

Nos. A07-1932 and A07-2006

State of Minnesota
In Supreme Court

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

**JOINT SUPPLEMENTAL RESPONSIVE BRIEF OF APPELLANTS
 THE SIERRA CLUB AND THE ST. CROIX RIVER ASSOCIATION**

BRIGGS AND MORGAN, P.A.

Sam Hanson (#0041051)
 Diane B. Bratvold (#0186966X)
 2200 IDS Center
 80 South Eighth Street
 Minneapolis, MN 55402-2157
 (612) 977-8400

Scott R. Strand, Esq. (#147151)
 1772 Eleanor Avenue
 St. Paul, MN 55116-1440
 (612) 386-6409

and

David A. Jones (#0052449)
 3415 University Avenue
 St. Paul, MN 55116

*Attorneys for Respondent
 Robert W. Hubbard*

ECKBERG, LAMMERS
 Nicholas J. Vivian, Esq. (#333669)
 1809 Northwestern Avenue
 Suite 110
 Stillwater, MN 55082-7598
 (651) 439-2878

*Attorney for Respondent
 City of Lakeland*

LORI SWANSON

Minnesota Attorney General
 David P. Iverson, Esq.
 Kimberly Middendorf, Esq.
 Assistant Attorneys General
 445 Minnesota Street, Suite 900
 St. Paul, MN 55101-2127
 (651) 296-0687

*Attorneys for Appellant the
 Department of Natural Resources*

MURNANE BRANDT

Andrew T. Shern (#100316)
 Thomas A. Gilligan, Jr. (#202150)
 30 East Seventh Street, Suite 3200
 St. Paul, MN 55101
 (651) 227-9411

and

HELLMUTH & JOHNSON, PLLC
 Ryan J. Wartick (#0339921)
 10400 Viking Drive, Suite 500
 Eden Prairie, MN 55344
 (952) 941-4005

Attorneys for Appellant The Sierra Club

A.W. Clapp, *pro se*
 757 Osceola Avenue, No. 1
 St. Paul, MN 55105

Attorney for Appellant the St. Croix River Association

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INTRODUCTION

The Sierra Club objects to the entire format and content of Respondents' "Statement of the Case and Facts." It is an improper joinder of two components of the brief which the rules require be separate, and which, in its entirety, is nothing more than a very long, very argumentative preface to the balance of their Argument.

Secondly, the Sierra Club objects that Respondents' Brief raises issues not addressed by Appellants, nor specifically authorized by the Court. In fact, the majority of Respondents' Brief addresses new issues. In their opposition to our petitions for review, Respondents expressly urged the court to expand briefing to all issues raised below, in the event that the court chose to grant review. While the court granted Appellants' petitions, it did not authorize the expansive briefing which Respondents requested. Nevertheless, remaining true to the course they chose at the outset of the variance process, Respondents have used their Brief to once again pursue their own agendas. In this Reply, Appellants' choices are to strictly adhere to the Court's Order granting review, but risk that the Court will consider the arguments of Respondents with no response from Appellants; or provide brief rebuttal to all of Respondents' new arguments within the clear confines and limits of the Appellate Rules for Reply Briefs. Either way Appellants are prejudiced, and should have a better remedy for Respondents' calculated decisions to stretch the rules.

STATEMENT OF FACTS

The Sierra Club agrees with the following of Respondents' opening statements: that the existing structure sits directly on the bluffline; that Hubbard proposed to replace it rather than remodel it; and that the Commissioner refused to certify Lakeland's variance from the bluffline setback requirement. (R Br. at 3)¹ Most of the rest of Respondents' opening comments are arguments or misstatements of facts.

Insofar as procedural history, Respondents accurately state that they raised four separate issues on appeal, but the court addressed only one, the 60-day rule, and didn't discuss or rule upon any of the others. Appellants petitioned for review of the court's misapplication of the 60-day rule, and this court granted those petitions.

Respondents' 'discussion' of the Lower St. Croix National Scenic Riverway implies that different rules are imposed south of Stillwater where Hubbard's property is located. (R Br. at 4) Respondents do not cite to any part of the record to support that innuendo. The DNR is charged with managing the section at issue here, whereas the National Park Service enforces the same rules for the St. Croix north of Stillwater. (AA.18) For historical reasons which obtained prior to Congress including the St. Croix in the Minnesota Wild and Scenic Rivers Act, the nature and pace of development, prior to 1973, was significantly different

¹ Appellant's Appendix filed by the DNR is cited as "AA. ___"; the Addendum filed by the DNR is cited as "DNR Add. ___"; the Appendix filed by The Sierra Club is cited "AA. ___" in The Sierra Club's Appellate Brief, but as "Sierra AA. ___" in this Reply Brief; The Sierra Club's Supplemental Appendix is cited "Sierra S.A. ___"; Respondents' Appendix is cited as "R.A. ___"; and Respondents' Brief is cited "R Br. ___"

north and south of Stillwater. (AA.22) Conditions north and south of Stillwater were and continue to be different, but there are no differences in enforcement of the Act.

Respondents do not cite any factual finding for their claim that "Many [existing homes] are larger than Mr. Hubbard's proposed home," because no such evidence was ever offered. According to the ALJ, the proposed structure would have had finishable square footage in excess of 16,000 sq. ft.(AA. 26) No evidence was offered that any house on the river is that large. Respondents also argue, in their Statement of Facts, that "virtually all are more visible from the river" than Hubbard's proposed home. (R Br. at 4) In her discussion of conditions before passage of the Act, the ALJ found that some existing structures are not at all screened from the river by trees or other vegetation, and then she found that, since passage of the Act, substandard structures on or too close to the bluffline have been replaced by new homes built farther back from the bluffline. (AA. 22) That happens when the local units of government and the DNR work together to enforce the bluffline setback ordinances established to preserve the character of the St. Croix River under the Act. (AA. 20-21)

Respondents continue their argument about the bluffline and the location of the old house, by claiming "The river side of the old house is even with the bluffline..." (R Br. at 5) In reality, the bluffline runs through the middle of the house, such that part of the house on the river side sits over or below the bluffline, while some of it is just behind the bluffline. (AA.24-26) At Hubbard's

request (and apparently without the knowledge of Lakeland) his surveyor drafted and presented survey documents showing the bluffline running around the front of the house rather than where his survey crew had staked the bluffline. (AA. 24) The ALJ found that this bluffline, as drawn, crossing several contour lines north and south of the structure, did not comply with either the DNR rule or with the Lakeland ordinance, because it was not drawn along the top of the slope. (AA. 24-26)

Next, Respondents discuss Hubbard's theories and arguments for why he thought he should be able build his proposed structure using "the footprint of the old house..." (R Br. 6) Once again, these are not facts and should not have been included in this section of their brief; but for context, the contrary findings by the ALJ, affirming the DNR staff decision, and as followed by the Commissioner, are as follows: "The fact that the existing structure is centered on the original bluffline and sits below it in part does not support a finding of hardship when DNR rules and Lakeland Ordinances require that if such structures are replaced, the replacement structures meet setback requirements." (AA. 36)

Then Respondents move to arguments about issues that were not even before the Court of Appeals and facts that have transpired long since the record was developed. They contend, "Hubbard had the option to leave the old house where it is, remodel it, and attach it to the new house, without obtaining any variance." (R Br.7) They do not cite to the record. They do not cite any legal authority. And their claim is not relevant to any issue before this court or the

Court of Appeals because, as the Commissioner observed, this was never Hubbard's plan. "He had no 'plan B'." (AA.14) All of his energies were focused solely upon replacement of the old house. And as to the replacement construction, per footnote 3, Respondents offer the court more evidence which could never have been a part of the record because it occurred long after the record closed, "That part of the house has already been built, and the Hubbards have moved in." (R Br. 7) Their purpose in making this improper offer was obviously to influence the court to simply resolve this litigation.

The Sierra Club began the Statement of Facts section of its Appellate Brief as follows: "The facts relevant to the grounds urged for reversal are undisputed." The facts relevant to the erroneous application of the 60-day rule by the Court of Appeals are not contested by Respondents. On the other hand, nearly all of the "facts" which Respondents' Brief apparently deemed to be relevant to the three additional independent reasons they argue this court should also consider, are in dispute. But they press on, stating, "Because no material facts are in dispute, a remand to the Court of Appeals is unnecessary to resolve any of them." (R Br. 13) Appellants respectfully submit that their recap of Respondents' representation of the facts demonstrates that there are numerous significant and material facts in dispute.

ARGUMENT

I. THE '60-DAY RULE' DID NOT APPLY TO THE CONTESTED CASE PROCEEDINGS UNDER THE FACTS OF THIS CASE.

A. The Standard Of Review Is *de novo*.

All parties agree that the standard of review is *de novo*. There are no material facts in dispute relating to the issue of whether the Court of Appeals erred in applying the 60-day rule to nullify the decisions of the Commissioner and the ALJ.

B. The Certification Process Functioned As Intended.

In considering Hubbard's requests for variances, Lakeland was required to and did comply with the requirements of the 60-day rule. MINN. STAT. § 15.99. The certification process was then triggered when Lakeland granted Hubbard a variance from the bluffline setback ordinance. A shorter time limit, 30 days, applied to the DNR's review of the variance. When the DNR issued its Notice of Nonapproval it complied with that time deadline. MINN. R. 6105.0540, subp. 3C.

Contrary to Respondents' arguments, Appellants have never contended that the certification process was an "appeal." (R Br. 15) Rather, it is Respondents who suggest that their demands for contested case hearings were not "appeals," but merely a continuation of the certification process. They present that strained and unsupported argument because the law is clear that an appeal is not a "written request" under MINN. STAT. § 15.99. *Moreno v. City of Minneapolis*, 676 N.W.2d 1, 6 (Minn. Ct. App. 2004) Under MINN. R. 6105.0540, subd. 3E, an aggrieved landowner may file a demand for a hearing. Here, the

choice to appeal is voluntary, and available only after the City and DNR have made a final decision regarding the application on the merits. Respondents' contention that this is a continuation of the certification process, and not an appeal from an adverse decision, is undermined by the record and the plain and unambiguous language of the Rule.

In this case, because Lakeland failed to enforce its bluffline setback ordinance, and there was no justifiable basis for granting the variance, the DNR issued its Notice of Nonapproval. Respondents contend DNR review "renders Lakeland's decision-making process irrelevant." (R Br. 16) That's an interesting spin on the consequences which resulted from Respondents' actions. Certainly, if a local unit of government or property developer is bent upon ignoring or skirting the long-standing statutory protections for the river, then responsibility rests with the DNR to serve the role of final protector. But that is not how the relationship is intended to work. The process assumes that most parties will act in good faith, and are interested in complying with the rules once they understand what those rules are. In this case neither Hubbard nor Lakeland, facing pressure from one of its most influential citizens, felt constrained by the longstanding ordinances. Hubbard was well aware of the Minnesota Wild and Scenic Rivers Act. He had lived on the lower St. Croix his entire life. In fact the home he was living in at the time he purchased the subject property was built or remodeled subject to provisions of the same Act, but in the earlier case the pertinent ordinance prohibited new construction in the flood plain of the river. In the earlier

case the local unit of government, Hubbard, and the DNR found a resolution and approved plans for that Hubbard home.

Here Hubbard had only one plan, to replace the old house and build the new one using the old footprint, so that the home would be sited as close to the river as possible. Lakeland's bluffline setback rule, like all current bluffland ordinances, preclude continuing abuse and misuse of the bluffline in that fashion, when the home can be constructed entirely behind the bluffline. Here it was obvious that there was no impediment to full compliance with the bluffline setback ordinance. Because Lakeland chose not to enforce its ordinance, the DNR would not approve the variance.

C. MINN. STAT. § 15.99 Did Not Apply To The Contested Case Hearing.

MINN. STAT. § 15.99 applied to Hubbard's application to Lakeland for a variance; and it operated as intended to provide Hubbard with a timely decision. Similarly, the DNR complied with the shorter time limit for its certification review. MINN. R. 6105.0540, subp. 3C. (R.A. 137)

However, Respondents then chose to exercise their rights to appeal, demanding a contested case hearing pursuant to the Administrative Procedures Act. (AA 90, 91) This public hearing process is a separate proceeding with its own rules and procedures. MINN. R. 6105.0230.

Respondents appear to suggest that merely because the DNR is an "agency" as that term is defined under MINN. STAT. § 15.99, that the 60-day rule

somehow always applies to any action it takes. Similarly, Respondents argue that because the contested case hearing they requested deals with a variance issue, MINN. STAT. § 15.99 is automatically triggered again.

There is no statutory or common law authority supporting Respondents' arguments. None of the cases cited by Respondents involved a contested case hearing under the APA, or the coordinated application of both the APA and MINN. STAT. § 15.99, which Respondents claim should have occurred here. *Advantage Capital Mgmt. v. City of Northfield*, 664 N.W.2d 421 (Minn. Ct. App. 2003) discussed the applicability of MINN. STAT. § 15.99 to a request relating to zoning, but the APA was not at issue in the case. In *Calm Waters, LLC v. Kanabec County Bd. of Comm'rs.*, 756 N.W.2d 716 (Minn. 2008) this court assumed, without deciding, that a subdivision application constitutes a "written request relating to zoning" so that the court could then deal directly with the issue of whether the County's denial of the application was timely. The APA was not at issue in *Calm Waters* either. Of greater relevance, however, was the court's conclusion that a letter from the director of the Environmental Services Department, rather than directly from the County, constituted the action of an "agency" within the meaning of subd. 3(f), and a valid extension of the 60-day deadline. *Id.* at 721.

D. If MINN. STAT. § 15.99 Applies, There Was An Extension Of The 60-Day Deadline Under subd. 3(f).

Respondents argue, as they did in their brief to the Court of Appeals, “The Commissioner could have secured additional time.” (citing MINN. STAT. § 15.99, subd. 3(f)) (R Br. 19) As Appellants have already discussed, the ALJ’s Notice, clearly informed Respondents of the applicable deadline for the Commissioner’s decision.(AA. 37, Sierra Br. 14-18) The ALJ’s statement that the Commissioner will be allowed 90 days from the close of the record meets the required elements for an extension under the statute. *Id.*

Respondent’s contention that only the DNR could request the extension is directly contradicted by this court’s holding in *Calm Waters* and is unsupported by any citation to authority. See, *Calm Waters v. Kanabec County Bd. of Comm’rs.*, 756 N.W.2d 716 (Minn. 2008). In *Calm Waters* this Court simply interpreted the plain meaning of the statute, which provides, “An agency may extend the time limit.” MINN. STAT. § 15.99, subd. 3(f). The Court then stated *in dicta* that the agency requesting the extension must have the power to act on behalf of the agency making the final decision. *Id.* at 721. Clearly, under the facts of this case the ALJ, conducting the contested case hearing through the Office of Administrative Hearings, an independent state agency, had the authority to extend the 60-day deadline to comport with the timelines and procedures of the APA.

Finally, Respondents argue that this issue was not made before the Court of Appeals. Part of their argument is technically correct, but it is not entirely accurate for Hubbard and Lakeland to now suggest that the issue of extension pursuant to subd. 3(f) was never addressed. It was Hubbard and Lakeland who jointly chose to discuss the issue in their brief, at page 27, wherein they argued "At no point in the process did the Commissioner notify the parties that he wanted or needed to grant himself an additional 60 days to decide under MINN. STAT. §15.99, subd. 3(f) (2006)." The fact that Appellants' Responsive Brief did not address every one of Hubbard's and Lakeland's arguments, does not mean that Appellants are forever barred from discussing or rebutting issues that were first raised by Respondents. Respondents are not entitled to repeatedly use the argument defensively as a shield, while Appellants are precluded from explaining why the extension provision was in fact effectively invoked.

Clearly the purposes of the extension provision have been fully met. Respondents were clearly informed of the applicable deadline in the ALJ's Notice. Unlike other cases involving MINN. STAT. § 15.99, this is not a case where an agency sat on its hands and unreasonably delayed a decision. The DNR's decision was issued in a timely manner pursuant to the timeframe set forth in the Administrative Procedures Act. For Respondents; to cry foul regarding the timeliness of the decision, after their application had been denied on the merits on two prior occasions, is the type of sharp practice and gamesmanship which should not be rewarded. Here, the DNR acted in good

faith in denying the application after fully notifying Respondents of the appropriate deadline.

If Respondents were uncertain for any reason, thinking perhaps that the 60-day rule should apply instead, the time and place to clarify or protest was the exceptions and objections process before the close of the record, not playing a game of "gotcha" after expiration of 60 days, while the Commissioner was using the full 90 days allowed under the Administrative Procedures Act, since Respondents requested a hearing under the APA and did not object to any of the deadlines set out in the Notice.

E. Respondents Have Waived Their Rights To Invoke The 60-Day Rule.

As partial explanation for why they contend they weren't required to speak up and take exception to the ALJ "Notice" providing for 90 days, Respondents characterize the language as "boilerplate." (R. Br. 28) Apparently Respondents thought that the provision didn't apply to this case, that the ALJ puts the provision in every Order. That excuse just doesn't make any sense. There is no other outline, summary or discussion of timelines that will govern this case other than the clear, explicit **NOTICE** provided by the ALJ. Respondents had an affirmative duty to take exception if they did not agree with the amount of time the ALJ said that the Commissioner had to render his decision. Combined, Respondents submitted nearly 100 pages of detailed exceptions, with no mention of their belief that the 60-day rule required a more accelerated decision-making process.

Next, Respondents argue that MINN. STAT. § 15.99, subd. 3(g) precludes implicit waiver. (R. Br. 28) It does not. The subdivision doesn't mention waiver, implicit or otherwise; it simply explains that an applicant may request an extension. In one respect the facts of *N. States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919 (Minn. Ct. App. 2002), are arguably similar to those in this case. In *NSP*, an extension to September 8, 2000 was found to be explicit and definite, and satisfied the clear requirements of § 15.99. No other specific date could have applied. Similarly, in this case, 90 days from the close of the record is the only date referenced in any of the submissions. That date was explicit and definite, and satisfied the clear requirements of § 15.99. No other date could have applied.

Finally, Respondents submitted written demands for contested case hearings, pursuant to MINN. STAT. §14.02, subd. 3 and §§ 14.57-.62. (AA. 90, 91) These provisions give the Commissioner 90 days to issue the final agency decision after the close of the record. Respondents expressly referred to these statutes and are bound by their provisions.

II. THE COURT SHOULD AFFIRM THE COMMISSIONER'S DENIAL OF THE VARIANCE

A. Whether The Court Should Proceed To Consider Respondents' Other Arguments Below Once It Concludes That The 60-Day Rule Did Not Apply.

Appellants' Introduction outlines the prejudice caused by Respondents' unilateral briefing of issues not decided by the Court of Appeals, and not appealed or briefed by Appellants. The usual procedure is for the court to only review issues raised in the

petition for further review. See, e.g., *In Re GlaxoSmithKline PLC*, 699 N.W.2d 749 (Minn. 2005). In *Glaxo* this court chose to apply that general rule because it was unclear whether the respondent might have argued its position differently. Here, it is clear that Appellants would have briefed the case differently—neither the DNR nor the Sierra Club argued the additional issues in their Appellate Briefs. The time and page limitations of the Rules for Reply Briefs do not permit Appellants to adequately respond to all of the issues raised in Respondents' Brief.

Appellants note that Respondents' joint objection to Appellants' petitions for review specifically asked the court to expand the issues to be briefed if the court decided to grant review. In granting the petitions for review the court did not authorize briefing of all issues argued below.

If this court chooses to address the issues which were not decided by the Court of Appeals, Hubbard and Lakeland are bound by the facts as determined by the Commissioner and the ALJ. Hubbard and Lakeland were the Appellants below and, to the extent that they argued that their bases for appeal were questions of law, they are not permitted to dispute the facts as found by the Commissioner and the ALJ. That is true before this court as well. Hubbard and Lakeland seek to have this court overturn decisions of the Commissioner and the ALJ. They are not entitled to argue their "new" version of the facts outlined in their combined Statement of the Case and Facts.

B. The DNR Had Authority To Deny Approval Of The Variance To Protect The St. Croix River From Unequal Land Use Decisions.

The DNR has statutory authority to review and certify bluffline variances. The express language of the Minnesota Wild and Scenic Rivers Act, and the Lower St. Croix Wild and Scenic Rivers Act require that the state assist in the enforcement of

ordinances, manage and administer the wild and scenic river system, and adopt guidelines related to the prohibition of certain residential uses. MINN. STAT. § 103F.335 and MINN. STAT. § 103F.351. A plain reading of both of these Acts shows numerous provisions where the DNR was granted authority by the legislature to assist in the enforcement of variances along the Lower St. Croix.

For example, the Minnesota Wild and Scenic Rivers Act states that the 'commissioner shall assist local government in the preparation, implementation and enforcement of ordinances.' MINN. STAT. § 103F.335, subd. 1(c). Respondents have argued that this statute does not provide authority for certification because the definition of "assist" does not encompass "veto, overrule or trump." Respondents conveniently choose to ignore the word most relevant to the issue, "enforcement," which means: to impose by force, or compel observance of (a law, etc.). Webster's New World Dictionary of the American Language, 1979, p. 203. The statute clearly authorizes the DNR to use certification as one of its tools for assisting in enforcement of local ordinances.

Under § 103F.321 of the Minnesota Wild and Scenic Rivers Act, the DNR is also authorized to "adopt rules to manage and administer the [wild and scenic rivers system]." MINN. STAT. § 103F.321. It is clear, then, that the legislature contemplated that the DNR would have broad powers to oversee the St. Croix River. The word "manage" means:

- (1) to control the movement or behavior of;
- (2) to have charge of; direct;
- (3) to succeed in accomplishing.

Webster's New World Dictionary of the American Language, 1979, p. 365.

Similarly, the Lower St. Croix Wild and Scenic Rivers Act explicitly authorizes the state to enact rules regarding new residential uses. The act states:

(a) The commissioner of natural resources shall adopt rules that establish guidelines and specify standards for local zoning ordinances applicable to areas within the boundaries covered by the comprehensive master plan. The 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. The standards specified in the guidelines must include:

(1) the prohibition of new residential, commercial or industrial uses other than those that are consistent with the above mentioned act;

MINN. STAT. § 103F.351 (emphasis added).

Clearly the DNR has explicit authority to adopt standards for local ordinances which prohibit residential construction that is inconsistent with the purpose of the act.

One of the unique concerns regarding management and Administration along the entire Lower St. Croix is that the river spans multiple counties and cities. The potential for inconsistent enforcement among cities was raised as a concern shortly after the act was passed. The final master plan for the Lower St. Croix noted that "a comprehensive land use plan should be developed jointly by all units of government bordering on the Lower St. Croix so that land use and developments back from the river will complement the recommended protective efforts along it." Final Master Plan for the Lower St. Croix National Scenic Riverway, Minnesota/Wisconsin, February, 1976, p. 5. (Sierra S.A.1)

As articulated in the certification rule, the rationale is to ensure that the variances along the river are granted in a uniform and consistent manner. MINN. R. 6105.0540.

Respondents' argument attempts to read out any oversight responsibility by the DNR, and instead resting sole and final authority for any variance decision to the local governments. This interpretation is clearly contrary to the intent of the law, which envisioned management by both the state and local governments. Joint management of the river has never operated as argued by Respondents, for the obvious reason that this would inevitably result in inconsistent enforcement and application of ordinances along the river.

C. Hubbard's Proposal For Replacement Of The Non-Conforming Structure Did Not Comply With Lakeland's Bluffline Setback Ordinance.

Hubbard was not entitled to replace the non-conforming structure as proposed because the application did not comply with the bluffline setback ordinance. MINN. R. 6105.0370, subp. 11. "If a substandard structure needs replacing due to destruction, deterioration, or obsolescence, such replacement shall comply with the dimensional standards of a St. Croix Riverway ordinance." MINN. R. 6105.0370, subp. 11D. The 40-foot setback requirement is a dimensional standard under the local ordinances. See Lower St. Croix Bluffline and Shoreland Management Ordinance § 402.01. (R.A. 91)

Furthermore, testimony by Hubbard and his land surveyor during the Contested Case Hearing requested by Respondents revealed that, unbeknownst to Lakeland, at Hubbard's request his surveyor ignored the stakes set by his own crew and instead submitted to Lakeland, as a part of the variance application, a survey drawing which showed the bluffline "running in the front of the house and crossing several contour lines north and south of the existing patio." (AA 24) The surveyor's drawing did not comply with either the DNR rule or the Lakeland ordinance, because it was not drawn along

the top of the slope. (AA 26) When the correct bluffline is used, Hubbard's proposed construction actually **increases** the amount of structure within the setback by approximately 2,000 square feet. (AA 27) (Emphasis added) All applicable statutes and ordinances prohibit expanding an existing non-conformity. See, e.g., MINN. STAT. § 462.357, subd. 1(e). ("any nonconformity may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion.") and MINN. R. 6105.0370, subp. 11B. ("In no instance shall the extent to which a structure or sanitary facility violates a setback standard be increased.")

D. The Commissioner Applied The Correct Variance Standard And Appropriately Determined That Hubbard Did Not Demonstrate Hardship Because There Were No Practical Difficulties To Building The Home Completely Behind The Bluffline Setback.

The subject property is very large. It consists of 3.8 acres, including 200 feet of frontage on the St. Croix River. The northernmost portion of the bluff, which is where the old house is situated, has a steep slope to the beach. From the bluff towards the public road at the rear of the property, a distance of more than 600 feet, the lot is essentially flat, with no obstructions to building. (AA 23) These findings by the ALJ are uncontested. This court needs no additional evidence to affirm the initial vote of Lakeland's Planning Commission, the DNR's nonapproval of the variance, the Findings of the ALJ, and the Findings, Conclusion and Order of the Commissioner. There was no basis for granting a variance.

Lakeland's ordinance states, "[a]ny extension, enlargement, or alteration of an existing substandard structure...shall meet the setback standards of this ordinance." § 601.02 (R.A. 94). Proposals for variances must satisfy all of the criteria of § 805.01:

Variations shall only be granted where there are particular hardships which make the strict enforcement of this ordinance impractical. Hardship means the proposed use of the property and associated structures in question cannot be established under the conditions allowed by this ordinance; the plight of landowner is due to circumstances unique to his property, not created by the landowner after May 1, 1974; and the variance, if granted, will not alter the essential character of the locality. (R.A. 98).

This language is identical to the minimum standards for variations in MINN. R. 6105.0520 (2005), but is not the same as the test found in the Municipal Planning Act, as argued by Respondents. Because Hubbard could not meet all three of the requirements, he was not entitled to a variance and the Commissioner's Order confirming the DNR's denial of certification should be affirmed.

Hubbard was not able to show hardship, as measured by the "reasonable use" standard. *Rowell v. City of Moorehead*, 446 N.W.2d 917, 922 (Minn. Ct. App. 1989). If the reasonable use can be accomplished under conditions allowed by the ordinance, then there is no reason to grant a variance. Because the uncontested facts clearly demonstrated Hubbard could build his proposed home, or even a larger one, entirely behind the setback, no variance was necessary.

An owner must meet a heavy burden when he seeks a variance which will allow him to use his property in a manner which the law forbids. *Luger v. City of Burnsville*, 295 N.W.2d 609, 612 (Minn. 1980); *Holacek v. Vill. Of Medina*, 303 Minn. 240, 244, 226 N.W.2d. 900, 903 (1975). The City of Lakeland has never before granted a bluffline setback variance when there is no impediment to building a new structure in compliance with its ordinance. (AA 33) Hubbard provided no evidence to address the critical question of why he could not build entirely behind the setback, because there is no such evidence.

CONCLUSION

Hubbard's goal in proposing to site his new home on the footprint of the old home was to retain the best view of the beach and river. His goal could not have been more diametrically opposed to the purposes of the Minnesota Wild and Scenic Rivers Act. Those purposes are to protect the existing natural scenic and environmental quality of the riverway, not to provide "better views" for private landowners.

Hubbard purchased the subject lot knowing full well it was within an environmentally sensitive area which has been protected by local, state and federal laws for decades. Those protections are part of what has made the area so desirable and valuable. The rare granting of a variance must ensure and advance the purposes of the preservation legislation, not degrade the unique scenic and recreational asset that is the lower St. Croix River.²

Because the grant of the bluffline setback variance by Lakeland was not consistent with the letter, spirit or intent of the ordinance, the Commissioner properly refused to certify the variance. We urge this court to reverse the Court of Appeals, and affirm the Commissioner in all respects.

² An article published in the Star Tribune newspaper yesterday, April 5, 2009, summarizes the unfortunate consequences to the St. Croix River when communities and private landowners refuse to follow the spirit and, on occasion, the letter of the laws enacted to protect the river. Of particular note is the condition of Lake St. Croix, which is the portion of the river directly impacted by Hubbard's proposed construction. (Sierra SA.3)

Respectfully submitted,

MURNANE BRANDT

Dated: April 6, 2009



Andrew T. Shern, #100316
Thomas A. Gilligan, Jr., #202150
Attorneys for The Sierra Club
30 East Seventh Street, Suite 3200
St. Paul, MN 55101
(651) 227-9411

HELLMUTH & JOHNSON, PLLC
Ryan J. Wartick, #0339921
Attorneys for The Sierra Club
10400 Viking Drive, Suite 500
Eden Prairie, MN 55344
(952) 941-4005

A.W. Clapp, *pro se*
Attorney for the St. Croix River Association
757 Osceola Avenue, No. 1
St. Paul, MN 55105

CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for The Sierra Club certifies that this Brief complies with the requirements of MINN. R. Civ. App. P. 132.01 in that it is printed in proportionately spaced typeface utilizing Microsoft Word 2002 and contains 5,341 words, excluding the Table of Contents and Table of Authorities.

Respectfully submitted,

MURNANE BRANDT

Dated: April 6, 2009



Andrew T. Shern, #100316
Thomas A. Gilligan, Jr., #202150
Attorneys for The Sierra Club
30 East Seventh Street, Suite 3200
St. Paul, MN 55101
(651) 227-9411

HELLMUTH & JOHNSON, PLLC
Ryan J. Wartick, #0339921
Attorneys for The Sierra Club
10400 Viking Drive, Suite 500
Eden Prairie, MN 55344
(952) 941-4005

A.W. Clapp, *pro se*
Attorney for the St. Croix River Association
757 Osceola Avenue, No. 1
St. Paul, MN 55105