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TO: Jason Wittenberg, Planning Supervisor

FROM: Erik Nilsson, Assistant City Attorney

DATE: June 18, 2009

RE: City's Authority to Regulate Air Emissions at HERC

MEMORANDUM

On June 8, 2009, at the conclusion of the public hearing on Covanta Energy's application for an amended conditional use permit ("CUP") for the Hennepin Energy Recovery Center ("HERC"), you inquired about the authority of the City to regulate air emissions from the facility. The stated purpose of the Minnesota Pollution Control Act ("MPC Act") contained in Minn. Stat. Chapter 116 is:

> To meet the variety and complexity of problems relating to water, air and land pollution in the areas of the state affected thereby, and to achieve a reasonable degree of purity of water, air and land resources of the state consistent with the maximum enjoyment and use thereof in furtherance of the welfare of the people of the state, it is in the public interest that there be established a Pollution Control Agency.

Minn. Stat. § 116.01. The MPC Act gives the Minnesota Pollution Control Agency ("MPCA") authority to adopt state-wide air quality standards. Pursuant to this authority, the MPCA adopted ambient air quality standards in Minn. Rules Chapter 7009. The statute states, "[n]o local government unit shall set standards of air quality which are more stringent than those set by the Pollution Control Agency." Minn. Stat. §116.07, subd. 2. This provision expressly preempts local ordinances that seek to establish generally applicable standards of air quality that are stricter than those set by the MPCA. The specific state ambient air quality standards for each type of pollutant are contained in Minn. R. 7009.0080.

However, Minn. Stat. § 116.07, subd. 4 ("Rules and standards") states, "[a]s to any matters subject to this chapter, local units of government may set emission regulations with respect to stationary sources which are more stringent than those set by the Pollution Control Agency." There is no definition of "stationary source" in the MPC Act; however, the federal Clean Air Act

defines the term as, "any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle." Title 42 U.S.C. §7602(z). HERC qualifies as a stationary source. "Emission" is defined as "a release or discharge into the outdoor atmosphere of any air contaminant or combination thereof." Minn. Stat. § 116.06, subd. 9. There is no definition of "regulation." As opposed to "standards" which imply general applicability, a "regulation" in common parlance could arguably be construed to mean a government action that is more site-specific in nature, such as a land use condition of approval. However, when viewed in the context of the entire provision, the plain meaning of the term appears to also imply more broad-based applicability in terms of "set[ting]," rather than "imposing," the regulations.

Minn. Stat. § 383B.235, subd. 3, adopted during the 2000 legislative session, after the provision in Minn. Stat. § 116.07, subd. 4, states as follows:

> [A]n existing resource recovery facility may reclaim, burn, use, process, or dispose of mixed municipal solid waste to the full extent of its maximum yearly capacity as of January 1, 2000. The facility must continue to comply with all federal and state environmental laws and regulations and must obtain a conditional use permit from the municipality where the facility is located.

The provision is specifically applicable to HERC and states that the facility must continue to comply with federal and state environmental regulations, but does not reference local regulations. This omission indicates that the legislature did not intend for HERC to be bound by local emissions regulations. Harris v. County of Hennepin, 679 N.W.2d 728, 731 (Minn. 2004) ("the expression of one thing indicates the exclusion of another"). This interpretation is bolstered by the language in the original legislation authorizing Hennepin County to construct HERC, which states as follows:

> Provided all environmental laws or regulations administered by the Minnesota Pollution Control Agency or federal agencies are followed, and *notwithstanding any ordinance or municipal land use plan to the contrary*, Hennepin County may acquire land and construct one or two resource recovery facilities.

Minn. Stat. § 383B.235, subd. 2 (*emphasis* added). This provision was adopted in 1984 and subdivision 3 was added in 2000. When these subdivisions are read together, it becomes apparent that the legislature did not intend for HERC to be bound by local emissions regulation(s) in light of the language in subdivision 3 that HERC shall "*continue* to comply with all federal and state environmental laws and regulations" (*emphasis* added), which refers back to the corresponding language in subdivision 2.

In addition, when construing the provisions in Minn. Stat. § 116.07, subd. 4 and Minn. Stat. § 383B.235, subd. 3 together, the principles of statutory interpretation dictate that to the extent the provisions are in conflict, the provision that is more current and has subject matter specificity shall control. Minn. Stat. § 645.26. In this case, the controlling provision would be Minn. Stat. § 383B.235, subd. 3, which lends further support to the argument that the City does not have the authority to impose a condition of approval on the HERC CUP regarding emissions. The

ultimate issue of whether the City has the requisite authority and the reconciliation of these provisions, however, is an open legal question that has not been answered by the courts to date.

Assuming the City does not have the authority to regulate the air emissions at HERC through the imposition of a site-specific condition of approval, your next question asked whether the City has the authority to deny the CUP based on potential health impacts of the increased air emissions. For over twenty years, HERC has held a CUP to operate at a 1,000 tons per day ("TPD") throughput limit. The limit was imposed as a condition of approval on the original CUP granted by the City in 1987. Pursuant to Minn. Stat. § 383B.235, subd. 3, Covanta Energy has now applied to amend the condition of approval to allow the facility to operate at its originally designed capacity of 1,212 TPD. The sole issue is the additional increment of 212 TPD. The City is not considering the revocation of the existing CUP. Testimony about whether the facility should exist in its present location and information about alternative methods of processing waste; therefore, are not relevant to the decision before the Planning Commission.

As opposed to permitted uses, which are allowed as of right, a conditional use permit "allows the city to review uses, which because of their unique characteristics, cannot be permitted as of right in a particular zoning district, but which may be allowed upon showing that such use in a specified location will comply with all of the conditions and standards of this zoning ordinance." MCO §525.300. Conditional uses must be allowed where the standards in the zoning ordinance are met. Zylka v. City of Crystal, 283 Minn. 192, 167 N.W.2d 45 (Minn. 1969). Courts will also examine the denial of a CUP more closely than the granting of a CUP. Because zoning laws are a restriction on the use of private property, there is a heavier burden required for those who challenge the *approval* of a conditional use permit, as compared to the degree of proof required of a land owner whose application is denied. Board of Supervisors v. Carver County Board of Commissioners, 302 Minn. 493, 499, 225 N.W.2d 815, 819 (1975).

The answer to your question solely hinges on the first finding required by the Zoning Code to grant a CUP – whether the use will "be detrimental to or endanger the public health, safety, comfort or general welfare." MCO § 525.340(1). In this regard, there is ample expert testimony in the record in the form of the environmental impact statement ("EIS") prepared in 2006-07 for the Target Field development site, which is directly adjacent to HERC. The EIS analyzed the HERC for potential health impacts from air emissions and odors *at the designed capacity of 1,212 TPD* and concluded that no adverse effects were anticipated and that no mitigation was necessary.

In light of the legal standard governing CUPs and the expert testimony that directly addresses the impact of the additional 212 TPD increment, it is doubtful that there is a sufficient legal basis to deny the CUP. Caselaw establishes that a municipality may not reject expert testimony without adequate supporting reasons. Chanhassen Estates Residents Association v. City of Chanhassen, 342 N.W.2d 335 (Minn. 1984) (holding denial of permit must be based on something more concrete than "non-specific" neighborhood opposition); Scott County Lumber Co. v. City of Shakopee, 417 N.W.2d 721 (Minn. Ct. App. 1988) (finding city could not prefer landowners' opinions, without a concrete basis, over experts' conclusions). Anecdotal testimony that more throughput equates to more pollution which equates to bad health effects is not a sufficient basis to deny the CUP. In addition, testimony of this sort from those who do not live, work, or frequent the areas surrounding the facility should be afforded even less weight by the

Commission in reaching its decision. Finally, the fact that the facility has operated on the site for twenty years and will continue to be subject to ongoing monitoring review, including obtaining a new emissions permit, from the MPCA weighs against reaching a contrary finding of detrimental effects.

If you need additional information or wish to discuss this memorandum in greater detail, please contact me at (612) 673-2192.