THE Boutique FIRM

The Boutique Firm PLC
5115 Excelsior Boulevard, #431
St. Louis Park, MN 55416

Matthew D. Melewski

p (612) 999-8600
e matthew@theboutiquefirm.com
w www.theboutiquefirm.com

To: Whomever It May Concern

From: Matthew Melewski

Re: Environmental Review & Minneapolis 2040

Date: December 4, 2018

MEMORANDUM

The Minneapolis City Council is scheduled to vote on a new City Comprehensive Plan, titled Minneapolis 2040, on Friday December 7, 2018. A significant aspect of Minneapolis 2040 is a proposal to increase the allowable zoning density of the City by varying degrees. A recently formed entity named Smart Growth Minneapolis ("SGM") recently brought a lawsuit against in the City in Hennepin County Court, seeking a declaration that Minneapolis has not complied with the Minnesota Environmental Rights Act ("MERA"), an injunction directing Minneapolis to comply with MERA by performing an Environmental Impact Statement ("EIS") or Alternative Urban Areawide Review ("AUAR"), and a temporary restraining order ("TRO") to prevent the City Council from voting on Minneapolis 2040.

This Memorandum seeks to briefly explain and evaluate the merits of the lawsuit.

The Complaint for Declaratory and Injunctive Relief

SGM's argument is essentially the following:

- SGM has made a "prima facie showing" under MERA that Minneapolis 2040 will cause "pollution, impairment or destruction" of natural resources.
- The City is therefore required to make a rebuttal to the contrary, or show that there was no feasible or prudent alternative.
- Since the City did not undertake an environmental review, it has no rebuttal to the contrary.
- A feasible alternative would be an EIS or AUAR.

The complaint then argues that SGM is right about each of these points. First, SGM provides some general and some specific reasons why they've made a prima facie showing of the requisite environmental impacts. The general reasons include:

(1) An EIS or AUAR is required just as an EIS or AUAR is required for all similarly large projects

(2) The Court is required to assume the "immediate and full build-out" of Minneapolis 2040, and therefore there will be environmental impacts[1]

The first statement conspicuously elides that there is a state law that governs whether or not an EIS is required, the Minnesota Environmental *Policy* Act ("MEPA"). Notably, MEPA *expressly exempts* comprehensive plans from the requirement to perform an EIS or AUAR,[2] and in the examples provided by SGM,[3] an EIS *was required by federal law*.[4] It is hard to interpret this statement as anything other than an end-run around MEPA, which is not what MERA is for.[5]

With regard to the second statement, SGM does not identify the legal requirement that ostensibly compels the court to assume the "immediate and full build-out" of Minneapolis 2040. SGM may be anticipating a motion to dismiss from the City, during which the Court has to assume the facts as SGM has alleged. That would not apply to the merits of the case. It is also possible that SGM is alluding to a different legal argument that SGM made in earlier public statements.[6] In that earlier statement SGM argued that a conflict between a comprehensive plan and zoning regulations must be resolved by making the zoning regulations consistent with Minneapolis 2040. Unfortunately for SGM, the MEPA regulations also expressly exempt from environmental review "zoning ordinances . . . [and] rezoning actions by a local governmental unit."

The Complaint also makes clear that SGM cannot define what the "immediate and full build-out" of Minneapolis 2040 *actually is*. The Complaint and the report of their consultant *Sunde* are filled with estimates and predictions and routinely use language like "potential impacts," "assumption," "impacts may include," and "contemplated." This is important because neither the City nor the Court is required to speculate about what might actually occur as a result of implementing the 2040 plan.[7] Indeed this is why Comprehensive Plans are expressly exempt from environmental review by state law: they are intentionally vague, overarching planning documents that do not contain the specific proposals necessary to conduct appropriate environmental review.

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[1] *See* Complaint at ¶ 45-48.
[2] *See* Minn. R. 4410.4600 Subp. 26 (" adoption and amendment of comprehensive and other plans . . . are exempt.").
[3] Complaint ¶ 46 ("Hiawatha LRT, Southwest LRT").
[4] The federal funding received for both projects obligated the federal transit administration to perform an EIS.
[5] Courts have routinely held that "MERA may not be used to seek review of an agency's decision not to prepare an EIS, because MEPA is the appropriate avenue for review of such decisions. *Nat'l Audubon Soc. v. Minnesota Pollution Control Agency*, 569 N.W.2d 211, 219 (Minn. Ct. App. 1997). MEPA regulates the actions of state agencies, requiring them to consider environmental factors before making decisions that potentially have significant environmental effects. MERA, on the other hand, is a citizen's remedy when the governmental agency fails to comply with MEPA. *Ass'n for Better Living, Inc. v. Fed. Reserve Bank of Minneapolis*, No. CX-94-145, 1994 WL 323412, at *2 (Minn. Ct. App. July 5, 1994); *see People for Envtl. Enlightenment & Responsibility (PEER), Inc. v. Minnesota Envtl. Quality Council*, 266 N.W.2d 858, 865 (Minn. 1978).
[6] *See* https://smartgrowthminneapolis.files.wordpress.com/2018/10/legal-doc.pdf
[7] *See Matter of Univ. of Minnesota*, 566 N.W.2d 98, 105–06 (Minn. Ct. App. 1997).

Next, SGM provides a series of "specific" arguments why they've met their prima facie standard:

(1) Even though Minneapolis 2040 is exempt from the specific requirements for environmental review, the exemption doesn't exempt Minneapolis from the general policy statement at the beginning of the MEPA statute, and therefore the general policy statement overrides the specific exemption, and Minneapolis 2040 is not exempt.[8]

This is a remarkably weak argument for several reasons. First, standard statutory interpretation provides that a specific clause governs over a contradictory general clause.[9] So even though the policy statement at the beginning of MEPA might speak to SGM's concerns about Minneapolis 2040, the specific exemption overrides. This is black letter law.

Second, general policy statements in a statute are given the lowest level of deference and courts will only refer to them to construe an otherwise ambiguous portion of the law. Here there is no ambiguity – Minneapolis 2040 is exempt.

Third, this end-run around the exemption would apply in equal force to any other exempted project, thereby nullifying the whole suite of exemptions enshrined in state law. If SGM had directly challenged the regulatory exemptions as incompatible with the statute they might have an argument; but they did not, and do not.

(2) Minneapolis 2040 will increase density and *Sunde's* analysis shows "likely [environmental] impacts" from increased density[10]

First, its worth reviewing what the *Sunde* report actually says on this point.[11] The report spends a long time projecting density, but then simply declares that these impacts may occur as a result. There is no analysis or explanation of the impacts whatsoever.

Second, *Sunde's* "analysis" of the density increases is entirely speculative. As the report makes abundantly clear, *Sunde* cannot determine what levels of density will actually occur or what environmental impacts are likely as a result. As noted above, speculative impacts are not enough.[12]

(3) *Sunde's* analysis shows stormwater load increases and traffic impacts[13]

These claims are similarly speculative. *See* above. Plus, there are several appendices to the 2040 plan that *do* address stormwater policies and transit. The *Sunde* report argues in several places that these policies are not specific enough to explain how impacts will be managed or mitigated, but the *Sunde* report is premised on the fact that the policies leading to density *are* specific enough to calculate impacts, and SGM argues that we have to assume

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[8] *See* Complaint ¶ 49-61.
[9] This explanation conflates the statute and regulations, but the point is basically the same and the longer explanation is very boring.
[10] *See* Complaint ¶ 65.
[11] *See Sunde* Report at 10-11.
[12] *See Matter of Univ. of Minnesota*, 566 N.W.2d 98, 105–06 (Minn. Ct. App. 1997).
[13] *See* Complaint ¶ 66-79.

they are effectively carried out. SGM does not say why the stormwater management and traffic policies will not be similarly carried out.

After the argument on the prima facie showing, the complaint alleges that the City has no defense because it has not performed an EIS or AUAR (and the associated environmental analysis), and that there is a feasible alternative, which is an EIS or AUAR.[14] These arguments are addressed above, but in short, these are decisions governed by MEPA, MEPA exempts comprehensive plans from environmental review, and MERA is not an end-run around MEPA. This conceptual basis for the lawsuit infiltrates every argument.

The Motion for a Temporary Restraining Order

SGM has also filed a motion for a TRO, seeking to prevent the City from voting on Minneapolis 2040. A TRO is an extraordinary remedy that is rarely granted. There are a number of factors that a Court evaluates in considering a motion for a TRO, but the most important factors are "irreparable harm" and "likelihood of success on the merits." The likelihood of success seems low, as discussed above, but there is an argument to be made.

With respect to irreparable harm, however, SGM makes 3 arguments:

(1) irreparable harm is "clear" "immediate" and "obvious" because of the general policy statement in MEPA;

(2) The *Sunde* report shows irreparable harm; and

(3) if the Council approves Minneapolis 2040 SGM will not be able challenge it in Court.[15]

None of these statements suggest that the City Council vote will cause harm that cannot be remedied,[16] and SGM provides no legal basis for concluding otherwise. This is remarkable, because unlike the complaint, this is a memorandum *of law*. The entire purpose of this document is to explain to the Court why the law compels a specific result. It could be that there is no legal basis whatsoever for this claim, because municipal policies and regulations, including comprehensive plans, are the subject of lawsuits after they are passed all the time. Without any legal basis for "irreparable harm," the TRO motion would appear to be a frivolous dilatory tactic, regardless of the other factors.

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[14] *See* Complaint ¶ 80-96.
[15] See Memorandum of Law at 4-5.
[16] An example of irreparable harm would be bulldozing a home. *See, e.g.*, http://www.ci.minneapolis.mn.us/www/groups/public/@cped/documents/webcontent/convert_285510.pdf