STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

Judge Joseph R. Klein

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.

ORDER

Court File No. 27-CV-18-19587
Case Type: Civil Other/Misc.

This matter came duly before the Honorable Joseph R. Klein on February 16, 2022 in District Court, Division I, Minneapolis, Minnesota. The parties appeared remotely on cross-motions for Summary Judgment. Attorney Jack Perry appeared on behalf of Plaintiffs. Attorney Ivan Ludmar appeared on behalf of Defendant City of Minneapolis. Upon conclusion of the hearing, the court asked Plaintiffs to file a detailed proposed order for consideration by March 3, 2022 and allowed Defendant until March 17, 2022 to respond. The cross-motions were taken under advisement on March 17, 2022. Based upon the evidence adduced, the arguments of the parties, and all the files, records, and proceedings herein, the court makes the following:

ORDER

1. Plaintiffs' Motion for Summary Judgment is **GRANTED**.
2. Defendant's Motion for Summary Judgment is **DENIED.**
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 rebutting Plaintiffs' prima facie showing, or 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 s*tatus 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 of 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 which implement the same residential development portions of the 2030 Plan.

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

7. The attached memorandum of law is incorporated herein.

Date: June 15, 2022

BY THE COURT:

Judge Joseph R. Klein
Judge of District Court

PROCEDURAL HISTORY AND UNDISPUTED FACTS

This case involves the Minneapolis 2040 Comprehensive Plan ("the 2040 Plan"). Under the Metropolitan Land Planning Act, the Metropolitan Council prepares long-range development plans for the Twin Cities region every ten years. Local governments in the region must adopt a comprehensive plan consistent with the development plan. Thus, the City of Minneapolis ("the City") must review and, if necessary, amend its comprehensive plan at least once every ten years. It must also make amendments and submit them for review to accommodate changes the Metropolitan Council makes to system plans. The Metropolitan Council reviews local government plans for compatibility with each other and conformity with the system plan.

In 2009, the City adopted a comprehensive plan called The Minneapolis Plan for Sustainable Growth. 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. The 2009 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. The 2040 Plan includes substantial amendments to the City's comprehensive plan, and officially went into effect on January 1, 2020. The Minneapolis City Council voted in favor of submitting the 2040 Plan to the Metropolitan Council on December 7, 2018. Three days before the vote, Plaintiffs began this action, seeking a declaration that Plaintiffs have made a sufficient prima facie showing under the Minnesota Environmental Rights Act (MERA) 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" and that the City had no affirmative defenses. Plaintiffs also sought to enjoin the City's approval of the 2040 Plan until the City offered a rebuttal or affirmative defense "presumably through a voluntary environmental review." Plaintiffs also filed a motion or a

temporary restraining order to enjoin the City Council from holding the vote. Plaintiffs' environmental analysis was attached to the Complaint. The day before the City Council's vote, this court denied Plaintiffs' motion for a temporary restraining order.

Shortly after the vote approving sending the 2040 to the Metropolitan Council, the City filed a motion to dismiss for failure to state a claim under Minnesota Rule of Civil Procedure 12.02(e). In response, Plaintiffs filed a motion for summary judgment. This court granted the City's motion to dismiss. Plaintiffs appealed. On October 25, 2019, while Plaintiffs' appeal of the district court order granting the City's motion to dismiss was pending, the Metropolitan Council gave its final approval to the 2040 Plan. The Minnesota Supreme Court reversed the district court's dismissal, holding that an administrative rule promulgated under the Minnesota Environmental Policy Act does not exempt a municipal comprehensive plan from the requirements of MERA and that Plaintiffs' complaint adequately alleged a causal link between the 2040 Plan and the alleged material adverse effects on the environment, thereby putting forth a legally sufficient claim for relief under MERA.

Upon remand to the district court, Plaintiffs again sought a temporary injunction, seeking to enjoin the City from approving any land use regulations required to implement the 2040 Plan and any approvals of land use proposals dependent on the 2040 Plan or any land use regulations enacted to implement the 2040 Plan. This court denied the motion, finding Plaintiffs did not demonstrate irreparable harm. With discovery now closed, the matter comes before the court on the parties' cross motions for summary judgment.

One potential but expected outcome of the 2040 Plan is increased urban population density. It is the increase in population density that is central to Plaintiffs' contentions of adverse or potential adverse environmental impacts. Increased population density is an affirmative feature of

the 2040 Plan that has not been present in any previous comprehensive city plan. The 2040 Plan, among other things, eliminates the City's single-family residential zoning district which previously covered 49.6% of the city. The City has never authorized the elimination of single-family residential zoning districts in any previous comprehensive plan. In anticipation of population growth, the 2040 Plan authorizes a full build-out of almost 150,000 new residential units during its duration. The City admits 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 notes that, consistent with the Plan's expressly stated up-zoning goals and policies, the Plan has authorized "as a matter of right" the "full build out" of the almost 150,000 residential units. The City has not disputed the fact that the Plan authorizes, as a matter of right, the full build out of almost 150,000 residential units.[1] Plaintiffs allege 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 seek declaratory judgment and injunctive relief under the Minnesota Environment Rights Act (MERA).

Plaintiffs rely on the report of expert Kristen Pauly (the "Pauly Report"), which analyzes the potential impacts of the 2040 Plan on several different elements of the environment. The Pauly Report assumes a full build out and analyzes the various ways in which such a plan would adversely impact the environment. Plaintiffs' expert opines that the land use changes proposed and authorized by the 2040 Plan result in substantial increase in development density. Pauly states that the increase in development density causes intensification of density, intensification of use, and intensification of scale. Plaintiffs, in their verified Complaint as well as their expert

[1] Plaintiffs also assert, through their expert, that even based solely the City's admitted anticipated growth of new residential units (25,048 by 2030, 42,630 by 2040, and 48,908 during the "duration of the plan"), such housing growth would trigger the need for an Environmental Impact Study under Minn. Rules 4410.4300, subp. 19 and Minn. Rules 4410.4400, subp. 14.

disclosures, identify the likely environmental impacts of such intensification as: 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.

The Pauly Report concludes that potential environmental impacts are likely to occur and that the 2040 Plan largely ignores those potential impacts, lacks an analysis of the impact on the environment, and does not provide for specific design criteria or measures which would mitigate adverse environmental impacts.

The City relies on the report of expert Mary Bujold ("the Bujold Report"), which analyzes 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. The analysis in the Bujold Report focused heavily on certain housing unit and structure trends through 2009-2019 and the anticipated economic benefits that will accompany the "overall shift toward increased density in the City of Minneapolis." As correctly pointed out by Plaintiffs, however, there was no analysis or discussion about the potential adverse environmental effects that are likely to result from the implementation of the 2040 Plan. The Bujold Report does not offer any rebuttal to Pauly's analysis. It does not challenge the credentials of plaintiff's expert. Instead, the Bujold report generally dismisses concerns of the potential environmental impact of a full buildout, offering 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.” The court finds this conclusory statement to be fundamentally flawed, however, and thus an ineffective response to the lengthy and detailed opinions set forth by Plaintiffs’ expert.

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. Of note is the fact that Bujold did not rely upon, nor apparently meaningfully consider, Pauly’s analysis. The City has admitted that Bujold did not rely on the Pauly Report. 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 the 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. Of note, however, is 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, or that has taken place since approval of the 2040 Plan.

The Bujold Report fails 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.

With discovery now closed, the record upon which the present cross motions are considered is set by the nature, extent, and quality of the parties' expert disclosures.

ANALYSIS

I. Summary Judgment Standard

Summary judgment is appropriate when there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. The purpose of summary judgment is not to deprive a litigant of his or her right to a full hearing on the merits of a real issue of fact, but to eliminate patently unmeritorious and unfounded claims or defenses. *Wall v. Fairview Hosp. and Healthcare Services*, 584 N.W.2d 395, 303 (Minn. 1998); *Cook v. Connolly*, 366 N.W.2d 287, 292 (Minn. 1985). By narrowing a case to triable issues, a motion for summary judgment promotes the "just, speedy, and inexpensive determination" of the action. *DLH Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). The moving party has the burden of showing the absence of a genuine issue of material fact. *Anderson v. State Dep't of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005). In deciding a motion for summary judgment, the court must not decide issues of fact, but instead must determine whether genuine issues of fact exist for trial. *Larson v. Northwestern Mut. Life Ins. Co*., 855 N.W.2d 293 (Minn. 2014). "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). A fact is material only if its resolution will affect the outcome of the case. *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996). The court will grant summary judgment when the existing record, including pleadings and affidavits, shows that the non-moving party has 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. A party opposing a motion for summary judgment may not rest on mere allegations but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). With that said, summary judgment is an extraordinary remedy—a blunt instrument—and should be granted with caution. *Lundgren v. Eustermann*, 370 N.W.2d 877, 882 (Minn. 1985); *Katzner v. Kelleher Const.*, 535 N.W.2d 825, 828 (Minn. Ct. App. 1995).

II. Minnesota Environmental Rights Act (MERA).

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.

A. Plaintiffs have appropriately brought a claim under MERA.

This court finds that the City's act of adopting the 2040 Plan is "conduct" as that concept is construed under MERA. Although "any conduct" is not a term that is expressly defined by MERA, higher courts in Minnesota have consistently interpreted the phrase broadly, giving it far-reaching application. *Floodwood-Fine Lake Citizens Group v. Minnesota Environmental Quality Council*, 287 N.W.2d 3900, 399 (Minn. 1979), *County of Freeborn by Tuveson v. Bryson*, 210 N.W.2d 290, 296 (Minn. 1973) (reaffirming the broad and comprehensive scope of MERA conferred by the legislature); *White Bear Lake Restoration Association, ex rel. State v. Minnesota Department of Natural Resources*, 946 N.W.2d 373, 380 (Minn. 2020). Thus, consistent with the legislative intent of conferring a broad and comprehensive scope to MERA, and in light of the guidance offered by prior rulings of the Minnesota Supreme Court, this court renders its finding that the act by the City of adopting the 2040 Plan constitutes "conduct" under MERA.

This court further finds that the Plaintiffs' have sufficiently demonstrated that protectable natural resources are at stake. As before, the City has not challenged Plaintiffs' assertions, made through their expert, that protectable natural resources are at stake,[2] or that the City's adoption of Plan 2040 is "conduct" under MERA. Rather, the City confines its argument to a contention that Plaintiffs' have failed to show undisputed facts that the 2040 Plan is likely to cause the type of environmental damage that MERA seeks to prevent. Since this court finds that MERA applies to the 2040 Plan, that the City's act of adopting the 2040 Plan is "conduct," and that protectable

[2] MERA defines "natural resources" as including, but not limited to, "all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources." Minn. Stat. § 116B.02, subd. 4.

natural resources are at stake by virtue of that conduct, the court will evaluate the present motions under Minn. Stat. § 116B.04 (b).

B. Plaintiffs have satisfied their initial burden under MERA.

In an action brought under Minn. Stat. § 116B, a plaintiff must first make 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[.]" Minn. Stat. § 116B.04(b). To satisfy its burden, a plaintiff must prove "(1) a protectable natural resource, and (2) pollution, impairment or destruction of that resource." *Freeborn County by Tuveson v. Bryson*, 210 N.W.2d 290, 297 (Minn. 1973). Pollution, impairment, or destruction of a resource "includes any conduct which has or is likely to have a materially adverse effect on the environment." *Id; see also* Minn. Stat. § 116B.02 subd. 5. The Minnesota Supreme Court has put forth a nonexclusive five-factor test to determine whether conduct would "materially adversely affect[] or is likely to materially adversely affect the environment" under MERA:

> (1) The quality and severity of any adverse effects of the proposed action on the natural resources affected;
> (2) Whether the natural resources affected are rare, unique, endangered, or have historical significance;
> (3) Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable;
> (4) Whether the proposed action will have significant consequential effects on other natural resources;
> (5) Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.

State by Schaller v. County of Blue Earth, 563 N.W.2d 260, 267 (Minn. 1997). Before the court can reach a discussion of whether Plaintiffs satisfied their burden under MERA, it must first address whether a presumption of an immediate full build-out is a proper basis on which to base a MERA challenge to a comprehensive plan.

i. Plaintiffs' presumption of an immediate, full build-out is appropriate.

This court finds that Plaintiffs' challenge to the 2040 Plan based on a full-build out is appropriate under MERA. The 2040 Plan is a "Comprehensive Plan" as that concept is contemplated under Minnesota law. Comprehensive plans are a "compilation of policy statements, goals, standards, and maps for guiding the physical, social and economic development, both private and public, of the municipality." Minn. Stat. § 462.352, subd. 5 (2020). The conduct of adopting a comprehensive plan has the direct effect of controlling a city's land use development because the plan becomes supreme vis-à-vis zoning ordinances. Minn. Stat. § 473.858, subd. 1 ("If the comprehensive municipal plan is in conflict with the zoning ordinance, the zoning ordinance shall be brought into conformance with the plan . . ."). A "comprehensive plan constitutes the primary land use control for cities and supersedes all other municipal regulations." *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W. 2d 162, 175 (Minn. 2006).

This court notes that the Minnesota Supreme Court has previously held in this case that a presumption of a full-build out is sufficient to withstand a motion to dismiss under Rule 12.02(e). It is also true, however, that the Minnesota Supreme Court expressly limited its ruling to fit the context of a Rule 12.02(e) motion to dismiss, in which the Plaintiffs—as the non-moving party—were entitled to such a presumption. The Court, at that time, stopped short of finding such a presumption to be appropriate beyond the context of the Rule 12.02(e). *State by Smart Growth v. City of Minneapolis*, 954 N.W.2d 584, 595 (Minn. 2021).

Most, if not all, of the opinions advanced by Plaintiffs' expert are predicated on the assumption of the full build-out that is authorized by the Comprehensive Plan. It thus becomes necessary for this court to revisit the appropriateness of Plaintiffs' presumption of a "full build-

out" at this more advanced stage of the litigation. With discovery now closed, Plaintiffs bring their motion for summary judgment[3], asserting that they are able to make a prima facie showing that the City's "conduct" (i.e. the adoption of the 2040 Plan) has or is likely to have an adverse impact on the environment, by virtue of future actions that, though fully authorized by the approved Plan, have not yet taken place—nor would they take place unless a full build-out, as authorized, is achieved. The City argues that such an approach is too speculative, claiming there is no evidence of harm to the environment caused by "a Plan" (as opposed to actual projects, where the actual work and its impact on the environment can be more directly assessed). This leads to a question that must therefore be addressed: When can a Comprehensive Plan, such as the 2040 Plan, be challenged under MERA? Plaintiffs' position, in a nutshell, is this: A challenge at the "Plan" stage must be allowed, lest later challenges—made after numerous projects are already commenced or even completed (the compilation of which present a likely adverse impact to the environment)—be too late to achieve the environmental protections so strongly directed by MERA. The Supreme Court, without expressly ruling on the issue, has already previously commented on this concern, noting the apparent legitimacy of the dilemma in its earlier Decision issued in this case. As to the propriety of Plaintiffs' analysis of the environmental impacts of the 2040 Plan based on its authorization for the "full build-out" of nearly 150,000 new residential units within the duration of the 2040 Plan, the Court observed:

> The projections supporting Smart Growth's allegations are based on a full build-out, but that build-out is what the actual land-use criteria contained in the Plan allows for; Smart Growth is not speculating about the type of actions that will result from other future comprehensive plans that would follow the 2040 Plan.

State by Smart Growth, 954 N.W.2d at 596 (*Smart Growth II*) (Emphasis added).

[3] The court recognizes that both parties have moved for summary judgment. The court further notes that the parties are diametrically opposed on the question of whether a full build-out may be presumed in considering Plaintiffs' efforts to show that a prima facie case has been made under MERA. Given the record presented, the determination of this question is outcome determinative to both parties' motions.

When, then, does MERA permit a challenge to a comprehensive plan? The determination of whether to permit the presumption of a full build-out in assessing the likely adverse environmental impact of the 2040 Plan under MERA is fundamentally a question of law. It is, however, a determination of law made against the backdrop of several undisputed facts in this case. It has not been disputed that the 2040 Plan represents a significant change from any previous plan, in terms of land use. It is undisputed that before the 2040 Plan there was no express intent to achieve increased population density for the Minneapolis area. Before the 2040 Plan there was no abolition of new single-family dwellings in Minneapolis. Before the 2040 Plan was approved there was no land use plan which authorized the increase of nearly 150,000 new residential units. There is further no dispute that such a build-out is fully authorized under the 2040 Plan, both as it was written and as it was approved. It is also undisputed, based on the record presented, that in the three and a half years since the 2040 Plan was approved, the City has not elected to amend the 2040 Plan to moderate what has been authorized and approved for the full build-out.

In assessing a plan that represents a significant change from previous plans, particularly with respect to its preference of promoting increased population density as a feature of that plan, this court looks to prior Minnesota Supreme Court decisions on the question of at what point in the process a MERA challenge can be made. The Minnesota Supreme Court has undertaken the analysis in its prior assessment of Minn. Stat. § 116B.03 MERA actions to challenge similar "administrative conduct" or "administrative action" of political subdivisions of the state which would, as here, not itself directly "cause" pollution, impairment, or destruction but would indirectly do so by authorizing or allowing others' conduct or action to pollute, impair, or destroy. *See, e.g., Corwine v. Crow Wing County,* 244 N.W.2d 482, 490-91 (Minn. 1976) (challenge to county's approval of special use permit for developer's planned unit development for a campground

because of its anticipated resulting overcrowding of the adjacent lake), *overruled on other grounds by Northwestern College v. City of Arden Hills*, 281 N.W.2d 865 (Minn. 1979); *Krmpotich v. City of Duluth*, 483 N.W.2d 55, 55-56 (Minn. 1992) (challenge to city's land use approvals for developer's proposed 35-acre, 267,000 square foot strip mall because of its anticipated resulting adverse impact on an already degraded 1.85-acre wetland); *State by Schaller v. County of Blue Earth*, 563 N.W.2d 260, 265-66 (Minn. 1997) (challenge to county's route selection for its proposed construction of a portion of a new two-lane highway because of its anticipated resulting noise violations if it eventually expanded into a four-lane highway). In each of these cases, the Supreme Court evaluated "proposed" and "assumed" conduct (or action) being challenged as a whole and in its entirety. *See Corwine*, 244 N.W.2d at 489-91 (challenging county's approval for the "proposed additional usage of about 110 families" and "approximately triple the crowding of present usage" of the lake (emphasis added)); *Krmpotich*, 483 N.W.2d at 55-56 (challenging city's land use approvals for developer's proposed 35-acre, 267,000 square foot strip mall, "arguing that the project, if completed in accordance with the council's actions, would violate [MERA]" because of its anticipated resulting adverse impact on an already degraded 1.85-acre wetland (emphasis and bracketed information added)). The City has cited *State by Schaller* as support for its position, suggesting that the result in that case should be controlling. In *State by Schaller*, plaintiff challenged the construction of a highway based on its generation of potential future violations of the Minnesota Pollution Control Agency's "noise" standards. The district court found, and both the Court of Appeals and Minnesota Supreme Court affirmed, that "the projected [noise] violation was 'too speculative, premature and minimal' to establish a prima facie case under MERA." *Id.* at 267-68. As this court reads *State by Schaller*, however, what is striking is that at all three levels of review the court engaged in the evaluation of proposed action, not what construction had taken

place as of the time the case was heard.[4] In the present case, the Comprehensive Plan is not shovels in the ground, but it is nevertheless the driving force that permits a scale of population intensification and residential unit increase that has never before been authorized. There is a certain fundamental wisdom, and the broad purpose of MERA supports such wisdom, that the one truly meaningful time to challenge a Comprehensive Plan, particularly one as far-reaching as the 2040 Plan, is when it is still just that—a plan.

The City argues that a project-by-project environmental review of new residential construction under the 2040 Plan would sufficiently protect the environment from adverse impacts. This court finds the City's approach untenable. Evaluating the environmental impact of new residential construction projects on an individual basis will result in residential construction being allowed until the city is one project away from—or even one step beyond the point of no return from—material and adverse environmental impacts. Additionally, the impact of each individual project is only a fraction of the cumulative impact of all projects authorized under the 2040 Plan. An environmental study on a single project may focus on localized areas, such as a city block or a neighborhood, without regard to the collective impact on the entire city or on the greater metro area as a whole. Such an approach might very well result in a dangerous blind spot to the cumulative adverse effects that may result from changes that have already been authorized and approved by the 2040 Plan. An individual project may be found to have a negligible adverse impact on the environment, but the same might not hold true when that project acts with numerous other such projects. Permitting only studies of new residential construction projects—individually—that have been authorized under one overarching Comprehensive Plan may very

[4] Insofar as *State by Schaller* confirms a court's ability to review a proposed plan—or in this case—assume the full build-out of the 2040 Plan, this court finds it offers instruction. The same, however, is not true for the result reached in *State by Schaller*. As discussed below, the court finds that Plaintiffs have presented a considerable amount of detailed and unrebutted expert opinion in this case, thus rendering the result reached in *State by Schaller* inapposite.

well fall short of the environmental protections envisioned by the state legislature when it promulgated MERA. Public policy, which favors broad protections of the environment in Minnesota, also supports the court presuming a full build-out when assessing the 2040 Plan. MERA is consistently interpreted broadly out of respect for the environment. In enacting MERA, the state legislature was expressly concerned with activities that could cause long-standing and dramatic negative impacts to the environment.

The City, in its cross-motion for summary judgment, has argued that Plaintiffs have not raised a genuine issue of material fact as to whether the 2040 Plan has caused or is likely to cause pollution, impairment, or destruction of natural resources because the presumption of a full build-out is not the correct basis upon which to challenge a comprehensive plan under MERA. Because this court holds that the presumption of a full build-out, as authorized under the 2040 Plan, is the proper basis upon which to challenge a comprehensive plan under MERA, the City's arguments fail. As discussed below, the City has based its entire argument on the notion that a full build-out should not be presumed. To the extent that it has limited its arguments in this way, based on the analysis set forth below with respect to Plaintiffs' prima facie showing under MERA, the City's motion for summary judgment must be, and is, denied.

ii. The likely environmental impacts of the 2040 Plan are not speculative.

Because MERA does not contain a causation standard to evaluate whether the conduct of a defendant "has[] or is likely to cause" material adverse effects on the environment, this court again turns to case law for guidance. As observed above, in *State by Schaller*, the Minnesota Supreme Court considered a challenge to the construction of a new highway that alleged its construction would result in an ordinance violation occurring 16 years in the future. 563 N.W.2d at 268. In that case, the court affirmed a district court finding that a future violation of an ordinance

was "too speculative, premature and minimal" because it relied on projected traffic levels, assumed future construction that was not currently planned or authorized, assumed the current ordinance would still be in effect when the violation was projected to occur, and assumed that the county would not be able to obtain an ordinance variation. *Id*.

The circumstances presented in the present case, however, are different. When the 2040 Plan is analyzed using the nonexclusive *Schaller* factors, it becomes clear that the undisputed facts of this case support the conclusion that the potential impacts of the 2040 Plan are not speculative, premature, or minimal.

First, this court examines the quality and severity of any adverse effects of a full build-out on natural resources. The adverse impacts presented in the Pauly Report, which have not been rebutted by the City, cover several different categories. At least one of these categories is discussed in great detail: increased contaminant load to storm sewer systems due to increased housing density. The following numbers cited by Plaintiffs' expert illustrate the expected increase in storm water pollution for *only one zoning area* authorized under the 2040 Plan. Pauly cites data showing that at least 279,294 pounds of suspended solid contaminants enter Minneapolis' storm sewer system per year from the R1 zone. Under a full build-out of only this single zone, Pauly opines that additional 219,367 pounds are expected to enter the storm water system – and eventually the city's 22 lakes, 4 streams, and the Mississippi River, some of which are already considered "impaired waters" by the Minnesota Pollution Control Agency[5]. This is a 78.5% increase in the volume of contaminants polluting the city's waters. Based on this unrebutted showing by Plaintiffs' expert, this factor weighs significantly in favor of Plaintiffs.

[5] Minnesota Pollution Control Agency, *Minnesota's Impaired Waters List*, https://www.pca.state.mn.us/water/minnesotas-impaired-waters-list (last updated April 29, 2022)

The second *Schaller* factor requires the court to assess whether the natural resources affected by a full build-out are rare, unique, endangered, or have historical significance. Based on the record presented, the resources that are likely to be impacted by the 2040 Plan include, but are not limited to, the air, water, soil, animals, and quietude. As Plaintiffs' correctly point out, the Minneapolis City Council itself has voted unanimously to recognize that these resources are already under threat from the effects of climate change. In Resolution 2019R-422, the Minneapolis City Council unanimously voted to declare a climate emergency in December 2019, finding that "climate change due to global warming has caused, and is expected to cause additional, substantial interference with and growing losses to infrastructure, property, industry, recreation, *natural resources*, agricultural systems, human health and safety, and the quality of life…" (emphasis added). Using the City's own admission alone, the resources that would be affected by a full build-out under the 2040 Plan are already at risk. Based on the record presented, the court finds that this factor weighs in favor of Plaintiffs.

Under the third *Schaller* factor, the court must evaluate the long-term effects of a full build-out on the affected natural resources, including whether those resources are easily replaced. Presuming the full build-out, the 2040 Plan's elimination of all single-family residence zoning areas will, under its own terms, result in larger structures replacing current single-family homes. According to Pauly's expert opinion, once these structures are built, the increase of hard surfaces will not be reversible, and the consequences of such will be significant. Pauly's unrebutted expert opinion is that the adverse impact to the environment will be far-reaching. Based on the record presented, the City has failed to conduct any specific analysis of the plan's impact on the environment, and does not provide for specific design criteria or measures which would mitigate

adverse environmental impacts. For this reason, the court finds that the record supports a finding that this factor weighs in favor of Plaintiffs.

Fourth, the court must consider whether a full build-out will have significant consequential effects on other natural resources. The unrebutted expert opinion advanced by Pauly establishes this factor. The substantial increase in contamination contained in storm water runoff discussed in the first factor will likely have significant consequential effects on other natural resources. Increased contamination, along with the accompanying increased volume of water runoff, has many downstream effects, including, but not limited to, erosion, an increase in floodplain elevation, degradation of aquatic structure, a reduction in habitat diversity, and a reduction in aquatic biodiversity. This factor weighs in favor of Plaintiffs.

Finally, this court considers whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of a full build-out. As correctly pointed out by Plaintiffs, the 2040 Plan contains no mitigation strategies to address the direct consequences of a full build-out on the environment. The Pauly Report opines that a full build-out will decrease desirable resources and increase undesirable ones. The city and its residents would see, as opined by Pauly, a decrease in air quality, privacy, and access to light while simultaneously seeing an increase in noise and vehicle traffic and congestion. As with all of Pauly's expert opinions, the City's expert has failed to specifically address the effect of the 2040 Plan on these resources, leaving Pauly's opinions unrebutted. The court finds that this factor weighs in favor of Plaintiffs.

This court finds that based on the record presented, all five *Schaller* factors demonstrate that a full build-out under the 2040 Plan, a plan that has no fixed duration, will cause or is likely to cause material adverse effects to the environment. The court finds that these effects, as put forth

by expert Kristen Pauly, are not unduly speculative, premature, or minimal. Plaintiffs have met their burden to show "pollution, impairment or destruction" under MERA.

iii. Plaintiffs have demonstrated a prima facie case of material adverse environmental harm under MERA.

This court finds Plaintiff has satisfied its burden to make the prima facie showing required by Minn Stat. § 116B.04(b). The Pauly Report, compiled by Plaintiffs' expert, concludes that "[t]he magnitude of physical impact to the environment resulting from the 2040 Plan is likely to cause pollution and impairments to the environment." The Pauly Report[6] raises and discusses the potential impact of the 2040 Plan on several environmental areas, such as increased noise, increased vehicle and pedestrian traffic, decreased air quality, decreased water quality, decreased aesthetic quality, reduction of bird and wildlife habitat, etc. It provides a more detailed analysis of the effects the 2040 Plan will have on, for example, stormwater discharge: an uncontrolled increase in runoff due to increased impervious surfaces "result[s] in impact to water quality, increased flooding, and other impacts." The Pauly Report states that these impacts will, if left unmitigated, cause more severe impacts to the environment such as soil erosion, increased water temperatures, reduction in habitat diversity and aquatic biodiversity, etc. Each of these adverse environmental impacts is tied by expert opinion to the intensification of population density and the authorized growth of residential units, both of which are features of the 2040 Plan.

The City admits that its expert did not rely upon Pauly's report in preparing her expert report. Moreover, the Bujold Report does not specifically address any of the environmental

[6] The Pauly Report states its "project magnitude data was evaluated for comparison with the Environmental Impact Statement (EIS) Mandatory Thresholds for residential development[]" pursuant to Minnesota Administrative Rules 4410.4300 and 4410.4400. These rules state that for a proposed development beyond a certain number of attached or unattached residential units (1,500 and 1,000, respectively) an EIS is required. The City argues these rules do not apply to the 2040 Plan. The court need not reach the issue of whether these rules apply in this case because the applicability does not change the fact the Pauly Report is based on the correct metric: a full build-out.

concerns raised by Pauly.[7] The report identifies what documents Bujold reviewed in preparing her report. Conspicuously absent from the reviewed documents identified in the Bujold Report is the Pauly Report. There is no mention of Pauly's concerns, nor any reference to the Pauly Report. The court notes that the Pauly Report was prepared in November of 2018 and was provided to the City as early as December of 2018, when it was attached to Plaintiffs' verified Complaint. Despite knowledge of Pauly's expert report throughout this litigation, the City presented to this court, as opposition to Plaintiffs' motion for summary judgment, a report, prepared three years later, that made no attempt to reconcile or even expressly address the assertions and opinions of Plaintiff's expert. The result of this "two ships passing in the night" approach is that the City has left the Pauly Report unrebutted. Based upon the uncontroverted expert testimony of Kirsten Pauly and the non-exclusive *Schaller* factors, this court finds that the environmental impacts asserted by Plaintiffs would have a materially adverse effect on the environment.

The Pauly Report recognizes that the 2040 Plan does not include an analysis of the potential environmental impacts to water resources, but instead defers such an analysis to a later date or later plan. More broadly, the Pauly Report recognizes the 2040 Plan does not identify any potential environmental impacts, much less provide an analysis of such impacts[8]. Nor does the 2040 Plan put forth any criteria or measures to mitigate any potential impacts on the environment. Plaintiffs, through their expert's disclosure have put forth a sufficient prima facie showing that a full build-out as authorized by the 2040 Plan is likely to cause material adverse effects to natural resources.

[7] The court notes that at one point in the litigation, the City raised the possibility of challenging Plaintiffs' expert through a *Frye-Mack* hearing. The court allowed that it would permit such a hearing, if timely brought. The City, however, did not avail itself of the opportunity, choosing to instead bring this motion for summary judgment.
[8] During discovery, Plaintiffs requested "[d]ocuments related to City's investigation into the environmental impact of its 2040 Plan" regardless of when such documents were prepared pursuant to Minn. Stat. § 13. The City responded that it has "[n]o responsive data."

C. Defendant has not met its burden to rebut Plaintiffs' showing 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.*

In a challenge to proposed conduct under MERA, the court looks to the entirety of the proposed conduct being challenged, not a lesser subset of that conduct. *See e.g. Corwine v. Crow Wing County*, 244 N.W.2d 482, 489-90 (Minn. 1976) ("*the proposed* additional usage…will approximately triple the crowding of present usage")(emphasis added); *Krmpotich v. City of Duluth*, 483 N.W.2d 55, 57 (Minn. 1992) ("The trial court did, however, proceed to conduct the analysis appropriate…making findings on the suitability of the *proposed project* to the site…[t]he trial court then determined that *the proposed project* was consistent with a reasonably required for the promotion of public health…")(emphasis added). Four of the five *Schaller* factors consider the character and impact of the "**proposed** action." *State by Schaller*, 563 N.W.2d at 267 (emphasis added). Thus, the proper conduct to analyze the 2040 Plan under MERA is defendant's proposed conduct, not the conduct that is likely to occur.

The court finds that the City has not satisfied its burden to rebut Plaintiffs' prima facie showing of environmental harm. The City's argument in opposition to Plaintiffs' motion is based on the report of expert Mary Bujold. The Bujold Report analyzes population growth trends, commercial and residential development trends, and the projected population growth used by the Metropolitan Council for Minneapolis to conclude that the "maximum permitted development is

extremely unlikely in the long term[.]" The City has not put forth any evidence showing that a full build-out will not have any of the potential adverse environmental impacts the Pauly Report identifies. The City has offered no evidence to rebut Plaintiffs' prima facie showing. The City argues that it does not need to do any environmental analysis because a full build-out of almost 150,000 new residential units is extremely unlikely to occur. The City's expert report vaguely dismisses the risks that the plan presents 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 misses completely the crux of the Pauly Report. This court has held that analyzing the impact of the 2040 Plan's full build-out is appropriate. The Bujold Report falls 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, the City has failed to show that a reasonably prudent alternative to the 2040 Plan is unavailable.

In evaluating the City's failure to satisfy its obligation under Minn. Stat. § 116B.04 (b), a further brief discussion is required. The City has not, as required under Minn. Stat. § 116B.04(b), either rebutted or affirmatively defended against Smart Growth's prima facie showing, and this appears to be due largely to tactical decisions made by the City during the course of this litigation. From the time of their initial Complaint, Plaintiffs have asserted that the City has failed to rebut Plaintiffs' prima facie showing. Plaintiffs have correctly asserted that, upon a *prima facie* showing under MERA, the City is required to rebut or affirmatively defend under Minn. Stat. § 116B.04(b).

Consistent therewith, the City's counsel filed an affidavit on January 18, 2019, attesting to the City's need for fact "discovery" to defend against Smart Growth's MERA action if, as subsequently did happen, City's Minn. R. Civ. P. 12.02(e) motion to dismiss failed. Even after the Supreme Court in *Smart Growth II,* 954 N.W.2d at 593 and 596, reversed this Court's Minn. R. Civ. P. 12.02(e) dismissal of Plaintiffs' claims, the City failed to produce any discovery responses that would speak to the requirements of MERA. Rather, the City, in response to a request for "all data . . . regarding the . . . [d]ocuments related to City's investigation into the environmental impact of its 2040 Plan whether prepared prior to, or after,the 2040 Plan's final approval," responded that it had "no responsive data." The City's discovery responses further acknowledged that it <u>never</u> conducted any environmental review of the 2040 Plan. The record is similarly devoid of any indication that the City conducted discovery for the purpose of developing rebuttal evidence or an affirmative defense.

The City, despite having represented to this court that it intended bring a Frye-Mack motion to disqualify Plaintiffs' expert and to submit a rebuttal to Pauly's expert opinions, never did so, notwithstanding the fact that this Court amended its scheduling order to accommodate this request. Further, as already noted above, the City's expert report neither referred to the Pauly Report, nor did it specifically address any of the environmental concerns raised in the Pauly Report. It did not mention the Pauly Report and, from the face of the Bujold Report, the City's expert did not even review the Pauly Report in developing her own report. 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.

Based on the record presented, this court finds that Plaintiffs have satisfied their burden under Minn. Stat. § 116B.04 (b), requiring a "prima facie" showing that portions of the 2040 Plan

which authorized a significant increase in new residential units, utilizing population densification, is likely to materially adversely affect the environment. The City has failed to make an adequate showing of either of the two defenses required under Minn. Stat. § 116B.04 (b). Therefore, the City's motion for summary judgment is denied, and Plaintiffs' motion is granted.

The relief requested by Plaintiff is that the City be enjoined from any ongoing implementation of the 2040 Plan, and that the City be required to revert back to the 2030 Plan for its prospective enforcement of both residential development and land use ordinances. While this may no doubt create no small amount of short-term chaos—which the court does not take lightly—this court is inclined to agree that, under MERA, no other action by the court would properly address or remedy the likely adverse environmental impacts of the 2040 Plan. This court therefore orders that the City be immediately enjoined from any ongoing implementation of the 2040 Plan and shall immediately cease all present actions in furtherance of the 2040 Plan. Under MERA, after Plaintiffs have satisfied their prima facie showing, it is necessary—indeed required—that the City either rebut Plaintiffs' prima facie showing or offer an affirmative defense. Unless and until the City does so, it shall be so enjoined.

Within 60 days of this Order, and unless and until it satisfies the requirements set forth under Minn. Stat. § 116B.04 (b), the City must restore the s*tatus 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 of residential development that this court has determined is likely to create adverse environmental impacts to the Minneapolis area.

Within 60 days of this Order, and unless and until it satisfies the requirements set forth under Minn. Stat. § 116B.04 (b), 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 which implement the same residential development portions of the 2030 Plan.

Given that Minn. Stat. § 15.99, subd. 2(a) imposes the same 60-day deadline for deciding all land use requests and further that the City has for over three years been repeatedly forewarned of the possibility of this ruling given the claims[9] advanced by Plaintiffs, this court finds that 60 days should provide adequate time for City to so restore "the *status quo ante* relationship between the parties" as it existed on December 4, 2018 by both (1) permanently enjoining its prospective enforcement of the residential development portions of the 2040 Plan at issue and its land use ordinance amendments therefor and (2) reinstating for its prospective enforcement of the residential development portions of the 2030 Plan and its land use ordinances therefor.

III. 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

[9] Plaintiffs brought this action on December 4, 2018. The Supreme Court issued its ruling in this matter on February 10, 2021, Plaintiff's renewed their motion for injunctive relief on March 31, 2021, and later brought this motion for summary—seeking the same relief—on January 6, 2022.

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, in its discretion, does find that at least a nominal bond is appropriate. The relief being ordered by the court represents a significant change from the status quo that has been in place for the past three years. The court recognizes that the likelihood of appeal of this Order is high (and indeed would be high regardless of which side prevailed). The parties have been actively litigating and vigorously opposing each other. This court further recognizes that a reviewing court, in its wisdom, might well correct this one on matters of law or the relief granted. Should that be the case, there would certainly be costs to the City. 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

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