

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT
CASE TYPE: 14. Other Civil
(declaratory judgment and MERA)

State of Minnesota by Smart Growth
Minneapolis, a Minnesota nonprofit
corporation, Audubon Chapter of Minneapolis
and Minnesota Citizens for the Protection of
Migratory Birds,

Case File No. _____
The Honorable _____

**VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF UNDER MERA**

Plaintiffs,

v.

City of Minneapolis,

Defendant.

Plaintiffs State of Minnesota by Smart Growth Minneapolis, a Minnesota nonprofit corporation (Smart Growth), Audubon Chapter of Minneapolis (Audubon) and Minnesota Citizens for the Protection of Migratory Birds (MCPMB) (Plaintiffs) for their complaint against Defendant City of Minneapolis (City) allege as follows:

I. CASE OVERVIEW

1. On Friday, December 7, 2018 at 9:30 a.m., City, through its City Council, is scheduled to approve of its "Minneapolis 2040 Comprehensive Plan" (2040 Plan) per its Minn. Stat. § 473.864, subd. 2-required "once every ten years" comprehensive plan "review." See <https://minneapolis2040.com/pdf/>.¹

¹ Per Minn. Stat. § 473.864, subd. 1, City is required (*i.e.*, "shall") by December 31, 2018 to "review and, if necessary, amend its entire comprehensive plan." But, per its § 473.864, subd. 2 authority, the Metropolitan Council has given City until "**December 21, 2018**" to "make a request of up to 6 additional months to submit their plan, or through June 30, 2019." <https://metro council.org/Handbook/Review-Process/Comprehensive-Plan-Updates.aspx>. Indeed, on Wednesday, November 28, 2018, Plaintiffs, to no avail, reminded Mayor Jacob Frey that "Minneapolis can certainly seek an extension from Met Council, as St. Paul did." Ex. 5.

2. With nearly 150,000 "anticipated new [housing] units" (Ex. 1 at 6) and densification (or "upzoning") increases for its existing residential areas of "43%," "149%," "210%," "326%" and "435%" (*id.* at 11-12), the 2040 Plan is the "furthest reaching" upzoning proposal "from a U.S. municipality" (Ex. 2 at 1-2).

3. Not surprisingly, then, Plaintiffs have, through their highly-credentialed environmental consultant Sunde Engineering (Sunde) (Ex. 1), easily satisfied their "prima facie showing" under Minn. Stat. ch. 116B (Minnesota Environmental Right Act (MERA)) that the 2040 Plan "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.

4. Yet, even though an exhaustive environmental review is its only realistic way to satisfy its MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing" (*id.*), City has declined Plaintiffs' repeated requests that it, like Seattle recently did with its own (albeit scaled-down) upzoning proposal entitled "Seattle 2035 Comprehensive Plan,"² voluntarily do so (Exhs. 3-5).

5. Thus Plaintiffs seek, as compelled under MERA, to (1) immediately enjoin City from approving of its 2040 Plan and (2) order the continuation of the injunction unless and until City satisfies its requisite "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing," presumably through its voluntary environmental review.

6. And, because City has continued to materially change its 2040 Plan long after its November 14, 2018 close of public input, Plaintiffs could not have commenced its action any sooner. For example, at the Wednesday, November 28, 2018 meeting of its City Council

² Citywide Implementation of Mandatory Housing Affordability (MHA) Final Environmental Impact Statement, available at https://www.seattle.gov/Documents/Departments/HALA/Policy/MHA_FEIS/0_CoverFactSheet_MHA_FEIS_2017.pdf.

Committee of Whole, City Council approved of Councilmember Bender's 12 sets of proposed changes affecting 4,994 residences,³ as well as several other material changes thereto such as the head-scratching increased residential densification in the flood zone.⁴ City has, moreover, the opportunity to make further changes to the 2040 Plan at the City Council Committee of the Whole meeting at 1:30 p.m. on Wednesday, December 5, 2018 and at its City Council meeting at 9:30 a.m. on Friday, December 7, 2018, though the reasonable expectation is that any such last-minute changes will be modest.

II. MERA'S REQUIREMENTS

A. OVERVIEW

7. MERA empowers almost any citizen, group or corporation in Minnesota to bring a lawsuit "for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction." Minn. Stat. § 116B.03, subd. 1 (emphasis added).

8. And "pollution, impairment, or destruction" under § 116B.03, subd. 1 is broadly defined under § 116B.02, subd. 5 as inclusive of "any conduct which . . . is likely to materially adversely affect the environment."

B. STANDING REQUIREMENT

9. A MERA action can be commenced by "[a]ny person residing within the state . . . or any partnership, corporation, association, organization or other entity having shareholders,

³Available at <https://lms.minneapolismn.gov/Download/File/1877/Mpls%202040%20-%20Council%20President%20Map%20Amendments.pdf>.

⁴<https://www.dropbox.com/s/bp4vv10jwzmjvl/com.apple.AVKit.Share-EBBC8496-719F-4163-B7D4-6FA02A535B1A.mov?dl=0>.

members, partners or employees residing within the state." Minn. Stat. § 116B.03, subd. 1 (emphasis added).

10. And "person" is broadly defined under MERA as follows:

"Person" means any natural person, any state, municipality or other governmental or political subdivision or other public agency or instrumentality, any public or private corporation, any partnership, firm, association, or other organization, any receiver, trustee, assignee, agent, or other legal representative of any of the foregoing, and any other entity, except a family farm, a family farm corporation or a bona fide farmer corporation.

Minn. Stat. § 116B.02, subd. 2.

C. SHIFTING BURDENS OF PROOF

1. The plaintiff's two requirements for its requisite "prima facie showing" when there is not an alleged violation of "any environmental quality standard"

11. When there is not an alleged violation of "any environmental quality standard," MERA requires that "the plaintiff shall have made a prima facie showing that the conduct of the defendant . . . 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 (emphasis added).

12. "Shall" is mandatory." Minn. Stat. § 645.44, subd. 16.

13. The plaintiff's "prima facie showing" has, more specifically, two requirements. *State by Archabal v. County of Hennepin*, 495 N.W.2d 416, 421 (Minn. 1993).

14. "First, the plaintiff must show the existence of a protectable natural resource." *Id.*

15. Second, the plaintiff must show the "pollution, impairment or destruction" — as defined in Minn. Stat. § 116B.02, subd. 5 above — of that "natural resource" which is likely to be caused by the "conduct at issue." *Id.*

a. **REQUIREMENT NO. 1: "A protectable natural resource"**

16. "Natural resources" are broadly defined under MERA as follows:

"Natural resources" shall include, but not be limited to, all [(1)] mineral, [(2)] animal, [(3)] botanical, [(4)] air, [(5)] water, [(6)] land, [(7)] timber, [(8)] soil, [(9)] quietude, [(10)] recreational and [(11)] historical resources. [(12)] Scenic and [(13)] esthetic resources shall also be considered natural resources when owned by any governmental unit or agency.

Minn. Stat. § 116B.02, subd. 4 (emphasis and bracketed information added).

17. "'Shall' is mandatory." Minn. Stat. § 645.44, subd. 16.

18. Consistent with its broad definition, "natural resources" has been broadly defined by the courts. *State by Archabal*, 495 N.W.2d at 418 (Armory protected natural resource); *State by Powderly v. Erickson*, 285 N.W.2d 84, 88 (Minn. 1979) (historical row houses protected natural resource); *Minnesota Public Interest Research Group v. White Bear Rod & Gun Club*, 257 N.W.2d 762, 770 (Minn. 1977) (lakes and wetlands are "natural resources"); *State by Fort Snelling State Park Ass'n v. Minneapolis Park & Recreation Bd.*, 673 N.W.2d 169, 174-75 (Minn. App. 2003) (historical polo grounds on Fort Snelling site protected natural resource); *State ex rel. Wacouta Twp. v. Brunkow Hardwood Corp.*, 510 N.W.2d 27, 29 (Minn. App. 1993) (holding "bald eagles and the trees in which they roost are a natural resource within the scope of MERA" and noting that "[i]n general, MERA's definition of natural resources is presumed to be broad"); *State by Drabik v. Martz*, 451 N.W.2d 893, 896-97 (Minn. App. 1990) (scenic and esthetic resources impacted by view of proposed radio tower protected natural resource).

b. **REQUIREMENT NO. 2: "[P]ollution, impairment, or destruction"**

19. Consistent with the above-stated broad definition of "pollution, impairment, or destruction" under Minn. Stat. § 116B.02, subd. 5 (*see above* ¶ 8), the "materially adverse effects [on] . . . the environment" has also been broadly construed. *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 805 (Minn. App. 2001) (identifying the broad nature

of "materially adverse affects" provision of MERA by "recognizing that there are instances when environmental regulations may not keep up with changing conditions"); *see State by Drabik*, 451 N.W.2d at 897 (finding MERA "broad enough" to prevent materially-adverse effects on scenic and aesthetic resources from installation of radio tower on private property); *Minnesota Public Interest Research Group*, 257 N.W.2d at 781 (describing MERA, in the context of materially-adverse effects, as "a far-reaching legislative enactment").

20. Courts will consider the following five factors in determining whether the "conduct at issue" "is likely to materially adversely affect the environment":

- (1) The quality and severity of any adverse effects of the proposed action on the natural resource 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.

Citizens for a Safe Grant, 624 N.W.2d at 805-06 (quoting *White v. Minnesota Dep't of Natural Resources*, 567 N.W.2d 724, 738 (Minn. App. 1997)).

2. **The defendant's requisite "rebut[tal]" or "affirmative defense" to such a "prima facie showing"**

21. Whenever the MERA plaintiff has made such a "prima facie showing," the defendant has to either (1) "rebut the prima facie showing by the submission of evidence to the contrary" or (2) "show, by way of an affirmative defense, that [(a)] there is no feasible and

prudent alternative and [(b)] the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare 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," though "[e]conomic considerations alone shall not constitute a defense hereunder." Minn. Stat. § 116B.04 (emphasis and bracketed information added).

a. **"REBUT[TAL]": "[T]he submission of evidence to the contrary"**

22. The defendant's MERA-required "rebut[tal]" to the plaintiff's "prima facie showing" requires its "submission of evidence to the contrary." *Id.* (emphasis added).

23. The defendant's "evidence" is required to be specific, substantive and verifiable, not vague, conclusory and speculative. *See, e.g., Minnesota Public Interest Research Group*, 257 N.W.2d at 781 (conclusory opinion testimony insufficient to overcome presumption when "defendant made no attempt to show that the operation of the Gun Club could be conducted in such a way . . . that it would not materially adversely affect the natural resources of the area").

b. **"AFFIRMATIVE DEFENSE": "[S]how . . . that there is [(1)] no feasible and prudent alternative and [(2)] the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare 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"**

24. "[A]nd" is a conjunctive. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 874 n.8 (Minn. 2010) ("We conclude that the word 'and' is conjunctive").

25. As such, the defendant's MERA-required "affirmative defense" to the plaintiff's "prima facie showing" requires its proof of both prongs thereto—*i.e.*, (1) there is "no feasible and prudent alternative" to "the conduct at issue" and (2) "the conduct at issue" is "consistent with and required for promotion of the public health, safety, and welfare 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."

26. Critically, other than through (1) the state's highest level of environmental review (*i.e.*, an Environmental Impact Statement (EIS) under Minn. R. 4410.2000-.3200) or (2) the equivalent thereto, (*i.e.*, "substitute methods of environmental review" under Minn. R. 4410.3600-.4000, including an Alternative Urban Areawide Review (AUAR) under Minn. R. 4410.3610), there is virtually no way for the defendant to satisfy both of these required prongs for "conduct at issue" such as the 2040 Plan's massive, city-wide upzoning proposal.

27. As to the appropriateness of an EIS to satisfy the first prong of the MERA-required "affirmative defense" for such "conduct at issue" (*i.e.*, "no feasible and prudent alternative"), the Minnesota Environmental Quality Board (EQB) notes that "[o]ne of the main purposes of an EIS is to examine potential environmental impacts of project alternatives." Minnesota Environmental Quality Board, *Guide to Minnesota Environmental Review* (EQB Guide) at 12 (available at <https://www.eqb.state.mn.us/sites/default/files/documents/rulguid3.pdf>) (emphasis added).

28. EQB explained, as follows, the scope of the EIS's required "alternatives" analysis:

In 1997 the Environmental Quality Board amended the rules to provide more guidance to Responsible Governmental Units for selecting an appropriate range of alternatives.

■ The revised rule requires that an EIS must include the **no-build alternative and at least one alternative of each of the following types** or provide a concise explanation of why no alternative is included in the EIS:

- Sites
- Technologies
- Modified designs or layouts
- Modified scale or magnitude and
- An alternative incorporating reasonable mitigation measures identified through comments on the scope or the draft EIS

Alternatives may be excluded only if they meet any of the following criteria:

- Underlying need for or purpose of the project is not met.
- Significant environmental benefit over the proposed project is not provided.
- Another alternative is likely to be similar in environmental benefits but will have lesser socioeconomic impacts.

The RGU should keep a written record of alternatives examined and its rationale for any exclusions, providing a summary in the EIS scoping document and complete documentation in the EIS. It is not necessary for the EIS to identify any alternative as preferred.

* * *

For public projects, the RGU should be careful not to eliminate alternatives from the EIS based simply on the culmination of a prior planning process. The RGU must take a hard look at the basis for prior decisions to make sure that environmentally superior alternatives were not eliminated without sufficient justification based on the rule's three criteria. Eliminated alternatives should be discussed in the EIS and noted in the scoping decision document. Prior decisions to eliminate options may need to be revisited in the EIS if insufficient consideration was given to environmental impacts. The next chapter describes how the RGU can use the "tiered" EIS concept, added to the rules in 1997, to efficiently incorporate environmental review into complicated public decision-making processes and to help avoid prematurely dismissing alternatives without sufficient justification.

Public project proposers are further cautioned against taking any actions regarding site or route acquisitions or project commitments prior to completing the EIS unless it is clear that such action is not prohibited by part 4410.3100, subpart 2 or other laws.

EQB Guide at 12-13.

29. And, as to the appropriateness of an EIS to satisfy the second prong of the MERA-required "affirmative defense" for such "conduct at issue" (*i.e.*, "consisten[cy] with . . . the public health, safety and welfare"), the EIS is also required to address all significant environmental impacts as "[t]he EIS often serves as a basic public document about a controversial project and its audience expects information about all topics related to the project" (*id.* at 10), including the "mitigation measures identified in the EIS provide decision-makers with a list of possible measures to reduce impacts" (*id.* at 13).

30. Equivalent thereto, there are, as well, "substitute methods of environmental review" under Minn. R. 4410.3600-.4000 (EQB Guide at 15-17), including – most notably – an AUAR under Minn. R. 4410.3600 (EQB Guide at 16-17).

31. An AUAR is, as explained by EQB, tailor-made for where the "conduct at issue" is akin to the 2040 Plan's massive, city-wide upzoning proposal:

The regular environmental review process is best suited for distinct projects with environmental impacts that do not overlap. In 1988 the Environmental Quality Board adopted a process to review incremental impacts accumulating from a series of sequential projects, development typical of the rapidly growing suburbs of the Twin Cities metropolitan area. The Alternative Urban Areawide Review process substitutes for any EAW or EIS required for specific qualifying projects, provided they comply with the review assumptions and mitigation measures.

The review's key feature is that its subject is a development scenario or several scenarios for an entire geographical area rather than a specific project. Development scenarios are established by the local unit based upon the comprehensive plan, zoning ordinances, developers' plans and other relevant information. More than one scenario can be reviewed, providing at least one is consistent with the adopted comprehensive plan. A maximum development, "worst case" scenario is usually included. Development scenarios chosen by the local unit serve as the project description for the environmental impacts analysis. Specific projects ready for review within the area can be included, however, the review can also be done before any specific projects are proposed.

* * *

Types of development projects that can be reviewed through the Alternative Urban Areawide Review process were clarified in the 1997 rule amendments. Specifically, an AUAR can now substitute for review of: residential development, commercial development, warehousing, light industrial development and infrastructure associated with any developments such as roadways, water, sewer and stormwater systems. Light industrial development is defined as the assembly of products from components that are produced off-site. Development with characteristics that meet thresholds of any industrial mandatory EAW or EIS categories (part 4410.4300, subparts 2 to 13, 15 to 18 or 24; part 4410.4400, subparts 2 to 10, 12, 13 or 25) are not eligible for AUAR.

EQB Guide at 15 (emphasis added).

32. EQB explains, in fact, the following "benefits of the AUAR process":

Benefits of the AUAR process. The process offers several significant advantages to developers, city governments, reviewing agencies and to the environment. It is an excellent tool for review of cumulative impacts of multiple projects in a given area. AUAR enables city planners to better integrate environmental review into their comprehensive planning process. A single review process can address both public infrastructure construction scheduled in the near future as well as the ensuing residential and commercial development slated for later years. By examining multiple development scenarios through the AUAR process, planners are able to evaluate how much development can be accommodated in an area without significant environmental impacts. Moving review to an earlier planning stage helps anticipate and correct potential problems while project plans are still flexible.

Id. at 16 (underlining added).

D. AVAILABLE REMEDIES

33. Where (1) the plaintiff has satisfied its MERA-required "prima facie showing" but (2) the defendant has not satisfied its MERA-required "rebut[tal]" or "affirmative defense" to such a "prima facie showing," this Court is broadly authorized under MERA to issue any of the following "relief":

The court may grant [(1)] declaratory relief, [(2)] temporary and permanent equitable relief, or may [(3)] impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction.

Minn. Stat. § 116B.07 (emphasis and bracketed information added).

34. In such a situation, injunctive relief is appropriate to protect against the unmitigated material adverse environmental impact. *See, e.g., State ex rel. Wacouta Twp.*, 510 N.W.2d at 31 ("The trial court properly concluded that Wacouta Township established a prima facie case and that Pepin Heights did not rebut this case and granted injunctive relief that is supported by the record"); *County of Freeborn v. Bryson*, 243 N.W.2d 316, 320 (Minn. 1976) (where prima facie case is un rebutted, injunctive relief is appropriate):

35. But, "in the absence of unusual or extraordinary factors, the trial court must enjoin environmentally destructive conduct if a feasible and prudent alternative is shown." *County of*

Freeborn, 243 N.W.2d at 321 (emphasis added); see also *State by Archabal*, 495 N.W.2d at 426 (reversing trial court order refusing to enjoin destruction of historical building where defendant failed to establish absence of feasible and prudent alternatives).

III. PLAINTIFFS

36. Plaintiffs are a coalition of "persons" that are concerned not necessarily with the merits of the 2040 Plan itself, but rather with the alarming reality that (1) the 2040 Plan, with its massive, city-wide upzoning, will materially adversely impact the environment but (2) City has refused to identify, let alone address, these material adverse environmental impacts.

37. Smart Growth is "organized and shall be operated primarily to conduct activities related to the common good and general welfare of the Minneapolis community, including through the preservation, beautification and environmentally sustainable development of Minneapolis, through education of the public, advocacy efforts, litigation or otherwise, and to do any and all other acts and things and exercise any and all other rights and powers which may be reasonably necessary, incidental, desirable or expedient in the accomplishment of such purposes." And, consistent with its mission, Smart Growth has submitted to City its concerns with and opposition to the 2040 Plan. Exhs. 3-5.

38. Audubon's mission "is to be a local leader in effective bird conservation, to engage community members in bird related activities, and to support programs that align with this mission." And, consistent with its mission, Audubon has submitted to City its concerns with and opposition to the 2040 Plan. Exhs. 6-8.

39. MCPMB's mission is also "to protect migratory birds and their habitat throughout Minnesota." And, consistent with its mission, MCPMB has, along with Audubon, submitted to City its concerns with and opposition to the 2040 Plan. Ex. 7; <https://www.facebook.com/pg/citizensprotectmigratorybirds/about/>.

IV. THE 2040 PLAN

40. A municipality's comprehensive plan, not its zoning ordinance, controls the land use development within its jurisdictional boundaries. Minn. Stat. § 473.858, subd. 1; *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 175 (Minn. 2006) ("comprehensive plan constitutes the primary land use control for cities and supersedes all other municipal regulations when these regulations are in conflict with the plan").

41. And, to the extent its comprehensive plan is in conflict with its zoning ordinance, it is the zoning ordinance that must be amended for consistency with the comprehensive plan, not vice versa. Minn. Stat. § 473.858, subd. 1 ("[i]f the comprehensive plan is in conflict with the zoning ordinance, the zoning ordinance shall be brought into conformance with the plan"); *Mendota Golf, LLP*, 708 N.W.2d at 175 ("the nature of the [trial court] order itself – directing the city to bring its comprehensive plan into conformity with its zoning ordinance – appears to violate [Minn. Stat. § 473.858, subd. 1] because this approach undermines the supremacy of the comprehensive plan via-a-vis the zoning ordinance").

42. Thus, if the 2040 Plan is approved, then it controls land use development within City for at least the next decade. *Id.* Consistent therewith, Sunde's "November, 2018 Environmental Analysis" (Analysis) (Ex. 1 at 15) explains that "[t]he 2040 Plan indicates that the City of Minneapolis will update its Zoning Code and Zoning Map to reflect the guidance of the Future Land Use and Built Form Maps after adoption of the plan. Height, bulk and setback standards will work in concert with and be informed by the maps and policies of the plan."

43. As illustrated by Sunde's Analysis (Ex. 1), it is impossible to overstate the resulting land use changes being proposed by the 2040 Plan. Indeed a recent article on the 2040 Plan was appropriately captioned: "**Can Minneapolis's radical rezoning be a national model?**" Ex. 2 at 1 (underlining added). And the "**radical rezoning**" article begins by boldly

proclaiming that "[c]alling the Minneapolis 2040 plan ambitious is an understatement" (*id.*), adding that "[t]he plan . . . is the furthest-reaching such [upzoning] proposal from a U.S. municipality." *Id.* at 1-2 (underling and bracketed information added).

44. As proof of its caption and initial proclamation, the "**radical rezoning**" article explains, as follows, that "[t]he updated policy would upzone nearly the entire city, which will allow taller buildings with more units to be built in areas that previously only contained single-family homes (at present, more than 75 percent of city residents live in areas that only allow single-family residences or small multifamily housing)." *Id.* at 2 (underlining added). The article further explains:

Minneapolis 2040 believes the solution is simply more: [(1)] more construction, [(2)] more high-rises, and [(3)] more triplexes. The comprehensive plan update would create new zoning categories across the city. In addition to allowing triplexes, the new rules would allow developers in most residential areas to build four stories high. It would also eliminate off-street parking requirements, which add to the cost of a new project without increasing density.

This update didn't come out of nowhere; city planners update it every decade. According to Minneapolis's long-range planning director, Heather Worthington, this year's update just happens to be more ambitious, seeking to tackle big goals, like climate change, housing choice and affordability, and racial equity.

"We know Minneapolis is facing some of the deepest and most challenging disparities in the nation," Worthington said during a recent episode of the *Streets.MN* podcast. "Today's zoning is built on those old redlining maps."

In many ways, it's a market-oriented answer to artificial scarcity: More supply meets demand, brings down housing costs, and allows more workers to live close to jobs and other opportunities.

The updated plan would allow for more construction for the future, while [Mayor Jacob] Frey's plans to invest \$40 million in programs to help those suffering from the impact of high housing costs would help expand the safety net today. Initiatives like Stable Homes, Stable Schools, which would support homeless children and teens in Minneapolis Public Schools; a fund to help upgrade existing affordable housing; a tripling of the \$6.5 million Affordable Housing Trust Fund; and money for tenant legal advocacy would provide immediate assistance as the changes envisioned by Minneapolis 2040 begin to take shape.

Id. at 4-5 (emphasis and bracketed information added).

V. PLAINTIFFS' "PRIMA FACIE SHOWING"

A. GENERALLY STATED

45. So as to remove City's anticipated red herring "defense" to the contrary, Plaintiffs' "prima facie showing" has absolutely nothing to do with the merits of the "heated debate" for and against the 2040 Plan. Ex. 2.

46. Instead, Plaintiffs' "prima facie showing" is, as required under MERA (*i.e.*, Minn. Stat. § 116B.04), exclusively focused on the ineluctable conclusion that, unless it is both (1) environmentally vetted and (2) properly adjusted and planned for (*e.g.*, infrastructure designed) in advance as state law requires to be done with any other massive project (*e.g.*, Hiawatha LRT, Southwest LRT), the 2040 Plan's likely material adverse environmental impacts will be dramatic and unmitigated, as well as unmitigable.

47. This is because, using the legally required assumption of the immediate and full build-out of City per its 2040 Plan, there will be, for example, the potential for and likelihood of each of the following:

- *Dramatic* increase in the amount of impervious surface area, thus resulting in the material increase in the rate and volume of stormwater runoff;
- *Dramatic* increase in the number of residents, thus resulting in the material increase in domestic wastewater generation, potable water usage and parking needs/vehicles/traffic; and
- *Dramatic* loss of the amount of tree coverage/green space, thus resulting in the material decrease in aesthetic livability and bird and other wildlife habitat.

48. And the resulting potential and likely environmental effects will include, among others, the following:

- (1) Threats to the adequacy of existing public infrastructure, including storm and sanitary sewer systems and water supply;
- (2) Threats to traffic congestion;
- (3) Threats to air quality; and
- (4) Threats to aesthetic livability, tree coverage, and bird and wildlife habitat.

B. SPECIFICALLY PROVEN

49. Plaintiffs hired Sunde as undisputedly qualified environmental experts to objectively assess the likelihood for and the extent of 2040 Plan's material adverse environmental impacts. (Ex. 1).

50. And, consistent with the sheer scope and audacity of the 2040 Plan's massive, city-wide upzoning proposal, Sunde's resulting Analysis concluded as follows:

The 2040 Plan establishes a dramatic shift in land use policy with a general city wide increase in permitted density. Proposed changes in land use consistent with the 2040 Plan inherently impact the environment as well as existing infrastructure that was implemented based on entirely different design criteria.

Id. at 1 (emphasis added).

51. In reaching its conclusion, Sunde's Analysis relied upon four different bases.

a. **BASIS NO. 1: "Mandatory EIS category"**

52. Even though the 2040 Plan is "exempt" from involuntary environmental review under Minn. Stat. § 116D's Minnesota Environmental Protection Act (MEPA) (Minn. R. 4410.4600, subp. 26 ("exemption" from involuntary environmental review for the "amendment of comprehensive and other plans, zoning ordinances, or other official controls by local government units")), this "exemption" does not extend to either (1) any other portions of MEPA, including without limitation (a) its "**DECLARATION OF STATE ENVIRONMENTAL POLICY**" under § 116D.02, subd. 1,⁵ (b) its identification of "**[s]tate responsibilities**" under § 116D.02, subd. 2⁶ and (c) its "**[p]rohibition**" under § 116D.04, subd. 6,⁷ or (2) MERA.

⁵ Per § 116D.02, subd. 1, the "**STATE ENVIRONMENTAL POLICY**" is as follows:

Policy. The legislature, recognizing the profound impact of human activity on the interrelations of all components of the nature environment, particularly the profound influences of [(1)] population growth [and] [(2)] high density urbanization . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of

53. And, because they have shown their ability to narrowly "exempt" municipal "comprehensive plans" from involuntary environmental review under MEPA (Minn. R. 4410.4600, subp. 26), the lawmakers' failure to likewise "exempt" municipal "comprehensive

human beings, declares that it is the continuing policy of the state government, in corporation with . . . local governments . . . to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state's people.

(Underlining and bracketed information added). Indeed, "as a political subdivision of the state, [City] has a greater duty than does a private individual to see that legislative policy is carried out. As a creature of the state deriving its sovereignty from the state, the [city] should play a leadership role in carrying out legislative policy." *County of Freeborn*, 243 N.W.2d at 320 (emphasis and bracketed information added).

⁶ Per § 116D.02, subd. 2, the "[s]tate responsibilities" pointedly include, as follows, the environmental impacts related to land use planning:

In order to carry out the policy set forth in Laws 1973, chapter 412, it is the continuing responsibility of the state government to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs and resources to the end that the state may:

* * *

(6) develop and implement land use and environmental policies, plans, and standards for the state as a whole and for major regions thereof through a coordinated program of planning and land use control.

⁷ Per § 116D.04, subd. 6, the "[p]rohibition" includes the following:

No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

plans" from either (1) the rest of MEPA or (2) MERA is required to be construed as purposeful. *See In re Stadsvold*, 754 N.W.2d 323, 328-29 (Minn. 2008) ("distinctions in language in the same context are presumed to be intentional"); *Seagate Tech., LLC v. W. Digital Corp.*, 854 N.W.2d 750, 759 (Minn. 2014) (same).

54. Accordingly, while the 2040 Plan is "exempt" from involuntary environmental review under MEPA, the 2040 Plan is not "exempt" from the "**STATE ENVIRONMENTAL POLICY**," which is directly at issue with the 2040 Plan because it "recogniz[es] the profound impact of human activity on the interrelations of all components of the nature environment, particularly the profound influences of [(1)] population growth [and] [(2)] high density urbanization." Minn. Stat. § 116D.02, subd. 1 (underlining and bracketed information added).

55. Similarly, the 2040 Plan is not "exempt" from Plaintiffs' "prima facie showing" under MERA, including Plaintiffs' satisfaction of this "showing" by their reference to MEPA's mandatory environmental review "categories." *See* Minn. R. 4410.4300 (38 categories for mandatory environmental assessment worksheet (EAW), which is the state's lowest level of environmental review) and .4400 (28 categories for mandatory EIS, which is the state's highest level of environmental review). This is because these mandatory environmental review categories are, as determined by the EQB (Minn. Stat. § 116D.04, subd. 2a(b)), uses which inherently pose such potential for material adverse environmental impacts that they are subject to mandatory environmental review.⁸

⁸ Necessarily reserved for the types of projects which inherently pose the greatest potential for material adverse environmental impacts, the 28 mandatory EIS categories are (1) "**[n]uclear fuels and nuclear waste**" (Minn. R. 4410.4400, subp. 2), (2) "**[e]lectric generating facilities**" (Minn. R. 4410.4400, subp. 3), (3) "**[p]etroleum refineries**" (Minn. R. 4410.4400, subp. 4), (4) "**[f]uel conversion facilities**" (Minn. R. 4410.4400, subp. 5), (5) "**[t]ransmission lines**" (Minn. R. 4410.4400, subp. 6), (6) "**[u]nderground storage**" (Minn. R. 4410.4400, subp. 7), (7) "**[m]etallic mineral mining and processing**" (Minn. R. 4410.4400, subp. 8), (8) "**[n]onmetallic**

56. And, consistent with the "STATE ENVIRONMENTAL POLICY," which "recogniz[es] the profound impact of human activity on the interrelations of all components of the nature environment, particularly the profound influences of [(1)] population growth [and] [(2)] high density urbanization" (Minn. Stat. § 116D.02, subd. 1 (emphasis and bracketed information added)), Minn. R. 4410.4400, subp. 14 includes the mandatory EIS category for the "residential development . . . for construction of a permanent or potentially permanent residential development of:

* * *

D. 1,000 unattached units or 1,500 attached units in a city within the seven-county Twin Cities metropolitan area that has adopted a comprehensive plan under Minnesota Statutes, section 473.859."

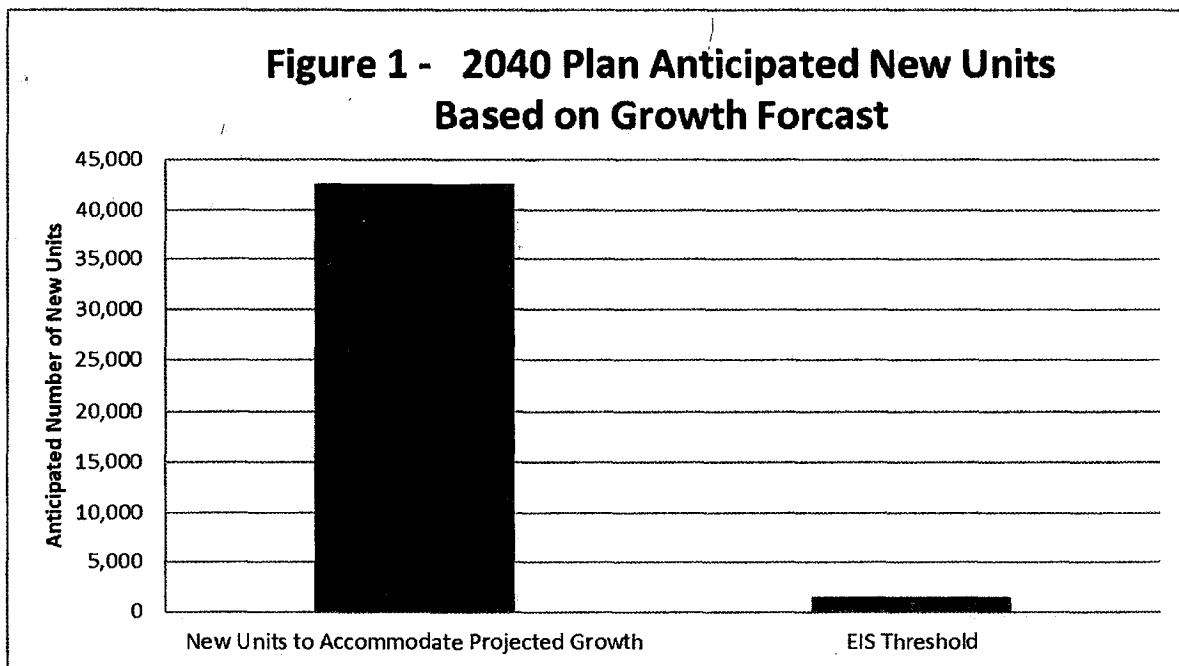
(Emphasis added).

57. This is determinative of Plaintiffs' "prima facie showing" because, whether calculating its "anticipated new units" either (1) "[b]ased on projected growth" in the plan (Ex. 1 at 2-4) or (2) "[b]ased on allowable units per acre" under the plan (*id.* at 4-7), the 2040 Plan's

mineral mining" (Minn. R. 4410.4400, subp. 9), (9) "**[p]aper or pulp processing**" (Minn. R. 4410.4400, subp. 10), (10) "**[i]ndustrial, commercial, and institutional facilities**" (Minn. R. 4410.4400, subp. 11), (11) "**[h]azardous waste**" (Minn. R. 4410.4400, subp. 12), (12) "**[s]olid waste**" (Minn. R. 4410.4400, subp. 13), (13) "**[r]esidential development**" (Minn. R. 4410.4400, subp. 14), (14) "**[r]esidential development in shoreland outside of the seven-county Twin Cities metropolitan area**" (Minn. R. 4410.4400, subp. 14a), (15) "**[a]irport runway projects**" (Minn. R. 4410.4400, subp. 15), (16) "**[h]ighway projects**" (Minn. R. 4410.4400, subp. 16), (17) "**[b]arge fleeting facilities**" (Minn. R. 4410.4400, subp. 17), (18) "**[w]ater appropriation and impoundments**" (Minn. R. 4410.4400, subp. 18), (19) "**[m]arinas**" (Minn. R. 4410.4400, subp. 19), (20) "**[w]etlands and public waters**" (Minn. R. 4410.4400, subp. 20), (21) "**[m]ixed residential and commercial-industrial projects**" (Minn. R. 4410.4400, subp. 21), (22) "**[s]ports or entertainment facilities**" (Minn. R. 4410.4400, subp. 22), (23) "**[w]ater diversions**" (Minn. R. 4410.4400, subp. 23), (24) "**[p]ipelines**" (Minn. R. 4410.4400, subp. 24), (25) "**[i]ncineration of wastes containing PCBs**" (Minn. R. 4410.4400, subp. 25), (26) "**[r]esorts, campgrounds, and RV parks in shorelands**" (Minn. R. 4410.4400, subp. 26), (27) "**[l]and conversion in shorelands**" (Minn. R. 4410.4400, subp. 27), and (28) "**[g]enetically engineered wild rice**" (Minn. R. 4410.4400, subp. 28).

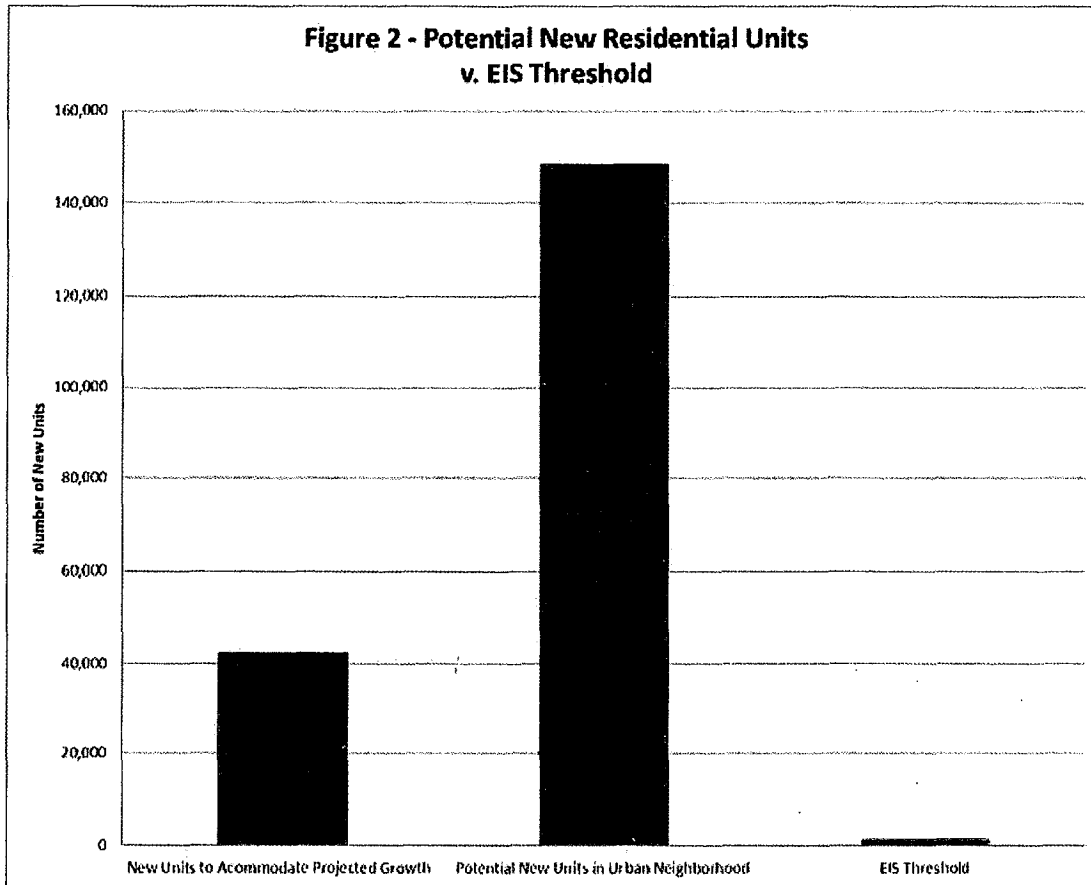
"anticipated new units" exponentially exceed subpart 14's EQB-required threshold of just "1,000 unattached units or 1,500 attached units" for a mandatory EIS, thereby evidencing the plan's overwhelmingly strong potential for material adverse environmental impacts.

58. In contrast to subpart 14's EQB-required threshold of just "1,000 unattached units or 1,500 attached units" for a mandatory EIS, Figure 1 illustrates, as follows, the 2040 Plan's over 42,000 "anticipated new units" "[b]ased on projected growth":



Id. at 3.

59. And, in contrast to subpart 14's EQB-required threshold of just "1,000 unattached units or 1,500 attached units" for a mandatory EIS, Figure 2 illustrates, as follows, the 2040 Plan's nearly 150,000 "anticipated new units" "[b]ased on allowable units per acre":



Id. at 6.

60. Based upon its irrefutable proof that its "anticipated new units" exponentially exceed subpart 14's EQB-required threshold of just "1,000 unattached units or 1,500 attached units" for a mandatory EIS, Sunde's Analysis concludes that "[t]he 2040 Plan results in large magnitude changes in land use. Increased density, use and scale resulting from the implementation of the 2040 Plan is likely to materially adversely affect the environment." *Id.* at 8 (emphasis added).

61. Given this Court's required deference to EQB's rulemaking determination that subpart 14's threshold of just "1,000 unattached units or 1,500 attached units" inherently poses such a potential for material adverse environmental impact that an EIS is mandated (*Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) ("decisions of administrative agencies

enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience"), the 2040 Plan's exponential exceedance of this threshold satisfies by itself Plaintiffs' "prima facie showing." This conclusion is reinforced by the closely-related "STATE ENVIRONMENTAL POLICY," which "recogniz[es] the profound impact of human activity on the interrelations of all components of the nature environment, particularly the profound influences of [(1)] population growth [and] [(2)] high density urbanization." (Emphasis and bracketed information added).

b. **BASIS NO. 2: "Environmental impacts relating to land use resulting from intensification of density, use and scale"**

62. Sunde's Analysis' "Table 6 presents an estimate of the increase in residential density for existing single family R1/RA lots based on proposed built form districts":

Built Form District	Acres	Existing net density du/acre	Approx. current du	2040 expected density	Potential du	Potential new du	Percent increase in density
R1/R1A to Interior 1	5,074	7.10	36,036	10.17	51,602	15,566	43%
R1/R1A to Interior 2	2,801	7.25	20,305	18.08	50,642	30,377	149%
R1/R1A to Interior 3	238	7.28	1,733	22.60	5,379	3,646	210%
R1/R1A to Corridor 4	605	7.49	4,530	31.91	19,305	14,775	326%
R1/R1A to Corridor 6	59	6.74	398	36.09	2,129	1,731	435%

Id. at 12.

63. Figure 5, which follows, is a "visualiz[ation]" of this "increased density":



Id. at 13.

64. Based upon these "estimate[s]" for and "visualiz[ation]" of this increased density," Sunde's Analysis concludes that the 2040 Plan's "[p]roposed changes to land use result in a substantial increase in development intensity (allowed density or building height) and will permit new land uses not allowed under current zoning (e.g., low density residential use to medium or high density residential or commercial uses)." *Id.* at 10.

65. Sunde's Analysis further concludes that "[s]ignificant environmental impacts result from the change in land use and built forms," with the "likely impacts" inclusive of the following:

1. Increased noise impacts;
2. Increased pedestrian traffic;
3. Increased vehicle traffic;
4. Increased vehicle congestion and idling;
5. Decreased air quality;

- 6. Increased parking constraints;
- 7. Negative impacts to existing viewsheds (landmark buildings, open spaces, water bodies);
- 8. Longer hours of activity;
- 9. Reductions in privacy;
- 10. Increased light and glare from buildings;
- 11. Greater impacts from construction if construction of larger buildings than previously permitted increases the duration of construction activity;
- 12. Decreased access to light for surrounding properties;
- 13. Shadowing of adjacent properties;
- 14. Impacts to existing solar panels on neighboring structures.

Id. at 10-11 (emphasis added).

c. BASIS NO. 3: "Stormwater and Water Resource Impacts"

66. In modeling "likely impacts," Sunde's Analysis' Table 7 calculates, as follows, the percentage of hard (or impervious) surface area increase for each Built Form District:

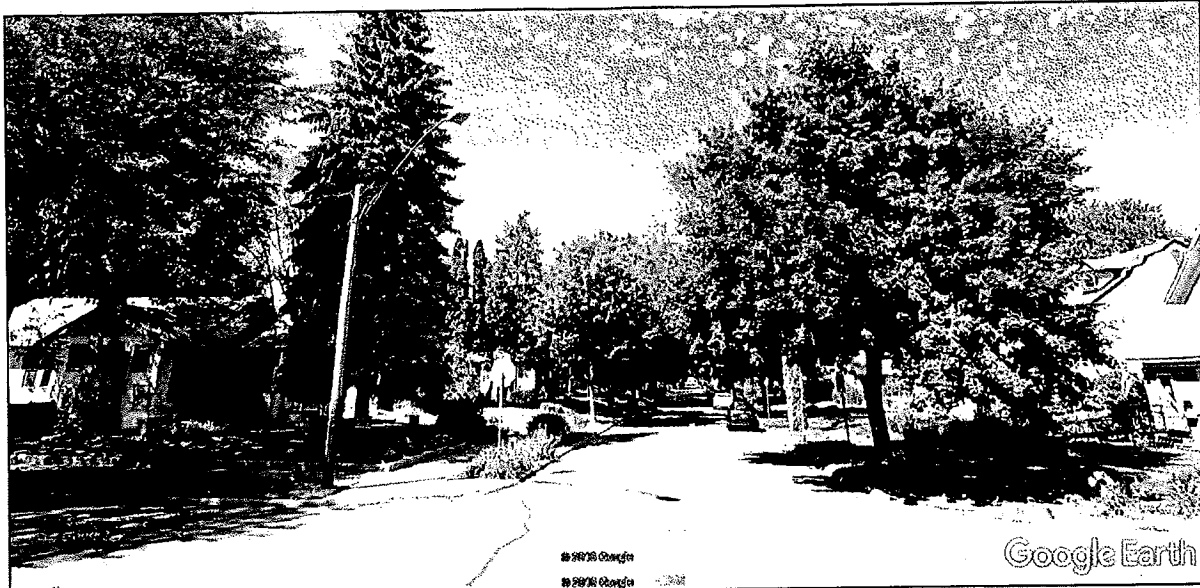
District	R1/R1A	Interior 1	Interior 2	Interior 3	Corridor 4	Corridor 6
Average % Impervious	50	60	65	70	85	85
% Increase in Hard Surface Area		10	15	20	35	35

An assumption of impervious area for each built form district was necessary because the 2040 Plan does not include specific building criteria (e.g. setbacks, impervious area) other than number of stories associated with each built form district and the visual renderings presented with each description of the various built form districts.

Id. at 19.

67. "To help visualize how each built form district will result in an increase in hard surface from the existing conditions, a series of viewsheds from existing R1 and R1A Districts that are within the future Interior 1, Interior 2, Interior 3, Corridor 4, and Corridor 6 Built Form Districts are compared to each of the corresponding built form districts. Built form districts are represented using the conceptual rendering of the built form district provided in the 2040 Plan (Figures 6-10). *Id.* at 19-24.

68. As one of these "impervious surface comparisons," Figure 8 vividly illustrates, as follows, the dramatic "increase in hard surface":



Existing: Looking north from Intersection of 33rd Street East and 38th Avenue South. Current Zoning R1A. Proposed Built Form Interior 2.



Proposed: Interior 2 Built Form (from 2040 Plan)

Figure 8
Interior 3 Impervious Surface Comparison

Id. at 21.

69. Based upon these percentages of impervious surface increases and these visual "before and after" comparisons thereof, Sunde's Analysis concludes, among other things, that:

Stormwater discharges are generated by stormwater and snowmelt runoff from land and impervious areas such as paved streets, parking lots, and building rooftops. As stormwater flows across the land and impervious surfaces, the runoff often picks up and transports pollutants in quantities that can adversely affect water quality. Increasing the amount of impervious surfaces increases rate of runoff and volume runoff. Uncontrolled, these increases result in impacts to water quality, increased flooding, and other impacts.

Id. at 16 (emphasis added).

70. Sunde's Analysis explains, as follows, the "likely result" therefrom:

12. Increasing hard surfaces without proper mitigation will likely result in:

- Increased volume of runoff flowing into local surface waters
- Increased rate of runoff into local surface waters
- Increased velocity of runoff into local surface waters
- Shorter time of concentration
- Increased pollutant loads to local surface waters
- Reduced groundwater recharge
- Increased frequency, severity, and duration of local flooding events
- Diminished capacity of stormwater drainage systems

13. Impacts to receiving waters without proper mitigation will likely result in:

- Stream widening and bank erosion
- Stream down cutting
- Changes to channel bed due to sedimentation
- Increases in floodplain elevations
- Degradation of aquatic structure
- Reduction in habitat diversity and aquatic biodiversity
- Reduced base flows
- Increased stream temperatures

Id. at 17-18.

(1) "Increased Contaminant Load"

71. Table 8 below documents, as follows, the modeled "increase in contaminant load on an annual basis" due to the increased impervious surface area:

Contaminant	Existing (pounds per year)	2040 Plan Buildout (pounds per year)	Increase (pounds per year)
Total Suspended Solids (TSS)	295,412	532,502	237,090
Total Phosphorous (TP)	1,171	1,957	786
Total Nitrogen (TKN)	5,622	9,201	3,579
Copper	168	281	113
Lead	63	111	47
Zinc	600	981	382
Hydrocarbons	7,881	13,818	5,937

Id. at 26.

72. Sunde's Analysis explains that "[t]he additional contaminant load resulting from the increased density and hard surface area of lots less than one acre in size will add to stress from pollutants such as nutrients, bacteria, and suspended solids on receiving waterbodies within these watersheds." *Id.*

73. Of additional concern, Sunde's Analysis notes that, "[a]ccording to information contained in Appendix F of the 2040 Plan, the existing storm sewer system has 419 outfalls that discharge into 22 lakes, four streams and the Mississippi River." *Id.* Worse yet, Sunde's Analysis adds that "[s]ome of these waterbodies are listed by the Minnesota Pollution control Agency as impaired waters, meaning they already have compromised water quality." *Id.*

74. "Figure 11, Increased Contaminant Load to Impaired Waters, illustrates a map of the existing storm sewer outfall locations, impaired waters and the current extent of low density residential lots that are in the future Interior 1, Interior 2, Interior 3, Corridor 4, and Corridor 6 Built Form Districts." *Id.* at 27. And this figure "illustrates the widespread nature of the impact the connection between increased contaminant loads and the city's stormsewer system, and the receiving surface water resources." *Id.* at 26.

(2) "Increased Volume of Runoff"

75. Tables 9 and 10 estimate, as follows; the "Increased Volume of Runoff" due to the increased impervious surface area:

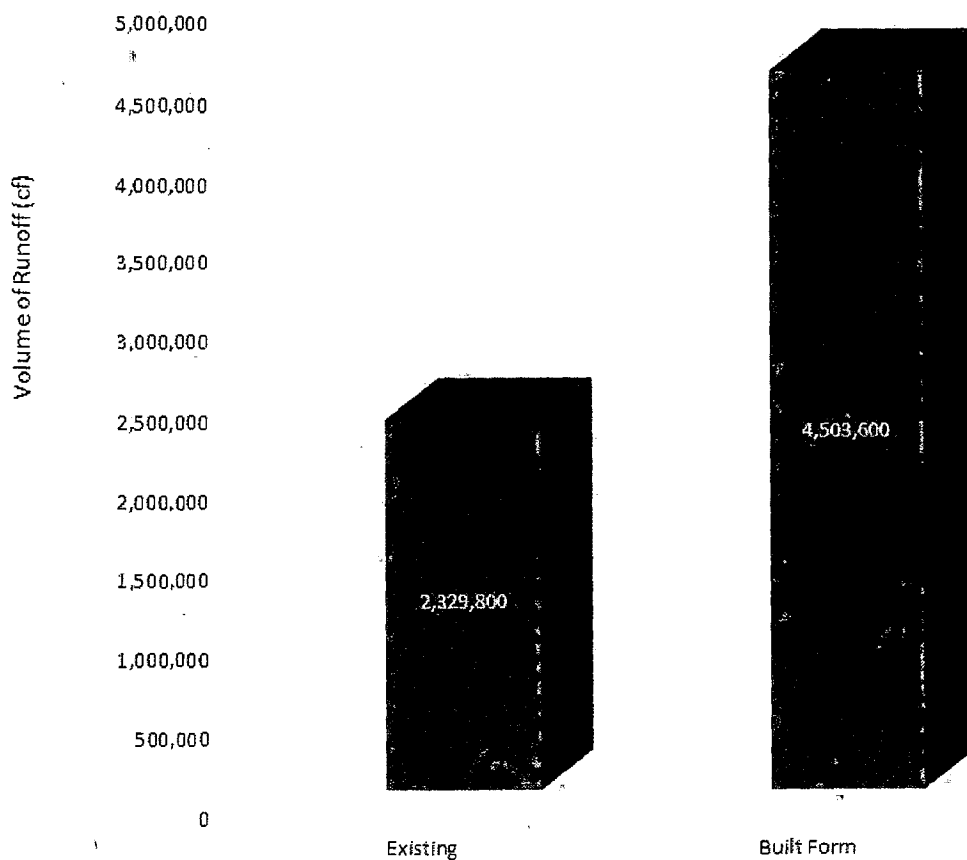
Event	Interior 1	Interior 2	Interior 3	Corridor 4	Corridor 6
	Increase	Increase	Increase	Increase	Increase
2-YR	16%	24%	31%	109%	109%
10-YR	9%	13%	18%	75%	75%
100-YR	3%	4%	5%	44%	44%

Event	Interior 1	Interior 2	Interior 3	Corridor 4	Corridor 6
	Increase	Increase	Increase	Increase	Increase
2-YR					
10-YR					
100-YR					

Id. at 28.

76. "For example, Figure 12 depicts the modelled increase in the volume runoff as a result of increased hard surface for 600 acres of existing single family lots redeveloping in the future to Corridor 3, 4, and 6 Built Form district":

Figure 12 Volume of Runoff
2 YR-24 HR Rainstorm Event
Existing Single family to Corridor 3, 4, and 6 Built Forms



Id. at 29.

77. Based on these calculations and this depiction, Sunde's Analysis concludes that the "likely impacts" are as follows:

1. Increased volume of runoff flowing into local surface waters
2. Increased rate of runoff into local surface waters
3. Increased velocity of runoff into local surface waters
4. Increased pollutant loads to local surface waters
5. Reduced groundwater recharge
6. Increased frequency, severity, and duration of local flooding events
7. Diminished capacity of stormwater drainage systems

Id. at 31.

d. BASIS NO. 4: "Traffic Impacts"

78. Sunde's Analysis calculates, as follows, the more than doubling of "total trips per day" from the 2040 Plan:

	Parcels	du/parcel	du	Trip Generation Land Use Category	Rate of Trip/du ^c	Adjusted trips/du ^d (25% reduction)	Total Trips per day
Existing							
R1/RIA	57,500	1	57,500	single family	9.44	7.08	407,100
Total							407,100
2040 Plan							
Interior 1	36,000	3	108,000	multifamily low rise	7.32	5.49	592,920
Interior 2	20,000	3 ^a	60,000	multifamily low rise	7.32	5.49	329,400
Interior 3	1,500	3 ^b	4,500	multifamily mid rise	5.44	4.08	18,360
Total							940,680

^a up to 4 on larger lots

^b higher density allowed

^c ITE Trip Generation 10th, Ed.

^d 25% reduction for smart growth

Id. at 36.

79. Based on this analysis, Sunde's Analysis concludes as follows:

The widespread land use changes inherent in the 2040 Plan represent the potential for significant traffic impacts. Potential impacts include

- roadway and intersection capacity issues;
- pedestrian, bicycle, and vehicle safety conflicts;
- parking issues; and
- congestion and related air quality impacts.

Id. at 34.

VI. CITY'S REQUISITE "REBUT[TAL]" OR "AFFIRMATIVE DEFENSE" FAIL

A. FAILED "REBUT[TAL]": CITY DID NOT (AND CANNOT) "SUBMI[T] . . . EVIDENCE TO THE CONTRARY"

80. Strikingly, however, "[t]he 2040 Plan has not included a thorough evaluation of potential impacts of the plan on the environment" (Ex. 1 at 1), adding that instead "[t]he 2040 Plan lacks both [(1)] an identification of these impacts and [(2)] specific design criteria which could be utilized as a means of mitigating or reducing potential adverse environmental effects" (*id.* (emphasis and bracketed information added)).

81. Sunde's Analysis explains that "[t]he 2040 Plan has not included a thorough evaluation to identify environmental impacts that are a likely result of the adoption of the 2040 Plan. Without such evaluation, the specific criteria for mitigating likely adverse environmental impacts cannot be identified or incorporated into the regulating document. *Id.* (emphasis added).

82. For example, "Appendix B – Land Use . . . does not provide any discussion or identification of land use impacts associated with dramatic growth. Without first identifying impacts, meaningful mitigation cannot and has not been developed." *Id.* at 15 (emphasis added).

83. City's stormwater impacts analysis is, as follows, similarly lacking:

Appendix F Wastewater includes supporting content for wastewater related policies and satisfies the Metropolitan Council requirements related to wastewater, but it does not include any type of analysis to identify likely impacts related to or resulting from induced development permitted in the 2040 Plan.

With respect to stormwater the plan includes discussions and links to City's stormwater management plan regulations, and watershed districts. The plan does not evaluate capacity, discharge rates, and runoff volumes associated with the land use changes contemplated in the plan or the impacts of the increase in volume of runoff and contaminant loads on downstream water resources, some of which are currently impaired. The plan does not address downstream impacts to surface water resources that are likely to occur under the current regulations which apply for the most part to only to sites greater than one acre in size or areas within the MRCCA.

The appendix notes that certain areas of the city are currently subject to stormwater capacity issue. It does not address how the increased stormwater volumes will impact flooding. The plan includes a stormwater catchment inventory and describes the current impervious surface data based on existing use and receiving waters. The inventory does not include an assessment of the changes to the system that will result from the increased density associated with the new land use categories and built form districts within the pipesheds and receiving water bodies.

The Appendix F in general describes the need to balance multiple important water resource issues and concerns including aging infrastructure, management of flooding, and management of quantity and quality stormwater runoff as current trends in water resources management, but does not analyze the repercussions of the implementation of the 2040 Plan on water resources or the storm sewer infrastructure. It does not identify areas that will require mitigation to address those impacts or specific steps that could be taken to reduce or minimize impacts. Appendix F includes capital improvement projects to complete Environmental protection Agency Requirements for stormwater quality improvements. These are projects resulting from existing water quality and impaired waters issues and do not consider the additional impacts resulting from the 2040 Plan.

Policy 71 of the 2040 Plan includes "reduce impervious cover" as an action step in protecting and improving soil health. There is no discussion in the 2040 Plan or Appendixes on how this action step can be implemented or the inherent conflict between this action step and the requirement that each new development and redevelopment must meet the new built form guidance, which results in increased impervious surface as illustrated in Figures 6-10.

Id. at 33-34 (emphasis added).

84. In other words, "[t]he 2040 Plan has not evaluated [(1)] capacity, [(2)] discharge rates, and [(3)] runoff volumes associated with the land use changes contemplated in the plan or the impacts of the increase in volume of runoff and contaminant loads on downstream water resources, some of which are currently impaired," explaining that "[t]he current stormwater management regulations, which apply to sites greater than one acre in size, do not regulate these increases." *Id.* at 30 (emphasis and bracketed information added).

85. Similarly, "[t]he 2040 Plan does not include a transportation analysis that evaluates the impacts of implementing the range of land use alternatives identified in the 2040

Plan." *Id.* at 35. In fact, "[i]t does not [(1)] identify, [(2)] analyze, or [(3)] provide specific mitigation of transportation-related impacts." *Id.* (emphasis and bracketed information added).

86. For example, "Appendix D-Transportation" "does not address [(1)] the repercussions of the plan on congestion at key intersections in the city, [(2)] the impacts of removing off street parking requirements, or [(3)] pedestrian, bicycle vehicle conflicts that may result from the densification of certain areas of the city." *Id.* at 37 (emphasis and bracketed information added).

87. "Appendix D Transportation" is otherwise fundamentally lacking because (1) "[t]he appendix does not include any type of traffic impact analysis or evaluation of the transportation related impacts that are likely to occur as a result of the land use changes included in the 2040 Plan" (*id.*) and (2) "[t]he appendix does not address the ability of the local system designed and constructed to serve predominantly low density residential development over thousands of acres to now accommodate future traffic demands likely marked by localized areas of dramatic growth" (*id.*).

88. In summation, "[w]ithout identifying the impacts, the plan lacks specific mitigation to reduce or eliminate likely effects." *Id.* The 2040 Plan, including its appendices, thus contained literally no "rebut[tal]" to Plaintiffs' "prima facie showing."

B. FAILED "AFFIRMATIVE DEFENSE": CITY DID NOT (AND CANNOT) "[S]HOW . . . THAT THERE IS [(1)] NO FEASIBLE AND PRUDENT ALTERNATIVE AND [(2)] THE CONDUCT AT ISSUE IS CONSISTENT WITH AND REASONABLY REQUIRED FOR PROMOTION OF THE PUBLIC HEALTH, SAFETY, AND WELFARE 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"

89. City has effectively eschewed its requisite "affirmative defense" to Plaintiffs' "prima facie showing" by declining Plaintiffs' repeated requests that it voluntarily subject the

2040 Plan to an exhaustive environmental review, presumably an EIS or AUAR. Exhs. 3-5. In so doing, City, through Mayor Jacob Frey, expressed, as follows, a fundamental misunderstanding for (or, more likely, a feigned ignorance of) MERA:

You said to the citizens' group last night that you opposed environmental review of the 2040 Plan because all the studies show that increasing density decreases carbon emissions. But MERA addresses the existence of and correspondingly required mitigation of "likely" material adverse impacts arising from the 2040 Plan, not (as you suggested) whether those impacts outweigh or are lesser than the impacts from City's alternatives to the 2040 Plan, whatever they are. Indeed, MERA's effectively required EIS, as [was] done by Seattle for its own scaled-down upzoning project, would require City to assess that very issue—*i.e.*, prove or disprove your conclusion.

Ex. 5 (emphasis added).

90. Mayor Frey's full response on November 27, 2018 as to whether he was "in support of an environmental impact [statement]" is, as follows, even more revealing:

Jeffrey Niswanger: Are you in support of an environmental impact plan?

Mayor Jacob Frey: So the environmental piece is one area where we do disagree. The statistics — this is not my opinion at all — the statistics are exceedingly clear. There have been a ton of different studies on this and — I'm not arguing that increased density would be universally loved or accepted or liked — but increased density does lead to a substantially decreased carbon footprint. It's not my opinion; it is factually proven over and over and over again. In fact, there's nobody that's arguing that.

Keith Williams: What about water quality?

Frey: Water quality . . . actually it's the same piece as well with water quality.

Williams: Yeah.

Frey: I don't know all the specifics on water quality as much as I do carbon footprint. But density generally is an environmental tool. Now, again, does that mean it enhances livability, which is more subjective, and many people patently disagree with? No, it doesn't. Does that mean that it will improve your day-to-day lives for

you as a person? I cannot speak to that. But in terms of environmentalism, it's pretty . . . it's cut and dry.

Katharine Brown: Have you done this research yourself? Have you seen this? Because this couldn't be farther from the truth.

Frey: No, I have not done the research myself. I read the reports.

Brown: I think you should.

Frey: I mean, the research has been conducted by experts; I'm not one.

Brown: It doesn't take an expert to know this is gonna deeply affect and hurt the environment in the City of Minneapolis. You can be a leader and you can try and save this and be a hero, or you're gonna destroy it. And I can assure you that if you don't stand for us and be a leader, you will not be mayor again. No one's gonna vote for you sir.

Ex. 9 (emphasis added).

91. Whether or not the purported environmental "reports" referenced by Mayor Frey actually exist, it is a record fact, as mentioned by Sunde's Analysis, that they were not part of or referenced in the 2040 Plan, including its appendices. Ex. 1. It is also a record fact that these "reports," if they exist, run directly counter to Sunde's Analysis.⁹ *Id.*

92. Moorhead, with its AUARs for its land use planning,¹⁰ and Seattle, with its EIS for its upzoning proposal,¹¹ as Plaintiffs explained to Mayor Frey on November 28, 2018 (Ex. 5),

⁹ Indeed, a study co-authored by an MIT professor disputes the conclusion that increased housing density necessarily results in a decreased carbon footprint. *See* MIT News, How Cities Can Fight Climate Change Most Effectively, available at News.MIT.edu/2017/how-cities-can-fight-climate-change-most-effectively-1027.

¹⁰ *See* documents available at <http://www.cityofmoorhead.com/home/showdocument?id=4776>; <http://www.cityofmoorhead.com/home/showdocument?id=4774>; and <http://www.cityofmoorhead.com/home/showdocument?id=4778>.

have demonstrated how City could have (and still could) satisfy its requisite "affirmative defense."

93. Despite its "exemption" therefrom under Minn. R. 4410.4600, subp. 26, Moorhead has thrice subjected its land use proposals to voluntary AUARs. *See* n.9.

94. In a closely-analogous situation, Seattle, as well, recently subjected its own upzoning proposal to an EIS. *See* n.10.

95. By so doing, Moorhead and Seattle prophylactically put the inherent environmental impacts of their land use proposals to the test and, as a result, progressively provided a forum for robust, judicially-reviewable public input on those environmental impacts and their mitigation thereto.

96. And, if it, like Moorhead and Seattle, had promptly subjected its 2040 Plan to a voluntary environmental review (*i.e.*, EIS or AUAR), then City could have, like them, not only (1) already completed such environmental review but also (2) been the responsible governmental unit (RGU) for the review thereof. Thus, because there is no other realistic way for it to satisfy its requisite "affirmative defense" to Plaintiffs' "prima facie showing," City has only itself to blame for its strategically-flawed decision to avoid the voluntary environmental review of the 2040 Plan.

VII. JURISDICTION & VENUE

97. Jurisdiction and venue are appropriate under MERA. Minn. Stat. § 116B.03, subs. 1 and 4.

¹¹ *See* document available at https://www.seattle.gov/Documents/Departments/HALA/Policy/MHA_FEIS/0_CoverFactSheet_MHA_FEIS_2017.pdf.

VII. CAUSES OF ACTION

COUNT ONE: DECLARATORY JUDGMENT UNDER MERA

98. The parties dispute whether Plaintiffs have satisfied their "prima facie showing" under MERA that the 2040 Plan "is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state."

99. The parties also dispute whether City has (or can) satisfy its corresponding requirement under MERA to either (1) "rebut the prima facie showing by the submission of evidence to the contrary or (2) "show, by way of an affirmative defense, that [(a)] there is no feasible and prudent alternative and [(b)] the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare 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," though "[e]conomic considerations alone shall not constitute a defense hereunder."

100. The parties further dispute whether the appropriate "relief" under MERA for City's failure to satisfy its MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing" is to (1) immediately enjoin City's approval of the 2040 Plan and (2) order the continuation of the injunction unless and until City satisfies its burden, presumably through a voluntary environmental review (*i.e.*, EIS or AUAR).

101. As shown above, Plaintiffs are entitled to a declaration they have met their MERA-required "prima facie showing."

102. As shown above, Plaintiffs are also entitled to a declaration that City has not (and cannot) satisfy their MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing."

103. As shown above, Plaintiffs are further entitled to both (1) an immediate injunction enjoining City's approval of the 2040 Plan and (2) an order continuing the injunction unless and until City satisfies its MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing," presumably through a voluntary environmental review (*i.e.*, EIS or AUAR).

COUNT TWO: INJUNCTIVE RELIEF UNDER MERA

104. Because, as shown above, Plaintiffs have met their "prima facie showing" and City has not (and cannot) satisfy its MERA-required "rebut[tal]" or "affirmative defense" thereof, a MERA claim has been stated and "relief" is compelled.

105. The appropriate relief is to (1) immediately enjoin City's approval of the 2040 Plan and (2) order its continuation unless and until City satisfies its MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing," presumably through a voluntary environmental review (*i.e.*, EIS or AUAR).

VIII. PRAYER FOR RELIEF

Plaintiffs respectfully request the following relief:

1. A declaration in favor of Plaintiffs against City that they have satisfied their MERA-required "prima facie showing" that the 2040 Plan "is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state."

2. A declaration in favor of Plaintiffs against City that the City has not (and cannot) satisfy its corresponding requirement under MERA to either (1) "rebut the prima facie showing by the submission of evidence to the contrary or (2) "show, by way of an affirmative defense, that [(a)] there is no feasible and prudent alternative and [(b)] the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare 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," though "[e]conomic considerations alone shall not constitute a defense hereunder."

3. A declaration that, because of City's failure to satisfy its MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing," Plaintiffs are entitled to (1) an immediate injunction enjoining City's approval of the 2040 Plan and (2) an order continuing the injunction unless and until City satisfies its MERA-required burden, presumably through a voluntary environmental review (*i.e.*, EIS or AUAR).

4. A temporary and permanent injunction (1) immediately enjoining City from approving of the 2040 Plan and (2) ordering its continuation unless and until it satisfies its requisite "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima-facie showing," presumably through a voluntary environmental review (*i.e.*, EIS or AUAR).

5. A recovery by Plaintiffs against City of their reasonable costs, disbursements and attorneys' fees incurred in bringing and successfully prosecuting this MERA action.

6. All other legal and equitable relief deemed appropriate by this Court.

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ACKNOWLEDGMENT

The parties, through their undersigned counsel, hereby acknowledge that sanctions may be imposed for a violation of Minn. Stat. § 549.211, subd. 2 pursuant to Minn. Stat. § 549.211, subd. 3.

s/ Jack Y. Perry _____

Jack Y. Perry

