

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Application  
of Channel Drive Homeowners Association  
to Dredge a Channel in an Inlet on the  
REQUEST  
East Side of St. Alban's Bay of  
Lake Minnetonka in the City of Greenwood

FINDINGS OF FACT  
CONCLUSIONS OF LAW.  
AND ORDER ON

FOR ATTORNEY'S FEES

This matter originally came on for hearing before Administrative Law Judge Phyllis A. Reha, who issued Findings of Fact, Conclusions and a Recommendation, dated June 19, 1992. The Recommendation was considered by the Commissioner of Natural Resources (the Commissioner), who made a final decision in this matter on December 14, 1992. At the time of the Recommendation, a petition for attorney's fees under the Minnesota Equal Access to Justice Act (EAJA) was stayed as not yet ripe. That petition for relief under the EAJA has now been renewed by the City of Greenwood (the City) and the St. Alban's Green Homeowners Association (Homeowners).

A. W. Clapp, III, Special Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155 filed submissions on behalf of the Minnesota Department of Natural Resources (the Department). William F. Kelly, City Attorney of Greenwood, 351 Second Street, Excelsior, Minnesota 55331 represents the City. No brief was filed on behalf of the Channel Drive Homeowner's Association, the Applicant in the underlying permit case.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Channel Drive Homeowner's Association (the Association) received a permit from the Department (first permit) to excavate a navigational channel. The first permit authorized construction of a 680-foot long access channel with a 30-foot bottom width, 2:1 side slopes, and a bottom elevation of 924.4 feet. The first permit was set to expire on November 10, 1989.

2. On November 29, 1989, the Association requested the first permit be extended to complete the work authorized. The Department extended the first

permit to November 30, 1990. The contractor doing the channel construction requested that the depth be changed from 924.4 feet to 923.6 feet. Under its existing practice, the Department would grant this request for an amendment, so long as the local units of government affected agreed to the change. The City did not approve the change and the Department denied the requested amendment.

3. Another extension of the first permit was requested by the Association on November 28, 1990. The Department received information from the Homeowners and the City in considering this request and decided to issue an amended permit (second permit) that would supercede the first permit.

4. The second permit was issued on January 3, 1991, and authorized construction of a 680-foot long access channel with a a 30-foot bottom width, 2:1 side slopes, and a bottom elevation of 924.4 feet, except for the 70 feet of the channel nearest the entrance which would have a 15-foot bottom width and riprapped sideslopes. The second permit was set to expire on November 30, 1991.

5. The City demanded a hearing on the second permit as provided for under Minn. Stat. 103G.311, subd. 5. The Homeowners intervened in this matter under Minn. Stat. 116B.09. A contested case hearing on this matter commenced on April 7, 1992.

6. The Association asserted that it was entitled to construct an access channel under the terms of the first permit, or in the alternative, the second permit as issued by the Department. The Association bore the burden of proof in the contested case hearing. The Department, to the limited extent that it took a position in the matter, asserted that the granting of the second permit was a proper exercise of the agency's power.

7. The City argued that the amended permit should not be granted for the following reasons:

- (a) lack of substantial evidence supporting the permit application;
- (b) the Department violated its own goals, rules, and standards in granting the second permit; and,
- (c) the Department violated the Lake Minnetonka dredging policy inter-agency agreement by granting the permit.

The City did not argue that a modified permit should be granted.

8. The Homeowners argued that the amended permit should not be granted due to the lack of substantial evidence supporting the permit application, the excavation is being sought for an improper purpose, and the excavation would violate various state standards. The Homeowners argued that, at a minimum, issuance of the second permit should be delayed until a separate issue, the right to build docks, was resolved.

9. Administrative Law Judge Phyllis Reha heard this matter and issued Findings of Fact, Conclusions of Law, and Recommendation, dated June 19, 1992. She recommended that the application of the Association for the second permit be granted, provided that the second permit be limited as follows:

- (a) excavation be restricted to dates other than April 1 to June 30 (bass spawning season);
- (b) the access channel must not exceed four feet in depth and be no more

- (c) than 15 feet in width at the bottom; and,  
issuance of the permit be conditioned upon resolution of the dock  
issue with the City.

10. The City and the Homeowners made application for attorney's fees, witness fees, and costs in this matter under Minn. Stat. 3.761-65 (Minnesota Equal Access to Justice Act or EAJA). Since the Administrative Law Judge's Recommendation was not a final decision, the applications were not immediately ruled upon, but were held in abeyance pending a final decision from the Commissioner.

11. The Commissioner of Natural Resources (through Deputy Commissioner Nargang) issued a final order in this matter on December 14, 1992. The order issued the second permit with the following amendments:

- (a) the entire channel shall have a bottom width of 15 feet with 3:1 side slopes; and,
- (b) dredging is prohibited during the largemouth bass spawning season of April 1 to June 30.

The memorandum attached to the Commissioner's order explained that Department staff erred in not limiting the period of permissible dredging in the second permit to accommodate the bass season. The memorandum noted the possibility that the inter-agency agreement, which limits dredging during bass spawning, may not have been executed when the first permit was issued. Nevertheless, the Commissioner acknowledged that the inter-agency agreement was binding on this matter and amended the second permit accordingly. The Commissioner found any question relating to docks irrelevant to the permit application. The Commissioner also found that the proposed excavation would not extend riparian rights to nonriparian lands.

12. The City and Homeowners have now renewed their applications under the EAJA. The Department has opposed any award of fees and cost, arguing that the EAJA was not intended to apply to this situation and these parties do not meet the standards for relief under the statute.

13. The City is a municipal corporation with fewer than 50 employees and annual revenues less than \$4,000,000. The Homeowners is an unincorporated association of persons with no employees and no revenue.

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

#### CONCLUSIONS

1. The Administrative Law Judge has Jurisdiction of this matter pursuant to Minn. Stat. 3.762 and Minn. Rule 1400.8401.
2. All relevant, substantive and procedural requirements of law or rule have been fulfilled for an application for attorney's fees, witness fees, and costs under the Minnesota Equal Access to Justice Act.
3. The City is a party as defined by Minn. Stat. 3.761, subd. 6. The

other intervenor, the Homeowners, is a party as defined by Minn. Stat. 3.761, subd. 6.

4. The Department's position on the issuance of the second permit to the Association for excavating an access channel was substantially justified, as defined in Minn. Stat. 3.761, subd. 8.

5. Neither the City nor the Homeowners prevailed in the contested case conducted on the issuance of the second permit.

6. The contested case conducted on the issuance of the second permit was not brought "by or against the state," as required for an award of fees and costs by Minn. Stat. 3.762(a).

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

The applications of the City of Greenwood and the Homeowners for attorney's fees, witness fees, and costs is hereby DENIED.

Dated this 17th day of February, 1993.

PHYLLIS A. REHA  
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 3.764, subd. 3, this Order is the final decision in this case and under Minn. Stat. 3.764, subd. 3, any party dissatisfied with the fee determination made here may seek judicial review pursuant to Minn. Stat. 14.63 to 14.69.

MEMORANDUM

The Minnesota Equal Access to Justice Act establishes the right of parties to be reimbursed for attorney's fees, witness fees, and costs expended in certain actions where the party prevails and the state's position was not substantially justified under the facts or law. If any one requirement of the EAJA is not met by the applicant, the application must be denied. Every aspect of the application of the EAJA to this case has been disputed in this case. Therefore each issue will be discussed regardless of whether another issue decides the eligibility of the applicant.

Definition of "Party"

The EAJA allows only parties to receive fees and costs. Minn. Stat. 3.761, subd. 6(a) defines party as:

A person named or admitted as a party, or seeking and entitled to be admitted as a party, in a court action or contested case proceeding, or a person admitted by the administrative law judge for limited purposes, and who is:

(1) an unincorporated business, partnership, corporation, association, or organization, having not more than 50 employees at the time the civil action was filed or the contested case proceeding was initiated; and

(2) an unincorporated business, partnership, corporation, association, or organization whose annual revenues did not exceed \$4,000,000 at the time the civil action was filed or the contested case proceeding was initiated.

The City notes that the definition does not exclude municipal corporations. The City Attorney submitted an affidavit that the City does not employ more than 50 persons and has revenues less than \$3,000,000. The attorney for the

Homeowners related that their group has no employees and no revenues. The

Department has not questioned the number of employees or revenues of the City or the Homeowners.

Caselaw has not clearly interpreted the definition of a party for the purposes of the EAJA. In *McMains v. Commissioner of Public Safety*, 409 N.W.2d

911, 914 (Minn.App. 1987), the Court of Appeals conducted a searching inquiry of the legislative history of the EAJA and concluded:

The presentation of the bill, testimony, and discussion of various amendments that were prepared make it clear that the parties entitled to recover fees and expenses under the bill are small businesses that meet the requirements of Minnesota Statutes 3.761, subdivision 6(a)(1) and (2), as well as a partner, officer, shareholder, member, or owner of an entity described in subdivision 6(a)(1) and (2).

Questions were raised several times as to the reason why an individual could not collect fees and expenses under these bills, and it was made clear that this bill was specifically targeted toward small businesses. Senate Judiciary Committee (tape of Feb. 24, 1986); Senate Floor Session (tape of Mar. 4, 1986).

A reasonable conclusion from the holding in *McMains* is that only small businesses are entitled to recover fees and costs under the EAJA. See also *Department of Natural Resources v. Mahnomen County Hearing Unit*, C6-86-1988, Order issued July 28, 1987 (Minn.App.). However, the Court of Appeals subsequently held:

The State argues the certified class [an informal group of individual taxpayers] does not constitute an "association, or organization" within the meaning of the statute. It contends by referring to an organization or association with 50 or less [oil] employees and less than \$4,000,000 in revenues, the type of association or organization contemplated by the act is one

where the members are joined together to conduct business. "

Respondents argue the class is an association or organization  
under the usual and customary meaning of the words. Minn.Stat.

645.08(1) (1986). Black's Law Dictionary (5th ed. 1979) defines "association" as "a number of persons uniting together for some special purpose." "Organization" is defined as "two or more persons having a joint or common interest." He find that the class of respondents joined together for their common interest are an association or organization. Since they have no revenue (other than the damage award of about \$75,000) and only one employee (their attorney), the class of is a party under Minn. Stat. 3.761.

Snider v. State Department of Transportation 445 N.W.2d 578, 581 (Minn.App. 1989).

The Homeowners are clearly a party for the purposes of the EAJA under the holding of Snider. The City is not a small business, but it is an association of persons having a common interest. The common interest, for the purposes of this case, is the protection of the rights of residents. The City is also a municipal corporation. The category of corporation is present in the statutory definition. The Department properly points out that municipal corporations are not specifically mentioned. Under Snider, however, a party need not be a business to meet the definition of "party."

The Legislature did not expressly include the words "small business" or "for profit" in the EAJA, although the Administrative Law Judge believes the McMains court was correct in asserting that the statute was aimed at protecting small businesses. The Legislature may wish to clarify the statute to deal with the questions raised by Snider and this case. Absent such clarification, however, the precedent set in Snider remains valid. The City is a party under the EAJA.

#### Contested Case Brought By or Against the state

The EAJA only permits an award in civil or contested cases "brought by or against the state" Minn. Stat. 3.762(a). The second permit in this case was issued without a hearing by the Department. Only after the City's demand for a hearing under Minn. Stat. 103G.311 was made did the Department schedule a contested case hearing. Minn. Stat. 103G.311, subd. 5 states:

If a hearing is waived (by the Department) and an order is made issuing or denying the permit, the applicant, the managers of the watershed district, the board of supervisors of the soil and water conservation district, or the mayor of the municipality

may file a demand for hearing on the application ....

If a hearing is demanded, the Commissioner of Natural Resources must review the hearing record and decide whether the application should be issued, denied, or modified. Minn. Stat. 103G.315, subd. 1. The Commissioner must grant the permit if the Commissioner finds that the applicant's plan is "reasonable, practical, and will adequately protect public safety and promote the public welfare." Minn. Stat. 103G.315, subd. 3. The applicant has the burden of proof. Minn. Stat. 103G.315, subd. 6.

The City argues that the Department has the burden to demonstrate that it acted in accordance with its rules and any applicable statutes in issuing the second permit. No statute or rule has been cited to support this proposition. However, if 1) the Department waives the hearing; 2) a public authority other than the applicant demands a hearing; and 3) the Commissioner's order is affirmed without material modification, the party requesting the hearing must pay for the court reporter, the hearing hall rental, and costs of publication. Minn. Stat. 103G.311, subd. 7. The statutory scheme for hearings recognizes that the Department is often acting in a quasi-judicial role rather than as an advocate where permits have been requested.

In this case, the Department waived the hearing and issued the second permit. The hearing was brought at the demand of the City. The Department was not obligated to argue for or against any outcome in this matter. The Association bore the burden of proof. The City and the Homeowners opposed the evidence presented in support of the second permit. This contested case was not "brought by or against the state," within the meaning of the EAJA.

#### Substantially Justifies

A party is entitled to fees and costs under the EAJA only if "the position of the state was not substantially justified." Minn. Stat. 3.762(a). "Substantially justified" is defined as a reasonable basis in law and fact based on the totality of the circumstances. Minn. Stat. 3.761, subd. 8. The definition has been clarified by caselaw. Parties cannot rely upon prevailing in their action as demonstrating that the state's position was not substantially justified. *Donvan Contracting v. Department of Transportation* 469 N.W.2d 718, 720-21 (Minn.App. 1991)(citing Minn. Rule 1400.8401, subp. 3(A)(2)(c)). Interpreting a statutory ambiguity through unpromulgated rules constitutes a basis for finding the state's position was not substantially justified. *Donvan*, at 722-23. Taking adverse action against a license without facts is also a basis for such a finding. *In re Haymes*, 427 N.W.2d 248 (Minn.App. 1988), *Rev. on other grounds* 444 N.W.2d 257 (Minn. 1989).

The Department made clear on several occasions that it had no interest in the outcome of the case. The Association bore the burden of proof. The City and the Homeowners objected to the issuance of the second permit. The Department explained the basis of its action in issuing the second permit. In this contested case, the Department has not taken a position which it needs to justify. The Association met its burden to show a permit should be granted. Since that burden was carried, the Department was obligated by statute to issue the second permit. See Minn. Stat. 103G.315, subd 3. The City and the Homeowners have failed to demonstrate that the Department was not substantially justified in issuing the second permit to the Association.

#### Prevailing Party

Minn. Rule 1400.8401, subp. 3(A)(2) sets two standards for determining who is a prevailing party. The party need not have succeeded on every issue, but must have at least been successful on the central issue raised or the or received substantially the relief requested. Minn. Rule 1400.8401, subp. 3(A)(2)(a). No presumption is granted a party where the agency did not prevail. Minn. Rule 1400.8401, subp. 3(A)(2)(a). In this case, the agency



did not have a position to prevail on. The City and Homeowners argued that the second permit should be denied or stayed pending resolution of a dock issue.

The Administrative Law Judge's Recommendation held that the access channel was appropriate with some modifications, but the permit for construction should be stayed pending resolution of the dock issue. The Department staff did file exceptions to the Recommendation. The exceptions corrected one clerical error, clarified two findings not related to the decision, and objected to the stay of the permit's issuance. The objection to the stay was that no "dock issue" exists for resolution. The final decision of the Commissioner adopted the modifications to the access channel specifications, and deleted the stay.

The permit modifications arose directly from the evidence and argument presented by the City and the Homeowners. The modifications are important restrictions on the size, shape, and time for constructing the channel. The modifications provide valuable environmental protections. Modifying the permit, however, was not the central issue raised or substantially the relief requested by either the City or the Homeowners. The City and Homeowners sought permit denial and/or delay pending resolution of the dock issue. Neither type of relief was granted by the Commissioner in his final decision. Neither the City nor the Homeowners are the prevailing party in this contested case.

#### Permit or License

The Department argues that this matter is exempt from the EAJA as "a contested case ... to grant or renew a license." Minn. Stat. 3.761, subd. 3. The Department maintains that permit and license are synonymous and cites definitions in Black's Law Dictionary and Webster's Dictionary as support for this position. This argument is not persuasive. In its responsive brief, the City lays out a cogent analysis of the difference between permits and licenses. As the terms have come to be used, a permit allows limited activity in a specific location, while a license authorizes the conduct of a range of activities throughout the jurisdiction. A common example of a license is an occupational license, such as an insurance agent's license. The Department is well aware that it does not issue licenses, as that term is used in the EAJA, to persons seeking authorization for working in protected waters. This matter

is not exempt from the EAJA, because it is not a license proceeding.

Conclusion

The City and the Homeowners are parties under the EAJA. They did not prevail in a contested case brought by or against the state. The contested case was not for granting or renewing a license. The Department's position was substantially justified. The City and the Homeowners are not entitled to attorney's fees, witness fees, or costs under the EAJA.

P.A.R.