



Legislation Text

File #: RES 23-333, **Version:** 1

Memorializing denial of an appeal by Tom Dimond from to a decision of the Board of Zoning Appeals which denied an administrative appeal alleging Zoning Administrator error in denying a “stop work order” request regarding the island building work in Pigs Eye Lake.

WHEREAS, on July 8, 2022, Tim Dimond (hereinafter “Appellant”), filed an administrative appeal with the Board of Zoning Appeals (hereinafter, “BZA”) under BZA File No. 22-072764, from a decision made by the Zoning Administrator who had previously denied Appellant’s request to issue a “stop work order” for work taking place within the basin of Pig’s Eye Lake based upon a determination that the City lacked authority to issue the “stop work order” because the project was taking place within a public water under the jurisdiction of the Minnesota Department of Natural Resources (hereinafter, “DNR”) pursuant to a permit issued by the DNR; and

WHEREAS, on July 18, 2022, City staff notified the DNR by email of the said appeal application and set a hearing date on the appeal before the BZA on August 8, 2022; and

WHEREAS, on July 28, 2022, City staff notified property owners within 350 feet of Pigs Eye Lake of the August 8, 2022, public hearing on Appellant’s appeal; and

WHEREAS, on August 8, 2022, the BZA, pursuant to Leg. Code Sec. 61.701, duly conducted a public hearing at which all person interested were afforded an opportunity to be heard and to submit written statements which were also provided to the BZA as a part of the Appeal record and, after concluding its receipt of statements, the BZA moved to lay over making a decision on the matter and to continue the public hearing to August 22, 2022, for the purpose of obtaining additional information from the DNR; and

WHEREAS, in a letter dated August 17, 2022, the DNR responded to the questions raised by the BZA on August 8, 2022, and detailed and reiterated the DNR’s position regarding its jurisdiction over Pigs Eye Lake and further reiterated its position regarding minimum and ordinary high water level as applied to the classification and management of Pigs Eye Lake; and

WHEREAS, August 22, 2022, the BZA again took up the matter and again received additional statements from the public and in addition to the DNR’s August 17, 2022 information, at the conclusion of which the BZA closed the public hearing to begin its deliberation on the matter during which, a motion to again lay the matter over was duly made but failed, at which time, the BZA discussed its options and ultimately moved to continue its deliberations to September 6, 2022 with BZA staff and legal counsel instructed to review next steps on process and report back to the BZA at the September 6, 2022 meeting; and

WHEREAS, on September 6, 2022, the BZA again took up the matter and continued is deliberations whereupon the BZA, having considered all the records, statements and the report of BZA staff, duly moved to deny the appeal based upon its finding that that the Zoning Administrator did not err in its decision to deny the

Appellant's request to issue a stop work order based upon the following facts as set forth in BZA Resolution No. 22-072764:

"1. Appellant contends the Administrator failed to apply Mississippi River Corridor Critical Area ("MRCCA") rules to the Project. The City's MRCCA jurisdiction is established by law. This jurisdiction is typically applied to development on land that takes place above the Ordinary High Water Level ("OHWL").

The OHWL is defined as "the boundary of water basins, watercourses, public waters, and public waters wetlands, and ... is an elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial." Minn. Stat. § 1030.005, subd. 14(1). The OHWL elevation is determined and established by the DNR.

In order to issue a stop work order, there must be underlying authority to authorize the action. In evaluating Appellant's request, the Administrator concluded that the Project lies within the DNR's jurisdiction over public waters because the Project takes place below the elevation of the OHWL and was therefore outside of the City's jurisdiction under MRCCA. This conclusion was based in part in consultation with the DNR's East Metro Area Hydrologist who estimated that the OHWL for Pigs Eye Lake at 692.9 feet. The Administrator also consulted with the USACE to determine the elevation of the Project's islands. The USACE advised that the elevation of the constructed islands will be 692.6 feet.

Based upon these estimations, the Administrator reasonably concluded that the Project's islands are below the OHWL and therefore within the basin of Pigs Eye Lake which is within the DNR's regulatory jurisdiction and outside of the City's jurisdiction. The 692.9 OHWL elevation reasonably defines the jurisdictional boundary of the DNR's "public waters" permit authority. As a designated public water, permitting authority over work in the lake which is taking place below the OHWL of this designated public water is specifically vested in the DNR. See, Minn. Stat. § 103G.245, subd. 1(2) ("a political subdivision of the state [in this case, the Ramsey County Parks Department] ... must have a public-waters-work permit [to] change ... the ... cross section of public waters, ... by any means, including filling, excavating, or placing of materials in or on the beds of public waters."). Minn. Stat. § 103G.245, subd. 1(2) clearly does not contain language giving the City additional permitting authority - or, by inference - any regulatory authority to issue "stop work orders." While the Appellant has also argued that Minn. Stat. § 103G.245, subd. A allows work in public waters to be delegated to local unit of government, the DNR has never delegated its public water work permit authority to the City under Minn. Stat. § 103G.245, subd. A.

The County [and the USACE] obtained a public waters work permit as required under Minn. Stat. § 103G.245, subd. 1(2). Because the Project work is being performed within a public water and below the OHWL elevation of the lake, there is no additional permitting required from the City for the Project which would form a basis for issuing a stop work order under Minn. Stat. § 103G.245.

Likewise, there is no authority under MRRCA for the City to issue a stop work order. Generally, the DNR approves MRRCA regulations proposed by municipalities with land within the MRCCA. See, Leg. Code § Sec. 68.101(a) (the intent and purpose of Leg. Code Chap. 68 establishes a "River

Corridor Overlay District ... designed to provide comprehensive floodplain and river bluff management for the city in accordance with the policies of Minnesota Statutes Chapters 103 and 116G, Minnesota Regulations and Governor's Executive Order No. 79-19."). The City's current MRCCA regulations, codified under Leg. Code Chap. 68 have been approved by the DNR. The City is in the process of updating Leg. Code Chap. 68 and is working with the DNR to develop new MRCCA ordinances. However, the existing MRCCA ordinances remain effective until the City adopts a new MRCCA ordinance.

The purpose of MRCCA regulations is generally to regulate development on lands above the OHWL. See, Leg. Code § 68.102(a) ("This chapter shall apply to all lands within the city shown on the river corridor overlay zoning district maps...") As noted above, the Project work objected to by the Appellant is taking place below the OHWL over which the City's current MRCCA ordinances do not apply.

2. Appellant contends the City has violated Wetland Conservation Act ("WCA") rules. MN Rule Chapter 8420 implements the regulatory provisions of the Wetland Conservation Act of 1991. Per MN Rule 8420.0100 Subd. 3, The Wetland Conservation Act is administered by local government units with oversight provided by the Board of Water and Soil Resources. Enforcement of the act is provided by Department of Natural Resources conservation officers and other peace officers. MN Rule 8420.0150 covers the scope of WCA, however as stated in MN Rule 8420.0150, Subd. E (This chapter does not apply to the public waters and public waters wetlands as defined in Minnesota Statutes, section 103G.005, subdivisions 15 and 15a, which have been inventoried by the commissioner according to Minnesota Statutes, section 103G.201). As previously noted above, this project is within a Public Water and all work is below the OWHL and thus not covered under WCA rules as being regulated by the City of Saint Paul but is under the jurisdiction of the DNR.

3. Appellant contends the Project has failed to meet flood plain rules. The Project is located in a flood plain under the jurisdiction of the Ramsey Washington-Metro Watershed District (RWMWD). The Project was previously reviewed by staff of the RWMWD as well as by the City's Water Resources Manager. Based its review, the RWMWD conditionally issued RWMWD watershed permit No. 20-27 to the Project on August 5, 2020. Subsequently, on June 20, 2022, the RWMWD issued a construction permit for the Project. The RWMWD also granted a variance for floodplain fill because the Project is "within an ineffective flow area resulting in no adverse impacts to water surface elevations." The Administrator was advised that a RWMWD engineer reviewed the Project's hydraulic modeling prior to the RWMWD approval. Accordingly, under the jurisdiction of the RWMWD, an allegation of floodplain rules violations should be addressed to the RWMWD given its jurisdiction over floodplain matters.

4. Appellant contends that the City's statement in its June 30, 2022, decision letter that "Pig's Eye Lake Regional Park is owned and operated by Ramsey County and is not a component of the City's park system" is inaccurate. Appellant appears to contend that the Project is taking place within a City-owned park. It has since been verified by staff from the City's Park Department that certain parcels of land located generally to the north of the Pigs Eye Lake shoreline Park are in fact owned and operated by the City as a part of the City's park system as Pigs Eye Lake Regional Park.

However, Parks Department staff noted that but for the City's parkland that abuts the northernmost shoreline of Pigs Eye Lake, the vast majority of land surrounding Pigs Eye Lake is owned by

Ramsey and operated by it as the Pigs Eye Unit of Battle Creek Regional Park. Furthermore, City Park's staff advised that the City's jurisdiction over the land abutting the shoreline of Pig's Eye Lake ends at the OHWL because the OHWL would form a defined boundary between the City's Pigs Eye Lake Regional Park and the County's Pigs Eye Unit of Battle Creek Regional Park. City Park's staff noted that Ramsey is designated as the implementing agency for the Pigs Eye Unit of Battle Creek Regional Park and, as such, this land is a part of County's park system and subject to Ramsey's jurisdiction. More specifically, the master plan for Battle Creek Regional Park (dated June 1981) specifically states: "Ramsey County will have operational responsibility for two sections: Battle Creek *and Pigs Eye Lake*." (italics added) (1981 master plan, pg. 40). The boundary of the regional park is shown in the 1981 master plan and is also reaffirmed in a current draft master plan for Battle Creek Regional Park.

Therefore, the City's parkland north of the lake and operated by the City as Pigs Eye Lake Regional Park. is outside of Ramsey's jurisdictional and operational boundaries of the Pigs Eye Unit of Battle Creek Regional Park as defined by the OHWL of the lake. Accordingly, the locations of the Project's islands are entirely within park areas administered and operated by Ramsey. The City does not have any park-related jurisdiction of the lake below the OHWL, and the statement made in the City's June 30, 2022, decision letter is not inaccurate.

5. Appellant lists several projects as examples of work along the river that was either approved or denied by the City of Saint Paul. However, as the Appellant admits, these projects were above the OHWL. Accordingly, they are not relevant to the claim made by the Appellant.

WHEREAS, on September 15, 2022, Appellant and Friends of Pigs Eye Lake Park (together hereinafter, "Appellants"), pursuant to Leg. Code § 61.702(a) and under BZA File No. 22-097024, duly filed with the City Clerk an appeal from the BZA's September 6, 2022, determination and requested a hearing before the City Council for the purpose of considering the action taken by the BZA; and

WHEREAS, on September 22, 2022, staff notified the DNR of the new appeal application as well as those property owners within 350 feet of Pigs Eye Lake and set the matter for hearing before the City Council on October 5, 2022, under Council File No. ABZA 22-2; and

WHEREAS, on October 5, 2022, and pursuant to Leg. Code § 61.702(b), a public hearing on the said appeal was duly conducted by the City Council whereby all interested parties were given an opportunity to be heard and, upon the close of the public hearing, the City Council duly moved to layover its deliberations on the matter to October 19, 2022; and

WHEREAS, on October 19, 2022, after comment by the City Council, the City Council took no action on the appeal and instead duly moved another two-week layover of the matter to November 2, 2022; and

WHEREAS, on November 2, 2022, the City Council took no action on the matter and again duly moved an additional two week layover of the matter in order to allow all Councilmembers to participate in the deliberations which was then set to be heard on November 16, 2022; and

WHEREAS, on November 16, 2022, the Council took up its deliberations on the matter and, having heard the statements made and, having considered the application, the reports, the statements made to the BZA and the BZA's minutes and staff report; NOW, THEREFORE,

BE IT RESOLVED, that the Council of the City of Saint Paul hereby upholds the BZA's decision in this matter to deny the Appellants' appeal and thereby reaffirms the decision of the Zoning Administrator that the City had no jurisdiction over the DNR's duly permitted work in Pig Eye Lake, there being no showing by the Appellants, as is their burden, that the BZA erred in its decision to deny a request to issue a "stop work order" on the Pigs Eye Lake Island Building project; and

BE IT FURTHER RESOLVED that the Council, in support of its decision, hereby adopts as its own and incorporates by reference, the BZA's findings in this matter as set forth in BZA Resolution No. 22-072764; and

BE IT FURTHER RESOLVED that the City denies Appellants appeal based upon the Council's adopted findings and

BE IT FINALLY RESOLVED that a copy of this Memorialization Resolution shall be provided to the Appellants, the Zoning Administrator, and the BZA.