



May 23, 2016

Administrative Law Judge Eric L. Lipman
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
Saint Paul, MN 55164-0620

cc: Dan Petrik, Land Use Specialist
Minnesota Department of Natural Resources
500 Lafayette Road, Saint Paul, MN 55155-4025

RE: Mississippi River Corridor Critical Area Comments

Dear Judge Lipman:

The Saint Paul Area Chamber of Commerce (SPACC), the largest local chamber in Minnesota, is a network of businesses and individuals that advocates for building communities that foster economic prosperity and a high quality of life for all. We submitted extensive comments in response to the Minnesota Department of Natural Resources' (DNR) request for comments regarding the "Proposed Permanent Rules Relating to Mississippi River Corridor Critical Area"¹ and appreciate the opportunity to comment on the DNR's Statement of Need and Reasonableness through this forum. We also value the DNR's willingness to consider the interests of stakeholders throughout this rulemaking process.

The Mississippi River continues to be a critical asset to the State of Minnesota, serving recreational, aesthetic, cultural, and historical value. It is also a working river and an important transportation corridor.

In re-authorizing the DNR's administrative rulemaking authority in 2013, the Minnesota Legislature made several important changes to the enabling legislation that must guide the rulemaking process, making it clear that the river corridor is a multi-purpose resource.² The law states that one of the important interests served by the river is redevelopment of commercial and industrial property, and includes commercial, industrial, and residential resources in the list of key features served by the river that must be protected and/or enhanced by any rules promulgated by the DNR.³

¹ See attached SPACC comments dated August 11, 2014.

² Minn. Laws Ch. 137, Art. 2, § 18-21 (2013).

³ Minn. Stat. § 116G.15.

FAILURE TO DEMONSTRATE THAT THE PROPOSED RULES ARE NEEDED AND REASONABLE

The Legislature designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules, including a statement as to the need for and reasonableness of the rule.⁴ The DNR has failed to meet this requirement through at least three of the necessary factors for regulatory analysis.

1. The DNR Fails to Show There Are Not Less Intrusive Methods for Achieving the Purpose of the Proposed Rules

One of the nine factors for a regulatory analysis that must be included in the Statement of Need and Reasonableness (SONAR) is a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.⁵

SPACC disagrees with the DNR's assessment that there are not less intrusive methods for achieving the purpose of the proposed rules.

a. Creating Nonconforming Structures is Intrusive

The SONAR states that "A primary goal of the rules is to reduce complexity and be less intrusive for property owners, developers, and local governments wherever possible by focusing on the specific development impacts on those key resources and features identified in Minn. Stat. § 116G.15."⁶ However, creation of nonconforming structures will increase complexity and be more intrusive for property owners, developers, and local governments.

The City of Saint Paul's 2014 analysis shows that more than 1,000 existing buildings in Saint Paul will become legally nonconforming as a result of the proposed rules.^{7, 8} Structures that currently conform to all standards that would become legally nonconforming under the proposed rules would be allowed to conduct repairs, replacements, maintenance, and improvement. Those structures would not, however, be allowed to **expand** without obtaining a permit, by ordinance, from the appropriate municipality.⁹

Creating legally nonconforming structures will create an administrative burden for property owners and the City, lower property values and reduce the strength of Saint Paul's tax base, and will prevent some businesses from expanding in Saint Paul. These consequences are highly intrusive for property owners, City finances, and the vibrant business community in Saint Paul.

⁴ Minn. Stat. § 14.131.

⁵ Minn. Stat. § 14.131(3); SONAR p. 11.

⁶ State of Minnesota Department of Natural Resources, "In the Matter of Proposed Rules Relating to the Mississippi River Corridor Critical Area (MRCCA), Statement of Need and Reasonableness (SONAR)," p. 12.

⁷ See attached SPACC comments dated August 11, 2014, p. 3.

⁸ The proposed rules will result in less legal nonconformities than there are currently, but that is of no comfort to property owners of those new nonconformities.

⁹ Minn. Stat. § 462.357 Subd. 1e(b).

In addition, Minnesota law states that the MRCCA must be managed as a multipurpose resource in a way that “conserves the scenic, environmental, recreational, mineral, economic, cultural, and historic functions of the river corridor” and “provides for the continuation, development, and redevelopment of a variety of urban uses, including industrial and commercial uses, and recreational and residential uses, where appropriate, within the Mississippi River corridor.”¹⁰

It is extremely important that the rules reflect the language of the authorizing statute, which clearly states that the river corridor should be managed in a way that provides for the development and redevelopment of a variety of urban uses. Requiring additional administrative burdens to businesses wanting to expand does not conform to the statute.

b. There Are Less Intrusive Alternatives

The goals of the proposed rules can be met without making existing structures legally nonconforming. For example, the SONAR states that the purpose of the bluff setback requirements is to protect natural resource values and public safety, help prevent bluff failure and erosion, and limit visual impact of structures on scenic resources.¹¹ The rules would create a new Bluff Impact Zone (BIZ) to achieve these goals. As of the City’s 2014 analysis, 440 structures would be affected by the proposed Bluff Impact Zone rules (BIZ).¹²

However, the broad definition of “bluff” in the proposed rules includes some low and gentle slopes, and the integrity of those slopes can be protected, and erosion prevented, by requiring that development be done according to best management practices specified by qualified professionals. It is possible to protect slope stability without outright prohibitions on development on or near them.

Rather than strict prohibitions regarding what can be done on a wide variety of landscapes that fit a broad definition, the rules should provide a clear path for a property owner and its local government to study the land and determine, using engineering best practices, what is allowable on that land.

To further make this point, the SONAR notes that “The geology across the MRCCA is variable,” giving examples of different types of geology throughout the Area.¹³ This is another reason that the one-size-fits-all rule is inappropriate.

Under Minnesota law the rules must be managed in a way that provides for the

¹⁰ Minn. Stat. § 116G.15 Subd. 2 (1) and (3).

¹¹ SONAR, p. 49.

¹² See attached SPACC comments dated August 11, 2014, page 3.

¹³ SONAR, p. 22.

development and redevelopment of industrial and commercial uses.¹⁴ The proposed rule will unnecessarily burden existing businesses wanting to contribute more to the region and will act as an intrusive disincentive to investment for businesses in the MRCCA.

2. The DNR Fails to Provide Appropriate Probable Costs Borne By Affected Parties

Another of the nine factors for a regulatory analysis that must be fulfilled in the SONAR is: “The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.”¹⁵

a. Governmental Units

The DNR asserts that governmental units will only incur modest changes in the direct or indirect costs of complying with the proposed rule.

The DNR has a history of grossly underestimating the costs of these proposed rules for local governments. In its January 14, 2014 report to the Legislature, the DNR estimated the long-term costs to local communities in implementing the proposed rules at \$5,000 per community. The DNR indicated that the costs would likely be higher in the future, somewhere between \$7,000 and \$10,000 per community.¹⁶

We appreciate that the DNR then sent a cost survey to all local governments within the MRCCA in October 2014 asking them to estimate the cost to update their MRCCA plan and ordinance. In its results, the DNR stated, “With a few exceptions, total costs per local government were under \$20,000.”¹⁷ Unfortunately, these “few exceptions” are not minor: \$30,700 for the City of Anoka, \$100,000 for Brooklyn Park, \$55,000 for Grey Cloud Island Township, and \$210,000 for Minneapolis.¹⁸

In the DNR’s January 14, 2014 report to the Legislature, it estimated that the total cost for the applicable jurisdictions would be between \$200,000-\$300,000.¹⁹ In fact, the total cost as estimated by the local governments in the DNR’s survey adds up to \$587,590, which does not include estimates from 9 local governments, including Saint Paul.²⁰

Chronic underestimation of costs and failure to include 9 local governments in its

¹⁴ Minn. Stat. § 116G.15 Subd.2 (1) and (3).

¹⁵ Minn. Stat. § 14.131(5); SONAR p. 13.

¹⁶ Minnesota DNR Report to Legislature on Mississippi River Corridor Critical Area Rulemaking dated January 15, 2014, p. 12-13, <http://files.dnr.state.mn.us/input/rules/rulemaking/mrcca/final-report-legis.pdf>

¹⁷ SONAR, p. 14.

¹⁸ SONAR, p. 14-15.

¹⁹ Minnesota DNR Report to Legislature on Mississippi River Corridor Critical Area Rulemaking dated January 15, 2014, p. 12-13, <http://files.dnr.state.mn.us/input/rules/rulemaking/mrcca/final-report-legis.pdf>

²⁰ SONAR, p. 14-15.

analysis, including Saint Paul, is evidence of the DNR's failure to meet this fifth factor necessary to show need and reasonableness of the proposed rules.

b. Businesses and Individuals

The DNR makes no attempt to lay out the probable costs to businesses or individuals, as required in the fifth factor necessary to show the need and reasonableness of the proposed rules. When local governments need to establish new licensing programs, update local plans, ordinances, and maps, and provide additional staff support, those costs will be passed along to property owners in the form of increased taxes, licensing fees, and other development-related costs. However, nothing about these costs are noted in the SONAR, and no attempt to study this issue was made.

The DNR skirts the intention of the legislative requirement to “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”²¹ The SONAR merely states that it will take longer than a year for local governments to revise their plans and ordinances, so the proposed rules will not impact businesses within the MRCCA within a year's time.

This is true, but does not follow the intent of the statute, which is to assist the community in understanding the values and consequences of the proposed rules, including costs to businesses and individuals. Making absolutely zero effort to determine cost of the proposed rules for businesses and individuals is unacceptable. The DNR has failed to meet its obligation in the fifth factor.

In addition, we take exception to one specific statements in the SONAR related to effects on businesses. The SONAR notes that “small businesses already in existence would not be subject to additional restrictions, except in cases where these businesses choose to expand or redevelop.”²² Again, Minnesota law states that development and redevelopment of industrial and commercial uses must be provided for in the MRCCA rules.²³ The statement in the SONAR that small businesses would only be subject to additional restrictions if they choose to expand or redevelop shows a lack of attention for this component of the law.

3. The DNR Fails to Adequately Address Probable Costs or Consequences of Not Adopting the Proposed Rules

The sixth factor that the DNR must fulfill to show need and reasonableness of the rules states: “The probable costs or consequences of not adopting the proposed rule, including

²¹ Minn. Stat. § 14.127, subd. 1.

²² SONAR, p. 20.

²³ Minn. Stat. § 116G.15 Subd. 2 (1) and (3)

those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals.”²⁴

In the SONAR, the DNR provides scant evidence of a positive relationship between water quality and natural landscapes and property values, in fact only stating that “there is a positive relationship” between these things. The DNR then concludes that “persons owning or developing property within the MRCCA...will benefit economically from the amenities that the proposed MRCCA rules are intended to preserve.”²⁵

In addition, the DNR states with zero evidence or explanation that “There may also be indirect costs to the public and property owners if the proposed rules are not adopted....”²⁶

It is the DNR’s role to explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken. The leap of logic provided by the DNR gives almost no evidence and no rational connection to the proposed rules.

OTHER CONCERNS

While we recognize that it is not the Administrative Law Judge’s role to determine which policy alternatives present the “best” approach, we would like to use this forum of public comments to state a few more concerns.

Specific Districts

SPACC believes that certain proposed districts in Saint Paul are inconsistent with existing development and potential new commercial, industrial, and residential opportunities.

1. Ford site: The proposed districts do not align with the City of Saint Paul’s vision for redeveloping this critically important urban site. The City is engaging the community in a public process to prepare a plan for the redevelopment of the Ford site. This process will result in a community-based redevelopment plan, which will include a determination of the building heights most appropriate for this site. If the DNR restricts building heights before the community has the opportunity to complete the planning process, proposed district designations may unnecessarily restrict redevelopment of the Ford site. Accordingly, the dimensional standards applicable to the Ford site should be governed by Saint Paul’s underlying zoning code.
2. West Side Flats: The proposed rules call for the West Side Flats, a 45-acre area directly

²⁴ Minn. Stat. § 14.131(6); SONAR, 15.

²⁵ SONAR, p. 15.

²⁶ SONAR, p. 15.

across the river from downtown Saint Paul, to be designated as an Urban Mixed (CA-UM) district. This designation is inconsistent with community's vision for revitalizing the West Side Flats. Instead, the West Side Flats should be designated as an Urban Core (CA-UC) district to better align with the community's vision in the *West Side Flats Master Plan*. We agree with the Saint Paul Planning Commission that another way to address this would be to allow for more height without requiring a conditional use permit (CUP) in the CA-UM district.

Visual Impacts; Variances

1. The rules limit building heights and state that this is to reduce visual impacts and protect views of the river and views from the river. The term "visual impacts" is not defined, and it is unclear how a local government will determine if a CUP is appropriate. This will lead to otherwise avoidable confusion and conflicts for businesses wanting to build or expand.
2. The proposed rules state that when a local government evaluates a request for a variance or CUP and identifies a "potential negative impact," the variance or CUP must require mitigation and that "Mitigation must be directly related to and must bear a rough proportionality to the impact of the project on primary conservation areas, public corridor views, and other resources identified in the local government's plan."²⁷

The proposed rules are overly broad with respect to when mitigation is required, and local governments should have discretion in choosing to require mitigation even where a variance affects the defined natural resource.²⁸

CONCLUSION

The DNR has failed to meet at least three of the nine factors necessary for a complete regulatory analysis. In addition, the DNR has not followed state law in providing for development and redevelopment of industrial and commercial uses in the MRCCA rules.²⁹

Respectfully,



Marie Ellis
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Saint Paul Area Chamber of Commerce

²⁷ Minnesota Department of Natural Resources, Proposed Permanent Rules Relating to Mississippi River Corridor Critical Area, dated 02/26/16, § 6106.0080 Subp. 5.

<http://files.dnr.state.mn.us/input/rules/rulemaking/mrcca/proposed-rules.pdf>.

²⁸ To read more on our concerns about this, please see attached SPACC comments dated August 11, 2014, p. 4-5.

²⁹ Minn. Stat. 116G.15 Subd. 2 (1) and (3).