STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1725

State of Minnesota, by Friends of the Boundary Waters Wilderness,
Respondent,

vs.

AT&T Mobility, LLC, et al.,
Appellants.

Filed June 18, 2012
Reversed
Larkin, Judge

Hennepin County District Court
File No. 27-CV-10-15150

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Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

LARKIN, Judge

Appellants challenge the district court's order permanently enjoining the construction of a 450-foot wireless-communications tower in Lake County, arguing that respondent failed to prove that the injunction is warranted under the Minnesota Environmental Rights Act (MERA), Minn. Stat. §§ 116B.01-.13 (2010). Because the district court erred in concluding that the proposed tower would have a materially adverse effect on the environment, we reverse.

FACTS

This appeal arises from a proposal to construct a wireless-communications tower outside of the Boundary Waters Canoe Area Wilderness (BWCAW). The BWCAW is a 1.1 million-acre wilderness area composed of federal and state lands in northeastern Minnesota. The BWCAW consists of 1,175 lakes, hundreds of miles of streams and rivers, and surrounding forested areas. It is the most heavily used wilderness area in the country and the only wilderness area that has an airspace reservation prohibiting flights below 4,000 feet. Visitors to the BWCAW value its scenic beauty and remoteness, as well as its lack of evidence of human existence. The BWCAW was one of the first federally designated wilderness areas, and it is protected by the federal Wilderness Act of 1964 and the Boundary Waters Act of 1978. The Minnesota legislature also protects the BWCAW by statute, recognizing that the BWCAW is an area "of surpassing scenic

beauty and solitude, free from substantially all commercial activities and artificial development." Minn. Stat. § 84.523, subd. 2 (2010).

Appellants AT&T Mobility LLC and American Tower Inc. applied for a conditional use permit (CUP) in Lake County, seeking permission to construct a wireless-communications tower (the proposed tower). Appellants plan to build the tower approximately 1.5 miles outside of the border of the BWCAW and 7.5 miles east of Ely, on the western edge of the Fernberg Corridor.[1] The proposed tower would be 450 feet high and have five sets of three guy wires. The tower would be lit with red or white blinking lights 24 hours a day to increase its visibility and comply with federal aviation requirements. The CUP application stated that the proposed tower is "deemed the optimum size tower to provide the most amount of coverage in this rural area with the least amount of visual impact." The Lake County Planning Commission concluded that there is "a need for this tower for the health and safety of residents, tourists, and businesses." Lake County approved appellants' CUP application on July 20, 2009.

In July 2010, respondent Friends of the Boundary Waters Wilderness filed a complaint in Hennepin County District Court seeking a declaration that the proposed tower would violate MERA and an injunction prohibiting construction of the proposed tower.[2] The district court held a bench trial over four days in April 2011, heard the testimony of 15 witnesses, received the deposition testimony of 17 additional witnesses, and received 123 trial exhibits. On August 3, 2011, the district court issued its findings

[1] The Fernberg Corridor is an area of non-BWCAW land that protrudes into the BWCAW east of Ely.

[2] Respondent did not participate in the permitting process in Lake County.

of fact and conclusions of law, granting respondent's request for declaratory and injunctive relief. Specifically, the district court determined that respondent is entitled to relief under MERA because the proposed tower would materially adversely affect the scenic and esthetic resources in the BWCAW. The district court also determined that appellants failed to establish an affirmative defense under MERA. The district court therefore enjoined construction of the proposed tower. This appeal follows.

D E C I S I O N

I.

The Minnesota legislature enacted MERA to provide persons in the state with a "civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction." Minn. Stat. § 116B.01. The legislature sought "to create and maintain within the state conditions under which human beings and nature can exist in productive harmony." *Id.* Under MERA, any person or organization may maintain a civil action in district court for declaratory or other equitable relief in the name of the state for the protection of natural resources located within the state. Minn. Stat. § 116B.03, subd. 1.

To maintain an action under MERA, a plaintiff must make a prima facie showing that "the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state." Minn. Stat. § 116B.04. Pollution is defined, in relevant part, as "any conduct which materially adversely affects or is likely to materially adversely affect the environment."

Minn. Stat. § 116B.02, subd. 5. Natural resources include "[s]cenic and esthetic resources" owned by any governmental unit or agency. *Id.*, subd. 4.

A defendant may defeat a prima facie claim by affirmatively proving 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." Minn. Stat. § 116B.04. This affirmative defense must be considered "in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction," and "[e]conomic considerations alone shall not constitute a defense." *Id.*

In district court, respondent argued that MERA protects the scenic and esthetic resources in the BWCAW. Respondent further argued that the proposed tower would materially adversely affect those resources because portions of the proposed tower and its lights would be visible from several locations in the BWCAW. Appellants challenged respondent's prima facie showing under MERA. Appellants also asserted an affirmative defense, arguing that the expansion of wireless service in Lake County and the BWCAW is consistent with the promotion of public health and safety and that there is no feasible and prudent alternative to the 450-foot tower.

The district court concluded that the scenic and esthetic resources at issue here, namely, scenic views, are natural resources under MERA, relying on this court's decision in *State by Drabik v. Martz*, 451 N.W.2d 893, 895-97 (Minn. App. 1990) (concluding that MERA provides "protection broad enough to cover" scenic views within the BWCAW that are affected by structures on nearby private property), *review denied* (Minn. Apr. 25,

1990). The district court further concluded that the proposed tower would materially adversely affect those resources. The district court rejected appellants' affirmative defense, reasoning that appellants had at least three reasonable and prudent alternatives that would expand wireless coverage in the target area.

Appellants make several arguments in support of reversal. First, appellants argue that the district court's decision should be reversed as a matter of law, "because views of points located outside the BWCAW are not part of the scenic and esthetic resources of the BWCAW owned by a governmental unit." Appellants acknowledge that this argument is at odds with this court's contrary conclusion in *Drabik*.[3] Second, appellants argue that the district court's decision should be reversed because MERA does not apply to scenic and esthetic resources owned by the federal government. Third, appellants argue that the district court erred in concluding that the proposed tower would materially adversely affect scenic and esthetic resources in the BWCAW. And fourth, appellants

[3] In *Drabik*, the plaintiff filed a MERA claim seeking to enjoin the defendant from constructing a 600-foot radio tower near the BWCAW. 451 N.W.2d at 894-95. The district court granted a preliminary injunction pending trial on the merits, and the defendant appealed the injunction. *Id.* at 895. Although a trial on the merits had yet to occur, the defendant argued the merits of his entire case. *Id.* We limited our review to determining whether a preliminary injunction was proper. *Id.* In doing so, we considered the defendant's argument that "because the tower would be constructed upon private property, no actionable scenic or esthetic pollution of government owned resources would occur under [MERA]." *Id.* at 897. This court rejected that argument and concluded that "MERA provides protection broad enough to cover the natural resources at issue." *Id*. Appellants argue that *Drabik* was wrongly decided and invite this court to overrule its previous conclusion that MERA may protect scenic views within the BWCAW that are negatively affected by structures on nearby private property. We decline to do so. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010) (recognizing that this court is "bound by supreme court precedent and the published opinions of the court of appeals"), *review denied* (Minn. Sept. 21, 2010).

argue that the district court erred in rejecting appellants' affirmative defense. Because appellants' third argument is dispositive, we limit our review to the district court's conclusion that the proposed tower would materially adversely affect scenic and esthetic resources in the BWCAW.

II.

When reviewing a district court's determination regarding whether challenged conduct is likely to have a material adverse effect on the environment under MERA, an appellate court reviews the factual findings that underlie a material-adversity conclusion for clear error, but reviews the district court's legal conclusions de novo. *See Minn. Pub. Interest Research Grp. v. White Bear Rod & Gun Club*, 257 N.W.2d 762, 780 (Minn. 1977) (stating that in the supreme court's opinion, "the evidence produced by plaintiffs clearly established that [the proposed action] would materially adversely affect the natural resources of the area"); *Zander v. State*, 703 N.W.2d 845, 856 (Minn. App. 2005) (concluding, based on this court's review and analysis of the record, that the record did not show a materially adverse effect); *State by Fort Snelling State Park Ass'n v. Minneapolis Park & Recreation Bd.*, 673 N.W.2d 169, 176-77 (Minn. App. 2003) (agreeing with the district court's analysis of the material-adversity factors and concluding that the district court "correctly applied the law and concluded that there was no material adverse effect"), *review denied* (Minn. Mar. 16, 2004); *State ex rel. Wacouta Twp. v. Brunkow Hardwood Corp.*, 510 N.W.2d 27, 30 (Minn. App. 1993) (concluding that the record amply supported the district court's findings of fact, independently applying the relevant factors for determining material adversity in light of those findings,

and holding that the challenged action was likely to have a material adverse effect). Appellate courts review de novo whether the district court's factual findings support its ultimate conclusions of law. *See Donovan v. Dixon*, 261 Minn. 455, 460, 113 N.W.2d 432, 435 (1962) ("[I]t is for [appellate courts] to determine whether the findings support the conclusions of law and the judgment."); *Ebenboh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. App. 2002) (stating that whether a district court's findings of fact support its conclusions of law and judgment is a question of law, which we review de novo).

In *State by Schaller v. Cnty. of Blue Earth*, the supreme court articulated five factors to be considered when determining "whether or not conduct materially adversely affects or is likely to materially adversely affect the environment under [MERA]." 563 N.W.2d 260, 267 (Minn. 1997). The five factors are:

> (1) The quality and severity of any adverse effects of the proposed action on the natural resources affected;
> (2) Whether the natural resources affected are rare, unique, endangered, or have historical significance;
> (3) Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable (for example, by replanting trees or restocking fish);
> (4) Whether the proposed action will have significant consequential effects on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed);
> (5) Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.

Id.

The *Schaller* factors are non-exclusive and "each factor need not be met in order to find a materially adverse effect." *Id.* "Rather, the factors are intended as a flexible

guideline for consideration as may be appropriate based on the facts of each case." *Id.* Even though the supreme court has broadly interpreted MERA, the supreme court has also recognized that MERA "requires something more than merely an adverse environmental impact to trigger its protection." *Id.* at 266. "[A]lmost every human activity has some kind of adverse impact on a natural resource," but MERA is not construed as "prohibiting virtually all human enterprise." *Id.* at 265 (quotation omitted).

The district court analyzed the *Schaller* factors and made findings and conclusions regarding each of the factors. Appellants do not assign error to the district court's factual findings. Instead, appellants challenge the district court's attendant legal analysis and conclusions. Appellants argue that the district court "effectively ignored the statute's materiality requirement in accepting [respondent's] subjective position that any view of a man-made structure from within the BWCAW would unduly interfere with the 'wilderness experience' of its members." We address this argument in the context of the district court's analysis of the *Schaller* factors.

Quality and Severity of Any Adverse Effects

The first factor addresses the quality and severity of any adverse effect of the proposed action on the natural resources affected. *Id.* at 267. "Severe" is commonly defined as unsparing or harsh; strict; very serious; grave or grievous. *The American Heritage Dictionary of the English Language* 1653 (3rd ed. 1992); *see* Minn. Stat. § 645.08(1) (providing that "words and phrases are construed according to . . . their common and approved usage"). As we recognized in *Fort Snelling*, in the context of MERA, "severity is relative and must be weighed and analyzed." 673 N.W.2d at 176.

This approach recognizes the competing interests that are expressed in the statement of legislative purpose regarding the civil remedy established in MERA: "[T]o create and maintain within the state conditions under which human beings and nature can exist in productive harmony . . . ." Minn. Stat. § 116B.01; *see Schaller*, 563 N.W.2d at 264 (recognizing the express legislative purpose).

The district court found that the natural resources at issue in this case are the scenic and esthetic resources in the BWCAW, specifically, scenic views. As to the adverse effect of the proposed tower on those resources, the district court found that "when there is an unobstructed line of sight, the [p]roposed [t]ower would be visible for at least 8 miles during the daytime and more than 10 miles during the night time." The district court specifically found that the proposed tower would be partially visible from ten lakes within the BWCAW. This finding was primarily based on the testimony and viewshed analysis of a professional surveyor who was called as a witness by respondent. The court found that between 38 and 180 feet of the proposed tower would be visible from the ten lakes, depending on the lake, but the light at the top of the proposed tower would be visible from each of the ten lakes at night. The court also found that portions of the proposed tower and the light at the top of the tower would be visible from campsites on four of the ten lakes. The court further found that although three existing communications towers in and around Ely are visible from one of the ten lakes, no communications towers are visible from the other nine lakes. Based on its findings regarding the visibility of the proposed tower, the district court concluded that the

proposed tower "would have a qualitative and severe adverse effect on the scenic views from at least 10 significant areas within the protected BWCAW."

Appellants argue that the district court "failed to appropriately consider the nature of the proposed tower's impact in assessing the quality and severity of any adverse effects" and that the court's decision "rests upon a purely subjective esthetic judgment about the impact of the tower upon scenic views." First, appellants stress the fact that respondent presented no "competent evidence" regarding what the proposed tower, or more specifically, what the visible portions of the proposed tower would look like to a BWCAW visitor. *Cf. Drabik*, 451 N.W.2d at 896-97 (indicating that a plaintiff in a MERA action challenging the construction of a communications tower near the BWCAW presented drawings by a registered land surveyor demonstrating the visual impact of the tower). Although respondent introduced photographs of an existing tower near Cotton, taken from various distances as an example of what the proposed tower would look like from a distance, the district court did not rely on those photographs in arriving at its determination.

Second, appellants contend that the district court should have assessed the relative severity of the adverse effect in an overall context, rather than treating any potential visibility as a severe adverse effect. For example, appellants note that the ten lakes from which portions of the tower would be visible constitute less than one percent of the 1,175 total lakes within the BWCAW. Appellants also note that the U.S. Forest Service has classified the BWCAW into areas reflecting different levels of isolation and solitude. Several of the lakes at issue are categorized as "semi-primitive motorized wilderness,"

the category with the lowest degree of solitude. There is no assertion that any of the lakes in question are categorized as "pristine wilderness," the category with the best opportunities for isolation.

We agree with appellant's contention that the district court erred as a matter of law by failing to weigh and analyze the relative severity of the proposed tower's adverse effect on scenic views as required under *Fort Snelling*. The district court's failure to do so is apparent when one attempts to reconcile the district court's factual findings with its conclusion that the proposed tower would have a severe adverse effect. The findings primarily focus on preserving scenic views that do not include any evidence of human existence: "people value the scenic views and the lack of evidence of humans on the 10 lakes at issue . . . ." But the district court also found that evidence of human existence (including a water tower, cabins, and existing communication towers) is already visible from one of the lakes in question and that the lake is nevertheless popular with BWCAW visitors. The district court further found that motor-boat use is allowed on four of the lakes during the summer.

In sum, the district court's findings establish that less than fifty percent of the proposed tower will be visible from less than one percent of the BWCAW's 1,175 lakes, several of which have scenic views that include signs of human existence. And the district court made no findings as to what degree of visibility from the less-than one percent of the lakes reaches the "severe" threshold, that is, harsh or very serious. As the district court observed, "[s]ome people are not bothered by the sight of a cell phone communication tower" but "other people find that cell towers, even outside of a protected

wilderness area, have a very negative impact on scenic views and are a negative visual esthetic." The district court's analysis appears to turn, in large part, on the subjective judgment that respondent advocates. But the policies embodied in MERA cannot reasonably be applied on a subjective basis. Because the district court's findings do not sustain its legal conclusion that the proposed tower would have a severe adverse effect on scenic and esthetic resources in the BWCAW, the conclusion is erroneous as a matter of law, and this factor does not weigh against construction of the proposed tower.

Rarity, Uniqueness, Endangered Status, or Historical Significance

As to the second *Schaller* factor, the district court found that "the scenic views from the BWCAW where there are no permanent signs of man or modernity are rare and unique" and that these views become "increasingly endangered" as "commerce increases." The district court also found that the BWCAW "has special historical significance for many" people. Reasoning that "[t]he unique value of the BWCAW derives precisely from the rarity of the extraordinary scenery and wilderness experience," the district court concluded that "[t]he scenic views and vistas from within the BWCAW are rare, unique, endangered and of great historical significance," and the district court weighed this factor "very strongly" against construction of the proposed tower. We discern no error in the district court's conclusion on this factor.

Long Term Adverse Effects

In support of its conclusion on this factor, the district court found that the tower is not permanent but that it will be present for many decades. The court also found that "broad scenic views with no visible signs of man" are not replaceable. The district court

concluded that the proposed tower will have a "persistent and long term negative effect on the scenic views from numerous locations within the BWCAW" and that this factor weighs against construction of the tower.

Appellants contend that the district court misconstrued the pertinent inquiry, arguing that "[t]his factor asks not how long a structure might be kept in place, but whether it will cause any permanent, long-term damage." The long-term-adverse-effect factor has two components: "[w]hether the proposed action will have long-term adverse effects on natural resources," and "whether the affected resources are easily replaceable." *Schaller*, 563 N.W.2d at 267. The district court discounted the relevance of the second component, reasoning that it is limited to "replacing resources such as replanting trees or restocking fish that cannot happen here." This reasoning is inconsistent with this court's approach in *Fort Snelling*. In *Fort Snelling*, this court agreed with the district court's conclusion that a proposed athletic center (i.e., a structure that could be used for decades) would have no long-term effects because "the district court properly considered the nature of the athletic center improvements and that simple removal of the structures would return the [site] to [its] original open space." *Fort Snelling*, 673 N.W.2d at 176. The same is true here: removal of the proposed tower, which would be located outside of the BWCAW, would immediately eliminate any adverse effect on scenic views in the BWCAW, thereby restoring the affected resource to its original condition. We therefore conclude that this factor does not weigh as heavily against construction of the proposed tower as the district court concluded.

Significant Consequential Effects on Other Natural Resources

The fourth *Schaller* factor considers whether the proposed action will have "significant consequential effects on other natural resources." 563 N.W.2d at 267. "Significant" is commonly defined as "[h]aving or likely to have a major effect; important." *The American Heritage Dictionary of the English Language* 1679 (3rd ed. 1992). Although the district court made detailed findings of fact regarding the effect that the proposed tower will have on migratory birds, the district court also found that "it [was] not possible . . . to confidently quantify how many of which species of birds will be killed by the [p]roposed [t]ower." The district court observed that it was "difficult to determine how many birds will be killed by the [p]roposed [t]ower and equally difficult to determine how significant this effect will be."

These findings are not sufficient to sustain the district court's legal conclusion that this factor weighs against the proposed tower. The district court's failure to consider the possibility that the proposed tower may make the BWCAW accessible to more visitors is also of concern. *See Fort Snelling*, 673 N.W.2d at 176 (stating that the district court properly considered the effects of the proposed action on other natural resources, including the positive effects of reinvigorating presently abandoned historical buildings and increasing the number of visitors to a historical site). In the end, this factor requires a determination regarding the significance of any consequential effect on other natural resources. Because the district court did not find a *significant* consequential effect on other natural resources, the district court erred in concluding that this factor weighs against construction of the proposed tower.

Whether the Affected Natural Resource is Significantly Increasing or Decreasing

The district court found that scenic views "from the lakes and rivers in the BWCAW where there are no lasting signs of human impact, are limited and finite resources" and that "[t]hey are not increasing and unless protected they will decrease over time." The district court therefore concluded that this factor weighs against construction of the proposed tower.

This factor asks whether the affected natural resource is *significantly* increasing or decreasing in number. Yet the district court's findings and conclusion regarding this factor do not address whether the potential decrease in scenic views is significant. Because the district court did not find that the affected natural resource is significantly decreasing, the district court erred in concluding that this factor weighs against the proposed tower.

Summary of Schaller *Factors*

In sum, the district court committed legal error by failing to weigh and analyze the relative severity of the adverse effect of the proposed tower on scenic views in the BWCAW. *See id.* Moreover, the district court's findings of fact do not support its conclusions of law on the first, fourth, and fifth *Schaller* factors. Although the long-term-adverse-effects factor weighs against the proposed tower, it does not weigh as heavily as the district court concluded once this court's approach in *Fort Snelling* is considered. Thus, only the rareness-and-uniqueness factor weighs strongly against construction of the proposed tower.

Even though the rareness-and-uniqueness factor is compelling, and "each factor need not be met in order to find a materially adverse effect," *Schaller*, 563 N.W.2d at 267, we hold that the district court's factual findings and legal analysis do not sustain its legal conclusion that respondent proved a prima facie case of a materially adverse effect on the scenic and esthetic resources in the BWCAW. Because respondent failed to establish a prima facie case for judicial intervention under MERA, *see* Minn. Stat. §§ 116B.02, subd. 5, .04, we reverse the district court's order enjoining construction of the proposed tower without addressing appellants' other arguments in support of reversal.

Reversed.