

Exhibit B
Plaintiffs' Reply Memorandum
Motion for Partial Summary Judgement
Feb. 17, 2010

Article XXIV. Downtown Waterfront Mixed Use-Design Review District (DWMX-D).

Sec. 50-144. Statement of purpose.

Located south of Interstate Highway 35, the Downtown Waterfront encompasses canal point and several bayfront properties. Canal Point is the centerpiece of Duluth's revitalizing waterfront, containing not only the state's number one tourist attraction, the Aerial Lift Bridge and shipping canal, but also a solid core of historic industrial and warehouse structures that lend a special working waterfront atmosphere to the area. Immediately west is Minnesota Slip with the museum ore carrier, the William A. Irvin; the Duluth Entertainment Convention Center; Bayfront Festival Park along with Slip Nos. 1 and 2 and several private properties. The area's visibility, historical uniqueness and economic importance to the city as a whole all recommend a special approach in the development of this area. Thus, the Downtown waterfront mixed use-design review district (DWMX-D), which is a mixed use zoning district with an overlapping design review district (the latter being created pursuant to Laws of Minnesota, 1987, Chapter 84), is hereby established to preserve and enhance the unique visual character and environmental quality of this area and to provide for the coordinated implementation of the downtown waterfront plan.

The DWMX-D district allows for flexible and creative approaches to development concepts with mixed land uses that would not be permitted within standard zoning districts. Because mixed land uses have the potential for conflicting impacts and the unique qualities of mixed use districts are fragile and unusually sensitive to visual chaos and blight, design review is considered essential to maintain those characteristics deemed worthy of protection and enhancement. Substantial city investment in public improvements within the district also call for special regulations for the district. (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-145. Subdistricts.

For purposes of regulating setbacks, permitted uses and building heights, the DWMX-D district has been divided into subdistricts. Refer to the official zoning map, Plate 29 for delineation of these subdistricts. (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-146. Permitted uses.

(a) Generally. It is the intent of this Section to provide for a variety of compatible, integrated land uses that will enhance the liveliness of the DWMX-D district and to provide for a balance between tourist-oriented attractions, public recreational facilities, commercial and industrial enterprises, residential uses and neighborhood services. A building or premises within the DWMX-D district may be used for the following listed uses, or uses determined by the city planning commission to be similar to those listed and compatible with the purposes of the district;

(b) Residential;

(1) Multi-family dwellings, townhouses or apartments, except in the area south of Buchanan Street and east of

Canal Park Drive;

(c) The following retail and wholesale sales, services and production and accessory uses; provided drive-up service windows are not permitted:

- (1) Antiques refinishing, repairing and sales;
- (2) Art studio;
- (3) Bakery and sale of bakery products on the premises;
- (4) Bar licensed to serve liquor;
- (5) Boat sales room;
- (6) Catering service;
- (7) Cleaning service;
- (8) Clothing store;
- (9) Dancing and music academy;
- (10) Delicatessen;
- (11) Display room for wholesale merchandise stored elsewhere;
- (12) Dressmaking, tailoring and shoe repair;
- (13) Dry cleaning and pressing;
- (14) Excursion rides;
- (15) Florist shop;
- (16) Fueling facilities for motor vehicles, except that no such fueling facility (either as a principal or accessory use) shall be permitted in Subdistrict A;
- (17) General business office (except medical and dental clinics);
- (18) Grocery stores;
- (19) Hair styling salon;
- (20) Hotel and motel;
- (21) Household appliance repair;
- (22) Laundry and laundromat;
- (23) Livery stable;
- (24) Marina;
- (25) Meat, poultry and fish shops, provided that there is no slaughtering of animals or poultry on the premises;
- (26) Parking lots and ramps;

- (27) Photography studio;
- (28) Pottery studio;
- (29) Remote electronic bank teller facility;
- (30) Restaurant;

(31) Retail and wholesale sales of general or specialized merchandise; except that in connection with such sales, there shall be no slaughtering of animals or poultry on the premises;

(32) Theater, movie or live performance;

(33) Upholstery shop;

(d) The following light industrial production, warehousing and distribution:

(1) Beverage blending and bottling;

(2) Brewery;

(3) Cooperage works;

(4) Cosmetics and toiletries;

(5) Food packaging;

(6) Fruit and vegetable processing;

(7) Ice cream production;

(8) Iron (ornamental) fabrication;

(9) Leather goods manufacture, not including tanning operations;

(10) Motion picture production;

(11) Pharmaceutical products;

(12) Printing, publishing and engraving;

(13) Small metal products fabrication such as needles and pins, nails, brads, tacks, staples, tools and hardware products.

(14) Storage, packaging and distribution of wholesale merchandise;

(15) Textile bedding and fiber production (excluding rubber and synthetics processing and productions);

(16) Wharves, docks and the repair, service and storage of boats and other facilities used in connection with water transportation or navigation;

(e) The following institutional uses:

(1) Convention centers;

(2) Museums, research and interpretive facilities;

- (3) Parking decks/ramps and surface parking lots;
- (4) Private schools and academies;
- (5) Public parks and open space;
- (6) Sports facilities;
- (7) Recreational vehicle parking;
- (f) The following miscellaneous and/or water-related uses:
 - (1) Boat manufacture;
 - (2) Boatyards and shipyards;

No variances from the provisions of this Section shall be allowed. (Ord. No. 8972, 3-12-1990, § 1; Ord. No. 9832, 5-14-2007, § 1.)

Sec. 50-147. Technical design advisory committee .

(a) A technical design advisory committee, hereinafter called the design committee, is hereby established for the DWMX-D district pursuant to Laws of Minnesota, 1987, Chapter 84;

(b) Responsibilities. The design committee shall have the responsibility of reviewing development proposals within the DWMX-D district for consistency with the established design framework for the area, as set forth in Sections 50-150 through 50-160, and issuing certificates of appropriateness where warranted. The design committee may by rule delegate specified review functions for minor proposals to subcommittee and/or department of planning and development staff as deemed necessary in order to expedite the review process;

(c) Membership. The design committee shall consist of seven members, appointed by the mayor, subject to confirmation by the city council. No more than three of the members shall be property owners or tenants of the district and one shall be a member of the city planning commission. All members of the design committee shall be knowledgeable in the field of design by virtue of their interests, training and experience, and at least one member shall be an architect;

(d) Terms. One of the five design committee members initially appointed will serve a term of one year, two will serve terms of two years, and two will serve terms of three years. All subsequent appointments shall be for a term of three years. In the event of a vacancy, the unexpired term shall be filled in the same manner as the appointment was originally made. No member shall serve more than three consecutive terms. Members shall serve without compensation and shall continue to hold office until their successors have been appointed and confirmed;

(e) Organization. The design committee shall select from among its members such officers as it may deem necessary. The design committee shall make such rules and regulations as it may deem advisable and necessary for the conduct of its affairs for the purpose of carrying out the intent of this ordinance which are not inconsistent with the laws of the city of Duluth and the state of Minnesota. Such rules and regulations shall include, but not be limited to meeting notification, procedures and provision for timely reviews of development proposals;

(f) Reports and records. The design committee shall make an annual report, containing a statement of its activities and decisions, to the Duluth City Council. Minutes of all meetings shall be kept and all records and meetings of the committee shall be open to the public. (Ord. No. 8972, 3-12-1990, § 1; Ord. No. 9089, 8-10-1992, § 1.)

Sec. 50-148. Approval of construction activity.

(a) Type of activity. The design committee shall review all construction activities, including all street and utility activities, within the DWMX-D district. No person shall undertake any of the following activities in a DWMX-D district prior to issuance of a certificate of appropriateness under this Article:

(1) Remodeling, repairing or altering structures or improvements in any manner which will change their exterior appearance, including such things as sandblasting, chemical cleaning and painting;

(2) New construction and improvements;

(3) Construction of and changes to parking facilities, curb cuts and driveways;

(4) Moving a building;

(5) Adding or removing any landscape plantings or features whose characteristics include a height at maturity of over four feet;

(6) Placement of signs, except for temporary signs which are regulated under Section 44-9 of this Code;

(b) Seasonal concession activities. In addition to the construction activities requiring review, all mobile and/or seasonal concession vehicles/stands located within the DWMX-D District which effectively become permanent structures by remaining immobile at the same location for more than three hours in any day shall be required to obtain a certificate of appropriateness under the provisions of Sections 50-150 through 50-160 of the City Code;

(c) Application and plans. Every application for a building permit or certificate of appropriateness for any activity listed in paragraph (a) of this Section within the DWMX-D district shall be accompanied by detailed plans for the proposed work to be done and a narrative explaining the proposed use. Such plans shall, at a minimum, include:

(1) Scale drawings of all building elevations impacted by the proposed change including notes on building materials and color samples;

(2) Floor plans to scale;

(3) Landscape plans;

(4) Site plans;

(5) Sign plans; showing materials, colors and text at scale.

Applications, plans and narrative shall be submitted to the city planning division, which shall process the applications for review by the design committee. The division of building inspection shall not issue permits in regard to an application until receiving a written certificate of appropriateness from the design committee;

(d) Plan review. The design committee, upon receipt of a complete application for a permit, shall undertake an expeditious and timely review of the proposal to determine whether the work to be performed meets the intent and requirements of the design framework for the district. A certificate of appropriateness shall be issued only upon a finding by the design committee that the proposed construction activities are in conformance with the design framework. The design committee may delegate to subcommittee or a designated city department of planning and development official its power to review and approve permit applications and issue certificates of appropriateness for certain minor modifications;

(e) Variances. The provisions of Section 50-47(b) relating to the granting of variances shall be applicable to only Section 50-152 building height limitations, Section 50-154 setbacks, and Section 50-155 parking and loading of this Article. Variances from and/or interpretations of all other Sections of this Article shall be made by the design committee if it is found that the proposed work in question will better meet the overall intent, goals and policies of the design framework without strict compliance, and findings to this effect are made;

(f) Appeals. If an application for a certificate of appropriateness is denied by an official of the city department of planning and development or subcommittee, the applicant has the right of appeal to the design committee within ten days of official notification of the decision. The applicant or any party aggrieved by any decision by the design committee regarding design framework standards or variances therefrom has the right of appeal to the city council within ten days of the written notice of the official decision. A public hearing shall be held upon appeal to the city council, notice of which shall have been published in the city's official newspaper and sent to all other property owners within 400 feet of the subject property at least ten days prior to the date of the hearing. Decisions by the design committee appealed to the city council regarding variances from design framework standards may only be overturned after specific findings are made based on the overall intent, goals and policies of the design framework as reflected in Sections 50-156 through 50-160 and upon the affirmative vote of at least five councilors. (Ord. No. 8972, 3-12-1990, § 1; Ord. No. 9089, 8-10-1992, § 1.)

Sec. 50-149. Notification of demolition activities.

Applications for demolition permits within the DWMX-D district are subject to a 30 day waiting period, commencing upon the date of application. The waiting period is to allow for documentation of the building(s) to be demolished and for the property owner to consult with the design committee regarding the design framework guidelines for the site. The city building official shall not issue a demolition permit within the 30 day waiting period unless the design committee finds that the demolition is compatible with the design framework for the district and waives in writing the waiting period. (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-150. Design framework established.

A design framework for the DWMX-D district, consisting of Sections 50-150 through 50-160 of the city Code, is hereby established to serve as a basis for design review in the district. The Downtown waterfront design framework supplement (DF supplement), a copy of which is on file in the office of the planning division, is a guideline for the implementation of this design framework. Additions to, or deletions from, the DF supplement may be made from time to time by resolution of the city council. (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-151. Design framework goals and objectives.

The primary goal of the design framework is to foster the spirit of the working waterfront in the Downtown Waterfront. To achieve this, the design framework presents specific objectives that will enhance the unique historic waterfront/industrial character of the district, promote public access to the water, assure The standards and guidelines set forth in this design framework are intended to encourage sensitive architectural rehabilitation and preservation of the older buildings and historic artifacts. The design framework also establishes standards for new developments, including how they harmonize with existing structures of quality and otherwise contribute to the waterfront character of the district. The design framework should be enforced with an understanding of the aesthetic rationale which lies behind it so that the spirit of the waterfront character is fully expressed. (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-152. Building height limitations.

(a) The building height limitations vary between the six subdistricts in order to maintain the existing building

massing which is stepped-down from the central business district and harbor areas to Lake Superior. Maximum heights allowable within these districts are as follows:

- (1) Subdistrict A: shall comply with height limits contained in Chapter 51 of this Code (water resource management ordinance);
- (2) Subdistrict B: shall not exceed 4½ stories and 54 feet in height;
- (3) Subdistrict C: shall not exceed eight stories and 100 feet in height;
- (4) Subdistrict D: shall not exceed 74 feet in height;
- (5) Subdistrict E: shall not exceed six stories and 75 feet in height;
- (6) Subdistrict F: shall not exceed four stories and 48 feet in height. (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-153. Lot coverage.

The aggregate gross area of new buildings and accessory structures on an individual parcel or group of parcels shall be regulated by the setback and parking requirements of this Article and Chapter 51 of this Code, and also by restrictions on impervious surfaces, contained in Chapter 51 of this Code (water resource management). (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-154. Setbacks.

(a) Side yards in Subdistrict A, for purposes of this Section, shall be defined as running along property boundaries which are generally perpendicular to either Canal Park Drive or Lake Avenue South. In Subdistrict A, the total side yard setbacks shall be a minimum of 20 percent of the lot width. For lots with 200 feet or more of frontage, the required side yard setbacks shall be met by providing two side yards, each of which must be a minimum of 20 feet. For lots with less than 200 feet of frontage, the side yards may be combined, with the location of the resulting side yard being subject to approval by the design committee. Principal structures, fences which are more than ten percent opaque and over 36 inches in height and accessory buildings and structures are all subject to the setbacks stated herein. However, accessory buildings and structures which cover less than 200 square feet of ground may be allowed in side yards by the design committee if the purposes of the side yard setback requirement to preserve visual access to the water are otherwise achieved. No side yard setbacks are required for Subdistricts B, D, E and F;

(b) In Subdistrict A, rear yard setbacks, measured from the January 1, 1985, ordinary high water mark (OHW), shall be a minimum of 50 feet and the design committee shall require that any accessory structures or fences do not detract from Downtown Lakewalk. In the other subdistricts, rear yard setbacks shall be regulated by the provisions of Chapter 51 of this Code (water resource management). (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-155. Parking and loading.

(a) Provision of off street parking is not required in the DWMX-D district, except for hotels and motels and residential developments of over ten dwelling units and in Subdistrict F, in which case the requirements set

forth in Article III of this Chapter apply;

(b) All parking lots and parking areas shall be improved with permanent, smooth, hard surface coverings;

(c) Off street loading shall be provided as required for C-4 districts pursuant to Article III of this Chapter. (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-156. Urban design.

To refine and/or enhance the most desirable characteristics of the district, the design committee shall apply the following urban design concepts which have been established by the Downtown Waterfront Plan to its review of all development proposals:

(a) Waterfront character. Developments throughout the Downtown Waterfront shall contribute to capturing the authentic spirit or character of the working waterfront. By considering the impact of new development on all our senses, this spirit can be promoted. Along with views of the water and water-related activities discussed in paragraph (b) below, use of water- and boating-related artifacts, architectural features and historical interpretive devices are encouraged to carry out the waterfront theme. The use of cobblestone, brick and boards underfoot should be considered, as they add another dimension to the experience of the working waterfront district. Other senses such as sound which reinforce the waterfront experience should also be considered. Use of traditional regional architectural styles and related artifacts will help ensure cohesiveness and harmony with the overall character of the district. Devices which introduce additional sensory stimulation must be handled in a skillful and sensitive manner so that the resulting design does not simply add a chaotic, distracting quality to the environment;

(b) View corridors. Preservation of view corridors that allow visual access to the lake and harbor solidify the perception of the waterfront character. Designated view corridors, as illustrated in the DF supplement, are of particular importance and new building construction and landscaping should be designed to not unduly block or compromise these corridors. In addition to the major designated views, open space along the water's edge is encouraged to allow views to the water and water-related activities;

(c) Access. Pedestrian access to the water's edge is important to allow direct, tangible experience of the waterfront as well as to ensure visual access. Thus, promenades along shorelines to provide comfortable access are encouraged on all waterfront properties;

(d) Scale/texture. The present scale and texture of much of the district (specifically, Subdistricts A through C) is largely determined by the existing historic buildings within the district, with brickwork, architectural detailing and classic proportions. Thus, in addition to encouraging the retention of historic buildings, new developments shall emulate the scale and texture of these structures. Matching the existing pattern of building heights in the area will also emphasize the traditional, human scale of the district. To strengthen and enhance the historic feel of this area, new construction should repeat and harmonize with the scale, height, proportion and texture of the historic buildings. As an example, the window-to-wall proportions of the district's major historic buildings, such as DeWitt-Seitz, should be utilized as extensively as possible. Use of ornamentation such as brackets supporting overhanging roofs, arched entrances with sculpted keystones, stone corbels flanking windows and broken building fronts with decorative panels will provide the finer details which will help recreate the texture and scale of traditional area buildings in new developments. Where taller buildings are proposed, a stepping down of building masses to match adjacent building heights provides the transition necessary to create harmony between old and new.

In Subdistrict D, the scale and texture of the built environment is monumental, thus improvements in this area should aim at providing more detailed, human scaled elements to provide a transition between the divergent characters of Canal Point and the DECC area.

Few structures occupy subdistricts E and F, most of which are expected to be removed. Redevelopment of this area

affords an excellent opportunity to introduce forms and details which reflect historic styles native to the region. From the traditional Scandinavian fishing village to the romantic Victorian flavor of the old Duluth boat clubhouse, buildings which utilize a variety of older, vernacular architectural styles could reinstitute a waterfront atmosphere in subdistricts E and F;

(e) Construction techniques. Use of traditional building techniques is one of the principal methods of achieving a character and look that will further the historic industrial flavor that is to be enhanced in subdistricts A through C and F. Some modern construction methods such as the glass curtain wall can destroy the continuity and cohesiveness of the district and are therefore inappropriate. In subdistricts D and E where new construction relates to the existing DECC, modern construction techniques are more acceptable;

(f) Signage. Signs shall be designed to be integral with the architectural expression of the building to which they belong. Specifically, the scale, proportion and color shall be appropriate to the building to which the sign is attached. In subdistricts A through C and F, historic typestyles shall be utilized; examples of appropriate sign designs are illustrated in the DF supplement. Signs which carry out the waterfront/historic industrial flavor of the district, and which incorporate sculptural characteristics and appropriate symbols should be promoted. In particular, the following types of signs are encouraged:

- (1) Projecting sculptural or carved signs with wrought iron brackets as illustrated in the DF Supplement;
- (2) Wall signs consisting of individually mounted letter (except for internally illuminated letters);
- (3) Neon signs within windows or over building entrances;
- (4) Banners and flags, not including temporary pennant stringers.

Signs are specifically regulated by Chapter 44 of this Code;

(g) Variety. The foregoing urban design guidelines are in no way intended to create uniformity which would result in an uninteresting and contrived appearance. Rather, new developments which add to the variety of compatible uses, harmonious visual images, and rich sensory experiences of the district are encouraged. (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-157. Building materials, colors and architectural features.

(a) Acceptable exterior building materials within the district include brick, wood, stone and ornamental iron or other metal determined to be appropriate by the design committee. The use of such materials, along with traditional building techniques, are intended to promote and enhance the waterfront character of the district while providing a harmonious cohesiveness between old and new structures. Where additions to historic buildings are proposed, materials should match as closely as possible, as should the patterns created, and mortar, in the case of brick buildings. In general, brick and stone buildings should not be painted;

(b) Colors are an important element of the overall design concept for the downtown waterfront and should be used to bring richness to the area and to carry out the desired nautical flavor rather than solely for the purpose of demanding attention. The color palette in the DF supplement provides examples which reflect the desired traditional industrial/waterfront character. Colors to be used on buildings and in architectural features such as sculptural elements, awnings, etc., along with building signage, should reflect this color palette;

(c) Architectural features which create a sculptural or three-dimensional quality such as marquees, balconies, grill work, sculpted keystones, caryatids, dentiled cornices, brackets, niches and awnings are encouraged. Such ornamentation also furthers the urban design goal of adding scale and texture to the district. However, these features shall be in keeping with the overall architectural style of the building and carry out the authentic historic industrial/waterfront character of the district as illustrated in the DF supplement. Internally illuminated awnings, for example, are not considered to be suitable in the district due to their ubiquitous, contemporary qualities. (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-158. Landscaping and screening.

(a) All open areas of a lot not covered by buildings, sidewalks, required parking areas, drives, courtyards or accessory structures shall be landscaped with a combination of trees, shrubs, flowers and ground covers. Landscape design introducing a nautical character in features such as decorative walks, statuary, bollards, fountains, wood decks and terraced areas are encouraged. Plantings shall be utilized so as to frame and enhance denoted view corridors and vistas, and shall not block important architectural, historic or natural features on the site or adjacent property;

(b) Deciduous trees shall have a minimum caliper of 2.5 inches except that ornamental deciduous trees are required to have a minimum caliper of 1.5 inches. Coniferous trees shall be a minimum of six feet in height. The above dimensions apply to sizes at time of planting;

(c) All surface parking lots and parking areas containing over 100 stalls shall be designed to incorporate unpaved, landscaped islands; number and locations as approved by the design committee. Landscaped islands shall contain a minimum of 200 square feet. (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-159. Skywalks.

(a) Skywalks are encouraged to be located in such a manner that they do not block major view corridors as illustrated in the DF supplement. Also the location and design of skywalks should not compromise the historic or architectural integrity of existing buildings. If proposed for any building or district on the national register of historic places or locally designated as a heritage preservation landmark, comments on the skywalk location and design shall be obtained from the city's heritage preservation commission prior to any issuance of a certificate of appropriateness by the design committee;

(b) Design of skywalks shall be closely scrutinized as to their architectural sensitivity, harmony, and cohesiveness with the historic/industrial waterfront character of the district. In particular, the skywalks should not compete with views of the aerial lift bridge or limit the water-to-sky vistas available from major pedestrian areas within the district. (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-160. Special review considerations.

(a) Because of the varying characteristics of the land uses allowed and adjacent uses, projects must be viewed in the context of existing and planned developments. The design committee may impose special design requirements upon a proposed use in order to mitigate against undue negative impacts on surrounding uses;

(b) The design committee, when considering the aesthetics of a development proposal, should recognize that developments must maintain their economic viability if any improvements are to be made in the district;

(c) The design committee should be mindful of the need and requirements for handicapped accessibility in its review of development proposals. (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-161. Violations constitute nuisance.

Any remodeling, repairing, altering, demolition or construction activity in violation of this Article is hereby declared a nuisance, and the city may take appropriate action to prevent unlawful alteration of the building and/or site in question. Such action may include restraining, correcting or abating the violation(s). (Ord. No. 8972, 3-12-1990, § 1.)

Sec. 50-162. Other regulations applicable.

The regulations contained in this Article shall be deemed to be in addition to those contained in this Code and other applicable laws, ordinances, rules and regulations unless otherwise noted. Where conflicts occur, the most restrictive regulations shall apply. (Ord. No. 8972, 3-12-1990, § 1.)