

MEMORANDUM

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

From: Christopher M. Hood, City Attorney

Date: September 20, 2021

Re: **Petition for Environmental Assessment Worksheet – Kraewood Development**

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 is signed by over 600 individuals and has been submitted pursuant to Minnesota Rules, part 4410.1100. The Petition is requesting that an EAW be prepared on the proposed Kraewood Development project.

BACKGROUND

The following is provided for purposes of background to place in context the discussion that follows:

1. Rebound Real Estate (the “Developer”) has applied for a preliminary plat to create Kraewood Addition on property known as the Paulson Christmas Tree Farm.
2. The proposed Kraewood Development is on a wooded parcel of approximately 12.5 acres and would create 31 lots consisting of 22 single-family homes, 2 twin homes, 1 four-plex/row house and an apartment building (the “Project” or “Development”).
3. The Developer has also submitted an application for a preliminary plat and tax increment financing (“TIF”) assistance related to the Development as well as an application to re-zone two small remnant pieces of land within the Project area.

ISSUES

1. **Does the Project fall within a category under state law requiring preparation of a mandatory EAW?**

No. The Project does not meet the threshold for preparation of a mandatory EAW under Minnesota Rules, part 4410.4300, subp. 19. Therefore, preparation of an EAW is

discretionary or one may be required by the City Council in the event the City Council grants the Petition for an EAW.

2. Does the Petition require preparation of an EAW for the Project?

No. The City Council must make that decision. The City Council may choose to grant the Petition and thereby order the Developer to prepare an EAW on the Project. The Council may also deny the Petition and not require the preparation of an EAW.

In making this decision, the City Council must order the preparation of an EAW if the material 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 City 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, 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 make specific findings of fact of its decision based upon the above criteria on the need for an EAW and must make such decision within 30 days from the date of receipt of the Petition, which was September 17, 2021. Thus, the City Council must make a decision on the Petition to either grant or deny/dismiss the same with findings

supporting the decision by no later than October 17, 2021 and then communicate that decision in writing to the EQB and Petitioner's representative.

3. Does the Petition meet the basic legal requirements for submission of a petition for an EAW thereby allowing for further consideration of the same by the City Council?

Minnesota Rules, part 4410.1100, subp. 5, requires the EQB to determine the adequacy of a Petition, and specifically whether the Petition complies with the basic requirements of Minnesota Rules, part 4410.1100, subparts 1 and 2, allowing for such a petition to proceed further in the process.

The above Rule goes on to state that if the petition complies with subparts 1 and 2, then the EQB must designate the Responsible Governmental Unit ("RGU") pursuant to Minnesota Rules, part 4410.0500, and forward the petition to the RGU within five days of receipt of the petition, or, to the contrary, if the petition fails to comply with subparts 1 and 2, then the EQB shall return the petition to the petitioner's representative within five days of receipt of the petition with a written explanation of why it fails to comply.

In this case, the EQB has submitted a transmittal letter to the City, dated Sept. 17, 2021, enclosing the Petition and designating the City as the RGU. Based on the above Rule and this letter, the City can conclude that the EQB has determined that the Petition meets the basic legal requirements for it to be considered further by the City Council to grant or deny the same.

4. Given that a Petition has been filed and the same has been deemed by the EQB to meet the basic requirements for further consideration, impact does filing the Petition have on the City's consideration of the preliminary plat, rezoning and/or TIF for the Project?

Minnesota Rules, part 4410.3100, subp. 1, requires that when an EAW is required or a petition for an EAW is filed, which it has been here, no project may be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project until either a petition for an EAW is dismissed; a negative declaration on the need for an environmental impact statement ("EIS") is issued; an EIS is determined adequate; or a variance is granted under subparts 3 to 7 or the action is an emergency under subpart 8 of the above-referenced Rule.

The primary question with this Rule based project decision prohibition is whether it precludes the City Council from considering for approval the preliminary plat, rezoning and/or TIF application for the Project until following the EAW determination. The governing law and case law, including the definitions in Minnesota Rules, part 4410.0200, subp.4, 33, 58 and 65 defining the terms approval, governmental action, permit and project, lead to the conclusion that the Rule would apply to the present Council actions on the preliminary plat, rezoning and TIF postponing a decision on the same until following a decision on the EAW.

The mere filing of the Petition triggered the above prohibition on subsequent decisions by the City Council for approval of the Project. The above Rule prohibition states that: "... a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project ..." until the EAW decision is made. The use of the term "permit" here, and as defined above, encompasses both the preliminary plat decision and the TIF decision on the Project.

The term "permit" specifically includes "... the commitment to issue or the issuance of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, by a governmental unit ..." TIF falls within that definition as financial assistance to the Project. Thus, the City should postpone a decision on TIF until after the EAW decision is made.

With respect to the plat decision, the preliminary plat is a step towards Project approval and outlines a specific Project "... the results of which would cause physical manipulation of the environment, directly or indirectly." The results of environmental review could also impact the preliminary plat and may require alterations to it to address required mitigation of any identified significant environmental effects. Again, based on this, the City should postpone a decision on TIF until after the EAW decision is made.

With respect to the rezoning, the same appears more routine in nature and would likely need to be made whether the Project proceeds or not. However, since the preliminary plat decision should be postponed, it is logical that the rezoning be postponed as well for the same reasons given the breadth of the Rule prohibition.

5. **While the TIF decision is not subject to any specific approval time deadline and can be delayed pending the EAW decision, the preliminary plat and rezoning decisions are subject to the 120-day rule as well as the 60-day rule. Based on the application of those statutory timing rules, what is the impact of the above Rule prohibition on a preliminary plat and rezoning decision with respect to the timing for City Council action on the preliminary plat and rezoning decision for the Project?**

With respect to the preliminary plat, Minnesota Statutes, Section 462.358, subd. 3b, provides in part that:

A subdivision application shall be preliminarily approved or disapproved within 120 days following delivery of an application completed in compliance with the municipal ordinance by the applicant to the municipality, unless an extension of the review period has been agreed to by the applicant.

Thus, for preliminary plats, a decision to approve or deny a preliminary plat must be made by the City Council within 120 days of the date of submission of a completed application to the City. Such timeframe can be extended beyond 120 days with the agreement of the applicant. In this case, however, the Minnesota Environmental Policy Act (MEPA), Minnesota Statutes, c. 116D, and its corresponding rules as contained in Minnesota Rules, c. 4410, mandate additional procedures, which cannot be likely completed within the statutory 120 period contained in the above-referenced statute. The above referenced statute does not

address this issue, but it is addressed in the 60-day rule statute contained in Minnesota Statutes, section 15.99.

Specifically, Minnesota Statutes, section 15.99, subd.3, provides in part as follows:

(d) The time limit in subdivision 2 is extended if a state statute, federal law, or court order requires a process to occur before the agency acts on the request, and the time periods prescribed in the state statute, federal law, or court order make it impossible to act on the request within 60 days. In cases described in this paragraph, the deadline is extended to 60 days after completion of the last process required in the applicable statute, law, or order. Final approval of an agency receiving a request is not considered a process for purposes of this paragraph.

The preliminary plat and rezoning are requests related to zoning under subdivision 3(b). More specifically, however, the EAW process is a state statutory process required to occur before the Council can legally act upon the preliminary plat or rezoning. As a result, Minnesota Statutes, section 15.99, subd.3(d) applies under these circumstances, which means the time period for consideration of approval of the preliminary plat is stayed until the EAW decision can be made; after which the City will have 60 days to make the decision on the preliminary plat and rezoning.¹

6. What is the EAW preparation, review and decision process?

The general process and timeline to complete an environmental assessment worksheet is as follows:²

- a. City orders preparation of an EAW on the Project.
- b. Project applicant submits completed data portions of the EAW to the City.
- c. City reviews data submittal from Project applicant for completeness and makes determination of completeness within 30 days (within 30 days – extendable with agreement of the applicant).
- d. If complete, City notifies applicant that the data submittal is complete within 5 business days of such determination.

¹ See *Allen v. City of Mendota Heights*, 694 N.W.2d 799, 800, 2005 Minn. App. LEXIS 317, *1. After the developer had made its various written requests for preliminary plat approval, rezoning, site-plan approval, and a conditional-use permit for a planned-unit development, citizens petitioned the Minnesota Environmental Quality Board for an environmental-assessment worksheet. The developer argued that its applications for permits to the city were automatically approved under Minn. Stat. § 15.99, subd. 2 (2004). The appellate court noted that the issue on appeal was whether a citizens' petition under the Minnesota Environmental Policy Act (MEPA), Minn. Stat. ch. 116D (2004), tolled the running of the 60-day period for city action under Minn. Stat. § 15.99, subd. 2. The city responded that the 60-day deadline for agency action was tolled by Minn. Stat. § 15.99, subd. 3(d), when environmental processes under MEPA were initiated. The appellate court held that because a citizens' petition for an environmental-assessment worksheet under MEPA initiated a process that had to occur before agency action on a written request under Minn. Stat. § 15.99, subd. 2 (2004), and that made it impossible to act within 60 days, the 60-day deadline of Minn. Stat. § 15.99 was extended by Minn. Stat. § 15.99, subd. 3(d) to 60 days after completion of the last environmental-review process required by MEPA.

² See Minn.R. parts 4410.1100 through 4410.1700.

- e. If incomplete, City returns to applicant for corrections and completion of the missing data (then steps a & b are repeated).
- f. City prepares the EAW on the EQB standard form from the data submittals and adds any supplemental information, if necessary, approves the EAW for distribution (within 30 days of notice of completeness sent to applicant).
- g. Within 5 days after the City approves the EAW, the City must provide a copy of the EAW to the EQB to publish the notice of availability of the EAW in the *EQB Monitor*. The City can submit the EAW electronically to EQB using the *EQB Monitor* Submission Form found on the EQB website:
<https://www.eqb.state.mn.us/eqb-monitor>
- h. At the time of submission of the EAW to EQB, the City shall also submit one copy of the EAW to each of the following:
 - i. MN EQB;
 - ii. The applicant of the Project;
 - iii. Rice County;
 - iv. The list state and federal agencies on pages 12 and 13 of the following link:
https://www.eqb.state.mn.us/sites/default/files/documents/Env%20Review%20Distribution%20List_August%202021.pdf
 - v. The regional development commission and regional development library for the region of the Project site;
 - vi. Any local government unit within which the project will take place;
 - vii. The representative of the Petitioners; and
 - viii. Any other person who has submitted a request for written notification.
- i. Within 5 days of EAW submission to the EQB, City publishes press release/notice about the EAW to at least one newspaper of general circulation in the project area or on an official publication website for the political subdivision in which the project is proposed (this must be done within 5 business days of the notice sent to the EQB).
- j. Such notice must contain the availability of the EAW for public review, the name and location of the project, a brief description of the project, the location at which copies of the EAW are available for review, the date the comment period expires, and the procedures for commenting.
- k. *Notice will appear in the EQB Monitor* (varies between 7 and 20 days from receipt of notice at EQB, but usually is 7 days).
- l. *Comment period ends* (30 days after the *EQB Monitor* notice is published).
- m. City prepares written responses to substantive and timely comments (Documented in Record of Decision documents – the City may request further information from the applicant as necessary).
- n. The City makes the decision on whether an EIS is needed for the Project based on whether the record (EAW, comments, responses) indicates the Project has the potential for significant environmental effects (between 3 business and 30 calendar days after the end of public comment period; the City may postpone the decision to gather critical missing information for up to 30 days or a longer period if agreed to by the Project proposer; the City decision must be documented in a written record of decision with findings).

- o. City distributes notice of EIS need decision (within 5 business days to EAW distribution list (above) and anyone else who submitted timely and substantive comments, commenters must receive a copy of the response to their comments).
- p. EQB publishes notice of EIS need decision in *EQB Monitor*.

Often, cities will hire consultants to prepare all or part of the EAW or to independently review the Project proposer's submittal. The City may want to hire a consultant, typically an engineering and planning consultant, to assist with the EAW process. In addition, cities are allowed to charge the costs of the EAW to the applicant if they have an ordinance in place allowing the City to do so. Staff and consultant time may be significant to undertake and complete the EAW process. Northfield City Code, Section 8.3.9 (C)(a)(i) provides that if it is determined that an EAW shall be prepared, the proposer of the project shall submit an application along with the completed data portions of the EAW. The applicant shall agree in writing, as a part of the application, to reimburse the city for all reasonable costs, including legal and consultants' fees, incurred in preparation and review of the EAW.

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.

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