STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1865

Lake Carlos Area Association,
Appellant,

vs.

Douglas County,
Respondent.

Filed September 2, 2008
Affirmed
Kalitowski, Judge

Douglas County District Court
File No. 21-C6-07-000258

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Considered and decided by Johnson, Presiding Judge; Kalitowski, Judge; and Shumaker, Judge.

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

KALITOWSKI, Judge

On appeal from dismissal of a claim brought under the Minnesota Environmental Policy Act (MEPA), appellant Lake Carlos Area Association, a nonprofit organization of residents and property owners, argues that respondent Douglas County's decision not to

require an environmental impact statement for the CSAH 42 highway-expansion project was erroneous as a matter of law, unsupported by substantial evidence, and arbitrary and capricious. Specifically, appellant claims that the county: (1) erroneously considered the supplemental report and plans as part of the administrative record; (2) failed to analyze all three phases of the project; (3) failed to give proper consideration to the cumulative potential effects of related existing or anticipated projects; and (4) failed to undertake adequate environmental review of certain shoreland-setback standards and design-minimization requirements set forth in Minn. R. 6120.3300 (2007). We affirm.

D E C I S I O N

An environmental assessment worksheet (EAW) is "a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required" for a particular proposal or project. Minn. Stat. § 116D.04, subd. 1a(c) (2006). The Minnesota Environmental Policy Act (MEPA) requires a responsible government unit (RGU) to prepare an environmental impact statement (EIS) before engaging in any major governmental action when that action creates the "potential for significant environmental effects." *Id.*, subd. 2a (2006).

The Environmental Quality Board (EQB) has set forth four criteria that an RGU is required to analyze in determining whether a project has the potential for significant environmental effects: (1) "type, extent, and reversibility of environmental effects"; (2) "cumulative potential effects of related or anticipated future projects"; (3) "the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority"; and (4) "the extent to which environmental effects can be anticipated and

controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs." Minn. R. 4410.1700, subp. 7 (2007). "Connected actions and phased actions shall be considered a single project for purposes of the determination of need for an EIS." *Id.*, subp. 9 (2007). Moreover, the RGU's analysis must take into account both the project's EAW and any comments received during the public-comment period. Minn. Stat. § 116D.04, subd. 2a(b). Here, the RGU decision-making body was a publicly elected county board charged with exercising the powers of respondent Douglas County. *See* Minn. Stat. § 373.02 (2006).

An appellant has the burden of proving that the RGU's findings are unsupported by the evidence as a whole. *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 833 (Minn. 2006) (*CARD*). When faced with a summary-judgment order affirming a negative declaration regarding the need for an EIS, we review the proceedings before the RGU decision-making body, not the findings of the district court. *Iron Rangers for Responsible Ridge Action v. Iron Range Res.*, 531 N.W.2d 874, 879 (Minn. App. 1995), *review denied* (Minn. July 28, 1995). In doing so, we evaluate whether the RGU took a "hard look" at the salient issues, but defer to the RGU's decision unless the decision reflects an error of law, is arbitrary and capricious, or is unsupported by substantial evidence. *CARD*, 713 N.W.2d at 832.

Substantial evidence is "1. [s]uch relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2. [m]ore than a scintilla of evidence; 3. [m]ore than some evidence; 4. [m]ore than any evidence; and 5. [e]vidence considered in its entirety." *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 730 (Minn. App.

1997), *review denied* (Minn. Oct. 31, 1997); *see also Iron Rangers*, 531 N.W.2d at 881 (noting that speculative factors are insufficient to compel a RGU to prepare an EIS). An RGU's determination that no EIS is necessary is arbitrary and capricious if the decision represents "its will, rather than its judgment." *Pope County Mothers v. Minn. Pollution Control Agency*, 594 N.W.2d 233, 236 (Minn. App. 1999). Accordingly, a decision is deemed arbitrary and capricious if it (1) is based on factors that the legislature did not intend for the RGU to consider; (2) entirely fails to address an important aspect of the problem; (3) offers an explanation that is counter to the evidence; or (4) is so implausible that it could not be explained as a difference in view or the result of the RGU's decision-making expertise. *CARD*, 713 N.W.2d at 832.

I.

As an initial matter, appellant contends that the county's supplemental report and project plans should not be reviewed by this court because they are not part of the administrative record. We disagree.

The scope of the administrative record is defined by statute, and thus presents a question of statutory interpretation that we review de novo. *See In re Grain Buyer's Bond of Mischel Grain & Seed*, 591 N.W.2d 734, 736 (Minn. App. 1999). MEPA dictates the scope of the record on which an RGU may base its decision: "The [RGU]'s decision on the need for an environmental impact statement shall be based on the environmental assessment worksheet and the comments received during the comment period." Minn. Stat. § 116D.04, subd. 2a(b). Rules promulgated by the EQB further clarify that the record includes "specific responses to all substantive and timely

comments on the EAW." Minn. R. 4410.1700, subp. 4 (2007). And we have held that the administrative record includes all documents "available and in the possession of the [RGU]" when it considered the need for an EIS. *Trout Unlimited, Inc. v. Minn. Dep't of Agric*., 528 N.W.2d 903, 908 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995).

Here, the supplemental report and project plans submitted by the county were available and part of its own records when it rendered a negative declaration regarding the need for an EIS. Accordingly, these documents are properly part of our review of the administrative record.

II.

Appellant argues that the county's decision was unreasonable, arbitrary and capricious, and erroneous as a matter of law because it failed to consider all three phases of the CSAH 42 project. We disagree.

An EAW is required to analyze all phases of a proposed project. Minn. R. 4410.1700, subp. 9 (noting that "[c]onnected actions and phased actions shall be considered a single project for purposes of the determination of need for an EIS"). Appellant cites letters from various agencies in support of its contention that respondent failed to adequately address phases two and three of the CSAH 42 project, and in particular the stormwater-runoff and filling-of-shoreline aspects of those phases. Although the EAW itself provides only a brief description of the project's phasing, a review of the entire administrative record indicates that, in response to citizen and agency comments requesting more information regarding the environmental impact of phases

two and three, the county drafted a supplemental report and findings of fact that analyzed and elaborated on each of the project's three phases.

The stormwater-runoff and pollutant-load calculations proffered by the county in its supplemental report were based on projected surface-area measurements for all three phases of the project. Based on these calculations, the county concluded that the mitigating measures proposed for phase one were so effective that, standing alone, they provided sufficient compensation for the overall increase in impervious surface area caused by the entire project. And the project plans submitted by the county provided further detail as to the exact location and design of these mitigating measures. Additionally, in its findings of fact, the county provided further estimates as to how much, where, and when "a minor amount of fill" would be put into the lake's water as part of the project. Moreover, the board's supplemental report states what parts of the highway will be repaired during each phase of the project and establishes that each phase of the project contemplates virtually the same reconstruction work on separate lengths of roadway, including: removing existing signs and road beds; excavating common and subgrade soils for road beds; excavating for the installation of storm sewer and water main; replacing unsuitable excavated materials with road base materials; constructing curbs and gutters in select areas; bituminous paving of roadways; constructing stormwater-treatment facilities, including rainwater gardens and dry ponds; and establishing turf in disturbed areas.

Appellant contends that it was insufficient for the county to provide a stormwater pollution prevention plan (SWPPP) for only the first phase of the project and then assert,

based on its calculations of the total proposed increase in impervious surface area, that the infiltration features incorporated into phase one would be sufficient to compensate for the cumulative increase in impervious surface area caused by the entirety of the project. But because the county concluded that phase one's infiltration features would suffice to compensate for the whole project's cumulative increase in impervious surface area, we cannot say it was unreasonable for the board to decide that it was unnecessary for it to provide a SWPPP for the project's second and third phases, and appellant has failed to articulate a specific reason as to why this conclusion is incorrect. *See CARD*, 713 N.W.2d at 834 (finding that appellant's vague, unsubstantiated concerns were insufficient to meet its burden of proof).

Appellant also argues that the county's environmental review was deficient because it failed to analyze the potential degradation of Bemo Pond and Indian Pond, existing wetlands that will be affected by the CSAH 42 project. Minn. R. 7050.0186 (2007) sets forth guidelines designed to protect Minnesota wetlands from adverse impacts. Minn. R. 7050.0186, subp. 4, states that "[n]o person may cause or allow a physical alteration which has the potential for a significant adverse impact on one or more designated uses of a wetland, unless there is not a prudent and feasible alternative that would avoid impacts to the designated uses of the wetland." When no reasonable alternative is available, the rule allows for a project to go forth, so long as the project's impact to wetlands is minimized or otherwise compensated for by the restoration or creation of wetlands. *Id.*, subps. 4-6.

Appellant, referencing several agency comments, asserts that the county failed to address (1) why there was no reasonable alternative to degradation of the wetlands and (2) how increased stormwater runoff from the project might impact the pollutant load and water level of these wetland areas. But the EAW explains that the only alternative to affecting the wetlands would damage the Hoffman Mounds Burial site, and was therefore deemed unreasonable. And even though the EAW did not provide specific details as to how the proposed project would impact the wetlands' pollutant load and water level and the analysis as to how the project's impact would be mitigated, these deficiencies were later remedied by the county's analysis of runoff volumes, pollutant loads, and the analysis as to how proposed stormwater-treatment facilities would mitigate any degradation in the findings of fact, supplemental report, and project plans.

In sum, considering the deference we afford to an agency's decision-making expertise, a review of the administrative record here demonstrates that the county gave adequate consideration to the relevant environmental issues pertinent to each of the project's three phases.

III.

Appellant contends that the county's decision was arbitrary, capricious, and erroneous as a matter of law because it gave inadequate consideration to the potential cumulative effects of related existing and anticipated projects. We disagree.

When analyzing a project's cumulative potential effects, "an RGU must take into account outside projects that have the potential to cause significant environmental effects when considered in conjunction with the proposed project." *CARD*, 713 N.W.2d at 831-

32. This analysis considers whether the project, "which may not individually have the potential to cause significant environmental effects, could have a significant effect when other local projects already in existence . . . are considered." *Id.* at 829. But this inquiry should not be too speculative in nature, and remains limited to those projects for which an actual plan or specific basis of expectation can be established. *Id*. at 830.

Here, appellant contends that the county failed to consider the cumulative potential effects of the CSAH 42 project. But the cases cited by appellant in support of this argument are inapposite because appellant asserted only speculative claims and "cumulative impact" analysis is distinguishable. *See Trout Unlimited, Inc.*, 528 N.W.2d at 908 (noting neighboring landowners had "planned as likely" future irrigation projects); *CARD*, 713 N.W.2d at 830 (identifying particular future projects that should have been considered); *see also Pope County Mothers*, 594 N.W.2d at 237 (applying Minn. R. 4410.0200 (11)'s "cumulative impact" analysis); *see also CARD*, 713 N.W.2d at 827 (concluding that the environmental review rules intended for "cumulative potential effects" and "cumulative impact" to be two separate and distinct analyses).

The county determined that there were no existing or anticipated projects in the vicinity of the CSAH 42 project that would result in the potential for cumulative effects to a natural or social source, no additional phases to the project other than the three phases discussed in the EAW, and no plans to widen any of the roadways at issue beyond the proposed project limits. Appellant has failed to identify any specific project that it believes should have been considered as part of the county's "cumulative potential effects" analysis. Instead, appellant claims that the county failed to give appropriate

consideration to anticipated growth in traffic volumes in the CSAH 42 project area. But although evidence in the record projects continued traffic growth along this corridor, appellant has failed to show that the CSAH 42 project will cause, or even contribute to, the traffic growth problem. Contrary to appellant's assertions, the project does not propose adding additional lanes of traffic, does not add parking, and is not anticipated to increase business or residential development along this corridor, which is already substantially developed. Thus, we conclude that the EAW's cumulative-effects analysis was not deficient due to its failure to discuss the "build it and they will come" phenomenon alleged by appellant.

IV.

Appellant argues that the county failed to adequately address the project's failure to comply with Minn. R. 6120.3300's shoreland-setback standards. We disagree.

The county argues that this issue need not be addressed because it was not raised below before the district court. But the record shows it was raised in comment letters that were part of the administrative record before the county, and thus is appropriately before us. *See Iron Rangers*, 531 N.W.2d at 879 (explaining that an appellate court reviews the proceedings before the RGU, and not the district court).

Minn. R. 6120.2600 (2007) explains the minimum standards and criteria that govern the development of shoreland property. Of particular relevance here, Minn. R. 6120.3300, subp. 3, requires that all structures, including roads, have a 75-foot setback from the ordinary high water level for general development lakes. But in those situations where no reasonable alternative exists, Minn. R. 6120.3300, subp. 5(A), allows for

roadways to be placed within the shoreland-impact zone, so long as they are "designed to minimize adverse impacts." Here, it is undisputed that the existing roadways at issue in this highway-expansion project are already in serious violation of the aforementioned setback requirements.

Appellant argues that the proposed project fails to comply with Minnesota law because the county's analysis (1) erroneously measured the project's setback distance from the centerline of the highway and (2) failed to adequately analyze reasonable placement alternatives. We disagree.

Although Minn. R. 6120.2500, subp. 14 (2007), defines "setback" as the horizontal distance between structures and the ordinary high water level, Minn. R. 6120.3300, subp. 3(F) (2007), addressing how to measure the proximity of structures to roads and highways in particular, instructs that all setbacks be measured from the edge of the county right of way. Here, because the CSAH 42 project will expand the roadways, but is not expected to alter the locations of the highway center lines, the county determined that the roads' setback measurements would not change as a result of the project. Because it was appropriate for the county to construe the setback requirements of these two rules in a manner that gave effect to both provisions, and because we defer to an agency's expertise in interpreting its own regulations, we cannot say that the county erred in measuring the project's setback requirements from the highway center lines. *See* Minn. Stat. § 645.16 (2006) (explaining that a goal in statutory construction is to give all provisions effect); *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 40

(Minn. 1989) (explaining that courts defer to an agency's reasonable interpretation of a statute).

Moreover, the record here shows that (1) there was no reasonable, feasible placement alternative and (2) the project was designed to minimize adverse impacts. Although the county's initial EAW did not elaborate on why there was no reasonable alternative for rerouting the roadway, its findings of fact and supplemental report explain that there was no reasonable alternative because the roadway was already highly developed, and thus, altering its current location would displace local residents and businesses. Moreover, the county determined that not making improvements or completely eliminating the plan's proposed sidewalk were not reasonable alternatives to the proffered plan because these options completely neglected the currently poor pavement conditions and critical safety objectives of the project.

In addition, the EAW, findings of fact, supplemental report, and project plans indicate that the CSAH 42 project was designed to minimize environmental effects. The administrative record shows that the county modified and customized the project's design throughout the EAW process in an effort to address environmental concerns by implementing rainwater gardens and dry ponds that mitigate stormwater runoff, reducing the overall increase in impervious surface area by eliminating an extra sidewalk and turn lane from the initial proposal, and avoiding unnecessary removal of rock walls, trees, and shrubbery along the roadside.

In sum, because the record shows that there was no reasonable alternative placement, and because the county took appropriate measures to minimize the project's

adverse impacts on the shore-impact zone, we conclude that the CSAH 42 project complied with Minnesota's shoreland-setback requirements.

Affirmed.