

No. A08-1264

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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FRIENDS OF TWIN LAKES,

Appellant,

v.

CITY OF ROSEVILLE, MINNESOTA,

Respondent.

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REPLY BRIEF OF APPELLANT

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**ATTORNEYS FOR APPELLANT**

Julie Root, Reg. No. 386461  
1370 Carling Drive #303  
St. Paul, MN 55108  
(651) 343-5606

Grant Merritt, Reg. No. 7214X  
6160 Summit Drive, Suite 560  
Minneapolis, MN 55430  
(763) 259-3400

**ATTORNEYS FOR RESPONDENT**

GREENE ESPEL, P.L.L.P.  
John M. Baker, Reg. No. 174403  
Pamela L. VanderWie1, Reg. No. 305960  
200 S. Sixth Street, Suite 1200  
Minneapolis, MN 55402  
(612) 373-0830

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## INTRODUCTION

The heart of this case is whether the district court erred when it granted the City of Roseville's ("City") motion for summary judgment and upheld the City's decision not to require complete and accurate environmental review of the massive planned expansion of the Northwestern College's main campus. The City attempts to convince this Court that the district court did not err, and that the City provided sufficient environmental review. However, MEPA specifically states that a Responsible Governmental Unit ("RGU") is accountable for the completeness and accuracy of the Environmental Assessment Worksheet ("EAW"). *See* Minn. R. 4410.1400 (2006).

This case also concerns the level of deference to be accorded to a municipality, acting as the RGU, when approving an EAW. The City attempts to persuade this Court that, as an RGU, it should be accorded the same level of deference as the Minnesota Pollution Control Agency ("MPCA") and the Minnesota Department of Natural Resources ("DNR") when dealing with environmental issues.

## ARGUMENT

### **I. DISTRICT COURT EXCLUDED EVIDENCE SUBMITTED BY APPELLANT.**

The City attempts to persuade this Court that, although the district specifically stated it would not review documents that were not part of the record, the evidence submitted by Appellant, the 1986 Planned Unit Development ("PUD") documents, was reviewed. To support its statement that the district court did consider the evidence submitted by Appellant, the City refers to White v. Minnesota Dept. of Natural

Resources, as its authority. (567 N.W.2d 724 (Minn. Ct. App. 1997).) However, in White, this Court determined that the evidence submitted by the Appellants, testimony and affidavits regarding the potential environmental effects the trail extension would have on natural resources, was not originally made available to the DNR when it made its decision of whether an Environmental Impact Statement (“EIS”) is required. White, 567 N.W.2d 724, 734. Consequently, this Court determined that the evidence was not excluded by the district court, and it was part of the record on appeal. Id. This Court stated that the evidence submitted by the Appellants could have been raised during the comment period where the DNR would have had the opportunity to address the concerns by applying its expertise, thereby making these concerns part of the administrative record. Id. Here, Appellant did reference the PUD documents during the comment period, providing the City sufficient opportunity to address the concerns of inaccuracy and incompleteness, yet the City decided against this action. Moreover, as it stated in its Formal Brief, Appellant submitted the City’s own documents available for review of the EAW. (Appellant’s Brief at 9.)

Conversely, should this Court determine that Appellant did submit evidence outside of the record, it may still consider the evidence. As this Court stated in White, evidence may be considered outside the administrative record in four instances: (1) when it is evident that the agency failed to explain its action thereby frustrating judicial review; (2) when additional evidence is necessary to explain technical terms or complex subject matter involved in the agency action; (3) when the plaintiff makes a showing that the agency acted in bad faith; or (4) *when the agency failed to consider information*

*relevant to making its decision.* White, 567 N.W.2d 724, 734 (citing Animal Defense Council v. Hodel, 840 F.2d 1432, 1436-37 (9th Cir. 1988)) (emphasis added). Clearly, the PUD documents submitted by Appellant illustrate how the City failed to consider information relevant to making its decision. For example, Appellant argued extensively, and submitted the 1986 EAW and PUD documents, that the plans submitted by Northwestern College for the 2007 planned construction of the dormitory were exactly the same plans the College submitted for its 1986 expansion, yet Northwestern College's 2007 "estimations" state that the dormitory will house at least double the number of students as the 1986 plans acknowledged. (Plaintiff Ex. 1(B), at Appendix B.) This is clearly indicative that that the City Failed to consider information relevant to making its decision.

Finally, the City argues that, if in fact the district court did disregard the 1986 PUD documents submitted by Appellant, Appellant has not demonstrated how it was harmed by this exclusion. Appellant has effectively shown that, by approving an incomplete and inaccurate document, the City has performed inadequate environmental review that may have the potential for significant adverse environmental impacts on Lake Johanna and Little Lake Johanna and the surrounding environment, an area that Appellant visits on a regular basis to enjoy the wildlife, solitude, and recreational opportunities these amenities provide.

**II. THE APPELLANT HAS MET THE BURDEN OF SHOWING THAT THE DISTRICT COURT ERRED WHEN IT DEFERRED TO THE CITY'S DETERMINATION THAT THE "ESTIMATED" INCREASE OF GROSS FLOOR SPACE WAS COMPLETE AND ACCURATE.**

The district court improperly deferred to the City's determination that the estimation of gross floor space is complete and accurate. The City continuously asserts that this Court must accord deference to its decision under the separation of powers principle (Respondent's Brief at 7) and cites Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency (MCEA), 644 N.W.2d 457, 463-64 (Minn. 2002) and White v. Minnesota Dept. of Natural Resources, 567 N.W.2d 724 (Minn. Ct. App. 1997) as its authority. Yet, the decisions in both MCEA and White involved agencies with specific expertise in the areas of water, air, and land pollution, and expertise in timber and forestry issues respectively.

"The MPCA has technical expertise regarding water, air, and land pollution. Similarly, the DNR assisted the MPCA for several years and in this process has technical expertise with respect to timber and forestry."

MCEA, 644 N.W.2d at 465 (Minn. 2002). The requirements of the RGU are to ensure that the information submitted for the EAW is complete and accurate. Minn. R. 4410.1400 (2006). The 2007 EAW for the massive Northwestern College expansion provides only estimations for the total gross floor space of four of the seven buildings, and provides the same architectural drawings as was submitted by Northwestern College in 1986. The environmental impacts from a building that will be at least twice the size as the plans submitted will be quite different than the impacts assumedly analyzed in the 2007 EAW. This is indicative that the City did not engage in reasoned decision-making

when it approved the 2007 EAW, and therefore the district court erred when it granted the City's motion for summary judgment.

### **III. THE CITY INCORRECTLY RELIES ON MITIGATION MEASURES FROM FUTURE AGENCY OVERSIGHT.**

The City cites the rules implementing MEPA as justification of its lack of complete and accurate information when it approved the 2007 Northwestern College EAW. While it is true that one criterion in determining whether a project has the potential for significant environmental effects is "whether the effects are subject to mitigation by ongoing public regulatory authority" (Minn. R. 4410.1700, subp. 7(C) (2006)), the RGU may not rely on this oversight to be determinative of its decision. As this Court stated in Nat'l Audubon Society v. Minn. Pollution Control Agency, 569 N.W.2d 211, (Minn.App.1997), and as the Minnesota Supreme Court stated in Citizens Advocating Responsible Development v. Kandiyohi County Board of Commissioners, 713 N.W.2d 817 (Minn. 2006), (CARD), when it adopted this Court's approach to mitigation by ongoing regulatory authority, before an RGU may determine that an EIS is not needed because of future regulatory oversight, it must first determine whether a given project has the potential for significant environmental effects. CARD, 713 N.W.2d, 834-35. In other words, the RGU must have some idea of what the impacts are *before* they occur. Id (emphasis added). Therefore, the City's decision to rely on future regulatory oversight to provide for required mitigation measures was improper.

**IV. THE CITY INCORRECTLY STATES THAT APPELLANT WAIVED ITS ARGUMENT THAT REMAND IS REQUIRED TO PROVIDE ACCURATE AND COMPLETE ENVIRONMENTAL REVIEW.**

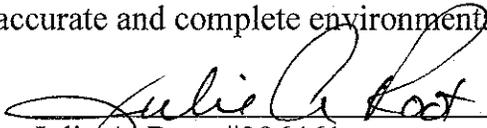
The City states that, because Appellant did not specifically request a remand so that the City may determine whether the planned expansion meets or exceeds the threshold level of a mandatory Environmental Impact Statement (“EIS”), it has waived its right to do so now. This is a specious argument because the Appellant specifically seeks a declaratory judgment and injunctive relief in this action. Does not the request for injunctive relief include a court ordered remand? It is a request for either the Court to order an Environmental Impact Statement or a remand back to the City to reconsider its decision for a negative declaration. The City seems to be arguing that the Appellant should have sought a remand in arguing against the City's motion for summary judgment but that does not make sense in light of the standards applicable to summary judgment.

**CONCLUSION**

Because Appellant has illustrated that the district court erred in granting the City’s motion for summary judgment, Appellant respectfully requests that this Court negate the decision and require the City to prepare an accurate and complete environmental review.

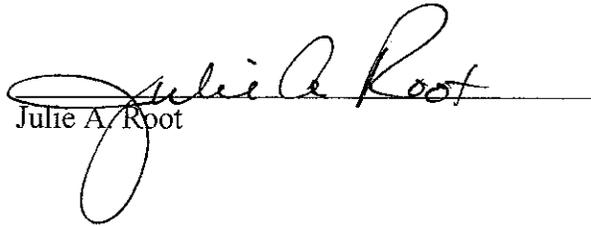
Respectfully Submitted,

Dated October 14, 2008

  
Julie A) Root #386461  
1370 Carling Drive #303  
St. Paul, MN 55108  
Grant J. Merritt # 7214X  
Kalina, Wills, Gisvold & Clark, P.L.L.P.  
6160 Summit Drive, Suite 560  
Minneapolis, MN 55430  
Telephone: (763) 259-3400  
*Attorneys for Appellant Friends of Twin  
Lakes*

**CERTIFICATE OF COMPLIANCE**

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(b). The brief was prepared using Microsoft Word 2003, which reports that the brief contains 1,466 words.

  
Julie A. Root