STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1276

In re: Determination of Need for Environmental Impact Statement for Pavilion Estates Subdivision

Filed June 6, 2022
Affirmed
Kirk, Judge[*]

Rochester Township
Resolution No. 2021 09 01

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Steve Connelly, Byron, Minnesota (pro se respondent)

Considered and decided by Bjorkman, Presiding Judge; Frisch, Judge; and Kirk, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

KIRK, Judge

In this certiorari appeal, relators challenge respondent Rochester Township's (the township) negative declaration on the need for an environmental-impact statement in relation to a residential-development project proposed by respondent International Properties, LLC. Because we determine the township's declaration was not based on errors of law and was not arbitrary, capricious, or unsupported by substantial evidence, we affirm.

FACTS

The dispute in this matter relates to property owned by respondent Steve Connelly in Rochester Township, Olmsted County that is composed of 28.9 acres of primarily undeveloped woodland. The land was historically used for fenced woodland pasture, but has for the past 40 years been used for recreational purposes.

In June 2020, Connelly entered into a purchase agreement to sell the property to respondent International Properties (IP) for $1,400,000. Connelly and IP entered into this agreement contingent upon the granting of certain zoning changes which would allow for the construction of "ten single-family homes on large lots," collectively known as the Pavilion Estates development.

As part of the initial development efforts, IP and Connelly applied to Olmsted County and the township for approval of a General Development Plan (development plan) and an amendment to the county land-use plan to allow for the development of the property into Pavilion Estates. IP and Connelly also applied to the county for a change in the designation of the property to "potential suburban," which would allow for the reduced lot

size needed to accommodate the 10 planned lots. The development plan identifies the construction of a new road, Pavilion Lane SW, construction of which would—relevant to the matters raised on appeal—result in the removal of a number of trees containing Great Blue Heron nests.[1]

Following IP and Connelly's various applications, a public hearing on the proposed development was held by the Rochester Township Planning Commission (planning commission). In advance of the hearing, the planning commission proposed granting the applications but requiring the creation of a "wildlife corridor" consisting of a "perpetual easement along the entire length of the easterly side of the property." However, shortly thereafter, the township received a letter requesting that the town "not allow Mr. Connelly's subdivision, as proposed, to be built." The letter indicated concerns with, among other things, the fact that the land in question was "home to incredible wildlife, including dozens of herons and bald eagles."

Subsequently, in April 2021, the Minnesota Environmental Quality Board (EQB) informed the township that it had received a petition for an environmental-assessment worksheet (EAW). In that petition, seven separate potential environmental concerns were noted with relation to the project, including: (1) potential for loss of a Great Blue Heron rookery on the property, (2) potential for loss of wetlands, (3) potential for impacts to rare, endangered, and threatened mussel species, (4) potential for impacts to hydrology,

[1] Great Blue Herons are migratory birds that, in Minnesota, return each summer to breed in colonies where they build large nests at the tops of trees.

(5) potential impacts on flooding and flood mitigation projects, (6) potential for impact to surface water quality, and (7) potential loss of mature forest and contiguous forest canopy.

In May 2021, town staff notified the planning commission that IP and Connelly had—in response to the public petition—voluntarily agreed to complete an EAW. The township subsequently issued a resolution indicating that, if Olmsted County were to approve the project, an EAW into the potential environmental impacts raised by the public petition would be warranted. The resolution indicated that an EAW would allow for investigation of those potential environmental impacts as well as potential mitigation measures and the potential need for additional study beyond an EAW.

Respondents submitted and made available an initial EAW on July 19, 2021. The EAW described the proposed development as "a 28.9-acre . . . 10-lot suburban subdivision [that would] have a private road, two private wells, and individual septic systems." The EAW provided a brief timeline of the project's planning, specifically noting the seven potential environmental impacts raised in the public petition.

Most importantly to the issues on appeal, the EAW discussed the potential impact on "[f]ish, wildlife, plant communities, and sensitive ecological resources." According to the EAW, the Minnesota Department of Natural Resources (DNR) completed a Minnesota Biological Survey for Olmsted County in 1997, which identified the existence of the "8th Street Suburban Great Blue Heron Rookery," which the EAW indicated was "located roughly a half-mile to the east of the Connelly property." The EAW indicated that the 1997 biological survey and Minnesota's later Wildlife Action Plan in 2015 came to similar conclusions regarding the herons—that "the area did not meet its criteria for protection as

a significant local ecological resource" and "did not indicate that the Great Blue Heron rookeries along the ridge warranted a priority conservation area designation," respectively. The EAW noted that numerous observations and studies of the rookeries had been undertaken in recent years, several of which were attached to the EAW. These observations generally substantiate the claims that a number of Great Blue Heron nests exist on the Connelly property, as well as other nearby properties.

The EAW additionally stated that while "lot design [would] largely preserve[] 56% of the woodlands from destruction . . . some additional habitat fragmentation is likely to occur as roads are constructed, and homes are constructed on the lots." However, the EAW stated that the EAW petition had "made unsubstantiated claims of the size and significance of the Great Blue Heron Rookery." It stated that "activity surveys of the colony during the breeding season suggest that breeding activity in 2021 was likely limited to a small number of pairs," and that "[i]t is common for [Great Blue Heron] to build a new nest every year, and the observed number of nests appears to reflect the accumulation of old nests after years of new nest building." The EAW also, noting the existence of the nearby 8th Street Rookery, stated that "the Connelly [Great Blue Heron] rookery is not unique, even within the immediate vicinity of the Connelly property." The EAW also generally minimized public concerns regarding the potential impact of the project on nearby wetlands, a species of endangered mussel, hydrology and a nearby downstream restoration project, flooding, surface water turbidity, and the loss of contiguous forest canopy.

Subsequent to the release and publication of the EAW, the township accepted public comments for 30 days, from July 2021 to August 2021. The township received numerous

comments from members of the public. The township also received comments from the Minnesota Pollution Control Agency (MPCA), State Historical Preservation Office (SHPO), and DNR. The MPCA indicated potential concerns with the amount of deforestation and the potential impact on nearby water resources. The SHPO recommended "that a Phase I archaeological survey be completed." The DNR indicated that there were some potential permitting issues regarding water, the EAW had been filed before a Natural History response could be obtained, there were some concerns regarding shallow bedrock as it related to septic systems, and there were concerns regarding the amount of planned deforestation. The DNR also noted the Great Blue Heron rookery, and indicated that while the property was

> currently mapped as a Minnesota Biological Survey (MBS) site below the threshold for biodiversity significance . . . even sites that do not meet the higher MBS ranking standards may include areas of conservation value at the local level, such as habitat for native plants and animals, corridors for animal movement, buffers surrounding higher-quality natural areas, areas with high potential for restoration of native habitat, or open space.

The DNR indicated that "[t]he removal of over 17 acres of remnant forest would be a loss of habitat and a significant impact to local wildlife."

Near the end of the public-comment period, the township held another public hearing to discuss the proposed development. The board heard comments from numerous members of the public. The majority of those speaking indicated that they were opposed to the project, and voiced concerns over damage which could be done to the natural habitat, including the Great Blue Heron rookery.

In September 2021, in response to public and state-agency comments, IP and Connelly submitted an amended EAW. Though the amended EAW was largely similar to the original, it did contain notable modifications, including a change to the project's tree-clearing plan. The new plan reduces the total amount of clearing from 17.6 acres to 5.94 acres. The amended EAW also contained detailed responses to all of the comments, including those comments from the public and those from state agencies. These detailed responses are preceded by a short summary of common comments and the applicants' responses to those comments, including the argument that there had been "a great deal of reliance on erroneous information and unsupported claims by so-called experts and the advocacy groups about the Great Blue Herons," a "theme that claimed personal values as the public interest that people believe should take priority over property rights or the existing laws and regulations," and "[a] failure to recognize the presence of upland rookeries nearby, in abutting counties and over much of Minnesota." In responding to the more detailed state-agency comments, in particular those from the DNR, the amended EAW relied in large part on the plan to reduce the total amount of clearing, as well as their agreement to not clear trees during certain months to avoid disturbing certain bird species, including the Great Blue Heron.

Two days after the release of the respondents' amended EAW, Rochester Township issued a negative declaration on the need for an environmental-impact statement (EIS) for the Pavilion Estates development. This declaration was accompanied by a staff report on the EAW process that outlined the proposed project and potential environmental impacts, and ultimately concluded that "[t]he anticipated environmental effects of this project are

found to be the same as those experienced with any development. No significant environmental impacts are anticipated from the proposed development which would warrant the preparation of an environmental impact statement." The staff report also recommended that the township adopt the amended EAW's responses to the public comments and that those responses be incorporated by reference. However, the staff report also provided its own responses to the public and state-agency comments.

In its resolution adopting the negative declaration, the township largely mirrored the staff report. The resolution found that "[n]o significant environmental impacts are anticipated from the proposed development which would warrant the preparation of an environmental impact statement." The resolution indicated that the township had received comments from both the public and state agencies regarding "domestic water, septic treatment and wastewater management, stormwater and erosion control management, including the design, permitting, construction, and maintenance of stormwater facilities," as well as comments regarding potential harm and mitigation efforts to protect the natural habitat and several species, most notably the Great Blue Heron. Regarding the Great Blue Heron rookery, the township found:

> The EAW and public comments investigated the Great Blue Heron, a migratory bird that is not threatened or endangered. The EAW investigated [the] rookery in detail and noted that the Great Blue Herons nest in multiple areas in Rochester Township and made clear the fact that the birds can freely pick and choose sites that are most suitable for their colonial nesting habits and for proximity to their primary feeding areas. With the mitigation for avoiding disturbances of active nests as required by the Migratory Bird Treaty Act, there are no significant environmental effects of developing Pavilion Estates.

The township also found that "[t]he EAW, as amended to address the lesser impact on land cover and tree removal adequately identifies that there will not be any significant environmental effects." Also, of import to the issues raised on appeal, the township ordered—likely in response to the SHPO's request for a Phase I Archaeological Survey—that "[i]f at any time human remains are encountered on the property, development should stop, and a burial site assessment should be completed."

Relators appeal this declaration by way of petition for a writ of certiorari.

DECISION

On appeal, relators argue that the township erred in issuing a negative declaration on the need for an EIS. Relators request that this court reverse that determination and remand for the township to prepare an EIS. Relators make three arguments in support of this request.

Before taking any governmental action—broadly defined as "activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by units of government," Minn. Stat. § 116D.04, subd. 1a(d) (2020)—the township as the responsible governmental unit (RGU) must determine whether "there is potential for significant environmental effects" resulting from that action. Minn. Stat. § 116D.04, subd. 2a(a) (2020). The RGU shall, if there is such potential, order the preparation of an EIS. *Id.*; *see also* Minn. R. 4410.1700, subp. 1 (2021); *In re Env't Impact Statement*, 849 N.W.2d 71, 75 (Minn. App. 2014) (setting forth and applying the significant-environmental-effects analysis). In determining whether a project may result in

"significant environmental effects," the RGU must consider four factors: (1) the "type, extent, and reversibility of environmental effects"; (2) the "cumulative potential effects" of related or anticipated future projects; (3) "the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority"; and (4) "the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs." Minn. R. 4410.1700, subp. 7 (2021).

The first step in any such determination is the preparation of an EAW, which is "a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action." Minn. Stat. § 116D.04, subd. 1a(c) (2020). Once an EAW has been prepared, the public may comment on the EAW for 30 days. Minn. R. 4410.1600 (2021). Following the public-comment period, the RGU "shall" make a determination as to the need for an EIS within 30 days. Minn. R. 4410.1700, subp. 2(A) (2021). The RGU's options at this step are: (1) make a negative declaration as to the need for an EIS, (2) make a positive declaration as to the need for an EIS, or (3) "postpone the decision on the need for an EIS, for not more than 30 days or such other period of time as agreed upon by the RGU and proposer, in order to obtain [additional information]." *See generally id.*, subps. 2a-3 (2021). The RGU's declaration as to the need for an EIS is appealable directly to this court by way of petition for a writ of certiorari. Minn. Stat. § 116D.04, subd. 10 (2020).

On appeal, the relator has the burden of proving the RGU's findings are unsupported by the evidence as a whole. *Env't Impact Statement*, 849 N.W.2d at 75 (citing *Citizens*

Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs (CARD), 713 N.W.2d 817, 833 (Minn. 2006)). Appellate courts "accord substantial deference to the agency's decision." *CARD*, 713 N.W.2d at 832. However, this court may nevertheless reverse if the RGU's determination "reflect[s] an error of law, the findings are arbitrary and capricious, or the findings are unsupported by substantial evidence." *Id.*; Minn. Stat. § 14.69 (2020).

This court reviews alleged errors of law de novo. *ITW Food Equip. Grp. LLC v. Minn. Plumbing Bd.*, 933 N.W.2d 523, 531 (Minn. App. 2019). The RGU's decision is arbitrary and capricious if the agency

> (a) relied on factors the legislature never intended it to consider, (b) entirely failed to consider an important aspect of the problem, (c) offered an explanation for the decision that runs counter to the evidence, or (d) rendered a decision so implausible that it could not be ascribed to a difference in view or the result of agency expertise.

Env't Impact Statement, 849 N.W.2d at 76. "Substantial evidence consists of: (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'; and (5) evidence considered in its entirety." *CARD*, 713 N.W.2d at 832 (quotation omitted). In other words, substantial evidence consists of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*

Relators make three arguments in favor of reversal. First, they argue the township's negative declaration is affected by various errors of law. Second, they argue that the declaration demonstrates that the township "failed to engage in reasoned decisionmaking."

Third, they argue that the declaration "was arbitrary, capricious, and unsupported by substantial evidence." Each argument is addressed in turn.

I. The township's declaration was not affected by errors of law.

Relators argue the township's declaration was affected by errors of law. They take issue with (1) the township's failure to distribute, publish, and take public comments on the *amended* EAW, (2) the county's approval of several zoning measures during the pendency of environmental review, (3) the township's failure to address the EAW's non-compliance with applicable land-use regulation and improper deferral of mitigation, and (4) IP and Connelly's failure to obtain certain documents from SHPO and DNR prior to the township's declaration as to the need for an EIS. We disagree with each assertion.

1. Lack of Publishing of and Public Comment on the Amended EAW

Relators argue that the township erred by "fail[ing] to distribute, publish notice of availability, and take public comment on the amended EAW" and by "basing the negative declaration on the amended EAW without receiving or giving consideration to public comments on the substantial new material [in the EAW]." In support of this argument, relators cite to the Minnesota Rules relevant to preparation and publication of EAWs. In relevant part, those rules state that the RGU must, after approving an EAW for completeness, distribute that EAW to a number of listed governmental entities and publish notice of the availability of the EAW to the general public. Minn. R. 4410.1500 (2021).

However, while the rules clearly require the initial EAW to be published and made available for public comment, they are also clear: the RGU shall "base its decision regarding the need for an EIS on the information gathered during the EAW process and the

comments received on the EAW." Minn. R. 4410.1700, subp. 3. In this case, the additional information contained within the amended EAW was merely additional "information gathered during the EAW process," *id.*, and did nothing to abrogate the township's duty to issue a declaration as to the need for an EIS following the conclusion of the public-comment period on the first EAW. The rules do not require a second comment period be opened if the applicant submits additional information, and indeed state that such a step is available only if there is "[i]nsufficient information." Minn. R. 4410.1700, subp. 2a. This is true even if such "additional information" is presented as an amended EAW. Given the township's determination that there was sufficient information upon which to make a determination (which relators do not challenge), the township was therefore obliged to issue a declaration on the need for an EIS, Minn. R. 4410.1700 (2021), which it did.[2]

2. Olmsted County's Approvals

Relators also argue that the township committed reversable error by violating the "prohibition rule" when "Olmsted County illegally approved the [application] without the information . . . that the EAW would provide, in violation of Minn. Stat. § 116D.04, subd. 2b [(2020)] and Minn. R. 4410.3100." However, the county is not a party to this appeal, and its decision to amend the county-use plan or make other approvals is irrelevant to the

[2] Relators' reply brief references Minn. R. 4410.1000, subp. 5 (2021), as allegedly requiring a second official EAW (and therefore a second public-comment period) due to there being "a substantial change . . . in the proposed project." However, rule 4410.1000, subpart 5, applies only if such substantial change occurs "after a negative declaration has been issued but before the proposed project has received all approvals." In this case, while there were changes to planned forest clearing in the amended EAW, the amended EAW and this change were made *prior to* the township's negative declaration. Thus, rule 4410.1000, subpart 5, is inapplicable.

validity of the township's negative declaration on the need for an EIS. While relators cite to *In re Winona Cnty. Mun. Solid Waste Incinerator*, 442 N.W.2d 344 (Minn. App. 1989), *rev'd*, 449 N.W.2d 441 (Minn. 1990), in support of their position, the decision being appealed in that matter was the simultaneous denial of a request for a supplemental EIS and granting of a permit for a garbage incinerator by the same agency—the MPCA. *Id.* at 347. The actions relators point to here were taken by a separate governmental body (the county) that is not a party to this matter, and the decisions of which are wholly separate from the decision being appealed—the *township's* negative declaration on the need for an EIS. Whether the county erred by approving the amendment to their plan is outside the scope of this appeal.

3. Township's Land-Use Determinations and Deferral of Mitigation

Relators also argue that the amended EAW failed "to describe non-compliance with applicable land[-]use regulations and improperly deferred mitigation." Specifically, they argue that "the EAW and amended EAW fail to address noncompliance with [c]ounty and [t]ownship official controls, fail to address the consequences of noncompliance, and mislead by stating that the project complies with all land use controls."

However, as noted by respondents, the question at issue in determining the need for an EIS is not whether the proposed project complied with land-use regulations but rather whether "there is potential for significant environmental effects" resulting from that action. Minn. Stat. § 116D.04, subd. 2a(a). That being said, it is also true that relators tie this alleged non-compliance to potential environmental effects; relators note that "[c]omments raised specific concerns regarding details on road width, slope, and runoff, including going

through the heart of the rookery and destroying nesting trees," "concerns about destruction of the [Great Blue Heron] rookery because of the location of the road directly beneath," "concerns about the number and sizes of lots disturbing the [Great Blue Heron] rookery," "[c]oncerns . . . for the amount of impervious surface of the 10 lots," "the effects of climate change, rainfall events, and runoff," and "cumulative impacts and proposed inadequate forms of mitigation."

Regardless, while relators pose this as an error of *law*—whereby the failure to describe non-compliance with land-use regulations resulted in the process being invalid as a matter of law—the real question this presents is one of *fact*: whether the environmental impacts caused by the alleged non-compliance in the plan as proposed would be such that an EIS was required. Indeed, this is merely a restatement of the various issues of fact discussed below related to whether the township's negative declaration on the need for an EIS was "arbitrary, capricious, [or] unsupported by substantial evidence." Because there was no error of law, the township did not err as a matter of law.

4. Failure to Obtain Certain Documents

Finally, relators argue that the township "acted willfully and without deliberate process when [it] failed to obtain necessary information from state agencies in rushing to approve the project." Relators take issue with the township's failure to obtain and include with the EAW two separate documents—letters regarding (1) a "phase I archaeological survey" from the SHPO[3] and (2) a "Natural Heritage letter" from the DNR describing "any

[3] While relators also argue that the record does not include even a *letter* from the SHPO regarding the need for a survey, as the township correctly notes, this is incorrect. The

rare features, such as state-listed species, native plant communities, or other sensitive ecological resources on or within close proximity to the site."

However, Minn. R. 4410.1200 (2021) sets forth the information and documents required to be in an EAW. These include general factual and procedural details of the project, known governmental approvals that will be required to proceed, and, most importantly, "major issues sections identifying potential environmental impacts and issues that may require further investigation before the project is commenced, including identification of cumulative potential effects." However, nothing in that rule—nor any other—requires the two documents noted to be absent by relators. That does not mean that their absence is irrelevant, however. Rather, as with the previous issue, this is an issue of *fact*—i.e., whether the absence of those two documents rendered the record produced during the EAW process insufficient to support the township's finding as to the potential for significant environmental effects. However, as to relators' argument that the township's issuance of a negative declaration without these documents was an error of *law* subject to de novo review, we disagree.

In sum, the township's negative declaration was not affected by errors of law.

II. The township engaged in reasoned decision-making.

Relators also argue the township's order demonstrates that they "failed to take a hard look at the salient issues and to engage in reasoned decision making." Specifically, by (1) failing to "make accurate and reflective responses to comments and findings,"

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administrative record contains a letter from the SHPO indicating their desire to conduct a phase I archaeological survey—it is the survey itself which was not completed.

(2) supporting the project before receiving the applications, and (3) "demonstrat[ing] unacceptable bias in the quasi-judicial process."

At the outset, while relators cite to *Pope Cnty. Mothers v. Minn. Pollution Control Agency*, 594 N.W.2d 233 (Minn. App. 1999), for the proposition that this court reverses agency environmental decisions when they "reflect a combination of danger signals that suggest the agency has not taken a hard look at the salient issues and has failed to engage in reasoned decision-making," *Pope County* merely applies this "danger signals" language to articulate one situation in which it could be determined that an agency decision was "unreasonable, arbitrary or capricious." *Id.* at 236. Stated more completely, therefore, we must "determine whether the [RGU] has taken a 'hard look' at the problems involved, and whether it has 'genuinely engaged in reasoned decision-making.'" *CARD*, 713 N.W.2d 817, 832 (citation omitted). However, the question of whether the agency "[took] a hard look" at the relevant problems is subject to the general standard of review of agency decisions. *Id.* "Agency decisions are reversed when they reflect an error of law, the findings are arbitrary and capricious, or the findings are unsupported by substantial evidence." *Id.*

1. Failure to Make Accurate and Reflective Responses to Comments and Findings

Relators first argue that the township "failed to make accurate and reflective responses to comments and findings and instead accepted and adopted the applicants' [submissions] without demonstrating a reflective analysis of and a deliberate judgment as to the applicants' submissions." Relators note that while IP and Connelly "prepared and submitted to [the township] detailed responses to comments," the township thereafter

"included the prepackaged findings" from IP and Connelly without deliberation or other independent findings. Relators argue that this violates the requirement that "[t]he record . . . include specific responses to all substantive and timely comments on the EAW" and that the RGU "compare the impacts that may be reasonably expected to occur from the project with the criteria in [the rules]." Minn. R. 4410.1700, subps. 4, 6 (2021).

The township disagrees with relators' contention that it failed to "take a hard look" at the public comments. While the township acknowledges that IP and Connelly provided their own responses to the public comments, they also point out that "[t]he applicants' decision to provide detailed responses to comments and submit proposed findings to the Town . . . does not change the reality the Town engaged in this effort as well."

Indeed, the record does reflect that the staff report prepared in conjunction with the township's negative declaration included substantial responses to public and agency comments, including on the issues of the Great Blue Heron rookery, greenhouse-gas emissions, water use, and more. The township's determination, while also adopting the responses provided by IP and Connelly, explicitly stated that it was making its determination "based on the complete staff report," thereby incorporating those responses. Moreover, the caselaw cited to by the township, *In re Valley Branch Watershed Dist.*, 781 N.W.2d 417 (Minn. App. 2010), supports the proposition that a governmental unit may rely on findings made by staff or a committee. *Id.* at 424 (noting ability of regulatory agency to "review[] and rely[] on . . . staff and committee findings").

The township's declaration reflects the township's own response to the public comments. The township's declaration repeatedly mentions those comments in the context

of land-use regulation, development, regulatory issues, mitigation efforts, potential endangered species, water, the cumulative effects of suburban development, land cover and deforestation, and the impact on the Great Blue Heron rookery. The township's declaration then explains how the EAW addresses these concerns and why the project will not create significant environmental effect.

Looking at all the above, the township properly noted and responded to public comment, as required.

2. Support of the Project Before Receiving Application

Relators also argue that the township erred by supporting the Pavilion Estates development before receiving the application. Relators point to a letter from the township to the county based on a January 2021 meeting at which the township board members apparently voiced support for land-use changes related to the project. This, according to relators, constitutes "pre-approval" of the project, demonstrating that the decision to approve was "based and made on incomplete information."

However, this is again insufficient grounds for reversal. The January 2021 letter merely indicates that the town board indicated support for IP and Connelly's land-use plan and development plan. As discussed above, the issues of land use and zoning are separate and distinct from the issue relevant to the EIS-declaration process—whether there is potential for "significant environmental effects." As the township notes, though the township did voice support for the land-use and zoning changes, "[t]he Town did not prejudge the EIS decision" and "[r]elators can point to no evidence the Town reached a conclusion on the Project's potential for significant environmental effects before issuing

its ultimate decision." Relators cite no caselaw supporting the proposition that a township's initial support for *land-use changes* results in invalidation of any future determinations they make as to *potential environmental impacts*, and we are aware of none.

3. "Unacceptable Bias in the Quasi-Judicial Process"

Citing *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655 (Minn. 2015), relators argue that the township was unacceptably biased in favor of the development. Relators cite to numerous public comments, including comments from the Sierra Club and several members of the public, all of which accused the township of varying degrees of bias and partiality during the environmental-review process.

However, it should be noted that the facts and procedural posture of *Rochester City Lines* were vastly different from the instant matter. In that case, a transit-service provider challenged the City of Rochester's bidding process by which the city had accepted a competing contractor's bid. *Id.* at 657. In relevant part, the provider argued that "numerous irregularities in the bidding process suggest that the City's decision to award the bus-service contract to [the provider's competitor] was arbitrary, capricious, or unreasonable." *Id.* at 665. Because the district court had granted summary judgment to the city on this claim, the issue before the supreme court was "whether genuine issues of material fact exist[ed] and the district court correctly applied the [law]." *Id.,* (citing *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997)). In examining this question, the supreme court concluded that two alleged irregularities, relating to apparent favoritism towards the competitor during the bidding process and apparent guidance from the city to act aversely to the provider, "raise[d] the specter of pervasive bias against [the provider], even if . . . there

[we]re other legitimate explanations for the City's actions." *Id.* Given the summary-judgment standard of review, the supreme court reversed and remanded. *Id.*

In this way, the holding of *Rochester City Lines* is of limited value here. Whereas on a motion from summary judgment the question is "whether genuine issues of material fact exist" and the district court must "view the evidence in the light most favorable to the nonmoving party," *id.* at 661, 664, on appeal here from the township's determination as to the need for an EIS we defer to the township's decision absent a compelling reason to do otherwise. *CARD*, 713 N.W.2d at 832. Likewise, whereas in *Rochester City Lines* it was sufficient for the provider to merely "raise[] the specter of pervasive bias," 868 N.W.2d. at 665, relators provide no support for application of that standard here.

Moreover, the evidence of bias presented in *Rochester City Lines* appears much more *compelling* than that provided here—whereas the evidence provided in that case indicated actual evidence of potential bias, *id.*, relators here provide nothing more than comments from the public alleging bias. Relators provide no concrete evidence demonstrating bias on the part of the township and provide no support for the proposition that mere allegations of bias by members of the public result in a determination which is arbitrary and capricious. These allegations are insufficient to support reversal.

III. The township's determination was not arbitrary, capricious, or unsupported by substantial evidence.

Finally, relators argue the township's determination must be reversed as it was "arbitrary, capricious, and unsupported by substantial evidence." They argue that substantial evidence in the record demonstrates that the project "has the potential for

significant environmental effects" and that the township "did not take a hard look at" the salient facts. Relators' arguments on this issue can be divided into three rough categories. First, environmental effects to the Great Blue Heron rookery and potential fragmentation of wildlife habitation. Second, contributions based on greenhouse-gas emissions. Third, the lack of the DNR Natural Heritage letter and SHPO archaeological survey.

1. Impacts on Great Blue Heron Rookery, Fragmentation and Deforestation

Relators argue that the township erred when it discounted "[s]ubstantial evidence in the record, including the comments of leading experts, not[ing] that the [Great Blue Heron] rookery is unique in Minnesota and rises to the level of a protected scientific natural area." Relators also argue, as a separate but related issue, that the township erred when it "failed to take a hard look at the significant effects from fragmentation of the wildlife corridor that the project would cause."

At the outset, we note that the township did provide analysis of the impact on the Great Blue Heron rookery, taking into account both the public comments as well as the EAW and the other information gathered during the EAW process. Furthermore, while relators argue that the township's determination was arbitrary and capricious, the record does not support this assertion. The township clearly noted the issue of the Great Blue Heron rookery in its negative declaration and made a plausible decision which was reasonably based on the evidence. Apart from disagreement between the township's ultimate declaration and numerous public comments, relators point to no rationale for a finding that the declaration was arbitrary and capricious, and provide no law supporting such a result.

Moreover, there is substantial evidence in the record supporting the township's determination. The township points to the following as evidence substantially supporting the township's determination:

> The great blue heron is a migratory bird . . . . The great blue heron is not threatened or endangered . . . . As part of the EAW process, the Applicant studied the Section 6 Rookery [on the Connelly property] in detail . . . . These studies noted the great blue heron nests in multiple areas in Rochester Township . . . . These studies also made clear the great blue heron freely picks and chooses sites deemed suitable for their colonial nesting habits and for proximity to their primary feeding areas.

There is also additional evidence in the record supporting the determination. The Blueline study provided in the EAW described the Great Blue Heron as a "very common and virtually ubiquitous species" in Olmsted County as well as the entirety of Minnesota and all of North America. Indeed, the Blueline study, while providing maps showing extensive Great Blue Heron distribution throughout Olmsted County, also noted that "apparent gaps in the distribution shown in [the maps] are *more likely to represent gaps in birdwatching effort than gaps in the actual distribution of [Great Blue Heron]*." (Emphasis added.) DNR's 2015 Wildlife Action Plan additionally concluded that the herons and the rookery "did not meet its criteria for protection as a significant local ecological resource" and "did not indicate that the Great Blue Heron rookeries along the ridge warranted a priority conservation area designation." There is also evidence in the record of DNR's 1997 biological survey, which noted additional Great Blue Heron populations even in the relatively close vicinity, including the "8th Street Suburban Great Blue Heron Rookery," which the EAW indicated was "located roughly a half-mile to the east of the Connelly

property." Finally, the EAW also specifically noted that development would comply with protection of actively nesting migratory birds, as required by the Migratory Bird Treaty Act. All of these facts constitute additional evidence supporting the finding that some disruption to the Great Blue Heron rookery on the Connelly property, while inevitable, would not rise to the level of "significant environmental effects," thus supporting the township's negative declaration.

Moreover, the amended EAW reflecting the change in plans by reducing the planned deforestation from 17 acres to six acres runs directly counter to the concerns regarding tree cover and reduces any environmental effects. The township specifically noted the changes in the plan designed to "address the lesser impact on land cover and tree removal." While it is true that creation of the road and homes would inevitably lead to destruction of some tree cover, this change specifically speaks to Rule 4410.1700's requirement that a plan seek "approved mitigation measures specifically designed to address the cumulative potential effect." This mitigation, combined with the fact of the Great Blue Heron being a "ubiquitous" species throughout Minnesota, constitutes substantial evidence supporting the township's declaration.

It is true that there is conflict between some of the positions taken by the EAW and the public comments. The public comments contain some (likely substantial) evidence contradicting the EAW that could support a finding as to environmental effects contrary to what the township ultimately determined. However, that is not the question on appeal. The question is whether the township's negative determination as to the need for an EIS is arbitrary, capricious, or unsupported by substantial evidence and we "accord substantial

deference to the agency's decision." *CARD*, 713 N.W.2d at 832. Thus, we defer to the township's discretion.

2. Climate Change and Greenhouse-Gas Emissions

Relators also argue that the township "failed to address climate change and greenhouse-gas emissions in the EAW." Relators' argument, which acknowledges the additional greenhouse-gas-related information contained in the amended EAW, hinges largely on their assertion that the township erred in considering that additional information. As noted above, the township did not err in so doing, as the amended EAW was merely considering "information gathered during the EAW process." Minn. R. 4410.1700, subp. 3. We nevertheless briefly address this issue.

The township found that "[t]he anticipated environmental effects of this project are found to be the same as those experienced with any development." The township's determination could have more explicitly and thoroughly set forth its findings as to greenhouse-gas emissions. However, the question presented to this court is whether the township's declaration—that there would be no significant environmental effects—fits the narrow definition of arbitrary and capricious or is unsupported by substantial evidence. *CARD*, 713 N.W.2d at 832. So long as this standard is met, we defer to the RGU's determination. *Id.*

Looking at the record on appeal, including the amended EAW, we conclude the township's determination here was thoroughly supported. For example, in response to questions regarding "type, sources, quantities, and compositions of any emissions"

including "hazardous air pollutants, criteria pollutants, and any greenhouse gases," the amended EAW states,

> The ten residential units of the proposed development would be supplied with 60,000 BTU natural gas/liquid petroleum gas furnaces or electric heating and cooling. This development will not generate greenhouse emissions that warrant concern. *Air emissions from the residential heating units will yield carbon dioxide, carbon monoxide, and nitrogen oxides at a rate comparable to other suburban homes of similar size*.

The amended EAW also contained a section in which they the addressed "factors considering climate change and greenhouse-gas emission," which it stated, "deserve mention." In that section, the amended EAW again highlighted the reduction in planned forest clearing from 17 to six acres, which it indicated was "a positive measure of greenhouse-gas sequestration." It also noted that furnaces in the homes would be "high-efficiency," that the homebuilders would be "encouraged to use techniques for well insulated and tight building envelopes including energy saving windows, doors, and air circulation systems," which it claimed would result in homes that would be "models of energy efficiency and greenhouse-gas emission." Finally, the EAW noted the proposed development's proximity to the City of Rochester (fewer than five miles) as another "greenhouse-gas reduction factor," reducing the amount of greenhouse gasses residents would emit while commuting to and from the city. This record more than supports the township's determination on this issue.

3. Lack of DNR Letter and SHPO Archaeological Survey

Finally, relators argue the lack of the SHPO phase I archaeological survey and DNR Natural Heritage letter renders the township's negative declaration arbitrary, capricious, and unsupported by substantial evidence.

However, regarding the archaeological survey, the mitigation efforts set forth in the amended EAW's response to the SHPO letter and the subsequent provision in the township's negative declaration reasonably support the township's implied conclusion that such a survey is not necessary. The communication from the SHPO indicated that a phase I study was appropriate to determine whether any protectible archaeological sites existed on the property. In response, the amended EAW and resultant negative declaration state the following mitigation efforts: "if at any time human remains" or "any historic items . . . are uncovered, development should stop until further assessment is completed to determine the nature of the find." Mitigation efforts and their effectiveness are one criteria the RGU is explicitly instructed to consider in determining the need for an EIS, and these mitigation efforts directly address the concerns set forth by the SHPO in their communication calling for an archaeological survey. Minn. R. 4410.1700, subp. 7(B)-(C). While relators argue this provision is nothing more than "voluntary compliance during construction," it is no more voluntary than various other conditions, such as the reduction in forest clearing or planting of flowers to protect endangered bees. Moreover, relators provide no caselaw indicating that mitigation efforts dependent on "voluntary compliance" are insufficient. The mitigation efforts identified directly address the concerns presented in the SHPO's letter, and the township's determination is thus reasonably supported on this issue.

Regarding the Natural Heritage letter, the communication from the DNR in response to the EAW stated that the Natural Heritage Information Systems process was "the only way to determine if the proposed project may impact rare features that are protected by Minnesota's endangered species laws." The DNR did indicate that there were certain other rare features which could be noted without such a process, such as the Great Blue Heron rookery, two state-listed birds of special conservation concern, and the rusty patched bumblebee, but the DNR also indicated that it could not be determined conclusively whether other endangered species would be impacted by the construction.

At the outset, however, we conclude the township's determination on this issue was not arbitrary and capricious, which, as noted above, has a very narrow definition. *Env't Impact Statement*, 849 N.W.2d at 76. Furthermore, the bar for substantial evidence when reviewing an RGU's declaration is particularly low and this court "accord[s] substantial deference to the [RGU]'s decision." *CARD*, 713 N.W.2d at 832. The township, while admitting that it did not obtain DNR's suggested review, relied on a study done of the abutting property, which the township found to be sufficiently similar to permit its application to the Connelly property.

On the record presented, we find this sufficient to clear the low hurdle needed to establish that the determination was not arbitrary and capricious and that it was supported by substantial evidence. While the township may not have had *all* of the evidence related to the presence of endangered species on the property, in relying on the DNR's own suggestions, the survey of the adjacent property, and the resultant mitigation efforts contained in the amended EAW and the township's own determination, it certainly had

more than "a scintilla of evidence" or "any evidence." *Id*. Thus, the township's conclusion on this issue was supported by substantial evidence. *Id.*

Therefore, on balance, and given the highly deferential standard afforded an RGU's declarations, we affirm the township's negative declaration on the need for an EIS.

Affirmed.