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Environmental Law—MINNESOTA ENVIRONMENTAL POLICY ACT—*In re City of White Bear Lake*, — Minn. —, 247 N.W.2d 901 (1976).

The Minnesota Legislature, in an effort to conserve and utilize best the natural resources of the state, has declared that all waters which serve a beneficial purpose are public waters subject to the control of the state.¹ Any activity which may change the course, current, or cross-section of public waters,² therefore, requires a permit from the Commissioner of Natural Resources.³ The Commissioner's decision is directly affected by the Minnesota Environmental Policy Act (MEPA),⁴ which charges all state agencies with the responsibility to discourage ecologically unsound practices.⁵ The Act provides that no permit for natural resources management and development may be issued where the permitted activity will cause pollution, impairment, or destruction of natural resources, if there exists a reasonable and prudent alternative.⁶

1. See MINN. STAT. § 105.38(1) (1976) (Minnesota Water Management Act).

2. "Waters of the state" is defined in MINN. STAT. § 105.37(1) (1976) as "any waters, surface or underground, except those surface waters which are not confined but are spread and diffused over the land."

3. See MINN. STAT. § 105.42 (1976): ("It shall be unlawful for the state, any person, . . . to change or diminish the course, current or cross-section of any public waters, wholly or partly within the state, by any means, . . . without a written permit from the commissioner previously obtained.").

4. MINN. STAT. §§ 116D.01-.07 (1976) (Minnesota Environmental Policy Act).

5. MINN. STAT. § 116D.02(1) (1976) states:

The legislature, recognizing the profound impact of man's activity on the inter-relations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resources exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state government, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state's people.

6. See MINN. STAT. § 116D.04(6) (1976), which states:

No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

Although "natural resources" are not defined in MINN. STAT. § 116D.01-.07 (1976), the broad scope of this term can be seen in MINN. STAT. § 116B.02(4) (1976) which states:

In the recent case of *In re City of White Bear Lake*,⁷ the Minnesota Supreme Court was confronted with the issue of how Minnesota's environmental protection and conservation policies should be applied to a city's request to construct a roadway extension through the bay of a lake. The City requested the permit to prevent a potential traffic safety problem in a residential area, asserting that the proposed roadway would relieve traffic congestion within the city limits.⁸ Work began on the project in 1969 and continued until 1974, during which time approximately \$50,000 was expended on plans and designs. In 1974 the City, in compliance with the Minnesota Water Management Act, applied for a permit to infringe on the lake.⁹ The Commissioner of Natural Resources denied the City's request because the road extension would adversely affect the lake and the adjacent wetlands and because other reasonable and prudent alternatives had been presented which would have little or no adverse environmental effect.¹⁰

The City appealed the Commissioner's order to the district court, which reversed, holding that the order was arbitrary, capricious, unreasonable, and not supported by the evidence.¹¹ The Minnesota Supreme Court, in reversing the district court's decision, held that there was substantial evidence in the record to support the Commissioner's findings, and the fact that the City had expended a substantial amount of money in preparation for the project did not require the project's approval.¹² More significantly, the court stated that the decision of the

"Natural resources shall include, but not be limited to, all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources."

7. ___ Minn. ___, 247 N.W.2d 901 (1976).

8. *Id.* at ___, 247 N.W.2d at 902.

9. *Id.* at ___, 247 N.W.2d at 901.

10. Seven alternatives to the City's application were proposed. Alternatives "V" and "VII" would not encroach on Birch Lake, produce major adverse effects on wetland areas, or increase traffic pressures on the existing residential streets. *Id.* at ___, 247 N.W.2d at 905. The Commissioner's findings, however, revealed that the proposed roadway alignment would intersect or pass over 14 wetland areas. These areas were valuable because of their water and nutrient retention, preservation of open spaces, and as wildlife habitat. Additionally, the construction would downgrade the water quality of Birch Lake, eliminating about 10% of the water surface area, and the roadway would act as a barrier to wildlife movement, resulting in a substantial killing of wildlife. Moreover, chemical pollutants would drain directly off the road without the benefit of wetland filtration. *Id.* at ___, 247 N.W.2d at 905-06.

11. *Id.* at ___, 247 N.W.2d at 903. The City raised the additional issue that the Water Management Act had been amended in 1973 to broaden the definition of protected waters which substantially increased the burden on a permit applicant. Additionally, because the City had expended revenues on planning and designs prior to the amendment of the statute, the City asserted that it had a vested right to the standard established by the statute prior to amendment. The supreme court dismissed the issue finding that the Birch Lake wetlands would have constituted protected public waters under either version of the statute. *Id.* at ___, 247 N.W.2d at 903-04.

12. *Id.* at ___, 247 N.W.2d at 906.

Commissioner was directly supported by MEPA, an act which has drastically changed the state's environmental law.¹³

The narrow issue presented in *White Bear Lake* was whether there was sufficient evidence presented to the Commissioner to support his denial of the permit to infringe upon Birch Lake.¹⁴ The decision, however, has much broader implications; for the first time MEPA was judicially recognized as support for the decision of the Commissioner of Natural Resources.¹⁵

Generally, judicial review of administrative actions and proceedings is limited in scope.¹⁶ The court's review usually is confined to questions of whether the administrative agency has acted within its constitutional or statutory powers, whether the agency's action is reasonable and not arbitrary, or whether the agency's order is supported by substantial

13. *Cf. County of Freeborn v. Bryson*, ___ Minn. ___, 243 N.W.2d 316, 321 (1976) (MERA) ("The remaining resources will not be destroyed so indiscriminately because the law has been drastically changed by the [Minnesota Environmental Rights] Act. Since the legislature has determined that this change is necessary, it is the duty of the courts to support the legislative goal of protecting our environmental resources.").

14. ___ Minn. at ___, 247 N.W.2d at 904.

15. *Id.* at ___, 247 N.W.2d at 906.

16. The scope of judicial review of administrative agencies is legislatively delineated in MINN. STAT. § 15.0425 (1976) which states:

In any proceedings for judicial review by any court of decisions of any agency . . . the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion or decisions are:

- (a) In violation of constitutional provisions; or
- (b) In excess of the statutory authority or jurisdiction of the agency;
- or
- (c) Made upon unlawful procedure; or
- (d) Affected by other error of law; or
- (e) Unsupported by substantial evidence in view of the entire record as submitted; or
- (f) Arbitrary or capricious.

See *United States v. Reserve Mining Co.*, 380 F. Supp. 11, 76 (D. Minn.) ("Minnesota Court decisions unanimously share the judgment that the judiciary has extremely limited review authority in permit matters delegated to state agencies, and that the judiciary will not assume the functions of the agencies."), *modified on other grounds*, 490 F.2d 688 (8th Cir.), *motion for stay of injunction granted*, 498 F.2d 1073 (8th Cir.), *successive motions to vacate stay denied*, 418 U.S. 911, 419 U.S. 802, 420 U.S. 1000 (1974), *modified on other grounds*, 514 F.2d 492 (8th Cir. 1975); *Markwardt v. Water Resources Bd.*, ___ Minn. ___, 254 N.W.2d 371 (1977) (citing MINN. STAT. § 15.0425 (1976) as the appropriate scope of judicial review); *Gibson v. Civil Serv. Bd.*, 285 Minn. 123, 126, 171 N.W.2d 712, 715 (1969) ("The functions of fact-finding, resolving conflicts in testimony, and determining the weight to be given to it and the inferences to be drawn therefrom rest with the administrative board."); *Mitchell Transp., Inc. v. Railroad & Whse. Comm'n*, 272 Minn. 121, 130, 137 N.W.2d 561, 567 (1965) ("[Q]uestions of fact and of policy are for administrative and not judicial determination.").

evidence.¹⁷ In *White Bear Lake*, the Commissioner's denial of the permit was challenged as not based on sufficient evidence.¹⁸ The proper test for establishing sufficiency of the evidence is whether the order is based on substantial evidence.¹⁹ If the evidence presented in the record reasonably supports the agency's decision, the reviewing court cannot overturn the agency's decision.²⁰ The Minnesota court found this substantial basis was present in *White Bear Lake*, and it therefore upheld the decision of the Commissioner denying the permit.²¹

The significance of *White Bear Lake* is the judicial recognition of MEPA, which requires the Commissioner to refuse the issuance of any permit when environmental damage may result. The current environmental movement in Minnesota was launched in 1971 by the adoption of the Minnesota Environmental Rights Act (MERA),²² which provides individuals with grounds to challenge in the courts private and governmental activities that adversely affect the environment.²³ In the initial test of MERA, *County of Freeborn v. Bryson*,²⁴ the statute was given a liberal interpretation, with the court holding that MERA could be invoked to restrain the exercise of the state's power of eminent domain to take a portion of the plaintiff farmer's land.²⁵ The passage of MERA

17. See MINN. STAT. § 15.0425 (1976).

18. ___ Minn. ___, ___, 247 N.W.2d 901, 904 (1976).

19. See, e.g., *Minneapolis Van & Whse. Co. v. St. Paul Terminal Whse. Co.*, 288 Minn. 294, 180 N.W.2d 175 (1970) (substantial evidence rule applied through the statutory rule governing the scope of judicial review, MINN. STAT. § 15.0425 (1976)).

20. *Id.* at 299, 180 N.W.2d at 178 ("if the evidence is conflicting or the undisputed facts permit more than one inference to be drawn, the findings of the commission may not be upset"). See generally 4 K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.01-1 to -8 (1976) (review of current tests).

21. ___ Minn. at ___, 247 N.W.2d at 906.

22. MINN. STAT. §§ 116B.01-.13 (1976). For a comprehensive analysis of the Act, its legislative history, and its operation, see Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575 (1972).

23. MINN. STAT. § 116B.03(1) (1976) states in part:

Any person residing within the state . . . may maintain a civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction.

24. 297 Minn. 218, 210 N.W.2d 290 (1973).

25. *Id.* at 227, 210 N.W.2d at 296 ("[W]e conclude that the legislature intended in appropriate cases that the power of eminent domain possessed by the governmental subdivision . . . was to be limited by the provisions of the [Environmental Rights] [A]ct."). The *Bryson* decision has been hailed as the first judicial affirmance of a statute conferring standing on individuals to oppose the state's eminent domain power when that power is exercised through a political subdivision. The eminent domain power of the state itself is not affected by the *Bryson* decision. See Comment, *Eminent Domain and the Minnesota Environmental Rights Act: A Shift in the Balance of Power*, 9 URB. L. ANN. 237, 237, 244 (1975).

ended an era during which the power of eminent domain was indiscriminately used to further economic and social needs at the expense of the environment.²⁶

In 1973, the legislature enacted MEPA,²⁷ imposing directly on state agencies the duty to protect against environmental destruction.²⁸ The Commissioner of Natural Resources is now required to evaluate each application for a permit to determine if there will be an adverse environmental effect.²⁹ A determination of adverse effect and the showing of a feasible alternative will cause the permit to be denied.³⁰ The applicant can rebut the Commissioner's decision by showing the public importance of the project outweighs the environmental considerations and there are, in fact, no reasonable alternatives.³¹ Under MEPA the burden

26. See *County of Freeborn v. Bryson*, ___ Minn. ___, ___, 243 N.W.2d 316, 321 (1976) ("Until the Act was passed, the holder of the power of eminent domain had in its hands almost a legislative fiat to construct a highway wherever it wished."). Prior to the amendment of MERA in 1971, the power of eminent domain was exercised with few restraints and minimization of costs was the paramount concern. However, with the enactment of MERA the power of eminent domain has been severely limited and environmental factors have taken precedence over social and economic factors. Compare *State v. Christopher*, 284 Minn. 233, 170 N.W.2d 95 (1969) (decision of the Commissioner of Highways to condemn 22 acres of park for freeway construction was upheld by the Minnesota Supreme Court because the route was the most convenient and least costly of all alternatives), *cert. denied*, 396 U.S. 1011 (1969) with *In re City of White Bear Lake*, ___ Minn. ___, 247 N.W.2d 901 (1976) (request for infringement upon a lake for highway construction denied because alternative routes existed).

27. Act of May 19, 1973, ch. 412, 1973 Minn. Laws 895 (codified as MINN. STAT. §§ 116D.01-.07).

28. See MINN. STAT. § 116D.03(2) (1976).

29. *United States v. Reserve Mining Co.*, 380 F. Supp. 11, 76 (D. Minn.), *modified on other grounds*, 490 F.2d 688 (8th Cir.), *motion for stay of injunction granted*, 498 F.2d 1073 (8th Cir.), *successive motions to vacate stay denied*, 418 U.S. 911, 419 U.S. 802, 420 U.S. 1000 (1974), *modified on other grounds*, 514 F.2d 492 (8th Cir. 1975) states as follows:

The statutory procedures proscribed by the legislature for water permit matters may be summarized as follows: The Commissioner is delegated specific authority to use his discretion, within broadly defined statutory guidelines, to utilize the state's police power to protect the public interests. The Commissioner must take certain factors such as public safety and welfare into consideration and if he doubts that they will be protected he can deny the permit.

30. An agency determination that a permit should not be issued should contain at least three elements of proof: (1) that the environmental resource is protected; (2) that there is pollution, impairment, or destruction of the protected resource; and (3) that there is a feasible or prudent alternative course of action. See MINN. STAT. § 116D.04(6) (1976). The last of these elements, "feasible and prudent" alternatives, has been analyzed under MERA as requiring a dual standard. Initially, under MERA, "feasibility" is characterized as the absence of a better technological method of carrying on the desired activity. Additionally, "prudent" alternatives are those which are economically reasonable in light of the social benefits derived from the activity. See Note, *supra* note 22, at 599-600; Note, *Highways, Environmental Legislation, and Judicial Review: The Changing Notion of Necessity*, 50 N.D.L. REV. 483, 497 (1973) (discussion of the environmental effects of highway placement and the legislative measures taken to protect the environment).

31. See MINN. STAT. § 116D.04(6) (1976).

of proof on the applicant is significantly increased because no longer can the applicant receive a permit by merely proving that the desired activity is less costly and environmentally disruptive than the other alternatives.³² Under MEPA, the applicant must now prove all alternative activities are unreasonable. It is possible, therefore, had the City of White Bear Lake applied for the permit prior to the adoption of MEPA, that the permit may have been granted because the Commissioner had the authority to approve any reasonable permit regardless of the environmental effect.³³

MEPA is patterned, in part, after the National Environmental Policy Act (NEPA),³⁴ passed by Congress in 1969. A federal statute similar to Minnesota's was interpreted by the United States Supreme Court in *Citizens To Preserve Overton Park, Inc. v. Volpe*,³⁵ a case strikingly similar to *White Bear Lake*, where the Court applied environmental policies to resolve a conflict between the protection of natural resources and the placement of a highway.³⁶ In *Overton Park* the Department of Transportation argued that its Secretary had the discretion to undertake a wide-ranging review of economic, social, and environmental factors to determine whether to allow the construction of a freeway through a park.³⁷ The United States Supreme Court held that NEPA did not grant the Secretary such wide-ranging discretionary powers.³⁸ The Court

32. See note 26 *supra*.

33. This position assumes that no action would be brought under the Minnesota Environmental Rights Act, MINN. STAT. §§ 116B.01-.10 (1976).

34. 42 U.S.C. §§ 4321-4347 (1970). See *No Power Line, Inc. v. Minnesota Environmental Quality Council*, No. 48014 (Minn. Sup. Ct. Sept. 30, 1977). The Minnesota Act adopts the general policy and goals of NEPA almost verbatim. Compare 42 U.S.C. § 4331 (1970) with MINN. STAT. § 116D.02 (1976). Twenty states and Puerto Rico have adopted legislation similar to NEPA. See 2 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.07 (1977); Hagman, *NEPA's Progeny Inhabit the States—Were the Genes Defective?*, 7 URB. L. ANN. 3 (1974).

35. 401 U.S. 402 (1971). This case required the construction of two federal statutes, both of which required the Secretary of Transportation to refuse funding for any environmentally disruptive program which would require the use of publicly owned land and for which a feasible and prudent alternative land use was available. The requirements placed on the Secretary are almost identical to those placed on the state agencies under the Minnesota Environmental Policy Act. Compare 23 U.S.C. § 138 (Supp. V 1975), as amended by Act of May 5, 1976, Pub. L. No. 94-280, § 124, 90 Stat. 440 and 40 U.S.C. § 1653(f) (1970) with MINN. STAT. § 116D.04(6) (1976).

Subsequent federal court decisions have broadly interpreted the term "use" under 49 U.S.C. § 1653(f) (1970), finding that encircling or bordering on protected park property is a use under the statute. See Colton, *The Case for a Broad Construction of "Use" in Section 4(f) of the Department of Transportation Act*, 21 ST. LOUIS U.L.J. 113 (1977).

36. 401 U.S. at 411-12. The Secretary of Transportation approved federal funding for a six-lane interstate highway through a 342-acre park in Memphis, Tennessee. The plaintiff citizens committee asserted that circumventing the park was a reasonable and prudent alternative and, therefore, the federal funds should not have been approved.

37. *Id.* at 411.

38. *Id.* The Court found that the reasonable and prudent exemption would only apply

agreed that because people do not live in parks, a highway routed through a park is the most direct, least costly, and least disruptive of all alternative routes.³⁹ However, the Court found that the standards for permit approval were more than a mere balancing of the economic, social, and environmental factors.⁴⁰ In finding that environmental protection was to be afforded preference over economic considerations, the Court stated:⁴¹

The very existence of the statute indicates that protection of parkland was to be given *paramount importance*. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in the particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

The same "paramount importance" under federal law is afforded the environment under the Minnesota Act, where Minnesota's Act states: "Economic considerations alone shall not justify such conduct."⁴² Additionally, in *White Bear Lake*, the court denied the permit despite the City's forceful argument that the new highway route across the lake would drastically reduce traffic congestion in the city.⁴³ The announced state policy to favor environmental resources was implemented by the *White Bear Lake* court to give environmental interests priority over the social needs of the local community.

MEPA signals the beginning of a new era of increased protection for natural resources. All state agencies are presently required to evaluate all state action and, when damage is found, to initiate actions to prevent further diminution of natural resources. Minnesota, therefore, through MEPA, has taken affirmative action to insure that all natural resources will be protected in the future.

if it would be feasible, "as a matter of sound engineering," to build the road along another route. *Id.* See also note 30 *supra*.

39. 401 U.S. at 411-12.

40. *Id.* at 412. See generally 2 F. GRAD, TREATISE ON ENVIRONMENTAL LAW §§ 9.01-.07 (1977).

41. 401 U.S. at 412-13 (emphasis added).

42. MINN. STAT. § 116D.04(6) (1976); see *Reserve Mining Co. v. Herbst*, ___ Minn. ___, 256 N.W.2d 808, 841 (1977) ("As we construe the statutes, and apart from statute, if there were substantial evidence that . . . [the proposed action] at Mile Post 7 would have significantly adverse medical effects on the residents of Silver Bay, no further consideration would be given to the economic consequences of a total shutdown and the site would be rejected.").

43. ___ Minn. at ___, 247 N.W.2d at 907.