

A06-378
NO. A06-1069

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,
Delroy Rothstein, Donna Rothstein, Ann Kruger, Julie Johnson,
Kevin Johnson, Tanya R. Boser, David Johnson,
Estelle Johnson, Roger Carstensen, Christine Carstensen,
Shawn Corrigan, LouAnn Corrigan, Marilyn C. Popp,
Katharine Allie, Penny Kassier, Dale Behrend, John Waseka,
Marla Waseka, Bryan Carstensen,

Appellants,

vs.

Benton County Board of Commissioners, and
the County of Benton, Minnesota,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX

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STATEMENT OF THE CASE

Scott Jarnot (“Jarnot” or “the developer”)¹ is developing agricultural land in Benton County. In November and December 2004, he applied for a preliminary plat and a zoning change from agricultural to residential. His preliminary plat was approved, with conditions, in January 2005. In March 2005, a Petition for an Environmental Assessment Worksheet (“EAW”) was submitted to the Environmental Quality Board (“EQB”) by people who lived in the area of the development. The EQB appointed Benton County as the entity to determine whether an EAW was appropriate. Following submissions by a number of people, the County Board determined in April 2005 that an EAW was not necessary.

The present declaratory judgment action was commenced in May 2005 by Appellants. No attempt was made by Appellants to stop the developer, however, and he continued to work on his project, eventually receiving permits for his waste water treatment facility and his water well. In November 2005, Mr. Jarnot withdrew his plat and submitted a new one to take into account changes that had to be made because of a new waste water treatment design.

The County Board held a public hearing on December 8, 2005, and decided to continue it until January 17, 2006. Appellant had already moved for summary judgment on the declaratory judgment action, with a hearing scheduled for December 21, 2005. Because the County Board was going to review the EAW issue at the January meeting,

¹ Scott Jarnot and his company are listed as respondents on Appellants’ brief, but they were not defendants in the district court action and therefore are not parties to this appeal.

and that review may have rendered the declaratory judgment action moot, the parties stipulated to postpone the summary judgment hearing until February 2006. More information was received by the Board in December and January. The Board met on January 17, 2006, and heard considerable additional testimony. The Board then voted to approve the initial and final plat as well as the rezoning. The Board's previous decision on the EAW was not changed.

The County made a cross-motion for summary judgment, and the motions by both parties were heard on February 22, 2006. The Honorable James W. Hoolihan of the Benton County District Court issued his decision on May 23, 2006, denying Appellants' motion and granting Benton County's motion. Appellants appealed on or about June 5, 2006.

STATEMENT OF FACTS

Developer Scott Jarnot owns rural land in Benton County on which he wants to build 61 homes (“the project”). The project requires that the property be rezoned from A-2 (agricultural) to R-3 (residential). He will provide a community water supply for the development and a community waste water treatment facility. He applied for a zoning change and filed his preliminary plat in November and December 2004. *See Tabs 79, 85.*² On January 18, 2005, the County Board approved the preliminary plat with the condition that a well draw-down test³ be conducted to determine if pumping water for the development will adversely affect neighboring wells. *Tabs 66, 67.*

Neighboring landowners submitted a two-page petition for an EAW at the February 15, 2005, County Board meeting. *Tabs 28, 30.* It had not yet been filed with the Environmental Quality Board (“EQB”). The petition itself did not contain any evidence of potential environmental effects. *Tab 30.* The primary issue at that time was so-called “spot zoning.” *See Tabs 30, 26.* The Board took no action on the development proposal. *Tab 28.*

On or about March 14, 2005, the County was notified that the EAW petition had been filed with the EQB and that Benton County was the designated governmental unit to decide the need for an EAW. *Tab 20.* The petition was accompanied by a letter from Charles Wocken, who mentioned his concerns about “water table depletion” and waste

² The Tabs refer to the binder that was submitted to District Court and is part of the record.

³ An irrigation well already exists on the property. It was that well that was used for the water supply testing.

water contamination of adjoining wetlands. *A11*.⁴ No evidence supporting these concerns was attached. *Id.* There was a letter from Shawn and LouAnn Corrigan, but it simply discussed a well they previously had. *A12*.

The County asked the developer for data on the water supply issue. *Tab 17*. The developer's engineer responded by letter containing information on the waste water issue as well as the water supply issue. The developer had conducted draw-down tests in early March and was compiling the data for the DNR; *Tab 16; A17-18*.

The County Board met on April 5, 2005, and voted to hold a meeting of the "Committee as a Whole" on the EAW issue on April 15th. *Tab 13*. The developer, through his engineer, North American Wetland Engineering, LLC, submitted additional information by letter dated April 11, 2005. *Tab 12*. The letter references the lack of material evidence submitted by the petitioners, and the fact that the water supply and water discharge issues are regulated by the MDH, DNR and the MPCA. Attached to the letter was preliminary well testing data. *Id.* That data was modified slightly the next day by fax. *Tab 10*.

On April 14, 2005, Dan Lais of the DNR sent Chelle Benson of the County Department of Development an e-mail that he had sent to the developer's engineer. Mr. Lais' "quick assessment" of the developer's pump test data was that one neighboring well was drawn down below the pump setting, and that some neighboring wells may have to

⁴ A__ refers to Appellants' appendix. "RA__" refers to the attached appendix.

be hooked up to the developer's water supply or have their pumps lowered. *Tab 111; A19.*

The Board's "Committee of the Whole" meeting on the EAW petition took place on April 15th. The developer's letters, the DNR e-mail, and the petitioners' concerns were discussed at length. *Tab 7; A20-92 (transcript).*

On April 18, 2005, the developer's engineer provided the County with the raw data from Traut Wells regarding the test pumping that was performed in early March. *Tab 5.* That same day, the engineer sent the County a letter explaining the volume of wastewater attributable to this project, and the volume of potable water that will likely be used on a daily basis. *Tab 4.*

On April 19th, County Attorney Robert Raupp wrote a letter to the Board explaining the EAW citizen petition standard and the role of governmental permitting when determining whether to order an EAW. *Tab 4.* That day, the County Board met to decide whether to order an EAW as requested by the citizen petition. The Board concluded that no significant environmental effects were identified by the petitioners, and that any potential environmental effects would be mitigated by the State authorities who permit and regulate the waste water and water supply systems. *Id.* An EAW was therefore not required. *Tabs 3, 4; A93-141 (transcript); A142-144 (Findings).*

This declaratory judgment action was commenced on or about May 13, 2005. The developer applied to the MPCA for a National Pollutant Discharge Elimination System ("NPDES") permit. On August 24, 2005, the MPCA wrote the developer that because of a recent, unrelated Court of Appeals decision involving the protection of impaired waters,

the MPCA was going to have to re-evaluate the developer's application. *Tab 104; A145-146.*

Appellants assert that by this letter, the "MPCA invalidated the Project's wastewater permit" and that the "MPCA withdrew approval" "because the Project was planned in a manner that violated Minnesota law." Appellants' Brief at 7, 10. That is inaccurate. Appellants mischaracterize the letter to make it look as if Jarnot did something wrong and the MPCA took away a permit. The reality is that Jarnot designed a typical surface discharge wastewater system, and had not yet received any permit for it, but because of this Court's decision in In re Cities of Annandale and Maple Lake, 702 N.W.2d 768 (Minn. App. 2005), which was issued while Jarnot's permit application was pending, the MPCA decided that a surface water discharge system could not be used. Mr. Jarnot then redesigned the waste water treatment facility so that it does not discharge to surface waters. This redesign satisfied the MPCA and it issued a five-year disposal system permit to Jarnot on November 17, 2005. *Tab 109; RA 88.*

Work also continued towards obtaining a water appropriations permit from the DNR for the water well. Appellants assert in their "facts" section that "Jarnot continued to struggle with adequate water supplies and pumping levels." App.'s Brief at 10. Again, that is inaccurate. Jarnot did test pumping of the well and all that was found is that the water levels of a couple nearby farm wells *might* be impacted, and that is primarily because their pumps are so high in their respective wells. Jarnot reached an agreement with the DNR that if the well for the development impacts the neighbors, Jarnot would correct any problems by either modifying the neighbors' wells or

connecting them to the Lake Andrews water supply system. *Tabs 105, 109 and 112.*

Based upon that arrangement, a permit was obtained on December 1, 2005. *Tab 109; RA 86.*

On November 30, 2005, the developer withdrew his original preliminary and final plats and submitted a revised preliminary and final plat. *Tab 103.* The revised plat took into account changes necessitated by the new sewage treatment design. The County Board held a public hearing on December 8th. After considerable discussion, the Board decided to continue the public hearing until January 17, 2006. *Tab 107; RA72 (minutes).* The December 21, 2005, summary judgment hearing on this matter was postponed by stipulation so that the County Board could reassess the EAW issue in light of the developments that occurred since April. *RA 96 (stipulation).*

Additional information was received by the County from the developer and his engineer in letters dated December 22, 2005, and January 6, 2006. *Tab 108; RA 76.* The developer's letter attached a letter from the DNR dated December 12, 2005, in which the DNR hydrologist expressed his satisfaction that appropriate measures have been taken to resolve any future interference with neighboring wells. *RA 79.*

The Board met on January 17, 2006, to consider the developer's preliminary and final plat applications as well as the requested zoning change from A-2 to R-3. DNR hydrologist Dan Lais spoke about the water appropriations permit that was issued by the DNR to the developer and the fact that a plan is in place in the event that any interference occurs with the neighboring wells. Mr. Lais also noted that the existing irrigation well was previously permitted to use more water than will be allowed under the current permit

for the Lake Andrews development (20 million gallons per year vs. 18.5 million). The size of the waste water treatment facility was also discussed at length, with the developer stating that it will be built to only handle the 61 homes in the development and no more. After considerable additional testimony from over a dozen other witnesses, the Board voted to approve the plats and the rezoning. RA 1-71 (transcript).

ARGUMENT

I. STANDARD OF REVIEW.

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Within the context of this appeal of a summary judgment, this Court reviews the governmental body's EAW determination on the basis of whether it was unreasonable, arbitrary or capricious, without according deference to the trial court's review. Carl Bolander & Sons Co. v. City of Minneapolis, 502 N.W.2d 203, 207 (Minn. 1993); Pope County Mothers v. Minnesota Pollution Control Agency, 594 N.W.2d 233, 236 (Minn. App. 1999); Trout Unlimited, Inc. v. Minnesota Dep't of Agriculture, 528 N.W.2d 903, 907 (Minn. App. 1995), review denied (Minn. Apr. 27, 1995).

An agency's decision is arbitrary or capricious if the agency relied on factors the legislature never intended it to consider, if it entirely failed to consider an important aspect of the problem, if it offered an explanation for the decision that runs counter to the evidence, or if the decision is so implausible that it could not be ascribed to a difference in view or the result of agency expertise.

Pope County Mothers, 594 N.W.2d at 236. The mere fact that EAW petitioners disagree with the agency's decision is not sufficient to demonstrate that the agency acted arbitrarily. The arbitrary and capricious standard is a significant hurdle for petitioners.

Indeed,

[a] reviewing court will intervene only where there is a combination of danger signals [that] suggest the agency has not taken a hard look at the salient problems and has not genuinely engaged in reasoned decision-making.

Id. (internal quotes omitted).

II. APPELLANTS FAILED TO PROVIDE MATERIAL EVIDENCE DEMONSTRATING A NEED FOR AN EAW.

The Appellant Alliance of neighboring landowners does not want this development to proceed and is trying to use an EAW to stop it. The problem with their approach, however, is that they have never offered any facts to support their arguments, much less hire someone with the expertise to counter the considerable data put forth by the developer or to show that the approvals granted by the State were inappropriate. The neighbors have chosen instead to ignore or mischaracterize facts and to argue for an EAW petition standard that is so low that it is basically nonexistent. This approach did not pass muster in District Court and the same result should occur on appeal.

A. State law requires the neighbors to provide material evidence demonstrating that there may be a potential for significant environmental effects.

As they did in District Court, the neighbors set forth a lengthy explanation of the environmental review process and then argue that all they have to do to force the County to require an EAW is to submit, in “good faith,” evidence that is “not frivolous.” See Appellants’ Brief pp. 13-21. That is not, and never has been, the standard.

An EAW is “a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action.” Minn. Stat. § 116D.04, subd. 1a(c) (2004). In those situations where an EAW is not mandatory, citizens can petition the EQB to have an EAW completed. Id., subd. 2a(c). Simply submitting a petition to the EQB with the requisite number of

signatures on it, however, does not mean that an EAW will automatically be completed; there are certain threshold requirements that must be met. In addition to identifying the project and the project proposer, the petitioners are obligated to provide “material evidence indicating that, because of the nature or location of the proposed project, there may be potential for significant environmental effects.” Minn. R. 4410.1100, subpt. 2 (E) (2005) (emphasis added). Site-specific information is required. Minnesotans for Responsible Recreation v. Department of Natural Resources, 651 N.W.2d 533, 539 (Minn. App. 2002). There must be sufficient data presented to show that the project is capable of significantly impacting the environment.

B. “Not frivolous” is not a legitimate standard.

Appellants cite extensively to the 1981 SONAR released by the EQB in support of their argument concerning the EAW petition standard. The reason for citing to the SONAR is that it contains the words that Appellants like to use to argue in favor of a reduced EAW standard. According to Appellants, the SONAR “directs the focus upon the ‘good faith presentation’ of the petition to bring legitimate concerns forward. Where a petition is not frivolous, then the agency should grant the petition and prepare an EAW.” Appellants’ Brief at 17. Appellants key in on the “good faith” and “frivolous” language to argue that, as long as the neighbors are not acting in bad faith and their petition is not frivolous, their petition should be granted. Appellants further argue that detailed scientific and other information on environmental effects need not be gathered until after the EAW is ordered. Id.

While a comprehensive analysis of scientific evidence is not necessary at the petition stage, the petitioners must nevertheless submit sufficient material evidence to satisfy the requirements of state law. It takes more than just a statement of concerns and complaints mixed with speculation and conjecture to force an investment in an EAW. An EAW is not to be prepared unless “material evidence accompanying a petition... demonstrates that, because of the nature or location of a proposed action, there may be potential for significant environmental effects.” Minn. Stat. § 166D.04, subd. 2a(c). See also Minn. R. 4410.1100, subpt. 6 (same).

A December 2005 EQB publication entitled, “A Citizen’s Guide: The Petition Process,” explains the statutory requirement as follows:

With environmental review, petitioners bear the burden of demonstrating that the project warrants an EAW despite the fact that the Mandatory EAW thresholds have not been crossed. The petition must do more than raise questions or concerns; it must present facts that demonstrate that something about the location and nature of the project makes it more deserving of review than other typical development projects of the same size.

A157. Thus, simply making assertions in “good faith” and avoiding “frivolous” arguments is not enough. Facts must be presented demonstrating that this project necessitates an EAW despite not making the list for mandatory EAWs. Those facts – the material evidence – is what is lacking in this case.

C. The information submitted by Appellants did not satisfy the material evidence standard.

Appellants assert that the information available to the County Board as of the date that the EAW petition was denied was sufficient under Minnesota to require an EAW.

Upon review, however, the “evidence” submitted does nothing more than convey neighborhood concerns and basic facts about the geography of the area.⁵

Appellants assert that the letters from Charles Wocken and the Corriganes, and the maps submitted with the petition, constitute material evidence. Appellants cite the Citizen’s Guide, which mentions testimonial letters and maps as types of information that may provide material evidence sufficient to support a petition for an EA W. Just because a letter can be described as a “testimonial letter,” or just because a map is in fact a map, however, does not, by itself, mean that the statutory standard is satisfied. Obviously, the letters or maps must contain relevant, material evidence of the potential for a significant environmental effect.

The letter from Mr. Wocken (Appellants’ Appendix at A11) mentions two issues: water supply and waste water contamination of the wetland. With respect to water supply, he has a “concern that due to the shallowness of the bedrock that providing adequate water to the subdivision will affect water supplies.” He mentions his concern about water table depletion and he attached maps showing granite outcrops and the location of local quarries.

⁵ Appellants argue that the County only addressed the two issues on the face of the petition (spot zoning and the road issue) as part of the petition. Appellants’ Brief at 27-28. That is patently false and constitutes just another straw man argument by Appellants. As indicated in the County’s Findings, Appellants’ Appendix at A143, and the hearing transcripts, the waste water and water supply issues have been discussed at great length throughout this entire process even though they were not listed on the face of the petition. The County Board allowed petitioners to submit information on whatever issue they had.

This letter illustrates the problem with Appellants' case. While Mr. Wocken may very well be concerned with water supply, all he provided to the County was a description of that concern and a couple maps. The maps conveyed no information other than the presence of granite, which, of course, is the basis for his concern. Just stating that he was concerned because of the well-known presence of granite does not equate to "material evidence" of a potential significant environmental effect. After all, the granite may or may not significantly impact water supplies, depending on the size of the aquifer, the rate of water drawn from it, the rate at which the aquifer recovers, the location and nature of neighboring wells, etc. Submitting a letter describing a theoretical possibility of a problem is hardly a sufficient basis for ordering an EAW. If that were the case, the material evidence standard would be truly meaningless and virtually any development could be forced into environmental review.

Mr. Wocken's reference to waste water is likewise unsupported by any evidence. He expresses a concern about wetland contamination and odors and leaves it at that. No evidence is submitted showing that the particular design proposed by the developer at that time was potentially harmful to the environment.

On appeal, Appellants argue that the mere fact that the original waste water treatment system design was to eventually discharge to wetlands is, by itself, material evidence of a potential significant environmental effect. Appellants' Brief at 30. Aside from the fact that the original design is no longer at issue, thus rendering the waste water issue moot, the problem with this argument is the implicit assertion that *any* discharge into a wetland will result in an adverse environmental impact. That is a false assertion.

Waste water discharge into wetlands is not uncommon in a state with thousands of wetland areas; the DNR has approved many such discharges. The issue before the County Board was whether petitioners demonstrated that this particular proposed treatment system had the potential to harm this particular wetland. Petitioners offered no evidence whatsoever on that point.

The Corrigan letter is likewise of little or no substantive value (Appellants' Appendix at A12). Their letter also expresses a concern about water supply, but then recounts a previous experience with their well and how it had to be re-dug. It is apparently working fine now. This letter hardly constitutes a basis for requiring an EAW.

In sum, the information provided by the petitioners did not provide any material evidence demonstrating a need for an EAW. The mere expression of concerns, coupled with conjecture about what could happen, is insufficient. The County properly determined that petitioners did not satisfy their burden for demonstrating the need for an EAW.

III. THE COUNTY DID NOT IMPROPERLY RELY ON MITIGATION THROUGH FUTURE PERMITS.

Appellants argue that an RGU may never look at the mitigating effects of ongoing regulatory authority when determining whether to grant a petition for an EAW. Instead, they argue, such mitigating factors can only be considered when the EAW is actually being prepared. Appellants' position is illogical and misstates the law.

Appellants argue that Rule 4410.1100 is the sole source for determining the standard for granting an EAW petition. That rule, however, simply sets forth the petition

process. It does not contain any substantive terms or definitions, which are set forth elsewhere in the rules. For example, Rule 4410.1100 expressly states that “[t]he RGU shall deny the petition if the evidence presented fails to demonstrate the project may have the potential for significant environmental effects.” This begs the question, what does the “potential for significant environmental effects” mean? The only place that phrase is defined is Rule 4410.1700. Appellants argue that this Rule is only relevant for EIS determinations. The Minnesota Supreme Court, however, has cited Rule 4410.1700 when discussing the potential for significant environmental effects in the context of an EAW. Prior Lake American v. Mader, 642 N.W.2d 729, 739 (Minn. 2002). Likewise, the Court of Appeals, in the unpublished decision that Appellants cite for other reasons, quoted and applied Rule 4410.1700 when determining whether a county properly denied an EAW petition. Vasgaard v. Murray County, C2-03-181 (Minn. App. Aug. 13, 2003) (Appellants’ Appendix at A211). Thus, the appellate courts apparently do not agree with Appellants’ overly restrictive reading of the rules.

Moreover, even if one were to ignore Rule 4410.1700 and just focus on Rule 4410.1100, it is still necessary to determine whether the project may have the potential for significant environmental effects. One of the obvious ways of controlling the environmental effects of any development project is through the use of local and state regulatory controls. If the county or state can prevent adverse environmental effects by putting conditions or restrictions on their respective permits, then the potential is eliminated and there is no need for an EAW. It is wholly illogical and disingenuous to turn a blind eye towards the permitting processes and pretend that they do not exist, and

then argue that an EAW is necessary because there is nothing to stop the potential adverse environmental effects of the project. The regulations and permits do exist and they serve a very valid purpose, as illustrated in this very case. Through the use of their respective regulatory authorities, the County and State are controlling the design of the waste water treatment facility (below surface discharge), the size of that facility (61 homes only), the amount of water usage (18.5 million gallons), and the impact on any neighboring wells (if there is an impact, the pumps must be lowered or the neighbors supplied with water from the new development). This is how the process is supposed to work: potential problems are identified and solutions are found before any work is undertaken. With the possible potential for significant environmental effects mitigated, there is no basis for requiring an EAW. Appellants cannot ignore the mitigation provided by the permitting process.

IV. THE RECORD NECESSARILY INCLUDES INFORMATION RECEIVED THROUGH JANUARY 17, 2006.

Appellants complain that the District Court considered evidence received by the County after the EAW decision in April 2005. In fact, they now go so far as to claim that the County violated Minnesota law, that the record has been improperly supplemented, and that it was all done in some vile attempt to deprive Appellants of their statutory rights. These arguments are rather disingenuous given Appellants' involvement in the post-denial process and their refusal to try to stop the developer from proceeding with his development.

The EAW petition was denied in April 2005 following receipt of substantial information from the developer, the State and the Appellants. The information was reviewed for an hour and a half at the Committee of the Whole meeting on April 15th, and then discussed at length during the public hearing and Board meeting on April 19th. After the petition was denied and Appellants initiated the current action, they made no attempt to stop the developer from proceeding with his project. Consequently, while this action was pending, several events occurred, such as a complete redesign of the sewage treatment system, the receipt of permits for both the water supply and the sewage treatment systems, and the withdrawal of the existing, approved preliminary plat and the submission of a new plat.

The new plat, the permits and the additional communications concerning the water supply issue gave rise to some questions. For example, the water treatment permit references a capacity for 110 homes, which is above the threshold for a mandatory EAW. Appellants were well aware of the issues and the fact that the County Board was going to review them when the plat came before it. Indeed, Appellants' attorney, Jim Peters, attended the December 8, 2005, public hearing before the Board and asked that the plat be denied because it was quite different than the original proposal and because Appellants felt that the water availability, sewer treatment and road issues needed to be addressed. RA-72. Appellants themselves also testified, as did the developer and his engineer. The public hearing lasted almost an hour and a half, with much of the discussion concerning the water and sewer issues. In the end, the Board decided to continue the hearing to give the Board more time to digest all the information. Id.

In light of this continuation and the possibility that the Board would order an EAW based on the revised plat and the additional information that had been submitted, the parties to this action stipulated that the pending summary judgment hearing should be postponed until after the next Board meeting. The parties agreed that the motion would be rendered moot if the Board ordered an EAW. That stipulation was filed with the Court and approved.

Additional correspondence was received from the developer, his engineer and the DNR prior to the January 17th meeting and included in the Board packet. At the meeting, the Board opened up the public hearing again and received additional testimony from the developer, his engineer, a township supervisor, some Appellants and other neighbors. The sewage treatment system and water supply system were discussed at length, as was whether this development and one to the south were related actions so as to trigger a mandatory EAW. Frankly, a review of the 70 page transcript of that meeting reveals that very little time was actually spent discussing the plat; nearly all of the testimony and discussion dealt with the various environmental issues and whether an EAW should be ordered.

At no time before or during that hearing did Appellants suggest that no new information should be presented to the Board, or that the Board could not reconsider its prior denial of the EAW. Indeed, Appellants expressly asked the Board to reconsider the denial and to reverse their April 2005 decision. They were intimately involved in the process. For Appellants to now argue that they were denied a hearing and that none of the post-April 2005 testimony and information should be considered is ludicrous. It all

became part of the record in this case before the Board and reflects the reality that the facts continued to evolve after the April 2005 Board meeting. That is why Judge Hoolihan held,

The Court finds that plaintiffs' argument restricting the record to everything prior to April 19, 2005, makes little practical sense. The plat upon which the EAW was originally based has been withdrawn. The new plat contains substantial changes which affect the need for an EAW. Furthermore, both parties acknowledged and stipulated that the January 17, 2006, County Board meeting, where the need for an EAW was again discussed, had the potential to moot this summary judgment motion. Plaintiffs themselves wish to extend the record beyond the April 19, 2005, date by asking the Court to consider the DNR letter and the new sewer permit.

Appellants' Appendix at A179.

Appellants cannot now ignore a large part of the record, which they played a significant role in creating. All of the information received by the County through the January 17th meeting where the EAW issues were discussed again is properly part of the record and is relevant to this appeal.

V. THE ADDITIONAL INFORMATION RECEIVED THROUGH JANUARY 17, 2006, DEMONSTRATES THE INADEQUACY OF APPELLANTS' PETITION.

Appellants argue at the end of their brief that the post April 2005 record evidence proves their point that the project may have the potential for environmental effects. A cursory review of their argument in light of the record, however, illustrates the falsity of their claims.

Appellants first argue that they raised concerns about waste water from the beginning and that the project "was so improperly designed from an environmental

standpoint that the MPCA later denied the permit.” As discussed earlier, this is a blatant mischaracterization of the facts. The proposed waste water treatment system was originally a typical surface discharge design. This Court issued its Annandale decision after the treatment system had been proposed. Because of the Annandale decision, the MPCA said it had to re-evaluate the proposal. The result, which Appellants neglect to mention, is that a new ground discharge system was designed by the developer’s engineer and approved by the MPCA. Appellants have never provided any evidence that there is an environmental issue with the new design.

Appellants’ next quarrel concerns the water supply; specifically, the idea that mitigation is used in the form of an agreement by the developer to correct any water supply issues that neighbors may have as a result of the new well. As discussed previously, mitigation is a proper factor to consider when determining whether an EAW is necessary. Here, the developer has gone on record stating that any interference to neighboring wells will be resolved by him at his cost. That was also a condition on the plat. Furthermore, the DNR Water Appropriations Permit expressly provides that any interference requires the appropriation to cease. In other words, the well for the new development must stop pumping until the interference is resolved. RA-86. Such regulatory measures are an entirely appropriate means by which to eliminate potential adverse environmental effects, and they demonstrate that the water supply issue was properly addressed.

Appellants next raise the township road issue, asserting that it will be too crowded and needs updating. The District Court refused to look at this issue because it was never

part of the declaratory judgment action. See Order - Appellants' Appendix at A191 n.45. The County agrees that this issue is not properly before this Court. Even if it were, however, the fact remains that mere increased traffic on a township road is not, by itself, an environmental issue. Furthermore, the fact that traffic is mentioned on the EAW worksheet form also does not automatically turn traffic into an environmental issue. The traffic paragraph (Appellants' Appendix at A164) is there to gather information to be used in the next paragraph of the EAW, which is the environmental issue of vehicle-related air emissions. If there is truly a large amount of traffic, there can be air emissions issues. In this case, however, there is no evidence that vehicle air emissions are an issue on the township road.

Finally, Appellants argue that because the permit issued by the MPCA for the sewage treatment system sets forth a 110-home capacity, and 100 homes is the threshold for a mandatory EAW, an EAW should have been ordered. Again, this issue has been resolved. It was discussed at length during the January 17, 2006, public hearing, with the developer and his engineer going on record that they will only build a treatment system that can handle the 61 homes in the development, despite the 110-home limit set forth in the permit. In addition, as a condition for approval of the plat, that limitation must be set forth in both a developer's agreement and a separate agreement that will be recorded. In other words, the developer will be restricted by a legally binding contract not to build larger than a 61-home capacity system. This is well below the mandatory threshold.

If anything, the post-April 2005 events added even more focus to the issues raised by Appellants and others, resulting in all of the relevant issues being properly addressed

through project design changes and mitigation. Appellants never met their burden of establishing the potential for significant environmental effects.

CONCLUSION

An EAW cannot be ordered unless material evidence is submitted demonstrating that there may be a potential for significant environmental effects. Appellants never submitted the required evidence to satisfy the standard. The developer, County and various state agencies have worked diligently to address all issues. It was not arbitrary or capricious for the County to deny the EAW petition or to refuse to reverse that denial. The County respectfully requests that the District Court's order be affirmed.

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Appellants,

vs.

Benton County Board of Commissioners,
and the County of Benton, Minnesota,

Respondents.

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a monospaced font. The length of this Brief is 650 lines, 6275 words. This Brief was produced using Microsoft Word 2000.

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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).