STATE OF MINNESOTA

COUNTY OF ST. LOUIS

CASE TYPE: 14
DISTRICT COURT
SIXTH JUDICIAL DISTRICT
File No. 69DU-CV-2866

THE STATE OF MINNESOTA by Marilyn Campetti and Eric J. Ringsred;
And Marilyn Campetti and Eric J Ringsred, individuals.

Plaintiffs,

vs.

CITY OF DULUTH, a municipal corporation.

Defendant.

PLAINTIFF'S REPLY MEMORANDUM

MOTION FOR PARTIAL SUMMARY JUDGEMENT FOR
February 17, 2010

Defendant's Memorandum opposes Partial Summary Judgement on the following grounds:

Procedural

1) Failure to properly amend the original complaint (Defendant's Memorandum of Law Opposing Plaintiffs' Motion for Summary Judgement – p 3).

2) Inadequate publication of legal notice as required by MS 116B.03 Subd 2. (ibid p9).

3) Failure to join an indispensable party (ibid p18).

Substantive

1) A single family home is exempt from environmental review (ibid pp.8,16).

2) The City's issuance of a construction permit is not reviewable under MERA (ibid

p 11).

3) Skyline Parkway is not a protected resource because it is not owned by the City (ibid p.14).

4) There is no evidence of a material adverse effect on Skyline Parkway (ibid p.16).

5) There exists no "prudent and feasible alternative" to the construction at 3800 Skyline Parkway (ibid p. 18).

Amendment of Complaint

Plaintiffs have amended the complaint as instructed by the Court in the Scheduling Hearing of November 24, 2009 in conformance with Rule 15.01 which states "…a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires…". Plaintiffs clearly had leave of the Court. (See Affidavit of Eric Ringsred, EXH. A attached hereto.)

The amended complaint merely deletes two named parties which were deemed inappropriate. This was discussed by all parties, including the City, and by Judge Hylden, with unanimous agreement.

Moreover, Attorney Lutterman when exiting Judge Hylden's chambers volunteered to Plaintiff Ringsred that the City "will take care of the amendment papers" (see Ringsred Affidavit EXH A).

The City's posture on this amendment matter, given the facts and circumstances, is not only without merit, but on its face appears dilatory and frivolous.

Publication of Legal Notice

Took place on October 14, 2009, within 21 days of filing Complaint on September

28, 2009, as required by MS 116B.03 subd.1. (see Lutterman affidavit Exh.3).

Defendants cite a case where a MERA plaintiff failed to file notice within the statutory 21 days, thus depriving that court of subject matter jurisdiction. County of Dakota (C.P.46-06) v Lakeville, 559 NW2d 716 (Minn App. 1997).

While Plaintiffs clearly complied with the 21 day requirement, Defendant argues that other aspects of the notice are inadequate; that the wording "impairment by Defendants of protected natural (scenic) resources, specifically Duluth's Skyline Parkway and Lakewalk areas" as stated in the Notice, and "declaratory and injunctive relief to abate and prevent the impairment" as stated in the Notice, do not sufficiently comply with statutory requirement for: "specifying the act or acts complained of, and the declaratory or equitable relief requested". .

The notice as published certainly is sufficient to alert reasonable persons as to the City's actions and requested relief to "abate and prevent" further actions – especially under the circumstances of intense public controversy and debate on the issue.

Moreover the statute specifically allows the Court to order "additional notice", presumably to improve upon the original, stated in MS 116B.03 Subd 2:

> "The court may order such additional notice to interested persons as it may deem just and equitable."

Defendants could have raised this issue any time in the past four months, yet have waited until just 10 days prior to a hearing for Partial Summary Judgement.

Finally and most importantly,

There are two Court Doctrines which bar the Defendant from raising the issue of

jurisdiction at this late date.

Laches, where denial of a claim

> "under the equitable doctrine of laches is appropriate if "there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for" Felsch v Holm 236 Minn 158, 163, 52 NW 2d 113, 115 (1952).

Melendez v O'Connor 634 NW 2d 114, 117 (Minn. 2002)

And submission to the Court's jurisdiction as occurred at the scheduling hearing of November 24, 2009.

> "We have held, however, that a party who takes or consents to any step in a proceeding which assumes that jurisdiction exists or continues has made a general appearance which subjects him to the jurisdiction of the court. Slayton Gun Club v Town of Sheteck, 286 Minn. 461, 176 NW 2d 544 (1970)

Peterson v Eishen, 512 NW 2d 338, 341 (Minn. 1994)

Failure to Join An Indispensable Party

Again, this is raised for the first time just 10 days prior to Hearing for Summary Judgement. Not a word of this by Defendants when appropriateness of parties was discussed at the scheduling hearing of November 24, 2009, nor in Defendant's "Answer" to the original Complaint.

Had homeowner William C. Agenter desired to intervene, the MERA Statute provides the mechanism at 116B.03 subd 3:

> "Other interested parties may be permitted to

> intervene on such terms as the court may deem just in order to effectuate the purposes and polices set forth in section 116B.01"

Finally, under Rule 19 "Joinder of Persons Needed for Just Adjudication", the court may join a party should it deem this necessary for justice, per Rule 19.01:

> "….If the person has not been so joined, the court shall order that the person be made a party"

Plaintiffs have not requested any relief of Mr. Agenter. Abatement would presumably require the City to negotiate abatement by mitigation, modification, or removal of his home; or by taking the property by eminent domain – with just compensation.

> "Persons who lose their home can be fully compensated in damages. The destruction of protectible environmental resources, however, is noncompensable and injurious to all present and future residents of Minnesota. Any other result would be contrary to *Citizens to Preserve Overton Park, Inc. v. Volpe,* in which the United State Supreme Court rejected such wide ranging balancing of compensable with noncompensable impairment. In order to protect natural resources to the fullest extent possible, (that) court required that truly extraordinary disruption be demonstrated before a prudent and feasible alternative to an environmentally destructive action would be refused. PEER, 266 N.W.2d at 869-70 (citations omitted).

State by Archibal v County of Hennepin 495 NW 2d 416, 422 (Minn. 1992)

Is Construction of a Single Family Home Categorically Exempt From Environmental Review?

The City advances such a hypothesis, based upon the Minnesota Environmental Policy Act (MEPA) MS 116D.01 et seq, which is not the statute at issue here.

MEPA requires preparation of an EAW or EIS for certain governmental activities, permits, etc. Single family houses are among the exemptions for an EAW or EIS (MN Rules 4410.4600 Subp.12)

Defendants have not, and can not, provide statute or case law to support their contention that an exemption under MEPA must limit the scope of other existing environmental law such as MERA, or the Federal "Clean Water Act," or Minnesota Shoreline Regulations, or City wetlands ordinances, or a myriad of others.

Furthermore, even under MEPA's rules, it is not clear whether a single family home is absolutely exempt from review. A mandatory EIS is required according to MN Rules 4410.4300 Subp. 30, "for projects resulting in the permanent physical encroachment on lands within a …….scientific and natural area, or state trail corridor….."

Is The Issuance of a Construction Permit by the City Reviewable Under MERA?

MS 116.02 Subd 5 defines:

> "Pollution, impairment or destruction is….
> any conduct which materially adversely
> or is likely to materially adversely affect
> the environment;…"

Defendants assert that issuance of a permit does not meet the statutory definition, incorrectly citing National Audobon Society vs MPCA 569 NW 2d 211 (Minn. App. 1997).

The citation is incorrect because issuance of a permit is not the question in National Audobon; the question was whether environmental review may cause pollution,

impairment, or destruction – thereby subject to judicial review under MERA.

> "Environmental review is a process of information gathering and analysis…. because environmental review cannot result in pollution, impairment or destruction of the environment, we conclude environmental review does not constitute "pollution, impairment, or destruction' of the environment as defined by MERA"

Ibid p218.

Issuing a permit is an affirmative act, vastly different than the mere gathering of information.

MERA at 116B.09 Subd 1 specifically allows intervention "in any administrative, licensing, or other similar proceeding, and any action for judicial review thereof."

Is Skyline Parkway Not a Protectable "Natural Resource" Because it is Not Owned by the City?

MS116B.02 Subd 4 defines:

> "Natural resources shall include, but not be limited to, all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources. Scenic and aesthetic resources shall also be considered natural resources when owned by any governmental unit or agency."

Now the City claims it does not own Skyline Parkway. They say Skyline Parkway therefore cannot meet the definition of a scenic and aesthetic "natural resource" because it is not "owned by a governmental unit or agency".

Their argument seems desperate at best. If not owned by the City, then who <u>does</u>

own Skyline Parkway?

Finally the City ignores that Skyline Parkway is also a "recreational"and "historical" resource (see Plaintiffs' Memorandum in Support of Partial Summary Judgement (Exhibits A&B).

"Recreational" and "historical" resources have no requirement of government ownership to meet the statutory definition of a "natural resource".

Is There No "Prudent & Feasible Alternative" to the Construction At 3800 West Skyline Parkway?

The Minnesota courts have established a high standard for Defendants to prove, for this affirmative defense.

> "Guidance for application of this requirement can be found in a trio of Minnesota cases: *Powderly,* 285 N.W.2d at 84; *People For Envtl. Enlightenment and Responsibility* (PEER) *v. Minnesota Envtl. Quality Council,* 266 N.W.2d 858 (Minn. 1978); and *County of Freeborn by Tuveson v. Bryson,* 243 N.W.2d 316 (Minn. 1976). In *Powderly* we stated:
>
> > In deciding whether defendants have established an affirmative defense under MERA, *the trial court is not to engage in wide-ranging balancing of compensable against non-compensable impairments.* Rather, protection of natural resources is to be given paramount consideration, and those resources should not be polluted or destroyed unless there are truly unusual factors present in the case, or cost of community disruption from the alternatives reaches an extraordinary magnitude. 285 N.W.2d at 88 (citing *Bryson,* at 321) (emphasis added).

State by Archibal v County of Hennepin 495 NW 2d 416, 422 (Minn. 1992)

The "no-build" alternative is clearly an option here, just as the City does not allow construction in their environmentally sensitive areas such as flood plains and wetlands. (See Duluth Legislative Code Chapt. 51, "Water Resource Management" including Sec. 51-32).

Setback and height restrictions are other alternatives currently used in the City building and zoning codes (See 50-7; 50-20 to 25; 50-53; et.al).

Design requirements are another alternative already used by the City (for aesthetically sensitive areas), such as those imposed in the Waterfront District. Indeed such a "Design Review District" enacted by the City would be entirely appropriate for Skyline Parkway. See Exh B "Article XXIV Downtown Waterfront Mixed Use – Design Review District".

No Challenge to Plaintiffs Claims
Under MS 116B.10

have been offered by Defendant in their response.
This is the claim which finds existing City regulations inadequate for protection of Skyline Parkway, and remits to City government the responsibility to promulgate adequate protections.

Respectfully submitted:

Eric J. Ringsred