STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

CASE TYPE: OTHER - CIVIL

COURT FILE NO. 95-14085

Rush Creek Golf Club, Ltd., ex rel. State of Minnesota,

Plaintiff,

vs.

City of Corcoran, Minnesota; and Steven Fraasch,

Defendants.

DEFENDANT STEVEN FRAASCH'S WRITTEN ARGUMENT

I. MERA CLAIM

Minnesota Environmental Rights Act provides:

> "each person is entitled by right to the protection, preservation, enhancement of air, water, land, and other natural resources located within the state and that each person has a responsibility to contribute to the protection, preservation and enhancement thereof."

Minn. Stat. §116B.01.

The act provides that anyone residing within the state may commence a civil action for declaratory or equitable relief against any person for the protection of the water, air, land or other natural resources from pollution, impairment or destruction. Minn. Stat. §116B.03, subd. 1. The act defines pollution, impairment or destruction as ". . . any conduct which materially adversely affects or is likely to materially adverse affect the environment." Minn. Stat. §16B.02, subd. 5. Under MERA, there must be a

material adverse affect on the environment before relief may be granted. State ex rel. Wacouta TP. V. Brunkow, 510 NW2d 27 Minn. Ct. App. 1993.

There are two prongs to a prima facia case under MERA. First there must be a protectable natural resource, and Second the defendant's conduct must cause or be likely to cause pollution, impairment or destruction of that resource. State v Archabal, 495 N.W. 2d 416 at 421 (Minn. 1993).

A. Are Trumpeter Swans a Natural Resource?

Plaintiffs acknowledge the Trumpeter Swan is not a naturally existing resource but is a species that has been introduced into the Twin City area in the 1960's. (Tr. 169) Dr. Cooper acknowledges it is an open question whether or not the current Twin Cities environment is inhospitable to Trumpeter Swans at the present time. (Tr. 230) One purpose of the reintroduction program is to find out whether or not Trumpeter Swans can have a viable population in the Twin Cities. (Tr. 231) Based on the testimony and evidence submitted by the plaintiffs, Trumpeter Swans in the Twin City metropolitan area are not a naturally existing resource. The introduction of swans into this urban area is an experiment. (Zink Tr. 250 - 252)

B. Effect of Fraasch Tower on Trumpeters Swans

1. Presence of Trumpeters Swans at Goose Lake

Assuming Trumpeter Swans are a natural resource, plaintiff must show that the Fraasch tower ". . .materially adversely affects or is likely to materially adversely affect the environment." Minn. Stat. §116B.02, subd. 5.

Plaintiffs have only shown two documented instances of Trumpeter Swan in the Goose Lake area over the past fifteen years. (Ex. 7) One of the sightings was in July of 1984 and the other was in April of 1992. Dr. Cooper acknowledged that neither of those sightings indicated whether Trumpeter Swans would nest in the Goose Lake area. (Tr. 183) No evidence was presented to show any continuing or regular sightings or presence of Trumpeter Swans in the Goose Lake area. Though a neighbor, Ann Hoaglund has seen and photographed birds she believed to be Trumpeter Swans, she acknowledges that no birds nest in the area and they are not a continuing presence. (Hoaglund Tr. 68) Other long term and short term residents of the Goose Lake area have indicated that they have not seen Trumpeter Swans or large white birds in the area. (Motz Tr. 498) (Dennison Tr. 501) A substantial question exists as to whether there is any real or significant presence of Trumpeter Swans in the Goose Lake area.

None of the evidence submitted shows the presence of Trumpeter Swans on that portion of Goose Lake near or adjacent to Mr. Fraasch's property. The only testimony presented demonstrated there were no Trumpeter Swans in the vicinity of the Fraasch property. (Fraasch Tr. 454) (Motz and Dennison supra)

2. Does the Fraasch Tower Pose a Risk of Injury to Trumpeter Swans?

Even if we assume Trumpeter Swans visit the Goose Lake area in the vicinity of Mr. Fraasch's property, plaintiffs have failed to prove this tower poses any risk of injury or death to Trumpeter Swans.

Dr. Cooper acknowledged that he is unaware of a single instance where a Trumpeter Swan has been injured or killed by collision with a power or guy wires. (Tr. 213).

Mr. Robert Jannsen, a recognized expert in bird population distribution in Minnesota, (Tr. 254-255) (Ex. 38) is familiar with the literature as to bird mortality with respect to power lines and towers. (Tr. 325-326) Mr. Jannsen has participated directly in studies as to bird mortality relating to towers (Tr. 327-331). He unequivocally stated that Mr. Fraasch's tower would not have any effect in the introduction, population or the future population of Trumpeter Swans in the Twin City area. (Tr. 337-338).

Mr. Robert Garwood testified that for a period of ten years from 1982 to 1992 he had a tower almost identical to the installation of Mr. Fraasch, namely a 130 foot tower with a Yagi beam antenna at the top. (Tr. 294-298). Mr. Garwood's home was located immediately adjacent to Lake Rebecca Park Preserve in view of a nesting sight for Trumpeter Swans. (Tr. 294 and 297)). During that time, Mr. Garwood indicated that Trumpeter Swans regularly flew in the area, (Tr. 298-299). He further indicated though swans occasionally flew in the area of the towers, there was never an instance of injury or harm to a Trumpeter Swan due to collision with the tower or guy wires. (Tr. 299). There can be no better evidence than that of Mr. Garwood as to the absence of any real risk to Trumpeter Swans occasioned by the presence of the 130 foot amateur radio tower. The plaintiffs have not shown that this particular structure is "detrimental to significant wildlife habitat." Minn. Rules 6115.0210, subpart 3B.

3. Does the Fraasch Guy Wire Anchor Have any Impact on the Wetland?

It is important to note that the relief requested by plaintiff relates to the placing of a single guy wire anchor in a portion of the wetlands surrounding Goose Lake. This portion of the wetland is totally within the boundaries of Mr. Fraasch's property. Plaintiffs acknowledge that whether or not a permit should be issued in this matter is in the discretion of the Minnesota Department of Natural Resources. However, they suggest that if the DNR concludes that a permit is permissible, this court should enjoin the project unless it determines the tower ". . .represent(s) a minimal impact solution to a specific need with respect to all other reasonable alternatives." Minnesota Rules 6615.0210 subpart 5. First of all, there is no indication that the placement of the anchor itself in any way has any impact of significance on the environment.

Plaintiffs have failed to make any prima facia showing of pollution, impairment or destruction to a protected resource.

Plaintiff seems to suggest that should order Mr. Fraasch to dismantle the tower because he is waiting for a DNR permit. They have intimated Mr. Fraasch somehow attempted to "slip one past " the DNR. The testimony of Thomas Hovey of the DNR is unequivocal. Mr. Fraasch applied for a permit in a timely fashion (Tr. 317) and has done everything requested by the DNR (Tr. 310).

Apparently, the plaintiffs are also claiming that the Fraasch tower will pollute, impair or destroy protected natural resources. No evidence whatsoever was presented which would indicate that the mere presence of the anchor in the wetland in any way pollutes, impairs or destroys the wetlands. There was no evidence to indicate that the anchor has any interaction with the wetlands whatsoever. Other than a small portion of

the anchor, several inches in diameter, extends above the surface of the wetlands. No claim has been made that either portion of the anchor or any portion above or below the surface has any impact on the wetlands whatsoever. (Bramen Tr. 135-136, Ex. 43)

4. Scenic and Aesthetic Resource Claim

Plaintiffs apparently contend that the tower in some way pollutes or impairs or destroys the scenic or aesthetic resources of the wetlands. Plaintiff's have repeatedly sought to equate the visibility of the Fraasch tower with the towers which were the focus in State by Drabik v. Martz, 451 N.W. 2d 893 (Minn. Ct. App. 1990) and Application of Cent. Baptist Theo. Seminary, 370 N.W. 2d 642 (Minn. Ct. App. 1985) despite the fact those were commercial towers 500 to 600 feet tall. The court has had opportunity to view the tower both at the site and from adjacent areas. As is amply demonstrated by Exhibits 14, 15 and 16, the Fraasch tower is difficult to see against the background sky even with the aid of telephoto lenses and other enhancements. Not even plaintiffs own witnesses claimed the towers polluted or destroyed scenic or aesthetic resources of the wetlands. At most, Richard Howell said that he thought the tower "interrupted the aesthetic qualities of the golf course and did not fit in the general rural atmosphere that existed throughout the site." (Tr. 22-23) Even Mr. Howell acknowledged that there were a number of other factors immediately adjacent to the golf course that were not part of the rural environment such as a mobile home park, (Tr. 27) and the junkyard at the Peterson home, (Tr. 28). Mr. Howell further indicated that these factors were visible from the golf course, (Tr. 20). That the Peterson junkyard is

immediately adjacent to the golf course. (Tr. 29). He further acknowledged that the portion of the Peterson property that was covered with junk that abuts the golf course is more than 300 feet. (Tr. 31-32). Mr. Howell further acknowledged that it is not uncommon to find water towers and power lines and other tower-like structures around golf courses. (Tr. 37). Even Mr. Howell was unwilling to state that the Fraasch tower would be a major impairment to the view of the golf course. (Tr. 40).

As respects to various neighbors, there appears to be a substantial amount of difference of opinion as to whether the Fraasch tower has any visual impact on the area. Ann Hoaglund indicated that she thought the tower was excessively high. She further indicated that she could not see it from her home and that when viewed from the city hall, the tower was little more than a vertical line on the horizon. (Tr. 68). Ms. Hoaglund further indicated that perhaps her best view of the tower would be when she was skiing across Mr. Fraasch's property in the winter time. (Tr. 65-66). Other witnesses said they either could not see the tower from their property. Mary Hart, (Tr. 76). Or that they did not fee that the tower detracted from the character of the area. (Duane Motz, Tr. 497). (John Dennison, Tr. 501).

Essentially, plaintiffs have failed to show that this structure poses any significant risk of impairment or destruction of the air, water, land or any other natural resource.

The Minnesota Environmental Rights Act protects the "scenic and aesthetic resources owned by any government unit or agency". MERA does not prescribe the elaborate standards to guide the trial courts but allows a case by case determination by use of a balancing test analogous to the one traditionally employed by courts of equity, where the utility of a defendants conduct which interferes with a protected natural

resource is weighed against the gravity of harm resulting from such an interference or invasion . Minnesota Public Research Group v. White Bear Rod and Gun Club, 357 N.W. 2d 762 (Minn. 1977) at 782.

5. Limited preemption of PRB-1

Even if plaintiffs have made a prima facia showing of such "pollution, impairment or destruction", the balancing test set forth in MERA must be viewed in light of the limited preemption provided by PRB-1 and 47 C.F.R. Sec. 97.15(e) which provides:

> . . . [State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See, PRB-1, 101 FCC 2d 952 (1985) for details.]

The imposition of the MERA standard by the state without full consideration for the amateur's communication needs would not be a reasonable accommodation, nor the minimum practical regulation to accomplish the state or local authorities legitimate purpose. The federal requirement of "reasonable accommodation" on the part of the state is more rigorous than a balancing of competing interests. Pentel v. City of Mendota Heights, 13 Fed. 3rd at 1261 (8th Cir. 1994). Furthermore, specific consideration must given to the communication needs of the amateur operator.

> " . . . Some amateur configurations require more substantial installations than others if they are to provide the amateur operator with the communications he/she desires to engage in. For example, an antenna array for international amateur communications will differ from an antenna used to contact other amateur operators at shorter distances." (PRB-1, para. 25)

The City of Corcoran recognized the need for some antenna installations to be more substantial than others and the obligation to reasonably accommodate Mr. Fraasch's needs as an amateur radio operator when it issued his conditional use permit for the 130 foot tower.

Mr. Fraasch testified he is a licensed amateur radio operator (Tr. 408). Because of his work schedule (Tr. 484) most of his amateur communications are in the hours of darkness on the 160, 80 40 meter bands. (Tr. 415) and on weekends on 20 meters. (Tr. 415) He is particularly involved with public service and Military Affiliate Radio System (MARS) communications. (Tr. 412) In recent years he has participated in hundreds of radio phone patches to soldiers assigned in the Gulf area during Desert Storm (Tr. 412) but has been limited in his ability to communicate from his home.

Mr. Fraasch has a Masters Degree in Electrical Engineering. (Tr. 406) His masters thesis is in the field of antenna analysis. (Tr. 406) He uses the 160 and 80 meter amateur bands because they are most reliably open during hours of darkness. (Tr. 434) The higher frequency bands which utilize smaller antennas (Tr. 415) such as 20, 15 and 10 meters are not usable during hours of darkness. (Tr. 489)

Defendant's expert engineer, Dr. Robert Sianti, has a Ph.D. with a concentration in antenna engineering. (Tr. 361) Mr. Fraasch and Dr. Sianati performed a through analysis of Mr. Fraasch's delta loop antenna and a smaller antenna proposed by plaintiff's engineer. (Tr. 375) They concluded the smaller antenna would be 1/5 to 1/10 as effective as the existing delta loop.(Tr. 376) (Tr. 443) Mr. Fraasch testimony that reducing the height of the existing delta loop would substantially impair its performance. (Tr. 419) was not challenged by plaintiff's expert.

Though Plaintiff's expert has suggested alternative antennas he did not perform any analysis or modeling of either the proposed antennas or the Fraasch antenna. (Tr. 508) Unlike Mr. Fraasch and Dr. Sianatt, Mr. Lysiak has never been a professional antenna designer.(Tr. 361) Mr. Lysiak criticized the analysis of Dr. Sianati and Mr. Fraasch for not considering the effect of the supporting tower on the antenna (Tr. 525); failing to recognized the effect of adjacent trees (Tr. 526) and not considering the electrical effect of ground (Tr. 541). Apparently Mr. Lysiak was not listening to the testimony. Dr. Sianati and Mr. Fraasch testified their analysis included the effect of the supporting tower, (Tr. 388, Tr. 443) and ground effects (Tr. 389) Dr. Sanati also testified the effectiveness of the delta loop antenna would not be diminished by touching tree branches unless the tree was covered with water or snow. (Tr. 391)

Mr. Lysiak opted not to perform any modeling or analysis in rendering his opinion as to the relative effectiveness of Mr. Fraash's delta loop and the antennas he proposed. (Tr. 542) Rather he simply came to his conclusions by looking at the delta loop. (Tr. 538) Mr. Lysiak admitted his approach was not the approach taught engineers and was not preferable to the approach employed by Mr. Fraasch and Dr. Sianati. (Tr. 543-544) Finally, Mr. Lysiak proposed alternative towers costing from $19, 000.00 to $40,000.00. (Tr. 518) (Tr. 524) These towers cost 4 to 8 times more than the present tower which Mr. Lysiak acknowledged was cost effective. (Tr. 557) He did not provide any specification for these towers and did not know if they even conformed to the structural requirements of the Corcoran Building Code. (Tr. 549).

The MERA balancing standard must be viewed in light of the state's more rigorous obligation under PRB-1 to reasonably accommodate the amateurs desired

communications under Pentel. Not only is the state required to reasonably accommodate the amateurs communication needs, any regulation imposed must be "...the minimum practical regulation to accomplish the state or local authorities legitimate purpose." 47 CFR , Sec 97.15 (e) Requiring defendant to remove a cost effective permitted antenna that is little more than a faint vertical line on the horizon would not appear to meet that test.

II. NUISANCE CLAIM

Plaintiffs have contended that Mr. Fraasch's tower is a nuisance and will interfere with Rush Creek's use and enjoyment of the property. Presumably, Rush Creek is relying on the provisions of Minn. Stat. §561.01 which provides that anything that is injurious to health or indecent or offensive to the senses or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life and property is a nuisance. This statute is not to be viewed in the vacuum or simply from the perspective of a few individuals who find offense or discomfort in an activity. Rather, the court has held that "the law cannot base its concepts of nuisance upon the extremes of temperament in human nature but must adapt them to the comfort of persons of ordinary taste and susceptibilities". Excelsior Baking v. City of Northfield, 247 Minn. 387, 77 N.W. 2d 188 (1956). Radio towers and antennas are used customarily incident to residential property. Village of St. Louis Park v. Casey, 16 N.W. 2d 450 (1944).

Corcoran City Ordinance, Number 130 specifically acknowledges that antennas and towers in excess of 75 feet may be permitted under a conditional use permitting process. (Exhibit 1)

Richard Howell, project manager of the Rush Creek Golf Course, stated the rural nature of the course was the primary reason for developing Rush Creek. (Tr. 9). However, Rush Creek is far from a pristine rural environment. There is a 200-odd mobile home park adjacent to Rush Creek Golf Club and visible from various parts of the course that is not part of the rural environment. (Tr. 26 - 27) There is a junkyard full of farm and construction equipment immediately adjacent to the golf course that is not in keeping with a rural environment. (Tr. 29 - 30). Mr. Howell acknowledged that it is not uncommon to find water towers and power lines and other tower-like structures around golf courses in the Twin Cities area. (Tr. 37). He further acknowledged that there were towers and power lines across or near by the Wilds Golf Course, Edinburgh Golf Course and Hazeltine Golf Course. (Tr. 37 - 38). The Wilds is the most expensive golf course in the Twin City area. (Tr. 277) Finally, Mr. Howell acknowledged that there was a radio tower several hundred feet tall immediately adjacent to one of the fairways at Bunker Hills Golf Course. (Tr. 38).

Nowhere did the plaintiffs provide any evidence that the Fraasch tower will be anything more than a thin vertical line on the horizon. (Tr. 67).

Plaintiffs have suggested that the presence of Mr. Fraasch's tower would in some fashion financially impact the golf course. The only testimony as to financial impact was that of Mr. Berge Hansen. Mr. Hansen is a real estate appraiser. Mr. Hansen acknowledged that he was presenting a personal opinion based on

unsubstantiated assumptions. Mr. Hansen acknowledged that the green fees used in his calculations were estimates and were higher than the rate card prepared by Rush Creek. (Tr. 275 - 276). Mr. Hansen admitted that in the course of making his assumptions as to the impact of Mr. Fraasch's tower on Rush Creek, he did not make any inquiry with respect to other golf courses and the impact of towers and power lines upon the number of people who play at those courses. (Tr. 278). Mr. Hansen acknowledged that his personal opinion was the effect of Mr. Fraasch's tower could be up to five percent. (Tr. 289 - 290). As noted by the court, up to five percent means it could be anywhere between 0 and 5%. (Tr. 290) Finally, Mr. Hansen acknowledged that he did nothing to determine whether any players at golf courses with towers or power lines adjacent to it were in any way impacted by the presence of those structures. (Tr. 292).

Defendant has submitted a study of the impact of a radio antenna located on residential property upon the values of nearby or adjoining residential property (Exhibit 1, Tab 51). This study was made by Russ Wehner, MAI. Mr. Wehner studied properties with 31 matching pairs and spoke with brokers to determine the influence of adjoining radio antenna. He found the presence of a radio antenna has not only failed to make any measurable difference in value, it did not affect the sale time involved. Thus the only study of record unequivocally indicates there is no impact on adjacent or nearby properties from the presence of the amateur radio tower.

Plaintiff has failed to show the tower constitutes a nuisance. At best they have shown Mr. Howell and his employer don't like the tower and some of the more remote

residents may think it is inappropriately tall. Given the mobile home park and junk yard adjacent to plaintiff's property any impact of this tower upon the surrounding area is minimal. Defendant Fraasch requests the court enter judgment denying plaintiff's relief herein.

Date:_____ By_____

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