

Nos. A04-886 and A04-890

State of Minnesota  
In Supreme Court

CITIZENS ADVOCATING RESPONSIBLE DEVELOPMENT, ET AL.,  
*Appellants.*

vs.

KANDIYOHI COUNTY BOARD OF COMMISSIONERS;  
COUNTY OF KANDIYOHI, MINNESOTA; AND DUININCK BROS, INC.,  
*Respondents.*

RESPONDENT DUININCK BROS, INC.'S BRIEF AND APPENDIX

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## STATEMENT OF LEGAL ISSUES

### **I. WAS THE COUNTY BOARD'S DECISION BASED ON SUBSTANTIAL EVIDENCE AND WAS THERE A BURDEN TO PRODUCE OTHER EVIDENCE?**

The Court of Appeals held: The decision was based on substantial evidence.

Most apposite authorities:

Reserving Mining Company v. Herbst, 256 N.W.2d 808 (Minn. 1977)

Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency, 644 N.W.2d 457 (Minn. 2002)

### **II. WAS THE COUNTY BOARD JUSTIFIED IN RELYING ON MITIGATION OF ENVIRONMENTAL EFFECTS BY ONGOING REGULATORY AUTHORITY?**

The Court of Appeals held: In the affirmative.

Most apposite authorities:

White v. Minnesota Department of Natural Resources, 657 N.W.2d 724 (Minn.App. 1997)

Iron Rangers for Responsible Ridge Action v. Iron Range Resources, 531 N.W.2d 874 (Minn.App. 1995)

## STATEMENT OF THE CASE

Appellants Citizens Advocating Responsible Development, et al., appeal from the Opinion of the Minnesota Court of Appeals of January 11, 2005, reversing the decision of the Kandiyohi County District Court, Honorable David H. Peterson, granting summary judgment in favor of Appellants.

The record includes the Administrative Record (hereinafter "AR") and the Supplemental Administrative Record (hereinafter ("SAR")).

## STATEMENT OF THE FACTS

Respondent Duininck Bros, Inc. (hereinafter “Duininck”) mines gravel, produces asphalt, and constructs roads and other facilities. They have operated gravel pits in Kandiyohi County for decades (Trial Court Memorandum, Page 3).

Appellants Citizens Advocating Responsible Development, et al. (hereinafter “Citizens”) is a nonprofit organization consisting primarily of landowners residing in the vicinity of two planned gravel pits in Kandiyohi County (Trial Court Memorandum, Page 3).

The subject of this suit, and this appeal, is the decision of the Respondent Kandiyohi County Board of Commissioners (hereinafter “County Board”) to issue two Conditional Use Permits for gravel extraction to Duininck, without requiring Environmental Impact Statements, on July 28, 2003 (AR150 and AR152).

The initial application for one of the Conditional Use Permits was made in 1998 (SAR1). The initial application for the other was made in 2002 (SAR151).

The record documents the various actions of the Kandiyohi County Planning Commission, the County Board, and Duininck over the years until eventual issuance of the permits on July 28, 2003. This process included applications, withdrawals of applications, requests for delays, denials of applications, hearings, and other decisions and actions.

Discretionary Environmental Assessment Worksheets (hereinafter “EAWs”) were prepared by Duininck and submitted to the County Board (AR125 and AR137). They were reviewed and accepted for completeness by the County Zoning Administrator (AR43). They were disseminated and published.

During the EAW comment period, letters were submitted by residents, some of whom were named Plaintiffs/Appellants herein (AR45-54; 59-66; 70; and 73-104). Letters were also received from state regulators and departments (Transportation, Pollution Control Agency, Natural Resources, and Historical Society) (AR44, 58; AR55; AR14, 35, 106; AR 19, 40).

The County Board, at the first meeting at which the applications were considered, postponed the decision. It indicated that it needed additional time to fully review the comments received and the responses from the applicant (AR114). At the next meeting, the County Board again postponed the decision and requested further, specific information (AR120). Duininck responded to that request, as well as to the questions and comments which had been received by the County (AR109-113; 115-119). The County Board, on July 28, 2003, made Findings of Fact which included the specific conclusion that:

“There were no Environmental effects identified which cannot be adequately addressed by the developer or resolved through ongoing enforcement of existing regulations and permits. The EAW for the Duininck Bros, Inc. CA pit in Green Lake Township is adequate and, therefore, a negative declaration is made on the need for an EIS.” (AR150)

The same findings were made with regard to the application for the Eagle Lake West pit in Dovre Township (AR152).

Appellants brought action in August, 2003, seeking Judgment and Order of the District Court finding that the proposed facility poses the potential for significant environmental effects and for an Order requiring preparation of an Environmental Impact Statement. The Trial Court entered Summary Judgment in favor of the Appellants on February 19, 2004. The Court of Appeals reversed the Trial Court on February 11, 2005.

## ARGUMENT

Respondent Duininck adopts and supports the arguments of Co-Respondent Kandiyohi County Board of Commissioners with regard to the issues of cumulative effects/impacts and interpretation of Environment Quality Board rules.

**I. THE COUNTY BOARD'S DECISION WAS BASED ON SUBSTANTIAL EVIDENCE AND IT HAD NO BURDEN TO PRODUCE OTHER EVIDENCE.**

Appellants argue that Respondent Kandiyohi County Board of Commissioners ignored input from public and government agencies; ignored a significant quantity of evidence; and should not have been satisfied with information submitted in the EAW (Appellants' Brief, Pages 30-38).

These allegations are not supported by the record. There is no indication that the County Board did not carefully consider everything before it. The County Board requested and received further information about subjects addressed in the EAW. Appellants' suggestions that the County Board would not have understood and should have had questions about certain items in the EAW ignores an important fact, i.e. this County Board, and its staff, has extensive history and experience in dealing with gravel mining. Although the Appellants and the Trial Court failed to give the County Board credit for this, the Court of Appeals did. It recognized the "breadth of knowledge of a county board serving as the primary decision maker with regard to land use within its jurisdiction." (Court of Appeals Opinion, A.5) The Court of Appeals correctly pointed

out that “The county is in the unique position of being responsible for the CUP process, for implementation and enforcement of its mining ordinances, and for environmental review of these proposed gravel pits.” (Court of Appeals Opinion, A.12)

Appellants also suggest that the County Board had a “burden to produce evidence refuting” certain information (Appellants’ Issue No. III, Appellants’ Brief, Page 30). No law is cited to support this argument. Again, the County Board has a breadth of experience which is not, and cannot, be reflected in the record and the findings of a Regulated Government Unit’s (hereinafter “RGU”) decision. It is for the RGU to determine whether they have substantial evidence sufficient to make a decision. “Where there are technical disputes and uncertainties, the court must assume that the agency or RGU has exercised its discretion appropriately.” Iron Rangers for Responsible Ridge Action v. Iron Range Resources, 531 N.W.2d 874, 881 (Minn.App. 1995). The Court of Appeals correctly held that this was an “ample record” and the Appellants failed to identify a specific deficit in the record. (Court of Appeals Opinion, A.5)

Appellate Courts are to review the record to determine whether there is substantial evidence supporting the findings of the County Board. Reserving Mining Company v. Herbst, 256 N.W.2d 808 (Minn. 1977). A decision not to prepare an EIS is to be upheld unless it is unsupported by substantial evidence in view of the entire record as submitted, or was arbitrary or capricious. Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency, 644 N.W.2d 457, 464 (Minn. 2002).

This record is extensive. It shows careful, contemplative action over several years on these applications. This County Board has permitted and regulated gravel mining in this specific area for years. There is substantial evidence to support the County Board's decision. There is no evidence that the decision was arbitrary or capricious.

**II. THE COUNTY BOARD WAS JUSTIFIED IN RELYING ON MITIGATION OF ENVIRONMENTAL EFFECTS BY ONGOING REGULATORY AUTHORITY.**

Kandiyohi County Ordinance, Section 1-412, Extractive Use Standards (AR 155), sets out the conditions for a conditional use permit for mining and mineral extraction. The Ordinance provides that the permit is limited in time and requires a mining and reclamation site plan. It requires the addressing of dust, noise, possible pollutant discharges, hours, duration of operation, and anticipated vegetation and topographic alterations. It requires identification of actions to be taken during operation to mitigate adverse environmental impacts, particularly erosion. It requires explanation on how the site will be rehabilitated. It also requires a bond in an amount equal to the anticipated minimum reclamation requirements.

As recognized by the Trial Court, operations under these permits are also subject to the continuing authority of regulatory agencies such as the Department of Natural Resources, the Pollution Control Agency, the Department of Health, as well as other Kandiyohi County agencies (Trial Court Memorandum, Page 14).

The record indicates that Respondent Duininck has had a number of gravel pits in Kandiyohi County for years. The County Board and its staff have experience with Duininck as applicant and permittee and have a basis for judging responsiveness and reliability. This experience is relevant to decisions such as ongoing regulation, reclamation plans, responsiveness to enforcement measures, etc. Although this experience is not part of the record or findings, it is certainly weighed in decisions by the County Board and it is a significant factor.

Where proposed mitigation measures are “more than mere vague statements of good intentions,” RGUs may properly consider mitigation of environmental effects in determining that an EIS is not required. White v. Minnesota Department of Natural Resources, 657 N.W.2d 724, 734 (Minn.App. 1997), citing Iron Rangers for Responsible Ridge Action v. Iron Range Resources, 531 N.W.2d 874, 881 (Minn.App. 1995).

CONCLUSION

Duininck does not address the cumulative impact/effect issue and the issues of the interpretation of EQB rules in this Brief.

Duininck has addressed the other two issues raised by the Appellants in this Brief. The extensive record of evidence considered by the County Board; the contemplative consideration given by the County Board; and the extensive regulatory procedure in place in Kandiyohi County, compel affirmation of the decision of the Court of Appeals.

Dated this 25th day of May, 2005.

Respectfully submitted,

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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).