

No. A23-1592

STATE OF MINNESOTA
IN COURT OF APPEALS

In the Matter of the Petition for an Environmental Assessment Worksheet for the
Summit Avenue Regional Trail Project

Gary R. Todd and Historic Summit Avenue d/b/a/ Save Our Streets,

Relators,

vs.

City of St. Paul,

Respondent.

RELATORS' BRIEF AND ADDENDUM

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STATEMENT OF THE ISSUES

- I. Was the City of St. Paul's (City) denial of a petition (Petition) for an environmental assessment worksheet (EAW) for the Summit Avenue Regional Trail, which will destroy nearly 1,000 mature trees and irreversibly damage a historic treasure, inconsistent with the law, unsupported by substantial evidence, or arbitrary and capricious?**

Gary R. Todd and Historic Summit Avenue d/b/a Save Our Street (collectively, SOS) raised this issue by stating in their Petition that an EAW was necessary to preserve the tree canopy along Summit Avenue. The City concluded that no EAW was necessary because the trees will grow back and the City claims it can implement unspecified mitigation measures.

Most Apposite Authority:

Minn. R. 4410.1700, subp. 7;

Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs, 713 N.W.2d 817 (Minn. 2006); and

People for Env'tl. Enlightenment and Responsibility, Inc. v. Minn. Env'tl. Quality Council, 266 N.W.2d 858 (Minn. 1978).

- II. Did the City properly deny the Petition based upon both the incorrect legal conclusion that historic elements are only protected if they are expressly referenced in the nominations of Summit Avenue for the National Register of Historic Places and the incorrect factual statement that the streetscape is not a contributing historic element?**

SOS raised this issue by stating in its Petition that an EAW was necessary to preserve Summit Avenue's historic streetscape, including the scale of its boulevards and medians, its granite curbs, and its historic streetlights. The City asserted that no EAW was necessary, wrongly concluding that historic preservation extends only to historic elements expressly identified in the nomination and finding incorrectly that the

streetscape is not mentioned as an element contributing to the two National Historic Districts protecting Summit Avenue.

Most Apposite Authority:

Minn. Stat. § 116B.02, subd. 4; and
Minn. R. 4410.0200, subp. 23.

III. Is the approved final plan for a designated off-road trail on a specified street that requires no further governmental approvals sufficiently definite to constitute a “project” under the Minnesota Environmental Policy Act (MEPA)?

SOS raised this issue by petitioning the City for an EAW for the Trail. The City concluded because no funding has yet been secured for the Trail, it does not constitute a “project” under MEPA.

Most Apposite Authority:

Minn. Stat. § 116D.04, subd. 2a;
Minn. R. 4410.1400, subp. A; and
Minn. for Responsible Rec. v. Dep’t of Nat. Res., 651 N.W.2d 533, 536 (Minn. App. 2002).

STATEMENT OF THE CASE

St. Paul's iconic Summit Avenue constitutes the longest stretch of remaining Victorian architecture in the United States. Miles of mature tree canopy frame the avenue's historic streetscape. Combined with other historic elements, Summit Avenue is widely recognized as one of the best preserved historic residential districts anywhere in the United States. By moving the existing bicycle facility off the street and into the boulevards and medians that currently line Summit Avenue, the City of St. Paul's (City) proposed Regional Trail (SART, Project, or Trail) would require the destruction of most of the surrounding tree canopy, re-route the current symmetrically balanced drive lanes into zig-zagging chicanes, and irreversibly alter the environmental and historic elements that make Summit Avenue unique.

The City recognizes, as it must, that "if . . . the evidence presented shows that, because of the nature or location of the proposed project, the project *may have* the potential for significant environmental effects, then the [the City] is required to order preparation of an [environmental assessment worksheet (EAW)]" under the Minnesota Environmental Policy Act (MEPA). (Emphasis added.) The City's discussion of the Project throughout the development process and the SART Plan itself demonstrate convincingly that the Project triggers this basic threshold test. Ironically, the City's own denial of SOS's Petition for an EAW concedes that "construction of the [Trail] may result in *irreversible damage* to some existing trees currently lining Summit Avenue." (Emphasis added.)

Yet the City asserts it should be able to devastate the tree canopy and dramatically change the historic character of Summit Avenue without conducting even the most basic

level of environmental review. Rather than seriously consider the potential for environmental effects, the City simply assumes no such effects will occur; the trees eventually will grow back; and that the historic street, boulevards, and sidewalks are not entitled to protection. The City's conclusory dismissal of the need to prepare an EAW contradicts its own repeated and unqualified acknowledgements throughout the process that any proposed trail configuration must protect the mature tree canopy and preserve the historic character of Summit Avenue. Because the proposed SART "may have the potential for significant environmental effects," the Court should reverse the City's denial of SOS's EAW Petition and direct the City, at the very least, to complete an EAW on the Project, if not a full-blown environmental impact statement (EIS).

STATEMENT OF THE FACTS

I. SUMMIT AVENUE, MINNESOTA'S MOST ICONIC HISTORIC STREET, IS DEFINED BY ITS ARCHITECTURALLY AND ENVIRONMENTALLY UNIQUE STREETScape AND TREE CANOPY.

The seeds of Summit Avenue began to sprout when the first residences were built on the bluff above St. Paul in 1870. *See* Add. 8. Some of the first residents of Summit Avenue were local luminaries who constructed Late Victorian and Revival style homes. Add. 7-8. East Summit Avenue, extending from the St. Paul Cathedral to Lexington Parkway, was mostly developed by the close of the 19th Century. Add. 8. West Summit Avenue, between Lexington Avenue and the Mississippi River Boulevard, was largely built in the first half of the 20th Century. Add. 8.

Renowned landscape architect Horace W. S. Cleveland was integral to the establishment and design of Summit Avenue. *See generally* Add. 8-9. Cleveland

envisioned a “linear park” connecting Minneapolis and St. Paul. *See* Add. 9. The City hired Cleveland to carry out his vision. Add. 9. And with the aid of residents along Summit Avenue who donated their land to make this unique treasure possible, Cleveland created boulevards on West Summit Avenue commencing in 1887, which have been carefully preserved and maintained ever since. Add. 5.

Summit Avenue’s unique place in the region’s history has been recognized by its incorporation into two National Historic Districts. The National Park Service added the Historic Hill District to the National Register of Historic Places in 1976. Add. 1. The Historic Hill District covers more than Summit Avenue, but the 16 blocks of East Summit Avenue make up the Historic Hill District’s backbone. Add. 2-3. In 1993, the National Park Service designated the West Summit Avenue Historic District. Add. 4. The West Summit Avenue Historic District picks up where the Historic Hill District left off, extending 2.5 miles west from Lexington Avenue to the Mississippi River Boulevard. Add. 5. Thus, the entire length of Summit Avenue is included on the National Register of Historic Places.

The West Summit Avenue District Nomination Form (WSA Nomination Form) explains, “The most visually distinguishing feature of the avenue is its width and median boulevard. Summit Avenue is 200-220 feet wide including the median parkway, which is planted in trees, shrubs, and lawn.” Add. 5. The boundaries of the West Summit Avenue

Historic District were “designed to preserve an unbroken *streetscape* within the district.” Add. 5 (emphasis added).¹

The St. Paul City Council has also designated two heritage preservation districts covering Summit Avenue—the Summit Avenue West and Historic Hill Heritage Preservation Districts—which are essentially the same as the similarly named National Historic Districts. *See* City of St. Paul, Minn. Code of Ordinances ch. 74, arts. II & III.

II. BOTH THE CITY AND ITS EXPERT CONSULTANTS INITIALLY ACKNOWLEDGED THE CRITICAL IMPORTANCE OF PROTECTING HISTORIC SUMMIT AVENUE BUT INEXPLICABLY ABANDONED THAT COMMITMENT AS THE PROJECT EVOLVED.

The first designated bike lanes appeared on Summit Avenue in the 1990s and preserved the existing tree canopy and historic streetscape by carefully maintaining the existing curb lines. Doc. 17 at 7. In November 2018, the Metropolitan Council included Summit Avenue as a “Regional Trail Search Corridor” in its Regional Parks Policy Plan. Doc. 17 at 11. In October 2021, the City formally began the planning process for the proposed SART. Doc. 1. The City’s planning documents acknowledged that any potential changes to the designated bike lanes on Summit Avenue required “careful consideration and sensitivity” to the historical context. Add. 26, 28. Under pressure from bicycle activists, however, the City then abandoned its commitment to preserve Summit Avenue’s natural and historical resources, and proposed replacing the existing on-street bike lanes with an off-road bike trail, which would require moving the historic curb lines, rerouting

¹ A more detailed discussion of the prominence accorded to the existing streetscape and its contribution to the historical character of Summit Avenue is provided *infra* at Argument, § II.C.

portions of the roadway, cutting into the grassy boulevards, and devastating the existing mature tree canopy.

A. The City Originally Rejected Alternatives that Would Have Created Significant Adverse Impacts on the Tree Canopy and Historic Streetscape by Moving Existing Curb Lines.

In an early information session regarding the Project in June 2022, the City publicly committed that among the Project’s main objectives were: (1) “limit[ing] impacts to greenspace and trees” and (2) “compatib[ility] with historic context.” City of St. Paul, Summit Avenue Trail Master Plan: Public Information Session, at 29 (June 6, 2022) (June 6 Meeting), <https://www.stpaul.gov/sites/default/files/2022-07/June%206%20-%20Public%20Information%20Session%20-%20Meeting%20Slides.pdf>.² The City pledged that the proposed Trail would “include stewardship” of natural resources and agreed that “**maintaining curb line is an important consideration to minimize impacts.**” June 6 Meeting at 30.

The City initially assessed numerous design alternatives as part of its June 6 Meeting, Add. 12-15, some of which included designs that maintained the existing curb lines and others that would have required moving the existing curb line. Consistent with the City’s commitment to minimize impacts on the tree canopy and preserve the historic character of Summit Avenue, *all* of the designs that moved the existing curb line

² Although the City did not include the materials from the June 6 Meeting or the 60% and 90% Plans in the itemized list of the record filed on November 22, 2023, the City has agreed not to object to SOS’s references to these documents in SOS’s brief and their inclusion in SOS’s addendum.

were: “**NOT RECOMMENDED DUE TO POTENTIAL BOULEVARD IMPACTS.**”

Add. 12-15.

B. The 60% Plan Maintains the City’s Commitment to Keep the Existing Curb Line to Minimize Impact to Trees and Historic Resources.

The City continued to study options and released the 60% Plan for the Project in October 2022. City of St. Paul, Summit Avenue Regional Trail Master Plan at 23 (Oct. 2022) (“60% Plan”) at 23, <https://www.stpaul.gov/sites/default/files/2022-11/60%25%20Draft%20Summit%20Avenue%20Regional%20Trail%20Master%20Plan%20ALL%20CHAPTERS.pdf>; *see also* Add. 16-19. The 60% Plan acknowledged that Summit Avenue is “one of the most iconic public spaces in the Twin Cities with national recognition.” Add. 16; *accord* Add. 27, and expressly incorporated the Historic Resources Technical Memorandum prepared *for the City* by expert consultants Bolton & Menk, Inc. (Bolton & Menk). 60% Plan at 212-28; *accord* Doc. 17 at 250-268. Bolton & Menk observed that both local heritage preservation districts covering Summit Avenue “emphasize [that] the pattern of the roadway, sidewalks, and boulevards should be maintained within the historic district along Summit Avenue.” Add. 19; *accord* Add. 48. Bolton & Menk cautioned “that additions to Summit Avenue should be as simple as possible and *not change the existing curb lines* whether it is within the 100-foot-wide or 200-foot-wide section of the avenue.” Add. 19 (emphasis added); *accord* Add. 48. Most importantly, Bolton & Menk stressed:

Minimal or no impact to the greenspace that is a character-defining feature to the historic districts is recommended to avoid any potential adverse impacts.

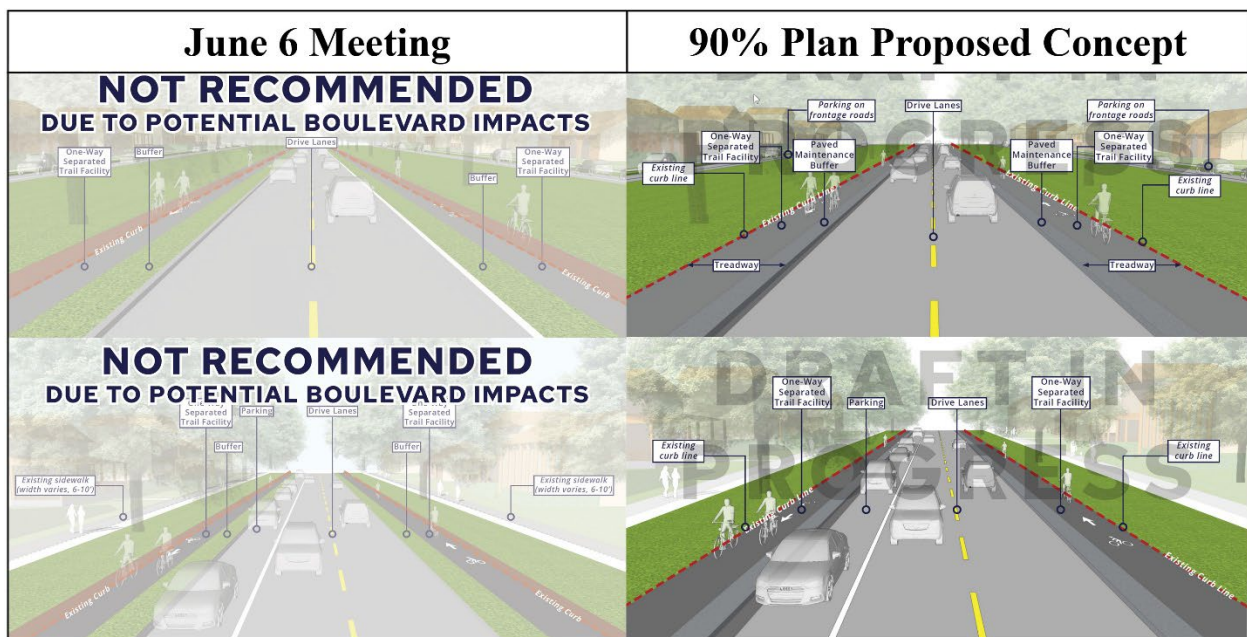
Add. 19 (emphasis added); *accord* Add. 48. The 60% Plan demonstrates that the City understood early in its process that both the tree canopy and streetscape are critical to Summit Avenue’s historic character and must be preserved.

C. The City Abandoned Earlier Commitments to Maintain the Existing Curb Line and Preserve Natural and Historic Resources.

In February 2023, the City released the SART 90% Plan. City of St. Paul, Summit Avenue Regional Trail Master Plan at 23 (Feb. 2023) (“90% Plan”), https://drive.google.com/drive/folders/1lWx8utrgDxn-kzIrb0OFnfp5eqxecC_y. The City conceded that less than half of those commenting supported the 60% Plan, which for the first time included as acceptable alternatives designs that would dramatically change the character of Summit Avenue’s streetscape and tree canopy. Add. 20; *accord* Add. 31. Concerns included a “[d]esire to maintain and preserve existing natural features including mature tree canopy.” Add. 21; *accord* Add. 32. In fact, Summit Avenue’s “[m]ature tree canopy” and “parkway green spaces” garnered the first and third most votes, respectively, from commenters asked about the most important elements of Summit Avenue. Add. 22; *accord* Add. 33. Commenters also stressed the importance of “historic elements,” like “granite curbs.” Add. 21; *accord* Add. 32.

The City ostensibly agreed with these comments. As in the 60% Plan, the 90% Plan said, “The mature tree canopy is one of the most important features of this corridor.” Add. 26; Add. 18. The City further stated, “[P]reserving this tree canopy is a top priority and a major consideration in the planning and implementation.” Add. 26; Add. 18. The design concepts in the 90% Plan, however, told a different story. Apparently in response

to bicycle activists demanding that the on-street lanes be replaced by off-road trails, the 90% Plan would require moving *all* of the existing curb lines, changing the route of much of Summit Avenue, and destroying massive amounts of the existing tree canopy. Add. 23-24. The City’s about-face is starkly illustrated by comparing the concepts identified as “**NOT RECOMMENDED**” at the June 6 Meeting with the concepts proposed in the 90% Plan. *Compare Add. 12, 14, with Add. 24-25.*



Source. Top Left: Add. 12; Top Right: Add. 24; Bottom Left: Add. 14; Bottom Right: Add. 25.

As the above comparison plainly demonstrates, the 90% Plan proposed as acceptable the very alternatives that the City specifically rejected as unacceptable earlier in the process. The 90% Plan contained no explanation whatsoever as to why a design that was “**NOT RECOMMENDED due to potential boulevard impacts**” had now mysteriously emerged as the preferred alternative—nor has the City ever provided any explanation to this day.

D. The City Bulldozed Ahead With a Plan that Pays Lip Service to Preserving Natural and Historic Resources While, in Practice, Destroying Them By Denying that Such Impacts Even Exist.

In April 2023, the City published a “draft final” version of the SART Plan. Doc. 26. The City Council approved the draft final plan the following month. Doc. 17 at 189. Once again the final approved plan (Final Plan) pays lip service to preventing harmful effects on natural and historic resources, proclaiming as guiding principles: “preserv[ing] green space and tree canopy” and “[i]dentify[ing] a trail facility design and alignment that is compatible with historic context.” Add. 35. The Final Plan continues to include the statements from previous plans that, “[t]o the extent possible, retaining the existing curb line on Summit Avenue will have the best outcome for long term tree health.” Add. 18, 26, 44. In fact, however, virtually every curb line will now have to be moved, which will indisputably devastate the tree canopy. The Project as now proposed would move the existing curb line a *minimum* of 1.5 feet, with the vast majority of the curb line moving between 8.5 and 9 feet. Add. 38-40. This dramatic change in the curb line will decimate the tree canopy and destroy the historic character of the Summit Avenue streetscape.

III. THE SART WILL HAVE A DEVASTATING IMPACT ON THE TREE CANOPY AND HISTORIC STREETScape.

The approximately 1,500 trees that form the canopy gracing Summit Avenue have been universally acknowledged as critical elements of Summit Avenue’s character. Add. 6. For example, the 60% and 90% Plans stressed that “[t]he mature tree canopy is one of the most important features of this corridor.” Add. 18, 26. And the City’s consultant Bolton &

Menk stated “the tree canopy” is a “primary character defining feature[.]” of Summit Avenue. Add. 45.

The SART Plan includes conclusory and self-serving assurances about supposedly minimizing the impact of the proposed Project on Summit Avenue’s tree canopy.³ The City concedes that construction would at the very least invade the structural root zone of at least 221 trees along Summit Avenue. Add. 37. Even that estimate, however, only tells part of the story, because it completely ignores reconstructing driveways, carriage walks, and many sidewalks along Summit Avenue itself that will also be required as part of the Project. *See* Add. 41, 43, 49; Doc. 34, Ex. C at 2. Importantly, the City completely neglects to assess any of the impact on the structural, much less critical, root zone of all of this other construction.⁴ Consequently, in many places, the root zones (both structural and critical) will be disturbed, not just from the work on the side that abuts the street, but often from all four sides that abut the tree—the street, the carriage walk, the driveway, and the sidewalk.

From the outset SOS and the public at large were deeply concerned about the impact of the proposed Project on Summit Avenue’s iconic tree canopy. For this reason, SOS retained an independent arborist to “inspect [trees] visually from the ground,” Doc. 34

³ The City’s assessments purported to estimate how many trees would be disturbed in their *structural* root zone by construction. Add. 37. Invasion of the structural root zone makes a tree “highly vulnerable” to risk of failure. Add. 34. Consequently, by the City’s own admission, “[c]onstruction activities should be avoided within the [structural root zone].” Add. 36.

⁴ The City did not even try to estimate the substantially greater number of trees that would be disturbed in their *critical* root zone, which is much larger than the structural root zone and exposes the tree to “medium vulnerability” and “should be done carefully, *if at all.*” Add. 34, 36 (emphasis added).

Ex. C at 2, rather than relying on a desktop survey using GIS data, Add. 36. The arborist analyzed three segments of Summit Avenue. Doc. 34 Ex. C at 1.⁵ The arborist’s analysis of Sections 2 and 3 are the most comparable to the final proposed concept for the Trail because they required moving the curb immediately adjacent to the tree.⁶ Unlike the City’s analysis, the arborist’s on-the-ground analysis of Sections 2 and 3 considered all of the impacts related to construction that changes to the curb line, sidewalks, driveways, and carriage walks. Doc. 34, Ex. C at 2-3. Of the 132 trees in Sections 2 and 3, the arborist determined 80 trees, around 61%, would suffer severe construction impacts, meaning the trees are “unlikely to recover from damage resulting from construction.” Doc. 34, Ex. C at 8, figs. 16 and 17. The arborist determined that construction would also significantly impact another 42 trees, around 32% of the total, meaning the trees “could possibly recover from damage”—or might not. Doc. 34, Ex. C at 8, figs. 16 and 17.

The arborist’s figures for Sections 2 and 3 can be extrapolated across the 1,561 trees on Summit Avenue. *See* Add. 37. Conservatively assuming a fatality rate of 61%, which is

⁵ The three segments were between: (1) Saratoga Street North and Albert Street North, (2) Lexington Parkway South and Victoria Street South, and (3) Virginia Street and Nina Street. Doc. 34 Ex. C at 1, fig. 6.

⁶ Specifically, on the one hand, the arborist’s analysis of Section 2 (Lexington Parkway to Victoria Street) and Section 3 (Virginia Street to Nina Street) assumed “removal of the existing roadbed, curbs, sidewalks, carriage walks, and all visible utilities.” Doc. 34 Ex. C at 3. Section 1 (Saratoga Street North to Albert Street North), on the other hand, assumed construction impacts would be limited to the street. Doc. 34, Ex. C at 1. The Final Plan requires moving the curb lines and dramatic changes to the boulevard, including driveways, carriage walks, and sidewalks. Add. 38-41, 43, 49. The assumptions for Sections 2 and 3, therefore, more accurately reflect the final proposed concept for the Trail. The City has never undertaken a comparable analysis.

limited only to those that would suffer from “severe construction impacts,” the Project would kill 946 trees.⁷ Since the “tree canopy” is a “[p]rimary character defining feature[]” of “federal, state, and local historic registries,” sacrificing, at the very least 61% of the tree canopy (and very likely significantly more, once the impact on critical root zone is taken into account) necessarily destroys the historic character of Summit Avenue. *See* Add. 46.

The Project will have negative effects on other historic elements of Summit Avenue as well. The wide and symmetric avenue and boulevards, and historic granite curbs, also contribute to the avenue’s historic character. For this reason, Bolton & Menk “recommended that additions to Summit Avenue should be as simple as possible and not change the existing curb lines,” and explicitly urged the City to maintain the granite curbs. *See* Add. 45, 48. As noted, although the City mouthed these same words throughout the process, eventually political expediency won out. Rather than maintaining the existing curb lines, the Final Plan proposes to move virtually all of them—most by around 9 feet. Likewise, if the curb lines must be moved in some locations, Bolton & Menk stated that, *at the very least*, granite curbs should be “incorporated back into place.” *See* Add. 47. The Final Plan, however, ignores even this modest element of preservation: “It is *possible* that

⁷ SOS provided the City with the arborists report when it was prepared. Nothing in the record indicates that the City ever attempted to reconcile its tree loss estimate of 221 trees with the far greater estimate using the arborist’s boots-on-the-ground report. The City seems to have simply turned a blind eye to the loss of the tree canopy—recall the City itself conceded in its denial of the Petition that “construction of the [Trail] may result in *irreversible damage* to some *existing* trees currently lining Summit Avenue”—now declaring it to be essentially irrelevant. Add. 51. SART represents a classic example where a government entity has chosen to exercise its will rather than its judgment.

granite curbs *may* be a part of the final plans, *in limited locations* . . . [but] granite curbs are more expensive to procure, install, and repair.” Add. 42 (emphasis added). Despite the City’s lofty sounding rhetoric throughout the process about preserving tree canopy and history, the City is now abundantly and unfortunately unequivocal in its deeds about its lack of any interest in preserving the historic character of Summit Avenue.

IV. SOS REQUESTED THE MOST BASIC LEVEL OF ENVIRONMENTAL REVIEW.

Faced with the contradictions between the City’s words and its actions, and the sobering consequences those actions would produce, SOS petitioned the City to prepare an EAW for the proposed Project under MEPA. Doc. 34. The Petition explained, among other things, that environmental review was necessary because the Project will require “the elimination of approximately 950 mature trees that line the street” and, therefore, would inflict “significant environmental impacts.” Doc. 34 at 2. In addition to the inexorable negative environmental consequences that go with such a massive loss of mature tree canopy, SOS noted that the Project “will irreversibly destroy the existing historic streetscape,” including the preserved granite curbs and carefully designed boulevards and medians. Doc. 34 at 1–2. SOS also noted that these impacts implicated numerous Minnesota administrative rules requiring the preparation of an EAW. Doc. 34 at 2–5. As evidence, the Petition included a substantial portfolio of documentation. Doc. 34. The Petition included the report from SOS’s independent arborists, Bolton & Menk’s technical memorandum discussing the importance of preserving Summit Avenue’s tree canopy and other historic features, as well as its listing on the National Register of Historic Places, and

abundant supporting evidence. Doc. 34, Exs. A-D; Doc. 32, Exs. 1 and 4; *see also* Add. 1-10.

V. THE CITY’S CONCLUSORY DENIAL OF SOS’S REQUEST FOR ENVIRONMENTAL REVIEW DEMONSTRATES ITS ERROR.

The City denied the Petition in a brief letter on September 26, 2023. *See* Add. 50-53. Although the City acknowledged that “the law requires the [City] to evaluate the evidence . . . to determine whether a project ‘may [or may not] have the potential for significant environmental effect’ ”⁸ and even conceded that the Project “may result in irreversible damage” to the existing tree canopy, the City summarily dismissed SOS’s concerns. Add. 50-51 (alteration in original). The City argued that “the present Summit Avenue tree canopy . . . is the undisputed product of the City’s practices,” Add. 51, apparently asserting the nonsensical concept that “if you protected it before, you can destroy it now.” The City’s denial cited no precedent to support the notion that previous stewardship of a natural resource somehow relieves a government entity of any obligation to protect against its destruction going forward. The City also claimed that because it might implement tree replacement practices sometime in the future when the Project is commenced (it cited no legally enforceable commitment to do so), this vague commitment somehow eliminates the need for environmental review. Add. 51. Reduced to its essence,

⁸ The City curiously added the phrase “or may not” in quoting Minn. R. 4410.1000, subp. 3B. It remains unclear what the City was attempting to achieve through its unilateral amendment to a Minnesota Rule.

the City's response to SOS's concerns regarding the tree canopy was that, eventually, "trees will grow back". Add. 51.⁹

The City also dismissed the Project's impacts on the historic character of Summit Avenue's carefully designed and preserved streetscape, asserting it is not part of the contributing elements of Summit Avenue's historic designation, and thus not subject to environmental review. Add. 52. The City's assertion is factually incorrect and legally misplaced. First, the City's own consultant, Bolton & Menk, acknowledge that the "primary character defining features" of Summit Avenue include "the tree canopy and wide grass medians and boulevard." Add. 46. There can be no dispute that the Project will dramatically and irreversibly destroy the tree canopy and significantly alter its existing boulevards and medians, plainly requiring the City to conduct an EAW.

Second, the City's attempt to parse the wording of the Nomination Forms as not expressly including the word "streetscape" is legally irrelevant for purposes of whether an EAW is required under Minnesota law, which extends well beyond simply protecting properties listed on the National Register of Historic Places. Minn. Stat. §§ 116D.04, subd. 1a(a), 116B.02, subd. 4 (" 'Natural resources' shall include, but not be limited to, all

⁹ Dismissing the destruction of hundreds of mature trees in an urban environment as not having any significant environmental effect because 50 or 100 years hence the trees hopefully will have grown back to replicate the existing tree canopy completely ignores the fact that during the 50- or 100-year span the absence of hundreds of trees will itself create significant environmental effects. The scientific literature, not to mention common sense, conclusively establishes that mature trees provide tremendous environmental benefits, which will be lost during the decades necessary for replacement trees to grow to take their place. *See* Doc. 17 at 73.

mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and *historical* resources.”) (emphasis added). Just as with the tree canopy, one must determine if there may be a significant effect on historic resources. If the answer to that question is yes, then an EAW must be prepared.

Finally, the City asserted that the SART is not a “project” to which environmental review could ever apply. Add. 52. The City contended that, because the Project does not have a 100% finalized funding source, there is no guarantee that the Project will be undertaken and therefore the Trail should not be considered as a “project” susceptible to environmental review. Add. 52. The City thus ignores its own characterization of the “Final Plan” for the SART, as well as the fact that no further governmental approval is required by any government entity to commence the Project. The City disingenuously characterizes the “project” as “no more than an indefinite plan which does not warrant preparation of an EAW.” Add. 53.

In the face of the City’s vague references to potential future mitigation of tree loss and that funding is not guaranteed, SOS petitioned this Court for a writ of certiorari, challenging the City’s denial of the Petition for an EAW.

ARGUMENT

I. STANDARD OF REVIEW

Minnesota law empowers a person “aggrieved by a final decision on the need for an environmental assessment worksheet” to petition the Court of Appeals for certiorari review within 30 days of the decision. Minn. Stat. § 116D.04, subd. 10. This Court may reverse, modify, or remand decisions regarding environmental review under MEPA, Minn. Stat.

ch. 116D, that are: (1) in violation of constitutional provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedure, (4) affected by other error of law, (5) unsupported by substantial evidence in view of the entire record as submitted, or (6) arbitrary and capricious. Minn. Stat. § 14.69; see *In re City of Cohasset's Decision on the Need for an Env't Impact Statement for the Proposed Frontier Project*, 985 N.W.2d 370, 374 (Minn. App. 2023) (reviewing a municipal environmental-review decision pursuant to Minn. Stat. § 14.69).

Minnesota courts will overturn municipal action as “exceed[ing] the [municipality’s] statutory authority” when the underlying statute does not authorize the local government’s action. See e.g., *In re Haslund*, 781 N.W.2d 349, 355–56 (Minn. 2010); *In re De Laria Transp., Inc.*, 427 N.W.2d 745, 745 (Minn. App. 1988) (reversing action not authorized by statute). City decisions “made upon unlawful procedure” because they depart from a statutorily prescribed process must also be reversed. *In re Wetland Conservation Act*, No. A08-1220, 2009 WL 1312098, at *3 (Minn. App. May 12, 2009). Likewise, governmental actions must be reversed for an “error of law” if they take an action in contravention of Minnesota statutes, rule, or case law. *In re Halberg Constr. & Supply, Inc.*, 385 N.W.2d 381, 384 (Minn. App. 1986). Minnesota courts will overturn municipal actions as unsupported by substantial evidence if the decision lacks “evidence that a reasonable mind might accept as adequate.” *Minneapolis Police Dep’t v. Minneapolis Comm’n on Civil Rights*, 425 N.W.2d 235, 239 (Minn. 1988). Finally, a municipality’s decision is “considered arbitrary and capricious if it represents the agency’s will, rather than its judgment.” *In re City of Owatonna’s NPDES/SDS Proposed Permit Reissuance*,

672 N.W.2d 921, 926 (Minn. App. 2004). In particular, “where there is a combination of danger signals which suggest the agency has not taken a hard look at the salient problems and has not genuinely engaged in reasoned decision making it is the duty of the court to intervene.” *Id.* (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)).

Decisions regarding the need for environmental review under MEPA are a type of government decision-making over which the Court of Appeals exercises judicial review under each prong of Minn. Stat. § 14.69. *See In re City of Cohasset’s Decision on the Need for an Env’t Impact Statement for the Proposed Frontier Project*, 985 N.W.2d at 377. Appellate courts afford local governments no deference when interpreting statutes and rules. *Id.* (citing *In re Reissuance of NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 576 (Minn. 2021)).

II. THE CITY COMMITTED REVERSIBLE ERROR BY DENYING SOS’S REQUEST FOR AN EAW.

A. MEPA Protects Environmental Resources by Identifying Proposed Projects for Which Responsible Governmental Units Can and Must Conduct Environmental Review.

It is Minnesota’s environmental policy to foster “productive and enjoyable harmony between human beings and their environment” and “promote efforts that will prevent or eliminate damage to the environment.” Minn. Stat. § 116D.01. Moreover, Minnesota Statutes charge the State with protecting environmental assets by “all practicable means.” Minn. Stat. § 116D.02.

To effectuate these policies, Minnesota imposes exacting procedural requirements on governmental actions that may impact environmental resources. *See* Minn. Stat. ch. 116D. Among the tools available to effectuate the State’s policy is the completion of an EAW, “a brief document which is designed to set out the basic facts necessary to determine whether an [EIS] is required for a proposed action.” Minn. Stat. § 116D.04, subd. 2a(a); *see also* Minn. R. 4410.0200, subp. 26. Minnesota law requires the preparation of an EAW for a proposed action if “material evidence accompanying a petition by not less than 100 individuals. . . demonstrates that, because of the nature or location of a proposed action, there may be potential for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(e).

Statutes also obligate the Environmental Quality Board (EQB) to “establish categories of actions for which . . . environmental assessment worksheets *must* be prepared” Minn. Stat. § 116D.04(b) (emphasis added). In determining the applicability of mandatory EAW categories to “multiple stages of a single project that are connected actions or phased actions,” responsible governmental units (RGU)¹⁰ must evaluate the project “in total.” Minn. R. 4410.4300, subp. 1. One mandatory category requires an EAW “for the destruction, in whole or in part, . . . of a property that is listed on the National Register of Historic Places or State Register of Historic Places.” Minn. R. 4410.4300, subp. 31.

¹⁰ “ ‘Responsible governmental unit’ means the governmental unit that is responsible for preparation and review of environmental documents.” Minn. R. 4410.0200, subp. 75.

In response to a petition for an EAW, Minnesota law *requires* preparation if “material evidence accompanying [the] petition . . . demonstrates that, because of the nature or location of a proposed action, there *may be potential* for significant environmental effects” due to the proposed action. Minn. Stat. § 116D.04, subd. 2a(e) (emphasis added). Applicable rules broadly define the “environment” to include “land, air, water, minerals, *flora*, fauna, ambient noise, energy resources, and artifacts or natural features of *historic*, geologic, or *aesthetic* significance.” Minn. R. 4410.0200, subp. 23 (emphasis added). “The threshold requirement of this statute . . . is whether the project *may* harm the environment.” *Carl Bolander & Sons Co. v. Minneapolis*, 502 N.W.2d 203, 207 (Minn. 1993) (emphasis in the original).

In determining whether a project potentially inflicts “significant environmental effects,” RGUs consider: (1) the “type, extent, and reversibility of environmental effects”; (2) the “cumulative potential effects” including 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”; (3) the extent to which the public authority will enact “specific” mitigation measures that are “reasonably expected to effectively mitigate the identified environmental impacts of the project”; and (4) “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 EIS.” Minn. R. 4410.1700, subp. 7.¹¹

B. The Project’s Threatened Impact on the Summit Avenue Tree Canopy Requires Environmental Review.

The City’s own analysis confirms that the Project will destroy vast swaths of tree canopy that contribute to Summit Avenue’s unique character and constitute a protectable environmental resource. An independent analysis from an arborist also demonstrates that the Project will inflict profound damage on Summit Avenue’s tree canopy, concluding that approximately 946 of the avenues roughly 1,500 trees would be “severely impacted” and, consequently, unlikely to recover. *See, supra*, Statement of Facts, § III; *see also* Doc. 34, Ex. C. This wholesale destruction of the tree canopy manifestly inflicts “significant” harm on the “environment.” Minn. R. 4410.0200, subp. 23. In fact, the Final Plan itself acknowledges the need to assess environmental impacts but proposes to postpone any such review until it is too late to have any impact, stating that, although “[s]pecific impacts and tree preservation strategies are beyond the scope of the Summit Avenue Regional Trail Plan” such impacts “will be evaluated during the design and engineering phases of the project.” Add. 37. The City’s approach would therefore postpone any environmental review until after the Trail has received its final governmental approval and is essentially a “done deal”; detailed design and engineering drawings are exactly that: details, and

¹¹ SOS acknowledges that Minn. R. 4410.1700 applies to determinations regarding whether to prepare an EIS but believes that the rule provides a helpful context for EAW determinations. The City evidently agrees insofar as it cited Minn. R. 4410.1700 in its EAW denial. Add. 51.

cannot change off-road trails back into some other less-environmentally destructive alternative like improved on-street bike lanes.

The City's refusal to conduct an EAW does not attempt to refute the practical impact of deferring environmental review until it is too late to be meaningful. Instead, the City dismisses concerns over the massive loss of trees that currently constitute Summit Avenue's iconic tree canopy by stating that, "while construction of the [project] may result in irreversible damage to some *existing* trees . . . , the extent of this tree damage . . . [need not] be permanent." Add. 51. The City instead offers vague and unenforceable assurances that "tree replacement and protection will be initiated and controlled during and after construction." Add. 51. Apparently not even sensing the irony of a project that sacrifices hundreds of mature trees so it can replace the existing on-street bike lanes with an off-road bike path, the City asserts that SOS's concerns about the tree canopy are overstated because eventually "trees grow back." Add. 51. The City also claims SOS's concerns are speculative because perhaps some of the 946 trees on the chopping block might be saved by the City's unenforceable and entirely indeterminate plan to "mitigate" tree damage. Add. 51.

Although Minnesota rules allow RGUs to consider mitigation in ascertaining the likelihood of "significant" impact, such mitigation must be "specific" and "reasonably expected to effectively mitigate the identified environmental impacts." Minn. R. 4410.1700, subp. 7. "When an RGU considers mitigation measures as offsetting the potential for significant environmental effects under Minn. R. 4410.1700, it may reasonably do so *only if those measures are specific, targeted, and are certain* to be able

to mitigate the environmental effects.” *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm’rs*, 713 N.W.2d 817, 835 (Minn. 2006) (emphasis added). Indeed, “[t]he RGU must have some concrete idea of what problems may arise and how they may specifically be addressed by ongoing regulatory authority.” *Id.* “There is a definite difference between an RGU review that approves a project with vague promises of future mitigation and an RGU review that has properly examined a project and determined that specific measures can be reasonably expected to deal with the identifiable problems the project may cause.” *Id.*

The City contends that “tree replacement and protection will be initiated and controlled during and after construction.” Add. 51. It does so without citation to any ordinance or legally enforceable commitment because there are none. Essentially, the City makes the illogical leap of asserting that because earlier stewards avoided destroying the tree canopy on Summit Avenue, current city officials should now have the unfettered discretion to decimate most of it. The City attempts to allay stakeholders’ concerns by asserting the City at least may be able to avoid losing some of the trees (numbers and locations completely unstated, because, of course, the City has no idea which ones, if any, might be saved) through voluntary and unenforceable mitigation steps—and remember, eventually trees grow back. Far from comprising a “specific, targeted” mitigation scheme that is “certain” to be effective, the City’s unenforceable and indeterminate assurances comprise exactly the kind of “vague promises of future mitigation” that Minnesota precedent rejects as insufficient to evade environmental review. *Citizens Advocating Responsible Dev.*, 713 N.W.2d at 835; *see also Audubon Soc’y of Cent. Ark. v. Dailey*, 977

F.2d 428, 436 (8th Cir. 1992) (stating that “mitigating measures must be more than mere vague statements of good intentions”) *cited by Rangers v. Iron Range Res.*, 531 N.W.2d 874, 881 (Minn. App. 1995); *Unlimited, Inc. v. Minn. Dep’t of Agric.*, 528 N.W.2d 903, 909 (Minn. App. 1995).

Finally, the City’s legal assertion that any harm to trees essentially should be categorically exempt from environmental review because trees can grow back finds no support in Minnesota law. Applicable rules explicitly define the “environment” to include “land, air, water, minerals, *flora*, fauna, ambient noise, energy resources, and artifacts or natural features of historic, geologic, or aesthetic significance.” Minn. R. 4410.0200, subp. 23 (emphasis added). All flora “grows back”; yet the EQB—charged with issuing rules governing environmental review, Minn. Stat. § 116D.04, subd. 5a—created no such exemption, and expressly included flora in its definition of “environment.” Minn. R. 4410.0200, subp. 23. Similarly, Minnesota Rules require EAW preparation “[f]or harvesting timber for commercial purposes on public lands” Minn. R. 4410.4300, subp. 28. The argument that EAWs are not required simply because the “trees will grow back” begs the question: why would Minnesota Rules require an EAW for commercial timber harvesting if damage to the tree canopy is environmentally irrelevant because ultimately, the trees will grow back? *See also Troyer v. Vertlu Mgmt. Co.*, 806 N.W.2d 17, 24 (Minn. 2011) (“We also construe rules as a whole and words and sentences are understood . . . in the light of their context.”). Note too, the Minnesota Supreme Court has previously interpreted the Minnesota Environmental Rights Act (MERA), Minn. Stat. ch. 116B, as treating “virgin oak [as] a protectable natural resource.” *People for*

Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858, 867 (Minn. 1978); *see also State v. Leathers*, 799 N.W.2d 606, 611 (Minn. 2011) (stating that courts “must” construe statutes “with common purposes and subject matter . . . together”). MEPA incorporates MERA’s definition of “natural resources.” Minn. Stat. §§ 116B.02, subd. 4, 116D.04, subd. 1a(a). To hold—as the City suggests—that damage to trees is environmentally irrelevant because “trees grow back” would remove environmental protection from all regenerative natural resources.

The City has conceded that this Project will inflict significant and, in its own words, “irreversible” damage on Summit Avenue’s mature tree canopy. Minnesota law requires the preparation of an EAW when “material evidence . . . demonstrates that, because of the nature or location of a proposed action, there may be potential for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(e). In rejecting the need for an EAW based on newly conceived and unenforceable mitigation goals, and a misapplication of applicable law, the City issued a decision that was: (1) affected by other error of law, (2) utterly unsupported by substantial evidence in view of the entire record as submitted, and (3) arbitrary and capricious. Minn. Stat. § 14.69. This Court should therefore reverse and remand with instructions to prepare the required EAW.

C. The Project’s Undisputed Impact on the Historic Streetscape Requires Environmental Review at the Very Least as a Discretionary EAW, and Arguably as a Mandatory EAW.

The City attempts to evade environmental review of the undeniable and adverse impacts on the historic character of Summit Avenue by asserting a newly invented standard

that limits preservation solely to historic *buildings* that are located within a National Historic District. First, the City’s own consultant concedes that the Project impacts the key *character-defining elements* of two separate National Historic Districts. This alone requires a discretionary EAW. Second, Minnesota administrative rules mandate that “[a]n EAW shall be prepared for any project that meets or exceeds” certain threshold mandatory EAW categories, Minn. R. 4410.1000, subp. 2, including “destruction . . . of a property that is listed on the National Register of Historic Places,” Minn. R. 4410.4300, subp. 31.¹²

MEPA plainly protects more than just historic buildings themselves that are listed within a National Historic District. MEPA defines “natural resources” as including “historical resources.” Minn. Stat. §§ 116B.04, subd. 1a(a), 116B.02, subd. 4. EQB’s rules likewise define “environment” as including “natural features of historic . . . or aesthetic significance.” Minn. R. 4410.0200, subp. 23. The City conflates the criteria that require a mandatory EAW with more comprehensive criteria for a discretionary EAW (which merely requires a showing that there is a “potential for significant environmental effects”). An EAW is required if the proposed Project may have the potential to significantly impact “historic resources,” regardless of whether those resources are listed as contributing to a National Historic District.

¹² In determining the applicability of mandatory EAW categories to “multiple stages of a single project that are connected actions or phased actions,” courts and RGUs must evaluate the project “in total.” Minn. R. 4410.4300, subp. 1. If a project satisfies the requirements of a mandatory EAW category, Minnesota Rules exempting the preparation of an EAW are inapplicable. Minn. R. 4410.4600, subp. 1.

The City compounds this legal error by misstating the facts. The City cannot seriously argue that the Project will not impact the “primary character defining features” of Summit Avenue. Its own consultant identified the character-defining features to include “the tree canopy and wide grass medians and boulevard.” Add. 46. Nor does the record support that an EAW is not required because, in the City’s words, “[t]he National Register Nomination Narratives for the West Summit Avenue Historic District and the Historic Hill District make[] no reference to the streetscape on Summit Avenue being nationally protected.” Add. 52. The City’s assertion is demonstrably false.

The WSA Nomination Form dwells at length on the tree canopy and the historic streetscape as essential components of the District’s historic character. For instance, the WSA Nomination Form explicitly states that the tree canopy comprises “the most visually distinguishing feature of the avenue.” Add. 5. Similarly, the WSA Nomination Form discusses how the avenue projects a feeling of “stateliness” that is central to the historic designation and which “is a result of the combination of large lots, large houses, compatible architectural styles, generous set-backs, *the boulevard, and mature plantings.*” Doc. 32, Ex. 1. at 5–6 (emphasis added); Add. 5. The documents also repeatedly refer to the importance of the “streetscape.” The first paragraph of the Narrative Description in the WSA Nomination Form states that the boundaries of the historic district were “designed to preserve an unbroken streetscape within the district.” Add. 5. The WSA Nomination Form also states that ensuring relatively few alterations to adjacent structures means these structures “have not marred the *streetscape.*” Doc. 32, Ex. 1. at 11 (emphasis added). Later, the WSA Nomination Form notes that “Macalester College, St. Paul Seminary, and

University of St. Thomas buildings fronting Summit Avenue which were constructed in the period of significance and *which contribute to the streetscape* were considered contributing to this nomination.” Doc. 32, Ex. 1 at 64 (emphasis added); *accord* Doc. 32, Ex. 1 at 8 (“In 1946, Albertus Magnus Hall was built east of Aquinas Hall, completing the *streetscape* of the college along Summit Avenue.”) (emphasis added), 58 (“The present-day campus of the University of St. Thomas presents cream-colored Kasota stone buildings to the Summit Avenue *streetscape*.”) (emphasis added). These excerpts from the WSA Nomination Form demonstrate conclusively that the City is incorrect when it says, “The National Register Nomination Narratives for the West Summit Avenue Historic District and the Historic Hill District make[] no reference to the ‘streetscape on Summit Avenue’ being ‘nationally protected.’ ” Add. 52.

The Final Plan itself recognizes the importance of the historic streetscapes to Summit Avenue’s historic designation. For instance, in discussing the Historic Hill District, the Final Plan acknowledges that, in early nominations, like the Historic Hill District Nomination Form in 1976, “character defining features are not called out directly, especially not in relation to the streetscape.” Add. 29. Nevertheless, the Final Plan continues, “It is expected that with these large homes, associated landscape *and streetscape* would also be very important.” Add. 29 (emphasis added). The Final Plan also recognizes the WSA Nomination Form’s observation that the “most visually distinguishing feature of the avenue is its width and median boulevard.” Add. 30 (quoting Add. 5). The Final Plan also explicitly lists “granite curbs,” “marble sidewalks,” and “the general rhythm of trees

and manicured lawn/vegetation in the median and on the boulevards” as “character defining features” of the historic district. Add. 30.

Due to its importance of the streetscape, Bolton & Menk urged that “[m]inimal or no impact to the greenspace *that is a character-defining feature to the historic districts* is recommended to avoid any potential adverse impacts.” Add. 48 (emphasis added). Likewise, City ordinances for the preservation of the Historic Hill Heritage Preservation District emphasize the importance of the streetscape to the Heritage Preservation District, making clear that “[t]he traditional pattern of public streets, curbs, boulevards, and sidewalks in the area should be maintained. Distinctive features of public spaces in the area, such as brick alleys, stone slab sidewalks, granite curbs, and the early twentieth century lantern style streets lights, should be preserved.” City of St. Paul, Minn., Code of Ordinances § 74.65(g)(1).

The Project will irreversibly destroy the singular streetscape and canopy that are central to Summit Avenue’s historic designation. This analysis has already discussed the Project’s likely impact on Summit Avenue’s mature tree canopy. *See, supra* Argument, § II.B. Since the tree canopy is part of the historic streetscape, negative impacts to the tree canopy has a corresponding impact on the historic character of Summit Avenue. In addition, the Project will irreparably destroy Summit Avenue’s design, layout, and other attributes critical to its designation as a historic district. Contrary to the City’s early assurances that “the proposed trail alignment would not impact the area outside the existing

curb and would maintain the greenspace,” Add. 17, the Final Plan would move all of the curb lines—most by around 9 feet. Add. 38-40.¹³

Minnesota courts readily reverse—as lacking substantial evidence—municipal decisions that rely on conclusory assertions that fail to address countervailing evidence presented by petitioners. *See, e.g., In re City of Cohasset’s Decision on the Need for an Env’t Impact Statement for the Proposed Frontier Project*, 985 N.W.2d 370, 381 (Minn. App. 2023); *see also* Minn. Stat. § 14.69. Courts must also reverse decisions based on inaccurate understandings of the law. Minn. Stat. § 14.69(d). Here, the City denied the EAW based on factual assertions contradicted by the record, including incorrectly stating that the Nominating Forms make no mention of the historic streetscape. The City’s error was exacerbated by an erroneous legal conclusion that Minnesota law only protects historic resources contributing to a National Historic District. These twin legal and factual errors underlying the City’s denial are sufficient for this Court to reverse and remand with instructions to conduct the required EAW.

D. The Project Is Sufficiently Finalized to Warrant Environmental Review.

The City also contends that the Summit Avenue redesign is “a project in name only” because, “[w]ithout a funding source, the [project] is not ‘substantially certain to be undertaken.’ ” Add. 52. The Court should note that the City’s proffered standard

¹³ As noted earlier, *see supra* Statement of Facts, § III, but worthy of repeating here, in moving the curb line, the City would necessarily remove the existing granite curbs. Add. 38-40. The City has not committed to replace *any* of the granite curbs because they are “expensive to procure, install, and repair.” Add. 42.

“substantially certain to be undertaken,” is inapplicable in this case. Add. 52. That standard applies to the determination of a “phased action,” something nobody contends is applicable here. Minn. R. 4410.0200, subp. 60. Moreover, the City’s argument that a “project” requires absolutely finalized funding not only undermines Minnesota’s environmental review scheme, it directly contradicts it.

Specifically, the entire purpose of environmental review is “to force agencies to make their own impartial evaluation of environmental considerations *before reaching their decisions.*” *No Power Line, Inc. v. Minn. Env’tl. Quality Council*, 262 N.W.2d 312, 327 (Minn. 1977) (emphasis added). To that end, Minnesota law requires that decision makers assess potential environmental impacts while projects are still in their preliminary phases. For instance, EQB rules require that “[t]he EAW shall be prepared *as early as practicable* in the development of the *proposed* project.” Minn. R. 4410.1400, subp. A (emphasis added); *accord* Minn. Stat. § 116D.04, subd. 2a (“To ensure its use in the decision-making process, the environmental impact statement must be prepared as early as practical in the formulation of an action.”). Similarly, EQB rules explicitly impose review requirements on proposed (rather than finalized) projects. *See, e.g.*, Minn. Stat. § 116D.04, subd. 2a(e) (requiring EAW preparation “for a proposed action”); Minn. R. 4410.1000, subp. 3B (“An EAW shall be prepared: . . . when a governmental unit with approval authority over a *proposed* project determines pursuant to the petition process set forth in part 4410.1100 that, because of the nature or location of a proposed project, the project may have the potential for significant environmental effects.”) (emphasis added).

Indeed, Minnesota courts have previously required environmental review for projects at a similar stage. In *Minnesotans for Responsible Recreation v. Department of Natural Resources*, for instance, a state administrative agency published four system plans for forests in several Minnesota counties. 651 N.W.2d 533, 536 (Minn. App. 2002). Together, the four system plans addressed more than 30 different trails. *Id.* All but one of the system plans included trails in multiple counties. *Id.*

Upon publication, a non-profit organization requested an EAW for each system plan. *Id.* The non-profit attached to its petitions “the affidavits of an environmental scientist and a professor emeritus of fisheries” who concluded that “nine trails, extensions, and connections . . . posed significant risks of adverse environmental effects.” *Id.* at 537. The agency denied the requests, concluding that “because the system plans were not yet sufficiently developed to constitute projects as defined by Minnesota rules, no environmental review was required.” *Id.* The Court of Appeals partially reversed the agency’s denial. *Id.* at 542.

Citing federal precedent, the Court of Appeals concluded that a “project” for purposes of MEPA, “is a definite, site-specific, action that contemplates on-the-ground environmental changes, including changes in the nature of the use.” *Id.* at 539–40. Other states interpreting similar statutory schemes conclude that a project is sufficiently final to be subject to environmental review even if funding is not absolutely secured. *See, e.g., Tri-County Taxpayers Ass’n v. Town Bd. of Queensbury*, 437 N.Y.S.2d 981, 983 (N.Y. App. Div. 1981) (requiring environmental review for a project even though funding had not yet

been committed by state and federal authorities and the project could be rescinded at any time).

In *Minnesotans for Responsible Recreation*, the Court of Appeals determined that, although the system plans themselves were not “projects,” at least eight of the specific trails contemplated by the plans constituted “projects.” 651 N.W.2d at 540. The Court of Appeals concluded that the proposed trails were “sufficiently definite and represent on-the-ground environmental changes that require the preparation of EAWs.” *Id.* at 540-41.

Here, the SART is the equivalent of the trails in *Minnesotans for Responsible Recreation* rather than the system plans. SOS did not petition for an EAW for the Metropolitan Council’s Regional Parks Policy Plan, which, like the system plans, covered multiple trails. See Metropolitan Council, Regional Parks Policy Plan at 53-59 (Nov. 2018), <https://metro council.org/METC/files/40/40d78518-295b-474e-a26c-e85f62b9e706.pdf>.

SOS petitioned for an EAW for a single, site-specific (Summit Avenue) trail. The Trail has been subject to a 60% Plan, 90% Plan, and Final (100%) Plan. The Final Plan is highly detailed, specifying such important details as the number of feet by which the curb will move (typically around 8-9 feet) and the height of the final curb (6 inches). Add. 38-40. The Final Plan specifies the location of vehicle barriers, seating, and decorative paving. Doc. 17 at 148. The Final Plan also details where wayfinding signs for historical markers, directional signage, and other signage will be located. Doc. 17 at 158. Many of the Final Plans definite, site-specific actions contemplate on-the-ground environmental changes. It cannot be seriously disputed that the SART constitutes a “project” under MEPA.

To justify denial of the Petition, the City invented a self-serving standard that would require final project financing as a condition precedent to environmental review. The City’s denial was, thus, “affected by . . . [an] error of law,” “unsupported by substantial evidence,” and the result of the City’s will rather than its judgment (i.e., arbitrary or capricious). Minn. Stat. § 14.69(d)-(f). This Court should reverse and remand with instructions that the City conduct the required environmental review.

Conclusion

For the reasons stated above, this Court should reverse the City’s denial of SOS’s Petition for an EAW and direct the City to complete the required EAW.

Dated: January 5, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of the brief is 9,514 words. This brief was prepared using Microsoft Office Word 2016.

Dated: January 5, 2024

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