

September 8, 2006

TO: EQB Members
FROM: Michael Sullivan
Executive Director
SUBJECT: Follow up to testimony of Mr. Michael Felix

The purpose of this memorandum is to follow up on the testimony of Mr. Michael Felix given at the August Board meeting concerning development in the city of Rogers.

Mr. Felix's basic point was that the City of Rogers "got away with something that no private developer could get away with" by "gaming the system," specifically that the city segmented a large project into smaller pieces for review and consequently was able to eliminate or fill wetland resources that otherwise would have been protected. Mr. Felix felt that the EQB and others ought to take a lesson from this situation; he did not ask the Board to do anything else regarding the situation.

To investigate Mr. Felix's claims, EQB staff, with the assistance of DNR staff, examined the records of the various reviews of the projects developed in the area. We also consulted with the staff of the City of Rogers. We found that an EAW had been prepared and reviewed for the Rogers Drive project in 2003; that a DNR permit had been issued to the city for the road crossing the DNR-protected wetland on the northern part of the site; and that the elimination of the wetlands in the center portion of the site is being compensated for as part of a major wetland restoration project in another part of the city.

The 2003 EAW covered the road project only, although it indicates that the adjoining undeveloped land was expected to develop and that the stormwater pond constructed as part of the roadway project was planned to service such future development. The EAW also notes that any development on the parcel would require compensation for the loss of the wetlands under the state Wetland Conservation Act (WCA). Our records do not indicate that Environmental Review was done on the development which has now occurred on the land adjoining the road project. The City Administrator confirmed that none of the development projects on the adjoining land required mandatory Environmental Review.

We do not have any evidence that review was required for any of this development, nor that it should have been reviewed as a single project. Contemporaneous, independent development of adjoining or nearby parcels does not require joint review under the law. The AUAR process is the State's attempt, on a voluntary basis, to jointly review independent, nearby developments. The Environmental Review rules do not require that adjoining developments be considered as part of one bigger project unless they meet the tests of being either "phased actions"¹ or

¹Phased action means two or more projects to be undertaken by the same proposer that an RGU determines: (A) will have environmental effects on the same area; and (B) are substantially certain to be undertaken sequentially over a limited period of time. (4410.0200, subp. 60)

“connected actions,”² as defined in the rules. “Phased actions” only apply to actions by the same project proposer. Infrastructure, such as an adjoining road, does not constitute a “connected action” with adjoining development unless the infrastructure is built solely to service that particular development. We have found no evidence that a larger project was segmented into smaller pieces to avoid review.

Further, records show that the City of Rogers has completed eight other EAWs for other projects since 2000. Several of those projects were in the immediate area. That seems to indicate that the City was not trying to avoid doing required reviews.

Regarding the wetland impacts, there are two points in response to Mr. Felix’s claims. First, protection of a wetland from the impacts of a given project does not depend on the size of the project, so even if a larger project had been segmented into smaller pieces, that would not have gotten around the wetland protection laws. Second, building the road across part of the wetland on the northern part of the site required and received a permit from the DNR and the filling of the other wetlands in the center of the site by a later commercial development required review under the Wetland Conservation Act (WCA) process. Without going into the details of either the DNR or WCA permitting processes, state law does allow wetlands to be filled or otherwise altered provided that the loss is compensated for by creating or restoring wetlands elsewhere. The EAW indicated that the impacts to the wetland on the northern part of the site would be compensated for from a “wetland bank” the City had already created on the south side of I-94. Further, the EAW explains that the route chosen for the roadway across the wetland minimized the wetland impact by crossing along one end rather than bisecting the wetland by going through its middle. The City Administrator informed us that the City is working on a wetland restoration project of 30-40 acres that will serve as compensation for the loss of the other wetlands in question that were filled to allow for the commercial developments.

Eliminating some wetlands while replacing them is acknowledged by law as acceptable, provided that the proper process is followed. Further, the process is available to private developers as well as governmental units. It is true that in justifying the need to fill and replace a certain wetland rather than avoiding the filling altogether by moving the project, a governmental unit may have a “public purpose” argument that a private developer would not have.

In conclusion, EQB staff has been unable to find documentation that would substantiate the allegations Mr. Felix presented to the EQB at the August 2006 meeting.

If any Board members would like further details about either the EAW or the DNR permit, staff can supply electronic copies of either upon request.

²Connected actions: two projects are connected actions if an RGU determines they are related in any of the following ways: (A) one project will induce the other; (B) one project is a prerequisite for the other and is not justified by itself; or (C) neither project is justified by itself. (4410.0200, subp. 9b (as amended by EQB on June 15, 2006).