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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

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

Plaintiffs,

v.

City of Minneapolis,

Defendant.

Court File No. 27-CV-18-19587
Judge Joseph R. Klein
Case Type: Other Civil (Declaratory Judgment and MERA)

AMENDED ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

PROCEDURAL HISTORY

The procedural history of this matter is quite lengthy and will not be fully recited here. Relevant to the present Order, the procedural history is as follows: After the close of discovery,[1] the parties presented to the court cross-motions for Summary Judgment. On June 15, 2022, this Court denied the summary judgment motion of the City of Minneapolis (hereinafter, "the City") and granted summary judgment in favor of Plaintiffs.

This court issued injunctive relief to Plaintiffs under the Minnesota Environmental Rights Act (MERA), Minn. Stat. §§ 116B.01-.13 (2022). Relevant to this Order, the injunctive relief outlined by this court was as follows:

[1] As required by the court's July 28, 2021, Scheduling Order and Referral to Mediation, discovery was to be completed by January 17, 2022. As required by this court's Amended Scheduling Order of October 25, 2021, the City was to complete its Expert Disclosure by 4:30 p.m., December 8, 2021. The City timely made its expert disclosure on December 8, 2021. At no time since that disclosure has the City ever sought this court's permission to reopen the period for expert disclosures, or for leave to amend its expert disclosures.

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* * *

3. As of the date of this Order, the City is immediately enjoined from any ongoing implementation of the 2040 Plan and shall immediately cease all present action in furtherance of the 2040 Plan, unless and until the City satisfies the MERA requirements of [(1)] rebutting plaintiffs' prima facie showing, or [(2)] prevails in establishing an affirmative defense, as required by MERA.

4. Within 60 days of this Order, and unless and until it satisfies the requirements of #3 above, the City must restore the *status quo ante* relationship between the parties, as it existed on December 4, 2018, by refraining from its enforcement of, and any prospective enforcement of, any aspect of the 2040 Plan, including amendments to land use ordinances directed by the 2040 Plan, that authorize the scope and degree residential development that this court has determined is likely to create adverse environmental impacts to the Minneapolis area.

5. Within 60 days of this Order, and unless and until it satisfies the requirements of #3 above, the City shall restore the *status quo ante* relationship between the parties as it existed on December 4, 2018, by reinstating for its prospective enforcement both the residential development portions of the City's Comprehensive 2030 Plan, and the pre-December 4, 2018, land use ordinances the same residential development portions of the 2030 Plan.

The City filed an appeal, challenging this court's grant of summary judgment and injunctive relief. On December 27, 2022, the Court of Appeals affirmed in part, reversed in part, and remanded this court's June 15, 2022 Order. *Smart Growth II*, 2022 WL 17957328, at *7. The Court of Appeals affirmed this court's grant of summary judgment in Plaintiff's favor, holding:

". . . [W]e conclude that, under *Smart Growth*, it was appropriate for the district court to base its MERA analysis on the presumption of a full build-out under the 2040 Plan. Using that approach, the district court correctly determined that respondents established a prima facie case for relief under MERA and that the city failed to raise a genuine issue of material fact sufficient to preclude summary judgment."

In its Order, the Court of Appeals also held that this court did not abuse its discretion in ordering injunctive relief based on an inadequacy of notice that injunctive relief would be ordered. The Court of Appeals held that the City had notice that Plaintiffs were seeking injunctive relief in

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conjunction with the summary judgment proceedings and had even addressed arguments relating to injunctive relief at the summary judgment hearing.

The Court of Appeals, however, did reverse and remand this court's grant of injunctive relief. As set forth above, this court's Order had enjoined the City from implementing any aspect of the residential development portion of the 2040 Plan, ordering the city to revert to the 2030 Plan. The Court of Appeals held that this court had done so without findings and with limited analysis on the necessity and scope of the injunctive relief, referencing the City's argument that "injunctive relief would not remedy issues arising from full build-out [of the 2040 Plan] unless a full build-out under the new order's conditions [reversion to the 2030 Plan] would cause fewer environmental effects." The Court of Appeals ordered a remand for additional proceedings on Plaintiffs' request for injunctive relief. The City then filed a Petition for Review of the Court of Appeals' Order with the Minnesota Supreme Court.

On April 18, 2023, the Minnesota Supreme Court denied the City's Petition for Review. Following the denial of the City's Petition for Review, Plaintiffs made a motion to this court seeking an Order Granting Temporary Injunction with Supportive Findings and Analysis. This court scheduled a hearing on that motion. The hearing was to take place on June 7, 2023. On May 16, 2023 the City electronically served "Amended Expert Disclosures" on Plaintiffs. On May 17, 2023, Plaintiff moved to strike the City's May 16, 2023 "Amended Expert Disclosures" and also moved to compel the City to supplement its discovery responses.

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UNDIPUTED FACTS[2]

On October 2, 2009, the City adopted a comprehensive plan called The Minneapolis Plan for Sustainable Growth (hereinafter referred to as the "2030 Plan[3]"). This plan guided development through a Future Land Use Map, primarily through "land use features," that described in general terms what type of development would be appropriate in a given area. With respect to housing, the 2030 Plan sets forth:

> **Minneapolis in 2030**
>
> If the Minneapolis Plan for Sustainable Growth is successfully realized, this is a mental image of the city in 2030.
>
> * * *
>
> **Housing Affordability and Choice**
>
> Minneapolis preserves its existing housing stock and neighborhood character through context-sensitive design, Housing types are integrated, preserving the rich fabric of housing stock and providing access to housing throughout the city, maximizing choice.
>
> * * *
>
> **Livable Neighborhoods**
>
> The city's 81 neighborhoods contain varying densities and price-points and are home to diverse populations. Neighborhoods are distinctive communities with a strong sense of place, strong public participation, and transportation choices. Important priorities include improving public safety, preservation, and equal access to community facilities, such as schools and libraries.

[2] This court adopts and incorporates by reference its findings from the June 15, 2022 Order. To the extent practicable, the court has restated and expanded these findings to better address the issues raised on remand. These findings are made based on the record that was presented at the time of the parties' cross-motions for summary judgment. These findings are intended to be consistent with the court's previous findings, with the intent to expand them insofar as they relate to the order for temporary injunction.

[3] The term "2030 Plan" is the court's shorthand means of referring to the comprehensive plan that was in effect prior to the City's adoption of the 2040 Plan. The plan itself is entitled, "The Minneapolis Plan for Sustainable Growth." At various times throughout this litigation, the parties, the district court, and the Court of Appeals have all used the shorthand phrase, "2030 Plan." Though the use of this phrase may be apocryphal, for ease and clarity's sake it will be used to reference "The Minneapolis Plan for Sustainable Growth."

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The 2030 Plan did not provide specific guidance on the size of new buildings, which was left to the zoning code and varied depending on the zoning district. During the nine years that it was in effect, the 2030 Plan itself was never challenged in any district court action as being in violation state environmental policy. The parties have not brought to this court's attention any litigation in which any expert witness has ever given the opinion that the comprehensive plan "the 2030 Plan" was likely to materially adversely affect the environment. The record is devoid of any evidence that any entity sought to enjoin the implementation of the 2030 Plan due to any claimed violation of either MERA or MEPA. The record is devoid of any evidence of any environmental challenges made to any of the pre-December 7, 2018 land use ordinances which implemented the residential development portions of the 2030 Plan.

The 2040 Plan was passed by the Minneapolis City Council on December 7, 2018. The comprehensive plan was then submitted for approval to the Metropolitan Council. On October 25, 2019, the Metropolitan Council gave its final approval to the 2040 Plan.

The 2040 Plan included substantial amendments to the City's previous comprehensive plan, and officially went into effect on January 1, 2020. It has not been disputed that the 2040 Plan represents a significant change from any previous comprehensive plan, including the 2030 Plan, in terms of residential land use. One potential but expected outcome of the 2040 Plan is increased urban population density. Increased population density is an affirmative feature of the residential portions of the 2040 Plan, a feature that has not been present in any previous comprehensive plan, including the 2030 Plan.

The 2040 Plan, among other things, eliminated the City's single-family residential zoning district which previously covered 49.6% of City's 57.49 square miles (or 28.52 square miles). The elimination of single-family residential zoning for 49.6% of the city is a significant departure from

any previous comprehensive plan, including the 2030 Plan. Prior to the 2040 Plan the City had never authorized the elimination of single-family residential zoning districts in any previous comprehensive plan.

In anticipation of population growth, the 2040 Plan authorized a full build-out of almost 150,000 new residential units during its duration. Before the 2040 Plan was approved, there was no land use plan, including the 2030 Plan, which affirmatively authorized the increase of nearly 150,000 residential units. The City has previously admitted that it anticipates 42,630 new residential units to be built in Minneapolis by 2040 and expects 48,908 new residential units to be built during the duration of the 2040 Plan, which has no fixed end date. The court finds that, consistent with the Plan's expressly stated up zoning goals and policies, the Plan authorized "as a matter of right" the "full build out" of the almost 150,000 residential units. The City did not dispute the fact that the Plan authorizes, as a matter of right, the full build out of almost 150,000 residential units. Plaintiffs have alleged that because of these significant land use changes, including the densification of population feature, 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. As a result, Plaintiffs sought declaratory judgment and injunctive relief under the Minnesota Environment Rights Act (MERA).

When the parties argued their cross-motions for summary judgment, Plaintiffs relied on the report of expert Kristen Pauly ("the Pauly Report"), which analyzed the potential impacts of the 2040 Plan on a limited number of environmental concerns. The Pauly report relied upon the assumption of a full build out and analyzed the various ways in which such a Plan would adversely impact the environment. The expert opinions offered by Ms. Pauly very clearly delineated the nature of the likely environmental problems directly related to the population densification feature

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of the 2040 Plan. According to the Pauly report, the ultimate consequences of eliminating approximately 47% single-family residential zoning districts by the 2040 Plan were that the City of Minneapolis would be impacted by the resulting intensification of density, intensification of use, and intensification of scale that was permitted and encouraged in the Urban Neighborhood future land use category under the 2040 Plan. Pauly opined that under the 2040 Plan, the likely environmental impacts resulting from the change in land use and built forms linked to intensification of density, intensification of use and intensification of scale were likely to include:

- Increased noise impacts;
- Increased pedestrian traffic;
- Increased vehicle traffic;
- Increased vehicle congestion and idling;
- Decreased air quality;
- Increased parking constraints;
- Negative impacts to existing viewsheds (landmark buildings, open spaces, water bodies);
- Longer hours of activity;
- Reductions of privacy;
- Increased light and glare from buildings;
- Greater impacts from construction if construction of larger buildings than previously permitted increases the duration of construction activity;
- Decreased access to light for surrounding properties;
- Shadowing of adjacent properties; and
- Impacts of existing solar panels on neighboring structures.

Pauly further opined that the increase in density under the 2040 Plan would also result in more hard surfaces in the city. This change would result in increased stormwater runoff, which could decrease water quality and increase flooding. Without proper mitigation, increased hard surfaces would also lead to increased velocity of runoff into local surface water, increased pollutants in local surface waters, reduce groundwater recharge, and diminished capacity of stormwater drainage systems. Impacts to receiving waters without proper mitigation would likely result in stream widening and bank erosion, stream down cutting, changes to channel beds due to

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sedimentation, increases in floodplain elevations, degradation of aquatic structure, reduction in habitat diversity and aquatic biodiversity, reduced base flows and increased stream temperatures. The Pauly Report concluded that potential environmental impacts were likely to occur since the 2040 Plan largely ignored those potential impacts and did not provide for measures which would mitigate them.

The City relied primarily on the report of expert Mary Bujold ("the Bujold Report"), which analyzed population growth trends in Minneapolis and comparable cities, residential and commercial growth trends, building density and energy consumption, and the projected population growth metrics for Minneapolis. Bujold's analysis focused heavily on certain housing unit and structure trends through 2009-2019 and the anticipated economic benefits that would accompany the "overall shift toward increased density in the City of Minneapolis." This court found, however, that there was no analysis or discussion about the potential adverse environmental effects that were likely to result from the adoption of the 2040 Plan. The Bujold Report did not offer any rebuttal to Pauly's analysis. Indeed, the record confirmed that Bujold did not rely upon, nor apparently meaningfully consider, Pauly's analysis. The City admitted that Bujold did not rely on the Sunde report.[4] Instead, the Bujold report dismissed the concerns raised by Pauly and the Sunde report, offering

[4] As noted in this court's Order of June 15, 2022 During the course of discovery, the City responded to Interrogatories, Requests for Admissions, and Requests for Production of Documents. The City's discovery responses confirm that, in formulating all opinions set forth in the Bujold report, the City's expert relied only on those documents expressly identified in her report, as well as certain other documents that had been produced by the City in its responses. Plaintiffs asked City to "[i]dentify any environmental review or analysis performed by City for purposes of evaluating and approving City's 2040 Comprehensive Plan" to which City responded that "Minneapolis 2040 was subject to Metropolitan Council Review; see also Minneapolis 2040, Goals 10, 11; and Policies 3, 4, 7, 9, 13, 14, 16, 17, 18, 19, 20, 22, 48, 61, 62, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 80, 87, 97, 98; environmental analysis and considerations are also taken into account when implementing any of these goals or policies, see e.g., March 24, 2021 Declaration of Paul Mogush." *Id.* at 10. This court found that other than vague references to 'environmental analysis and considerations', the City did not specifically identify any formal environmental review or analysis that was performed as part of the approval process of the 2040 Plan. As of the hearing date for the cross-motions, the City had not supplemented its discovery responses to identify any formal environmental review or analysis since the 2040 Plan's adoption.

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that the "maximum permitted development is extremely unlikely in the long-term absent significant and unforeseeable changes to population growth and migration patterns" and that there is "no direct correlation between completed and anticipated zoning changes in Minneapolis and the proposition that there will somehow be a significant impact to people and nature in the short-term." This court rejected such a vague and conclusory statement, finding that it was fundamentally flawed and thus an ineffective response to the opinions set forth by Plaintiffs' experts.

This court found that the Bujold Report failed to specifically address, or purport to rebut to any degree of specificity, the many detailed assertions advanced by Plaintiffs as to increased traffic impacts, increased noise impacts, decreased air quality, loss of the amount of tree coverage/green space, negative impacts to existing viewsheds, negative impact on aesthetic livability, negative impact on bird and other wildlife habitat, adverse impact to water quality, potential adverse impact of stormwater runoff, increased contaminant load to stormwater due to the increase in hard surfaces, soil erosion due to increased runoff, reduced ground water recharge, increased wastewater generation, increased potable water usage, and increased stress to existing public infrastructure, including sanitary sewer system.. As a result of all of these deficiencies, this court granted summary judgment in favor of Plaintiffs on the issue of whether Plaintiffs had established a prima facie case for relief under MERA and further granted summary judgment finding that the City had failed to rebut the prima facie case established by Plaintiff, and that the City had failed to offer evidence supporting any affirmative defense. The Court of Appeals affirmed this court's findings in that regard.

Of relevance to this court's Order following remand, this court also finds that in addition to the deficiencies already noted, Bujold's disclosed opinions did not include any analysis of the 2030 Plan. Specifically, Bujold did not offer any opinions on whether the 2030 Plan's full build out would in any manner adversely affect the environment. Prior to the December 8, 2021 deadline for expert

disclosure, the City disclosed no opinions relating to the environmental impact of the 2030 Plan. There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in the violation of any statute or law.

In stark contrast to the unrebutted record established by Plaintiffs' expert: There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in increased noise impacts. There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in increased pedestrian traffic. There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in increased vehicle traffic. There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in increased vehicle congestion and idling. There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in decreased air quality. There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in increased parking constraints. There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in negative impacts to existing viewsheds (landmark buildings, open spaces, water bodies). There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in longer hours of activity. There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in reductions of privacy. There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in increased light and glare from buildings. There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in greater environmental impacts from construction. There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in decreased access to light for surrounding properties, shadowing of adjacent properties, and impacts of existing solar panels on neighboring structures. There is nothing in the record to suggest that the 2030 Plan would or did result in more hard surfaces in the city or would increase stormwater runoff.

At the time of the summary judgment motion, the City offered the February 2, 2022, Disclosure of Wesley Durham. Durham was employed by the City of Minneapolis as a Senior City Planner, Community Planning and Economic Development, and at the time of his declaration, had been so employed for approximately five years. He stated that his job duties generally consisted of quantitative and geographic analysis, mapping, and data visualization related to existing conditions, activity, and policy development. The City's own employee conceded that under the previous comprehensive plan, (the 2030 Plan) it was not possible to make precise calculations of housing unit capacity. Moreover, while he ventured some estimate of future full housing unity capacity, he did not make any assertions that relate to environmental impact. His declaration did not disclose or attempt to render any opinions. In short, to the extent that Durham's housing capacity estimates for the 2030 Plan are of any reliable use, they are not tethered to any opinion that the 2030 Plan is likely to adversely affect the environment. The City has offered no timely, admissible expert opinion that presents evidence that the 2030 Plan presented the potential of any likely adverse effects to the environment.

The record also contains the March 17, 2021, Declaration of Alissa Pier, which was part of the record at the time of the original cross-motions. Pier was a City Planning Commission member from July 2008 through January 2021. Pier was asked to review and quantify land use applications in relation to the 2040 Plan. She was asked to identify certain projects whose land use applications were approved under 2040 Plan guidance which might not have qualified for approval under the previous 2030 Plan. She was further asked to review projects proposed after approval of the 2040 Plan but before the City's Zoning Code was amended in accordance with the 2040 Plan and to identify projects that included specific citations to the 2040 Plan as part of the recommendation for approval. Her observations were based on quantitative data related to

elements of height, scale, massing, density, lot coverage, and green space. Her observations permit the court to make further findings bearing on the comparison of the 2040 Plan and the 2030 Plan.

Pier observed that since the Minneapolis 2040 Plan took effect on January 1, 2020, there has been a significant increase in total approved building height, linear feet, gross area footprint, and impermeable surface coverage. Updates to the Minneapolis Zoning Ordinance to bring the Zoning Code into alignment with the guidance of the new Comprehensive Plan (Minneapolis 2040) took place over the following year with the Built Form Guidance taking effect January 1, 2021. In the interim, the Minneapolis Planning Commission reviewed projects that were brought forth under the existing Zoning Ordinances, which were written to align with the former 2030 Plan. The Minneapolis Planning Commission was instructed to consider this asynchrony (caused by the delay in the updating the Zoning Code) as a required finding for approval of requested Land Use Applications which were not in compliance with the existing Zoning Ordinances. Pier studied information from 68 projects that come before the Planning Commission in the 14 months since the Minneapolis 2040 Plan took effect (January 2020 – February 2021). These projects were selected due to the specific citation of the 2040 Plan as a required finding for approval in the 5,100+ pages of public record that corresponded to their respective projects' Land Use Application packets and staff reports.

Pier noted that the data compiled from these 68 projects included the following observations:

1) Projects totaled 391 stories in height. Of those, 163.5 stories were approved in excess of the 246.5 stories that were allowed by right under the former Zoning Code.

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2) Projects totaled 4,745.54 linear feet in height. Of those, 1,721.59 linear feet were approved in excess of the 3,395 linear feet that were allowed by right under the former Zoning Code.

3) The average Floor Area Ratio (FAR) that was approved was 1.3 above what was allowed by the former Zoning Code.

4) Of these projects, where relevant, 83% received a reduction in a setback(s) to the required yard.

5) The total lot area of these projects totaled 2,748,732.7 square feet. The total Building Footprint of these projects totaled 1,526,296.5 square feet.

6) The average impervious surface coverage[5] amount for these projects was 80.4%. This equates to 1,955,961.6 square feet of impervious surface for the aforementioned projects.

Pier further noted that impervious surface coverage is calculated by combining the square footage of the building lot coverage with the square footage of all impervious/nonporous surfaces within said parcel's property lines.

7) The total gross floor area of these projects totaled 7,535,365.3 square feet. Of that amount, 1,199,168.6 square feet were granted above what was allowed by the former Zoning Code.

Pier's observations were not challenged by the City at the time of the cross-motions for summary judgment. The City's entire defense against Plaintiffs' summary judgment motion rested in the challenge to Pauly's presumption of a full build-out.

[5] This court notes that Chapter 510.10 of Minneapolis Code defines Impervious Area to mean: "the number of square feet of hard surface areas that either prevent or retard the entry of water into the soil matrix, as it entered under natural conditions as undisturbed property, and/or cause water to run off the surface in greater quantities or at an increased rate of flow from that present under natural conditions as undisturbed property, including, but not limited to, roofs, roof extensions, driveways, pavement, and athletic courts."

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The record reflects that, following the remand, and after Plaintiffs had moved this court for an Order for Injunctive Relief with Findings and Analysis, the City electronically served "Amended Expert Disclosures" on May 16, 2023. At that time, this court had already set the date for hearing Plaintiffs' motion, and the disclosures were served 22 days ahead of that hearing date. This court notes that the City had not and still has not sought leave to extend the period for expert disclosure, nor has it ever asked the court for permission to amend its expert disclosure. The City's Amended Expert Disclosures" identified 14 new "retained" expert witnesses from Stantec Engineering (Stantec), 34 pages of packaged resumes., as well as including other declarations. The City also filed the Declaration of Ms. Sarff, of the City Attorney's Office, to which was attached numerous exhibits that were not part of the record at the time of the cross-motions. Plaintiffs have also filed additional documents or made reference to numerous matters that were not part of the record at the time of the cross-motions. As set forth below, none of these attempts to augment the record will be considered by this court in ruling on Plaintiffs' requested injunction.

CONCLUSIONS OF LAW

Plaintiffs have prevailed on their motions for summary judgment. They have established a prima facie case for relief under MERA. The City has failed to rebut the prima facie showing or present an affirmative defense.[6] This is the law of the case, as this court's grant of summary judgment has been upheld on appeal and the Minnesota Supreme Court has declined review.

[6] The Court of Appeals noted in a footnote to its December 27, 2022, decision, that the City had "failed to follow through on its expressed intent to take discovery, challenge the admissibility of the Pauly Report, and submit a rebuttal to the Pauly Report." The Court of Appeals made note of this court's observation that "this unfortunate strategy has left the City bereft of any fact-based rebuttal or affirmative defense, the type of which is called for under MERA." At the time of the cross-motions, discovery was complete and the time to disclose experts had expired. The record was closed. In order to avoid summary judgment, the City was required to, at a minimum, create a genuine issue of fact on its ability to rebut the prima facie case, or establish an affirmative defense. It failed to do so. This failure resulted in summary judgment being granted against the City, foreclosing any future attempt to rebut the prima facie case, or present and affirmative defense.

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This present Order comes on the heels of the Court of Appeals reversal and remand of the order for injunctive relief. In issuing the remand order, the Court of Appeals noted, "Given the lack of findings supporting the district court's grant of injunctive relief, as well as the limited analysis of this issue, the record is insufficient for this court to determine whether the district court properly exercised its discretion in granting injunctive relief." The Court of Appeals held, ". . . we reverse and remand the order for relief because the district court did not make adequate findings to enable appellate review."

Plaintiffs have formally moved to have this court issue a second order on their request for a temporary injunction, now that the law of the case is that they have established a prima facie case for relief under MERA. "District courts are given broad discretion to determine how to proceed on remand, as they may act in any way not inconsistent with the remand instructions provided." *Janssen v. Best Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005). As this court reads the Court of Appeals decision, with respect to the grant of injunctive relief, it is a continuation of the original proceedings. Because it is a continuation of the original proceeding, the remand proceedings must take care to "prevent any unfairness." *See McClelland v. Pierce*, 376 N.W.2d 217, 220 (Minn. 1985) ("reconsideration of these cases on remand is a continuation of the original proceedings, . . . it is not a new proceeding which gives rise to a right of peremptory challenge, and that the affidavits of prejudice were untimely" (emphasis added)); *Earthburners, Inc. v. County of Carlton,* 513 N.W.2d 460 (Minn. 1994) (on remand, to prevent any unfairness to the applicant, the board must confine its inquiry to those issues raised in earlier proceedings before the planning commission and county board while allowing adequate opportunity for a meaningful discussion of those issues); *cf. Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. Ct. App. 1988) ("[w]hen the trial court receives no specific directions as to how it should proceed in fulfilling the remanding court's

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order, the trial court has discretion in handling the court of the cause to proceed in any manner not inconsistent with the remand order." *Rev. denied* (Minn. Feb. 24, 1988).

In this case, the Court of Appeals' remand is narrow and specific. The Court of Appeals held that this court's grant of injunctive relief was not supported by sufficient findings or analysis for appellate review of whether this court properly exercised its discretion. It is thus for this court to determine whether the existing record supports a grant of injunctive relief. If the record supports a grant of injunctive relief, then this court will do so. If the court cannot properly grant injunctive relief based on the record before it, then further proceedings relating to the injunctive relief being sought may be warranted, or the request for injunctive relief will be denied. As noted in cases such as *Earthburners* and *Duffey*, Minnesota law gives the trial court discretion on remand regarding the extent of material it considers in explaining its earlier ruling.

1. **The court shall consider Plaintiffs' motion for injunctive relief based on the record as it existed at the time of the hearing on the parties' cross-motions for summary judgment.**

Before proceeding with its analysis on the request for injunctive relief, this court will first address the issue of the parties' attempts to expand the record following the remand order. On remand, a district court's jurisdiction is limited to that which is in the remand. *Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 720 (Minn. 1987) ("If complete finality cannot be accomplished, if something remains to be done by the court below, the appellate court will ordinarily so indicate, usually by a remand with directions or a mandate which the trial court must follow" . . . "[c]onsequently, the scope of the finality of an appellate decision depends on what the court intends to be final, and this is determined by what the court's decision says." (emphasis added)); *Johnson v. Princeton Pub. Utilities Comm'n*, 899 N.W.2d 860, 868 (Minn.

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App. 2017) (On remand, a district court "must execute an appellate court's mandate strictly according to its terms and lacks power to alter, amend, or modify that mandate.'" (quoting *Drewitz v. Motorwerks, Inc.*, 867 N.W.2d 197, 209 (Minn. App.), *rev. denied* (Minn. Sept. 15, 2015)).

In this case, in May 2023, the City introduced into the record a series of documents from residents, business owners and city officials, discussing various project-specific and broader policy plans for development in a variety of neighborhoods. The May 24, 2023, Declaration of Ms. Sarff seeks to introduce several exhibits that were not part of the record at the time of the cross-motions for summary judgment. Documents that were not part of the record at the time of the cross-motions will not be considered for the purposes of this Order. The City also sought to serve "Amended Expert Disclosures" on May 16, 2023. The Court's Amended Scheduling Order, issued on October 25, 2021, had expressly set the deadline of December 8, 2021, for the City to complete its expert disclosure. The City had not sought leave to extend the period for expert disclosure, nor had it asked the court for permission to amend its expert disclosure. As of the date of this Order, the City still has not sought any such leave from this court. Rule 16.02 of the Minnesota Rules of Civil Procedure gives the district court the discretion to set scheduling deadlines and other matters appropriate to the circumstances of a case. Rule 16.02 expressly states, "A schedule shall not be modified except by leave of court upon a showing of good cause." Minn. R. Civ. P. 16.02. The court has not granted leave to the City to modify its expert disclosure of December 8, 2021. Whether good cause exists to allow for modification of the either the court's Scheduling Order or Amended Scheduling Order has not been established. For the purposes of the present motion concerning Plaintiffs' request for an injunction, the court will not consider any information, record, or opinion that was not already part of the record at the time of the cross-motions for summary judgment. Plaintiffs have also sought to expand the record for the court's consideration by

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referencing numerous materials that were not part of the record at the time of the cross-motions for summary judgment. This ruling applies equally to those matters introduced by Plaintiffs.

Thus, in response to Plaintiffs' motion to exclude and to strike Defendant's May 16, 2023 "Amended Expert Disclosures," to the extent that the court is considering the issue on remand based only on the record that was presented at the time of the cross-motions for summary judgment, that motion is **GRANTED**. The May 16, 2023 Amended Expert Disclosures were submitted well after the deadline set for the City to complete its expert disclosures. The City has not sought leave to amend its disclosures, nor has it made any request of the court to extend any deadlines.

2. **Plaintiffs' motion for an order enjoining any ongoing implementation of the residential development portions of the City's 2040 Plan is GRANTED**.

The Court of Appeals has upheld the district court's grant of summary judgment in Plaintiffs' favor, that Plaintiffs have established a prima facie showing of environmental harm under MERA. Once a plaintiff has satisfied the Minn. Stat. § 116B.04(b) prima facie showing requirement, the burden shifts to defendant to "rebut the prima facie showing by the submission of evidence to the contrary." Minn. Stat. § 116B.04(b). Alternatively, a defendant can show "that there is no reasonable and prudent alternative and 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…" *Id.*

Based on the record presented, this court, in its June 15, 2022, Order found that the City had not satisfied its burden to rebut Plaintiffs' prima facie showing of environmental harm. The City's argument in opposition to Plaintiffs' motion was based on the report of expert Mary Bujold. This court has outlined its findings regarding the deficiencies of the Bujold Report, and the report's

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ineffectiveness in both opposing Plaintiffs' prima facie MERA showing or rebutting the prima facie showing by submitting evidence to the contrary. This court found that the City had offered no evidence to rebut Plaintiffs' prima facie showing. The City argued that it did not need to do any environmental analysis because a full build-out of almost 150,000 new residential units was extremely unlikely to occur. The City's expert report vaguely dismissed the risks that the 2040 Plan presented to the environment, offering the conclusory statement that "there is no direct correlation between completed and anticipated zoning changes in Minneapolis and the proposition that there will somehow be a significant impact to people and nature in the short term." As previously observed, the City's expert did not even review the Pauly Report. Moreover, by restricting her statement to "in the short term" the City's expert missed completely the crux of the Pauly Report. This court held that the Bujold Report fell short of rebutting any of the concerns addressed with respect to the likely environmental impact of the 2040 Plan's full build-out, a fatal flaw to both the City's defense against Plaintiffs' summary judgment motion and the City's own motion for summary judgment. Similarly, this court found that the City failed to establish any record that a reasonably prudent alternative to the 2040 Plan was unavailable. The City contested this court's findings on appeal, and the district court's grant of summary judgment was affirmed.

Based on the issues litigated to date, the residential portions of the City's 2040 Plan have been found to be in violation of MERA. Thus, this court finds that any ongoing implementation of the residential development portions of the City's 2040 Plan is an ongoing violation of MERA. Upon determining a violation of MERA, "The court may grant declaratory relief, temporary and permanent equitable relief, or may 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; *see also State ex rel. Swan Lake*

Area Wildlife Ass'n v. Nicollet Cnty. Bd. of Cnty. Comm'rs, 799 N.W.2d 619, 625 (Minn. App. 2011) (*Swan Lake III*). A district court "may issue an injunction that 'provides an adequate remedy without imposing unnecessary hardship on the enjoined party.'" *State ex rel. Wacouta Twp. v. Brunkow Hardwood Corp.*, 510 N.W.2d 27, 31 (Minn. App. 1993) (quoting *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 93 n.6 (Minn. 1979)).

The *Dahlberg* factors set the standards for issuance and review of a temporary injunction. These include consideration of the relationship of the parties, the relative harm to the parties if the temporary injunction is granted or denied, the likelihood of success on the merits, public policy considerations, and the administrative burdens to supervise or enforce the injunction. *See Resol. Tr. Corp. v. River Properties of St. Paul Limited Partnership*, No. C7-94-2547, 1995 WL 295963, at *2 (Minn. App. May 16, 1995), citing *Dahlberg Bros. Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965). Of the five factors under *Dahlberg,* the key factors that must be satisfied are irreparable harm and the probability of success in the underlying action. *See Resol. Tr. Corp.* As discussed below, each of the five *Dahlberg* factors, including the two key factors, weighs in favor of this Court's grant of injunctive relief.

The court finds that both of the key factors are satisfied in this case. As the court has already detailed in its findings, Plaintiffs have outlined numerous environmental impairments that are likely to result by virtue of the full implementation of the 2040 Plan. The court finds that such damage to the environment would be an irreparable harm to the environment, the protection of which is viewed by this state as being of paramount concern. The 2040 Plan's provision for nearly 150,000 new residential units is 100 times more than the minimum number of new unattached residential units and 150 times more than the minimum number of new attached residential units that trigger a mandatory environmental impact statement (EIS) under Minn. Stat. Ch. 116D

Minnesota Environmental Policy Act (MEPA). Minn. R. 4410.4400, subp. 14(D). This fact support's the court's finding that the 2040 Plan's potential for significant environmental effects present a significant risk of irreparable harm to the environment. The court notes that the Environmental Quality Board (EQB) was statutorily required to identify those categories of "conduct" which are "likely" to have such "potential for significant environmental effects" as to require a mandatory EIS. Minn. Stat. § 116D.04, subds. 2a(a) and 5a. An EIS is the state's most rigorous environmental review (*see In re Minn. Power's Petition for Approval of EnergyForward Res. Package*, 938 N.W.2d 843, 848 (Minn. App. 2019)). EQB has categorized "residential development" of just 1,000 attached and 1,500 unattached residential units as one of just 27 categories of "conduct" requiring a mandatory EIS (Minn. R. 4410.4400, subps. 1-28). There is nothing on the record that challenges EQB's categorization of such massive "residential development" as having such "potential for significant environmental effects" so as to necessitate a mandatory EIS. Moreover, the court has already found that the 2040 Plan does authorize as a matter of right the full build-out of 100 to 150 times EQB's threshold minimum number of new residential units to require a mandatory EIS, the record supports the inescapable conclusion that the 2040 Plan would have such potential for significant environmental effects that it is likely to affect the environment materially adversely, causing irreparable harm. The same is true even if this Court were to only look at the environmental impact from City's expressly "expected" 48,908 new residential units under the 2040 Plan. This "expected" number of new residential units under the plan is still over 32 to 48 times more than EQB's minimum number of new attached (1,500) and unattached (1,000) residential units which are "likely" to have such "potential for significant environmental effects" as to require a mandatory EIS. As Plaintiffs' expert has opined, without analysis and the identification of the impacts, the 2040 Plan lacks the development of any specific

criteria or mitigation steps necessary to reduce or minimize impacts resulting in likely pollution and harmful effects to natural resources. This supports the court's finding of the likelihood of irreparable injury.

Other courts have found irreparable harm for injunction purposes to have been shown where, as here, environmental rights have been violated. *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 995 (8th Cir. 2011) ("the failure to comply with NEPA's requirements causes harm itself, specifically the risk that 'real environmental harm will occur through inadequate foresight and deliberation."); *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 816 (8th Cir. 2006) (injury under NEPA includes "failing to issue a required environmental impact statement"); *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002) (court held that harm to the environment "may be presumed when an agency fails to comply with the required NEPA procedure." Given all of the foregoing this court finds that the showing of irreparable harm has been met.

As to the probability of success, as *Dahlberg* requires, Plaintiffs have already prevailed on summary judgment. The prima facie case of a MERA violation has been satisfied. The City has failed to rebut or to present an affirmative defense. Discovery is closed. Thus, the "probability of success" for Plaintiffs is already assured.

The remaining three *Dahlberg* factors are also satisfied in this case. The relationship between the parties supports the grant of an injunction. Plaintiffs are citizen's groups who are organized for the purposes of protecting the environment. The City of Minneapolis is a governmental entity, with the power to enact policies that can, as here, have the potential to affect the environment. The City is charged with the responsibility to act in such a way as to not endanger or harm the environment. MERA requires that all citizens of this state comply with the state's

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environmental policy, but the City's obligation to do so is even more pronounced. As the Minnesota Supreme Court has previously held, a political subdivision of the state, has a greater duty than does a private individual to see that legislative policy is carried out." *See, County of Freeborn by Tuveson v. Bryson*, 243 N.W.2d 316, 321 (Minn. 1976) (*Bryson II*)

As it relates to the public policy factor, MERA's "paramount" concern for the environment weighs heavily in favor of this Order. Finally, while there may be administrative burdens in enforcing this Order, they are not significant enough to outweigh the remaining factors. This court finds that all five *Dahlberg* factors have been satisfied in favor of granting an injunction.

In considering injunctive relief as a remedy, this court looks to whether the court's issuance of a temporary injunction would provide an adequate remedy without posing unnecessary hardship on the enjoined party. The Court of Appeals has observed in its remand order that the adoption of the 2040 Plan is not the harm in this matter. Rather, it is the adverse environmental effects that may result from the "implementation of the policy." Based on the record presented, anything short of a temporary injunction of the ongoing implementation of the residential development portions of the 2040 Plan would be inadequate to safeguard the environment, which the legislature has determined to be of paramount concern.

Plaintiffs presented a lengthy, detailed, compelling, and unrebutted case outlining the likely environmental problems directly related to the population densification feature of the 2040 Plan. The unrebutted expert opinion set forth that the ultimate consequences of eliminating nearly 50% of single-family residential zoning districts by the 2040 Plan were that the City of Minneapolis would be impacted by the resulting intensification of density, intensification of use, and intensification of scale that was permitted and encouraged in the Urban Neighborhood future land use category under the 2040 Plan. Plaintiffs' expert opined that under the 2040 Plan, the likely

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environmental impacts resulting from the change in land use and built forms linked to intensification of density, intensification of use and intensification of scale were likely to include numerous adverse impacts[7] to the environment, as outlined by this court in its findings of undisputed fact. Pauly further opined that the increase in density under the 2040 Plan would also result in more hard surfaces in the city. This change would result in increased stormwater runoff, which could decrease water quality and increase flooding.[8] With these undisputed findings in mind, this court finds that allowing any continuing implementation of the residential development portions of the 2040 Plan would be a manifest violation of both the letter and the spirit of MERA. To allow continued implementation of the residential portions of the 2040 Plan would be to foster an ongoing constellation of environmental risks as outlined in great detail by Plaintiffs' expert. This would be contrary to not only the letter of the law set forth in MERA, but the spirit of both MERA and MEPA, which hold paramount the protection of this state's environment and natural resources, for the benefit of all its citizens. The Minnesota Environmental Rights Act (Minn. Stat. § 116B) was enacted to provide a civil remedy for the protection of "air, water, land and other natural resources located within the state from pollution, impairment, or destruction" because "each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state." Minn. Stat. § 116B.01.

[7] These included increased noise impact, increased pedestrian traffic, increased vehicle traffic, increased vehicle congestion and idling, decreased air quality, increased parking constraints, negative impacts to existing viewsheds, longer hours of activity, reduction in privacy, increased light glare from buildings, greater impacts from construction, decreased access to light for surrounding properties, shadowing of adjacent properties, and impact of existing solar panels on neighboring structures.

[8] While this court's repeated recitation of its findings and analysis of issues that have already been affirmed by the appellate court may seem redundant, this court does so to underscore the degree of lopsidedness of the record presented at the time of the cross-motions. That lopsided record is the same lopsided record which is in place as the City presents its argument against Plaintiffs' proposed injunction.

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This court, in its previous Order of June 15, 2022, had enjoined the City from any ongoing implementation of the 2040 Plan[9] unless and until the City satisfied the MERA requirement either rebutting Plaintiff's prima facie showing, or establishing an affirmative defense as required by MERA. This court further ordered that unless and until the City satisfied the MERA requirements it was to restore the status quo ante relationship between the parties as it existed on December 4, 2018, by ordering the City to refrain from its enforcement of the 2040 Plan and ordering the City to revert to the residential development portions of the 2030 Plan and the pre-December 4, 2018 land use ordinances which implement the same residential portions of the 2030 Plan. That aspect of the Order was reversed and remanded, as the court had failed to make findings and engaged in only limited analysis on the issue. The Court of Appeal held that the record was therefore insufficient to determine whether this court properly exercised its discretion in granting the injunctive relief.

In revisiting the argument on remand, the City has argued that this court's grant of an injunction reverting the City to the 2030 Plan is not supported by the record. Having lost on appeal, the City now concedes that the Court of Appeals accepted this court's determination that it was proper to assess the environmental effects of the comprehensive plan (the 2040 Plan) by applying a presumption of "full implementation of the policy." The City now wishes to parlay that holding into an argument in favor allowing the status quo to continue, by arguing that in order to fashion equitable relief consistent with the purpose of MERA, equitable relief must be based on the same full implementation presumption. While the Court of Appeals found this argument—raised for the

[9] This court notes the clerical error in its original June 15, 2022 Order. The district court intended only to enjoin the City from any ongoing implementation of the **residential development portion** of the 2040 Plan. The clerical error created an apparent inconsistency between the court's findings and its original Order. That clerical error is rectified by this Order.

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first time on appeal—persuasive, this court is less swayed after considering it on remand. It is possible—even likely—that the appellate court found the City's argument persuasive given the lack of this court's findings. The lack of findings and analysis on the court's original grant of an injunction is a shortcoming this court both recognizes and acknowledges. As will be set forth below, however, the record does amply support enjoining any ongoing implementation of the residential development portions of the City's 2040 Plan. A careful examination of both the record and the City's argument fails to persuade this court that the state's natural resources and environment are best protected by allowing the City to advance further down the slippery road of implementing a residential development plan that presents a multitude of risks of adverse impact to the environment, without providing for any measures for mitigating those potential environmental impacts.

First, a clear understanding of the posture of this case at the time of the cross-motions for summary judgment is required. Minnesota Statute § 116B.04 (b) sets forth the burden of proof for a civil action under MERA. That section states:

> (b) In any other action maintained under section 116B.03, whenever the plaintiff shall have made a *prima facie* showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, **the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative** and 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. Economic considerations alone shall not constitute a defense hereunder.

Minn. Stat. § 116B.04 (b) (emphasis added).

Plaintiffs have made their *prima facie* showing. The Plaintiffs had the burden of establishing the *prima facie* MERA violation and the record is replete with evidence in support of that position. It is important to recognize that Plaintiffs' expert tied together several factors that in

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combination supported the opinion that the full implementation of the 2040 Plan created the likely risk of adverse impact on the environment:

- that the 2040 Plan was significantly different from any prior comprehensive plan, with an affirmative feature of increasing urban population density;
- that the 2040 Plan was significantly different from any prior comprehensive plan, in the elimination of single-family residential zoning in 49.6% of City's 57.49 square miles (or 28.52 square miles);
- that the 2040 Plan affirmatively authorized a full build-out of almost 150,000 new residential units during its duration;
- that the population densification, together with the increase in residential units contemplated in the plan would likely create a multitude of varied adverse environmental impacts.

The burden then shifted to the City to rebut the prima facie showing by the submission of evidence to the contrary. It is important to recognize that the City was facing a motion for summary judgment, in which Plaintiffs asserted, among other things, that the City could not rebut Plaintiffs' prima facie evidence. The summary judgment motion was brought after the close of discovery, and after expiration of the deadline for the City to complete its expert disclosures. This was the time for the City to present its evidence in order to, at a minimum, create a genuine issue of material fact on an issue (rebuttal of the prima facie MERA case) on which the City ultimately bore the burden of proof. "When a motion for summary judgment is made and supported, the nonmoving party must present specific facts showing that there is a genuine issue for trial." *DLH Inc.*, 566 N.W.2d at 69 (internal quotations omitted). The court must grant summary judgment when the existing record, including pleadings and affidavits, shows that the non-moving party has

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established no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Non-moving parties must do more than present evidence showing the existence of some "metaphysical doubt" about the material facts. *DLH Inc.*, 566 N.W.2d at 71; *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993); *Southcross Commerce Cent. v. Tupy Props.*, 766 N.W.2d 704, 707 (Minn. Ct. App. 2009). Mere averments are similarly inadequate. *DLH Inc.*, 566 N.W.2d at 71. Instead, non-moving parties will survive a motion for summary judgment only by pointing to evidence that would permit reasonable persons to reach different conclusions regarding an essential element of the non-movant's claim. *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 507 (Minn. 2006); *DLH Inc.*, 566 N.W.2d at 71; *Southcross Commerce Cent*., 766 N.W.2d at 707.

This court has already found that the City failed to present any evidence that would rebut Plaintiffs' prima facie showing. The City's opposition to Plaintiffs' summary judgment motion was based solely on the Bujold Report. This court found that the Bujold Report fell short of rebutting Plaintiffs' prima facie showing. The Bujold Report did not mention or even consider the Pauly Report. This court found that the Bujold Report missed completely the crux of the Pauly Report, a fatal flaw to its defense against Plaintiffs' motion for summary judgment. This court granted summary judgment against the City on the issues that:

- Plaintiffs had satisfied their prima facie showing of a violation under MERA;
- The City had failed to rebut Plaintiffs' prima facie showing; and
- The City had failed to show that a reasonably prudent alternative to the 2040 Plan was unavailable.

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The court of appeals affirmed this court's findings and the grant of summary judgment against the City on all three of the above issues. As such, this is the law of the case. It is under such posture that the court's consideration of Plaintiffs' injunction request is considered.

As noted by the Court of Appeals, upon determining a violation of MERA, "The court may grant declaratory relief, temporary and permanent relief, or may 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; *see also State ex re. Swan Lake Area Wildlife Ass'n v. Nicollet Cnty Bd. Of Cnty Comm'rs,* 799 N.W.2d 619, 625 (Minn. App. 2011) (*Swan Lake III*). A district court "may issue an injunction that 'provides an adequate remedy without imposing unnecessary hardship on the enjoined party.'" *State ex rel. Wacouta Twp. v. Brunkow Hardwood Corp.*, 510 N.W.2d 27, 31 (Minn. App. 1993) (quoting *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 93 n.6 (Minn. 1979)). A district court's award of injunctive relief is an exercise of its equitable powers. *Borom v. City of St. Paul,* 289 Minn. 371, 376, 184 N.W.2d 595, 598 (1971). A district court has broad discretion when fashioning an equitable remedy. *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979). This court will reverse a district court's equitable remedy only if the district court abuses its discretion. *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 23 (Minn. 2011) (*citing Nadeau*, 277 N.W.2d at 524).

The City's argument is that the record is insufficient to establish that a full implementation of the 2030 Plan would be less potentially harmful to the environment than would the full implementation of the 2040 Plan. This argument is based in the suggestion that the full implementation of the 2030 Plan is not less harmful to the environment than the full implementation of the 2040 Plan. The argument as it is presented is no different than asserting the

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affirmative defense that "there was no feasible prudent alternative", an issue on which the City would bear the burden of proof. *See* Minn. Stat. § 116B.04 (b). At the hearing, the City offered no evidence that the 2030 Plan was not a feasible prudent alternative. This court found that it offered no evidence of any affirmative defense. The record is a stark contrast between Plaintiffs' showing—which was detailed and supported by expert opinion—and the City's showing. The City now raises the metaphysical concern that the full implementation of the 2030 Plan could be of greater danger to the environment than the well-detailed, unrebutted, environmental risks that are of record for the 2040 Plan. The City, however, offers utterly no evidentiary support for raising this metaphysical concern. Bujold, the City's only expert, offered no opinions critiquing the 2030 Plan. Specifically, Bujold did not offer any opinions on whether the 2030 Plan's full build out would in any manner adversely affect the environment. Prior to the December 8, 2021 deadline for expert disclosure, the City disclosed no opinions relating to the environmental impact of the 2030 Plan. There is nothing in the record to suggest that the 2030 Plan's residential land use would or did result in the violation of any statute or law. This court has outlined in detail its findings at pages 10-11 of this order, highlighting the lack of any factual support in the record for the City's metaphysical concerns.

The City also seeks to raise metaphysical concerns about the 2030 Plan's full implementation through the declaration of Wesley Durham. Durham is a City of Minneapolis employee, who is identified as a "non-retained expert." The City's own employee conceded that under the previous comprehensive plan, (the 2030 Plan) it was not possible to make precise calculations of housing unit capacity.[10] Moreover, while he ventured some estimate of future full

[10] Durham's Declaration is similar in many respects to March 24, 2021 Declaration of Paul Mogush. Mogush, a City employee, is Manager of Community Planning in the Development Services Division of the Community Planning and Economic Development department for the City. Mogush also noted that the 2030 Plan was not accompanied by

housing unity capacity, he did not make any assertions whatsoever that relate to environmental impact. His declaration did not attempt to render any opinions to a reasonable degree of certainty. The significant flaw in the City's use of Durham's declaration in attempting to bootstrap it into a metaphysical concern about the environmental dangers of the full implementation of the 2030 Plan, is that the argument fails to recognize or even consider the vast difference between the two plans. With respect to the concept of population densification, the two comprehensive plans are as different from each other as apples and oranges. The record makes this abundantly clear.

Plan 2040 sought to do something that no other previous comprehensive plan, including the 2030 Plan, had ever done. It made a feature and a goal of increasing population densification. The 2040 Plan eliminated the City's single-family residential zoning district which previously covered 49.6% of City's 57.49 square miles (or 28.52 square miles). The elimination of single-family residential zoning for 49.6% of the city is a significant departure from any previous comprehensive plan, including the 2030 Plan. Specifically, the 2030 Plan did neither of those things. Prior to the 2040 Plan, the City had **never** authorized the elimination of single-family residential zoning districts in any previous comprehensive plan. The 2040 Plan authorized a full build-out of almost 150,000 new residential units during its duration. Before the 2040 Plan was

specific guidance on the size of new buildings, which was left to the zoning code and varied depending on which zoning district was applied. Some areas of the City were also the subject of small area plans, which provided more detailed development guidance than the comprehensive plan but varied widely in their approach to guiding building height and bulk. Interestingly, Mogush observed that the result of these three layers of guidance, which were not always consistent with one another, was that similarly situated properties throughout the City often had very different guidance from one another. For this reason, new buildings very often required special approvals such as variances and conditional use permits that left the outcome to the review process. That new building projects were more likely to require special approval such as variances or conditional use permits suggests strongly that there new building projects would be subjected to additional review on a project-by-project basis. As such, this court finds that the additional layer or layers of review would make it much less likely that a build-out that created environmental impairments would be approved. The added need for special permits and review weighs in favor of a finding that the 2030 Plan, in full build-out, would cause fewer environmental effects than would a full build-out under the 2040 Plan. These anticipated added requirements and additional layers of review also support a finding that, unlike the 2040 Plan, the 2030 Plan had built-in measures that would mitigate against potential adverse environmental impacts.

approved, there was no land use plan, including the 2030 Plan, which affirmatively authorized the increase of nearly 150,000 residential units. Durham's estimates of the 2030 Plan's future housing capacity are by his own admission uncertain. Unlike the 2040 Plan, the 2030 Plan does not affirmatively authorize a specific number of new residential units. Moreover, neither Durham's declaration, nor Bujold's Report, nor any other evidence offered by the City describes in any manner how the 2030 Plan's future housing capacity would affect the environment. In short, to the extent that Durham's housing capacity estimates for the 2030 Plan are of any reliable use, they are not tethered to any opinion that the 2030 Plan is likely to adversely affect the environment. The City attempts to mimic Pauly's method to raise concerns about reverting to the 2030 Plan. The City lacks, however, the evidence or expert opinion to meaningfully do so.

The record, in fact, undercuts the City's attempt to mimic Plaintiffs' challenge of the 2040 Plan. The 2030 Plan itself states:

> **Minneapolis in 2030**
>
> If the Minneapolis Plan for Sustainable Growth is successfully realized, this is a mental image of the city in 2030.
>
> * * *
>
> **Housing Affordability and Choice**
>
> Minneapolis preserves its existing housing stock and neighborhood character through context-sensitive design, Housing types are integrated, preserving the rich fabric of housing stock and providing access to housing throughout the city, maximizing choice.
>
> * * *
>
> **Livable Neighborhoods**
>
> The city's 81 neighborhoods contain varying densities and price-points and are home to diverse populations. Neighborhoods are distinctive communities with a strong sense of place, strong public participation and transportation choices. Important priorities include improving public safety, preservation, and equal access to community facilities, such as schools and libraries.

(Emphasis added).

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As the 2030 Plan declared, its goal was to preserve existing housing stock. Its mental image of the status in 2030 was that housing types would be integrated, and the City's 81 neighborhoods would contain varying densities and price-points. This is in stark contrast to the expressed goal of the 2040 Plan, which sought to eliminate nearly 50% of the City's single-family residential zoning and sought to promote and achieve population densification. In short, with regard to population densification, the 2040 Plan—which has been found to be a prima facie violation of MERA—is everything that the 2030 Plan is not. The 2030 Plan sought not to pursue urban densification, but to maintain diversity of population density within its 81 neighborhoods. The City seems to suggest that there is a reasonable concern that the 2030 Plan, on full implementation, will present environmental impairments—the types of which it has not specified and the means by which it has not, through any expert declaration, explained. This court finds that the record is sufficient to establish that a full build-out of the 2030 Plan, which has not been demonstrated to present any risk to the environment, would cause fewer environmental effects than would a full build-out under the 2040 Plan. Moreover, as the court has already noted in footnote 9 of this Order, under the 2030 Plan, new buildings very often required special approvals such as variances and conditional use permits that would result in additional layers in the review process prior to these new buildings being approved. These additional review layers would serve as measures to mitigate potential environmental impacts that were likely to occur, significantly diminishing the likelihood of the environmental risks presented by a full build-out of the plan. Again, this stands in stark contrast with Pauly's unrebutted findings relating to the 2040 Plan.

As noted earlier, the court also draws support from the Declaration of Alissa Piers, of the City Planning Commission, whose observations provide an instructive contrast between the

operation of the two comprehensive plans. She noted rapid increases in approved (1) project height, (2) linear feet, (3) gross area footprint and (4) impermeable surface coverage that has been realized in the 14 months since the 2040 Plan was finally approved.

Plaintiffs have argued in earlier filings that 163.5 stories is the equivalent of 5.1 Foshay Towers; 1,721.59 linear feet is the equivalent of 5.04 Minneapolis City Halls; 1,199,168.8 square feet would be the equivalent of 9.2 Target stores; and that the impermeable surface coverage of 44.9 acres would be the equivalent of 7.8 Minneapolis City parks.[11] All of these changes, which Pauly opined would likely lead to adverse environmental impacts, were more than would have been permitted under the 2030 Plan. Piers' observations, which were not challenged by the City, further support the court's finding that a full build-out of the 2030 Plan would cause fewer environmental effects and would be less harmful to the environment than a full build-out of the 2040 Plan.

This court returns to a point raised earlier. This analysis still falls under the statutory framework set forth by MERA. The City's metaphysical concern against enjoining the ongoing implementation of the residential development portions of the 2040 Plan is that it cannot revert to the 2030 Plan—that the 2030 Plan is not a feasible prudent alternative. That is an issue on which the City had the burden of proof at the time of the cross-motions, and it provided no evidence. It failed to make the argument or provide any evidence when it had the burden of proof. Now, at the time of this hearing, it raises essentially the same type of argument, again has providing no proof beyond mere conjecture. Even if the City does not have the burden of proof at this stage, this court finds that the record supports granting Plaintiffs' request for an injunction. The causes of

[11] While this court does rely upon this argument to establish as a matter of factual finding these comparisons, for the sake of an illustrative argument, Plaintiffs' point is taken.

environmental concern relating to the 2040 Plan—that were detailed and unrebutted, are not concerns presented by the 2030 Plan. The court relies not only on the 2030 Plan's statements set forth above, or the observations of Pier set forth above, but also the fact the comprehensive 2030 Plan was never challenged as being in violation of MERA during the nine years that it was in effect. The record is devoid of any evidence that any entity sought to enjoin the implementation of the 2030 Plan due to any claimed violation of either MERA or MEPA. The parties have not brought to this court's attention any litigation in which any expert witness has ever given the opinion that the comprehensive plan "the 2030 Plan" was likely to materially adversely affect the environment in any manner. The record is devoid of any evidence of any environmental challenges made to any of the pre-December 7, 2018, land use ordinances which implemented the residential development portions of the 2030 Plan.

While it can be argued that the absence of evidence does not establish the contrary, it is nevertheless also true that the absence of evidence of this nature provides absolutely no support for the City's suggestion that its own 2030 Plan might be more harmful to the environment than the 2040 Plan that it adopted. The 2040 Plan has been successfully challenged, through proper and unrebutted expert opinion, for the precise reason that it radically departed (with respect to population densification) from what was in place in the 2030 Plan. In that regard, the absence of any prior challenge to the 2030 Plan does provide this court with assurance that the 2030 Plan would pose less risk to the environment than would the 2040 Plan.

There is another defect in the City's argument. The City argues that in weighing the grant of an injunction, this court must necessarily compare the full build-out conditions of the 2030 Plan with those of the 2040 Plan. That argument would have some merit, if this court were to decide that the City should be permanently enjoined from ongoing implementation of the residential

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development of the 2040 Plan, replacing it permanently with the residential development portions of the 2030 Plan. This court, however, did not order a permanent injunction and replacement in its original June 15, 2022 Order, and it does not intend to do so now. This court's injunction is intended to be temporary, to be in place while the City does what it should have done some time ago—address the environmental concerns presented by the residential development portion of the 2040 Plan. It was appropriate for this court to consider the environmental impact of a full build-out of the 2040 Plan, because when it was installed, a full build-out was authorized under the plan. This court, in granting an injunction that orders the temporary reversion to the 2030 Plan, is not authorizing a full build-out under the 2030 Plan. The injunction is temporary and the reversion to the 2030 Plan is temporary. A temporary reversion to the 2030 Plan, which ends once the City has addressed the concerns raised by Plaintiffs in this lawsuit, ends any theoretical concerns about what the full build-out of the 2030 Plan might mean to the environment. Quite simply, the City has fully within its own power the ability to take affirmative action to ensure that no full build-out under the 2030 Plan is ever reached or needed. A properly conducted EIS would meet this obligation. Similarly, an order by this court that the reversion of the 2030 Plan would be subject to judicial review no later than 2028 to consider any adverse environmental impacts caused by the reimplementation of the residential development portions of the 2030 Plan, would also protect against the City's metaphysical concern. In that regard, it is not necessary to conduct a "full build-out analysis" of the 2030 Plan, to temporarily enjoin the City, since by design of the temporary injunction, the 2030 Plan would never reach full build out.

In considering Plaintiffs' request for an injunction, this court also weighs the hardship, if any, on the enjoined party. The court is directed to provide an adequate remedy without imposing unnecessary hardship on the City. In issuing an injunction, the district court "may issue an

injunction that 'provides an adequate remedy without imposing unnecessary hardship on the enjoined party.'" *State ex rel. Wacouta Twp. v. Brunkow Hardwood Corp.*, 510 N.W.2d 27, 31 (Minn. App. 1993) (quoting *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 93 n.6 (Minn. 1979)) (emphasis added).

The City raises several arguments that an injunction would impose unnecessary hardship. It cites several "unintended consequences" that would follow from enjoining the 2040 Plan. A number of the City's arguments, however, draw support from several documents that were not part of the record at the time of the cross-motions. Those items, from the Declaration of Ms. Sarff, are not part of the record and will not be considered. Taking into consideration items that were part of the record, the court considers the "negative impacts" that the City asserts would follow from enjoining the 2040 Plan. The City asserts that an injunction of Plan 2040 would impair the City's "incremental progress toward reducing automobile dominance." This assertion is based on the March 24, 2021 Declaration of Paul Mogush. When one studies the entire statement from which that argument is drawn, however, the assertion loses force. Mogush states, "Under the 2040 Plan, the City is also continuing its incremental progress toward reducing automobile dominance. While previous comprehensive plan policies allowed steps like reducing minimum parking requirements, the 2040 Plan and new Transportation Action Plan provide for concrete steps toward additional progress." Mogush's statement concedes that previous comprehensive plan polices addressed reducing automobile dominance. The Declaration merely speaks in general terms of "concrete steps toward additional progress." When this court considers Pauly's environmental concerns with the 2040 Plan that relate to traffic and parking[12], and weighs these environmental concerns against

[12] Pauly opined that due to intensification of population density, intensification of use, and intensification of scale, the likely environmental impacts of the 2040 Plan would include: increased vehicle traffic, increased vehicle

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this asserted "hardship," this court finds that "impairment of the City's incremental progress toward reducing automobile dominance" does not constitute a meaningful or "unnecessary" hardship.

The City also contends that enjoining the 2040 Plan would override and "reverse residential land use changes implemented to protect the environment, including those required by statute in the Mississippi River Corridor Critical Area." (citing,"Index No. 164, at 5-6"). As authority for this assertion, however, the City cites to its own Memorandum of Law in support of its failed motion for summary judgment. The actual pages cited contain language unrelated to land use changes to protect the environment, making no mention of the Mississippi River Corridor Critical Area. As such, this court cannot find the unsupported assertion to be persuasive as an indication of unnecessary hardship.

The City further argues that an injunction would create conflicting legal obligations. This is perhaps true and would create hardship for the City. The court cannot find, however, that this hardship is unnecessary. This hardship is to be balanced against the strong interest in protecting the environment. It is also true that much of the hardship that will be experienced by the City will be of its own making. The City has known since December 4, 2018, the date it was served with Plaintiffs' verified Complaint, that an expert engaged by Plaintiffs was offering the professional opinion that the 2040 Plan was in violation of MERA. The City knew that one of the challenges levied by Plaintiffs' expert was that the potential environmental impacts of the 2040 Plan were likely to occur since the 2040 Plan largely ignored those potential impacts and did not provide for measures which would mitigate them. Still, the City moved forward to approve the comprehensive

congestion, increased parking constraints, decreased air quality, increased noise impacts, among other adverse impacts.

plan, without taking any steps to amend it to address such concerns, moving to obtain approval of that unaltered 2040 Plan by the Metropolitan Council. The City knew that the 2040 Plan was the subject of litigation to enjoin both the approval and the implementation of the 2040 Plan. The City knew, since December of 2018 that Plaintiffs were advocating that the City conduct a voluntary review, either through an EIS or an Alternative Urban Area Review (AUAR). Throughout nearly five years of active litigation, the City took no steps to voluntarily conduct a EIS or AUAR. The City's litigation strategy resulted in its failure to rebut Plaintiffs' prima facie showing of a MERA violation, or to establish any affirmative defense. After it lost the cross-motions for summary judgment, the City still took no steps to conduct any environmental assessment to study the potential adverse environmental impacts cause by the 2040 Plan. After all appeals were completed, it took no steps to address the environmental concerns raised by Plaintiffs. All the while, the City has continued to implement the 2040 Plan. It did so with eyes wide-open to the fact that Plaintiffs were seeking an Order enjoining any ongoing implementation of the residential development portions of the City's 2040 Plan.

This court notes that courts around the country have held that a party's, including a governmental party's, "self-inflicted harm" should not be considered in conducting the "balance of harms" analysis required for the issuance of a temporary injunction. *See, e.g.*, *Sierra Club,* 645 F.3d at 997 ("When agencies 'jump the gun' or 'anticipate a pro forma result' in permitting applications, they become largely responsible for their own harm") (quoting *Davis*, 302 F.3d at 1116)); *Richland/Wilkin Joint Powers Authority v. United States Army Corp of Engineers*, 826 F.3d 1030, 1040 (8th Cir. 2016); *Utahns for Better Transportation v. United States Dept. of Transportation*, No. 01-4216, 01-4217, 01-4220, 2001 WL 1739458, at *2 (10th Cir. Nov. 16, 2001) (holding that harm was largely self-inflicted where state agency "was aware there were

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several court cases challenging the approval of the Legacy Parkway, but chose to proceed nevertheless"); *Sanofi-Synthelabo v. Apotex*, 470 F.3d 1368, 1383 (Fed. Cir. 2007) (affirming district court holding that "harms were 'almost entirely preventable' and were the result of its own calculated risk to launch its product pre-judgment and that the court did not abuse its discretion in finding that the balance of hardships tipped in [movant's] favor"); *Processed Plastic Co. v. Warner Comms., Inc.*, 675 F.2d 852, 859 (7th Cir. 1982) (party "cannot now complain that having to mend its ways will be too expensive"); *Opticians Assn. of America v. Independent Opticians of America*, 920 F.2d 187, 197 (3d Cir. 1990) (party "can hardly claim to be harmed, since it brought any and all difficulties occasioned by the issuance of an injunction upon itself"); *SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc.,* 63 F. Supp.2d 467, 472 (S.D.N.Y. 1999).

This court, having balanced the concerns that MERA seeks to protect against the effects on the enjoined party (the City), finds that a temporary injunction is warranted. The hardship claimed by the City cannot be deemed unnecessary, particularly in light of high value the legislature has placed on protecting the air, water, land, and other natural resources from pollution, impairment, or destruction. Consistent with the broad equitable authority under Minn. Stat. 116B's Minnesota Environmental Right's Act, this court **GRANTS** Plaintiff's motion for an Order enjoining any ongoing implementation of the residential development portions of the City's 2040 Plan. The City is ordered to immediately cease all present action in furtherance of the 2040 Plan unless and until the City conducts an EIS or an alternative Urban Area Review (AUAR) to address and, to the extent required to bring the Plan into compliance with MERA's requirements, remedy the environmental concerns raised by Plaintiffs.

The object of a temporary injunction is to maintain the matter in controversy in its existing condition until judgment, so that the effects of the judgment will not be impaired by the acts of the

parties during the litigation. *Berggren v. Town of Duluth*, 304 N.W.2d 24, 26 (Minn. 1981) (quoting *Pickerign v. Pasco Marketing*, Inc., 303 Minn. 442, 446, 228 N.W.2d 562, 565 (1975)). *See also, Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 372 (Minn. App. 1999). A purpose of a temporary injunction is to "preserve the '*status quo ante*' relationship between the parties," which means the *status quo* between the parties as it existed "prior to" (or "earlier than") the parties' dispute.

Under the circumstances of this case, the appropriate equitable relief is to enjoin the City's implementation of the residential development portions of the City's 2040 Plan until an appropriate and properly conducted EIS or AUAR has been completed. For more than 40 years, the courts have had the broad authority under MERA to order an EIS under MEPA. *People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minn. Envtl. Quality Council,* 266 N.W.2d 858, 874 (Minn. 1978). In *PEER, Inc.,* the Supreme Court "remand[ed]" to EQB to conditionally conduct a "new EIS" under MEPA. *Id.* Indeed, the Supreme Court has already clarified in this case that the courts' authority under MERA to order an EIS includes the ordering of an involuntary EIS under MEPA for MEPA "exempt" "conduct." *State by Smart Growth Minneapolis,* 954 N.W.2d at 593. The Supreme Court explained that "[i]t is not inconsistent to recognize that a MERA challenge might result in environmental review that would *not* be required under MEPA, given that MERA [(1)] is broader in scope than MEPA and [(2)] applies to 'any conduct' of 'any person' — including municipal governments." *Id.* (emphasis and bracketed information added).

For all the reasons set forth above, until such time as an appropriate and properly conducted EIS or AUAR is completed, the City must restore the *status quo ante* relationship between the parties as it existed on December 4, 2018, by refraining from its enforcement of, and any prospective enforcement of, any aspect of the residential development portions of the 2040 Plan,

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including but not limited to, amendments to land use ordinances directed by the 2040 Plan that authorize the scope and degree of residential development that this court has already determined to create "adverse environmental impacts" to the Minneapolis area.

For all the reasons set forth above, unless and until the City completes as an appropriate and properly conducted EIS or AUAR, the City must restore the *status quo ante* relationship between the parties as it existed on December 4, 2018, by reinstating for its prospective enforcement both (1) the residential development portions of the City's comprehensive plan that has been referred to herein as the 2030 Plan, and (2) the pre-December 4, 2018, land use ordinances which implement the same residential development portions of the 2030 Plan.

Given this Court's Order, it is evident that the development of parameters for an EIS or AUAR is necessary. Plaintiffs have moved to strike the City's "Amended Expert Disclosures" but have also conceded in their filings that they would likely not object to having Stantec Engineering act as the entity that would conduct an EIS. Plaintiffs have raised concerns relating to transparency of the EIS process, given the contentious nature of this litigation. The Court hold the same concern. Under the circumstances, this court finds that it would be appropriate to create a clearer record of the parties' respective positions concerning an EIS or AUAR. Given the active litigation that still divides the parties it is also prudent to establish clear guidelines for the EIS or AUAR process, to assure transparency and objectivity. A case management conference would be appropriate to further evaluate the parties' respective positions and to set this matter on for a hearing dedicated to making a record of the parties' respective positions on issues related to the court's ordered EIS or AUAR. The parties at that time may make their record with respect to any request to reopen discovery, extend expert disclosure deadlines, compel discovery responses, or another related issue that the court-ordered EIS or AUAR presents.

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3. **Plaintiff's Motion to Compel is not properly before the court and will be deferred, pending further motion practice concerning the City's obligations under the Order for Temporary Injunction, including any right, or lack thereof, to amend or add expert witnesses at this stage.**

While the court was in the process of scheduling the hearing that is the subject of this order, a dispute arose between the parties relating to off-the-record statements made by the City's counsel that suggested that the City, in January of 2023 had hired experts for the purposes of conducting its environmental assessment. City explained that it has, with its environmental assessment, a MERA-required rebuttal or affirmative defense to Plaintiffs' prima facie showing "in the works" for purposes of trying to comply with this court's June 15, 2022 Order.

Plaintiffs assert that the City has a continuing obligation to supplement its discovery responses, including updating its responses to disclose all information relating to the retention of these experts. The City asserts that Plaintiffs have not properly satisfied the prerequisites under the rules in order to properly bring a motion to compel. The City also argues that a motion to compel is untimely, as the deadline for discovery and non-dispositive motions has long passed. The court finds this a curious argument to raise, given that the City seems intent on hiring experts and mounting defenses long after its own deadline for expert disclosure has passed, and after it has already lost on summary judgment on the rebuttal and affirmative defenses issues under MERA.

The court notes that the City has yet to seek the court's leave to either re-open discovery, or to extend the deadline for it to complete its expert disclosures. Unless and until the City does so, it is not in compliance with the court's direct order on its expert disclosure.

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Plaintiffs filed their motion to compel on May 17th, three weeks before the hearing on their motion for an injunction. This court was underwhelmed by the apparent efforts taken by the parties to meet and confer on the dispute.

The court is not satisfied that the motion to compel is ripe at this time. This is particularly true given this court's Order Granting Temporary Injunctive Relief. The motion to compel was not a motion that needed be resolved in order to address Plaintiffs' motion for an injunction, since the character of the record has already been established by this court to be the record as it existed at the rime of the original cross-motions for summary judgment. Any concerns relating to discovery will be further discussed at the Case Management conference referenced in this order, in advance of any further hearing or hearings relating to the City's obligation to conduct an EIS or AUAR.

4. Plaintiffs shall post a Security Bond of $10,000

MERA provides that "when a court grants injunctive relief, it may require the prevailing party to post a bond sufficient to indemnify the party enjoined." *State by Drabik v. Martz,* 451 N.W.2d 893, 897 (Minn. Ct. App. 1990). But "[w]hile MERA terms a bond as optional, a temporary injunction shall not be granted except upon the giving of security in an amount as the court deems proper for payment of costs and damages as may be incurred or suffered by a party who is wrongfully enjoined." *State by Drabik,* 451 N.W.2d at 897 (affirmed trial court's imposition on the MERA plaintiff of a nominal $1,000 bond even though the enjoined MERA defendant sought a $15 million bond). In the exercise of its discretion, a trial court may waive or impose the security requirement. *See, Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 296-97 (Minn. App. 1995). The amount of security required is within the trial court's discretion. *In re Petition of Giblin*, 304 Minn. 510, 232 N.W.2d 214 (1975). In the present case, the court has previously found that at least a nominal bond was

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appropriate upon the grant of an injunction against the City. That calculation has not changed and this court again finds that at least a nominal bond is appropriate. As this court noted earlier, the relief being ordered by the court represents a significant change from the status quo that has now been in place for almost five years. The court recognizes that the likelihood of appeal of this Order is still high. The parties have been actively litigating and have consistently vigorously opposed each other at every level. The appellate court would review this court's equitable decision to award relief under MERA for an abuse of discretion. The City certainly has a right to expect some degree of protection for its costs. At the same time, given the importance of the environmental interests at stake, the court does not wish to impose an unreasonable burden on citizen groups who in good faith exercise their efforts to protect the environment of their community. Weighing these factors, the court in its discretion, deems that a $10,000 bond is appropriate

ORDER

1. Plaintiff's Motion for a temporary injunction is **GRANTED**.

2. Plaintiff's motion to strike is **GRANTED**, as previously indicated.

3. As of the date of this Order, the City is immediately enjoined from any ongoing implementation of the residential development portions of the City's 2040 comprehensive plan (2040 Plan), and it shall immediately cease all present action in furtherance of the 2040 Plan, unless and until the City has completed an appropriate and properly conducted EIS or AUAR.

4. Within 60 days of this Order, and unless and until it has satisfied the requirements of #3 above, the City must restore the *status quo ante* relationship between the parties, as it existed on December 4, 2018 by refraining from its enforcement of, and any prospective enforcement of, any aspect of the 2040 Plan, including amendments to land use ordinances directed by the 2040 Plan, that authorize the scope and degree residential development that this court has determined is likely to create adverse environmental impacts to the Minneapolis area.

5. Within 60 days of this Order, and unless and until it satisfies the requirements of #3 above, the City shall restore the *status quo ante* relationship between the parties as it existed on December 4, 2018 by

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reinstating for its prospective enforcement both the residential development portions of the City's Comprehensive 2030 Plan, and the pre-December 4, 2018 land use ordinances the same residential development portions of the 2030 Plan.

6. The reversion to the 2030 Plan is intended to be temporary and not permanent. This injunction will expire on December 31, 2028, unless modified or vacated under the Minnesota Rules of Civil Procedure or this Court's inherent power.

7. Within 10 days of this Order, the court shall schedule a Case Management conference relating to the EIS process. The court will allow further motions related to the EIS or AUAR process, which may be scheduled at the Case Management conference.

8. Plaintiffs shall post a security bond of $10,000 within 30 days of this Order.

9. This Order is not stayed and shall be effective immediately.

BY THE COURT:

DATED: September 5, 2023

The Honorable Joseph R. Klein
Hennepin County District Court
Judge