MEMORANDUM

FACTS

The Kasson Elementary School (School), located at 101 3rd Avenue, Kasson, Minnesota, was constructed in 1917-1918 and operated as a public school until 1996. The School has essentially remained vacant since 1996.

In early 2005, the City of Kasson (City) retained Kane and Johnson Architects, Inc., to conduct a space and needs analysis regarding possible use of the School or its site as a library and municipal building. The analysis estimated that refurbishing the present School building, excluding abatement, would cost $3,295,936, whereas demolition of the current School and construction of new facilities excluding abatement, would cost $3,399,000.

In March, 2006, in exchange for forgiveness of $320,000 in assessments owed to the City by the School District, the City acquired title to the School.

On April 26, 2006, the City resolved to hold a special election on July 18, 2006, placing the following question to the voters of Kasson:

> "Shall the City of Kasson, Minnesota, be authorized to issue it general obligation bonds in an amount not to exceed $3,900,00 to defray the expense of the renovation, expansion and equipping of the former elementary school for city hall, library or other governmental purposes."
>
> OR
>
> "Shall the City of Kasson, Minnesota, be authorized to issue it general obligation bonds in an amount not to exceed $3,900,00 to defray the expense of demolition of the former elementary school and the acquisition and betterment of a new building for city hall, library or other governmental purposes."

There was public discussion concerning the issue, including published letters to the editor in the Dodge County Independent newspaper. On November 7, 2006, Kasson voters rejected the bonding referendum by a vote of 1,026 to 904. The record is unclear as to what became of the April 26, 2006, resolution to hold a special election on July 18, and unclear as to whether the question to the voters as written in the April 26, resolution survived and was the question rejected in the November election.

On November 21, 2006, the City Counsel resolved to demolish the School as surplus and further resolved to advertise for bids for asbestos removal, salvage, and demolition of the School. The City set aside $176,202 to finance the demolition.

The City retained Applied Environmental Sciences, Inc., to prepare a pre-demolition inspection report related to asbestos, lead, and hazardous material. The survey identified asbestos, lead, and hazardous materials to be removed prior to

demolition. In response to a citizen petition, the City consulted Neil Britton (Britton) of QED Engineering, Inc. (QED), regarding whether an Environmental Assessment Worksheet (EAW) was required prior to the demolition project. On May 18, 2007, Britton found no potential for significant impacts due to dust, vibration, or noise necessitating an EAW. QED was unqualified to evaluate the potential environmental impacts related to historic, archeological or architectural significance and recommended Robert Vogel (Vogel) for that evaluation.

Vogel conducted a preliminary assessment and on May 17, 2007, submitted his preliminary report and opinion to the City that the School is not a historical resource and recommended that the City adopt his opinion that an EAW is not needed to demolish the School. The City adopted Vogel's recommendation on May 23, 2007. Plaintiff Kasson Alliance for Restoration (KARE) filed this lawsuit that same day, May 23, 2007.[1]

Plaintiffs' have submitted affidavits containing opinions that the School qualifies as a historic resource based upon its likely eligibility for registry on the National Register of Historic Places for its architectural style and its local historic role in the community.[2] Defendant argues that Plaintiffs' opinions are insufficient to make a prima facie case that the School is a historic resource. Defendant also included an affidavit from Vogel in rebuttal. Vogel states that under one criterion (Criterion A) in assessing historical significance, a specific link to an important event is required. Vogel acknowledges that due to the time constraints in this case, he conducted a limited assessment.

Defendant claims that granting injunctive relief exposes the City to an estimated $636, 959 in damages. Included in the City's estimate is $540,660 in excess costs associated with higher interest on $4,000,000 worth of general obligation bonds that would result from a one year delay in construction of the new complex. The City has no present financing in place for the purported new construction. The City also concedes that it has no present plan in place for any construction project related to the site.

Additionally, the current bids for demolition expire on June 21, 2007. Injunctive relief would require a re-bidding process. The City claims re-bidding would result in $750 to $1000 in costs resulting from Notice and advertising related to re-bidding. The current nine bids range from a low of $198, 483 to $454,453.98. The City claims that throwing out the low and high bids, and averaging the remaining seven bids is the proper measure of damages related to the future bidding process. The City calculates its exposure as $95,549 resulting from any future re-bidding based upon the proposed modified average formula.

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[1] Subsequent to the motion hearing, Plaintiffs' submitted responsive material to the Court, contrary to the discussion at the hearing and conclusion of the Court concerning additional submissions. The Court does not take Plaintiffs' June 6, 2007, submission into consideration in this Order and Memroandum.
[2] The parties each submitted affidavits addressing Criteria A and C as defined by 36 C.F.R. 60.4 as informative in this case in determining whether the School is a Historic Resource.

ANALYSIS

The Minnesota Environmental Rights Act (MERA) protects natural resources, which "include, but [are] not . . . limited to, . . . recreational and historical resources. Scenic and esthetic resources shall also be considered natural resources when owned by any governmental unit or agency. Minn. Stat. § 116B.02, Subd. 4 (2006).

Under MERA, a prima facie case is established by showing the existence of a protectible natural resource and conduct likely to have a materially adverse effect. State by Drabik v. Martz 451 N.W.2d 893, 897 (Minn. Ct. App. 1990) pet. for rev. denied, (Minn. April 25, 1990). A prima facie case may be rebutted. Id. citing Minn. Stat § 116B.04. An affirmative defense that there is no feasible and prudent alternative and that the conduct is consistent with, and reasonably required for, the public good, in light of the state's paramount concern for the protection of natural resources, may also be presented. Id. Economic considerations alone shall not constitute a defense. Id.

A temporary injunction may be granted to preserve the status quo pending trial on the merits. State by Drabik, 451 N.W.2d at 897. A party seeking injunctive relief, to preserve the status quo during the pendency of litigation, must show it has no adequate remedy at law and interim relief is necessary to prevent great and irreparable injury. Ecolab, Inc. v. Gartland, 537 N.W.2d 291, 294 (Minn. Ct. App. 1995); County of Wright v. Litfin 386 N.W.2d 757, 758 (Minn. Ct. App. 1986). When considering whether to grant a Temporary Injunction, this Court must consider the following five factors:

(1) the relationship of the parties;
(2) the relative harm to the parties if the injunction is or is not granted;
(3) the likelihood of success on the merits;
(4) public policies expressed in statutes; and
(5) the administrative burdens in judicial supervision and enforcement of the temporary decree.

Dahlberg Brothers Inc. v. Ford Motor Co., 272 Minn. 264, 274-275, 137 N.W.2d 314, 321-322 (1965); Ecolab, Inc. 537 N.W.2d at 294.

Additionally, when a court grants temporary relief under MERA, the court may require the prevailing party to post a bond sufficient to indemnify the party enjoined for damages suffered if permanent relief is not granted. Minn. Stat. § 116B.07. "While MERA terms a bond as optional, a temporary injunction shall not be granted except upon the giving of security in an amount as the court deems proper for payment of costs and damages as may be incurred or suffered by a party who is wrongfully enjoined." State by Drabik, 451 N.W.2d at 897 (citing Minn.R.Civ.Pro. 65.03 (a)).

Here, Plaintiffs' have made a sufficient showing that the School may qualify for protection under MERA to warrant further proceedings. See, State by Drabik, 451 N.W.2d at 897 (upholding the trial court's findings that potential for significant

environmental visual impact and potential risk to plant and animal life sufficient for prima facie showing under MERA). Both parties have supplied expert affidavits in support of their position regarding the issue of whether the School qualifies as a historic resource. Mere difference of opinion contained in opposing affidavits does not prove failure of a prima facie showing. Resolution of a battle of experts is better reserved for the trier of fact than in weighing the credibility on paper.

Similarly, assuming the School is a historic Resource for the purposes of MERA, demolition is a sufficient to make a prima facie showing of prima facie showing of conduct likely to have a materially adverse effect. Defendant's argument that Plaintiffs' have failed to meet the threshold under MERA to warrant consideration of injunctive relief is without support. Defendant's opposing position, while showing questions of material fact remain, does not rebut Plaintiffs' position to show as a matter of law that the Court should not proceed further in determining the ultimate questions regarding whether injunctive relief is warranted, and if so, the scope of the warranted relief. Vogel's opinion does not conclusively show that there is no feasible and prudent alternative and that the conduct is consistent with, and reasonably required for, the public good, in light of the state's paramount concern for the protection of natural resources, may also be presented.

DAHLBERG FACTORS

RELATIONSHIP OF THE PARTIES AND PUBLIC POLICY CONSIDERATIONS

Plaintiffs' are citizens of the Kasson area. Defendant City of Kasson is an entity controlled by elected, public officials acting in a representative capacity on behalf of the Plaintiffs' and, presumably, non-Plaintiff citizens. The issue in dispute has been, at least in part, addressed by the City Counsel and submitted to the voters as a referendum. The relationship of the parties in this case implicates public policy considerations, and the Court therefore considers these two Dahlberg factors together.

The City Counsel has conducted extensive research and given consideration to the matter. The City argues indirectly that Plaintiffs' are merely seeking to end-around that process in bringing an action under MERA. The City does not specifically raise a challenge on this basis. During the process afforded to the citizens of Kasson, the City explored the need to fill out an EAW, consulted with its engineers, allowed opportunity for public discussion, and submitted a bonding referendum to the voters, including Plaintiffs'. Plaintiffs' have had an opportunity to be heard in this relationship between citizenry and elected officials through democratic process.

The Statutes of Minnesota and stare decisis also inform of the policies involved in this case. The Statutes indicate state's paramount concern for the protection of natural resources. Stare decisis informs that historic resources as a subpart of natural resources include historical structures. See, State by Powderly v. Erickson, 285 N.W.2d 84 (Minn. 1979).

These two factors are in direct conflict. The democratic process defines the relationship of the parties in this case. Consideration of the relationship of the parties weighs against granting temporary injunctive relief. Conversely, the state has a paramount concern for the protection of natural resources. This concern must also be tempered by the fundamental public policy concern in supporting democratic process. [3] However, the democratic process does not exclude judicial review of process. Public policy concerns are at odds. On balance, the relationship of the parties and public policy concerns are neutral.

THE RELATIVE HARMS TO THE PARTIES

If the Court were to deny enjoining demolition of the School, the City would be inclined to demolish the School under the June 21, 2007, timing of the bidding process. The harm to Plaintiffs' would be absolute if Plaintiffs' were subsequently able to prevail on the merits. That is there would be no remedy of preserving the already demolished structure.

Defendant's harm involves potential increased costs in demolition. Defendant's claim additional potential harm related to delays in construction and the consequential potential increase in interest obligation related to $4,000,000 in new construction bonding. However, regardless of whether the temporary injunction were to issue, Defendant's have no financing or construction plans in place and therefore cannot show a causal relationship between injunction and purported consequential construction delays. Defendant's harm can be remedied, or mitigated, through legal process such reasonable security necessary under Minn.R.Civ.Pro. 65.03. This factor weighs in favor of a Temporary Injunction issuing.

LIKELIHOOD OF PREVAILING ON THE MERITS

Both parties have submitted conflicting evidence regarding whether the School is a natural resource within the meaning of MERA. If the School is a natural resource, its demolition would likely qualify as a materially adverse affect. The Court is not inclined to weigh the credibility of the evidence at this stage of the proceeding. Plaintiffs have submitted sufficient evidence to show a likelihood of prevailing on the merits, if Plaintiffs' opinion evidence at trial is believed in light of all the evidence. This factor weighs in favor of a Temporary Injunction issuing.

ADMINISTRATIVE BURDENS IMPOSED ON THE COURT

The Court finds no administrative burdens if a Temporary Injunction issues.

After considering and weighing the Dahlberg factors, the Court finds that enjoining the demolition plans of the City is appropriate to preserve the status quo pending determination on the merits.

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[3] Plaintiffs' argued at the hearing that MERA overrides the democratic process. The Court does not agree.

PROPER SECURITY UNDER MINN.R.CIV.P. 65.03

Plaintiffs' argue that minimum security is all that should be imposed to indemnify Through democratic process the voters of Kasson rejected spending toward a renovation project. The Court cannot take that rejection lightly.

The Court finds Defendant's claim that it will incur $540,660 in damages resulting from construction delays in the absence of any concrete plans to enter into construction speculative. The City is not entitled to have Plaintiffs' indemnify future claimed costs incurred from a purported delay in an unplanned construction project.

The City has concrete demolition plans and actual bids in place. Those bids show a wide range between high and low bids. It is reasonable that a competitive re-bidding process will alter the spread. The City's proposed formula, however, merely states a modified average bid. The Court finds that on this record, the average potential increase if a re-bidding process were to be held remains an average. It is equally likely that the high end will come down as the low end will rise if the construction market remains the same. There is no evidence to show the potential future market to support a shift.

If a re-bidding process is indicated after trial on the merits related to demolition of the School, the City is entitled to the reasonable costs associated with Notice and advertising the bidding.

The current low bid of $198,483 is the proper measure to determine whether damages are triggered. If Plaintiffs' do not prevail on the merits, and if the City moves forward with demolition, a security in the amount of $50,000 is proper to indemnify the City for damages.

C.J.C.