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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1656**

In re City of St. Paul's Decision on the Need for an Environmental Impact Statement
for the Proposed University of St. Thomas Multipurpose Arena.

**Filed July 8, 2024
Reversed and remanded
Bratvold, Judge**

City of St. Paul

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Considered and decided by Bratvold, Presiding Judge; Segal, Chief Judge; and
Frisch, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this certiorari appeal, relator Advocates for Responsible Development (ARD) challenges respondent City of St. Paul's (city's) negative declaration on the need for an environmental-impact statement (EIS) for a proposed multipurpose arena on the south campus of respondent University of St. Thomas (university). ARD argues that this court should reverse the city's decision for three independent reasons: (1) the

environmental-assessment worksheet (EAW) is “legally deficient” because it overlooked multiple stages “in total” of a phased action; (2) the city’s negative EIS declaration is arbitrary and capricious, and its findings are not supported by substantial evidence; and (3) the city’s mitigation measures are not specific, targeted, and certain.

Because multiple stages of a phased action “must be considered in total” before an EIS determination is made, *see* Minn. R. 4410.1000, subp. 4 (2023), and because substantial evidence does not support the city’s finding that it considered multiple stages of the university’s south-campus development as part of the existing conditions, we reverse and remand for a revised EAW, for which the city may reopen the record. Because it may be helpful on remand, we also discuss the second and third issues and conclude that the city’s negative EIS determination is arbitrary and capricious. On the second issue, because the city overlooked an important aspect of the problem by ignoring multiple stages of a phased action, we conclude that, on remand, the city’s revised EAW may likewise include revised findings about the potential environmental effects. We also conclude that the city’s finding that the EAW adequately considered greenhouse-gas emissions overlooked an increase in spectator traffic. Finally, on the third issue, the city’s recommended mitigation measures are not specific, targeted, and certain.

FACTS

The university proposes to build a multipurpose arena (the project or arena project) on its south campus in St. Paul. The city is the responsible governmental unit (RGU) that determines the level of environmental review required for the project. *See* Minn. R. 4410.0200, subps. 75-76 (defining “responsible governmental unit” and “RGU”), .2000,

subp. 3 (requiring an environmental-impact statement when the RGU determines that a project has the potential for significant environmental effects) (2023). The project site is located on six acres “bounded to the north by Summit Avenue, the east by Cretin Avenue, the south by Goodrich Avenue, and the west by Mississippi River Boulevard South.”

The project “include[s] one building to house a dual-purpose competition venue for the university’s hockey and basketball programs with capacity for approximately 4,000 to 5,500 spectators.” It will “include coaching offices, locker rooms, and student athlete support services including sports medicine, strength and conditioning, nutrition, and equipment.” The university plans to use the venue for “other university events such as commencement ceremonies, academic convocations, speakers, career fairs, and other events for the university.” The university proposes to demolish three buildings, five whole parking lots, and part of a sixth lot to accommodate the project. The project does not include constructing new parking lots.

Within this same area and immediately adjacent to the arena project site is Schoenecker Center. The university recently constructed Schoenecker Center “to meet a space deficit for academic programs across the university’s campus.” When the city issued its negative EIS declaration for the project in September 2023, the university anticipated opening Schnoecker Center in spring 2024.

Because the arena project is designed to accommodate more than 5,000 persons, it required the completion of an EAW. *See* Minn. R. 4410.4300, subp. 34 (2023) (noting that an EAW is mandatory for a “new sports or entertainment facility designed for or expected to accommodate a peak attendance of 5,000 or more persons”). The project’s EAW is dated

June 2023 and was published in the *Environmental Quality Board (EQB) Monitor* on June 27, 2023. The 30-day public-comment period ran from June 27 to July 27, 2023. The city received comments from 21 members of the public and four agencies—United States Army Corps of Engineers, the Metropolitan Council, the Minnesota Department of Natural Resources, and the Minnesota Department of Transportation.

ARD is a nonprofit organization with members including neighborhood residents who submitted public comments in response to the EAW. ARD’s arguments on appeal mirror some of the public comments, including concerns about increased greenhouse-gas (GHG) emissions, the impact on parking and transportation, and the city’s determination that the project is not part of a “phased action.”

The EQB granted the city’s request for additional time to consider the EAW comments. The city’s findings of fact and conclusions of law, which totaled five pages, were published in the *EQB Monitor*. The city found the project has the potential to impact parking and traffic, found GHG emissions, and identified cumulative potential impacts associated with the project. The city identified five mitigation measures that the university could undertake: (1) monitor event attendance for two years; (2) develop a traffic-management plan with the city; (3) establish parking incentives for public transit and rideshare options; (4) maintain a list of potential events to be hosted at the arena; and (5) keep the community informed of events. The city found that these mitigation measures would address the potential environmental effects associated with the project. Based on its findings, the city concluded that the project did not have the potential for significant environmental effects and, therefore, that an EIS was not necessary.

ARD petitioned this court for certiorari review.

DECISION

As mentioned above, an EAW is required for sports and entertainment facilities designed to accommodate 5,000 or more persons. Minn. R. 4410.4300, subp. 34. An EAW is a “brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action.” Minn. Stat. § 116D.04, subd. 1a(c) (2022). In comparison, an EIS is a more “exhaustive environmental review,” *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm’rs*, 713 N.W.2d 817, 824 (Minn. 2006) (*CARD*), and provides “information for governmental units, the proposer of the project, and other persons to evaluate proposed projects which have the potential for significant environmental effects, to consider alternatives to the proposed projects, and to explore methods for reducing adverse environmental effects.” Minn. R. 4410.2000, subp. 1. A project requires an EIS if it has the “potential for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(a) (2022).

When considering whether a project has the potential for significant environmental effects, the RGU must consider (A) “type, extent, and reversibility of environmental effects”; (B) “cumulative potential effects”; (C) “the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority”; and (D) “the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.” Minn. R. 4410.1700, subp. 7 (2023). The RGU must consider all

criteria when determining whether a project requires an EIS. *Id.*; *see also CARD*, 713 N.W.2d at 825.

A reviewing court defers to the RGU's decisions unless "they reflect an error of law, the findings are arbitrary and capricious, or the findings are unsupported by substantial evidence." *Id.* at 832. Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* A decision is arbitrary and capricious if it is "based on factors that the legislature did not intend"; "entirely fails to address an important aspect of the problem"; "offers an explanation that is counter to the evidence"; or is "so implausible that it could not be explained as a difference in view or the result of the RGU's decision-making expertise." *Friends of Twin Lakes v. City of Roseville*, 764 N.W.2d 378, 381 (Minn. App. 2009). The party challenging an RGU's decision "has the burden of proving that its findings are unsupported by the evidence as a whole." *Id.* An appellate court's "role when reviewing an agency action is to determine whether the agency has taken a hard look at the problems involved, and whether it has genuinely engaged in reasoned decision-making." *CARD*, 713 N.W.2d at 832 (quotations omitted).

Here, the city determined that the project does not warrant an EIS because the project is "subject to regulatory authority which will be sufficient to implement mitigation necessary to address potential environmental effects." ARD argues that the city's negative EIS declaration is arbitrary, capricious, and unsupported by substantial evidence for three reasons. First, ARD challenges whether the city considered Schoenecker Center, another project that was under construction next to the arena when the project EAW was being prepared, in its evaluation of the potential environmental effects. Second, ARD argues that

substantial evidence does not support the city’s findings on the project’s potential environmental impacts on parking, traffic, and GHG emissions. Third, ARD asks us to reject the city’s findings that recommended mitigation measures will address the project’s environmental effects.

I. The city’s finding that it considered Schoenecker Center when assessing the need for an EIS is arbitrary and capricious.

The EAW submitted for public comment stated that the project was not part of a phased action.¹ Responding to public comment, the city acknowledged that, because the university was constructing Schoenecker Center while the EAW was underway, some might consider the project to be a “phased action.” The city added, however, that the “impacts associated with the Schoenecker Center project were included as part of the existing conditions analysis and background conditions for the EAW and [t]raffic study analysis.” We understand the city’s response to imply that the city need not consider the proposed arena a phased action.

In its brief on appeal, ARD argues that the “EAW is legally deficient” because it did not consider the project to be a phased action that included Schoenecker Center.² ARD

¹ More precisely stated, the EAW states, “No,” in response to the question asking whether “this project [is] a subsequent stage of an earlier project.” The EAW also certifies that the EAW “describes the complete project; there are no other projects, stages, or components other than those described in this document, which are related to the project as connected actions or phased actions, as defined at Minnesota Rules, parts 4410.0200, subparts 9c and 60, respectively.”

² While ARD argues that we should reject the EAW because it is “legally deficient,” it cites no legal authority for this proposition. We decline to scrutinize the EAW for legal deficiencies. Instead, we apply the standard of review to the city’s decision as stated in existing caselaw and summarized in this opinion.

argues that, because Schoenecker Center was under construction, it was not an existing condition at the time of the EAW and that, therefore, the city disregarded the potential environmental effects of multiple stages of the phased action.

“Multiple projects and multiple stages of a single project that are connected actions or phased actions must be considered in total when determining the need for an . . . EIS.” Minn. R. 4410.1000, subp. 4. “‘Phased 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 geographic area; and B. are substantially certain to be undertaken sequentially over a limited period of time.” Minn. R. 4410.0200, subp. 60 (2023).

Despite effectively conceding that the arena and Schoenecker Center are in “the same geographic area” and were “undertaken sequentially over a limited period,” *see id.*, the city adhered to its initial determination that the project is not a phased action. Justifying its determination, the city explained that it considered Schoenecker Center as part of the existing conditions for the EAW. We are not convinced. Schoenecker Center was not completed or open for use when the EAW was prepared. And, as the city notes, no EAW was prepared for Schoenecker Center because it did not fall into a category for which an EAW was required.

The transportation study is central to the EAW for the arena project, and the study does not mention Schoenecker Center.³ While the city maintains that Schoenecker Center

³ The university’s brief to this court insists that the transportation study included Schoenecker Center, citing to figure 3, which is titled, “UST Campus Parking Summary.” We note that the figure depicts Schoenecker Center as a dotted outline and labels it as “under construction” and “opening 2024.” None of the 43 pages in the transportation study

was an “existing condition,” this assertion appears to be “counter to the evidence,” given that Schoenecker Center was not open when the transportation study was completed. *See Friends of Twin Lakes*, 764 N.W.2d at 381 (stating that an administrative decision is arbitrary and capricious if the explanation is “counter to the evidence”).

By failing to consider the project as part of a phased action that included Schoenecker Center, the city overlooked “an important aspect of the problem.” *Id.* An EIS is needed when a project has “the potential for significant environmental effects.” Minn. R. 4410.1700, subp. 1 (2023). “[P]hased actions shall be considered a single project for purposes of the determination of need for an EIS.” *Id.*, subp. 9 (2023); *see also* Minn. R. 4410.1000, subp. 4 (stating that multiple stages of a single project “must be considered in total”).⁴ When determining “whether a project has potential for significant environmental effects,” the RGU must consider the cumulative potential effects. Minn. R. 4410.1700, subp. 7(B).

The university appears to argue that the city’s failure to consider the project and Schoenecker Center to be parts of a phased action was harmless error because the combined

discusses the traffic impact or other environmental effects of Schoenecker Center. At most, the transportation study reflects that 127 parking spots were eliminated with the construction of Schoenecker Center; the transportation study does not discuss what effect, if any, Schoenecker Center will have on parking demand. After reviewing the transportation study, we conclude that it does not meaningfully address the impacts resulting from Schoenecker Center.

⁴ We note that applicable regulations provide that “where it is not possible to adequately address all the project components or stages at the time of the initial EAW, a new EAW must be completed before approval and construction of each subsequent project component or stage.” Minn. R. 4410.1000, subp. 4.

projects would not automatically require an EIS. *See* Minn. R. 4410.4400, subp. 11B(4) (2023). Although it is true that an EIS would not be mandatory due solely to the combined size of the arena and Schoenecker Center, that does not mean that the city’s error is harmless. “An EIS shall be ordered for projects that have the potential for significant environmental effects.” Minn. R. 4410.1700, subp. 1. As explained above, all stages are to be considered “a single project” when determining whether the project has the potential for significant environmental effects and requires an EIS. *Id.*, subp. 9. Because the EAW did not consider Schoenecker Center, the city’s negative EIS determination failed to address the phased action as “a single project.” *Id.* Thus, the university’s argument that the phased action was not subject to a mandatory EIS misses the mark.

The effect of the city’s flawed findings is evident in the EAW. For example, the transportation study recommended that the parking supply should exceed demand by 5-15% after the arena project is completed. For weeknight events hosted at the arena, the transportation study estimated that there will be *a parking deficit* of 100 to 740 spaces. Because the transportation study does not discuss events at Schoenecker Center, this estimated deficit does not account for simultaneous events, if any, at Schoenecker Center and the arena.⁵ In short, the parking deficit may be greater than is reflected in the

⁵ The record suggests that the university constructed Schoenecker Center to remedy a space deficit for academic programs. ARD claims that Schoenecker Center will also include a music auditorium and will host music events, which the university maintains is outside the administrative record. Based on our review, the administrative record does not include information about music events at Schoenecker Center. We therefore do not consider ARD’s claims about music events. But we note that the city may reopen the record on remand to do so.

transportation study because the EAW did not consider the arena to be a phased action that includes Schoenecker Center.

We conclude that the city's finding that it considered the environmental effects of Schoenecker Center as an existing condition is arbitrary and capricious because Schoenecker Center was under construction and incomplete at the time the EAW was prepared. Because the city found that the project and Schoenecker Center are both undertaken by the university, "will have environmental effects on the same geographic area," and are "substantially certain" to be undertaken in sequence "over a limited period of time," we conclude that the project is a phased action. *See* Minn. R. 4410.0200, subp. 60. The city was therefore required to consider the multiple stages "in total when determining the need for . . . an EIS." Minn. R. 4410.1000, subp. 4. But because the city did not consider the project to be a phased action, the EAW does not address the environmental effects in total. The city therefore overlooked "an important aspect of the problem." *Friends of Twin Lakes*, 764 N.W.2d at 381. Thus, we reverse and remand for a new EAW that considers the project and Schoenecker Center to be a phased action.

II. The city's negative EIS determination is arbitrary and capricious because its GHG analysis overlooked an increase in spectator traffic and the recommended mitigation measures are not specific, targeted, and certain.

Independent of its analysis of the project as a phased action with Schoenecker Center, ARD broadly challenges the city's determination that there is no potential for significant environmental effects and that, therefore, an EIS is not required. ARD argues that the city failed to adequately consider the environmental effects of parking, traffic, and GHG emissions and that the recommended mitigation measures are insufficient to address

the potential environmental effects. Because we have reversed and remanded for a new EAW that considers the project to be a phased action that includes Schoenecker Center, we address ARD's other arguments that may relate to a revised EAW.

A. Traffic and Parking

ARD contends that the transportation study is inadequate and that the project will result in traffic congestion and a significant parking shortage. The university argues that "the city properly considered traffic and parking impacts." The city maintains that the impacts on traffic and parking will be mitigated if the university follows identified measures.

As part of the EAW, the city retained a consulting firm to prepare a "traffic impact analysis" that analyzed "existing operations and parking within the study area," identified "transportation and parking impacts associated with the proposed arena during event and non-event conditions, and recommended potential mitigation to address any issues." The transportation study identified existing conditions, including "traffic volumes and parking utilization counts," and reviewed the "current transportation characteristics (roadways, pedestrians, bicycles, and transit), crashes/safety, and intersection operation." The transportation study determined that the university "may have a parking deficit ranging from 40 to 740 vehicles, depending on event size and night of the week." And the study recommended "mitigation strategies" to address the deficits, including reducing campus parking to increase event parking, requiring prepaid tickets to park in lots, encouraging public transit, partnering with a rideshare company, providing overflow parking, and scheduling high-attendance games on the weekends.

ARD objects to the transportation study's method for collecting data and its analysis of the impacts to parking and traffic. But we defer to the technical expertise of RGUs and the experts they employ. *See Minn. Ctr. for Env't Advoc. v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002) (*MCEA*) (concluding that an agency with expertise in a particular area knows best what resources to use in its analysis). We, therefore, will not substitute our judgment for that of the experts who conducted the transportation study.

The city found that maximum-capacity basketball games attracting up to 5,500 attendees, which would occur once or twice per year, would result in a deficit of 742 parking spaces. The city determined that maximum-capacity hockey games attracting up to 4,000 attendees, which would occur up to four times per year, would result in a deficit of 330 parking spaces. Based on our review, these findings about parking deficits caused by the arena are supported by the transportation study. As noted above, however, the transportation study does not consider what impact, if any, events at Schoenecker Center would have on the parking-deficit analysis. This shortcoming must be addressed on remand.

ARD, citing *City of Bloomington v. City of Burnsville*, 666 N.W.2d 414 (Minn. App. 2003), argues that the transportation study is flawed because it does not account for employees, players, and vendors in determining peak event attendance. In that case, however, we considered whether the RGU erred in determining that the project was designed for, or could be expected to accommodate, fewer than 20,000 people. *Bloomington*, 666 N.W.2d at 417; *see also* Minn. R. 4410.4400, subp. 22 (2023) (requiring an EIS for

sport and entertainment facilities designed to accommodate more than 20,000 people). Here, the maximum capacity of the proposed arena is 5,500 attendees, which is well short of the attendance threshold requiring an EIS. And the transportation study states that employees and players are expected to park in staff lots during events.

ARD also challenges the average vehicle-occupancy (AVO) rate used in the transportation study, stating that the study “uses an estimated AVO of 2.75 without supplying any source documentation or reasoning.” The transportation study explained that the source of its reasoning about the AVO rate was “[b]ased on a combination of data collected at multiple events at Allianz Soccer Stadium, local event studies, numerous technical resources, and event travel characteristics around the Twin Cities and the country.” ARD’s argument is unavailing because there is evidence in the record to support the study’s reasoning and we do not weigh evidence. *See MCEA*, 644 N.W.2d at 466.⁶

In sum, on remand, the parking and traffic findings must address the multiple stages of the phased project in total. To the extent, however, that ARD challenges how the city weighed the evidence in the record, rather than any lack of evidence, its arguments are unpersuasive. *See Friends of Twin Lakes*, 764 N.W.2d at 381 (noting that the party challenging an RGU’s decision bears “the burden of proving that its findings are unsupported by the evidence as a whole”).

⁶ ARD further argues that the anticipated parking deficits violate the city’s comprehensive plan because the plan requires the city to manage parking supply and minimize traffic congestion. The city found that the parking deficit would be addressed by recommended mitigation measures, including event-traffic management and parking management. We discuss the mitigation finding below.

B. GHG Emissions

ARD argues that the city's GHG analysis for the project is inadequate because it does not account for emissions related to hockey-rink refrigerants and increased spectator transportation. The city and the university claim that the refrigerants to be used were excluded from the GHG analysis because the selected refrigerants are non-ozone-depleting chemicals. Relating to spectator transportation, the university maintains that the GHG analysis was performed according to EQB guidance.

The EAW analyzed potential GHG emissions following the EQB's guidance and utilizing the Environmental Protection Agency's GHG-emission calculator. As explained in the EAW,

[e]missions from cooling and refrigeration systems are not accounted for in this operational emissions analysis as GHGs from refrigerants are approximately less than 5 percent of the total GHG emissions of a building. The project will incorporate an ammonia (NH₃)-based refrigerant plant for the ice rinks; however, annual usage will be limited for maintenance needs only and therefore not included in the GHG analysis. Ammonia is considered an acceptable non-ozone depleting alternative for ice rinks compared to other hydrochlorofluorocarbons substances under EPA's Significant New Alternatives Policy program. . . . The project will include the use of Zambonis to service the ice rink and a forklift to service the facility and both are planned to be electric and not included in the GHG analysis.

While ARD is correct that the EAW does not include cooling and refrigeration systems, the EAW explains that those systems were excluded in the GHG analysis because they are "acceptable non-ozone depleting alternative[s]" and therefore not of concern. The city's decision to omit the cooling and refrigeration systems from the GHG analysis is, therefore, supported by substantial evidence.

ARD also faults the city for not considering emissions from spectator transportation in its GHG analysis. The university responds that no agencies commented on the GHG analysis. Neither the city nor the university disputes ARD's claim that the GHG analysis does not include spectator transportation.

The university proposed that the arena will host the university's hockey and basketball programs as well as commencement ceremonies and career fairs. The EAW clarifies that the basketball program, commencement ceremonies, and career fairs are currently hosted at other facilities on the university's St. Paul campus. The hockey program, however, is not currently hosted on the university's St. Paul campus. Because the hockey program is not currently hosted at the St. Paul campus, the project will increase the number of spectators traveling to the St. Paul campus by moving the hockey program and events there. By overlooking how spectator travel would impact the project's GHG emissions, the city "entirely fail[ed] to address an important aspect of the problem." *See Friends of Twin Lakes*, 764 N.W.2d at 381. The city's determination that the project does not have the potential for significant environmental effects due to spectator transportation is, therefore, arbitrary and capricious.

C. Recommended Mitigation Measures

ARD claims that the city's recommended mitigation measures related to traffic and parking are "no more than vague statements of good intentions that cannot be considered as proper and sufficient mitigation." The city and the university argue that the recommended mitigation measures are sufficient to address the project's impact on parking and traffic.

When determining “whether a project has the potential for significant environmental effects,” an RGU must consider “the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority.” Minn. R. 4410.1700, subp. 7(C). An RGU may consider mitigation measures, including those that “may be applied by a regulatory authority.” *CARD*, 713 N.W.2d at 834. An RGU may rely on mitigation measures to offset the potential for significant environmental effects under Minn. R. 4410.1700 (2023) “only if those measures are specific, targeted, and are certain to be able to mitigate the environmental effects.” *Id.* at 835.

The city, “based on the nature and extent of the potential impact, and building on strategies identified in the EAW,” recommended mitigation measures. The city also stated that “[i]mplementation should be tied to issuance of a Certificate of Occupancy.” And the city noted that it used “mandatory language” but also stated that “alternative strategies or components of strategies that result in a substantially similar or better mitigation will be considered acceptable.” The city recommended five mitigation measures to address the project’s impact on parking and traffic:

1. St. Thomas has agreed to monitor event attendance, traffic, and parking for no less than two operational years after the Multipurpose Arena is occupied.
2. Event Traffic Management: St. Thomas has agreed to develop, in consultation with Saint Paul [Police Department] and Public Works, an Event Traffic Management Plan, including strategies for traffic control. The plan will tie specific strategies to event size and timing. In addition to collegiate hockey and basketball, the plan will also cover any other planned/potential events at the Multipurpose Arena.

3. Parking Management: St. Thomas has agreed to establish incentives for the use of public transportation and/or rideshare when attending events at the Multipurpose Arena. St. Thomas will also implement reasonable parking system applications to inform patrons what lots are sold out/full for major events to encourage the use of transit, rideshare or carpool, and will provide off-site parking and shuttle service to provide alternatives to on-campus parking when large events occur at the Multipurpose Arena.

4. Non-sporting Events. St. Thomas has agreed to maintain a list of potential events other collegiate sports to be held at the arena, including the type, number, frequency, and timing of such events.

5. Community Engagement. St. Thomas will work to keep the community informed of upcoming events through the neighborhood relations website . . . as well as provide regular communications from the email list-serve. A dedicated email can also be used for neighbor concerns

ARD's argument is persuasive that these mitigation measures are not specific, targeted, and certain. *See CARD*, 713 N.W.2d at 835. To put the analysis in the correct context, we note that the regulatory scheme defines mitigation as

A. avoiding impacts altogether by not undertaking a certain project or parts of a project;

B. minimizing impacts by limiting the degree of magnitude of a project;

C. rectifying impacts by repairing, rehabilitating, or restoring the affected environment;

D. reducing or eliminating impacts over time by preservation and maintenance operations during the life of the project;

E. compensating for impacts by replacing or providing substitute resources or environments; or

F. reducing or avoiding impacts by implementation of pollution prevention measures.

Minn. R. 4410.0200, subp. 51 (2023).

We first consider each of the five measures and note that four measures are nonspecific and emphasize passive observation and communication, which does not align with the active verbs—avoiding, minimizing, rectifying, reducing, eliminating, and compensating—used in the regulatory definition of mitigation. *Id.* The first measure recommends that the university “monitor” or observe attendance, traffic, and parking for at least two years. While this may facilitate future mitigation, it is unclear how observation alone is a mitigation measure. Observation is not included in the regulatory definition of mitigation. Minn. R. 4410.0200, subp. 51.

The second measure recommends a traffic-management plan with the city, which is nonspecific, but presumably, the plan will include targeted mitigation measures. The fourth measure—a list of nonsporting events—is passive. It is unclear how keeping a list will mitigate environmental effects. Similarly, the fifth measure is communication—a university website of events to alert the neighborhood. Neither the list nor the website appears to include targeted steps that mitigate the potential environmental effects identified in the transportation study.

The only mitigation measure that appears to specifically reduce parking and traffic congestion is the third measure, which provides that the university will provide offsite parking and a shuttle service as well as incentives for arena spectators to use public transit. *See CARD*, 713 N.W.2d at 835 (requiring mitigation measures to be specific and targeted). The transportation study recommends that parking supply should *exceed* demand by 5-15%. For events during the week, the transportation study estimates that there will be a parking *deficit* of 100 to 740 spaces. Yet nothing in the record establishes the location or

capacity of offsite parking or the potential to reduce demand through public transit. Thus, substantial evidence does not support the city’s finding that offsite parking and incentives for public transit will mitigate the anticipated parking deficit. *See id.* (noting that mitigation measures must be “certain to be able to mitigate the environmental effects”). For the reasons stated, we conclude that none of the five mitigation measures is specific, targeted, or certain to mitigate the parking and traffic effects.

ARD also challenges the mitigation measures more broadly and argues that the mitigation measures are not mandatory. The city found that the mitigation measures would be tied to its issuance of a certificate of occupancy for the arena. The university contends that the city appropriately considered mitigation by a regulatory authority because it tied the implementation of these mitigation measures to the issuance of a certificate of occupancy.

We are concerned that the mitigation measures expressly allow the university to adopt “alternative strategies or components of strategies” and do not explain how any authority oversees the university’s compliance with the measures. To the extent that issuing a certificate of occupancy is regulatory oversight, it is different from the “ongoing” regulatory oversight described in the applicable law. Minn. R. 4410.1700, subp. 7(C) (providing that the RGU may consider “the extent to which the environmental effects are subject to mitigation by *ongoing* public regulatory authority” (emphasis added)).

We reject the university’s argument that the city’s recommended mitigation measures are like permitting requirements. The permitting requirements that other caselaw has recognized as mitigation measures included an enforcement mechanism. *See, e.g.,*

MCEA, 644 N.W.2d at 467-68 (stating that a mitigation measure can be tied to permitting requirements because the agency can enforce the measure through its permitting function). Here, it is unclear how the city could or would enforce the mitigation measures it recommends because the measures described occur *after* the city issues a certificate of occupancy to the university. We note that the city’s brief to this court states merely that the certificate of occupancy will not be awarded unless the university “agreed to the mitigation required by the city.” This falls far short of what caselaw requires. *See CARD*, 713 N.W.2d at 835 (“The RGU must have some concrete idea of what problems may arise and how they may specifically be addressed by ongoing regulatory authority.”). Thus, the certificate of occupancy cannot be compared to permitting requirements and does not provide “ongoing regulatory authority” without additional evidence or findings by the city. *Id.*

When we consider the details of each of the five recommended mitigation measures or more generally consider the regulatory authority proposed to implement these measures, we conclude that the measures are not specific, targeted, and certain. The city must address the noted shortcomings upon remand.

To conclude, the city’s finding that it considered the environmental effects of Schoenecker Center as an existing condition is arbitrary and capricious. Because the city overlooked an important aspect of the problem by ignoring multiple stages of a phased action, we reverse and remand for a new EAW. We acknowledge that, during remand, the city’s revised EAW may likewise revise its conclusions on the potential environmental effects in parking, traffic, and GHG emissions by spectator traffic. Finally, the city’s mitigation measures are not specific, targeted, and certain.

We, therefore, reverse and remand for a new EAW that considers the project and Schoenecker Center to be a phased action. In so doing, the city may reopen the record. We express no opinion about whether an EIS is needed.

Reversed and remanded.