STATE OF MINNESOTA

IN COURT OF APPEALS

Metropolitan Airports Commission,

Petitioner,

and

Northwest Airlines, Inc.,

Intervenor,

v.

State of Minnesota by the City of Minneapolis, Minneapolis Public Housing Authority in and for the City of Minneapolis, City of Eagan, and City of Richfield,

Respondents.

METROPOLITAN AIRPORTS COMMISSION'S PETITION FOR DISCRETIONARY REVIEW

TRIAL COURT CASE NO: MC 05-5474

DATE OF FILING OF ORDER: November 30, 2005

TO: Court of Appeals of the State of Minnesota.

The petitioner, Metropolitan Airports Commission, requests discretionary review of the November 30, 2005 order of the Hennepin County District Court.

I. STATEMENT OF FACTS NECESSARY TO AN UNDERSTANDING OF THE ISSUES PRESENTED.

In 1996, the Metropolitan Airports Commission ("MAC") adopted a noise mitigation program that expressed the policy of extending noise mitigation to areas or "contours" near Minneapolis-St. Paul International Airport ("MSP") that will fall within the Federal Aviation Administration's ("FAA") 60 to 64 decibel ("dB") sound level as measured on a day-night average sound level ("DNL" or "LDN"). A.81-A.83. The genesis of MAC's policy was a

directive of the Minnesota legislature that MAC *examine* mitigation measures in the 60 to 64 DNL contours surrounding MSP. Minn. Stat. § 473.661, subd. 4(f). According to the 1996 policy, MAC would amend its existing noise mitigation program, which FAA approved under 14 C.F.R. Part 150, to begin implementing mitigation in the 60 to 64 DNL contours once it completed the ongoing noise mitigation program in the 65 and greater DNL contours. A.83. This policy was extraordinary, because FAA typically does not consider aircraft noise outside the 65 DNL contour to be "significant." MAC's 1996 noise mitigation program did not specify a noise mitigation approach in the 60 to 64 DNL contours, and did not provide that it would implement noise mitigation in the 60 to 64 DNL contours that is identical to noise mitigation in the 65 and greater DNL contours. Id. MAC's noise mitigation program for the 65 and greater DNL contours is designed to provide an additional five-decibel noise reduction from existing residential interior noise levels.

As directed by the Minnesota Legislature, MAC in 1998 completed a Final Environmental Impact Statement for the Dual Track Airport Planning Process ("Dual Track FEIS") that evaluated an expansion of MSP, including construction of a new 8000-foot north-south runway, new taxiways, terminal expansion, and associated airport facilities and roadways. A.36. The Dual Track FEIS incorporated the 1996 noise mitigation program's policy of implementing noise mitigation in the 60 to 64 DNL contours, and MAC's 1999 Airline Lease Agreement with airlines using MSP also reflects that policy. A.36-A.37. In 2001 and 2002, MAC adopted two differing approaches as to how it might implement the policy to provide noise mitigation in the 60 to 64 DNL contours. A.-37-A.38. MAC's actions between 1996 and 2002 declared for planning purposes an intended course of action to be pursued in the future.

In November 2004, in a study for MSP prepared under 14 C.F.R. Part 150 and submitted to FAA, MAC set forth its specific noise mitigation proposal for the 60 to 64 DNL contours. A.38. Respondents (collectively, the "cities") contend that the MAC proposed mitigation plan for the 60 to 64 DNL contours is a "retreat" from MAC's earlier noise mitigation "commitments." A.37-A.38. On April 6, 2005, the cities filed a three count complaint alleging that the MAC proposed mitigation plan for the 60 to 64 DNL contours violates the Minnesota Environmental Rights Act ("MERA") and, in the alternative, is subject to a writ of mandamus. A.30-A.46. The cities seek an order requiring that MAC implement a noise mitigation program in the 60 to 64 DNL contours that will provide at least a five-decibel noise reduction from existing residential interior noise levels. A.41. MAC estimates that providing at least a five-decibel noise reduction from existing residential interior noise levels to homes in the 60 to 64 DNL contours will cost in excess of $300 million.

MAC moved the Hennepin County District Court to dismiss the cities' complaint for lack of subject matter jurisdiction, because the cities' claims were not ripe for adjudication. MAC also moved to dismiss the three causes of action in the cities' complaint for failure to state a claim. MAC argued that the cities' first MERA claim actually stated a cause of action for damages and economic regulation, which MERA does not permit. A.59-A.61. MAC also argued that the cities' second MERA cause of action did not state a claim for enforcement of a state environmental quality standard under MERA. A.62-A.71. Finally, MAC argued that the cities' request for a writ of mandamus was improper because the complaint did not establish that MAC has a mandatory duty to implement the relief that the cities seek. A.71-

A.73. On November 30, 2005, the Hennepin County District Court denied MAC's motion to dismiss.

II. STATEMENT OF THE ISSUES.

MAC seeks review of the following three issues:

1) Does the complaint fail to state a claim for enforcement of an environmental quality standard under MERA?

2) Does the complaint fail to state a claim because the cities' MERA causes of action involve damages and economic regulation rather than the protection of natural resources?

3) Does the complaint fail to state a claim because the cities' mandamus cause of action does not establish that MAC has an unequivocal legal duty to implement a five-decibel noise reduction package in the 60 to 64 DNL contours?

III. STATEMENT WHY IMMEDIATE REVIEW IS NECESSARY.

The district court's denial of MAC's motion to dismiss is not an order subject to appeal under Rule 103 of the Minnesota Rules of Appellate Procedure. Minn. R. Civ. App. P. 103.03. This Court, however, has the discretion under Rule 105 to review the district court's decision. Minn. R. Civ. App. 105.01 ("the Court of Appeals may allow an appeal from an order not otherwise appealable"). Discretionary review under Rule 105 is appropriate where an interlocutory appeal would permit "resolution of an important legal issue that is also important to the particular litigation." Gordon v. Microsoft Corp., 645 N.W.2d 393, 401-02 (Minn. 2002). See also In re Contest of General Election, 264 N.W.2d 401, 402 n. 1 (Minn. 1978) (granting discretionary review under Rule 105 because issue was of general importance); Price v. Amdal, 256 N.W.2d 461, 462 n.1 (Minn. 1977) (granting

discretionary review under Rule 105 because of "troublesome and vexing question"); 3 Eric J. Magnuson & David F. Herr, Minnesota Practice Series: Appellate Rules § 105.4 (2005) (cases presenting "significant legal issues having impact beyond the particulars of the case are good candidates for discretionary review" under Rule 105).

All three issues upon which MAC seeks discretionary review meet the requirements for an interlocutory appeal under Rule 105. Each of the issues raises important legal questions that are critical to the cities' case and that also have an impact beyond the confines of the cities' litigation against MAC. The first issue, whether the cities' complaint fails to state a claim for enforcement of an environmental quality standard under MERA, involves a legal question of first impression. The cities, advancing what the district court termed a "novel theory under MERA," assert that the Minnesota Environmental Policy Act, MAC's enabling statute, MAC's noise mitigation program, and the Dual Track FEIS create a "constellation" that establishes an environmental quality standard. A.21. The district court acknowledged that "there is no case law to provide direction" on the "novel 'constellation' theory," and that the "easy, simple answer would be to reject" the cities' claim. A.25. Nevertheless, the district court found as a matter of public policy that "[a] case could be made that the 'sequence' of events orchestrated by a state agency, and the 'constellation' of documents and approvals secured by the state agency, *themselves* create an environmental quality standard, limitation, rule or order, worthy of protection under MERA." A.26 (emphasis original).

By repeatedly and accurately using the word "novel" to describe the cities' MERA claims, the district court confirmed that MAC's motion to dismiss raised important legal issues that an interlocutory appeal under Rule 105 would resolve. Moreover, as the district

court opined, there is no case law whatsoever supporting the notion that a sequence of events constitutes an "environmental quality standard, limitation, rule, or order" under MERA. To the contrary, MERA's private right of action addressing environmental quality violations applies only to state environmental standards, limitations, rules, orders, licenses, stipulation agreements, or permits that are substantive and enforceable. Minn. Stat. § 116B.02, subd. 5. See also A.62-A.71, citing Kennedy Bldg. Associates v. Viacom, Inc., 375 F.3d 731, 743-44 (8th Cir. 2004) and Williams Pipeline Co. v. Soo Line R. Co., 597 N.W.2d 340, 345-46 (Minn. Ct. App. 1999). There is no factual dispute regarding the "sequence of events" that the cities assert creates an environmental quality standard enforceable under MERA, so there is no need to develop "a full record in the event of appellate review" as the district court's decision suggests. A.26-A.27. The only dispute is whether a "sequence of events," as a matter of law, constitutes a substantive environmental standard enforceable under MERA. Even if a "sequence of events" could create an environmental quality standard, the district court failed to articulate how MAC could modify such a standard in the face of changed conditions. Accordingly, the Court of Appeals should consider the cities' novel MERA theory in an interlocutory appeal.

The second issue for discretionary appellate review, which addresses whether the cities' MERA claims involve damages and economic regulation rather than the protection of natural resources, also involves an important legal issue. The cities style the first cause of action in their complaint as a MERA claim, alleging that the MAC proposed mitigation plan is inadequate and would therefore cause "pollution, impairment, or destruction" of quietude, a protected natural resource. A.39. In actuality, the cities' cause of action attempts to enforce purported promises or "commitments" by MAC to implement a five-decibel noise

reduction package for residents in the 60 to 64 DNL contours surrounding MSP. A.30, A.35, A.37. Similarly, although MERA allows injunctive or other equitable relief to prevent "pollution, impairment, or destruction" of quietude, the Minnesota Supreme Court has held that federal law preempts a state court's ability to regulate airport noise. Minnesota Public Lobby v. Metro. Airports Comm'n, 520 N.W.2d 388, 393 (Minn. 1994).

The cities also allege that aircraft noise from MSP has impaired property use and reduced property values. A.32-A.33. Because MERA does not provide a cause of action for damages and does not extend to economic regulation, MAC argued that the cities' complaint fails to state a MERA claim for "pollution, impairment, or destruction" of quietude. A.59-A.60, citing Skeie v. Minnkota Power Coop., 281 N.W.2d 372, 373 (Minn. 1979) and Stansell v. City of Northfield, 618 N.W.2d 814, 820 (Minn. Ct. App. 2000). MAC also argued that where aircraft noise allegedly results in impaired use of property or diminution in value, the appropriate claim arises not under MERA, but in an action for inverse condemnation. A.61, citing Alevizos v. Metro. Airports Comm'n of Minneapolis & St. Paul, 216 N.W.2d 651, 662 (Minn. 1974). The district court acknowledged that Alevizos discusses the circumstances under which MAC should be held responsible for the adverse effects of its activities, but did not address MAC's argument that Alevizos specifies an inverse condemnation action is the proper remedy under such circumstances. A.19-A.20. This Court should grant MAC's petition for discretionary review to resolve the appropriate role of MERA claims and inverse condemnation actions under Alevizos.

As with the first and second issues for discretionary appellate review, whether the cities' mandamus cause of action fails to state a claim for relief is important in the context of the cities' litigation and because the issue is a significant legal question in its own right.

MAC argued that the cities' complaint failed to establish as a matter of law that MAC had an unequivocal legal duty to implement a five-decibel noise reduction package in the 60 to 64 DNL contours, and that the cities actually acknowledged the discretionary nature of MAC's noise mitigation program. A.71-A.72 & A.308-A.309. In denying MAC's motion to dismiss, the district court stated that "a writ of mandamus will only be considered if it is determined that MAC has an unequivocal duty," but failed to address MAC's argument that the cities could not establish as a matter of law that MAC has an unequivocal duty. A.28. The district court also apparently chose not to dismiss the mandamus claim because injunctive relief under MERA "is similar to a writ of mandamus" and "if MERA violations are found, such a writ may be (part of) an appropriate remedy." Id. This analysis improperly ignores that a writ of mandamus may not issue if there is "any degree of discretion with respect to the act in question." A.72, citing Electronics Unlimited, Inc. v. Village of Burnsville, 182 N.W.2d 679, 682-83 (Minn. 1971). In short, if MAC's actions involve any discretion whatsoever, then a writ of mandamus may not issue even if the cities could prove that MAC's actions would violate an environmental quality standard or result in pollution, impairment or destruction of the state's natural resources under MERA.

As discussed above, the issues addressed in the district court's order on MAC's motion to dismiss satisfy the requirements for discretionary review because they are important in the litigation and involve significant legal questions. Gordon, 645 N.W.2d at 401-02. In addition, although not a prerequisite to granting discretionary review, a reversal of the motion to dismiss decision would obviate all proceedings in the district court. MAC does not seek discretionary review to advance "piecemeal appeals" that interrupt and delay litigation. Gordon, 645 N.W.2d at 403; Emme v. C.O.M.B., 418 N.W.2d 176, 179 (Minn.

1988). Rather, MAC requests that the Court of Appeals review the significant issues raised in this petition so that the parties may avoid large expenditures of public funds to develop a trial court record wholly unnecessary for this Court to decide the purely legal questions raised by MAC's motion to dismiss. Those issues, which involve novel questions of law regarding the scope of MERA and the application of the writ of mandamus, have been fully briefed in an adversarial proceeding before the district court. See Israelson & Assocs., Inc. v. Cardarelle & Assocs., Inc., 382 N.W.2d 554, 556 (Minn. Ct. App. 1986) (denying discretionary review under Rule 105 because the issues for review were not fully briefed in an adversarial proceeding and were not "novel"). Accordingly, granting MAC's petition for discretionary review would conserve public revenues and promote judicial economy.

WHEREFORE, petitioner Metropolitan Airports Commission respectfully requests an order of the Court of Appeals granting this petition for discretionary review.

Dated: December 30, 2005

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ACKNOWLEDGEMENT

Petitioner Metropolitan Airports Commission hereby acknowledges through its undersigned counsel that sanctions may be imposed under Minn. Stat. § 549.211 if, after notice and a reasonable opportunity to respond, the Court determines that a party has violated Minn. Stat. § 549.211, subd. 2.

Thaddeus R. Lightfoot