



CITY OF SAINT PAUL
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To: Comprehensive Planning Committee

From: Josh Williams and Allan Torstenson

Subject: **Comments on Draft Rules for Mississippi River Corridor Critical Area**

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 DNR will accept comments on its working draft rules for the MRCCA through August 15.

The proposed rules would mandate new MRCCA zoning overlay districts and regulations that the city would be required to adopt, administer, and enforce.

The purpose of this memo is to provide background for and begin to outline some primary city comments and concerns.

Background and MRCCA History:

1976 MRCCA, stretching 72 miles from Dayton to Hastings, designated as a state critical area by Governor Wendell Anderson (Executive Order No. 130).

The MRCCA includes about 7150 acres of land in St. Paul, 21% of total city land area. Of the roughly 17,000 parcels of land in the Critical Area, 3948 parcels (23%) are in St. Paul.

1979 MRCCA designation continued by Governor Albert Quie (Executive Order 79-19). Exec. Order 79-19 required local units of government to adopt local plans and regulations for the MRCCA, and provided Standards and Guidelines for this.

Interim Development Regulations for the MRCCA. Exec. Order 79-19 included Interim Development Regulations that it said “shall remain in effect . . . for each local unit of government until it adopts plans and regulations approved by the Council.” Exec. Order 79-19 said that “at the options of local units of government, they [the Interim Development Regulations] may be used as guidance for the preparation of plans and regulations” but “should not be used as a complete model ordinance.”

DNR documents misrepresent the Interim Regulations in Exec. Order 79-19 as “existing regulations,” even though they were replaced by locally adopted regulations over 30 years ago (1982 in St. Paul).

Interim Use District Boundaries. The Interim Regulations in Exec. Order 79-19 said that because the Corridor “should be managed as a multiple-purpose resource, and possesses a variation in both natural characteristics and types of urban development,” it was segmented into four use districts “which shall be applied throughout the Interim Period” pending adoption of local regulations. The interim use district boundaries, defined in one page of text in Appendix B of Exec. Order 79-19, broadly and roughly reflected the predominant land use directly along the 144 miles of riverfront itself. They did not attempt to reflect land uses further from the river, leaving such more fine-grain analysis for local regulations.

DNR documents and maps misrepresent the interim use districts in Exec. Order 79-19 as current, causing unnecessary confusion. DNR maps showing MRCCA districts should be updated to show current locally adopted MRCCA districts. Any reference to the interim use districts should accurately represent them as the original interim use districts in 1979, noting that district boundaries and designations were amended in approved local ordinances over 30 years ago.

1982 St. Paul’s local River Corridor regulations were adopted and approved by the EQB, establishing standards and criteria for four River Corridor Overlay Districts:

RC1 River Corridor Floodway Overlay District

RC2 River Corridor Flood Fringe Overlay District

RC3 River Corridor Urban Open Overlay District

RC4 River Corridor Urban Diversified Overlay District

1995 EQB responsibilities for the Critical Area shifted to the DNR by Governor Arne Carlson (Reorganization Order 170).

2009 Legislature directs DNR to conduct rulemaking for the Mississippi River Corridor Critical Area.

2011 DNR develops draft rule after participatory stakeholder process, but rulemaking authority lapses.

2013 Legislature directs DNR to resume rulemaking process in consultation with local governments. The new rules are to update, replace, and be more prescriptive than the Standards and Guidelines for Preparing Plans and Regulations for the MRCCA in Exec. Order 79-19. MN Stat. 116G.15 authorizes the rules and directs the DNR to manage the MRCCA as a multipurpose resource, “consistent with its natural characteristics and its existing development, and in consideration of potential new commercial, industrial, and residential development and redevelopment,” in a way that “conserves the scenic, environmental, recreational, mineral, economic, cultural, and historic resources and functions of the river corridor, . . . 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.”

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.

Comments:

The City of Saint Paul has a long track record of diligent and careful planning and management of the MRCCA as a multipurpose resource consistent with its natural characteristics and its existing development, in a way that conserves the scenic, environmental, recreational, mineral, economic, cultural, and historic resources and functions of the river corridor as required.

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 the areas to be protected 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 effort has been focused on planning, development and management of this park and open space system and other areas in St. Paul for the purposes of the MRCCA, from the St. Paul Mississippi River Corridor Plan in 1981, creation of the St. Paul Riverfront Corporation and all of the important work they have done over the years, to the more recent Great River Passage Master Plan adopted in 2013.

General City concerns with the working draft rules include:

- Superseding the careful, fine-grain, site-specific planning the City is doing, such as for implementation of the Great River Passage Master Plan, with overly prescriptive, unnecessarily restrictive, broad-brush, apparently arbitrary, unjustified, problematic, corridor-wide limitations in the rules;
- Elements of the rules that are broadly inconsistent with existing development, thereby creating a lot of nonconformities, and inconsistent with existing MRCCA guidelines to provide for the continuation, development, and redevelopment of a variety of urban uses; and
- The substantial burden and cost for property owners and cities of unnecessarily restrictive rules and of requiring permanent set aside and restoration of private land for public conservation and habitat purposes through public acquisition, conservation easements and deed restrictions subject to regulatory takings law.

Detailed comments, citing specific provisions in the rules and providing suggestions and alternative language that could improve the rules, will be compiled. Following is a summary of some primary comments and concerns on specific topics.

Prohibitions of development on all very steep slopes

The draft rules define “*very steep slope*” as a slope with an average grade as little 8 degrees from horizontal (18%), which is a 2 foot rise in an 11 foot run, that may be as little as 10 feet high. The draft rules would prohibit structures, impervious surfaces, land alteration, and vegetation removal on all such slopes. These prohibitions are particularly onerous in regard to areas of very steep slopes that are relatively small in contiguous areal extent and/or not connected with bluff complexes—such as those found in a number of Saint Paul neighborhoods—and in areas that have been developed for commercial, industrial, or residential purposes for many years.

Our understanding is that these prohibitions are intended to protect slope integrity and reduce the potential for erosion. To a lesser extent they may be intended to maintain or improve stormwater infiltration and reduce the visibility of development from the river, although any connection to this is unclear and unstated, the best thing for stormwater infiltration may be to leave the flat part of a site open for infiltration and tuck a walkout basement or earth sheltered structure into a slope where stormwater would otherwise run off.

The purposes of protecting slope stability and preventing erosion 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 (SPZ)*” (on and within 20 feet of very steep slopes) 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 intrusive.

The Interim Development Regulations, which were in effect between 1979 and 1982 and said they may be used as guidance for permanent regulations but should not be used as a model ordinance, did not allow new structures on slopes greater than 18%. However, the specific standards and guidelines for preparing plans and regulations in Exec. Order 79-19 simply said they need “to protect bluffs greater than 18% and to provide conditions for the development of bluffs between 18% and 12%.” The standards and guidelines did not suggest that development needs to be prohibited on all very steep slopes, or even that development needs to be prohibited everywhere on bluffs.

Drafting new rules to replace the standards and guidelines for preparing plans and regulations in Exec. Order 79-19 not only provides an opportunity to take a fresh, thoughtful look at what standards are needed and reasonable to protect bluffs and very steep slopes.

Minnesota statutes that govern the rulemaking process require that if existing standards are unneeded or unreasonable, or if the purposes of the rules can be achieved through less costly or less intrusive methods, they must be replaced by new standards that are less costly, less intrusive, and more reasonable.

The creation of Slope Preservation Zones (SPZ) and Bluff Impact Zones (BIZ)

The SPZ and BIZ are 20 foot zones surrounding very steep slopes and bluffs in which structures, impervious surfaces, land alteration, and vegetation removal would be prohibited. Combined, these two zones would make about 1,300 existing buildings in Saint Paul nonconforming, and impact about 1,800 properties in St. Paul, along with large numbers of roads, driveways, etc. The SPZ and BIZ were not a feature of Exec. Order 79-19, nor are they a feature of Saint Paul's current approved critical area overlay ordinance. Thus, the statement in the DNR's Homeowner's Guide to the MRCCA Working Draft Rules that building setbacks "will not change for most homeowners" is really misleading.

It is not clear what benefit, if any, would be derived from the proposed SPZ and BIZ. The Homeowner's Guide says "the setback provisions are intended to keep buildings and other development activity away from . . . areas prone to soil erosion." However, prohibitions on development on steep slopes themselves are unnecessary, and extension of this prohibition to adjacent areas is also unreasonable, unnecessary, and intrusive.

Bluff definition

The bluff definition in the draft rules (slopes at least 25 feet high with an average grade of at least 30%) is generally consistent with that of the Minnesota Shoreland Rules and with the blufflines that were defined and mapped as part of St. Paul's River Corridor regulations adopted and approved in 1982. However, it also picks up some little hills that are not part of primary bluff complexes facing the river.

Changes to increase bluff setback requirements and apply them also to all very steep slopes

A 100 foot bluff setback requirement that currently applies only in rural open space areas under the draft rules would also apply to most urban parks and some urban developed areas including the Highwood neighborhood in St. Paul. Perhaps the most significant change from the rules that were drafted in 2010 is a change to apply 40 to 100 feet bluff setback requirements also to all very steep slopes. This significantly increases setback requirements and would make a lot of additional homes and other buildings nonconforming. An estimated 600 buildings in St. Paul alone would be in these bluff and very steep slope setback areas.

It is not clear what benefit, if any, would be derived from these proposed changes. They are unreasonable, unnecessary, overly intrusive, and do not comply with the direction in MN Stat. 116G.15 that the rules be consistent with existing development.

Prohibitions on Downtown bluff development

Downtown Saint Paul has an intimate relationship with the Mississippi River bluff. The Ramsey County Government Center West buildings (comprised of former West Publishing

buildings and the former Ramsey County jail), Ramsey County Government Center East, and the District Energy Facility are built right into the bluff. Kellogg Park is on a structure built right on the bluff, and 2nd Street crosses the bluff face. More recently, the Science Museum of Minnesota was constructed immediately adjacent to and in front of the bluff.

Proposed redevelopment of the Ramsey County Government Center West site would be inconsistent with the draft rules. *Prosper: Momentum is Building*, a 2014 report from Mayor Coleman’s Downtown Task Force, identified the RGCG West site as a key redevelopment opportunity for Saint Paul. The redevelopment of the site is also a top priority for Ramsey County, and would return valuable land to the tax rolls.

The rules as drafted would have prevented construction of the Science Museum. The draft rules would also prohibit the creation of the river balcony, an important feature identified in the recently adopted Great River Passage Master Plan, which will guide Saint Paul’s continued reconnection to the Mississippi River over the next 30 years.

When the Planning Commission and a special St. Paul Critical Area Task Force, which included DNR staff, looked at updating St. Paul’s River Corridor regulations several years ago, both recommended excepting “the area of downtown St. Paul along the river’s left descending bank from Chestnut Street to the Lafayette/Highway 52 bridge” from location requirements in the regulations.

Administrative burden and lack of analysis of rule impacts

The proposed rules outline protections for a number of key natural features of the MRCCA, and the areas adjacent to them, such as setbacks and protection zones. The draft rules include definitions of both these features themselves, such as primary conservation areas and bluffs, as well as the areas where development prohibitions apply and the features that help delineate those areas, such as the slope protection zone and the ordinary high water level. However, proper understanding of the impacts of the proposed rules, as well as efficient administration of the rules through ordinance, requires geographic information which has been neither considered by the DNR nor made available as part of the rulemaking process.

At the outset of the rulemaking process, DNR staff provided GIS files that allowed the mapping of bluffs and very steep slopes. However, these files include both natural and man-made (such as road embankments) features, the latter of which are not included in the definitions of bluff and very steep slope in the draft rules. Other geographic data sets were not provided at all, including the ordinary high water level of the Mississippi River (needed to determine shoreline setbacks and the shoreland protection zone), the bluffline (needed to determine required bluff setbacks) and the top of very steep slopes (needed to determine required very steep slope setbacks).

The lack of good geographic information has two consequences in regard to the rules and their implementation. First, understanding of the location and spatial extent of the protection and setback zones for bluffs, very steep slopes, and shorelines is required to adequately evaluate the impact of the rules on existing development, i.e., which existing structures and developed areas are impacted. Second, the lack of good geographic information sets the stage for an administrative burden on local governments in developing and administering zoning overlays to implement the rules. Both local governments and

property owners are likely to face increased costs, and the potential for conflict between local governments and property owners and other stakeholders is increased.

A similar problem exists with the definition of primary conservation areas. Primary conservation areas are targeted for preservation and/or restoration where significant new development or redevelopment occurs. While the rules allow for some local government discretion in identification of resources for protection, the definition of primary conservation rules includes a number of vague terms, which will lead to confusion regarding what features require protection under the rules.

In general, the proscriptive approach taken by the rules necessitates that, in order to prevent an undue burden on local governments, sufficient geographic information regarding the resources to be protected be provided. The alternative is to provide substantially greater leeway to local governments in identifying resources for protection.

Flexibility provisions/exceptions

The draft rules include several provisions which allow for small scale exceptions to development prohibitions as well as local flexibility in the implantation of the rules as ordinance. The inclusion of some of these provisions was specifically in response to comments provided informally to DNR staff prior to the release of the draft rules and is an improvement to the rules. However, a number of concerns still exist.

The draft rules presently contain a number of provisions which are overly proscriptive and which fail to adequately meet the charge of the DNR (from MN Stat. 116G.15) to provide for the “continuation, development, and redevelopment of a variety of urban uses, including industrial and commercial uses.” The inclusion of a provision [cite] which will potentially allow local government units, at the discretion of the DNR, to in special circumstances adopt ordinances which are not in strict conformance with the MRCAA rules is an insufficient mechanism for addressing the shortcomings of the rules and does not meet the obligations of the DNR under the rulemaking legislation. The provisions invite confusion over the intent of the rules, and leaves uncertainty regarding how the rules will affect the City and our residents and business and property owners. It should not be necessary to ask for an exception to the rules in order for the rules to reasonably apply to the 23% of Critical Area parcels of land in Saint Paul.

The draft rules also provide for exceptions for limited removal of vegetation, land disturbance and installation of retaining walls and patios in area where it would otherwise be prohibited. These exceptions may not be sufficient in scope (i.e., the amount of vegetation removed or the size of a retaining wall) to allow reasonable use of long-developed residential lots. A more appropriate approach would be to craft blanket exceptions in long-developed urban areas such as within Saint Paul, or to craft rules that are more reasonable and consistent with existing development so that exceptions would not be necessary.

MRCCA district designations

Although the draft MRCCA rules generally do not regulate land use, the rules provide for six different districts that are tied to dimensional standards, particularly limits on building height and setback requirements. In theory, the districts are drawn to group areas of a similar

type and intensity of land use together.

The proposed district boundaries for Saint Paul can be seen in Figure 1, attached. Proposed district designations are inconsistent with the height of existing development in some areas, and may unreasonably or unnecessarily restrict some key redevelopment sites, including the Ford site and the West Side Flats. In other areas, proposed district designations seem to be inconsistent with how the districts are used in other parts of the MRCCA.

The draft rules released in April reclassified the developed residential neighborhood in the Highwood area east of Highway 61, which is separated from the river by distance, industrial areas, and Highway 61, as CA-ROS Rural and Open Space, an inappropriate designation for a Saint Paul neighborhood. The principal impact of this change would be to increase required bluff setbacks, which the draft rules now also propose to apply to “very steep slopes,” from the 40 foot setback required in all other districts to a 100 foot setback required in the CA-ROS district. It would make a large number of homes in the Highwood neighborhood nonconforming. This change is unjustified, unnecessary, unreasonable, highly intrusive, and does not comply with the direction in MN Stat. 116G.15 that the rules be consistent with existing development.