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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A06-2225**

Save Our Creeks,
Appellant,

vs.

City of Brooklyn Park, Minnesota,
Respondent.

**Filed February 19, 2008**
**Affirmed**
**Hudson, Judge**

Hennepin County District Court
File No. 27-CV-03-013783

Richard Brian Bates, Bates Law Office, 1985 Grand Avenue, St. Paul, Minnesota 55105 (for appellant)

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Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

**HUDSON,** Judge

On appeal from dismissal of a claim arising under the Minnesota Environmental Policy Act, appellant argues that the dismissal was improper because respondent arbitrarily and capriciously denied appellant's request for further environmental review. Because the district court did not abuse its discretion in dismissing appellant's claim, we affirm.

## FACTS

In June 2003, several individuals, including William Barton (Barton), petitioned the Minnesota Environmental Quality Board (EQB) for further environmental review of several pending residential development projects planned by respondent City of Brooklyn Park. The petitioners were concerned about the effect the projects would have on Oxbow Creek and its surrounding wetlands. The EQB designated respondent as the responsible governmental unit (RGU) to decide the need for environmental review. Respondent determined that further environmental review, in the form of an Environmental Assessment Worksheet (EAW) and/or an Environmental Impact Statement (EIS), was not required for the projects in the subject area and denied appellant's petition. Thereafter, Barton formed a non-profit corporation, Save Our Creeks, to dispute respondent's decision.

In August 2003, Save Our Creeks filed a complaint for declaratory judgment against respondent. In the complaint, appellant chiefly alleged that several projects in Brooklyn Park met the mandatory EIS requirement and, as a result, respondent violated

the Minnesota Environmental Policy Act (MEPA) when it denied appellant's petition for environmental review. After extended litigation concerning whether appellant could proceed because an attorney did not sign its initial pleadings, appellant filed an amended complaint for declaratory judgment on March 30, 2006. The amended complaint was signed by an attorney and added a claim that respondent violated the Minnesota Environmental Rights Act (MERA).

Both parties moved for summary judgment. The district court denied appellant's motion for summary judgment, denied respondent's motion for summary judgment as to the MEPA and MERA claims, and granted respondent's motion for summary judgment as to appellant's other claim. One month before trial, but after the discovery deadline, appellant filed a witness list that included several lay and expert witnesses not previously identified by appellant. Due to the late filing of appellant's witness list, the district court granted respondent's motion in limine to exclude all but Barton's testimony at trial.

At the August 2006 trial, only Barton testified. At the close of the presentation of appellant's case, respondent moved for dismissal under Minn. R. Civ. P. 41.02(b). The district court granted the motion to dismiss. In its order, the district court concluded, "Plaintiff did not meet its burden of proving its case by a preponderance of the evidence. . . . No testimony was offered to support or explain any of the admitted exhibits. No testimony was offered to show that Brooklyn Park's decisions were arbitrary or capricious or that protected waters were encroached upon." This appeal follows.

## D E C I S I O N

Appellant argues that dismissal of its MEPA claim under Minn. R. Civ. P. 41.02(b) was improper because appellant presented evidence showing that respondent acted arbitrarily and capriciously when it denied its request for further environmental review as required under MEPA. Appellant contends that further environmental review was required in the form of an EIS because the residential development projects (1) eliminated a protected water or wetland; and (2) consisted of a project area that included over 1,500 units.[1]

When the district court dismisses a case under rule 41.02(b) and makes factual findings, this court reviews the district court's factual findings for clear error. *Fidelity Bank & Trust Co. v. Fitzimons*, 261 N.W.2d 586, 588 n.5 (Minn. 1977); *Poured Concrete Founds., Inc. v. Andron, Inc.*, 507 N.W.2d 888, 891 (Minn. App. 1993), *review denied* (Minn. Jan. 27, 1994). And this court reviews the district court's legal conclusions de novo. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003). We will only reverse an involuntary dismissal when the district court abused its discretion. *See Bonhiver v. Fugelso, Porter, Smith & Whiteman, Inc.*, 355 N.W.2d 138, 144 (Minn. 1984) (holding that an involuntary dismissal will not be reversed absent an abuse of discretion); *Zweski v. Pipella*, 309 Minn. 585, 586, 245 N.W.2d 586, 587 (1976) (holding that an involuntary dismissal under rule 41.02 "is an exercise of discretionary authority" and will be sustained on appeal in the absence of a clear abuse of discretion); *Brazinsky v.*

[1] Contrary to respondent's contention in its brief to this court, appellant does not challenge the propriety of the district court's granting respondent's motion in limine excluding all but Barton's testimony at trial. Accordingly, we do not address this issue.

*Brazinsky*, 610 N.W.2d 707, 711 (Minn. App. 2000) (stating that "[t]his court reviews a district court's decision to dismiss a claim with prejudice under an abuse of discretion standard").[2]

Under MEPA, a party may seek judicial review of an RGU's decision on the need for an EAW or EIS by a declaratory judgment action to establish that the RGU acted arbitrarily and capriciously in denying its request for further environmental review. Minn. Stat. § 116D.04, subd. 10 (2006); *see Bolander*, 502 N.W.2d at 207 (analyzing whether the RGU's determination under MEPA was unreasonable, arbitrary, or capricious); *Pope County Mothers v. Minn. Pollution Control Agency*, 594 N.W.2d 233, 236 (Minn. App. 1999) (reviewing on appeal from summary judgment whether agency's decision was unreasonable, arbitrary, or capricious).

Minn. Stat. § 116D.04, subd. 2a (2006), sets forth the criteria for determining when an EIS and an EAW must be prepared for a proposed project. An EIS must be prepared when the proposed project has the "potential for significant environmental effects resulting from any major governmental action," and an EAW is required when there is "material evidence" showing that the project may have the "potential for

[2] In contrast, for a MEPA claim on appeal from summary judgment, this court reviews the actions of the RGU to determine if it was arbitrary and capricious and does not review the district court's findings. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 207 (Minn. 1993) (stating that when "reviewing actions by a governmental body, the focus is on the proceedings before the decision-making body, in this case, the Minneapolis City Council, not the findings of the trial court"); *Iron Rangers for Responsible Ridge Action v. Iron Range Res*., 531 N.W.2d 874, 879–80 (Minn. App. 1995) (holding that on appeal from summary judgment, the appellate court determines whether the governmental body decision was arbitrary or capricious), *review denied* (Minn. July 28, 1995).

significant environmental effects." *Id.*; *see Watab Twp. Citizen Alliance v. Benton County Bd. of Comm'rs*, 728 N.W.2d 82, 90 (Minn. App. 2007) (stating that material evidence is evidence that "is admissible, relevant, and consequential to determine whether the project may have the potential for significant environmental effects"), *review denied* (Minn. May 15, 2007).

*Protected waters*

Appellant contends that further environmental review was warranted because Oxbow Creek is a Department of Natural Resources (DNR) protected water, and therefore the preparation of an EIS was required. We disagree.

An EIS must be prepared when the proposed project "will eliminate a protected water or protected wetland." Minn. R. 4410.4400, subps. 1, 20 (2005). A protected water or wetland is a public water or public water wetland as defined in Minn. Stat. § 103G.005, subds. 15-15a (2006). Minn. R. 4410.0200, subps. 69–70 (2005). Thus, to meet the threshold requirement for an EIS, appellant had to establish that Oxbow Creek is a statutorily defined protected water or wetland and that the disputed development projects will or have eliminated it.

Appellant contends that it provided evidence showing that Oxbow Creek is a DNR protected water. But in its order to dismiss, the district court found that Barton's testimony did not explain the significance of the exhibits or their relevance to his case. The district court concluded that appellant did not show that respondent's actions encroached upon protected waters. The district court's conclusion is amply supported by the record.

At trial, appellant submitted an exhibit of a large map identifying protected DNR waters in Hennepin County and a list outlining the protected waters and wetlands in that area from 1984. On this list, Oxbow Creek was not specifically named as a protected water. Further, appellant did not provide testimony to establish that Oxbow Creek was one of the identified unnamed protected waters on the list. But even if Oxbow Creek was identified as a DNR-protected water in 1984, appellant was still required to establish that Oxbow Creek met the statutory definition of a protected water or wetland at the time of its 2003 petition and that it would be or has been eliminated by the disputed development projects.

While submissions to the district court indicated that Oxbow Creek and its surrounding wetlands existed at some point, there was evidence in the record indicating that for many years prior to appellant's 2003 petition, Oxbow Creek was no longer a natural waterway.[3] In fact, in a March 2003 letter to the Minnesota Board of Water and Soil Resources, Barton expressed concerns for the "watershed and creek that used to flow" in Brooklyn Park, noted that the "creek has been replaced by sterile ponds," and stated that a swamp "is already gone." Further, in reply to one of Barton's letters, the West Mississippi Watershed Management stated: "A panel of water resource experts

[3] For example, the West Mississippi Watershed Management Commission stated, "Flow in Oxbow Creek is and was most likely supplied by localized runoff and available groundwater. As groundwater levels have dropped the more constant water source has been removed making the channel intermittently flow as a result of rainfall or spring runoff." Further, in a June 2003 Wetland Delineation Report for a development project petitioned upon by appellant, the independent consultant company stated, "Wetland hydrology indicators were not observed in any area of the site. . . . No wetlands were observed on or extending off the site." Another independent consulting group stated in 2002 that no wetland existed in the area of one development project.

reviewed the project you mentioned and found that it *did not impact* any existing wetlands." Thus, the evidence submitted by appellant did not establish that Oxbow Creek was a protected water or wetland and that the disputed development projects would or have eliminated a protected water or wetland so as to mandate an EIS.

*Number of units in project*

Appellant also argues that an EIS was required because the residential development project area concerned more than 1,500 attached and unattached units. We disagree.

An EIS must be prepared if the residential development includes 1,000 unattached units or 1,500 attached units for certain metropolitan RGUs. Minn. R. 4410.4400, subp. 14 (2005). Further, "[m]ultiple projects and multiple stages of a single project that are connected actions or phased actions must be considered in total when comparing the project or projects" to determine whether an EIS is necessary. Minn. R. 4410.4400, subp. 1 (2005); *see also* Minn. R. 4410.1700, subp. 9 (2005) (stating that connected actions and phased actions are considered a single project to determine whether an EIS is necessary). A "connected action" exists when the RGU determines that two projects are related because (1) "one project would directly induce the other"; (2) "one project is a prerequisite for the other"; or (3) "neither project is justified by itself." Minn. R. 4410.0200, subp. 9b (2005). Respondent does not dispute that it is an RGU subject to these rules.

Appellant contends that because one of respondent's city planners stated in an affidavit to support respondent's summary judgment motion that the total project area

consisted of 1,590 units, respondent effectively admitted that the developments met the threshold requirement to mandate an EIS.[4] The planner's affidavit, however, identified a "project area" consisting of 36 individual development projects, which individually consisted of too few units to meet the mandatory EIS threshold. As a result, to establish that an EIS is necessary, appellant must show that the separate development projects located in the "project area" in the city planner's affidavit were connected actions.

Appellant did not provide any testimony or other evidence at trial to establish that the "project area" identified in the affidavit consisted of developments that are connected actions that met the mandatory EIS threshold.

Because appellant did not establish that an EIS was mandatory, appellant did not meet its burden of proof to show that respondent's actions in denying its petition for further environmental review were arbitrary and capricious. Therefore, the district court did not abuse its discretion in granting respondent's motion to dismiss.

**Affirmed.**

[4] Respondent argues that the affidavit signed by the city planner is not part of the record on appeal. But the affidavit was filed as part of respondent's summary judgment motion, and therefore, is properly part of the appellate record. Minn. R. Civ. App. P. 110.01 ("The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.").