

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HUBBARD

NINTH JUDICIAL DISTRICT

Court File:

Tara Houska, Winona LaDuke,
AhnaCole Chapman, Akiing Land Co., LLC,
and Switchboard Trainers Network,

Plaintiffs,

Vs.

**ORDER and
MEMORANDUM**

County of Hubbard,
Corwyn Aukes, in his official capacity, and
Mark Lohmeier, in his official capacity,

Defendants.

The above-entitled matter came before the undersigned Judge of District Court on September 9, 2021, pursuant to Plaintiffs' motion for a temporary injunction enjoining Defendants from: (1) barricading, obstructing, or otherwise interfering with access to the property; (2) stopping vehicles or persons and/or issuing citations and/or arresting or threatening to arrest persons premised on the person's presence on the driveway or driving a motorized vehicle upon the driveway during the pendency of this action; (3) initiating or continuing prosecution of any criminal cases premised upon citations issued for purported violations of Hubbard County Ordinance number 36 from June 28, 2021 to the date of this Order.

The parties again appeared before this Court on October 21, 2021, pursuant to Plaintiffs' motion for summary judgment as to all counts of the First Amended Complaint seeking: (1) declaratory relief as to the easement; (2) Declaratory and injunctive relief regarding the blockade notice; and (3) declaratory and injunctive relief regarding citations issued for the purported violations of Hubbard County Ordinance number 36 from June 28, 2021 to the date of this Order.

Plaintiffs were represented at both hearings by attorneys Jason Steck and Marco Simons.

Defendants were represented at both hearings by attorneys Elizabeth Viera and Jay Squires.

Based upon the submissions, the arguments of counsel and the file and proceedings herein, this Court makes the following:

ORDER

1. Plaintiffs' motion for a temporary injunction is **GRANTED**. Pending further order of this Court or resolution of this matter, Defendants are enjoined from (1) barricading, obstructing, or otherwise interfering with access to the property; or (2) stopping vehicles or persons and/or issuing citations and/or arresting or threatening to arrest persons premised solely upon the person's presence on the driveway or driving a motorized vehicle upon the driveway during the pendency of this action.
2. This Court's July 23, 2021 temporary restraining order is **VACATED** as it has been replaced by this Temporary Injunction.
3. Plaintiffs' motion for summary judgment as to all counts of the First Amended Complaint is **DENIED**.
4. The Court, through court administration, will contact counsel to set a date and time for a scheduling conference.
5. The attached Memorandum is a part of this order.

BY THE COURT:

Jana M. Austad
Judge of District Court

MEMORANDUM

I. FACTUAL BACKGROUND

This section is based upon the allegations in the complaint as well as the affidavits and exhibits filed by both parties. That this Court has included some statements and allegations and omitted others does not mean that the Court does not accept, or is otherwise discounting, that allegation for purposes of the present motion. The Complaint is lengthy and the Court is focusing on the allegations the Court believes are most relevant to the temporary injunction. In addition, the Court in this memorandum may at times refer to Plaintiffs or Defendants collectively when referring to only one Plaintiff or Defendant. For example, the court may refer to “Defendants” when referencing only Defendant Hubbard County.

This litigation concerns property located

. (Complaint¹ ¶11; Mark Lohmeier Affidavit, August 26, 2021, ¶3). The sole means of accessing the property is over a driveway/roadway/trail and “there are no reasonable alternatives to obtain access” to the property. (Complaint ¶12; Res. No. 05151806, Hubbard County Board of Commissioners (May 15, 2018)). A portion of the driveway/roadway/trail crosses tax-forfeited Hubbard County land. (Complaint ¶14). This portion of the driveway/roadway/trail is depicted on Figure 2, page 4 of the Complaint.

In 1915, the property was assessed for a state highway that runs through both the property and the tax forfeited Hubbard County land. The assessment was paid off and the lien released in 1949. (Complaint ¶ 15).

Plaintiff Winona LaDuke purchased the property in May of 2018. (Complaint ¶16 Lohmeier Aff, Ex 5). Plaintiff LaDuke applied to the Hubbard County Board of Commissioners

¹ All references to the Complaint refer to the Amended Complaint filed September 24, 2019.

for an easement over and across the Hubbard County land. (Complaint ¶17; Affidavit of Jason Steck, August 19, 2021, Ex C.) The Hubbard County Board of Commissioners passed a resolution granting the easement, finding “there are no reasonable alternatives to obtain access to the property” and that “the easement will not cause significant adverse environmental or natural management impact.” (Complaint ¶18; Steck Aff, Ex C). After Ms. LaDuke paid \$192.00 for the easement, the easement was issued to her and she recorded the easement with the Hubbard County Recorder. (Complaint ¶25, 26, 27). The easement provides that “[c]onstruction and maintenance of a **road** on the easement shall be the sole responsibility of the grantee. The easement will revert to the state in trust in the event of non-use.” (emphasis added) (Steck Aff. Ex. D; Lohmeier Aff, Ex. 7). The easement further provides that “any transference of this easement will require County Board approval.” This is consistent with a Hubbard County Board Policy adopted in 2017. (Steck Aff. Ex. D, Ex. F; Lohmeier Aff, ¶11).

On September 26, 2018, Plaintiff LaDuke recorded a quitclaim deed conveying the property to Plaintiff Akiing, a holding company with Plaintiff LaDuke as Board Chair. (Complaint ¶30; Lohmeier Aff, Ex. 12). On November 1, 2018, Plaintiff LaDuke wrote a letter requesting that the driveway easement to the property be transferred from her name to Akiing Land Company, LLC. (Lohmeier Aff, Ex. 11). The Hubbard County Board approved the Transfer at a meeting on November 20, 2018 (Lohmeier Aff, Ex. 13). The easement contained the same requirement that “[a]ny transference of this easement will require County Board approval.” (Id). Neither Plaintiff LaDuke nor Akiing ever recorded the easement even though Defendant Hubbard County mailed Akiing a copy of the easement with explicit direction to “[p]lease have this easement recorded with the Hubbard County Recorder’s Office.” (Lohmeier Aff, Ex. 16).

On November 20, 2020, Plaintiff LaDuke, in her capacity as Akiing Board Chair, transferred title to the property to Plaintiff Switchboard Trainers Network via quit claim deed. (complaint ¶32, 35; Lohmeier Aff, Ex 17). Plaintiff Tara Houska is a tenant and steward of the property, authorized by Switchboard to exercise all rights regarding the property, including permitting additional tenants, visitors and invitees. (complaint ¶ 33-35). The property is used by the Anishinaabe to engage in cultural and spiritual practices and is a central organizing point for persons opposed to the Enbridge Line 3 pipeline. (Complaint ¶ 36). Ms. Houska conducts classes on treaty rights and decolonization at the property. (Complaint ¶37).

Since Ms. LaDuke's acquisition of the property in 2018, the easement has continuously been used for vehicular traffic. (Complaint ¶40). Water and food are transported onto the property by vehicles (Complaint ¶43).

On June 28, 2021, at approximately 6:00 a.m. multiple squad cars from the Hubbard County Sheriff's Office arrived at the property. Defendant Cass County Sheriff Corey Aukes informed the occupants of the property that beginning at 10:00 a.m. the roadway/driveway/trail "will be barricaded," and that vehicles would no longer be allowed to enter the property. Defendant further advised that enforcement action would be taken against persons who did not comply. (Complaint ¶44, 45; Answer ¶29). The owners/occupants of the property were not notified of any right to be heard or to appeal the abrupt decision to change the use of the roadway/driveway/trail and deny vehicle access to the property (Complaint ¶47). Prior to 9:00 a.m. the Sheriff's Office began denying people the right of access to the property and blocking cars. Persons who attempted to park along [REDACTED] were informed that no one was allowed into the property and that their cars would be towed (Complaint ¶49). The

Sheriff's Office maintained a blockade of the property until Midnight on June 28, at which time they would not allow anyone to leave the property (Complaint ¶50).

Plaintiffs claim the Sheriff's Office also prevented persons from bringing food or water onto the property. (complaint ¶51). The Sheriff's Office denies that it prevented any person from accessing the roadway/driveway/trail on foot from carrying food or water into the property. (Answer ¶35). The Sheriff's Office arrested multiple persons along the roadway/driveway/trail. (Complaint ¶52).

The Sheriff's office remained on the roadway/driveway/trail through July 1, 2021. (Complaint ¶53). Since that time, deputies from the Sheriff's Office would appear at the property. (Complaint ¶54). Officers from other jurisdictions have also appeared at the property (Id).

Among the persons given citations for driving on the roadway/driveway/trail was Plaintiff AhnaCole Chapman. (complaint ¶55).

Plaintiffs allege the conduct of the Hubbard County Sheriff's Office has significantly infringed upon Plaintiffs' ability to access and use the property and that the motive for his actions is to disrupt and penalize the opposition of Plaintiffs and others the expansion of the Enbridge pipeline. (Complaint ¶ 63-66). Defendants claim they are concerned about motor vehicles causing ruts on soft ground. (Corwyn Aukes Affidavit of August 26, 2021, ¶4; Lohmeier Aff ¶ 25).

II. TEMPORARY INJUNCTION

Plaintiffs' present motion seeks a temporary injunction enjoining Defendants from: (1) barricading, obstructing, or otherwise interfering with access to the property; (2) stopping vehicles or persons and/or issuing citations and/or arresting or threatening to arrest persons

premised on the person's presence on the driveway or driving a motorized vehicle upon the driveway during the pendency of this action; (3) initiating or continuing prosecution of any criminal cases premised upon citations issued for purported violations of Hubbard County Ordinance number 36 from June 28, 2021 to the date of this Order.

A temporary injunction is an extraordinary equitable remedy. *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982). It is meant to preserve the status quo pending an adjudication on the merits. *Id.* Defendants have pointed out, when ruling on motions for temporary injunctions, courts must exercise “great caution and deliberation” because the injunctive process is the strong arm of liberty.” (Defendant’s Memorandum in Opposition to Plaintiffs’ motion for Temporary Injunction, p. 11, filed August 26, 2021).

In evaluating whether to grant a temporary injunction courts consider the five *Dahlberg* factors:

- 1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief;
- 2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial;
- 3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in the light of established precedents fixing the limits of equitable relief;
- 4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal; and
- 5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros. v. Ford Motor Co., 137 N.W.2d 314, 321–22 (Minn. 1965).

For the reasons set forth below, this Court grants the temporary injunction. While some factors favor Plaintiffs, whether Plaintiffs are likely to prevail on the merits, is uncertain and

dependent upon disputed facts. Considering all the *Dahlberg* factors, Plaintiffs have established that the imposition of a temporary injunction is appropriate in this case.

(1) The nature and background of the relationship between the parties.

The relationship between the parties is not extensive, but it is contractual. Express easements are contracts and any injunctive relief based on a contract must be coextensive with the terms of the contract. *Lindberg v. Fasching*, 667 N.W.2d 481, 487 (In-app. 2003) (express easements are contracts); *Cherne Indus., Inc. v. Grounds Assocs.*, 278 N.W.2d 81, 93 (Minn.1979) (injunctive relief generally coextensive with terms of contract).

The parties' relationship began in May of 2018 when Plaintiff LaDuke first acquired the property and Defendant Hubbard County granted Plaintiff LaDuke an easement to access the property across Hubbard County tax forfeited land. The easement included a provision that any transference of the easement must be approved by the Hubbard County Board. In September 2018, after Plaintiff LaDuke transferred the property to Akiing, a company for which Plaintiff LaDuke was Board Chair, Plaintiff LaDuke applied to have the easement transferred to Akiing. The Hubbard County Board unanimously granted the request. The easement included the same provision, that any transference of the easement be approved by the Hubbard County Board. When Plaintiff LaDuke, as Board Chair of Akiing, transferred the property to Defendant Switchboard Trainers Network in 2020 neither party sought to have the easement transferred. Plaintiffs' access to the property was unrestricted in any way until June 28, 2021 when the Hubbard County Sheriff's Office, with little notice, began preventing persons from accessing the property by motor vehicle.

Plaintiffs allege that the easement grants them the right to access the property.

Defendants argue any easements were extinguished because the easements were in gross, any

transfer required County Board approval, and no approval was sought or given when the property was transferred to Switchboard, the present owner of the property. Because there is no contract between Plaintiff Switchboard and Defendant Hubbard County, the dispute revolves around whether Plaintiffs LaDuke and/or Akiing retained any rights under the contract after transferring the property.

In this case, the status quo is impacted by the disputed question of whether there is an existing contractual relationship- is the what the dispute and it is unclear whether this factor favors plaintiff or defendant. *See Upper Midwest Sales Co. v. Ecolab*, 577 N.W.2d 236, 244 (Minn.App. 1998) (dispute in case involving existing contract favored injunction versus dispute in case involving expired contract did not favor injunction).

Despite the uncertainty surrounding the continued existence of an express easement, Plaintiffs claim other bases for ruling that they have a right to access the property that are not dependent upon the existence of an express easement. Those claims are addressed in the likelihood of success factor below, but the previous contractual relationships between Defendant County of Hubbard and Plaintiffs LaDuke and Akiing, as well as the likelihood of Plaintiffs continuing to have access to their property by motor vehicle over and across the easement when this matter is resolved tips this factor strongly in favor of Plaintiffs.

(2) The harm to be suffered by the plaintiffs if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial;

Assuming Plaintiffs are property owners or have a right to use the property, the harm to plaintiffs is significant. Defendants' argument that Hubbard County and the Hubbard County Sheriff have an obligation and right to enforce county ordinances free from judicial branch interference obscures the issue by shifting from actual harm to abstract concerns about separation

of powers. Defendants have also identified a concrete harm, damage caused by Plaintiffs travelling on the easement in motor vehicles.

The harm to Defendants, ruts in the road, is a type of harm that is easily repairable whichever party prevails in this case. If Plaintiffs prevail, they will be responsible for maintaining the easement. If Defendants prevail, they can obtain a judgment against one or more Plaintiffs for the cost of repairing damage Plaintiffs caused to the easement.

The harm alleged by Plaintiffs is significant because it significantly impairs Plaintiffs' use of private property. Defendants advance a number of arguments aimed at suggesting the harm to Plaintiffs is not significant, but those arguments are not persuasive. Defendants argue individuals were not prevented from driving on the trail because the only harm they faced was being charged with a crime if they did so. The idea that being charged with a crime is not significant is not persuasive. It is the exact tool chosen by the County to deter Plaintiff's organization efforts.

Defendants argue that that Plaintiffs could use any method other than motor vehicles to access the property. This argument ignores the fact that individuals were not allowed to park vehicles anywhere near the property or easement without threat of ticketing and being towed. The facts in the record are that food and water needed by those on the property are transported to the property by motor vehicle. The prohibition on motor vehicle traffic across the easement combined with the inability to park or leave vehicles alongside the roadway before entering the easement significantly interferes with Plaintiffs' ability to continue using the property as they have been. This argument also ignores the fact that the inability to drive motor vehicles across the easement renders the property inaccessible during the winter.

Defendants argue Plaintiffs could access the property by alternative routes, but this is directly contradicted by the Hubbard County Board's previous finding that "there are no reasonable alternatives to obtain access to the property."

This factor significantly favors Plaintiffs as the harm to be suffered by Plaintiffs appears significantly greater than any potential harm to Defendants. Whether the harm to Plaintiffs is truly irreparable is somewhat unclear given the use of the property and limited record.

(3) The likelihood that one party or the other will prevail on the merits;

This is the most critical of the Dahlberg factors. "[I]f a plaintiff makes even a doubtful showing as to the likelihood of prevailing on the merits, a district court may consider issuing a temporary injunction." *Metropolitan Sports Facilities Comm'n v. Minnesota Twins Partnership*, 638 N.W.2d 214, 226 (Minn.App. 2002).

Plaintiffs make a number of arguments in support of the position that they are likely to succeed on the merits, including (A) Plaintiffs have an express appurtenant easement; (B) an easement is constitutionally required due to a prior road assessment lien; (C) Plaintiffs have an easement by necessity; (D) Defendants took possession of the servient parcel with constructive notice of Plaintiffs' pre-existing easement; (E) Defendant's resolution granted Plaintiff LaDuke a statutorily required cartway; and (F) Plaintiffs are likely to succeed on the merits due to Defendants' denial of Plaintiffs Constitutional due process rights. Defendants effectively counter that Plaintiffs' arguments are either unlikely to be successful or are dependent upon facts that would need to be established at trial.

This Court agrees that Plaintiffs' claim that there presently exists an express appurtenant easement is dependent upon disputed material facts and that other of Plaintiffs arguments are

either unsupported by the law or unlikely to succeed. The central issue here is whether Plaintiffs (or subsequent purchaser of the land) will continue to have access to the property by motor vehicle and the answer to that seems to be more likely than not, but who bears costs and responsibilities is unclear.

(A) Whether Plaintiffs have an express appurtenant easement

An easement can be appurtenant or in gross. “An easement appurtenant is one that is granted for the benefit of the grantee's land.” *Block v. Sexton*, 577 N.W.2d 521, 525 (Minn. App. 1998). An appurtenant easement “runs with the land” and passes to subsequent owners of the land. See *Alvin v. Johnson*, 63 N.W.2d 22, 25 (Minn. 1954) (“An easement appurtenant to another lot, when created by conveyance, attaches to the possession of that other lot and follows it into whosesoever hands it may come.” (quotation omitted)). In contrast, “[a]n easement in gross is the right to use another's property that is personal and revocable.” *Block*, 577 N.W.2d at 525. “[W]hether an easement is appurtenant or in gross is determined not by contiguity but by whether the easement was intended to benefit the grantee's land.” *Id.*

When an easement is created by an express grant, as were the easements to Plaintiffs LaDuke and Akiing, its terms constitute a contract. *Lindberg v. Fasching*, 667 N.W.2d 481, 487 (Minn. App. 2003), review denied (Minn. Nov. 18, 2003). “The primary goal of contract interpretation is to determine and enforce the intent of the parties.” *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 913 N.W.2d 687, 692 (Minn. 2018) (quotation omitted). If an agreement is susceptible to more than one reasonable interpretation, it is ambiguous, and extrinsic evidence may be considered to interpret its meaning. *Id.*

There is conflicting language in the easements granted to Plaintiff LaDuke and Akiing that render them ambiguous. The easement granted to Plaintiff LaDuke, minus the legal description, reads as follows:

For valuable consideration, the County of Hubbard, a municipal corporation, grantor, hereby conveys and quitclaims to Winona LaDuke, Grantee/s, and Grantees's heirs and assigns, a non-exclusive easement for access, ingress and egress to the following described property in Hubbard County, Minnesota:

[legal description]

Said easement contains 0.13 acres more or less.

Construction and maintenance of a road on the easement shall be the sole responsibility of the grantee. The easement will revert to the state in trust in the event of non-use.

Timber rights are retained by the County and any timber removal will be charged for at current rates.

The easement is conveyed to the owners of the above-referenced parcel as identified in the Hubbard County tac records on the day the easement is conveyed. Any transference of this easement will require County Board approval.

This easement is germane only to the above-described parcel. Any land, through subdivision or addition to the property to which the easement was originally granted, being added or subtracted, is/are not granted the rights of the easement without first requesting an amendment from Hubbard County.

(Lohmeier Aff, Ex 10). The Akiing easement is substantially similar. (Lohmeier Aff. Ex 15).

The easements differ from the resolutions adopted by the County Board in that the resolutions do not include the limiting language regarding transfer of the easement. (Lohmeier Aff, Ex 9).

However, Hubbard County Land Commissioner Mark Lohmeier asserts that the easement he prepared for the County Board in advance of the LaDuke meeting included the language requiring County Board approval for any transfers of the easement. (Lohmeier Aff. ¶17).

From Plaintiffs' perspective, the language of the easement and the surrounding circumstances establish that the easement was intended to be appurtenant: the plain language of the easement allows Plaintiff to transfer to her heirs and assigns; Plaintiff LaDuke paid the full,

appraised value of the easement; the County Board resolution did not include the language limiting transfer of the easement, but listed other conditions (Lohmeier Aff. Ex 8); and there is no evidence in the record to support a finding that Plaintiff LaDuke was aware of the language limiting transfer of the easement when the resolution was adopted by the County Board.

Defendants point to different facts in support of a conclusion that the easement was intended to be in gross: the easement was granted to Plaintiff LaDuke individually and not to the property; Hubbard County has a policy that transference of any easement granted by the County across County property may only be transferred with the approval of the County Board; the language requiring County Board approval for any transfer was included in the easement given to Plaintiff LaDuke; and Plaintiff LaDuke recorded the easement with the limiting language included in the easement.

Plaintiffs make an additional argument that even if Defendant's prevailed on the argument that the easement is in gross, Defendant's requirement of consent to transfer is an unlawful restraint on alienation. If, as Defendant's allege, the easement was in gross, it was essentially a revocable license. *Chicago & N.W. Transp. Co. v. City of Winthrop*, 257 N.W.2d 302, 304 (Minn.1977). Even if the easement is appurtenant, Defendants can still place reasonable conditions on the easement because the granting of an easement is not a relinquishment of the grantor's interest in the land. The situation is like a contract for deed where the seller retains an interest in the property contingent upon the buyer's satisfaction of the contract. As Plaintiffs acknowledge in their reply memorandum, a contractual restriction on transfers is valid during the period when the purchaser does not have full title and the seller retains a legal interest in the property. (P. 13). The same is true where easements are involved. The servient estate retains a

legal interest in the property and the easement holder never has full title. Therefore contractual restrictions on transfers are valid.

There are factual disputes. The disputed facts are material to the determination of whether the easement was appurtenant and could be transferred by Plaintiff LaDuke or Akiing or whether it was an easement in gross that was personal to LaDuke or Akiing and could be revoked by Defendant Hubbard County. Because these factual disputes exists, the nature of the easement is something to be decided at trial.

(B) Whether an easement is constitutionally required due to a prior road assessment lien

In 1914 Hubbard County assessed a lien against the property for construction of a road that became Plaintiffs argue that the road lien is only constitutional if Plaintiffs can use and the only way Plaintiffs can access from the property is over what is now the easement. In support of this argument, Plaintiffs cite the Minnesota Constitution, which provides that the only properties that may be assessed for local improvements are those that are “benefited thereby,” Minn. Const. Art X, § 1, and *Murray v. Smith*, 136 N.W. 5, 6, (Minn. 1912), in support of the position that county highway construction assessments are only constitutional if the properties assessed receive a “special benefit” from the highway, which is defined as the owner having access to the highway. *Id.* at 7.

But *Murray v. Smith* did not hold that only roads that border roads are specially benefitted by those roads. *Id.* at 495 (rejecting legal decisions that permit assessment of lands on a fixed sum per acre basis or limiting assessments to lands bordering roads). *Murray* specifically recognized the benefits of rural farmers having access to highways even when their property was not adjacent to the new road. *Id.* at 494.

In addition to pointing out the lack of authority in support of Plaintiffs' position, Defendants argue that road assessors can assess non-abutting properties on the theory that access to the road enhances the property's utility and value. Citing Minn. Stat. § 429.051 and *Quality Homes, Inc. v. Village of New Brighton*, 183 N.W.2d 555, 559-60 (Minn. 1971). *Quality Homes* is consistent with *Murray* in that neither limits assessments to properties abutting the roadway to be assessed. Accordingly, Plaintiffs are unlikely to prevail on this particular claim.

(C) Whether Plaintiffs have an easement by necessity

Plaintiffs argue they have an easement by necessity. The elements of an easement by necessity are:

- (1) separation of title;
- (2) the use that gives rise to the easement is so long and continued that it shows it was intended to be permanent; and
- (3) the easement is necessary to the beneficial use of the land.

Niehaus v. City of Litchfield, 529 N.W.2d 410, 412 (Minn. App. 1995). “[A]n implied easement must be determined at the time of severance, and a subsequent change of conditions will not defeat or create an implied easement.” *Id.* (quotation omitted). The party asserting an easement by necessity has the burden of proving that necessity existed at the time of severance. *Id.* Implied easement is an equitable doctrine. *Lake George Park, LLC v. IBM Mid-America Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998).

Plaintiffs argue that separation of title occurred in 1902 “when the property was severed from the other portions of Section 26.” (Plaintiffs Memorandum in Support of Motion for Temporary Injunction, p. 12). But as Defendants point out, the County parcel is part of Section 35, calling into question whether the two parcels were ever under common ownership. In addition, Plaintiffs have not shown that at the time of severance the use giving rise to the

easement had been so long and continued that it was intended to be permanent. Thus, Plaintiffs have failed to establish the first two elements of an easement by necessity.

The final element, the necessity of the easement, is the most important. But implied easements are determined by equitable considerations, and courts must look to the circumstances underling the claim to determine whether awarding the easement would be an equitable result. Here, Plaintiff Switchboard should have been aware of the Hubbard County policy requiring County approval for the transference of easements. Not only had the policy been enacted by the County Board years earlier, but Akiing's easement included the requirement that the County Board approve any transference of the easement. Thus, Plaintiff Switchboard was, or should have been aware that an easement was available by seeking County Board approval and the easement granted by the County Board would include the same restriction as the easements granted to Plaintiff LaDuke and Akiing. Given the availability of an express easement this Court has a difficult time envisioning how an award of an implied easement, which would presumably be free of the restrictions included in the County-granted express easement, would be an equitable result.

Given the uncertainty surrounding Plaintiffs' claim of an implied easement, it is unclear whether Plaintiffs would prevail on this claim.

(D) Defendants took possession of servient parcel with constructive notice of

Plaintiffs' easement

If a party has "actual, constructive, or implied" notice of an easement across its property when acquiring that property, the party is burdened by the easement. *Levine v. Twin City Red Barn No. 2, Inc.*, 207 NW.2d 739, 742 (Minn. 1973).

Plaintiffs argue that Defendant Hubbard County had actual notice of the easement because the County was involved in planning and road construction in 1914 and assessed the property for that construction, the County had actual knowledge of the easement. But the problem with that argument is that there is no evidence the easement existed at that time. Plaintiffs' arguments regarding notice are based entirely on speculation about what may have occurred in the past rather than upon evidence in the record. Accordingly, Plaintiffs are unlikely to prevail on the claim that Defendants took possession of the servient parcel with constructive notice of Plaintiffs' easement

(E) Whether Defendants' resolution granted Plaintiff LaDuke a statutorily required cartway

Plaintiffs argue that the Hubbard County Board's act of granting a resolution awarding her an easement is the functional equivalent of establishing a cartway pursuant to Minn. Stat. § 164.08.

Plaintiff is not entitled to a cartway because she has not filed a petition for a cartway as required by law. *Scheffler v. Lake Edward Township*, 2021 WL 2530635 (Minn.App. June 21, 2021). Although an unpublished case, *Scheffler* correctly observes “the cartway statute expressly requires a “petition.” Citing Minn. Stat. §164.08, subd. 2(a) and that the petition must “contain a description of the [cartway],” “the names of the owners of the land, if known, over which such [cartway] is to pass,” the “point of beginning, general course, and termination” of the cartway, and “a statement of the purpose and necessity for establishing … the [cartway].” Minn. Stat. § 164.07, subd. 1; see also Minn. Stat. § 160.02. *Id.* at * 2.

Because Plaintiff LaDuke's request for an easement was not a petition to establish a cartway, plaintiff did not receive a cartway by virtue of the Hubbard County Board's resolution granting her an easement and Plaintiffs cannot prevail on this claim.

(4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, state and federal;

There are competing interests in this case. From Plaintiffs' perspective this case is about the ability of private property owners to access and use their property without governmental interference, particularly where the government is seeking to achieve questionable political goals through facially lawful means even those means are pretextual. From Defendants' perspective it is about the government interest in enforcing ordinances. Defendants also express concern that judicial branch involvement in this dispute implicates the separation of powers.

“The framers believed the most dangerous power was the power to enact laws restricting the people’s liberty.” *Gundy v. United States*, 139 S.Ct. 2116, 204 L.E.d.2d. 522 (2019) (Alito, J. concurring) (*citing* The Federalist No. 48, James Madison). “The judiciary has a constitutional duty to safeguard individual liberty.” *Department of Homeland Security v. Thuraissigaiam*, 140 S.Ct. 1959, 1994, 207 L.Ed.2d 427 (2020) (Sotomayor, J. dissenting). “Judicial review is deeply rooted in US history and separation of powers and is used to guard against arbitrary government.” *Thryv, Inc. v. Click-To-Call Technologies, LP*, 140 S.Ct. 1367, 206 L.Ed.2d. 554 (2020) (Gorsuch, J. dissenting).

Here, the parties have articulated facially legitimate positions worthy of consideration from a public policy perspective such that this factor does not favor either party.

(5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

The administrative burden of the injunction is negligible.

III. SUMMARY JUDGMENT

Plaintiffs' complaint has three counts: (1) declaratory relief as to the easement; (2) declaratory and injunctive relief regarding the blockade notice; and (3) declaratory and injunctive relief regarding citations issued for the purported violations of Hubbard County Ordinance 36. The second and third counts of the complaint are dependent upon Plaintiffs' prevailing upon the first count, which requires a finding that Plaintiffs have some form of easement over and across the Hubbard County tax-forfeited land. Whether an easement exists is dependent upon disputed issues of material fact. Accordingly, an award of summary judgment on any of Plaintiffs claims for relief cannot be granted at this time.

The present ruling is limited to the narrow issues presented and is based upon the record as it currently exists. The parties are encouraged to reach a reasonable resolution of this case. .

J.M.A.