STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1428

Final Alternative Urban Areawide Review and Mitigation Plan for the Upper Harbor Terminal Development.

Filed March 28, 2022
Appeal dismissed; motion granted
Bryan, Judge
Concurring specially, Wheelock, Judge

City of Minneapolis
File No. 2021A-0696

Melissa Lorentz, Evan Mulholland, Minnesota Center for Environmental Advocacy, St. Paul, Minnesota (for relators Community Members for Environmental Justice and Minnesota Center for Environmental Advocacy)

Charles N. Nauen, Rachel A. Kitze Collins, Lockridge Grindal Nauen PLLP, Minneapolis, Minnesota; and

James R. Rowader, Jr., Minneapolis City Attorney, Mark Enslin, Assistant City Attorney, Minneapolis, Minnesota (for respondent City of Minneapolis)

Considered and decided by Bryan, Presiding Judge; Florey, Judge; and Wheelock, Judge.

SYLLABUS

Minnesota Statutes section 116D.04, subdivision 10 (2020), only authorizes certiorari review of a final decision regarding the need for an environmental assessment worksheet, the need for an environmental impact statement, and the adequacy of an environmental impact statement. It does not authorize review of a final decision approving an alternative urban areawide review.

SPECIAL TERM OPINION

BRYAN, Judge

Respondent City of Minneapolis approved a final alternative urban areawide review[1] for the proposed redevelopment of the Upper Harbor Terminal in Minneapolis and published notice of its final decision in the *EQB Monitor*. Relators Minnesota Center for Environmental Advocacy and Community Members for Environmental Justice subsequently filed this certiorari appeal based on the provisions of Minnesota Statutes section 116D.04, subdivision 10. Relators also filed a declaratory-judgment action in district court, which the district court stayed pending this appeal. Respondent moved to dismiss this appeal, arguing that subdivision 10 does not authorize certiorari review of final decisions regarding an alternative urban areawide review.

We agree with respondent that, by its plain language, subdivision 10 refers only to environmental impact statements and environmental assessment worksheets; it does not refer to other forms of environmental review created as alternatives to environmental impact statements and environmental assessment worksheets.[2] We therefore grant the motion to dismiss this appeal.

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[1] As explained below, an alternative urban areawide review is an alternative form of environmental review used instead of an environmental impact statement and an environmental assessment worksheet.

[2] Relators argue in the alternative that the general certiorari statute provides an independent basis for this court to exercise certiorari review. The general statute permits a writ of certiorari only when no other avenue of judicial review is available. Minn. Stat. §§ 606.01-.06 (2020); *County of Washington v. City of Oak Park Heights*, 818 N.W.2d 533, 539 (Minn. 2012). The administrative rule provides an avenue for judicial review: a declaratory judgment action in district court. Minn. R. 4410.0400, subp. 4. Thus, the general certiorari review statute does not convey jurisdiction on this court.

DECISION

Relator's argument that subdivision 10 of section 116D.04 permits certiorari review of final decisions regarding an alternative urban areawide review requires us to consider the meaning and effect of that portion of the statute. The first step of statutory interpretation is to "determine whether the statute's language, on its face, is ambiguous." *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). "A statute is ambiguous only if it is susceptible to more than one reasonable interpretation." *500, LLC v. City of Minneapolis*, 837 N.W.2d 287, 290 (Minn. 2013). "In determining whether a statute is ambiguous, we will construe the statute's words and phrases according to their plain and ordinary meaning." *Christianson v. Henke*, 831 N.W.2d 532, 536 (Minn. 2013) (citation omitted) (internal quotations marks omitted).

Section 116D.04 is clear and susceptible to only one reasonable interpretation: certiorari review is authorized only for final decisions relating to environmental impact statements and environmental assessment worksheets, not to those regarding alternative urban areawide reviews. Our analysis begins with the acknowledgement that section 116D.04 refers to three distinct types of environmental review documents, two specific types (environmental impact statements and environmental assessment worksheets) and one generic category of alternative forms of environmental review. First, section 116D.04 references environmental impact statements and describes the components of environmental impact statements:

> The environmental impact statement must be an analytical rather than an encyclopedic document that describes the proposed action in detail, analyzes its significant

> environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated. The environmental impact statement must also analyze those economic, employment, and sociological effects that cannot be avoided should the action be implemented. To ensure its use in the decision-making process, the environmental impact statement must be prepared as early as practical in the formulation of an action.

Minn. Stat. § 116D.04, subd. 2a(a) (2020).

Second, section 116D.04 refers to environmental assessment worksheets. In contrast to the analytical and detailed environmental impact statement, an environmental assessment worksheet is a "brief document . . . designed to set out the basic facts," and it serves a unique purpose: "to determine whether an environmental impact statement is required for a proposed action." *Id.*, subd. 1a(c). Section 116D.04 also discusses when one or the other environmental review document should be prepared, *id.*, subd. 2a(a),(b),(c),(j) (2020), as well as procedures and timelines unique to each document, *id.*, subds. 2a(d),(e), 3a (2020).

Third, the legislature contemplated circumstances in which a streamlined environmental review process might be appropriate and it created an alternative to environmental impact statements and environmental assessment worksheets: a generic, catch-all category, using the term "alternative forms of environmental review."[3] The legislature authorized the Environmental Quality Board (the board) to determine what

[3] Importantly, the legislature never used the term "alternative urban areawide review" in this section. Indeed, the legislature did not use this term of art at any point in chapter 116D or the other chapters regarding environmental protection (chapters 114C-116i).

would fall within this third category, directing the board to specify the characteristics, requirements, and procedures to be followed for any type of alternative environmental review document that the board created:

> Alternative review. The board shall by rule identify alternative forms of environmental review which will address the same issues and utilize similar procedures as an environmental impact statement in a more timely or more efficient manner to be utilized in lieu of an environmental impact statement.

Id., subd. 4a (2020).[4]

Having determined that the plain language of the statute identifies three separate types of environmental review, we now review the language of the authorization for certiorari review in subdivision 10. In this subdivision, the legislature referred to the first and second types of environmental review, expressly using these two terms of art, and it did not reference any alternatives to environmental impact statements and environmental assessment worksheets, either specifically or generally:

> **Review.** A person aggrieved by a final decision on the need for an environmental assessment worksheet, the need for an environmental impact statement, or the adequacy of an environmental impact statement is entitled to judicial review of the decision under sections 14.63 to 14.68. A petition for a writ of certiorari by an aggrieved person for judicial review under sections 14.63 to 14.68 must be filed with the court of appeals and served on the responsible governmental unit not

[4] Pursuant to the legislature's delegation of authority, the board created the alternative urban areawide review process in 1988. 13 Minn. Reg. 1438 (Dec. 19, 1988); Minn. R. 4410.3110 (1989); *see also* 21 Minn. Reg. 1458 (Apr. 14, 1997) (renumbering rule 4410.3110 as 4410.3160). The characteristics and procedures regarding alternative urban areawide review differ from those regarding environmental impact statements and environmental assessment worksheets. *Compare* Minn. R. 4410.1100-.1700, 4410.2100-.3000, and 4410.3600-.4000 (2021).

> more than 30 days after the responsible governmental unit provides notice of the final decision in the EQB Monitor.

Minn. Stat. § 116D.04, subd. 10. The language is clear: the legislature only authorized certiorari review for final decisions regarding environmental impact statements and environmental assessment worksheets. Because the authorization of certiorari review does not include any reference to alternative forms of review identified or created by the board pursuant to subdivision 4a, we conclude that this court cannot exercise certiorari review over the alternative urban areawide review decision in this case.

Relators argue that the term "environmental impact statement" in subdivision 10 unambiguously includes the term "alternative urban areawide review." Relators base their argument on the legislative history of section 116D.04, the history of the board's regulations, and the phrase "in lieu of an environmental impact statement" in subdivision 4a. We are not persuaded for three reasons.

First, the argument contravenes our caselaw regarding how this court determines ambiguity. Only after identifying ambiguity in the current statutory language should we consider legislative history or the history of the board's regulations. *E.g.*, *In re Welfare of Child. of J.B.*, 782 N.W.2d 535, 545 (Minn. 2010) ("Resort to legislative history to interpret a statute is generally appropriate only where the statute itself is ambiguous."); *Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 435 n.2 (Minn. 2009) (acknowledging that legislative history is an extrinsic source and cannot be relied on to determine ambiguity); *Nelson v. State*, 896 N.W.2d 879, 885 (Minn. App. 2017) ("[A]bsent ambiguity, this court

does not resort to legislative history to interpret a statute." (quotation omitted)), *rev. denied* (Minn. Aug. 8, 2017).

Second, relators misunderstand the meaning of the phrase "in lieu of an environmental impact statement" in subdivision 4a. Under subdivision 4a, the board is authorized to establish "forms of environmental review" that are "more timely or more efficient" than an environmental impact statement, and this streamlined process can "be utilized in lieu of an environmental impact statement." The phrase "in lieu of" plainly reflects the board's authority to create an alternative to an environmental impact statement, but the use of this phrase does not relate to judicial review, and the creation of the alternative urban areawide review process does not change the plain meaning of the term "environmental impact statement" as that term is used in subdivision 10. We cannot agree that the use of the phrase "in lieu of" makes the term "alternative urban areawide review" interchangeable with the term "environmental impact statement." Environmental impact statements, environmental assessment worksheets, and alternative urban areawide reviews are separate forms of environmental review, and governmental units are required to follow one path or another, but these terms are plainly not substitutes for one another.

Third, we do not accept relators' argument because the current administrative rule regarding judicial review supports respondent's motion to dismiss. In 1982, the board promulgated a rule regarding judicial review of the environmental review process, incorporating the legislature's 1980 amendments to section 116D.04 regarding judicial

review. 7 Minn. Reg. 350 (Sept. 20, 1982); 6 MCAR § 3.023D (1982);[5] 1980 Minn. Laws ch. 447, § 7, at 279 (amending section 116D.04 to include subdivision 10). The 1982 version of subdivision 10 provided that judicial review of final decisions regarding environmental impact statements and environmental assessment worksheets be accomplished "by a declaratory judgment action in the district court of the county wherein the proposed action, or any part thereof, would be undertaken." Minn. Stat. § 116D.04, subd. 10 (1982).

More than twenty years after the board created the alternative urban areawide review process, the board added "the adequacy of an alternative urban areawide review document" as a third type of decision that could be reviewed by a declaratory judgment action in district court:

> Appeal of final decisions. Decisions by a RGU [(responsible government unit)] on the need for an EAW [(environmental assessment worksheet)], the need for an EIS [(environmental impact statement)], the adequacy of an EIS, and the adequacy of an alternative urban areawide review document are final decisions and may be reviewed by a declaratory judgment action initiated within 30 days of the RGU's decision in the district court of the county where the proposed project, or any part thereof, would be undertaken.

33 Minn. Reg. 1246 (Jan. 20, 2009); *see also* 34 Minn. Reg. 721 (Nov. 16, 2009) (referring to and adopting the proposed language set forth in 33 Minn. Reg. 1246); 13 Minn. Reg. 1438 (creating the alternative urban areawide review process in 1988).

[5] 6 MCAR § 3.023D was recompiled as Minnesota rule 4410.0400, subpart 4 (1983), when the Minnesota Code of Agency Rules was replaced by Minnesota Rules in 1983.

Although the legislature amended subdivision 10 in 2011 to authorize certiorari review of final decisions regarding environmental impact statements and environmental assessment worksheets, 2011 Minn. Laws ch. 4, § 8, at 60, the statute does not refer to alternative urban areawide review, and the board has not amended the administrative rule regarding judicial review. *Compare* 33 Minn. Reg. 1246 *with* Minn. R. 4410.0400, subp. 4 (2021). The plain language of the current rule continues to require relators to file a declaratory judgment action in district court to review the final decision on the alternative urban areawide review. Thus, the plain meaning of the administrative rule supports dismissal of the appeal.

For all of these reasons, we conclude that the legislature did not authorize certiorari review of a final decision regarding an alternative urban areawide review.

Appeal dismissed.

WHEELOCK, Judge (concurring specially)

While I concur in the result reached by the majority because the court's decision comports with rules of interpretation applicable to the relevant statutes and administrative rules, I write separately to express my observation that the procedure for judicial review applicable to a final decision approving an alternative urban areawide review (AUAR) is dissimilar from the procedure for judicial review of a final decision on the adequacy of an environmental impact statement (EIS).

As the decision of the court observes, the environmental quality board (the board) created the AUAR as an "alternative form of environmental review" in 1988 pursuant to the board's statutory authority to "identify alternative forms of environmental review which will address the same issues and utilize similar procedures as an environmental impact statement in a more timely or more efficient manner." Minn. Stat. § 116D.04, subd. 4a (2020); *see* 13 Minn. Reg. 1437, 1438 (Dec. 19, 1988) (adopting AUAR); Minn. R. 4410.3610 (2021) (current AUAR rule). At that time, a final decision on the adequacy of an EIS was subject to judicial review through a declaratory-judgment action in district court. Minn. Stat. § 116D.04, subd. 10 (1988); Minn. R. 4410.0400, subp. 4 (1987). In 2009, the board amended its rules to provide that a decision on the adequacy of an AUAR could also be reviewed through a declaratory-judgment action in district court. 34 Minn. Reg. 721 (Nov. 16, 2009); Minn. R. 4410.0400, subp. 4 (2021) (current rule). Thus, by 2009, the procedure for obtaining judicial review of AUAR adequacy decisions was consistent with the procedure for obtaining review of EIS adequacy decisions.

In 2011, in a law designed to increase efficiency and consistency while clarifying the pathway for challenging environmental-review decisions, the legislature streamlined the procedure for judicial review of EIS adequacy decisions by providing for direct review in this court through a writ of certiorari. *See* 2011 Minn. Laws ch. 4, § 8, at 60. But the 2011 law did not address the judicial-review procedure for AUAR adequacy decisions, and the board did not amend its rules to conform to the streamlined procedures. *See id.* § 11, at 61 (requiring board to amend rules to conform to law); Minn. R. 4410.0400, subp. 4 (2021) (current rule, providing for declaratory-judgment review of decisions to prepare environmental assessment worksheets and EISs as well as EIS and AUAR adequacy decisions).[6] Thus, AUAR adequacy decisions remain subject to review through declaratory-judgment actions in district court, from which appeal may be taken to this court. *See* Minn. R. 4410.0400, subp. 4; Minn. R. Civ. App. P. 103.03(a).

I see nothing in the statutory scheme revealing why the statute directs courts to treat AUAR adequacy decisions differently from EIS adequacy decisions. By design, an AUAR serves the same purpose as an EIS. Minn. Stat. § 116D.04, subd. 4a. The express purpose of allowing alternative forms of environmental review is to meet the objectives of an EIS "in a more timely or more efficient manner." *Id.*[7] It is not apparent, then, why AUAR

[6] The portion of the board's rule governing judicial review of EIS adequacy decisions is preempted by the 2011 statutory amendments. *See Berglund v. Comm'r of Revenue*, 877 N.W.2d 780, 784-85 (Minn. 2016) (explaining that statute controls over conflicting administrative rule).

[7] The relators' response to the motion to dismiss sets forth an informative discussion of the history of the legislature's revisions to the Minnesota Environmental Policy Act (MEPA) in 2011 and its intent to streamline the MEPA process at the administrative and judicial levels, increase efficiency by avoiding an intermediate step of bringing a district court

adequacy decisions are subject to an additional layer of judicial review given the interest in streamlining procedures to improve efficiency.

Notwithstanding my observations about the dissimilar procedure for judicial review of AUAR adequacy decisions, I am cognizant that it is not the role of the courts to "add words or meaning to a statute that were intentionally or inadvertently omitted." *Rohmiller v. Hart*, 811 N.W.2d 585, 590 (Minn. 2012). It is for the legislature or the board[8] to clarify whether final decisions from alternative forms of environmental review, including AUARs, are appropriate for certiorari review. *See Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001) ("When a question of statutory construction involves a failure of expression rather than an ambiguity of expression, courts are not free to substitute amendment for construction and thereby supply the omissions of the legislature." (quotation omitted)). I therefore concur in the decision of the court to dismiss this appeal.

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action, and ensure that local government decisions would be subject to the same judicial-review process as state agency decisions. Allowing district court challenges to AUARs and other alternative forms of environmental review upsets the legislature's intent to expedite and make uniform MEPA's judicial-review process.

[8] Because the statute is silent about the method of judicial review of the adequacy of an AUAR, it seems that the board could amend the rule to provide for certiorari review of a final decision approving an AUAR and bring the current rule into alignment with the provisions in the statute that provide for direct review of EIS adequacy decisions.