

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Application
of the City of Brooklyn Park to
Extend 73rd Avenue-North Across
a Wetland between Boone Avenue
and Highway 169

FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

The above-entitled matter came on for hearing on May 6, 1987, in Brooklyn Park, before Allan W. Klein, Administrative Law Judge.

Appearing on behalf of the Applicant, the City of Brooklyn Park, was Curtis A. Pearson, of the firm of Wurst, Pearson, Larson, Underwood & Mertz, Attorneys at Law, 1100 First Bank Place West, Minneapolis, Minnesota 55402. Appearing on behalf of Intervenor Northland Development Company was Christopher L. Dietzen, of the firm of Larkin, Hoffman, Daly & Lindgren, Ltd., Attorneys at Law, 1500 Northwestern Financial Center, 7900 Xerxes Avenue South, Bloomington, Minnesota 55431. Appearing on behalf of the Department of Natural Resources were Special Assistant Attorneys General A. W. Clapp III and Tibor M. Gallo, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155.

The record closed on August 25, 1987.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Natural Resources shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Joseph Alexander, Commissioner of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155.

STATEMENT OF ISSUES

Should the Commissioner grant a permit to the City allowing it to construct a road across a wetland? Does the public need for the road rule out the no-build alternative? Is there a feasible and practical alternative to the project having less environmental impact?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Description of the Area

1. The City of Brooklyn Park is a "second tier" suburban city, located in Hennepin County, in the northwestern quadrant of the metropolitan area.

While the City is quite large, this proceeding focused upon the southwest corner of the City, which contains the intersections of County Road 18 (a north-south major arterial), I-94/694 (a major east-west interstate freeway) and Highway 169 (a southeast-northwest minor arterial street). These can be seen, along with other routes of interest, on the attached Figure 1, taken from Ex. 48.

2. There is a wetland in the general area marked "Project Location" on the figure. Seventy-third Avenue North is in existence from Boone Avenue to the western edge of the wetland. There is no road across the wetland at the present time. Seventy-Third Avenue North resumes east of the wetland. The proposed project would cross the wetland, connecting the western edge with the eastern edge, so that it would be possible to drive from Boone Avenue to Highway 169 directly on 73rd, without having to go north to Brooklyn Boulevard or south to I-94.

3. The land identified as the "study area" in the figure consists of approximately 600 acres. Approximately 380 acres are currently being used, predominantly for office and office/distribution purposes. Other uses include industrial, a city park, and residential. Approximately 220 acres are idle or vacant, and are expected to be developed at some undetermined time in the future.

4. The western half of the study area, the portion west of Shingle Creek, is dominated by the Northland Industrial Park. It is owned by Northland Development Company, which owns approximately 400 acres of the 600-acre total. All of Northland's holdings are to the west of Shingle Creek, on both sides of Boone Avenue.

5. The Northland Park Project began with some early land purchases in 1969, followed by additional purchases in 1975 and 1976. It represents a "master plan office park", whereby the developer (Northland Development Company) assembles a large tract of land, creates a master plan for its usage, and then develops it consistent with the master plan. This results in greater uniformity of architecture, landscaping, and uses than would likely occur if a

variety of different owners developed the land on a parcel-by-parcel basis. In theory, the master plan allows development to a higher and better use than would occur without it. The parties stipulated that the Northland project was a "good industrial park". It can be seen in aerial photographs, Exs. 73-77.

6. Northland does not own any land to the east of Shingle Creek, and that land is not subject to Northland's master plan. The land to the east of the creek is much less developed than the Northland parcel. It contains a diverse mix of heavy and light industry, including a concrete plant, a mini-storage building, a truck repair operation, a cable television office, and a lawn fertilizer operation.

7. It is proposed that a portion of the land east of Shingle Creek be the site of a waste transfer station as part of a much larger Hennepin County Resource Recovery Project. This would be known as the Brooklyn Park East transfer station. This transfer station would be located just north of I-94 at approximately 70th Street, to the east of Shingle Creek but to the west of Winnetka.

Description of the Wetland

8. The wetland which would be crossed by the proposed roadway is approximately 120 acres in size. It is a Type III wetland (shallow freshwater

marsh). It is oriented in a north-south direction, and 73rd Avenue North is at approximately its center point. The proposed extension of 73rd Avenue North would, therefore, approximately bisect it.

9. The wetland is bordered by Shingle Creek. Shingle Creek flows in a generally northerly and easterly direction to its mouth at the Mississippi River. Shingle Creek serves as the inflow and outflow of the marsh area. A beaver dam on Shingle Creek near the northwest corner of the wetland is effectively blocking the creek at present, and as of April, 1987, there was no flow downstream from the dam. This has created higher than normal water levels in the wetland.

10. The marsh is generally a cattail monotype with reedgrass and reed canary grass along its borders. Borders also include larger plants such as willows, aspen, and box elder.

11. The marsh has supported Canadian geese, mallards, woodducks, pheasants, beaver, muskrat, raccoon, rabbits, fox, skunk and mice. As noted earlier, an colony of beaver is active in the area. The wetland area provides a natural corridor for deer using the habitat up and down the drainage. Nesting habitat is provided for waterfowl, such as geese, mallards and woodducks.

12. The creek has no significant fishery value, other than to support minnows and carp. Even that support is dependent upon a continuation of the high waters resulting from beaver dams; if the dams are removed, the stream would have little or no value because it would be extremely shallow and seasonally intermittent in this area. Ex. 82.

13. In addition to supporting plant life and wildlife, the wetland also acts as a natural sponge to help regulate surface water levels. It is part of a flood control reservoir system. In addition, it acts as a natural filter for water which percolates down to subsurface levels.

Procedural History of the Road Project and DNR Permit Applications

14. In 1971, Bather, Ringrose, Wosfeld, Inc. prepared a "Transportation Plan for Brooklyn Park". Ex. 50. That plan contemplated a collector street crossing the wetland, connecting Boone Avenue on the west and Highway 169 on the east. The street was originally referred to as 71st Avenue North, but appears to be at approximately the location that is now 73rd Avenue North.

Regardless of the exact location, it was the conceptual predecessor of what is now proposed as 73rd Avenue North.

15. In late 1977 or early 1978, Northland Development Company (through Steubner Properties) and Equity Life Insurance Society petitioned the City to construct a portion of the 73rd Avenue North roadway. The portion which they requested ran from Boone Avenue to the western edge of the Shingle Creek wetland, approximately 1,000 feet. This would allow access to land lying between Boone Avenue and Shingle Creek in the area of 73rd Avenue North.

16. in March of 1978, a feasibility report was prepared, which concluded that the proposed construction was feasible and consistent with the City's transportation plan. The feasibility report noted that at such time as a need is determined, the road could be extended across the wetland to Winnetka and Highway 169. Ex. 7. The 1,000-foot roadway was built in 1978-79.

17. In January of 1980, the City began exploring the continuation of 73rd across the wetland. This was prompted by the availability of free fill material, which was important because a major impediment to the construction of the street was the high cost of fill for crossing the wetland. From the spring of 1980, the City engaged in various soil investigations to determine the difficulties which would be caused by the peat in the wetland.

18. On June 30, 1980, the City submitted an application for a permit to work in public waters, which was assigned Department Identification No. PA81-6009. During the remainder of 1980 and throughout 1981 and into 1982, the Department and the City worked on various issues raised by the Application. This included resolving flood control issues and re-examining the situation as the City's source of fill changed. Ultimately, in late 1981 or early 1982, the City placed the project "on hold". In July of 1982, the Department wrote the City asking for certain technical data, stating that once the data was supplied, the Department would issue the permit. The Department stated that it understood that the project had been delayed indefinitely. Ex. 42.

19. In October of 1983, the Department adopted amendments to its water permit rules. One of the amendments changed the criteria applicable to permits for road crossings.

20. During 1983 and 1984, the City took no action to further the project. It was still "on hold". On November 13, 1984, the Department wrote to the City, stating that it understood that the project was still indefinitely delayed, and suggesting that since the rule had changed and the new criteria would be applied to the Application, the City ought to withdraw its application and then reapply when it was ready to proceed. The letter stated that unless the City "advises otherwise" by December 3, 1984, the Department would withdraw the Application. The City did not respond to the letter, and the Department deemed the Application to have been withdrawn.

21. In 1985, there were no actions by the City to reactivate the permit. However, during this time period (going back at least to August of 1984), Hennepin County was focusing its search for a waste transfer site on what became known as the "Brooklyn Park East" site. Despite the opposition of the City and Northland Development (Ex. 48 and 113), the County ultimately determined that the Brooklyn Park East site was the most appropriate site for the transfer station.

22. In 1985, interest revived in the proposed crossing at 73rd Avenue North. The City hired Barton-Aschman Associates to evaluate the impact of building the road on traffic flows on I-94 (to the south) and Brooklyn

Boulevard (to the north).

23. In March of 1986, a new feasibility report on the proposed extension was prepared, and in April of 1986, a public hearing was held before the City Council. Northland appeared at that hearing and voiced its opposition to the project. The City Council voted, unanimously, that the project should go forward.

24. On June 6, 1986, the City's consulting engineer submitted to the Department the technical data which the Department had requested back in July of 1982. Ex. 20.

25. The Department informed the City that a new Application would be required, and on September 19, 1986, the City filed a new Application with the Department. It was identified as P.A. No. 87-6087. Various correspondence and meetings followed, and on January 9, 1987, the City supplied information regarding the public need for the proposed roadway. Ex. 47.

26. In late January or early February, 1987, the Department determined that a hearing would be appropriate prior to deciding whether or not to grant the requested permit.

27. On February 25, the Commissioner issued the Order and Notice for Hearing, setting the hearing for April 2.

28. The hearing was continued from time to time due to scheduling conflicts. On April 22, 1987, a prehearing conference was held. At that time it was discovered that Northland was not a formal party to the hearing. Northland filed a formal Petition to Intervene, and the City filed a formal objection to the Petition. At the start of the hearing, the Administrative Law Judge announced that the Petition was granted. See Memorandum.

Description of Procosed_project

29. The proposed project is a two-lane road (one lane in each direction). It would run in an east-west alignment, beginning at the cul-de-sac on the western edge of the wetland, crossing the wetland, and ending at the corner of 73rd Avenue North and Winnetka.

30. The roadway will be approximately 1100 feet in distance through the wetland. Its width (including shoulders and, in some places, counter-balancing berms) will vary from 120 feet to 160 feet wide. The road itself will only be 46 feet curb to curb. A sidewalk will be constructed on the north side (only) from Highway 169 across the wetland to Boone Avenue. The roadway surfacing will be based on a nine-ton pavement design. A concrete curb and gutter will be constructed, and low points along the roadway will have shoulder drains to control the run-off from the street. Ex. 4.

31. The roadway will be built to conform to state aid design standards. In 1978, when the first 1,000 feet of this road was built from Boone Avenue to the western edge of Shingle Creek, state aid funds were used. This was done because a total MSA route was designated from Boone Avenue to Highway 169, and even further easterly to West Broadway (County Road 130). In 1983, the segment of 73rd Avenue well east of the wetland, from Highway 169 to West Broadway, was constructed.

32. In order to qualify as an MSA route, a road must terminate at either (a) another MSA street; (b) a trunk highway; or (c) a county highway. If 73rd is not completed as planned, the portion from Boone Avenue to the western edge of Shingle Creek, which was built in 1978-79 with state aid funds, will not qualify as a state aid road. It will be removed from the state aid system, and the state aid monies which were expended for it (approximately \$108,000)

will have to be repaid to the state aid fund.

33. The construction method proposed to be used is the "surcharge method", which is required by virtue of the peat underlying parts of the

roadbed. The surcharge method is a recognized, legitimate method of road construction for use in difficult circumstances. It requires more time and expense than ordinary construction methods. See generally, Ex. 23. When used properly, however, it creates no unusual environmental damage. The City is aware of the proper use of the method.

Impacts on Wetland and Wildlife

34. Construction of the road would have an adverse impact upon the wetland. It would result in the destruction of between three and four acres of marshland and habitat. It would disrupt travel lanes used by wildlife to move up and down the narrow area. It would create problems of noise, air and water pollution (although these were not quantified, they are the same as those from any road). It will result in an increased number of road kills and, in the case of deer or other large animals, an increased danger to human travelers.

35. The character and use of the area will change because of increased disturbances and an opening up of the center of the wetland to dogs, cats and other predators. While such predators now have access to the borders, they do not have access to the center.

Public Need

36. At the present time, the freeway and arterial system serving the study area is adequate to handle the existing level of development. Ex. 48, p. 25 and Ex. 81, p. 3. Today, 73rd would be a convenience, but not a necessity. The question of need for 73rd Avenue revolves around whether the traffic system can function without it in the future, and if not, when is it going to become a necessity.

37. Traffic in the study area has grown more rapidly than anticipated. In 1971, when the City's transportation plan was put together, 73rd Avenue was proposed as a collector street on the assumption that, by 1990, there would be 1,360 employees in the study area, and the road would carry 2,500 vehicles per day. In fact, by 1987, the study area has current employment estimated to be between 5,000 and 6,000 employees. Traffic on the incomplete segment of 73rd Avenue between Boone and Shingle Creek is already 1,800 vehicles per day. Similar growth has occurred in other parts of the study area. For example, the 1971 transportation plan forecasted that Boone Avenue, just north of 73rd Avenue, would be carrying 3,000 vehicles per day by 1990. However, today it is already carrying approximately 8,000 vehicles per day. Ex. 48, p. 6.

Clearly, the 1971 plan did not foresee the growth which has occurred in this area, particularly the rapid development of the Northland Industrial Park.

38. Theoretical city planning suggests that there be a "functional classification" perspective employed in laying out streets and highways. The recognized hierarchy of roadways ranges from interstate freeways, to major arterials, to minor arterials, to collector streets, and finally, local streets. Seventy-third Avenue North was planned as a collector street. The Metropolitan Council's Metropolitan Development Guide/Policy Plan for transportation recommends that collectors be spaced between major and minor arterials, usually from one-quarter mile to one mile apart. If 73rd Avenue were built as proposed, it would provide a collector street at a one-half mile spacing between Brooklyn Boulevard on the north and I-94 on the south.

39. I-94 is currently overloaded in the morning rush hour in the segment from Highway 169 East across the Mississippi River, and extending well to the east. There is a particular problem at the Mississippi River Bridge. At the bridge, it is a problem of major congestion, but on either side of the bridge, it is not as bad. It is anticipated, however, that by the year 2000, I-94 will suffer major congestion in the stretch of particular interest in this hearing, from County Road 18 East to Brooklyn Boulevard. Ex. 47, Attachs. C and D. The Department of Transportation will restrict entry onto the freeway and take whatever other steps are necessary to preserve the integrity of its traffic flow. For example, Mn DOT plans to "meter" (stoplight) the eastbound entrance ramps onto I-94 from both Boone Avenue and Highway 169 in 1988 or 1989. Mn DOT believes that I-94 is suffering severe congestion in the study area in the eastbound direction in the morning rush hour, and severe congestion in both directions in the evening rush hour.

40. The purpose of metering is to divert traffic away from the freeway. The traffic most likely to be diverted is "short haul" trips which can most readily use alternatives to the freeway. The Department and the Metropolitan Council are both desirous of diverting short haul trips off of the freeway. They both support the extension of 73rd Avenue North so that drivers who desire to proceed southerly on Highway 169 from the area of Boone Avenue would not use I-94 to get from Boone Avenue to Highway 169, but rather will use 73rd Avenue to get to Highway 169.

41. On one afternoon in April of 1987, a study was made of all of the cars which entered eastbound I-94 from southbound Boone Avenue, as well as all the cars which entered southbound Highway 169 from eastbound I-94. This was an attempt to quantify this "short haul" traffic which might be diverted by the building of 73rd Avenue North. It was found that of the 337 cars which entered eastbound I-94, 28 of them exited at southbound Highway 169. That is only eight percent of those that entered at Boone, and a minuscule percentage of all of the traffic traveling eastbound on I-94. Nonetheless, planners from both the Mn DOT and the Metropolitan Council want to divert such short haul traffic from I-94 to 73rd Avenue North.

42. Although all of the traffic experts agreed that there were no traffic operational problems today, they disagreed as to when problems would emerge and to what extent the construction of 73rd would alleviate those problems. They did agree, at least, on the appropriate methodology to use in attempting to determine the questions of when problems would develop, and to what extent they would be alleviated by the construction of 73rd Avenue North.

43. An appropriate methodology for determining the capacity of a transportation system is to (1) count existing traffic; (2) document present land use; (3) estimate future planned use; (4) estimate traffic to be generated from future land uses; (5) distribute the traffic along the most logical routes; and finally, (6) conduct capacity analyses of key elements in the transportation system to determine whether or not they can handle the projected traffic flows. Both of the major traffic studies used in this proceeding (Ex. 48, advanced by the City, and Ex. 81, advanced by Northland) agreed on this basic methodology. There were, however, two major disagreements between the two. These disagreements result in different scenarios in future traffic flows. The two differences are in the area of (1) future land use, and (2) the number of trips that would be generated by certain of the land uses.

44 There are ten intersections which were identified as "critical intersections", and adopted by both of the studies as appropriate measurement points to evaluate the capacity of the transportation system to handle future traffic. These are identified in Figure 3 of Exhibit 48, and include such intersections as the Boone Avenue/I-94 eastbound ramps, the Highway 169/1-94 eastbound ramps, and the intersection of Brooklyn Boulevard and Highway 169 in the northeast corner of the study area. To illustrate the differences that arise from the differing estimates of land use and trips generated by that land use, one of the studies estimates that if 73rd Avenue is not built, by the year 2010, there will be seven of the ten intersections which are over capacity. That can be contrasted with the estimate of the other study, which project that only two of the intersections will be over capacity. Similarly, the estimates of over capacity intersections if 73rd Avenue is built vary from four to two. In other words, one study projects that building 73rd Avenue will make a difference in protecting three intersections from going over capacity, while the other study projects that the building of 73rd Avenue won't make any difference and that there will be two intersections over capacity regardless of whether 73rd Avenue North is built.

45. Traffic volume projections depend upon the number of square feet projected to be built by the target date, and the traffic generated by that volume of development (measured in terms of trips per 1,000 square feet). Estimates of the total number of square feet present in the study area at "build out" varied from 5,204,431 (Northland/BRW--Ex. 81, Table I and Ex. 79) to 5,673,167 (City/SRF--Ex. 48, Table 2, as amended, and Ex. 79). The differences can be seen from Table 1, below.

TABLE I - SQUARE FOOTAGE OF DEVELOPMENT IN STUDY AREA AT BUILD-OUT

	SRF	NDC
Existing Development 2,474,431	2,647,167	
Future Development 2,730,000	3,026,000	
5,204,431	5,673,167	

46. In terms of existing square footage, it is found that the SRF number is more accurate than the NDC number because the SRF number is based upon the assessor's records (the taxpayer would have an interest in keeping the number as low as possible), the Honeywell Building (which is 200,000 square feet, not 150,000) and because the appropriate figure to use throughout is the gross square footage figure, not the net square footage. Finally, one parcel (Site #39) is a bankrupt health club. NDC elected to treat that as equivalent to zero square feet. It is found that within the time frame of importance to this project, the building will be occupied and generating traffic.

47. In terms of estimating future square footage, it must be understood that developers in general, and Northland in particular, will develop their properties so as to maximize their long-term financial return. Northland admits as much when it states (in Ex. 98):

Northland Development Company intends to develop the remaining acres of Northland parkland in accordance with

the master plan. However, the master plan will be modified if conditions in the marketplace dictate more valuable uses of the land than presently shown.

48. There is currently a glut of office space in the Brooklyn Park/Plymouth/Suburban Northwest area. One creditable market survey showed a vacancy rate of 39 percent in December of 1986, as compared with 14 percent in downtown Minneapolis and nine percent in downtown St. Paul. Vacancy rates, however, fluctuate due to a variety of factors (the economy, tax laws, interest rates, etc.), most of which are beyond the control of the developer.

The same study shows a fluctuation in the office vacancy index for overall suburban locations which varied from 13 percent in July of 1984 to 24 percent in July of 1986. Ex. 112, p. 1, fig. 2. The fact that there is a glut in December of 1986 does not control the mix of uses that would be built in the future. That mix is unpredictable at the present time. The best estimate that can be made of that mix is to look at the mix that has evolved over the past 15 years. North land has, from time to time, developed forecasts far different from that contained in Ex. 81, and much closer to SRF'S. Ex. 90 and 92.

49. Once a square footage number is arrived at, then it is necessary to select an appropriate trip generation figure. This figure varies, depending upon the type of use. There is no disagreement that the appropriate source for such trip generation figures is Trip Generation, 3rd Edition-1982, published by the Institute of Transportation Engineers. For many of the land uses, there was no disagreement among the parties with regard to an appropriate trip rate to use. For some of them, however, where the trip generation manual did not specify a precise number, the parties disagreed as to the appropriate number to use. The most important incident of this disagreement was in the case of multi-use buildings, principally office/distribution buildings.

50. The appropriate methodology to use in calculating a trip rate figure for an area such as the Northland Industrial Park is to determine the traffic generated by each type of use, determine the portion of the total that is represented by that type of use, and then combine the traffic flows into a total. The ITE trip generation manual puts it this way:

Category 130--Industrial Park. Industrial parks are areas containing a number of industrial or related facilities. They are characterized by a mix of manufacturing, service and warehouse facilities with a wide variation in the proportion of each type of use from one location to another.

Caution should be exercised when using average trip generation rates found for industrial parks. The data showed wide inconsistencies . . . believed to be due to

differences in the mix of activities from one park to another.

It is recommended that traffic generation of industrial parks be forecast using rates for each type and amount of activity, i.e., manufacturing, office, warehouse, light

industrial, etc. The combined result of these calculations should give a more realistic rate than the average indicated herein. It is not believed that additional data sources will improve validity of an average rate for all Industrial parks.

51. The method described above is most closely akin to that used by SRF. Of particular importance to the Northland situation is the ability of this method to take into account the very substantial difference between traffic volumes generated by an office building and traffic volumes generated by a warehouse building. While it is possible to disagree about the percentages of uses in each building, it is concluded that the SRF methodology is more appropriate, and will yield a more accurate number, than the BRW methodology. For reasons which will become apparent, it is not necessary to calculate a precise number for purposes of this decision.

52. Once an appropriate trip generation number is arrived at, then it becomes a mathematical exercise to multiply the square foot figure (for future development) by the trip generation rates, add the products together, add those to the existing traffic counts, and arrive at a projected future total. In doing this, it is vital that the gross square footage be used, rather than the net rentable square footage. Again, this was a difference between the figures used by SRF and the figures used by BRW. It is clear from the ITE manual that the trip generation rates assume that they will be applied to gross square footage, rather than net or rentable square footage. See copies of ITE manual pages attached to Pearson letter of June 29 and Dietzen letter of June 29.

53. The appropriate number for future square footage is found to be 3,026,000. This figure was derived on the assumption that future development would mirror present development in terms of the ratio of land uses by type, and average floor area ratios. It is based on gross area, rather than net area. It is certain that actual square footage will vary from this estimate, but that is to be expected. The question to be answered at this point is whether 3.0 or 2.7 million is the more likely of the numbers. It is found that 3.0 million is the more likely.

54. The most reasonable estimate of traffic patterns is that contained in Ex. 48. If 73rd Avenue North is built, three out of the ten intersections would be over capacity. However, if 73rd Avenue is not constructed, then six out of the ten would operate over capacity. Ex. 48, p. 25.

55. Aside from the projections of intersection breakdown, there are some

other factors to be considered in evaluating the need for the road. Bell Cold Storage operates two refrigerated and freezer-equipped warehouse facilities in the Twin Cities area. They have a total combined square footage of 287,000 and a combined cubic feet capacity of 7.25 million. Together, they constitute the largest public cold storage warehouse facility in the upper Midwest. In 1985, Bell constructed an 80,000 square foot facility at 71st Avenue and Winnetka, on the east side of Shingle Creek. Bell alone handles 12,000 trucks per year, the vast majority of them semi-trailer trucks. TCI, a similar operation housed in the Bell Cold Storage building, is visited by a total of 5000 trucks per year. Those two operations alone account for nearly 50 trucks a day, 365 days a year. If the proposed Hennepin County transfer station is located on the east side of Shingle Creek, as currently proposed, that will

add an additional unknown number of trucks serving the east side of Shingle Creek. One estimate places the number at 50 "packer" trucks and 250 small garbage trucks per day. What is important about this is that today's realistic access from this area onto I-94 is at Highway 169. The ramps serving I-94 at Highway 169 are not only congested, but are an upgrade. That means trucks entering the freeway will be going slower than if the ramps were on a level grade, or a downgrade. On the other hand, the entrance ramps onto I-94 from Boone Avenue are on a downgrade, which are much better for trucks entering the freeway flow. A number of businesses on the east side of Shingle Creek favor the road so that they may direct vehicles over to Boone Avenue and enter the freeway from Boone rather than from Highway 169.

56. Another problem faced by Bell, TCI, Fraser Steel and other industries east of Shingle Creek is the inadequate intersection of highway 169 and 73rd Avenue North. This intersection will be improved regardless of whether or not 73rd Avenue North is extended over the wetland. Contracts have already been let for the improvements. While this will alleviate SOME of their concerns, it will not alleviate them all.

57. If 73rd Avenue North is not built, additional traffic "costs" will be incurred by persons who would otherwise use it. These include vehicle time and operating costs of \$331,800 per year; extra fuel of 48,500 gallons per year; 37,600 pounds of carbon monoxide per year 4,000 pounds of hydrocarbons per year; and, 6,900 pounds of nitrogen oxide. See Ex. 55.

58. A public hearing was held before the City Council on April 28, at which time both proponents and opponents voiced their views to the Council. The Council voted, unanimously, to proceed. This position is endorsed by Mn DOT and the Metropolitan Council.

Alternatives

59. A review of the aerial photographs, Exhibits 73 through 77, demonstrates that the wetland is long and thin, running from north to south. It is definitely wider in some areas than in others, particularly where there have been encroachments which have narrowed it. But it is impossible to cross from Boone Avenue to Highway 169 between I-94 and Brooklyn Boulevard without crossing the wetland. Shingle Creek runs in a north-south alignment in the

study area, and the associated wetland runs the entire length of the study area.

60. There are places, however, where the wetland area is significantly narrower than it is at 73rd Avenue North. For example, there is a large cement plant area on the east side of Shingle Creek at approximately 75th Avenue North. Ex. 74 demonstrates the difference in width between the two. If, for example, a bridge were being considered there, the cost of the bridge would be substantially less than a bridge at 73rd Avenue North. However, there has been no detailed examination of such a crossing.

61. A bridge, either at the 73rd Avenue location or another location involving less expense, is a feasible and prudent alternative. It would definitely have less environmental impact.

62. There is no question but that a bridge at 73rd Avenue would be substantially more expensive than a road crossing. A rough estimated cost is

\$5,107,000. This includes the cost of a bridge with pilings at approximately \$65 per square foot, a length of 1400 feet and a width of 46 feet. An additional 22 percent is added for legal, engineering, and similar costs. Nevertheless, the City's Director of Public Works opined that, in his opinion, the need for a crossing was so strong that it warranted a bridge if that was the only way the crossing could be achieved.

63. The expansion of Brooklyn Boulevard (which is currently two lanes in either direction, and 52 feet wide) is a feasible and prudent alternative having less environmental damage than the proposed project. It does have significant difficulties, but they are not insurmountable. The most serious problem arises from the existence of single-family homes facing Brooklyn Boulevard. They are required to be set back at least 35 feet, but the record does not disclose how far the actual setbacks are. Therefore, it is unclear whether the widening would require merely an encroachment into the setback or an actual taking of the homes. The encroachment would require a minimum acquisition of 12 feet on each side, which would reduce the 35-foot setback minimum to 23 feet. In addition, near the creek there would be an additional 24 feet of slope required, for a total of 36 feet.

64. When Brooklyn Boulevard was originally built, ordinary excavation and backfill methods were used. The same kind of methods could be used again, but additional work might have to be done for culverts and other associated facilities.

65. Brooklyn Boulevard is a county road, and would require county approval of any widening plan.

66. Another problem (but again not insurmountable) is caused by a railroad track which parallels Highway 169. The problem caused by the railroad track is that of "stacking space" for cars waiting at the intersection. It is not desirable to have cars waiting for a stoplight on a railroad track. The track can be signalized, however, with a moving arm or similar devices to prevent cars from getting caught on the track waiting for a red light. It is a problem, but not insurmountable.

67. Alternatives to the south of I-94, such as Modern Road/68th Street have problems because they go through a residential area. They are not designed for high speed or high volume transport. The final problem with Modern Road is that it ends at West Broadway, and does not provide a direct

route onto either I-94 or Highway 169. It is not a reasonable alternative.

68. A "wait and see" alternative is also feasible and prudent. There are many unknowns regarding future traffic flows. The two primary traffic studies were both conducted by able personnel, using up-to-date methods. Nevertheless, their results were substantially at variance. The rate of future development of Northland Park and the mix of land uses is dependent upon the economy, competing developments-and a variety of other factors. The traffic that will be generated can only be estimated at this time. If the City does not wish to use one of the other alternatives presented above, but rather wants to go ahead with the road crossing at 73rd Avenue North, then it is feasible and prudent to require the City to wait until there can be greater certainty regarding traffic flows and the necessity for the road crossing at 73rd.

PARAPHRASE OF APPLICABLE STATUTES AND RULES

Minn. Stat. 105.42, subd. 1 (1986) provides that it shall be unlawful for any person, municipality or other political subdivision to change or

diminish the course, current or cross section of any public waters by any means, including filling or placing materials on the beds of public waters, without a written permit from the Commissioner previously obtained.

Subdivision 1(a) of that same statute provides that permits may be granted only when the project involves a minimum of encroachment, change or damage to the environment, particularly the ecology of the waterway.

Minn. Stat. 105.45 (1986) provides that if the Commissioner concludes that the plans of the applicant are reasonable, practical, and will adequately protect public safety and promote the public welfare, he shall grant the permit. In all other cases, the Commissioner shall reject the application, or require such modification of the plan as is deemed proper to protect the public interest. In all permit applications, the applicant has the burden of proving that the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare. In granting a permit, the Commissioner may include terms and reservations regarding the method of construction as appear reasonably necessary for the safety and welfare of the people of the State.

Minn. Stat. 116D.04, subd. 6 (1986) provides that no permit for natural resources management and development shall be granted where such permit is likely to cause pollution, impairment or destruction of natural resources so long as there is a prudent and feasible alternative consistent with the reasonable requirements of the public health, safety, an, welfare and the State's paramount concern for the protection of its natural resources from pollution, impairment or destruction. Economic considerations alone shall not justify such conduct.

Minn. Rules pt. 6115.0190, subp. 3, item F, provides that placement of fill shall not be permitted to construct a roadway or to facilitate land transportation across waters; however, where a project is proposed by a local government agency and this provision would prevent or restrict the project, or create a major conflict with other public purposes or interests, the Commissioner may waive this provision provided: (1) there is no feasible and practical alternative to the project that would have less environmental impact; and (2) that the public need for the project rules out the no-build alternative.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. All relevant substantive and procedural requirements of law or rule

have been fulfilled. The Department and the Administrative Law Judge have jurisdiction over this proceeding pursuant to Minn. Stat. 105.42, 105.44, 105.45 and 14.50.

2. That Minn. Stat. 105.45 provides that in all permit applications, the applicant has the burden of proving that the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare.

3. The proposed project does constitute the construction of a roadway and the facilitation of land transportation across waters within the meaning of Minn. Rule pt. 6115.0190, subp. 3(F).

4. The prohibitions of Minn. Stat. 105.42, subds. I and 1(a), 105.45, 116D.04, subd. 6, and Minn. Rules pt. 6115.0190, subp. 3. item F apply to the City's permit application.

5. The City's proposal will not involve a "minimum of encroachment, change, or damage to the environment, particularly the ecology of the waterway" within the meaning of Minn. Stat. 105.42, subd. 1(a).

6. The City's plan is not "reasonable, practical, [nor will it] adequately protect the public safety and promote the public welfare" within the meaning of Minn. Stat. 105.45.

7. The City's proposed action is "likely to cause pollution, impairment or destruction of . . . natural resources" within the meaning of Minn. Stat. 116D.04, subd. 6 (1986). The requested permit is a "permit for natural resources management and development".

8. There are "feasible and prudent alternatives Consistent with the reasonable requirements of the public health, safety and welfare and the State's paramount concern for the protection of its . . . natural resources from pollution. impairment or destruction" within the meaning of Minn. Stat. 116D.04, subd. 6 (1986).

9. The applicable rule constitutes a "environmental quality standard" which would be violated by the City's proposal within the meaning of Minn. Stat. 116B.02, subd. 5. In addition, the project would "materially adversely affect the environment" within the meaning of that statute.

10. There are "feasible and practical alternatives to the project that would have less environmental impact" within the meaning of Minn. Rule pt. 6115.0190, subp. 3, item F. The public need for the project does not rule out the no-build alternative within the meaning of that rule.

11. The Department's treatment of the 1980 Application does not estop it from denying or modifying the 1986 Application.

12. Any of the foregoing Conclusions which are more appropriately labeled Findings, or any of the foregoing Findings which are more appropriately labeled Conclusions, are hereby adopted as such.

Based upon the foregoing, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Commissioner of Natural Resources deny the permit application of the City of Brooklyn Park to extend 73rd Avenue North across a wetland between Boone Avenue and Highway 169.

Dated this 24th day of September, 1987.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail .

Reported: Tape Recorded: 35 Tapes.

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MEMORANDUM

I.

The most difficult question is whether or not the over-capacity intersections constitute "community disruption" reaching "extraordinary magnitudes". Based upon the history of judicial interpretation of the applicable laws and rule, I have concluded that it does not meet the standard. Reasonable people might, however, differ with that conclusion.

It should be noted at the outset that I have accepted the City's projection of future traffic volumes and the impact of that traffic on the crucial intersections. However, I do not believe that this meets the level necessary to rule out the no-build alternative; moreover, there are a number of feasible and practical alternatives to the project that would have less environmental impact. The City's preferred route must be rejected under either one of those conclusions.

In the case of *Urban Council on Mobility v. Minnesota DNR*, 289 N.W.2d 729 (1980), the Supreme Court set forth a thorough and thoughtful analysis of the law in this area. In that case, which also involved the routing of a freeway over public waters, the court found that frustration of city planning, delays in construction, condemnation of seven or eight homes, or substantial amounts of money previously invested, do not render an alternative unacceptable. They do not constitute "truly unusual factors" within the meaning of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411, 91 S. Ct. 814, 821, 28 L.Ed.2d 136, 150 (1971).

Every reported case in Minnesota which I am aware of involving disputes over the placement of a roadway across a wetland or lake has resulted in the court's determining that the road should not be placed as originally proposed. *Freeborn County, by Tuveson v. Brvson*, 297 Minn. 218, 210 N.W.2d 290 (1973) and 309 Minn. 178, 243 N.W. 316 (1976) established the principle that the historical right of a city or county to site a road without regard to the impact on natural resources had been "drastically changed" by the adoption of Chapter 116D and related environmental legislation. Then came Application of

City of White Bear Lake, 311 Minn. 146, 247 N.W.2d 901 (1976), where a highway was proposed to encroach into Birch Lake and several adjacent wetlands. The city argued that it ought to be allowed to build the highway despite the Commissioner's objection because it had already spent substantial sums on planning, designing, and land acquisition along the proposed route. The Supreme Court rejected the argument, stating:

The fact that the city has expended a substantial amount of money in preparation for an environmentally damaging project does not require that project's construction.

247 N.W. 906. The next case was People for Environmental Enlightenment and Responsibility v. Minnesota Environmental Quality Council, 266 N.W.2d 858 (1978). That case involved the routing of a power line, rather than a highway, but in language which is equally applicable, the court reaffirmed its commitment to the Overton Park concept: "That truly extraordinary disruption be demonstrated before a prudent and feasible alternative to an environmentally destructive action would be refused."

In 1980 the court decided Urban Council on Mobility, *supr* Finally, and most recently, the Court of Appeals decided Roach v. Commissioner of Natural Resources, 356 N.W.2d 432 (Minn. App. 1984). In that case, the court upheld the Commissioner's decision to deny a permit to an individual who wanted to construct a road out to an island. The court noted that it "extends to a private road proposal the principles of public law and policy well-established for public roads since enactment of modern legislation on environmental protection and water resources management." The court went on to cite the cases which I have cited above.

in summary, the legal standards to be applied to Brooklyn Park's proposal are now well established and their validity is beyond question. The only remaining question is a judgmental one: Do the facts brought out at the hearing Justify the conclusion that there are prudent and feasible alternatives, including not building a crossing at all. I have determined not only that doing nothing would not cause "community disruption [of] extraordinary magnitude", but also there are alternatives to the crossing at 73rd that have fewer environmental consequences.

II.

The City has asked that I set forth the reasons for my granting Northland's Petition to Intervene. The reasons fall into two basic categories: a statute and a rule.

Minn. Stat. 116B.09, subd. 1 (1986) provides that any natural person residing within the State or any corporation having employees residing in the State "shall be permitted to intervene as a party" in any administrative

proceeding "upon the filing of a verified pleading asserting that the proceeding . . . involves conduct that . . . is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the State." While the Petition to Intervene is not verified, it was signed by attorney Dietzen and was filed at a point in the proceeding where all parties acknowledged that environmental protection was one of the central issues--the Notice of Hearing made this obvious, as did the prehearing conference. Therefore, I do not believe that the petition in any way was a sham or artifice to allege a frivolous issue. The statute required its approval.

The second reason for granting the petition was that it met the standards contained in Minn. Rule pt. 1400.6200, subp. 1. The only problem with it was its late filing, but the rule provides that "Timeliness will be determined by the Judge in each case based on circumstances at the time of filing." It was

obvious from the prehearing conference that the Department's failure to name Northland in the Notice of and Order for Hearing was not intentional, but rather was an oversight. Northland's attorney had timely filed a Notice of Appearance (the form to be filed by parties) on the mistaken assumption that he was already a party. The City negotiated discovery issues, scheduling matters, and other matters for some time with Northland, and it was not until just before the prehearing conference that it was discovered that Northland was not, in fact, a party.

Based upon all the circumstances learned in the prehearing conference and in the Petition and Objection, I determined that the standards set forth in the rule had been satisfied and that the City was not prejudiced by Northland's failure to file at an earlier date. Therefore, both the statute and the rule supported the granting of the Petition.

III.

At the close of the hearing, the Department sought to elicit an opinion from Ms. Body Boudreau, Area Hydrologist for the Metro Region, as to whether or not the permit ought to be granted. The City objected, claiming that she was not qualified to render the opinion (for reasons which will be discussed more fully below). I sustained the objection, but granted the Department's request that she be allowed to make her testimony the subject of an offer of proof. This was done, and the testimony which she would have given is in an envelope, attached to a transmittal letter from Mr. Gallo dated July 17, 1987. The Department has asked that I specify the reasons for my ruling.

By the end of the hearing, it appeared that the ultimate issue would be decided by the facts from the traffic studies and their application to the law. Earlier in the hearing, Ms. Boudreau had testified that her duties as area hydrologist involved permit application reviews, land use issues arising out of shoreland and flood plain ordinances, coordination with watershed districts, cities, counties, the corps of engineers, pollution control agency, and other governmental bodies. In addition, she stated that she was involved

in public informational meetings and reviewing potential violations. She further testified that she was not a registered professional engineer, nor was she a traffic engineer. She stated that prior to determining whether or not to hold a hearing, she had tried to compare the facts with the rule, and had found it difficult to assess the traffic need "as a lay person". That was one of the reasons for holding the hearing: to gather facts that could tip the decision one way or another. She testified that the issues seemed to be coming down to traffic issues, and she was not a traffic engineer.

At the end of the hearing, the Department attempted to have Ms. Boudreau offer an opinion as to whether or not the permit ought to be granted. The City objected on the basis of foundation. I sustained the objection because it was clear from her earlier testimony that Ms. Boudreau did not have the requisite experience to qualify as an expert on questions of whether or not the alternatives were prudent and feasible, or on the question of whether or not public need for the road prevented the no-build alternative. Minn. Rule of Evidence 702 limits expert testimony. It provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an

expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Emphasis added.

The long and the short of the matter is that Ms. Boudreau made no pretensions about her abilities as a traffic engineer. I did not believe that she was in a position to offer expert testimony.

Another reason for the objection was the length of the hearing. The hearing had extended far longer than anyone had expected. It had been difficult to schedule additional hearing days when all counsel could be present. Indeed, counsel for the Department had to be switched in the middle of the hearing. We were working very hard on that last day to finish up. There was no lunch break taken. It was in the afternoon of the last day, at the end of the hearing, that the Department proposed to call Ms. Boudreau. In the course of entering his objection, counsel for the City pointed out that if she were allowed to offer her opinion, he would be entitled to thoroughly cross-examine her on the bases underlying it, and he believed that such cross-examination would be lengthy. I had every reason to believe him. This contributed to my ruling. However, the primary basis for the ruling was that it was clear that Ms. Boudreau did not possess the expertise required to offer opinion testimony on the traffic issues.

A.W.K.