

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1870**

Eugene Kaster and Michael Kaster as Trustees of
the Kenneth J. Kaster Family Revocable Living Trust, dated June 5, 2008,
Appellants,

vs.

Township Board of LaGarde,
Respondent,
Walter Geray,
Respondent.

**Filed June 15, 2010
Affirmed
Stoneburner, Judge**

Mahnomen County District Court
File No. 44CV08443

Christopher D. Robinson, Robinson Law Firm, P.L.C., Brainerd, Minnesota (for
appellants)

Kristi A. Hastings, Pemberton, Sorlie, Rufer & Kershner, P.L.L.P., Fergus Falls,
Minnesota (for respondent LaGarde Township)

Thomas A. Opheim, Opheim Law Office, Ada, Minnesota (for respondent Walter Geray)

Considered and decided by Stoneburner, Presiding Judge; Toussaint, Chief Judge;
and Connolly, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellants assert that the district court erred in granting summary judgment affirming respondent township's grant of a cartway petition. Appellants argue that the township acted arbitrarily by failing to adequately consider that an existing road provides access to the subject property and is the most appropriate route for a cartway and that the district court's grant of summary judgment prior to the close of discovery was inappropriate. We affirm.

FACTS

Appellants Eugene and Michael Kaster and respondent Walter Geray own adjacent parcels of property in respondent LaGarde Township.¹ Geray's property is landlocked. Geray petitioned the township for a cartway over Kaster's land. The township board tabled Geray's request and encouraged the parties to arrive at an agreement. The parties did not reach an agreement. The township board considered the request on September 18, 2007. The township board passed a resolution, stating that a cartway location proposed in the petition was reasonable, and ordered Geray to post \$10,000 bond prior to the township board taking further action.

Geray obtained a survey of the route he proposed, and the township board scheduled a hearing on the proposed cartway. Kaster claimed that he received notice

¹ Kenneth Kaster, who owned the property at the time the cartway petition was filed, died while the matter was pending, and his brothers, Eugene and Michael, continued the lawsuit as trustees of the Kenneth Kaster Family Revocable Living Trust. Appellants will be referred to throughout as "Kaster."

three days before the hearing and therefore filed procedural objections to the proposed cartway based, in part, on his claim that he had not received a copy of the cartway petition or the township board's resolution in a timely manner. Included with Kaster's objection was Michael Kaster's affidavit stating that he (Michael Kaster) was the previous owner of the land directly north of Geray's property, and that an "established roadway" exists across that property that would allow Geray access to his property.

The township board rescheduled the hearing. At the rescheduled hearing, Kaster again objected to improper service of the cartway petition, asserted that there was a conflict of interest on the board, and argued that an existing roadway on the property is a "more reasonable" route for the cartway than the route proposed by Geray.² Testimony taken at the hearing revealed that Kaster's proposed alternative is not the shortest or most economical route. There was testimony that the proposed route is not passable by vehicle at many points and completely impassable during the winter months. Members of the township board were personally familiar with the properties involved. After discussion, the township board approved the cartway, as petitioned for by Geray, and awarded Kaster \$4,500 in damages.

Kaster appealed to the district court and served requests for admissions, interrogatories, and production of documents. He notified the attorney for the township board that he intended to depose township board members. The township board indicated that it would object to the depositions, and Kaster did not give notice of any depositions.

² Kaster asserted that an existing road provided access to Geray's property, but his primary argument was that the cartway should have been established over the existing route rather than that Geray's property was not landlocked.

After outstanding discovery had been answered, but before the scheduled closing of discovery, the township board and Geray moved for summary judgment. At the hearing on the summary judgment motion, Kaster stated his intent to take depositions, but he did not move for a continuance. The district court granted partial summary judgment, affirming the grant of the cartway petition, but denying summary judgment on the amount of damages. A jury subsequently awarded Kaster \$6,750 in damages (\$4,500 for the value of property actually taken, and \$2,250 in severance damages for the remaining property). This appeal followed.

D E C I S I O N

A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. *DHL, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). No genuine issue for trial exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *Id.* at 69 (quotation omitted). “On appeal from summary judgment, we review de novo whether a genuine issue of material fact exists, and whether the district court erred in its application of the law.” *Peterka v. Dennis*, 764 N.W.2d 829, 832 (Minn. 2009) (quotation omitted).

A township board acting on “a cartway petition acts in a legislative capacity and will be reversed on appeal only when (1) the evidence is clearly against the decision, (2) an erroneous theory of law was applied, or (3) the town board acted arbitrarily and capriciously, contrary to the public’s best interest.” *Horton v. Twp. of Helen*, 624

N.W.2d 591, 595 (Minn. App. 2001) (citing *Lieser v. Town of St. Martin*, 255 Minn. 153, 159, 96 N.W.2d 1, 5–6 (1959)), *review denied* (Minn. June 19, 2001). “When judicially reviewing a legislative determination, the scope of review must necessarily be narrow.” *Sun Oil Co. v. Vill. of New Hope*, 300 Minn. 326, 333, 220 N.W.2d 256, 261 (1974). Appellate review “is limited to a consideration of whether the [district] court has confined its review to the limited scope of such review and, aside from jurisdictional questions, whether the evidence reasonably supports the determination of the [district] court.” *Lieser*, 255 Minn. at 163, 96 N.W.2d at 8 (quotation omitted). “Generally, this court will affirm even though we may have reached a different conclusion.” *Horton*, 624 N.W.2d at 595.

The Minnesota cartway statute, Minn. Stat. § 164.08 (2008), provides in relevant part:

Upon petition presented to the town board by the owner of a tract of land containing at least five acres, who has no access thereto except over a navigable waterway or over the lands of others, . . . the town board by resolution shall establish a cartway at least two rods wide connecting the petitioner’s land with a public road. . . . The town board may select an alternative route other than that petitioned for if the alternative is deemed by the town board to be less disruptive and damaging to the affected landowners and in the public’s best interest.

Id., subd. 2(a).

Kaster argues that the district court erred by granting summary judgment affirming the township board’s cartway order because (1) an alternative route already exists providing access to Geray’s property; (2) the township board ordered the cartway without

giving consideration to the proposed alternative route; and (3) discovery had not yet been completed.

The record reflects that the township board was familiar with portions of Kaster's proposed route and considered the route, but determined that Geray's route is the best option. The township board concluded that Kaster's route is not an "established roadway" as he argued, but rather, was a trail of a "rustic nature" that is not passable by a vehicle at many points and is completely impassable during the winter months. A township board cannot grant a cartway if a legally enforceable easement or right-of-passage to a public road already exists. *Roemer v. Bd. of Supervisors of Elysian Twp.*, 283 Minn. 288, 291–92, 167 N.W.2d 497, 499–500 (1969). But a temporary or permissive grant of use does not preclude a cartway petition. *In re Daniel for Establishment of Cartway*, 644 N.W.2d 495, 498 (Minn. App. 2002), *reversed on other grounds*, 656 N.W.2d 543 (Minn. 2003). *Roemer* does not support Kaster's argument that the rustic trail precludes granting Geray's cartway petition because in *Roemer*, the cartway petitioner had a permanent easement for roadway purposes that ran with the land and afforded "ingress to and egress from" the petitioner's property. 283 Minn. at 289, 167 N.W.2d at 498. Geray has no easement providing ingress to and egress from his landlocked property.

Kaster argues that the township board did not properly examine the proposed route. Kaster submitted to the district court pictures of a wide dirt road that he asserts depicts his route. The township board did not physically examine the entire route proposed by Kaster and based their decision, in part, on personal knowledge of board

members about portions of the route, some of which was based on memories of the route from many years prior to the hearing. But a township board's decision will not be set aside as arbitrary and capricious solely because the board had "preconceived views" about the issue or because a member of the board showed actual or sympathetic interest. *Lieser*, 255 Minn. at 160, 96 N.W.2d at 6–7. And the township board did not base its decision solely on personal recollection of the subject properties. The township board heard testimony from people who attended the public hearing. Because testimony in the record supports the town board's findings, the fact that the town board did not walk the entirety of the proposed route does not make their decision arbitrary and capricious or establish any material fact question about the decision.

On appeal, Kaster asserts that the district court abused its discretion by granting Geray's and the township board's motion for summary judgment before completion of discovery, instead of granting a continuance to complete discovery. But Kaster did not give notice of depositions in response to the summary judgment motion or move the district court for a continuance to complete discovery. Kaster nonetheless argues that they planned to depose board members to discover whether one board member owned property adjacent to Geray's property that would have given the board member a direct interest in the outcome of the cartway petition and "would directly undermine the Town Board's position that the cartway petition was not granted capriciously." But Kaster has failed to explain why a deposition was necessary to discover ownership of property that is of public record.

Kaster also asserts that the township clerk and one of the board members are Geray's first cousins. But Kaster does not make any argument about how the mere existence of that relationship necessarily constituted bias or a conflict of interest. At oral argument on appeal, Kaster suggested that a deposition was necessary to discover whether Geray had discussed the cartway with his relatives. But Kaster did not inquire about such discussions in interrogatories and only speculates that conversations may have occurred. This court will generally not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quotation omitted). On this record, we cannot conclude that the district court abused its discretion by failing to *sua sponte* grant a continuance for further discovery.³

Affirmed.

³ Although the information is not in the record, the parties agreed that the person on the town board who is Geray's first cousin is also a first cousin of Kaster.