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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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLANTS THE SIERRA CLUB AND THE ST. CROIX RIVER ASSOCIATION

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

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STATEMENT OF ISSUES

I. WHETHER THE COMMISSIONER HAD STATUTORY AUTHORITY TO REFUSE TO CERTIFY THE NON-CONFORMING VARIANCE GRANTED BY THE CITY OF LAKELAND TO ROBERT W. HUBBARD.[1]

The Court of Appeals did not decide this issue. The Commissioner concluded that the certification process was authorized by statute.

- Most apposite authority:
  MINN. STAT. § 103F.301 *et seq.*
  MINN. STAT. § 103F.351
  MINN. R. 6105.0540
  Drum v. Minnesota Board of Water & Soil Resources, 574 N.W.2d 71 (Minn. Ct. App. 1998)

II. WHETHER THE 2004 AMENDMENTS TO THE MUNICIPAL PLANNING ACT RELATING TO "REPLACEMENT" OF NONCONFORMING STRUCTURES, APPLIED TO MR. HUBBARD'S VARIANCE REQUEST WHERE THE APPLICANT'S PROPOSED NEW STRUCTURE ACTUALLY EXPANDED THE NONCONFORMITY WITHIN THE BLUFFLINE.

The Court of Appeals did not address this issue. The Commissioner concluded that the amendments did not apply to the variance request as proposed by Mr. Hubbard.

- Most apposite authority:
  MINN. STAT. § 462.357
  MINN. R. 6105.0370, subp. 11
  Lakeland City Ordinance § 402.01

III. WHETHER THE COMMISSIONER APPLIED THE CORRECT VARIANCE STANDARD.

The Court of Appeals did not address this issue. The Commissioner concluded that the variance standard for municipalities, undue hardship, applied to Mr. Hubbard's application to the City of Lakeland.

- Most apposite authority:
  Lakeland City Ordinance § 805.01
  MINN. STAT. § 103F.351, subd. 1
  Rowell v. Bd. of Adjustment, 446 N.W.2d 917, 922 (Minn. Ct. App. 1989)

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[1] Pursuant to Rule 128.02, subd. 2, Appellants have restated the issues.

STATEMENT OF THE CASE

This case involves a bluffline setback variance requested by Respondent Robert W. Hubbard ("Hubbard"). The Lakeland Planning Commission recommended that the variance be denied. Contrary to the recommendation from the Planning Commission, Respondent City of Lakeland ("Lakeland") granted the variance. On November 2, 2006 Lakeland notified Appellant the Department of Natural Resources ("DNR"), of the variance and requested that the DNR certify or deny the variance. (AA.176) On November 29, 2006, the DNR issued a Notice of Nonapproval to Lakeland. (AA.174-175)

On December 21 and December 22, 2006, Hubbard and Lakeland, respectively, both demanded contested case hearings under the Administrative Procedures Act ("APA"), MINN. R. 6105.0540, subp. 3E. (AA.164-173, 163) Appellants Sierra Club and the St. Croix River Association's motion to intervene as parties was granted. A hearing was held before Administrative Law Judge Kathleen D. Sheehy ("ALJ"), on March 29-30, 2007. After hearing the evidence and receiving written arguments from the parties, the ALJ recommended that the Commissioner of the DNR ("Commissioner") affirm the denial of the bluffline setback variance. (AA.17-49)[2]

The decision of the ALJ notified all parties that the Commissioner had 90 days after the close of the record to issue a final decision; otherwise the ALJ's

[2] The ALJ Report is found in Appellant Commissioner's Appendix ("AA"), which was filed with his initial Brief.

recommendation would become the decision of the agency under MINN. STAT. § 14.62, subd. 2(a)(2005). (AA.37) The hearing record closed on June 22, 2007, upon receipt of exceptions and arguments from the parties. On September 18, 2007, in compliance with the APA timeline, as referenced by the ALJ, the Commissioner issued an Order affirming the denial of the bluffline setback variance. (AA.7-16)

Hubbard and Lakeland both appealed to the Court of Appeals. On December 9, 2008 the Court of Appeals, in an unpublished opinion, reversed the decision of the Commissioner on the grounds that the variance was automatically approved under MINN. STAT. § 15.99 because the Commissioner did not issue his final decision within 60 days of the close of the record. The DNR, Sierra Club and St. Croix River Association petitioned this court for review of the decision of the Court of Appeals. On February 17, 2009 the Supreme Court granted the petitions for further review and directed the parties to serve and file briefs. (AA. 1) On June 10, 2009 the Supreme Court heard oral arguments, and on June 12, 2009 the Supreme Court requested supplemental briefing on the issues briefed to the Court of Appeals, but which the appellate court did not reach. Appellants the St. Croix River Association and The Sierra Club jointly submit this supplemental brief in response to the Supreme Court's June 12, 2009 Order.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Federal Legislation

The Wild and Scenic Rivers Act ("WSRA"), enacted in 1968, established a national policy that certain rivers with "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition," and that these rivers "and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271. Congress implemented this policy by establishing a national Wild and Scenic River System and developing a process so that other rivers with "outstandingly remarkable values" could be added to the system.

The upper stretch of the St. Croix (from its headwaters to Taylors Falls, Minn.) was one of eight rivers originally included in the system. *See* 16 U.S.C. § 1274(a)(6). At the time of the Act's passage, the Lower St. Croix was designated a study river so that it could be added a later date. *Id.* § 1274(a)(21).

The WSRA contains several provisions designed to protect designated rivers and their environments. Foremost among these is Section 10(a), which mandates that wild and scenic rivers be administered and managed "in such manner as to protect and enhance the values which caused it to be included in said system..." 16 U.S.C. § 1281(a). This provision is known as the "protect and enhance" requirement.

The Lower St. Croix (from Taylors Falls to its confluence with the Mississippi River) is widely recognized for its pristine natural character and scenic qualities. It passes through a variety of landscapes, including a deep narrow gorge and broad valleys lined with wooded bluffs. This "juxtaposition of landforms and geologic features, including blufflands, islands, the Dalles, and Lake St. Croix, [is] unique." Management Plan (Ex 10. RR 1.10) The Hubbard property lies along Lake St. Croix.

Because of its natural and scenic qualities, as well as its proximity to the Twin Cities, the Lower St. Croix is a popular destination for recreational activities, including boating, hiking, skiing, canoeing, camping and fishing. The riverway and its associated state and local parks receive more than two million visitors annually.

In recognition of the river's "outstandingly remarkable scenic, recreational, and geologic values, Congress passed the Lower St. Croix Act in 1972. 16 U.S.C. § 1274 (a)(9). Protecting against overdevelopment was one of the principal purposes of the Act:

> [T]his is one of the last remaining major rivers in the United States which lies within a major metropolitan area and is still relatively unspoiled. The river borders the eastern boundary of the Minneapolis-St. Paul urban area and is within easy access of over 2 million people. Ironically, it is this accessibility which places in jeopardy the features which make this river an outstanding natural resource, and which makes it imperative that the river quickly receive protection under the Wild and Scenic Rivers Act...

> If comprehensive protection is not extended to the riverway, the St. Croix will eventually become one more city river, its waters poisoned with pollution, its shoreline gutted with indiscriminate development.

118 Cong. Rec. 34391, 34393 (Oct. 9, 1972) (Statements of Senators Jackson and Nelson).

B. Minnesota's Wild and Scenic Rivers and Lower St. Croix Wild and Scenic River Acts

In 1973, the Minnesota Legislature passed companions to the federal legislation, with our Wild and Scenic Rivers and Lower St. Croix Wild and Scenic River Acts. MINN. STAT. §§ 103F.301 *et seq,* and 103F.351. The legislature expressly stated Minnesota's scenic river protection policy:

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

MINN. STAT. § 103F.305 (emphasis added).

Specific to the St. Croix, the legislature expressly found that:

> The lower St. Croix River, between the dam near Taylors Falls and its confluence with the Mississippi River, constitutes a relatively undeveloped scenic and recreational asset lying close to the largest densely populated area of the state. The preservation of this unique scenic and recreational asset is in the public interest and will benefit the health and welfare of the citizens of the state. The state recognizes and concurs in the inclusion of the lower St. Croix River into the federal wild and scenic rivers system by the Lower St. Croix River Act of the 92nd Congress, Public Law 92-560. **The authorizations of the state are necessary to the preservation and administration of the lower St. Croix as a wild and scenic river, particularly in relation to those portions of the river that**

are to be jointly preserved and administered as a wild and scenic river by this state and Wisconsin.

MINN.STAT. § 103F.351, subd. 1. (emphasis added).

i. Management Plan

As required by the federal WSRA, and Minnesota's corresponding provisions, the administering agency (DNR for this section of the river) must prepare a comprehensive management plan to "provide for protection of the river values." 16 U.S.C. § 1274(d)(1). These plans ensure that the agency "is properly managing the river to enhance such important values as wildlife, scenery, cultural resources, and recreational opportunities." *Nat'l Wildlife Fed'n v Cosgriffe,* 21 F. Supp. 2d 1211, 1219 (D. Or. 1998). The directives of a management plan are mandatory. *See* 47 Fed. Reg. 39454, 39458 (Sept. 7, 1982) ("Wild and scenic rivers shall be managed in accordance with plans prepared in accordance with the requirements of the Act...;" further, the Secretarial Guidelines state that the nondegredation and enhancement policy applies to "all designated river areas, regardless of classification.") The agency charged with management, here the DNR, must give "primary emphasis...to protecting its esthetic, scenic, historic, archeologic, and scientific features." 16 U.S.C. § 1281(a)

The Commissioner of the DNR was authorized and directed by the Minnesota legislature to develop a management plan for rivers included in the system and develop standards and criteria relating to boundaries, classification, and development. MINN. STAT. § 103F.325, subd. 1(a). In the case of the Lower

St. Croix, the Commissioner was further directed to join with the Secretary of the United States Department of the Interior and the appropriate Wisconsin state agency in preparing a comprehensive master plan relating to boundaries, classification, and development. MINN. STAT. § 103F.351, subd. 2.

ii. Rules and ordinances

In 1976, the DNR adopted rules for the Lower St. Croix, found at MINN. R. 6105.0351, *et seq.* Among other provisions, local units of government shall have 90 days to adopt ordinances in compliance with rule standards, but if they failed to do so the Commissioner could do so on behalf of the local unit of government. MINN. R. 6105.0352, subp. 2. The ordinances adopted by local governmental units could be more protective than the minimum standards and criteria in the rules, but not less protective. *Id.* Similar rules were adopted under the Wild and Scenic Rivers Act. *See* MINN. R. 6105.0010-.0250. Washington County adopted the Lower St. Croix River Bluffland and Shoreland Management Ordinance, which thereafter was adopted by the City of Lakeland. (Ex. 12 (RR1.12)) These ordinances must meet or exceed the DNR standards.

Under DNR rules and the Lakeland Ordinance, a "substandard structure" is one that was established before the effective date of a St. Croix Riverway ordinance and is permitted within a particular zoning district, but does not meet the structural setbacks or other dimensional standards of the ordinance. MINN. R. 6105.0370, subp. 11; substandard structures shall be allowed to continue, but in no instance may the extent to which a structure violates a setback standard be

increased. MINN. R. 6105.0370, subp. 11; Lakeland City Ordinance §§ 601.01-.04. Any alteration or expansion of a substandard structure which increases the horizontal or vertical riverward building face shall not be allowed unless it can be demonstrated that the structure will be visually inconspicuous in summer months as viewed from the river. MINN. R. 6105.0370, subp. 11; *see also* Lakeland City Ordinance §§ 601.01-.04.

iii. The process for certification of variances

The DNR rules provide that local authorities must conduct public hearings before any variance from dimensional standards may be approved. MINN. R. 6105.0530, subp. 1; and Lakeland City Ordinance § 801.01. Variances may only be granted when it is established that there are hardships that make strict enforcement of a St. Croix Riverway ordinance impractical. *Id.* Hardship means that the proposed use of the property and associated structures in question cannot be established under the conditions allowed by a St. Croix Riverway ordinance; the plight of the landowner is due to circumstances unique to the property not created by the landowner after May 1, 1974; and the variance, if granted, will not alter the essential character of the locality. *Id.* Economic considerations alone shall not constitute a hardship if a reasonable use of the property and associated structures exists under the conditions allowed by a St. Croix Riverway ordinance. *Id.*

A local authority must forward any final decision on an application for a variance to the DNR Commissioner within ten days of such action. MINN. R.

6105.0530, subp. 5; MINN. R. 6105.0540, subp. 2; and Lakeland City Ordinance § 802.01. No grant of a variance becomes effective unless and until the Commissioner has certified that the action complies with the intent of the National Wild and Scenic Rivers Act, the federal and state Lower St. Croix Wild and Scenic River Act, the master plan adopted thereunder, and the standards and criteria contained in the DNR rules. *Id.* The purpose of the certification rule is **"to ensure that the standards and criteria herein are not nullified by unjustified exceptions in particular cases, and to promote uniformity in the treatment of applications for such exceptions."** MINN. R. 6105.0540, subp. 1. (Emphasis added)

Since passage of the Lower St. Croix Wild and Scenic River Act, many structures that were considered substandard because they were built too close to the bluff have been removed from the bluffline (or from below the bluffline), replaced by new homes built farther back, and the bluffline areas restored to control erosion from these sites. (AA.22)

II. PROCEDURAL HISTORY

A. The City Planning Commission, the DNR staff, the Administrative Law Judge, and the Commissioner of the DNR all found that there was no hardship and therefore no basis to grant a variance from the bluffline setback rule

Hubbard sought a variance to replace a visually inconspicuous old cottage, which had been built into the blufftop, with a three story mansion of nearly 16,000 square feet. The DNR found no basis to grant the variance because the

configuration of the lot would permit the entire structure to be built 40 feet back from or behind the bluffline, in full compliance with the local ordinance and DNR rules. (AA.88, 7, 17)

Hubbard's variance request was first considered by the Lakeland Planning Commission at a public hearing. At the conclusion of the hearing, on a 4-2 vote, the Planning Commission recommended that the Lakeland City Council deny the variance applications for the bluffline and sideyard setbacks because there was no showing of hardship. (AA.28-30)

In spite of that recommendation, Lakeland approved a resolution granting the application for a variance to the bluffline setback, and on November 2, 2006, Lakeland notified the DNR of its decision and sought a certificate of approval or notice of nonapproval pursuant to MINN. R. 6105.0540. (AA.84-87)

On November 29, 2006, the DNR issued its Notice of Nonapproval of the variance. (AA.88) Lakeland and Hubbard demanded a contested case hearing pursuant to MINN. R. 6105.0230, subp. 3E. (AA.90, 91)

The contested case hearing took place on March 29-30, 2007. The ALJ took extensive testimony, conducted a site visit, and received exhibits. The parties also submitted extensive pre-hearing and post-hearing briefs. On May 8, 2007, the ALJ filed Findings of Fact, Conclusions and Recommendation, recommending that the Commissioner affirm the DNR's denial of certification of the bluffline setback variance. (AA.17-49) The ALJ's decision notified the parties that there would be a period for submission of exceptions and argument, after

which the record would close and, pursuant to MINN. STAT. § 14.62, subd. 2(a), the Commissioner would have 90 days to issue a final decision. (AA.37)

The parties did in fact submit extensive written exceptions and objections to the ALJ's decision, after which the record closed on June 22, 2007. In compliance with the ALJ's notice and in accordance with MINN. STAT. § 14.62, the Commissioner issued Findings of Fact, Conclusions and Order on September 18, 2007. (AA.7-16) The Commissioner adopted the bulk of the ALJ's Findings and Conclusions and accepted the ALJ's recommendation. (AA.7-16) The Commissioner affirmed the DNR's denial of certification of the bluffline setback variance granted to Hubbard by Lakeland. (AA.7-16)

ARGUMENT

I. STANDARD OF REVIEW

The standard of review in this case is governed by MINN. STAT. § 14.69. Under MINN. STAT. § 14.69, decisions of administrative agencies are presumed to be correct. *Schoen v. County of St. Louis,* 448 N.W.2d 112, 114 (Minn. Ct. App.1989). Deference should be shown by courts to an agency's expertise and special knowledge in the field of its technical training, education and experience. *Reserve Mining Co. v. Herbst,* 256 N.W.2d 808, 824 (Minn.1977). Review is limited to the evidence in the record, and the decision is upheld if the administrative action has a legal basis demonstrated by substantial evidence. *Rostamkhani v. City of St. Paul,* 645 N.W.2d 479, 483 (Minn. Ct. App. 2002). Ultimately, there are two separate standards of review for contested case

hearings under the Administrative Procedures Act. There is the substantial evidence test for findings of fact, and *de novo* review for pure questions of law.[3] *Appeal of Signal Delivery Service, Inc.*, 288 N.W.2d 707, 709-710 (Minn. 1980) ("The substantial evidence test is applicable to commission decisions when it is acting in a quasi-judicial manner; that is, when the commission hears the view of opposing sides presented in the form of written and oral testimony, examines the record and makes findings of fact."); *Dozier v. Commissioner of Human Services*, 547 N.W.2d 393, 395 (Minn. Ct. App. 1996) ("When reviewing questions of law, however, we are not bound by the agency's decision, and we need not defer to the agency's expertise"). In regard to findings of fact made by the Commissioner as part of contested case hearing the substantial evidence standard of review applies. *Independent School Dist. No. 709 v. Bonney,* 705 N.W.2d 209, 213 (Minn. Ct. App. 2005). If an agency engages in reasoned decision-making, the reviewing court will affirm, even though it may have reached a different conclusion than the agency. *Id.* at 669.

[3] As we have previously observed in our Reply Brief, Respondents' principal brief contains an extensive recitation of their version of facts, which were rejected by the ALJ and the Commissioner, and which Respondents did not appeal. Further, Respondents, as appellants below, have the burden of proof as to the issues not addressed by the court of appeals.

II. THE DNR HAS EXPRESS AND IMPLIED STATUTORY AUTHORITY TO REFUSE TO CERTIFY NON-CONFORMING BLUFFLINE VARIANCES PURSUANT TO THE MINNESOTA WILD AND SCENIC RIVERS ACT AND THE LOWER ST. CROIX WILD AND SCENIC RIVER ACT

The DNR has statutory authority to review and certify bluffline variances based on the express language of the Minnesota Wild and Scenic Rivers Act and the Lower St. Croix Wild and Scenic River Act. *See* MINN. STAT. § 103F.301 and MINN. STAT. § 103F.351.[4] There is also implied authority for certification based on the practical difficulties of effectively administrating the Lower St. Croix River, which flows past many cities and counties. As a result, the certification process is necessary to ensure that the standards and criteria adopted pursuant to the statute are not nullified by unjustified exceptions in particular cases, and to promote uniformity in the treatment of applications for such exceptions.

Under Minnesota law, an administrative agency exercises the authority granted to it by the legislature. *Application of Minnegasco*, 565 N.W.2d 706, 711 (Minn. 1997); *Frost-Benco Elec. Ass'n v. Public Utils. Comm'n,* 358 N.W.2d 639, 642 (Minn.1984); *Great Northern Ry. v. Public Serv. Comm'n,* 284 Minn. 217, 220-21, 169 N.W.2d 732, 735 (1969). That authority may be either express or implied. "While express statutory authority need not be given a cramped reading, any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." *Peoples Natural Gas Co. v. Public Utils. Comm'n,* 369 N.W.2d 530,

[4] The federal legislation also requires that the designated agency administer and manage the river. 16 U.S.C. § 1274

534-36 (Minn.1985). In determining implied authority, courts must consider the legislature's intent in enacting the statute and whether the authority exercised by the agency is supported by "the necessity and logic of the situation." *Id.* at 534.

In this case, the DNR has express authority under the Minnesota Wild and Scenic Rivers Act and the Lower St. Croix Wild and Scenic River Act to assist in the enforcement of ordinances, manage and administer the wild and scenic river system and to adopt guidelines related to the prohibition of residential uses. MINN. STAT. § 103F.335 and MINN. STAT. § 103F.351. In addition, there is implied authority for the certification process based on the necessity and logic of the statutes.

A. The DNR has express authority for review and certification

The DNR has express authority for review and certification under both the Minnesota Wild and Scenic Rivers Act and the Lower St. Croix Wild and Scenic River Act. MINN. STAT. § 103F.301, *et seq.* and 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. It is clear from a review of both Acts that the DNR has express authority for the certification process.

i. The Minnesota Wild and Scenic Rivers Act provides express authority

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 argue that this statute does not provide authority for certification because the definition of "assist" does not encompass "veto, overrule or trump." However, Respondents conveniently choose to ignore the word most relevant to the issue, "enforcement." MINN. STAT. § 103F.335, subd. 1(c). The word "enforce" means:

(1) to impose by force;
(2) to compel observance of (a law, etc.)

Webster's New World Dictionary of the American Language, 1979, p. 203 *See, e.g., Rivard v. McGinnis* 454 N.W.2d 453, 454-455 (Minn. 1990) (dictionary use appropriate in issues of statutory interpretation). While assist may not necessarily mean "veto, overrule or trump", there is no doubt that the term "enforce", which the DNR is empowered to do, can encompass all of those meanings. Therefore, employing a literal reading of the statute, it is clear that there is express authority for the certification process to empower the DNR to assist in enforcing local ordinances.

There is also express authority under a companion provision of the Act. Under section 103F.321, the DNR is authorized to "adopt rules to manage and administer the [wild and scenic rivers system]." MINN. STAT. § 103F.321. Employing even the most literal reading of the statute, it is clear that the legislature contemplated that the DNR would have broad powers to oversee the scenic riverways of the State of the Minnesota. Specifically, 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. This particular provision shows that the legislature envisioned the DNR having broad powers over the riverways of the State of Minnesota.

ii. The Lower St. Croix Wild and Scenic River Act also provides express authority

Express statutory authority also lies in Minnesota's Lower St. Croix Wild and Scenic River Act. MINN. STAT. § 103F.351. The act explicitly authorizes the state to enact rules regarding new residential uses. Under the plain language of the Lower St. Croix Wild and Scenic River Act, the DNR had express authority to establish the review and certification process. The act states:

> (a) The commissioner of natural resources **shall adopt rules that establish guidelines** and specify standards for local zoning ordinances applicable to area within the boundaries covered by the comprehensive master plan.
>
> (b) 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). Here a plain reading of the statute shows that the DNR has explicit authority to adopt standards for local ordinances

which prohibit residential construction that is inconsistent with the purpose of the act.

iii. Conclusion

Based on the express authority granted by the legislature to the Department of Natural Resources to assist in the enforcement of ordinances, "manage" the Lower St. Croix Riverway and establish rules for the prohibition of residential construction inconsistent with the Act, it is clear that the DNR has express statutory authority for the certification process.

There is nothing in any of these statutes which directs, suggests or implies that the DNR's role regarding protection of the river would cease once it had assisted in developing the rules and ordinances. Such a result would be neither advisable or reasonable. All of the statutes clearly state that the DNR's role would continue in perpetuity. One of the primary continuing responsibilities for the DNR is to enforce and manage bluffland and shoreline ordinances. Commissioner review and certification is the process for fulfilling this responsibility.

Finally, we note that, while Respondents have provided lengthy arguments on the issue of express authority, they have failed to cite any Minnesota decisions in which DNR authority for review and certification has been found lacking.

B. The DNR has implied authority for the certification process

It is also clear that implied authority for review and certification can be "fairly drawn and fairly evident" from the statutes' mandates to preserve and administer the Lower St. Croix River. The general rule is that agencies and courts may not "under the guise of statutory interpretation enlarge the agency's powers beyond that which was contemplated by the legislative body." *Peoples Natural Gas Company, a Division of Inter-North, Inc. v. Minnesota Public Utilities Commission*. 369 N.W.2d 530, 534 (Minn. 1985). However, courts must also consider the legislature's intent in enacting the statute and whether the authority exercised by the agency is supported by "the necessity and logic of the situation." *Id. See* also *In re Qwest's Wholesale Service Quality Standards,* 702 N.W.2d 246, 261 (Minn. 2005); *Minnesota Ins. Guar. Ass'n v. Integra Telecom, Inc.,* 697 N.W.2d 223, 227 (Minn. Ct. App. 2005) ("implied authority may be inferred when the necessity and logic of the situation requires it").

In this case, the necessity and logic of the DNR's certification process can be drawn from the DNR's assignment to preserve and administer the entire Lower St. Croix, which spans several counties and encompasses many cities and municipalities. The rationale for the review and certification process is explained by the following reference: "in order to ensure that the standards and criteria herein are not nullified by unjustified exceptions in particular cases, and to promote uniformity in the treatment of applications for such exceptions." MINN. R. 6105.0540. This implied authority is also evidenced by statements made

during the public hearings on adoption of the administrative rules related to the Minnesota Scenic Riverways Act and the Lower St. Croix, the DNR's own review of the certification provisions, and by the legislature's more recent incorporation of DNR certification into subsequent river management programs. *See, e.g.*, MINN. STAT. § 103F.373 (Mississippi Headwaters Board), and MINN. STAT. § 103F.389 (Project Riverbend – Minnesota River)

First, the DNR has implied authority for certification based on the Lower St Croix Wild and Scenic River Act's authorization to the state to protect the scenic and recreational character of the entire Lower St. Croix riverway. MINN. STAT. § 103F.351, subds. 1 and 2. From the beginning, it was recognized that preservation of the Lower St. Croix as a scenic and recreational asset was an important government objective. MINN. STAT. § 103F.351, subd. 1. In particular, the statute describes the aspirational goals of the act as follows, "the preservation of this unique scenic asset and recreational asset is in the public interest and will benefit the health and welfare of the citizens of the state." *Id.* The purpose of the statute was echoed in the original comprehensive management plan, which noted that "the development and management of the Lower St. Croix should place primary emphasis on maintaining and enhancing the esthetic, scenic, historic, fish and wildlife, and geologic features." Final Master Plan for the Lower St. Croix National Scenic Riverway, Minnesota/Wisconsin, February, 1976, p. 5. (Ex 10. RR 1.10)

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 the cities was raised as a concern shortly after the act was passed. For example, 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 River so that land use and developments back from the river will complement the recommended protective efforts along it." *Id.* To meet specifically the challenges posed by potential unequal enforcement of variances if management was left entirely to the local government, the DNR adopted the review and certification process, the express goal of which was "to ensure that the standards and criteria herein are not nullified by unjustified exceptions in particular cases, and to promote uniformity in the treatment of applications for such exceptions." MINN. R. 6105.0540.

Ultimately, the necessity and logic for certification is clear. The federal Lower St. Croix Wild and Scenic River Act delegates protection of the Lower St. Croix, which includes multiple cities and counties, to Minnesota, Wisconsin, and the U. S. Department of the Interior. By statute, Minnesota determined that the Commissioner of the Department of Natural Resources would be the agency to whom this state's obligation to "protect and enhance" the river would be delegated. As articulated in the rule, the rationale for certification is to ensure that the variances along the river are granted in a uniform and consistent

manner. Respondents' argument attempts to read out any oversight ability by the DNR, and instead gives the sole and final authority for any variance decision to the local governments. This interpretation, for which Respondents cite no authority, is clearly contrary to the intent of the law, which envisioned management by both the state and local governments, and emphasized uniform treatment of land use decisions along the entire river. The statutes are directive to the Commissioner only. As Respondents would have it, certification would disappear and applications for variances would be left entirely to the discretion of local governments. Joint management of development along the river has never operated as argued for by Respondents, for the obvious reason that this would inevitably result in inconsistent enforcement and application of ordinances along the river.

It is important to note that Minnesota courts have found implied statutory authority under similar circumstances. Specifically, the case of *Drum v. Minnesota Board of Water & Soil Resources* supports a finding of implied statutory authority when the rule is consistent with the purpose and intent of an act. *Drum v. Minnesota Board of Water & Soil Resources*, 574 N.W.2d 71 (Minn. Ct. App. 1998). In *Drum*, relator challenged the statutory authority of the Minnesota Board of Water and Soil Resources ("MBWSR") to regulate wetlands greater than ten acres in size. *Id.* at 72. Relator owned a piece of wetland which was 15 acres in size. *Id.* at 74. Relator challenged a MBSWR rule which granted the MBSWR jurisdiction over all public waters wetlands not inventoried by the

DNR, which include relator's 15 acre parcel. *Id.* Relator contended that the rule was in excess of the statutory authority granted to the MBSWR because it sought to regulate public waters wetlands, which were specifically excluded under the authorizing statute. *Id.* at 74. Relator advanced this argument because his wetland was not inventoried and therefore would not be subject to regulation either by the DNR or the MBSWR. *Id.* at 75. The court rejected Relator's argument noting that the goal of the authorizing statute was to ensure that there is "no net loss in wetlands." *Id.* The court reasoned that despite the literal language of the statute, the rule was consistent with the statutory authority granted to the MBSWR because "leaving some wetlands without regulatory authority would have undermined the legislature's goal." *Id.*

Ultimately, the *Drum* case demonstrates that this Court may go beyond the literal language of the statute and find authority where it is consistent with the purpose of the act. Here, implied authority for certification can be found by looking at the purpose and intent of the act. The purpose and intent of Lower St. Croix Act is to protect the scenic character of the entire Lower St. Croix. *See* MINN. STAT. § 103F.351. Certification is a necessary and logical tool to create uniform and consistent application of the laws along the entire river. Therefore, this Court should look to the necessity and logic of the rule, along with the purpose and intent of the statute and find that there is implied authority for review and certification.

The necessity and logic for certification is also supported by an examination of the administrative hearing records during the creation of the certification process. A careful review of the record demonstrates that during the hearings, despite Respondents' assertion to the contrary, there was analysis of statutory authority for the certification process. Respondents argued to the court of appeals that the DNR did not provide "any response to the objection [regarding certification] or any analysis of the statutory authority" in the rulemaking record. However, the record clearly demonstrates the analysis and consideration given to the issue. Below are the relevant excerpts from the public hearings:

- In (1) we state, in order to ensure that the standards herein are not nullified by unjustified exceptions in particular cases, and to promote uniformity in the treatment of applications for such exceptions, review and certification procedure is hereby established for certain local land use decisions.

Jeffrey Featherstone, Environmental Planner for the for the DNR's Bureau of Environmental Planning and Protection, Public Hearing, December 27, 1973, *In the Matter of the Proposed Adoption of the Rules and Regulations of the Commissioner of the Department of Natural Resources governing the Minnesota Wild and Scenic Rivers System*, at p. 39 (R.32)

- This commissioner review and certification process of certain local acts is proposed to ensure compatibility with the purposes of intent for the Wild and Scenic Rivers Act, these regulations and plans adopted. In section 8 of the Minnesota Wild and Scenic Rivers Act states that, all state, local and special government units, councils, commissions, boards, districts, agencies, departments and other authorities shall exercise their powers so as to further the purpose of this act. We felt that such a certification process would be exercising my (sic) powers so as to further the purpose of this act.

Id. at p. 43-44 (R.33-34)

- The final comment I would like to make on behalf of the Commission at this time is that we believe the certification process wherein the local units of government and the applicants and the state are partners in the final decision regarding variances from these regulations and ordinances thereunder is fair and equitable. We believe this is a unique partnership arrangement that people who are going to continue to live and do business within the boundaries of the riverway are in effect living and doing business in a national park and that, therefore, they should be willing to share the responsibility for these decisions where they do not conform quite to the standards that are set forth here.

James M. Harrison, Executive Director of the Minnesota-Wisconsin Boundary Area Commission, Public Hearing, December 29, 1975, *In the Matter of the Adoption of the Proposed Guidelines and Standards for the Local Zoning Ordinances of the Lower St. Croix National Scenic Riverway pursuant to Minnesota Statutes Sect. 104.25*, at p. 55-56 (R.36).

- I guess I have one thing further to say about the department's revue (sic) power over variances. The Department of Natural resources has had some experience with shoreland management and indicates that where the lack of uniformity and application between two units of government is most likely to occur is in the determination of whether a variance is granted and it's one place where the regulations really can't get very specific. You get a variance, if to deny one creates a hardship and a hardship is to deny a person all reasonable use of his property and it's in the determination of whether you are denying a person all reasonable use of his property that you get the lack of uniformity, that's, as you can see, a subjective judgment. There really isn't any way to spell it out. I just make that comment as that probably is the area where there would be a lack of uniformity, where it would be more likely to occur.

A.W. Clapp, Special Assistant Attorney General, December 30, 1975, *In the Matter of the Adoption of the Proposed Guidelines and Standards for the Local*

Zoning Ordinances of the Lower St. Croix National Scenic Riverway pursuant to Minnesota Statutes Sect. 104.25, at p. 46-47 (R.38-39)

Furthermore, in the findings of fact prepared by the DNR regarding the rules promulgated under The Minnesota Scenic Riverways Act and The Lower St. Croix Wild and Scenic River Act, the issue of authority for certification is specifically addressed. The Commissioner noted that the certification process is needed to promote uniformity across the cities and counties and to prevent unjustified variances by local governments:

- In order to ensure that the statewide standards and criteria are not nullified by **unjustified exceptions** in particular cases, and to **promote uniformity** in the treatment of applications for such exceptions, it is essential for the Commissioner to establish a procedure for reviewing and certifying certain local land use decisions.

Findings of Fact, *In the Matter of the Proposed Adoption of the Rules of the Commissioner of Natural Resources establishing the Statewide Standards and Criteria for the Minnesota Wild and Scenic Rivers System, as required by Section 4, Subdivision 2 of the Minnesota Wild and Scenic Rivers Act, Laws of Minnesota, Chapter 271*, p. 3, ¶ 17 (R. 42)(emphasis added).

- The administrative requirements of NR2202 are reasonable and appropriate particularly **in light of the many governmental units involved (two counties and ten cities)**. The discussion of the certification process revealed good arguments on both sides of the issue (Tr. 12-29 afternoon p. 55; 12-30 pps. 37-38, 41, 45-46; written statement #5). The hearing officer findings that **it is reasonable and necessary** that departure from provisions of these rules (rezonings and variances) require Department of Natural Resources approval. The hearing officer further recommends that in two to four years the Department of Natural Resources review with the local units of government the need for continuing the certification process."

Findings of Fact and Recommendations of Hearing Officer, *In the Matter of the Adoption of the Proposed Guidelines and Standards for the Local Zoning Ordinances of the Lower St. Croix National Scenic Riverway pursuant to Minnesota Statutes Sect. 104.25*, p. 13-14, ¶ 49 (R.55-56) (emphasis added).

These statements clearly show that, despite Respondents' assertion that there was no analysis of the statutory authority for certification when the process was developed, the Commissioner fully considered all facets of the certification issue. The certification process was enacted to ensure that the standards and criteria set forth by the DNR, and adopted by local governments, are not nullified by unjustified exceptions in particular cases, and to promote uniformity in the treatment of applications for such exceptions. *See* MINN. R. 6105.0540.

In addition, implied authority can be found in the fact that the legislature has explicitly incorporated the concept of certification in subsequent river management plans. *See, e.g.*, MINN. STAT. § 103F.373 (Mississippi Headwaters Board), and MINN. STAT. § 103F.389 (Project Riverbend – Minnesota River). In both of these programs, the legislature found that certification was necessary "to ensure that the comprehensive land use plan is not nullified by unjustified exceptions in particular cases and to promote uniformity in the treatment of applications for exceptions." MINN. STAT. § 103F.389. Therefore, comparable river management plans demonstrate that the legislature has clearly

contemplated, approved of, and provided statutory authority for review and certification of local government variances.

Because the intent of the Lower St. Croix Wild and Scenic River Act was to empower the state to protect the entire Lower St. Croix Riverway, and given the logic and necessity for review and certification, implied authority for certification may be fairly drawn and is fairly evident from the statute. Furthermore, a thorough examination of the discussions at the public hearings for The Minnesota Scenic Riverways Act and The Lower St. Croix Wild and Scenic River Act, the Findings of Fact, as determined by the DNR following those hearings, and the more recent examples of incorporation of the certification process in subsequent river management plans, all clearly demonstrate implied authority for the certification process used by the DNR and municipalities all along the St. Croix for nearly three decades.

i. Conclusion

Based on an analysis of the statutory language and the debate on the policy underlying review and certification, it is clear that there is both express and implied statutory authority for the certification process. Ultimately, Commissioner review and certification ensures uniformity in the processing of variances by the numerous local government units along the river, and serves as a check against unjustified and inconsistent variances granted by these units. The power to check unjustified variances is particularly relevant in this case, where Hubbard

presented no evidence that failure to grant the variance would constitute a hardship.

III. BECAUSE THE DNR RULES AND LAKELAND ORDINANCES PROHIBIT THE EXPANSION OF A NON-CONFORMITY, THE COMMISSIONER CORRECTLY REFUSED TO CERTIFY THE VARIANCE

Respondent Hubbard was not entitled to replace the existing structure in the manner he proposed, for a number of reasons. First, the DNR rules and Lakeland ordinances are specifically exempted from the Municipal Planning Act. MINN. STAT. § 462.357, subd. 1(f). Second, Respondent Hubbard's proposed replacement violated the DNR rules and Lakeland City Ordinances. The ordinance and rule require that any replacement of a non-conforming structure comply with the bluffline setback. MINN. R. 6105.0370, subp. 11; Lakeland City Ordinance § 402.01. Third, no matter which rule, ordinance or statute is employed, Respondent may not expand the non-conformity.[5]

The Lower St. Croix Riverway is specifically excluded from the purview of the Municipal Planning Act under MINN. STAT. § 462.357, subd. 1(f). The Municipal Planning Act states that:

> Notwithstanding subdivision 1e, Minnesota Rules, parts 6105.0351 to 6105.0550, may allow for the continuation and improvement of substandard structures, as defined in Minnesota Rules, part

[5] Minn. Stat. § 462.357, subd. 1(e) ("any nonconformity [...] may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion.); Lakeland City Ordinance § 601.04 ("replacement shall comply with the dimensional standards of the ordinance."); 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.").

6105.0354, subpart 30, in the Lower Saint Croix National Scenic Riverway.

MINN. R. 6105.0370, subp. 11 governs the replacement of substandard structures along the Lower St. Croix River. Unlike MINN. STAT. § 462.357, subd. 1(e), the DNR rules for the Lower St. Croix do not allow for replacement of substandard structures if the replacement does not comply with the bluffline setback. The rule states that: "[i]f a substandard structure needs replacing due to destruction, deterioration, or obsolescence, such replacement shall comply with the dimensional standards of a Saint Croix Riverway ordinance." MINN. R. 6105.0370, subp. 11D. The rule also provides that "In no instance shall the extent to which a structure or sanitary facility violates a setback standard be increased." *Id.* at subp. 11B. The 40-foot setback requirement is a dimensional standard under the local ordinances. *See* Lakeland City Ordinance § 402.01

The DNR rules are echoed in the Lakeland City Ordinances. The ordinance requires that "any extension, enlargement or alteration of an existing substandard structure or sanitary facility shall meet the setback standards of this ordinance." Lakeland City Ordinance 601.02 The ordinances also state that: "[i]f a substandard structure needs replacing due to destruction, deterioration, or obsolescence, such replacement shall comply with the dimensional standards of the ordinance." *Id.* at § 601.04.

Hubbard consistently stated that his plan was to replace the existing substandard structure, and build a completely new home. This position was

acknowledged by both Hubbard and his architect during the contested case hearing. (AA.26) In order for Hubbard to replace the non-conforming structure using the existing footprint, he has constructed an argument that the Municipal Planning Act provision allowing for "replacement" of non-conforming structures applies, to the exclusion of the local ordinances and DNR rules. However, Respondents' argument mischaracterizes the plain language of MINN. STAT. § 462.357, subd. 1(f), and ignores its legislative history.

First, the plain language of the statute is clear: the DNR's rules regarding the Lower St. Croix and the local ordinances apply "notwithstanding" subdivision 1(e). The word "notwithstanding" means "in spite of." Webster's New World Dictionary of the American Language, 1979, p. 410. "In spite of" means "regardless of." *Id.* at p. 577. Therefore, subdivision 1(f) should be read "regardless of subd. 1(e), the DNR rules regarding land use along the Lower Saint Croix may allow for continuation and improvement of substandard structures as defined in Minnesota Rules, part 6105.0354, subpart 30, in the Lower Saint Croix National Scenic Riverway." Nowhere in the plain language of the provision is there any indication that subdivision 1(e) trumps the DNR rules and local ordinances, or that a land owner is entitled to replace a substandard structure and not observe the bluffline setback requirement.

In addition, there is nothing in the legislative history which indicates anything other than the fact that the Lower St. Croix River is excluded from the scope of subdivision 1e. Before the court of appeals, Respondents cited a DNR

Fact Sheet and legislative hearing testimony regarding the addition of subdivision 1(f) to the Municipal Planning Act. Apparently, Respondents contend that the purpose of subdivision 1(f) is to afford landowners the right to replace non-conforming structures under subdivision 1(e). However, Respondents' argument is undermined by the language they cite. Specifically, the DNR Fact Sheet states:

> The substandard structure provision of the riverway ordinances is an important tool for the management of the Lower St. Croix where there are lots of older structures that need improvement but do not meet setbacks.
>
> [...]
>
> Unless there is a legislative exception for the Lower St. Croix zoning, this will create significant problems for working with local governments to manage development within the Lower St. Croix riverway.

(Respondent's Appendix at 79) This language supports a reading that subdivision 1(f) is meant to completely exempt the Lower St. Croix from subdivision 1(e) of the Municipal Planning Act.

This sentiment was also echoed during the legislative hearing testimony cited by Respondents to the court of appeals. Respondents cited the testimony of Michelle Beeman ("Beeman"), the legislative director for the Minnesota DNR, who stated that subdivision 1(f) would "keep the Lower St. Croix rules separate from the broader zoning statute the legislature amended last year." (Petitioner Robert W. Hubbard's Exceptions and Argument in Response to the Administrative Law Judge's Report, p. 58; R.R. 10.2.) Ultimately, both passages

cited by Respondents support Appellants' position that the DNR rules regarding the Lower St. Croix are exempted in their entirety from the purview of subdivision 1(e).

Respondents' contention that subdivision 1(f) should be given a restricted reading is also unsupported by the language of the statute itself. Subdivision 1(f) notes that all the DNR rules regarding the Lower St. Croix, specifically Minnesota Rules, parts 6105.0351 to 6105.0550, are exempted from subdivision 1(e). MINN. STAT. § 462.357, subd. 1(f). Clearly, if the legislature had intended that subdivision 1(f) applied to just one specific provision of the DNR rules it would not have exempted all DNR rules from the purview of subdivision 1(e).

In addition to the exemption of the DNR rules regarding the Lower St. Croix, there is an independent basis to reject Respondents' argument. Regardless of which statute, rule or ordinance is used, Hubbard is not permitted to expand the existing non-conformity. *See* MINN. STAT. § 462.357, subd. 1(e) ("any nonconformity [...] may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion."); Lakeland City Ordinance § 601.04 ("replacement shall comply with the dimensional standards of the ordinance."); 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.").

Respondents contend, without citation to the record, that the proposed construction does not expand the non-conformity. Apparently the basis for that

argument is Hubbard's surveyor's determination of the bluffline. However, the ALJ, after hearing testimony from Hubbard's surveyor and from the DNR's surveyor, and after actually visiting and walking the property, specifically rejected Hubbard's proposed bluffline determination, and adopted the DNR's determination. The ALJ noted that Hubbard's bluffline determination was incorrect because it "did not use the bluffline definition in the Lakeland Ordinance or the DNR rule." (AA. 26) The ALJ further found that Hubbard's surveyor was aware of the DNR and Lakeland definitions of a bluffline, but instead chose to ignore these definitions and determine "the original location of the bluffline." (AA.25) Using the DNR's bluffline, (which follows the DNR rule and Lakeland ordinance) the proposed construction actually increases the amount of structure within the setback by approximately 2,000 square feet. (AA.27) These findings of fact are not just entitled to deference because they were based on substantial evidence and reasoned decision-making by the ALJ, *see Cable Communications Bd.,* 356 N.W.2d at 668, they are the law of the case. Respondents did not challenge any of the factual findings of the Commissioner in their appeal to the court of appeals, and may not do so now. *See e.g. Fingerhut Products Company v. Commissioner of Revenue,* 258 N.W.2d 606, 608 (Minn. 1977)

Therefore, given that the Commissioner rejected Hubbard's proposed bluffline, there is no evidence to support a finding that the proposed construction does not expand or increase the non-conformity. In fact, if the DNR bluffline is used, there would be a substantial increase in the amount of structure within the

bluffline setback. Since Hubbard's proposal expands the non-conformity by building more of his home within the bluffline setback, Respondent Lakeland's request to certify the variance was properly denied by the Commissioner.

IV. THE COMMISSIONER APPLIED THE CORRECT VARIANCE STANDARD AND APPROPRIATELY DETERMINED THAT HUBBARD DID NOT DEMONSTRATE HARDSHIP TO BUILDING THE HOME COMPLETELY BEHIND THE BLUFFLINE SETBACK

Denial of the bluffline setback variance should also be upheld because the Commissioner appropriately determined that Hubbard did not demonstrate any hardship in complying with the ordinance. The Commissioner employed the correct legal standard when he determined that Hubbard must not simply show that his proposed construction is reasonable. Lakeland City Ordinance § 805.01. Furthermore, the Commissioner appropriately determined that granting the variance without demonstration of hardship is contrary to the purposes and intent of the ordinance.

First, the Commissioner appropriately determined that Hubbard's variance should not be approved because Hubbard can build entirely behind the bluffline setback in compliance with the ordinance. Respondents argue that Hubbard was entitled to a variance so long as his proposed construction was reasonable. However, this conclusion is an oversimplification of the law and is undermined by the law cited in Respondents' brief. In particular, Respondents cite to *Rowell v. Bd. of Adjustment* for the proposition that Hubbard need only show that his proposed construction was reasonable. *Rowell v. Bd. of Adjustment*, 446

N.W.2d 917, 922 (Minn. Ct. App. 1989). However, Respondents ignore the *Rowell* court's analysis of the reasonableness standard. In *Rowell*, the court found that in order for a proposed use to be reasonable there must be "practical difficulties" that support a variance. *Id.* at 922 (citation omitted).

In *Rowell*, a church wished to build an addition three feet from the front property line. *Id.* at 918. The city required a setback of 25 feet from the front property line. *Id.* The Court of Appeals upheld the city's grant of a variance, in part because the city found that there were practical difficulties including functional and aesthetic concerns. *Id.* at 922. Specifically, the court pointed to numerous examples of hardship, including the fact that the roof lines and front line would not match, the internal corridors would be misaligned, and the classroom windows, exit routes and classroom configurations would be adversely affected if the church was required to observe the setback. *Id.* at 921-922.

In this case, Hubbard did not show that there were any practical difficulties. In his variance application, Hubbard gave numerous reasons for the variance, including: refusing to grant the variance would result in increased "impervious surface area" and increased tree removal behind the bluffline, eliminates need for grading if the building is removed, removal of the "aesthetically" unpleasing current structure, and improved stabilization of the bluffline. (AA.26-28) Hubbard summed up his justification for hardship in his application by noting that granting the variance will result in "a net improvement to the site and a net add for the City of Lakeland." (AA.26-28) Hubbard's architect gave similar reasons during his

testimony when he noted that hardship exists because the existing structure provides monitoring points for the beach and reduced excavating. Hubbard provided a similar rationale at the hearing arguing that "a single family use in a residential neighborhood" is reasonable and that the existing structure "needs to be dealt with." (T.177, 204) While the hardship justifications offered by Hubbard suggest why he could build within the setback, they do not address the critical question of why he cannot build behind the setback. Hubbard's application and his testimony at the hearing, as well as the testimony of his architect, all acknowledge the requirement of demonstrating hardship; a burden he was unable to meet.

In fact, the hearing testimony demonstrates that Hubbard never even considered the possibility of building behind the bluffline setback. When asked at hearing about removing the existing home and building behind the setback, Hubbard offered the following response:

> Q. You decided not to consider removing it?
> A. It will not be removed
> Q. That's not an option?
> A. It's not an option
> Q. Did you tell the city that?
> A. I told the city that.
> Q. Did you tell the planning commission that?
> A. I told the planning commission that. It's a great part of the value of what we bought.

(T.204-205; *see* also T.288, 406) This testimony clearly demonstrates that Hubbard never considered the possibility of building behind the setback. Meeting the ordinance was never considered.

The logical implication of Hubbard's purported justification for a variance was best summed up by the ALJ when she concluded that Hubbard's rationale for a variance "reads hardship out of the ordinance." (AA.47) Accordingly, the Commissioner's adoption of the ALJ's determination that Hubbard failed to demonstrate hardship was based on sound legal principles and a reasoned analysis of the facts.

In addition, Hubbard and Lakeland's appeal ignores one of the primary reasons for the Commissioner's refusal to certify the variance, namely that the variance is inconsistent with the purpose and intent of the ordinances. Under MINN. STAT. § 462.357 subd. 6, a variance may only be granted when it is demonstrated that such actions will be in keeping with the spirit and intent of the ordinance. MINN. STAT. § 462.357, subd. 6. The Lakeland Ordinances were specifically enacted with the purpose of:

> (3) Regulating the setback of structures and sanitary waste treatment facilities from blufflines to protect the existing and/or natural scenic values, vegetation, soils, water, and bedrock form disruption by man-made structures or facilities;
>
> [...]
>
> (5) Regulating alterations of natural vegetation and topography;
> *(6)* **Conserving and protecting the natural scenic values and resources of the river valley and maintaining a high standard of environmental quality to comply with the Department of Natural Resources Standards and Criteria for the Lower St. Croix National Scenic Riverway (NR 2200-2202).**

Lakeland City Ordinance § 202 (Emphasis added).

Hubbard stated that his goal in replacing the existing structure was to retain the view of the beach. (T.173) However, this purpose could not conceivably advance any of the purposes underlying the ordinances. As stated in the ordinances, the purpose is to protect the existing natural scenic value of the riverway, not the view of landowners. DNR Regional Hydrologist Dale Homuth, best articulated the spirit and purpose of the ordinances when he testified that the goal is to protect the "view from the river" not the view of landowners. (T.354)

Respondents' "property rights" argument seeks to treat this lot on the St. Croix River as a typical city lot in Minnesota. However, what he refuses to acknowledge is that this property is located in an environmentally sensitive area which is protected by local, state and federal laws. The Commissioner is required by federal and state statutes and regulations to "protect and enhance" the qualities which caused the river to be added to the wild and scenic rivers system. Any grant of a variance must further those purposes and not degrade the "unique scenic and recreational asset" of the Lower St. Croix River. MINN. STAT. § 103F.351, subd. 1. Therefore, since the grant of the bluffline setback variance by Lakeland was not consistent with the spirit and intent of the ordinance, the Commissioner properly refused to certify the variance.

CONCLUSION

Based on the foregoing, Appellants Sierra Club and St. Croix River Association respectfully request that this Court affirm, in its entirety, the

Commissioner's refusal to certify the variance granted to Respondent Robert W. Hubbard by Respondent City of Lakeland.

The Commissioner and his staff at all times acted diligently and in a timely manner. The Commissioner timely advised the Lakeland Planning Commission of inconsistencies between the variance application and the Shoreland Ordinances, and of their concerns with the location of the bluffline as shown on drawings submitted by Hubbard's surveyor. The Commissioner then notified Respondents of the nonapproval on November 29, 2006 within the 30 day statutory deadline. Last, the Commissioner acted promptly, by issuing his decision regarding Hubbard's appeal in compliance with the APA.

Many decades ago the citizens of Minnesota chose to join with their fellow Americans to protect the future of the St. Croix River by creating legislation to protect the scenic, recreational, geologic, historic, and cultural character of the river. To paraphrase Senator Gaylord Nelson, we established plans and controls to assure that future growth would be in harmony with the river's scenic and recreational values. We did not simply leave the river to be developed at the whim of local landowners. We refused to let the river be swallowed up by growing urban pressures and financially motivated decisions. We preserved the river then; we continue to monitor and protect the river today; and we trust future generations will be equally vigilant, so that the outstandingly remarkable St. Croix River may be enjoyed forever.

Respectfully submitted,

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Dated: July 2, 2009

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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 10,003 words, excluding the Table of Contents and Table of Authorities.

Respectfully submitted,

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