

Case No. A08-1264

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

**Friends of Twin Lakes,**

*Appellant,*

v.

**City of Roseville, Minnesota,**

*Respondent*

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**BRIEF AND APPENDIX OF RESPONDENT**

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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).

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## **STATEMENT OF THE ISSUES**

1. Whether the City's decision not to prepare an EIS was supported by substantial evidence in view of the entire record as submitted or if it was arbitrary and capricious.

The district court held that the City's decision not to prepare an EIS was supported by substantial evidence in view of the entire record as submitted and that the decision was not arbitrary or capricious.

## **STATEMENT OF THE CASE**

On August 22, 2007, Appellant Friends of Twin Lakes ("FOTL") brought this lawsuit, alleging that the City of Roseville's ("the City") decision to issue a negative declaration after its review of an Environmental Assessment Worksheet ("EAW") for a project proposed by Northwestern College ("Northwestern" or the "College") was arbitrary and capricious. The City filed a motion for summary judgment. FOTL did not file a cross motion for summary judgment or request any relief, but simply asked the district court to deny the City's motion, arguing that there were genuine issues of material fact regarding whether the EAW was complete and accurate.

In its reply brief, the City pointed out that FOTL had set forth the wrong standard of review and that by arguing that "genuine issues of material fact" exist without filing a cross motion for summary judgment, the FOTL apparently believed that it would be entitled to a trial. The City argued that FOTL was not entitled, under any circumstance, to a trial in this matter and the district court's review should be confined to the administrative record.

The district court agreed with the City, holding as follows:

The Court agrees with the Defendant that the review of an RGU's negative declaration is confined to the administrative record created during the proceedings during which the RGU considered the EAW and whether an EIS was required, absent the presence of certain factors. These factors involve the agency's failure to explain its action or consider relevant information; the need for additional evidence; or a showing of bad faith. [citing *White v. Minnesota Dept. of Natural Resources*, 567 N.W.2d 724, 735 (Minn. Ct. App. 1997)] However, even if one or more of these factors is present, the proper remedy is to remand to the RGU, rather than consideration of evidence outside of the record, which invites judicial meddling. The Plaintiff has not produced specific evidence that would suggest the presence of any of these factors. Consequently, remand is not required and the Court will consider only the evidence that is part of the record.

(Appellant's Appendix ("AA") at 181.) After reviewing the administrative record, the Court determined that FOTL had not raised a genuine issue of material fact regarding whether the City's decision not to order an EIS was supported by substantial evidence or whether it was arbitrary and capricious, and the district court granted the City's motion for summary judgment. (*Id.* at 180-81, 187.)

### STATEMENT OF FACTS

Northwestern College ("Northwestern" or "the College") is a private, non-denominational, Christian college, founded in 1902. (Administrative Record ("AR"), Ex. J (PUD Application Report) at 1.)<sup>1</sup> In 2006, Northwestern's full-time equivalent enrollment was 1,650 students. (*Id.* at 2.) Its campus occupies 107 acres and consists of 12 academic buildings.<sup>2</sup> (*Id.* at 5.) The northern portion of Northwestern's main campus

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<sup>1</sup> The Administrative Record was filed with the district court on February 28, 2008 with the City's memorandum in support of its motion for summary judgment.

<sup>2</sup> Northwestern owns property that is not contiguous with its main campus. The project at issue in this matter is the main campus, which consists only of 94.64 acres. (AR, Ex. Y (EAW at 2).)

is located in the City of Arden Hills, and its southern portion is located in the City of Roseville. (*Id.* at 7.) The campus is bordered by two lakes, Lake Johanna and Little Lake Johanna. (*Id.* at 9.)

In 1986, Northwestern prepared a long-term master plan for the future development of the campus, and requested approval of a Planned Unit Development (“PUD”)<sup>3</sup> from the City of Roseville. (*Id.*, Ex. B at 1.) The City granted the PUD after reviewing and issuing a negative declaration on an Environmental Assessment Worksheet (“EAW”), which assessed the environmental impacts of the proposed project. (*Id.*, Ex. A.) As a condition to PUD approval, the City required that the PUD be reviewed for modifications and extended by the City Council every five years, and that procedure was followed thereafter. (*Id.*, Ex. B.) In August 2001, the City Council granted what was to be the final extension of the PUD. (*Id.*, Ex. C.) In doing so, the City Council directed that future updates to the PUD be made through an amendment of the PUD, rather than through additional five-year extensions. (*Id.*)

On or around November 17, 2006, the College submitted an application for an amendment to the PUD to the City of Roseville and to the City of Arden Hills. (*Id.*, Exs. D, E.) The PUD application was based on a Master Plan developed by Northwestern in

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<sup>3</sup> A Planned Unit Development is “any development for which a municipality approves a development plan as the basis for project development.” Ruth Eckdish Knack, *In the Zone*, Planning, July 2007, at 27. One of its purposes is to provide a developer flexibility to incorporate a variety of uses and densities in a single project, without first having to obtain multiple zoning designations for different portions of the project. Daniel R. Mandelker, *Land Use Law* § 9.24 (5<sup>th</sup> ed. 2003). Approval of a PUD affects only zoning and does not relieve the property owner of the need to obtain permits under other regulatory programs.

2003. (*Id.*, Ex. J (PUD Application Report) at 2.) The Master Plan predicted that by 2018, Northwestern's enrollment would grow from its current full-time equivalent of 1,650 to 2,400 students. (*Id.*) In order to accommodate this increase, Northwestern presented to the City its concept plan, which proposed to construct eight new structures, make additions to several existing buildings, and create a campus green by re-routing a road that currently bisects the campus, over the course of the next 12 to 20 years. (*Id.* at 2, 5-6.)

On February 7 and March 7, 2007, the City of Roseville Planning Commission held public hearings, during which it reviewed and considered the application. (*Id.*, Exs. K, M.) On March 7, 2007, the Planning Commission voted 6-0 to recommend approval of the PUD amendment, subject to the completion of an EAW. (*Id.*, Ex. M.) Northwestern subsequently agreed to complete an EAW, as recommended by the Planning Commission. (*Id.*, Ex. O.)

On April 23, 2007, the City Council accepted the Planning Commission's recommendation that an EAW be completed (*id.*, Ex. Q) and on May 7, 2007, the City of Roseville determined that the City was the Responsible Government Unit ("RGU") responsible for reviewing the EAW under the Minnesota Environmental Policy Act. (*Id.*, Ex. T.) The EAW was submitted to the City on May 11, 2007. (*Id.*, Ex. CC.) On May 21, 2007, notice of the EAW was published by the Environmental Quality Board in the EQB Monitor, and copies were distributed and made available to interested persons for comment. (*Id.*, Exs. V, BB, CC.) The City received written public comments between May 21, 2007 and June 20, 2007, and during that time, the City prepared written

responses to those comments. (*Id.*, Exs. BB, CC.) On July 23, 2007, the City held a public hearing. (*Id.*, Ex. DD.) After receiving public comment and reviewing and discussing the EAW, the City Council determined, on a 3-2 vote, that the proposed project did not have the potential for significant environmental effects and that an Environmental Impact Statement (“EIS”) was not required. (*Id.*, Ex. DD.) The City issued detailed Findings of Fact in support of the negative declaration. (*Id.* at CC.) On October 8, 2007, the City approved Northwestern’s PUD application. (*Id.* at LL.)

### **SUMMARY OF LEGAL ARGUMENT**

FOTL’s first argument is that the district court should be reversed and the matter remanded to the City because the City has not proven that the gross square footage of the project does not exceed the threshold for a mandatory EIS. FOTL does not even attempt to rebut the presumption of correctness to which the City is entitled under long-standing administrative law standards by pointing to any facts in the record that show that the City’s determination that the threshold was not reached was arbitrary and capricious. Rather, FOTL impermissibly attempts to shift the burden to the City to show that its decision was correct. FOTL’s approach should be rejected.

FOTL’s argument that the City deferred environmental review to the PUD approval process is not borne out by the record. The City’s findings set forth its examination of the project and the mitigation measures that will ensure that the project will not have significant environmental effects. FOTL’s argument that some of the mitigation measures are inadequate because they rely upon ongoing public regulatory authority ignores the fact that MEPA not only approves of an RGU taking such

mitigation measures into consideration, it requires such consideration under Minn. R. 4410.1700, subp. 7(C).

Finally, FOTL's observation that the Metropolitan Council and the Rice Creek Watershed District both commented that there were additional studies that the City could include in the EAW does not show that the City did not fully consider the environmental effects of the proposed project or cast any doubt on the City's determination that the project would not have significant environmental effects.

FOTL cannot show any error warranting reversal, and the Court should affirm the district court's decision.

## **LEGAL ARGUMENT**

### **I. STANDARD OF REVIEW**

Long-standing standards for reviewing the decisions of administrative agencies apply when courts review an RGU's decision on an EAW. *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency (MCEA)*, 644 N.W.2d 457, 463-64 (Minn. 2002). As such, the Court's review is deferential, and the Court must "attach[] a presumption of correctness to agency decisions and show[] deference to an agency's conclusions in the area of its expertise." *White v. Minnesota Dept. of Natural Resources*, 567 N.W.2d 724, 730 (Minn. Ct. App. 1997). This is because of the "bedrock separation of powers principle that the legislature may not delegate to the courts 'duties that are essentially administrative in character'" and because a deferential standard of review is appropriate in areas such as environmental review, which involve the agency's

expertise, technical training, and experience.<sup>4</sup> *MCEA*, 644 N.W.2d at 464. The determination not to prepare an EIS is reviewed for whether it was unsupported by substantial evidence in light of the entire record, or whether it was arbitrary or capricious. *Id.* If the court determines that the agency “engaged in reasoned decisionmaking,” it must affirm the agency, even if it would have reached a different conclusion if it were the factfinder. *White*, 567 N.W.2d. at 730.

Because of this highly deferential standard of review, *the burden is on the party challenging the RGU’s decision* to establish that the reviewing agency avoided an issue that it should have addressed or ignored evidence it should have addressed. *Nat’l Audubon Society v. Minnesota Pollution Control Agency*, 569 N.W.2d 211, 217 (Minn. Ct. App. 1997). When no such showing is made, summary judgment is appropriate. *Id.*

## **II. OVERVIEW OF THE MINNESOTA ENVIRONMENTAL POLICY ACT (“MEPA”).**

An EAW is “a brief document prepared in worksheet format which is designed to rapidly assess the environmental effects which may be associated with a proposed project.” Minn. R. 4410.1000. The EAW is used by the RGU to determine whether to engage in more detailed environmental review through the preparation of an EIS. Minn. Stat. § 116D.04, subd. 1a(c); Minn. R. 4410.1700. MEPA provides that an EIS must be ordered if it is determined by the RGU, after proceeding through the process of preparing

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<sup>4</sup> FOTL argues that the Court need not defer to the City’s determinations because a city has no special expertise in environmental matters. FOTL cites no authority to support its position and Minnesota’s appellate courts have never entertained such a notion.

and reviewing an EAW, that the project in question has “the potential for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a; Minn. R. 4410.1700, subp. 1.

In determining whether a project has the potential for significant environmental effects, the RGU must consider four factors:

- A. Type, extent, and reversibility of environmental effects;
- B. Cumulative potential effects of related or anticipated future projects;
- C. The extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority; and
- D. The extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

Minn. R. 4410.1700, Subp. 7.

### **III. THE DISTRICT COURT DID NOT EXCLUDE EVIDENCE SUBMITTED BY FOTL.**

The first point of error raised by FOTL is contained under the heading “The District Court Erred When It Determined The Evidence Appellant Presented Was Outside the Administrative Record.” (App. Br. at 8.) The heading and the argument that follows is inaccurate, however, because the district court did not, in fact, “determine” that any evidence presented by FOTL was outside the administrative record.

On February 19, 2008, counsel for the City presented a copy of the administrative record to FOTL’s counsel, and requested that FOTL’s counsel contact her if she believed that the record was inaccurate or incomplete. (Respondent’s Appendix at 2.) FOTL’s counsel did not respond. (*Id.* at 1.) Instead, after the City filed its motion for summary judgment and filed the administrative record with the district court, FOTL submitted

documents with its brief in response to the motion for summary judgment. The documents submitted by FOTL were not in the administrative record compiled by the City and FOTL had never suggested to the City that they were appropriately included therein. Moreover, FOTL did not assert in its brief that the documents belonged in the administrative record or explain why it believed the district court should consider the documents if they were not properly part of the administrative record. The City did not file a motion to strike the documents, but noted the procedural irregularity and requested that the district court disregard the documents.

Despite the City's objection, the district court's decision is silent on the question of whether the documents were properly submitted to the court. The district court acknowledged that it was required to confine its review to the administrative record, but it did not hold that the documents were not properly part of the record. The evidence was not excluded by the district court and the district court did not indicate in any way that it intended not to consider it.

In 1997, this Court was confronted with exactly this same issue (or "non-issue"). In *White v. Minnesota Dept. of Natural Resources*, the party challenging the DNR's negative declaration under MEPA submitted to the district court materials outside the administrative record. The DNR objected to the inappropriate submission and moved to strike them. The district court neither ruled upon the motion nor referred to the materials in its order, which affirmed the DNR's decision. Upon review, this Court held that the district court's action did not form the basis for reversal. The *White* court stated:

“It is well to bear in mind that on appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. Not only that, but the burden of showing error rests upon the one who relies upon it.”

*White*, 567 N.W.2d at 734 (quoting *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (quoting *Waters v. Fiebelkorn*, 216 Minn. 489, 495, 13 N.W.2d 461, 464 (1944))). Since the evidence was not excluded by the district court and the evidence remained part of the record on appeal, the Court of Appeals found no basis in the record to establish that the district court did not consider the evidence submitted. *Id.*

*White* is on all fours with the issue before this Court. As in *White*, the Court should not presume that the district court did not consider the documents presented by FOTL and there is no reason to believe that the district court did not consider the documents submitted by FOTL. Accordingly, the district court committed no “error” for this Court to review.

Even if the district court had disregarded these documents, however, its decision should be affirmed. FOTL has made no attempt to explain how it has been harmed by the district court’s error, if any. In the absence of such an explanation in FOTL’s opening brief, this Court can only reach the conclusion that the error was harmless, and it should affirm the district court’s decision. See *Midway Center Associates*, 237 N.W.2d at 78 (“And we do not reverse unless there is error causing harm to the appealing party. In other words, error without prejudice is not ground for reversal.”); see also Minn. R. Civ. P. 61 (harmless error not a ground for “disturbing a judgment or order”).

**IV. FOTL HAS FAILED TO MEET ITS BURDEN TO SHOW THAT THE EAW WAS INCOMPLETE OR INACCURATE.**

- A. The district court properly deferred to the City's determination that the proposed project increases Northwestern's campus by 414,600 gross square feet.**

FOTL takes the City to task because it estimated the square footage of the proposed project in order to prepare the EAW, rather than requiring Northwestern to provide a square footage calculation for each and every future proposed building included within the project. FOTL provides no evidence that the estimates performed by the City or provided by Northwestern were unreasonable, considering the size and diagrams of the buildings proposed, however, and the district court properly deferred to the City's expertise and rejected FOTL's argument.

The PUD proposed by Northwestern is a plan intended to be implemented over the course of the next 12 to 20 years. (AR Ex. J at 2, 5-6 (PUD Application Report).) As such, the plans submitted to the City in support of the PUD are *concept plans*, without the detail that will later be provided to the City after site plans are prepared. Nevertheless, Northwestern's application proposes a gross square footage increase from 656,306 gross square feet to approximately 1,068,091 gross square feet – an increase of 411,785 gross square feet. (*Id.* at 5.) The concept plans supplied by Northwestern in support of its application shows the proposed number of stories and the rough size, shape, and placement of the structures proposed to be constructed. (*Id.*, Ex. BB at 5, 6, and attachment Campus Master Plan Scope, Fall 2006.) Based on his review of Northwestern's concept plans, the consultant who prepared the EAW estimated the

increased gross square footage of the project to be 414,600, confirming Northwestern's gross square footage estimate. (*Id.*, Ex. BB (EAW).)

FOTL provided the district court with no reason to believe that the estimates at which Northwestern or the consultant arrived are unreasonable, considering the size, shape, or number of structures proposed. Where, as here, there is no obvious defect with the agency's gross square footage calculation, the Court should defer to the agency because "[w]here 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. Ct. App. 1995). The district court properly deferred to the City in determining that the EAW was complete, and its decision should be affirmed.

**B. FOTL has waived its argument that remand is required to determine whether the mandatory EIS threshold has been exceeded but is, in any event, incorrect in that assertion.**

FOTL raised the objection below that the City did not prepare a complete or accurate EAW because it did not have square footage estimates for each of the buildings proposed in Northwestern's PUD. FOTL argued that the City had acted arbitrarily and capriciously because the City deemed the EAW complete and accurate without obtaining square footage estimates for each building. Notably lacking from FOTL's submissions to the district court was any mention of the argument FOTL now raises -- that the Court must remand the EAW for reconsideration because the City has not proven that the gross square footage of the project does not exceed the mandatory EIS threshold of 750,000 gross square feet.

Arguably, the Court should decline to reach this issue because it has been waived by a failure to raise it below. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Even if the Court reaches the issue, FOTL's argument should be rejected because FOTL has not provided this Court with any reason to believe that the mandatory threshold has been exceeded. MEPA requires that projects exceeding certain square footage thresholds undergo a mandatory EIS. For cities of the second class, such as Roseville, the threshold for a mandatory EIS is 750,000 gross square feet. Minn. R. 4410.4400, subp. 11(B). As discussed above, however, Northwestern's and the City's consultants estimated the project's gross square footage to be 411,785 and 414,600, respectively. Even the higher of the two estimates is only slightly above half the threshold level of 750,000 square feet.

FOTL does not even attempt to argue that the project exceeds the mandatory EIS threshold. As FOTL admits in its brief: "There is no indication that the mandatory EIS thresholds have been met . . ." (App. Br. at 13.) Instead, FOTL's argument is that "there is clearly no indication that the EIS threshold levels have *not* been met." (*Id.* at 13-14.) Having made that statement, FOTL concludes that "appellant has more than met its burden to require at least a revised EAW for the Northwestern College expansion to obtain complete and accurate information." (*Id.* at 14.) But that is far from the case.

FOTL's argument that the case should be remanded because the City has not *proven* that the mandatory EIS threshold has not been met attempts to shift the burden impermissibly from FOTL to show that the City's determination was arbitrary and capricious to the City to show that it was correct. It also disregards the deferential standard under which this Court is required to review the City's determinations. FOTL's

argument must be rejected because the City's determination that the mandatory threshold has not been met is not arbitrary and capricious, and FOTL is unable to show otherwise.

**V. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE EAW SET FORTH ADEQUATE MITIGATION MEASURES.**

The district court correctly concluded that the City identified adequate mitigation measures as a result of its review of the EAW. The findings issued by the City in conjunction with its decision not to order an EIS include several mitigation measures Northwestern would be required to take, such as:

1. Requiring Northwestern to preserve migratory bird habitat, to replant native trees, and to maintain a buffer area to mitigate impacts on migratory birds (§ 12);
2. Post-habitat restoration to mitigate temporary effects on wildlife (§ 13);
3. Significant changes to nearby roads to mitigate effects on traffic (§ 25);
4. Curfews and implementation of MPCA standard noise guidelines for public announcements to mitigate neighbors' exposure to increased noise (§ 28);
5. Sweeping and watering of construction sites and limiting digging, backfilling, and boring to mitigate dust generation (§ 29); and
6. Implementing the City's landscaping and lighting standards to mitigate for increased lighting (§ 32).

(AR, Ex. CC.)

FOTL does not challenge any of these mitigation measures. Rather, FOTL states generally that "the City justified its decision not to prepare an EIS for the Northwestern College expansion project on the grounds it could deal with mitigation measures through the PUD Agreement and future regulatory oversight." (App. Br. at 14.) This statement and the ensuing arguments appear to be directed to the City's consideration of measures

that will be taken to mitigate the project's potential impact on surrounding lakes and wetlands. A review of the record demonstrates, however, that the City thoroughly reviewed the impact the project would have on surrounding lakes and wetlands and adequately identified measures to mitigate the impacts.

**A. The City set forth specific mitigation measures in its findings.**

Contrary to FOTL's assertion, the City identified measures to mitigate the proposed project's impact on wetlands and lakes bordering the campus. The record demonstrates that the City considered Northwestern's PUD application, which included a Stormwater Management Study. (AR, Ex. J.) The Stormwater Management Study describes the Best Management Practices Northwestern proposes to implement throughout the project. (*Id.* at 1.) It also set forth the numerous agencies with oversight over Northwestern's storm water discharge activities, such as the Rice Creek Watershed District, the Ramsey Soil and Water Conservation District, the Minnesota Department of Natural Resources, and the Cities of Arden Hills and Roseville.

Northwestern's promised adherence to Best Management Practices and governmental regulations was noted by the City. In response to the comment that the City had not compared pre- and post-construction run-off quantity and quality, the City responded:

The Storm Water Management Plan included as an attachment to the EAW analyzes the impact of proposed development on runoff quantity and quality. Since the proposed capital improvements are planned for the next 12 to 20 years, no comparison has been completed. This comparison will be completed as the proposed capital improvements are planned and constructed . . . facilities will be required to meet Rice Creek [Watershed District's] requirements for runoff quality and quantity when they are construction; Stormwater Best Management Practices included in the SWMP include wet detention ponds; pollution prevention such as material storage control, turf management, parking lot cleaning; pervious pavements to reduce the amount of runoff; infiltration practices and filter devices which primarily trap solids that have pollutants attached to them.

(AR, Ex. Z (City response to comments) at 11.) Similarly, in response to the comments regarding potential effects on wetlands located on campus, the City responded:

The requirements of the Rice Creek Watershed District will be adhered to in relation to all the wetlands on campus. Any existing BMPs [Best Management Practices] that will be utilized by the proposed construction will be assessed and upgraded as required. The proposed alternatives will not cause significant environmental impacts.

(*Id.* at 12.)

The City Council also addressed impacts to surrounding lakes and wetlands in its Findings of Fact supporting the negative declaration as follows:

15. Several outfall structures located around Lake Johanna and Little Lake Johanna will be altered by the project. The alteration of the outfall structures will not create a significant environmental effect on surface water. In fact, potential environmental effects on surface waters can be mitigated through replacement and improvement of existing outfall structures and installation of high flow silt fences and bio-rolls. The City will impose these obligations on the College as part of the land use approval process.

16. Several commenting parties asserted that the project would negatively impact surface waters by creating a risk of erosion and sedimentation during and after construction. This potential impact does not create a reasonable expectation of a significant environmental effect on surface water. *Regulatory oversight under NPDES and RCWD permits will mitigate any potential environmental effects in this regard.*

\* \* \* \*

20. Impervious surface at the project site will increase as a result of the project. The increase in surface water runoff will not create the potential for significant environmental lake impacts that are reasonably expected to occur. Potential surface water impacts to the lakes can be mitigated through Best Management Practices identified in the Stormwater Management Plan including: wet detention ponds; pollution prevention such as material storage control, turf management, parking lot cleaning; pervious pavements to reduce the amount of runoff; infiltration practices and filter devices which preliminarily trap solids that have pollutants attached to them. These requirements will be imposed as part of the approval process for the project. *Pertinent requirements of the City, MPCA, and RCWD require that water runoff rates and volumes be equal to or less than [sic] pre-project rates and volumes.*

(*Id.*, Ex. CC at 3-4 (emphasis added).)

The record, when reviewed as a whole, demonstrates that the City considered the impacts the proposed project might have on water quality and wetlands, and concluded that these impacts will be mitigated by the permitting and other requirements imposed by the agencies who have an interest in protecting water quality and wetlands and who have on-going regulatory authority over Northwestern's development activities.

**B. The City properly considered the extent to which the proposed project's environmental effects are subject to mitigation by ongoing public regulatory authority.**

FOTL objects to the City's consideration of on-going regulatory authority to mitigate any environmental effects the proposed project might have on water quality and wetlands, stating in its brief: "appellant is challenging the reliance by the City on future

permitting procedures to provide oversight.” (App. Br. at 14.) The problem with FOTL’s argument is that it directly contradicts the mandate of MEPA, itself. Under the regulations implementing MEPA, the RGU is required to take into account four factors when determining whether to order an EIS. One of these factors is “[t]he extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority.” Minn. R. 4410.1700, subp. 7(C).

FOTL ignores the plain language of Minn. R. 4410.1700, subp. 7(C). Instead, FOTL invokes three cases for the proposition that the City’s consideration of the factor enunciated in Minn. R. 4410.1700, subp. 7(C) is improper. These cases are inapplicable to the matter before this Court, however, because each concerns a project for which the RGU identified a significant environmental effect, but proposed to impose mitigation measures only *after* the environmental effect had already occurred.

For example, in *Trout Unlimited v. Minnesota Dept. of Agriculture*, the project proposer had applied for a water appropriation permit for an irrigation project. 528 N.W.2d 903, 905 (Minn. Ct. App. 1995). The EAW and several agencies expressed concerns about potentially immitigable impacts to a nearby trout stream and to groundwater and drinking water. *Id* at 906. Despite the evidence that the project had a potential for significant environmental effects, the RGU (which in this case was the Commissioner of Agriculture) determined that an EIS was unnecessary. *Id* at 907. The Court of Appeals held that the RGU’s decision was arbitrary and capricious because “the irrigation project would go forward without an EIS and *in the event significant environmental effects did occur*, the Commissioner would then rely on monitoring or

restrictive permitting procedures to reduce or eliminate those deleterious effects.” *Id.* at 909 (emphasis added). This was improper, according to the Court, because “[t]he very purpose of an EIS . . . is to determine the potential for significant environmental effects *before* they occur.” Similarly, in *Pope County Mothers v. Minnesota Pollution Control Agency*, MPCA staff had identified a risk that the proposed feedlots would increase hydrogen sulfide emissions into the environment. 594 N.W.2d 233, 238 (Minn. Ct. App. 1999). Nevertheless, the MPCA did not require any study of the extent of the risk or identify how that risk would be mitigated, instead deferring that determination to a later time. *Id.* at 237-38. The deferral of that determination resulted in the immitigable release of hydrogen sulfide by the project, as the MPCA had also prematurely issued permits for some of the feed lots prior to completing its EAW review. *Id.* at 236-37. The reason the Court found error in *Trout Unlimited* and *Pope County Mothers* is discussed in *Citizens Advocating Responsible Development v. Kandiyohi County Board of Commissioners*, where the Minnesota Supreme Court commented that:

it is not sufficient for an RGU to release an EIS determination stating that it did not bother to investigate environmental effects because it was confident it could later pass regulations if any environmental harm occurred. Under MEPA, an RGU must determine whether a given project has the potential for significant environmental effects before approving the project.

713 N.W.2d 817, 834-35 (Minn. 2006) (*CARD*).

When Minn. R. 4410.1700, subp. 7(C) is read in conjunction with *Trout Unlimited*, *CARD*, and *Pope County Mothers*, a rule emerges: for an RGU’s consideration of “[t]he extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority” as required by Minn. R. 4410.1700, subp. 7(C) to

be proper, the regulatory authority to mitigate the environmental effects must exist in order to prevent environmental harm *before* it occurs. A review of the administrative record in this case demonstrates that the City followed this rule.

A PUD such as the College's is a long-range planning tool, described in the record as follows:

The Master Plan lays out the design and concept for a development, and the Final Plan incorporates any changes required by the City to mitigate the impacts of the development. The Final Plans are usually detailed and include a specific construction timetable.

In the case of Northwestern College . . . there will not be a Final Plan stage. Instead, the Master Plan outlines the overall building plan for the Campus, an estimated development timeline, the impacts of the plan, and potential mitigation measures. A Campus Master Plan is less detailed in terms of architecture, landscaping and stormwater management because the Plan covers a longer timeframe and changes may need to be made before a particular part of the Plan is implemented. *However, as each part of the Master Plan is implemented, the College will be required to return to the City for a Site Plan Review.*

*During the Site Plan Review for a particular building or change to the campus, the College would then submit a detailed construction, landscaping, stormwater management, and other plans required by the City.*

(AR, Ex. I at 2 (emphasis added).) Since a PUD affects only zoning, an approval of a PUD does not relieve the project proposer of the need to obtain permits under other regulatory programs. (*See id.*, Ex. L (“[Interim Community Development Director] Mr. Darrow further noted that the exhibits to the PUD do not constitute project specific approval by the City, but that each project would be required to formally apply for a permit consistent with the City Code”) and (“Mr. Darrow clarified that any potential location or condition as it related to the PUD Agreement would still need to meet City

ordinance, including shoreland ordinances, and the PUD Agreement did not identify an exact location for specific structures.”).)

Contrary to FOTL’s assertions, the City did not determine that it would defer its environmental review to the PUD approval process. Rather, the City recognized that Northwestern would be required to obtain permits from several agencies, including the City, the Minnesota Pollution Control Agency, and the Rice Creek Watershed District, before it began construction on any part of the project. (AR, Ex. CC at ¶ 20.) As noted by the City, these agencies “require that water runoff rates and volumes be equal to or less tha[n] pre-project rates and volumes.” (*Id.*) Accordingly, unlike *Trout Unlimited*, *CARD*, and *Pope County Mothers*, the City studied the situation and determined that the project did not have a potential for significant environmental impact because pre-existing regulations and agency oversight require mitigation measures to be put into place to prevent any environmental impact *before* it occurs.

As repeatedly recognized by this Court, agency oversight such as that employed in this case “weighs heavily in favor of a finding of no significant impact for an EIS.” *Iron Rangers for Responsible Ridge Action*, 531 N.W.2d at 881; *see also MCEA*, 644 N.W.2d at 468-69 (holding that substantial evidence exists for finding that environmental effects are subject to mitigation by ongoing public regulatory authority when there is ongoing agency oversight); *Watab Township Citizen Alliance v. Benton County Board of Commissioners*, 728 N.W.2d 82, 92 (Minn. Ct. App. 2007) (finding that county board’s determination of no significant impact is supported by substantial evidence when the “project will require an NPDES permit from the MPCA and the waste-water discharge is

subject to ongoing regulatory review”). Accordingly, the City’s determination that this ongoing regulation was adequate to protect water quality was not arbitrary or capricious and its decision should be affirmed.

**C. Comments submitted by the Metropolitan Council and the Rice Creek Watershed District do not demonstrate that the City failed to consider ways in which to mitigate wetland impacts.**

FOTL relies on comments from the Rice Creek Watershed District and the Metropolitan Council that certain water quality studies for surrounding lakes were available to the City to argue that the City did not adequately consider measures to mitigate environmental effects to the surrounding lakes. FOTL makes this argument despite the fact that the Metropolitan Council made the explicit finding that “[a]n EIS will not be necessary,” (AR, Ex. Z) and neither the Metropolitan Council nor the Rice Creek Watershed District opined that the proposed project has the potential for significant environmental impact.

FOTL’s reliance on these agencies’ comments is misplaced. That the Rice Creek Watershed District and the Metropolitan Council commented that there is additional information that might be reviewed by the City or that additional information should be gathered in the future does not prove, as FOTL asserts, that the EAW was incomplete or that the City did not adequately consider ways in which to mitigate the environmental impact of Northwestern’s proposed project. The operative question is whether the City included sufficient information in the EAW that allowed it to determine that an EIS was not required:

It is difficult to imagine a situation where there would not be additional information that could be included in an EAW. ***But appellants cannot defeat a motion for summary judgment simply by presenting additional evidence that was not considered by the [agency] when making its decision. Instead, appellants must present evidence that the [agency] failed in its responsibility to prepare an EAW “designed to set out the basic facts necessary to determine whether an EIS is required,”*** either by avoiding an issue or by ignoring evidence about an issue that was addressed.

*White*, 567 N.W.2d at 735 (emphasis added). As FOTL acknowledges in its brief, both the Metropolitan Council and the Rice Creek Watershed District determined an EIS to be unnecessary. (App. Br. at 16.) This very fact demonstrates that both agencies had been provided “the basic facts necessary to determine whether an EIS is required.” *White*, 567 N.W.2d at 735. “The EAW is a brief document prepared in worksheet format which is designed to rapidly assess the environmental effects which may be associated with a proposed project and to help determine whether an EIS is needed.” *Id.* at 731 (quotation omitted). It is not a compendium of all the facts pertaining to a particular site or project. If an RGU’s negative declaration could be overturned simply because additional information existed but was not included in the EAW, environmental review would become impossible to perform. As noted by the *White* court, someone will always be able to point out additional information that might be included in the EAW, whether it would assist in making the determination of whether an EIS is required or not. Accordingly, an entity could never be certain that it has fully completed an EAW, which ultimately would make the process unwieldy, overly burdensome, and prohibitively expensive. The district court’s determination that the City’s EAW was complete and

accurate and that the City's decision not to order an EIS was not arbitrary and capricious should be affirmed.

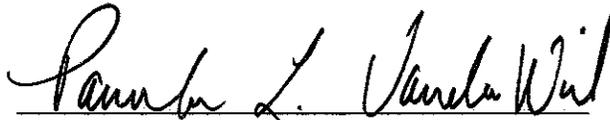
### CONCLUSION

Because Appellant FOTL has failed to show any error warranting reversal, the City of Roseville respectfully requests that the Court affirm the district court's decision.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2003, which reports that the brief contains 6956 words.

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