversed the board's decision, noting that a "reasonable analysis regarding the existence of access is essential" and finding that it would be impracticable to try to connect to the road through the bluffs.[55]

--The petitioner argued that he could only access his property by means of a horse, snowmobile, or all-terrain vehicle. The court upheld the town board's denial of a cartway, noting that the evidence supported the town's decision. The case is of limited value, though, because the court did not describe what type of evidence supported the town's decision.[56] It should not be taken for the general proposition that access by means of, say, horseback is sufficient "access."

--The petitioner could theoretically bridge a creek on his own land to access a public road. He argued that the creek was a fast flowing stream with a muddy bottom and steep banks, subject to flooding, and four feet deep in places. The town board felt that the creek was passable and, even if it was not, that a cement swale to provide a crossing could be installed for $7,000-8,000. The trial court and, later, the court of appeals disagreed, finding that crossing the creek would be impracticable. The court of appeals seemed influenced by the idea that "proposed access that is only intermittently passable is not sufficient to avoid creation of a cartway." In light of the Minnesota Supreme Court's decision in the *Daniel* case (discussed below), that proposition may be questionable.[57]

These cases obviously stand for the proposition that a town board may, in proper circumstances, conclude that purported or theoretical access to a public road can be so impracticable that it does not qualify as "access" under the Cartway Statute. It is much more difficult to come up with hard and fast rules about when those circumstances might exist. For example, there are two court of appeals decisions that deal with petitioners trying to cross creeks or streams—the cases appear to have roughly comparable facts, but they reach diametrically opposite conclusions. The

[54] *In the Matter of Wood*, 1996 WL 70101 (Minn. App. 1996).
[55] *Schacht v. Town of Hyde Park*, 1998 WL 202655 (Minn. App. 1998).
[56] *Horton v. Township of Helen*, 624 N.W.2d 591 (Minn. App. 2001) (rev. den. 6/19/01).
[57] *Ullrich v. Newburg Township*, 2002 WL 31553853 (Minn. App. 2002).

best that I can recommend is that town boards keep in mind that purported access might be impracticable, keep in mind the cases summarized above, and ultimately make their best judgment about whether, under all the facts and circumstances presented, they believe that a purported access is or isn't practicable.

The other aspect is to keep in mind is that when town boards act on cartway petitions, they are acting in a legislative capacity.[58] When a court reviews a town board's legislative decision, the judge is not supposed to attempt to substitute his or her judgment for the town board's judgment; instead, the judge is supposed to uphold the board's decision unless (1) the evidence is practically conclusive against it, (2) the board applied an erroneous legal theory, or (3) the board acted arbitrarily, capriciously, or contrary to the public's best interest.[59] Whether access is or isn't impracticable is usually a fact question, and town boards will usually have to sift through the evidence and weigh the arguments on both sides of the question The individual supervisors might reasonably disagree about what the "right" answer is but, if there are reasonable arguments (supported by the evidence) on both sides, it is ultimately up to the board as a whole to make its best decision. A district court, as a general proposition, is supposed to defer to that decision if the record of the town board proceedings (1) contains evidence reasonably supporting it and (2) the board applied the appropriate legal rules or considerations. This may explain why some of the cases abstracted above seem to come to arguably contrary conclusions—the court was deferring to the town board's decision. It also emphasizes the importance of documenting what evidence was presented to the board at the hearing, what arguments were raised and considered, and the board's reasons for its decision.

Access via navigable water—The Daniel Debacle. The Minnesota Supreme Court shocked most town attorneys with a 2003 decision called *Daniel*.[60] The decision said, basically, that access via "navigable water" could constitute "access" for purposes of the Cartway Statute. The legislature responded in 2004 with an amendment[61] to the Cartway Statute that "overruled" *Daniel* and returned us to the proposition that water access is not "access" for purposes of the Cartway Statute.

The petitioner in *Daniel* owned land on Lake Vermillion, and had accessed, used, and enjoyed his property via lake access from 1995-99. He sought a cartway across his neighbor's land to a public road. His neighbor argued that there was no entitlement to a cartway because there was "access" via Lake Vermillion. The county board[62] rejected that argument, and granted a cartway. The district court judge affirmed.

The case went to the Minnesota Court of Appeals.[63] It agreed that access via navigable water was not "access" under the Cartway Statute. It felt that "access" should mean year-round access, not occasional access, and that lake access necessarily would be intermittent. It also noted that, in the *Rose* case, trying to build a road across a muddy lake bottom was found to be impracticable—how much more impracticable would it be to try to reach property across a large lake in bad weather?

[58] E.g., *Lieser v. Town of St. Martin*, 255 Minn. 153, 96 N.W.2d 1 (1959); *Rask v. Town Board of Hendrum*, 173 Minn. 572, 218 N.W. 115 (1928).
[59] *Id.*
[60] *In the Matter of Daniel*, 656 N.W.2d 543 (Minn. 2003).
[61] Minn. Laws 2004, Ch. 262, Art. 2, Section 7 (effective 7/1/04); codified at Minn. Stat. 164.08, subd. 2 (a) (2005).
[62] When a petition for a cartway is brought in unorganized territory (land not within a city or town), the county board applies the Cartway Statute just as a town board would. Minn. Stat. § 164.08, subd. 2 (b).
[63] *Matter of Thomas Daniel for the Establishment of a Cartway*, 644 N.W.2d 495 (Minn. App. 2002) *reversed* 656 N.W.2d 543 (Minn. 2003).

The case went to the Minnesota Supreme Court.[64] It reversed. The court seemed to be heavily influenced by the fact that the petitioner had accessed his land for years via the lake, and that it was undisputed that the petitioner did have access via the lake. Its analysis was basically historical. It observed that for many years numerous properties on Lake Vermillion had been accessed only by the lake, and that "Minnesota has a long-established tradition of accessing lake properties via navigable waterways."[65] The "no access" requirement was added to the Cartway Statute in 1913, a time when "travel over navigable waterways was more commonplace than it is today and was often the best mode of transportation."[66] The county argued that "access" referred only to land access because the Cartway Statute (1) was in a portion of the statute books dealing with roads, and (2) required establishing a cartway when access was less than two rods wide. If a cartway must be established when access is less than two rods wide, the county argued, how can "access" mean anything but land access? The court believed that did not prevent lake access from being an alternate type of access. As to the *Rose* case, the court said that *Rose's* analysis was limited to determining if the lake prevented land-based access—*Rose* did not consider whether there was access over the lake itself. As a result, the court held that the petitioner had access via the navigable waterway, and that a cartway could not be established.

In *Daniel's* wake, cartway petitioners usually argued that they were situated differently than the petitioner in *Daniel*—that although there were no fact questions in *Daniel* about whether the lake constituted access to the property, there were fact questions in their circumstances.[67]

Effective July 1, 2004, the legislature "overruled" the *Daniel* case by amending the Cartway Statute to provide that access over a navigable waterway is not access for purposes of the statute.[68] In effect, the legislature sided with the court of appeals' decision—that "access" for Cartway Statute purposes means land access to a public road, not access across navigable waters.

Is there anything left of *Daniel* in light of the legislative change?

Not much. One lingering remnant might be *Daniel's* suggestion that "part-time" or "seasonal" access might be sufficient access for the Cartway Statute. That was out of keeping with at least two previous court of appeals' cases.[69] One of those cases stated that "proposed access that is only intermittently passable" was not access for purposes of the Cartway Statute.[70] The other—*Daniel* when it was before the court of appeals—said that "the lake-access interpretation is problematic because inevitably the vicissitudes of the Minnesota climate can produce conditions that will prevent even lake access. Seasonal transformations might create ice on the lake that is too thin to traverse by foot or vehicle and yet is too thick to navigate by watercraft. Thus, the consequence of [adopting] the lake-access interpretation is that the legislature intended that access less than 100% of the time would nevertheless be sufficient to disqualify a landowner from eligibility for a cartway.

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[64] *In the Matter of Daniel*, 656 N.W.2d 543 (Minn. 2003).
[65] *Id.*, 656 N.W.2d at 545.
[66] *Id.*
[67] *Kranz v. Township of Mantrap*, 2005 WL 2130269 (Minn. App. 9/6/05); *In re Harris*, 2004 WL 2590636 (Minn. App. 11/16/04).
[68] Minn. Laws 2004, Ch. 262, Art. 2, Section 7 (effective 7/1/04); codified at Minn. Stat. 164.08, subd. 2 (a) (2005).
[69] The court of appeals' decision in *Daniel* relied heavily on the idea that there would be times in late fall and early winter when the property owner could neither boat safely across the water nor traverse the ice. In *Ullrich v. Newburg Township*, 2002 WL 31553853 (Minn. App. 2002), the court also seemed to rely on the idea that seasonal or occasional access across a river would not be sufficient access.
[70] *Ullrich v. Newburg Township*, 2002 WL 3155853 (Minn. App. 2002).

This would not be a reasonable interpretation of the cartway statute . . ."[71] Both of those cases indicated that access needs to be year-round, reasonably permanent and dependable. The Minnesota Supreme Court's decision in *Daniel* at least gives rise to the argument that "part-time" or "seasonal" access might be enough. The 2004 legislative change did not address that, so we will have to see what the courts do with this issue in the future.

We've been discussing access in the context of issues that may arise at the cartway hearing, and specifically the issue of whether the petitioner is entitled to a cartway. One last note about entitlement—what does the board do if it decides the petitioner is not entitled to a cartway? The Cartway Statute says that if, following a hearing, the petition is refused, that fact shall be noted on the back of the petition.[72] If refused, the petitioner cannot bring the same petition again until one year after the town board's refusal of the petition.[73]

If the Petitioner is Entitled to A Cartway, Where Will it Be Located, and How Wide Will it Be?

The previous sub-section dealt with issues that may arise at a cartway hearing about whether the petitioner is entitled to a cartway. If the petitioner is entitled to a cartway, another question that usually arises during the cartway hearing is where should the cartway be located, and how wide should it be?

The Cartway Statute says that the town board may select an alternate route other than that petitioned for if the board deems the alternate route to be "less disruptive and damaging" and "in the public's best interest."[74] Our courts have written that the cartway's location does not depend "on the petitioner's arbitrary choice. The propriety of the location of the [cartway] is a matter for the determination of the town board," and the board may "exercise a reasonable discretion in varying the route proposed as public interests may require . . . ."[75]

Although there's no doubt that a town board may establish a route other than that petitioned for, I encourage town boards to tread carefully if they are going to depart from the route petitioned for. There are several reasons for this.

First, the Cartway Statute appears to require the board to find three things before varying the route: That the alternate route is (1) less disruptive, (2) less damaging, *and* (3) in the public's best interest. Because the determination could later be challenged, it is probably best, if a town board is going to select an alternate route, to make express written findings about why each of these three requirements are satisfied. The first two are often easy enough to articulate—varying the route here or there would be less disruptive to the neighbors and result in less damages to their land. It is often

[71] *Matter of Thomas Daniel for the Establishment of a Cartway*, 644 N.W.2d 495, 497 (Minn. App. 2002) *reversed* 656 N.W.2d 543 (Minn. 2003).
[72] Minn. Stat. § 164.07, subd. 3.
[73] *Id.*, subd. 12.
[74] Minn. Stat. § 164.08, subd. 2 (a).
[75] *Johnson v. Town of Chisago Lake*, 122 Minn. 134, 141 N.W. 115, 116 (1913).

harder to articulate why the public's best interest would be served by varying the route because, typically, there is no particularly strong public interest in a cartway's location.[76]

Second, there might be some uncertainty about the breadth of a town's power to select an alternate route. At least two cases, while acknowledging that a town board may vary the route petitioned for, immediately qualified that by saying that the board should adhere to the point of beginning, terminus, and general course.[77] If a town board must adhere to the point of beginning, terminus, and general course, it becomes difficult to explain what is left for the board's discretion, or how far it can safely depart from the route petitioned for. The answer to that, I think, is that these two cases pre-date the 1993 legislative change[78] specifying that town boards may select an alternative route. My view is that this probably legislatively overruled the language in the earlier cases. Still, that language is out there, and might cause concerns.

Third, varying the route might create significant notice problems. If a town board varies the route so that the cartway will be located on the land of someone who was never given notice of (and never participated in) the cartway proceedings, that person has an obvious argument that the cartway's establishment is invalid due to their lack of notice. If the town board varies the route, but the cartway remains on the lands of persons who were given notice, it still may be that those people have a notice argument—they may have decided not to oppose the cartway as petitioned for, and not to appear at the hearing, but they might have an argument that, had they known that the cartway would be in a different location, they would have appeared and opposed it. That may be a valid argument.[79]

As a result, a town board has the power to vary the cartway's location, but how far that power may be safely exercised is a more sensitive question. If a town board is going to vary the location in any significant way, it should probably (1) make written findings explaining why it believes an alternate route was (A) less disruptive, (B) less damaging, and (C) in the public interest, and (2) be very cognizant and careful about notice problems. The flip side is that if a petitioner is uncertain about what the best route is, it may be best to petition for defined alternative routes. Notice can then be given that alternative routes are being requested, the one that is the best "fit" can be established, and the others can be denied.

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[76] Although a cartway is a public way, the reality is that it often only serves as a means of ingress and egress for the petitioner, and the citizens of the town at large frequently have little or no interest in it. That said, two old cases can give a board some support for finding that there is a public interest in selecting an alternate location. *Rask v. Town of Hendrum*, 173 Minn. 572, 218 N.W. 115 (1928), recognized that the person principally benefited by a cartway is the petitioner, but added that "the public, without a doubt, has an interest in having access to the" petitioner's land. In *Mueller v. Supervisors of Town of Courtland*, 117 Minn. 290, 135 N.W. 996, 997 (1912) the court wrote that "the public undoubtedly has an interest, in too many ways to recite, in having access to each and every one of the members thereof."

[77] *Johnson v. Town of Chisago Lake*, 122 Minn. 134, 141 N.W. 115, 116 (1913) says that the board "may exercise a reasonable discretion in varying the route proposed as public interests may require, provided they adhere to the point of beginning, the general course, and the termination." *State ex rel. Rose v. Town of Greenwood*, 220 Minn. 508, 20 N.W. 345, 348 (1945) says that the "town board may exercise a reasonable discretion in varying the route proposed as the public interest may require, provided it adheres to the termini and general course stated in the petition."

[78] Minn. Laws 1993, ch. 275 § 1.

[79] In the Notice of Cartway Hearing form that I use (a copy of which is appended), I enclose language pointing out that one of the issues that may be discussed at the hearing is whether the cartway should be established in the location petitioned for, or in an alternate location. This might help fend off this argument, because it provides notice that the route may be varied.

How wide can a cartway be? For many years, the Cartway Statute said that a cartway could not be more than two rods (33') wide.[80] The current statute says that a cartway must be "at least two rods wide."[81] So, while a cartway cannot be narrower than two rods, there is currently no express limit on how wide it can be. The "upper limit" would seem to be whatever is reasonable under all the circumstances. Typically, petitioners ask for a cartway two or four rods wide (33-66').

Ascertaining Damages for the Lands Subject to the Cartway

We are still dealing with issues that frequently arise at the cartway hearing. We've discussed whether the petitioner is entitled to a cartway, and the town board's powers in deciding where the cartway will be located. The next issue, typically, is the amount of damages that will be awarded to the persons across whose land the cartway is established.

There are constitutional dimensions to this. When a cartway is established, the government (the town) is establishing a special type of easement (the cartway) across a private citizen's land. That private citizen no longer has full ownership of that land, in the sense that it is subject to the easement. That is a taking. The government may take private property for a public purpose[82] but, if it does, it must pay just compensation.

As a result, the person across whose land the cartway is established is entitled to an award of damages if and to the extent that the value of their land is diminished.

The statute says that the town board is to determine damages using this formula: (1) ascertain the money value (if any) of the damages that the establishment of the cartway will cause to the owner in question, (2) ascertain the money value of the benefits (if any) that the establishment of the cartway will confer on the owner in question, (3) deduct the benefits from the damages, and (4) award the "net" damages, if any.[83]

How does a town board—other than trying to apply this formula—go about trying to determine the appropriate amount of damages? It basically calls for a judgment call by the board,

[80] *See, State ex rel. Rose v. Town of Greenwood*, 220 Minn. 508, 20 N.W.2d 345, 346 (1945). Note also that "agricultural cartways" must be two rods wide, apparently no wider or narrower. Minn. Stat. § 168.04, subd. 1.

[81] Minn. Stat. § 164.08, subd. 2.

[82] The reality is that in many cartway proceedings the town has little or no need for the cartway. The usual scenario is that the petitioner needs a cartway, the neighbors don't want it across their land, and whether it is established or not is not a significant issue to the town as a whole. So what's the public purpose? Our court has said that the public purpose lies in the public's interest "in having access to each and every one of the members thereof," and that the public "has an interest in having access to" the petitioner's land. *Mueller v. Supervisors of Town of Courtland*, 117 Minn. 290, 135 N.W. 996, 997 (1912); *Rask v. Town Board of Hendrum*, 173 Minn. 572, 218 N.W. 115 (1928). Other states have what might loosely be called "Cartway Statutes," but many of these say that the access that is created is a private road, as opposed to Minnesota's where the cartway is a right of public passage. *See, generally*, B. Harris, "Private Road or Public Use? The Landlocked Property Dilemma: a Constitutional and Economic Analysis of Private Road Acts," 80 U. Det. Mercy L. Rev. 149 (2002). Some courts have held that statutes that allow the government to establish a *private* road over a person's land, even if compensation is paid, are unconstitutional because there is no public purpose in creating the road. *Id.* Other courts have held that there are sufficient public purposes, such as facilitating the development of otherwise inaccessible land. *Id.*

[83] Minn. Stat. § 164.07, subd. 5. The Cartway Statute itself (§ 164.08) does not contain this formula, but says that the cartway proceedings shall be "in accordance with" the proceedings outlined in the Town Road Statute (§ 164.07). This is the formula set out in the Town Road Statute. The Town Road Statute also says that damages can be established by agreement between the owners and the board, or that the owners can release their damage claims. Minn. Stat. § 164.07, subd. 5. As to "owners" versus "occupants," see discussion on pages 10-11.

based on all the relevant facts and circumstances. I think it is useful to do something of a "two-step"—ask (1) what is the fair value of the land that is actually subject to the cartway, and (2) what is the economic effect of the cartway on the land that is not actually subject to the cartway?

The first step is often a fairly simple calculation. How much land (in acres) is the cartway going to occupy, what type of land is it and, in that vicinity, what is the "going price" for that type of land?[84] Forest land obviously may be more valuable than scrub land. Land suitable for (or actually used for) raising crops or grazing may be more valuable than barren, rocky soil. Are there factors that make the "going price" for that type of land too high? Too low? This is not always an easy decision but, by computing the amount of land that will be subject to the cartway and then applying a per-acre price to that land, the board has made a good start. It has estimated how much the neighboring landowner has lost by the cartway actually being on the property.

The second step is often more subtle. What is the economic effect of the cartway on the remainder of the neighboring landowner's land, that is, the land that is not subject to the cartway itself? It isn't possible to list all the factors that might be relevant to that, because the particular situations will all vary. Some typical factors that might be considered are:

1. How close will the cartway be to the affected person's house? If the cartway is a quarter mile away, the damage is probably less than if the cartway is forty feet from the house;

2. Does the cartway sever the affected person's land? A cartway that cuts through the middle of a person's land might devalue it more than one that goes along the edge of the property;

3. What could/would the affected person realistically have done with the land absent the cartway? Does the cartway make the property more difficult to build upon, change or complicate any setbacks, preclude or make any uses of the property more difficult?

4. Will the cartway have to be fenced off, and how much will that cost?

5. Will the cartway make it easier for the affected person to fully use her property—if so, it might suggest an increase in the land value.

Again, there's no real magic in this. Every petition will present its own facts, and every decision will stand on its own merits. The board needs to do its best to try to establish a reasonable amount of damages under the circumstances (which, again, may be zero), and to base that upon the facts and evidence at the cartway hearing. Some written findings, perhaps in the award of damages, explaining how the board arrived at its decision are encouraged.

The cartway petitioner and the affected landowner at times have their own appraisers give opinions about the value of the damages. You will probably not be surprised to learn that the petitioner's appraiser almost always has an analysis that produces a lower figure and the affected landowner's appraiser's analysis produces a higher figure. Boards can usually assess those

[84] An acre is 43,560 square feet. A section is a mile long, 5280 feet. If, for example, the cartway will be 33' wide and will run for one quarter/quarter section (the edge of a 40) across a neighbor's land, the equation would be 33' x 1,320' = 43,560 square feet = one acre.

competing opinions by examining the credentials of the appraisers, the assumptions they are indulging, their credibility (or lack of it) in general, and the supervisors' own knowledge about land values in the area. In my opinion, the board has the power to retain its own appraiser if it thinks that is necessary, but I usually discourage it—the appraiser's cost is going to be passed on to the petitioner as a cost of the proceeding and, usually, the board is in a position to consider the evidence, use its common sense, and come to a reasoned estimate of the damages. But if a board is truly "stumped" about the value of the damages, hiring its own appraiser is an option.

I encourage town boards to have at least one member, during the cartway hearing, try to work out a deal between the petitioner and each affected landowner. There is nothing that prevents a supervisor from acting essentially as a mediator during the cartway hearing to try to see if an agreement on damages (or at least a range of what both parties think is reasonable) can be reached. I've seen some board members do this very skillfully. While ultimately the board may have to make a judgment call about what the damages are, there is no reason that the board cannot at least try to see if there is an amount or a range that both parties agree is more or less reasonable.[85] At times, the "pressure" of trying to appear to be the reasonable party leads both the petitioner and his neighbor to concede that a given amount is reasonable, or at least that there is a range of damages that is more or less palatable.

Ascertaining the Town's Damages

Another issue for the cartway hearing is the amount of the town's damages. The petitioner is to pay for the cost of the town's "professional and other services, hearing costs, administrative costs, recording costs, and other costs and expenses which the town may incur in connection with the proceedings for the establishment of the cartway."[86]

As discussed above, ideally the town has already required the petitioner to post security not only for the town's damages, but for the damages incurred by the affected owners.

The town needs to consider, at this point in the cartway hearing, what costs it has incurred through the time of the hearing. What are the town's legal fees, will a survey be needed (and, if so, how much is it likely to cost), what has been incurred for the time spent by the supervisors, the clerk, and the treasurer? The problem with setting those damages during the cartway hearing is that if the petition is granted, the work is not finished—there are going to be more expenses for attending to the final paperwork, mailing further notices, filing items at the land office, and so forth. It is difficult for the town to know at the hearing how much additional expense it will incur after the hearing.

One way of dealing with this is to tie it all in with the earlier resolution that estimated the total damages and required the petitioner to post that amount as security. Presumably, the town's expenses up to the time of the hearing have been largely submitted and fully paid out of the amount the petitioner deposited. Hopefully, there is still a balance in that special account. If so, a practical

[85] A gambit I've seen work went essentially like this:

Supervisor: I don't think I have many more questions about this. Jerry [petitioner], you're saying that $1,000 would be fair. Jim [affected owner], you're saying that $3,000 would be fair. I can't say what we as a board would decide, but let's assume for the sake of argument we decided that the fair amount is in the middle, $2,000. Jerry, could you live with that—not that you'd be real happy about it, but could you live with it? Jim, how about you—not that you'd be overjoyed, but do you think that would be fair, all in all?

[86] Minn. Stat. § 164.08, subd. 2 (c).

solution is to provide, in the award of damages, that the petitioner will continue to be responsible for the town's ongoing expenses through the conclusion of the cartway proceedings, that the town will continue to bill and pay those expenses from the security deposit, and will not return the balance of the security (if any remains) until all the proceedings have concluded.

Miscellaneous

We've discussed, in this section, issues that commonly arise at the cartway hearing. There are a few miscellaneous points.

Will Town Funds Be Spent on the Cartway? As discussed above, towns usually have no obligation to construct or maintain cartways, and cartways are typically constructed and maintained by those who use the cartway to serve their land. The statute says that town road and bridge funds shall not be expended on the cartway unless the town board by resolution determines that an expenditure is in the public interest.[87] If no such resolution is adopted, the grading or other construction work and the maintenance of the cartway is the petitioner's responsibility.[88] Thus, if the board is silent about this issue, town funds will not be spent on the cartway. Nevertheless, to make that abundantly clear, and perhaps more for political than legal reasons, it may make sense to make it clear at the cartway hearing that the town board is not going to be spending town funds on the cartway, and to reflect that in the resolution that establishes the cartway.

There is a qualification worth making here. If the town board decides that no town funds will be spent on the cartway, there is a procedure by which the electors can "overrule" that decision. If they follow certain procedures, ten town taxpayers may submit a petition prior to the annual meeting asking that the electors approve funding for the maintenance of the cartway and, if the petition passes upon a majority vote of the electors, the cartway is to be maintained by the town.[89]

Petitioner Must Pay Damages Before Opening the Cartway. To insure that the petitioner pays the damages—both to his affected neighbors and to the town—the statute provides that the damages must be paid to the town before the cartway is "opened," which essentially means worked, constructed, maintained, or used.[90] Note also that the petitioner does not pay the damages directly to the affected neighbor—the petitioner pays the town, and the town pays the neighbor.

Survey. A survey may or may not be needed. The statute provides that if the town board grants the petition, it can cause a survey to be made if it deems a survey necessary.[91] Quite frequently, the petitioner has had a survey done prior to commencing the cartway proceedings, and a "new" survey is not necessary. Usually, the two primary reasons for having a survey done are (1) that without a survey there is no way to give an adequate legal description of the cartway's boundaries, which is necessary for the resolution that creates the cartway and that must be filed in the land office, and (2) that without a survey (and marking of the ground) the risk of the landowners feuding about where the cartway's boundaries are is simply too high. If the board decides that a

[87] Minn. Stat. § 164.08, subd. 2 (d).
[88] *Id.*
[89] Minn. Stat. § 164.10.
[90] Minn. Stat. § 164.08, subd. 2 (c).
[91] Minn. Stat. § 164.07, subd. 4.

survey is necessary, the statute sets out some technical specifications for the surveyor[92] and provides that the surveyor, as the town board's agent, may enter upon any property to conduct the survey.[93]

VIII. Resolution Establishing Cartway and Award of Damages

The cartway hearing is over. If the cartway petition was refused, the town chair writes "petition refused" on the back of it.[94] If the cartway petition is granted, there is more work to do. The first step is that the town board must issue a resolution establishing the cartway, and an award of damages.

The statute tells us very little about the resolution establishing the cartway. It simply says that if a cartway is established, it will be established "by resolution."[95] It says that this must then be filed with the town clerk who, following certain statutory procedures (discussed below), in turn files it with the county auditor and country recorder or registrar of titles.[96] This necessarily implies that the resolution has to be a written document that the land records office would accept for filing.

The statute basically tells us nothing else about the resolution establishing the cartway, and there are no appellate court cases discussing it. So what should the resolution say? It would seem that it should contain at least the following elements:

1. A summary description of the cartway proceedings. This should contain the petitioner's name and a legal description of the petitioner's land, the names of the affected owners and a legal description of their lands, a recitation that the petitioner requested a cartway, a legal description of the cartway requested, an explanation that a hearing was held after proper notice and posting, and a finding of entitlement to a cartway and the basis for that finding (e.g., the petitioner owns at least five acres of land and has no access from it to a public road except across the lands of others);

2. A resolution and order that establishes the cartway, subject to the payment of all damages to the town and the affected landowners, describing any other appropriate conditions that might apply and how those are to be fulfilled, setting out a legal description of the cartway, and perhaps noting that town funds shall not be expended upon the cartway.

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[92] Minn. Stat. § 164.07, subd. 4.

[93] Minn. Stat. § 164.07, subd. 13. The idea, obviously, is that this forces a disappointed neighbor to allow the surveyor onto the property without the surveyor trespassing.

[94] Minn. Stat. § 164.07, subd. 3. Although the statute does not say this, I encourage the board to explain why the petition was refused, either on the back of the petition or, at least, to see that the explanation is reflected in the minutes. This should be useful, and might be required, if the petitioner appeals to the district court.

[95] Minn. Stat. § 164.08, subd. 2 (a).

[96] Minn. Stat. § 164.07, subd. 11. Note a discrepancy here. The Cartway Statute says that the cartway shall be established "by resolution." Minn. Stat. § 164.08, subd. 2 (a). The Cartway Statute does not say anything about how you go about filing that resolution with the land office, but does say that the proceedings shall be "in accordance with" the Town Road Statute (§ 164.07). The Town Road Statute says that you file an "order" creating a road (read "cartway") with the county auditor and land records office. Minn. Stat. § 164.07, subd. 11. So do you create a cartway by a "resolution" (as the Cartway Statute says) or an "order" (as the Road Statute says)? *State ex rel. Rose v. Town of Greenwood*, 220 Minn. 508, 20 N.W.2d 345, 347 (1945) says that, in a cartway proceeding, you follow the procedures spelled out in the Town Road Statute, except where the Cartway Statute provides to the contrary. Because the Cartway Statute specifically says that you establish a cartway through a "resolution," it would appear that this resolution qualifies as the "order" that is to be filed with the auditor and land records offices under the Town Road Statute. To be doubly sure, you can entitle the document "Resolution and Order Establishing Cartway."

If there were contentious issues in the cartway proceeding, it makes a great deal of sense to address them in the resolution and order, and explain why they were resolved in one fashion or another. This can be very valuable if the town's decision is appealed to the district court, because it shows that the town board considered the evidence, heard the arguments, and explains how the town resolved the issues.

A sample Resolution and Order Establishing Cartway is appended at the end of these materials. It bears noting that every cartway proceeding is different and "one size does not fit all," but I've used the sample (revised for each proceeding) successfully in a number of proceedings.

There is a second required document, and that is the Award of Damages. It usually makes sense to combine the Resolution and Order Establishing Cartway with the Award of Damages because they typically go more or less hand-in-hand.

The statute does not tell us much about the Award of Damages. It is only mentioned obliquely—the statute says that the "award of damages shall be filed with the town clerk."[97] This tells us, basically, that the board is to make an award of damages, implicitly says that it must be in writing, and it is to be filed with the town clerk. What should the Award of Damages say? We need to keep in mind that the "damages" include not only the damages to the affected landowners, but also to the town for its costs and expenses. In light of that, an Award of Damages should probably contain at least the following:

1. An award of damages to the affected landowners. The Award should probably describe the land that will be subject to the cartway, who the owners (or potentially an occupant under a lease) are of that land and, for each, the amount of damages (which may be zero) that the town board has established. It should indicate that the Award will be paid to each by the town, either out of the security that the petitioner has deposited or, if none, out of amounts that will be paid to the town by the petitioner. If there were contentious issues regarding damages, it might be best to address them in the award, and explain how they were resolved and decided.

2. An award of damages to the town. If the petitioner has deposited security for the town's damages and if a balance remains, it may be best to indicate that the town will continue to incur further costs and expenses "wrapping up" the proceedings, and that the town will continue to "cover" those costs and expenses with the security, returning any excess to the petitioner when the proceedings are fully concluded (or, alternatively, requiring the petitioner to deposit additional security if the funds are exhausted).

A sample Award of Damages is appended to the end of these materials. Because the Award and Resolution are inter-related, the sample combines both into a single document. Again, I would caution you that one size does not fit all, and that the town attorney should tailor these documents for each individual cartway proceeding.

[97] Minn. Stat. §164.07, subd. 6.

IX. Filing of Award of Damages with the Town Clerk and Notification of Award

After the town board has signed the Resolution and Order Establishing Cartway and Award of Damages, there is still one more necessary document. That is the Notification of Award of Damages. This document goes to the affected landowners, and is their formal notice of the amount of damages set by the town board.

The statute says that the Award of Damages is to be filed with the town clerk.[98] Within seven days after filing, the town clerk is to notify, in writing, each known owner and occupant of each potentially affected tract of land about the filing of the award of damages.[99] The notification is to include (1) the date of the award of damages, (2) the amount of the award, (3) any terms or conditions of the award, and (4) an explanation of the right to appeal to the district court.[100]

I've appended a sample of a Notification of Award of Damages to this paper. Again, it should be tailored to fit the circumstances of each particular proceeding, and is only an example.

The statute says, literally, that each owner and occupant of each tract is to receive this notification. That has to be considered carefully. The haphazard way the statute uses the terms "owner," "occupant," and "owner and occupant" is discussed on pages 10-11. If you have an affected tract of land on which a family lives, and there are 15 people in the family, most of them minors, do you really have to notify each and every one? Probably not, but the statute is unclear about this. Presumably, every adult who may have any type of ownership or leasehold interest in the land should receive a notice. Presumably, a notice given to one adult in the family should serve to be notice to all adults in the family, but I'd be careful about that presumption if I knew that, for example, a husband and wife were "on the outs," and had reason to suspect that one might not tell the other about the notice. As with any notice, more notice is better than less notice.

Note that even if an award to a given owner is zero, the owner should receive a notification of the award of damages (no damages, in that case).

I strongly recommend that each Notification of Award of Damages include a copy of the Resolution and Order Establishing Cartway and Award of Damages. The statute does not require that, but it serves the purpose of getting all the materials to the affected landowners, and also results in the Notification providing the landowners with "any terms or conditions of the award."

Should a check be enclosed with the Notification of Award of Damages? That would depend on a number of considerations. If you are dealing with an affected landowner who you trust, if the proceedings were not overly-contentious, if it seems highly likely that the landowner wants to accept the award and not appeal, and if the amount of the award is modest, it might be best to enclose the check and explain that the check should be returned if the landowner decides to appeal to the district

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[98] *Id.* "Filed" in this context means, essentially, "given to." Usually, the town board chair will sign the Award of Damages, so the chair should sign it, date it, then give it to the clerk. The clerk should note the date that it was filed, because that is needed for the Notification of Award of Damages. The filing is a highly important step, because it "triggers" the period of time in which the affected landowners can bring a district court action contesting the cartway proceedings.

[99] *Id.*

[100] *Id.*

court. If any of those factors are missing, you might prefer informing the landowner that the check can be obtained from the town clerk after the appeal time has expired.

I recommend that the clerk serve the Notification of Award of Damages either by personally giving it to the owners or occupants or sending it by registered or certified mail. You want to be able, if called upon, to have some proof that the notification was received by the owner or occupant.

X. Appeal to the District Court

The petitioner or any affected owner may appeal the town board's decision to the district court. The details of that are complicated and, because the town board will never be appealing its own decision, they go beyond the scope of this paper.

The filing of the award of damages "starts the clock" for purposes of an appeal.[101] If an affected landowner wants to appeal, the time frame is:

1. Within 10 days if they want to delay the opening of the cartway;

2. Within 40 days if they do not want to delay the opening of the cartway.[102]

There's a lurking problem in this timeframe. The clock starts to run not when the affected landowner first receives the Notification of Damages but, instead, when the town board files the Award of Damages with the town clerk.[103] When the Award of Damages is filed with the clerk, the clerk has seven days in which to get the Notification of Award to each affected owner.[104] That leaves an affected landowner who wants to appeal within the ten-day period in the ungainly position of possibly only having three days to file and serve the appeal papers, bond, and so forth. It also emphasizes the importance of the town clerk attending to the Notification of Award immediately.

If 41 days pass from the filing of the Award of Damages without an appeal, the cartway proceedings become final. If an appeal is taken, the proceedings move to the district court level. I am not going to dwell on what might happen there, because it goes beyond the scope of this paper.

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[101] Minn. Stat. § 164.07, subd. 7.

[102] *Id.*, subds. 7 & 10. My reading of the statute is that if an affected landowner wants to challenge the *establishment* of the cartway, the appeal must be perfected within ten days after the filing of the award; the landowner would then have an additional 30 days (40 days total) in which to challenge the *amount of damages*. The "flip side" of that, to my mind, is that if the affected landowner does not appeal within the ten day period, he or she should be limited only to challenging damages, not raising issues that go to the cartway's establishment. The contrary argument would be that any issue can be raised if an appeal is taken within the 40 day period. I don't accept that argument, primarily because (1) I cannot see what real purpose the 10 day period serves if you can raise any challenge to the cartway by appealing within the 40 day period, and (2) it potentially sets a "trap" for the cartway petitioner, who might construct the cartway in the period from 10 to 40 days only to find that the affected landowner now challenges the cartway's very existence. If any challenge to the cartway can be raised in the 40 day period, a "wily" affected landowner could sit quietly by and let the cartway petitioner build the cartway during the 10-40 day period, then bring an action not only challenging the cartway's establishment but also seeking an order that the cartway petitioner must restore the land to its original condition. The cartway petitioner, who had the statutory right to build the cartway during the 10-40 day period would be "over a barrel" if this interpretation were adopted. That said, there is absolutely no appellate court law on this subject, so it is probably wisest for a cartway petitioner to refrain from building the cartway until after the 40 day period expires.

[103] *Id.*

[104] Minn. Stat. § 164.07, subd. 6.

XI. Filing the Resolution and Order Establishing Cartway (and Award of Damages)

The last formal step in the cartway process is filing. The Resolution and Order Establishing the Cartway needs to be filed both with the county auditor and with the county recorder or registrar of titles. This allows the cartway to be a matter of record, and to commemorate it as an interest in land on the titles of the affected owners.

The Cartway Statute itself says nothing about this. But the Cartway Statute says that cartway proceedings are to be "in accordance with" Section 164.07, which is the Town Road Statute. That statute explains how towns establish roads, and sets out the procedures for establishing roads. It says that the order establishing any road is to be recorded in the town's records by the town clerk, and that the clerk is to then file a copy of that order, certified by the clerk as a true and correct copy, with the county auditor and the county recorder or registrar of titles.[105] Because cartway proceedings are to be handled "in accordance with" that statute, the clerk should file the Resolution and Order Establishing Cartway and Award of Damages with these public officials and in accordance with those procedures. I have not had clerks report any problems with getting that document filed and on record. The filing fee is usually quite minimal.

XII. Post-Proceeding—Maintenance Disputes Between Cartway Users

After the cartway has been established, the town board might have to again become involved with the petitioner and the affected owners. This is because town boards have some jurisdiction over maintenance disputes between cartway users.

Typically, the cost of constructing and maintaining the cartway is not borne by the town, but instead by the petitioner and those who use the cartway to serve their land.[106] The statute says that the cost of maintaining the cartway shall be equitably (a fancy word for “fairly”) divided among all the private property owners who own land (1) adjacent to the cartway and (2) with no access to a public road except by the cartway.[107] The statute encourages those owners to agree upon the cost of

[105] Minn. Stat. § 164.07, subd. 11. Presumably, the idea behind giving it to the county auditor is that a cartway, as a right of way in favor of the public, affects the taxable value of the land it crosses. I have for convenience referred to the county recorder or registrar of titles collectively as the "land records office." Basically, there are two systems of recording used in Minnesota. The county recorder's office maintains records for "abstract" property, which is the older system of recording. The country registrar's office maintains a different type of record for "Torrens" property, which is the "newer" (it was instituted in 1901) system of recording. The requirement that the clerk file the order with the county recorder or the registrar of titles begs the question of whether the property across which the easement is established is abstract or Torrens property. I am told that the fine employees in these departments will usually steer the clerk helpfully in the right direction.

[106] Minn. Stat. § 164.08, subd. 2 (d) says that town road and bridge funds shall not be expended on cartways unless the town board, by resolution, determines that an expenditure is in the public interest. It goes on to say that, if no resolution to that effect is adopted, the construction and other maintenance is the petitioner's expense. The exception to this is that if the town electors follow the correct procedures, they can raise the issue of public maintenance of a cartway at an annual meeting and, if the majority of the electors agree, "overrule" the town board's decision not to spend town money on a cartway. Minn. Stat. § 164.10.

[107] Minn. Stat. § 164.08, subd. 3. "Equitably" basically means "fairly." Note that the maintenance costs are to be fairly divided among the "private" property owners who fit those criteria. The adjective suggests that governmental entities need not share in the maintenance costs.

maintenance, and even gives them some factors that might bear on a fair division of maintenance costs.[108]

But if the owners cannot agree on the maintenance costs, the town board might get "dragged back in" to the situation. The statute says that if the owners cannot agree on the division of maintenance costs, "the town board may determine the maintenance costs to be apportioned to each private property owner."[109] In other words, if the owners cannot agree on how to split up the maintenance costs, they can ask the town board to make that decision for them. The statute does not explain the procedures by which the owners would bring the dispute to the town board, but presumably there has to be a more or less formal request, appropriate notice of a hearing, a hearing, and a decision.

If the owners disagree with the board's decision, they can take it to a district court judge.[110] They also have the ability, under certain circumstances, to "by-pass" the town board and go directly to the district court level.[111]

I think it is worth emphasizing that the statute says the town board "may" determine the apportionment of maintenance costs. It doesn't say the town board "shall" or "must" do that, and my opinion is that the town board, if it so desires, can tell the landowners that it prefers not to. If so, presumably the landowners would then take their dispute directly to the district court.

XIII. Post-Proceeding—Conversion to a "Private Driveway"

After the cartway has been established and constructed, it is maintained at the expense of those who use it to serve their land, unless the town board believes that it is in the public interest to spend town funds on the cartway[112] or the electors, at the annual meeting and following a proper petition proceeding, direct the board to spend funds on the cartway.[113] In light of that, there is always at least some chance that the cartway might become publicly maintained.

There is a way to put an end to that possibility. The statute says that, after the cartway has been constructed, and with the written consent of the affected landowners, the town board may by resolution designate the cartway as a private driveway.[114] If that happens, no town road and bridge funds can be expended for maintenance.[115]

What is less clear is whether the so-called "private driveway" really becomes private. The statute expressly says that this "conversion" results in the cartway being designated as a "private driveway."[116] But it then immediately adds that the "cartway" shall not be vacated unless proper

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[108] *Id.* The factors are (1) frequency of use, (2) type and weight of vehicles or equipment used, and (3) distance traveled on cartway to the individual's property. Obviously, these are not meant to be exclusive.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] Minn. Stat. § 164.08, subd. 2 (d).
[113] Minn. Stat. § 164.10.
[114] Minn. Stat. § 164.08, subd. 2 (e).
[115] *Id.*
[116] *Id.*

vacation proceedings are used.[117] If the cartway is truly a "private driveway," then the public has no right to travel on it, and presumably the landowners can post it and restrict its use. But if it remains a "cartway" until properly vacated, then (until vacated) the public has the right to travel on it, and presumably the landowners cannot restrict access. So, following "conversion," is the thing really a "private driveway" or does it remain a "cartway?" Is it open to the public or not?

Our appellate courts have not decided that issue. A court might say, essentially, that the statute means that it is a "private driveway" in the sense that town funds can under no circumstances be spent for its maintenance, but it remains a "cartway" in the sense that the public still has a right of passage. It is not clear to me how that issue would be resolved.

XIV. Conclusion

As can be seen—if by nothing else from the length of this paper—cartway law is not basic, simple, or straightforward. I'd encourage towns, when receiving cartway petitions, to get their attorneys involved early on, and to require the petitioner to post security to cover the town's attorney fees (and the town's other costs and expenses) from the outset. I hope that this paper is some help for both the town officials and town attorneys who handle cartway proceedings.

[117] *Id.* "Vacated" means that the town extinguishes all interest in a road or cartway. See, Minn. Stat. § 164.07 (describing vacation procedures).

SAMPLE—ORDER SETTING CARTWAY HEARING

TOWN OF *[FILL IN NAME]*

ORDER SETTING A *[FILL IN DATE]* HEARING UPON PETITION REQUESTING THE ESTABLISHMENT OF A CARTWAY

The Town of *[Fill in Name]* has received a Petition for the Establishment of a Cartway. A copy of the Petition is attached to and made part of this Order.

The Petition seeks to establish a cartway pursuant to Minnesota Statute 164.08. The description of the proposed cartway is:

[Describe as near as practicable, pursuant to Minn. Stat. § 164.07, subd. 2]

The description of the individual tracts of land over which the proposed cartway would pass are:

[Describe as near as practicable, pursuant to Minn. Stat. § 164.07, subd. 2]

Minnesota Statute 164.08, subd. 2 (a), requires a town board to establish a cartway at least two rods wide connecting a petitioner's land to a public road if a petition is presented by the owner of a tract of land containing at least five acres who has no access thereto except over lands of others.

Minnesota Statute 164.08, subd. 2 (a), says that the town board may select an alternate route other than that petitioned for if the alternate route is deemed by the town board to be less disruptive and less damaging to the affected landowners and in the public's best interest.

That same statute says that the town board shall assess damages to landowners affected by the establishment of the cartway pursuant to Minnesota Statute 164.07, subd. 5, which directs the town board to (1) determine the money value of any detriment that the cartway's establishment might cause to an affected landowner, (2) determine the money value of any benefit that the cartway's establishment might cause to an affected landowner, and (3) award the affected landowner the difference (if any).

Minnesota Statute 164.07, subd. 4, allows the town board to direct that a survey be made if necessary.

Minnesota Statute 164.08, subd. 2 (c), says that the cartway petitioner shall pay all damages before the cartway is opened, and that those damages include (1) compensation (if any) awarded to affected landowners and (2) any costs the town incurs for professional and other services, hearing costs, administrative costs, recording costs, and other costs and expenses incurred by the town in connection with the proceedings.

IT IS ORDERED pursuant to Minnesota Statutes 164.08 and 164.07 that:

1. A hearing upon the attached Cartway Petition shall be held at the Town Hall in the Town of *[Fill in Name]* on *[Date]*, at *[Time]*;

2. The purpose of the hearing shall include, but is not limited to, determining:

(a) Whether the Petitioner is entitled to a cartway under Section 164.08, subd. 2;

(b) If so, whether the cartway should be located where requested and to the width requested, or whether it should be located at an alternate route or of a different width (but at least two rods wide);

(c) What damages, if any, must the Petitioner pay to affected landowners for the establishment of the cartway;

(d) What other damages have been incurred or likely will be incurred by the Town in connection with the establishment of the cartway; and

(e) Any other issue or matter that might relate to the cartway petition.

3. The petitioner shall:

(a) Cause personal service of this Order and the Cartway Petition to be made upon each owner and occupant of land over which or adjacent to which the proposed cartway would pass, and upon each person whose land would be reasonably expected to be affected by the establishment of the proposed cartway;

(b) Post a copy of this Order and the Cartway Petition at the Town's posting places;

(c) Accomplish items 3 (a) and (b) at least ten days before the cartway hearing; and

(d) Submit to the Town an affidavit, prior to the hearing, showing that items 3 (a) – (c) have been accomplished.

All persons who wish to be heard on any of the issues identified above, or on any other issue or matter relating to the Cartway Petition, should appear at the hearing and be prepared to offer or present any testimony, evidence, opinions, or views that they may have.

Affected landowners are hereby notified, pursuant to Minnesota Statute 164.07, subd. 2, that they are entitled to judicial review if the cartway is established, but that to do so they must follow all of the procedures set forth in Minnesota Statute Section 164.07, subd. 7, including but not limited to serving and filing a notice of appeal within 40 days after the filing of the award of damages, and within ten days after the filing of the award of damages if they wish to delay the opening or construction of the cartway, together with an approved bond of not less than $250.

Dated: _____

TOWN OF *[FILL IN]*

_____

Chair of Town Board

Attachments:

Copies of Cartway Petition and Attachments to Cartway Petition (if any)

SAMPLE—RESOLUTION AND ORDER ESTABLISHING CARTWAY AND AWARD OF DAMAGES

TOWN OF *[FILL IN]*

RESOLUTION AND ORDER ESTABLISHING CARTWAY AND AWARD OF DAMAGES

1. RESOLUTION AND ORDER ESTABLISHING CARTWAY

WHEREAS, the Town of *[Fill in Name]* has received a cartway petition pursuant to Minn. Stat. § 164.08, from [*petitioner's name]* (hereafter "petitioner") in which the petitioner asks the town board to establish a cartway to his property across the lands of others; and

WHEREAS, the petitioner's property is described as follows:

[Legal description of petitioner's property]

WHEREAS, the petitioner asks that a cartway be established as follows:

[Legal description of cartway]

WHEREAS, the requested cartway would pass over the lands of the following persons, whose property is described as follows:

[List affected persons and provide legal description of their property]

WHEREAS, on *[Fill in Date or Dates]*, after proper posting and notice, a hearing on the cartway petition was heard by the *[Fill in Name]* Town Board; and

WHEREAS, the Town Board finds that, pursuant to Minn. Stat. § 164.08, subd. 2 (a), the petitioner owns a tract of land containing at least five acres and has no access from it to a public road except over the lands of others; and

WHEREAS, the petitioner is therefore entitled to the establishment of a cartway pursuant to Minn. Stat. § 164.08, subd. 2 (a);

WHEREAS, the Town Board heard evidence and arguments from the petitioner, the affected landowners, and members of the public regarding the question of what damages, if any, should be paid to the owners and occupants across whose land(s) the cartway will be established, and regarding what damages the town has incurred as costs and expenses related to these proceedings;

NOW, THEREFORE, IT IS RESOLVED AND ORDERED:

1. A cartway pursuant to Minn. Stat. § 164.08, subd. 2 (a) is established, subject to the terms and conditions that follow, the terms and conditions in the award of damages, and the payment of all damages.

2. The town board finds that the following location and width of the cartway is the least disruptive and least damaging for neighboring landowners and in the public's best interest:

[Legal Description of Cartway Established]

3. Prior to opening or constructing the cartway, the petitioner shall pay to the town (or have paid from amounts on deposit, if sufficient) all items described below as damages for the establishment of the cartway.

4. Town road and bridge funds shall not be expended for this cartway.

TOWN OF *[Fill in Name]*

_____
Chair of Town Board

Dated: _____

2. AWARD OF DAMAGES

A. AWARD TO AFFECTED LANDOWNERS

The Town Board finds that the cartway established above will pass over land owned and occupied by the following:

[Names of Affected Owners/Occupants and Legal Description of Their Property]

The Town Board is not aware of any other landowner or occupant whose land would be affected by the establishment of the cartway.

The Town Board awards the following damages as a result of the establishment of this cartway:

TO:	AWARD OF DAMAGES
[Owner/Occupant and Legal Description of Property]	$
[Owner/ Occupant and Legal Description of Property]	$
TOTAL	$

These damages shall be paid by the Town from the amounts that have been deposited with the Town by petitioner as security, if said amounts are sufficient to pay these damages. If said amounts are insufficient to pay these damages, petitioners shall pay to the Town any necessary additional amount prior to opening or constructing the cartway.

B. AWARD OF DAMAGES FOR OTHER ITEMS

The Town Board finds that additional "damages"—as defined by Minn. Stat. § 164.08, subd. (c)—either have been or will be incurred, including but not limited to the Town's attorney fees, the time and expenses for the supervisors, clerk, and treasurer related to these proceedings, a survey of the cartway, and filing and recording costs. Some of these damages have been incurred, and others will not be incurred until a future date. The final amount of these damages will be ascertained when these proceedings are completed, and an itemization of the same will be given to petitioner.

The damages either have been or will be deducted from the amount previously deposited with the Town.

If the actual damages of all kinds (including the award to the affected landowners) prove to be less than amount on deposit, any excess in the deposit will be returned to petitioner. If said actual damages exceed the amount of the deposit, the Town will so notify petitioner, and petitioner shall deposit any necessary additional amount to cover the excess prior opening the cartway or any further proceedings herein.

The Town Treasurer shall keep an account of all expenses and all amounts paid from said deposit, and shall provide to petitioner upon request a reasonable accounting of the same. If petitioner disagrees or disputes any amounts deducted from the deposit, petitioner and the Town Board shall meet to discuss the same, and reasonably attempt to resolve any such disputes.

TOWN OF *[Fill in Name]*

Dated: _____

_____
Chair of Town Board

I hereby certify that the forgoing is a
True and correct copy of the Resolution
Establishing Cartway and Award of
Damages.

_____
Town Clerk
Dated: _____

SAMPLE—NOTIFICATION OF FILING OF AWARD

TOWN OF *[Fill in Name]*

NOTIFICATION OF FILING OF AWARD

TO: *[Name and Address of Each Affected Owner/Occupant]*

(registered or certified mail, or hand-delivered)

Please take notice, pursuant to Minn. Stat. § 164.07, subd. 6, that the enclosed Resolution Establishing Cartway and Award of Damages was filed with the undersigned Town Clerk on *[Date of Filing with Clerk]*.

The date of the enclosed award of damages is *[Date of Award of Damages]*.

The amount of the enclosed award of damages, to you, is *[Dollar Amount in Award]*.

Any terms and conditions of the enclosed award are fully explained in the enclosed Resolution and Order Establishing Cartway and Award of Damages. If you wish to accept the award of damages, you may cash the enclosed check. If you do not wish to accept the award, you may appeal as described below, but you must then return the check to the undersigned.

Pursuant to Minn. Stat. § 164.07, subd. 6, you are informed that the requirements for appealing this award are contained in Minn. Stat. § 164.07, subd. 7, which provides:

> Subd. 7. Appeal. Within 40 days after the filing of the award of damages, any owner or occupant may appeal from the award by filing a notice of appeal with the court administrator of the district court of the county where the lands lie. However, the owner or occupant must file the notice of appeal within ten days in order to delay the opening, construction, alteration, change, or other improvement in or to the road [here—the opening or construction of the cartway] pursuant to subdivision 10. The notice of appeal shall be accompanied by a bond of not less than $250, with sufficient surety approved by the judge or the county auditor conditioned to pay all costs arising from the appeal in case the award is sustained. A copy of the notice shall be mailed by registered or certified mail to the town clerk or any member of the town board. The notice of appeal shall specify the award or failure to award appealed from, the land to which it relates, the nature and amount of the claim of appellant, and the grounds of the appeal, which may include a challenge to the public purpose or necessity of the proposed road or condemnation.

TOWN OF *[Fill in Name]*

_____

Town Clerk

Enclosures: Check and Resolution and Order Establishing Cartway and Award of Damages