



CITY OF SAINT PAUL
Christopher B. Coleman, Mayor

25 West Fourth Street
Saint Paul, MN 55102

Telephone: 651-266-6700
Facsimile: 651-228-3220

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To: Comprehensive Planning Committee
From: Josh Williams (josh.williams@ci.stpaul.mn.us, 651-266-6659) and
Allan Torstenson (allan.torstenson@ci.stpaul.mn.us, 651-266-6579)
Subject: **Comments on Draft Rules for Mississippi River Corridor Critical Area**

Background and Purpose

The Minnesota Department of Natural Resources, on June 2, 2014, published a Request for Comments on draft rules for the Mississippi River Corridor Critical Area (MRCCA). The proposed rules would replace the Standards and Guidelines for Preparing Plans and Regulations for the MRCCA in Executive Order 79-19 by Governor Quie in 1979, and would mandate new MRCCA zoning overlay districts and regulations to replace the districts and regulations that were adopted by the City and approved by the state pursuant to Exec. Order 79-19 in 1982. The DNR will accept comments on the draft rules through August 15.

This memo provides background for and outlines primary City comments and concerns. A longer companion piece provides more detailed comments and specific recommendations.

Minnesota statutes that govern the rulemaking process require that the purposes of the rules be achieved through the least costly and least intrusive methods, and that the DNR demonstrate that the rules are needed and reasonable. Therefore, this is a primary focus of our comments and recommendations.

Principal general guidelines in Executive Order 79-19 for preparing plans and regulations are:

1. Management of the river corridor as a multiple-purpose resource by:
 - conserving the scenic, environmental, recreational, mineral, economic, cultural, and historic resources and functions of the river corridor; and
 - providing for the continuation and the development of a variety of urban uses; and
2. Management of the river corridor consistent with its natural characteristics and its existing development, using districts with different standards and guidelines to fit the character and existing development for different areas within the corridor.

MN Stat. 116G.15 reflects this language in authorizing the rules and directing the DNR to ensure that the river corridor is managed as a multipurpose resource in a way that “conserves the scenic, environmental, recreational, mineral, economic, cultural, and historic resources and functions of the river corridor, [and] . . . provides for the continuation, development, and redevelopment of a variety of urban uses.” It goes on to require that the DNR “take into account municipal plans and policies, and existing ordinances and conditions” in establishing districts for “management of the river corridor consistent with its natural characteristics and its existing development, and in consideration of potential new commercial, industrial, and residential development and redevelopment.” Therefore, this is also a primary focus of our comments and recommendations.

Summary Comments

1. Fine-grain local planning versus broad-brush corridor-wide regulations

The draft rules attempt to protect key resources and features of the river corridor through new broad-brush definitions of such things as *primary conservation areas* and *slope impact zones*, general corridor-wide prohibition of development or change in such areas, and more restrictive or new height limits. In too many cases this broad-brush approach would be inconsistent with the existing character and development of a specific site, would not make sense, and would be unnecessary and/or unreasonable. For example, the proposed prohibition of structures, impervious surfaces, land alteration, and vegetation removal in an urban yard just because it happens to be within 20, 40, or even 100 feet from a 10 or 20 foot high slope is unreasonable, and unnecessary to achieve the MRCCA purposes of protecting and preserving critical resources for public use and benefit.

The City of Saint Paul has a long track record of careful and effective planning and management of the river corridor as a multipurpose resource consistent with its natural characteristics and its existing development using a more sensible, finer-grain approach.

The first St. Paul Mississippi River Corridor plan under the requirements of the MRCCA was adopted by the City Council and approved by the EQB in 1981. It identified primary conservation areas that were critical to protect as a continuous publically-owned and maintained river-oriented park, open space, wildlife preservation, and natural area system, almost all of which has now been acquired. Since creation of the MRCCA, the St. Paul Port Authority alone has transferred over 1300 acres to the St. Paul Department of Parks and Recreation for parks and open space purposes. Of the 7150 acres of land in St. Paul in the Critical Area, about 2500 acres (35%) are now publically-owned parks and open space. A great deal of effort has been focused on planning, development and management of this park and open space system for MRCCA purposes, from the St. Paul Mississippi River Corridor Plan in 1981, creation of the St. Paul Riverfront Corporation and all of the important work it has done over the years, to the more recent Great River Passage Master Plan.

The Great River Passage, a master plan adopted in 2013 for the 17 miles of Mississippi River park lands in Saint Paul, identifies a number of investments to enhance access to and promote use of the Mississippi River. Overly broad development restrictions in the draft rules, including doubling river setback requirements and more than doubling bluff setback requirements for most urban parkland, and applying bluff setback requirements to smaller slopes, are not only broadly inconsistent with existing park development; they would also hinder the ability to make planned investments in parks and public spaces along the river, such as in Lilydale and Hidden Falls regional parks and at the Watergate Marina.

The City has done a lot of thoughtful planning to enhance the relationship of specific sites and areas to the river, including for new urban villages with strong physical and visual connections to the river, restored natural systems, and public spaces that integrate green infrastructure for stormwater management. Examples include the West Side Flats, the Ford site, and the former Island Station power plant site. On the West Side, the proposed rules would make the existing river esplanade non-conforming, and could prevent other public realm features suitable for a dense urban neighborhood. Rather than through the absolute, broad-brush height and locational standards proposed in the draft rules, the best development for these areas can be achieved through careful planning based on the unique characteristics of each site and surrounding areas.

2. Consistence with existing development and appropriate redevelopment

Elements of the draft rules are broadly inconsistent with existing development, would thereby create many nonconforming buildings, lots, roads, etc., and would be inconsistent with existing critical area guidelines to provide for the continuation, development, and redevelopment of a variety of urban uses where appropriate. Most significant are proposed rules that would go beyond the current bluff setback requirements and prohibition of structures on slopes of 18% or greater. These new rules would: a) prohibit structures, impervious surfaces, land alteration, and vegetation removal in a 20-foot “slope preservation zone” (SPZ) around all sides of these slopes; b) more than double bluff setback requirements in many areas; and c) apply bluff setback requirements to “*very steep slopes*” defined as slopes with an average grade of at least 18% (about 8 degrees, a 2 foot rise in an 11 foot run) and a height of at least 10 feet.

Based on a shapefile from the DNR representing bluffs and “very steep slopes” as defined in the draft rules, it appears that about 1300 buildings in St. Paul would be in the new slope preservation zones proposed in the draft rules (making them nonconforming), and about 600 existing buildings would be nonconforming with the setback requirements from 18% slopes. Based on incomplete analysis, it appears that the draft rules would make roughly twice as many existing buildings in St. Paul nonconforming with regard to locational standards related to bluffs and very steep slopes compared to the City’s existing regulations. Many of these would be single-family residential properties in long-developed neighborhoods.

Downtown Saint Paul. Several major buildings as well as Kellogg Park and 2nd Street are constructed in, on, or across the face of the downtown bluff. The draft rules specifically prohibit expansion of nonconforming uses where it would result in further encroachment into required setbacks. It appears that this would prohibit the creation of the *river balcony*, a feature proposed in the recently adopted Great River Passage Master Plan to improve the connection between Downtown St. Paul and the river, and would impact redevelopment of key downtown sites such as the Ramsey County Government Center West and former Ramsey County jail, a top priority for both the City of Saint Paul and Ramsey County. The need and reasonableness of rules that would prohibit development along the downtown bluff has not been demonstrated.

Several years ago a taskforce that included DNR staff was convened for the purposes of updating the City’s river corridor ordinance. The task force recommended excepting “the area of downtown Saint Paul along the river’s left descending bank from Chestnut Street to the Lafayette/Highway 52 bridge” from location requirements in the regulations. The same or a similar exception for downtown Saint Paul should be included in the MRCCA rules.

Ford redevelopment site. This is a redevelopment site of critical importance for which the City is doing careful, site-specific planning to create a new urban village that has the density necessary to be walkable and sustainable, and also has significant public spaces that would provide strong physical and visual connections to the river, restored natural systems, and integrated green infrastructure for stormwater management. It has not been demonstrated that the height restrictions that would apply to the Ford site under the proposed rules are needed to protect critical views of and from the river, and they may unreasonably inhibit appropriate redevelopment of the site. The CA-SR Separated from River District, which is used directly across the river from the Ford site, is a less restrictive option that would be a better fit for appropriate redevelopment of the Ford site, especially for the portion farther east.

3. Administrative burden, intrusiveness, and cost

Several aspects of the draft rules would be unnecessarily costly and intrusive for property owners, and create unnecessary costs and administrative burden for municipalities. These include: a) development restrictions that would result in many nonconforming structures; b) some of the provisions regarding development and administration of ordinances; and c) requirements for permanent set aside and restoration of private land for public conservation and habitat purposes through public acquisition, conservation easements and deed restrictions, which are subject to regulatory takings law. The rules need to balance such impacts with the purpose of the rules. In some cases the connection between the rule and critical area purposes is weak or questionable. In other cases there are alternative, less costly and less intrusive options for achieving the purpose of the rules.

As noted above, draft rules pertaining to locational standards related to bluffs and slopes would result in a large number of new nonconforming structures. They would also be unnecessarily intrusive regarding construction of common residential accessory structures and, subject to some minor exemptions, patios, driveways, retaining walls, and changes to vegetation in residential yards. The DNR has indicated in presentation and in documents such as their Homeowners Guide to the Rules that these standards are intended to protect slope integrity and reduce the potential for erosion. This can be achieved in a less intrusive and more reasonable manner through development standards, including but not limited to requiring a report and plans certified by a licensed professional such as a geotechnical or soils engineer showing that the soil types and geology are suitable for the proposed development, how slope stability will be protected, how the development will be accomplished without increasing erosion, and how vegetation will be managed to control runoff and increase ground water infiltration.

Our Parks design staff note that the proposed definitions of “*very steep slope*” and “*slope preservation zone*)” include areas that are not really prohibitive land forms and can reasonably be built on with competent design and construction. Maintained turf slopes are commonly built to a 25% grade, and any earth sheltering of buildings almost requires slopes of at least this minimum. Best management practices and accepted engineering standards typically permit restoration slopes of 33% (1 foot rise over a distance of 3 feet) to 50% (1 foot rise over a distance of 2 feet). Moreover, current stormwater treatment and erosion control requirements (both during and after construction), including proposed requirements in the draft rules, are much more stringent than those in place at the time of Exec. Order 79-19. Broad prohibitions on development in these areas are unreasonable, unnecessary, and overly intrusive.

A number of other aspects of the draft rules, such as vegetation and stormwater management provisions, would introduce significant new permit requirements and/or additional conditions and standards for review. They would add a large number of restrictions on property use that would need to be explained and monitored, and require permitting processes that would add significantly to the time and expense of otherwise relatively simple and inexpensive projects. The cost associated with some of these rules does not appear to be justified by possible benefits.

The draft rules include a “flexibility” provision that provides for local ordinances that are not in “strict conformity” with the MRCCA rules, requiring that the local government unit demonstrate that special circumstances exist and “justify” the use of alternative standards to

meet the intent of the rules. “Special circumstances” described in the draft rules include places where “urban, residential, commercial or industrial development patterns have been in place for many years and much of the development does not meet the minimum state standards.” This approach is in direct conflict with both the authorizing legislation, which requires that the rules be consistent with existing development, as well as with the requirement that the purposes of the rules be achieved through the least costly and least intrusive methods.

4. Lack of Data and analysis

The DNR has not conducted meaningful analysis of how the proposed rules will impact existing development in the MRCCA. The ability to do any such analysis depends on the availability of accurate geographic data depicting the natural features such as slopes and bluffs that the some of the proposed regulations are based on. To date, the DNR has not provided accurate and complete geographic information of these features.

The draft rules propose prohibition of any kind of development, including construction of impervious surfaces for driveways, patios, etc., on and within 20 feet of bluffs and very steep slopes as defined. The draft rules also propose the same prohibitions within 40 or 100 feet of the tops of these features depending on the MRCCA district. While the draft rules propose definitions of very steep slopes and bluffs, the definitions are fairly complex and difficult to accurately map. The DNR has provided only "preliminary" geographic data identifying these features.

The City of Saint Paul had done a rough analysis of the impacts of the proposed rules, in terms of the number of nonconforming structures and lots that would be created, using the preliminary data provided by the DNR. This analysis indicated substantial impacts. However, based on discussions with DNR staff and examination of the data, it is not clear if the data provided by the DNR is completely consistent with the definitions of bluff and slope features that are used in the draft rules. The DNR has also not provided accurate or complete geographic information regarding the location of the ordinary high water level (OHWL), another important feature addressed in the rules.

Accurate data regarding the location of protected features and zones is crucial to understanding the impacts of the draft rules, particularly in Saint Paul where many long-developed neighborhoods are located on and very close to bluffs, and include numerous separate little slopes and hills. Therefore, we are working with DNR staff to refine mapping of bluffs and slopes as defined in the draft rules.