

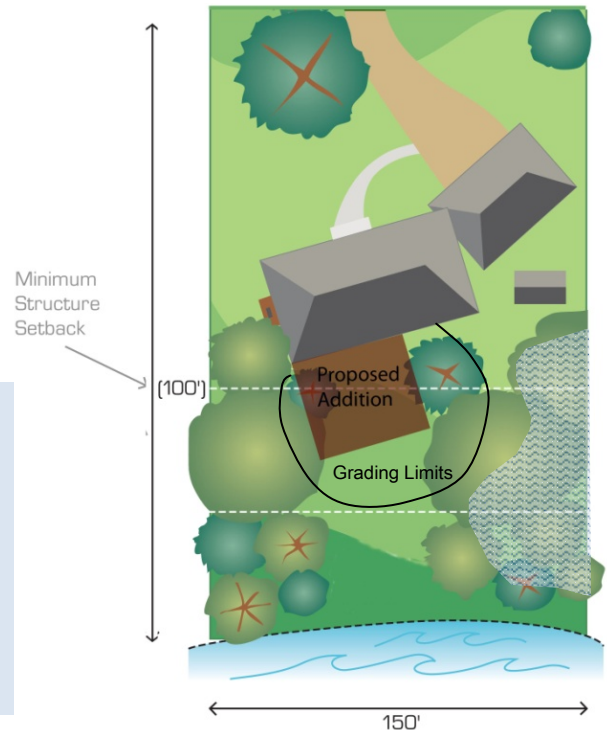
This is one of a series of examples developed as guidance for considering variance requests along lakes and rivers. Consult your local shoreland, floodplain, and river-related ordinances.

Why are setbacks from the OHWL important?

The Ordinary High Water Level (OHWL) is a dynamic area of high biodiversity and ecological function, as well as the regulatory line that separates local land use and state public waters jurisdictions. Setbacks from the OHWL are established in statewide rules and administered through local ordinances to ensure adequate spacing between structures and public waters to protect against runoff and pollution, and to preserve the natural shoreline. Local governments have limited discretion to deviate from - or grant a variance to - a required setback. They may do so only if *all* of the variance criteria established in state statutes and their local ordinances are met. In evaluating such requests, local governments must examine the facts, determine whether all statutory and local criteria are satisfied, and develop findings to support the decision. If granted, local governments may impose conditions to protect resources. An example OHWL variance request, with considerations, is provided below.

Example OHWL Setback Variance Request

A property owner requests a variance to construct a 1000 square foot addition on an existing home on a lake. The proposed addition would be located 75 feet from the OHWL of the lake instead of 100 feet as required by the local shoreland ordinance. The property owner claims that the addition is needed to provide extra space for a growing family, that it will improve the value and appearance of the property, and that there is no other reasonable location on the property due to the design of the home and an adjacent wetland.



Considerations for Findings

A good record and findings help keep communities out of lawsuits and help them prevail if they find themselves in one. In evaluating the facts and developing findings for this variance request, *all* of the following statutory criteria must be satisfied, in addition to any local criteria:

- Is the variance in harmony with the purposes and intent of the ordinance?**

Considering a variance request is a balancing test that requires weighing the need of an individual property owner against the purposes of the local shoreland regulations - in this case a setback from the OHWL - for protecting public waters. Statewide Shoreland Management Rules establish structure setbacks from the OHWL for several reasons, including but not limited to managing the effects of shoreland crowding, preventing pollution of surface water, and maintaining property values and natural characteristics of shorelands. These regulations are implemented through local ordinances.

Considerations: *What are the purposes of the OHWL setback as established in the local shoreland ordinance – what is it intended to prevent or protect? Will deviating from the required OHWL setback on this property undermine the purposes and intent? Why or why not?*
- Is the variance consistent with the comprehensive plan?**

The local comprehensive plan establishes a framework for achieving a community's vision for the future. Most plans contain goals and policies for protecting natural resources and shorelands, as well as maps that identify areas of high risk or with high ecological value where development should be avoided. The variance request must be considered with these goals and policies in mind. Maps should be consulted to determine if the property is within any areas identified for protection.

Considerations: *Which goals and policies apply? Is allowing structural encroachment within the OHWL setback area on this property consistent with these goals and policies? Why or why not?*

- **Are there *unique circumstances* to the property not created by the landowner?**

Unique circumstances relate to physical characteristics of the land such as lot dimensions, steep slopes, poor soils, wetlands, and trees that prevent compliance with the required setback. These *do not* include physical limitations created by the property owner or personal circumstances such as a growing family or design preferences. Consider what distinguishes this property from other shoreland properties to justify why the applicant should be allowed to deviate from the required setback when others must comply. **Considerations:** *What physical characteristics are unique to this property that prevent compliance with the setback requirement? Were any difficulties in meeting the setback created by some action of the applicant? Has the applicant demonstrated no other feasible alternatives exist that would not require a variance?*

- **Will the variance, if granted, alter the *essential character* of the locality?**

Consider the size of the proposed structure, the extent of encroachment, and how it relates to the shoreline and hydrology of the riparian area. A large addition and associated grading close to the shoreline can detract from the natural appearance and character of the lake and its riparian areas and degrade water quality by altering topography, drainage, and vegetation in the riparian area, negatively affecting recreational, natural, and economic values. **Considerations:** *Does the variance provide minimal relief or a substantial deviation from the required setback? Does it affect the natural appearance of the shore from the lake? Does it affect the hydrology of the area?*

- **Does the proposal put property to use in a *reasonable manner*?**

Examine the reasons that the variance is requested and evaluate them in light of the purposes of the local shoreland ordinance and the public water resource at stake. The OHWL setback is generally intended to keep development away from the water's edge and to maintain the natural characteristics and function of the shoreline. As such, development within the setback area should only be considered when no other alternatives exist, particularly if the public water at stake is impaired or at risk of becoming impaired. **Considerations:** *Has the applicant demonstrated that the proposed addition is reasonable in this location given the sensitivity of the riparian area, any known water quality impairments, and the purposes of the setback regulations? How or how not?*

Note: *The last three criteria address practical difficulties. Economic considerations alone cannot create practical difficulties.*

Range of Outcomes

Based on the findings, several outcomes can occur:

- If the applicant fails to prove that *all* criteria above are met, then the variance must be denied. For example, the local government may find the proposed size and design of the addition creates the circumstances necessitating a variance rather than unique physical characteristics of the property.
- If the applicant demonstrates that *all* criteria are met, then the variance may be granted. For example, the local government may find that the circumstances are unique given the adjacent wetland, that the encroachment of the addition within the setback is reasonable given its orientation, that it won't alter the hydrology and natural characteristics of the riparian area, and that there would be no other impacts.
- If the variance is granted and the addition in any way affects the setback area or public water, then conditions may be imposed to mitigate the impacts. For example, the local government may find that the addition increases the home's visibility from the water and that the associated grading alters the hydrology of the area, and impose conditions such as reducing the size of the addition, decreasing the amount of grading involved, requiring tree protection measures, and requiring rain gardens to infiltrate additional runoff.

Conditions on Variances

If findings support granting the variance, consideration must be given to the impacts on the lake or river and the riparian area, and appropriate conditions to mitigate them. Conditions must be directly related and roughly proportional to the impacts created by the variance. Examples are provided below:

- Additional impervious coverage within the setback area – require a smaller addition, rain garden, riparian buffer, or other method to reduce and/or infiltrate additional runoff before entering the lake;
- Increased crowding and visibility of structures from the lake – require the planting of native trees, shrubs, and grasses to reduce the visibility of the structure and maintain natural characteristics; and/or
- Reduced natural characteristics and habitat – require protection of existing trees during construction and/or restoration of an equivalent area within the setback to native vegetation to maintain the natural characteristics and ecological functions of the riparian area (which also treats stormwater).

More information at: www.dnr.state.mn.us/waters/watermgmt_section/shoreland/variances.html