

NO. A05-1029

State of Minnesota
In Court of Appeals

Minnesota Center for Environmental Advocacy,

Appellant,

v.

City of St. Paul Park, R. Gordon Nesvig,
and D.R. Horton, Inc.,

Respondents.

BRIEF OF RESPONDENT CITY OF ST. PAUL PARK

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STATEMENT OF THE ISSUES

Issue: Was there substantial evidence to support the City's decision to adopt the final AUAR when analysis of cumulative effects beyond the boundaries of the AUAR was not required under the Environmental rules and even if required, the record demonstrates that cumulative effects beyond the AUAR boundaries were studied?

The District Court, Honorable J.E. Cass presiding, held that the City's decision was rationally based, was not arbitrary or capricious, that the City was not required to analyze the cumulative effects beyond the boundaries of the AUAR and that while the analysis was not required, substantial evidence existed to show that the City studied the cumulative effects beyond the AUAR boundaries. The District Court granted the City's motion for summary judgment.

Apposite Cases: Minnesota Center for Env'tl. Advocacy v. Minnesota Pollution Control Agency, 644 N.W.2d 457 (Minn. 2002); White v. Minnesota Dep't of Natural Res., 567 N.W.2d 724 (Minn. Ct. App. 1997)

INTRODUCTION

The Minnesota Center for Environmental Advocacy ("MCEA" or Appellant) seeks to challenge the City of St. Paul Park's ("City") adoption of the final Alternative Urban Areawide Review ("AUAR") as arbitrary and capricious. Because the City's decision was rational and adequately supported by the record, the City respectfully requests that this Court affirm the District Court's grant of summary judgment in favor of the City.

The City is relying on and will not repeat the Statement of the Case and Statement of Facts in the brief of Respondents D.R. Horton, Inc. ("Horton") and R. Gordon Nesvig ("Nesvig"). The City joins in and supports the arguments made by Respondents Horton and Nesvig in their brief. The City will not be making a separate argument in response to the Brief of Amicus Curiae, the Minnesota Department of Natural Resources, and instead directs the Court to the brief of Respondents Horton and Nesvig.

ARGUMENT

I. Standard of Review

On appeal from a summary judgment, the Court of Appeals is to determine whether any genuine issue of material fact exists and whether the District Court erred in applying the law.¹ Offerdahl v. University of Minnesota Hospitals and Clinics, 426 N.W.2d 425, 427 (Minn. 1998).

The Court of Appeals “attaches a presumption of correctness to the agency’s [RGU’s] decisions and shows deference to an agency’s [RGU’s] conclusions in the area of its expertise.” White v. Minnesota Dep’t of Natural Resources, 567 N.W.2d 724, 730 (Minn. Ct. App. 1997). Therefore, “[w]hen reviewing the agency’s [City’s] determination, the Court independently examines the agency’s [RGU’s] record and decision and need not defer to a lower court’s decision on the matter.” Id. The City’s decisions may be reversed “only when they reflect an error of law, the findings are arbitrary and capricious, or the findings are unsupported by substantial evidence.” Id. The Court has found that “substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Id. An agency [RGU’s] decision is arbitrary and capricious if the agency:

(a) relies on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that was counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency’s expertise.

¹ The MCEA does not allege any fact disputes.

Id. “The role of a court in reviewing the sufficiency of an agency’s consideration of environmental factors is a limited one.” Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency, 644 N.W.2d 457, 465 (Minn. 2002). If the City engaged in reasoned decision making, the Court shall affirm, even though it may have reached a different conclusion than the factfinder. White, 567 N.W.2d 724.

II. The District Court properly held that the City’s decision to adopt the final AUAR as adequate, was rational and supported by the record.

The rules governing AUARs designate the RGU as the entity responsible for adopting the final AUAR and mitigation plan. The final AUAR and mitigation plan are to be adopted unless they are found to be inadequate. The AUAR and mitigation plan are inadequate only if “they contain inaccurate or incomplete information necessary to the identification and mitigation of potentially significant environmental impacts or that the proposed plan for mitigation will be inadequate to prevent the occurrence of potentially significant environmental impacts.” Minn. R. 4410.3610, subp. 5H. Here, the City, acting as the RGU, determined that the AUAR contained the information necessary for the identification and mitigation of potential environmental impacts and that the Mitigation Plan is adequate to prevent the occurrence of potential environmental impacts. Substantial evidence exists in the record to support the City’s decision. The City’s decision was reasonable and must be affirmed.

Appellant is challenging the District Court’s affirmance of the City’s reasonable decision based on its claim that the AUAR did not study cumulative impacts. Because there is more than a scintilla of evidence in the record demonstrating that the AUAR

analyzed the cumulative impacts which must be studied, Appellant's challenge is inadequate to overcome the presumption of correctness attached to the City's decision. The District Court's grant of summary judgment must be affirmed.

- A. The AUAR by its very nature is an analysis of cumulative impacts of related development over a geographic area consisting of 667 acres.

Appellant, in an attempt to downplay the extensive studies and analysis completed as part of the AUAR process, mischaracterizes the City's position by claiming that the City asserts "EQB Guidance particular to AUARs does not require cumulative impacts analysis." Appellant's claim appears to be based on the fact that in response to the cumulative impacts item, the AUAR cites to the EQB guidelines for cumulative impacts for AUARs in effect at the time of the subject AUAR which provides: "[t]his item does not require a response for an AUAR since the entire AUAR process deals with cumulative impacts from related developments within the AUAR area." Affidavit of Debra Schneider dated December 20, 2004, Exhibit D, p. 6.² While the EQB guidelines state that cumulative impacts do not require a response, it provides that it is inherent in an AUAR that the cumulative impacts of the developments within the AUAR will be studied. The City has not and is not asserting that a cumulative impact analysis is not required under the AUAR within the AUAR area. Appellant's assertion of this claim

² In order to avoid unnecessary duplication and re-submission of the voluminous exhibits submitted below, citations in the City's brief are to the materials submitted to the District Court as part of the parties motions for summary judgment.

ignores the very nature of the AUAR and is simply an attempt to re-assert its challenge to the use of an AUAR for a 667 acre geographic area owned by one landowner.³

Despite dismissing its challenge to the use of an AUAR for a geographic area owned by a single landowner, Appellant continues to insist that the City's adoption of the final AUAR as adequate was arbitrary and capricious. Because substantial evidence exists in the record to support the City's decision, the District Court's order upholding the City's decision must be affirmed. The District Court properly concluded that the AUAR contains extensive analysis of possible environmental effects that could result from three different development scenarios, containing various stages of development. This analysis included the possible effects of a phased development of single family housing, multi-family housing and commercial development within the 667-acre AUAR study area. The AUAR also analyzed the possible effects of these development scenarios on river ecology, wild life migration, bald eagles, river mussels, water quality and numerous other topics. In short, the AUAR studied the cumulative impacts of the development scenarios on the environment.

The AUAR identified the "endangered, threatened or special concern species, rare plant communities or other sensitive ecological resources... on or near the site." Second Affidavit of Amanda K. Morken dated December 20, 2004, Exhibit 17 at 5673. In accordance with the AUAR requirements, the AUAR discussed the possible impacts to

³ The MCEA early in this case asserted that the use of an AUAR was not appropriate for a one developer, multi-faceted project. Realizing the error of the assertion, that claim was dismissed early in this litigation.

these sensitive ecological resources and set forth a specific mitigation plan to address any potential impacts. Second Morken Aff., Ex. 17 at 5673-75; 5737-39.

Similarly, the AUAR identified the fish and wildlife resources and habitats on or near the site. *Id.* at 5905-5955; 5668-5675. The AUAR included a natural resources survey studying the vegetative and wildlife features present in the area. *Id.* at 5905-5955. The natural resources survey was conducted by Applied Ecological Services. The AUAR also included a detailed discussion of the numerous wildlife habitats, including short grassland, tall grassland, savanna, woodland and wetland habitats present in the AUAR area. As required, the potential impacts of development on all fish and wildlife were discussed in detail, including but not limited to the effects development may have on each of the wildlife habitats and wildlife migration. *Id.* at 5668-5675. Pursuant to the environmental rules, the AUAR contains specific requirements and limitation on any future development to mitigate such effects. (Mitigation Plan). “All riverine habitat and about 80 percent of the wooded, wetland and prairie habitat will be preserved.” *Id.* at 5672. The preservation and setback requirements placed on any future development are designed to preserve the least disturbed, highest quality areas. *Id.* Previously disturbed agricultural areas are to be converted to developed uses. *Id.* Additionally, in response to comments received, the bluff setback was increased to 100 feet to provide additional protection for the bluff and to mitigate adverse effects on wildlife. *Id.* at 5674.

Not only does the Mitigation Plan mitigate potential negative effects, it also enhances and restores previously damaged areas. The AUAR provides for the restoration of approximately 50 acres of woodland, forests and oak savanna and 15-25

acres of wetland. *Id.* at 5766. The Mitigation Plan also provides for the elimination and clean up of the “manure lagoon” on the property near the Mississippi River, created by drainage of the waste from two stockyards originally constructed between 1874 and 1887. Moreover, once clean up is complete, the Mitigation Plan proposes to restore the area as wetland. *Id.* at 5676-5677, 5740-41.

The potential physical impacts to water resources of future development within the 667 acre AUAR area were also studied. The AUAR identifies existing water resources and discusses the possible impact to the water resources from future development. *Id.* at 5676-79. The mitigation plan specifically requires that the stormwater management system include infiltration basins to enhance groundwater recharge. *Id.* at 5741, 5744. This stormwater management will also improve water quality in the bay and Mississippi River. *Id.* at 5744-75. In order to mitigate potential impacts to seeps and springs, new municipal wells will be required to be sited at appropriate locations to ensure that “the cone of influence/drawdown area does not impact existing ... seeps.” *Second Morken Aff.*, Ex. 15 at 5576 and Ex. 17 at 5742.

Therefore, the cumulative effects of related development over a wide geographic area for multiple projects or actions were studied as part of the AUAR process. *Second Morken Aff.*, Ex. 17 at 5625-6080. Because the AUAR studied the cumulative impacts of “related developments within the AUAR area,” the District Court properly concluded that the City’s adoption of the final AUAR was not arbitrary or capricious. The District Court’s Order should be affirmed.

- B. The AUAR is adequate as there is no requirement that the AUAR study cumulative impacts beyond the project boundaries.

The District Court properly held that the City's adoption of the final AUAR as adequate was not arbitrary and capricious because the environmental rules and guidelines in place at the time of the adoption did not require an analysis of cumulative impacts beyond the project boundaries.⁴ Contrary to Appellant's assertion, the change in the guiding documents after the City's adoption of the AUAR does not make the City's adoption of the final AUAR arbitrary or capricious. The EQB participated in the City's review of the area to be studied for environmental impacts and did not require that a larger geographic area or that a "cumulative impact" beyond the boundaries of the AUAR be studied. The EQB guidelines in place at the time of the City's adoption of the final AUAR did not require an analysis of the cumulative impacts beyond the boundaries of the AUAR. *Schneider Aff.*, Ex. D p. 6. Moreover, neither the environmental rules nor case law required such an analysis. The AUAR fully complied with the rules and guidelines in place at the time of the adoption and the District Court properly held that the City's adoption of it as adequate was not arbitrary or capricious.

Additionally, Appellant relying on Trout Unlimited v. Minnesota Dept. of Agriculture, 528 N.W.2d 903 (Minn. Ct. App. 1995) and Dead Lake Association, Inc. v. Otter Tail County, A04-717, 2005 Minn. App. LEXIS 123 (February 1, 2005) (App. Appendix 242-247) argues that case law compels analysis of cumulative impacts beyond

⁴ As set forth in the brief of Respondents Horton and Nesvig, the City as the RGU was responsible for selecting the boundaries of the AUAR and the City's selection of the boundaries is entitled to judicial deference.

the AUAR boundaries. Appellant's reliance on Trout Unlimited and Dead Lake is misplaced. While both cases affirm the settled position that in determining whether a project has the potential for significant environmental effects, the cumulative potential effects of related or anticipated future projects must be analyzed, neither case dealt with the adequacy of an AUAR. Additionally, contrary to Appellant's claim, the court in Dead Lake did not order an analysis of cumulative effects beyond what was expected from the project at issue. The court stated that the County's decision not to require an EIS was arbitrary and capricious because the County, without studying the effects of increased boat traffic from the proposed project, simply stated that it could mitigate any adverse effects by implementing and enacting boating restrictions on the lake. Dead Lake 2005 Minn. App. LEXIS 123, *17, App. Appendix p. 246. The Court pointed out that "we fail to see how the county will be able to impose any kind of meaningful boating restrictions with plans for more than 100 new boat slips on an extremely shallow lake when the effects of the increased boating activity have not yet been meaningfully studied..." Id. Similarly, in Trout Unlimited, the court stated that a negative declaration on the need for an EIS was arbitrary and capricious because the RGU deferred or mitigated regulation of the significant impact to a stream to the future permitting process and failed to take into account a known plan of an adjacent property owner to irrigate. Trout Unlimited, 528 N.W.2d 903. In both cases, the RGU failed to take into account known future projects. Appellant has not and cannot present any evidence of other known future projects that the City failed to take into account.⁵

⁵ While not conceding that NEPA cases are applicable to the analysis of the City's

- C. Even though not required, the AUAR contained an analysis of cumulative impacts beyond the boundaries of the Project.

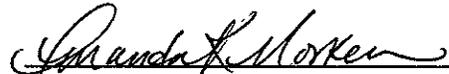
While not required to do so the AUAR did consider cumulative impacts occurring outside of the AUAR area. As discussed in more detail in the brief of Respondents Horton and Nesvig, this study included consideration of the effects of development on migratory birds, regional water sources and storm water runoff to the Mississippi River. Second Morken Aff., Ex. 17 at 5672, 5674, 580-5683, 5741-5743, 5811-5815, 5974-5980, 5696-5700. Thus, even if the City were required to study cumulative effects outside of the AUAR boundaries, substantial evidence exists in the record to support the City's decision. The City's decision must be affirmed.

CONCLUSION

Because the City's decision to adopt the final AUAR as adequate was rational and supported by the record, the City respectfully requests that the District Court's Order be affirmed.

decision under the MEPA rules, the NEPA cases cited by Appellant to support its claim that the City was required to study cumulative impacts beyond the AUAR boundaries all dealt with the failure to study the impacts of *known* future or contemporaneously approved projects. There is no allegation of such a failure here.

Dated: August 1, 2005



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