

Nos. A07-1932 and A07-2006

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STATE OF MINNESOTA  
IN SUPREME COURT

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In the Matter of the Denial of Certification of the Variance Granted to Robert W.  
Hubbard by the City of Lakeland

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**APPELLANT COMMISSIONER OF NATURAL RESOURCES' REPLY BRIEF**

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## STATEMENT OF FACTS

The Commissioner of Natural Resources (“Commissioner”) provides the following response to those facts set forth in the Joint Brief and Appendix of Respondents Robert W. Hubbard and the City of Lakeland (“Resp’ts Br.”).

This Court should note that the facts set forth in the Commissioner’s initial Brief (“Commissioner’s Br.”) are recited in an unbiased fashion, are based upon the record, and are limited to those relevant to the issue before this Court—the application of the “60-day rule” of Minn. Stat. § 15.99 (2008) to the contested case procedures set forth in the Administrative Procedures Act (“APA”), Minn. Stat. §§ 14.54-.62 (2008). In contrast, many of the “facts” provided by Respondents Robert W. Hubbard (“Hubbard”) and the City of Lakeland (hereinafter jointly referred to as “Respondents”) are 1) irrelevant to this appeal as they do not address the one issue before this Court,<sup>1</sup> 2) Respondents’ version of the facts that were rejected by the 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.

Respondents state, without citation to testimony, that Hubbard’s video shows that his proposed home is smaller than other homes on the St. Croix River and “virtually all are more visible from the river.” (Resp’ts Br. at 4.) Hubbard also claims that the existing structure “is even with the bluffline,” when in fact this issue was disputed at hearing, with

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<sup>1</sup> If the Court is inclined to accept Respondents’ invitation to review the other independent legal issues raised, the Commissioner directs the Court to his recitation of the facts addressing these issues and his complete legal arguments found in the Commissioner’s Responsive Brief filed with the Court of Appeals.

the ALJ concluding that the location of the bluffline at a minimum was an open question and may actually be located so that the existing structure extends riverward of the bluffline. (Resp'ts Br. at 5; ALJ Report at 9-10, 31 (Appellant's Appendix ("AA") at 25-26, 47).) Equally irrelevant is Respondents' statement that, from the river side of the existing structure, the shoreline of river can be seen, but from the setback line one can only see to the middle of the river.<sup>2</sup> (Resp'ts Br. at 6.)

The Court should also note that the ALJ dismissed Respondents' argument repeated here that the tearing down of the old house would have detrimental impacts on the bluff. (*Id.* at 6; ALJ Report at 30 (AA 46).) The ALJ concluded that the bluff would need to be secured even in the event the structure was removed. (*Id.*) In fact, Respondents' own statement, that "[b]ecause the bluff is subject to erosion, it is uncertain whether such a project [restoring the bluff after removal of the old home] could be completed without adverse affects on the bluff and the river," is against Hubbard's own interest because his proposal involves removal of the old house and construction of a new structure with extensive associated grading work. (Resp'ts Br. at 6; ALJ Report at 10-11; 31 (AA 26-27, 47).)

While also irrelevant, Hubbard and the City imply that the City's own Planning Commission was merely an empty shell that did DNR staff's bidding when it denied Hubbard's variance application. (Resp'ts Br. at 9.) There is no support in the record for this contention and in fact, as its minutes reflect, the City's Planning Commission

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<sup>2</sup> If relevant at all, this fact illustrates why Department of Natural Resources ("DNR") staff were concerned with the proposal. That is, if the shore can be seen from the existing structure, any new structure utilizing the footprint can be seen from the shore as well.

subjected Hubbard's application to a rigorous analysis before it rejected the request. (*See* Respondents' Appendix ("RA") at 3-13.)

Last, contrary to Respondents' assertion at page 10 of their Brief, the City did not file timely exceptions on June 22, 2007; rather, as found by the Commissioner, the City's exceptions were filed late on June 28, 2007. (AA 8.)

### ----- ARGUMENT

**I. THIS COURT SHOULD REJECT RESPONDENTS' INVITATION TO DECIDE THOSE ISSUES NOT ADDRESSED BY THE COURT OF APPEALS OR ACCEPTED BY THIS COURT FOR REVIEW.**

Respondents not only respond to the Commissioner's arguments regarding the applicability of Minn. Stat. § 15.99 (2008) to the APA, but they also argue the unrelated independent legal issues that were before, but not decided by, the Court of Appeals. (Resp'ts Br. at 31-49.) Respondents' raising of these issues in their Responsive Brief is improper, is prejudicial to the Commissioner and the intervening appellants, the Sierra Club and the St. Croix River Association (hereinafter referred to as the "Intervening Appellants"), and is unsupported by the caselaw cited.

First, this Court specifically granted review of "the petitions of the Commissioner of Natural Resources and the Sierra Club and St. Croix River Association for further review of the decision of the court of appeals ...." (*See* Order dated February 17, 2009, at AA 1.) Both the Petition of the Commissioner and the Petition of the Intervening Appellants specifically state that the sole issue is the Court of Appeals' decision on Minn. Stat. § 15.99 (2008). (AA 2; Intervening Appellants' Petition for Review at 1.) Respondents as well state in their Joint Response to the Petitions for Review that the

issue before the Court is the applicability of section 15.99 to the current matter. (*See* Joint Response of City of Lakeland and Robert W. Hubbard to Petition for Review at 1.) Only in a footnote do Respondents note that they “would present these alternative theories to support affirmance if review was granted.” (*Id.* at 4 n. 1.) Notwithstanding this statement, this Court granted only the Petitions of the Commissioner and the Intervening Appellants. (AA 1.) Therefore, the only legal issue before this Court is the one issue that was specifically identified by *all* the parties—namely, this particular application of the 60-day rule.

Second, the Commissioner would be severely prejudiced if this Court entertained the independent legal issues not addressed by the Court of Appeals. To address these issues, the Commissioner does not have the benefit of a full thirty days and 45 pages allowed under Minnesota Rules of Appellate Procedure 132.01, subd. 3, but rather must address these issues within the time and page limitations of this Reply Brief.

Third, the caselaw upon which Respondents rely does not support their request that this Court consider these independent issues. Specifically, Respondents cite to *Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assoc.*, 418 N.W.2d 173 (Minn. 1988) to support their contention that this Court has previously held that it may affirm a decision on grounds litigated before but not decided by a lower court. (Resp’ts Br. at 31.) *Hoyt* does not stand for such a proposition; rather, in *Hoyt* this Court held that, while issues not addressed at the lower court do not have to be preserved through a notice of appeal, the proper procedure to address such issues is a remand. 418 N.W.2d at 175. Likewise, Respondents’ citation to *Ryan Contracting, Inc. v. JAG Inv., Inc.*,

334 N.W.2d 176 (Minn. 2001), is easily distinguished. In *Ryan*, this Court merely addressed alternative theories not addressed by the lower court regarding the single legal issue of jurisdiction. 334 N.W.2d at 188. That differs from the current matter as Respondents ask this Court to consider completely different legal issues that they assert are independent bases for them to ultimately prevail.

The controlling case is *Clifford v. Geritom Med., Inc.*, 681 N.W.2d 680 (Minn. 2004). In *Clifford*, this Court noted that the Court of Appeals had addressed only one issue of several raised by the appellant. 681 N.W.2d at 689. This Court noted that “[t]he alternative issues raised ... before the court of appeals and not addressed by that court remain unresolved. Therefore, we remand this case to the court of appeals for consideration of .... [the] remaining issues in a manner consistent with this opinion.” *Id.* The same result is warranted here—remand to the Court of Appeals for consideration of the remaining issues.

Last, Respondents urge this Court to decide these remaining issues now “without remand and without another round of virtually certain appeals.” (Resp’ts Br. at 14.) As the remand would be to the Court of Appeals, where the remaining issues have been briefed and argued, there would be no further appeals other than the possibility that a non-prevailing party would petition this Court for further review.

For these reasons, this Court should reject Respondents’ invitation to address these independent legal issues.

**II. THE 60-DAY RULE IS INAPPLICABLE TO A CONTESTED CASE PROCEEDING OTHERWISE GOVERNED BY MINN. STAT. § 14.62 (2008).**

**A. Respondents' Demands For Hearing Are Not Written Applications.**

Respondents attempt to overcome the Commissioner's position that the 60-day rule is inapplicable to a contested case proceeding by arguing that DNR is an "agency" as the term is defined at section 15.99, subd. 1(b), and that the certification and subsequent contested case are "related to zoning." (Resp'ts Br. at 12-13, 17, 18.) The Commissioner does not dispute that DNR is an agency as defined in section 15.99 or that the issue addressed in certification and the subsequent contested case proceeding relates to a zoning request made to and granted by the City. However, section 15.99 was not written by the Legislature to apply to every procedure undertaken by every governmental authority that may in some way be related to zoning. Rather, the clear language of the statute reflects that the Legislature intended the 60-day rule to apply to an initial application related to zoning, here an application made by a landowner to a local authority for a variance. (*See* Commissioner's Br. at 20-25.)

Respondents briefly assert that the letters of Hubbard and the City demanding a contested case hearing are "written requests related to zoning" but, similar to the Court of Appeals' decision, provide little substantive support. (Resp'ts Br. at 18.) When addressed, Respondents merely characterize the Commissioner's argument to be that their demands for a hearing are not requests "because they were not submitted on printed application forms." (*Id.* at 22.) The Commissioner makes no such assertion. Rather, the Commissioner's argument as set forth in his initial Brief is that the clear statutory

language reflects the Legislature's intent that the 60-day rule apply to what is generally considered as initial applications for governmental action related to zoning, whether the request is made on forms provided by the governmental authority or not. (*See* Commissioner's Br. at 22-23.)

While section 15.99 relieves an applicant from using an application form, the statute clearly narrows the definition of a "request" to be "application-like." *See* Minn. Stat. § 15.99, subd. 1(c) (2008) (describing form the request must take). Respondents, however, turn this definition around on itself, attempting to define the term "application" as a "request." (Resp'ts Br. at 22 ("In most dictionaries, the word 'application' includes 'the act of requesting'").) The Legislature, on the other hand, in defining the broad term "request" as an "application," demonstrates an intent to narrow its meaning. Minn. Stat. § 15.99, subd. 1(c) (2008). And while Respondents correctly note that DNR does not provide an "application form for a request to certify the grant of a variance," this is irrelevant as it is the local authority that requests certification, not the variance applicant.<sup>3</sup> (Resp'ts Br. at 23.)

**B. The 60-Day Rule Applies Once To Any Request Related To Zoning.**

Respondents dispute the Commissioner's contention that the 60-day rule applies one time to any request related to zoning, and that its application here is limited to the City's consideration of Hubbard's variance application. (Resp'ts Br. at 14-16, 21.)

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<sup>3</sup> Interestingly, Respondents fail to address that the Court of Appeal's interpretation of section 15.99 would make the 60-day rule applicable to interagency relationships, which the Commissioner has noted is far removed from what was intended by the Legislature. (Commissioner's Br. at 26.)

However, Respondents provide no substantive arguments to refute the Commissioner's well-reasoned analysis of the statute and the Legislature's intent. (See Commissioner's Br. at 15-17.) Respondents assert only that, if there is only one 60-day period, then DNR staff's certification would have to occur within 60 days of the initial request for a variance. To fit this interpretation into this case, Respondents repeatedly characterize the City's variance as a mere recommendation to DNR. (Resp'ts Br. at 14-16, 21.) To the contrary, the variance granted by the City on Hubbard's variance application was a *final decision* of the local authority. See Minn. R. 6105.0540, subp. 3.B (2007) ("The local authority shall notify the commissioner of its final decision on the proposed action within 10 days of the decision"). Under the certification rule, the final decision must be submitted to DNR staff for review and certification that the relevant parts of the decision are consistent with the state and federal river programs before those relevant parts of the decision becomes effective. Minn. R. 6105.0540, subp. 2 (2007) ("No such action becomes effective unless and until the commissioner has certified" the final decision or taken no action within 30 days). As occurred here, much of the variance may not be subject to DNR staff's certification consideration and, therefore, DNR's review has no impact. (See ALJ Report at 17 (AA 33) (DNR had no authority over sideyard setback or this height variance).) Consequently, the local authority's decision is much more than a mere recommendation.

Respondents' reliance upon *Moreno v. City of Minneapolis*, 676 N.W.2d 1 (Minn. Ct. App. 2004), to support their argument that the City's decision "is nothing more than a recommendation to the DNR" is misplaced. (Resp'ts Br. at 21, n.12.) In *Moreno*, the

court found that the planning commission was merely an internal administrative creation of the city council and, therefore, not an “agency,” and as a result the 60-day rule could not be tolled by the planning commission’s decision as only the city council had the legal authority to grant zoning requests. *Id.* at 5. Here, the City is not a powerless creation of DNR, but is an agency as defined in Section 15.99 with full authority to grant zoning requests pursuant to Minn. Stat. § 462.357 (2008).

In response to the Commissioner’s alternative argument that, if section 15.99 applies to DNR’s certification, then it was satisfied when DNR denied certification within 30 days, Respondents characterize the certification decision as merely a “preliminary” decision of DNR staff that “cannot become final unless no one demands a hearing.” (Resp’ts Br. at 25.) Even though it makes no difference as both the certification and appeal time periods taken together total no more than 60 days, Respondents argument is flawed. DNR staff’s decision on certification of the local authority’s final zoning decision is the effective date of that zoning decision. Minn. R. 6105.0540, subp. 2 (2007) (local authority final decision becomes effective upon certification). The appeal process cited by Respondents, Minn. R. 6105.0540, subp. 3.E (2007), merely represents the 30-day period the applicant has to demand a contested case hearing; the certification is still complete and the variance effective. While Respondents again cite *Moreno* in support, the case differs as *Moreno* involved an internal process whereby only the city council had the decision-making authority as an agency. 676 N.W.2d at 5 (“the planning commission is merely a level of government within the city’s government structure”). With certification, DNR staff has the authority and makes

the certification decision, the applicant may then decide whether to demand a contested case proceeding. A more relevant case is *Kramer v. Ottertail County Board of Commissioners*, where the Court of Appeals concluded that the 30-day appeal period afforded by the Minnesota Environmental Policy Act, Minn. Stat. § 116D.04, subd. 10 (2008), applicable after an agency decision is made on the need for environmental review, does not extend the 60-day rule as the agency's decision is complete. 647 N.W.2d 23, 25-26 (Minn. Ct. App. 2002).

**C. A Contested Case Proceeding Is Not A "Process" Under Minn. Stat. § 15.99, Subd. 3(d) (2008).**

Respondents assert, as did the Court of Appeals, that the contested case procedure is a "process" under section 15.99, subd. 3(d) that ends at the close of the record. (Resp'ts Br. at 23-24.) In response to the Commissioner's argument that, if a process under section 15.99, the process does not end with the close of the record, Respondents state that "[t]he 90-day period provided in section 14.62 is just that, an internal process used by the Commissioner to reach a decision." (*Id.* at 24.) As Respondents' own statement reflects, the 90-day period clearly is not an "internal process used by the Commissioner" as it is a requirement of and governed by the APA. Minn. Stat. § 14.62, subd. 2 (2008). Also, there is nothing to support Respondents' contention that the "contested case hearing closed" with the filing of exceptions. (Resp'ts Br. at 24.) Rather, the contested case procedure and the requirements of the APA continue on through the Commissioner's Order. (*See* Commissioner's Br. at 27-33.)

**D. The APA Is Not Subject To The 60-Day Rule.**

Respondents assert that the 90-day time frame of Minn. Stat. § 14.62 (2008) does not supersede the 60-day rule. (Resp'ts Br. at 26-27.) First, Respondents argue that the phrase “notwithstanding any other law to the contrary,” as found in section 15.99, subd. 2(a), reflects the Legislature’s intent to supersede the 90-day requirement of the APA. (Resp'ts Br. at 26.) As the Commissioner has noted, if the Legislature intended the existing 60-day rule to govern the APA’s timelines, it would have stated so upon adoption of the 90-day rule in 2002. (Commissioner’s Br. at 19.)

In addition, if the 60-day rule was applicable to the APA, the “mischief” that the Legislature was intending to address with both timing statutes—long-delayed agency decision-making—would be frustrated as application of section 15.99 to the APA would in fact extend the time period an agency could consider an ALJ’s recommendation rather than shorten it. *See* Minn. Stat. § 645.16(3) (2008). Specifically, if section 15.99 was applicable to the APA, an agency could give itself an additional 60 days by merely providing notice to the applicant. *See* Minn. Stat. § 15.99, subd. 3(f) (2008). Consequently, the agency would have 120 days, rather than the 90 days set forth in the APA, to make its decision. To address this obvious glitch, Respondents’ argue that section 15.99 would now *not* be controlling as the APA would take precedence; that is, section 15.99 applies until such time as the agency gives itself a 60-day extension, at that point forward the APA applies and the 60-day extension section 15.99 explicitly authorized must be shortened by half so that the decision is made within 90 days as required by section 14.62. (Resp'ts Br. at 27.) Clearly, this confusing, and conflicting,

scenario demonstrates that application of the 60-day rule to the APA was not intended by the Legislature.<sup>4</sup>

**E. Respondents Waived Application Of the 60-Day Rule.**

Respondents dispute the Commissioner's contention that they waived their right to assert the 60-day rule. (Resp'ts Br. at 28-30.) As they did below, Respondents argue that the Court of Appeals' decision in *Northern States Power v. City of Mendota Heights*, 646 N.W.2d 919 (Minn. Ct. App. 2002) is controlling. (*Id.* at 28-29.) However, as the Commissioner argued in his initial Brief, *Northern States Power* was concerned about "subtle movement of players," something that does not exist here. 646 N.W.2d at 926; (Commissioner Br. at 26.) Consistent with the concept of waiver, there is no question that Respondents knowingly waived application of the 60-day rule by demanding a contested case hearing pursuant to the APA and knowingly accepting the ALJ's statement of the applicable timeframe for decision by the Commissioner.

Respondents' assertion that Minn. Stat. § 15.99, subd. 3(g) (2008) stands for the proposition that the 60-day rule can only be waived in writing is unsupported by the language of the statute. (Resp't J. Br. at 28.) The statute states only that "[a]n applicant may by written notice to the agency request an extension of the time limit under this

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<sup>4</sup> Respondents correctly note that Minn. R. 6105.0540, subp. 3.E(2) (2007) states that the Commissioner is to issue his decision within 30 days after a hearing is closed. When promulgated in 1976, these rules directed that the hearing be conducted as set forth in Minn. Stat. § 105.44, subd. 6 (1976), which stated that hearings "shall be conducted by the commissioner or a referee appointed by him." See Minn. Reg. NR2202(e)(3)(ee)(i) (March 15, 1976). That statute has since been recodified and amended to incorporate the contested case procedures of the APA. See Minn. Stat. § 103G.311, subd. 2(3) (2008). Thus, the time periods referenced in Minn. R. 6105.0540, subp. 3.E(2) (2007) are no longer effective.

section.” Minn. Stat. § 15.99, subd. 3(g) (2008). This provision does nothing more than create a process by which an applicant can request an extension. The Commissioner is not asserting that Respondents here requested an extension; rather the Commissioner asserts that Respondents voluntarily and knowingly waived the 60-day rule by their actions.

Respondents assert that it cannot voluntarily relinquish their right to the 60-day rule because filing of exceptions is not voluntary. (Resp’ts Br. at 30, *citing* Minn. Stat. § 14.61 (2008).) In fact, Respondents assert that under the APA, an appellant “must file exceptions challenging the ALJ decision in order to obtain review by the Commissioner.”

(*Id.* at 30.) To the contrary, the statute states only that

the decision of the officials of the agency who are to render the final decision shall not be made until the report of the administrative law judge ... has been made available to the parties to the proceeding for at least 10 days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument ....

Minn. Stat. § 14.61, subd. 1 (2008). Clearly, exceptions are not *required*, they are *voluntary*. Here, Respondents voluntarily submitted exceptions, but did not dispute the applicability of the APA’s 90-day schedule for decision as set forth in the ALJ Report.

**III. IF CONSIDERED, THE COMMISSIONER’S DECISION ON THE REMAINING LEGAL ISSUES NOT ADDRESSED BY THE COURT OF APPEALS SHOULD BE AFFIRMED.**

As argued above, this Court should reject Respondents’ invitation to consider the issues not addressed by the Court of Appeals. Rather, if this Court reverses the Court of Appeals, it should remand the matter for further consideration. Nevertheless, the Commissioner provides the following limited response to Respondents’ arguments.

**A. DNR Has Statutory Authority For The Certification Process.**

The basic purpose of administrative regulation is to leave preciseness and detail of application to administrators who will bring an expert's familiarity to bear upon the problems in consideration. *Welsand v. State of Minn. R.R. and Warehouse Comm'n.*, 251 Minn. 504, 509, 88 N.W.2d 834, 838 (1958). Investing regulatory power in an administrative agency, the Legislature does not need to expressly delineate the powers conferred but may, in order to allow for administrative flexibility, leave the exact scope of the rulemaking power to "reasonable implication." *Id.* "An agency's interpretation of the statutes it administers is entitled to deference and should be upheld absent of finding that it is in conflict with the express purpose of the act and the intention of the legislature." *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988). In addition, an agency's rulemaking authority "need not be given a cramped reading" so long as "any enlargement of express powers by implication" is "fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." *Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480, 485 (Minn. 1995) (internal quotations omitted).

The certification rule at issue here was adopted pursuant to the express legislative authority found in the Lower St. Croix Wild and Scenic River Act, Minn. Stat. § 103F.351 (2008). Subdivision 1 states that "[t]he preservation of this unique scenic and recreational asset [the lower St. Croix River] is in the public interest and will benefit the health and welfare of the citizens of the state." Subdivision 2 requires the Commissioner to prepare a Master Plan jointly with the State of Wisconsin and the U.S. Department of

Interior regarding, among other things, the development of the riverway. Subdivision 4(a) then states that the Commissioner “shall adopt rules that establish guidelines and specific standards for local zoning ordinances applicable to the area within the boundaries covered by the comprehensive master plan.” Subdivision 4(b) states that such “guidelines and standards must be consistent with this section, the federal Wild and Scenic Rivers Act, and the federal Lower St. Croix River Act of 1972.”

Even if it was considered something less than an express grant, the “reasonable implication” that is “fairly drawn and fairly evident” from the applicable statutes is that the Legislature intended to delegate to DNR the authority necessary to implement a regulatory system that would assure compliance with not only the general statutory designation of purpose but also with the federal laws requiring state administration and the Master Plan. The certification rule certainly falls within this broad grant of legislative authority and is meant to assure that the minimum guidelines and standards, adopted by local units of government in order to meet the state and federal mandate for river protection, are not cavalierly ignored through improper implementation and enforcement or a complete lack thereof. Consistent with this grant of statutory authority, Minn. R. 6105.0540, subp. 2 (2007), specifically states that the certification process is adopted to assure that a local action “complies with the intent of the National Wild and Scenic Rivers Act, the federal and state Lower St. Croix River Acts, and the master plan adopted thereunder, and the standards and criteria.”

Legislative authority is also found in the Wild and Scenic Rivers Act, Minn. Stat. § 103F.335, subd. 2 (2008). This statute, applicable to all state wild and scenic rivers,

states that “all *state*, local, and special government units, councils, commissions, boards, districts, agencies, departments, and other authorities *shall exercise their powers to implement the purposes of* [the Wild and Scenic Rivers Act] and management plans adopted by the commissioner.” Minn. Stat. § 103F.335, subd. 2 (2008) (emphasis added.) In addition, Minn. Stat. § 103F.335, subd. 1(c) (2008) states that “[t]he commissioner shall assist local governments in the preparation, *implementation, and enforcement* of the ordinances.” (Emphasis added.) The Act also mandates DNR to “manage the components of the system, and adopt rules to *manage and administer* the system.” Minn. Stat. § 103F.321, subd. 1 (2008) (emphasis added). The certification rule is consistent with this broad legislative mandate that DNR, as the state agency vested with the oversight and implementation of the state’s wild and scenic river program, exercise its authority to the fullest to implement both the purpose of the state and federal Acts and, in the case of the lower St. Croix River, the Master Plan.<sup>5</sup>

The current matter is analogous to the regulatory challenge at issue in *Drum v. Minn. Bd. of Water & Soil Res.*, 547 N.W.2d 71, 73 (Minn. Ct. App. 1998). In *Drum*, a landowner charged that the Board of Water and Soil Resources (“BWSR”) was without statutory authority to regulate his 15-acre wetland. *Id.* at 73. The Wetland Conservation Act (“WCA”), Minn. Stat. § 103G.221-.2372 (2008), vests regulatory authority for

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<sup>5</sup> The DNR certification process is not only found in state rule but also in the City’s ordinances. See City Ordinance § 802.01 (RR 1.12.) Respondents’ objections notwithstanding (Resp’ts Br. at 38-39), authority for DNR staff’s review of the variance granted here is not only grounded in state rule but also in the City’s ordinance. See *In re Hashund*, 759 N.W.2d 680, 687 (Minn. Ct. App. 2009) (court found DNR certification authority in municipal ordinance).

wetlands of ten or fewer acres in size in BWSR and the local government. The landowner argued that BWSR lacked statutory authority to adopt a rule defining its jurisdictional wetlands as any wetland not “inventoried” by DNR rather than by size as done in statute. *Id.* at 74. His wetland, while large enough to fit the definition of DNR wetlands, was not “inventoried” by DNR as a wetland under its jurisdiction. *Id.* The Court of Appeals, however, found that BWSR had the authority to adopt the rule at issue because, while inconsistent with the plain language of the statute, it furthered the intent of the Legislature in protecting state wetlands. *Id.* at 73. Like the DNR certification process at issue here, the court recognized that WCA was administered through a partnership between state and local governments and that BWSR was charged to implement the program through rulemaking. *Id.* at 73-74. The court found that BWSR’s rules “are consistent with the legislature’s intent” evidenced in the extensive discussion in the legislation of the value of wetlands. *Id.* at 74-75.<sup>6</sup>

In *County of Pine v. State Dep’t of Natural Res.*, 280 N.W.2d 625 (Minn. 1979), this Court was considering DNR’s authority to adopt for Pine County the Kettle River Wild and Scenic Ordinance under the Wild and Scenic Rivers Act, based upon minimum

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<sup>6</sup> Respondents’ reliance on *Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480 (Minn. 1995) and *State v. Lloyd A. Fry Roofing Co.*, 310 Minn. 528, 246 N.W.2d 696 (1976) is misplaced. (Resp’ts Br. at 35.) In the former, the agency took all discretion from the workers’ compensation judges, dictating exact limits on services, contrary to legislative intent to adopt “standards.” 537 N.W.2d at 485. In the latter, the agency attempted to require air emissions tests where the Legislature had expressly limited the agency’s authority to require water quality tests. 310 Minn. at 533, 246 N.W.2d at 699. In the present matter, the certification rule standard does not eliminate discretion of local government to consider variance applications, and the rule clearly falls within the legislative grant of authority to administer the Lower St. Croix Wild and Scenic River Act.

standards promulgated in rule. On appeal, this Court considered whether the ordinance “exceeds a valid exercise of the police power” by DNR. *Id.* at 629. This Court examined the land use controls established by the ordinance, specifically noting that the ordinance permits the local governmental unit “to grant a variance ... subject to approval by the commissioner of the DNR.” *Id.* at 628. This Court observed that the ordinance “represents no radical departure from traditional zoning .... Taking the Kettle River ordinance as a whole, it clearly represents a valid exercise of the police power.” *Id.* at 630. This Court noted that “enabling legislation cannot possibly cover every detail, or the need for administrative regulation would disappear.” *Id.* at 631. Nothing distinguishes the Kettle River ordinance’s variance approval provision from the certification rule challenged here.<sup>7</sup>

Respondents note that the hearing officer at the time the rules were adopted in 1974 had evidence before him of reservations by DNR staff and the public regarding the authority vested in DNR to adopt the certification rule. (Resp’ts Br. at 38, n. 21.) While not surprising that such a question was raised with the hearing officer, that the record contains expressions of such concerns is irrelevant and does not invalidate the rule at issue here. It is important to note that the hearing officer ultimately found that the certification process was essential to further the state and federal acts through promotion

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<sup>7</sup> The Legislature has since recognized the usefulness of the certification process and incorporated such a process for non-state government entities in two more recent river management programs. *See* Minn. Stat. § 103F.373 (2008). (Mississippi River Headwaters Board) and Minn. Stat. § 103F.389 (2008) (county boards for the Minnesota River). The certification process is found in statute as neither the Headwaters Board or the county boards as a work group have been delegated rulemaking authority.

of uniformity and equal treatment of applications for exceptions to the local ordinances. (Ex. L at 44 (Return of Record (“RR”) 24.15).)

**B. The Municipal Planning Act Amendments Are Inapplicable.**

Respondents assert that the Municipal Planning Act (“MPA”) gives Hubbard the “right” to replace the current structure without a variance or, in the alternative, obligates the City and the Commissioner to grant Hubbard a variance. (Resp’ts Br. at 40-43.) The MPA, as amended in 2004, states that “[a]ny nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an additional control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion ....” Minn. Stat. § 462.357, subd. 1e(a) (2008). According to Respondents’ argument, the amended provision has effectively eliminated the longstanding concept of zoning to phase out substandard structures over time. See 1 Kenneth H. Young, *Anderson’s American Law of Zoning* § 6.02, at 485, and § 6.69, at 695-96 (4th ed. 1996). Respondents’ assertion must be rejected as factually unsupported and inconsistent with the plain language of the law.

First, Hubbard’s proposal expands the level of nonconformity, rather than reduces or maintains it, such that the proposed replacement is not permitted under Minn. Stat. § 462.357, subd. 1e(a) (2008) (occupation may be continued, “but not including expansion”). The Commissioner found that Hubbard’s surveyor “made changes to the bluffline determination after being told by [Hubbard] that it ‘looks weird to me.’” (AA 6, *citing* T. 47; *see also* ALJ Report at 8-9 (AA 24-25).) Relying upon the undisputed evidence in the record, the Commissioner found that Hubbard’s surveyor “did not use the

existing data sufficiently to locate the best bluffline alternative.” (AA 13; *see also* ALJ Report at 30-31 (AA 46-47).) DNR staff, on the other hand, determined the bluffline as defined in Minn. R. 6105.0354, subp. 5 (2007). (ALJ Report at 9-10, 31 (AA 25-26, 47).) And using DNR’s bluffline determination, it is undisputed that the proposed construction would increase the nonconformity from approximately 1100 square feet for the existing structure to 2000 square feet by including portions of the main structure, as well as the “wing,” within the bluffline setback. (ALJ Report at 11, 31 (AA 27, 47); T. 390; Exs. 21 (RR 2.21) and 51 (RR 2.51).) In short, the record reflects that Hubbard’s proposal would constitute an “expansion” of the nonconformity, taking it out of the provisions of Minn. Stat. § 462.357, subd. 1e(a) (2008).

Second, to the extent that reference to legislative history is helpful, it falls far short of establishing that the Legislature meant to give landowners the “right” to replace substandard structures, effectively eliminating the decades-old policy of phasing such structures out. The legislative history reveals that the intent of these amendments is to provide municipalities’ greater flexibility in allowing nonconforming uses, rather than substandard structures, to continue.<sup>8</sup> (*See* RR 25.2 and attachments (transcription of House and Senate comments).)

Third, even if applicable to substandard structures, the statute as it is now written certainly does not authorize unreviewed and unregulated replacement of substandard

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<sup>8</sup> Respondents cite to Young, *supra*, § 6.01 at 483 to assert the term “nonconforming use” incorporates substandard structures. (Resp’ts Br. at 41.) A review of the cited authority reveals that the author recognizes as well that some governments define nonconforming uses and substandard structures separately, and that the differences, as here, “may be critical.”

structures. Rather, the statute states that such nonconformities “*may* be continued.” Minn. Stat. § 462.357, subd. 1e (2008) (emphasis added). At most, the statute gives municipalities the option of amending ordinances to allow replacement, which had previously been prohibited, with a showing of hardship.

Fourth, the MPA reflects a clear intent on the part of the Legislature to distinguish these particular provisions from those zoning rules meant for implementation on the lower St. Croix River. Specifically, Minn. Stat. § 462.357, subd. 1f (2008) states that “[n]otwithstanding subdivision 1e, Minnesota Rules parts 6105.0351 through 6105.0550, may allow for the continuation and improvement of substandard structures, as defined in Minnesota Rules 6105.0354, subpart 30, in the Lower St. Croix National Scenic Riverway.” As Respondents correctly point out, it was the clear intent of the Legislature, as well as DNR as the sponsor of this language, that the lower St. Croix River be governed by its special provisions “notwithstanding subdivision 1e.” (Resp’ts Br. at 43.) As noted at Minn. Stat. § 103F.345 (2008), “[a] river in the wild and scenic rivers system is subject to the provisions of sections 103F.301 to 103F.345, except that in case of conflict with some other law of this state *the more protective provision shall apply.*” (Emphasis added.) To accept Respondents’ argument is to erroneously conclude that the Legislature and, by proposing the addition of subdivision 1f to the MPA, DNR intended

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<sup>9</sup> Respondents’ argument that “one legislature generally cannot bind future legislatures” in order to ignore this statutory provision is an about-face from their assertion that the 90-day rule of the APA adopted in 2002 could not supersede the 60-day rule adopted in 1995. (Resp’ts Br. at 26-27, 43.)

to do away with much of chapter 103F and the long-standing policy to gradually eliminate nonconformities.

**C. The Commissioner Applied The Correct Legal Standard.**

Respondents assert that the Commissioner and, presumably, the City applied the incorrect legal standard to Hubbard's variance request. (Resp'ts Br. at 43-44.) First, Respondents assert that the "practical difficulties" test set forth in *In re Stadsvold*, 754 N.W.2d 323 (Minn. 2008) is applicable to a variance request rather than the "undue hardship" standard. (*Id.* at 44.) Respondents' assertion is incorrect. In *Stadsvold*, the governmental entity involved was a county rather than a municipality as we have here, which is determinative because the variance standards for each differ. Specifically, the variance standard for a county is set forth in Minn. Stat. § 394.27, subd. 7 (2008) and, as recognized by this Court in *Stadsvold*, includes both a particular hardship and a practical difficulties test, depending on whether addressing a use or an area variance request. 754 N.W.2d at 327-28. However, no mention of practical difficulties is found in the variance provision set forth for municipalities in Minn. Stat. § 462.357, subd. 7(2) (2008). Thus, for municipalities, only the undue hardship standard applies.

Second, Respondents assert the Commissioner found that Hubbard had to prove that his property could not be put to any reasonable use without a variance. (Resp't J. Br. at 44-45.) The Commissioner agrees with Respondents that the "any reasonable use" standard is applicable to regulatory takings, not variances. (*Id.*) Respondents rely solely upon the Commissioner's statement in his Order that "[i]t is clear that the property in question can be put to reasonable use under official controls." (Resp'ts Br. at 44, citing

AA 15.) What Respondents fail to note is that the Commissioner's statement immediately follows his quotation of, and is meant to paraphrase, the "undue hardship" definition of Minn. Stat. § 462.357, subd. 6(2) (2008). (AA 15.)

Third, Respondents assert that the Commissioner adopted an incorrect definition of "unique circumstance" requiring the presence of physical obstacles that make compliance with setback requirements impossible. (Resp'ts Br. at 45-46.) Again, Respondents cite to the Commissioner's Order for support. (*Id.* at 46.) While the Commissioner notes that there are no physical obstacles to meeting the bluffline setback, he also notes that moving the structure back "will minimize long-term disturbance in the bluffline area." (AA 13.) Respondents' other reference to the Commissioner's Order again reflects merely a paraphrasing of the statutory hardship definition. (AA 15.) And Respondents' reference to the ALJ Report merely provides a discussion of the City's findings and why such findings were insufficient to support a variance. (ALJ Report at 30-31 (AA 46-47).) In short, Respondents' assertion is unsupported by the record they cite.

Fourth, Respondents claim that the Commissioner ignored Hubbard's right to remodel the old house and that the "practical difficulties test" should have been applied to the status quo. (Resp'ts Br. at 46-47.) As discussed above, the practical difficulties test is inapplicable here. That aside, Hubbard's ability to remodel the existing structure is irrelevant to the variance decision. As the Commissioner concluded, such consideration would mean that all existing non-conforming structures can be replaced merely because

they can be remodeled, making the general principle of the phasing out of non-conforming structures a nullity. (See ALJ Report at 31-32 (AA 47-48).)

Last, Respondents assert that the Commissioner failed to give appropriate deference to the local authorities. (Resp'ts Br. at 47.) The ALJ correctly noted that the rule adopted under the APA, Minn. R. 1400.7300, subp. 5 (2007), states that the party proposing an action be taken has the burden of proving the facts by a preponderance of the evidence. (ALJ Report at 29 (AA 45).) And as noted by the ALJ, Respondents incorrectly rely upon caselaw addressing the standard of review utilized by district courts when reviewing local zoning decisions. (*Id.*) In the present matter, the statute and rules make it clear that an appeal of a denial of certification does not limit the Commissioner's review to the City's record but rather the appeal is subject to a contested case proceeding where, as occurred here, additional evidence is taken. See Minn. Stat. § 103G.311, subd. 2 (2008); Minn. R. 6105.0540, subp. 3.E(1) (2007). In short, Respondents' rhetoric regarding this issue, unsupported by any legal citation other than *Stadsvold*, is inapplicable to the certification and administrative appeal procedures.

### CONCLUSION

This Court should reverse the Court of Appeals decision on the applicability of Minn. Stat. § 15.99 (2008) to contested case proceedings. In addition, this Court should reject Respondents' invitation to address those issues not decided by the Court of Appeals or accepted by this Court for review.

Dated: April 6, 2009.

Respectfully submitted,

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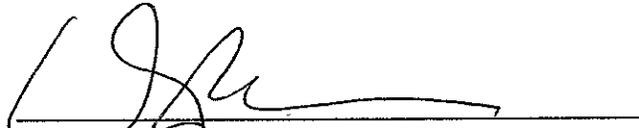
**CERTIFICATE OF COMPLIANCE**

**WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 6,922 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.

Dated: April 6, 2009.

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