STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1046

Duininck, Inc.,
Relator,

vs.

Renville County Board of Commissioners,
Respondent.

Filed April 15, 2013
Affirmed
Larkin, Judge

Renville County Board of Commissioners

Gary W. Koch, Kaitlin M. Pals, Gislason & Hunter LLP, New Ulm, Minnesota (for relator)

Scott T. Anderson, Ana C. Kaschinske, Rupp, Anderson, Squires & Waldspurger, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Rodenberg, Judge.

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

LARKIN, Judge

In this certiorari appeal, relator challenges a decision by respondent to require preparation of an environmental assessment worksheet (EAW) in connection with

relator's application for an interim use permit to allow gravel mining on 44 acres of land in Renville County. Relator argues that respondent's conclusion that an EAW is mandatory under Minn. R. 4410.4300 (2011) is legally erroneous, arbitrary, capricious, and not supported by substantial evidence. We affirm.

FACTS

Relator Duininck Inc. applied to respondent Renville County Board of Commissioners for an interim use permit (IUP) to allow gravel mining on approximately 44 acres of land in Renville County. Duininck had been mining at the site, known as the Molenaar Pit, since 2000, pursuant to conditional use permits (CUPs) issued by the county for a 39-acre area. With its 2012 application for an IUP, which the county now requires instead of a CUP for gravel mining, Duininck sought to expand the site by approximately five acres to a total of approximately 44 acres.

The county's director of environment and community development, Mark Erickson, reviewed Duininck's IUP application, and concluded that, because the application encompassed more than 40 acres, an EAW might be mandatory under Minnesota Rules. Erickson referred the matter to the county board—the responsible governmental unit (RGU) under the rules—for its determination of whether to require an EAW, placing the application on the agenda for the board's next meeting. Before the meeting, Duininck filed a second IUP application encompassing only the originally permitted 39 acres, to ensure that it would be able to continue existing mining operations if its CUP expired during the environmental-review process. Duininck intended to

pursue the 44-acre application unless the board decided to require an EAW for that application, in which case it would pursue the 39-acre application.

At the meeting, the board voted to require an EAW in connection with the 44-acre application. The meeting was not recorded, and the board did not issue written findings or an order. But the board's minutes reflect that it unanimously passed a motion "to require an Environmental Assessment Worksheet if the applicant goes forward with the application for expansion of the Molenaar Pit to 44 acres. (In accordance with Minnesota Rules 4410, an expansion over 40 acres would require an EAW.)" Duininck withdrew the 44-acre application after the meeting, and the county subsequently reviewed and granted the 39-acre application.

Duininck appeals the board's decision to require an EAW in connection with the 44-acre application.

D E C I S I O N

"A person aggrieved by a final decision on the need for an environmental assessment worksheet . . . is entitled to judicial review of the decision." Minn. Stat. § 116D.04, subd. 10 (2012). Since a 2011 legislative amendment, challenges to EAW determinations have been properly asserted directly to this court by petition for writ of certiorari. *Id.*; 2011 Minn. Laws ch. 4, § 8, at 60. This court reviews an EAW determination to determine whether it is unreasonable, arbitrary or capricious, made under an erroneous theory of law, or unsupported by substantial evidence. *Watab Twp. Citizen Alliance v. Benton Cnty. Bd. of Comm'rs*, 728 N.W.2d 82, 89 (Minn. App. 2007), *review denied* (Minn. May 15, 2007).

The necessity for an EAW is governed by rules adopted by the Minnesota Environmental Quality Board (EQB). *See* Minn. Stat. § 116D.04, subd. 2a(a) (2012) (directing board to establish categories for which EAW's are and are not required). Minnesota Rule 4410.4300 describes the types of projects for which an EAW must be prepared and the RGU charged with completing the EAW. Preparation of an EAW is mandatory for projects that meet or exceed the thresholds identified in rule 4410.4300, unless an environmental impact statement (EIS) is required by rule 4410.4400. Minn. R. 4410.4300, subp. 1. The parties agree that the relevant threshold here is set forth in Minn. R. 4410.4300, subp. 12.B., which requires preparation of an EAW in connection with a project for the "development of a facility for the extraction or mining of sand, gravel, stone, or other nonmetallic minerals, other than peat, which will excavate 40 or more acres of land to a mean depth of ten feet or more during its existence."

Duininck challenges the board's determination that an EAW is required in connection with Duininck's 44-acre IUP application. Because the threshold in the rules is set with respect to a "project," our analysis necessarily begins with determining the scope of the project at issue. The rules define a project as

> a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly. *The determination of whether a project requires environmental documents shall be made by reference to the physical activity to be undertaken* and not to the governmental process of approving the project.

Minn. R. 4410.0200, subp. 65 (2011) (emphasis added). In this case, the physical activity to be undertaken is Duininck's mining on 44 acres of land. Thus, we conclude that the

board did not err in determining that an EAW is required in connection with the 44-acre IUP application.

Duininck argues that the scope of the project for purposes of determining whether an EAW is required should not include the 39 acres that it had been mining under CUPs since 2000, citing a portion of the rules that provides a three-year look-back rule for determining whether to include original project acreage in determining whether the threshold for a mandatory EAW is met. Minn. R. 4410.4300, subp. 1. The previous CUPs under which Duininck had been mining, however, expired by their own terms. Thus, when Duininck filed the 44-acre application, it was applying to continue its mining operations, in addition to expanding them. Because all 44 acres are properly considered part of the current project, the rule governing expansions does not apply.[1]

Duininck also argues that the county erred by treating the five-acre expansion as a phased action. Phased actions are multiple projects to be undertaken by the same proposer that "will have environmental effects on the same geographic area" and "are substantially certain to be undertaken sequentially over a limited period of time." Minn. R. 4410.0200, subp. 60. The rules require an RGU to consider phased actions in determining whether EAW thresholds are met. Minn. R. 4410.4300, subp. 1. Although the county argues on appeal that Duininck's expansion can be considered a phased action, the record does not reflect this as a basis for its decision. Rather, the board minutes

[1] Duininck also suggests that it will not ultimately mine all 44 acres of the Molenaar Pit. But Duininck sought an IUP for all 44 acres, and there is no evidence in the record suggesting conditions that might limit the area actually mined. Thus, the county did not err by determining that the IUP would "excavate 40 or more acres of land . . . during its existence." Minn. R. 4410.4300, subp. 12.B.

merely state that "an expansion over 40 acres would require an EAW." Moreover, just like the language in the rules governing expansions, the rules governing phased actions do not apply because all 44 acres are part of the present project.

Our decision in this case is dictated by the plain language of the relevant rules, as applied to the particular facts before us. We are cognizant of the unusual context in which this case arises. Nonetheless, we are required to apply the language of the EAW rules—which contemplate projects with completed phases—to ongoing mining operations, which require the permit renewals whether or not a proposer has completed mining any particular area. Duininck argues that the EQB has a different understanding as to how the EAW rules should be applied to mining operations.[2] But neither the unusual context nor the EQB's opinion negates our duty to apply the plain language of the rules. *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 310 (Minn. 2009) ("If the language of the regulation is clear and free from ambiguity, we must give effect to the plain meaning and give no deference to the agency's interpretation."). Accordingly, we affirm the county's decision to require an EAW in connection with the 44-acre application.

Affirmed.

[2] We are not able to definitively determine the EQB's interpretation from the evidence presented by Duininck in this regard, and the EQB has not moved to intervene or otherwise inform this court of its interpretation of the rules.