

Meeting Date: 05/17/2011

Agenda Item: 8. f) 1)

City Council Agenda Report

City of Scandia

14727 209th St. North
Scandia, MN 55073 (651) 433-2274

Action Requested: Receive a status report on Zavoral Mining and Reclamation Project EIS (Environmental Impact Statement.)

Deadline/ Timeline: N/A

Background: Since this project was discussed with the Council at the April 19 meeting, new information received is as follows:

- The City received a letter from the attorney representing Take Action – Conserve our Scandia (TA-COS.) The letter requests that the city terminate preparation of the EIS and immediately deny Tiller’s Conditional Use Permit (CUP) application.
- Tiller Corporation submitted the information needed for the EIS that the City’s consultants were waiting for, by May 3, 2011 as promised. The consultants are currently reviewing the data for completeness, and have submitted some questions to Tiller to clarify the information.
- Assuming that Tiller responds to all questions satisfactorily and completely within two weeks of the time the questions are submitted, and that input needed from MnDOT is received by June 15, 2011, a timeline for completing the EIS can be set. (A meeting with MnDOT has not yet been scheduled.) The recommended new timeline is as follows:

August 23, 2011	PAC meeting—review of technical data and issues
October 24- November 10, 2011	PAC meeting—review of Draft EIS (meeting date to be determined)
December 16, 2012	Draft EIS submitted to City
January 17, 2012	City Council approves Draft EIS for public review
January 30, 2012	Submit notice to EQB Monitor
February 6, 2012	Publication of notice
February 6- March 7, 2012	Official Comment Period on Draft EIS
March - ?	Respond to comments, prepare final EIS

- The City will need to extend its agreement with AECOM to change the completion date of the project. In order to ensure that the entire

process can be completed, including approval of the Final EIS, the end date should be changed from December, 2011 to September, 2012.

- Recommendations:**
- The City Attorney has reviewed the letter from the attorney, and will provide comments and answer questions at the Council meeting.
 - The Council should approve the new timeline for completion of the EIS.
 - The Council should also approve the amendment to the contract with AECOM to change the completion date to September, 2012.

Leslie Knapp of AECOM will be available at the Council meeting to answer questions.

- Attachments/
Materials provided:**
- Letter dated May 2, 2011 from Kieran P. Dwyer, Dorsey and Whitney LLP on behalf of Take Action – Conserve our Scandia (TA-COS)
 - Amendment No. 2, Contract with AECOM for Zavoral Mining and Reclamation Project Environmental Impact Statement

Contact(s): Leslie Knapp, AECOM (763 551-2441)
Prepared by: Anne Hurlburt, Administrator

(Zavoral EIS Update)



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May 2, 2011

Mayor Simonson and Council Members
Scandia City Office
14727 209th Street North
Scandia, MN 55073

Re: Zavoral Mining and Reclamation Project EIS (Environmental Impact Statement)

Dear Mayor Simonson and Council Members:

I represent Take Action – Conserve Our Scandia (“TA-COS”) with regard to Tiller Corporation’s application for the Zavoral Mining and Reclamation Project. In light of Tiller Corporation’s most recent disregard for the requirements for timely preparation of an Environmental Impact Statement (EIS) for this project and in the interest of consistent application of the City’s zoning code, TA-COS respectfully urges the City to cease preparation of the EIS and deny Tiller Corporation’s application for a conditional use permit (“CUP”). As this letter sets forth, these actions are the proper result as a matter of law for two reasons. First, Tiller Corporation has violated both the Minnesota Statute and the City resolution requiring timely completion of the EIS. Second, Tiller Corporation is required by the City Development Code to submit a new CUP application subject to the City’s current zoning code which prohibits the proposed project. The citizens of Scandia have a legal right to expect fair, consistent, and reasonable administration of the City’s Development Code, Comprehensive Plan, and Council resolutions, as well as Minnesota Statute.

I. Background

TA-COS is a group of concerned residents from Scandia and the surrounding area opposed to the development of the gravel mine at the Zavoral property proposed by Tiller Corporation. TA-COS’s stated mission is “To promote sustainable development in Scandia while endorsing conservation of its waters, wildlife, natural and historic resources and beauty, referring to the Scandia Comprehensive Plan as its visionary guide.” TA-COS believes the development of the Tiller gravel pit is incompatible with current land use and will have a number of significant and adverse environmental, safety, and welfare impacts, including development incompatible with the Comprehensive Plan, hazardous and increased traffic, damage to the scenic value of the area including the St. Croix River, and a negative effect on the value of surrounding properties.

In appearances before the Council on November 16, 2010 and December 7, 2010, and in letters dated November 23, 2010 and December 6, 2010, I raised two legal objections to allowing Tiller Corporation to continue its application for the conditional use permit. First, Tiller Corporation had failed to meet its obligation to complete the EIS within 280 days as required by Minnesota Statute § 116D.04, subd. 2A(h). Second, the Scandia City Code now prohibits

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mining on the Zavoral property and Tiller Corporation is not entitled to rely on prior zoning codes. Scandia Development Code, Chapter 2 - Zoning (Ordinance 122); *Almquist v. Town of Marshan*, 245 N.W.2d 819 (Minn. 1976). I was joined by many citizens of Scandia who felt Tiller Corporation's delays were unfair and showed disregard for the concerns of those who would be impacted by Tiller Corporation's project.

In spite of the concerns raised by the people of Scandia, the City Council gave Tiller Corporation another opportunity to remedy its MEPA violation. At the December 7, 2010 meeting, the City Council passed a unanimous resolution directing Tiller Corporation, AECOM, and the City to develop a timeline for completion of the EIS to which Tiller Corporation was expected to abide. Tiller Corporation has now violated the most recently imposed deadline.

II. Failure to Comply with Resolution Regarding Timely Preparation of the EIS

Tiller Corporation has squandered its opportunity by failing to comply with the timeline's requirements on multiple counts. As of April 15, Tiller Corporation had not provided five of the 16 items that should have been submitted. All of these items are over a month past due and two items are now three months past due under the terms of the resolution. These items were already far overdue when the resolution was passed.

The City of Scandia should now end the EIS process and deny Tiller Corporation's application. The resolution passed by the City allowed Tiller Corporation to continue the preparation of the EIS despite its failure to complete the EIS within 280 days as required by Minnesota Statute § 116D.04, subd. 2A(h). Extension of the 280-day time limit is only permitted for good cause. *Id.* Tiller Corporation's failure to comply with the resolution demonstrates that there is no good cause for further extension. The preparation of the EIS should be halted and Tiller Corporation's application denied.

The purpose of the 280-day time frame to prepare an EIS is not merely in the interests of expediency or government efficiency. The time frame is imposed to assure preparation of accurate and timely information that reflects existing human and ecological considerations. See Minn. Stat. § 116D.02. As of the date of this letter, it has been 899 days since Tiller Corporation submitted its application for a CUP on November 14, 2008; 615 days since the original notice of EIS preparation was issued on August 25, 2009; and 448 days since the revised notice of EIS scope was published on February 8, 2010. Significant changes have occurred during this time, including a new City Comprehensive Plan which does not include mining on the Zavoral property in the City's vision for the future.

III. Issuance of Permit Prohibited by Development Code

Furthermore, the Scandia Development Code prohibits Tiller Corporation from obtaining a CUP and makes further preparation of the EIS unnecessary. As I previously brought to the City's attention, the current Scandia zoning code prohibits mining on the Zavoral property as it is not an allowed land use. See Development Code, Chapter 2, Section 1.3 and 2.4. Further review of the Scandia Development Code shows that the City has no discretion to consider Tiller Corporation's CUP application under the previous zoning code as the CUP application is

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procedurally defective and a new CUP application will be required which must be denied under current zoning code.

The Scandia City Code requires that an EIS be prepared prior to submission of a CUP application. The Code states: "In cases where a mandatory or discretionary EAW is required, or an EIS is required, those documents shall be prepared and accepted by the City before application for a CUP." Scandia City Code Chapter 4, Section 3.1(3) (effective August 28, 2007). The City of Scandia determined that an EIS is required for Tiller Corporation's proposed project. See City of Scandia Resolution No. 03-03-09-02. As a result, this EIS must be accepted by the City before Tiller Corporation can submit its CUP application. Tiller Corporation's current CUP application is procedurally defective and Tiller Corporation is required to submit a new CUP application. This requirement to submit the application after acceptance of an EIS serves the important purpose of assuring the terms of the application incorporate the mitigation measures and other considerations identified by the EIS. This purpose is well illustrated by the current situation where the project proposed by Tiller Corporation has changed significantly during the course of preparing the EIS.

The new CUP application that must be submitted will be subject to the current Scandia zoning code without exception, which requires Tiller Corporation's proposed mining project be denied. Therefore, the City must deny Tiller Corporation's CUP application as procedurally defective and the City should cease preparation of the EIS.

The City of Scandia has already made the decision that mining is not an appropriate land use at the Zavoral property. The City made this decision when it adopted its Comprehensive Plan on March 17, 2009 that limited mining to areas with existing mines. See City of Scandia, Map 27 Future Land Use Areas, Comprehensive Plan 106, 113 (designating only the three areas where mining operations currently exist for mining land use). It affirmed and enforced this decision when its current zoning code became effective November 3, 2010 which prohibited mining on land designated for agricultural use.

Tiller Corporation has attempted to force the City of Scandia to allow the approval process despite the clear decision by the City that mining should not occur by incorrectly arguing that it has a right to have its application considered under the Comprehensive Plan and zoning code in force at the time of application. Minnesota law is very clear that Tiller Corporation has no such right and that current zoning ordinances may apply to pending applications. The rule has repeatedly been affirmed by the Minnesota courts in *Almquist v. Town of Marshan*, 245 N.W.2d 819 (Minn. 1976), *Rose Cliff Landscape Nursery v. City of Rosemount*, 467 N.W.2d 641 (Minn. Ct. App. 1991), and *Property Research and Development Co. v. City of Eagan*, 289 N.W.2d 157 (Minn. 1980).

Minnesota law is also clear that the City of Scandia and Tiller Corporation must comply with the requirements of its Development Code—both by requiring the application for the Zavoral Mining and Reclamation Project be submitted after completion of the EIS and by denying the application as in violation of the zoning code and Comprehensive Plan. Adjacent landowners are entitled to require enforcement of these zoning laws. *Mohler v. City of St. Louis*

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Park, 643 N.W.2d 623 (Minn. Ct. App. 2002); *Lowry v. City of Mankato*, 42 N.W.2d 553 (Minn. 1950). TA-COS, whose members include adjacent landowners, has expressed its interest in upholding the principles of the Comprehensive Plan and the injuries that will be suffered by these citizens and the community if mining is allowed on the Zavoral property. The City has a duty to these affected citizens of Scandia to enforce the City's laws fairly and completely. These laws require the City to refuse Tiller Corporation a CUP for its proposed project.

Conclusion

The City has the legal authority and duty to terminate the preparation of the EIS and deny Tiller Corporation's application for a conditional use permit. Tiller Corporation has not abided by the express expectations of the City to conduct its proposal in a timely manner and Tiller Corporation's project is in violation of the City's Development Code. The interested citizens of Scandia deserve better treatment in this matter which has caused them great concern. As a matter of fairness and consistent application of the City's laws and authority, the City should no longer tolerate Tiller Corporation's inability to comply with the City's rules and expectations. The conditional use permit should be denied.

Sincerely,

DORSEY & WHITNEY LLP



Kieran P. Dwyer

KPD/aj

cc: Ms. Anne Hurlburt
Ms. Laurie Allmann
Ms. Kristin Tuenge



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 Minneapolis, MN
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May 10, 2011

Anne Hurlburt
 Administrator
 City of Scandia
 14727 209th Street North
 Scandia, Minnesota 55073

Re: Project Name: Zavoral Mine and Reclamation Project Environmental Impact Statement
AECOM Project No.: 910095.02
Amendment No.: 2

Dear Ms. Hurlburt,

This modification letter amends and modifies the Agreement entered into between the City of Scandia and AECOM Technical Services, Inc. ("AECOM"), formerly EDAW, Inc., with an effective date of March 2010.

It is understood and agreed that performance of contract completion in Article 3-Contract Time be amended so that the new contract completion date is September 2012.

The foregoing is the sole modification or amendment to the Agreement, and no other express or implied modification or amendment is intended or shall be construed herefrom. All other provisions, prior amendments [if any] and obligations of the Agreement shall continue in full force and effect.

AGREEMENT AND ACCEPTANCE:

Signed, this 17th Day of May, 2011.

AECOM Technical Services, Inc

Client: City of Scandia

By: _____

By: _____

Print: _____

Print: _____

Title: _____

Title: _____

Attest: _____

Print: _____

Title: _____