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By: OAH on 7/12/2016 at 11:07 AM

Friends of Shepard Davern, LLC
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friendsofsheparddavern@gmail.com

July 12, 2016

Administrative Law Judge Eric L. Lipman
Office of Administrative Hearings
600 North Robert Street
PO Box 64620
St. Paul, MN 55164-0620
Fax: 651-539-0310

Dear Judge Lipman,
Thank you for the opportunity to respond to comments and changes made in the hearing process for the Mississippi River Corridor Critical Area rules.

On June 3, 2015 we testified before the City Council in regard to the Johnson Brothers development of the U.S. Bank site on Shepard Road and their request for a height variance of 73.5 feet. Attached is a letter from our attorney Peter Coyle of Larkin Hoffman to the Saint Paul City Council, and our position remains the same.

Therefore, we are very pleased to support the DNR's proposed zoning change for the Shepard Davern Area along Shepard Road from Highway 5 to Rankin from Urban Mixed District - UM (height limit of 65 feet) to River Towns & Crossings District – RTC (height limit of 48 feet).

We also therefore support the Friends of the Mississippi River's preference for a 48 foot height limit because the bluffs and shorelines of the Mississippi River are a highly significant and sensitive resource, and we agree with that for the entire length of the St. Paul river bluffs for consistency and preservation,

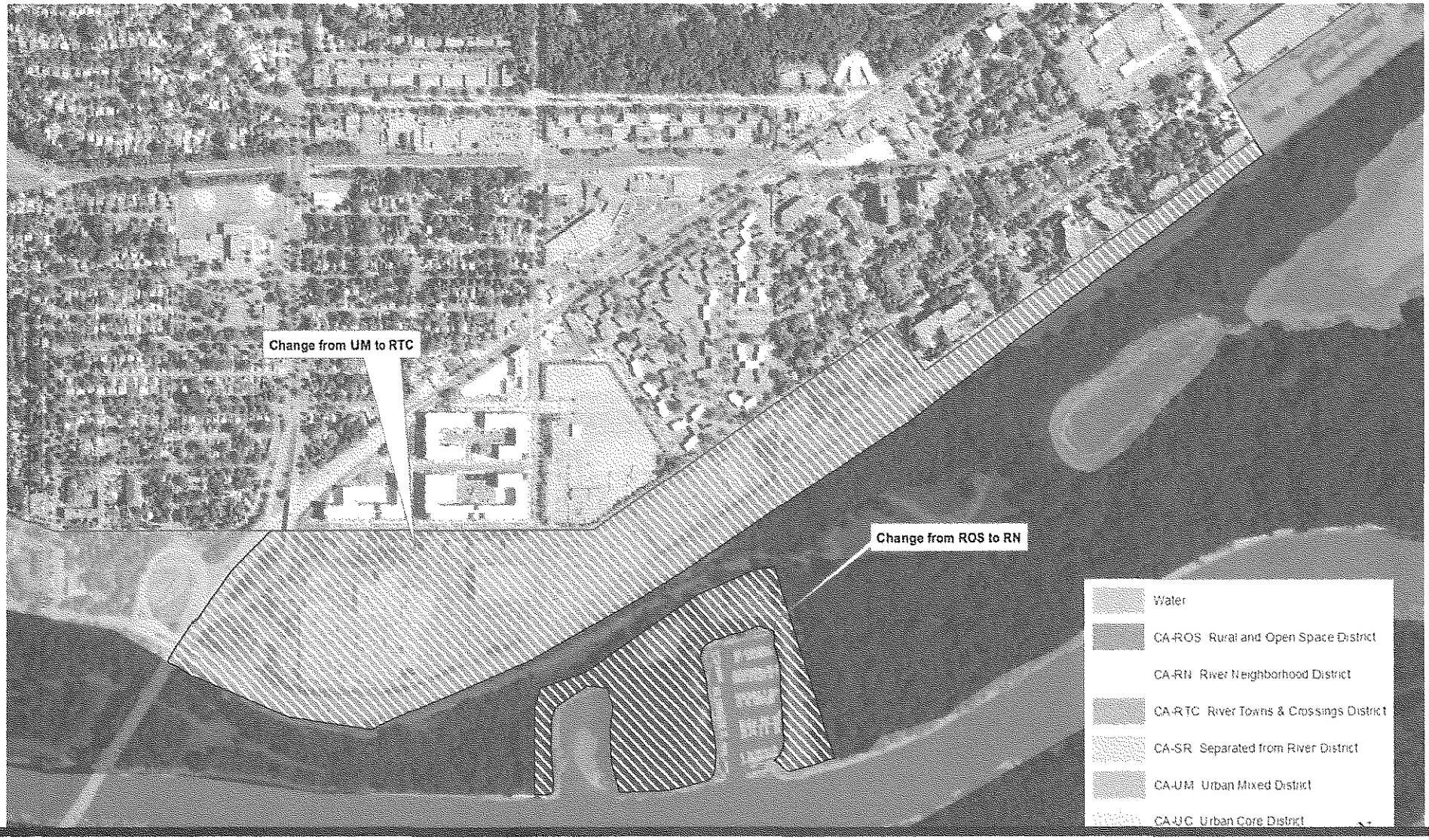
Sincerely,

Connie Barry and Art Kourajian for
Friends of Shepard Davern, LLC

Attachment: Zoning Change Map for Shepard Davern Area

cc: Mayor Chris Coleman
President Russ Stark and Members of the Saint Paul City Council
State Representative Dave Pinto
State Senator Dick Cohen
Alicia Uzarek, Friends of the Mississippi River

MRCCA Proposed District Changes
W 7th to Rankin & Watergate Marina



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May 13, 2015

Council President Russ Stark
City of St. Paul
320-C City Hall
15 Kellogg Blvd., West
Saint Paul, MN 55102

Re: Shepard Development LLC (1475 Davern Street) Variance Appeal

Dear Council President Stark:

This firm represents Friends of Shepard Davern, LLC ("FSD") with regard to the appeal of the height variance granted to the proposed mixed use development located at 1475 Davern Street (the "Property") in the City of St. Paul (the "City"). FSD is an organization that consists of residents and property owners of the Shepard Davern Area, including residents of Highland Pointe Condominiums. On April 24, 2015, the City Planning Commission approved the land use applications by the developer of the Property, Shepard Development LLC (the "Developer"), for site plan review and a variance to construct a mixed use building (the "Project") at a height of 73.5 feet, which is 33.5 feet taller than the height permitted by the City Code. On May 4, 2015, the Friends of the Mississippi River appealed the Planning Commission's decision. On behalf of FSD, we respectfully request that the City Council grant the appeal and deny the Developer's applications on the following legal basis.

1. Legal Standard for Variances

Under Minnesota law, a variance may be approved only when it is "in harmony with the general purpose and intent of the ordinance and when the ordinances are consistent with the comprehensive plan." Minn. Stat. § 462.357, subd. 6(2). A variance request must be predicated on "practical difficulties" in meeting the municipality's ordinance standards. This can be shown by demonstrating that: 1) the applicant proposes to use the subject property in a reasonable manner not permitted by the zoning ordinance; 2) the condition giving rise to the variance is due to a unique circumstance relating to the subject property; and, 3) if granted, the variance will not alter the essential character of the locality. Economic considerations alone do not constitute practical difficulties. *Id.*

When reviewing a municipality's zoning decision, the courts will reverse a zoning authority's decision to deny a variance and issue a permit if the decision is arbitrary and capricious. *In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999). A decision is arbitrary and capricious where it is based on insufficient evidence or arising from a failure of the zoning authority to apply relevant provisions of the applicable law. *In re Decision of County of Otter Tail Bd. of Adjustment*, 754

N.W.2d 323, 332 (Minn. 2008). Given the basis for the approval of the variance as described in the City's staff report, not only was the variance decision inconsistent with the City's Comprehensive Plan (the "Comp Plan"), but it failed to satisfy the required findings under Minnesota law.

2. The Proposed Height is Inconsistent with the Comprehensive Plan and is Therefore Inconsistent with Minnesota Law.

The staff report provides only one reference to height guidance in the Comp Plan, which was found in the Shepard-Davern Area Plan and calls for "3-5 story mixed use development." The staff report concludes that, notwithstanding the fact that the 6-story Project is a story taller than the Comp Plan guidance, it is "similar in height" to certain buildings along Shepard Road, so it must therefore be consistent with the Comp Plan. This is a non sequitur, in light of the fact that, according to the LIDAR data provided by the National Park Service, the tallest nearby buildings on Shepard road are 13.5 to 18.5 feet shorter than the proposed Project height. Moreover, the properties presumably referenced by the Staff Report are zoned either RM2 or RM3 Districts, which is irrelevant and inapplicable to the T3 zoned Property. There are additional inconsistencies between the approved height and the Comp Plan, many of which have been cited on the record and will not be reproduced here for the purposes of brevity.

3. The Developer Has Not Shown that Practical Difficulties Exist Under Minnesota Law.

The applicant has failed to demonstrate practical difficulties under Minnesota Statutes Section 462.357, subd. 6(2). The proposed height of the Property is not a reasonable height in light of the location and surrounding environment or the applicable policy. The condition necessitating the variance is shallow bedrock, which is not unique to the subject Property; it is a condition of all properties along Shepard Road and the bluff. The staff report acknowledges that many other structures on Shepard Road are built on shallow bedrock. The variance will also alter the essential character of the locality by disrupting view sheds on both sides of the river with a height that exceeds the highest buildings in the vicinity by 13.5 to 18.5 feet. Additionally, it is worth noting that the adjacent parking garage, which is also referenced in the staff report to justify the height of the Project, is 29.5 feet shorter than the proposed Project height, and the new height will dramatically alter the views of the river. Moreover, it is apparent that the primary driver of this application is to maximize rental units and increase revenues, which cannot, under the law, constitute a practical difficulty.

4. The Project Should be Treated as a Multi- Family Residential Structure.

The Developer has only proposed 1,200 square feet of retail in the 218,000-square foot Project. This very limited amount of retail accounts for less than 1% of the entire building, and can hardly be classified as "mixed use." It seems apparent that the intent of characterizing the Project as a "mixed use" building was to increase the maximum allowed height in the T3 District from 45 feet for multi-family residential buildings to 55 feet. While the Project has been evaluated and approved as a mixed-use development, the retail is *de minimis* and too trivial to warrant the classification of the Project as mixed-use development.

5. The Variance Ignores More Than 1.5 Years of Community Work to Adopt the Current T3 Zoning of the Property.

The Shepard Davern Task Force worked to adopt the new Traditional Zoning District for this area over a period of 1.5 years. The City Council finalized the recommendation and adoption of this zoning only 3 months ago. In determining these zoning classifications, the Council considered every constituency within the Shepard Davern neighborhood, including the possible development of the Property. This is the first proposal for new construction since the new zoning requirements have been adopted; approval of the variance ignores the height restrictions that were just recently adopted. Allowing this height increase establishes a precedent that the height requirements offer little protection to the neighborhood and will discourage future neighborhood group participation in similar planning processes.

FSD urges the City Council to grant the appeal and deny the height variance for the Project to allow a 73.5-foot tall building. FSD would support a height of 55 feet for the Project, which is the maximum allowed in the T3 District, but any additional height is unjustified. The Developer has not demonstrated the required practical difficulties under Minnesota law and the decision is inconsistent with the Shepard-Davern Area Plan. Consequently, the approved variance is inconsistent with Minnesota law and likely would be found arbitrary and capricious by a reviewing court.

Thank you for considering this letter of behalf of FSD in support of the appeal initiated by Friends of the Mississippi River challenging the building height variance for the Project.

Sincerely,

Peter J. Coyle, for
LARKIN HOFFMAN

Cc: Friends of Shepard Davern, LLC
Councilmember Dai Thao
Councilmember Dave Thune
Councilmember Chris Tolbert
Councilmember Amy Brendmoen
Councilmember Dan Bostrom
Councilmember Bill Finney

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Via Fax: (651) 539-0310

July 13, 2016

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

RE: Mississippi River Corridor Critical Area Comments
OAH Docket No. 8-9014-33236
R-4240 (Revisor's Number)

Dear Judge Lipman:

Friends of the Riverfront (FOR) is a Minnesota non-profit whose mission is to protect and preserve the cultural and natural resources of the Central Mississippi Riverfront Regional Park. We thank you for the opportunity to reply to the issues raised in the comment period regarding the St Anthony Falls Historic District (SAFHD), an important asset of the Critical Area that is endangered by both the construction of buildings that are too tall and the destruction of "contributing" properties.

The changes that we are ask are modest, but we hope that that if they are included in the final rules, that they may cause the City of Minneapolis to take a second look when considering projects that may further injure the SAFHD. The requested changes are as follows:

Reclassify property within the boundary of the St. Anthony Falls Historic District currently in the Urban Core District as Urban Mixed. The underlying maximum heights in the zoning code are more in line with Urban Mixed rather than Urban Core. As the SAFHD is likely a "primary conservation area", the CUP required under 6106.0080 Subp. 4 would require consideration of impacts on the SAFHD.

In the alternative, add a requirement in the Urban Core District for a CUP for height in the St. Anthony Falls Historic District. This would add the

considerations for a CUP contained in 6106.0080 Subp. 4. A and the additional considerations in 6106.0120 Subp. 2. D. for CUP's in the SAFHD.

Include all of Nicollet Island in the River Neighborhood District. Nicollet Island is a unique historical resource. As an Island any structures higher than the current historic structures will be visible from parkland on both banks of the river, from the water and from bridges. Views of the historic residential neighborhood are considered to be important features of the SAFHD.

SAFHD boundary is the Critical Area Boundary in Minneapolis

In recognition of the importance of the resources in the SAFHD, the Critical Area boundary in Minneapolis follows the SAFHD boundary. The rich historic resources in the SAFHD were one of the reasons that Congress created MNRRA and the National Park Service called out SAFHD as a Cultural Resource in the MNRRA's Comprehensive Management Plan.

The historic and cultural resources in the SAFHD were formally recognized as follows:

1965 Nicollet Island & Falls of St Anthony named as Historic Sites

1971 St Anthony Falls Historic District was:
1. Placed on the National Register of Historic Places
2. Designated as a Historic District by the State of Minnesota[1]
3. Designated as a local District by the City of Minneapolis

The Commissioner is required by the Critical Area statute to adopt rules that will protect historic resources in the SAFHD.

A Historic District is a Collection of Resources conveying a Sense of Time and Place.

A historic district is a collective of resources that give a sense of time and place. "The identity of a district results from the interrelationship of its resources, which can convey a visual sense of the overall historic environment or be an arrangement of historically or functionally related properties.[2]"

---

[1] 138.71 Subd. 17. St. Anthony Falls historic district (1971)

[2] National Register Bulletin: How to Apply the National Register Criteria for Evaluation. U.S. Department of the Interior, National Park Service. IV. How to Define Categories of Historic Properties.
DISTRICT
A district possesses a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united historically or aesthetically by plan or physical development.
(Continued on next page)

As such the integrity of a historic district can be damaged by **both** the destruction of properties that contribute to the district and the building of new intrusive and incompatible structures in the district. These actions damage "the sense of time and place."

New buildings that are too tall can have a devastating effect on the "sense of time and place." For example, many comments have stated concerns about the proposed 42-story Alatus building. It sits in front of and isolates the single story 1904 Beaux Arts Pillsbury Library, which is a significant contributing resource to the District.[3]

It has been long feared that the SAFHD is near a tipping point where we risk having the SAFHD removed from the National Register. Thus each additional destruction of a historic structure or addition of an intrusive building is magnified in its significance.

The precarious state of the District and its elements has been recognized by both national and statewide organizations. It has been listed on the Preservation Alliance of Minnesota's 10 Most Endangered Historic Places list twice and the National Trust for Historic Preservation's list of the 11 Most Endangered Historic Places.[4]

Proposed Rules do Little to Protect Historic Resources

The regulatory framework in the proposed rules does little to protect the historic resources in the critical area other than acknowledging that they exist and could be a "primary conservation area".

It is possible to build appropriate new buildings that do not damage the SAFHD. Appropriate height depends on the historic elements around the new construction.

We have considered many options that would allow appropriate new construction in the SAFHD, including a cap on height in the SAFHD and a restriction on increasing height more than a certain percent over existing zoning or guidelines governing the historic district. All of these are options the DNR could consider.

However, given the City of Minneapolis's request for flexibility, we are pessimistic that these options would be given serious consideration.

Concentration, Linkage, & Continuity of Features

A district derives its importance from being a unified entity, even though it is often composed of a wide variety of resources. The identity of a district results from the interrelationship of its resources, which can convey a visual sense of the overall historic environment or be an arrangement of historically or functionally related properties. For example, a district can reflect one principal activity, such as a mill or a ranch, or it can encompass several interrelated activities, such as an area that includes industrial, residential, or commercial buildings, sites, structures, or objects...

[3] http://minneapolishistorical.org/items/show/77?tour=5&index=18

[4] Preservation Alliance of Minnesota 10 Most Endangered Historic Places: St. Anthony Falls Historic District, Minneapolis (2005) and St. Anthony Falls Historic District, archeological ruins, Minneapolis (2008); and The National Trust for Historic Preservation 11 Most Endangered Historic Places, the Pillsbury A-Mill (2011).

Modest Suggestions to Add Some Protections for the SAFHD

We strongly urge the DNR to place the SAFHD property on both banks of the river into the Urban Mixed District. Being Urban Mixed would add special conditions for consideration of "primary conservation areas" which likely would include the SAFHD when a CUP is requested for an increase in height. All of the zoning in the SAFHD currently placed in the Urban Core has a maximum height of 4 stories or 56 feet.[5] This a good match with the 65-foot Urban Mixed District.

We acknowledge that there are 1990's era buildings on the east bank facing the river that are too tall. These are generally viewed as a mistake. Prior to 1999, there were no "maximums" on height in the zoning code. When the maximums were adopted, the zoning code provided for additional height with a CUP. Unfortunately, in the case of the Alatus building, this flexibility is being abused to the detriment of the SAFHD. We are thus very uncomfortable putting the SAFHD in the Urban Core District as it does not have any height limits and does not provide for CUPs that would give special consideration regarding "primary conservation areas" in the CUP process. If the DNR feels compelled to keep parts of the SAFHD in the Urban Core District, we request that it add the special consideration CUP requirement for the SAFHD.

We also ask that all of Nicollet Island be placed in River Neighborhood. The Island is a unique place and the inclusion of additional tall buildings would not only further damage the SAFHD, but greatly damage the public views in the Critical Area.

Thank you for consideration of our requests.

/s/ Christine Viken
Friends of the Riverfront

[5] is C1, C2, C3, I1, I2, R5, all of which have a maximum height of 4 stories or 56 feet

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By: OAH on 7/13/2016 at 2:21 PM

July 13, 2016

Katie Lin
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Fax: 651-539-0310

RE: Diane Hofstede, former Minneapolis City Councilmember, President of the Great River Coalition, Anthony West Neighborhood Organization Board Member, Member St. Anthony Falls Alliance(SAFA).

Comments on the Minnesota Department of Natural Resources Working Draft Rules for the Mississippi River Corridor Critical Area.

Proposed Permanent Rules Relating to Mississippi River Corridor Critical Area 1.3 6106.0010 POLICY. 1.4 It is in the interest of present and future generations to preserve and enhance the 1.5 natural, aesthetic, economic, recreational, cultural, and historical values of the Mississippi 1.6 River corridor within the Twin Cities metropolitan area and protect its environmentally 1.7 sensitive area.

Dear Ms. Lin,

The Great River Coalition, are advocates for preserving, protecting, and promoting the historic, commercial, and environmental significance of the Mississippi River, the city of Minneapolis and its relationship to the people and their communities.

The Great River Coalition requests that the Minneapolis District Map be changed to River Neighborhood (CA-RN) in the following area:
The St. Anthony West Neighborhood area West of Marshall Street Northeast, and North of the Hennepin Avenue Bridge to the South side of to 8th Avenue Northeast be classified as CA-RN (River Neighborhood). Bordering the Riverfront Regional Parks B.F. Nelson and Boom Island and fitting the DNR description **River Neighborhood District (CA-RN)** - Developed residential lands and existing/planned parkland that are visible from the river or that abut riparian parkland. The area

is a residential, single-family neighborhood currently **zoned R1-A,** in the adopted City of Minneapolis **Above the Falls Plan**, the St. Anthony West Small Area Plan as **R1-A** zoning.

The St. Anthony West Mission Statement in the Small Area Plan reads:

> ***The small area plan will focus our attention to the riverfront as our most important asset. It will examine means to embellish it, in order to improve our designated historic neighborhood: attract homeownership, strengthen the diversity of the ecology, improve river quality, and create St Anthony West as the City Minneapolis' most desirable, diverse, safe and sustainable river community in which to live, to work, and to recreate.***

St. Anthony West Neighborhood Vision Statement:

> *The St. Anthony West neighborhood will build on its assets (its history, quality housing stock, sound urban infrastructure, and supportive social networks) to usher in a rebirth in the neighborhood's appeal as a choice location.*
>
> *These characteristics, which made the neighborhood successful in the past, will serve the neighborhood's future, ensuring a welcoming environment for a diverse community of seniors, single adults, and families with and without children. The neighborhood will be viewed as an attractive area by people who want to become part of a cohesive and healthy community. Newcomers to St. Anthony West will value the neighborhood's historical and cultural resources, location within the region, proximity to downtown Minneapolis and the Mississippi River, accessible transportation options, and preservation of traditional land use.*

The classification as River Neighborhood, within the boundary of the Riverfront Regional Park, are

The CA-RN (River Neighborhood) designation is consistent with the adopted City of Minneapolis Above the Falls Plan, the Draft St. Anthony West Small Area Plan and the RiverFirst Plan adopted by the Minneapolis Park & Recreation Board in 2012.

RIVERFIRST

The Minneapolis Parks and Recreation Board adopted RiverFirst Plan supports the Riverfront Parks in the Northeast Neighborhood and as stated in the plan, " is critical to the creation of a larger regional parks and trails network, as well as ecological and infrastructure systems. It fills a gap in the Mississippi River parks and trails system and contributes significantly to the improved water quality of the river, completes a critical connection in the larger City of Minneapolis Grand Rounds, and links into the existing corridor initiatives taking place on both sides of the river. Furthermore, it creates a healthy community network and opportunities for economic development by tying into the expansive regional parks and trails system managed by the Three Rivers Park District and the Metropolitan Council. When realized, the RiverFirst proposal will enhance our regional identity and reinforce our role as civic leaders in the 21st century."

The Great River Coalition supports SAFA advocates for implementation of the updated Master Plan ("Master Plan") for the Central Mississippi Riverfront Regional Park ("Riverfront Regional Park") adopted by the independent Minneapolis Park and Recreation Board. The Master Plan is the controlling "municipal" plan. We support the statements submitted below by SAFA regarding the "Master Plan".

1. "The governance of the parks and recreational areas in Minneapolis is unlike most other municipalities in the United States. The Minneapolis Park and Recreation Board is legally separate from the City. ("Minneapolis Comprehensive Plan for Sustainable Growth," pg. 7-.)

The unadopted Draft Downtown Public Realm Framework Policy[3] that the City cites to support its comments specifically defers to the Master Plan.

"3.6.3 Parks and Open Space
The DPRF [Downtown Public Realm Framework] embraces the recommendations and planning guidance contained in the Central Mississippi Riverfront Regional Park Master Plan and defers to that plan with regard to all land currently held by the Minneapolis Park and Recreation Board."

2. **Metropolitan Regional Parks are High Quality Natural Resources**

The Metropolitan Regional Park System was established by the state legislature in the 1970's to protect as open space for public recreation, high quality natural resources pressured by development.[4] These regional parks were to be the equivalent of state parks, but located in the metro area. As regional parks were viewed as a state resource, their acquisition, development and management are funded by the State of Minnesota. The seven county regional park system is guided and administered by the Metropolitan Council. "Natural resource restoration and protection is a key objective in the Regional Parks System."[5]

3. **The Riverfront Regional Park while started in 1981 is not yet complete.**

The Minneapolis Park Board's long held goal is for continuous regional parks and trails along the entire length of the Mississippi riverfront in Minneapolis, thus protecting hundreds of acres of the Mississippi riverfront. This continuous riverfront regional park is meant to seamlessly connect with the regional parks in Hennepin, Ramsey and Anoka counties, forming part of the National Mississippi River Trail.

Minneapolis park design calls for a parkway to border the park with no private development allowed on the water side of the parkway. This standard Minneapolis park design was incorporated in the 1981 Riverfront Regional Park Master Plan that guided park acquisition and development.

The Great River Coalition with SAFA requests that the definition of River Neighborhood (6106.0100 Subd. 4 A) be modified to read: The district includes parks, open space and <u>properties within the boundary of a regional park slated for public acquisition,</u> limited commercial development, marinas, and related land uses. (Added language is underlined.)This will clarify the area. Planning for the Riverfront Regional Park started in the 1970's. The Master Plan was adopted in 1981. The updated Plan is currently in the Metropolitan Council's review process. The updated plan expands the boundary slightly. As this boundary expansion has not yet been formally adopted, this document refers to the adopted 1981 boundary.

4. **The Master Plan is the Controlling "Municipal" Plan**

"The governance of the parks and recreational areas in Minneapolis is unlike most other municipalities in the United States. The Minneapolis Park and Recreation Board is legally separate from the City. ("Minneapolis Comprehensive Plan for Sustainable Growth" pg. 7-2.)

The unadopted Draft Downtown Public Realm Framework Policy[3] that the City cites to support its comments specifically defers to the Master Plan.

"3.6.3 Parks and Open Space: The DPRF [Downtown Public Realm Framework] embraces the recommendations and planning guidance contained in the Central Mississippi Riverfront Regional Park Master Plan and defers to that plan with regard to all land currently held by the Minneapolis Park and Recreation Board."

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Minneapolis park design calls for a parkway to border the park with no private development allowed on the water side of the parkway. This standard Minneapolis park design was incorporated in the 1981 Riverfront Regional Park Master Plan that guided park acquisition and development.

[3] Draft Downtown Public Realm Framework Policy, pg 65[4] MINN. STAT. 473.302,[5] 2040 Regional Parks Policy Plan, pg. 31

6. **The Met Council requires that all property included within the boundary of a regional park master plan be acquired for park purposes.** The Park Board acquired all of the property within the 1981 park boundaries on both banks of the river except a handful of mainly low profile energy oriented properties owned by public utilities or the University of Minnesota, and a privately owned surface parking lot[6]. All these "in-holdings" in the 1981 Master Plan are required to be acquired for park purposes by the Park Board in the updated master plan. See Exhibit D. Master Plan pg. 8-3

Energy - gas distribution facility, low profile are slated for transition to non-industrial uses, they are subject to an Industrial Living Overlay which allows residential uses (including parks) in land zoned industrial.

Districts RN and ROS best fit the Management for the Resources

7. The Minneapolis Park Board requested the DNR to create a separate district for its current and planned large regional parks. This is in-line with the Metropolitan Council's desire to have regional parks in their own zoning classification.[9] The DNR declined that request stating that parks can be in any District. In doing so, the DNR did not take into account that some of these parks are not complete and that there are a handful of private "in-holdings" within the acquisition boundary of the Riverfront Regional Park. Placing the majority of the Riverfront Regional Park in Urban Core, an inappropriate district slated for intense development, may frustrate the park's completion and use by encouraging inappropriate private development on these important inholding parcels when they become available for purchase by the Park Board.

As regional parks do not fit perfectly in any of the draft districts, it is important to look at the resources and planned management contained in the Master Plan and attempt to fit it in the district where it best fits and protects the resources.

The RTC, UM, and UC districts contemplate that the land in the District will be managed in a more intense manner than it currently is. These districts do not contemplate that the land may be reclaimed

from a previous industrial use and restored to a more natural state.

The draft rules inappropriately place much of the Riverfront Regional Park in CA-UC. The UC district "... must be managed with the greatest flexibility to protect commercial, industrial, and other high-intensity urban uses," 6106.0100 Subp. 8.B. This is opposite from the restoration and protection of high quality natural, historic and cultural resources that is called for by the Master Plan and the Regional Park Policy Plan.

The Great River Coalition has concluded that the River Neighborhood District would better protect the resources, and better guide resource management than CA-UC, CA-UM, or CA-RTC.

[9] *The Met Council has urged that Regional Parks be placed in their own park zoning classification. They object to Minneapolis's practice of stating that regional parks can be in zoning classification as it can lead to confusion and possible inappropriate development. This is the same problem that could be encountered with the DNR's commingled category.*

The rules for CA-RN state:

> *"The CA-RN district must be managed to maintain the character of the river corridor within the context of existing residential and related neighborhood development, and to protect and enhance habitat, parks and open space, public river corridor views, and scenic, natural, and historic areas. Minimizing erosion and the flow of untreated storm water into the river and enhancing shoreline habitat are priorities in the district." (6106.0100 Subp. 4 B.)*

We concur with SAFA that the Riverfront Regional Park contains crucial habitat for migrating birds and supports a variety of animal life. Golden Eagle Protection Act (16 U.S.C. 668-668d) and are the subject of NFW management guidelines[10] that guide protection of nesting birds from nearby development. In Particular, nesting eagles have special cultural significance to the Dakota people. Spirit Island, a rocky island inhabited by eagles just below the Falls, was a sacred place to the Dakota people and was thoughtlessly desecrated and destroyed by Europeans. This loss of a sacred site had been greatly mourned. When the St. Anthony Heritage Board consulted with Dakota nation about how to honor the loss of Spirit Island, the Board was advised that nothing needed to be done as the return of the nesting eagle to the Falls was seen as a sign that all had been put right.

The Great River Coalition supports SAFA concerns that inclusion of the Riverfront Regional Park in any district other than RN or ROS may suggest that inappropriate intense development on "inholdings" is the desired outcome and will make it more difficult for the Minneapolis Park Board to acquire the property when the time comes[11]. This will not only interfere with the use and enjoyment of the Riverfront Regional Park; but also the use and enjoyment of the other regional parks that it is connected to.

[10] *National Bald Eagle Management Guidelines. https://www.fws.gov/northeast/ecologicalservices/pdf/NationalBaldEagleManagementGuidelines.pdf*

[11] *The Park Board acquired much of the private land in the Riverfront Regional Park through eminent domain. That tool is not as easily available and the current policy is to attempt to buy property from willing sellers.*

Conclusion

The Great River Coalition requests that the St. Anthony West Area **West of Marshall Street Northeast, South side of 8th Avenue Northeast, West of 5th Avenue Northeast be classified as River Neighborhood**, (CA-RN), adjacent to the boundary of the Riverfront Regional Parks B.F. Nelson and the Boom Island Parks. The cluster of single-family homes borders the parks. This area, in the St. Anthony West neighborhood, **is zoned R-1A**. The area identified in the adopted City of Minneapolis Above the Falls Plan as a single-family neighborhood, **zoned R1A**, and in the St. Anthony West Small Area Plan as single-family, **zoned R-1A**. The area is currently **zoned R-1A and consistent with the description of a River Neighborhood by the DNR: District (CA-RN) - Developed residential lands and existing/planned parkland that are visible from the river, or that abut riparian parkland.**

Thank you for considering our requests.

Sincerely,

Diane Hofstede,

President
Great River Coalition

RECEIVED
By: OAH on 7/13/2016 at 4:00 PM

VIA FAX 651 539-0310 --- 8 pages

July 13, 2016

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Administrative Law Judge Eric J. Lipman
Office of Administrative Hearings
600 North Robert St
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OAH Docket No. 8-9014-33236
Rev # R-4240

Dear Judge Lipman:

In reply to the comments made by the DNR in response to my testimony, I repeat my request to unite Nicollet Island as a River Neighborhood by placing all of it in CA-RN.

No valid reason has been put forward that the Island should be bifurcated, the plans that are cited support my position, and the management criteria for a river neighborhood is a much better fit for an Island where no change is planned. Upon reflection both the Minneapolis Park Board and FMR have restated their positions to align more with mine.

If the DNR has some valid reason to divide the Island, it should be one of the options that keeps the historical residential neighborhood together (options 2 Hennepin Avenue and 3 Grove Street).

To summarize the options:

1. All of Nicollet Island -- Friends of the Mississippi River
   Friends of the Riverfront
2. Hennepin Avenue -- Minneapolis Park Board
3. Grove Street -- Residential neighborhood boundary
4. Railroad Tracks -- City of Minneapolis unknown rationale

Based on review of the Central Riverfront Master Plan and the NEIBNA small area plan along with the zoning, the DNR response to my testimony was:

"Designation was changed from UM to RN/RTC in 11/14, following discussions with City and MPRB. The Small Area Plan guides Nicollet Island for Parks and Open Space (MPRB land) and low density residential in central portion. As both an island and historic district, Nicollet Island has special significance. The Regional Park Plan calls for preservation of island's existing character. The RTC district recognizes existing institutional and commercial uses and will allow some intensification where taller buildings currently exist. NO CHANGE"

K to 12 Schools are "related land uses" to Residential Neighborhoods not "Institutional Campus"

Despite asking the DNR and the City for any reason why Nicollet Island should not be RN, the above response by the DNR was first time that I have ever heard that a school was considered an "institutional campus" for the purposes of the Critical Area rules. I was informed earlier in the process by FMR that the words "institutional campuses" referred to small colleges and other post-secondary uses. The term "campuses" denotes a post-secondary use.

Over the weekend, I took a tour of part of the river and observed that small university campuses such as the University of St Thomas were in a RTC district carved out of a River Neighborhood.

I did not observe any K to 12 schools that had been carved out of RN districts and placed in RTC. In fact I observed 5 or 6 K to 12 schools in the RN district in both Minneapolis and St Paul. In Minneapolis these schools were in the most restrictive R1A residential zoning classification, the same as the school on Nicollet Island.

Schools are a very important asset and welcome addition to residential neighborhoods in Minneapolis. If at this late date, the DNR finds that K-12 schools are threats to the character of residential neighborhoods, the DNR will have to be consistent and remove all K-12 schools from all the RN districts in the Critical Area.

A better interpretation is that schools are "related land uses" in the RN district description[1] which reads "The district includes parks and open space, limited commercial development, marinas, and related land uses."

The school on Nicollet Island, compared to the other K-12 schools, is on a much smaller piece of land, is very compact and has low profile. The 3 story historic buildings which are exempt from the dimensional standards are taller than the recent additions, including the 1956 two story addition that is currently being internally retrofitted. If the DNR carves out these K-12 schools, they would be opening up taller development on some key riverfront parcels on Nicollet Island and the Gorge where height would be very visible.

[1] The Minneapolis Zoning Code has a use category Institution Public in which all K-12 schools are in. They are a conditional use in all residential neighborhoods. This category does not include post secondary uses.

Limited Commercial Uses are Permitted in River Neighborhoods

The DNR stated in its response to my comments that the RTC recognized the "commercial uses" on Nicollet Island. This is not a reason to place it in the RTC district as the RN District allows "limited commercial development." The South tip of Nicollet Island is owned by the Minneapolis Park Board. The only "commercial" use is the Nicollet Island Inn which is a very small Inn and restaurant in a historic buildings leased by the Minneapolis Park Board. It is a non-conforming use in a R1A zoning classification.

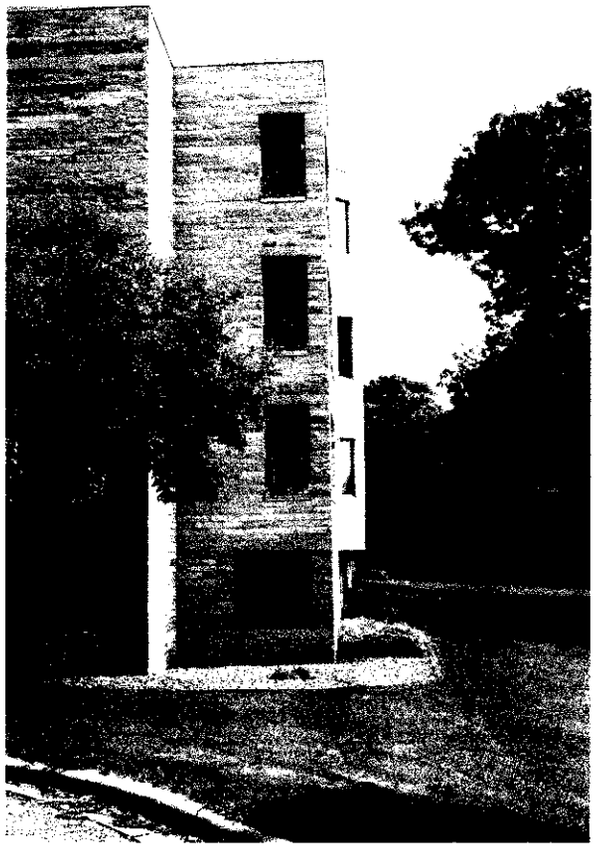
There are restaurants in other park properties including the Sea Salt restaurant in a historic building in Minnehaha park which is in the Rural Open Space District.

The other building on the South tip is the Nicollet Island Pavilion, another historic building that was repurposed as a park pavilion. It is currently used for park purposes, weddings and other celebrations. The building is not leased; but, like other park properties where liquor is served for weddings, there is a catering services agreement. The Master Plan calls for fewer of such events and more open public use. I understand that the caterer does not pay property taxes for the use.

Less public uses such as the privately owned Mississippi Gardens event venue at 9500 W River Rd in the RN district hosts private weddings and corporate events. It has no public ownership or use. While I think that it is a misclassification to consider the Pavilion a Commercial use, even if it is, the DNR is treating other similar uses like the Mississippi Gardens differently.

I observed commercial uses in the River Neighborhoods of the Critical area including this one which I believe is in the RN district.

Even if the school on Nicollet Island is considered a "Institutional campus", DNR's practice is to place adjoining residential uses in the RN District.



St Thomas University is in the RTC district, but the Leo Byrne residences for retired priests are in the adjoining RN districts. The Byrne residence is a 4 story building with 3 stories devoted to living space and the ground level devoted to parking.

There are also 5 story buildings in the RN.

Of the suggested districts the River Neighborhood is a better fit

The management of the two districts are vastly different. The RN is to be managed to"... maintain the character of the river corridor within the context of existing residential and related neighborhood development, and to protect and enhance habitat, parks and open space, public river corridor views, and scenic, natural, and historic areas."

"The CA-RTC district must be managed in a manner that allows continued growth and redevelopment in historic downtowns and more intensive redevelopment in limited areas at river crossings..."

"The river towns and crossings district (CA-RTC) is characterized by historic cdowntown areas and limited nodes of intense development at specific river crossings, as well as institutional campuses that predate designation of the Mississippi River Critical Corridor Area and includes taller buildings"

Nothing in either of the governing plans anticipates redevelopment or intensity.

As stated in the charts provided in my earlier written comments, the plans reflect no change. There are no plans for redevelopment.

The NEIBNA small area plan states:"The Plan envisions no changes to zoning or other land use controls on Nicollet Island during the next 20 years....with multiple overlapping special districts applicable to this part of the neighborhood there is little possibility of material change in the pattern of development."[2] Thus the kind of intense development that is a characteristic of RTC is not possible.

I believe that the DNR misinterprets a map in the Small Area Plan showing Future Uses which has the school and the residential area as "low density." The Historic District guidelines which cover this area state that "buildings up to 3 stories" are allowed. This is consistent with a residential neighborhood where if the school would leave which is not anticipated, it would be redeveloped consistent with its R1A zoning. This does not suggest an intensification of use.

In addition, if the school were to leave or any of the private property became available, it is in the boundaries of the Central Riverfront Regional Park and the Park Board should acquire it as park land.

---

[2] NIEBNA small area plan, pg 2.8.

Regional Park Master Plan for Nicollet Island is to maintain its current historical character[3]

"Main directive for Nicollet Island include promoting green infrastructure, restoration, more accessible public use, and connectivity while maintaining the island's overall experience and historical character."

Comments by Minneapolis Park Board are :

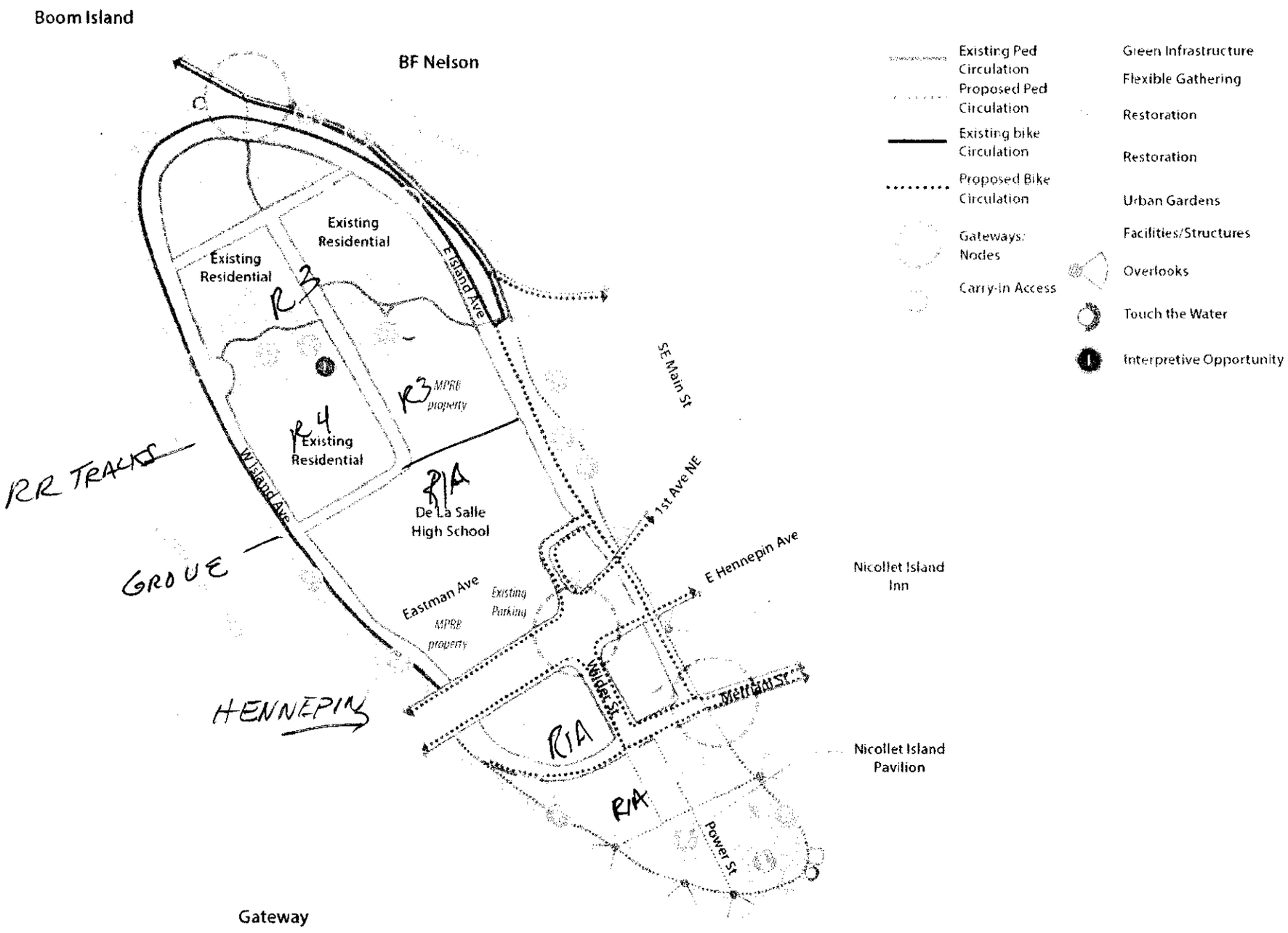
> 6106.0100, supb. 4: MPRB supports the categorization of the northern half of Nicollet Island in the CA-RN District. This district has height rules best suited to this primarily residential area that sits on parkland. However, we believe the boundary between the CA-RN and the CA-RTC districts should run along Hennepin/1st Avenues. Should taller, higher-density development occur between Hennepin Avenue and the railroad tracks, it would significantly diminish the character of the northern half of the island, which is an historic and low density neighborhood. MPRB urges modification of the district boundary on Nicollet Island.

In conclusion, I request that Nicollet Island be reunited as a River Neighborhood and if for any reason this can not be accomplished that it is divided in a way that keeps the historical residential neighborhood together.

Sincerely,

Edna Brazaitis

[3] pages 7-22 to 7-23


Boom Island
BF Nelson
Existing Ped Circulation
Proposed Ped Circulation
Existing bike Circulation
Proposed Bike Circulation
Gateways: Nodes
Carry-in Access
Green Infrastructure
Flexible Gathering
Restoration
Restoration
Urban Gardens
Facilities/Structures
Overlooks
Touch the Water
Interpretive Opportunity
Existing Residential
Existing Residential
R3
E Island Ave
R3 MPRB property
R4 Existing Residential
W Island Ave
RR TRACKS
R1A
De La Salle High School
GROVE
Eastman Ave
MPRB property
Existing Parking
HENNEPIN
SE Main St
1st Ave NE
E Hennepin Ave
Nicollet Island Inn
Wilder St
Merriam St
R1A
Nicollet Island Pavilion
R1A
Power St
Gateway

7. Nicollet Island

Main directives for Nicollet Island include promoting green infrastructure, restoration, more accessible public use, and connectivity while maintaining the island's overall experience and historical character.

A. Promote pedestrian connections to Nicollet Island from E Hennepin Ave.

B. Create a "Green Street Loop" with shared bicycle and roadway circulation along Island Avenue and Merriam Street.

C. Remove gravel parking area along Island Avenue. Restore and expand the woodland habitat.

D. Remove invasive species and restore woodland habitat on Nicollet Island North.

E. Utilize alternative, non-asphalt trail surfaces such as crushed limestone to preserve the unpaved and natural feel of the Merriam Street to Boom Island trail on Nicollet Island.

F. Promote open public use of Nicollet Island Pavilion and Park.

» Short-term: The current catering agreement runs through 2026. During this time the pavilion should be adapted to better serve public access needs to the south tip of the island during private events. This could include:

- Removing the tent between the Pavilion and the river that essentially 'claims' public riverfront.
- Providing better access to restrooms inside the pavilion.
- Move dumpsters from the south side of the Pavilion to a more appropriate place to encourage proper aesthetics and pedestrian circulation.

» Long-term: Consider establishing a partnership with a new enterprise to provide public programming for seasonal or year-round use.

G. Retrofit existing parking lot to include green infrastructure.

H. Power Street becomes a "woonerf" to treat stormwater and provide service access to Nicollet Island Pavilion.

I. Keep amphitheater function and program with low-volume events. Repair and rehabilitate aging infrastructure.

J. Restore shoreline and remove invasive species around the entire Island.

K. Ensure an off-street pedestrian trail starts at West Island Ave at the Hennepin Avenue Bridge, going around the south tip of the island, and then along the East Channel to Boom Island. Associated with C, E, and F above.

L. Support historical interpretation on Nicollet Island.

M. Support the restoration of the historic Grain Belt sign. Discourage any new signage facing the island or CMRRP.

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By: OAH on 7/13/2016 at 4:29 PM

SAINT PAUL PORT AUTHORITY

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FAX COVER SHEET

Date: 7/13/2016

To: Judge Eric Lipman / Attention: Katie Lin

Fax No: 651-539-0310

From: Lee Krueger

Number of pages, including cover sheet: 3

Message:

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July 13, 2016

Administrative Law Judge Eric L. Lipman
Office of Administrative Hearings
600 North Robert Street
PO Box 64620
Saint Paul, MN 55165-0620

RE: Revisor #R-4240 Mississippi River Corridor Critical Area Rulemaking

Dear Judge Lipman:

The Saint Paul Port Authority is submitting this letter as part of the rulemaking process regarding response to comments submitted during the initial 5-20 day comments period.

We request that you send the draft DNR rules regarding the Mississippi River Critical Corridor back to the DNR for further work and clarification.

Our reasons for requesting this action include the following:

1. Rational Basis: Compared to the assertion in the July 6, 2016, DNR letter to you, paragraph three, we contend that DNR has not, in fact, met the rational basis standard that the proposed rules are needed and reasonable. In fact, within DNR's Response to Public Comments of July 6, 2016, it admits that it needs to do more work on clarifying language in certain areas.

   Additionally, we find DNR's explanations in this document to be insufficient in the areas of:

   - Takings and Property Rights (including claiming that building heights will allow for "increased opportunities for business expansion", but DNR is silent on the impacts to lower scale commercial and industrial properties, and it is silent on the issue of the lack of ability of these uses to continue after a fire or to lose value with this stigma, or to unduly harm business owners who may wish to sell their property);

   - Less Intrusive Methods (the Port Authority in fact provided an idea in our letter to you of July 6, 2016 for the DNR to allow under the exceptions clause more local control and decision-making);

   - Costs to Local Governments (clearly more analysis work is needed on this matter regarding impacts, especially since the DNR process of helpful local governments will itself cause more administrative time; its contention of costs likely not exceeding $25,000 is quite low, and a more robust analysis, we believe, is called for);

- Costs to Small Businesses (there has been insufficient analysis of the many impacts on small businesses when stigmatized by being a nonconforming building; the Port Authority outlines a few above here, and did so in more detail in our letter to you referenced above);

- Bluff Definition Creating Too Many Nonconformities (DNR did not undertake any analysis of the number of properties affected; it relied on some data from one of the local governments, which is insufficient for the DNR to make the broad assertion that the impacts are not substantial);

- Comments Regarding Rip Rap (DNR agrees that more work needs to be done regarding clarifications, and this is another reason for the need for these rules to be sent back for further work).

2. DNR Zoning and Takings Memo of June 30, 2016: The Port Authority believes that the assertion in paragraph three, page four, is insufficient regarding the actual negative effect on businesses that will occur if these rules are enacted. The DNR should do more analysis in this area, rather simply contending that the rules were "to permit property owners to continue their current use and to develop their properties". This and the other language in this paragraph incorrectly and inadequately characterize the negative effects on property owners.

Judge Lipman, thank you for considering our request that you send these draft rules back to the DNR for more analysis and clarification. This will allow for the rules language insufficiencies, and the failures of the DNR to prove necessity and reasonableness to be corrected and reviewed in the future by all interested parties.

Sincerely,

Lee Krueger
President

cc: Lorrie Louder, Senior Vice President of Business & Intergovernmental Affairs
Eric Larson, General Counsel
Kathryn Sarnecki, Vice President of Redevelopment & Harbor Management
Jennifer Shillcox, Manager of Waters Division & MRCCA Rulemaking, MN DNR
Donna Drummond, Manager, Planning, City of Saint Paul, PED
Matt Kramer, President, Saint Paul Area Chamber of Commerce
Marie Ellis, Director of Public Affairs & General Counsel, Saint Paul Area Chamber of Commerce

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July 13, 2016

ADMINISTRATIVE HEARINGS
JUL 13 2016
REC'D AT LOBBY DESK

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

Dear Judge Lipman,

Thank you for the opportunity to provide comments in response to comments submitted by other parties regarding the proposed rules for the Mississippi River Corridor Critical Area (MRCCA). Overall, we are pleased with the draft rule and we support most of the rule modifications proposed by DNR that are described in their memo on pages 3-7. In reading the comment letters from other parties, there are a number of suggested changes or concerns raised that we disagree with. In most cases, no new or compelling evidence has been presented in support of weakening the standards. The rebuttal comments that we are providing here are not exhaustive, but rather an attempt to raise the issues we believe will have the greatest impact on the river's most important assets.

DNR Response to Comments memo p. 5

DNR proposes to make the following modifications to the section on local government requests for a district boundary change:

6106.0100 Subp. 9.C.(1)(d) District Boundaries

Line 35.7
(d) ~~be consistent with~~ identify those local comprehensive plans, regional system statements, and state park and transportation master plans, and applicable federal plans;

FMR Rebuttal: We concur with Judge Lipman's concern about the original language being overly broad, so adding specific detail to the types of local, regional, state and federal plans makes sense and we support this. We do not support deleting "be consistent with" and replacing it with "identify." This changes the meaning of the clause. "Be consistent with" is a requirement; "identify" does not require anything. DNR's proposed change goes beyond

what Judge Lipman asked for and no explanation for such a change is provided.

Consistency with a city's comprehensive plan is a required standard any time a city or township proposes amendments to their zoning code, and the MRCCA rules should include the same requirement

DNR Response to Comments memo p. 40-41
DNR provided the following responses to Friends of the Mississippi River's testimony

> **FMR COMMENT: SR District Several Sites.** Concerned that SR district allows too much uncertainty in determining whether individual structures exceed the height of the treeline or surrounding development.
>
> **DNR RESPONSE:** Propose to revise SR district height requirement to specify that height in underlying zoning must be generally consistent with the height of mature treeline and existing surrounding development (see Attachment D.0)

FMR Rebuttal: We appreciate the consideration given to this issue, and we support the proposed change. This approach raises a concern however, that, in the future, cities might opt to change their underlying zoning without notifying the DNR. We suggest adding language to the MRCCA rules to require that cities notify DNR if they change the underlying zoning in the SR District. We also wonder what will happen if in the future a city adopts underlying zoning that exceeds the height of treeline. Would those circumstances lead to an automatic district change from SR to one of the other districts?

> **FMR COMMENT: Subdivision.0170 Subp. 4B PCA set asides**
> Requirement for 50% open space in the ROS district is needed to protect specified scenic, geologic and ecological resources. This is reasonable because areas are already zoned for rural low-density. These areas (ROS) contain lands with the highest ecological integrity and function in the MRCCA. Open space dedication (set aside) in the ROS will preserve quality habitat and maintain the potential for public access to the river in the future. A 10% set aside requirement in the UM and RTC districts is reasonable, but for land adjacent to the river, a threshold of 10 acres is too high as most parcels in urban areas are already smaller than 10 acres. To effectively protect them, the set-aside threshold in these areas should be smaller than 10 acre; we recommend 5 acres. Some may argue that it's burdensome to monitor and enforce open space requirements on small acreage (5 - 10 acres) but we believe the statute requires these resources be protected and that benefits that will accrue in terms of property values, scenic enhancement and ecosystem health will last for generations and will be worth the effort.
>
> **DNR RESPONSE:** We carefully considered various proposals for set-asides on properties of various sizes, and continue to support a minimum size of 10 acres below which open space set-asides are not required. Our analysis showed that most parcels within the ROS district were 10 acres or more in size.

FMR Rebuttal: This comment had two parts and the DNR did not respond to one of them. We said "for land adjacent to the river, a threshold of 10 acres is too high as most parcels in urban areas are already smaller than 10 acres. To effectively protect them, the set-aside threshold in these areas should be smaller than 10 acre; we recommend 5 acres." This comment was intended to address the more urban areas of the corridor that are in the RTC or UM districts. Although land within RTC and UM often do not have as many primary conservation areas as land within ROS, if a parcel is river-adjacent, the shoreline is always present and worth protecting. There are many parcels smaller than 10 acres in the UM district in north and northeast Minneapolis that will be redeveloped in the next 5-20 years. Requiring open space dedication of the riverfront is a critical tool for ensuring that the urban riverfront provides adequate public access and open space for the growing urban population.

We'd also like point out that on page 14 of the Mississippi National River and Recreation Area (MNRRA) comment letter, they cite a survey conducted by National Park Service staff that found that 6% of the parcels within MRCCA were greater than 6 acres, whereas only 3.6% of the parcels were greater than 10 acres. Changing the threshold to 6 acres would not impact a large percentage of the land in the corridor, but it would double the number of properties potentially subject to open space dedication.

FMR Response to Comment Letter from Saint Paul Area Chamber of Commerce
The letter submitted by the SPACC is premised on flawed logic. It presumes that because the law includes provisions to ensure development can continue in the corridor, therefore any rules that infringe on the ability to develop land or expand a business are unreasonable.

For example, the letter states, "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."

And later in the document, "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."

SPACC concludes their letter by stating "the DNR has not followed state law in providing for development and redevelopment of industrial and commercial uses in the MRCCA rules."

First of all this language is not new. It comes straight out of the Executive Order and developers and businesses have been subject to corridor regulations for 35 years.

From E.O. 79-19 (3 S.R. 1693):

B. General guidelines for preparing plans and regulations
1. The Mississippi River shall be managed as a multiple-purpose resource by:
c. Providing for the continuation and the development of a variety of urban uses, including industrial and commercial uses, and residential, as appropriate, within the river corridor

The purpose of MRCCA is to protect and preserve the river's unique and significant resources and to allow development that will not impair those resources. SPACC appears to be arguing that the rules are invalid because some development will be limited, when in fact ensuring that those limits are in place is the intention of the Critical Areas Act

From Minnesota Statutes §116G.02 POLICY:

> "The legislature finds that the development of certain areas of the state possessing important **historic, cultural, or esthetic values, or natural systems** which perform functions of greater than local significance, could result in irreversible damage to these resources, decrease their value and utility for public purposes, or unreasonably endanger life and property. The legislature therefore determines that the state should identify these areas of critical concern and assist and cooperate with local units of government in the preparation of plans and regulations for the wise use of these areas."

FMR Response to Comment Letters from PAS Associates, Ltd; Upper Mississippi Waterways Association (UMWA), Aggregate Industries and City of Cottage Grove

FMR strongly disagrees with the request to change Lower Grey Cloud Island from the ROS District to the UM District. The City of Cottage Grove requested this area change from ROS to RN. Although this would be less drastic, we firmly believe that ROS is the district that is both needed and reasonable for Lower Grey Cloud for the following reasons.

- The island is extremely rural, with less than ten private homes on large rural lots, a bible camp and the Nelson Mine. There is no sewer service.
- The southern end of Lower Grey Cloud Island includes massive mussel beds that support more than 1 million mussels, some of which are rare or threatened species.
- Lower Grey Cloud and the small islands that surround it offer an unprecedented opportunity to restore and enhance fish and wildlife habitat in the corridor
- Most of the island is within the Grey Cloud Island Regional Park Boundary, which expresses the regional goal to reclaim the island as a natural area after the mining operation is completed.
- The landowner has presented development concepts to the City of Cottage Grove, but they have never approved a development plan. The City's comprehensive plan does not anticipate developing this area until after 2030.

In addition, we disagree with the comment from UMWA and Aggregate Industries that suggests adjusting the proposed standards in the UM district to grant existing industrial uses the same exemptions as are proposed for river dependent uses. There is no reason to

extend these exemptions to industry that does not require access to the river for its operations. Why should industrial uses be exempt when all other uses, including public parks, have to follow the rules? Exempting industrial uses would clearly be inconsistent primary purpose of the MRCCA, which is to protect the river resources.

FMR Response to Comment Letters from R. Gordon Nesvig and City of St. Paul Park

FMR disagrees with the request to change Gordon Nesvig's property in St. Paul Park from ROS to RN. Mr. Nesvig's property was the subject of a controversial development proposal in the early 2000s, and he falsely claims that the City, Met Council and DNR approved his development. The Alternative Urban Areawide Review (AUAR) was approved, but it is an environmental review document, not a development plan. The AUAR contained several scenarios, including one that retained rural densities on the site. Throughout the process, DNR was very clear that the property had significant and sensitive geological and ecological resources and the 100-foot bluff setback and 200-foot shoreline setback required by MRCCA under E.O. 79-19 would be strictly enforced. Although the area was zoned residential when St. Paul Park annexed the land from Grey Cloud Island Township, it is currently very rural and not sewered. Plans to provide sewer service to this area are tenuous because of the shallow bedrock and aquifers on site. The City's Comprehensive Plan does call for some development in this area, but it also includes goals to provide open space along the river. Considering the size of the property and the presence of bluffs, islands, groundwater seeps, high quality native plant communities and outstanding scenic values, the ROS District will provide the level of protection needed for this site if and when it gets developed.

We are attaching two letters from the DNR about this site to provide evidence of the ecological significance of the Nesvig property. The first letter expresses DNR's opposition to the annexation of the land in 2000 and the second letter is in regard to DNR's formal objection to the original draft AUAR in 2004.

FMR Response to Comment Letter from Minneapolis Park and Recreation Board

We urge you to provide the district changes requested by MPRB for land in their jurisdiction. In Minneapolis, the Park Board is independent from the City of Minneapolis and is governed by a body of locally elected commissioners. Their request should be sufficient justification for making this change. MPRB has taken a renewed interest in restoring and managing natural areas within their regional parks and it is encouraging and laudable that they have requested more parkland be in the ROS district. We support MPRB's request to include the following in the ROS district:

- West River Parkway between Cedar Lake Trail and Plymouth
- Boom Island and B.F. Nelson Park
- North Mississippi Regional Park

We also support MPRB's request to move the RN-RTC district boundary on Nicollet Island from the railroad tracks to Hennepin Avenue.

FMR Response to Comment Letter from the St. Anthony Falls Alliance

We are in strong agreement with the comments provided by SAFA, and the reason we are pointing this out is they did an outstanding job of providing evidence as to why the land within the boundary of the Central Riverfront Regional Park should not in the UC District. SAFA argues that the ROS-District is much more appropriate for Father Hennepin Bluffs than UC-District, and RN-District for the remainder of the park. Although we originally suggested this area be changed to UM, the evidence provided by SAFA makes a compelling case to provide the greatest level of protection for these areas. In particular, they cite City policy in which land use guidance is deferred to MPRB for land within the regional park boundary. We urge you to reconsider SAFA's suggested changed to the rules.

FMR Response to Comment Letter from the Mississippi National River and Recreation Area

Our final comment is in response to MNRRA's request to add islands to the definition of primary conservation areas (6106.0050 Subp. 53). We strongly agree and recommend doing this in order to ensure that the undeveloped islands in the corridor remain in a natural state. Executive Order 79-19 prohibited development on undeveloped islands in all but one of the original MRCCA districts (3 S.R. 1704), and if these protections are not extended into the future, we could lose important habitat for birds, fish and other wildlife.

Thank you for including us in a robust and constructive rulemaking process. We appreciate your consideration of these rebuttal comments.

Sincerely,

Whitney L. Clark
Executive Director

FMR Attachment 1

Minnesota Department of Natural Resources

500 Lafayette Road
St. Paul, Minnesota 55155-4010

April 12, 2004

[BY FACSIMILE]
[Original to follow by U.S. Mail]

Barry Sittlow, City Administrator
City of St. Paul Park
600 Portland Avenue
St. Paul Park, MN 55071

RE: DNR Objection to the Rivers Edge Final AUAR, Response to request for evidence

Dear Mr. Sittlow,

The purpose of this letter is to supplement and elaborate on our letter of March 31, 2004. The Department of Natural Resources (DNR) believes that our letter of July 16, 2003, the Final AUAR and Mitigation Plan where the RGU responded to our comments, our letter of March 31, 2004 and this letter, taken together constitute "...evidence that the revised document contains inaccurate or incomplete information relevant to the identification and mitigation of potentially significant environmental impacts..." (Minnesota Rules 4410.3610, Subp. 5D).

The DNR submits additional evidence on the following AUAR Items: 6, 10-15, 25, 27, and the Mitigation Plan. We do not have additional evidence to our March 31, 2004 letter on Items 16, 28, and 29 and do not believe such evidence is necessary to add to our previous correspondence.

Item 6: Description

Based on the Draft and Final AUAR, the Land Title Survey, and the Shoreland Program, calculations of open space for Rivers Edge do not appear to be adequate to support the cluster/PUD development being proposed. Within the shoreland overlay district, the most restrictive regulations relating to open space must be used.

Item 10. Cover Types

The DNR is encouraged that the Final AUAR reflects the recommendations of a 100 foot bluffline setback (average) for structures. However, we need to know the minimum setback and where the setbacks will be less than 100 feet from slopes greater than 18% (in addition to the area north of the bay) to evaluate impacts to vegetation, habitat, and views from the river. Additionally, shoreline and bluffline minimum setback areas must also exclude roads, parking areas and other impervious surfaces.

Item 11. Fish, Wildlife, and Ecologically Sensitive Resources

Dredging as a potential restoration measure
Dredging results in a loss of habitat. If dredging becomes a restoration measure as mentioned in Mitigation Item 11-10, more information about the intentions of the dredging and restoration are needed in order to evaluate the potential environmental impacts. The Final AUAR Mitigation Item 11-10 contradicts the statement on page 32 that no dredging is proposed in the Final AUAR.

Habitat restoration measures
At the top of page 35, the Final AUAR suggests that restoration of habitat "will enhance wildlife habitat in some locations that are currently degraded." If restoration measures are proposed, information should be provided as to how and what will be done in order to evaluate potential impacts. Will it affect the tree line? Will it affect the understory, shrubs, etc? What other visual effects will occur? Will it violate Critical Area standards?

Cumulative impacts of site development on habitat (Also relevant to Item 29)
Impacts to migratory birds remains an issue with the DNR since it is unreasonable to assume that the birds will find new nesting sites due to increased development in the area. DNR staff disagrees that the cumulative impacts do not need to be addressed in an AUAR process. Impacts to the river corridor beyond the AUAR study area should be discussed and evaluated.

Past development has shrunk the migratory bird habitat along the flyway. Current and reasonably foreseeable development continues to diminish those critical functions. Less habitat equals less wildlife. Based on understanding of animal behavior and ecology, nesting density in surrounding areas has been maximized. Returning birds, finding the nesting area diminished, will have to compete for sites, rather than just finding new sites.

Items 12. and 13. Physical Impacts on Water Resources and Water Use

Seeps and Springs
The Final AUAR does not adequately address our concerns about impacts to the seeps and springs. On page 41 (Seepage Areas and Springs), the FAUAR states that GME Consultants, Inc. concluded that "the placement of infiltration/detention basins near bedrock fractures would enhance the springs." (1) This conclusion appears to contradict GME's conclusion that "the source of the springs is well beyond the AUAR boundary from the north and east." (2) We continue to be concerned that detention and infiltration near bedrock fractures will provide a direct route for pollutants to enter the springs and seeps.

Groundwater
The DNR's Draft AUAR comment letter stated that the AUAR needed to include testing of the groundwater and a detailed groundwater analysis to determine which areas affect the seeps, alter

recharge rates, or provide groundwater recharge. The Final AUAR provides no details, stating only that GME conducted research and came to conclusions. Clarification is needed on what and how the research was conducted in order to evaluate the potential environmental impacts to the seeps, springs and groundwater.

Water Conservation Plan
Our comments on the Draft AUAR indicate that a Water Conservation Plan is required. This comment was not addressed in the Final AUAR.

Items 14. and 27. Water Related Land Use Management Districts and Compatibility with Plans

These Items are the most important in the AUAR because they determine whether or not the Rivers Edge development and Mitigation Plan will be/can be consistent with the state and local programs, plans, and ordinances. Proposed deviations (not necessarily all listed in the Final AUAR) and inconsistent mitigation plan items cannot be assumed to be approvable. We will need to go over comments from our July 16, 2003 letter and Final AUAR responses paragraph by paragraph. This will provide a better understanding of our comments and a better evaluation of the adequacy of your responses for these complex issues.

Item 15. Water Surface Use

Impacts associated with individual lot owners accessing the river have not been evaluated or addressed. Private owners should be informed that they have the right to request access, but that does not mean it is guaranteed or that a permit will be granted to have structures or topographic or vegetative alterations on steep slopes, within setbacks, and/or below the ordinary high water level of the river (docks, stairs, etc).

Item 25. Sensitive Resources

The Appendix I "view analysis" methodology is not documented in sufficient detail to determine its validity and adequacy to assess potential impacts of future development proposals. The DNR, Metropolitan Council and National Park Service requested that a comprehensive viewshed analysis be done for the proposed development. Suggested parameters included: 1) 35, 45, and 55-foot building heights; 2) leaf-on and leaf-off conditions; 3) view points approximate to those shown in Appendix I on figure I-1 (and possibly some upland locations); and 4) a viewer height of 5 feet. While a view analysis such as was conducted for the AUAR is useful to help visualize impacts of specific proposed structures if simulated summer vegetation is unchanged, conducting the recommended viewshed analysis would have helped in comprehensively determining the potential visibility of buildings over the *entire* AUAR area at a range of building heights. Results of such an analysis could then be used to determine building locations that would best minimize visual impacts and meet standards, and also to delineate critical vegetation retention areas. Carefully done, and combined with a vegetation management and preservation plan and appropriate structure

restrictions, a viewshed analysis of the AUAR area could also eliminate the need for additional future visual analysis.

The Mitigation Plan proposes that only summer, leaf-on conditions would be considered in any future site-specific visual analysis. This is inadequate. Consideration of leaf-off conditions and proposed vegetative alterations throughout the duration of the project, therefore, is critical for determining the potential visual impacts of developing this area.

Mitigation Plan

The current mitigation plan has inconsistencies with the Critical Area Program as well as local plans and ordinances. The DNR is concerned that an inconsistent AUAR and Mitigation Plan will be approved and then used to amend Critical Area plans and ordinances in such a way that the program's resource protection goals are compromised.

In some cases, mitigation is equated with complying with existing or amended ordinances, instead of avoiding or minimizing potentially significant environmental impacts.

In our commitment to work with you on resolving these issues, we look forward to meeting with you on Wednesday, April 14 at the St. Paul Park City Hall.

Sincerely,
S/

Thomas W. Balcom, Supervisor
Environmental Policy & Review Unit
Division of Ecological Services
651-296-4796

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Jim Larson, Metropolitan Council
Steve Johnson, National Park Service
Theresa Greenfield, MFRA
Peter Gualtieri, Bridgeland Consulting
Ciara Schlichting, DSU, Inc.
Richard Mullen, Town Clerk
Richard Adams, Board Chair
Tom Bell, Township Board

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FMR Attachment

Minnesota Department of Natural Resources

Metro Region
1200 Warner Road
Saint Paul, MN 55106

651-772-7990

October 19, 2000

The Honorable Beverly Jones Heydinger
Office of Administrative Hearings
100 Washington Square, Suite 1700
100 Washington Avenue South
Minneapolis, MN 55401-2138

RE: Proposed Annexation of the Gordon Nesvig Property

Dear Judge Heydinger:

The Metro Region Management Team of the Minnesota Department of Natural Resources appreciates the opportunity to comment on the proposed annexation of the Gordon Nesvig property in Grey Cloud Township. Our concerns regarding this matter arise from the high natural resource and habitat values currently evidenced on the property and in the adjacent waterways, the property's significant role as part of a healthy , biologically diverse riverine ecosystem, and the negative environmental impacts that may result from its development to the urban or suburban densities proposed by Mr. Nesvig and underlying his petition for annexation.

According to information compiled by the DNR's County Biological Survey, the portion of the Nesvig property located between County Road 75 and the Mississippi River contains several natural communities that have become increasingly rare and noteworthy. These areas provide critical habitat for birds and other animals that migrate along the river corridor. Given that less than six percent of the land area of Washington County–or even the entire metro region–supports natural communities, the natural communities found on this property are clearly a resource of local and regional significance worthy of efforts to protect them. Prairie, oak woodlands and floodplain forest provide an unusual mix of habitat types characterized by native species. Twenty-foot rock walls along the Mississippi River are home to native dry cliff flora. Because the landowner has not allowed DNR biologists access to this property for purposes of field surveying, evaluations of quality and diversity have been difficult. Observations have been limited to information that can be gathered from aerial photos and observations made from the river.

Along the river, the land funnels down to a picturesque, spring-fed bay, known locally as Crystal Cove. Mr. Nesvig has proposed converting this bay to a marina. The river in this area, along with its side channels and backwaters, and the vegetative communities in the vicinity of Grey Cloud Township, provide a host of habitat and recreational benefits, including:

- A travel corridor for migratory birds
- Food and cover for waterfowl, herons and other birds
- Fish spawning, nursery and feeding areas
- Habitat for aquatic invertebrates and refuge for increasingly threatened populations of freshwater mussels
- A significant urban fishery
- Canoeing and other recreational opportunities

A survey of the area conducted by the DNR in June 2000 reveals that Crystal Bay supports a healthy fishery and its sheltered waters serve as a nursery and harbor of refuge for many aquatic species. A June 2000 mussel survey of Pool 2, including areas near the Nesvig property, found 18 species of native mussels, including four listed as endangered, threatened or special concern in Minnesota. The survey also revealed clear evidence that native mussels are making a dramatic comeback in the area due to improved water quality resulting from state, regional and federal regulatory efforts. The braided backwater channels in the area of Crystal Cove also provide rich habitat for waterfowl. A two-month Spring survey of Mississippi River Pool 2 from Holman Field in St.Paul to Lock and Dam 2 at Hastings found an estimated 36,493 waterbirds using this area, which includes Crystal Cove. Six Minnesota threatened and special concern species were noted, as well as several other species of particular noteworthiness. The area is also within the territory of a pair of nesting bald eagles. Both resident and migrating eagles use this stretch of the river, with its maze of relatively undisturbed islands and backwaters, for roosting and foraging. Further development of this area, with the accompanying increase in surface water use, is likely to interfere with these majestic birds' reclamation of their Mississippi River territory.

The potential loss of these communities and natural features as a result of urban or suburban development raises serious environmental concerns. The Nesvig property and the adjacent lands and waters provide a critical link in a larger riverine ecosystem. In 1997 the Metro Greenways Collaborative, a diverse group of nearly three dozen conservationists, county planners, developers and citizens from around the seven-county region, identified this area as a critical link in an ecological corridor of high biodiversity. The area of opportunity for protecting and restoring this unique natural system includes Grey Cloud Island and the river bluffs of Cottage Grove, Saint Paul Park and Newport on the east side of the river, and bluffs found in Nininger, Rosemount and Inver Grove Heights on the west side of the river. Metro Greenways is currently working with several public and private partners to protect and manage portions of the Pine Bend Bluffs area located directly across the river from the Nesvig property. The Nesvig property has

characteristics similar to Pine Bend Bluffs and Mr. Nesvig has been approached by Metro Greenways staff offering technical assistance to assure that the natural features of the property are maintained. He has so far declined that assistance.

The interdisciplinary Metro Region Management Team of the Minnesota DNR raises these concerns in the hope that the significant natural resource values of this property will be recognized and given consideration during this annexation hearing process.

Sincerely,

Kathleen A. Wallace

Kathleen A. Wallace
Regional Director

Attachments (2)