



CITY OF SAINT PAUL

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Board of Zoning Appeals

Staff Report

TYPE OF APPLICATION: Administrative Appeal **FILE # 22-072764**

APPLICANT: Tom Dimond

HEARING DATE: August 8, 2022

LOCATION: Pigs Eye Lake

LEGAL DESCRIPTION: UTM zone 15N, 497941m east, 4973841m north (centroid), SENE of Section 15, T28N, R22W, NENE of Section 15, T28N, R22W, SWNW of Section 14, T28N, R22W, NWNW of Section 14, T28N, R22W, SWSW of Section 11, T28N, R22W, SESE of Section 10, T28N, R22W

PLANNING DISTRICT: 1

PRESENT ZONING: R1

ZONING CODE REFERENCE: § 61.701

DATE RECEIVED: July 8, 2022

REPORT DATE: July 27, 2022

DEADLINE FOR ACTION: September 5, 2022 **BY: Andrew Hogg**

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- A. **PURPOSE:** Administrative Appeal from a Zoning Administrator decision to deny a request to issue a “stop work order” regarding island building work in Pigs Eye Lake. The Zoning Administrator determined that the City had no authority to issue a stop work order because the Project is taking place within a public water under the jurisdiction of the Minnesota Department of Natural Resources pursuant to a permit issued by the Department of Natural Resources.
- B. **SITE AND AREA CONDITIONS:** The Project is taking place in Pigs Eye Lake. The lake is a designated as “public water basin” No. 62-4 P. The lake basin area is also located in an area subject to the control of the Ramsey County Parks and Recreation Department (“Ramsey”) as part of Pigs Eye Lake Regional Park (“Park”). Ramsey initiated the Project to construct habitat enhancement features for the Park using dredged materials from maintenance of the Mississippi River navigation channel. Ramsey applied for and received a Minnesota Department of Natural Resources (“DNR”) public waters work permit for the Project which was issued by the DNR as public waters permit No. 2020-1818. The Project is on-going.

For ease of reference, Exhibit 1 below Exhibit 1 illustrates Pigs Eye Lake as Public Water No. 62-4-P as shown on the Public Waters Map for Ramsey County, published by the Minnesota DNR, May 20, 2011.

Exhibit 2 below shows the limits of construction for the Project and is provided to show that the Project is entirely within the basin of Pigs Eye Lake and that the Project does not affect any areas around and above the lake's ordinary high water level.

C. CODE CITATIONS:

Sec. 61.701: Administrative Appeals

- (a) The board of zoning appeals shall have the power to hear and decide appeals where it is alleged by the appellant that there is an error in any . . . refusal made by the zoning administrator in carrying out or enforcing any provision of this code.

D. BACKGROUND:

This is an administrative appeal pursuant to Leg. Code § 61.701(a) from a decision by the Zoning Administrator ("Administrator") to deny a request by Tom Dimond ["Appellant"] that the City immediately issue a "stop work order" for Project work presently taking place in Pigs Eye Lake. Ramsey is the sponsor of the Project the purpose of which is to enhance and restore wildlife habitat features and reduce sedimentation in Pigs Eye Lake using material dredged from the Mississippi River. The lake is a "public water basin and has been assigned public water No. No. 62-4 P by the DNR. The Lessard-Sams Outdoor Heritage Council has contributed funding for the Project citing the Project's significant fish and wildlife habitat potential.

Construction of the Project was authorized under DNR Public Waters Permit No. 2020-1818 ("DNR Permit") which was issued on August 26, 2020. The DNR Permit approved the use of material dredged during maintenance of the Mississippi River navigation channel by the United States Army Corps of Engineers ("USACE") for the Project. Under Section 204 of the USACE's "Continuing Authorities Program," the USACE may plan, design and build projects to protect, restore and create aquatic and ecologically related habitats in connection with authorized Federal navigation dredging projects. These projects involve the use of dredged material from navigation channels to improve or create wetlands or waterbird nesting habitats.

Appellant alleged that the City failed to apply Mississippi River Corridor Critical Area ("MRCCA") rules, Wetland Conservation Act ("WCA") rules and the City's site plan review ordinances to the Project and was therefore required to issue a stop work order. The City's Water Resources Coordinator, acting on behalf of the Administrator, reviewed the request of the Appellant and subsequently advised Appellant that the City lacked jurisdictional authority over the Project to issue a stop worker order and advised Appellant that work being performed contrary to the DNR Permit could be addressed by the DNR Commissioner.

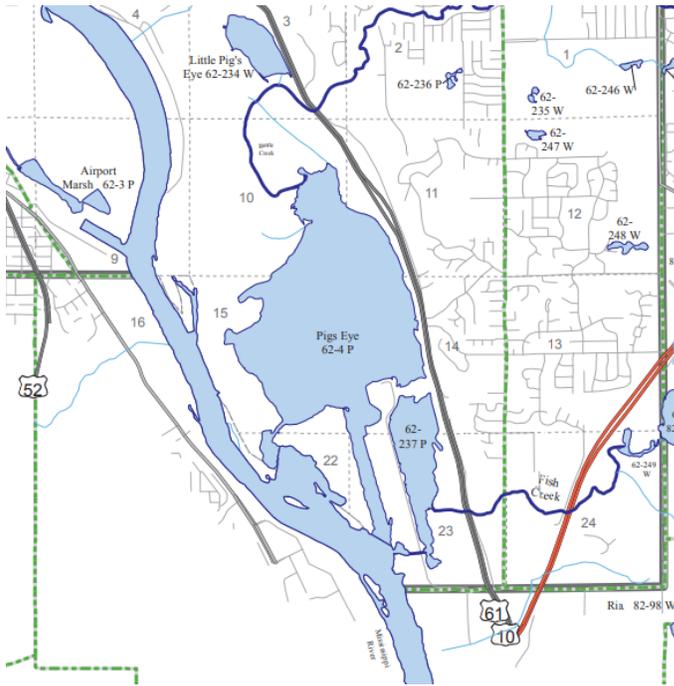


Exhibit 1

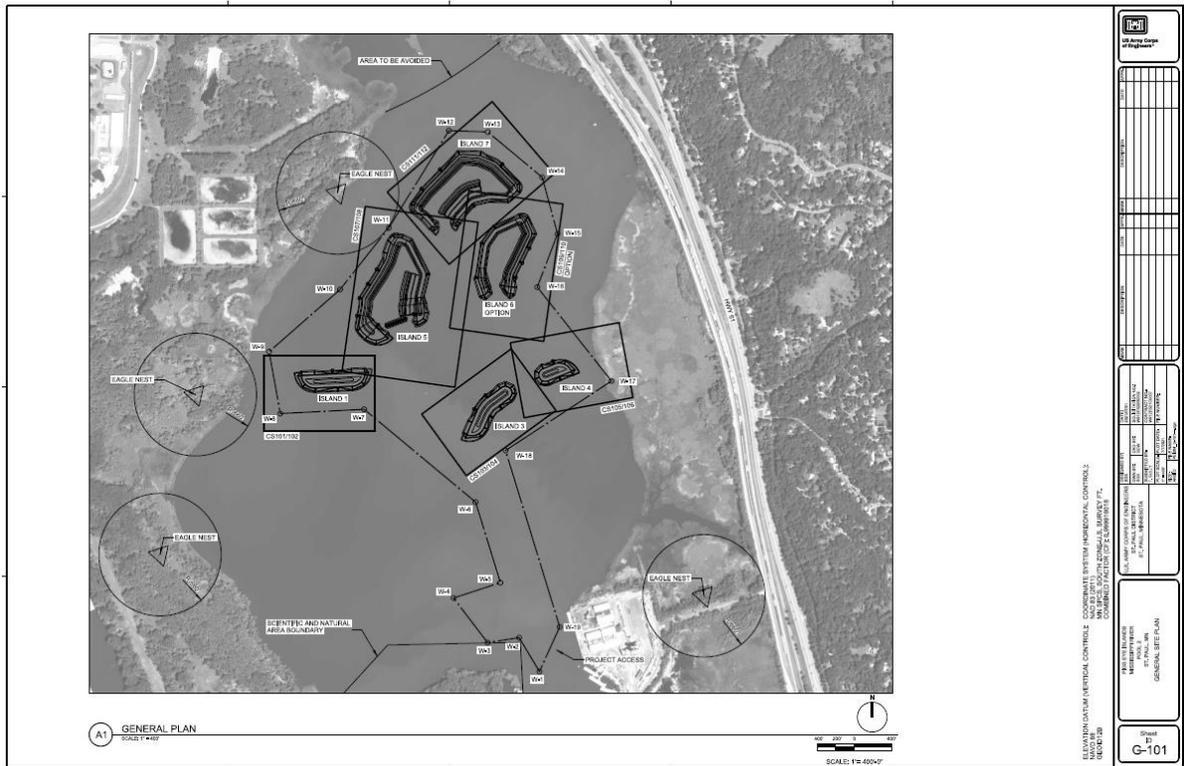


Exhibit 2

ANALYSIS AND FINDINGS

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. § 103G.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 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 OHWL 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.

- E. **DISTRICT COUNCIL RECOMMENDATION:** As of the date of this report, District 1- Southeast Community Organization has not provided a recommendation.
- F. **CORRESPONDENCE:** The following correspondence was received via from a resident.
- G. **STAFF RECOMMENDATION:** Based upon the foregoing findings and analysis, Staff recommends that the Board of Zoning Appeals find that the Zoning Administrator did not err in its decision to deny Appellant's request for a stop work order and that Appellant's appeal be denied.