

STATE OF MINNESOTA
COUNTY OF WASHINGTON

DISTRICT COURT
TENTH JUDICIAL DISTRICT

City of Oak Park Heights,
a Minnesota municipal corporation,

Case Type: Civil
Judge B. William Eckstrum
Court File No. 82-CO-06-006815

Plaintiff,

vs.

State of Minnesota, by its Commissioner
of Transportation,

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION
TO DISMISS**

Defendant.

TO: Plaintiff, City of Oak Park Heights, and its attorney Mark J. Vierling, 1809 Northwestern Avenue, Suite 110, Stillwater, Minnesota 55082.

INTRODUCTION

For a period well into its fourth decade, officials from the Minnesota and Wisconsin Departments of Transportation have been deciding whether, when, and how to bridge Minnesota T.H. 36 over the St. Croix River as it flows by Stillwater, Oak Park Heights, and Bayport. The instant lawsuit has been brought by the City of Oak Park Heights ("Oak Park Heights") against the State of Minnesota and its Commissioner of Transportation ("State" and "Commissioner") regarding the most recent such project. Oak Park Heights is asking the Court to decide which statutes govern the Commissioner's seeking and obtaining or being denied and proceeding without Oak Park Heights' consent to construct a bridge over the St. Croix together with its connecting roads and trails. The State believes the current law applies, while Oak Park Heights favors its immediate predecessor.

As of 2000 the law that Oak Park Heights seeks to use provided:

No state trunk highway . . . located within the corporate limits of any municipality, shall be constructed or improved in the manner specified in this section without the consent of the governing body of such municipality, unless the procedures described in sections 161.172 to 161.177 shall have been followed by the Commissioner of Transportation.

Minn. Stat. § 161.172 (a) (2000). In 2001, this law and the municipal consent procedures it contained were repealed and replaced by Minn. Stat. §§ 161.162 to 161.167 (2006). Act of May 24, 2001, ch. 191, §§ 1 to 10, 1991 Minn. Laws 709, 713.¹ In the section that provides the fulcrum around which this lawsuit pivots, the 2001 legislature made the current municipal consent law “effective the day following final enactment [May 25, 2001] and appli[ed] [it] to highway construction projects for which municipal approval is first sought after that date.” *Id.* at §10. As presently envisioned, the 2006 St. Croix River Crossing Project is a highway construction project for which the State has not yet sought municipal approval from Oak Park Heights. This project should therefore be governed by the current municipal consent procedures. Oak Park Heights’ argument to the contrary and its desire to utilize the 2000 municipal consent law are supported by neither the text nor the spirit of § 10. The City’s request for declaratory relief should therefore be denied.

¹ A copy of the 2000 municipal consent law, a copy of the current municipal consent law, and a chart comparing them are attached. Also attached is a description of significant differences between the two laws. Examples of some of those changes follow. Pursuant to the 2000 law, no time limit existed within which the highway appeal board had to make a decision on final layout plans submitted to it. In the current version, the appeal board must hold a hearing within thirty days of receiving the final layout plan from the Commissioner and must make a decision within sixty days of the hearing or the plan is deemed approved. *Compare* Minn. Stat. § 161.176, subd. 1 (2000) *with* Minn. Stat. § 161.164, subd. 3 (2006). In the present law, if Mn/DOT has been requested to make modifications to the final layout plans by a city and does so, it can proceed with preparation of construction plans and letting bids on the project. In the 2000 law, after Mn/DOT makes changes requested by a city to the final layout plans, those changes are to be submitted to the city which must consider them within sixty days. *Compare* Minn. Stat. § 161.174 (2000) *with* Minn. Stat. § 161.164, subd. 2(b)(3) (2006).

STATEMENT OF UNDISPUTED FACTS²

In the late 1960's, the Minnesota and Wisconsin Departments of Transportation ("Mn/DOT" and "Wis/DOT") commenced efforts to address congestion and safety concerns and to identify possible sites for the construction of a replacement for the Stillwater Lift Bridge, together with its required roadways and approaches. Mn/DOT, Wis/DOT, "Draft Study Outline And Scoping Document For Proposed Stillwater-Houlton Bridge Over the St. Croix River And Approaches" (October, 1985) ("1985 Draft Study") at 7. These activities were halted in 1972 due to a lack of funds. *Id.* In 1984, work resumed with a new corridor study, scoping activities, and the preparation of a draft environmental impact statement. *Id.*³

In the years following publication of the 1985 Draft Study, Mn/DOT and Wis/DOT officials produced, *inter alia*, the following three documents, the second and third of which were produced in cooperation with officials at the Federal Highway Administration ("FHWA").

Scoping Decision Document/Final Study Outline (January, 1987);

Final Stillwater-Houlton Draft Environmental Impact Statement and Section 4(f) Evaluations (March, 1990); and

Final Environmental Impact Statement and Section 4(f) Evaluation for the New St. Croix River Crossing (April, 1995) ("1995 Final EIS").

The 1995 Final EIS proposed a river crossing between Oak Park Heights and St. Joseph, Wisconsin, together with the reconstruction of portions of T.H. 36 in Minnesota and T.H. 35/64

² These facts are set out in compliance with Minn. Gen. R. Prac. 115.03 (d)(3).

³ "Scoping" is required by 23 C.F.R. §771.123 (b) (2003) and by the Minnesota Environmental Quality Board. Minn. R. 4410.2100 subp. 1 (2005) identifies scoping as a process "used before the preparation of an . . . [environmental impact statement] to reduce the scope and bulk of an EIS" [Environmental Impact Statement] through identification of "only those potentially significant issues relevant to the proposed project." Scoping, in addition, defines the parameters of preparation time for the EIS and is used "to determine the permits for which information will be developed concurrently with the EIS." *Id.*

in St. Croix County, Wisconsin. 1995 Final EIS at 1-2⁴. The 1995 Final EIS considered three possible crossings areas: the north, central, and south corridors. *Id.* at 3-1. The 1995 Final EIS recommended that the crossing be in the north alignment of the south corridor. *Id.* at 1-1 and Figures 1-2 and 1-3. The project using this alignment was designated Minnesota State Projects 8214-92 and 8217-10. *Id.* at coversheet.

While Oak Park Heights understood the need for a new bridge over the St. Croix, it did not initially approve the location chosen in the 1995 Final EIS, favoring instead the central corridor. *Id.* at 1-11, 1-12 and 3-2. At the same time that Oak Park Heights received the 1995 Final EIS, however, it received final layout plans from Mn/DOT for the recommended alignment. *See* Oak Park Heights Resolution No. 95-08-39.⁵ On August 14, 1995, Oak Park Heights approved the final layout plans for this alternative. *Id.*

After approval of the 1995 Final EIS by Mn/DOT and Wis/DOT officials and following issuance of the Record of Decision by the FHWA, “work began on final design of the river crossing and the approach roadways; right-of-way was acquired and site preparation work was initiated.” Mn/DOT, Wis/DOT, Federal Highway Administration, “2003 Amended Scoping Document And 2003 Amended Draft Scoping Decision Document St. Croix River Crossing” (November, 2003) (“2003 Amended Scoping Document”) at 4. Preliminary approval for this

⁴ Those portions of the 1995 Final EIS cited in this memorandum are set out in the appendix to Nick Thompson’s affidavit. The appendix also contains other documents relied upon and cited by Mn/DOT in this matter. These documents, the pleadings and affidavits in this case, and the attachments to this memorandum comprise the record on which defendant’s dispositive motion is made. Minn. R. Gen. Prac. 115.03 (d)(2).

For a more extensive view of documents and information regarding various St. Croix River Bridge alternatives, *see* <http://www.dot.state.mn.us>; then follow “Construction Projects” hyperlink to “St. Croix River Crossing Project” hyperlink to “Documents” hyperlink or “Project Background” hyperlink.

⁵ A copy of this resolution is attached. The 1995 final layout plans referred to in this resolution are attached as Exhibit B to the Affidavit of Nick Thompson (“Thompson Aff.”).

work was secured in November, 1995, from the FHWA. *Sierra Club North Star Chapter v. Pena*, 1 F. Supp. 2d 971, 975 (D. Minn. 1998).

The Sierra Club litigation was commenced in June, 1996, with allegations that construction of a proposed bridge was progressing without a determination as to whether it “would have a direct and adverse affect upon the values for which the lower St. Croix was included in the [wild and scenic rivers system]” and in violation of Section 7 (a) of the Wild and Scenic Rivers Act, 16 U.S.C. §1278 (a)(“Section 7”) (“WSRA”). *Sierra Club*, 1 F.Supp. 2d at 975. In September of that year, the National Park Service asked the United States Coast Guard and the U.S. Army Corps of Engineers to withhold the issuance of necessary dredging and filling permits pending a Section 7 analysis. *Id.* In October, 1996, the FHWA rescinded its authorization for the same reason. *Id.*

One of the central issues in the Sierra Club lawsuit was the contention by Minnesota and Wisconsin highway officials that a Section 7 evaluation was not necessary because the determination by the Department of Interior and by the National Park Service that the proposed bridge constituted a “water resources project” within the meaning of the WSRA was unauthorized and beyond the scope of the authority of the Secretary of the Interior. *Sierra Club*, 1 F.Supp.2d at 975. After construction of the bridge had been on hold for over two years, the federal district court rejected that argument in April, 1998. *Id.* at 983.

With the ink barely dry on the Sierra Club decision, officials turned in June, 1998, to former Mn/DOT Commissioner Richard Braun. Richard R. Braun, “St. Croix River Crossing - A Graceful Solution For A Magnificent River” (September 28, 1998) (“Braun Report”) at 5. Braun met with individuals and organizations both public and private. *Id.* at 7-8. He began essentially from scratch, examining the need for a bridge, the design of the bridge, and where the bridge should be located. *Id.* at 6. Braun recommended construction of a four-lane bridge

approximately 3600 feet south of the Stillwater Lift Bridge. *Id.* at 38-39 and Figure 9. Implementation of and work on Braun's proposals came to an end in January, 2001, for a variety of reasons including the inability of interested parties to "reach a consensus on the future of the [Stillwater] lift bridge." Mn/DOT, Wis/DOT and Federal Highway Administration, "2006 Supplemental Final Environmental Impact Statement St. Croix River Crossing Project" (June, 2006) ("2006 Supp. Final EIS") at 1-9.

The current proposed location of the St. Croix River crossing is the product of a process that began in June, 2002, after work had been suspended on the alternative suggested in the Braun Report. 2006 Supp. Final EIS at 1-9, 3-9 to 3-16. The current preferred alternative is the result of federal emphasis on combining environmental concerns with efficient review of transportation infrastructure projects, numerous meetings between the 28 member stakeholders group, transportation officials, and public and private interests as to the placement and design of the bridge and its supporting roadwork, and the future use of the Stillwater Lift Bridge. 2006 Supp. Final EIS at 1-9 and 1-10.

In June, 2003, formal facilitated meetings began among state, local, and federal government agencies and private organizations in order to address the "environmental, historical, and transportation concerns surrounding" a crossing of the St. Croix River. 2003 Amended Scoping Document at 5; accord 2006 Supp. Final EIS at 1-9. The agreement signed by these organizations, *i.e.*, the "Stakeholders Group", included consideration of new bridge alternatives, local concurrence for transportation projects, and criteria for seeking a preferred alternative. 2003 Amended Scoping Document at App. B, p.1. Participants, including Mn/DOT and Oak Park Heights agreed to use this process in an "attempt to resolve all questions associated with the St. Croix crossing." *Id.* at 3. The work of the Stakeholders Group was successful. The 2003 Amended Final Scoping Document identified six alternatives. 2006 Supp. Final EIS at 3-1.

Thereafter, four alternatives were identified in the 2004 Amended Scoping Decision Document in addition to a no-build alternative. *Id.* These alternatives were then studied in the 2004 Supplemental Draft Environmental Impact Statement-St. Croix River Crossing Project. *Id.* at 3-1 to 3-8.

The 2006 Supp. Final EIS contains the current preferred alternative for the St. Croix River Crossing Project and its connecting roadwork. *Id.* at 3-8 to 3-9. The current alternative is designated as B1a and numbered Minnesota State Projects 8214-114 and 8217-112. *Id.* at 3-8 and p.1. Among the St. Croix River crossing alternatives discarded as a result of the amended scoping phase in 2003 - 2004 and not present in the 2006 Supp. Final EIS is Alternative B. *Id.* at 3-1 and 3-2. "Alternative B was the original 1995 Final EIS preferred alignment." *Id.* at 3-2. Alternative B is numbered Minnesota State Projects 8214-92 and 8217-10. 1995 Final EIS at coversheet.

The St. Croix River crossing project envisioned by the 2006 Supp. Final EIS is different than the project that would have been built using the 1995 EIS preferred alternative.⁶ Examples of these differences begin with the bridge design. The 1995 bridge was conventional with haunched girders, whereas the 2006 version is an extradosed design. *Compare* 2006 Supp. Final EIS at 3-21 with 1995 Final EIS at 4-33. The 2006 preferred alternative results in "less bridge structure over the St. Croix River and fewer piers [4-6 vs. 8] in the Riverway." 2006 Supp. Final EIS at 3-21. This change in design is accompanied by a change in alignment. *Id.* The 2006 preferred alternative allows a 200 foot mussel bed in the river to remain undisturbed and a wetland to be avoided. *Id.* By using an existing Xcel Energy barge unloading facility in the course of construction, the current design "avoids the placement of a temporary barge docking

⁶ Attached as Exhibit A to Thompson Aff. is a chart setting out these differences.

facility” in the river. *Id.* Finally, the 1995 Final EIS left the Stillwater Lift Bridge open to vehicular traffic. *Id.* The 2006 preferred alternative closes off this use and converts the bridge to a trail for pedestrians and bikes. *Id.*

The final layout for the 2006 St. Croix River Crossing Project differs in at least 17 aspects from the 1995 final layout. Thompson Aff., Exs. A, B, and C. 7 changes involve the acquisition of additional right-of-way (“ROW”) and two involve altered highway access. *Id.* While but three of the changes are in Bayport and only 6 in Stillwater, each of the 17 differences between the 1995 and the 2006 final layouts is located in Oak Park Heights. *Id.*

The final layout of the alternative preferred by the 2006 Supp. Final EIS has been submitted to Stillwater and to Bayport for municipal approval. Thompson Aff. at ¶5, Exs. D and E. These submissions were made pursuant to the current municipal consent law. *Id.* at ¶5. Stillwater approved the layout on October 31, 2006; Bayport did so on January 8, 2007. Thompson Aff., Exs. D and D.⁷ The 2006 final layout has not yet been submitted to Oak Park Heights for municipal approval because of this lawsuit. *Id.* at ¶5.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD.

To the extent that the Court considers defendant’s motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e), the facts as pled in the Amended Complaint are to be taken as true. *Northern States Power Co. v. Franklin*, 265 Minn. 391, 122 N.W.2d 26 (1963). If, however, the facts as

⁷ Because the 1995 final layout did not have an impact on Bayport, that plan was not presented to that municipality for approval. Thompson Aff. at ¶5. The incongruity that thus emerges if Oak Park Heights’ position is adopted leaves the Commissioner seeking municipal approval from Oak Park Heights pursuant to the 2000 law but from Bayport pursuant to the current law. The legislature certainly could not have intended such an unequal application of law. *Kline v. Berg Drywall, Inc.*, 685 N.W.2d 12, 23 (Minn. 2004) (court must assume a statute is constitutional and therefore “place a construction on . . . [it] that will find it so if at all possible”).

pled do not sustain the claims made, dismissal is appropriate. *Wiegand v. Walser Automotive Groups, Inc.*, 683 N.W.2d 807 (Minn. 2004). Should the Court consider facts established outside of the Amended Complaint, the motion becomes one for summary judgment and should be decided pursuant to Minn. R. Civ. P. 56.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. “Rule 56 of the Minnesota Rules of Civil Procedure is designed to implement the stated purpose of the rules securing a just, speedy, and inexpensive determination of an action by allowing a court to dispose of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). In opposing summary judgment, “an adverse party may not rest upon the mere averments or denials of the adverse party’s pleading but must present specific facts showing that there is a genuine issue for trial.” Minn. R. Civ. P. 56.05. The facts in dispute must be material. *Id.*; *Pischke v. Kellen*, 384 N.W.2d 201, 205 (Minn. Ct. App. 1986). A material fact is a fact that affects the resolution of the case. *Zappa v. Fahey*, 310 Minn. 555, 245 N.W.2d 258, 259-60 (Minn. 1976). Defendant believes that the facts set out above and in the accompanying affidavits are not in dispute.

In order for a genuine issue of fact to exist, enough evidence must be presented to support a reasonable jury verdict in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986) (citing *First Nat. Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 289, 88 S. Ct.

1575, 1592 (1968)). While the analysis of the Supreme Court's "trilogy" of 1986 cases has not been specifically adopted by the Minnesota Supreme Court, it has indicated that the import of the Supreme Court's analysis, which favors a more liberal granting of summary judgment, is consistent with Minnesota's standards for summary judgment. See *DLH, Inc. v. Russ*, 566 N.W.2d at 71; *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989). In short, "there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusion." *DHL, Inc.*, 566 N.W.2d at 71; see *Drydal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004). Summary judgment is "mandatory against a party who fails to establish an essential element of her claim." *Lloyd v. In Home Health, Inc.*, 523 N.W.2d 2, 3 (Minn. Ct. App. 1994).

II. THE CURRENT MUNICIPAL CONSENT LAW GOVERNS MN/DOT'S SUBMISSION OF THE FINAL LAYOUT OF THE 2006 PREFERRED ALTERNATIVE TO OAK PARK HEIGHTS.

When the current municipal consent procedures were established, the legislature indicated that they should apply to "highway construction projects for which municipal approval is first sought after . . . [May 25, 2001]." Act of May 24, 2001, ch. 191, § 10, 1991 Minn. Laws at 713 ("§ 10"). In interpreting which municipal consent law applies to the 2006 preferred alternative, the Court must initially determine whether the meaning of § 10 is unambiguous. *State v. Stevenson*, 656 N.W.2d 235, 238 (Minn. 2003). If the statute is unambiguous, its plain meaning should be applied. *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996). Statutory ambiguity exists, however, when more than one reasonable interpretation can be made of a provision. *Stevenson*, 656 N.W.2d at 238. If, after giving words their common approved usage and natural meaning, an ambiguity exists, the statute must be construed. *Otis Lodge, Inc. v*

Comm'r of Taxation, 295 Minn. 80, 206 N.W.2d 3, 6 (Minn. 1972). In the instant case, ambiguity is present because of the uncertainty as to whether the highway construction project to which § 10 refers is the 1995 design or the 2006 design for the St. Croix River Crossing.

Given the foregoing ambiguity, the Court should look to what the legislature sought to accomplish by the 2001 amendments as well as to the consequences of the interpretations proffered by the State and by Oak Park Heights. *In re Peterson's Estate*, 230 Minn. 478, 483-84, 42 N.W.2d 59, 63 (1950). After conducting such an inquiry, it is fair to say that the legislature's intent included a desire to not subject either the State or municipal governments to a redundant or to a meaningless municipal consent process.

If the Commissioner had submitted a final layout plan for municipal approval prior to May 25, 2001; had received such approval; and was proceeding on the basis of such a plan, the legislature intended the parties to complete the municipal consent process using the 2000 law. Likewise, if an approved highway project had been halted prior to May 25, 2001, and thereafter restarted with the same design, the legislature did not intend for the parties to restart the consent process and for them to thereafter cover much of the same ground using the current municipal consent law. Simply put, if the Commissioner had sought to effectuate the 1995 final layout plan, use of the 2000 municipal consent law was consistent with the legislative objective in § 10.

This is not, however, what occurred in the case at bar. Some twelve years after obtaining municipal consent and almost six years after the effective date of § 10, the current Commissioner wishes to build a bridge over the St. Croix River according to a new final layout. That project is not the project that Oak Park Heights approved in 1995. The legislature could not have thought in 2001 that the Commissioner could now bypass the public participation component of the

current municipal consent law on the basis that a previous commissioner has sought and obtained municipal consent from, *inter alia*, Oak Park Heights, in 1995.⁸

Put another way, the legislature wants Mn/DOT and local governments to have the responsibilities and benefits of the new municipal consent procedures for projects in which the final layout plans had not been presented for municipal approval prior to May 25, 2001. Oak Park Heights does not read the statute in this straight forward manner.

In the instant case, Mn/DOT sought and obtained approval from Oak Park Heights of the layout envisioned in the 1995 Final EIS. Oak Park Heights Resolution No. 95-08-39. Subsequently, that alternative was abandoned. 2006 Supp. Final EIS at 3-1 and 3-2. The Commissioner now intends to use another alternative (B1a), one envisioned in the 2006 Supp. Final EIS. *Id.* at 3-8 and p. 1. She has presented this final layout to other municipalities, *i.e.*, Stillwater and Bayport, but has not done so to Oak Park Heights. Thompson Aff. at ¶5.

If Oak Park Heights' position is adopted, the 2006 final layout plans need not be reviewed *per se*. Approval by it of a final layout has already occurred. Prior to obtaining Oak Park Heights' approval of the 1995 final layout plans, the Commissioner was required by Minn. Stat. § 161.174 (2000) to conduct hearings at which "all interested persons . . . [were to] be permitted to present their views on the proposed highway construction or improvement." Minn. Stat. § 161.173 (2000). Such hearings could have been "continued as often as necessary."

⁸ As was noted earlier, *n.6 supra*, municipal consent was not sought from Bayport in 1995. The Commissioner has therefore correctly proceeded pursuant to the current municipal consent law and has obtained such consent from that municipality. Thompson Aff. at ¶6. Surely the legislature did not intend that the identical set of final layout plans would be presented for municipal approval pursuant to different procedures. No rational basis exists for Bayport's review of the 2006 final layout plans pursuant to the current municipal consent law while Oak Park Heights' review is governed by the 2000 law. This Court should not adopt such a view of §10. *In re Peterson's Estate*, 230 Minn. at 483-84, 42 N.W.2d at 63 (1980) (in construing a statute, the court is to consider "consequences of a particular interpretation"); Minn. Stat. § 645.17(1) (2006) (Legislature does not intend a result that is "absurd").

If Oak Park Heights' notion that the 2000 municipal consent procedures apply is correct, the opportunity that interested citizens and affected groups have to present their views on a final layout plan pursuant to Minn. Stat. §§ 161.173 and 174 (2000) will not exist *vis-à-vis* the current preferred alternative. Pursuant to the 2000 law, once the Commissioner obtained municipal consent, she could "prepare final construction plans and specifications for the highway construction or improvement consistent with the adopted layout plan." Minn. Stat. § 161.174 (2000). Having obtained municipal consent for the 1995 final layout, the Commissioner now needs only submit to Oak Park Heights "[n]ot less than 120 days before the date . . . [she sets] for the receipt of construction bids . . . [on the project] a copy of as complete a set of construction plans as possible." Minn. Stat. § 161.177 (2000). If, thereafter, Oak Park Heights concludes that the "construction plans are not in accordance with the layout plan as approved, Oak Park Heights may "request the establishment of a highway appeal board as provided in Section 161.175, and the highway appeal board shall approve the plans following the procedures outline in that section, except that action and comment is limited to changes from or additions to the layout."

*Id.*⁹ Adoption of Oak Park Heights' view of the municipal consent procedures thus permits the significant and substantial changes present in the 2006 preferred alternative to bypass the collaborative and more inclusive public hearing process set out in Minn. Stat. § 161.173 (2000).

Fairly read, the 2000 municipal consent procedures established highway appeal board review of the final construction plans as a check and balance on previously approved final layout plans. The 2001 legislature did not intend to allow a highway construction project that had

⁹ Although this provision requires that if a highway appeal board approves plans, it must follow the procedures in Minn. Stat. § 161.175 (2000), that section contains no procedures. Minn. Stat. § 161.176 (2000) does contain the powers of the highway appeal board. After hearing evidence, the appeal board is required to approve the Commissioner's layout plan or an alternative that must be "consistent with minimum federal requirements" and presented by a disapproving municipality. *Id.* at subd. 1.

stopped and started twice, abandoning its original final layout plans along the way, to have a new and substantially different final layout plan approved or disapproved solely by the three individuals who comprise the reviewing body. This is the view that Oak Park Heights asks this Court to adopt regarding the applicability of the 2000 municipal consent law to the St. Croix River Crossing Project. That view is not consistent with what the 2001 legislature sought to accomplish and is not a consequence that it intended.

The 1995 St. Croix River Crossing project is not the same as the 2006 St. Croix River Crossing project. Indeed, the alternative preferred in 1995 has been rejected in the 2006 Supp. Final EIS. *Id.* at 3-1 and 3-2. Moreover, as we noted above, the 2006 project is not the project for which Mn/DOT sought and obtained approval in 1995. *Supra*, at 12. First, as a technical matter, the projects have different numbers. *Compare* 1995 Final EIS cover sheet with 2006 Supp. Final EIS at p. 1. Accordingly, they are entitled to be viewed as separate projects. *See State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d at 701 (court should “construe technical words according to their technical meaning”).

Second, and more significant, the 17 differences between the two final layouts reveal why the projects are not identical. Thompson Aff., Exs. A, B, and C. Six of those alterations have to do with what property the State will take for the project. *Id.* The 2006 project will require the taking of 15 acres of ROW in addition to those acquired for the 1995 project. Thompson Aff., ¶7. Highlighting the changes is the design of the bridge itself. How it looks and how it is constructed in the 2006 preferred alternative differ markedly from the 1995 version. *Id.* at Exs. A, B, and C. Another distinction is that three different trails were added to the latest version. *Id.* In the end, it is not possible to conclude that the 2006 St. Croix River Crossing Project is the project for which Mn/DOT sought and obtained municipal consent in 1995.

III. MN/DOT'S OCTOBER 5, 2004, LETTER TO OAK PARK HEIGHTS DOES NOT STOP IT FROM APPLYING THE CURRENT MUNICIPAL CONSENT LAW TO THE 2006 PROPOSED ST. CROIX RIVER CROSSING PROJECT IF THE COURT CONCLUDES THAT THIS IS THE APPROPRIATE LAW FOR THE PARTIES TO FOLLOW.

Oak Park Heights seeks two forms of declaratory relief in this matter. The first, addressed above, is a request that the Court declare that the current St. Croix River Crossing Project is subject to the 2000 municipal consent procedures. Amended Complaint, "Wherefore Clause" at ¶1. Oak Park Heights' second request is that the Court declare that Mn/DOT is bound by the October 5, 2004, representation (the "October 5, 2004 letter") from Mn/DOT East Metro Area Manager Rick Arnebeck to Oak Park Heights City Administrator Eric Johnson that the Department would continue to use the municipal consent procedures set out in the 2000 law. *Id.* at ¶2 and Ex. A.

Though never designated as such, the argument that Oak Park Heights is advancing is that the State is estopped from using the present municipal consent law because it agreed to use the 2000 version of that law in the October 5, 2004, letter. As is demonstrated below, this argument turns the doctrine of equitable estoppel on its head. Oak Park Heights is, in effect, seeking a declaration that even if the Court determines that the appropriate municipal consent law is the present version, the State, having mistakenly represented otherwise in the October 5, 2004, letter, is now foreclosed by equitable estoppel from following the applicable law. As the Court might expect, decisional law does not support granting Oak Park Heights such relief.¹⁰

¹⁰ In a June 4, 2007, letter, plaintiff served the State with its Amended Complaint. Exhibit B to that document is a December 17, 2004, letter from Arnebeck to Johnson restating the representation in his October 5, 2004, letter (Exh. A) that Mn/DOT would be using the 2000 municipal consent law. Our arguments as to why the State is not estopped from following the current municipal consent law by the earlier letter apply with equal force to a lack of estoppel by the later letter.

Oak Park Heights' request for equitable estoppel should be viewed against the judicial determination that such relief "should be applied sparingly against the government and only if wrongful conduct threatens to work a serious injustice." *AAA Striping Services Co. v. Minnesota Dep't of Transp.*, 681 N.W.2d 706, 720 (Minn. Ct. App. 2004). Oak Park Heights is not entitled to equitable estoppel unless it can establish each of the five following elements:

- (1) Mn/DOT made a misrepresentation of material fact;
- (2) Mn/DOT, in this case Rick Arnebeck, knew that the misrepresentation was false;
- (3) Mn/DOT intended its representation to be acted upon;
- (4) Oak Park Heights did not know the correct facts; and
- (5) Oak Park Heights relied upon Arnebeck's misrepresentation in the October 5, 2004, letter to its detriment. *Id.* (citing *REM-Canby, Inc. v. Minnesota Dep't of Human Servs.*, 494 N.W.2d 71, 74 (Minn. Ct. App. 1992)).

When Oak Park Heights' Amended Complaint is reviewed in light of the requirement that it prove each of these five elements, fatal deficiencies in that document are apparent. Oak Park Heights does not allege that Mn/DOT made a material misrepresentation. Next, Oak Park Heights has not alleged that Mn/DOT made a misrepresentation knowing that it was false. Apparently the alleged misrepresentation in Rick Arnebeck's October 5, 2004, letter is that Mn/DOT would follow the 2000 municipal consent law. In truth, when Arnebeck took that position, he did so in the good faith belief that this is what the legislature intended. Affidavit of Rick Arnebeck at ¶ 2.

Finally, Oak Park Heights has made no allegation that it did not know any key fact or that it has relied upon Arnebeck's October 5, 2004, letter to its detriment. Oak Park Heights' failure

to meet the elements of a equitable estoppel claim is a sufficient basis for the Court to dismiss that portion of its Amended Complaint. *AAA Striping Services Co.*, 681 N.W.2d at 720.

The fatal flaws in Oak Park Heights' request for the application of equitable estoppel are not limited to the foregoing. Of the five elements set out above, the most important is the alleged government misconduct. *State v. Ramirez*, 597 N.W.2d 575, 578 (Minn. Ct. App. 1999). The government does not engage in the requisite wrongful conduct when the action at issue has been undertaken as a result of "simple inadvertence, mistake, or imperfect conduct." *Prairie Island Indian Comty. v. Minnesota Dep't of Pub. Safety*, 658 N.W.2d 876, 890 (Minn. Ct. App. 2003) (internal citation omitted). At best that is what has occurred in this case.

In *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006), the supreme court observed that the wrongful conduct standard contains "some degree of malfeasance." The court therefore held that the Minnesota tax court's "good faith interpretation of a statute, even if erroneous, would not rise to the level of [the required] malfeasance." *Id.* at 772. As is evident from Arnebeck's testimony, he believed that his representation that Mn/DOT would follow the 2000 municipal consent law was based upon a correct interpretation of the 2001 amendments. Arnebeck Aff. at ¶ 2. What malfeasance can be found in such conduct?

An additional reason why the requested estoppel should not be granted springs from its nature as an equitable form of relief. Decisional law teaches that when a party seeks to apply equitable estoppel against the government, the court should examine the nature of the public interest, if any, that would be frustrated if estoppel is permitted. *Save Lantern Bay v. Cass County Planning Comm'n*, 683 N.W.2d 862, 868 (Minn. Ct. App. 2004); *State v. Ramirez*, 597 N.W.2d at 577 ("estoppel is available as a defense against the government . . . if the public's interest would not be unduly damaged by the imposition of the estoppel") (internal citations omitted). A significant public interest in the instant matter is that the 2006 St. Croix

River Crossing project be submitted for municipal consent pursuant to the proper law. To the extent that Oak Park Heights asks the Court to allow it to use the 2000 law following a finding that the current law governs and solely on the basis that Mn/DOT mistakenly promised to follow an inapplicable law represents a near total disregard of the public's interest.

Following from the foregoing description of what Oak Park Heights is seeking, *i.e.*, judicial direction that Mn/DOT must grant it municipal review pursuant to inapplicable statutes, is a final reason why such relief should not be awarded. If the Court concludes, as requested by the State, that the current municipal consent procedures should be followed, Mn/DOT's earlier representation that it would use the 2000 law cannot come to fruition through estoppel. *Senior Citizens Coalition of Northeastern Minnesota v. Minnesota Pub. Utilities Comm'n*, 355 N.W.2d 295, 304 (Minn 1984) (“[w]here an agency has no authority to act, agency action cannot be made effective by estoppel”).

Thus, in *A.W.G. Farms, Inc. v. Fed. Crop Ins. Corp.*, 586 F.Supp. 690, 694 (D. Minn. 1984), the court observed that “misrepresentations by government agents cannot alter duly enacted legislation or regulations.” *See also Shakopee Mdewakanton Sioux (Dakota Community) v. Minnesota Campaign Finance and Pub. Disclosure Bd.*, 586 N.W.2d 406, 412 (Minn. Ct. App. 1998) (court refused to hold that board was estopped from requiring political contributions to be disclosed because it erroneously failed to require such disclosures in the past). If, therefore, Oak Park Heights obtains a declaration that the current river crossing project is subject to the current municipal consent laws, it cannot avoid the consequences of that holding through equitable estoppel.

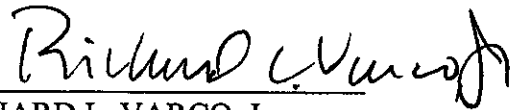
CONCLUSION

For all the reasons set forth about, the relief requested by Oak Park Heights in this matter should be denied and its Amended Complaint dismissed.

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Respectfully submitted,

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