

## MEMORANDUM

To: Mayor Pownell and City Council **VIA EMAIL ONLY**

From: Christopher M. Hood, City Attorney; and  
Robert T. Scott, Assistant City Attorney

Date: September 30, 2021

Re: **Petition for EAW Decision – Potential for Significant Environmental Effects**

-----

### **INTRODUCTION**

By letter, dated September 17, 2021, from Katrina Hapka, Environmental Review Program Coordinator with the Minnesota Environmental Quality Board (“EQB”), the City of Northfield (“City”) received a petition for an environmental assessment worksheet (“EAW”), dated August 26, 2021 (the “Petition”), for the proposed Kraewood Development. The Petition has been submitted pursuant to Minnesota Rules, part 4410.1100. The Petition is requesting that an EAW be prepared on the Kraewood Development project. This memorandum addresses the decision standard for the City Council to determine whether to grant or deny the Petition.

### **EAW PETITION DECISION STANDARD**

Within 30 days of receipt of the Petition, the City Council must either grant the Petition and thereby order the Developer to prepare an EAW on the Project, or deny the Petition and thereby not require the preparation of an EAW. In making this decision, the City Council must order the preparation of an EAW if the evidence presented by the Petitioners demonstrates that, because of the nature or location of the proposed Project, the Project may have the potential for significant environmental effects. The Council must deny the Petition if the evidence presented fails to demonstrate that the Project may have the potential for significant environmental effects.

In considering the evidence included with the Petition, the Council must take into account the factors listed in Minnesota Rules, part 4410.1700, subp. 7, which provides as follows:

Criteria. In deciding whether a project has the potential for significant environmental effects, the following factors shall be considered:

- A. type, extent, and reversibility of environmental effects;
- B. cumulative potential effects. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with

other contributions to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project;

- C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project; and
- D. the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

The City Council must adopt a resolution at its October 5, 2021 meeting making a decision to either grant or deny the Petition. The adopted Council resolution must contain specific findings of fact addressing the above criteria and then, following the decision, the same must be communicated in writing to the EQB and Petitioner's representative.<sup>1</sup>

The City Council in addressing this matter should first understand what an EAW does if one is ordered to be prepared. An EAW is a relatively brief document designed to set out the basic facts necessary to determine whether a more complex environmental study, called an environmental impact statement ("EIS") should be required.

A petition for an EAW must be supported by material evidence.<sup>2</sup> The courts have interpreted this to mean that the evidence filed with the EAW petition must be evidence that is "admissible, relevant, and consequential to determine whether the project may have the potential for significant environmental effects."<sup>3</sup> "Allegations of vague or generalized fears and concerns are therefore not sufficient under the statute."<sup>4</sup> "Moreover, in determining whether an EAW is warranted, an RGU properly considers "the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority."<sup>5</sup> The material evidence must also physically accompany the petition. It is not sufficient to merely provide a reference or citation to where the evidence may be found.<sup>6</sup>

It is therefore insufficient to just have identified environmental concerns in a petition.<sup>7</sup> Instead, the Petition must present material evidence that the Project because of its nature or location may have

---

<sup>1</sup> See Minn.R. 4410.1100.

<sup>2</sup> Minn. R 4410.1100, Subp. 2. The petition shall also include: ... E. material evidence indicating that, because of the nature or location of the proposed project, there may be potential for significant environmental effects. The material evidence must physically accompany the petition. It is not sufficient to merely provide a reference or citation to where the evidence may be found.

<sup>3</sup> *Watab Twp. Citizen Alliance v. Benton Cnty. Bd. of Comm'rs*, 728 N.W.2d 82, 90 (Minn. App. 2007), review denied (Minn. May 15, 2007).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (citing Minn. R. 4410.1700, subp. 7 (2005)).

<sup>6</sup> Minn. R 4410.1100, subp. 2.

<sup>7</sup> See *Wescott v. Wabasha Cty. Bd. of Comm'r*, 2017 Minn. App. Unpub. LEXIS 555, \*8, 2017 WL 2729597. ("The county board noted that environmental effects are subject to mitigation by the ongoing public regulatory authority of the

the potential for significant environmental effects. Most projects will have environmental effects, but the evidence to require an EAW from the Petitioner must meet a higher threshold and show that any potential effects may be significant.<sup>8</sup>

Further, the fact that EQB determined that the Petition was supported by material evidence is not dispositive and does not make the decision for the City Council. The Court of Appeals has expressly addressed this issue and ruled as follows:

Minn. R. 4410.1100, subp. 5, states that, if a petition complies with the requirements of subparts 1 and 2, the EQB's chair shall designate an RGU and forward the petition to the RGU. One of the requirements of subpart 2 is that the petition shall include "material evidence indicating that, because of the nature or location of the proposed project, there may be potential for significant environmental effects." Minn. R. 4410.1100, subp. 2(E). But the fact that the EQB's chair forwarded the petition to the RGU does not mean that the EQB concluded that there may be potential for significant environmental effects; it means only that the EQB determined that the petition included evidence that there may be potential for significant environmental effects. The RGU is responsible for evaluating the evidence and deciding whether to order the preparation of an EAW. The rule states that the RGU shall either (1) order the preparation of an EAW if the evidence presented by the petitioners, proposers, and other persons or otherwise known to the RGU demonstrates that the project may have the potential for significant environmental effects or (2) deny the petition if the evidence fails to [\*17] demonstrate that the project may have the potential for significant environmental effects. Minn. R. 4410.1100, subp. 6; *see also* Minn. Stat. § 116D.04, subd. 2a(c) (stating that "[a] decision on the need for an environmental assessment worksheet shall be made by the responsible governmental unit").<sup>9</sup>

A question has arisen concerning whether language found in the City's Land Development Code ("LDC") and in EQB guidance that seemingly would allow the City to order a discretionary EAW if it finds that "a development project may have some significant environmental impact *or when there is a perception of such*"<sup>10</sup> applies to the City Council's consideration of the Petition. This language does not apply to the City Council's consideration of the Petition for three reasons.

First, the petition process before the City Council is distinct from the discretionary EAW procedure contemplated by the LDC and EQB guidance, in which a local government with approval authority over a project acts on its own initiative (not in response to a petition) to order an EAW when one would not otherwise be required for the project. In acting on a petition, the City Council must apply the state-mandated decision standard set forth above, namely: whether the evidence presented by the petitioners, proposers, and other persons or otherwise known to the RGU demonstrates that,

---

MDA, MPCA, Minnesota Department of Natural Resources, and the county. See *Friends of Twin Lakes v. City of Roseville*, 764 N.W.2d 378, 382 (Minn. App. 2009) (stating caselaw supports the use of "regulatory oversight as a means of preventing significant environmental effects"). The petition contains no evidence that these regulations will not sufficiently address any potential negative environmental effects. The petition also cites several generalized concerns that are allayed by project-specific evidence presented to the county board by the CUP applicant.")

<sup>8</sup> *Whitefish Area Prop. Owners Ass'n v. Minnesota-Iowa Baptist Conf.*, 2015 Minn. App. Unpub. LEXIS 149, \*15-17.  
<sup>9</sup> *Id.*

<sup>10</sup> See City Code Ch. 34, Section 8.3.9(C)(3)(emphasis added); *see also* [Quick Reference, Environmental Assessment Worksheet](https://www.eqb.state.mn.us/sites/default/files/documents/Quick%20Reference%20-%20EAW.pdf), Minnesota Environmental Quality Board, Updated July 2017, p. 2 (available at <https://www.eqb.state.mn.us/sites/default/files/documents/Quick%20Reference%20-%20EAW.pdf>).

because of the nature or location of the proposed project, the project may have the potential for significant environmental effects. By rule, the City Council must consider the Rule 4410.1700, subp. 7 factors set forth above and must grant the Petition if this standard is satisfied and must deny the Petition if the standard is not satisfied. The seemingly broader “perception” language in the LDC and EQB guidance both purport to apply to the distinct discretionary EAW procedure.

Second, to the extent the LDC contains language that conflicts with or is inconsistent with this mandatory standard, the state’s standard set forth above would control over the LDC.

Third, and finally, the regulatory standard for ordering a discretionary EAW mirrors the petition standard and does not contain the “perception” language referenced in EQB’s guidance document and the LDC and is therefore not part of the state-proscribed standard for ordering even a discretionary EAW.<sup>11</sup>

In the event of a legal challenge related to the Council’s decision on the Petition the court will review a Council’s decision to determine whether the same was “unreasonable, arbitrary or capricious, or unsupported by substantial evidence.”<sup>12</sup> Thus, it is important that the Council include factual findings addressing the above criteria in the Council’s decision resolution.

I hope that the foregoing is helpful for your consideration of this matter. If you have any questions, please contact me at your convenience at (651) 225-8840.

CMH/RTS-sw

---

<sup>11</sup> Minn. R. 4410.1000, subp. 3 (stating that a discretionary EAW shall be prepared when “a governmental unit with approval authority over a project determines that, because of the nature or location of a proposed project, the project may have the potential for significant environmental effects.”)

<sup>12</sup> *Watab*, 728 N.W.2d at 90.