

Nos. A07-1932 and A07-2006

State of Minnesota
 In Supreme Court

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

JOINT REPLY BRIEF OF RESPONDENTS
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ARGUMENT

Summary of Argument

In the land use area, the legislature has achieved balance on several issues:

- Extensive local government zoning authority, but with preservation of landowners' rights to continue preexisting nonconformities;
- Precise dimensional and area standards, but with local government authority to grant variances when the proper criteria are met and the action is consistent with the spirit and intent of the ordinance; and
- Local government enforcement of zoning ordinances, but with state guidelines in limited circumstances.

The Department of Natural Resources ("DNR") has upset that careful balance by asserting plenary state authority over local zoning decisions, by claiming exemption from the state law on nonconformities, and by substituting its own judgment for that of the local government on whether a landowner's proposal justified a variance. Respondents Robert W. Hubbard and the City of Lakeland therefore submit this reply brief pursuant to this Court's June 12, 2009 order for supplemental briefing. Contrary to the DNR/Sierra Club arguments, Hubbard and Lakeland will demonstrate that:

1. The DNR's Certification Rule for the Lower St. Croix River, which prohibits local government variance decisions from taking effect unless and until the DNR "certifies" them, is beyond the department's statutory authority.
2. Even if the DNR had certification authority, the amended nonconformity provision in the Municipal Planning Act expressly permits landowners to replace

nonconforming structures on their property. Since that is all that respondent Hubbard has proposed, the DNR's certification rule does not apply and the DNR cannot prohibit Hubbard from proceeding.

3. Even if the DNR's certification authority survives and the nonconformity provisions in the statute are somehow avoided, the DNR did not apply the correct legal standard for variances from dimensional or area zoning restrictions. The correct standard is the one this Court adopted in *In re Stadsvold*, which was the standard applied by the City of Lakeland.

Many of the arguments made by the appellants DNR and Sierra Club were fully addressed in the initial Joint Brief of Respondents Hubbard and Lakeland. Where appropriate, Hubbard and Lakeland will simply refer the Court to those sections of the Joint Brief which have not been rebutted by Appellants. The primary focus will be on the issue of the DNR's statutory authority because this involves a fundamental challenge to the DNR's subject matter jurisdiction and its resolution should make all other issues moot.

I. STANDARD OF REVIEW

The DNR continues to insist that the Commissioner's legal conclusions are entitled to deference. DNR Supp. at 18-19. That is not correct. Under a long line of precedents, the law is clear that this Court is entirely free to substitute its own judgment for any of the Commissioner's legal conclusions.

When considering questions of law, reviewing courts are not bound by the agency's decision and need not defer to the agency's determinations. Any "presumption

of correctness” for administrative rulings does not extend to decisions that turn on interpretation of statutes or regulations. *See generally In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 513-16 (Minn. 2007) (“*Annandale*”); *In re Denial of Eller Media Cos. Applications*, 664 N.W.2d 1, 7 (Minn. 2003). The only exception to that rule is when all of the following circumstances are in place:

- The statute or regulation must be ambiguous. If it is “clear and free from ambiguity, we must give effect to the plain meaning and give no deference to the agency’s interpretation.” *Matter of the Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738 Reissuance for the Expanded Discharge of Treated Wastewater, Douglas County, Alexandria, Minn*, 763 N.W.2d 303, 310 (Minn. 2009) (“*Alexandria*”); *In re Rate Appeal of Benedictine Health Ctr.*, 728 N.W. 2d 497, 503 (Minn. 2007);
- The statute or regulation must be the agency’s “own,” i.e., one that the agency alone enforces and administers, *Annandale*, 731 N.W.2d at 513;
- The agency interpretation must derive from its unique expertise and judgment; the subject matter must be uniquely “within the agency’s technical training, education, and experience.” *Id.* at 514; *see also Minnesota Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 463 (Minn. 2002);
- The agency interpretation must be reasonable. *Annandale*, 731 N.W.2d at 515; and

- The issue must not involve the basic question of whether the agency has the statutory authority or jurisdiction to take the action in dispute, *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (“[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental ‘that an agency may not bootstrap itself into an area where it has no jurisdiction.’”).

None of the issues in this case fall within this exception. None of the issues involve the application of any unique DNR “expertise” or “technical training.” The first issue—whether the DNR had statutory authority to assert certification authority in the first place—falls squarely within the category where this Court has held deference to agency views is singularly inappropriate. “As a general rule, we resolve any doubt about the existence of an agency’s authority *against* the exercise of such authority.” *In re Qwest’s Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005) (“*Qwest*”) (emphasis added).¹ The wisdom of this rule is illustrated here by the Commissioner’s surprising statement – “If the legislature had not intended the DNR to have certification authority, it would have said so explicitly.” (AA. 16.) This, of course, is exactly opposite the proper rules of statutory construction – an agency has no authority

¹ The case the DNR relies on for the proposition that its interpretation of the statute is entitled to deference had nothing to do with an agency’s statutory authority. See DNR Br. at 18. The issue in *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47 (Minn. 1988), was whether workers could be eligible for unemployment benefits during a strike, and whether the substantive interpretation of the Department of Jobs and Training was correct. There was no question that the Department had the authority to decide, subject only to judicial review.

except that which has been given by the legislature and any doubt about the existence of agency authority is to be resolved against such authority. *Qwest*, 702 N.W.2d at 259; *Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480, 485 (Minn. 1995); *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985).

The second and third issues both involve interpretation of the Municipal Planning Act, a statute that the DNR cannot claim as its “own.” And finally, as the balance of this argument will explain, none of the DNR’s proffered interpretations of the legislature’s clear language can pass the test of “reasonableness.” Consequently, this Court owes no deference to the Commissioner’s interpretations of the law in this case.

II. THE DNR’S “CERTIFICATION” RULE DIRECTLY CONFLICTS WITH THE LEGISLATURE’S DECISION TO VEST THE DECISION-MAKING POWER IN INDIVIDUAL CASES UNDER THE WILD AND SCENIC RIVER STATUTES WITH LOCAL, NOT STATE, GOVERNMENT.

Minnesota’s wild and scenic river statutes clearly define the allocation of authority and responsibility between state and local government. Under both statutes, the DNR’s role is to prepare management plans for the designated river,² adopt “standards” and “criteria” for local zoning ordinances consistent with those management plans,³ and then “assist” local governments in their administration and implementation of those ordinances.⁴ Once a local government adopts an ordinance that meets the DNR’s “standards” and “criteria,” the local government assumes responsibility for enforcing that ordinance. If the DNR or any aggrieved party believes a local decision is contrary to law,

² Minn. Stat. §§ 103F.351, subd. 2, 103F.325, subds. 1-3 (2008).

³ Minn. Stat. §§ 103F.351, subd. 4, 103F.321, subd. 2, 103F.335, subds. 1-2 (2008).

⁴ Minn. Stat. § 103F.335, subd. 1(c) (2008).

they may seek judicial review. Minn. Stat. §§ 394.27, subd. 9 (counties), 462.361, subd. 1 (2008) (municipalities).

Stated another way, by requiring that the standards and criteria developed by the DNR be adopted as local zoning ordinances, the legislature effectively incorporated all of the local procedural mechanisms already in place under the county and municipal planning acts.⁵ This grant of express enforcement authority to local government negates any legislative intent to confer enforcement authority on the DNR. If the legislature had so intended, it would not have used the ordinance mechanism, but would have expressly authorized the DNR to enforce its own rules and adopt its own administrative procedures.

The DNR and the Sierra Club offer several alternative arguments for upholding the certification rule. First, they pull words and phrases from the statutes out of context to try to find express authority for the rule. Second, they make the circular argument that Lakeland conferred the authority on the DNR by adopting the certification language that the DNR required Lakeland to include in the ordinance. Third, they argue that the authority for the rule can somehow be implied by reference to the statutes' overall purposes. Fourth, they argue that this Court held that the certification rule had adequate statutory support in a case that did not even address the merits of the certification rule. None of these arguments has any merit.

⁵ Notices and public hearings, Minn. Stat. §§ 394.26, 462.357, subd. 3 (2008); appeals to boards of adjustment, Minn. Stat. §§ 394.27, subd. 6, 462.357, subd. 6(1) (2008); variances, Minn. Stat. §§ 394.27, subd. 7, 462.357, subd. 6(2) (2008); conditional use permits, Minn. Stat. §§ 394.301, 462.3595 (2008); nonconformities, Minn. Stat. §§ 394.36, 462.357, subd. 1e (2008); enforcement and penalties, Minn. Stat. §§ 394.37, 462.362; and judicial review, Minn. Stat. §§ 394.27, subd. 9, 462.361 (2008).

A. There Is No Express Statutory Authority For The DNR's Certification Rule

The only rulemaking authority the legislature granted to the DNR in the Lower St. Croix Act, was to “adopt rules that establish guidelines and specify standards for local zoning ordinances applicable to the area within the boundaries covered by the comprehensive master plan.” Minn. Stat. § 103F.351, subd. 4(a) (2008). The legislature was very careful to circumscribe the DNR’s role to ensure that the policy for the Lower St. Croix would reflect local control under state guidelines. This is the same policy judgment the legislature made with the earlier floodplain and shoreland management programs, adopted in the immediately preceding legislative sessions, to allow the state to set substantive standards⁶ and require that those standards be adopted as local zoning ordinances,⁷ but then leave the administration and enforcement responsibility with local governments, as with virtually all other zoning matters.⁸ *See note, Minnesota’s Flood Plain Management Act – State Guidelines of Land Use Controls*, 55 Minn. L. Rev. 1163, 1172 (1971).

The DNR and Sierra Club try to find express authority elsewhere in the statutes. They rely on the language in the general wild and scenic rivers act, Minn. Stat. § 103F.321, subd. 1 (2008), authorizing the commissioner to “adopt rules to manage and

⁶ Minn. Stat. §§ 103F.141 (floodplains); 103F.211 (shoreland) (2008).

⁷ Minn. Stat. §§ 103F.121 (floodplains); 103F.215, 221 (shoreland) (2008).

⁸ Minn. Stat. §§ 103F.121, subd. 3 (floodplains); 103F.215, subd. 3, 103F.221, subd. 2(c) (shoreland) (2008).

administer the system.”⁹ In doing so, they focus only on the words “manage” and “administer”, but ignore the word “system” (DNR Br. at 20-21; Sierra Br. at 14-16). In context, the “system” includes the development of the master plan, the designation of additional rivers, the promulgation of standards, and the drafting of model ordinances. But, a clear line was drawn between that “system” and the enforcement in individual cases, because the standards were to be incorporated into local ordinances that can only be enforced by the local government that adopted them. This is the line that defines the roles of each party in this state and local partnership – the state develops the guidelines and the local government adopts those guidelines in ordinances that it enforces.¹⁰

The DNR/Sierra Club argument is also flatly inconsistent with the canon that statutes must be interpreted to give effect to all their provisions. “A statute should be interpreted, whenever possible, to give effect to all its provisions; ‘no word, phrase, or sentence should be deemed superfluous, void, or insignificant.’” *American Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). The argument that Minn. Stat. § 103F.321, subd. 1 (2008) gives the DNR plenary rulemaking authority, including the

⁹ There is an open question whether or to what extent the general wild and scenic rivers act, Minn. Stat. § 103F.301-.345 (2008), applies to the Lower St. Croix, which is governed by its own statute. Minn. Stat. § 103F.351 (2008). The rules for the Lower St. Croix, Minn. R. 6105.0300-.0550 (2007) are separate from the general wild and scenic river rules, Minn. R. 6105.0010-.0250 (2007), and are based on separate statutory authority. Nevertheless, it is Hubbard and Lakeland’s position that the “certification” rule under the general statute, Minn. R. 6105.0230 (2007), is invalid for the same reasons as the “certification” rule that applies only to the Lower St. Croix, Minn. R. 6105.0540 (2007).

¹⁰ The legislature knows how to expressly authorize certification procedures when that is what it intends. *See, e.g.*, Minn. Stat. § 103F.373 (2008) (Mississippi Headwaters); Minn. Stat. § 103F.389 (2004) (now repealed) (Project Riverbend).

authority to allocate the responsibility between state and local government as the DNR sees fit, would render the other provisions *limiting* the DNR's rulemaking authority superfluous. And it would also conflict with the common-sense notion that a legislative body "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quoting *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001)).

The other arguments the DNR and Sierra Club make for express statutory authority are even more strained. The directive in Minn. Stat. § 103F.335, subd. 1(c)(2008) that the commissioner "*assist* local governments in the preparation, implementation, and enforcement of the ordinances" (emphasis added) only reinforces the conclusion that the primary responsibility for "preparation, implementation, and enforcement" rests with the local governments, and not with the DNR. "Assist" cannot reasonably mean "nullify, trump, or veto." Clearly, the City of Lakeland does not regard the certification rule as providing any assistance to local governments. To the contrary, where the DNR uses the certification rule to override the City's grant of a variance, it renders the time and effort of the local government, through staff investigations, public hearings, and planning committee and city council meetings, completely useless. The legislature would not have insisted on using local zoning processes if it wanted local zoning decisions to be meaningless. The assistance that is contemplated by the statute and that is valued by Lakeland is the DNR's development of standards, comments on

pending applications, participation in public hearings before the planning commission and council and advice to City staff.

The legislature decided how to divide the responsibility between state and local government with respect to wild and scenic rivers, and it made its judgment explicit in the statutes. It did not, as the DNR and Sierra Club contend, leave to the DNR the extraordinary authority to make the substantive policy decision of “who decides.”

B. Lakeland Cannot Authorize The Certification Rule

The argument that the DNR’s authority can be derived from the local ordinances is completely baseless.¹¹ Obviously, no local government has inherent authority to delegate responsibility to state agencies. The law is precisely the opposite. Local governments have *no* authority to act except pursuant to legitimate state delegations of authority. “[M]unicipalities 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.” *City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 6 (Minn. 2008) (quoting *Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 357, 143 N.W.2d 813, 820 (1966)). Therefore, if the DNR did not have statutory power to assert certification authority in the first place, it cannot create it through the expedient of

¹¹ The court of appeals apparently adopted this extraordinary “local government can delegate power to state agency” theory in *In re Denial of Certification of Variance Granted to Haslund ex rel. City of St. Mary’s Point*, 759 N.W.2d 680, 688 (Minn. Ct. App. 2009), *pet. for review* granted (Minn. April 21, 2009). The parties in that case did not brief the statutory authority issue, and the court of appeals’ discussion is very cryptic. If the holding was that the DNR could gain certification authority simply because the local governments put it in their local ordinances, the court was clearly in error.

requiring local governments to adopt ordinances that purport to give the DNR the authority it seeks.

C. There Is No Implied Authority For The DNR's Certification Rule

The DNR and Sierra Club argue that shifting the power to make zoning decisions from local governments, where it has always resided, to the DNR is consistent with the purposes of the legislation and should be implied. This Court has never adopted such a broad view of implied rulemaking authority. Indeed, it has repeatedly held the opposite.

This Court could not have been clearer when it declared in *Qwest* that “[h]istorically, we have been reluctant to find implied statutory authority . . . [The] general rule [is that] we resolve any doubt about the existence of an agency’s authority against the exercise of such authority.” 702 N.W.2d at 259 (citing *In re N. States Power Co.*, 414 N.W.2d 383, 387 (Minn. 1987)).¹² Contrary to the DNR and Sierra Club arguments, it is not enough to say that a rule might be “useful” for enforcement purposes, or might be consistent with the statute’s overall goals. *Qwest*, 702 N.W.2d at 259; *Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480, 485 (Minn. 1995). Rather, this Court has held that implied authority to adopt substantive legislative rules will only be found in those rare cases where “necessity and logic” compel the conclusion that the legislature would

¹² Therefore, this case is not like *Drum v. Minn. Bd. of Water & Soil Resources*, 574 N.W.2d 71 (Minn. Ct. App. 1998), where the effect of not finding implied authority would have been to leave an entire category of wetlands completely unregulated, a result that could not be reconciled with the Wetlands Conservation Act the legislature had just adopted.

have intended that the agency have the authority in question. *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1995).

This is not such a case. The appellants' stated concern that, without DNR "certification" authority, the river will be left unprotected, is wholly baseless. It is premised on a derogatory view of both the rights of landowners and the integrity of local governments. Appellants have cited nothing in the legislative history of the wild and scenic rivers statutes, or any of Minnesota's other water laws, to suggest that the legislature distrusted the ability of local government to administer and enforce the zoning ordinances that were called for by these laws. In fact, this case presents a striking example of local government being more sensitive to the purposes of these statutes than the DNR.

The DNR staff, the ALJ and the Commissioner all relied on the same false premise when evaluating Hubbard's proposals, comparing the replacement of the existing structure to the base case of complete removal of the structure and remediation of the bluff. This is not the correct base case because it ignores Hubbard's legal right to continue the nonconforming structure by, at the least, the repair and remodeling of the nonconforming structure without a variance. Hubbard's right to repair and remodel could only be eliminated by condemnation, which the DNR has the power to do but has not done. Minn. Stat. § 103F.351, subd. 3 (2008)

Lakeland recognized Hubbard's right to remodel and correctly viewed that as the starting point for its analysis, finding that:

(1) [The] ability to reuse the existing footprint presents opportunity to continue utilizing the property as a living unit without further encroaching or creating more harm to River environment, (2) applicant has met test of Ordinance demonstrating the structure/home is behind the bluffline as determined by his professional staff, and (3) applicant has demonstrated significant stewardship efforts to preserve or better protect the river by virtue of structural improvements as proposed in the plan submitted; hardship is continued deterioration of the property which will result in additional harm to the River.

(RA. 16). The structural improvements proposed by Hubbard were to move the structure back from the river a minimum of 9 feet, to reduce the size of the encroachment from 1,136 square feet to 956 square feet, to improve the drainage and bluff stabilization by directing storm water runoff back to rain gardens on land away from the bluff, and to preserve the trees between the house and the river. (AA. 31-35; T. 89-94, 460-461). By granting the variance, then, it was the City of Lakeland that took the appropriate action to protect the Lower St. Croix.

The DNR's argument that local government authority should always be narrowly construed and state authority should always be broadly construed is simply not correct. DNR Br. at 23-24. In both *Welsh v. City of Orono*, 355 N.W.2d 117 (Minn. 1984) and *City of Minneapolis Comm'n on Civil Rights v. Univ. of Minn.*, 356 N.W.2d 841 (Minn. Ct. App. 1984), relied on by the DNR, the issue was the existence of *implied* local authority in the face of an *express* delegation of authority to a state agency. Here, the situation is the opposite. It is the state that is claiming implied authority, and the local government that has an express delegation of power.

In this case, the legislature made the determination that the "necessity and logic" of its wild and scenic river program meant that, once the state set minimum standards and

guidelines, the administration and enforcement of the rules could safely be left with local governments. Local officials live in the communities near these rivers, and they have as much, if not more, incentive to protect these natural resources. If they make poor decisions, the DNR retains the option of seeking judicial review or tightening the standards and guidelines that govern local zoning ordinances. If the DNR believes the legislature was wrong, and that these decisions should be made at the state level, it remains free to seek legislation to that effect.¹³

D. County Of Pine Did Not Address, Much Less Decide, Whether The DNR Had Statutory Authority For Its Certification Rule

The DNR and Sierra Club argue that this Court already upheld the statutory authority for the certification rule in *County of Pine v. State Dep't of Natural Res.*, 280 N.W.2d 625 (Minn. 1979). But this Court did not even reach that issue. The issue in *County of Pine* was whether the state legislature could constitutionally force a reluctant local government to adopt a wild and scenic rivers ordinance or authorize the DNR to adopt such an ordinance for the local government, as allowed by Minn. Stat. § 103F.335,

¹³ The DNR is currently in the process of revising all of its shoreland and wild and scenic river rules, and part of that effort is to harmonize the two sets of regulations. The proposed draft rules now out for comment would *eliminate* the certification process in the Wild and Scenic River rules in favor of the process used in all other shoreland cases, where the DNR is notified of variance decisions and can seek court review if a local government unit makes a “poor decision.” See Minnesota Shoreland Rules Update Project (Merger of M.R. 6105 & 6120), http://files.dnr.state.mn.us/waters/watermgmt_section/shoreland/WSR_Supplementary_SummaryTable_April_2009.pdf. If certification authority were “necessary” to the success of the wild and scenic rivers program, the DNR would not be publicly proposing to repeal those provisions.

subd. 1(b) (2008). This Court answered that question in the affirmative. Because there had been no application for a variance or rezoning or any other decision that could be covered by the certification rule, the DNR had not made any decision whether to “certify” or “non-approve” a local decision. Therefore this Court did not have occasion to consider that issue. To date, no court has addressed that question. Contrary to the DNR and Sierra Club arguments, *County of Pine* does not decide the question in this case.¹⁴

III. THE 2004 AMENDMENTS TO THE MUNICIPAL PLANNING ACT’S NONCONFORMITY PROVISION GAVE RESPONDENT HUBBARD THE RIGHT TO REPLACE THE STRUCTURE ON HIS PROPERTY WITHOUT A VARIANCE.

A. The 2004 Amendments To The Municipal Planning Act Apply

Minn. Stat. § 462.357, subd. 1e (2008), as amended in 2004, provides that “[a]ny nonconformity, including the lawful use or occupation of land or premises existing at the time of an additional control under this chapter, may be continued, including through repair, *replacement, restoration, maintenance, or improvement*, but not including expansion.” (emphasis added) The intent of the added words (in italics above) was to give property owners with nonconforming structures or uses greater freedom to replace, restore, or improve those structures, and to supersede local ordinances that are more

¹⁴ The Sierra Club notes that Hubbard and Lakeland have not cited “any Minnesota decisions in which DNR authority for review and certification has been found lacking.” (Sierra Club Br. at 18). Of course, if there had been such a decision by this court, we would not be here. The fact is that, so far as we are aware, this is the first case to reach any court where the DNR failed to certify the local government’s grant of a variance.

restrictive. By adding these words, the legislature replaced the old policy favoring the gradual elimination of nonconformities with a new policy that encourages property owners to invest in replacing old structures or uses that might be nonconforming, so long as they do not expand the nonconformity. The amendments reflect the conclusion of several zoning experts that the old nonconformity restrictions are often counterproductive, because they create a perverse incentive for property owners to keep old nonconforming structures in place for as long as they can, rather than invest in new structures that might still be nonconforming but would otherwise better serve the purposes of the zoning law. *See, e.g., Donald L. Elliot, A Better Way to Zone 49-55, 169-76 (2008).*

Because Hubbard's proposal is precisely to "replace" an old nonconforming structure on his property with new construction that would still be nonconforming but would be set back further from the bluffline, his proposal is exactly the kind of project the legislature intended to allow, without any need to seek a variance. Under the amended statute, he has the right to proceed, and neither Lakeland nor the DNR have the authority to prohibit him from going forward.

The DNR and the Sierra Club offer several reasons why this section should not apply. First, they contend that the amendment only governs nonconforming uses, not nonconforming or "substandard" structures. That argument is baseless, for the reasons

stated in our initial Joint Brief at pages 40-41.¹⁵ That the short House floor debate on the bill focused on uses rather than structures reflects only that nonconforming uses, e.g., commercial or industrial facilities in residential zones, are more controversial than mere dimensional or area nonconformities.

Second, they argue that Minn. Stat. § 462.357, subd. 1f (2008), adopted in 2002, somehow exempts the Lower St. Croix from the new policy on replacing and improving nonconformities adopted in 2004. Subdivision 1f provides that:

Notwithstanding subdivision 1e, Minnesota Rules, parts 6105.0351 to 6105.0550 [the Lower St. Croix rules], may allow for the continuation and improvement of substandard structures, as defined in Minnesota Rules, part 6105.0354, subpart 30, in the Lower St. Croix National Scenic Riverway.

The new language was intended to be pro-landowner and to guarantee the right to continue and improve nonconforming structures, not to give the DNR the authority to impose greater restrictions or to exempt the Lower St. Croix from the benefits of this amendment to the MPA. In fact, the DNR proposed the 2002 enactment of subdivision 1(f) because it was concerned that an earlier amendment to subdivision 1(e), treating substandard structures as a “nonconforming use,” “actually restricts the ability to allow substandard structures to remain within the riverway . . .” DNR Fact Sheet (RA. 79).

¹⁵ The DNR has acknowledged that, under the current terminology in Minnesota’s statutes, “nonconformity” includes both “nonconforming uses” and “substandard structures”. See Minnesota Shoreland Rules Project (Merger of M.R. 6105 & 6120), at 2-3, http://files.dnr.state.mn.us/waters/watermgmt_section/shoreland/WSR_Supplementary_Summary_Table_April_2009.pdf. The DNR’s proposed rule would eliminate the definitions of “nonconformity,” “nonconforming use,” and “substandard structure” in the current rules and ordinances, and simply refer back to the statutory definition.

Third, they argue that Minn. Stat. § 103F.345 (2008) trumps the 2004 amendments to the nonconformity provision in the Municipal Planning Act. Minn. Stat. § 103F.345 (2008), adopted as part of the general wild and scenic river act in the 1970's, provides that "[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." That argument is incorrect, for the reasons outlined in the initial Joint Brief at pp. 42-43. Moreover, when the legislature wants to exempt a particular category of uses or structures from a provision in the state zoning laws, it knows how to do it. In 2004, for example, the legislature expressly excluded adults-only businesses from the benefit of the new liberalized nonconformity provision. Minn. Stat. § 462.357, subd. 1e(b)(2008). No other category was exempted. The logical conclusion, then, is that the legislature intended its liberalization of the nonconformity provision to apply in every zoning jurisdiction.

B. Mr. Hubbard's Proposal Is Not An "Expansion" Of The Nonconformity On His Property

Appellants' argument in the alternative is that, even if the 2004 amendments apply, they do not help Mr. Hubbard because his proposal would "expand" the nonconformity on his property.

The appellants concede that Mr. Hubbard's proposed construction would be further from the bluffline than the existing structure. Nevertheless, they contend that the nonconformity would be "expanded" because there would be more square footage in the setback area. There are three responses. First, the DNR formally admitted in its

prehearing responses to requests for admission that the square footage in the setback area would actually be less under Mr. Hubbard's proposal than it is today with the existing structure. (RA. 31.) Under Minn. R. Civ. P. 36.02,¹⁶ "[a]ny matter admitted pursuant to this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." There was never any such motion nor was there ever any such ruling from the ALJ, so the DNR's admission should be treated as "conclusively established." *See generally* 1A David Herr & Roger Haydock, *Minnesota Practice: Civil Rules Annot.* § 36.9, at 222-24 (4th ed. 2003) and cases cited.

Second, even if the DNR is permitted to recant its previous admission, the only way they can get to the conclusion that the square footage would be greater is to argue that the bluffline should be further back and that some of Mr. Hubbard's new house should be considered within the setback area. But, Mr. Hubbard's new house is covered by an exception in Lakeland's Lower St. Croix River Ordinance to the setback standards for "an extension, enlargement, or alteration of an existing substandard structure . . . on the side of the structure . . . facing away from the river and bluffline. Section 601.03(1) (RA. 94). All of Mr. Hubbard's new house is on the non-river side of the existing structure. Moreover, the DNR's certification rule only applies to local decisions that "grant a variance." Minn. R. 6105.0540, subp. A and B (RA. 137). The DNR does not, and cannot, claim that its certification rule would allow it to review a decision of a local government that a variance is not required. Thus, the question of whether Mr. Hubbard's

¹⁶ The Office of Administrative Hearing (OAH) rule on requests for admissions is Minn. R. 1400.6800 (2007).

proposal expands a nonconformity is solely within the City of Lakeland's decision-making authority on whether any variance is required. The DNR's only recourse, if it believes a local governmental unit has improperly decided that a variance is not required, is to take the issue to district court. Consequently, the only relevant findings on the bluffline are those of the City, which accepted the bluffline proposed by Hubbard's licensed surveyor. (RA 16.)

Third, even if the bluffline determination was relevant, there is no "DNR alternative bluffline designation." Under the DNR's rules, a bluffline designation has two components, one objective and one subjective. Minn. R. 6105.0354, subp. 5 (2007). The objective component determines the line where the slope becomes less than 12%; the subjective component determines whether any 12% slopes include "the tops of slopes not visible from the river" or "minor undulations." Both determinations must, under the rule, be made and "certified by a licensed land surveyor or the local authority." *Id.* Mr. Hubbard retained a "licensed land surveyor," Dan Thurmes, who certified a bluffline determination, including both the objective and subjective components. (Ex. 19, RA. 46.) The City of Lakeland did not propose a different bluffline, but adopted Mr. Thurmes' determination as its own. (RA 31.)

Although the DNR criticized Mr. Thurmes' determination of the bluffline, it did not certify one of its own. The DNR surveyor identified where the "12% slope line" would run, but he conceded that he made no attempt to formulate an opinion on the subjective components of the bluffline determination rule. As he testified, he was only asked to find where the 12% slopes were (T. 391-92.) His observations did not qualify as

an alternative bluffline because they were not “certified by a licensed land surveyor or the local authority.” Therefore, there is no alternative DNR bluffline and, under both the DNR’s admission and the only certified bluffline determination on the record, the square footage in the setback area will be reduced under Mr. Hubbard’s proposal.¹⁷

Mr. Hubbard’s proposal falls within the protection of the 2004 amendments to the Municipal Planning Act’s nonconformity provision. Because all he wants to do is replace an existing nonconforming structure with new construction further back from the bluff, he has the statutory right to proceed without a variance.

IV. THE COMMISSIONER APPLIED THE WRONG LEGAL STANDARD FOR AN AREA VARIANCE.

This Court clarified in *In re Stadsvold*, 754 N.W.2d 323 (Minn. 2008), that the criteria for granting dimensional or area variances are as follows:

1. How substantial the variation is in relation to the requirement;
2. The effect the variance would have on government services;
3. Whether the variance will effect a substantial change in the character of the

neighborhood or will be a substantial detriment to neighboring properties;

¹⁷ The DNR and Sierra Club argue that, even if the new construction will be further back from the bluff and will have a smaller footprint in the setback area, the Hubbard proposal is still an “expansion” because he proposes to add a second story. But the City granted a height variance for that second story, and the DNR’s “nonapproval” letter expressly declined to challenge the City’s decision on the height variance. That variance is, therefore, final and effective. Moreover, courts that have considered this issue have concluded that adding additional stories to a building that violates a setback requirement does not “expand” the setback nonconformity. See, e.g. *Nettleton v. Zoning Bd. of Adjustment of City of Pittsburgh*, 828 A.2d 1033 (Pa. 2003) (adding two stories to one-story building in violation of setback requirement did not “expand” nonconformity).

4. Whether the practical difficulty can be alleviated by a feasible method other than a variance, factoring in economic considerations;

5. How the practical difficulty occurred, including whether the landowner created the need for the variance; and

6. Whether, in light of all of the above factors, granting the variance will serve the interests of justice. *Id.* at 331. (See Joint Br. at 44.)

The attempts of the DNR and Sierra Club to avoid *Stadsvold* or to reconcile the Commissioner's order with *Stadsvold* are unavailing. First, there is no merit to the argument that *Stadsvold* only applies to counties, not municipalities. This Court was very clear in its opinion that, whether the enabling act has "practical difficulties" language, like Minnesota's county enabling act, or uses a singular "hardship" standard, like the statutes in Ohio and Wisconsin, the criteria for assessing area variances will be the same. Indeed, this Court expressly endorsed the Wisconsin Supreme Court plurality's approach in *State v. Outagamie County Bd. of Adjustment*, 628 N.W.2d 376, 383-89 (Wis. 2001), which applied a lesser "practical difficulties" standard to area variances, even though the Wisconsin statute contains a single "hardship" standard for both use and area variances. *Stadsvold*, 754 N.W.2d at 331.

The DNR and Sierra Club made no effort to demonstrate how Mr. Hubbard's application fails under the *Stadsvold* criteria. They simply insist that the variance would not be "reasonable" because it would be inconsistent with the "spirit and intent of the

ordinance.”¹⁸ That argument, however, consistently makes the wrong comparison. Instead of comparing Hubbard’s proposal to Hubbard’s right to remodel the existing structure without a variance, they ignore the existing structure and assume that Hubbard could be legally required to remove that structure and build entirely behind the setback area. In *Nolan v. City of Eden Prairie*, 610 N.W.2d 697, 702 (Minn. Ct. App. 2000), the court of appeals confronted a situation where the requested variances would “bring the property closer to compliance with the conditions allowed by the official controls” because previously granted variances had left the property further out of compliance. As the court of appeals recognized, the proper comparison was between the landowner’s proposal and what the landowner was permitted to do without a variance. Applying that comparison, the court of appeals held that any variance that brings a property into closer compliance with the zoning law could be presumed “reasonable.” *Id.* That is a sound rule, and one which this Court should adopt.

The DNR and Sierra Club’s attempts to distinguish the pre-*Stadsvold* cases are also without merit. This Court’s holding in *Merriam Park Community Council, Inc. v. McDonough*, 297 Minn. 285, 210 N.W.2d 416 (1973) *overruled on other grounds*, that landowners seeking setback variances need not prove the existence of a physical barrier to compliance remains good law after *Stadsvold*, and it clearly contradicts the rationale

¹⁸ They also belabor the argument that there is no “unique hardship” here, even though that is no longer part of the applicable criteria under *Stadsvold*.

offered by the DNR. Unlike Mr. Hubbard's requested variance, the variances at issue in *Merriam Park* took the property further out of compliance.¹⁹

Finally, the DNR and Sierra Club offer no justification for why DNR review of local variance decisions should be any less deferential than review in the courts. Although the DNR contends that, in practice, it is deferential to local decisions, it insists that DNR certification review must be *de novo* on both the law and the facts, and that variance applicants must carry the burden of persuasion throughout, even if the local government has already ruled in their favor. In other words, the DNR not only applies a *de novo* standard of review, it requires a *de novo* trial.

The courts have adopted a deferential standard for review of local land use decisions for several reasons. Local officials are closer to the facts and are closer to the needs and interests of the community. They are more likely to take their responsibilities seriously if they know their decisions count, and correspondingly, they are less likely to take their responsibilities seriously, or make sometimes difficult decisions, if accountability is placed at another level.

If the DNR's certification rule survives and if this Court determines that the new nonconformity provision in the Municipal Planning does not decide this case as a matter

¹⁹ The cases appellants cite are irrelevant. For example, *BECA of Alexandria, LLP v. County of Douglas ex rel. Bd. of Comm'rs*, 607 N.W.2d 459 (Minn. Ct. App. 2000) was a conditional use permit case. No variances were requested, and there is no discussion of when variances are "reasonable." The issue in *County of Morrison v. Wheeler*, 722 N.W.2d 329 (Minn. Ct. App. 2006) was whether an adults-only business had established a lawful nonconforming use before a new zoning ordinance was adopted. Again, it says nothing about the standards for granting variances.

of law, then this Court should nevertheless direct the DNR to certify any local variances that have some reasonable basis. The DNR should not be permitted to “substitute its judgment” for the judgment of local officials, as it so clearly did in this case.

CONCLUSION

There are four independent legal reasons why the Commissioner’s decision must be reversed. First, as addressed in earlier briefs, Lakeland’s grant of the variance was approved by operation of law under Minn. Stat. § 15.99 (2008). Second, the DNR’s certification rule is beyond the statutory rulemaking authority given to the DNR by the Lower St. Croix Wild and Scenic Rivers Act or the general Wild and Scenic Rivers Act. Third, because of the 2004 amendments to the Municipal Planning Act, Mr. Hubbard’s proposal to replace the existing house with new construction that will reduce the nonconformity does not require a variance. And, fourth, when reviewed under the correct legal standard, Lakeland’s grant of the variance should be upheld.

Under any of these alternatives, the order of the Commissioner denying certification of Lakeland’s variance decision should be vacated.

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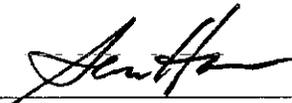
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent, certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word Word 2003 and contains 6,956 words, including headings, footnotes and quotations.

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