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TKDA

Memorandum

To:	Scandia Planning Commission	**Reference:**	Information for Planning Commission meeting on Dec. 12
Copies To:	Kristina Handt, Administrator		
	Vince Stevens, City Attorney		
		Project No.:	14305.001
From:	Sherri Buss, RLA AICP, City Planner	**Routing:**	
Date:	December 5, 2012		

The Planning Commission heard comments from the public about the Zavoral Mine and Reclamation Project Conditional Use Permit (CUP) application at its meeting on December 4. This memo provides information to supplement the Staff Report, to assist with the Commission's discussion on December 12. It discusses a general issue first, and then some of the comments.

I. Considering New Data and Analyses Submitted After the EIS Adequacy Determination

- *Does the City use any new data presented after the EIS?*

The City determined that the EIS was adequate on September 25, 2012. The analyses, conclusions and recommendations in the EIS are therefore the official environmental information that the City will use to determine whether the proposed mining project meets the requirements of the City's ordinance.

Some of the speakers at the December 4 meeting have submitted analyses challenging the analyses and proposed mitigation included in the EIS, including the traffic analysis. How do we deal with this post-EIS information as the City reviews the application?

The Planner has sought legal advice on how we may address this new information. Our advice is as follows:

- The additional information presented does not supercede, change or replace the information in the EIS.
- The information shall be part of the record of the public hearing.
- While the information is part of the record the City is not required to evaluate or use the information in making its decision on the CUP application
    - All of the data and analyses included in the EIS were "vetted" through an extensive public and agency review process. The agencies and members of the public who have interests in the analyses and mitigation recommendations had opportunities to review the Draft EIS, the responses and comments, and Final EIS, and make comments to address any issues or concerns that they had with

the analyses and mitigation recommendations. For example, Mn/DOT traffic engineers and experts reviewed the traffic analyses in those documents, and have given specific comments and mitigation recommendations regarding the roadways that Mn/DOT is responsible to manage--TH 95 and 97.

The information that was submitted on December 4 has not been subject to an evaluation process that looks at the accuracy or validity of the data. The agencies and individuals affected do not have the opportunity at this point to review the information or comment based on their expertise and legitimate interests. The information presented on December 4 avoided this review process, and therefore does not have the same credibility or value as the information that is included in the EIS for making a decision about whether the application meets the ordinance requirements.

Based on this advice, the City may decide whether it wants to consider any new data in making its decision on the application.

The traffic information provided by RLK was presented to create public concern about the safety of the TH 95 and 97 intersection. The Planner is providing some supplemental analysis to this information to address the concerns raised in the sections that follow. The City may decide whether it wishes to review the information. However, the Commission should consider that creating another series of discussions on traffic analyses as part of the CUP review, without the opportunity for the affected agencies and other interests to comment, only emphasizes the difficulty of making judgments about environmental analyses that were not “vetted” through the extensive public and agency review processes that were included in the EIS.

- *Is the additional data presented a sufficient reason to deny the CUP request?*

In evaluating the potential impacts that the Zavoral Mine project may have, the City is required to:

- Evaluate mitigation measures that will avoid or minimize impacts so that they are not significant, as part of the EIS analysis
- Consider and require reasonable conditions in the CUP so that the project meets the requirements of the Mining Ordinance and Development Code.

If the City considers new potential impacts identified during the CUP review process, it must consider any reasonable conditions that would mitigate for the impacts. It cannot use the information identifying impacts alone as a basis to deny the CUP without considering potential mitigation. The potential for denial would exist only if the potential impacts could not be mitigated, and the impacts were deemed significant. The EIS concluded that with the implementation of the mitigation measures proposed in the EIS, the impacts would not be significant.

II. Issues Identified in the Comments Received December 4

Staff are providing additional information on several issues raised during the public hearing on December 4, for your discussion on December 12.

- *Compliance with Scandia Comprehensive Plan*

The City Attorney will provide comments at the December 12 meeting related to the City's use of the "old" (2020) Comprehensive Plan to review the Zavoral Project application.

The Planner's additional comments include the following:

Mr. Dwyer's letter asserts that the City is obligated to consider the merits of the mine's impact on the 2030 Comprehensive Plan, and that the City must protect the "normal and orderly development and improvement of surrounding property" and that this would be frustrated by the Tiller mine. However, he provides no factual information to support his assertions.

The Planner's response to the comments is as follows:

- If the Zavoral Project CUP is approved under the 2020 Comprehensive Plan, it will be an "existing" project for the 2030 Comprehensive Plan.
- The Zavoral Mine would be treated on the zoning map in the same way that the other existing mine projects (Scandia Mine, Bracht Mine) are addressed—it will be in the Mine Overlay District. The new Mine District will not affect the zoning status, use, or potential development of other properties in the area. All properties in zoning districts around the Project will have the same opportunities for use and development under the 2030 Comprehensive Plan and Development Code as they would have if the Project is not approved.
- The EIS fully evaluated the potential environmental, social and economic impacts of the proposed project. The EIS found that if the mitigation measures included in the EIS are implemented, the project will not have significant impacts. The Planner has included the mitigation measures recommended in the EIS as potential conditions for the CUP. The comment provided no factual evidence that the presence of the Mining District that includes the Zavoral project will affect the development or improvement of surrounding properties or the City of Scandia, as long as the mitigation measures are implemented.

- *Potential Threat to Public Safety*

Vernon Swing PE of RLK Incorporated provided a traffic assessment of the Proposed Tiller Conditional Use Permit that identified some potential safety issues related to the intersection configuration that Mn/DOT would require in order to approve an access permit for the Project.

TKDA's Traffic Engineer, Bryant Ficek, PE PTOE (Professional Traffic Operations Engineer), briefly reviewed the analysis, and provided the following comments:

- The conflict points identified on the 3-leg and 4-leg intersections included in the analysis exist on every intersection in Scandia and elsewhere. Residents of Scandia are driving through intersections with the same conflict points and potential for crashes every day.

- The change from a 3-leg to a 4-leg intersection does increase the number of conflict points, simply due to the additional turning movements associated with adding one more leg to the intersection. A traffic engineer analyzes the conflict points, and as needed, proposes design changes to reduce the potential for crashes. For example, the engineer considers the intersection type, the addition of turn lanes, or the addition of controls such as stop signs or traffic signals to address the potential for conflicts and safety.

- Mn/DOT reviewed the traffic analysis that was included in the EIS, the proposed intersection plans submitted by Tiller, and the conditions at the existing TH95/97 intersection. Based on this review by its traffic engineers, Mn/DOT is requiring design improvements at the intersection to address the change from the 3-leg to 4-leg intersection that is proposed for the Zavoral Project (Section 4.13.3 in EIS):

    - Construct the new driveway access directly across from TH 97 as required by Mn/DOT for safe access.

    - Construct a new northbound right-turn lane on TH 95

- It is possible that Mn/DOT is proposing the direct access from TH 97 to the mine entrance ("Aligned" option in Swinger memo) as the safest intersection option because the traffic from TH 97 going into the mine is "through" traffic. The Offset intersection option that Mr. Swinger recommends results in the trucks being on TH 95 for a longer period of time than the "through" movement. This may create a higher potential for crashes with traffic on TH 95.

- The Offset driveway option identified by Mr. Swinger is often the recommended option for driveways that are on opposite sides of a highway and do not have "through" traffic (for example, driveways from 2 different homes on opposite sides of the roadway). In this case, aligned driveways could create safety issues due to opposing headlights on cars, or drivers pulling out simultaneously onto the roadway. In a "through" traffic situation, such as the one that may exist on the Zavoral Project, Mn/DOT's seems to have concluded that the Aligned intersection option is the safer option.

As noted earlier, Mn/DOT has not reviewed Mr. Swinger's analysis because it was provided outside the EIS process. The information from TKDA's traffic engineer is not meant to be a full professional traffic analysis, or to start a lengthy exchange on traffic engineering for the site outside the EIS process. Rather, it indicates the value of providing an opportunity for all agencies and individuals with interests and expertise in the project the opportunity to review analyses and mitigation options. This was previously completed in the EIS, and the TKDA discussion notes that Mn/DOT completed a traffic analysis for the proposed project as it impacts State roadways, and is requiring mitigation that the agency believes is appropriate and will provide safe access.

Mr. Swinger's analysis suggests that if the mine access were constructed according to Mn/DOT guidance, there would still be the potential for crashes. The potential for crashes exists on every roadway in Scandia and Minnesota. Mn/DOT manages the state's highways, and is responsible for the safe design of these roadways. The agency has provided its

recommendations to the City and to the applicant for the mitigation that it will require in order to adequately protect public safety and grant an access permit for the project.

- *Protecting the St.Croix River*

Several public comments addressed issues related to the protection of the St. Croix River, particularly from potential noise impacts.

The EIS notes that existing noise in the project area includes traffic on TH 95 and 97, including existing truck traffic to the Scandia mine. Man-made noise on the St Croix River is generated by boats (motorized and human powered), snowmobiles, campers and trailer users, and other recreational activities throughout the year. Noise may also be audible from residential and agricultural land uses near the River.

The EIS analysis included noise monitoring and modeling around the Project area, including sites within the Riverway. The EIS analysis concluded:

- Noise levels in the St. Croix Riverway would not increase over current ambient levels even at maximum mining rates.
- With the mitigation measures proposed in the EIS, noise levels on the Riverway will not exceed State noise regulations.
- At maximum mining levels, mine noise would likely be audible on the St. Croix River because the frequencies of mining noise and ambient river noise are different.
- The noise levels for Alternatives 1 and 3 would be similar; noise levels would be higher under Alternative 3A
- Noise mitigation measures such as screening and berms are included in the mitigation recommendations to minimize potential noise impacts.

The City's Development Code has adopted the State of Minnesota noise standards as the criteria for evaluating compliance with the CUP. The NPS departmental *policies* are not adopted rules or regulations. The NPS has suggested that the City adopt its goals for noise levels on National Scenic Rivers as the standard to be used for review, but the State of Minnesota has not adopted the NPS noise goals as a state regulation, and therefore the NPS goals are not enforceable. The City of Scandia cannot adopt more stringent noise standards than the state standard.

The Planner suggests that the City cannot deny the Conditional Use Permit using a rationale that the project does not meet NPS noise goals, because these goals are not the regulations that the City has adopted for the review of CUP's. The Planning Commission could discuss and recommend additional reasonable conditions to try to reduce potential noise from the project, including:

- Recommend a shorter project time frame, to reduce the length of impacts. However, under Alternative 3A, the noise levels during mine operation may be higher than under Alternatives 1 and 3
- Require additional berming or screening if this would be effective in reducing noise levels.

Mr. Dwyers letter includes a number of general references to the Wild and Scenic River Act that "encourage state and local governments to cooperate with the National Park Service" in the protection of the Riverway. The City has cooperated with the NPS in the past and continues to

do so. The City invited the NPS to participate in the Project Advisory Committee (PAC) for the EIS, requests NPS review and comment on development proposals in the Riverway, and has adopted and implements the Lower St. Croix River Bluffland and Shoreland Management Ordinance to provide protection to land and resources in the Riverway.

- *Potential Reduction in Property Values*

Mr. Dwyer's letter makes several assertions about the EIS analysis related to property values that are in error.

- *The letter states that the EIS identifies numerous impacts which will adversely affect home values.*
  Planner response: For each of the items identified, the EIS concludes that if the mitigation measures identified in the EIS is implemented, the impacts will not be significant. The conclusions of the property values analysis in the EIS (Item 4.3.5.) is based on the implementation of the mitigation measures.
- *The letter portrays potential losses that may occur with the sale of properties as actual losses that will be experienced by all property owners in the mine area and by the City of Scandia.*
  Planner response: The property analysis in the EIS (Item 4.3.5) explicitly notes that actual losses in property values only have the potential to be experienced by landowners who actually sell their properties while the mine is active. The County Assessor was contacted during development of the analysis, and was asked if the Assessor would reduce property values if the mine were operated. The County Assessor indicated that its office would not prospectively lower property values or related tax rates for groups of property owners based on changes that may or may not occur in the future. The values would not be modified unless actual sales took place or documented appraisal information for individual properties was submitted for County consideration in the valuation process."

  The EIS analysis notes that the potential 2 and 5% loss in value for some properties was based on the current state of the real estate market. It also noted that potential losses would diminish as reclamation occurs.

The Planner requested assistance from the staff at the League of Minnesota cities to identify how the issue of potential loss of property value has been addressed in the reviews of other conditional use permits, as the criteria related to property values in the Scandia code is similar to many other city codes. League staff indicated that the best information related to this is included in Appeals court cases, and provided examples.

Three relevant cases are attached. A summary of the key information from these cases and discussion with League staff is as follows:

- Courts indicate that evaluation of the potential loss of property values should be based on factual information that shows losses in value that are experienced by similar properties.
- Even "expert" opinions projecting potential losses in value have not always been considered as part of the rational to deny a CUP if they do not include factual information.
- In the Magone v. Denmark Township case involving a gravel mine, the Washington County Assessor's Office reported that location near a gravel mine "does not appear to

be a negative influence" on the sale prices of home. This evidence was used by the Court in its decision.

- The Courts include consideration of conditions to address potential impacts when it evaluates the potential for loss of property values and other issues related to mining impacts.
- The Courts utilize the evidence from environmental reviews (EAW's, EIS's) as factual information.
- Each of the cases notes that resident concerns should not be the sole basis for denial of a CUP application—a factual basis is needed for denial.

- *Other issues*

Other issues raised in during the public comments include:

- Potential erosion impacts to the St. Croix River
- Enforcement of reclamation plan
- Air pollution risk
- No build alternative

Each of these issues is discussed in the Staff Report. We can discuss each of the issues as we review the application on December 12.