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STATE OF MINNESOTA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of Permit Application
No. 76-6150 from the Department of
Natural Resources Relating to Lands
Owned by Parranto Brothers, Inc.,
Located in the Southeast Quadrant
of Silver Lake Road and County Road E,
Ramsey County.

FINDINGS OF FACT,
CONCLUSIONS AND
ORDER

The above entitled matter came on for hearing on
February 1, 1977, before Joseph N. Alexander, Assistant
Commissioner of Natural Resources, who had been duly appointed
to preside herein by Robert L. Herbst, Commissioner of Natural
Resources. The Applicant Parranto Brothers, Inc. was represented
by William M. Mahlum, Esq., Attorney at Law, 904 Commerce Building,
St. Paul, Minnesota. The Windsor Green Association, Intervenor,
was represented by John H. Herman, Esq., of Dayton, Herman &
Graham, 800 Midland Bank Building, Minneapolis, Minnesota. The
Department of Natural Resources staff personnel was represented
by A. William Clapp, Esq., Special Assistant Attorney General,
375 Centennial Office Building, Saint Paul, Minnesota. William G.
Peterson, Esq., Special Assistant Attorney General, 375 Centennial
Office Building, Saint Paul, Minnesota, appeared as advisor to
the chair. The Hearing Officer having heard all the evidence
presented, inspected the exhibits and read the arguments of
counsel made recommended findings of fact, conclusions and order.

The Commissioner has circulated copies of the proposed
findings of fact, conclusions and order to the parties of record
and has received comments in return, the last ones received
September 14, 1977. Having reviewed the proposed findings of fact
and conclusions as well as the comments thereon, the Commissioner
now makes the following:

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FINDINGS OF FACT

1. The two ponds involved herein individually and in a complex with each other and Silver Lake serve certain material beneficial public purposes, to-wit:

(b) Recharge of underground water strata;

(c) Retention of water to prevent or reduce downstream flooding, thereby minimizing erosion and resultant property damage;

(d) Entrapment and retention of nutrients and other materials which impair the quality of natural resources; . . .

(g) Wildlife habitat areas for the spawning, rearing, feeding and nesting of wildlife;

Minn. Stat. Section 105.37, Subdivision 6 (b) (c) (d) (g). The urban location further enhances the purposes served by these bodies of water.

2. Aerial photographs and soils surveys indicate that these ponds were glacially formed and of ancient origin.

3. The proposal of Applicant Corporation will impair service of the beneficial public purposes indicated in paragraph 1 above.

4. Applicant Corporation has not sustained its burden of proving that its proposal is reasonable, practical and will promote the public welfare pursuant to Minn. Stat. Section 105.45. The private gain anticipated by Applicant will not satisfy the public requirements of the statute.

5. The proposed activity will cause pollution and impairment of natural resources to a degree not allowable pursuant to the Minnesota Environmental Policy Act, Minn. Stat. Section 116D.04, Subdivision 6.

6. Urban development consistent with the protection of ponds and wetlands has been conducted elsewhere in the Metropolitan area and we find no persuasive reason that such cannot provide a

feasible and prudent alternative to the conduct proposed within the meaning of the Minnesota Environmental Policy Act, Minn. Stat. Section 116D.04, Subdivision 6.

7. The recommendations of the Minnesota Water Resources Board have been received into evidence in this proceeding. To the extent that the matters considered by the Board were genuine "questions of water policy" the facts elicited did not indicate that there were no public waters affected nor that the applicant should be allowed to destroy those water resources.

8. Ramsey County Ditches 2 and 3 charged assessments against a number of land and water areas within their overall watersheds including lands and ponds owned by applicant. The fact of these assessments does not automatically authorize the filling of these ponds.

9. These ditches did not approach closer than 1,000 feet to the ponds in question and did not serve to drain them.

10. The preservation of these ponds is consistent with the municipal development plans of the City of New Brighton.

Based on the Foregoing, the Commissioner makes the following:

CONCLUSIONS

1. The ponds at issue are public waters of the State of Minnesota and subject to the jurisdiction of the Commissioner of Natural Resources within the meaning of Minn. Stat. § 105.38.

2. Applicant Developer has no pre-existing right to destroy these ponds and must, accordingly, establish its case to justify the proposed filling of these ponds under the Minnesota Water Management Act (Minn. Stat. §§ 105.42, 105.44, and 105.45) and the Minnesota Environmental Policy Act (Minn. Stat. § 116D.04, Subdivision 6).

3. The recommendations of the Minnesota Water Resources Board are not binding on the Commissioner in proceedings under Minn. Stat. § 105.42.

4. The project proposed is not reasonable nor practical nor will it promote the public welfare. It will impair natural resources. There are prudent and feasible alternatives to the project which will protect the State's paramount interest in the protection of its natural resources.

5. The denial of the application is consistent with state environmental policy and the municipal plan of the City of New Brighton.

6. The permit applied for should be denied.

7. Rulings on the five motions urged by applicant are implicit in the foregoing findings and conclusions of the Commissioner. We find the motions to be without merit in light of the following considerations:

A. *Motion to Dismiss based on non-compliance with 20-day period in which to take preliminary action:* This provision is directory rather than mandatory. Even if it were mandatory, the intervention by the Environmental Quality Council and the Water Resources Board have, by force of statute, stayed action by the commissioner. Denied.

B. *Motion to Declare Findings of Water Resources Board as Binding:* The result of the Board on questions of water policy is a "recommendation" and not a mandate. The Board strayed somewhat beyond its "water policy" responsibilities and, even to the extent that it may have kept within its proper bounds, we are not persuaded by its recommendations. Denied.

C. *Motion to Order Prior Drainage Assessment*

Conclusive on Privilege to Drain These Ponds: The ditch assessments alleged were watershed-wide levies. It is clear that the public ditches in question never drained these ponds. In any case, private parties cannot be conferred with right to drain public waters which the drainage authority itself did not possess. Denied.

D. *Motion to Dismiss Application on Grounds that Permit Procedure is Inapplicable to Public Ditch Proceeding:* To the extent that Applicant's point of law is valid, it is clear that it has no applicability since Applicant seeks to proceed via a private drain rather than a proceeding under Minn. Stat. Chapter 106 (The Public Drainage Code). Denied.

E. *Motion to Dismiss on Grounds that Ponds are Not Public Waters as a Matter of Law:* We are of the opinion that the public nature of these ponds is a question of fact and not one of law. Accordingly, we have concluded that these ponds are public waters as a matter of fact and should not be destroyed. Denied.


Based on the foregoing the Commissioner now makes the following

ORDER

The permit applied for should be and hereby is denied in all respects.

Dated this 23rd day of November, 1977.

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES



WILLIAM B. NYE
Commissioner