

A06-1069

NO. A06-0378

State of Minnesota
In Court of Appeals

Watab Township Citizens Alliance,
Chuck B. Wocken, Clare M. Wocken, Barbara Wocken, Ernie Kruger,
Duane Popp, Laura Brand, Janice Buermann, Gary Buermann, Douglas J. Boser,
Jason A. Zwilling, Brian Zwilling, John Haus, Janice Haus, Barb Kirchner,
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Tanya R. Boser, David Johnson, Estelle Johnson, Roger Carstensen, Christine Carstensen,
Shawn Corrigan, LouAnn Corrigan, Marilyn C. Popp, Kathatine Allie, Penny Kassier,
Dale Behrend, John Waseka, Marla Waseka, Bryan Carstensen,

Relators,

vs.

Benton County Board of Commissioners, et al.,

Respondents.

RELATORS' BRIEF AND APPENDIX

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES.....	v
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
ARGUMENT	11
I. STANDARD OF REVIEW ON THIS APPEAL	11
II. WHERE AN INADEQUATE ENVIRONMENTAL REVIEW TOOK PLACE ON THE PROJECT, THE COURT OF APPEALS SHOULD REVERSE AND VACATE THE PLATTING AND REZONING DECISIONS	12
III. THE RELEVANT COUNTY ORDINANCE REQUIRES A PLAT APPLICATION TO MEET THE MINIMUM STANDARDS OF THE ORDINANCE AND TO FOLLOW THE TWO-STEP PLAT APPROVAL PROCESS. THE ROAD SERVING THE PROJECT DOES NOT MEET MINIMUM SAFETY STANDARDS. NO TWO-STEP APPROVAL PROCESS TOOK PLACE. RESPONDENT COUNTY ARBITRARILY APPROVED THE PLAT AND THE REZONING.....	16
CONCLUSION	21

TABLE OF AUTHORITIES

	Page
CASES	
<u>BECA of Alexandria, LLP v. County of Douglas</u> 607 N.W.2d 459 (Minn.App. 2000)	17
<u>Brookfield Trade Ctr., Inc. v. County of Ramsey</u> 584 N.W.2d 390, 393 (Minn. 1998)	11
<u>Boubelik v. Liberty State Bank</u> 553 N.W.2d 393, 402 (Minn. 1996)	11
<u>City of Mounds View v. Johnson</u> 377 N.W.2d 476 (Minn.App. 1985)	19
<u>Dead Lake Ass'n, Inc. v. Minnesota Pollution Control Agency</u> Case No. A04-483 (Minn.App. 2005)	13, 14
<u>Frank's Nursery Sales, Inc. v. City of Roseville</u> 295 N.W.2d 604, 608 (Minn. 1980)	11
<u>In re Winona County Mun. Solid Waste Incinerator,</u> 442 N.W.2d 344 (Minn.App. 1989), rev'd on other grounds, 449 N.W.2d 441 (Minn. 1990)	v, 11, 13
<u>Minnesota Center for Environmental Advocacy v. Big Stone County Bd. Of Com'rs</u> 638 N.W.2d 198 (Minn.App. 2002)	14
<u>National Capital Corp. v. Village of Inver Grove Heights</u> 222 N.W.2d 550, 301 Minn. 335 (Minn. 1974)	v, 11, 16, 17
<u>Picha v. County of McLeod</u> 634 N.W.2d 739 (Minn.App. 2001)	17
<u>Pope County Mothers v. Minnesota Pollution Control Agency</u> 594 N.W.2d 233, 235 (Minn.App. 1999)	12
<u>Property Research and Development Co. v. City of Eagan</u> 289 N.W.2d 157 (Minn. 1980)	v, 16
<u>PTL, L.L.C. v. Chisago County Bd. of Comm'rs</u> 656 N.W.2d 567, 571 (Minn. App. 2003)	17

<u>Rose Cliff Landscape Nursery, Inc. v. City of Rosemount</u> 467 N.W.2d 641 (Minn.App. 1991)	v, 17
<u>Save Lantern Bay v. Cass County</u> File No. C5-03-551, Cass County District Court (December 2005)	14
<u>Save Lantern Bay v. Cass County Planning Com'n</u> 683 N.W.2d 862 (Minn.App. 2004)	19
<u>Semler Constr., Inc. v. City of Hanover</u> 667 N.W.2d 457 (Minn.App.2003)	20
<u>Sunrise Lake Association, Inc. v. Chisago County Bd. Of Com'rs</u> 633 N.W.2d 59 (Minn.App. 2001)	17
<u>SuperAmerica Group, Inc. v. City of Little Canada</u> 539 N.W.2d 264, 266 (Minn. App. 1995), <i>review denied</i> (Minn. Jan. 5, 1996)	17
<u>Trout Unlimited v. Minn. Dep't. of Agric.</u> 528 N.W.2d 903, 907 (Minn.App. 1995), <i>review denied</i> (Minn. Apr. 27, 1995)	12
<u>Yang v. County of Carver</u> 660 N.W.2d 828 (Minn.App. 2003)	17

STATUTES

Minn. Stat. § 116D.04, subd. 2a (2004)	v, 12
Minn. Stat. § 116D.04, subd. 2b (2004)	v, 11
Minn.Stat. Ch. 373	4
Minn.Stat. Sec. 373.02	4

RULES

Minn. R. 4410.1700, subp. 1 (2003)	12
Minn.R. 4410.3100	13
Minn.R. 4410.3100, subp. 1	v, 11

OTHER AUTHORITY

Benton County Code4

Benton County Code, Section 10.84, 20

Benton County Code, Section 10.11.14, 5, 18

Benton County Code, Section 10.11.25

Benton County Code, Section 10.13.44, 18

Benton County Code, Section 11.85

STATEMENT OF ISSUES

- I. STANDARD OF REVIEW ON THIS APPEAL.
- II. WHETHER WHERE AN INADEQUATE ENVIRONMENTAL REVIEW TOOK PLACE ON THE PROJECT, THE COURT OF APPEALS SHOULD REVERSE AND VACATE THE PLATTING AND REZONING DECISIONS?

The Benton County Board refused to require an EAW on the Project based on a valid Citizen Petition and then granted plat and rezoning approval based on the inadequate environmental review.

Minn. Stat. § 116D.04, subd. 2a(c).

Minn. Stat. § 116D.04, subd. 2b.

Minn.R. 4410.3100, subp. 1.

In re Winona County Mun. Solid Waste Incinerator, 442 N.W.2d 344 (Minn.App. 1989), rev'd on other grounds, 449 N.W.2d 441 (Minn. 1990).

- III. THE RELEVANT COUNTY ORDINANCE REQUIRES A PLAT APPLICATION TO MEET THE MINIMUM STANDARDS OF THE ORDINANCE AND TO FOLLOW THE TWO-STEP PLAT APPROVAL PROCESS. THE ROAD SERVING THE PROJECT DOES NOT MEET MINIMUM SAFETY STANDARDS. NO TWO-STEP APPROVAL PROCESS TOOK PLACE. WHETHER RESPONDENT COUNTY ARBITRARILY APPROVED THE PLAT AND THE REZONING?

The Benton County Board approved the amended preliminary plat, rezoning and final plat all on January 17, 2006.

Rose Cliff Landscape Nursery, Inc. v. City of Rosemount, 467 N.W.2d 641 (Minn.App. 1991).

Property Research and Development Co. v. City of Eagan, 289 N.W.2d 157 (Minn. 1980).

National Capital Corp. v. Village of Inver Grove Heights, 222 N.W.2d 550, 301 Minn. 335 (Minn. 1974).

STATEMENT OF THE CASE

Relators bring this appeal to the Minnesota Court of Appeals from the January 17, 2006 decisions of Respondent Benton County Board to approve the amended preliminary plat, rezoning and final plat ("Approval") on the application of Respondent Jarnot for the Lake Andrew Plat in Watab Township, Benton County ("Project"). The Project is a relatively high-density rural residential real estate and housing development in the middle of agriculturally zoned property miles out in the country. Public services to this agricultural area are, at best, limited. The small, inadequate town road out to the development received criticism from the township, county engineer, and residents. Respondent County simply deferred the issue, with no party taking financial responsibility for correcting the obvious road hazard. There is no public water or sewer. Inadequate ground water is a major issue. The watershed is on the list of impaired waters.

Relators initiated the instant appeal of the January 17, 2006 Approval by obtaining a writ of certiorari from the Court of Appeals and serving same upon Respondents. By this appeal, Relators first maintain that Respondent County erred as a matter of law in making the January 17, 2006 Approval based upon an inadequate environmental review. The Citizen petition identified serious issues related to the inadequacy of groundwater and the further loading of pollutants on the impaired surface waters, among other things. The environmental review process provides a process and procedure to address these issues before the project receives all approvals, which was not done in this case. The rezoning improperly creates a small island of non-conformity out in an agriculturally zoned area. The Project is not near town so that orderly development would normally

proceed to this location. Relators also maintain that the Approval of January 17, 2006 was arbitrary and capricious in any event because the Project did not meet the minimum standards of the County Ordinances for the protection of public safety and did not follow established platting procedure. The Project is a relatively high-density residential development located in an agricultural area miles from any urban or suburban area, with inadequate roads serving the area, and with environmental concerns for adequate water and for contribution to an impaired waterway, among other things. Because of the rush of the County to approve the Project prior to the expiration of a year following major changes in the Project, the Project never underwent any meaningful final plat review. The Citizens appreciate this review by the Court of Appeals.

For the reasons set forth herein, Citizens respectfully request that this Court of Appeals reverse and vacate the Approval provided to the Project on January 17, 2006. Relators maintain in this and the consolidated appeal, Case No. A06-1069, that the EAW should take place first on this Project.

STATEMENT OF FACTS

The factual background on this appeal is set forth in the administrative record that was before Respondent County at the time of the decisions on January 17, 2006. This complete administrative record, including minutes of meetings and transcripts, is available for review by this Court of Appeals and is consolidated for hearing with the appeal of the environmental review decision, Court of Appeals Case No. A06-1069. The following is a summary of pertinent facts from the administrative record for purposes of the appeal of the amended preliminary plat, rezoning and final plat decisions.

A. **The Parties.** 1. **Appellants.** Watab Township Citizen Alliance is a non-profit organization composed of citizens of Watab Township who reside near or own property in close proximity to the proposed Project. The Citizens petitioned for environmental review on the Project. The Citizens rely upon private wells for drinking water and other household uses. They know from their own experience and from the Minnesota Department of Natural Resources ("DNR") that the water quantity in the area is limited and that significant new uses have the potential to cause interference with their wells. The Citizens expect that the new development that the Project represents will set up a direct conflict over available resources, such that the existing residents will face difficulty in obtaining water for everyday household use. The Citizens were also concerned with wastewater discharges from the Project to an adjacent wetland that is already a listed impaired waterway.

The Citizens expressed their concerns to Respondent County during the planning and zoning review of the Project and asked Respondent County to deny plat approval, which concerns included the inadequacy of the small town road to the Project, the lack of public services and the creation of a small area of high-density non-conformity in the middle of an agricultural area miles out in the country. The Citizens are concerned that the road does not meet minimum standards. The Town Board and County engineer both noted the substandard nature of the road, with the engineer indicating that he could not state it was safe. Respondent County acknowledged the hazard, but went ahead with approval in any event without any municipality or the Project taking responsibility for curing the substandard road conditions to this remote subdivision. Moreover, in their rush

to give final plat approval within one year of the preliminary plat approval where the Project required major revisions and an amended preliminary plat, there was no meaningful final plat approval of the final build-out of the Project where Respondent County gave both preliminary and final plat at the same meeting. No construction had taken place for the final plat review.

2. Respondent County. Respondent County Board is a publicly elected board, which exercises the powers of the County of Benton pursuant to Minn.Stat. Sec. 373.02. Respondent Benton County, Minnesota (“County”) is a political subdivision of the State of Minnesota, created and existing pursuant to Minn.Stat. Ch. 373. The County adopted the Benton County Development Code (“Code”) to address land use issues. The County Board makes decisions on preliminary plat, rezoning and final plat, following the recommendation of the planning commission.

Section 10.8 of the Code provides for a preliminary and final plat approval process, contemplates a period of time between preliminary and final plat approval for build-out of improvements and requires final plat approval within 1 year of preliminary approval. Section 10.8.1 of the Code provides:

“Approval of a preliminary plat is an acceptance of the general layout as submitted, and indicates that the subdivider may proceed toward final plat approval in accordance with the terms and provisions of this ordinance. However, approval of the preliminary plat in no way assures approval of the final plat.”

Section 10.13.4 also provides the process for final plat approval. Under this section, the final plat shall incorporate all recommendations made by the County engineer regarding roads. Section 10.11.1 of the Code sets forth the general requirements for a plat

approval, including for the review and approval of roads and streets within the plat and in the vicinity of the development. Section 10.11.1(2) provides:

“The arrangement, character, extent, width, and location of all streets shall be considered in their relation to existing and planned streets, to reasonable circulation of traffic, to topographic conditions, to runoff of storm water, to public convenience and safety, and in their appropriate relation to the proposed uses of the land to be served by such streets.”

Section 10.11.2 provides minimum standards for streets as part of the subdivision.

Section 11.8 provides for rezoning of lands upon application of the landowner.

3. Respondent Jarnot. The Project, described as the “Lake Andrew Plat,” consists of 75.3 acres located on parts of the N ½ SE ¼ and S ½ NE ¼, Section 26, Watab Township, Benton County, Minnesota. The Project Site is on a wetland approximately 1.5 miles east of the Mississippi River. The site was originally zoned “A-2” Agriculture. Jarnot requested a zoning change to “R-3” Single Family and Multiple Dwelling Residence in the December 6, 2004 zoning map amendment application. As initially proposed, the Project site would consist of 61 residential housing lots. The wastewater treatment facility for the Project has a permitted and a physical capacity to serve 110 residential lots and would be constructed on the site, with the discharge from the facility initially designed to flow into an adjacent wetland and then on to the Mississippi River.

B. January 6, 2005 Planning Commission Denial. On January 6, 2005, the County planning commission met and held a public hearing on the Project. The minutes of the planning commission meeting are in the Appendix at RA 10-17. Planning director Chelle Benson presented the application for rezoning and preliminary plat approval, with the

minutes of this meeting documenting that "the township road would be an issue . . . There was a discussion about roads in the area . . . [the director] Chelle [Benson] stated that if the development doesn't directly affect the roadway the Engineer doesn't get involved." RA 12. Benson presented the waste water system as a surface water discharge system to the wetland and then on to the Mississippi River. While the Township initially supported the Project without an express condition, the Township officer at the planning commission meeting noted for the record that: "the township knows there is a problem with 5th Ave and it's needs to be upgraded." Citizens repeated these concerns with site-specific information. One resident, Doug Boser, "stated that 5th Ave NE is a very small road. He said that when he came before the planning commission to expand his business and it was denied. One of the main concerns he was denied was the road not being able to handle the traffic." The planning director Benson indicated that the County highway engineer would not review the Project because it did not abut a County road or highway. Others voiced concerns about the rezoning as spot zoning because of the small area of proposed non-conformity. The transcript of the proceedings before the planning commission is available to the Court of Appeals.

Following the public hearing, the planning commission voted unanimously to recommend to the County Board denial of the preliminary plat and rezoning on the Project. On January 7, 2005, Benson wrote a letter to Respondent Jarnot to confirm the recommendation to deny rezoning and preliminary plat approval. RA 18.

C. County Board Approves Preliminary Plat. On January 18, 2005, the County Board took up Respondent Jarnot's rezoning and preliminary plat requests. The Board received

an Agenda Item Request, which listed the background information on the Project and the planning commission recommendation to deny the applications. RA 19-20. The County Board minutes are filed herewith at RA 21-24. The transcript of proceedings is available to the Court of Appeals. Benson provided initial information to the Board, noted that the Project had not addressed "traffic, fire hazards and congestion of population and listed the reasons for the planning commission recommendation to deny approvals to the Project at the time. Again, at the public hearing the township official "acknowledged that the township recognizes there is a problem with 5th Avenue NE." Board Commissioner Soyka "stated his belief that this is a township road and if the township says the road is adequate, the county shouldn't become involved." A motion made and seconded to return the matter to the planning commission failed. "Gondeck [of the township] reiterated that the township cannot guarantee a road improvements schedule, which depends on budget." The County Board passed a motion to approve, conditioned upon a water test to test the draw down on the aquifer from the Project.

D. Environmental Review Process. On April 5, 2005 at their regular meeting, the County Board received the Citizen Petition on the Project for the environmental assessment worksheet ("EAW"). RA 26. The minutes of the April 5, 2005 meeting state that the County Attorney "clarified the standard is whether the project, in the Board's determination, poses the potential for significant environmental effects." This is the higher legal standard for an environmental impact statement ("EIS"). The County Board set a committee meeting for April 15, 2005 on the Citizen Petition and then held a committee of the whole meeting on Friday April 15, 2005. The transcript of the meeting

is available to the Court of Appeals. The meeting was not a public hearing. The Board did not take any public testimony. The County Board did have available to it the April 14, 2005 e-mail from the DNR stating that there is impact to an adjacent well. The minutes of the committee meeting are filed herewith as RA 29-32.

The County Board then met on April 19, 2005 and voted to deny the Citizen Petition and not require an EAW. The minutes of the April 19, 2005 meeting are filed herewith as RA 33-38. The transcript of the meeting of April 19, 2005 is available to the Court of Appeals. This decision is the subject of the consolidated appeal to this Court.

E. Application for final plat approval. On August 2, 2005, Respondent Jarnot submitted an application for final plat approval for 61 lots in an A-2 zone as rezoned to R-3. A copy of the application is filed herewith as RA 39.

F. Township Decision on Final Plat. On August 26, 2005, Watab Township sent a letter to the County "regarding their conditional approval of the final plat." RA 40. The Township stated as follows: "The Town Board agrees with the Benton County Planning Commission that 5th Avenue is inadequate to handle the volume of traffic that will most likely result from the development. The final plat is approved with the request to the County Board that Benton County provide the financial assistance to upgrade the road as needed because of your approval of this plat." RA 40.

G. Planning Commission Again Recommends Denial. On December 6, 2005, the County Planning Commission met to address approval of amended preliminary plat, rezoning and final plat on the Project. The County noted that the amendment to the preliminary plat took place because the MPCA had denied a sewage treatment permit to

the Project, had required moving the sewage treatment facility to a new location on the property and required a substantial change in the design so that the facility was a zero discharge facility that would qualify for a NPDES permit. In permitting, MPCA had required that no surface discharge could take place to the already impaired waterway. The developer presented to the planning commission regarding the Project. Several individuals spoke in opposition to the Project, including regarding the adverse environmental effects, spot zoning, and the inadequacy of the town road. The Planning Commission passed a motion to recommend denial of the amended preliminary plat. The Planning Commission listed the issues as failure to address the road, spot zoning, and well and septic concerns. The Planning Commission also passed motions to recommend denial of the final plat and rezoning.

H. County Board Approves Project. On January 17, 2006, the County Board met to discuss the Project. The minutes of the meeting are filed herewith at RA 48-57. The meeting took place by one day within 1 year of the now revised and amended project first coming to the Board for preliminary plat approval. The Project gave a presentation to the Board. Individuals spoke regarding their concerns on the Project. The entire transcript of the January 17, 2006 meeting is available to the Court of Appeals. The minutes of the County document that County engineer, Bob Kozel, stated as follows to the Board: “Kozel stated that while it would be within the realm of this road to carry additional traffic “on the pavement”, he cannot say that that it would be safe (i.e. existing encroachments, obstacles within the obstacle-free zone).” RA 51. Various citizens voiced concerns regarding the water appropriations permit, the volume of water to be

used by the Project, the inadequacy of the town road, impacts on wildlife, the capacity of the waste treatment facility as being over 100 units, and the lack of an EAW on the Project.

On January 17, 2006, the County Board passed a motion to accept the amended preliminary plat. The County Board passed a motion to grant the request to rezone the property from A-2 to R-3. The County Board also passed a motion to accept the final plat, with findings. The County Board took all of these actions within one year of the preliminary plat approval from January 2005. The Project had not completed any of the improvements as of January 2006.

I. The Instant Appeal. Relators commenced the instant appeal in the Court of Appeals challenging the three decisions of the County Board made on January 17, 2006.

Thereafter, Relators filed a motion to stay the appeal while a related appeal proceeded in the District Court concerning the decision to not require an EAW. On Relators' motion to stay, the Court of Appeals dismissed the instant appeal without prejudice pending further action by the District Court in the companion appeal concerning the adequacy of the environmental review process. Following the District Court affirmance of the EAW decision, Relators appealed the EAW decision and also filed a motion to reinstate the instant plat and rezoning appeal. The Court of Appeals granted the motion to reinstate and established a briefing schedule. Relators have previously filed with this Court of Appeals their Brief and Appendix in the EAW appeal.

ARGUMENT

I. STANDARD OF REVIEW ON THIS APPEAL.

The Court of Appeals construes statutes, rules and ordinances relative to this matter de novo. Construction of statutes, rules and ordinances is a matter of law for de novo review. Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn. 1998). The application of statutes, rules and ordinances to the undisputed facts of a land use or other case involves questions of law. Boubelik v. Liberty State Bank, 553 N.W.2d 393, 402 (Minn. 1996); Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604, 608 (Minn. 1980).

Minnesota law requires a completed environmental review before a project obtains any final approval from a unit of government responsible for making decisions regarding the project. Minn. Stat. § 116D.04, subd. 2b (2004); Minn.R. 4410.3100, subp. 1. In re Winona County Mun. Solid Waste Incinerator, 442 N.W.2d 344 (Minn.App. 1989), rev'd on other grounds, 449 N.W.2d 441 (Minn. 1990). Where a proposed Plat violates the pertinent terms of the ordinance, it is arbitrary as a matter of law to grant approval. Failure to follow the directives of the applicable ordinance in the plat approval process is arbitrary. See, National Capital Corp. v. Village of Inver Grove Heights, 222 N.W.2d 550 (Minn. 1974). Our Minnesota Court of Appeals has held as follows regarding the arbitrary and capricious standard:

An agency ruling is arbitrary and capricious if the agency: (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs 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.”

Pope County Mothers v. Minnesota Pollution Control Agency, 594 N.W.2d 233, 235 (Minn.App. 1999). See also, Trout Unlimited v. Minn. Dep't. of Agric., 528 N.W.2d 903, 907 (Minn.App. 1995), *review denied* (Minn. Apr. 27, 1995). Our Minnesota Courts alternatively conclude that an agency's decision is arbitrary if, based on the failures of the agency to follow applicable law and procedure, "it represents the agency's will, rather than its judgment." Trout Unlimited, Inc. v. Minnesota Department of Agriculture, 528 N.W.2d at 907; Pope County Mothers, 594 N.W.2d at 235.

II. WHERE AN INADEQUATE ENVIRONMENTAL REVIEW TOOK PLACE ON THE PROJECT, THE COURT OF APPEALS SHOULD REVERSE AND VACATE THE PLATTING AND REZONING DECISIONS.

Respondent County improperly refused to require an EAW on the Project and then proceeded to approve the amended preliminary plat, rezoning and final plat without the additional information that an EAW would have provided following the environmental review process, rendering the later decisions void. Minnesota law requires a complete and adequate environmental review on a project prior to making final decisions on plats, among other things. An EAW is only a "brief document" prepared by the Project. If indicated by the EAW, a more detailed and independent review takes place in an EIS. "Where there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed [EIS] prepared by the [RGU]." Minn. Stat. § 116D.04, subd. 2a (2004); Minn. R. 4410.1700, subp. 1 (2003). Before the Project could receive any final decisions from the County, Minnesota law required the Project to complete the environmental review process commenced with the

EAW petition. Minnesota Rule 4410.3100 prohibits final governmental decisions on projects until a complete environmental review process is completed. The complete environmental review process includes an EAW based on a citizen petition. Minnesota Courts have vacated final governmental decisions, such as a permit, plat or other final decision issued based upon inadequate environmental review. See, In re Winona County Mun. Solid Waste Incinerator, 442 N.W.2d 344 (Minn.App. 1989), rev'd on other grounds, 449 N.W.2d 441 (Minn. 1990); Dead Lake Ass'n, Inc. v. Minnesota Pollution Control Agency, Case No. A04-483 (Minn.App. 2005) (RA 58-63). Minnesota law establishes that the grant of a permit or other final governmental decision is premature and void if adequate environmental review has not taken place prior to the decision. *Id.*

The Minnesota Court of Appeals in the Winona Solid Waste Incinerator case addressed a permit issued by the MPCA for the operation of a solid waste incineration facility by Winona County. Finding that the environmental review process was not adequate and that the project required additional environmental review in the form of a supplemental EIS, our Minnesota Court of Appeals vacated the permit that MPCA had previously issued to the incinerator. The Minnesota Supreme Court took further review of the decision in the Winona Solid Waste Incinerator case, left in place the decision to vacate the permit and reversed the decision regarding a contested case hearing.

In an unpublished decision, our Minnesota Court of Appeals held that an MPCA discharge permit, which had been issued prematurely before the completion of an EIS on a project in Otter Tail County, was void and vacated by operation of law. Dead Lake Ass'n, Inc. v. Minnesota Pollution Control Agency, Case No. A04-483 (Minn.App.

2005). In the Dead Lake Association case, the plaintiffs had separately appealed in a companion case a decision approving an EAW, which resulted in the Court of Appeals reversing and requiring an EIS on the project. The Court of Appeals in the Dead Lake Association permitting appeal went on to vacate the MPCA permit on the grounds that the permit was void for lack of an adequate environmental review.

It appears that at least one Minnesota District Court has also applied this tenet of Minnesota law. The Cass County District Court recently vacated a plat approval on the grounds that the project had not first completed an adequate environmental review on that project. Save Lantern Bay v. Cass County, File No. C5-03-551, Cass County District Court (December 2005) (RA 64-80).

The required permitting activity should take place after the environmental review process. Minnesota Center for Environmental Advocacy v. Big Stone County Bd. Of Com'rs, 638 N.W.2d 198 (Minn.App. 2002).

Here, Respondent County refused on April 19, 2005 to require an EAW on the Project pursuant to the Citizen Petition. Relators have appealed that decision with the matter consolidated for hearing with the instant appeal and appreciate the Court of Appeals consolidation for hearing. Relators will not repeat the arguments for the EAW at this place. Relators maintain that, upon determining that Respondent County should have required the EAW, the Court of Appeals should then also conclude that the failure of the project to complete an adequate environmental review process renders void the subsequent decisions of Respondent County. One of the primary purposes of the EAW is to establish a review procedure for the environmental impacts of the Project and to

provide Respondent County with the relevant information from that process in connection with later plat and rezoning decisions before the environmental effects take place. The review should take place before the project begins construction. It seems that water resources in Minnesota have in the past been both generally abundant and clean. In many places, this has changed. The availability of ground water for domestic and other uses in some places in Minnesota is not adequate. Some projects are having to seek connection to a rural water authority to obtain adequate water. Other projects have started construction only to find out that they can't drill a well deep enough to find adequate water. Projects are looking at hooking up directly to rivers instead of trying to find groundwater. While many of the water shortage and rural water authorities exist in western Minnesota and seem contrary to the normal abundance of ground water in our state, the Citizen Petition on this Project demonstrates a unique subsurface structure of a granite ledge that limits availability of water and creates water use conflicts. Minnesota water law has generally developed in the past based upon a model of abundance, not a model of shortage such that exists in western states of the United States. This model is coming into question in places in Minnesota, including on this Project. The simple fact is that the quality of our surface waters in Minnesota is changing, too. MPCA maintains a list of impaired waters in Minnesota. The list includes the watershed in which the Project is located. The Citizen Petition brought these issues to the attention of the County Board and asked for an EAW to address the issues. MPCA required substantial revisions to the Project in the NPDES permitting. The EAW process can help sort out these conflicts before a new project comes in to an area and creates or exacerbates a land use conflict.

Once the new project comes in and builds out, the owners of the new project will claim equal footing to the use of the resource. The EAW process should take place prior to final permitting decisions. The Court of Appeals should vacate the amended preliminary plat, rezoning and final plat decisions.

III. THE RELEVANT COUNTY ORDINANCE REQUIRES A PLAT APPLICATION TO MEET THE MINIMUM STANDARDS OF THE ORDINANCE AND TO FOLLOW THE TWO-STEP PLAT APPROVAL PROCESS. THE ROAD SERVING THE PROJECT DOES NOT MEET MINIMUM SAFETY STANDARDS. NO TWO-STEP APPROVAL PROCESS TOOK PLACE. RESPONDENT COUNTY ARBITRARILY APPROVED THE PLAT AND THE REZONING.

The Court of Appeals should also reverse Respondent County Board for arbitrarily approving the Project where the existing road leading to the development is plainly substandard according to everyone commenting on the Project, where the Project will create an island of non-conformity and where the plat process was distorted by the perceived need to approve final plat within one year on a project that was substantially amended and had not started construction. When reviewing a decision on the denial or approval of a preliminary plat application, Courts consider the decision a quasi-judicial administrative decision, which the Court reviews to determine whether the decision is unreasonable, arbitrary, or capricious in relation to the applicable ordinances and Minnesota law. National Capital Corp. v. Village of Inver Grove Heights, 222 N.W.2d 550 (Minn. 1974). The Court determines whether the decision is supported by substantial evidence and whether the decision complies in all respects with the applicable ordinance. Property Research and Development Co. v. City of Eagan, 289 N.W.2d 157 (Minn. 1980). The Court looks to the controlling ordinances. *Id.* Where the ordinances specify

standards to which a proposed plat must conform, it is arbitrary as a matter of law to make an approval or denial decision inconsistent with the established standards. *Id.* Where a proposed Plat violates the pertinent terms of the ordinance, it is arbitrary as a matter of law to grant approval. Failure to follow the directives of the applicable ordinance in the plat approval process is arbitrary. See, National Capital Corp. v. Village of Inver Grove Heights, 222 N.W.2d 550 (Minn. 1974).

In the review process, the Court of Appeals affords significant deference to the municipality's broad discretion to approve a proposed land use and will reverse only in the instance when the decision lacks a rational basis or is contrary to law. Yang v. County of Carver, 660 N.W.2d 828 (Minn.App. 2003); Picha v. County of McLeod, 634 N.W.2d 739 (Minn.App. 2001); Sunrise Lake Association, Inc. v. Chisago County Bd. Of Com'rs, 633 N.W.2d 59 (Minn.App. 2001); BECA of Alexandria, LLP v. County of Douglas, 607 N.W.2d 459 (Minn.App. 2000); SuperAmerica Group, Inc. v. City of Little Canada, 539 N.W.2d 264, 266 (Minn. App. 1995), *review denied* (Minn. Jan. 5, 1996). A decision lacks a rational basis if it is unsupported by substantial evidence, rests on a legally insufficient reason, or is premised on subjective or unreasonably vague standards. PTL, L.L.C. v. Chisago County Bd. of Comm'rs, 656 N.W.2d 567, 571 (Minn. App. 2003). The Court of Appeals will find an abuse of discretion by the municipality on a land use decision where the proposed project fails to meet ordinance standards. Rose Cliff Landscape Nursery, Inc. v. City of Rosemount, 467 N.W.2d 641 (Minn.App. 1991) (building permit and site plan subject to ordinance in effect at time of approval).

Here, Respondent County abused its discretion regarding the substandard road and arbitrarily approved the Project on January 17, 2006. Respondent County's Code makes clear that the existing roads in the vicinity must be adequate for public safety. Section 10.13.4 provides that the final plat shall incorporate all recommendations made by the County engineer regarding roads. Section 10.11.1 of the Code sets forth the general requirements for a plat approval, including for the review and approval of roads and streets within the plat and in the vicinity of the development. Section 10.11.1(2) of the Benton County Code provides:

“The arrangement, character, extent, width, and location of all streets shall be considered in their relation to existing and planned streets, to reasonable circulation of traffic, to topographic conditions, to runoff of storm water, to public convenience and safety, and in their appropriate relation to the proposed uses of the land to be served by such streets.”

The Code requires Respondent County to consider public convenience and safety with regard to roads. All of the evidence in the record establishes that the road is not adequate to serve the needs of public safety. The Project is miles out in the country and depends upon the substandard 5th avenue for ingress and egress. The Township noted the substandard nature of the road and on August 26, 2005 made clear that their approval of the Project was conditional on improvements to the road. The planning commission twice recommended denial of the Project based on, among other things, concerns for the adequacy of the road. Citizens expressed concerns regarding the safety of the road. One citizen pointed out that the County had denied him a permit based on the substandard nature of the road. The County engineer, Kozel, could not say the road is safe. Substantial evidence supported the decision of the Township and the recommendation of the

planning commission to deny the plat and rezoning for this reason. There were no changes or improvements to the road situation before the matter came to the County Board. Neither any municipality nor the Project took responsibility for making improvements to the road. Given the unique circumstances of this Project, it was arbitrary and capricious for Respondent County Board to approve the Project.

It was also arbitrary for Respondent County to rezone the Project to R-3 in the middle of the A-2 zone. Minnesota law recognizes the inappropriateness of creating an island of nonconformity by specific rezoning of a specific piece of property. See, City of Mounds View v. Johnson, 377 N.W.2d 476 (Minn.App. 1985) (“Forced spot-zoning endangers a comprehensive plan, which is designed by a city council to benefit all within the city.”) Citizens such as Delroy Rothstein, Chuck Woken, and Doug Boser, all commented to the County that rezoning was not appropriate in the circumstances of a change to R-3 from an A-2 zone in the circumstances presented. This development sits out in the middle of a rural, agricultural area. There are no public services for water or sewer and no likelihood of these services in the near future. The road infrastructure is inadequate. It was arbitrary to grant the rezoning.

Moreover, Respondent County did not follow its own Code regarding the process for preliminary plat approval, followed by construction of the improvements, and then followed by final plat approval. The normal and orderly process was here distorted because, as initially proposed, the Project could not receive all appropriate permits and required substantial modifications. Minnesota law recognizes the significant differences between preliminary plat approval and final plat approval. See, Save Lantern Bay v. Cass

County Planning Com'n, 683 N.W.2d 862 (Minn.App. 2004); Semler Constr., Inc. v. City of Hanover, 667 N.W.2d 457 (Minn.App.2003). The Semler court explained in detail the superior "importance" of preliminary-plat decisions as compared to the "mechanical" nature of final-plat approval. Both of these cases demonstrate that the developer builds the project based on preliminary plat approval and then receives final plat approval where the project meets the standards outlined in preliminary approval.

Here, this process did not take place in sequence because of the defects in the initial proposal. Unfortunately, Respondent County granted both preliminary and final plat approval at the same meeting on January 17, 2006 in violation of the Code. Section 10.8 of the Code provides for a preliminary and final plat approval process, contemplates a period of time between preliminary and final plat approval for build-out of improvements and requires final plat approval within 1 year of preliminary approval. Section 10.8.1 provides:

“Approval of a preliminary plat is an acceptance of the general layout as submitted, and indicates that the subdivider may proceed toward final plat approval in accordance with the terms and provisions of this ordinance. However, approval of the preliminary plat in no way assures approval of the final plat.”

Preliminary plat approval in this action was premised upon, among other things, a septic system in a particular location that included a discharge to surface waters in an impaired waterway. In August 2005, MPCA made clear that the Project could not have a surface water discharge and would not allow a NPDES permit for the proposed facility.

Respondent Jarnot thereupon substantially revised the survey drawings, moved the location of the septic system, made the capacity for the system 110 residences and

eliminated the discharge. Respondent Jarrot then sought amended preliminary plat review. All of this took place during the time in which construction normally takes place based on preliminary plat approval. Here, there was no construction. The Project did not have a NPDES permit. The matter came to the Board in January 2006 for amended preliminary and final plat approval at the same time. There was apparently a rush to grant approval within one year of the initial preliminary plat review. The result is a flawed process that deprives the County Board and the public of the final plat review process that compares the construction and build-out of the project with the preliminary plat approval. In the event that the Project does not follow all the requirements of the preliminary plat approval, Respondent County has no recourse. For example, if the Project fails to build the internal roads to the promised standards, Respondent County has lost the ability to withhold final plat approval. In contravention of the ordinance and Minnesota law, Respondent County arbitrarily deprived itself and the public of the protections normally afforded by the final plat approval process.

CONCLUSION

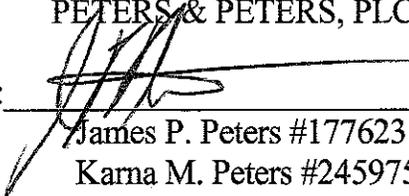
This controversial project should have gone through the environmental assessment worksheet process prior to permitting. The EAW would have helped identify issues for resolution in the later permitting process. There is not adequate groundwater and the surface water in the area is impaired. Respondent County arbitrarily refused to require the Project to complete the EAW. What more can a citizen petition do than identify that a proposed project is so deficient that no permit can issue? An EAW on this Project will help to, among other things, address the shortage of groundwater before the Project

builds out. An EAW will help to potentially avoid another project in Minnesota that builds first, only to find out later that there is no water. Ordering the EAW results in the voiding of the January 17, 2006 decisions to grant amended preliminary plat approval, rezoning and final plat.

Respondent County's decision to approve amended preliminary plat was arbitrary for a Project that will create a traffic hazard because of the substandard town road leading to the development for which no one takes responsibility. All of the substantial evidence in the record from the township officials, county engineer, citizens and county board established the substandard nature of the road. There was not a scintilla of evidence supporting the conclusion that the road was safe or adequate. Someone should take financial responsibility for the curing the hazard before the Project creates the hazard and someone gets killed or seriously injured on that road. The Citizens correctly noted that rezoning was arbitrary in the circumstances. Respondent improperly granted final plat approval before construction of the improvements and essentially abdicated its duty to ensure that the Project conforms to preliminary plat approval. For the foregoing reasons, Relators respectfully request that the Court of Appeals reverse and vacate the decisions of Respondent Board to approve the amended preliminary plat, rezoning and final plat.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).