

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of The Denial of the  
Certification of the Variance Granted  
to David Haslund by the City of St.  
Mary's Point

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

The above-entitled matter came on for a hearing on Cross Motions for Summary Disposition before Administrative Law Judge Eric L. Lipman on July 25, 2007, at the Minneapolis offices of the Office of Administrative Hearings. At the conclusion of argument on that day, the hearing record closed.

Kimberly Middendorf and David P. Iverson, Assistant Attorneys General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of the Department of Natural Resources (Department or DNR).

Patrick B. Steinhoff, Malkerson Gilliland Martin LLP, 220 South Sixth Street, Suite 1900, Minneapolis, MN 55402 appeared on behalf of David J. Haslund and Mary S. Floeder (Appellant or Haslund).

Cameron R. Kelly and Nicholas J. Vivian, Esq., Eckberg, Lammers, Briggs, Wolff & Vierling, PLLP, 1809 Northwestern Avenue, Suite 110, Stillwater, MN 55082, appeared for *amicus curiae*, the City of St. Mary's Point (City).

David J. Haslund, II and Mary S. Floeder have appealed the Department's denial of certification of an earlier variance granted to David Haslund by the City of St. Mary's Point ("City"). The variance authorized Haslund to build on an undeveloped substandard lot that is adjacent to the St. Croix River. DNR gave notice of non-certification by letter dated November 16, 2006 and this appeal followed.

**STATEMENT OF THE ISSUES**

The issue in this matter is whether the DNR properly denied certification of a variance granted to David J. Haslund II, by the City of St. Mary's Point, to build a home at 2959 Itasca Avenue South?

The Administrative Law Judge concludes the DNR properly denied certification of the variance.

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

### Lower St. Croix Shoreland Management

1. The Lower St. Croix Wild and Scenic River Act,<sup>1</sup> and the accompanying state regulations, oblige local units of government that are within the riverway boundary established in the Lower Saint Croix River Master Plan to adopt special zoning ordinances.<sup>2</sup> These ordinances must meet and implement the standards and criteria set forth in Minn. R. 6105.0351 through 6105.0550 (2005).<sup>3</sup>

2. Pursuant to this mandate, the City of St. Mary's Point adopted a conforming Bluffland and Shoreland Management Ordinance in 1978 ("City Ordinance").<sup>4</sup>

3. Under the terms of the City Ordinance, development in "urban districts" may only occur on lots that are at least one acre in size; at least 150 feet wide at the building setback line; and at least 150 feet long when measured from the water line.<sup>5</sup>

4. A lot that does not meet these dimensional standards may, nevertheless, qualify as a "buildable lot" under the following circumstances:

A lot or parcel 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.<sup>6</sup>

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<sup>1</sup> See, Minn. Stat. § 103F.35 1 (2006).

<sup>2</sup> See, Minn. R. 6105.0352 (2005).

<sup>3</sup> See, Minn. R. 6105.0352 (1) (2005).

<sup>4</sup> See, Affidavit of Molly Shodeen, at 1.

<sup>5</sup> See, Affidavit of Patrick Steinhoff, Exhibit B at 259; *accord*, Minn. R. 6105.0380 (3)(A)(2) (2005).

<sup>6</sup> See, Aff. of P. Steinhoff, Ex. B at 265.

5. City Ordinance § 602.02, however, limits the reach of the dimensional standards exception for “pre-existing lots.” Section 602.02 provides:

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.<sup>7</sup>

6. Minn. R. 6105.0380, subp. 2, likewise permits development of an otherwise substandard lot provided that “the lot has been in separate ownership from abutting lands since May 1, 1974.”<sup>8</sup>

7. Under the Part 6105, a variance from adherence to these standards may be granted where:

[t]here are particular hardships which make the strict enforcement of a Saint Croix Riverway ordinance impractical. Hardship means the proposed use of the property and associated structures in question cannot be established under the conditions allowed by a Saint 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. Economic considerations alone shall not constitute a hardship if a reasonable use for the property and associated structures exists under the conditions allowed by a Saint Croix Riverway ordinance. In addition, no variance shall be granted that would permit any use that is prohibited in a Saint Croix Riverway ordinance in which the subject property is located.<sup>9</sup>

### **Haslund-Floeder Property**

8. Until October 30, 1974, 2959 Itasca Avenue South, an undeveloped lot (“Lot A”), and 2969 Itasca Avenue South, a lot containing a residence (“Lot B”), existed as adjoining substandard lots under the ownership of Roy H. Haslund and Arthur E. Haslund, respectively.<sup>10</sup>

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<sup>7</sup> *Id.* at 266.

<sup>8</sup> See, Minn. R. 6105.0380 (2)(B) (2005) (emphasis added).

<sup>9</sup> See, Minn. R. 6105.0520 (2005); *accord*, City Ordinance §§ 302.01 (19) and 805.01.

<sup>10</sup> See, *Aff. of M. Shodeen*, Ex. 6.

9. Neither Lot A nor Lot B meets the minimum dimensional requirements of Section 402.01.<sup>11</sup> Lot A has a width of 115 feet at the waterline, 107.5 feet at the building setback, and a total area of .54 acres.<sup>12</sup>

10. Lots A and B are not platted lots, but are within the area subject to the City of St. Mary's Point Bluffland and Shoreland Management Ordinance.<sup>13</sup>

11. In combination, Lots A and B compose an area of 1.11 acres and meet the other dimensional standards imposed by Section 402.01.<sup>14</sup>

12. On October 30, 1974, Lots A and B came under common ownership when they were deeded to Gloria Haslund.<sup>15</sup> These lots remained under common ownership for twelve years until December 3, 1986, when Gloria Haslund sold Lot B to David Haslund.

13. In 2000, the lots were again under common ownership following Gloria Haslund's conveyance of Lot A to Haslund in April of 2000; a conveyance that was later recorded on May 25, 2000.<sup>16</sup>

14. Haslund owned both Lot A and Lot B until Haslund sold Lot B to Richard D. Stehly on September 28, 2004.<sup>17</sup>

### **Variance Application**

15. On May 3, 2000, Haslund applied for a variance ("2000 Variance") to build a home on the undeveloped Lot A. Haslund asserted in the application that "this property has always existed as a separate parcel that was buildable until recent change. Property lot width at waterline is 115 feet and at building setback line from water is 107.5 feet."<sup>18</sup>

16. While the variance application was pending, the Mayor of City of St. Mary's Point, Stephen Popovich contacted Molly Shodeen of the Department by telephone to discuss Mr. Haslund's request.<sup>19</sup> During the exchange, Ms. Shodeen did not have any documents relating to the variance application

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<sup>11</sup> Compare, Aff. of P. Steinhoff, Ex. B at 256 with Aff. of P. Steinhoff, Ex. A at 13, 17 and 18; Aff. of M. Shodeen, Ex. 1.

<sup>12</sup> *Id.*

<sup>13</sup> See, Aff. of P. Steinhoff, Ex. B at 259-60.

<sup>14</sup> See, Aff. of M. Shodeen, at 2; Aff. of P. Steinhoff, Ex. A at 42; Aff. of P. Steinhoff, Ex. B at 55.

<sup>15</sup> See, Affidavit of David J. Haslund II.

<sup>16</sup> See, Aff. of D. Haslund, Ex. C.

<sup>17</sup> See, Aff. of D. Haslund, Ex. E.

<sup>18</sup> See, Aff. of M. Shodeen, Ex. 4

<sup>19</sup> See, Aff. of M. Shodeen at 1-2.

before her, but did, as she often does, speak informally with the Mayor about the requirements of the shoreland regulations.<sup>20</sup> It is clear that Ms. Shodeen was not aware during this telephone conversation that Mr. Haslund was the owner of both the undeveloped lot at 2959 Itasca Avenue South and the adjoining developed lot at 2969 Itasca Avenue South.<sup>21</sup>

17. Unaware of the Haslund's common ownership of the adjoining lots, Ms. Shodeen only addressed the operation of state rules in terms of a request for a variance from local dimensional requirements during her conversation with Mayor Popovich. Ms. Shodeen expressed the view that DNR certification was not required of any such variance, because the Haslund application only requested a waiver of the dimensional requirements for building.<sup>22</sup>

18. The Notice of Hearing for the variance application describes the matter to be considered by the City Council as "a Variance application to build a 1727 square foot house with a property lot width at the water line of 115 feet requested by Jamie Haslund and Mary Floeder, 2959 Itasca Avenue South, St. Mary's Point, Minnesota 55043."<sup>23</sup>

19. On June 6, 2000, a public hearing was held on the May 3 variance application.<sup>24</sup> The City Council's Minutes regarding the hearing state:

Mayor Popovich called the public hearing to order at 6:34 P.M. Roll call was taken. Jamie Haslund<sup>25</sup> and Mary Floeder present to explain their proposal. He explained he had a septic inspection done, it appears to meet all the current requirements. He has spoken to Molly Shodeen of the DNR regarding the variance. He was told the elevation must be at 694 feet. The DNR doesn't seem to have any problems with building on this particular lot. He meets all sideyard setbacks.

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Mayor Popovich explained proper notice was published, property owners within 500 feet were also notified. A lengthy discussion followed. Motion by Councilmember Blake to grant a variance to build a new home on an existing legal lot at 2959 Itasca Ave. S., and that the Council grants a variance for the home to be built on

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<sup>20</sup> See, *id.*

<sup>21</sup> *Id.*

<sup>22</sup> See, Aff. of M. Shodeen at 2.

<sup>23</sup> *Id.* at Ex. 5.

<sup>24</sup> *Id.* at Ex. 3.

<sup>25</sup> In and around the City of St. Mary's Point, David J. Haslund II is also known by the nickname "Jamie."

the existing lot. Seconded by Councilmember Williams. Discussion followed regarding date being set to avoid a perpetual variance. Building to begin within 2 years. Motion passed by roll call vote (4).<sup>26</sup>

20. Despite the two-year time limitation imposed upon the variance, Haslund did not build the proposed structure within the time specified and the variance expired in 2002.<sup>27</sup>

21. In September of 2004, Haslund applied for, and was granted, a permit to install a septic system at Lot A.<sup>28</sup>

22. As noted above, on September 28, 2004, Haslund sold Lot B to Richard D. Stehly.<sup>29</sup>

23. On August 3, 2006, Haslund submitted a follow-on variance application to build on Lot A ("2006 Application"). As a result of the expiration of the 2000 Variance, City officials obliged Mr. Haslund to renew his application.<sup>30</sup> Mr. Haslund described his 2006 request as one that would "properly document and certify with the DNR the variance granted in June 2000."<sup>31</sup>

24. It was during this time period that Molly Shodeen learned that Lots A and B were both owned by Haslund between May of 2000 and December of 2004.<sup>32</sup> Ms. Shodeen objected to a variance that would permit building on Lot A alone, as an action that was inconsistent with the prohibition on development of adjacent substandard lots in common ownership.<sup>33</sup>

25. On October 12, 2006, a special City Council meeting was held to act upon the follow-on request of Mr. Haslund.

26. During the Council meeting, a majority of the Council sought to "clarify" the 2000 action and, by a vote of 3 to 2, extended the time for construction of the proposed residence.<sup>34</sup>

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<sup>26</sup> See, Aff. of M. Shodeen, Ex. 3.

<sup>27</sup> See, Aff. of P. Steinhoff, Ex. A at 73.

<sup>28</sup> *Id.* at 10.

<sup>29</sup> See, Aff. of D. Haslund, Ex. E.

<sup>30</sup> See, Aff. of P. Steinhoff, Ex. A at 73.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> See, Aff. of M. Shodeen, at 3.

<sup>33</sup> *Id.* at 2-5.

<sup>34</sup> See, Aff. of P. Steinhoff, Ex. A at 89 and 91.

27. By way of a letter dated October 18, 2006, the City informed DNR of the actions taken at the October 12 meeting. While a new variance was not approved at the October 12 meeting, the City requested that the DNR certify the Council's decision to extend the time for performance under the 2000 variance.<sup>35</sup>

28. DNR reviewed the information submitted by the City regarding the Council's actions on October 12, 2006.<sup>36</sup> By way of a letter dated October 30, 2006, DNR asserted that: (1) Minn. R. 6105.0540 and 6105.0380 do not require DNR certification of variances to lot size and width; (2) Section 602.02 of the City Ordinance prohibits the development or sale of Lot A, because Haslund owned the adjacent Lot B for a period of time after May 1, 1974; and (3) no variance to Section 602.02 of the City Ordinance was granted by the City Council, or certified by the DNR, in 2000.<sup>37</sup> Accordingly, the DNR declined to take action on the matters submitted for its review.<sup>38</sup>

29. Disagreeing with the claim that no variance to Section 602.02 of the City Ordinance was granted by the City Council in 2000, the City, by way of a letter dated November 15, 2006, made the following reply to the Department:

At the October 12, 2006 meeting, the Council took action to clarify the variances granted to Mr. Haslund and Ms. Floeder in June of 2000. The May 2, 2000 and June 6, 2000 City Council minutes clearly reflect that the property owner had come to the City requesting variance to build on two (2) adjacent substandard lots. It is the current City Council's assumption that the previous City Council was aware of not only the size and width requirements, but also of the City of St. Mary's Point Ordinance 602.02 regarding the common ownership of adjacent substandard lots. It is the current Council's conclusion that the previous Council was aware of this issue and intended to grant a variance to City of St. Mary's Point Ordinance 602.02.<sup>39</sup>

30. In this same letter, the City certified "completion of variances to lot size, lot width, and to City Ordinance 602.02 ... pursuant to the Bluffland/Shoreland Management Ordinance."<sup>40</sup>

31. On November 16, 2006, Dale Homuth, DNR Regional Hydrologist, issued the Department's Notice of Non-Certification. In the Notice, Mr. Homuth asserts that certification is not warranted because the proposed action to grant a

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<sup>35</sup> See, *id* at 79.

<sup>36</sup> *Id.* at 85.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 89.

<sup>40</sup> *Id.*

variance to Section 602.02 of the City Ordinance was not properly noticed in 2000, or in the autumn of 2006, and that such a variance is at odds with state and federal shoreland management laws. As Mr. Homuth summarizes:

There was no discussion of the parcel ownership situation in the minutes of the June 6, 2000 minutes of the City Council meeting and no proof that the final decision, containing a discussion of all of the relevant issues, was ever sent to the DNR prior to or after the hearing. There is only mention that the lot size issue was discussed with the DNR, but not the contiguous lot issue.

The city did not provide findings or conduct public hearings relative to all of the issues of building on this property. We believe the city needed to hold a public hearing, with adequate notice to the DNR, both in 2000 and 2006 to discuss a variance to Section 602.02 of your ordinance. Until such a hearing is properly conducted and DNR certification, Mr. Haslund is precluded from proceeding to obtain a building permit.

After careful consideration of the issues and circumstances in accordance with Minnesota Rules, part 6105.0540, the Department of Natural Resources has determined that the variance decision does not meet the above-listed standards and is not justified by hardship. The Department of Natural Resources is hereby notifying the City of nonapproval of this variance decision on the basis that it violates the intent of the National Wild and Scenic Rivers Act, the federal and state Lower St. Croix River Acts, the Master Plan adopted thereunder, and Minnesota Rules, Parts 6105.0351 to 6105.0550. Even if the city had conducted a proper hearing regarding the issue of the splitting of contiguous lots of record, the DNR would likely be precluded from certifying the action should the city approve such variances.”<sup>41</sup>

### **Procedural Findings**

32. On December 14, 2006, Haslund appealed DNR’s nonapproval decision pursuant to the Minnesota Administrative Procedure Act and Minn. R. 6105.0540, subp. 3 (E).<sup>42</sup>

33. On March 30, 2007, the Commissioner issued a Notice and Order for Prehearing Conference and Order for Hearing (Notice and Order for Hearing).

Based on these Findings of Fact, the Administrative Law Judge makes the following:

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<sup>41</sup> *Id.* at 96.

<sup>42</sup> *Id.* at 100-01.

## CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Natural Resources have authority to consider this matter pursuant to Minn. Stat. §§ 14.50, 103F.351 and 103G.311; and Minn. R. 6105.0540, subp. 3 (E)(1).

2. The Department has complied with all substantive and procedural requirements of law or rule.

3. The Applicant's property is subject to the St. Croix Riverway Ordinance of the City of St. Mary's Point, the Lower St. Croix Wild and Scenic River Act, and the rules adopted pursuant to Minn. Stat. § 103F.351.

4. Minn. R. 6105.0380, subp. (2) (B) requires that adjoining lots under the same ownership may not be severed for sale or development, but must remain combined unless two conforming lots can be created.

5. The December 3, 1986 transfer of Lot B by Gloria Haslund to David Haslund was contrary to the requirement of the state rules that such lots remain combined where two lots conforming to the requirements of the state rules cannot be created.<sup>43</sup> Parcels at 2959 and 2969 Itasca Avenue South were jointly owned by Gloria Haslund and two conforming lots could not be created by any division of these properties.

6. Similarly, the December 13, 2004 transfer of Lot B by David Haslund to Richard D. Stehly was contrary to the requirement of the City Ordinance 602.02 that such lots remain combined where two lots conforming to the requirements of the City Ordinance cannot be created.<sup>44</sup>

### Variance Practice

7. A variance is any modification or variation of the dimensional standards of a Saint Croix Riverway ordinance where it is determined that, because of hardships, strict enforcement of the ordinance is impractical.<sup>45</sup>

8. Variances are to be granted only in cases where there are particular hardships which make the strict enforcement of a Saint Croix Riverway ordinance impractical. In this context, hardship means that the proposed use of the property and associated structures in question cannot be established under the conditions allowed by a Saint Croix Riverway ordinance; the plight of the landowner is due to circumstances unique to the property; was not created by the landowner after May 1, 1974; and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone shall not

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<sup>43</sup> Compare, Minn. R. 6105.0380 (2) (B) (2005).

<sup>44</sup> *Id.*

<sup>45</sup> See, Minn. R. 6105.0354 (32) (2005).

constitute a hardship if a reasonable use for the property and associated structures exists under the conditions allowed by a Saint Croix Riverway ordinance.<sup>46</sup>

9. Mr. Haslund has failed to show that strict enforcement of the ordinance is impractical because of hardships.

10. While Mr. Haslund would have very limited uses of Lot A without a variance of the common ownership rules, the remaining uses permitted by Saint Croix Riverway ordinance are “reasonable uses of the property.”<sup>47</sup>

11. Haslund's mistake of law regarding the common ownership rules do not amount to a hardship entitling him to a variance of those rules.<sup>48</sup>

### **Proper Notice Practice**

12. The Department complains that the City's Notice regarding the 2000 Variance notice contained no reference to Haslund's and Floeder's common ownership of Lot B.<sup>49</sup> Yet, state rules do not require these disclosures.

### **Process for Certifying Variances**

13. The Commissioner shall, no later than 30 days after receiving notice of the final decision of a local authority, communicate to the local authority either certification or approval, with or without conditions, or notice of nonapproval.<sup>50</sup>

14. Pursuant to Minnesota Rules 6105.0540, subp. 1 (2005), all variances granted by the City to its Lower St. Croix River Bluffland and Shoreland Management Ordinance (“City Ordinance”) are subject to DNR review and certification “[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.” City Ordinance, § 802.01. Minn. R. 6105.0540, subp. 2 (2005) states in turn that:

No such [variance] action becomes effective unless and until the commissioner has certified that the action complies with the intent

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<sup>46</sup> See, Minn. R. 6105.0520 (2005).

<sup>47</sup> See, note 61, *infra*.

<sup>48</sup> Compare, *Graham v. Itasca Cty. Planning Comm'n*, 601 N.W.2d 461, 468 (Minn. App. 1999) (“It does not follow, however, that a property owner's purchase of land based on an erroneous belief is a hardship because a property owner's beliefs are not circumstances unique to the property”).

<sup>49</sup> Compare, DNR's Memorandum of Law in Support of Summary Disposition, at 25 and Aff. of M. Shodeen, Ex. 5 with Minn. R. 6105.0530 (2) (A) through (H) (2005).

<sup>50</sup> See, Minn. R. 6105.0540 (3)(C) (2005).

of the National Wild and Scenic Rivers Act, the federal and state Lower St. Croix River acts and the master plan adopted thereunder, and these standards and criteria.

15. Municipalities must incorporate the minimum standards imposed by those rules into their ordinances although they are permitted to enact more restrictive provisions.<sup>51</sup>

16. Upon appeal of a denial of certification, the matter is subject to a contested case proceeding and, ultimately, to consideration by the Commissioner, Minn. R. 61054.0540, subp. 3 (E) (2005). In considering the matter, Minn. R. 6105.0540, subp. 3 (E) (2) (2005) states that:

The decision of the commissioner shall be based upon findings of fact made on substantial evidence found in the hearing record. On concluding that the proposed action satisfies the criteria of subpart 2, then the commissioner shall certify approval; otherwise the commissioner shall deny it.

17. The Commissioner's decision here must be based upon his technical review of the evidence offered by all parties through the contested case proceeding. As required by rule, the Commissioner will ultimately be called upon to determine whether there was substantial evidence presented that the decision of the City complied with state and federal law, the Master Plan and, ultimately, the minimum standards set forth in state rules. In order to obtain a favorable decision from the Commissioner, Haslund must demonstrate that the variance decision was consistent with the referenced laws and standards.<sup>52</sup>

18. The Commissioner properly issued a notice of nonapproval of the request to certify the variance granted to the Applicant by the City of St. Mary's Point.

19. Summary disposition is appropriate in this case because there is no genuine issue as to any material fact.<sup>53</sup>

20. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

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<sup>51</sup> See, Minn. R. 6105.0352 (2) (2005).

<sup>52</sup> See, *Van Landschoor v. City of Mendota Heights*, 336 N.W.2d 503, 509 (Minn. 1983); *Luger v. City of Burnsville*, 295 N.W.2d 609, 612 (Minn. 1980); *In re Application of the city of White Bear Lake*, 247 N.W.2d 901, 904 (Minn. 1976).

<sup>53</sup> See, Minn. R. 1400.5500 (K) (2005).

## RECOMMENDATION

The Administrative Law Judge recommends that the Commissioner AFFIRM the Department's denial of certification of the variance granted to David Haslund by the City of St. Mary's Point.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

Dated: September 27, 2007

s/Eric L. Lipman  
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ERIC L. LIPMAN  
Administrative Law Judge

Reported: Digitally recorded  
No transcript prepared

## NOTICE

This report is a recommendation, not a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Mark Holsten, Commissioner of Natural Resources, 500 Lafayette Road, St. Paul, MN 55155, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

Haslund's argument boils down to a fairly simply proposition: Because the Department of Natural Resources earlier approved the City of St. Mary's Point Bluffland and Shoreland Management Ordinance, and the local restriction on severing substandard lots under common ownership in that ordinance applies to "contiguous platted lots,"<sup>54</sup> the restrictions do not apply to 2959 Itasca Avenue South. As Haslund correctly points out, this lot is not a platted lot.

For all of its rounded edges and elegance, this argument falters because it runs head long into other important principles of administrative law. Haslund, perhaps not surprisingly, inverts the regulatory hierarchy so that the local ordinance is at the top of the proverbial legal pyramid; edging past the state statutes in Chapter 103F and the state rules in Part 6105. As detailed below, however, this inversion does considerable violence to the overall regulatory scheme.

The State of Minnesota established a state standard for minimum lot size in "urban districts" along the Saint Croix River and provided for the gradual consolidation and elimination of substandard parcels.<sup>55</sup> The state requirements are that "where public sewer and water were not available as of May 1, 1974," such lots created after that date would not be "less than one acre in area; not less than 150 feet in width at the building line, and not less than 150 feet in width on the side abutting or nearest the river."<sup>56</sup> Additionally, the state rules provide that substandard lots along the riverway may be eligible for further development provided that "the lot has been in separate ownership from abutting lands since May 1, 1974."<sup>57</sup> Neither rule includes the word "platted" and seemingly applies to a broader range of parcels than does the St. Mary's Point Ordinance.

Faced with the text of the state rule, however, Haslund argues that because the words "contiguous platted lots" in the local ordinance were approved by the Department, the Commissioner may not retreat from this limitation when he is called upon to certify local variances for unplatted lots. A few points deserve emphasis.

First, Minn. Stat. § 103F.351, subd. 4, makes plain that local zoning powers in the shoreland area along the Saint Croix River are preempted in favor of state regulation and that the local standards must conform to the requirements that were established by state rulemaking. The statute reads:

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<sup>54</sup> See, Aff. of P. Steinhoff, Ex. B at 136.

<sup>55</sup> See *generally*, Minn. R. 6105.0380 (1) (2005).

<sup>56</sup> See, Minn. R. 6105.0380 (3)(B)(2) (2005).

<sup>57</sup> See, Minn. R. 6105.0380 (2)(B) (2005).

Subd. 4. **Rules.** (a) The commissioner of natural resources shall 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.

(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 acts; and

(2) the protection of riverway lands by means of acreage, frontage, and setback requirements on development.

(c) Cities, counties, and towns lying within the areas affected by the guidelines shall adopt zoning ordinances complying with the guidelines and standards within the time schedule prescribed by the commissioner.

(Emphasis added). The Commissioner of Natural Resources is directed to establish the operative standards by rulemaking, and once established, those standards are binding upon the Department and localities alike.

Second, there is no authority for the proposition that the Commissioner's ordinance approval power is separate from, or greater than, the power to establish standards for uses under the Lower St. Croix Wild and Scenic River Act. Indeed, the text and structure of the Act compels precisely the opposite conclusion. The Act makes clear that the state standards, local ordinances and the variance certification process are all mutually reinforcing processes – to the end of providing uniform “protection of riverway lands by means of acreage, frontage, and setback requirements on development.”<sup>58</sup> The Commissioner would not be obliged to establish acreage standards by rulemaking, nor would localities be required to adhere to these standards, if the Department was at liberty to later retreat from these requirements in individual cases through the ordinance approval process. Haslund's suggested reading of the statute and rules is simply not sensible.

Third, from the vantage point of overall management of the riverway, there is not much to commend Haslund's reading of the City Ordinance and state rules. At oral argument Haslund conceded that his claim that the common ownership rules are limited to “platted lots” in Saint Mary's Point, does not advance any

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<sup>58</sup> See, Minn. Stat. § 103F.351 (4)(b)(2) (2006).

particular shoreland management policy or goal, or follow from a deliberate choice by state or city officials to exclude unplatted parcels from the more general rules. Haslund flatly argues that the approved local ordinance includes the modifier “platted,” and that this narrower reach should be given effect.

Even if the Commissioner were empowered to narrow the reach of the state rules by approving the adoption of local ordinances that are inconsistent with those rules – a power that the Act plainly withholds from the Commissioner – Haslund’s reading of the statutes and rules frustrates the purposes that the state sought to achieve when approving the Act. Indeed, far from contributing to the regulatory purpose of “ensur[ing] 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,”<sup>59</sup> Haslund’s argument insists upon the very nullification and disunion that the Legislature labored to avoid.

Because refusing to permit Haslund and Floeder to develop Lot A significantly and dramatically impacts the value of the property to them, they argue that the Department’s denial of the variance certification is unduly and unlawfully harsh.<sup>60</sup> While not minimizing the financial impact to Haslund and Floeder – and the impact is unquestionably staggering – the couple does retain some useful property rights. They retain recreational and agricultural uses of the property, the right to exclude others, and retain the right to alienate the land. Accordingly, the impact of the common ownership rules, while significant, is not so severe as to take private property for a public purpose.<sup>61</sup>

Under these circumstances, therefore, Haslund has not sustained the “heavy burden” of demonstrating the Department’s certification of the local variance was required.<sup>62</sup>

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<sup>59</sup> See, Minn. R. 6105.0540 (1) (2005).

<sup>60</sup> See, e.g., Haslund’s Memorandum of Law in Support of Summary Disposition, at 13-14.

<sup>61</sup> See, *Pine County v. State, Dept. of Natural Resources*, 280 N.W.2d 625, 630 n.4 (Minn. 1979) (“Mere diminution in market value is not such a demonstration, when a reasonable use of the land is permitted under the zoning ordinance and currently undertaken by plaintiffs”); *Thompson v. City of Red Wing*, 455 N.W.2d 512, 516 (Minn. App. 1990) (notwithstanding a restriction on gravel mining “Where a property can be used for agricultural ... purposes, as is the Thompson parcel, the parties are not deprived of all reasonable use”); compare generally, *Hinz v. City of Lakeland*, 2007 WESTLAW 2481021 (Minn. App. 2007) (unpublished) (“because respondents retain recreational and agricultural uses of the property, retain the right to exclude others, and retain the right to alienate the land” the City of Lakeland’s denial of a variance to develop a house on a substandard lot along the St. Croix Riverway did not result in a “a complete elimination of value”) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019-20 (1992)); compare also, *Graham v. Itasca Cty. Planning Comm’n*, 601 N.W.2d 461, 468 (Minn. App. 1999) (“The merger of adjacent substandard lots owned by the same owner is a logical method to achieve these purposes”).

<sup>62</sup> Compare, *Luger v. City of Burnsville*, 295 N.W.2d 609, 612 (Minn. 1980).

Lastly, the Department argued that Haslund is not entitled to relief because the Notice of his variance application did not apprise nearby property owners of his common ownership of Lots A and B.<sup>63</sup> This argument is neither dispositive nor availing. Minn. R. 6105.0530 simply does not request or require the disclosures that the Department claims should have been provided – and is not a basis for denying certification.<sup>64</sup>

Yet this gap in the notice rules is significant because it points to the very source of the current difficulties. No one in the current system – neither City Staff, nor the County Recorder, nor the Department’s certification unit – has any system in place that operates to detect common ownership problems in sufficient time so as to warn off property owners before, as happened here, disaster strikes.<sup>65</sup>

The common ownership rules are thus a woeful trap for the unwary; yet, it is a trap that policymakers, and not Administrative Law Judges, must close.

**E.L.L.**

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<sup>63</sup> *Compare*, DNR’s Memorandum of Law in Support of Summary Disposition, at 25 with Aff. of M. Shodeen, Ex. 5.

<sup>64</sup> *See*, Minn. R. 6105.0530 (2) (A) - (H) (2005); *compare*, Aff. of P. Steinhoff, Ex. B at 273.

<sup>65</sup> *See*, Aff. of P. Steinhoff, Ex. A at 39 and 73.