UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

File No. 0:14-cv-03391-JRT-SER

Lakes and Parks Alliance of Minneapolis, a Minnesota non-profit corporation

Plaintiff,

vs.

Federal Transit Administration, an agency of the United States; and the Metropolitan Council, a public corporation and political subdivision of the State of Minnesota.

Defendants.

MEMORANDUM IN SUPPORT OF SECOND MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

When the Lakes and Parks Alliance of Minneapolis ("LPA") brought its first motion for summary judgment in this case, the Court declined to grant summary judgment, but stated that it "remain[ed] concerned that the Met Council has done more than express a preferred alternative" for the route for the Southwest Light Rail ("SWLRT") project, and "has 'gone too far' and has effectively committed itself to a specific route" before the completion of environmental review, in violation of the National Environmental Protection Act ("NEPA"). *LPA II*, p. 27.[1] The Court invited the

[1]The Court's previous decisions on defendants' motion to dismiss and plaintiff's motion for summary judgment will be referred to herein as "*LPA I*" for *Lakes and Parks Alliance of Minneapolis v. Fed. Transit Admin.*, 91 F.Supp.3d 1105 (D. Minn. 2015) (Docket No. 69) and "*LPA II*" for *Lakes and Parks Alliance of Minneapolis v. Metropolitan Council*, 120 F.Supp.3d 959 (D. Minn. 2015).

LPA to bring another motion for summary judgment at the appropriate time, after additional discovery and environmental analysis.

Discovery has been completed. Now is the appropriate time for summary judgment. The LPA has uncovered a multitude of emails, letters and other documents clearly demonstrating that the Metropolitan Council reached a decision long before the end of the environmental review process that only one option for the alignment of the SWLRT route—co-location of light rail and freight rail in the Kenilworth Corridor—was worth pursuing, and all others should be rejected and eliminated. The Metropolitan Council dropped proposed studies of other options, consolidated support around the co-location route, and began pushing all of the local governments along the SWLRT to adopt this option through the municipal consent process in order to ensure that it would meet the deadlines that would keep it in line for federal funding.

As part of this process, the Metropolitan Council, City of Minneapolis, City of St. Louis Park, and Minneapolis Park and Recreation Board, each for its own reasons wanted—and obtained—a binding agreement regarding the co-location of light rail and freight rail through the Kenilworth Corridor. So conclusive were the agreements, and the overall decision to eliminate all alternatives except co-location, that the project's Final Environmental Impact Statement only analyzed the co-location alignment and the no-build alternative. Gone were the various alternatives, including those involving relocation of freight rail from the Kenilworth Corridor, that were analyzed in the Draft Environmental Impact Statement (which bashed co-location as environmentally unsound)

and the Supplemental Draft Impact Statement (which purported to study relocation options, but was really intended to justify the co-location design already agreed upon).

An extensive chronology of the key facts is set out below. It shows each party's position and intent at the time it entered a memorandum of understanding ("MOU") with the Metropolitan Council providing for co-location. Those facts speak loudly and clearly. For example, Minneapolis Mayor Betsy Hodges sent an email to Adam Duininck, Chair of the Metropolitan Council, shortly after this Court ruled on the Metropolitan Council's Motion to Dismiss. In it, the Mayor rebuked the Metropolitan Council for defending the LPA lawsuit on the basis that the MOUs were non-binding, saying that the "City of Minneapolis in no uncertain terms considers them [the MOUs] to be binding."

Agreements were made. Alternative re-location alignments were taken off the table. By the time of the final environmental review analysis, any option other than co-location had been eliminated long ago. Clearly, the Met Council felt pressure to move the SWLRT project along to avoid falling out of the federal funding queue. But that does not justify its actions under NEPA, which prohibits the dismissal of available options before the environmental review is completed. NEPA is intended to ensure that environmental review does not become a meaningless formality or a subterfuge designed to rationalize a decision already made. Yet, that is exactly what happened here. By the time the Federal Transit Administration ("FTA") issued its Record of Decision, the only choices remaining were to build SWLRT and freight rail together in the Kenilworth Corridor or to build nothing at all. The LPA asks the Court to grant its motion for summary judgment and declare the Metropolitan Council in violation of federal law and

regulations, and prohibit it from further design and construction work on the SWLRT project until it has conducted a new environmental review process in full compliance with federal law.

STATEMENT OF UNDISPUTED FACTS

A. The Southwest Light Rail Transit Project and the Kenilworth Corridor

The SWLRT is a proposed light rail line that would run from downtown Minneapolis through the communities of St. Louis Park, Hopkins, Minnetonka, and Eden Prairie, including through the Kenilworth Corridor in Minneapolis.[2] (Aff. of Joy R. Anderson in Support of Mot. for S.J., filed 11/3/14 (Doc. 16) ("Anderson Aff. I"), Ex. 5 at 31.) The Kenilworth Corridor, which is 1.5 miles in length, lies between Cedar Lake and Lake of the Isles in Minneapolis, and it contains a popular bicycle and pedestrian trail as well as freight rail tracks. (Anderson Aff. I, Ex. 5 at 31; Ex. 10 at 17.) The route plan for the SWLRT calls for the light rail to pass through the southern half of the Kenilworth Corridor in a shallow tunnel, then emerge from the ground to pass over the water channel between Cedar Lake and Lake of the Isles ("Kenilworth Channel") on a new bridge before continuing through the northern portion of the corridor at ground level ("South Tunnel Plan"). (Aff. of Joy R. Anderson in Support of Second Mot. for S.J. ("Anderson

[2] The Court articulated the factual background of this case in detail in *LPA I* and *LPA II*. The full factual background, as articulated by the Court, will not be repeated in its entirety here. Instead, the LPA will provide an overview of the process and focus on new evidence from discovery that supports its claim that the Metropolitan Council violated NEPA.

Aff. II"), Ex. 43.) Existing freight rail tracks will remain in the corridor. ("Co-location Route"). (*Id.*)

B. First Steps of NEPA Review: Scoping and DEIS

The SWLRT is "major federal action" that requires an environmental review under NEPA. *LPA II*, at 5. The first step in that process, the Scoping Process, occurred in the fall of 2008. (Anderson Aff. I, Ex. 4, at 9.) The Scoping Summary Report, issued in January 2009 by the Hennepin County Regional Railroad Authority ("HCRRA"), established the alternatives for the project to be later studied. (*Id.* at 14, 22-23.) The 2009 Scoping Report did not address whether freight rail would be rerouted to make way for the SWLRT project because, at that time, the HCRRA believed there was an existing agreement to reroute freight rail through St. Louis Park. (Anderson Aff. I, Ex. 7, p. 2-9.) However, St. Louis Park requested the addition of an alternative in the Scoping Process that would co-locate freight rail and light rail in the Kenilworth Corridor. (*Id*., p. 2-8.) Informed that co-location would need to be studied separately, several agencies in cooperation with St. Louis Park independently conducted an analysis of alternatives for co-location of freight rail and light rail in the Kenilworth Corridor. The result deemed co-location was not feasible. (*Id*., p. 2-9.)

The next step in the environmental review process was the preparation of the Draft Environmental Impact Statement ("DEIS"). While that process was ongoing, in May 2010, the Metropolitan Council adopted one route, LRT 3A, as the locally preferred alternative and included it as part of the 2030 Transportation Policy Plan. (Anderson Aff. II, Ex. 1, p. 2-5.) Route LRT 3A placed light rail in the Kenilworth Corridor but rerouted

the freight rail traffic to the MN&S Line in St. Louis Park to provide adequate room for the SWLRT. (Anderson Aff. I, Ex. 7, p. 2-31.)

In 2011, the FTA informed the Metropolitan Council that freight rail relocation should be considered as part of the SWLRT project analysis, and accordingly, freight rail routes were analyzed in the DEIS then underway. (*Id*., p. 2-9.) The FTA also required that the DEIS analyze an alignment that routed both SWLRT and freight rail through the Kenilworth Corridor (Co-location Route). (*Id*., p. 2-9.)

The DEIS finally was issued in October 2012. (Anderson Aff. I, Ex. 5.) This was several years later than initially anticipated—the Scoping Report called for the DEIS to be completed in December 2009 (Anderson Aff I, Ex. 4, p. 2.) It analyzed seven options for the SWLRT and recommended LRT 3A—which had previously been selected by the Metropolitan Council—as the locally preferred alternative. (*Id*. Ex. 7, p. 2-31.) It also analyzed a Co-location Route, and concluded that it would not adequately preserve the environment and protect the quality of life in the area. (*Id*., Ex. 5 at 52-53.) While co-location at grade was studied, nowhere in the DEIS was there any analysis of co-locating freight and light rail in the Kenilworth Corridor by building tunnels.

C. Opposition to Co-location and Relocation Routes

Before the project could enter the preliminary engineering stage, more analysis of co-location and relocation was required by the FTA, so the Metropolitan Council began studying options in early 2013. (Anderson Aff. II, Ex. 2, p. 5.) Engineers for the project met with representatives from the railroads, the local governments, and other entities. It was soon determined that relocation faced some political and technical issues. (Anderson

Aff. II, Ex. 3, p. 2.) As a result, by summer 2013, the Metropolitan Council had developed a number of options for both co-location—including building shallow or deep tunnels for the light rail through the Kenilworth Corridor in order to fit light rail, freight rail, and the bicycle/pedestrian trail together in the narrow corridor—and relocation—including two different options for rerouting freight through St. Louis Park. (*Id.*, p. 3.) Recognizing that many of these options had not been analyzed in the DEIS, the Metropolitan Council issued a Notice of Preparation of Supplemental Draft Environmental Impact Statement ("SDEIS"), which stated that the scope of the SDEIS would include "freight rail alignments (i.e. Re-location and Co-location)." (Anderson Aff. II, Ex. 4.)

It quickly became apparent that the Metropolitan Council would have opposition from at least one local government whether it chose co-location or relocation. St. Louis Park strenuously objected to the relocation of freight rail from the Kenilworth Corridor into St. Louis Park. At a meeting of the Southwest Corridor Management Committee ("CMC") of the Metropolitan Council in June 2013, Tom Harmening, City Manager for St. Louis Park, summed up his city's position by stating that the relocation options under consideration would have a traumatic impact on the city, and that it would be hard for St. Louis Park to support any relocation option in the municipal consent process. (*Id.*, Ex. 5, p. 2-3.)

On the other hand, Minneapolis opposed the Co-location Route. Minneapolis Mayor R.T. Rybak expressed his city's position in an August 6, 2013 letter to Metropolitan Council Chair Susan Haigh by stating that when the locally preferred

alternative LRT 3A was adopted, "the City only agreed to support placing LRT on the Kenilworth Corridor on condition that the County's promise to not allow co-location with freight would be fulfilled." (*Id*., Ex. 6 p. 2.) The city's "nightmare scenario" was that, as project costs were cut, Minneapolis could end up with the co-location of both freight and light rail at grade. Rybak stated that Minneapolis "need[ed] a rock solid guarantee that will not happen." (*Id.*) On August 21, 2013, the Minneapolis Parks and Recreation Board ("MPRB") passed a resolution expressing support for relocating the freight rail out of Kenilworth Corridor or placing SWLRT in a deep tunnel, and opposition to co-location at grade or shallow tunnels. (*Id*., Ex. 7.)

Meanwhile, the Metropolitan Council was resisting any efforts to favor an alignment that removed light rail from the Kenilworth Corridor altogether. In an August 1, 2013 email to Gov. Mark Dayton, who was asking about the idea of routing the SWLRT through the Midtown Greenway and down Nicollet Avenue, Haigh asserted that the locally preferred alternative for SWLRT was "selected by Hennepin County and then the Council after a decade of comprehensive study and participation by all communities along the corridor," that the route was based on local government "consensus," and that the Nicollet/Midtown Corridor alignment had already been "rejected." (*Id*., Ex.8.) Haigh did not explain or suggest that options for routing the SWLRT could not legally be limited until the environmental review process was completed.

D. Consolidation Around the Shallow Tunnel Plan for Co-Location

In September 2013, in response to concerns from Minneapolis and other entities, the Metropolitan Council planned to hire a firm to conduct an independent review of

freight rail options, including a modified alignment along the MN&S Corridor. (*Id*., Ex. 9.; Ex. 10, p. 5, 7.) However, after the consultant bowed out before beginning the study, the Metropolitan Council opted not to hire another consultant, asserting it had made a "good faith effort" to examine freight options. (*Id*., Ex. 11.; Ex. 10, p. 7.) Two state legislators representing districts including the Kenilworth Corridor, Sen. Scott Dibble and Rep. Frank Hornstein—who were also the chairs of the Senate and House Transportation Committees, respectively—wrote to the Metropolitan Council to state that they were "deeply troubled by the Met Council's about face on a serious study of alternatives to co-location of freight rail and LRT in the Kenilworth Corridor." (*Id.*, Ex. 11.) They asked that votes on the SWLRT be postponed until freight rail options were fully studied. (*Id.*)

The Metropolitan Council, however, did not intend to delay the SWLRT project any further. By October 2, 2013, the Metropolitan Council staff recommendation was to build shallow tunnels on both the north and south halves of the Kenilworth Corridor ("Tunnel Plan"), and the idea for a deep tunnel was abandoned. (*Id.*, Ex. 10, p. 2.)

As it became clear that the Metropolitan Council had no interest in pursuing relocation of freight rail, those who opposed co-location argued the costs of co-location had not been fairly considered. Peter Wagenius, policy director for the Mayor of Minneapolis and CMC member, stated at the October 2, 2013 CMC meeting that the Co-location/Shallow Tunnel Plan was being recommended over relocation because the region was unwilling to negotiate with railroads or seek the approval of the federal Surface Transportation Board (which has to approve rail reroutes), and that a promise to

Minneapolis that freight rail would be removed from the Kenilworth Corridor was being broken. (*Id.*, Ex. 10, p. 7.)

Echoing these comments, Adam Duininck, then a Metropolitan Council Commissioner, told Haigh in an October 6, 2013 email that he

> agree[d] with folks from the city [of Minneapolis] who suggest that it has always been a discussion about how to get everyone on board with the shallow tunnel option. There was never a similar push to get St. Louis Park to move on their opposition to the relocation option. Even if the policy didn't make sense, even though cost/impacts were different, the politics about having more options alive longer would have been important cover for us at the Council. From the first briefing I received on SWLRT, it was overwhelmingly clear where the staff recommendation was headed. That sense of it being a foregone conclusion is the primary driver of why Minneapolis believes the process has not been fair.

(*Id*., Ex. 12, p. 1.) While Duininck also indicated that the Metropolitan Council was feeling pressure to move forward quickly with the project, because of the "risk of different political environment and the impact that has on the capital and operating dollars for this project," he disagreed that the Metropolitan Council needed to make a decision on the route quickly. (*Id*., p. 2.)

Despite the lack of a full study of freight rail options, the fact that the environmental analysis of the Co-location/Shallow Tunnel Plan had barely begun, and Minneapolis's concerns with co-location, on October 9, 2013, the CMC recommended that the project be altered to route the light rail through shallow tunnels in the Kenilworth Corridor, and that the Metropolitan Council "direct the SPO [Southwest Project Office] to discontinue any further work related to the freight-rail relocation out of the Kenilworth Corridor." (*Id*., Ex. 14.) At the CMC meeting, Mark Fuhrmann, Metro Transit program

director for light rail projects, specifically stated that the resolution to discontinue work on freight rail relocation "will make it very clear for the FTA, that the action of the SWCMC is a Shallow LRT tunnel and all other options that were considered are no longer in play." (*Id*., Ex. 14, p. 3) Several committee members, including St. Louis Park Mayor Jake Spano, noted that the resolution would indicate that the project would move forward with one design only. (*Id.*)

E. New Freight Rail Study

Gov. Mark Dayton, however, apparently had misgivings. In October 2013, Dayton convened a group of representatives of interested parties to discuss SWLRT issues, including whether there was an alternative alignment for freight rail, and whether the Metropolitan Council should conduct the SDEIS on the shallow tunnel before making a recommendation on a route. (*Id*., Ex. 15.) Ultimately, Dayton told the Metropolitan Council to go back and conduct further studies on freight relocation, hydrology for the shallow tunnels, and design/landscaping for the Shallow Tunnel Plan, before choosing a route—requiring a delay of several months. (*Id.*, Ex. 16.) Again, St. Louis Park objected to any further study of freight relocation. In an October 17, 2013 letter to Dayton, St. Louis Park Mayor Jeffrey Jacobs asserted that "[b]ased on our history of past statements of concerns over rerouting freight rail traffic in St. Louis Park …it will be difficult to see a path forward to municipal consent in our community should it now be recommended that freight rail traffic be rerouted to St. Louis Park." (*Id*., Ex. 17.)

Nevertheless, in accordance with Dayton's plan, in December 2013, the Metropolitan Council hired TranSystems to independently analyze freight rail relocation

options. (*Id*., Ex. 18.) In March 2014, TranSystems submitted an Engineering Evaluation of Freight Rail Relocation Alternatives, which asserted there was a viable reroute option through St. Louis Park that would meet railroad industry standards, including the standards of the American Railway Engineering Maintenance Association. (*Id.*, Ex. 19, p. 11.) Unsurprisingly, St. Louis Park did not like this new idea for rerouting freight—its mayor wrote to Haigh that St. Louis Park had deep and serious concerns about the plan. (*Id.*, Ex. 20.) Minneapolis, on the other hand, praised the new study and asked for a municipal consent package featuring the TranSystems option. (*Id*., Ex. 21.)

The TC&W Railroad Company, which operates the freight rail line that runs through the Kenilworth Corridor, also objected to the TranSystems proposed reroute plan. (*Id*., Ex. 49, p. 1.) On March 3, 2014, Mark Wegner, President of TC&W Railroad Company, wrote a memorandum to Haigh stating that the TranSystems option would not work for the TC&W, despite meeting national standards. Wegner stated that a different reroute plan—the Brunswick Central relocation plan—worked for TC&W from a physics and safety perspective. But he added, "[t]he community looked at what a safe reroute for freight would finally look like and rejected that idea as being too impactful on the community." (*Id*.)

F. Submission of the Shallow Tunnel Plan for Municipal Consent

In April 2014, in spite of the lack of an environmental impact statement analyzing the Co-location/Shallow Tunnel Plan, the Metropolitan Council began moving forward with municipal consent—a process required by Minnesota statutes, under which local governments along the route of a light rail project must approve the "physical design

component" of the project's preliminary design plans. (*Id*., Ex. 22; Minn. Stat. § 473.3994.) In addition, the Metropolitan Council asserted that it needed municipal consent from all the local governments to seek approval from the FTA to begin the final engineering phase of the project. (*Id*., Ex. 23.) There was clear concern that if municipal consent was not obtained quickly, local and federal funding could be jeopardized. (*Id*., Ex. 24; Ex. 25.)

Accordingly, on April 2, 2014, the CMC passed a resolution recommending the Co-location/Shallow Tunnel Plan be advanced to the municipal consent process. (*Id*., Ex. 26, p. 2, 8.) The CMC's recommendation, unlike its similar resolution in October, did not call for halting all study of the reroute of freight rail traffic. When St. Louis Park Councilmember Jake Spano asked about the removal of that language, Metro Transit's Fuhrmann stated that the language could not be included because the environmental review was not yet complete. (*Id.*, p. 5.) As stated in the minutes, "[t]he concern is if the resolution was to eliminate any and all freight rail options, that would run counter to our public document where we say we have evaluated and reviewed those freight rail options previously." (*Id.*) Another member noted that language was not needed because the recommendation already "says this is the route we are selecting and it's not the reroute." (*Id.*)

Minneapolis Mayor Hodges voted against the recommendation, asserting that there was another option—the freight rail relocation option proposed by TranSystems, and that this option was not being pursued only because of problems created by the Metropolitan Council by not hiring a consultant to review freight rail many years ago, by

not building in the time to ask for a route change from the Surface Transportation Board, and by giving the railroads veto power over the freight reroute. (*Id.*, p. 8.) Nevertheless, the motion passed. The Metropolitan Council adopted a resolution to submit municipal consent plans for the Co-location/Shallow Tunnel Plan to the local governments along the corridor at its April 9 meeting. (*Id.*, Ex. 26.)

G. Minneapolis's Memorandum of Understanding

Instead of approving the plan as presented, Minneapolis and St. Louis Park entered into negotiations with the Metropolitan Council regarding potential changes to the project. (Anderson Aff. I, Ex. 16.)

From May through June 2014, representatives of Minneapolis and the Metropolitan Council met in mediation sessions with retired federal Magistrate Judge Arthur Boylan to reach an agreement on the design components for the Minneapolis portion of the route. (Anderson Aff. II, Ex. 27.) Near the end of negotiations, Haigh wrote to Hodges submitting the Metropolitan Council's "final offer," which Haigh hoped Hodges would agree "represents a fair deal for the residents of your city." (*Id.*, Ex. 28, p. 1-2.)

Negotiations were successful, and in early July 2014, Minneapolis and the Metropolitan Council announced a "tentative agreement" that would become "final" after approval by both parties. (*Id.*, Ex. 29.) The agreement included two MOUs. Under the first MOU, the parties agreed to retain freight rail in the Kenilworth Corridor, to remove the light rail tunnel north of the Kenilworth Channel, add back a station at 21st Street, and add pedestrian-access, noise mitigation, landscape restoration and other

improvements in the Minneapolis section of the project. (*Id.*) The second MOU committed the Met Council to work closely with Minneapolis and HCRRA to ensure that the Kenilworth freight corridor remains in public ownership, to decrease the chances that freight traffic would increase or carry more dangerous cargo through the corridor. (*Id.*) Hodges stated in the joint announcement that Minneapolis's support for SWLRT "now comes at a high cost—an unexpected and unwelcome cost—because freight was supposed to be removed. … It could have been far worse, however, if not for the protections secured in this tentative agreement." (*Id.*) Haigh stated that with the agreement, the SWLRT project "has a clear path forward." (*Id.*) In an interview about the agreement, Haigh stated that moving freight out of the Kenilworth Corridor *was never on the table during the negotiations.* (*Id.*, Ex. 30.)

Ultimately, the MOU, which was entered into by the City of Minneapolis and the Metropolitan Council on August 29, 2014, began as follows:

> After lengthy discussions, the City and the Council have reached an understanding of how certain changes to the Preliminary Design Plan of the Southwest Light Rail Project (Project) within the City of Minneapolis would render the Project more acceptable to the City. In consideration of the mutual agreements set forth herein, the Parties agree as follows:

(Anderson Aff. I, Ex. 15.) The MOU then set forth the parties' agreement about the north tunnel, station, and design additions. Although the MOU states that the proposed design plan changes are subject to acceptance for funding by the FTA, it nowhere states that the MOU is non-binding, or suggests that there is any possibility of the selection of a SWLRT route other than the Co-location/South Tunnel Plan. (*Id.*)

Minneapolis officials have clearly stated on many occasions that they consider the MOU to be binding and that Minneapolis's support of the SWLRT depends upon the Metropolitan Council meeting its obligations under the MOU. For example, on March 25, 2015 Mayor Hodges wrote an email to Metropolitan Council Chair Adam Duininck that stated in full:

> Adam -
>
> I understand that the Met Council's defense in the lawsuit from resident's re: Southwest LRT is that the Met Council's agreements with Minneapolis are not binding agreements. Please note two things: first, the city of Minneapolis in no uncertain terms considers them to be binding and second, that's not a great way to demonstrate partnership.
>
> Please note, in the spirit of that partnership, I am sending this message to you and not to Judge Tunheim.
>
> Yours,
>
> Betsy Hodges
> Mayor, Minneapolis

(Anderson Aff. II, Ex. 31.)

In addition, Minneapolis's comments to the Supplemental Draft Environmental Impact Statement and the Final Environmental Impact Statements that were finally released in 2015 and 2016 (see next section) specifically stated that Minneapolis's support of SWLRT was "contingent on adherence to the Memoranda of Understanding reached between the City of Minneapolis and Met Council and between the City of Minneapolis and Hennepin County." (*Id*., Ex. 48.) In a letter dated June 18, 2015, Minneapolis Mayor Betsy Hodges told the Metropolitan Council that Minneapolis's

support for the SWLRT is contingent on "The Met Council's honoring the MOU it signed with Minneapolis at the conclusion of mediation." (*Id*., Ex. 32.) However the Metropolitan Council characterizes the MOU now, Minneapolis clearly thought they had a binding agreement with the MOU.

H. St. Louis Park's Memorandum of Understanding

St. Louis Park and the Metropolitan Council also entered into a MOU that stated that "it is the Parties' understanding that no further study of the feasibility of rerouting freight traffic to the MN&S Route in St. Louis Park will be undertaken, except as required for any continuing environmental review of the SWLRT project." (Alexander Aff., Ex. 9, p. 2 ¶ 12.) This is because, the MOU states, no route for freight rail traffic through St. Louis Park has been found that is "safe, operational and acceptable to the City." (*Id.* ¶ 11.)

St. Louis Park wanted stronger language guaranteeing no further study of rerouting of freight traffic. But in a July 11, 2014 email, Craig Lamothe of the Metropolitan Council asked that language in the St. Louis Park MOU be changed from

> WHEREAS, it is the City's understanding that no further study of the feasibility of rerouting freight traffic will be undertaken
>
> to
>
> WHEREAS, given that the current Plans are based on co-location, it is the City's and the Council's understanding that no further study of the feasibility of rerouting freight traffic to the MN&S Route in St. Louis Park will be undertaken, except as required for any continuing environmental review.

(Anderson Aff. II, Ex. 33.) General Counsel for the Metropolitan Council assured City Manager Harmening that the language of the MOU had to be "aspirational statements" because "the Council is limited by law on what it can firmly commit to at this stage of the environmental process." (*Id*., Ex. 34.) St. Louis Park was not entirely convinced that the language was needed, so Fuhrmann of MetroTransit assured Harmening that "if advanced engineering finds the south shallow tunnel is no longer feasible, the SWLRT project is dead." (*Id.*) Harmening responded that he was still concerned "about some kind of bait and switch," as members of the St. Louis City Council "are getting hammered on this kind of thing." (*Id*., Ex. 35.) This fact was reflected at a July St. Louis Park council meeting, during which a councilmember stated that the "Council has received a lot of emails and phone calls about making sure a reroute does not happen in St. Louis Park, and the MOU was revised accordingly to reflect that at the end of the Southwest LRT project there will be no further study of a freight reroute in St. Louis Park." (*Id*., Ex. 37.) The MOU was approved July 14, 2014. (*Id*.)

By the end of August 2014, all six local governments had approved the plan presented by the Metropolitan Council for municipal consent—that is, the Co-location/South Tunnel Plan . (Anderson Aff. I, at Ex. 15 and Ex. 20.) No environmental impact statement analyzing the South Tunnel Plan had been released at the time of the vote. After municipal consent was granted, the SWLRT project entered a "new chapter," with the Metropolitan Council's Southwest Project Office submitting a New Starts application to the FTA to advance the project in the federal funding queue, hiring a

consultant to review engineering work, and awarding a contract for advanced design. (Anderson Aff. II, Ex. 37.)

I. MPRB's Memorandum of Understanding

The Metropolitan Council entered into yet another MOU, this time with the MPRB, in March 2015. The MPRB, which was responsible for the parkland in the Kenilworth Corridor, including Section 4(f) review[3] of those properties, had wanted to explore the possibility of including a deep tunnel under the Kenilworth Channel, rather than a bridge over it. (*Id*., Ex. 38, Ex. 39.) The MPRB hired a consultant to study that possibility, but the Southwest Project Office asserted that the tunnel would be too costly, would require a new round of municipal consent, and could delay federal funding for the project, adding tens of millions of dollars in delay. (*Id*., Ex. 39.) In response, Gov. Dayton threatened to reduce the MPRB's funding by $3.77 million "due to the Board's continuing efforts to obstruct progress on the SWLRT project." (*Id*., Ex. 40.) Ultimately, instead of moving forward with further study of tunneling under the Kenilworth Channel, the MPRB entered into a MOU with the Metropolitan Council.

In the MOU, the Metropolitan Council agreed to follow specific processes with respect to light rail projects to ensure the protection of park areas and to work with the MPRB on the design of the bridges that would carry light rail and freight trains across the Kenilworth Channel. ((*Id*., Ex. 39, Attachments A and C.) In exchange, the MPRB

[3] Under Section 4(f) of the Department of Transportation Act on 1966, agencies cannot approve the use of land from publicly owned parks for transportation projects unless there are no feasible and prudent alternatives to the use of the land and the public agency responsible for the park determines that the transportation impacts are "de minimus."

agreed to work with the Metropolitan Council to facilitate the approval and construction of any LRT project. (*Id.*, p. 2.) The resolution by which the MPRB adopted the MOU specifically states that the Board is approving a "Legally Binding Memorandum of Understanding." (*Id.*, Ex. 38.) Clearly, the MPRB believed the MOU was legally binding, and the agreement about the bridge design process is meaningless if any SWLRT route other than the Kenilworth Corridor were to be chosen.

J. Release of SDEIS and FEIS

A Supplemental Draft Environmental Impact Statement ("SDEIS"), which at last studied the impact of the Co-location/South Tunnel Plan, was issued in May 2015, nine months after the South Tunnel Plan had been chosen by the Metropolitan Council and approved through the municipal consent process. (*Id*., Ex. 41.) Again, the SDEIS was issued later than the schedule called for—plans called for the release of the SDEIS in 2014. (*Id*., Ex. 10, p. 5.) Unsurprisingly, the SDEIS reversed the conclusions of the DEIS and found that the Co-location/South Tunnel Plan provided the best balance of costs, benefits, and environmental impacts, while all plans for relocation were not workable. (*Id*., Ex. 41, Section 10.)

Thereafter, in summer and fall 2015, another round of municipal consent was required to approve design adjustments caused by $250 million in budget reductions to the project. (*Id*., Ex. 42.) The co-location of light rail and freight in the Kenilworth Corridor, using the South Tunnel Plan, remained unchanged by these adjustments.

The Final Environmental Impact Statement was released in May 2016. By this time, there was only one route that was analyzed for the SWLRT—the Co-location

Route, using the South Tunnel Plan. (*Id*., Ex. 43.) All other options for building the SWLRT that had been analyzed in the DEIS or proposed thereafter during the SDEIS process had been eliminated from consideration. The only other option analyzed was not building the SWLRT at all, and this "No Build" analysis is always required by NEPA. (*Id.*) The FEIS minimizes the environmental impacts of the Co-location/South Tunnel Plan and concludes that it would not have serious harmful effects—even though the opposite conclusion was reached by the DEIS and the study performed at the time of the Scoping Summary Report. (*Id*., Section 14.) The FTA issued its Record of Decision ("ROD") in July 2016, determining that the requirements of NEPA had been satisfied for the SWLRT. (*Id*., Ex. 44, Section 1, p. 1.) Finally, the Metropolitan Council determined that the FEIS was adequate—the final step in the state environmental review process, on August 10, 2016. (*Id*., Ex. 45.)

Now, the SWLRT project continues to move forward. According to the Metropolitan Council's website, engineering on the project continues, with heavy construction scheduled to start later this year and finish in 2020. (*Id*., Ex. 46.) The Metropolitan Council has stated that it expects to receive a commitment for federal funding later this year. (*Id*., Ex. 47.) Before federal funding will be approved, the Metropolitan Council needs to secure the required local match.

ARGUMENT

Under Federal Rule of Civil Procedure 56(c), summary judgment should be granted where "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." To demonstrate that there are genuine issues of

material fact, the non-moving party "may not rest upon the mere allegations or denials" in its pleading, but instead, in affidavits or otherwise, must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In this case, the material facts are undisputed—the facts cited by the LPA to support its position are from communications and other documents written by the Metropolitan Council or by other public officials or entities. As there is no genuine issue as to any of the material facts, it simply remains for this Court to apply the law to those facts. As the Metropolitan Council clearly violated NEPA, the LPA is entitled to judgment as a matter of law.

A. NEPA and its Regulations

For all "major federal actions significantly affecting the quality of the human environment," NEPA requires federal agencies to prepare a detailed statement that analyzes the environmental impacts of the proposed action and any alternatives to the proposed action. 42 U.S.C. § 4332(C). NEPA has two purposes: to inform decision makers of the environmental effects of actions before they are taken, and to allow the public to have the information it needs to "play a role in both the decision making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA is intended to ensure that adverse environmental effects will not be overlooked only to be discovered after an agency has already committed to a project. *Id.* Ultimately, NEPA "require[s] agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives." *Envtl. Defense Fund, Inc. v. Corps of Eng'rs of United States Army*, 470 F.2d 289, 298 (8th Cir. 1972).

This means the NEPA environmental analysis must be completed before any decisions are made that would eliminate any potential alternatives for the project, so that potential disruptive environmental effects may be considered by decision makers "at a time when they retain a maximum range of options." *Conner v. Buford*, 848 F.2d 1441, 1446 (9th Cir. 1988). If the available options are limited before the environmental review is finished, the review becomes "a meaningless formality." *See Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1333 (4th Cir. 1972). If an agency commits to one course of action before completion of the environmental review, that fact is almost certain to sway the environmental review toward the desired end, in violation of NEPA. *See Metcalf v. Daley*, 214 F.3d 1135, 1144 (9th Cir. 2000). NEPA requires that the review be undertaken "objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Id.* at 1142.

NEPA regulations reinforce this requirement. Under regulations promulgated by the Council on Environmental Quality, "[u]ntil an agency issues a [ROD] … no action concerning the proposal shall be taken which would … [l]imit the choice of reasonable alternatives" for the project. 40 C.F.R. § 1506.1. This is meant to ensure that environmental impact statements are not mere cover for decisions that have already been made, as explicitly stated by other NEPA regulations. *See* 40 C.F.R. § 1502.5 (stating that an EIS "shall be prepared early enough so that it … will not be used to rationalize or justify decisions already made"); 40 C.F.R. § 1502.2(g) (stating that an EIS should not be used to "justify[ ] decisions already made.")

Although NEPA regulations allow responsible agencies to take some preparatory steps while the environmental review process is ongoing, NEPA and its regulations prohibit an agency from "irreversibly and irretrievably commit[ting]" itself to a particular route prior to completion of the environmental review process. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010). Such a predetermination, which "is dependent upon the NEPA environmental analysis producing a certain outcome," is anathema to the NEPA process, "which of course is supposed to involve an objective, good faith inquiry into the environmental consequences of the agency's proposed action." *Id.*

B. The LPA's Cause of Action

In its previous decisions in this case, this Court recognized that the LPA had a valid cause of action against the Metropolitan Council similar to the one articulated in *South Carolina v. Limehouse*, 549 F.3d 324 (4th Cir. 2008). In *Limehouse*, the Fourth Circuit allowed a lawsuit against a state actor "where a party seeks to preserve federal rights under NEPA …otherwise, state action could render a NEPA violation a '*fait accompli*' and eviscerate the federal remedy." *Limehouse*, 549 F.3d at 331; LPA I, p. 25. The LPA's cause of action here, this Court found, will involve "an examination of whether state or local action will limit the alternatives considered during environmental review and thereby 'eviscerate' any chance of obtaining a federal remedy under NEPA and the APA, because the state or local actor will have taken action that will be impossible for a plaintiff to reverse by later suing a federal actor." *LPA II*, at 16. As explained by the Court, "[T]he effect of multiple municipal agreements, reached through

extensive negotiations, and announced by local politicians with great fanfare, may amount to a sort of "bureaucratic steamroller' that, in all practicality, makes the plan chosen through municipal consent a foregone conclusion." *LPA II*, at 24.

C. The Metropolitan Council Violated NEPA Regulations' Prohibition on Taking Actions that Limit the Choice of Reasonable Alternatives During the Pendency of the Environmental Review

The documents disclosed in discovery show that the Metropolitan Council was operating a "bureaucratic steamroller" to ensure that co-location was the *only* plan. Pinched by time constraints with an environmental review process that took much more time than initially envisioned, concerned about losing their chance to obtain federal funding if a route was not selected, and running headlong into opposition from St. Louis Park and the freight railroad, the Metropolitan Council selected an option it felt was politically viable—the Co-location/Shallow Tunnel Plan—and obtained municipal consent by cutting separate side deals with Minneapolis, St. Louis Park and the MPRB addressing the concerns each had with the co-location alignment. This was all done years before the completion of the environmental review.

1. The Metropolitan Council Decided Years Before the End of the Environmental Review that Co-location Was the Only Option for the SWLRT.

Between the issuance of the DEIS in October 2012 (which analyzed six SWLRT routing options) and the FEIS in May 2016 (which analyzed only one), the Metropolitan Council violated 40 C.F.R. § 1506.1 by limiting the choice of reasonable alternatives to a single route—the Co-location/South Tunnel Plan. To say that this violation was flagrant is not hyperbole: the Co-location Route was rejected by an initial study during the

Scoping Process and by the DEIS, but the Metropolitan Council committed to it anyway, before *any* study of the particular configuration chosen for Co-location—the South Tunnel Plan—had been performed.

As early as August 2013, Metropolitan Council Chair Haigh was asserting, in a letter to Gov. Dayton, that the decision to route light rail through the Kenilworth Corridor had been "selected" by Hennepin County and the Metropolitan Council, that there was already a "consensus," and that another route for SWLRT, through Uptown Minneapolis, had been "rejected." (Anderson Aff. II, Ex. 8, p. 1.) There was no suggestion by Haigh in this letter that other options for a light rail route remained open or that environmental review needed to be completed before the alternatives for the project could be limited.

The Metropolitan Council also did not make a serious effort to study options for freight relocation out of the Kenilworth Corridor until ordered to do so by Gov. Dayton—because they had already decided to move forward with co-location, and any further study of relocation would merely increase expense and delay. The Metropolitan Council apparently planned to hire a firm to conduct an independent review of freight rail options in September 2013, but after the consultant dropped out, it declined to do any further study, despite the urging of the chairs of the Minnesota House and Senate Transportation Committees, who stated they were "deeply troubled" by the decision not to analyze freight options further. (*Id.*, Ex. 11, p. 1.) Only after Gov. Dayton "ordered" them to hire a consultant, did the Metropolitan Council do so. (*Id.*, Ex. 16.) The consultant, TranSystems, did identify a feasible relocation alternative consistent with federal railroad

standards, but that alternative was not pursued for implementation after the study was released.

Long before there was even a SDEIS analyzing co-location with shallow tunnels, the Metropolitan Council had determined it would pursue only that option. The CMC recommended that the Co-location/Shallow Tunnel Plan be chosen as the SWLRT route in October 2013, nearly three years before the issuance of the ROD, and that freight rail relocation not be studied any further. (*Id*., Ex. 13.) One member of the CMC specifically remarked that the recommendation meant that "all other options that were considered are no longer in play." (*Id*., Ex. 14.) This was reinforced in April 2014, when the Metropolitan Council approved the Co-location/Shallow Tunnel Plan as the physical design plan to be submitted to the local governments along the SWLRT route for municipal consent. At the CMC meeting preceding the Metropolitan Council's approval of the Co-location/Shallow Tunnel Plan, a member noted that the CMC's recommendation "says this is the route we're selecting." (*Id*., Ex. 26, p. 5.) Another CMC member wanted to include language stating that freight relocation would not be studied any further, but Fuhrmann indicated that such language should not be included because it had to appear for the environmental review that other options remained under consideration. However, none of the resolutions from the CMC or the Metropolitan Council acknowledged that a SWLRT route could not be chosen until after the environmental review process was completed.

Even Duininck, a commissioner on the Metropolitan Council who later became its chair, recognized that from the beginning of the process of analyzing options for the

SWLRT "it has always been a discussion about how to get everyone on board with the shallow tunnel option." (*Id*., Ex. 12, p. 1.) As Duininck stated, "it was overwhelming clear where the staff recommendation was headed" from the first briefing he received on SWLRT, making the whole process feel like "a foregone conclusion." (*Id*.)

Minneapolis certainly agreed. As Wagenius stated at the October 2, 2013 CMC meeting, the Metropolitan Council appeared to be pursuing the Co-location/Shallow Tunnel option only because the region was unwilling to stand up to the railroads that didn't want relocation. Similarly, at the April 2, 2014 CMC meeting, Mayor Hodges asserted that another viable option—the TranSystems route—was not being pursued only because the Metropolitan Council had not left time to analyze it properly. (*Id*., Ex. 26, p. 8.) Against this backdrop—of forced acquiescence to an option that had not even been analyzed through an environmental impact statement—several parties cut deals with the Metropolitan Council to obtain the assurances they believed were needed.

2. The MOUs Were Intended to Be Binding Agreements.

Although the Metropolitan Council now characterizes the MOUs as nonbinding, it is clear that Minneapolis, St. Louis Park, and the MPRB thought of them as binding at the time they were negotiated. The Metropolitan Council had timing pressures to deal with—it wanted to obtain political consensus and municipal consent because only then could it submit its application to the FTA for the New Starts program and advance on the priority list for federal funding. With Minneapolis and St. Louis Park holding up the municipal consent process, and later with the MPRB's analysis of a tunnel under the

Channel threatening to derail the timeline for the entire project, the Metropolitan Council needed to cut deals with those entities. So it did, through the MOUs.

The Minneapolis MOU nowhere states that it is "nonbinding" or "conditional." It specifically states that "in consideration of the mutual agreements set forth herein, the Parties agree as follows"—language that makes the document a contract, based on consideration. (Anderson Aff. I, Ex. 15.) The agreement—in which the parties agree to eliminate the north light rail tunnel and keep freight rail in the Kenilworth Corridor in exchange for Minneapolis adding a light rail station and being able to use some of the savings to fund design changes to the light rail—only makes sense if the Co-location/South Tunnel Plan is the route to be implemented. If it is not, the Metropolitan Council cannot possibly keep its promise to allow Minneapolis to use 50 percent of the savings on design changes. Minneapolis officials clearly believed the MOU was binding—multiple times both before and after the execution of the MOU, Minneapolis explicitly stated that its support for the SWLRT project is contingent on the Metropolitan Council honoring its commitments in the MOU. Minneapolis Mayor Hodges, in response to this very lawsuit, informed the Metropolitan Council that "the city of Minneapolis in no uncertain terms considers them [the MOUs] to be binding." (Anderson Aff. II, Ex. 31.) They had good reason to believe the Metropolitan Council believed the agreement was binding as well—Haigh offered Hodges a "fair deal for the residents of your city" in her final offer on the MOU, and the parties jointly announced that they had a "tentative agreement" that would become "final" after agreement by both parties. Nowhere in

these communications did the Metropolitan Council state that it believed the MOU was nonbinding and could be ignored at will if the Metropolitan Council so chose.

St. Louis Park also clearly believed it had reached a binding deal that would prevent freight rail from being re-routed through St. Louis Park. It wanted language in the MOU promising that there would be no further study of re-routing freight rail into St. Louis Park at all, and only reluctantly accepted the Metropolitan Council's explanation that less concrete, "aspirational" language was needed "to ensure nothing in the MOU will prejudice the federal or Minnesota environmental review processes." (*Id*., Ex. 33, 34.) Ultimately, St. Louis Park accepted this language but only after being assured in no uncertain terms that "if advanced engineering finds the south shallow tunnel is no longer feasible, the SWLRT project is dead." (*Id*., Ex. 35, p. 1.) In other words, at this point in 2014—approximately two years before the issuance of a ROD—*a reroute through St. Louis Park was entirely off the table*. It was the Co-location/South Tunnel Plan or nothing at all, and on this basis St. Louis Park gave municipal consent and signed the MOU.

Finally, the MPRB clearly believed its MOU was enforceable and binding, despite the inclusion of empty language stating that the MOU would not "prejudice or compromise any processes required under state or federal environmental or other laws or regulations." (*Id*., Ex. 38.) The MPRB Resolution approving the MOU specifically stated that it was a "legally binding Memorandum of Understanding." (*Id*., Ex. 39.) And like the Minneapolis and St. Louis Park agreements, the content of the MOU is

meaningless if a route other than one based on the Co-location/South Tunnel Plan was chosen for SWLRT.

With the MOUs paving the way for municipal consent, the Metropolitan Council reached a consensus with all the local governments along the SWLRT route that the Co-location/South Tunnel Plan would be the only route under consideration from that point forward—if that route did not go forward, the project would be dead. The route was announced with great fanfare, and the decision allowed the Metropolitan Council to submit a New Starts application to the FTA, hire a consultant to review engineering work, and award a contract for advanced design. (*Id*., Ex. 37.) Clearly, although some aspects of the SWLRT ***design*** later changed due to the need for budget cuts, the route chosen through the process—and specifically the closely negotiated Co-location/South Tunnel portion of the route—could not be reversed without killing the project entirely.

3. The Metropolitan Council's Irreversible and Irretrievable Commitment Made the FEIS Merely a Rationalization for a Decision Already Made.

By the time the Metropolitan Council drafted the FEIS, the irreversible and irretrievable commitment to the Co-location/South Tunnel Plan had long been made. Not even attempting to hide this, the Metropolitan Council only analyzed one option—the Co-location/South Tunnel Plan—in the FEIS. This is contrary to the purpose of an FEIS, which is supposed to be "prepared early enough so that it …will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5. As in *Metcalf*, the Metropolitan Council's obligations under the three MOUs and the practical impossibility of changing the route approved by municipal consent were certain to sway the environmental review

toward one end—rationalization of the previously made decision to co-locate. *See Metcalf*, 214 F.3d at 1144. This is a violation of NEPA, of 40 C.F.R. § 1506.1, and of the cause of action recognized by this Court in *LPA I*. The Metropolitan Council should not be allowed to flout federal environmental law and regulations in this manner.

CONCLUSION

For the foregoing reasons, the LPA asks that the Court grant its summary judgment motion. For its relief, the LPA requests declaratory judgment declaring the following: (1) The Metropolitan Council has violated and remains in violation of NEPA 42 U.S.C. § 4332(c) and NEPA regulation 40 C.F.R. § 1506.1(a) by eliminating reasonable alternatives to the Co-location/South Tunnel Plan before the issuance of the ROD in July 2016; (2) The environmental review process conducted by the Metropolitan Council leading to the ROD issued by the FTA for the Southwest LRT project is null and void; and (3) the Metropolitan Council is prohibited from conducting further final engineering, design, or construction work on the SWLRT project until it has completed a new environmental review in compliance with federal law.

Dated: April 28, 2017

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Lakes and Parks Alliance of Minneapolis, a Minnesota non-profit corporation

Plaintiff,

vs.

Federal Transit Administration, an agency of the United States; and the Metropolitan Council, a public corporation and political subdivision of the State of Minnesota.

Defendants.

File No. 0:14-cv-03391-JRT-SER

WORD COUNT COMPLIANCE

The undersigned counsel certifies that the attached Memorandum in Support of Motion for Second Summary Judgment was prepared using Microsoft Word 2010 word processing software and that the word count function of that software, applied specifically to include all text, including headings, footnotes, and quotations, indicates that the attached memorandum contains 8,851 words in a proportionately-sized font.

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