

Chisago County Attorney's Office

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TO: John Moosey, County Administrator
FROM: Janet Reiter, County Attorney
DATE: April 29, 2009
RE: LSPower Agreement

You have requested that Director of Zoning and Environmental Services, Mary Darragh Schmitz, and I provide comment on the proposed changes to the pending legislation, House File 2317 (and Senate File 1671). It is not my intention to respond directly to Mr. Wheatley, because directing this legislation is not directly within the purview of the County Attorney. It does not seem wise to engage in what may be considered negotiations with that entity without specific input or direction of my client - the County Board.

In reviewing today's (4/28/09) legislative update it appears the bill has been either included in the Tax Omnibus Bill (House File 2323) and been referred to the Tax Committee (in the Senate).

Background

The proposed facility would be located in Lent Township, Chisago County, Minnesota. As you are aware, Lent Township exerted authority over its zoning in 2007. Therefore, from a practical standpoint, Chisago County, would have less authority over the project than it would if located elsewhere in an unincorporated area of the County. However, the legislation, as proposed, would supersede the status quo and thereby authorize the County to exert some control in the form of a Development Agreement approved by the County Board. It should be noted that outside of traditional zoning oversight, the County does retain Wetland Conservation Act (WCA) authority

"Exempt Property" statute

The proposed legislation would amend Minn. Stat. 272.02, governing exemptions to the property tax laws. In review of Minn. Stat. 272.02, it appears there have been at least thirteen amendments/exemptions for Electric Generation Facilities similar to that contemplated in this legislation. What is noteworthy is that similar tax exempt status for other similarly situated projects have not been contingent upon Development Agreements as proposed in this legislation. I do not have any information that would lead one to believe that other local units of government had 'bad experiences' with other projects, thus prompting the proposed level of oversight suggested here. While the entity may be acquiescing to the requirements being proposed in the legislation, the burden of monitoring and enforcing the provisions of that agreement would fall on the County.

Proposed legislation:

With regard the specifics of the language pertaining to a Development Agreement, paragraph (9) in the proposed legislation, I note the following:

Requirement: Section (a)(9)(i): "it is designed to use effluent from a wastewater treatment facility as its preferred water source and will not seek an exemption under M.S. 103G.265, Subd. 3." [This first requires the design to use water from a facility for which the County does not maintain exclusive control; second this provision

prohibits the entity from seeking an exemption from water consumption limits as dictated by the Commissioner of the State Department of Natural Resources, an agency over which the County has no control or authority.]

Requirement: Section (a)(9)(ii): “all processed wastewater discharged will be co-located with the outfall of a wastewater treatment facility; [While a Development Agreement with County will presumably govern the discharge of the water, this phrase in the legislation does not clearly state which entity should ensure how the discharge will take place. It may fall within the authority of the Lent Township (the Local Governmental Unit governing the project), Chisago County (the zoning authority in Chisago Lakes Township where the outfall is located), or the Joint Sewage Treatment Commission (which does not have any zoning authority).]

Requirement Section (a)(9)(iii): “penalties will be paid to the county for harm to any aquifer or surface water as a result of construction or operation and maintenance of the facility. [The Chisago SWCD monitored Bloomquist Creek downstream from the outfall of the wastewater treatment plan in 2008, is monitoring it again in 2009 and is planning to do so in 2010. The parameters measured are total phosphorous, ammonium nitrogen orthophosphorous, total suspended solids, chloride, temperature, dissolved oxygen, transparency and turbidity. This will provide a baseline if the project was completed, particularly in the measures of ammonia, chloride, dissolved oxygen and temperature. There is also much monitoring being done on the Sunrise River, both above and below the proposed project site by the Minnesota Pollution Control Agency, National Park Service and citizen volunteer stream monitors. If the monitoring continues, the data could serve as a basis to determine if “harm” is caused to the surface water. Monitoring is done by volunteers for ground water elevation (but not chemical levels). However, the primary concern is the “drawdown” of aquifer levels and this may be measured by continued monitoring by volunteers. What “penalties” may be collected may be contained in the Development Agreement. There are no provisions in the zoning ordinance to address this concern, but it may be possible to enact an amendment to create a regulatory scheme and set a fee schedule.]

Summary

It appears there are good intentions associated with this statutory language associated with the required development agreement. To my knowledge, this is unprecedented, as similar language does not appear in similar tax exempt amendments/projects. There are oversight mechanisms in place at the State (with greater staff, resources and expertise), and with the local government unit which maintains zoning authority. Adding the responsibility associated with monitoring and enforcing a development agreement between Chisago County and the developer suggests a desire or need for greater control. Whether that is warranted, is primarily policy decision for those elected to those positions.