



August 11, 2014

Mr. Daniel Petrik
C/O MRCCA Rulemaking Project
Minnesota Department of Natural Resources
500 Lafayette Road, St. Paul, MN 55155-4032

VIA EMAIL

RE: Mississippi River Corridor Critical Area Comments

Dear Mr. Petrik:

The Saint Paul Area Chamber of Commerce (SPACC) is a dynamic network of businesses and individuals that advocates for building communities that foster economic prosperity and a high quality of life for all. As the largest local chamber in Minnesota, SPACC submits these comments in response to the Minnesota Department of Natural Resources' (DNR) request for comments regarding the proposed rules governing land development in the Mississippi River Corridor Critical Area (MRCCA).¹

OVERVIEW

The Mississippi River is a critical asset to our great State. For more than a century, the river has served a variety of important interests. The river is an internationally famous scenic recreational asset that provides great natural, aesthetic, cultural, and historical value of unparalleled significance. At the same time, it is also a working river and an important transportation corridor that has defined our region's history as a catalyst for economic growth and prosperity. As Mark Twain appropriately said in *Life on the Mississippi*, "It is not a commonplace river, but on the contrary is in all ways a remarkable river."

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.² First, the legislature added redevelopment of commercial and industrial property as one of the important interests served by the river. Second, the legislature modified the considerations for creating new districts, substituting the importance of major river features in existence in 1979 for greater emphasis on the natural character of the river and existing property development with consideration for new commercial, industrial, and residential development. Finally, the legislature added commercial, industrial, and residential resources to the list of key features served by the river that must be protected and/or enhanced by any rules promulgated by the DNR.

¹ The "proposed rules" refer to the working draft rules released by the DNR on June 2, 2014, *available at* <http://files.dnr.state.mn.us/input/rules/rulemaking/mrcca/2014-clean.pdf>.

² Minn. Laws Ch. 137, Art. 2, §§ 18-21 (2013).

To ensure that the river, and its surrounding area, continues to serve such an important role in the region, SPACC encourages the DNR to adopt rules that protect existing property and respect the multi-purpose nature of the river, particularly in Saint Paul, which makes up a large portion of the MRCCA.³ SPACC appreciates the opportunity to submit these comments, as well as the DNR’s willingness to consider the interests of stakeholders throughout the rulemaking process.

GENERAL CONCERNS

Based on a detailed review of the proposed rules, the following items are of concern to SPACC. We encourage the DNR to consider these general concerns while developing the final rules.

I. Insufficient Study into How Proposed Rules Affect Existing Development and Land.

The DNR proposes to increase the amount of regulatory control on existing structures and parcels of land within the MRCCA without a sufficient understanding of how much of an impact the changes will have on existing property.⁴ This is alarming, particularly in light of the fact that the proposed rules appear to overwhelmingly burden existing development. We believe the proposed rules work against public and private efforts designed to stimulate regional job growth, increase capital investment, and grow the local tax base.

To determine the extent to which the proposed rules affect existing structures and parcels of land, the City of Saint Paul conducted a GIS-based analysis of the proposed changes. As reflected in the tables below, the City’s analysis demonstrates that existing property owners are being asked to bear the greatest costs of the proposed rules:⁵

Structures Affected by Proposed Rules	
Existing Structures in Saint Paul	135,231
Structures in Saint Paul and the MRCCA	5,732
Structures affected by Slope Preservation Zone	1,374
Structures affected by Bluff Impact Zone	440
Structures affected by Shoreline Impact Zone	31
Structures affected by 40' Slope Setback	370
Structures affected by 100' Slope Setback	223
Structures affected by Shoreline Setback	61

³ Approximately 7,150 acres of land in Saint Paul (or 21 percent of the City) is within the MRCCA. There are roughly 17,000 parcels of land in the MRCCA. Of these, 3,948 are located in Saint Paul. Accordingly, Saint Paul represents about 23 percent of the total number of parcels of land in the MRCCA.

⁴ On several occasions, DNR staff indicated that a GIS-based analysis of how the rules impact existing structures and parcels of land was not performed prior to the publication of the proposed rules on June 2, 2014.

⁵ The information in the tables was provided by the City of Saint Paul on July 25, 2014. The figures were calculated using preliminary data on geographic features and are therefore an approximation of the impact on existing structures and parcels of land. The data is subject to change.

Parcels of Land Affected by Proposed Rules	
Existing Parcels of Land in Saint Paul	76,128
Parcels in Saint Paul and the MRCCA	3,948
Parcels affected by Slope Preservation Zone	1,829
Parcels affected by Bluff Impact Zone	908
Parcels affected by Shoreline Impact Zone	169
Parcels affected by 40' Slope Setback	576
Parcels affected by 100' Slope Setback	465
Parcels affected by Shoreline Setback	205

The City's analysis further shows that more than 1,000 existing buildings in Saint Paul will become legally nonconforming as a result of the proposed rules.⁶ This is unreasonable and inconsistent with Minn. Stat. § 116G.15.

SPACC is concerned that the proposed rules will negatively affect redevelopment opportunities and future investment in the East Metro. SPACC urges the DNR to conduct a similar GIS-based study to determine how existing development will be affected in each community within the MRCCA. The additional study should include mapping preservation zones, impact zones, and setback areas. Without performing this geographic-based analysis, it cannot be said that the DNR has sufficiently ascertained the (1) probable costs or consequences of adopting the proposed rules, (2) extent to which the proposed rules affect existing structures and parcels of land, or (3) cumulative effect of the proposed rules on each community within the MRCCA.

II. Recognizing Importance of Balancing Interests Served by the Mississippi River, including Existing Commercial, Industrial, and Residential Property.

Over the last 30 years, businesses, citizens, and local units of government (LGUs) have worked together to develop a regulatory framework for the MRCCA that balances the important interests served by the river. The balance achieved by the existing framework provides for the enhancement of the environmental and cultural interests of the MRCCA while ensuring that the river continues to play an important economic role in the development of our region. LGUs, particularly Saint Paul, have carefully planned and managed the MRCCA as an important asset that serves a large number of stakeholders, including existing property interests.

The proposed rules do not sufficiently provide for the continuation and enhancement of existing commercial, industrial, and residential property. If the proposed rules are adopted, a significantly large number of structures and parcels of land will be detrimentally affected by the regulatory changes. The increased regulations will unnecessarily cause affected properties to become legally nonconforming, particularly in Saint Paul. This will harm local communities as property owners refrain from investing in their property, property values go down, and real estate transactions become discouraged.

If new land use and zoning rules are promulgated by the DNR, it is imperative that the rules recognize the multi-purpose nature of the river and the institutional knowledge of LGUs that have effectively managed the MRCCA over the last 30 years. As discussed in greater detail below, the

⁶ This information was provided to the Comprehensive Planning Committee of the City of Saint Paul on August 5, 2014 by city-planning staff.

proposed rules should be revised to provide greater protection of existing commercial, industrial, and residential properties as required by Minn. Stat. § 116G.15.

III. Cost Implications.

According to the DNR's January 14, 2014 report to the legislature, the long-term costs to local communities in implementing the proposed rules are estimated at \$5,000 per community.⁷ The DNR indicates that the costs will likely be higher in the future, somewhere between \$7,000 and \$10,000 per community. In total, the DNR estimates that it will cost between \$200,000 and \$300,000 for the applicable jurisdictions that will be required to implement the new rules. SPACC believes the cost estimates are grossly underestimated. LGUs will be forced to establish new licensing programs, update local plans, ordinances, and maps, as well as provide additional staff support as needed. These costs will undoubtedly be passed along to property owners in the form of increased taxes, licensing fees, and other development-related costs.

SPECIFIC CONCERNS

Based on a careful review of the proposed rules, SPACC's specific concerns include but are not limited to the following (ordered sequentially to track the proposed rules):

I. PART 6106.0080 ADMINISTRATIVE PROVISIONS FOR ORDINANCES.

a. Subparts 2 and 4. Variances and Conditional Use Permits.

The proposed rules include a section on variances. This is important because it provides LGUs with flexibility in managing the MRCCA and allows them to retain authority over quasi-judicial decision making. With that being said, SPACC is concerned that the variance provision fails to explicitly state whether LGUs have authority to grant variances and, if so, whether further approval by the DNR is required when a LGU grants a variance. SPACC is of the position that the provision should be revised to read "a local government is permitted to issue variances from the MRCCA rules⁸ consistent with Minnesota statutes chapters 394 and 462." If a LGU grants a variance, SPACC believes that further approval of that variance by the DNR is unwarranted except as otherwise explained below. LGUs have effectively managed the river corridor and adding another layer of approval will only serve to discourage private investment in the MRCCA.

Moreover, for variances and conditional use permits that affect certain areas or natural resources, the proposed rules require mitigation "proportional to the impact of the project on primary conservation areas." This raises three additional concerns:

⁷ The DNR's estimates are based on survey data from 2010. Minnesota Department of Natural Resources, *Report to Legislature on Mississippi River Corridor Critical Area Rulemaking 12-13*, dated January 15, 2014. The report does not provide any information as to the scope of the survey, the questions raised in the survey, and the identities of the communities that actually responded to the survey. SPACC understands that key communities, including the City of Saint Paul, did not participate in the survey. Because not all of the communities responded, SPACC is of the position that the data does not provide an accurate representation of the projected costs.

⁸ If the term "MRCCA rules" is used, the rules should contain a citation section providing for said reference.

- (1) The variance and conditional use permits provisions are overly broad with respect to when mitigation is required. The provisions state that for variances and conditional use permits that affect “primary conservation areas or other identified resources,” mitigation is required. The term primary conservation area is openly defined to include a large number of “key resources and features.” This definition will certainly leave LGUs struggling to interpret what resources and features need to be affected to trigger the mitigation requirement. The use of the phrase “or other identified resources” does not provide any additional clarity but rather adds to the confusion as to the scope of the resources covered. These provisions should be revised to provide more clarity;
- (2) LGUs should have discretion in choosing to require mitigation even where a variance and/or conditional and/or interim use permit affects the defined natural resources. There will undoubtedly be scenarios where mitigation is not warranted. For those situations, LGUs should have the flexibility to avoid the mitigation requirement. If the DNR is concerned that this approach will provide too much flexibility to LGUs, the proposed rules could be revised to include more flexibility while providing greater agency oversight. For example, the variance and conditional use provisions could be revised to state that “if a local government determines that mitigation shall not be required where a variance, conditional use permit, or interim use permit affects [insert defined natural resources triggering the mitigation], the local government must obtain approval from the DNR in not requiring mitigation.” If such a provision is allowed, the proposed rules should also include a provision requiring the DNR to approve or deny the request within 10 business days; and
- (3) Finally, for those situations that warrant mitigation, the proposed rules incorporate a standard that is inconsistent with existing state and federal law. A condition that is tied to the issuance of a variance or permit need only bear rough proportionality to the impact created by the variance or permit. Minn. Stat. § 462.357, subd. 6(2); *see also Dolan v. City of Tigard*, 512 U.S. 374 (1994). The proposed variance rule increases this standard by requiring strict proportionality. This would drastically change existing law surrounding variances and conditional permits in Minnesota. The variance and conditional use provisions should be revised to state that mitigation must be “roughly proportional.”

b. Subpart 3. Nonconformities.

The proposed rule concerning nonconformities permits LGUs to allow expansion of legally nonconforming principal structures that violate the setback requirements enumerated in Part 6106.0120. The authority to expand existing structures appears unnecessarily limited to the expansion of principal structures and only to the extent that those structures violate the setback requirements. As written, the proposed rules could be interpreted to disallow expansion of existing structures (principal or accessory) that become nonconforming as a result of the other regulatory changes. This is far too restrictive. A more reasonable approach would be to permit expansion of all existing structures that become legally nonconforming as a result of the proposed rules. This approach respects the effectiveness of LGUs in managing the MRCCA, helps balance the many interests served by the river, and protects existing development.

II. PART 6106.0100 DISTRICTS.

a. Subpart 9. District Boundaries.

The enabling legislation permits the DNR to establish new land-use districts within the MRCCA. Minn. Stat. § 116G.15, subd. 13 (2013). The DNR proposes to increase the number of districts within the MRCCA from four to six.⁹ While SPACC largely agrees with increasing the number of districts, SPACC believes that certain proposed districts in Saint Paul are inconsistent with existing development and potential new commercial, industrial, and residential opportunities. Specifically, SPACC is concerned about the following areas within the proposed districts in Saint Paul:

i. Application of Rural & Open Space (CA-ROS) District to Urban Spaces.

The proposed rules call for a large amount of land within Saint Paul to be designated as Rural & Open Space (CA-ROS). The CA-ROS district is “characterized by *rural* low density development patterns and land uses.” Part 6106.0100, subp. 2 (emphasis added). However, Saint Paul is not a rural community. It is a unique urban environment. Presently, there is no land in Saint Paul designated as rural open space.

By reclassifying land as CA-ROS in Saint Paul, the dimensional standards governing property development and redevelopment become more restrictive and burdensome, particularly with respect to building setbacks and height limits. For example, structures located within current districts are not allowed within 40 feet of blufflines. By contrast, structures within the proposed CA-ROS district must be at least 100 feet away from blufflines and very steep slopes. In replacing the current districts with the CA-ROS district, the setback requirement applicable to development will increase by 60 feet (from 40 to 100 feet). These are significant changes that will affect a large number of properties. This is particularly troublesome in urban-developed areas such as the Highwood neighborhood in Saint Paul.

ii. Ford Site.

The proposed rules designate the front portion (closest to river) of the Ford site in Highland Park to be a River Towns & Crossing (CA-RTC) district and the back portion to be an Urban Mixed (CA-UM) district. The dimensional standards applicable to each district govern building height. Specifically, the proposed rules call for a 56-foot height limit within the CA-RTC district and 65-foot limit in the CA-UM district. The draft rules provide that taller buildings may be allowed by a conditional use permit. However, before a conditional use permit may even be considered, the permit applicant must satisfy a number of conditions, including (1) completing a visual impact assessment based on the methods detailed in the *Mississippi National River and Recreation Area Visual Resources Protection Plan*, (2) identifying techniques to minimize views of buildings, and (3) identifying opportunities to enhance public river corridor views.¹⁰

⁹ The current districts are (1) Rural Open Space, (2) Urban Open Space, (3) Urban Developed, and (4) Urban Diversified. In addition, some communities have created their own districts based on their particular needs. For example, the City of Saint Paul uses Floodway and Flood Fringe districts to manage the MRCCA. As with the current districts, the new districts will be governed by a series of dimensional standards that will apply to property development and redevelopment activities.

¹⁰ SPACC believes that the final rules should provide greater clarity into what public river corridor views are to be protected and the standards used to determine whether said protection has been achieved.

SPACC is concerned that the proposed districts do not align with the City of Saint Paul’s vision for redeveloping this critically important urban site into a 21st-century community. The City is in the early stages of engaging the community in a public process to prepare a land use and zoning plan for the redevelopment of the Ford site. This process will result in a community-based redevelopment plan, which will include a determination of the building heights most appropriate for this site. If the DNR restricts building heights before the community has the opportunity to complete the planning process, SPACC believes that proposed district designations may unnecessarily restrict redevelopment of the Ford site. Accordingly, SPACC believes the dimensional standards applicable to the Ford site, including the two structures located on the river parcel—the former steam plant and water treatment plant—should be governed by Saint Paul’s underlying zoning code.

iii. Downtown Saint Paul.

The proposed rules designate a portion of downtown Saint Paul as an Urban Core (CA-UC) district. SPACC agrees with the designation of this area as Urban Core but is concerned that the applicable dimensional standards are not consistent with existing development, and may prevent the City and County of Ramsey from achieving their vision for redeveloping key areas of downtown, including the former county jail and West Publishing buildings. SPACC urges the DNR to exempt the area from Chestnut Street to the Lafayette/Highway 52 Bridge in downtown from the proposed dimensional standards. This approach is more consistent with efforts to strengthen the local tax base through redevelopment while preserving the river as a natural, scenic, and environmental asset.

iv. West Side Flats.

The proposed rules call for the West Side Flats, a 45-acre area directly across the river from downtown Saint Paul, to be designated as an Urban Mixed (CA-UM) district. This designation is inconsistent with the community’s vision for revitalizing the West Side Flats. Instead, SPACC believes the West Side Flats should be designated as an Urban Core (CA-UC) district. This designation better aligns with the community’s vision. According to the West Side Flats Master Plan & Development Guidelines from 2001 (original Master Plan), “[w]hile the area has suffered from disinvestment over the last several decades and is currently the location of several acres of vacant land, the [West Side] Flats hold great promise to be transformed in a way that will complement the greater West Side area and reconnect it to the Mississippi River.”¹¹

To facilitate reinvestment in the West Side Flats, the community engaged in an extensive planning process that culminated in a “vision of Saint Paul as a city on both sides of the Mississippi River, where the river joins, rather than separates, neighborhoods.”¹² According to the original Master Plan, the community’s vision for West Side Flats is centered on a series of linked urban villages where people live, work, and play. “The Mississippi River is an integral part of the neighborhood [with] opportunities to experience it from a number of perspectives and vantage points.”¹³ This vision has facilitated new commercial, industrial, and residential investment in the West Side Flats—activity that SPACC strongly supports.

¹¹ City of Saint Paul, *West Side Flats Master Plan & Development Guidelines 1* (August 2001), available at <http://www.stpaul.gov/DocumentCenter/View/73938> (last visited July 25, 2014).

¹² *Id.* at 2.

¹³ *Id.*

More recently, the City of Saint Paul re-engaged the community to revise the West Side Flats Master Plan & Development Guidelines (updated Master Plan) as a way to guide future private development and public infrastructure projects in the West Side Flats area.¹⁴ The updated Master Plan reaffirms that the “overall development goal of the [West Side] Flats is to extend and reconnect the greater West Side community to the river.” To achieve that goal, the updated Master Plan outlines a redevelopment strategy that envisions an urban mixed-use commercial corridor with green infrastructure, parks and open space, as well as the preservation of important industrial uses.

The proposed rules fail to appreciate the extensive planning efforts that have taken place to prepare a community-based vision for redeveloping the West Side Flats. Under the proposed rules, for example, buildings would be limited to heights of 65 feet (unless a conditional use permit is obtained). By contrast, the community's vision calls for maximum building heights ranging from 50 feet to 90 feet. The proposed rules are therefore inconsistent with the community's vision for revitalizing this important urban area. SPACC believes the West Side Flats should be designated as a CA-UC district. This approach would respect the community's vision and allow Saint Paul's underlying zoning to govern dimensional standards applicable to existing and future development.

III. PART 6106.0120 DIMENSIONAL STANDARDS.

a. Subpart 2(D). Structure Height CUPs.

LGUs should be permitted to develop their own standards for issuing CUPs with respect to height requirements. This will provide LGUs with greater flexibility in crafting conditional requirements that are consistent with the particular needs of individual communities.

b. Subparts 3(A) and (B). Location of Structures and Setback Requirements.

The proposed rules prohibit construction of structures and impervious surfaces (1) in areas defined as either a Slope Preservation Zone (SPZ) or Bluff Impact Zone (BIZ) (collectively referred to as “protected zones”) and (2) within the setback areas applicable to blufflines and very steep slopes. These restrictions apply regardless of the contiguous nature of the slope and/or whether it is connected to a larger bluff complex. Any structures that violate the locational restrictions will become legally nonconforming. The proposed rules are problematic for several reasons.

First, the setback requirements applicable to “very steep slopes” (40 feet in non-ROS districts and 100 feet in the ROS district) are unreasonable and overly restrictive. Presently, there is no setback requirement for very steep slopes in Saint Paul. The existing setback regulation prohibits construction of new structures within 40 feet of slopes that average more than 18 percent and rise more than 25 feet over the ordinary high water level (OHWL) or toe of the slope. The DNR proposes that relatively modest slopes with as little as 10 feet rise (i.e. very steep slopes) trigger the setback restriction. SPACC opposes this approach.

Second, the outright prohibition against building in protected zones, which includes the area within 20 feet of the zones, is unreasonable and overly restrictive. The proposed change is also inconsistent with existing regulations that have been operating for more than 30 years. While existing

¹⁴ City of Saint Paul, *West Side Flats Master Plan & Development Guidelines* (July 2014), available at <http://www.stpaul.gov/DocumentCenter/View/73938> (last visited July 25, 2014).

regulations preclude commercial and industrial development on slopes greater than 12 percent and residential development on slopes more than 18 percent, there is currently no limitation on development within 20 feet of very steep slopes. The creation of protected zones and the extension of setback requirements to the zones are drastic regulatory changes that will affect a significantly large number of existing structures and parcels of land. In Saint Paul, for example, more than 1,000 buildings will become nonconforming under the proposed regulations.

It should also be pointed out that, despite the DNR's representations to the contrary (*see. e.g.* Homeowner Guide to Commenting), Executive Order 79-19 did not impose a setback requirement for very steep slopes. Executive Order 79-19 required a 40 foot setback from blufflines—this is not the same as a very steep slope.¹⁵ The proposed rules significantly increase the extent to which the regulations apply without sufficient justification. The standards and guidelines enumerated in Executive Order 79-19 cannot be interpreted as prohibiting development on or near very steep slopes. The extension of the prohibition against development to very steep slopes and protected zones appears arbitrary and is unreasonable, unnecessary, and intrusive.

Moreover, while it may be true that a landowner could seek a variance from the 20-foot zone restriction, the practical reality is that it will be extremely difficult, if not impossible, to obtain a variance. This is principally due to the outright prohibition against construction in the zones, which will operate above and beyond the proposed setback requirements. Under current Minnesota law, variances “shall only be permitted when they are in harmony with the general purposes and intent of the [zoning restrictions].” Minn. Stat. § 462.357, subd. 6(2). By including an outright prohibition against construction within the zones, it can hardly be said that granting a variance for constructing a building within 20 feet of a very steep slope would be in harmony with the proposed rules.

Finally, the exceptions listed in Table 1 are ambiguous in many respects. For example, the proposed rules provide an exception for the “expansion of nonconforming structures due to setbacks.” Table 1 indicates that the exception is applicable to setbacks and protected zone restrictions.¹⁶ However, it is unclear if the exception applies to existing structures that are entirely within a protection zone, or whether the exception applies only if the structure is in both a protection zone and the corresponding setback area. This should be clarified. Furthermore, Table 1 states that exemptions applicable to protection zones are also subject to, *inter alia*, the land alteration standards. However, the land alteration standards prohibit all activities that expose the soil or change the topography or drainage within protection zones. The exceptions are therefore inconsistent with the practical operation of the other rules. As a result, the exceptions will not function as intended.

In summary, the proposed location and setback requirements are overly restrictive and fail to sufficiently consider the important interests served by existing development. When combined with the nonconformity provision discussed above, the excessively restrictive location and setback requirements

¹⁵ Executive Order 79-19, Appendix C(8).

¹⁶ On July 21, 2014, during a stakeholder meeting co-hosted by the Saint Paul Area Chamber of Commerce, DNR staff indicated that the exception in Table 1 of the proposed rules related to the expansion of nonconforming structures that violate the locational restrictions applicable to the protected zones was an error. DNR staff explained that structures within the protected zones should not be allowed to expand. This explanation was reconfirmed by the DNR on July 31, 2014 at a stakeholder meeting hosted by the Saint Paul Area Association of Realtors. If the dimensional standards applicable to the protected zones are not substantially revised as recommended, SPACC encourages the DNR to preserve the exception.

make it difficult, if not impossible, for existing commercial, industrial, and residential properties to expand. The proposed restrictions affect a large number of properties and represent a significant increase in the level of regulatory control over existing regulations. A more reasonable approach would be to eliminate location restrictions applicable to protection zones and impose a setback requirement for slopes that are greater than 18 percent and rise more than 25 feet in height. Additionally, the setback requirements should only apply to slopes or bluffs facing the Mississippi River Valley that are connected to a larger bluff complex. Finally, SPACC is of the position that LGUs should be permitted to map and draw their own blufflines for purposes of establishing the trigger setback lines. These changes would be more consistent with existing regulations and better protect existing development.

IV. PART 6106.0150 VEGETATION MANAGEMENT AND LAND ALTERATION STANDARDS.

The proposed rules impose a number of new restrictions that are unreasonable and excessive with respect to vegetation-related activities and land alteration. SPACC is concerned that the proposed rules (1) contain triggering thresholds that are too low, (2) impose unnecessary licensing requirements, and (3) will prevent property owners from making necessary improvements to existing structures.

For vegetation removal and/or land alteration that occurs outside the protected zones, a permit will be required for any activity that exceeds a certain threshold. SPACC is concerned that the proposed thresholds are far too low. In terms of land alteration, the threshold is disturbing 250 sq. ft. or more of total surface area. With respect to vegetation removal, the proposed threshold is simply removing more than 5% or 1,000 sq. ft. of tree canopy or vegetative cover. This is also an unreasonably low threshold. Additionally, SPACC questions the need to require a permit for these activities, or whether the stated purposes of the proposed rules could be achieved by less burdensome means.

Moreover, the proposed rules will unnecessarily prevent property owners from improving existing structures. For property within the protected zones, the proposed rules prohibit any land alteration unless an exception in Table 1 applies. This is far too restrictive and problematic. There is not an exception for improving existing structures. Thus, when combined with the nonconformity provision in part 6106.0080, subp. 3, the proposed land alteration standards excessively burden existing development. Without an exception for improving existing structures, property owners will not be allowed to make any repairs that necessarily require land alteration activities, such as fixing a compromised or damaged building foundation. The proposed rules are therefore inconsistent with Minnesota statutes chapters 394 and 462, which allow for the “repair, replacement, restoration, maintenance, or improvement” of nonconforming structures. Minn. Stat. §§ 394.36, subd. 4 and 462.357, subd. 1(e).

SPACC encourages the DNR to include an exception in the proposed rules for improving and/or repairing existing structures. We also encourage the DNR to consider eliminating the applicability of vegetation management and land alternation standards from very steep slopes and Slope Preservation Zones. Finally, SPACC believes LGUs should be permitted to issue exemptions from vegetation management and land alternation standards without further approval from the DNR.

V. PART 6106.0170 SUBDIVISIONS AND DEVELOPMENT STANDARDS.

c. Subpart 3(A). Design Standards and Protected Open Space.

The proposed rules require that a certain amount of land be set aside as protected open space for new subdivisions, planned unit developments, and redevelopments involving 10 or more acres.¹⁷ The amount of area to be set aside is calculated as a percentage of the overall size of the land in the district where the development or redevelopment occurs. The amount of land to be set aside ranges from 10% to 50% of the entire tract of land to be developed and/or redeveloped. These changes raise questions of whether the proposed rules will require LGUs to pay property owners just compensation in exchange for satisfaction of the open space requirements.

Because the proposed rules condition approval of developing/redeveloping a piece of property on private land being set aside for public use (e.g. protecting private land as open space and connecting it to “abutting open space, natural areas, and recreational areas”), the rules must be analyzed under the body of law governing exactions under the United States and Minnesota constitutions. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Essentially, if an LGU cannot demonstrate that an “essential nexus” exists between the exaction and the public use and that the exaction is “‘roughly proportional’ in nature and extent to the impact of the proposed development,” the LGU will be ordered to pay just compensation for requiring the property owner to set aside private property as protected open space. *Id.*

In addition, the proposed open space rules, while seemingly legislatively imposed, appear to allow for adjudicative decision-making because LGUs will be required to make individualized determinations as to exactly how much private land must be set aside as protected open space. Accordingly, the adjudicative decisions will be subject to heightened scrutiny (as opposed to the lesser standard of deferential scrutiny) upon judicial review. *Id.* As a result, LGUs will be at greater risk of having to pay just compensation if their decisions are challenged.

Moreover, even if the proposed open space requirements are not construed as an exaction and therefore not subject to a *Dolan* and *Nollan*-type analysis, the requirements will certainly be subject to the body of jurisprudence governing regulatory takings, namely the balancing test established by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*. 438 U.S. 04 (1978); *see also Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007). Under *Penn Central*, courts must balance the following three factors when deciding whether a regulatory taking has occurred and just compensation to the property owner is required: (1) the extent to which the regulation has interfered with the property owner’s reasonable investment-backed expectations, (2) the economic impact of the regulation on the property owner, and (3) the character of the governmental action at issue. A property owner’s investment-backed expectations, alone, support finding that a regulatory taking has occurred, particularly where private property is already owned after the proposed open space requirements take effect.

SPACC would also like to point out that many communities within the MRCCA already impose land dedication requirements. For example, the City of Saint Paul requires a dedication of parkland (or payment in-lieu of) under certain situations. If the protected open space requirements are included in

¹⁷ Individual parcels must be aggregated if they are part of a common redevelopment plan. However, it is not clear what constitutes a “common plan.” This should be clarified.

the final rules, SPACC urges the DNR to also include a provision that requires LGUs with land dedication ordinances to accept satisfaction of the state set-aside MRCCA standard as also meeting the locally-enacted land dedication requirement. Property owners should not have to satisfy both requirements. Finally, SPACC is of the position that industrial redevelopments should be exempt from the protected open space requirements.

CONCLUSION

In summary, SPACC is concerned that the proposed rules will have a negative impact on future investment in our community. The proposed rules, as written, will increase restrictions on property use and development. As a result, the rules will cause a large number of existing properties to become legally nonconforming. At the same time, LGUs will have less flexibility in regulating the MRCCA. Moreover, the cost of implementing the rules will be significant. To ensure that the river remains an important national asset vital to the economic health of our region, SPACC encourages the DNR to adopt rules that provide greater protection of commercial, industrial, and residential resources within the MRCCA.

Please feel free to contact me with any questions or comments.

With Kind Regards,

A handwritten signature in black ink, appearing to read 'MB', with a long horizontal flourish extending to the right.

Michael J. Belaen
Director of Public Affairs and Legal Counsel