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A TECHNICAL REPORT on MANAGING NONCONFORMITIES in the SHORELAND MANAGEMENT DISTRICT

July 1995



Minnesota
Department of
Natural Resources
Division of Waters

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A TECHNICAL REPORT ON MANAGING NONCONFORMITIES IN THE SHORELAND MANAGEMENT DISTRICT

Foreword

Managing Minnesota's shoreland areas is the responsibility of local governments (counties, cities, and townships) with assistance and quality assurance by the Minnesota Department of Natural Resources' Division of Waters. Much of Minnesota's shoreland areas were subdivided into lots and/or developed prior to any building codes or zoning rules. As local shoreland management ordinances have been implemented, pre-existing lots, homes, cabins, resorts, etc. have been "grandfathered", i.e. allowed to continue in a state of non-compliance with the adopted ordinances.

The question of how to manage these "nonconformities" is the subject of this technical report.

Shoreland zoning has been in effect for 25 years in many Minnesota counties. The difficulties of achieving better lake and river water quality and protecting the values of water bodies and shorelands remains a complex challenge. The purpose of this technical report is to assist local government and shoreland residents in understanding acceptable methods to address shoreland nonconformities within the scope of state laws and rules. The Minnesota Lakes Association, local units of government and the Mississippi Headwaters Board have all voiced concerns about the management of shoreland nonconformities. This report attempts to address those concerns.

The Minnesota Department of Natural Resources' Division of Waters mission is to "... *provide leadership in the cooperative management of activities affecting Minnesota's water resources to promote resource protection while allowing reasonable use.*" We welcome thoughtful comments on all aspects of water resources management activities.

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Acknowledgements

The principal author of this document is Ed Fick, Shoreland Program Coordinator for the DNR, Division of Waters. The efforts and contributions of others including county zoning officials, lakeshore residents and other DNR staff from the St. Paul Central Office and field offices are also recognized. Finally, appreciation for the final formatting and layout of this document goes to Jim Zicopula, Graphic Arts Specialist for the DNR, Division of Waters.

A Technical Report On Managing Nonconformities in the Shoreland Management District

Legislative Background

The Minnesota State Legislature, in the 1969 session, stated the purpose for regulating shoreland development in State Statutes (M.S. 103F.201) as follows:

... it is in the interest of the public health, safety, and welfare to:(1) provide guidance for the wise development of shorelands of public waters and thus preserve and enhance the quality of surface waters; (2) preserve the economic and natural environmental values of shorelands; and (3) provide for the wise use of water and related land resources of the state.

This law directed the Commissioner of the Department of Natural Resources (DNR) to develop a shoreland management program. The statutory definition of "Shoreland" means land located within the following distances from the ordinary high water elevation of public waters: (1) land within 1,000 feet from the normal high watermark of a lake, pond, or flowage; and (2) land within 300 feet of a river or stream or the landward extent of a floodplain delineated by ordinance on the river or stream, whichever is greater.

The following diagram illustrates the area that is regulated.

The Statute went on to state the following:

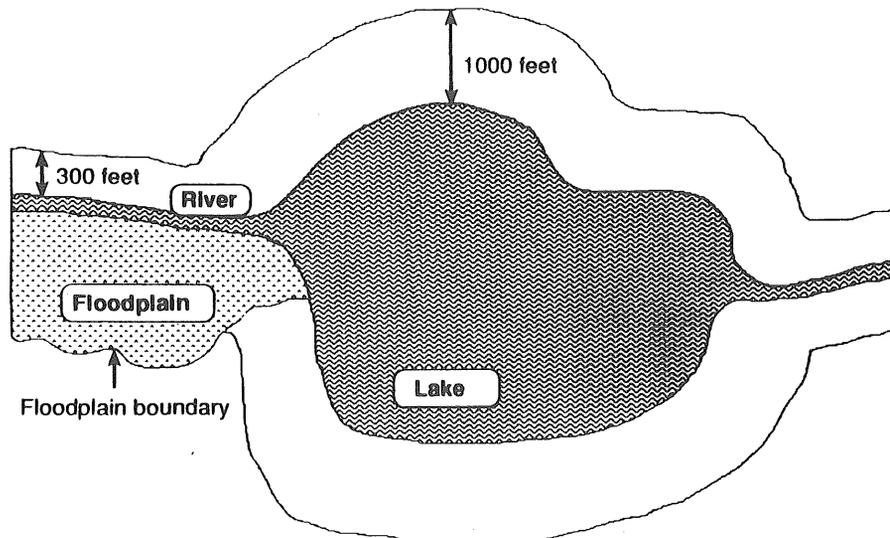
The commissioner shall adopt model standards and criteria for the subdivision, use, and development of shoreland in municipalities and areas outside of a municipality. The standards and criteria must include;

- (1) the area of a lot and length of water frontage suitable for a building site;
- (2) the placement of structures in relation to shorelines and roads;
- (3) the placement and construction of sanitary and waste disposal facilities;
- (4) designation of types of land uses;
- (5) changes in bottom contours of adjacent public waters;
- (6) preservation of natural shorelands through the restriction of land uses;
- (7) variances from the minimum standards and criteria; and
- (8) for areas outside of a municipality only, a model ordinance.

Figure 1.

Shoreland District

The Shoreland District includes 1000 feet back from the OHWL of lakes, 300 feet back from the OHWL of rivers and back to the floodplain boundary if it is greater.



History

Rules providing local units of government with minimum standards and criteria for the development and use of these shorelands have been in effect since July 1970 for unincorporated areas and March 1976 for incorporated areas. Amendments to these were made in 1989. Minimum lot size and structure setbacks from the affected water bodies were established for any new subdivisions of land. The standards became effective only after each local governmental unit (LGU) adopted zoning ordinances meeting or exceeding the statewide minimum standards.

Basic considerations in determining a proper minimum lot size are to insure that a lot would be large enough to have sufficient area, especially for locating structures, sanitary and water supply facilities, and minimizing any nonpoint source pollution from the impervious areas of the lot in accordance with accepted standards for public health and safety.

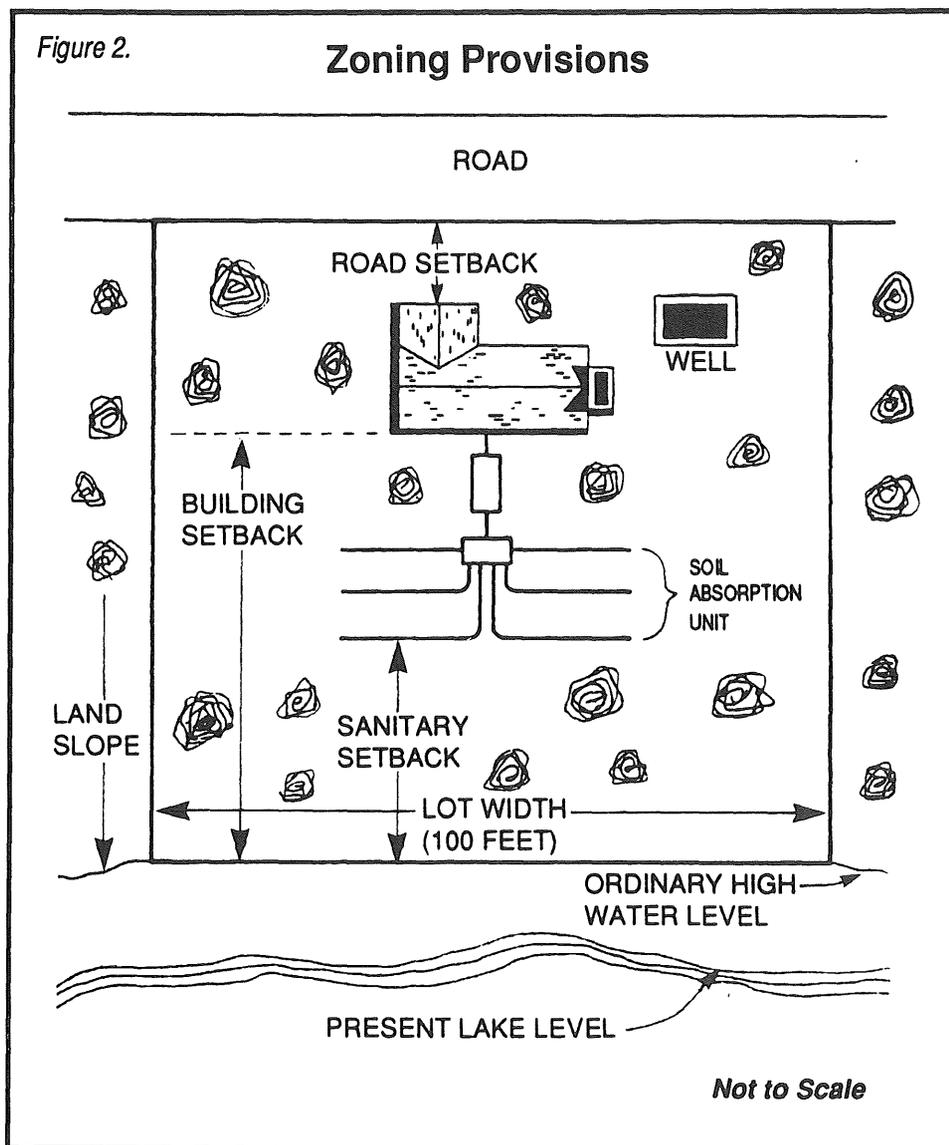
Most homes in shoreland areas employ the soil absorption method of sewage treatment. A soil absorption unit installed according to the Minnesota Pollution Control Agency (MPCA) specifications requires approximately 2,000 square feet of land area having suitable soils. This calculation assumes a percolation rate of 60 minutes or less for water to fall one inch in the soil for a two bedroom residence specified in the MPCA regulations. Proper soil absorption system sizes are based on the size of the home (number of bedrooms and bathrooms), and the waste water generated (automatic clothes and dish washers, garbage disposal, etc.). The area for the soil absorption unit, when added to area requirements for structure setbacks and separation distance between water wells (100 feet for wells less than 50 feet deep and 50 feet for wells deeper than 50 feet) and the soil absorption unit, totals approximately 15,000 square feet, assuming suitable soil conditions.

In addition, it can be assumed that not all portions of lots in shoreland areas can be developed, due to lack of adequate height above the ground water table, steep topography, poor soil conditions, etc.. The shoreland rules specify that not more than 25 percent of the lot area may be covered with impervious surfaces. This provision addresses the water quality concerns associated with nonpoint source pollution runoff.

To provide a reasonable measure of assurance that lots will have enough suitable area to be developed in accordance with adequate sanitary facilities, the smallest minimum lot size was set at 20,000 square feet for General Development Lakes (GD). The 1989 amendments required all newly platted lots in shoreland areas to contain sufficient area for a replacement soil absorption unit for an on-site sewage treatment system. This last requirement was based on experience gained from more than 20 years of monitoring the failure rate of existing soil absorption units of on-site systems and requiring their replacement.

A minimum lot width of 100 feet for GD lakes was determined upon consideration of existing densities of development. A study of lakeshore development completed by the University of Minnesota's Department of Geography in 1970 showed that very few lots [less than 4 percent of all government lots (defined as 40 acre or smaller land parcels adjoining lakes)] were developed to an average density of less than 100 feet of shoreline per cabin or less. The implication was that people tend not to crowd together at greater densities. This minimum lot width in shoreland areas provides a minimum amount of space to develop a lot consistent with individual preferences and protect the health, safety and welfare of others.

The following diagram illustrates this concept.



protect and promote public health, safety, and the general welfare. The solution is to require development on such lots of record to meet sanitary and water supply provisions and building setbacks without placing an unreasonable burden on the owner or risking the health, safety, and welfare of others.

Legal Basis for Managing Nonconformities

Zoning controls regulate the location of underlying land uses (residential, commercial, industrial, etc.). The shoreland standards focus primarily on the manner of use (i.e. dimensional standards) to reduce the potentially harmful effects on the public waters of overcrowding and poorly planned development of the shoreland areas, to maintain property values, and to preserve the natural characteristics of shorelands and adjacent water areas.

Larger lot areas and widths for other, more ecologically vulnerable, classes of lake and river shoreland areas reflect the desired management goals - policies on these areas are designed not only to prevent pollution, but also to keep development densities low enough to protect the natural environment in more sensitive areas.

The minimum lot sizes and setbacks should have been applied to all lots created since the adoption of the shoreland controls by local units of government. However, lots which were platted before the enactment of the ordinance fall into another category referred to as "lots of record". Based on application of the United States and Minnesota Constitutions, a zoning ordinance cannot deprive a property owner of all reasonable uses of their property. At the same time, the purposes and intent of the shoreland program are to

As required by the statute, administration and enforcement of the shoreland rules is the responsibility of the LGU's. As noted in the legislative background cited earlier, the Commissioner of DNR was required to address allowing variances from the minimum statewide shoreland standards. LGU's are also empowered to plan and adopt official zoning controls through M.S. 394 for counties and M.S. 462 for cities and townships, which authorize local governments to regulate planning, development, redevelopment, housing, etc..

The 1970 and 1976 shoreland management rules addressed two types of nonconformities: 1) "nonconforming uses"; where the use of the land or structure is not permissible in the applicable zoning district, and 2) those permitted uses that are nonconforming or "substandard" to some dimensional standard such as setback, height/size,

height/lot coverage, lot size/width, etc.. During the development of the 1989 amendments to the shoreland rules, the advice of the Revisor of Statutes and the Attorney General was that the amended rule should reference the empowering statutes for counties (M.S. 394). M.S. 462 is silent on the subject of nonconformities while M.S. 394 specifically defines nonconformity in its definition section and then discusses in detail how counties may elect to address nonconformities in M.S. 394.36. The rule-making committee decided to use the provisions found in M.S. 394 in formulating the amendments to the shoreland rules and providing guidance for LGU's and encouraged cities to follow the provisions found in M.S. 394.36. Authority and stated purposes for city and township zoning and subdivision regulation in M.S. 462 provides a framework for managing nonconformities in cities.

Under M.S. 394, any nonconformity *may* (emphasis added) be continued, except as “. . . regulated, terminated or acquired by the board . . .” (of County Commissioners, city council, township). The statute goes on to state that if the nonconformity is discontinued for more than one year or if the nonconforming building or structure “is destroyed by fire or other peril to the extent of 50 percent of its market value, any subsequent use or occupancy *shall* (emphasis added) be conforming.” M.S. 394 allows (using the “permissive” statutory word “may”) the county board (and by shoreland rules, city council or town board) to classify, regulate and control, reduce the number or extent, or provide for the gradual elimination of nonconformities. The last part of the section allows the board to use condemnation procedures to achieve their goals for managing nonconformities. All of this language is permissive, and arises from the enabling legislation for local governments to plan and zone within their boundaries.

Both M.S. 394 and M.S. 462 address the issuance of variances from any official control adopted by the LGU's. The statutes define that any application for a variance places a heavy burden of proof upon the applicant to demonstrate that the application is “in harmony with the general purposes and intent” of the official control in cases where “practical difficulties or particular hardship” prohibit strict interpretation of that control. “Hardship” as defined by both statutes, requires the applicant to meet a number of tests to address reasonable uses of the property.

The concept of “nonconformity” was addressed in the 1989 Statewide Standards for “Management of Shoreland Areas” to conform with the Minnesota Statutes. The definition of nonconformity addressed in Minnesota Rules 6120.2500, Subpart 10 is “‘Nonconformity’ means the same as that term is defined or described in Minnesota Statutes, chapter 394.”. Additionally, Minnesota Rules, Part 6120.3900, Subpart 4. B. states:

All nonconformities other than on-site sewage treatment systems must be managed according to applicable state statutes and local government official controls.

Due to the potential degradation of water quality by nonconforming septic systems, DNR has required LGU's to develop a specific plan for identifying and upgrading nonconforming systems. This subject is not discussed in this report.

DNR's Interpretation of Nonconformities and Recommended Actions in Shoreland Areas

The DNR's shoreland management rules address two major types of nonconformities, nonconforming land uses and nonconforming or substandard dimensions. When enacted, zoning controls are applied to future use and development. Therefore, existing uses and structures are allowed to continue (under the "grandfather clause") until the zoning controls require the gradual elimination of those nonconformities through replacement and amortization over a specified period of time. Any allowable changes to nonconformities should not increase the nonconformity (i.e. make it more nonconforming) but should lead to bringing that nonconformity closer to conformity with the zoning controls.

Nonconforming land uses are those land uses which were established before the zoning controls were adopted. An example would include be a commercial establishment such as a business or restaurant located within a residential district (and surrounded by residences). As stated earlier, the DNR shoreland rules address these by simply letting the LGU's handle them under their zoning authorities and local controls within the authorities of the applicable enabling legislation.

Nonconforming dimensions, although still regulated under the zoning authority of LGU's described above, are interpreted in a more stringent fashion since the dimensional standards are directly related to the two primary goals of the shoreland management program; namely protecting water quality and scenic or visual qualities. A number of dimensional nonconformities will be discussed as follows:

Inconsistent Plats (Lots of Record) - The Statewide Standards for the Management of Shoreland Areas (Part 6120.3300, Subpart 2.D.) contains the relevant language which is applicable. That part states the following: "Lots of record in the office of the county recorder on the date of enactment of local shoreland controls that do not meet the requirements . . . (of lot area and width) . . . may be allowed as building sites without variances from lot size requirements provided the use is allowed in the zoning district, the lot has been in separate ownership from abutting lands at all times since it became substandard, was created compliant with official controls in effect at the time, and sewage treatment and setback requirements of the shoreland controls are met. Necessary variances from setback requirements must be obtained before any use, sewage treatment system, or building

permits are issued for the lots. In evaluating all the variances, the board of adjustment shall consider sewage treatment and water supply capabilities or constraints of the lots and shall deny the variances if adequate facilities cannot be provided. If, in a group of two or more contiguous lots under the same ownership, any individual lot does not meet the requirements . . . (lot size and width), the lot must not be considered as a separate parcel of land for the purposes of sale or development. The lot must be combined with the one or more contiguous lots so they equal one or more parcels of land, each meeting the requirement . . . (of lot size and width) . . . as much as possible. Local shoreland controls may set a minimum size for nonconforming lots or impose their restrictions on their development."

There are a number of scenarios that need to be specifically addressed related to previously platted lots that do not meet the dimensional requirements of the statewide standards. Each of the following scenarios will be discussed separately.

Undeveloped (vacant) lots as building sites. The factors related to undeveloped nonconforming lots of record are primarily lot area and width, especially as these dimensions affect the lot(s)'s natural ability to comply with sewage treatment, water supply, and setback requirements. As discussed in the first part of the rules quotation above, a variance is not required to develop a lot that doesn't meet the area or width requirements, if the sewer and structure can be located to meet all setbacks and other dimensional requirements.

If any setbacks or other dimensional requirements could not be met, then the owner(s) could apply for a variance. The statewide standards allow local boards of adjustment to address how the applicant might address their lot(s)'s failure to meet the minimum dimensional standards. Examples might include such things as:

- modifying the lot(s)'s sewage treatment system to either contain all sewage until it can be pumped and hauled elsewhere for treatment (holding tank);
- requiring hook-up to an off-site sewage treatment system (a jointly owned or leased sewage absorption unit);

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- use of a shared or off-site water well;
- construction of a smaller size structure (and a resultant smaller size soil absorption unit); or
- use of other arrangements wherein the lot owner shares conforming services or locations with another adjacent lot owner(s).

DNR's main priority for addressing variance applications, after the applicant has satisfied the need and "hardship" tests, is that conforming sewage treatment systems and water supply facilities must be provided before any application is considered by the LGU. The shoreland management rules state that variances shall be denied if adequate facilities cannot be provided. This is in keeping with the Shoreland Program's primary goal of protecting water quality.

The more controversial portion of this part of the rules is the requirement that commonly owned, adjacent nonconforming undeveloped lots of record must be combined before they can be *sold* (emphasis added) or developed. DNR's interpretation and application of this part of the rules is that any individual lot not capable of meeting the sewage treatment and water supply standards and other dimensions as much as possible, cannot be sold for the purpose of constructing a new primary structure. The DNR's goal of protecting water quality is partly addressed by restricting the sale of undeveloped lots of record and requiring such lots to meet the sewage treatment and water supply standards. Lots which cannot meet the sewage treatment and water supply standards can be sold or used but their uses would be limited to such things as:

- use as a site for installing a soil absorption unit for neighboring properties;
- accessory building uses such as swimming pool, tennis court, sauna, solar collector, wind generator, satellite dish, detached garage, storage buildings, detached decks, detached platform, gazebo, automatic lift, stairways and landings, screen house, fish house, and pump house;
- use by self-contained recreational vehicles;
- use for recreational purposes such as camping, picnicking, and providing access to the water; and
- sale of all or a portion to a neighboring property owner to make each parcel conforming to the zoning ordinance to allow full residential usage or expansion which

includes accessory uses as well as provide a buffer for privacy.

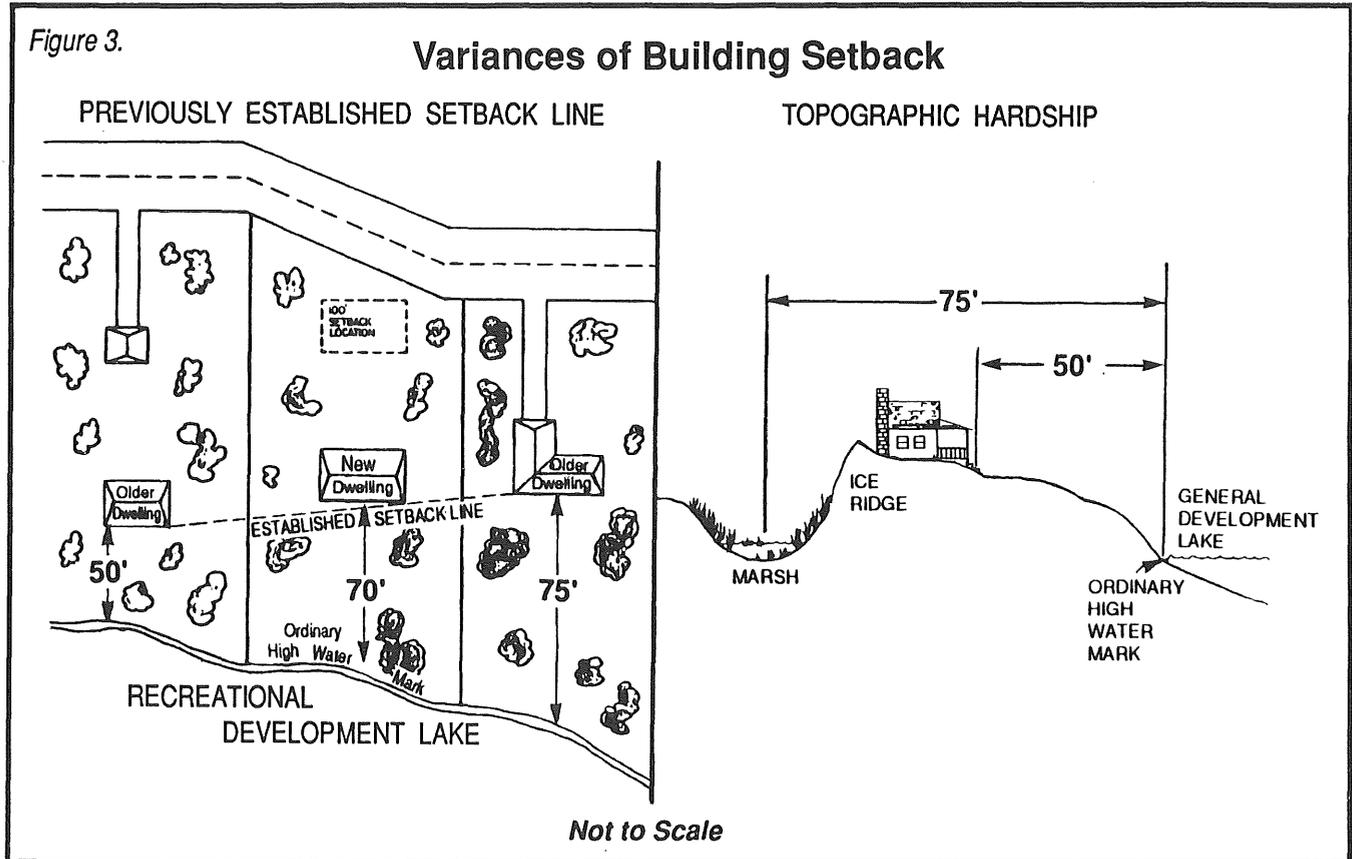
The last part of the "lots of record" portion of the statewide shoreland management rules states that local shoreland controls may set a minimum size for nonconforming lots. Many LGU's have used this part of the rules to state in their shoreland controls that primary structures will not be allowed to be constructed on lots of record containing less than a specified set of dimensions (i.e. a percentage of lot size and width such as 75% of the required dimensions for new lots). For example, 15,000 square feet of area and 75 feet of width would be required for lots along GD lakes before an existing lot of record could be developed. By comparison, the dimensional requirements for new lots adjacent to GD lakes is 20,000 square feet and 100 feet of width.

The DNR shoreland regulations apply the same principles toward nonconformities as traditional zoning theory; that is, no nonconforming use or dimension should be increased. An exception concerns building setback standards, where structures exist on the separately-owned adjoining lots on both sides of a proposed new construction on an undeveloped lot or additions to existing nonconforming structures. In either case, the local ordinance may allow structure setbacks to be altered without a variance provided the proposed addition to the building is not located in a shore or bluff impact zone and the adjoining lot's structure setbacks are addressed.

Proximity of existing development is another reason for varying the standards. To require one property owner to place their structure 100 feet from the water, while existing structures on either side are only 50 feet back, would be unreasonable. Existing structures could obstruct the view from any future structures and to strictly interpret a setback provision in such a case would not materially contribute to the goals of this program.

Application of this idea is often referred to as the "String" test wherein a theoretical string is stretched between the structures on the adjacent lots and the new structure is allowed to be constructed at the average setback of the two adjoining lots' structure setbacks (see Figure 3 on following page). The shoreland management rules state that no variance is required using the string test if not located in shore or bluff impact zone.

Local topographic relief may be a reason for granting variances to the setback standards. Steep slopes, high bluffs, or irregular topography often dictate practical location and size for shoreland homes. Uniform setback requirement cannot always be reasonably applied to all localities.



Development on Nonconforming Lots of Record.

As stated earlier, the authority to regulate uses on these type of lots comes from the enabling statutes, M.S. 394 for counties and M.S. 462 for cities and townships. Generally, DNR views any alteration or addition to a nonconforming structure in the shoreland district to be allowable only where the construction will not increase the nonconformity. For example, if the existing structure is located 30 feet from the ordinary high water level, any addition proposed for that structure can not be allowed to encroach closer to the water. Additions should only be allowed to be placed to the side or, better yet, to the rear (i.e. away from the water) of the existing structure.

Another example concerns the impervious coverage addressed in the shoreland rules as limiting impervious coverage to 25% or less of the lot area. If the existing coverage on a shoreland lot exceeds that limit, any new addition can not be allowed unless the proposed addition goes up, as a second story, rather than out to the side of the existing structure. Another possibility for requested structural additions on lots exceeding the impervious'

coverage limit would be to require the applicant to reduce some other impervious surface such as shortening or narrowing a drive way or parking area or removing a storage building. Construction of the addition more to the rear of the structure is preferred since side construction may interfere with the neighbor's view of the shoreland from their structure on the adjoining lot.

The DNR is often asked by LGU's and shoreland residents about the agency's concerns with variance applications. The first concern as discussed in the statutes is that the applicant must demonstrate that the test for "hardship" as specified in either M.S. 394 or M.S. 462 is met. Then, the DNR looks for the effect of the application on protecting water quality and then considers that application's effect on scenic or visual quality when viewed from the surface of the water body or from other shoreland areas. The shoreland rules would view construction within the shore or bluff impact zones as its highest priority consideration for evaluating variance applications. Other applications such as increasing the impervious surface coverage beyond the 25% limit would also be a high priority

but not quite as important as protecting the shore and bluff impact zones. The DNR generally has limited concerns with varying other setbacks such as side yard and road setbacks even though DNR recognizes the importance of these concerns for other public purposes such as emergency health evacuation, safety, fire, police, and transportation services. These types of concerns are more properly addressed by local providers of those services although the DNR rules address these concerns to assure they are considered in local decisions.

Another area of concern with existing nonconforming structures is how DNR interprets maintenance and repair as related to these shoreland nonconforming structures. DNR uses guidance from federal and state floodplain management rules to address these types of questions. To briefly summarize that guidance, nonconforming uses could not be expanded, however, nonconforming (substandard) structures could be maintained or repaired on an ongoing basis up to but not exceeding a cost of 50% of their current market value. Normal repair and maintenance is interpreted to include the following: re-siding; repairs and upgrades required by other codes such as plumbing, electrical systems, etc; re-roofing; installation of storm windows; insulation; installation of replacement heating or air conditioning unit, and painting. The goal is to allow amortization of such uses but not expansion beyond the current use. Again, this area would be handled by the LGU's through their enabling statutory authorities for planning and zoning.

Conclusion

This document was prepared in response to requests by various interest groups from across the state who are concerned with DNR's interpretation of its shoreland management rules, especially as more than 245 LGU's implement and administer them. This document's purpose is to put into writing the basic guidance DNR provides to both LGU's and private citizens about the administration of the DNR rules. This guidance represents a consensus of DNR program staff. As specific situations arise that may differ from those described herein, the people involved in those situations are invited to take their concerns to their local Area Hydrologist or to contact the DNR, Division of Waters, Shoreland Program Coordinator, 500 Lafayette Road, St. Paul, Minnesota 55155-4032 or by calling directly at 612-296-4800 or indirectly at 1-800-766-6000.



