STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0281

Living Word Bible Camp,
Respondent,

vs.

County of Itasca,
Respondent,

Pamela J. Brown, et al., intervenors,
Appellants.

Filed September 17, 2012
Affirmed in part, reversed in part, and remanded; motion denied
Stoneburner, Judge

Itasca County District Court
File No. 31-CV-10-885

G. Craig Howse, Jeffrey C. Thompson, Jacob R. Grassel, Howse & Thompson, P.A., Plymouth, Minnesota (for respondent Living Word Bible Camp)

Michael J. Ford, Cally R. Kjellberg, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for respondent Itasca County)

James P. Peters, Law Offices of James P. Peters, PLLC, Glenwood, Minnesota (for appellants)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellants, owners of land adjacent to a planned development on a lake, sought to intervene in a declaratory-judgment action brought by respondent developer to challenge the decision of respondent county requiring an environmental-impact statement (EIS) for respondent's planned lakeshore development. The district court denied the motion to intervene, reversed the county's EIS determination, remanded the matter for the preparation of a new environmental-assessment worksheet (EAW), and sua sponte enjoined the participation of one commissioner in further proceedings on the project. Appellants challenge the district court's orders, arguing that, as affected neighboring landowners, they have a right to intervene and have standing in this appeal to challenge the district court's ruling on the merits. Because we conclude that appellants have a right to intervene, we reverse the denial of the intervention motion and recognize appellants' standing to challenge the district court's rulings on the merits. Because we conclude that the district court did not err in concluding that a commissioner's bias made the county's decision on the EIS arbitrary and capricious, we affirm the district court's reversal of the EIS decision and remand for a new EAW process in which the biased commissioner shall not participate.

FACTS

This is the fourth time that this court has addressed disputes related to respondent Itasca County's handling of a proposal by respondent Living Word Bible Camp (LWBC) to build a camp on the shores of Deer Lake. Most recently, we reversed the decision of

county board of commissioners (board) granting a conditional-use permit (CUP) and planned-unit-development permit (PUD) for the project based on the board's decision, in its capacity as the responsible governmental unit (RGU), that an EAW was not necessary. We remanded to the board for completion of an EAW. *Applications of LWBC*, 2008 WL 2245708, at *1 (Minn. App. June 3, 2008).

The EAW

On remand from this court, the board retained the consulting firm of Widseth, Smith, Nolting & Associates, Inc. (WSN) to assist with preparation of the EAW. WSN assigned environmental scientist Brian Ross to work on the EAW. The board forwarded all of the comments it had received in relation to its prior EAW determination to Ross. LWBC submitted data in the form of a draft EAW to Ross, and Ross prepared and submitted a draft EAW to the county.

Commissioner Catherine McLynn, who represents a district encompassing LWBC's land, believed that the draft EAW submitted by Ross was incomplete and in some respects inaccurate. McLynn discussed her beliefs with staff and sent emails summarizing her views to staff, fellow commissioner Karen Burthwick, and Ross. McLynn made several suggestions for changes to the draft EAW and criticized Ross's failure to include or respond to letters and statements previously submitted to the county by parties opposed to the LWBC project. McLynn objected to including conclusory statements in the EAW.

Ross responded to McLynn' s concerns, editing the EAW in many respects, but also advising her that some of her proposals were not supported by the record and noting

that the EAW form calls for conclusory statements in some respects by asking for an opinion about effects and impacts.

McLynn submitted a request for board action (RBA) to return the draft EAW to Ross for revisions. The board met and passed McLynn's RBA. The board also scheduled a hearing for December 7, 2009, to approve the EAW for distribution.

Four days before the scheduled hearing, Ross sent a new draft of the EAW to McLynn, advising her that he had made "small revisions" based on comments received from LWBC's attorney. McLynn responded by email, asserting that there were "significant revisions so it will be impossible for the board to approve on Mon[day] a document that has been revised significantly from the copy we were given." She also wrote that she was "very disappointed in the revised draft." She asserted that,

> [a]ccording to the EQB Guidelines and state law, this document is THE COUNTY'S assessment of the project, not the proposer's. You are working for us in preparing the document. You were directed by the board to revise the document after reviewing specifically identified documents ON FILE with the county. And yet, the drafts you sent us are full of conclusionary [sic] statements that are NOT appropriate in the EAW and are in substantial conflict with what the county already has on file as far as knowledge of the project and impact on the environment. Please delete or revise ALL conclusionary statements and stick to known facts. Did you review and would you please refer and include as appendices the limnology and fish and wildlife reports on file . . . ?

(Emphasis in original.) McLynn further stated that "[t]he EAW is full of references to promises, indications, expectations and proposed conditions NONE of which are in force as mitigation measures YET." (Emphasis in original.)

Before the December 7 meeting, McLynn sent a memorandum to the board titled, "Accuracy and completeness of EAW for LWBC." The memo contained three pages of McLynn's recommendations for amendments, including the addition, as appendices, of the materials received by the county from individuals opposed to the project, some of which were not supported by the data. She also proposed deleting from the draft EAW numerous statements concluding that the project will not impact or significantly impact certain resources and, in some cases, replacing those statements with statements that the project *will* or *may* impact certain resources.

At the December 7 meeting, Ross spoke to the board addressing and objecting to several of McLynn's proposals and stating that the conclusions in the draft EAW reflected his professional opinions based on the reports that had been commissioned from a limnologist and an engineer.

McLynn asserted during the meeting that her proposed changes were her attempt to make the EAW more neutral. But Ross pointed out that some of McLynn's proposed language was itself conclusory. Ross and McLynn explained their respective positions and McLynn moved to approve the EAW with the amendments contained in her memo, with certain corrections. Four of the five county commissioners were present at the December 7 meeting. Two commissioners expressed an interest in accepting Ross's draft EAW as written. But a third commissioner supported McLynn, and the commissioners were deadlocked 2-2. Ross then proposed to make all but one of McLynn's amendments to the draft EAW, and McLynn agreed to drop that amendment and not to add anything to the appendices. McLynn moved for approval of that compromise. After that motion

failed, Ross reviewed and discussed with the commissioners specific changes that concerned him. Ross eventually agreed to remove much of the conclusory language. The board passed a motion, over McLynn's "no" vote, to exclude the language that Ross agreed to remove and to exclude the amendment and additional appendices that McLynn had previously agreed to. The board then approved the EAW for distribution, again over McLynn's "no" vote.

The EAW was submitted to the Environmental Quality Board (EQB) and published in the *EQB Monitor*, which started a 30-day public-comment period. The county received approximately 50 written comments and/or data submittals during the public-comment period, from supporters and opponents of the project, and from state agencies and other experts who advocated further study of the environmental impacts of the project. The Minnesota Department of Natural Resources (DNR) submitted a 12-page letter, identifying shortcomings of the EAW and concluding that "[t]here is a need to further describe various environmental effects from the project and identify specific mitigation measures that could be included as requirements of project permitting to minimize negative environmental effects."

The EIS vote

On February 23, 2010, the board met and voted to issue a positive declaration requiring an EIS for the project. In contrast to the lengthy discussion about the EAW, the record discussion on the EIS determination is brief. As part of his contractual duties, Ross prepared and presented to the board a resolution for a positive declaration with supporting findings. McLynn and two other commissioners proposed edits to the draft

findings. Some of McLynn's edits were to correct misstatements. But, as with the EAW, McLynn also proposed to delete a number of "no-impact" and "mitigation" statements in Ross's draft findings. McLynn also asked for her own findings to be appended to those drafted by Ross. After additional discussion, the chairperson called for any other comments regarding the findings and positive declaration, and hearing none, stated that she was most persuaded by the 12-page letter from the DNR, stating that there is potential for significant environmental impact. No other commissioner expressed a specific reason for voting for the positive declaration, but, as the district court later noted, "Commissioner Burthwick proposed significant substantive findings of fact in support of her vote and her findings are supported by substantial evidence in the record." The board voted three-to-one to require an EIS and to adopt the draft findings with the amendments proposed by McLynn, Burthwick, and the chairperson.

District court proceedings

LWBC brought a declaratory-judgment action in district court, seeking a declaration that the county's decision to require an EIS was arbitrary and capricious. LWBC moved for summary judgment, submitting affidavits and an extensive expert report by Westwood Professional Services (the Westwood report) critiquing the EAW process and, particularly, McLynn's role in that process. The Westwood report had not been presented to the board. Appellants noticed their intent to intervene in the declaratory-judgment action as a matter of right.

After a hearing on the motions, the district court issued an order on July 25, 2010, denying, in relevant part, appellants' motion to intervene, holding that as a matter of law

McLynn's actions reflected partiality and were improper such that her vote should be excluded, and ordering an evidentiary hearing to determine whether McLynn's "partiality and improper actions" rendered the board's resulting two-to-one positive declaration for an EIS arbitrary and capricious.

The district court based its decision on McLynn's conduct in the course of the EAW and EIS proceedings, explaining that "all of the changes McLynn sought and had made to the EAW, other than typographical changes (affect v. effect, for example) changed statements that were more favorable to LWBC's position into statements that were either facially neutral or more favorable to those opposed to LWBC's position." The district court also identified facts outside of the EAW and EIS proceedings supporting its determination that McLynn had acted partially. The district court, noting that because the record before it could support either a positive or negative declaration for an EIS, stated "it is impossible to speculate as to what the result would have been absent Commissioner McLynn's partiality and improper conduct."

Both LWBC and the county moved for amended findings, and appellants sought reconsideration of the denial of their notice to intervene. On December 15, 2010, the district court issued conclusions of law, concluding that, even without reference to matters outside of the record, the record supported the district court's finding that Commissioner McLynn acted arbitrarily and capriciously by voting for a positive declaration for an EIS and that her vote should not count. The district court also concluded that it had erred by upholding the positive declaration based on only two votes because it now understood that the board cannot pass any resolution unless a majority of

the five board members vote in favor of the resolution. The district court again concluded that the record could support either a positive or negative declaration for an EIS and that "[b]ecause Commissioner McLynn's actions and involvement may have affected the whole EAW process and the extent of her improper influence cannot be determined, it is necessary that the EAW process be completed anew." The district court, in relevant part, cancelled the previously ordered evidentiary hearing on whether McLynn's actions made the board's EIS decision arbitrary and capricious and remanded the matter to the county to conduct a new EAW process with a recommendation that the matter be referred to a different RGU if possible. Sua sponte, the district court enjoined McLynn's participation in further proceedings involving LWBC's proposal. The district court denied appellants' motion for reconsideration of the motion to intervene, stating that the county had appropriately represented their interests and that they could participate in the further proceedings before the board.

This appeal

The county did not appeal the district court's order and subsequently requested that the EQB appoint a different RGU.[1] Appellants filed this appeal, challenging the district court's denial of their notice to intervene and the district court's reversal of the county's positive EIS declaration. LWBC moved to dismiss the appeal, arguing that the appeal is untimely and that appellants do not have standing to appeal. A special-term panel of this court denied the motion, reasoning that the appeal is timely; that appellants

[1] The EQB addressed the request to reassign the matter at its June 18, 2012 meeting and voted to table the matter until this court issues a ruling.

have standing to challenge the intervention denial; and that the panel assigned to address the merits of the appeal would be in a better position to determine whether appellants have standing to challenge the merits of the district court's decision. LWBC has moved to strike three statements in appellants' brief on appeal.

D E C I S I O N

Motion to strike denied

LWBC's motion to strike three statements from appellants' brief on appeal asserts that the objected-to statements would mislead this court to believe that consultant Ross was hired by LWBC rather than the county. But the record is clear that Ross was hired by the county. The record reflects that LWBC also used consultants in connection with the EAW/EIS proceedings, and the use of consultants by LWBC has no bearing on our decision. The motion to strike is denied as unnecessary.

Intervention

Appellants assert that the district court erred by denying their motion for intervention as a matter of right under Minn. R. Civ. P. 24.01. This court reviews de novo an order denying intervention as a matter of right. *Star Tribune v. Minn. Twins P'ship*, 659 N.W.2d 287, 299 (Minn. App. 2003).

We have articulated four criteria that, when satisfied, compel a court to grant intervention: (1) a timely application by (2) someone with an interest in the property or transaction underlying the action; (3) circumstances under which the disposition of the action will impair or impede the applicant's ability to protect that interest; and (4) a lack of adequate representation by those who are already parties to the action. *Star Tribune*,

659 N.W.2d at 299. "Minnesota courts are to follow a policy of encouraging all legitimate interventions." *Jerome Faribo Farms, Inc. v. Cnty. of Dodge*, 464 N.W.2d 568, 570 (Minn. App. 1990), *review denied* (Minn. Mar. 15, 1991).

Both LWBC and the district court acknowledge that appellants have interests that will be impacted by this litigation. Their implicated interests include both preserving the value of their properties and protecting the environment. *See id.*, at 571 (recognizing neighboring landowners' interest in protecting value of their real property). But LWBC asserts that this court should affirm the district court's denial of intervention, arguing that appellants did not timely intervene, and that, contrary to the county's assertion that it does not adequately represent all of appellants' interests, the county adequately represents appellants' interests.

"The determination of whether intervention is timely must be considered on a case-by-case basis." *State Fund Mut. Ins. Co. v. Mead*, 691 N.W.2d 495, 501 (Minn. App. 2005). "Timeliness of an application depends on factors such as how far the suit has progressed, the reason for the delay in seeking intervention, and any prejudice to the existing parties because of the delay." *Blue Cross/Blue Shield of Rhode Island v. Flam*, 509 N.W.2d 393, 396 (Minn. App. 1993), *review denied* (Minn. Feb. 24, 1994). But posttrial intervention is disfavored. *Id.* Appellants noticed their intervention during summary-judgment briefing and sought no changes to the scheduling orders.[2] LWBC does not assert any prejudice resulting from the delay, and we conclude that, under the circumstances of this action, appellants timely sought intervention.

[2] The court's scheduling orders did not include a deadline for joining additional parties.

With respect to the fourth criteria, appellants "carry the minimal burden of showing that the existing parties may not adequately represent their interests." *Faribo Farms*, 464 N.W.2d at 570 (quotations omitted).

> [I]f [the applicant's] interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but [the applicant] ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the [applicant].

Costley v. Caromin House, Inc., 313 N.W.2d 21, 28 (Minn. 1981) (quotation omitted). The district court reasoned that appellants' interests would be adequately represented even if the county chose not to appeal the EIS determination because appellants can participate in the new EAW determination. But this analysis disregards the remedy sought by appellants at the district court. The remedy sought by appellants was affirmance of the county's decision to require an EIS. Moreover, "[t]he fact that an intervenor may have another remedy does not preclude intervention." *Avery v. Campbell*, 279 Minn. 383, 389, 157 N.W.2d 42, 46 (1968).

LWBC asserts that appellants face a heightened burden in seeking to intervene in an action already defended by a government entity, citing a parens patriae doctrine that has been applied by the federal courts. *See, e.g., Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996) (explaining that "when one of the parties is an arm or agency of the government, and the case concerns a matter of sovereign interest, the bar is raised, because in such cases the government is presumed to represent the interests of all its citizens") (quotations and alterations omitted). LWBC does not assert that either the

Minnesota Supreme Court or this court has adopted this doctrine. And even if the doctrine applied, we conclude that it should not bar intervention under the facts of this case.

The Eighth Circuit has recognized that the doctrine does not bar intervention in all cases involving the government. *Id.* The court has explained that, "when the proposed intervenors' concern is not a matter of 'sovereign interest,' there is no reason to think the government will represent it." *Id.* (citing *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994, 1001 (8th Cir. 1993); *United States v. Union Elec. Co.*, 64 F.3d 1152, 1170 (8th Cir. 1995)). Put another way, if the interests of the putative intervenors are narrower than, and cannot be subsumed into, the government entities' interests, then the presumption of adequate representation does not arise. *Mille Lacs Band*, 989 F.2d at 1000.

In *Mille Lacs Band*, the Eighth Circuit applied this analysis to a dispute over tribal hunting and fishing rights and concluded that both a group of Minnesota counties and a group of individual landowners had interests in the litigation that were not subsumed by those of the State of Minnesota. *Id.* at 1000-01. With respect to the landowners, the court focused on the landowners' property values, which might be affected by diminished fish and game stocks if tribal rights were recognized, explaining that their "interests are narrower and more parochial interests than the sovereign interest the state asserts in protecting fish and game." *Id.* at 1001. The court concluded: Because the counties and the landowners seek to protect local and individual interests not shared by the general citizenry of Minnesota, no presumption of adequate representation arises. The proposed

intervenors need only carry a minimal burden of showing inadequate representation. *Id.* And the court went on to explain that the minimal burden was met by the potential for conflict among the parties' positions:

> Although the Band notes that the counties' and landowners' proposed answers are almost identical to the answer filed by the state, there is no assurance that the state will continue to support all the positions taken in its initial pleading. Moreover, if the case is disposed of by settlement rather than by litigation, what the state perceives as being in its interest may diverge substantially from the counties' and the landowners' interests. For example, although the state's interest in natural resources may lead it to seek no more than that endangered species are protected and that wildlife stocks are preserved at certain levels, the counties and the landowners will be more concerned with ensuring that any settlement does not impair their property values. A potential conflict of this sort is sufficient to satisfy the proposed intervenors' minimal burden of showing that representation of their interests by the existing parties may be inadequate.

Id. The intervenors' interests in this case are comparable to those in *Mille Lacs Band*, and for similar reasons, the parens patriae doctrine should not apply. We conclude that appellants have met their minimal burden of demonstrating that the county does not adequately protect their interests in this action.

Because appellants have met the criteria for intervention, we conclude that the district court erred by denying intervention. Despite the district court's ultimate denial of intervention, however, appellants were able to participate to some extent in the district court proceedings and are not seeking a remand for further proceedings in district court. Rather, at this stage of the proceedings, appellants seek intervention only to appeal the

district court's orders on the merits. We conclude that appellants have the right to intervene and therefore have standing to appeal the district court's orders on the merits.

Challenges to merits of district court's order

Both appellants and the county challenge the district court's reversal of the county's determination that an EIS is required, arguing that McLynn's participation did not render the decision arbitrary and capricious, and challenging the district court's restrictions on McLynn's participation in future proceedings.[3] In preparing an EAW, an "RGU applies certain criteria laid out in Minn. R. 4410.1700, subp. 7, to determine whether the project has potential for significant environmental effects." *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 824 (Minn. 2006) (quotation omitted). "If, after reviewing the EAW, the RGU decides that the project does have the potential for significant environmental effects, the RGU is required to issue a 'positive declaration' indicating that an EIS must be completed." *Id.* (citing Minn. R. 4410.1700, subps. 1, 3).

This court reviews a county's positive declaration for an EIS "independently without according any special deference to the same review conducted by the district court." *Id.* at 832. But we defer to the county, limiting our role to determining whether the county took a "hard look at the problems involved, and whether it has genuinely

[3] The county does not appeal the district court's decision but, without objection from LWBC, challenges the district court's decision on the merits both in briefing and at oral argument. The county concedes that it takes no position contrary to appellants. Because we conclude that the county's failure to appeal precludes consideration of its arguments on the merits, we address only the arguments of appellants. But we note that the county's position that it does not represent all of the interests of the intervenors.

engaged in reasoned decision-making." *Id.* Nevertheless, a reviewing court should reverse the county's positive declaration if it reflects an error of law, is arbitrary and capricious, or unsupported by substantial evidence. *Id.*

LWBC argues, and the district court found, that the board's decision to require an EIS was arbitrary and capricious because McLynn failed to approach the decision impartially. A decision is arbitrary and capricious if, among other things, it reflects the decisionmaker's will rather than its judgment and if it considered facts not intended by the legislature. *In re Valley Branch Watershed Dist.*, 781 N.W.2d 417, 423 (Minn. App. 2010); *see also Chanhassen Chiropractic Ctr., P.A. v. City of Chanhassen*, 663 N.W.2d 559, 562 (Minn. App. 2003) (recognizing that "constitutional due process protections include the right to an impartial decisionmaker" (quotation omitted)).

The record in this case supports the district court's finding that McLynn's actions reflect partiality that affected the decisionmaking process, making the board's decision arbitrary and capricious. McLynn's comments and proposed edits to the EAW demonstrate that she failed to approach the EAW process with the neutrality required in this quasi-judicial matter. McLynn approached the EAW/EIS process in a biased manner from the beginning. She accepted as fact the assertions of project opponents in their submissions to the board. And she uniformly rejected any contrary opinions reached by experts engaged to assist the county in preparing the EAW and by Ross, the consultant assigned by WSN to exercise independent judgment and expertise in assisting the county's preparation of the EAW. The record supports the finding that McLynn's

conduct demonstrated bias and that her ability to alter the EAW to reflect her bias rendered the decisionmaking process arbitrary and capricious.

Appellants assert that McLynn's conduct was proper because an RGU is "responsible for the completeness and accuracy of all information" in an EAW. Minn. R. 4410.1400 (2011). Plainly, the RGU must independently evaluate the statements proposed to be included in an EAW. But, as the district court found, McLynn's conduct in this case does not reflect an independent evaluation of the EAW draft. McLynn insisted on and obtained input from opponents of the project in shaping the conclusions contained in the EAW even before the draft was released for public comment, and she was adamant in changing conclusory statements in the EAW to reflect the bias of project opponents.

Appellants also assert that this court should affirm the county's decision because there is sufficient evidence in the record to support a positive declaration requiring an EIS. The district court found that the EAW as approved could support either a positive or a negative declaration, and that, without McLynn's vote, there was not the majority vote required in order for the board to issue the positive declaration. We agree that, on this record, the district court's decision to remand for a new EAW, drafted without input from a biased decisionmaker, is the appropriate remedy. *See Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 732-33 (Minn. 2010) (explaining that remand is the appropriate remedy if the same decision under an appropriate standard would not necessarily be arbitrary).

We also agree with the district court that further proceedings before the board should be conducted without McLynn's participation. *See Cinderella Career & Finishing Schs., Inc. v. Federal Trade Comm'n*, 425 F.2d 583, 592 (D.C. Cir. 1970) (remanding for the commission's reconsideration of the issue without participation of the commissioner who had prejudged facts); *Texaco, Inc. v. Federal Trade Comm'n*, 336 F.2d 754, 760 (D.C. Cir. 1964) (stating that when partiality of a commissioner is the only infirmity, the appropriate remedy is remand for reconsideration without that commissioner), *vacated and remanded on other grounds*, 381 U.S. 739, 85 S. Ct. 1798 (1965); *Prin v. Council of Monroeville*, 645 A.2d 450, 452 (Comm. Ct. Pa. 1994) (remanding zoning decision for reconsideration without participation of the councilman who had advocated against the proposed project in his district).[4]

Affirmed in part, reversed in part, and remanded; motion denied.

[4] This issue may be rendered moot if the EQB does not reappoint the county board as the RGU.