

STATE OF MINNESOTA
COUNTY OF ST. LOUIS

CASE TYPE: 14
DISTRICT COURT
SIXTH JUDICIAL DISTRICT
File #: 69-DU-CV-09-2866

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.

MEMORANDUM
SUPPORTING PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGEMENT
FOR

February 17, 2010

1) Statement of issues which are grounds for Partial Summary Judgement:

- Is Skyline Parkway a protected “natural resource” under Minnesota law (MS 116B.01 Subd 2)?
- Does the City’s conduct in issuing building permits on Skyline Parkway constitute “conduct which materially adversely affects the environment or is likely to materially adversely affect the environment”? (MS 116B.01 Subd.5)
- Are City building and zoning regulations inadequate to protect Skyline Parkway as a “natural resource”? (MS 116B.10 Subd 2)

2) Documents comprising record:

Exhibit A: City’s Answer – 10/10/2009

Exhibit B: Establishment of a Minnesota Scenic Byway Commission, April 12, 1992 (including criteria which define a scenic byway).

Exhibit C: City Council Resolution - #98-0662R requesting State designation of Skyline Parkway as a “scenic byway”.

Exhibit D: Building permit #101388 for construction at 3800 W Skyline Parkway dated 11/26/2008.

Exhibit E: Affidavit of Tom Cox including photos of 3800 W Skyline Parkway and tabulation of public commentary
Exhibit F: Duluth News Tribune editorial, Oct. 4, 2009
Exhibit G: Duluth Legislative Code Chapter 28A “Heritage Preservation”

3) Material facts as to which there is no genuine dispute:

- Skyline Parkway is a State of Minnesota Scenic Byway (Exhibit A and B)
- Duluth’s Mayor and City Council have proclaimed Skyline Parkway a scenic, recreational and historic resource (Exhibit C).
- City of Duluth has issued a permit for construction at 3800 W Skyline Parkway which complies with City regulations (Exhibit D).
- Photos attested in the affidavit of Tom Cox are true and correct pictures of the construction at 3800 W Skyline Parkway (Exhibit E).
- A substantial public outcry has occurred against the construction at 3800 W Skyline Parkway. (Affidavit of Tom Cox – Exhibit E)
(Duluth News Tribune editorial – Exhibit F)

4) Argument and Authorities

Duluth’s Skyline Parkway: A “Scenic Resource”, an “Aesthetic Resource”, a Recreational Resource”, and an “Historic Resource”.

“Natural Resources” are protected under MN Law, MS 116B & 116D. The definition of a Natural Resource under both 116B & D is provided by 116B.02

Subd 4:

“Natural resources” shall include, but not be limited to, all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historic resources. Scenic and aesthetic resources shall also be considered natural resources when owned by any governmental unit or agency.” (emphasis added)

The State of Minnesota has designated Skyline Parkway as a “Scenic Byway”.

Defendants’s have admitted this. (See Exhibit A- Defendants’s Answer , paragraph 6)

Criteria which define a Minnesota Scenic Byway include at minimum

“The route must have outstanding scenic quality, with natural or cultural resources representative of the landscape region in which it is located” (Exhibit B “Establishment of a Minnesota Scenic Byways Commission” page 4)

Duluth’s Mayor and City Council, by official resolution, have proclaimed and delineated Skyline Parkway as a scenic, aesthetic, recreational, and historic resource. (Exhibit C; Resolution #98-0662R) which states in part:

“Construction of Skyline Parkway began in 1890, and was designed as part of the City park system and as a tourist route”

“This route is located at an elevation approximately 600 ft above the lake level providing a wide variety of scenic vistas of the City and waterfront of Lake Superior and the St. Louis River...”

“The route has a significant scenic character important to the people who live here and to tourists who visit and travel through the area...”

And declares its STATEMENT OF PURPOSE:

“Skyline Parkway has always been known as a scenic route through the City of Duluth since it’s inception in the late 1800’s and during improvements made throughout the first third of the 20th century under the direction of Mayor Snively. It was designed as a framework for Duluth’s park system. The state of Minnesota scenic byway program was established to recognize routes throughout the state with special qualities and provide some assistance to enhance such routes for the benefit of the residents of the state. The significant scenic and historic character of Skyline Parkway make it an excellent candidate for consideration of such state designation and possible Federal designation at a later (sic) date. This resolution indicates the support of the Duluth City Council to seek such designation.”

Duluth’s Skyline Parkway: “impaired” by City actions (invoking protection under MS 116B.03), inadequately protected by existing City environmental standards (invoking MS 116B.10).

Construction on private property along Skyline Parkway, which adversely affects the publicly owned “scenic and aesthetic” and “recreational” resource, is entirely analogous to the situation enjoined in *State by Drabik v Martz* , 451 NW2d 893(Minn. App 1990).

Drabik is the leading case pertaining to scenic and aesthetic resources.

The Court therein enjoins construction of a telecommunications tower which is visible from the BWCA.

“Martz’ argument attempting to limit the scope of section 116B.02, subd. 4 are flawed. The question is not whether the view from government owned land onto private property is protected. The issue is whether protected scenic and esthetic resources of the government owned land would be materially adversely affected by construction of the tower. Whether Martz’ land itself is visible from any of the public lands to be protected is irrelevant. We conclude that MERA provides protection broad enough to cover the natural Resources at issue here. Sec Minn. Stat. 116B.02, subd.4 ; *Minnesota Public Interest Research Group v. White Bear Rod & Gun Club*, 257 N.W. 2d 762 (Minn.1977). We conclude that the trial court properly applied section 116B.02, subd.4 in its consideration of Drabik’s request for a temporary injunction.”

Note that in our case involving Skyline Parkway, the adverse impact on scenic, aesthetic and recreational resources would appear to be more severe than *Drabik*, insofar as the construction not only degrades the character and

recreational experience on Skyline Parkway, but actually blocks the view.

In determining the existence of a “material adverse effect” upon the environment, and thus invoking the remedies of 116B.03 & 116B.10, Plaintiffs must demonstrate one or more of the (5) criteria below:

“Minnesota courts weigh five factors to determine whether the effect is material and adverse:

- 1) The quality and severity of any adverse effects of the proposed action on the natural resources affected;
 - 2) Whether the natural resources affected are rare, unique, endangered, or have historical significance;
 - 3) Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable..;
 - 4) Whether the proposed action will have significant consequential effects on other natural resources..;
 - 5) Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.
- State by Schaller v. Country of Blue Earth*, 563 N.W.2d 260, 267 (Minn.1997). The factors are not exclusive and need not all be met to constitute a material adverse effect. *Id.*

State ex. Rel. ESSPA v. Minneapolis Park Bd., 673 NW 2d 169, 176 (Minn. App. 2003).

Criteria #1, #2, and #3 are met in the present case:

The quality and severity of adverse effects (Criterion #1) of the City’s conduct upon this resource are not only self-evident by the photographs and affidavit of Tom Cox, but further evidenced by an overwhelming expression of public concern, also documented in the Tom Cox Affidavit (Exhibit E), and in Duluth News Tribune editorial (Exhibit F).

Skyline Parkway is rare, unique, and has historical significance (Criterion

#2) by the City's own declaration (Exhibit B); and it is not easily replaceable – in fact, it is probably not replaceable at all (Criterion #3).

The construction permit for 3800 W Skyline Parkway was issued under the City's existing zoning, construction, heritage preservation, and other environmental ordinances (Exhibit D). Presuming the City has followed its own regulations, it is clear from the preceding analysis that these existing regulations are inadequate to protect Skyline Parkway, although at least one of these ordinances purports to do so. (Chapter 28A "Heritage Preservation" Exhibit G):

Sec. 28A 1. Declaration of public policy and purpose.

The council of the city of Duluth hereby declares as a matter of public policy that the preservation, protection, perpetuation and use of areas, places, buildings, structures, lands, districts and other objects having a special historical, cultural or aesthetic interest or value is a public necessity, and is required in the interest of public health, prosperity, safety and welfare of the people of the city of Duluth. The purposes of this Chapter are to:

- (a) Safeguard the heritage of the city of Duluth by preserving sites and structures which reflect elements of the city's cultural, social, economic, political, engineering or architectural history;
- (b) Protect and enhance the city of Duluth's attractions to residents, tourists and visitors, and serve as a support and stimulus to business and industry;
- (c) Enhance the economic viability of heritage preservation landmarks and districts through the protection and promotion of their unique character;
- (d) Enhance the visual and aesthetic character, diversity and interest of the city of Duluth;
- (e) Foster civic pride in the beauty and notable accomplishments of the past; and
- (f) Promote the use and preservation of historic landmarks and districts for the educational and

general welfare of the people of the city of Duluth.
(Ord. No. 8938, 4-17-1989, 1.)

In looking to its obligation to future generations, the Minnesota Legislature has proclaimed environmental preservation as the State's "paramount" concern, thus providing a guiding ethic for its courts:

"MERA expresses a "paramount" concern for the preservation of natural resources. See Minn. Stat. 116B.09, subd. 2 (1988). The supreme court has specifically concluded that this means "superior to all other () (concerns)". *Floodwood-Fine Lakes Citizens Group v. Minnesota Environmental Quality Council*, 287 N.W.2d 390, 399 (Minn.1979). Thus, the balancing must be done with significant emphasis on saving the environment."

Krompotich v. City of Duluth, 474 N.W. 2d 392, 400 (Minn. App. 1991) reversed in part 483 N.W. 2d 55 (Minn. 1992)

"Minn. Stat. 116B.01 "(I)t is the duty of the courts to support the legislative goal of protecting our environmental resources."

County of Freeborn v. Bryson, 309 Minn. 178,188, 243 N.W.2d 316, 321 (1976).

"The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed."

M.S. 116B.01

Given the state's "paramount concern" for the protection of natural resources MS 116B.09 Subd.2; *Bryson* 243 N.W. 2d @ 317; *Swan Lake Area v.*

Nicollet Count Bd., 771 N.W. 2d 529, 536; and given that “paramount” means “superior to all others” *Floodwood-Fine Lakes Citizens Group v. Minnesota Environmental Quality Council*, 1979, 287 N.W. 2d 390. , therefore

“To this end, the legislature has permitted district courts in MERA cases to “grant declaratory relief, or...impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction.” Minn. Stat. 116B.07 (2008). Thus, the district court must necessarily look to the particular facts and circumstances of each case in fashioning a remedy.”

Swan Lake Area, *ibid.*

Because the City’s conduct in issuing permits for the construction at 3800 W. Skyline Parkway has caused a “material adverse effect” on a protected “natural resource”, Plaintiffs request under MS 116B.03 Subd 1 equitable relief in the form of an order to abate.

Because the City’s future issuance of building permits is “conduct which is likely to materially adversely effect the environment”, Plaintiffs request under MS 116B.03 subd. 1 the court enjoin against issuance of permits for new construction affecting Skyline Parkway until the City enacts regulations for its protection.

Because existing City building, zoning, and other environmental regulations are inadequate to protect Skyline Parkway, Plaintiffs request under MS 116B.10 the court enjoin permitting of new construction affecting Skyline

Parkway, and remit to the City for enactment of regulations adequate for its protection.

Respectfully submitted,

Marilyn Campetti

Eric J. Ringsred