

STATE OF MINNESOTA
IN SUPREME COURT

*ITMO the Denial of Certification of the Variance Granted to David
Haslund by the City of St. Mary's Point*

**RESPONDENT COMMISSIONER, MINNESOTA DEPARTMENT OF NATURAL
RESOURCES' BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

- I. Whether, pursuant to Minn. Stat. § 103F.351 (2006) and its implementing regulations, DNR must deny a city's request to certify its land use decision when the decision is inconsistent with the minimum standards of Minn. R. 6105.0380 (2005)?**

The Court of Appeals, like the Commissioner of the Department of Natural Resources and the Administrative Law Judge, concluded in the affirmative.

Apposite Authorities:

Minn. Stat. § 103F.351 (2006)

Minn. Stat. § 103F.335 (2006)

Minn. R. 6105.0380 (2005)

Minn. R. 6105.0540 (2005)

- II. Whether Appellant's plea for equitable estoppel must be denied, where Appellant fails to meet his burden of proof on each element?**

The Court of Appeals agreed with the Commissioner and the Administrative Law Judge and concluded that Appellant failed to establish a basis for the application of equitable estoppel.

Apposite Authorities:

Ridgewood Dev. Co. v. State, 294 N.W.2d 288 (Minn. 1980)

Graham v. Itasca County Planning Comm'n, 601 N.W.2d 461 (Minn. Ct. App. 1999)

STATEMENT OF THE CASE

This matter concerns the application of the lots-in-common provisions to which an undeveloped lot on the Lower St. Croix River is subject by statute, rule, and local ordinance. Appellant David J. Haslund (“Appellant”) owns an undeveloped lot (“Lot A”) riparian to the Lower St. Croix River. From 2000 to 2004, Appellant owned a developed lot (“Lot B”) with a residence that is adjacent to the lot at issue here (Lot A.) Both lots are nonconforming pursuant to City ordinance and State rule.

In 2000, the City of St. Mary’s Point (“City”) granted Appellant a variance to build a residence on Lot A. Pursuant to its terms, the variance expired if construction of the residence did not commence within two years of the grant. Appellant did not begin construction of the proposed residence within two years and the variance expired. In 2004, Appellant sold Lot B in violation of the lots-in-common provision of Minn. R. 6105.0380 (2005) and the City’s ordinance.

In 2006, Appellant sought and obtained an extension of the 2000 variance. The City, as required by its ordinance and Minn. R. 6105.0540 (2005), submitted its decision to the Minnesota Department of Natural Resources (“DNR”) for certification that it complied with the statewide minimum standards for development on the Lower St. Croix River and the intent of the wild and scenic rivers legislation. The Department determined that the decision was contrary to the intent of the wild and scenic rivers legislation, was not supported by hardship and denied certification.

Appellant demanded a contested case hearing. The City chose not to appeal or intervene but participated as amicus curiae. The parties submitted cross-motions for

summary disposition. The Administrative Law Judge (“ALJ”) granted DNR’s motion, concluding that Appellant failed to establish hardship, that the City’s decision to grant a variance violated the statewide minimum standards, and that the City’s request for certification was properly denied by DNR. The ALJ rejected Appellant’s argument that DNR’s certification rule does not provide it with any authority over this matter.

Following submission of exceptions and arguments to by the parties, the Commissioner of Natural Resources (“Commissioner”) adopted the recommendation of the ALJ with minor modifications and denied certification. Appellant appealed to the Court of Appeals. The Court of Appeals affirmed the decision of the Commissioner.

STATEMENT OF FACTS

I. THE REGULATORY FRAMEWORK APPLICABLE TO REAL PROPERTY LOCATED WITHIN THE LOWER ST. CROIX NATIONAL SCENIC RIVERWAY.

Minnesota’s wild and scenic rivers system is administered by the Commissioner of the Department of Natural Resources. The Legislature has entrusted the Commissioner to “administer the wild and scenic rivers system” and to “conduct studies, develop criteria for classification and designation of rivers, designate rivers for inclusion within the system, manage the components of the system, and adopt rules to manage and administer the system.” Minn. Stat. § 103F.321, subd. 1 (2006). To carry out the duty to administer the wild and scenic rivers system, the Commissioner is authorized to “adopt statewide minimum standards and criteria for the preservation and protection of shorelands within the boundaries of wild, scenic, and recreational rivers.” Minn. Stat. § 103F.321, subd. 2(a) (2006). The Commissioner is expressly authorized to adopt standards and

criteria that include “furtherance of the purposes of [the wild and scenic rivers act] and of the classifications of rivers” as well as their “application to the local governments.” *Id.* at subd. 2(b)(2) and (3).

The lower St. Croix River has long been designated a wild and scenic river. By act of Congress, the lower St. Croix River was nominated in 1972 as the ninth river for inclusion within the National Wild and Scenic Rivers system.¹ *See* Lower St. Croix River Act, Pub. L. No. 92-560, 86 Stat. 1174 (1972). Such inclusion was conditioned upon submission by the states of Wisconsin and Minnesota of an application to the federal government and upon the development of a “comprehensive master plan” that would “provide for State administration of the lower twenty-five miles of the Lower St. Croix River segment” 16 U.S.C. § 1274(a)(9) (2006). Recognition and approval of inclusion of the lower St. Croix River within the federal river system was accomplished by the Minnesota Legislature in 1973 through the Lower St. Croix Wild and Scenic River Act. Minn. Stat. § 103F.351 (2006).

In its authorization, the Legislature recognized the lower St. Croix River as “a relatively undeveloped scenic and recreational asset” and noted that “preservation of this unique scenic and recreational asset is in the public interest and would benefit the health and welfare of the citizens of the state.” Minn. Stat. § 103F.351, subd. 1 (2006). The Legislature observed that state authorization of the wild and scenic river designation was “necessary to the preservation and administration of the lower St. Croix River as a wild

¹ *See* 16 U.S.C. § 1271 (2006) (statement of Congressional policy for National Wild and Scenic Rivers Act).

and scenic river”² *Id.* As a component of the wild and scenic rivers system, the Lower St. Croix is subject to the provisions of Minn. Stat. §§ 103F.301-.345 (2006), “except that in cases of conflict with some other law of this state the more protective provision shall apply.” Minn. Stat. § 103F.345 (2006).

As part of this authorization, the Legislature directed the Commissioner to join with the U.S. Department of Interior and the State of Wisconsin in the preparation of the federally-required comprehensive master plan (“Master Plan”) meant to, among other things, guide development along the St. Croix Riverway consistent with the intent of the state and federal designation. Minn. Stat. § 103F.351, subd. 2 (2006). DNR, in cooperation with its state and federal partners, prepared and adopted its Master Plan in 1976, which was updated in 2000. A major objective of the Master Plan continues to be the preservation of the natural values of the area. *See* <http://files.dnr.state.mn.us/waters/wsrivers/nps/contents.pdf>. Of particular note, the Master Plan indicates that the trend toward increasing use of the river corridor for residential purposes continues to pose a significant threat to maintaining the scenic river environment. *Id.* The Legislature required the Commissioner to adopt rules establishing

² Underscoring the public’s interest in the state’s riverway resources, the Legislature adopted the following Scenic River Protection Policy:

The legislature finds that certain of Minnesota’s rivers and their adjacent lands possess outstanding scenic, recreational, natural, historical, scientific and similar values. It is in the interest of present and future generations to retain these values, and a policy of the state, and an authorized public purpose to preserve and protect these rivers.

Minn. Stat. § 103F.305 (2006).

minimum guidelines and standards for local zoning ordinances applicable to real property riparian to the lower St. Croix River. Minn. Stat. § 103F.351, subd. 4 (2006).

As it expanded the State's authority in the field of zoning, the Legislature expressly limited the zoning authority traditionally enjoyed by local units of government. Local governments are expressly required to comply with the standards and criteria of the Commissioner and the management plan applicable to their respective river district. *See* Minn. Stat. § 103F.335 (2006). Pursuant to Minn. Stat. § 103F.351, subd. 4(c), local units of government within the St. Croix River District must "adopt zoning ordinances complying with the guidelines and standards" In addition, "[a]ll state, local and special governmental units, councils, commissions, boards, districts, agencies, departments, and other authorities" are required to exercise their powers to further the goals of the wild and scenic rivers legislation and the management plans adopted by the Commissioner. Minn. Stat. § 103F.335, subd. 2 (2006). The authority to deviate from the minimum standards is limited to enacting provisions more restrictive than the minimum standards. Minn. R. 6105.0352 (2) (2005); *see also* Minn. Stat. § 103F.221, subd. 5 (2006) (a municipality may adopt and enforce ordinances or rules affecting the use and development of shoreland that are more restrictive than the standards and criteria adopted by the Commissioner). The Legislature requires the Commissioner not only to assist local governments with the preparation and implementation of their BSM Ordinances, but also with enforcement of the ordinances. Minn. Stat. § 103F.335, subd. 1(c).

Pursuant to this distribution of authority, DNR promulgated minimum standards for management and development of the lower St. Croix River. See Minn. R. 6105.0351-.0550 (2005). As specifically required by the Legislature, the minimum standards included “the prohibition of new residential ... uses other than those that are consistent with [the wild and scenic rivers acts and] the protection of riverway lands by means of acreage, frontage, and setback requirements on development.” Minn. Stat. § 103F.351, subd. 4 (2006); *see also* Minn. R. 6105.0380, subp. 5 (2005).

The minimum standards promulgated by DNR represent a compromise position with respect to nonconforming lots, permitting limited development of existing non-conforming lots while gradually eliminating undersized contiguous lots with a lots-in-common provision. Minn. R. 6105.0380 (2005) imposes the following statewide minimum standard for lots-in-common:

Substandard lots. Lots recorded in the office of the county register of deeds prior to May 1, 1974, that do not meet the requirements of subpart 3, may be allowed as building sites when:

- A. the proposed use is permitted in the zoning district;
- B. the lot has been in separate ownership from abutting lands since May 1, 1974;
- C. it can be demonstrated that a proper and adequate sewage disposal system can be installed in accordance with the provisions of part 6105.0390, subpart 3; and
- D. the dimensional standards of a St. Croix Riverway ordinance are complied with to the greatest extent practicable. A St. Croix Riverway ordinance may, consistent with these standards and criteria, set a minimum size for substandard lots or impose other restrictions on the development of substandard lots.

Minn. R. 6105.0380 (2005).

As required by statute and rule, the City adopted minimum standards, which are now found in its Bluffland/Shoreland Management City Ordinance (“BSM Ordinance”) at sections 1 through 8. (RA 8-24.) The minimum dimensions for a lot in an urban district are determined by BSM Ordinance § 402.01. *See also* Minn. R. 6105.0380, subp. 3(A)(2) (2005). Although BSM Ordinance § 402.01 relates to the dimensional standards set forth in Minn. R. 6105.0380 and, therefore, triggers a basis for certification pursuant to Minn. R. 6105.0540, DNR often declines to exercise its certification when the provision to which the city has granted a variance is more protective than the minimum standards require, like BSM Ordinance § 402.01. Under the BSM Ordinance, the minimum lot size required is 1 acre, with a lot width at the building setback line and the water line of 150 feet. *Id.* A substandard lot of less than 1 acre is nevertheless considered a buildable lot by BSM Ordinance if it meets the following conditions:

A lot or parcel for which a deed has been recorded in the Office of the Washington County Recorder on or prior to May 1, 1974 shall be deemed a buildable lot provided it has frontage on a maintained public right-of-way, maintained by the community or other unit of government, or frontage on a private road established and of record in the Office of the Washington County Recorder prior to May 1, 1974, and it can be demonstrated that a proper and adequate sewage disposal system can be installed; and a proposed structure can meet the sideyard setbacks of the local zoning ordinance, and the pre-existing lot area dimensions meet or exceed sixty percent (60%) of the requirements for a new lot in the same district.

BSM Ord. § 602.01. (Add. P. 13-14.)³ Without variances to 402.01, Lot A is not a buildable lot. BSM Ordinance § 602.02 addresses contiguous lots under common ownership as follows:

If in a group of contiguous platted lots under a single ownership, any individual lot does not meet the minimum requirements of this Ordinance, such individual lot cannot be considered as a separate parcel of land for purposes of sale or development, but must be combined with adjacent lots under the same ownership so that the combination of lots will equal one (1) or more parcels of land each meeting the full minimum requirements of this Ordinance.

BSM Ord. § 602.02 (Add. P. 14). The text of the City's General Zoning Ordinance ("SMP Ordinance") § 602.02 is identical but for the omission of the word "plat." SMP Ord. § 602.02 (RA 28). The provisions of the SMP Ordinance are "cumulative and in addition to the provisions of other laws and ordinances ... governing the same subject matter." SMP Ord. § 203.12 (RA 26). Ordinance provisions must be interpreted to meet the "minimum requirements necessary to accomplish the general and specific purposes of the ordinance." *Id.* at § 203.01 (RA 25). Pursuant to Minn. R. 6105.0540, subp. 1(A), DNR conducts a review of ordinances adopted by a local unit of government pursuant to the mandate of Minn. Stat. § 103F.351 (2006), and certifies the adopted ordinances that are in "substantial compliance" with the statewide minimum standards. As directed by this provision, the Commissioner certified that the City's BSM Ordinance "substantially complied" with the minimum standards. (AA 25 (RR 281-337.))

³ For the convenience of the Court, the Commissioner will use the style of citation adopted by Appellant in his Addendum.

In addition to initial certification of the City's BSM Ordinance, the Commissioner certifies whether certain of the City's land use decisions in the Lower St. Croix River District comply with the mandatory statewide minimum standards. Minn. R. 6105.0540; BSM Ord. § 802.01. These certain decisions include decisions to grant a variance from the provisions of a St. Croix Riverway Ordinance that relate to the statewide minimum standards contained in Minn. R. 6105.0380. Certification of such land use decisions is intended to "ensure that the standards and criteria herein are not nullified by unjustified exceptions in particular cases, and to promote uniformity in the treatment of applications for exceptions" Minn. R. 6105.0540, subp. 5 (2005). Pursuant to BSM Ordinance § 805.01, a variance may be granted to any requirement if the applicant can establish "hardship." (RA 18-23.) Pursuant to both Minn. R. 6105.0540, subp. 1(B) (2005) and BSM Ordinance § 802.01, all decisions of the City to grant variances in the St. Croix River District must be submitted to DNR for certification before such variances become effective. (RA 6, 21.)

II. THE HASLUND PROPERTY.

Appellant's Petition for Review involves two adjacent lots riparian to the St. Croix River in the City. Both lots are subject to the BSM and SMP Ordinances. Until October 30, 1974, 2959 Itasca Avenue South, an undeveloped lot ("Lot A"), and 2969 Itasca Avenue South, a developed lot containing a residence ("Lot B"), existed as substandard lots under the ownership of Roy H. Haslund and Arthur E. Haslund, respectively. (Add. P. 13.) Neither lot meets the minimum dimensional requirements of BSM Ordinance § 402.01. (Add. P. 14.) Lot A has a width of 115 feet at the waterline,

107.5 feet at the building setback, and a total area of .54 acres. *Id.* On October 30, 1974, both lots came under common ownership when both were deeded to Gloria Haslund. *Id.* In combination, these lots comprised an area of 1.11 acres and complied with the dimensional standards imposed by BSM Ordinance § 402.01. *Id.* These lots remained under common ownership for twelve years until December 3, 1986, when Gloria Haslund sold Lot B to the Appellant contrary to the requirement that such lots remain combined where two conforming lots cannot be created. *Id.*; Minn. R. 6105.0380; *see also* BSM Ord. § 602.02 (RA 19); *see also* SMP Ord. § 602.02 (RA 28).

In 2000, the lots were again under common ownership following Gloria Haslund's conveyance of Lot A to Appellant in April 2000, a conveyance which was recorded on May 25 of that year. (Add. P. 14.) Shortly before obtaining ownership of Lot A, Appellant applied for a permit to build an addition to the residence located on Lot B, which was apparently granted by the City at a meeting of the City Council on May 2, 2000. (RR 63-69.)⁴

On May 3, 2000, Appellant applied for a variance ("2000 Variance") to build a new home on the undeveloped Lot A. (Add. P. 14.) Presumably referring to the April 2000 change of ownership of Lot A, Appellant stated his reason for the request as "this property has always existed as a separate parcel that was buildable until recent change. Property lot width at waterline is 115 feet and at building setback line from

⁴ The substandard lots remained under common ownership for more than four years until Appellant sold Lot B to Richard D. Stehly on December 13, 2004. (Add. P. 14). Again, this transfer was contrary to SMP Ordinance § 602.02 and Minn. R. 6015.0380.

water is 107.5 feet.” (Add. P. 14.) Although the City failed to give the written notice required by Ordinance and Minnesota Rules to DNR, then-Mayor Steve Popovich contacted Molly Shodeen of DNR by telephone to discuss Appellant’s request. (Add. P. 14.); *see also* BSM Ord. § 801.02 *and* Minn. R. 6105.0540, subp. 3 (2005). During this exchange, Ms. Shodeen did not have any documents relating to the variance application before her but did, as she often does, speak informally about the requirements of the shoreland regulations. ((Add. P. 14-15.) Adopting the ALJ’s findings, the Commissioner found that “[i]t is clear that Ms. Shodeen was not aware during this telephone conversation that Mr. Haslund was the owner of both the undeveloped lot at 2959 Itasca Avenue South [Lot A] and the adjoining developed lot at 2969 Itasca Avenue South [Lot B].” (Add. P. 15.)⁵

The City’s Notice of Hearing for the application describes the matter to be considered as “a Variance application to build a 1727 square foot house with a property lot width at the water line of 115 feet requested by Jamie Haslund and Mary Floeder,

⁵ Appellant continues to attempt to cast DNR in the role of villain, claiming in contradiction to the record that DNR “did not bother to share its knowledge [of zoning requirements applicable to Lots A and B] until it was too late,” that the “Commissioner gratuitously struck [unfavorable comments] from the record,” and “blindly validate[d]” the staff’s position. *See* App. Br. at 19-20. Appellant further complains that “it took DNR fifteen months to complete the contested case hearing process and issue a final determination” which Appellant contends, without any factual support, “is much longer than an equivalent proceeding in District Court would have taken, and it cost just as much money.” *Id.* The findings made by the ALJ and adopted by the Commissioner, as well as the record as a whole, expose this as an argumentative attack lacking factual support. In addition, DNR’s “knowledge” is readily available to the public at its website, which contains a tremendous amount of information specifically concerning development on the Lower St. Croix River. *See* www.dnr.state.mn.us.

2959 Itasca Avenue South, St. Mary's Point, Minnesota 55043." *Id.* at 15. The Notice contained no reference to Appellant's common ownership of Lot B. *Id.* On June 6, 2000, a public hearing was held on the May 3, 2000, application. *Id.* Details in the minutes of that meeting are scant and, like the Notice of Hearing, no reference to the common ownership issue is found therein. *See id.* Discussion of the variance request is recorded in the meeting minutes as follows:

"Mayor Popovich called the public hearing to order at 6:34 P.M. Roll call was taken. Jamie Haslund and Mary Floeder present to explain their proposal. He explained he had a septic inspection done, it appears to meet all the current requirements. He has spoken to Molly Shodeen of the DNR regarding the variance. He was told the elevation must be at 694 feet. The DNR doesn't seem to have any problems with building on this particular lot. He meets all sideyard setbacks."

"Mayor Popovich explained proper notice was published, property owners within 500 feet were also notified. A lengthy discussion followed. Motion by Councilmember Blake to grant a variance to build a new home on an existing legal lot at 2959 Itasca Ave. S., and that the Council grants a variance for the home to be built on the existing lot. Seconded by Councilmember Williams. Discussion followed regarding date being set to avoid a perpetual variance. Building to begin within 2 years. Motion passed by roll call vote (4-)."

Id. This decision was never forwarded to the DNR for certification as required by rule, although the BSM Ordinance also specifically requires the city to take such action. BSM Ord. § 802.01 (RA 21.)

Despite the two-year time limitation specifically imposed on the variance, Appellant did not begin to build the proposed structure and the variance expired in 2002. (Add P. 16.) In September 2004, Appellant applied for, and received, a permit to install a septic system at Lot A. *Id.* On December 13, 2004, Appellant sold Lot B to Stehly. *Id.*

On August 3, 2006, Appellant submitted what the ALJ and the Commissioner termed a “follow-on” variance application to build on Lot A (“2006 Application”). *Id.* As a result of the expiration of the 2000 Variance, the City officials obliged Appellant to renew his application. *Id.* Appellant described the 2006 request as “to be allowed to build on a non-conforming lot size under current ordinance” and “to properly document and certify with the DNR the variance granted in June 2000.” *Id.* It was during this time that Molly Shodeen learned that Lots A and B had been commonly owned by Appellant from 2000 to 2004. *Id.* Ms. Shodeen objected to a variance that would permit building on Lot A alone as an action that was inconsistent with the prohibition of the development of adjacent substandard lots in common ownership. *Id.*

At a special City Council meeting that was held on October 12, 2006, to act on Appellant’s request, the City sought to “clarify” the 2000 action. *Id.* The City, by a vote of 3-2, voted to extend the performance time for construction of the proposed residence. *Id.* By letter dated October 18, 2006, the City informed DNR of the action taken at the October 12 meeting. *Id.* at 17. The City informed DNR “the Council is aware that a prior council in June of 2000 had previously taken action on the matter” and admitted that the June 2000 decision was not submitted to DNR for certification. *Id.* The City requested that DNR certify its “decision.” *Id.*

DNR reviewed the information submitted by the City relative to the October 12 action. By way of a letter dated October 30, 2006, DNR informed the City that Minn. R. 6105.0540 and 6105.0380 (2005) do not require DNR certification of the variances to lot size and width because the BSM Ordinance standards of section 402.01 exceed the

statewide minimum standards; that § 602.02 of the City Ordinance prohibits the development or sale of Lot A because Appellant owned the adjacent substandard Lot B for a 4-year period of time since 1974; and that no variance to § 602.02 was granted by the Council or certified by DNR in 2000. *Id.* Disagreeing with the claim that no variance to the lots-in-common provision appeared to have been granted in 2000, the City made the following reply:

At the October 12, 2006, meeting, the Council took action to clarify the variances granted to Mr. Haslund and Ms. Floeder in June 2000. The May 2, 2000 and June 6, 2000 City Council minutes clearly reflect that the property owner had come to the City requesting variance to build on two (2) adjacent substandard lots. It is the current City Council's assumption that the previous City Council was aware of not only the size and width requirements, but also of the City of St. Mary's Point Ordinance 602.02 regarding the common ownership of adjacent substandard lots. It is the current Council's conclusion that the previous Council was aware of this issue and intended to grant a variance to City of St. Mary's Point Ordinance 602.02.

Id. In this same letter, the City requested DNR certification of the alleged "completion of variances to lot size, lot width, and to City Ordinance 602.02 ... pursuant to the Bluffland/Shoreland Management Ordinance." *Id.*

On November 16, 2006, Dale Homuth, Regional Hydrologist, issued DNR's Notice of Non-certification to the City. *Id.* at 17-18. DNR stated the following reasons for noncertification:

MN Rules 6105.0380 Subpart 2B allows that a recorded lot created before May 1, 1974 is buildable provided it has been in separate ownership from abutting lands since May 1, 1974.

St. Mary's Point Ordinance Section 602.02 requires that adjoining lots under the same ownership cannot be split for sale or development purposes and must remain combined unless two conforming lots can be created.

Parcels at [Lot A] and [Lot B] were jointly owned by Mr. Haslund⁶ and 2 conforming parcels could not be created.

There was no discussion of the parcel ownership situation in the minutes of the June 6, 2000 minutes of the City Council meeting and no proof that the final decision, containing a discussion of all of the relevant issues, was ever sent to the DNR prior to or after the hearing. There is only mention that the lot size issue was discussed with the DNR, but not the contiguous lot issue.

The city did not provide findings or conduct public hearings relative to all of the issues of building on this property. We believe the city needed to hold a public hearing, with adequate notice to the DNR, both in 2000 and 2006 to discuss a variance to Section 602.02 of your ordinance. Until such a hearing is properly conducted and DNR certification [obtained], Mr. Haslund is precluded from proceeding to obtain a building permit.

After careful consideration of the issues and circumstances in accordance with Minnesota Rules, part 6105.0540, the Department of Natural Resources has determined that the variance decision does not meet the above-listed standards and is not justified by hardship. The Department of Natural Resources is hereby notifying the City of nonapproval of this variance decision on the basis that it violates the intent of the National Wild and Scenic Rivers Act, the federal and state Lower St. Croix River Acts, the Master Plan adopted thereunder, and Minnesota Rules, Parts 6105.0351 to 6105.0550. Even if the city had conducted a proper hearing regarding the issue of the splitting of contiguous lots of record, the DNR would likely be precluded from certifying the action should the city approve such variances.”

Id. at 18.

Appellant appealed DNR’s nonapproval decision, pursuant to Minn. R. 6105.0540, subp. 3 (2005). To accommodate Appellant’s schedule, the initial hearing was set for the beginning of May in 2007. The parties made cross-motions for summary disposition, which were heard in July of 2007 and introduced affidavits and exhibits in support

⁶ Although Appellant suggests DNR based its opposition on the illegal actions of “historical owners,” such is misleading. *See* App. Br. at 19.

thereof. Appellant argued that no variance to the lots-in-common provision was required pursuant to the BSM Ordinance certified by DNR and that, therefore, DNR has no authority to certify the City's decision. DNR argued that 1) a variance was required by ordinance and rule, such that the 2004 sale of Lot B was contrary to law; 2) that the City's decision was factually and legally unsupported by hardship; 3) that the City failed to properly notice DNR and other interested parties; 4) that Minn. R. 6105.0540 and BSM Ordinance § 802.01 provide DNR with authority to certify a City's land use decision in the Lower St. Croix River District; and 5) that DNR is compelled to deny certification where, as here, the City's decision is contrary to the intent of the wild and scenic rivers legislation and implementing regulations. The ALJ agreed with DNR on all points except the notice argument. After granting himself an extension pursuant to Minn. Stat. § 15.99, the Commissioner timely adopted the ALJ's findings and conclusions with only minor modification, notably concluding that the City is required to properly notice DNR and failed to do so.⁷

III. HASLUND'S STATEMENT OF FACTS.

This Court should note that the facts set forth in the Commissioner's Brief ("Commissioner's Br.") are recited in an unbiased fashion, are based upon the record and are limited to those relevant to the issues before this Court. In contrast, many of the "facts" provided by Appellant are 1) irrelevant to this appeal as they do not address the one issue before this Court; 2) Appellant's version of the facts that were rejected by the

⁷ Thus, there is no issue regarding the application of Minn. Stat. § 15.99 to this matter.

Administrative Law Judge (“ALJ”); or 3) are not based upon the record at all. While not attempting to address every misstatement, the Commissioner does highlight the following examples.

Appellant concedes that his appeal consists of legal issues, but contends the particular issue is “the proper scope of the DNR’s authority under a single statute and the DNR’s regulations implementing that statute.” (App. Br. 3.) To clarify, the issue with respect to DNR’s authority is whether BSM Ordinance § 802.01, the City’s certification provision, and Minn. R. 6105.0540, its certification rule, provide a basis to deny certification of a land use decision where a city ordinance arguably permits an action plainly forbidden by the statewide minimum standards. The ALJ, the Commissioner, and the Court of Appeals all concluded in the affirmative, because BSM Ordinance § 602.02 is preempted to the extent it permits development of an unplatted substandard lot in a manner that violates the statewide minimum standards. Petitioner fails to even address the determinative issue of preemption.

Appellant contends that the “interest of the DNR consists of its interest in preventing the development of a single lot that is only undevelopable, according to the DNR, because the Subject Parcel and the Adjacent Parcel were once owned by the same person. This is a relatively arbitrary distinction that the historical owners of [Lot A] and [Lot B] undoubtedly would have avoided had they known of the complex regulatory scheme” applicable to property within the Lower St. Croix River District. (App. Br. 19.) First, the interest in the protection of the Lower St. Croix does not belong exclusively DNR but to the public. The public’s interest is set forth in the wild and scenic rivers

legislation and includes protection of the Lower St. Croix River by ensuring that the statewide minimum standards implemented to protect it are not worn away by unjustified exceptions such as the one Appellant sought. Appellant conceded that his claim to a right to develop Lot B despite the contrary state regulation neither advances any shoreland management policy or goal, nor follows from any deliberate choice by state or city officials to exclude unplatted lots from the statewide minimum standards. (Add. P. 15.) Second, the decision was based on *Appellant's* common ownership of Lots A and B, not the "historical owners" of the parcels. (Add. P. 6, 7.) Nothing in the record even suggests DNR's action was based upon anything but Appellant's common ownership of Lots A and B.

Appellant continues to insist that "DNR did not bother to share its knowledge" of the regulations applicable to his riparian lots "until it was too late." (App. Br. 19.) This assertion was flatly rejected by both the Commissioner and the ALJ. Making findings of fact on the basis of the record, which included affidavits and documentary evidence regarding the City's decision, the Commissioner and ALJ found that the City did not provide notice of its land use decision in 2000, and that no one informed DNR of the common ownership issue. (Add. P. 4-5.)

Appellant contends that he "proceeded to begin building the single-family home on [Lot A]" pursuant to "the variances granted by the City." (App. Br. 5-6.) Appellant's claim that he began building within two years of the City's 2000 decision to grant a variance to BSM Ordinance § 402.02 (as Appellant claims, or to both BSM Ordinance §§ 402.02 and 602.02 as the City claimed) such that his sale of Lot A in 2004 was in

reasonable reliance on the grant of that variance (or those variances) directly contradicts the express findings of fact. To the contrary, the ALJ specifically found that “[d]espite the two-year time limitation imposed upon the variance, Appellant did not build the proposed structure within the time specified and the variance expired in 2002.” (Add. P. 6.) Appellant has not challenged this finding as unsupported by the record.

Appellant also contends that he never applied for a variance from the “lots in common” provision of its ordinance and that nothing in the record supports “the City’s assertion that it ever granted a variance” from BSM Ordinance § 602.02. This is not material, as made apparent by the Court of Appeals decision, but nevertheless it must be pointed out that the record does suggest Appellant sought a variance to BSM Ordinance § 602.02 in May of 2000 because Lot A “always existed as separate parcel buildable until recent change.” (Add. P. 4.) His contention that the City did not grant a variance to BSM Ordinance § 602.02 is questionable at best in light of the City’s contention that it granted such a variance as well. (*See* App. Br. 6.) Although the option was available to him, Appellant did not join the City as a party and did not contest the City’s assertion that it required and granted a variance to BSM Ordinance § 602.02 to Appellant.

SCOPE OF REVIEW

This Court’s review of agency decisions is governed by the Administrative Procedure Act (“APA”), Minn. Stat. §§ 14.63-.69 (1996). *See In re American Freight System, Inc.*, 380 N.W.2d 192, 195 (Minn. Ct. App. 1986). An agency’s decision may be reversed if it is determined to be unsupported by substantial evidence, arbitrary or

capricious or affected by other error of law. Minn. Stat. § 14.69 (2006); *Matter of Univ. of Minn.*, 566 N.W.2d 98, 104 (Minn. Ct. App. 1997).

Agency decisions are presumed to be correct by reviewing courts and will be reversed only when they reflect an error of law or when the findings are arbitrary and capricious or unsupported by substantial evidence. *In re Hutchinson*, 440 N.W.2d 171, 176 (Minn. Ct. App. 1989), *cert. denied* (Minn. Aug. 9, 1989). An Appellant has the burden of proof on appeal when challenging an agency decision under Minn. Stat. § 14.69 (2006). *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 375 (Minn. 1996) (“A party seeking review on appeal of an agency decision has the burden of proving that the agency has exceeded its statutory authority or jurisdiction”); *Markwardt v. State Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn.1977); *MT Properties, Inc. v. Alexander*, 433 N.W.2d 886, 893 (Minn. Ct. App. 1988).

In recognition of the separation of powers doctrine, a review of administrative agency decisions under Minn. Stat. § 14.69 (2006) is narrow in scope and deferential in nature. *Excess Surplus Status of Blue Cross and Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) (reviewing court generally defers to agency's expertise). Consequently, this Court must review the Commissioner's findings of fact in the light most favorable to the decision below and should not disturb the findings if there is evidence reasonably tending to sustain those findings. *McGowan v. Executive Express Transp. Enter., Inc.*, 420 N.W.2d 592, 594 (Minn. 1998); *White v. Metro. Med. Ctr.*, 332 N.W.2d 25, 26 (Minn. 1983).

ARGUMENT

I. PURSUANT TO MINN. STAT. § 103F.351 (2006) AND ITS IMPLEMENTING RULES, DNR HAS AUTHORITY TO DENY THE CITY'S REQUEST TO CERTIFY ITS LAND USE DECISION WHEN THE DECISION IS INCONSISTENT WITH THE MINIMUM STANDARDS OF MINN. R. 6105.0380 (2005).

Appellant concedes that DNR has regulatory authority over local zoning decisions pursuant to Minn. Stat. § 103F.351 and limits his challenge to DNR's application of the certification rule to the plight in which he finds himself after the sale of Lot B in 2004, contrary to the statewide minimum standards. (See App. Br. at 16 ("DNR's non-certification action in this case is therefore void and invalid because there is no variance for the DNR to certify (or not certify) in the first place".)) Without citation to any authority, Appellant contends that "DNR has *no authority* to enforce its regulations directly with respect to [Lot A]." (App. Br. 13) (emphasis in original). This contention is inaccurate because it is based upon Appellant's misreading of the certification rule and immaterial because in addition to having authority under the certification rule, DNR has certification authority pursuant to the City's BSM ordinance. Contrary to Appellant's assertion, the determinative issue before this Court is not whether DNR has regulatory authority directly over the use of private property located along the River,⁸ but rather whether DNR must deny a local unit of government's request for certification of a land use decision that is inconsistent with the intent of the state and federal statutes and

⁸ Although this case concerns only the extent of DNR's authority to ensure a LGU's compliance with the minimum standards, in Minn. R. 6105.0353 (2005), Appellant is incorrect because the minimum standards set forth within those rules *are* made applicable to private lands within the river district. Likewise, an LGU is required to exercise its power to further the purposes of the minimum standards. Minn. R. 6105.0353 (2005).

violates the statewide minimum standards for the protection of the Lower St. Croix. The minimum standards contained in Minn. R. 6105.0380 (2005) prohibit development of a substandard lot like Lot B that has not been in separate ownership from abutting lands. DNR has no alternative but to deny the City's request for certification of a land use decision that indisputably violates the minimum standards and is concededly not justified by hardship.

Appellant recites three reasons, which he believes establishes that the Court of Appeals erred, two of which relate to DNR's authority to certify the City's decision. First, he contends that the Court of Appeals "ignores the fact" that the regulatory scheme administered by DNR affords DNR the authority to regulate municipalities, which in turn regulate property owners. (App. Br. 20.) There is no merit to this contention as the Court of Appeals decision fully acknowledges this "fact" as does DNR. It is the very "fact" that compels the outcome reached by each and every decision maker to consider the matter—that DNR cannot grant the City's request for certification that its land use decision complies with the statewide minimum standards mandated by the Legislature when that decision plainly violates those standards. It is the City which in this matter has attempted to exercise authority it does not have, as the City has no authority to deviate below the statewide minimum standards mandated by the wild and scenic rivers acts. Appellant omits from his argument that the Court of Appeals, far from ignoring the division of authority between the State and municipalities, correctly applied the preemption doctrine to invalidate the "platted" limitation of BSM Ordinance § 602.02 because it irreconcilably conflicts with the minimum standards the Legislature expressly

commanded. *In the Matter of the Denial of the Variance Granted to David Haslund by the City of St. Mary's Point*, 759 N.W.2d 680 (Minn. Ct. App. 2009).

Second, Appellant claims that the Court of Appeals “ignored the plain language of the DNR’s own regulations” because the certification rule “grants the DNR authority to review and certify variances only from the provisions of a municipal ordinance, and not from its own regulations” and, according to Appellant, in this case “no variance was required” by BSM Ordinance § 602.02. Appellant’s argument that the Court of Appeals somehow invalidated DNR’s certification rule is apparently based on his continued misreading of that rule, as set forth below. To the contrary, the Court of Appeals properly applied the preemption doctrine to strike the portion of the ordinance, or in other words, the word “platted,” that indisputably conflicts with the mandatory statewide minimum standards. *Id.* Appellant does require a variance to BSM Ordinance § 602.02 because the implied limitation he claims exempts him from the need for a variance is void and unenforceable.

A. The Court of Appeals Correctly Concluded That BSM Ordinance § 602.02 Is Invalid Because It Permits What State Law Expressly Forbids.

No conclusion can be reached but that DNR has properly asserted its authority over the City, which Appellant concedes is DNR’s proper role under the lower St. Croix River regulations. (App. Br. 13.) Appellant utterly fails to address the Court of Appeals analysis, other than to point out that his arguments were rejected. (*See* App. Br.) Appellant does not assert, let alone argue, that the Court of Appeals incorrectly applied long-standing principles of preemption to invalidate the limitation of BSM Ordinance

§ 602.02 to only “platted” lots, as in conflict with the statewide minimum standards promulgated by DNR at the command of the Legislature. *See* Minn. Stat. § 103F.351 (2006).

It is well-established that municipalities have no inherent powers and “possess only such powers as are expressly conferred by statute or implied as necessary in aid of those powers which have been expressly conferred.” *State v. Kuhlman*, 729 N.W.2d 577, 580 (Minn. 2007) (quoting *Mangold Midwest Co. v. Vill. of Richfield*, 274 Minn. 347, 357, 143 N.W.2d 813, 820 (1966)). Where state law requires “uniformity and statewide application,” the intent of the Legislature is to preempt the field except for whatever limited local regulation state law expressly permits. *Id.* Local regulation in conflict with state law is not valid. *Id.* A municipality may not permit by ordinance conduct prohibited by State law where the State has preempted the field. *Id.*

As concluded by the Court of Appeals, the Legislature has preempted the field of zoning regulation in the St. Croix River District. *Haslund*, 759 N.W.2d at 687; Minn. Stat. § 103F.351 (2006). Pursuant to Minn. Stat. § 103F.351, subd. 4 (2006), the Commissioner is directed to establish the statewide minimum standards for development in the river district. The local authorities are required to then adopt and comply with those standards. *Id.* As the ALJ observed, and the Commissioner adopted, the “Commissioner of Natural Resources is directed to establish the operative standards by rulemaking, and once established, those standards are binding upon the Department and localities alike.” (Add. P. 14.) To the extent the BSM Ordinance § 602.02 can be construed as retreating from the minimum standards, as Appellant has repeatedly argued,

there is no dispute that BSM Ordinance § 602.02 irreconcilably conflicts with the statewide minimum standards. The Court of Appeals properly concluded that BSM Ordinance § 602.02 is preempted and invalid as it attempts to permit something clearly and plainly forbidden by state law. *Haslund*, 759 N.W.2d 687-89.

Appellant ignores the basis upon which the Court of Appeals concluded DNR has jurisdiction over the City's land use decision, making no attempt to even address the Court of Appeals' preemption analysis. Rather, Appellant contends that the Court of Appeals erred by not adopting his highly technical, legally unsound, and repeatedly rejected argument that appears to consist of a misunderstanding of the scope and purpose of the certification rule coupled with an unwillingness to accept the limitation of zoning authority the Legislature has imposed on local units of government as to property within wild and scenic river districts, including the St. Croix River District. Appellant argues that Lot A is an "unplatted lot," and that by the use of the phrase "contiguous platted lots" in the BSM Ordinance's lots-in-common provision, the City has enacted an exception to the mandatory statewide minimum standards prohibiting the development of contiguous substandard lots-in-common. As that theory goes, Appellant contends that his proposal to develop the subject parcel requires no variance and that, therefore, there is no basis for DNR to exercise its certification authority. To the contrary, the Court of Appeals correctly concluded that the City's ordinance is preempted and invalidated to the extent it

conflicts with the statewide minimum standards, such that the City cannot permit Appellant to develop the subject parcel without a lots-in-common variance.⁹

It cannot be sensibly argued that certification somehow operates to invert the hierarchy of legal authority so that thereafter ordinances reign supreme over state law. Even if BSM Ordinance § 602.02 does not apply to “unplatted” lots like Appellant’s, the Court of Appeals correctly concluded that Appellant’s position must nevertheless fail because local zoning powers in the shoreland area along the St. Croix River are clearly “preempted in favor of state regulation” such that “local standards must conform to the requirements that were established by state rulemaking.” (Add. P. 13-14.) To the extent that there is an implied exception for “unplatted lots” in BSM Ordinance § 602.02, any such exemption is invalid as it is undisputedly in conflict with the statewide minimum standards. Quite simply, in the event of conflict, state statute and rule trump municipal ordinances. The Court of Appeals, adopting the interpretation of BSM § 602.02 urged by Appellant, was thus forced to conclude that the City’s Ordinance invalid as in obvious, and undisputed, conflict with the statewide minimum standards. *Haslund*, 759 N.W.2d at 687.

⁹ Moreover, the generally applicable SMP Ordinance does not contain the implied “distinction,” and simply prohibits development of contiguous substandard “lots” in common ownership as the minimum standards do. The BSM Ordinance further requires application of the most restrictive provision in the event of “conflicting provisions in the text of [the BSM Ordinance] and/or other Ordinances” BSM Ord. § 301.01 (RA 37). Thus, even though the BSM Ordinance does not expressly prohibit development of Lot A, the SMP Ordinance does as the more restrictive and protective provision. *Id.*

As discussed above, Appellant's proposal requires a properly certified variance, and the Court of Appeals properly affirmed the conclusion reached by the Commissioner and the ALJ. (RA at 9-10.)

B. DNR Has Authority To Certify The City's Grant Of Variances Pursuant To BSM Ordinance § 802.01.

Despite Appellant's claims to the contrary, the question of whether a variance is required by the City's BSM Ordinance § 602.02 is not determinative of DNR's certification authority. (App. Br. 16.) In addition to his misreading of DNR's certification rule, Appellant fails to acknowledge or address that the *City Ordinance itself* provides for DNR certification. Appellant fails to acknowledge that the Court of Appeals concluded that the BSM Ordinance itself provides for DNR certification. *See* BSM Ord. § 802.01. BSM Ordinance § 802.01 provides as follows:

Before any zoning district or ordinance amendment or variance becomes final, the governing body shall forward the decision to the Commissioner. The Commissioner of Natural Resources shall certify in writing that the proposed action complies with the intent of the Wild and Scenic Rivers Acts and the Master Plan for the Lower St. Croix River in the manner specified in Department of Natural [Resources] Regulations including [Minn. R. 6105.0380].

BSM Ord. § 802.01.

The BSM Ordinance makes clear that no decision to grant "any" variance to the provisions of the BSM Ordinance is final until the Commissioner certifies in writing that the action proposed by the City complies with the intent of the Wild and Scenic Rivers Acts and the Master Plan for the Lower St. Croix River. The City's grant of authority to

DNR fits neatly within the distribution of authority between the locality and the State set forth in the Wild and Scenic Rivers Acts.

Clearly the City can require itself to obtain DNR approval of its land use decisions to the extent that the Legislature has expressly withheld from the City any authority to make decisions that fall below the requirements of the statewide minimum standards. Pursuant to Minn. Stat. § 103F.351, subd. 4(c), local units of government within the St. Croix River District must “adopt zoning ordinances complying with the guidelines and standards” In addition, “[a]ll state, local and special governmental units, councils, commissions, boards, districts, agencies, departments, and other authorities” are required to exercise their powers to further the goals of the wild and scenic rivers legislation and the management plans adopted by the Commissioner. Minn. Stat. § 103F.335, subd. 2 (2006). The Commissioner, on the other hand, is required to “manage the components of the wild and scenic river system,” “assist” with “enforcement” of the ordinances the Legislature mandated that the LGUs adopt, as well as establish the minimum standards. Minn. Stat. § 103F.321, subd. 1 (2006); Minn. Stat. § 103F.335, subd. 1(c) (2006); Minn. Stat. § 103F.351 (2006).

Pursuant to this express statutory authority, the City may put whatever reasonable measures it requires to ensure its decisions comply with the statewide minimum standards as expressly commanded by the Legislature. Minn. Stat. §§ 103F.351 and 103F.221, subd. 5 (2006) (A municipality may adopt and enforce ordinances or rules affecting the use and development of shoreland that are more restrictive than the standards and criteria adopted by the Commissioner). Even if DNR’s certification rule does not authorize DNR

to review the City's land use decisions that affect the river district, a claim DNR strongly disputes, BSM Ordinance § 802.01 is more protective than DNR's certification rule, because the City's certification provision requires the City to seek certification of *all* variances from the BSM ordinance. *See* BSM Ord. § 802.01. Moreover, the Legislature requires the Commissioner not only to assist local governments with the preparation and implementation of their BSM Ordinances, but also with *enforcement* of the ordinances. Minn. Stat. § 103F.335, subd. 1(c). Where the Legislature has required the Commissioner to assist with enforcement of the City's ordinance, and the City itself requests that assistance, Appellant can hardly argue against the Court of Appeal's conclusion that DNR has clear authority pursuant to BSM Ordinance § 802.01 to determine whether the City's decision complies with the statewide minimum standards and the intent of the wild and scenic rivers legislation.

C. Pursuant to DNR's Certification Rule, Minn. R. 6105.0540, The Commissioner Has Authority To Deny Certification Of A City's Decision Which Violates The Statewide Minimum Standards.

Although the Court of Appeals did not reach the question in light of DNR's obvious authority granted by the City's BSM Ordinance, the ALJ and the Commissioner correctly concluded that DNR has authority to deny certification pursuant to Minn. Stat. § 103F.351 (2006) and its implementing regulations and that such authority was properly exercised in this matter. App. P. 10. Appellant maintains that "DNR's non-certification action in this case is ... void and invalid because there is no variance for the DNR to certify (or not certify) in the first place." (App. Br. 16.) Just as his argument ignores the existence of BSM Ordinance § 802.01, Appellant continues to misread the certification

rule, which requires the Commissioner to certify whether the City's "land use decision" complies with the statewide minimum standards, not with the City's own ordinance. Minn. R. 6105.0540.

Pursuant to its authority to regulate components of the wild and scenic rivers system like the St. Croix River district, DNR has adopted rules set forth in Minnesota Rules 6105.0351-.0550 (2005). Minn. Stat. § 103F.351, subd. 4(a) (2006); *see* Minn. Stat. §§ 103F.335 and 103F.321. To carry out its statutory duty, DNR established a certification process by Minn. R. 6105.0540 (2005):

Subpart 1. In general. In order to ensure that the standards and criteria herein are not nullified by unjustified exceptions in particular cases, and to promote uniformity in the treatment of applications for such exceptions, a review and certification procedure is hereby established for certain land use decisions. These certain decisions consist of any decisions which directly affect the use of the land in the St. Croix Riverway, and are one of the following types of action:

A. Adopting or amending a St. Croix Riverway ordinance regulating the use of land, including rezoning of particular tracts of land.

B. Granting a variance from the provisions of a St. Croix Riverway ordinance which relates to the dimensional standards and criteria of part 6105.0380.

Minn. R. 6105.0540 (2005).

Appellant contends that, in this matter, DNR has no authority under this rule because he believes he does not need a variance to BSM Ordinance § 602.02. As set forth above, because the Legislature has preempted local zoning authority in wild and scenic river districts in favor of the statewide minimum standards, Appellant does require a variance to BSM Ordinance § 602.02. Moreover, Appellant's position clearly lacks

support from the text of DNR's certification rule. The land-use decision made by the City and reviewed by DNR clearly includes a decision to grant a variance to BSM Ordinance § 402.01, which represents a sufficient basis for DNR's exercise of jurisdiction pursuant to Minn. R. 6105.0540.

Minn. R. 6105.0540, subp. 1 (2005) requires that DNR certify certain decisions: 1) which "consist of *any decisions* which directly affect the use of land in the St. Croix Riverway" to 2) "ensure that the *minimum standards* are not nullified by unjustified exceptions in particular cases" when (3) the City's decision is an "*action ... granting a variance* from the provisions of a St. Croix Riverway ordinance *which relates to the dimensional standards and criteria of part 6105.0380.*" Minn. R. 6105.0540, subp. 1 (2005) (emphasis added).

There is no dispute that the City's decision to grant variances that would permit Appellant to build on an undevelopable lot is a decision that directly affects the use of land in the St. Croix Riverway, or that the City granted variances that relate to the dimensional standards and criteria of Minn. R. 6105.0380 (2005). Although Appellant claims the City's assertion that it granted a variance to BSM Ordinance § 602.02 is false, there is no dispute that the City granted a variance to BSM Ordinance § 402.02 or that the grant of a variance to BSM Ordinance § 402.02 is a grant of a variance from a St. Croix Riverway Ordinance that relates to the dimensional standards of Minn. R. 6105.0380. It is further undisputed that the City's decision falls below the minimum standards required by rule for development in the Lower St. Croix Riverway. The ALJ and the Commissioner each found that there is no hardship here, such that the City's decision

represents an unjustified exception to the minimum standards. While the Commissioner's decision to deny certification certainly affects Appellant as the beneficiary of what is here an unjustified exception, it is the City that must obtain certification and it is the City against which the rules are enforced. Very simply, the City made a decision that violates the statewide minimum standards, represents an unjustified exception, and is contrary to the intent of the federal and state wild and scenic rivers legislation. Whether its own ordinance would permit it to do so, had the Legislature not preempted its otherwise broad zoning authority in favor of the mandatory statewide minimum standards, is ultimately irrelevant. DNR cannot certify a City's decision that is entirely contrary to its duty to protect and preserve the Lower St. Croix River.

Appellant cites to no legal support for his contention that there is "nothing in Minn. Stat. § 103F.351 or any of its implementing regulations that suggests that the DNR has the authority to interfere with the application of a local ordinance" once certified by DNR. *Id.* at 13. Quite to the contrary, Minn. R. 6105.0540, subp. 1(B) does not "suggest" but rather unambiguously declares that DNR shall deny certification of an LGU's decision to grant a variance where, as here, it is an unjustified exception to the mandatory statewide minimum standards. This is precisely the sort of conclusory analysis that convinced the ALJ and the Commissioner that "Appellant's suggested reading of the statute and rules is simply not sensible." (Add. P. 14.)

Appellant is as mistaken about the object of certification as he is about the scope of the rule. There can be no dispute that the plain text of the rule for certification clearly establishes that DNR does not certify that the City's action complies with its ordinance,

but rather whether “*the action* complies with the intent of the National Wild and Scenic Rivers Act ... and *these standards and criteria.*” Minn. R. 6105.0540, subp. 2 (2005) (emphasis added). Appellant’s conclusion to the contrary is unsupported by authority and is simply wrong. It is with its own minimum statewide standards that DNR must certify the City has complied, not the City ordinance where the City’s ordinance is arguably silent on a restriction plainly and unambiguously set forth in the minimum standards.

Nothing in the text of the statutes or rule suggests that certification of an ordinance ends DNR’s statutory obligation to ensure that the minimum standards are not worn away over time in “particular cases” by the relentless pressure to develop that local governments face. See Minn. R. 6105.0540. This Court should affirm the Commissioner’s conclusion that DNR has authority to withhold certification of the City’s land use decision where, as here, it is inconsistent with the statewide minimum standards. Neither Minn. Stat. § 103F.351 (2006) nor the plain text of the certification rule supports Appellant’s argument, which the Commissioner, adopting the ALJ’s reasoning, concluded is one that “runs headlong into ... important principals of administrative law” and “does considerable violence to the overall regulatory scheme” carefully adopted by the legislature and implemented by DNR. (Add. P. 13.) As the above analysis makes plain, DNR must determine not whether the City’s land use decision is consistent with its ordinance but rather whether its decision is consistent with the statewide minimum standards applicable to all zoning decisions made regarding properties riparian to the St. Croix River.

II. APPELLANT'S PLEA FOR EQUITABLE ESTOPPEL MUST BE DENIED WHERE APPELLANT FAILS TO MEET HIS BURDEN OF PROOF ON EACH ELEMENT.

Appellant argues that DNR has “approved and certified [BSM Ord. § 602.02]” and thus should be estopped from denying certification despite the undisputed fact that the City’s decision to permit development of Lot A plainly violates the mandatory statewide minimum standards. The Commissioner submits that there is no merit to Appellant’s claim.

Appellant failed below to meet any of the elements of equitable estoppel. The predicament in which Appellant finds himself is regrettable but far from “highly inequitable and unjust.” (*See* App. Br. 23.) The record is entirely lacking in support for the application of equitable estoppel, and Appellant’s argument should be rejected. A property owner seeking equitable estoppel against a governmental entity exercising its zoning powers bears the burden of establishing that 1) he relied in good faith; 2) upon an act or omission of the government; and 3) to make “such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired.” *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980). Despite bearing the burden of establishing entitlement to equitable relief, Appellant’s argument fails on each of the elements.

Appellant claims the issue is whether DNR is “equitably estopped from substituting its own rules in place of a municipal ordinance that it had previously approved or certified.” (App. Br. 1.) This statement has no basis in fact or law. First, DNR is not “substituting its own rules in place of a municipal ordinance.” Rather,

DNR's rules require it to issue a nonapproval decision where, as here, the City's decision violates the statewide minimum standards. Minn. R. 6105.0540 (2005). Moreover, the Legislature preempted the field and made statewide minimum standards mandatory, not DNR. Minn. Stat. § 103F.351 (2006). Appellant then misstates the facts of record, claiming that DNR seeks "to renege on its previous determination that Ordinance § 602.02 does comply with the DNR Rules based on a subsequent determination that Ordinance § 602.02 does not comply with the DNR rules." (App. Br. 22.)

Appellant apparently asserts reliance upon the alleged certification by DNR of "a distinction in the City's Ordinance that exempts unplatted lots" from regulation, in addition to the City's grant of the 2000 variance. (*See* App. Br. 24.) DNR has never certified that "Ordinance § 602.02" complies with the statewide minimum standards, and Appellant produced no evidence to suggest otherwise. The BSM Ordinance was certified to be in "substantial" compliance with the statewide minimum standards. (AA 25.) DNR certification means only that the express provisions of an ordinance adopted by a city comply with the minimum standards. This is what DNR has certified.¹⁰ Appellant cites to no authority for the proposition that certification applies to anything other than the express terms of the ordinance.

As the Court of Appeals concluded, Appellant's argument lacks merit because the legal significance of DNR's certification of the City's BSM ordinance is nothing more

¹⁰ Appellant contends that DNR argued below that the BSM Ordinance and DNR's certification of the BSM Ordinance were "illegal." This is a mischaracterization of DNR's arguments below, which do not differ substantially from the arguments made here.

than a representation “that the BSM ordinance complied with DNR’s rules *to a considerable extent.*” *Haslund*, 759 N.W.2d at 689 (emphasis added). Certification of the ordinance is “not a representation that the city’s BSM ordinance was wholly in compliance with DNR’s rules or that any land-use decision made by the city under the BSM ordinance would necessarily comply with those rules.” *Id.* Thus, certification does not mean that any action the city can conceivably take under its own ordinance necessarily complies with the minimum standards or that certification bars further State involvement. Indeed, Appellant’s case proves the point, as the parties agree that permitting the sale or development of contiguous unplatted substandard lots violates the minimum standards and does not advance the purpose of the wild and scenic rivers legislation. (Add. P. 14.) As set forth at length, and as the Court of Appeals concluded, there is no “act or omission” by DNR upon which Appellant could have relied upon, reasonably or otherwise. *Haslund*, 759 N.W.2d at 689.

Further, there is no evidence to establish that any of Appellant’s actions were taken in reliance upon this alleged “distinction” or even whether Appellant was aware of the ordinance’s provisions. Appellant argued in his brief to the Court of Appeals that this is the consequence of his motion for summary disposition in lieu of an evidentiary hearing. To the contrary, Appellant submitted evidence via affidavit, which he contended below established reliance. (*See* RR 338-357.) This evidence was insufficient to establish reliance.

Appellant now appears to argue that this Court should simply eliminate the requirement of good faith reliance from the test for equitable estoppel in favor of a

presumption of reliance. To do so would completely undermine the purpose of the rule Appellant himself points out, namely that considerations of fairness arise because the individual seeking the equitable remedy in fact relied upon the representation. (See App. Br. at 23 (quoting *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 767 (Minn. 1982) (internal citation omitted).) To be applicable, the representation must have actually influenced the individual seeking the equitable remedy.

If, as Appellant suggests, it should be presumed that Appellant knew that DNR certified the ordinance to be in “substantial compliance,” his reliance is unreasonable. Even if good faith reliance could be presumed, Appellant certainly could not rely in good faith on his unfounded belief that he would be allowed to do something the statewide minimum standards expressly forbid, particularly where, as here, the very same ordinance requires that any variance decision be certified by DNR for compliance with the statewide minimum standards. BSM Ord. § 802.01. Appellant cannot argue that such a presumption be applied selectively. Either Appellant is presumed to have relied upon all of the applicable law, including the entire BSM Ordinance and state law, or none of it. If he is presumed to have relied upon DNR’s certification of the BSM Ordinance, then it was unreasonable to have relied on the grant of a variance by the City when the City’s ordinance expressly provides that no decision to grant a variance is final until certified by DNR. Appellant cannot reasonably rely on only the parts of the BSM Ordinance that are arguably favorable to him.

Appellant could only have taken the action he took in ignorance of the applicable statutes, rules, and the City’s ordinance as a whole. It would in no way serve equity to

assume that Appellant relied in good faith on DNR's certification of "substantial compliance" when there is obvious conflict between the plain terms of state law and local ordinance. Contrary to the assertion that DNR's rules are a "trap for the unwary," the statewide minimum standards have been in existence even longer than the BSM Ordinance and readily accessible to the City and Appellant. (See RR 163.) Indeed, lots-in-common provisions are often found in ordinances and for many years have been part of the State's Shoreland Management Standards. See Minn. R. 6120.330, subp. 2 (2005); see also *Graham v. Itasca County Planning Comm'n*, 601 N.W.2d 461 (Minn. Ct. App. 1999) (affirming Itasca County's denial of a variance request to Itasca County's lots-in-common provision and noting that the purpose of the ordinance provision was to gradually eliminate substandard lots) and *Tuckner v. Twp. of May*, 419 N.W.2d 836 (Minn. Ct. App. 1988) (affirming Washington County's refusal to grant a variance to its lots-in-common provision to permit the sale of two of four contiguous nonconforming lots on Carnelian Lake in Washington County); see also *David Ness v. County of Crow Wing*, C5-05-1278 slip op. at 11-15 (Crow Wing County District Court, December 18, 2007) (RA 30). These common provisions represent a compromise between property owners and the government, permitting the use of nonconforming lots until two adjacent nonconforming lots merge into one conforming lot due to their common ownership by a single individual. To the extent that Appellant's alleged ignorance of the law invites sympathy for his plight, Appellant's critical comment that DNR "did not bother to share its knowledge until it was too late" is simply unfounded where, of all the actors involved,

Appellant and the City were in the best position to bring to light the common ownership of adjacent substandard parcels. (App. Br. 19.)

Appellant's argument fails to withstand comparison to the record as well as to the law. Appellant does require a variance to develop Lot A. Indeed, the City required, and claims to have granted despite a lack of adequate support in the record, a variance to its lots-in-common provision.¹¹ While Appellant contends that he did not request a variance to BSM Ordinance § 602.02, in his 2000 variance application he lists the purpose in seeking variance from BSM Ordinance as "to build a new home on the undeveloped Lot A," incorrectly claiming that "this property has always existed as a separate parcel that was buildable until recent change." The only "change" referred to anywhere in the record is the change of ownership in April of 2000 that renders development impermissible under the statewide minimum standards. The obvious inference is that Appellant did have some awareness that the City would require a variance to the lots-in-common requirements. Nothing in the record suggests Appellant ever protested the City's requirement that he obtain a variance to the lots in common provision. Rather, Appellant's argument for an equitable remedy appears to be a technical legal argument crafted by counsel in support of Appellant's motion for summary disposition—long after DNR informed the City that it could not certify the City's land use decision because it is inconsistent with the intent of the river regulation.

¹¹ The City's position throughout has been that it granted the necessary variances, including a variance to BSM Ordinance § 602.02 based upon adequate findings of hardship. (See RR 359-365.)

Moreover, it would be equally unreasonable to rely, as Appellant claims, on the variances granted in 2000. The insinuation that Appellant relied upon the alleged “platted-unplatted distinction” and the City’s decision to grant a variance when he made the decision to sell Lot B and secure development approvals from the City for Lot A is unsupported by, and at times contrary to, the record. First, having obtained an area variance in 2000, Appellant clearly knew at the time he sold Lot B that he could not develop Lot A without a variance at least as to area dimensions. Second, whatever variance he obtained in 2000 was subject to a two-year limitation and had obviously expired in 2004 when he sold Lot B. (Add. P. 6.) At the very least, a reasonable person would not sell real property under these circumstances without at least confirming that his two-year variance was still valid four years after it was issued. Third, the undisputed facts clearly establish that Appellant did not have a hardship in 2000 and that any hardship he experienced in 2006 was self-created as a matter of law. (AA 13; Add. P. 10.) In 2000, Appellant had a residence on a conforming lot resulting from the merger of two adjacent substandard lots by operation of law. In 2004, he sold Lot B in violation of the City’s ordinance and state law, and was compensated by a sale price that exceeded the combined tax value of Lots A and B. Moreover, he retains ownership of Lot A, which undoubtedly maintains substantial value as a recreational property.¹²

¹² One could assume that building a residence on Lot A would further increase the value of the property, but the same could be said of any individual who wishes to subdivide his conforming lot into two nonconforming lots and then separately develop the properties.

The result compelled in this case—that DNR correctly denied certification of the City’s variance decision—is not one that is “highly inequitable and unjust.” (*See App. Br. 23.*) While it is unfortunate that the outcome compelled here disappoints Appellant, all that has been lost is Appellant’s unfounded expectation that he is allowed to do something the law clearly prohibits.

CONCLUSION

Based upon the above arguments, the Commissioner respectfully requests that this Court affirm the opinion of the Court of Appeals. The City’s decision represents an unjustified exception contrary to the policy of protecting the Lower St. Croix through responsible development, an unjustified exception that cannot be certified as complying with the intent of the wild and scenic rivers legislation.

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Respectfully submitted,

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