

NO. A08-427

State of Minnesota
In Court of Appeals

David J. Haslund,

Relator,

vs.

Commissioner, Minnesota Department of Natural Resources,

Respondent.

REPLY BRIEF OF RELATOR DAVID J. HASLUND

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE REGULATORY FRAMEWORK AT ISSUE IN THIS CASE PROVIDES THAT THE DNR REGULATES MUNICIPALITIES ALONG THE ST. CROIX RIVERWAY, AND THE MUNICIPALITIES REGULATE ACTUAL LAND USES AND ZONING WITHIN THEIR JURISDICTIONS	1
II. HASLUND DID NOT NEED A VARIANCE FROM THE CITY’S BSM ORDINANCE, AND THE DNR THEREFORE HAD NO AUTHORITY TO REVIEW THE CITY’S DECISION	3
III. THE RECORD IS MORE THAN SUFFICIENT TO SUPPORT HASLUND’S EQUITABLE ESTOPPEL CLAIM	10
CONCLUSION	14

TABLE OF AUTHORITIES

Page

STATE CASES

Frank’s Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604,
608 (Minn. 1980)9

Mohler v. City of St. Louis Park, 643 N.W.2d 623 (Minn. Ct. App. 2002)12

Ridgewood Dev. Co. v. State, 294 N.W.2d 288, 292 (Minn. 1980)10, 11, 12, 13, 14

STATUTORY PROVISIONS

Minn. Stat. § 103F.215.....7

Minn. Stat. § 103F.351.....6

Minn. Stat. § 103F.351, Subd. 42

Minn. R. 6105.0352, Subp. 22, 3, 7, 10

Minn. R. 6105.0354, Subp. 222, 8, 9, 10,14

Minn. R. 6105.03808

Minn. R. 6105.0380, Subp. 2.B.5

Minn. R. 6105.0540, Subp. 15, 7, 8, 9, 10, 14

ARGUMENT

The brief submitted by the Commissioner of the Department of Natural Resources (“DNR”) is a well-written and well-reasoned summary of the procedures under which the Lower St. Croix National Scenic Riverway land use regulations are *supposed to be* implemented and administered. Those procedures were not followed in this case, however, and the DNR is therefore now forced to ask this Court to apply the standards that it believes *should have* been adopted rather than the standards that were *actually* adopted by the City of St. Mary’s Point (the “City”) and then approved by the DNR. In addition, the DNR asks this Court to ignore the plain language of the DNR’s own rules to allow it to prevent relator Haslund from constructing his home on a lot that has been in his family for over 60 years, even though Haslund has obtained all necessary approvals under the applicable ordinances. We believe the arguments submitted by the DNR are contrary to the plain language of the applicable ordinances and rules and otherwise inequitable for the reasons that follow.

I. THE REGULATORY FRAMEWORK AT ISSUE IN THIS CASE PROVIDES THAT THE DNR REGULATES MUNICIPALITIES ALONG THE ST. CROIX RIVERWAY, AND THE MUNICIPALITIES REGULATE ACTUAL LAND USES AND ZONING WITHIN THEIR JURISDICTIONS.

Contrary to the implied argument in the DNR’s brief, the DNR has no direct zoning authority over land uses within counties and municipalities along the St. Croix Riverway (with a relevant exception, which is discussed below). Rather, the DNR is

responsible for creating guidelines and standards for adoption by the local units of government, and the counties and cities are then to adopt zoning ordinances consistent with those guidelines and standards. The Lower St. Croix Wild and Scenic River Act specifically provides that the DNR “shall adopt rules that establish guidelines and specify standards for local zoning ordinances...” and “[c]ities, counties and towns lying within the areas affected by the guidelines shall adopt zoning ordinances complying with the guidelines and standards...” Minn. Stat. § 103F.351, Subd. 4.

In accordance with this mandate, the DNR promulgated various rules for the development and management of the Lower St. Croix Riverway, as set forth in Minn. R. Chap. 6105. These Rules, like the Lower St. Croix Wild and Scenic River Act itself, make it clear that the local units of government must adopt consistent regulations to govern the actual land uses within their jurisdictions. The Rules provide that local units of government shall have 90 days “to adopt Saint Croix Riverway ordinances which reflect local needs and existing conditions, and which are in compliance with these standards and criteria.” Minn. R. 6105.0352, Subp. 2. Similarly, the term “St. Croix Riverway ordinance” is defined to mean “a set of rules and amendments thereto, adopted by a local unit of government in accordance with the standards and criteria for the Lower Saint Croix National Scenic Riverway, which regulates the use of land within any particular rural or urban district.” Minn. R. 6105.0354, Subp. 22.

In accordance with this regulatory framework, in 1978 the City duly adopted Washington County’s model ordinance as its Lower St. Croix River Bluffland and Shoreland Management Ordinance (“BSM Ordinance”). *See* DNR’s Br. at App. 36 to

App. 50 for the text of the BSM Ordinance. The DNR has the authority to review and to approve the local St. Croix Riverway ordinances under Minn. R. 6105.0352, Subp. 2. On September 28, 1976, the DNR advised Washington County that its model ordinance (and thus, the City's BSM Ordinance) was in substantial compliance with the DNR regulations.

In summary, it is important to understand that the DNR itself has no direct regulation over land uses along the St. Croix Riverway (subject to the exception discussed below). That authority has been delegated to the affected cities, counties and towns by the Lower St. Croix Wild and Scenic River Act, while the DNR's jurisdiction is directed at ensuring that the cities and counties adopt acceptable St. Croix Riverway ordinances. As a practical matter, this is consistent with the broad authority delegated to cities and counties generally with respect to matters involving local zoning and planning.

II. HASLUND DID NOT NEED A VARIANCE FROM THE CITY'S BSM ORDINANCE AND THE DNR THEREFORE HAD NO AUTHORITY TO REVIEW THE CITY'S DECISION.

As detailed in the parties' earlier briefs, in 2000 Haslund applied for a lot-size variance and a lot-width variance to construct a home on the lot at 2959 Itasca Avenue. The variances were necessary because the lot was legally regarded as "substandard" under the City's zoning ordinances because of its size, and it therefore could not be developed without the size and width variances. The City approved the variances in June 2000 subject to the condition that Haslund "begin" building within two years. The minutes of the City Council meeting reflect that the DNR had been contacted about the

application and that it “doesn’t seem to have any problems with building on this particular lot.” (App. Br. at App-19) Haslund proceeded to obtain a survey and a septic system permit from Washington County, and he constructed a retaining wall and a fence and prepared building plans, but he did not apply for a building permit at that time.

In 2006, Haslund applied to the City for a building permit. Presumably because of the lapse of time, he was referred to the City Council. In October 2006, the City formally ratified the 2000 variances previously granted to Haslund and extended the time period to begin construction of his home. (App. Br. at App-22) The City also notified the DNR that it had granted the size and width variances, as well as a variance to the “single ownership” provision of the City’s BSM Ordinance § 602.02. (App. Br. at App-89-90)¹

The DNR responded by letters to the City dated October 30 and November 16, 2006, stating that: (1) Haslund required a variance from the City’s BSM Ordinance § 602.02 (the “single ownership” provision), (2) the DNR has authority to certify a variance (and thus implicitly to deny a variance) under § 602.02, and (3) that in this case the DNR would not certify the City’s variance under § 602.02, meaning that Haslund could not proceed with the construction of his home. (The DNR acknowledged that it had no jurisdiction with respect to the lot-size and the lot-width variances granted by the City.) Haslund thereafter began the process of challenging the DNR’s certification denial.

¹ Haslund never requested a variance from the “single ownership” provision of the BSM Ordinance § 602.02, and for the reasons stated herein he does not believe that such a variance was required or appropriate.

The DNR argues that it has certification authority to review the City's "single ownership" variance under Minn. R. 6105.0540, Subp. 1. This Rule establishes a review and certification procedure for certain land use decisions, including "[g]ranteeing a variance from the provisions of a Saint Croix Riverway ordinance which relates to the dimensional standards and criteria of part 6105.0380." The dimensional standards and criteria in Rule 6105.0380, in turn, provide that a legally "substandard" lot may generally be allowed as a building site provided that, *inter alia*, "the lot has been in separate ownership from abutting lands since May 1, 1974." Minn. R. 6105.0380, Subp. 2.B. In this case, it is undisputed that the lot on which Haslund is attempting to build has not always been in separate ownership from abutting lands since 1974. Therefore, the DNR contends that the lot may not be allowed as a building site.

The DNR's argument is however erroneous, however, for each of the following three reasons:

1. First, the City's BSM Ordinance, which was approved by the DNR, contains the following provision exempting "lots-of-record" (such as Haslund's) from the normal minimum standards for buildable lots, providing that certain conditions are met:

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

BSM Ordinance § 602.01. It is undisputed that Haslund's lot meets the conditions specified in this part of the Ordinance, and it is therefore a buildable lot under § 602.01.

The DNR contends, however, that Haslund's lot fails to meet the single ownership provision of the City's BSM Ordinance § 602.02, which provides as follows:

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

BSM Ordinance § 602.02 (emphasis added). The plain language of the City's BSM Ordinance, however, applies only to *platted* lots, and it is undisputed that Haslund's lot has never been platted. Thus, the "single ownership" provision upon which the DNR relies does not even apply in this case as a threshold matter.

2. The second flaw in the DNR's argument is that the DNR Rules do not "trump" the local zoning ordinance in this case. (DNR's Br. at 27) As described above, the Lower St. Croix Wild and Scenic River Act, Minn. Stat. § 103F.351, and the Rules that implement it, mandate a regulatory approach under which the DNR promulgates various land use Rules and then ensures that local units of government adopt ordinances consistent with those Rules. In short, the DNR regulates the local cities and counties, and the local cities and counties regulate the individual property owners. If the DNR believes that a local unit of government has not adopted adequate ordinances, it may "adopt such an ordinance for the local unit of government in the manner and with the effect specified

in Minnesota Statutes, section 103F.215” (which requires notice and at least one public hearing). Minn. R. 6105.0352, Subp. 2. There were, of course, no such proceedings under Minn. Stat. § 103F.215 in the present case, and in fact the DNR approved the BSM Ordinance.

Accordingly, the DNR has no authority (with, as noted above, an exception that is addressed in the next section) to re-write and overrule the zoning and regulatory decisions made by local units of government. The record does not reveal whether the City’s adoption of the BSM Ordinance, which provides additional rights to the owners of unplatted lots, and the DNR’s certification of that Ordinance, were deliberate policy decisions, mistakes, or something in between. In the end, it does not make any difference because the Ordinance was finalized and approved by both the City and the DNR. We respectfully submit that neither the DNR nor this Court have the authority to disregard the plain language of the BSM Ordinance in favor of what the DNR believes the ordinance *should* have said.

3. The final flaw in the DNR’s argument is that the applicable Rules *do* provide the DNR with limited authority to review and to certify or approve two kinds of local land use decisions, but neither of those exceptions to the normal regulatory framework applies in this case. The Rules state that a “review and certification procedure is hereby established for certain [local units of government’s] land use decisions.” Minn. R. 6105.0540, Subp. 1. Under that Rule, the DNR has review and certification authority for two kinds of local land use decisions or actions: (1) “[a]dopting or amending a Saint Croix Riverway ordinance regulating the use of land, including rezoning of particular

tracts of land,” and (2) “[g]ranting a variance from the provisions of a Saint Croix Riverway ordinance which relates to the dimensional standards and criteria of part 6105.0380.”

This is the “exception” referred to above, under which the DNR does have limited direct authority over local land use decisions. The DNR does not contend that the first of these two exceptions applies (nor could it, since the DNR already approved the City’s adoption of the BSM ordinance and it is not being amended here). Instead, the DNR argues that it has the authority, under Minn. R. 6105.0540, Subp. 1, to review a variance relating to the dimensional criteria and standards of Rule 6105.0380, and that Rule 6105.0380 contains a requirement that in order for a substandard lot to be developed it must appear that “the lot has been in separate ownership since May 1, 1974...” (DNR’s Br. at 17, 20-27)

The DNR’s argument is premised on a fallacy, however, because Rule 6105.0540, Subp. 1, does *not* allow the DNR to review variances relating to the DNR’s own Rule 6105.0380, as the DNR’s argument presupposes, but rather it allows the DNR to review only “a variance from the provisions of a Saint Croix Riverway ordinance” relating to part 6105.0380. This is an important distinction, because a “Saint Croix Riverway ordinance” is specifically defined as “a set of rules and any amendments thereto, adopted by a local unit of government in the Lower Saint Croix National Scenic Riverway, which regulates the use of land within any particular rural or urban district.” Minn. R. 6105.0354, Subp. 22. Accordingly, the DNR may review and certify only variances to

the local ordinances that were actually *adopted by the local units of government*, after those ordinances have been approved or certified by the DNR.

In this case, the relevant local ordinance, namely the City's BSM Ordinance § 602.02, requires separate ownership for the development of substandard *platted* lots only, and that provision therefore does not limit or restrict the development of Haslund's substandard lot, which has never been platted. Thus, Haslund did not need a variance from § 602.02 of the BSM Ordinance, and the DNR therefore had no authority--under the express language of Minn. R. 6105.0540, Subp. 1--to review the City's purported grant of such a variance in the first place.

The DNR is asking this Court to hold that Minn. R. 6105.0540, Subp. 1, allows it to review any variances that even relate to the dimensional standards (including the separate ownership requirement) set forth in the DNR's own rules, but the plain language of Minn. R. 6105.0540, Subp. 1, limits the DNR's review authority to only those variances from the provisions of a local unit of government's ordinances (*i.e.*, a "Saint Croix Riverway ordinance"). This language is plain and unambiguous, and it is well settled that land use regulations and ordinances are to be interpreted according to their "plain and ordinary meaning." *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980). Moreover, if there is any ambiguity in the language it must be "construed against the [government] and in favor of the property owner." *Id.*

The DNR argues, finally, that the Legislature has "preempted" the field of zoning regulation in the St. Croix River District by virtue of the Lower St. Croix Wild and Scenic River Act, and that the City's BSM Ordinance is therefore "invalid." (DNR's Br.

at 27) We respectfully disagree. To the extent the Legislature intended to preempt this field, it did so by establishing, as described above, procedures under which local units of government would be responsible for the regulation of specific land uses, and the DNR would be responsible for approving the ordinances adopted by the local units of government and reviewing amendments and variances to those ordinances. Moreover, if the DNR believes that a city's shoreland management ordinances are inadequate or invalid, it may act to adopt its own ordinance on behalf of the City pursuant to Minn. R. 6105.0352, Subp. 2, but the DNR has taken no such action in this case.

In the present case, the DNR approved the City's BSM Ordinance and Haslund's application did not require a variance to the "single ownership" provision in the BSM Ordinance because his lot was not platted. If the Legislature and the DNR have "preempted" the regulations in the St. Croix River District, then why is the DNR asking this Court to re-write the DNR's own Rules (Minn. R. 6105.0540 Subp. 1 and 6105.0354, Subp. 22) and the City's BSM Ordinance (§ 602.02) that was previously approved and certified by the DNR? Having made the rules, the DNR should not complain when it is forced to follow them.

III. THE RECORD IS MORE THAN SUFFICIENT TO SUPPORT HASLUND'S EQUITABLE ESTOPPEL CLAIM.

The parties are in agreement that Haslund's equitable estoppel claim in this case is governed by the *Ridgewood* decision, as follows:

A local government exercising its zoning powers will be estopped when a property owner, (1) relying in good faith (2) upon some act or omission of the government, (3) has made such a substantial change in position or

incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired.

Ridgewood Dev. Co. v. State, 294 N.W.2d 288, 292 (Minn. 1980) (citation and emphasis omitted). The DNR contends that Haslund has failed to meet his burden of proof on all three of the elements of an equitable estoppel claim. (DNR's Br. at 28) We respectfully disagree.

A. An Act or Omission of the Government.

In order for the doctrine of equitable estoppel to apply, there must be some act or omission of the government. In the present case, those acts included the City's adoption of the BSM Ordinance, the DNR's certification or approval of that Ordinance, and the DNR's position in 2000, as reflected by the minutes of the City Council meeting approving the original variances, which state that the DNR had been contacted about Haslund's application and it "doesn't seem to have any problems with building on this particular lot." (App. Br. at App-19)

The DNR does not address these acts or omissions, other than to state that it did not approve or certify any distinction in the BSM Ordinance between platted and unplatted lots. (DNR's Br. at 28) In point of fact, however, the DNR *did* approve or certify the BSM Ordinance, and the DNR acknowledges elsewhere in its brief that "the Commissioner certified that the City's BSM Ordinance substantially complied with the minimum standards." (DNR's Br. at 8). While the DNR now argues that the BSM Ordinance should be judicially re-written, the plain language of that ordinance limits the

application of the “single ownership” provision for substandard lots to lots that have been “platted.”

B. Good Faith Reliance.

The next element under *Ridgewood* is good faith reliance on the government’s acts or omissions. The DNR argues that “there is no evidence to establish that any of Haslund’s actions were taken in reliance upon this alleged “distinction” [between platted and unplatted lots] or even whether Haslund was aware of the ordinance’s provisions.” (DNR’s Br. at 28) In Minnesota, however, citizens are deemed or presumed to have knowledge of the applicable regulations. *See e.g. Mohler v. City of St. Louis Park*, 643 N.W.2d 623 (Minn. Ct. App. 2002) (holding that a landowner was presumed to have knowledge of a city’s building height restriction). It would hardly be equitable to hold that this presumption applies only to the detriment of a citizen and not when it would benefit him or her.

Moreover, the record in this case includes evidence of good faith reliance, including Haslund’s affidavit, which states in part that “[i]n approximately May of 2000, I spoke with Ms. Molly Shodeen [of the DNR] regarding my intent to build a structure on the Subject Parcel. Ms. Shodeen advised me to ensure the structure was at least 100 feet from the shoreline and that it have a slab-on-grade elevation to avoid the floodplain.” Haslund Affid. ¶ 8. There was no reference to a “separate ownership” requirement such as the DNR now seeks to impose, notwithstanding the plain language of the BSM Ordinance itself. In addition, the minutes of the 2000 City Council meeting at which the City granted the lot-size and lot-width variances reflect that Haslund contacted the DNR

about building a home on his lot and that Haslund or the City, or both, believed that the DNR “doesn’t seem to have any problems with building on this particular lot.” (App. Br. at App-19)

Finally, after speaking with the DNR, Haslund proceeded to submit his application to the City, and thereafter obtained a property survey, obtained a septic system permit from Washington County, constructed a retaining wall and a fence, prepared building plans, and sold his home on the adjacent lot in the belief that he would be able to construct a new home on the lot at 2959 Itasca Avenue, which is the lot that is at issue in this appeal. This is more than sufficient evidence of Haslund’s good faith reliance on the acts and omissions of the DNR.

C. A Substantial Change in Position, or Such Extensive Obligations And expenses, that it Would be Highly Inequitable and Unjust.

The final element under *Ridgewood* is a substantial change in position or such economic consequences as would be highly inequitable or unjust. As noted above, Haslund incurred numerous expenses including submitting his application to the City (twice), obtaining a property survey, obtaining a septic system permit from Washington County, constructing a retaining wall and a fence, and preparing building plans. In addition, and even more significantly, he sold the home on the adjacent lot that had been in his family for over 60 years in anticipation of building a new home on the lot at 2959 Itasca Avenue.

The DNR argues that Haslund received a good price on the home he sold, and that the lot at 2959 Itasca Avenue still has substantial value as a recreational property.

(DNR's Br. at 30-31) The test under *Ridgewood*, however is not purely economic, although Haslund did incur significant expenses and is left with, according to the DNR's position in this action, a lot that cannot be developed and presumably retains only a small fraction of the value it would have under the plain language of the BSM Ordinance that was approved by the DNR. *Ridgewood* also considers whether a person has made a "substantial change in position." In this case there can be no doubt that Haslund made such a change by selling the family homestead and being left with, according to the DNR, an unbuildable lot.

For these reasons, we believe that the record supports Haslund's claim under the doctrine of equitable estoppel.

CONCLUSION

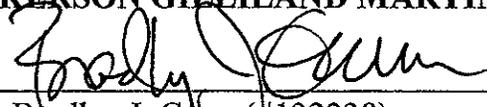
For the reasons set forth above, and in our initial brief, we respectfully request the Court to reverse the Commissioner's decision and to find that the applicable City ordinance (§ 602.02) and DNR Rules (Minn. R. 6105.0540, Subp. 1 and 6105.0354, Subp. 22) must be applied as written, and not as the DNR now claims they should have been written.

Respectfully submitted,

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Dated: May 20, 2008

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