

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Permanent
Rules Relating to Mississippi River Corridor
Critical Area, *Minnesota Rules* Part 6106

**ORDER ON REQUEST
FOR RECONSIDERATION**

This matter came before Administrative Law Judge Eric L. Lipman on September 7, 2016, with receipt of R. Gordon Nesvig's request for reconsideration.

Mr. Nesvig objected to the Minnesota Department of Natural Resources' (Department) proposed designation of certain parcels within the City of Saint Paul Park as a Rural and Open Space District in its draft regulations on management of uses within the Mississippi River Critical Corridor Area (MRCCA). The MRCCA is a specially-designated, 72-mile portion of the Mississippi River that extends from Dayton Township, at its northern edge, to Ravena Township, Minnesota in the south.¹

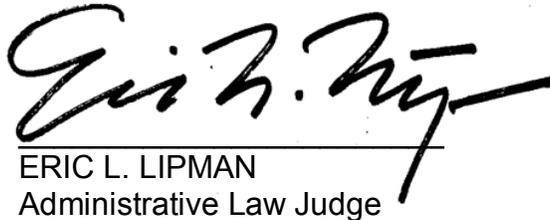
Mr. Nesvig maintains that the Department should have designated his parcels as within the River Neighborhood District instead of a Rural and Open Space District, in the proposed regulations.

Based upon the contents of the rulemaking record and the Memorandum that follows below,

IT IS HEREBY ORDERED:

Mr. Nesvig's Motion for Reconsideration is **DENIED**.

Dated: September 13, 2016


ERIC L. LIPMAN
Administrative Law Judge

¹ (Exhibit (Ex.) 3, at 1-2 (STATEMENT OF NEED AND REASONABLENESS or SONAR).

Factual Background

In early 2016, the Department circulated a set of draft administrative rules (Revisor R-4240) to update the administrative provisions, districts, and standards contained in Executive Order 79-19. For more than three decades, the structure and provisions of this Executive Order, as implemented through subsidiary local land use plans and zoning ordinances, has regulated uses within the MRCCA.

Like the predecessor Executive Order, the proposed rules established a set of districts for particular portions of the MRCCA with accompanying land use and building standards for each district.² For example, within an area designated as a Rural and Open Space District, a new structure may not be placed closer than 200 feet from the Mississippi River. By contrast, new structures may be placed 101 feet or more from the Mississippi River in an area designated as a River Neighborhood District.³

Because of these kind of impacts to land uses and viewsheds under the proposed standards, during the rulemaking proceeding there were a number of requests to adjust the boundaries of particular districts within the corridor – including the suggestion from Mr. Nesvig.⁴ Some commentators urged the Department to promulgate rules that allowed greater building height or density within particular areas, while others recommended more stringent restrictions on building height and density be applied to parcels that are adjacent to the Mississippi River.⁵

Mr. Nesvig has, for many years, been active in development of a set of parcels, some of which are in, and adjacent to, the Mississippi River.⁶

² See Ex. 2, at 34-35, 38-42.

³ See Ex. 2, at 40 (proposed Minn. R. 6106.0120, subp. 3 (A)(1), (2)).

⁴ REPORT OF THE ADMINISTRATIVE LAW JUDGE, at 25 (August 10, 2016) (Finding 116); Comments of R. Gordon Nesvig (July 5, 2016).

⁵ *Id.*

⁶ See *Minnesota Ctr. for Env'tl. Advocacy v. City of St. Paul Park*, 711 N.W.2d 526, 528 (Minn. Ct. App. 2006) ([The] proposed development [is] a 667-acre parcel of land owned by respondent R. Gordon Nesvig. The property sits along the east bank of the Mississippi River in Washington County and is located within Grey Cloud Island Township and the City of St. Paul Park. The majority of the property consists of agricultural fields, old fields, and pastures. But woods, bluffs, oak savanna, and limited prairie remnants also exist, and the property includes islands, backwaters, and open water on the Mississippi River."); *In the Matter of the Petition for the Annexation of Certain Land to the City Of St. Paul Park, Pursuant to Minnesota Statutes*, 414 (A-7212), 2005 WL 3964407, at 7-10 (Off. of Admin. Hrgs. 2005) ("The current concept plan proposes a total of 1,920 units to be built on the Nesvig property, which is known as the "Rivers Edge" project. Of those, 653 units would be built in the current proposed annexation area, consisting of 83 single-family houses, 22 twinhomes, 24 detached townhomes, 116 attached townhomes, and 408 multi-family units, including condominiums for senior housing. The Rivers Edge project also includes some commercial space for neighborhood retail uses, such as coffee shops and dry cleaners, and also a community center, parks, and open space where people could gather. The developer anticipates that complete build-out of the Rivers Edge project will take approximately ten years."); See also *In re Annexation of Land to City of St. Paul Park Pursuant to Minnesota Statute 414 (A-7212)*, A06-1738, 2007 WL 2177910, at *1 (Minn. Ct. App. July 31, 2007) (unpublished) ("The property is also located within the Mississippi River Corridor Critical Area, which was established by the 1979 executive order").

The Administrative Law Judge concluded that the districts, as modified by the Department during the proceedings, were adequately supported by the rulemaking record.⁷

In his report, the Administrative Law Judge found one legal defect – unrelated to the issues raised by Mr. Nesvig – and likewise disagreed with the Department’s assessment of the cost impact of the new rules on small businesses and small cities.⁸ By way of a later written order, the Chief Administrative Law Judge affirmed those determinations.⁹

For his part, Mr. Nesvig maintains that prior rulings by the Office of Administrative Hearings and the Minnesota Court of Appeals oblige a designation of his parcels as a part of a River Neighborhood District and not a Rural and Open Space District.¹⁰

Legal Analysis

As a threshold matter, the Administrative Law Judge doubts that there is a procedure available to Mr. Nesvig to seek “reconsideration” of the tribunal’s findings in a rulemaking proceeding.

Minn. R. 1400.2240, subp. 4 (2015) permits an “agency” to request that the Chief Administrative Law Judge reconsider an Administrative Law Judge’s disapproval of a proposed rule, but neither of those elements are present here. Mr. Nesvig is not a state “agency,”¹¹ and the rules about which Mr. Nesvig complains were not disapproved.

Citizens may “petition an agency requesting the adoption, amendment, or repeal of any rule”¹² and may also “petition for a declaratory judgment ... addressed to the Court of Appeals, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner.”¹³ Also, in this instance, the proposed rules themselves include a procedure for adjusting district designations and boundaries.¹⁴ Yet, none of these methods involve a review by an Administrative Law Judge.

Lastly, neither the earlier annexation proceedings nor the later challenge to the alternative urban area-wide review completed on Mr. Nesvig’s property, resulted in a determination that his property should be placed into a particular MRCCA district. The decisions in those cases preceded the Department’s latest rulemaking (and proposal of

⁷ *Id.* (Finding 117).

⁸ REPORT OF THE ADMINISTRATIVE LAW JUDGE, *supra*, at 2.

⁹ ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE, at 1 (August 11, 2016).

¹⁰ REQUEST FOR RECONSIDERATION, at 1 (September 7, 2016).

¹¹ Minn. Stat. § 14.02, subd. 2 (2016) (“Agency’ means any state officer, board, commission, bureau, division, department, or tribunal, other than a judicial branch court and the Tax Court, having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases. ‘Agency’ also means the Capitol Area Architectural and Planning Board.”).

¹² Minn. Stat. § 14.09 (2016).

¹³ Minn. Stat. § 14.44 (2016).

¹⁴ Ex. 2, at 34-35 (proposed Minn. R. 6106.0100, subp. 9(C)).

district lines) by nine years. Further, far from establishing that it was an error to describe Mr. Nesvig's properties as within part of an area that is

characterized by rural and low-density development patterns and land uses, and includes land that is riparian or visible from the river, as well as large, undeveloped tracts of high ecological and scenic value, floodplain, and undeveloped islands

as set forth in proposed rule 6106.0100, subpart 3(A), the cited cases bolster that conclusion. As Judge Shumaker summarized in *Minnesota Center for Environmental Advocacy v. City of St. Paul Park*,

The majority of the property consists of agricultural fields, old fields, and pastures. But woods, bluffs, oak savanna, and limited prairie remnants also exist, and the property includes islands, backwaters, and open water on the Mississippi River. The cliffs along the bluffs are unusual in Minnesota. There are seeps and springs along the bluffs. A bald eagle nests on the property, and two other eagle nests are within a mile of the property. Two endangered and one threatened species of mussels, along with many native species of plants, animals, and birds, are found on the property.

Part of the property is located within the Mississippi River Critical Area Corridor, permanently established in 1979 by executive order of the governor and designated as a "rural open space district." Local government units are directed to protect the Critical Area's resources, prevent and mitigate irreversible damage, and enhance its public value. According to the executive order, rural open-space districts "shall be used and developed to preserve their open, scenic and natural characteristics and ecological and economic functions." Part of the property is also located within the Mississippi National River and Recreation Area, a 72-mile corridor which is part of the National Park System. Throughout the development, the boundary of the Recreation Area is the same as the Critical Area. As part of the Recreation Area, National Park Service activities are carried out in the corridor with the cooperation of 25 local government units, including Grey Cloud Island Township and St. Paul Park, and several federal and state agencies.

The cited cases do not stand for the proposition that the proposed rule, or inclusion of Mr. Nesvig's property in a Rural and Open Space District, is unlawful.¹⁵

For all of these reasons, the request for reconsideration must be denied.

E. L. L.

¹⁵ See generally *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).