STATE OF MINNESOTA | DISTRICT COURT

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

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

Plaintiffs,

v.

City of Minneapolis,

Defendant.

Case File No. _____
The Honorable _____

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR TEMPORARY RESTRAINING ORDER

INTRODUCTION

As set forth in their December 3, 2018 "Verified Complaint for Declaratory and Other Relief" (Verified Complaint),[1] Plaintiffs have satisfied their "prima facie showing" under § 116B.04 by easily demonstrating that the 2040 Plan "is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state." In contrast, the Verified Complaint proves that City has not (and cannot), as required under § 116B.04, either (1) "rebut the prima facie showing by the submission of evidence to the contrary" or (2) "show, by way of an affirmative defense, that [(a)] there is no feasible and prudent alternative and [(b)] the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction," though "[e]conomic considerations alone shall not constitute a defense hereunder."

[1] Defined terms from the Verified Complaint are incorporated herein.

(Emphasis and bracketed information added). As compelled under § 116B.07 and the five TRO factors, this Court thus has to (1) immediately enjoin City from its anticipated approval of the 2040 Plan at 9:30 a.m. on Friday, December 7, 2018, and (2) order that this injunction continue unless and until City satisfies its MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing," presumably through a voluntary environmental review (*i.e.*, EIS or AUAR).

FACTS

A full recitation of the background facts, including MERA's requirements, are set forth in exhaustive detail in the Verified Complaint. Those facts are incorporated by reference herein, and they will not be repeated herein.

ARGUMENT

I. THE FIVE TRO FACTORS

Rule 65 of the Minnesota Rules of Civil Procedure governs the issuance of temporary injunctive relief. *See* Minn. R. Civ. P. 65.01-.04. "A temporary injunction is an extraordinary equitable remedy. Its purpose is to preserve the status quo until adjudication of the case on its merits." *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982) (emphasis added). This Court has "broad discretion" in determining whether a TRO should issue. *See Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 220 (Minn. App. 2002).

The five TRO factors which follow are well established:

1. The nature and background of the relationship between the parties pre-existing the dispute giving rise to the request for relief;

2. The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial;

3. The likelihood that one party or the other will prevail on the merits;

4. The public interest; and

5. The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros., Inc. v. Ford Motor Co., 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965); *Eakman v. Brutger*, 285 N.W.2d 95, 97 (Minn. 1979) (applying *Dahlberg* factors to TROs). While all five factors may be considered, the main focus is on (1) the likelihood of success on the merits and (2) the injury that will be suffered by the moving party in the absence of a TRO. *See* 2A David F. Herr & Roger S. Haydock, *Minnesota Practice* § 65.5 (2012).

II. EACH OF THE FIVE TRO FACTORS, ESPECIALLY THE TWO KEY FACTORS, WEIGHS HEAVILY IN FAVOR OF PLAINTIFFS' REQUESTED TRO

A. TRO FACTOR NO. 1: The "'status quo ante' relationship between the parties" weighs heavily in favor of Plaintiffs' requested TRO

An injunction is intended to "preserve the 'status quo ante' relationship between the parties," which means the status quo between the parties as it existed prior to the parties' dispute. *See Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 372 (Minn. App. 1999) (citing *Dahlberg*, 137 N.W.2d at 322). This factor evaluates the understanding among the parties as to what each might reasonably expect of the other as a result of the relationship of the parties. *See Dahlberg*, 137 N.W.2d at 322. To that end, evidence that "the parties' relationship could be maintained while awaiting trial on the merits" weighs in favor of granting an injunction. *See Dailey v. City of Long Lake*, No. C3-98-1663, 1999 WL 118633, at *2 (Minn. App. Mar. 9, 1999).

Here, the "'status quo ante' relationship between the parties" is clear and undisputed. Until December 7, 2018 at 9:30 a.m., which is City Council's scheduled time to approve of the 2040 Plan, Plaintiffs' Minneapolis land use rights are protected by City's existing comprehensive plan. *See* The Minneapolis Plan for Sustainable Growth (available at

http://www.ci.minneapolis.mn.us/cped/planning/cped_comp_plan_update_draft_plan). After that time, City is expected to have approved of the 2040 Plan and, in so doing, will have for at least the next decade, if not forever as interim density cannot be undone, "radical[ly]" altered these rights through its massive, city-wide upzoning proposal. Ex. 2 at 1. And, while it has the discretion to procure from the Metropolitan Council a six-month extension thereof, City has, unlike St. Paul, declined to do so. Ex. 5.

There is, therefore, but one way to preserve the parties' "'status quo ante' relationship" — *i.e.*, this Court's immediate issuance of Plaintiffs' requested TRO. This preservation of the "status quo" factor thus weighs heavily in favor of Plaintiffs' requested TRO.

B. TRO FACTOR NO. 2: The balance of harms weighs heavily in favor of Plaintiffs' requested TRO

1. Plaintiffs will be irreparably harmed without the requested TRO

A key factor in determining whether injunctive relief should be granted is whether the moving party will be irreparably harmed in the absence of an order. *See Cherne Indus., Inc. v. Grounds & Assocs. Inc.*, 278 N.W.2d 81, 92 (Minn. 1979); *see also Town of Burnsville v. City of Bloomington*, 264 Minn. 133, 139, 117 N.W.2d 746, 750 (1962) ("where the injury to the moving parties would be certain and irreparable if the application for a temporary injunction was denied, and if the injunction was granted the injury to the opposing parties, even though the final decree should be in their favor, would be inconsiderable, a temporary injunction will be issued to preserve the status quo until a trial on the merits"). Notably, the mere threat of irreparable harm is sufficient. *See Cherne Indus*, 278 N.W.2d at 92.

Plaintiffs' threatened irreparable harm is clear and immediate. This is, in fact, obvious from the "**STATE ENVIRONMENTAL POLICY**," which "recogniz[es] the profound impact of human activity on the interrelations of all components of the natural environment, particularly

the profound influences of [(1)] population growth [and] [(2)] high density urbanization." Minn. Stat. § 116D.02 (underlining and bracketed information added). And Plaintiffs' irreparable harm from City's massive, city-wide upzoning is otherwise proven by Sunde's Analysis thereof. Ex. 1. Indeed, unless and until City can somehow counter Sunde's Analysis with its own qualified and credible environmental consultant, this Court is bound by Sunde's credible and uncontroverted expert analysis. *See, Trisko v. City of Waite Park,* 566 N.W.2d 349, 356 (Minn. App.) (reversal of city's improper rejection of applicant's uncontroverted traffic expert), *review denied* (Minn. Sept. 25, 1997).

Without this Court's grant of Plaintiffs' requested TRO, City will approve of the 2040 Plan. And City will then argue that Plaintiffs' MERA claims are, regardless of the substantive merits thereof, forever foreclosed by this approval. In other words, Plaintiffs' rights will, per City's actions and anticipated arguments, be forever lost as of Friday, December 7, 2018 at 9:30 a.m. unless this Court grants Plaintiffs' requested TRO.

2. City will suffer no legally cognizable harm

In stark contrast, City will suffer no harm if this Court grants Plaintiffs' requested TRO. Indeed the only impact on City is that, before it could approve of the 2040 Plan, it would be required under MERA to either "rebut" or "affirmative[ly] defen[d]" against Plaintiffs' "prima facie showing."

But, given that Seattle has recently addressed the same types of environmental impacts advising its own (albeit scaled-down) upzoning proposal through its EIS[2] and City has routinely

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

required other project proponents to conduct such environmental review,[3] City cannot in good faith complain about this consequence. Thus, despite Mayor Frey's syllogistic fallacy that City's MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing" is unnecessary "because all the studies show that increasing density decreases carbon emissions" (Ex. 5; *see also* Ex. 9),[4] City should be made to do precisely what it would require of any other like proponent — *i.e.*, satisfy its MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing," presumably through a voluntary environmental review (*i.e.*, EIS or AUAR). Indeed, what possible good reason exists for City to even try to circumvent its statutorily-required burden? And, in any event, this burden "is expressly imposed by statute under MERA (Minn. Stat. § 116B.04), thus foreclosing any argument by City or this Court for ignoring it.

In sum, then, the above-discussed balance of harms decidedly favors this Court's issuance of Plaintiffs' requested TRO.

C. TRO FACTOR NO. 3: Plaintiffs' likelihood of success on the merits of their claims weighs heavily in favor of Plaintiffs' requested TRO

Plaintiffs need only show a likelihood of success on the merits. *See Dahlberg*, 137 N.W. 2d at 321. This factor does not require a strong or even a fair showing of the probability of success. *Metro. Sports Facilities Comm'n*, 638 N.W.2d at 226. Rather, "if a plaintiff makes even a doubtful showing as to the likelihood of prevailing on the merits, a district court may

[3] *See* discussion and documents available at http://www.ci.minneapolis.mn.us/cped/planning/cped_eaw

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

consider issuing a temporary injunction to preserve the status quo until trial on the merits." *Id.* (emphasis added).

Regardless of the likelihood of success which is required, Plaintiffs easily meet their burden. That is, the Verified Complaint proves that Plaintiffs have satisfied their "prima facie showing" because 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." And the Verified Complaint likewise proves that City has not (and cannot) "rebut" or "affirmative[ly] defen[d]" against Plaintiffs' "prima facie showing."

Plaintiffs have, therefore, shown an extremely high likelihood of success on the merits. That is, given Sunde's Analysis (Ex. 1), this is not even a close call. And, because Plaintiffs' likelihood of success on the merits of their claims is so high, this Court's issuance of its requested TRO is compelled. *See Softchoice, Inc. v. Schmidt*, 763 N.W.2d 660, 666 (Minn. App. 2009) ("[o]f these [five] factors, the most important is a party's likelihood of prevailing on the merits at trial"). Indeed, "in the absence of unusual or extraordinary factors, the trial court must enjoin environmentally destructive conduct if a feasible and prudent alternative is shown." *County of Freeborn v. Bryson*, 243 N.W.2d 316, 321 (Minn. 1976) (emphasis added); *see also State by Archabal v. County of Hennepin*, 495 N.W.2d 416, 426 (Minn. 1993) (reversing trial court order refusing to enjoin destruction of historical building where defendant failed to establish absence of feasible and prudent alternatives).

D. TRO FACTOR NO. 4: The public interest weighs heavily in favor of Plaintiffs' requested TRO

The public interest will be served by granting Plaintiffs' requested TRO. To sufficiently protect the statutorily-codified public interests in the sanctity of the environment as set forth in § 116D.02, subd. 1's "**STATE ENVIRONMENTAL POLICY**" and under MERA, it is

critically important that City be immediately enjoined from its anticipated 9:30 a.m., Friday, December 7, 2018 approval of the 2040 Plan. And this TRO needs to continue unless and until City satisfies its MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing," presumably through a voluntary environmental review (*i.e.*, EIS or AUAR).

Tellingly, while City can (and has) lauded the purported underlying public policy benefits to the 2040 Plan (Ex. 2), City cannot articulate with a straight face any public interest advanced by its attempted circumvention of this MERA-required defense of its massive, city-wide upzoning proposal. And, without such an articulation, this public interest factor weighs heavily in favor of Plaintiffs' requested TRO.

E. TRO FACTOR NO. 5: The lack of administrative burdens weighs heavily in favor of Plaintiffs' requested TRO

There would be little, if any, administrative burden placed upon this Court by granting Plaintiffs' requested TRO. If this Court issues the requested TRO, then either (1) City will satisfy its MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing," presumably through a voluntary environmental review (*i.e.*, EIS or AUAR), or (2) the parties will proceed with the lawsuit and the claims will be determined by this Court as in any other case with the "status quo ante" preserved until then. And, in the interim, there will be literally no further entanglements which would require this Court's participation.

III. NO TRO BOND SHOULD BE REQUIRED

The purpose of a TRO bond is to require the party seeking temporary injunctive relief to pay for any harm caused by the erroneous grant of a TRO. *See Hubbard Broad., Inc. v. Loescher*, 291 N.W.2d 216, 220 (Minn. 1980). A trial court has wide discretion in setting the amount of a bond (*see Paradata of Minn., Inc. v. Fox*, 356 N.W.2d 852, 855 (Minn. App. 1984)),

and it may, therefore, waive the requirement that the movant post a bond. *See Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 296-97 (Minn. App. 1995).

As discussed above and in the Verified Complaint, there will be no harm to City if the requested TRO is granted so as to maintain the "status quo ante" until either (1) City satisfies its MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing," presumably through a voluntary environmental review (*i.e.*, EIS or AUAR), or (2) the parties proceed with the lawsuit and the claims will be determined by this Court as in any other case with the "status quo ante" preserved until then. Indeed, because of City's ability to, like St. Paul, request by December 21, 2018 a six-month delay in its approval of and submission to Metropolitan Council of the 2040 Plan (Ex. 5), Plaintiffs' "Civil Cover Sheet" proposes a case schedule which would conclude within this six-month window. As a result, there is no conceivable penalty to City from this Court's allowance of a full hearing of Plaintiffs' MERA claims.

This Court should, therefore, exercise its discretion and waive any requirement that Plaintiffs post a bond or other security as a condition to the issuance of the TRO. Indeed, City could not identify any possible damages to it resulting from its enjoined approval of the 2040 Plan. And, perhaps most significantly, any bond request would undermine (and perhaps foreclose) Plaintiffs' efforts to advance the public interest at issue — *i.e.*, the environment.

CONCLUSION

Because each of the five TRO factors decidedly favors Plaintiffs' requested TRO, City must be immediately enjoined from its anticipated 9:30 a.m., Friday, December 7, 2018 approval of the 2040 Plan. And this TRO must be ordered to continue unless and until City satisfies its MERA-required "rebut[tal]" or "affirmative defense" to Plaintiffs' "prima facie showing,"

presumably through a voluntary environmental review (*i.e.*, EIS or AUAR). The facts and the law compel this result.

DATED: December 3, 2018

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ACKNOWLEDGMENT

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

s/ Jack Y. Perry
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