



## Shoreland & Floodplain Variance Guidance Series

### The Basics: What Communities Need to Know

*This document provides an overview of the statewide regulations governing development and land use along lakes and rivers; the roles of local governments in enforcing these regulations; and what local governments need to know when considering variances to these regulations.*

### The Variance Guidance Series

Considering variances is an important but very challenging job. The DNR – in collaboration with the League of Minnesota Cities, Association of Minnesota Counties, and the Minnesota Council on Environmental Advocacy – has developed a series of resources to help local governments make informed decisions on variances affecting Minnesota’s shorelands, floodplains, and designated riverways. The purpose of the series is to:

- Ensure that Minnesota’s lakes and rivers are not compromised through the variance process,
- Guide communities in balancing legal protection of water resources with property use,
- Minimize legal challenges, and
- Empower communities to enforce their shoreland, floodplain, and riverway ordinances through better understanding of the variance process and state laws governing variances.

### Why do we have Shoreland & Floodplain Regulations?

The health of Minnesota’s lakes and rivers are affected by our activities in the watershed. How we develop land and alter the landscape affects water quality and the health of fish and animal habitat associated with water bodies.

The DNR oversees five statewide programs that regulate the use of land abutting lakes and rivers: Shoreland Management, Floodplain Management, Wild and Scenic Rivers, Lower St. Croix National Scenic Riverway, and the Mississippi River Corridor Critical Area. While the specific purposes of each program vary, their common goal is to guide development in a manner that protects public waters for all Minnesotans.

Under each program, the DNR establishes, through rule, minimum land use standards that communities must adopt and enforce through local zoning ordinances. The responsibility for protecting our lakes and rivers lies largely with local governments and the decisions they make in administering and enforcing their ordinances. Local governments have some flexibility in adopting zoning regulations to address specific concerns within the context of local goals and policies, but they must look beyond local needs to protect public water resources for everyone.



### What are Variances? Why are they Granted?

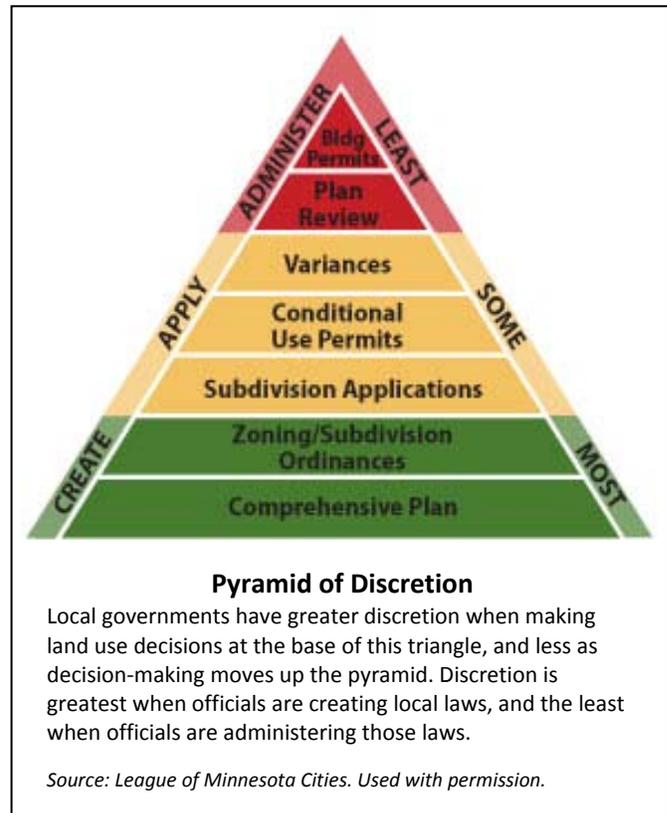
Variances are a means for departing from the strict enforcement of an ordinance as applied to a specific property. Variances may be approved for **area** or **dimensional standards** such as structure setbacks, limitations on impervious surface, bluff protection, lot size, grading and filling, and other similar provisions, but only if all criteria under state law are met. State law prohibits allowing, by variance, any **use** that is not allowed in a zoning district.

Variations allow the property owner to use his/her property in a manner that is not allowed by the ordinance, but is basically consistent with the established regulations with minor variations. Occasionally, a situation will arise where the regular application of ordinance requirements is inappropriate or unfair. In these situations, a variance may provide an equitable solution. Variations should be rare and for reasons of exceptional circumstance.

### Local Authority and Discretion

Local governments have two types of authority in making decisions. When adopting or amending a zoning ordinance, a city council or county board is exercising so-called “legislative” authority. Here, the body is advancing health, safety, and welfare by making rules that apply throughout the entire community. When acting legislatively, the body has broad discretion and will be afforded considerable deference by any reviewing court.

In contrast, when administering an existing zoning ordinance and considering a variance, discretion is much more limited. When considering a variance application, the local unit of government is exercising “quasi-judicial” authority. Here, the local government is making a judge-like determination about whether an individual variance application meets all of the legal criteria. Decisions on variances are often made by a body called the board of adjustment and appeals; in some communities the planning commission serves this function. The board’s decision may be appealed, so it is important to make legally sound decisions.



### State Criteria for Variances

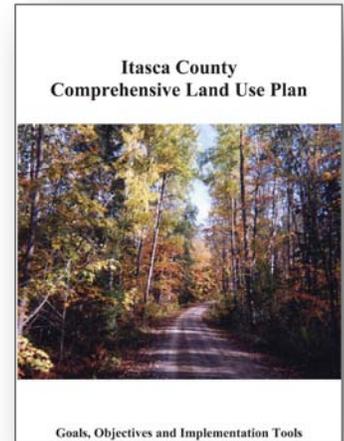
In 2011 the State Legislature revised the laws that govern the granting of variances (Minnesota Statutes, section 394.27, subd. 7 for counties, and section 462.357, subd. 6 for municipalities). Local governments may grant a variance if **all five** of the following criteria are satisfied:

- Would granting the variance be *consistent with the comprehensive plan*?
- Would granting the variance be *in harmony with the general purposes and intent of the ordinance*?
- Are there *unique circumstances to the property* not created by the landowner?
- Would granting the variance allow the *essential character* of the locality to stay the same?
- Does the property owner propose to use the property in a *reasonable manner not permitted by the ordinance*?

The last three criteria address whether **practical difficulties** exist in complying with the ordinance. Minnesota statutes state that economic considerations alone cannot create practical difficulties.

## Evaluating Variances against the Statutory Criteria

Shorelands, floodplains, and riverways are sensitive areas that need special consideration because **public resources** are at stake. Local governments must consider each criterion on its own merit, and make findings and conclusions based on the following considerations:



**1) The variance is consistent with the comprehensive plan.**

The comprehensive plan serves as a citizen-derived policy foundation for the zoning ordinance. Comprehensive plans include goals and policies for protecting natural resources. They may also contain maps that identify areas of high risk or with high ecological value where development should be avoided or carefully planned. The variance request must consider these goals, policies, and maps.

**Considerations:** *Which goals and policies apply? Is allowing deviation from the ordinance consistent with these goals and policies? Why/why not?*

**2) The variance is in harmony with the purposes and intent of the ordinance.**

A variance decision is a balancing test that requires weighing the need of an individual property owner against the interests of other shoreland residents and all state residents. Ordinances will typically state the purpose for a particular set of standards or requirements. (*Note: If the purposes for specific standards are not clearly articulated in the local ordinance, a resource for determining the purposes is the [Statement of Need and Reasonableness \(SONAR\)](#) that accompanied the statewide rules on which the ordinance standards are based.*)

**Considerations:** *What are the purposes and intent of the Ordinance? What is the particular standard being deviated from intended to prevent or protect? Will deviating from the required standard on this property undermine the purposes and intent? Why/why not?*

**3) The problem is due to unique circumstances of the property not created by the landowner.**

Unique circumstances relate to physical characteristics of the land such as lot shape and dimensions. Unique circumstances do **not** include personal matters unrelated to the property itself, such as health difficulties, a growing family, or design preferences, or changes made to the property by the property owner that prevent compliance with the ordinance.

Steep slopes, floodplains, riparian vegetation, and erodible soils are common, and not usually unique, in shoreland areas. Owning and developing land in these sensitive areas requires acknowledgment of these conditions and designing with them in mind; that is the point of shoreland and floodplain regulations.

**Considerations:** *What distinguishes this property from other properties subject to the shoreland regulations to justify deviation from the requirements when others must comply? Has the applicant demonstrated that no feasible alternatives exist that would not require a variance? Is the application motivated by economic concerns or design preferences?*

**4) The variance, if granted, will not alter the essential character of the locality.**

This criterion requires assessing whether the resulting structure or land disturbance will alter the hydrology, soil stability, vegetation, aesthetics, and landscape features on the site, or be out of place or scale, or otherwise inconsistent with the surrounding area.

**Considerations:** *How does the size and character of the structure compare to other structures in the area or expectations as described in the comprehensive plan or other policy*

*documents? To what extent does the structure encroach into sensitive natural areas such as bluffs or shores? Is significant soil disturbance or vegetation removal required? What is the long-term risk from changing hydrology and increasing erosion and subsequent sediment in public waters? Do the structure and shoreline alterations affect the character of the area?*

**5) The proposal puts the property to use in a reasonable manner.**

The standards in the local ordinance are established to protect public water resources and adjoining property. It may not be reasonable to deviate from them if doing so would undermine those protections. For example, a minor deviation on a setback may not reduce the protective function of the setback, but a major deviation would. Variance requests should only be considered reasonable when no other alternatives exist, particularly if the public water at stake is impaired or at risk of becoming impaired.

**Considerations:** *How substantial is the request in relation to the standard? What might be considered a reasonable deviation from the rules in a non-riparian area could have significant impacts in a riparian zone. How justifiable are the reasons for the variance request in the context of sensitive shoreland areas and the potential impacts on public waters?*



Owner's design preference for a walkout is not reasonable in a sensitive bluff area.

## A Note on Floodplains...

FEMA requires that in floodplains, the requirements of 44 Code of Federal Regulations (CFR), Section 60.6 (variances and exceptions) be met. These requirements specify that variances: 1) can only be granted for lots of one-half acre or less; 2) cannot cause any flood stage increase or additional threats to public safety; 3) cannot cause extraordinary public expense; and 4) the variance is the minimum necessary to afford relief. [Specific language that complies with FEMA's requirements is provided in the DNR's sample floodplain ordinances.](#)

Minnesota Rules, part 6120.6100 also talk about allowing variances where there is "undue hardship" if consistent with state and national laws and programs. It also specifies that "although variances may be used to modify permissible methods of flood protection, no variance shall provide for a lesser degree of flood protection than stated in these standards." This has been interpreted to mean that a variance can be given to allow an alternate form of flood protection not allowed in the local government's floodplain ordinance (e.g., "wet" instead of "dry" floodproofing of principal non-residential structures), but the level of floodproofing must always be to the regulatory flood protection elevation.

The community granting the variance must always be mindful of FEMA's additional variance criteria noted above and that variances that modify the method of floodproofing will likely result in expensive flood insurance premiums.

## Making a Decision

After evaluating the variance application against the criteria, several outcomes can occur:

- If the applicant fails to prove that **all** criteria are met, then the variance should be denied.
- If the applicant demonstrates that **all** criteria are met, then the variance may be granted.
- If findings support granting the variance, but the project will impact the public resource, then the variance may be granted but conditions should be imposed to mitigate the impacts.

## Conditions of Approval

If findings support granting the variance, impacts to the lake or river and riparian areas should be considered in developing appropriate conditions to mitigate them. Minnesota law allows communities to impose conditions when granting a variance as long as the conditions are **directly related and roughly proportional to the impact created by the variance**.

When the variance involves nonconforming lots of record in shorelands, Minnesota law<sup>1</sup> states that communities **shall require** the property owner to address, when appropriate, storm water runoff management, reducing impervious surfaces, increasing setbacks, restoration of wetlands, vegetative buffers, sewage treatment and water supply capabilities, and other conservation-designed actions.



Vegetative restoration may be an appropriate condition to mitigate the impacts associated with a variance.

Variance conditions serve to ensure that the intent of the regulation is met or to mitigate the impact of the proposed activity. Through thoughtful conditions that can be enforced long-term, the intent of the regulation can often be achieved.

## Best Practices in Considering Variances

In making a quasi-judicial decision that is likely to stand up in court, the decision-making body should apply the following best practices, some of which are required by law. Following these practices will also increase public acceptance of the decision, though not necessarily agreement with the decision.

### ***Support the decision with “findings of fact”***

The local government should make “findings of fact.” Findings of fact is a legal term for simply saying “the reasons used to support a decision.” Findings are very important. To be legally defensible, findings should not just state that legal criteria have been met, but explain *how* the criteria are met. The purpose for making findings is to bridge the gap between the facts and the ultimate decision. Variance findings should explain how the relevant facts support or do not support the legal criteria described above. The DNR’s “[Formula for Variance Findings](#)” will help guide the development of good findings. An “[example of Good Findings](#)” was developed with the formula to demonstrate what good findings might look like.

Discrimination and prejudice should not play a role in deciding on a variance request, nor should a poll of those attending a public meeting. General statements of support or opposition should not be used as a finding of fact. Statements made by the public that are concrete and factual relating to the criteria can be useful in developing findings. Findings should be more than a mere recitation of statutory criteria; they must provide the factual basis that leads to a rational conclusion.

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<sup>1</sup> Minnesota Statute, section 462.357, subd. 1e, item (i)

### **Create a public record that supports the decision**

Minnesota law requires that the reasons for a variance decision be articulated in the record. A written document (such as the DNR's "Formula for Variance Findings") clearly stating the findings and adopted by the community is recommended to supplement meeting minutes. The law also **requires written findings** whenever an application is denied. Findings should explain the decision by listing relevant facts, addressing each of the legal criteria, and explaining how each criterion is/is not satisfied as part of the conclusions.

### **Use an open and transparent process for making the decision**

Facts or evidence used for making findings should be available for the public to observe and review. Typical sources for gathering relevant evidence include: the variance application documents, documents submitted by the public (paper or digital), public meetings and hearings. Holding a public hearing is an important component in developing the record and eliciting facts. State statute requires that counties hold a public hearing for variances.



Notices of public hearings should be sent to nearby property owners, the DNR, and other interested parties. The body making the decision should discuss the facts, deliberate on the decision and make the decision at a public meeting. Public officials should refrain from prejudging a situation or advocating for a decision before the facts are established. The burden of proof that a variance is warranted lies with the applicant, not the board, planning commission, or staff.

Under all statewide land use programs, local governments are required to provide the DNR with copies of notices for public hearings to consider variance requests, as well as the final decisions. Decisions should include the complete record for the decision, including findings of fact.

A variance application is subject to Minnesota's "60-day rule<sup>2</sup>." This means that a variance request must be approved or denied within 60 days from the date the application was submitted. The rule allows one 60-day extension, if done in writing and within the initial 60-day period. Failure to approve or deny a request within the statutory time period is deemed an approval.

### **Further Considerations**

Be aware of the rules for Open Meetings, Conflicts of Interest, the 60-day Rule, and the constitutional limits on government regarding Takings, Due Process and Equal Protection.

### **Resources on Variances**

Additional resources, including example variance requests, FAQs, sample variance forms and resolutions, sample mitigation scoring systems, review checklists, stormwater management best management practices, native plant listings, rare species information, training opportunities, and more, visit:

[http://www.dnr.state.mn.us/waters/watermgmt\\_section/shoreland/variances.html](http://www.dnr.state.mn.us/waters/watermgmt_section/shoreland/variances.html)

#### **References**

Statewide Wild & Scenic River and Lower St. Croix Rules – *Minnesota Rules, Chapter 6105*

Statewide Shoreland Management & Floodplain Management Rules- *Minnesota Rules, Chapter 6120*

Variance Criteria for Counties - *Minnesota Statutes, §394.27, subd. 7*

Variance Criteria for Municipalities - *Minnesota Statutes, §462.357, subd. 6*

<sup>2</sup> MS 15.99 Time Deadline for Agency Action