STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2222
A07-944

Friends of the Riverfront, et al.,
Relators,

vs.

DeLaSalle High School,
Respondent,
City of Minneapolis,
Respondent.

Filed November 20, 2007
Affirmed
Stoneburner, Judge

Minneapolis City Council
Petition No. 271514

Jack Y. Perry, John A. Cairns, Matthew J. Franken, Briggs and Morgan, P.A., 2200 IDS Center, Minneapolis, MN 55402 (for relators)

Carolyn V. Wolski, Jeffrey J. Harrington, Leonard, Street and Deinard, Suite 2300, 150 South Fifth Street, Minneapolis, MN 55402 (for respondent DeLaSalle)

James A. Moore, Stephen H. Norton, Office of City Attorney, 300 Metropolitan Center, 333 South Seventh Street, Minneapolis, MN

55402 (for respondent City)

********** Considered and decided by Wright, Presiding Judge; Shumaker, Judge; and Stoneburner, Judge.

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

STONEBURNER, Judge

In these consolidated appeals, relators challenge by writ of certiorari respondent city's grant of a Certificate of Appropriateness and amended Certificate of Appropriateness to respondent high school for the construction of an athletic facility adjacent to the school on Nicollet Island. Because respondent city's action was not arbitrary or capricious, we affirm.

FACTS

Respondent DeLaSalle High School (DeLaSalle) has been located on Nicollet Island since 1898. Nicollet Island is a legislatively protected "historic place," and is within the Minnesota National River and Recreation Area (MNRRA), a unit of the National Park System. Minn. Stat. § 138.664, subd. 64 (2006). MNRRA is coextensive with the Mississippi River Critical Area Corridor (MRCAC), and is part of a "regional recreational open space system" encouraged under Minn. Stat. § 473.302 (2006) (facilitating a process for acquisition and development of regional recreational open space). Nicollet Island is also located within the St. Anthony Falls National Historic District (NHD), which, in 1971, was listed on the National Register of Historic Places and the State Register of Historic Places. Nicollet Island is further subject to numerous river and historic preservation policies and guidelines, including: the City of Minneapolis (the city) 2006 Mississippi River Critical Area Plan; the Minneapolis Community and Economic Development Agency's Nicollet Island & East Bank Urban Renewal Plan; the Minneapolis Park and Recreation Board's Central Riverfront Open Space Master Plan; Executive Order 79-19; MNRRA's Comprehensive Management Plan (CMP); the 2000 Minneapolis Plan; MPRB's 1996 Master Plan; and the St. Anthony Falls Historic District Guidelines.

DeLaSalle and the Minneapolis Park and Recreation Board (the MPRB) entered into an agreement under which DeLaSalle would construct an athletic facility (the project). The project will provide regulation-size football and soccer fields

and three junior soccer fields for shared use by the school and the public.[] DeLaSalle and the MPRB propose to build the facility on two adjacent parcels of land, one owned by DeLaSalle and one owned by the MPRB.[] The parcels are bisected by a portion of Grove Street right-of-way which will be destroyed by the project.[] Grove Street itself is not a historic feature. []The pavers, curbs and lighting were all replaced in the late 1990s.[] But the alignment of Grove Street is a historic feature that will be affected by the project because the view down the street will be interrupted by the project.[]

In October 2005, J. Michael Orange, principal planner in the city[]s planning department, completed a mandatory Environmental Assessment Worksheet (EAW) for the project.[] The EAW explored the project[]s compatibility with existing plans and land use regulations that apply to the project site, and concluded that []s]everal adopted plans apply to the p]roject with policies that might be interpreted as being supportive of the p]roject and others that might be interpreted as indicating inconsistency.[][] Based on the EAW, the city concluded that an Environmental Impact Statement is not required for the project.

In June 2006, DeLaSalle applied to the Heritage Preservation Commission (HPC) for a Certificate of Appropriateness (certificate) for the project.[] The Code of Ordinances for the city requires a certificate from the HPC for any alteration of property in an historic district.[] Minneapolis, Minn., Code of Ordinances [] 599.320 (Supp. 2007).[] The code requires the HPC to make findings regarding reasonable alternatives to destruction of historic property and allows destruction only if there are no reasonable alternatives.[] *Id.* at [] 599.350(b).[]

The Community Planning and Economic Development Department [] Planning Division, prepared a 28-page staff report on the project for the HPC.[] The report included proposed findings and a recommendation that the HPC deny the certificate.[] In August 2006, the HPC adopted a modified version of the proposed findings and denied the certificate, finding, in part, that []m]any aspects of the project . . . would have a lasting adverse effect on the [historic] district.[]

[][][][][][][][][][][] DeLaSalle appealed the HPC[]s denial to the city council.[] The Zoning and Planning Committee (the

committee) received public comment and held a hearing regarding the project in September 2006. The committee made proposed findings and recommended, based on the proposed findings, that the city council approve the certificate. Relators intervened in the city council proceedings under the Minnesota Environmental Rights Act (MERA), which permits intervention into an administrative proceeding on filing of a verified pleading asserting that the proceeding . . . involves conduct that has caused or is likely to cause pollution, impairment, or destruction of the air, water, land, or other natural resources located within the state. Minn. Stat. 116B.09, subd. 1 (2006). MERA defines natural resources to include historic resources. Minn. Stat. 116B.02, subd. 4 (2006). The parties agree that the project affects a natural resource as defined by MERA.

After a hearing, the city council adopted the committee's proposed findings of fact, including provisions to mitigate the impact of the project on the historic district, and approved the certificate. Relators appealed by writ of certiorari (A06-2222).

While appeal A06-2222 was pending, DeLaSalle applied for an amended certificate for a revised project that addresses some of the objections raised to the initial project. The HPC denied the application for an amended certificate and DeLaSalle appealed to the city council. The city council approved DeLaSalle's application for an amended certificate. Relators also appealed this decision by writ of certiorari (A07-944). Appeals A06-2222 and A07-944 were consolidated by order of this court.[1] Relators concede that issues on appeal from approval of the amended certificate are not materially distinct from the issues involved in the appeal from approval of the original certificate, and therefore our discussion does not distinguish the two appeals.

D E C I S I O N

I. Standard of review

The parties agree that approval of the certificate involved a quasi-judicial decision. This court affirms quasi-judicial decisions unless they are unreasonable, arbitrary, or capricious. *Billy Graham Evangelistic Ass'n v. City of Minneapolis*,667 N.W.2d 117, 123 (Minn. 2003). On certiorari review, we review the evidence only to determine whether it supports the findings of fact or the

conclusions of law, and whether the municipality's decision was arbitrary or capricious. *In re Dakota Telecomm. Group*,590 N.W.2d 644, 646 (Minn. App. 1999). We exercise judicial restraint to avoid substituting our judgment for that of an administrative body. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001). Decisions of administrative bodies are reviewed for "substantial evidence" which is defined as "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *In re North Metro Harness, Inc*.,711 N.W.2d 129, 137 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. June 20, 2006).

"The functions of factfinding, resolving conflicts in the testimony, and determining the weight to be given to it and the inferences to be drawn therefrom rest with the administrative board." *Quinn Distrib. Co. Inc. v. Quast Transfer, Inc.*, 288 Minn. 442, 448, 181 N.W.2d 696, 700 (1970) (quotation omitted). Absent manifest injustice, inferences drawn from the evidence by an administrative body must be accepted by a reviewing court "even though it may appear that contrary inferences would be better supported or that the reviewing court would be inclined to reach a different result were it the trier of fact." *Ellis v. Minneapolis Comm'n on Civil Rights*,295 N.W.2d 523, 525 (Minn. 1980). Where an administrative body contemporaneously states reasons for its decision, the burden is on the challenger to show that the decision was unreasonable, arbitrary, or capricious. *Billy Graham Evangelistic Ass'n*, 667 N.W.2d at 123.

II. Requirements for certificate

Section 599.350 of the city code provides, in relevant part:

> Before approving a certificate of appropriateness, the commission shall make findings that the alteration will not materially impair the integrity of the . . . historic district . . . and is consistent with the applicable design guidelines adopted by the commission . . . .
>
> [and]
>

> Before approving a certificate of appropriateness that involves the destruction, in whole or in part, of any landmark, [or] property in an historic district . . ., the commission shall make findings that . . . there are no reasonable alternatives to the destruction.[illegible] In determining whether reasonable alternatives exist, the commission shall consider, but not be limited to, the significance of the property, the integrity of the property and the economic value or usefulness of the existing structure, including its current use, costs of renovation and feasible alternative uses.

Minneapolis, Minn., Code of Ordinances [illegible] 599.350 (Supp. 2007).

III.[illegible] Minnesota Environmental Rights Act (MERA)[illegible]

The parties agree that because relators intervened in these proceedings under section 116B.09 of MERA, our review of the city[illegible]s action must accord with the provisions of MERA.[illegible] [illegible]In any action for judicial review of any administrative, licensing, or other similar proceeding, the court shall grant review of claims that the conduct[illegible] impaired or will impair natural resources, [illegible]and in granting such review it shall act in accordance with the provisions of sections 116B.01 to 116B.13 and the Administrative Procedure Act.[illegible] Minn. Stat. [illegible] 116B.09, subd. 3 (2006).[illegible]

Under MERA, in a licensing or similar proceeding, an administrative body must consider alleged impairment or destruction of historic resources and the existence of feasible alternatives:

> [N]o conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state[illegible]s paramount concern for the protection of its . . . [historic resources] from pollution, impairment, or destruction.[illegible] Economic considerations alone shall not justify such conduct.
> [illegible]

Minn. Stat. [illegible] 116B.09, subd. 2 (2006).

Relators rely on *State by Archabal v. County of Hennepin*, 495 N.W.2d 416 (Minn. 1993), to define what is necessary to make a prima facie case under MERA and how a prima facie case can be rebutted.[illegible] *Archabal* sets out two requirements for a prima facie showing in a district court action under MERA section 116B.03: (1) the existence of a protectable natural resource and (2) the

pollution, impairment or destruction of that resource. 495 N.W.2d at 421 (citation omitted). Under section 116B.04, the challenged party may rebut a prima facie case with a showing of contrary evidence, or with the affirmative defense that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its [natural resources]. *Id.* at 422 (quotingMinn. Stat. 116B.04 (1992)).

Relators primarily argue that DeLaSalle failed to meet its burden of establishing that no feasible and prudent alternatives to the project exist. But relators also assert that this affirmative defense is not available to DeLaSalle because section 116B.04 (unlike section 116B.09) precludes the no-feasible-and-prudent-alternative defense if proposed conduct will violate an environmental-quality standard promulgated by certain agencies, including the DNR. *McGuire v. County of Scott*, 525 N.W.2d 583, 586-87 (Minn. App. 1995).

Both *Archabal* and *McGuire v. County of Scott,* 525 N.W.2d 583, 586 (Minn. App. 1995), *review denied* (Minn. Mar. 14, 1995),involved actions brought in the district court and the application of section 116B.04, which, by its plain language, applies only to district court actions brought under section 116B.03 and does not purport to apply to interventions in administrative proceedings under section 116B.09. Throughout this controversy, the parties have assumed that the provisions of section 116B.04 apply to interventions under section 116B.09. At oral argument on appeal, this court questioned that assumption, but the parties urge that this issue need not be resolved in the present litigation. Assuming, without deciding, that the limitation on the affirmative defense applies to a section 116B.09 intervention, we must address whether the project violates an environmental-quality standard promulgated by the DNR.

Relators argue that because the DNR manages the MRCAC, the DNR has promulgated standards and guidelines that will be violated by the project, precluding DeLaSalle from asserting the affirmative defense of no feasible and prudent alternative. In support of their argument, relators submitted information from the DNR's website which describes the DNR's roles regarding the MRCAC,

including: (1) review of existing ordinances for compliance with state critical area standards and guidelines; (2) technical assistance for ordinance development and amending existing ordinances that will be consistent with the voluntary MNRRA CMP policies; and (3) review of plans and ordinances to ensure consistency with provisions of Executive Order 79-19. Based on this record, we cannot conclude that the DNR has *promulgated standards* by undertaking these responsibilities, and hold that the section 116B.04 limitation on the no-feasible-and-prudent-alternative defense does not apply in this case.

IV. Applicable land-use plans and guidelines

Relators argue at length that the city failed to consider that the project violates a myriad of land-use plans and guidelines applicable to Nicollet Island. The city counters that these plans and guidelines were fully addressed in a five-page discussion in section 27 of the EAW, which was addressed in the committee's report to the city. The findings adopted by the city specifically address the Nicollet Island Sub-District Guidelines, the applicable Historic District Guidelines for the project. The findings state that the project is generally compatible with the applicable guidelines if the field has a grass surface and is equipped with lighting that is in character with the historic district and not visible from all four directions. We conclude that the city did not arbitrarily or capriciously fail to consider the plans and guidelines that apply to the project site.

Furthermore, the city correctly asserts that the certificate was approved based on a finding that there is no feasible and prudent alternative as permitted by the Code of Ordinances and MERA. Neither section 116B.09 of MERA nor the city code requires an agency to make specific findings about a project's compatibility with applicable plans and guidelines when the conduct is permitted based on a finding of no feasible and prudent alternative. We conclude that the city's findings were adequate under the code.

V. Feasible and prudent alternatives

The city's finding that there are no feasible and prudent alternatives to the project is based on the city's position that DeLaSalle and the MPRB are entitled to define the project. DeLaSalle and the MPRB concluded that being adjacent to the school's

existing campus is an essential element of the project.[illegible] Based on this determination, the city declined to address some of the alternatives that would locate the project on property not adjacent to DeLaSalle.

Relying again on the *Archabal* case, relators attack the city[illegible]s finding that the project must be adjacent to DeLaSalle.[illegible] In *Archabal*, the supreme court concluded that the county failed to establish the affirmative defense of no feasible and prudent alternative to constructing a proposed new jail on the Armory site.[illegible] 495 N.W.2d at 426.[illegible] Construction of the jail on that site would have required destruction of the Armory, which is on the National Register of Historic Places and is regarded as one of the best examples of the WPA Modern style of architecture in the country.[illegible] *Id.* at[illegible] 420.[illegible]

In *Archabal*, one of the primary arguments for the Armory site was that the proximity of the site permitted use of a tunnel to transport inmates from the jail to the government center and that such a tunnel was necessary to public safety.[illegible] *Id*. at 425.[illegible] But alternative sites had also been recommended to the county, and expert testimony established that the county[illegible]s safety concerns could be adequately met by busing prisoners from a more distant site.[illegible] *Id.* [illegible]Most of the other factors supporting location of the jail at the Armory site were economic considerations.[illegible] *Id.* at 426.[illegible]

Although *Archabal*[illegible]s emphasis on the potency of MERA in the protection of historic resources is instructive, we do not read the case to require the city in this case to consider project sites that are not adjacent to DeLaSalle.[illegible][illegible] *Archabal* is factually distinguishable from this case because the construction of a jail on the Armory site would have involved the total destruction of a unique building, several sites had been recommended to the county as potential sites for the project, and expert testimony demonstrated that the primary concern, safety, did not require that the project be within tunneling distance of the government center.[illegible]

An administrative body is not required [illegible]to consider alternatives that would frustrate the very purpose of the project.[illegible][illegible] *Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545, 550 (8th Cir. 2006) (discussing challenges to approval for an upgrade to existing rail lines as violating 49 U.S.C. [illegible] 10901 and the National Environmental Policy Act, 41 U.S.C. [illegible][illegible] 4321-4347).[illegible] In this case, none of the

non-adjacent proposed alternative sites for the project meets DeLaSalle's need. DeLaSalle is not just looking for a place to play football. For years DeLaSalle has maintained a successful football program playing on non-owned, non-adjacent fields. Nor is DeLaSalle interested merely in seating spectators around its current adjacent practice field, as relators assert it can do by installing movable bleachers. The project is by definition an adjacent athletic facility with locker rooms, concession stands, and lighting consistent with such a facility. As noted in the EAW, the 22-member Citizens Advisory Committee, established by the MRPB to review all aspects of the project, was limited in its review of alternative locations to "adjacent parkland" based on the programmatic needs of DeLaSalle and the MPRB.

The city heard testimony that two off-site alternatives urged by relators, the B.F. Nelson site and the Boom Island site, are not available.[2] Relators argue that because the city's findings of fact do not address the Boom Island site, the use of portable bleachers, or a "no build" option, the findings regarding feasible and prudent alternatives are prima facie arbitrary and capricious. "Relators cite numerous cases which have held that a city's failure to record sufficient reasons for its decision makes its decision prima facie arbitrary.[3] Because none of the alternative options is consistent with the definition of the project, however, we conclude that the city was not required to consider any of them. Therefore, its failure to make findings on those sites does not make its decision regarding feasible and prudent alternatives prima facie arbitrary or capricious.

The city made findings about three "on-site" alternatives. Relators challenge only the rejection of one of these alternatives as not feasible and prudent: "construction of an elevated facility over the parking lot in front of the school." The city heard evidence that construction of such a facility is feasible. But the city found, based on evidence in the record, that this site would create potential safety issues for motorists on Hennepin Avenue, and would create a cavernous area beneath such a field that would also create safety concerns and would compromise emergency access to the school. This option was also considerably more costly, and while MERA precludes economic considerations from being determinative, it does not preclude consideration of economic

factors altogether.&#65533; *See Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 841 (Minn. 1977) (stating that &#65533;we have previously indicated that state agencies and courts are required by statute to consider both the economic impact and the environmental impact in rendering decisions dealing with environmental matters&#65533;).&#65533; We conclude that the city&#65533;s determination of no feasible and prudent alternative was not arbitrary and capricious.

Based on the record and our standard of review, we conclude that the city did not act unreasonably, arbitrarily, or capriciously in approving the certificates.

&#65533;&#65533;&#65533;&#65533;&#65533;&#65533;&#65533;&#65533;&#65533;&#65533;&#65533; **Affirmed.**

---

[1] Relators have also brought a district court action against respondents and others for injunctive and other relief.&#65533; The district court dismissed that action, and relators appealed (appeal A07-925).&#65533; This court denied relators&#65533; request to consolidate the appeal in A07-925 with these appeals.

[2] The city adopted four findings concerning five non-adjacent sites considered by the MPRB, including the B.F. Nelson site.&#65533; The city found that none of the sites &#65533;satisf[ies] the fundamental requirement of being on or adjacent to the existing DeLaSalle campus.&#65533;

[3] *See Holasek v. Vill. of Medina*, 303 Minn. 240, 243, 226 N.W.2d 900, 902 (1975) (stating &#65533;it is now a settled rule of judicial review that the failure of the governing body to record contemporaneously the facts and legally sufficient reasons for its determination constitutes a prima facieshowing of arbitrariness&#65533;); &#65533;*Zylka v. City of Crystal*, 283 Minn. 192, 198, 167 N.W.2d 45, 50 (1969) (stating that where a city has failed &#65533;to record any legally sufficient basis for its determination at the time it acted . . . [,] a prima facie showing of arbitrariness [is] inevitable&#65533;); *In re Application of N. States Power Co.*, 440 N.W.2d 138, 141 (Minn. App. 1989) (stating that an administrative decision may be set aside where the record fails to contain document or study critical to the agency&#65533;s decision); *Apple Valley Red-E-Mix v. City of St. Louis Park*, 359 N.W.2d 313, 314 (Minn. App. 1984) (concluding that city council&#65533;s failure to record sufficient reasons made its decision prima facie arbitrary), *review denied* (Minn. Mar. 21, 1985).