

No. A05-1029

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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Minnesota Center for Environmental Advocacy,

Appellant,

vs.

City of St. Paul Park, R. Gordon Nesvig, and D.R. Horton, Inc.,

Respondents.

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BRIEF OF *AMICUS CURIAE*  
MINNESOTA DEPARTMENT OF NATURAL RESOURCES

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GEORGE C. HOFF, #45846  
AMANDA K. MORKEN, #0329228  
Hoff, Barry & Kuderer, P.A.  
160 Flagship Corporate Center, Suite 160  
775 Prairie Center Drive  
Eden Prairie, MN 55344  
Telephone: (952) 941-3220  
*Attorneys for City of St. Paul Park*

LAURIE J. MILLER, #135264  
RICHARD D. SNYDER, #191292  
DEBRA A. SCHNEIDER, #313105  
Fredrikson & Byron, P.A.  
400 Pillsbury Center  
200 South Sixth Street, Suite 4000  
Minneapolis, MN 55402-1425  
Telephone: (612) 492-7000  
*Attorneys for R. Gordon Nesvig, and D.R.  
Horton, Inc.*

JANETTE K. BRIMMER, #174762  
Suite 206  
26 East Exchange Street  
St. Paul, MN 55101  
Telephone: (651) 223-5969  
*Attorney for Minnesota Center for  
Environmental Advocacy*

MIKE HATCH  
Attorney General  
State of Minnesota

DAVID P. IVERSON, #180944  
Assistant Attorney General  
445 Minnesota Street, Suite 900  
St. Paul, MN 55101-2127  
Telephone: (651) 296-0687  
*Attorneys for Amicus Curiae Minnesota  
Department of Natural Resources*

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## STATEMENT OF *AMICUS CURIAE*<sup>1</sup>

The Minnesota Department of Natural Resources (“DNR”) is an agency of the State of Minnesota with several significant areas of responsibility, including the administration of the Mississippi River Corridor Critical Area. The Mississippi River was designated as a critical area in 1976 by the State of Minnesota and comprises 54,000 acres of riverway corridor within the seven-county Twin Cities’ metropolitan area. The primary reason for designating the Mississippi River as a critical area was the State’s desire to protect and preserve this unique natural resource and to prevent or mitigate irreversible damage resulting from development activities. In order to achieve this purpose, the DNR’s responsibilities include ensuring that local governments comply with State development standards and guidelines applicable to the entire river corridor.

The DNR respectfully submits this brief as *amicus curiae* in an effort to provide the Court with an overview of the Mississippi River Corridor Critical Area. In addition, DNR wishes to express its concern that the district court’s order, if upheld, could allow for the piecemeal development of discrete parcels of land within the Mississippi River Corridor Critical Area without requiring consideration of the environmental impacts of such development on the entire corridor. Consequently, the DNR submits this brief in support of the position of Appellant Minnesota Center for Environmental Advocacy.

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<sup>1</sup> Pursuant to Minnesota Rule of Civil Appellate Procedure 129.03, the undersigned certify that counsel for *amici curiae* Minnesota Department of Natural Resources authored the brief in whole and that no other person or entity made monetary contribution to the preparation or submission of this brief.

## LEGAL ISSUES, STATEMENT OF THE CASE, AND STATEMENT OF FACTS.

DNR is in agreement with the Legal Issues, Statement of the Case, and Statement of Facts as set forth in Appellant's brief.

### ARGUMENT

This appeal involves environmental review undertaken pursuant to Minn. Stat. ch. 116D (2004) and Minn. R. ch. 4410 (2003) by Respondent City of St. Paul Park ("City") for residential and commercial development proposed by Respondents R. Gordon Nesvig and D.R. Horton, Inc. The development, called the "Rivers Edge Development Project," encompasses 667 acres along the east bank of the Mississippi River in southern Washington County, Minnesota. *See* Record ("R") at 5660, *et seq.* Approximately 250 acres of the proposed project lie within the Mississippi River Corridor Critical Area, an area subject to heightened regulatory protection due to its unique and important natural values and resources. *Id.*

In order to consider the environmental impacts of the Rivers Edge Development Project, the City prepared an Alternative Urban Area Wide Review and Mitigation Plan ("AUAR"), instead of an Environmental Impact Statement ("EIS"), pursuant to Minn. R. 4410.3610 (2003). (R. 5582.) An AUAR is an alternative form of environmental review. Its "key feature is that its subject is a development scenario or several scenarios for an entire geographical area rather than a specific project." Minnesota Environmental Quality Board, *Guide to Minnesota Environmental Review Rules* 15 (1998) ("MEQB Guidelines") (Appellant's Appendix ("AA") at 174). In preparing an AUAR, the

responsible government unit ("RGU") is required to follow the form of an Environmental Assessment Worksheet ("EAW"), but provide the same level of information and analysis as an EIS. Minn. R. 4410.3610, subp. 4 (2003).

Part of the analysis required in an EAW and an EIS is a discussion of the cumulative impacts resulting from the proposed project. Minn. R. 4410.1700, subp. 7.B; 4410.2000, subp. 5; 4410.2100; and 4410.2300, item H (2003). Cumulative impacts are defined as "the impact on the environment that results from incremental effects of the project in addition to other past, present, and reasonably foreseeable future projects regardless of what person undertakes the other projects." Minn. R. 4410.0200, subp. 11 (2003).

Notwithstanding these requirements, the final AUAR prepared by the City did not provide a discussion of the possible cumulative impacts of the development on areas outside of the 667 acre project site. (R. 5503, 5604, 5688). To the contrary, the City merely stated that no discussion of cumulative impacts was necessary in the AUAR process. (R. 5582, 5735); (AA 21).

Appellant Minnesota Center for Environmental Advocacy challenged the City's decision in Washington County District Court. However, the district court found that a discussion of cumulative impacts was unnecessary. *Minn. Ctr. for Envtl. Advocacy v. City of St. Paul Park*, CX-04-4470 slip op. at 6-7 (Washington County District Court, April 20, 2005) (AA 124-25). The district court found that Minn. R. 4410.3610 (2003), which sets forth the AUAR process, does not specifically state that cumulative impacts

are a required topic for analysis in an AUAR. *Id.* In addition, the court found that the guidelines prepared by the Minnesota Environmental Quality Board (“MEQB”) assume that the AUAR is designed to automatically consider all cumulative impacts within the large geographic area that is the subject of the study. *Id.*

The DNR is troubled by the district court’s conclusion. By finding that cumulative impacts occurring outside of the study area may be ignored, the decision could have a detrimental impact on the ability of the agency to protect the Mississippi River Corridor Critical Area. The DNR believes that piecemeal land development within the critical area requires due consideration of its impact on the Mississippi River Corridor Critical Area as a whole, not just within the development area.

**I. THE MISSISSIPPI RIVER CORRIDOR CRITICAL AREA IS AN IMPORTANT STATE RESOURCE GIVEN HEIGHTENED PROTECTION BY STATE LAW.**

In 1973, the Minnesota Legislature adopted the Critical Areas Act to provide for the designation of areas of the State considered of critical concern due to the impacts of increased development on the State’s natural resources. *See* Minn. Stat. §§ 116G.01-.151 (2004); 1973 Minn. Laws ch. 752. In particular, the Critical Areas Act permits the designation of areas of the State “containing or having a significant impact on historical, natural, scientific, or cultural resources of regional or state-wide importance” that are threatened by significant development. *See* Minn. Stat. § 116G.05 (2004).

By Executive Order 130, dated October 18, 1976, Governor Wendell R. Anderson designated the segment of the Mississippi River located within the Twin Cities metropolitan area as the Mississippi River Corridor Critical Area and set forth “Standards

and Guidelines” to be utilized by local governments in regulating land use within the river corridor. 1 S.R. 656-83 (November 1, 1976) and 1 S.R. 768-811 (November 23, 1976); *see* Minn. Stat. § 116G.06, subd. 2(a) (2004) (governor may designate by written order areas of critical concern). Governor Albert H. Quie issued Executive Order 79-19 on February 26, 1979, that continued the designation of the Mississippi River Corridor Critical Area and the “Standards and Guidelines” to be utilized by local governments. 3 S.R. 1680, 1692-710 (March 12, 1979) (AA 127, 139-57). On July 12, 1979, the Metropolitan Council approved the designation, permanently establishing the Mississippi River Corridor Critical Area. *See* Minn. Stat. § 116G.06, subd. 2(c) (2004) (governor’s order establishing critical area made permanent by approval by regional development commission, the Metropolitan Council here). The Metropolitan Council also approved the Standards and Guidelines to be followed by local governments in preparing, adopting, and revising local land use plans and regulations. *Id.*

The MEQB was originally directed to administer the Critical Areas program. *See* Minn. Stat. §§ 116G.04, 116G.07, 116G.09, and 116G.10 (2004). MEQB’s management responsibilities included review and approval of zoning plans and regulations adopted by local governments located along the Mississippi River corridor for consistency with the Standards and Guidelines set forth in Executive Order 79-19. 3 S.R. 1696 (March 12, 1979) (AA 143-44). The process of adopting plans and regulations by local governments proceeded through the 1980s and into the early 1990s. On July 31, 1995, the Minnesota Department of Administration (“DOA”) transferred authority to administer the

Mississippi River Corridor Critical Area to the DNR pursuant to DOA Reorganization Order No. 170.<sup>2</sup> This reorganization gave DNR management authority over the Mississippi River Corridor Critical Area.<sup>3</sup> It retains this authority today.

Under the oversight of the DNR, the Mississippi River Corridor Critical Area is administered as a joint state and local program providing coordinated planning and management for 72 miles of the Mississippi River and 54,000 acres of adjacent corridor lands running from the cities of Dayton and Ramsey in the north to the lower St. Croix National Scenic Waterway in the south.<sup>4</sup> Management of the Mississippi River Corridor Critical Area is guided by the Standards and Guidelines that were first set out in Executive Order 130 and made permanent by the Metropolitan Council, providing for coordinated management of the Mississippi Corridor Critical Area through State

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<sup>2</sup> The reorganization order became effective upon filing with the Secretary of State's Office on August 31, 1995. *See* Minn. Stat. § 16B.37, subd. 2 (1994).

<sup>3</sup> In 1988, Congress passed the Mississippi National River and Recreation Area Act ("MNRRA"), finding that the Mississippi river corridor in the Twin Cities metropolitan area "represents a nationally significant historical, recreational, scenic, cultural, natural, economic, and scientific resource" and that "there is a national interest in the preservation, protection and enhancement of these resources ...." 16 U.S.C. §§ 460zz-a (2002). In the federal designation of the river corridor, Congress set the same boundaries as the MRCA. *See* 16 U.S.C. § 460zz-1(a) (2002); *see also* Minn. Stat. § 116G.15 (2004). Implemented by the National Park Service ("NPS"), MNRRA established a coordinating commission to provide development and land use planning assistance to local governments lying within the river corridor and, presently, NPS implements the MNRRA Comprehensive Management Plan. *See* 16 U.S.C. §§ 460zz-2; 460zz-4(d) (2002). DNR presently coordinates local land use assistance with the NPS under both the MNRRA and Mississippi River Corridor Critical Area programs.

<sup>4</sup> An extensive general discussion of the Mississippi River Corridor Critical Area and DNR's role in its management can be found at the DNR website, <http://www.dnr.state.mn.us/waters/watermgmt-section/critical-area/index.html>.

oversight. See 1 S.R. 656-83 (November 1, 1976) and 1 S.R. 768-811 (November 23, 1976).

The Standards and Guidelines begin by stating that:

[T]he purposes of the Critical Area designation and the following standards and guidelines are:

- (a) to protect and preserve a unique and valuable state and regional resource for the benefit of the health, safety and welfare of the citizens for the state, region, and nation;
- (b) to prevent and mitigate irreversible damage to this state, regional, and national resource;
- (c) to preserve and enhance its natural, esthetic, cultural, and historical value for the public use;
- (d) to protect and preserve the river as an essential element in the national, state and regional transportation, sewer and water, and recreational systems; and
- (e) to protect and preserve the biological and ecological functions of the corridor.

3 S.R. 1692-93 (AA 139-40). The Standards and Guidelines provide a framework to be followed by local governments in the preparation of and amendment to land use plans and regulations. *Id.* at 1692-97 (AA 139-44). The DNR's role includes providing technical assistance to local governments, but more importantly reviewing and granting or withholding final approval of land use plans, ordinances, and amendments to plans and ordinances affecting lands within the Mississippi River Corridor Critical Area in order to achieve the goal of resource protection and preservation set forth in the Standards and Guidelines. Minn. Stat. §§ 116G.07 and .12 (2004). Once plans, ordinances, and amendments have been approved, the DNR provides ongoing technical assistance and reviews development proposals and applications requiring discretionary actions or a

public hearing that arise under the local plans and ordinances.<sup>5</sup> *Id.*, see also Minn. R. 4410.9800 (2003).

The State expressly determined that the Mississippi River Corridor Critical Area is entitled to heightened protection through comprehensive land use and development planning and implementation that is to be applied corridor-wide. By placing the Mississippi River corridor under unified State-level management, the Legislature recognized both the need for coordinated planning and that such planning, and the resulting resource protection, could not be accomplished in a piecemeal fashion by many different local government entities. See Minn. Stat. § 116G.02 (2004) (legislature recognizes natural systems “which perform functions of greater than local significance”). This broad management scheme is important to note when considering the important question of defining the scope of environmental review. Under the district court’s interpretation, the existence of the critical area designation is all but ignored by allowing environmental review to be limited to a single project area. Viewed in this context, the district court’s interpretation, if upheld, would not only frustrate adequate environmental review but also defeat the very purpose of the critical area designation.

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<sup>5</sup> In the present case, the DNR notified the City that DNR approvals were a necessary step for local plan and ordinance amendments for the Rivers Edge Development Project and that such approvals would be “unlikely” if proposed amendments to the City’s Critical Area plan and ordinances “are inconsistent with State laws and standards.” DNR letter to City, dated May 4, 2004 (AA 27-28).

## II. THE DISTRICT COURT'S INTERPRETATION IGNORES IMPACTS OCCURRING OUTSIDE OF THE PROJECT AREA.

The DNR's concern lies with the district court's determination that the environmental review performed by the City for the 667 acre River's Edge Development Project did not need to include a discussion of the impacts of the proposed project outside of the study area. *See Minn. Ctr. for Env'tl. Advocacy*, slip op. at 6-7 (AA 124-25). This is of particular concern to DNR since the natural features, resources, and habitats that are meant to be preserved and protected by the Mississippi River Corridor Critical Area designation are not limited to the project site but are shared throughout the river corridor.<sup>6</sup> For example, there may not be a heron rookery within the project area, but development within the area could very well impact herons living elsewhere in the critical area. This recognition was the reason for designating the river corridor as a critical area and subjecting it to the State's management oversight. *See* 3 S.R. 1693 (March 12, 1979) (AA 140) (purpose of designation of critical area is "to protect and preserve the biological and ecological functions of the corridor"). By limiting discussion to a project area, the resulting environmental review process would ignore the fact that activity in one part of the critical area impacts other parts. Environmental review procedures should be used to support, not defeat, such interests.

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<sup>6</sup> The DNR noted many of these corridor-wide impacts from the project in its comments on the AUAR made to the City. *See* DNR Comment Letter dated July 16, 2003, to City ("DNR Comments") (AA 5-22). These include possible cumulative impacts to the aquifer and associated seeps (AA 10-11), to existing vegetation found throughout the corridor (AA 16), and impacts resulting from habitat fragmentation (AA 21).

Approximately 250 acres of this proposed development lies within the Mississippi River Corridor Critical Area. The area is largely rural and retains many natural aspects and incorporates a variety of rare habitats that the critical area designation is meant to protect. These include varieties of prairie and oak savannah habitats, as well as bluffs, flood plain forest, upland oak forest, and Mississippi River backwaters. (AA 8, 19-20.) The diverse habitat of the project area is important to the support of migratory waterfowl and many other bird species that do not limit themselves to this 250 acres. (R. 5561, 5619, 5938-39, 6004.) In addition, the project area is a part of a unique geological feature where seeps, springs, and sinkholes form connections between surface and groundwater. (R. 6005, 6050-51.) The interrelationship of this project site to the critical area, and the DNR's concern of the impact of one on the other, is reflected in the agency's statement to the City that "[t]he destruction or diminishment of any part [of the resource] would effectively diminish the functions and values of the whole." DNR Comments at 16 (AA 20). These natural features of the project area, as well as the use of the project area by wildlife, are not limited to the project boundaries. The AUAR incorrectly assumes they are so limited if cumulative impacts are not found part of its analysis. If the district court's decision is affirmed, the practical effect will be that impacts occurring beyond this project area can be ignored based upon the faulty assumption that the AUAR incorporates all impacts.

The court's holding, based solely on language taken out of context from MEQB's general guidance on environmental review, is contrary to the overall statutory and rule

requirement that cumulative impacts be addressed in environmental review. By rule, EAWs and EISs are required to thoroughly examine all potential environmental impacts from a proposal, including an analysis of cumulative impacts.<sup>7</sup> See Minn. R. 4410.1700, subp. 7.B; 4410.2000, subp. 5; 4410.2100; and 4410.2300, item H (2003); *see also* Minn. Stat. § 116D.04 (2004). MEQB recognized that cumulative impacts would be a necessary part of AUAR when an AUAR is used for large geographical areas where more than one project is proposed. *See* MEQB Guidelines at 16 (AA 175) (the AUAR “is an excellent tool for review of cumulative impacts of multiple projects in a given area”). Where an AUAR is prepared for a single project, however, the consideration of cumulative impacts is not an inherent part of an AUAR. In such a case, a cumulative impacts analysis focusing only on the study area is woefully inadequate. Consistent with Minn. Stat. § 116D.04, a separately broader cumulative impacts analysis is required under those circumstances.

### CONCLUSION

In its comments to the City on the AUAR, the DNR stated that, “[i]n evaluating this project, the [City] should be careful to envision this is a whole system, not as parts that can be removed without paying a heavy ecological price.” DNR Comments at 16 (AA 20). In its decision, the district court validated the City’s failure to look at the Mississippi River Corridor Critical Area as a “whole system” in the environmental

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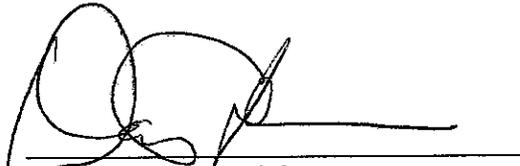
<sup>7</sup> Even MEQB guidelines highlight the importance of analysis of cumulative impacts in environmental review. *See* MEQB Guidelines at 5 (AA 166).

review process. Consequently, for the foregoing reasons, the DNR respectfully submits that this Court should reverse the district court in favor of Appellant Minnesota Center for Environmental Advocacy.

Dated: July 15, 2005

Respectfully submitted,

MIKE HATCH  
Attorney General  
State of Minnesota

A handwritten signature in black ink, appearing to read 'DAVID P. IVERSON', is written over a horizontal line.

DAVID P. IVERSON  
Assistant Attorney General  
Atty. Reg. No. 180944

445 Minnesota Street, Suite 900  
St. Paul, Minnesota 55101-2127  
(651) 296-0687 (Voice)  
(651) 296-1410 (TTY)

ATTORNEYS FOR MINNESOTA  
DEPARTMENT OF NATURAL RESOURCES

AG: #1434747-v1