



Minnesota Department of Natural Resources

500 Lafayette Road
St. Paul, Minnesota 55155-4032

December 21, 2009

Mr. Ben Oleson, Zoning Administrator
Corinna Township
9801 Ireland Avenue NW
Annandale, MN 55302

Dear Mr. Oleson:

Regarding your letter dated November 13, 2009, and a similar letter to the Minnesota Pollution Control Agency requesting clarification on state and agency statutes and rules governing subsurface sewage treatment in shoreland areas, I offer the following comments. Please note that these answers do not take the place of formal legal advice from a qualified attorney and are not binding on either the county or the township. See the PCA response for answers specific to subsurface sewage treatment system rules.

First, you ask whether MN Rules 6120.3400 or 6120.3900 (or other applicable rules/statutes) tie the administration of a sewage treatment ordinance to the administration of a zoning ordinance within the same shoreland area. While separate ordinances, statutes, rules and agencies are involved, it is reasonable that there be crossover or linkage between the two ordinances at the local level. For example, MN Rule 6120.3400, Subp. 3B. specifies that "all private sewage treatment systems must meet or exceed applicable rules of the Minnesota Department of Health, the Minnesota Pollution Control Agency, specifically chapter 7080... and any applicable local government standards." It goes on to establish setback standards for the various shoreland classes and to provide options whereby a local government can achieve compliance including the required reconstruction of an existing nonconforming sewage treatment system "whenever a permit or variance of any type is required." Clearly, what constitutes a conforming system is determined by PCA statutes and rules administered through local sewage treatment system ordinances. The shoreland ordinance administered through a local government's planning and zoning authority provides a mechanism whereby required sewage treatment system setbacks can be achieved and nonconforming systems can be identified and brought into compliance. The two separate ordinances serve to complement but not displace each other. This applies regardless whether a local government is a township or a county. However, a township is bound by MN Statute 394.33 to be as strict or stricter than its county in the management of its planning and zoning authority. More specifically, you asked if the DNR would require a county that maintains its shoreland zoning authority within a township to continue enforcing its sewage treatment ordinance within the shoreland area of a township that has adopted a sewage treatment ordinance compliant with PCA standards. The answer is no.

Second, you ask if DNR interprets the above rules and statutes as prohibiting a township/city from adopting and administering a SSTS ordinance applicable to shoreland areas if the County Board has not accepted the township's attempts to adopt shoreland ordinances under MN Rule 6120.3900, Subp. 4a.B. Essentially, this rule is a rephrasing of MN Statute 394.33. In reviewing the Statement of Need and Reasonableness (SONAR) for this section of the shoreland rules, there is reference to some of the limitations of township zoning that were identified in Shoreland Update Project Report No. 2 (1984). Concerns over the problems of multi-jurisdictional zoning prompted the added requirements that conclude saying, "after adequate shoreland management controls are adopted by a township, property owners do not have to obtain similar permits or approvals under the county's shoreland controls."

“Adequate shoreland management controls” means that the same full range and degree of shoreland controls that were managed by the county are to be managed by the township so that similar permits or approvals by the county are no longer required. This has been called the “all or nothing” approach that has helped dictate DNR policy on township zoning over the past twenty years.

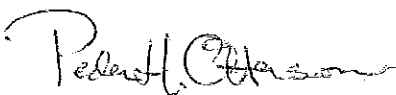
An issue involving a township seeking partial shoreland controls in 2002 prompted a policy review and a DNR Discussion Paper written in consultation with representatives of the Association of Minnesota Counties and Minnesota Association of Townships (September 10, 2003). This paper was subsequently revised on January 9, 2008 (see attached) to clarify that how a township and county resolve their differences regarding the requirements of MN Statute 394.33 is not the DNR’s responsibility to decide. In light of recent questions regarding subsurface sewage treatment systems and building permits, I would add that it is also not within the DNR’s authority to make such decisions. The answer to your second question is also no. DNR cannot interpret its rules to preclude a township/city from adopting and administering a SSTS ordinance in areas still administered under county shoreland controls.

However, the 2003 Discussion Paper does present options whereby the issues between a township and county over administration of shoreland areas might be resolved. The preferred option is to work through a joint powers agreement or contract out specific services to ensure the integrated management of shoreland areas across jurisdictional boundaries. Such an approach is also listed among the options for shoreland management by townships in the draft shoreland rules.

There has been much progress at all levels of government since the shoreland rules were first promulgated in 1970. At the time, full county planning and zoning was quite limited and there were no standards for shoreland development, sewage treatment systems, stormwater management, feedlots, to name just a few major land use and related water quality issues. To their credit, local governments have come a long way towards addressing these issues. So have state agencies. Through the development of new statutes and rules, agencies help to provide guidance and clarity to local governments in carrying out their required duties to ensure the public health, safety and welfare. The revised shoreland rules make reference to other agency rules and statutes that may apply to shoreland areas. Where possible, as with the PCA’s revised feedlot rules, DNR has simplified its shoreland standards so that feedlots need only follow the required PCA rules. A similar approach applies to both stormwater management and sewage treatment systems where considerable effort has been taken to coordinate with PCA to ensure transparency across administrative boundaries so that related programs complement each other without overlapping.

I acknowledge the efforts that both Corinna Township and Wright County have taken to ensure sound land use decisions affecting water quality and wish them both well in finding ways to work through their differences to achieve resolution on issues of disagreement on the management of shoreland areas.

Sincerely,
DIVISION OF WATERS



Peder H. Otterson, Shoreland Program Manager

Cc: Tom Salkowski, Wright County Zoning Administrator
Dale Homuth, Region 3 Hydrologist
Gretchen Sabel, Pollution Control Agency

Encl.: 2

TOWNSHIP ZONING AND SHORELAND MANAGEMENT

A DNR Discussion Paper written in consultation with representatives of the Association of Minnesota Counties and Minnesota Association of Townships
September 10, 2003, Revised January 9, 2008*

Thanks to the following persons for participating in a discussion on township zoning as it relates to the statewide shoreland management program. Present for the discussion at DNR Waters on February 7, 2003, were Kent Sulem, John Dooley, Minnesota Association of Townships; Dave Weirens, Association of Minnesota Counties; and Russ Schultz, Peder Otterson and John Stine, DNR Waters. Present to observe was Mr. Ron Radeke, Wabana Township, Itasca County. This paper is a refinement of that discussion.

The “all or nothing” approach to township zoning has been DNR Waters’ preferred approach since the revision of the Statewide Standards for Management of Shoreland Areas (Minnesota Rules 6120.2500 – 3900) went into effect in 1989. This took shape from an April 29, 1977, Opinion of the Attorney General that stated that the adoption of shoreland zoning regulations by towns has the effect of excluding the application of the county shoreland regulations within that town. A town’s shoreland regulations must be as restrictive or more restrictive than those of the county. “A person whose property is subject to a town shoreland zoning ordinance does not have to get a county permit for proposed construction since this would be an unnecessary burden on the individual.”

Similar words are found in the 1989 revision to the shoreland rules, Minnesota Rules 6120.3900, Subp. 4a: “Shoreland management controls adopted by townships will only be considered to be consistent with county controls if they cover the same full range of shoreland management provisions covered by the county controls.” The Statement of Need and Reasonableness (SONAR) to the 1989 revised shoreland rules explained what was meant. “The problem with the zoning authority of townships is an issue of capability and accountability. Adopting and administering a shoreland program is not a small undertaking for a local government.” Reference was made to the *Shoreland Update Project Report No. 2* (1984) which found that townships frequently adopt only portions of the shoreland program leaving the county to administer other portions. This can lead to confusion, poor shoreland management, unnecessary overlap, litigation, and, in some instances, gaps in shoreland controls. The 1984 study found a township’s limited fiscal and administrative resources to be the biggest problem. From a DNR perspective, this can raise questions of accountability, as noted in the 1984 study. Although a township cannot adopt controls that are less strict than its county, the county has no obligation to oversee the township’s enforcement of these controls. Without such oversight by the county, there is added burden and, at times, confusion to all parties from the local property owner to township, county and state government. The “all or nothing” approach in the shoreland rules sought to ensure that a township not only has the tools, but the capability and resources to carry out its responsibilities in shoreland management.

Twenty years later, this issue is more in the forefront as all levels of government struggle to make ends meet. County, state, city and township all face the challenge of maintaining core services to their constituents with fewer staff and financial resources.

*Revision based on discussion from 1/9/2008 Water Management Committee Meeting
P. Otterson

DNR core services include assistance and technical support to local governmental units on shoreland management issues. For LGUs, it involves the direct administration of shoreland management controls within their other planning and zoning responsibilities.

It is difficult to know what lies ahead for township zoning. In some areas of high growth and public participation, townships may, indeed, be willing, able and have the resources to take on shoreland management responsibilities in full compliance with the rules.

Sometimes, a township enacts its own zoning rules because of some disagreement with the county. Later, the township may seek to give back its authority to the county. For example, where formerly there were twelve townships with zoning authority around the City of Duluth; today, there are only four. In another county, there was confusion between the county and its townships on who was enforcing required floodplain controls. All five townships have now returned floodplain zoning responsibility to the county.

Local water planning and its growing link with comprehensive land use planning is helping to make the connection between land use and water quality in a growing number of counties. Sometimes, this has led to creative joint powers arrangements among local governmental units and the pooling of resources to address common needs and interests. DNR Waters continues to support and encourage such initiatives. Much can be gained by working together to address common issues of land and water resource management. Unfortunately, even the best studies, citizen participation and comprehensive planning efforts do not always result in immediate changes to local ordinances. What, then, can a township do when it is not satisfied with county actions?

1. Adopt shoreland management controls in accordance with M.R. 6120.3900, subp. 4a.* DNR Water's past interpretation of "full range of shoreland management provisions" specified in the rules included its other land use programs (Floodplain Management and Wild & Scenic River Program). This is because there is significant overlap across the programs. For example, the width of the shoreland zone on rivers is 300 feet OR the landward extent of a designated floodplain. Similarly, shoreland rules require that structures be placed three feet above a certain water elevation OR in compliance with an established floodplain ordinance. Wild and Scenic River rules are similar to the Shoreland Management rules, but apply to designated reaches of seven different rivers. However, a narrower interpretation of M.R. 6120.3900, subp. 4a is that "full range of shoreland management provisions" applies only to the shoreland standards in M.R. 6120.2500 – 6120.3900, and nothing else. Formal policy is unclear on which approach to follow.

The following table shows some of the complexities involved in the administration of the three DNR land use programs and why townships should think twice before taking them on. The local adoption, administration and enforcement of these programs require the ongoing service of qualified professionals or those who are knowledgeable in the field. Land Use Districts show up as a component in all three programs. However, they can address different concerns. In Shoreland Management and Wild and Scenic River

*Revision based on discussion from 1/9/2008 Water Management Committee Meeting
P. Otterson

Program, land use districts may be set up based upon specific lake or river classifications or sensitive natural resource areas. In Floodplain Management, the districts distinguish between uses within the Flood Fringe and Floodway. In all instances, land use districts depend upon the development of a comprehensive plan, important to all good zoning.

Shoreland Management	Floodplain Management	Wild & Scenic Rivers
Statewide oversight	Statewide/Federal oversight	Specific river laws (7)
Shoreland Classifications	Floodplain Classifications	River Classifications
Land Use Districts	Floodway/Flood Fringe	Land Use Districts
Agriculture standards		Agriculture standards
Standards for lot sizes	Setback outside Floodway	Standards for lot sizes
Setbacks from OHWL	Flood Protection Elevations	Setbacks from OHWL
Shoreland alterations	Fill in Floodway	Shoreland alterations
Grading & filling/excavation	Grading & filling/excavation	Grading & filling/excavation
Stormwater Management		Stormwater Management
Limits to % impervious		Limits to % impervious
Bluff Impact Zones		
Shore Impact Zones	Floodway setback	
Subdivision controls	Subdivision controls	Subdivision controls
Controlled Access Lots		
Structures (size, location)	Structures (size, location)	Structures (size, location)
Planned Unit Developments	Water well construction	Planned Cluster Developments
Sewage Treatment Systems	Sewage Treatment Systems	Sewage Treatment Systems
Public facilities/infrastructure	Public facilities/infrastructure	Public facilities/infrastructure

“Full range of provisions” does not include ordinances and controls outside the scope of shoreland management even though they may relate to it. For example, a township could impose a minimum five-acre lot size to apply to all properties zoned residential within its boundary, whether within a shoreland area or not. In another example, a town might choose to adopt a town-wide tree ordinance regulating the planting and/or cutting of trees that would apply to all properties in the town, whether located within a shoreland area or not. To be enforceable within the shoreland area, the regulation would have to be at least as restrictive as the most restrictive regulation applicable to that use within the designated shoreland area. How a township and county resolve their differences regarding the statutory requirement that a township’s controls need to be as strict or stricter than the county’s is not DNR’s responsibility to decide.*

The statement at the end of this section of the rules, “[p]roperty owners do not have to obtain similar permits or approvals under the county’s shoreland controls,” applies when a township has adopted the full range of shoreland management provisions covered by county controls, contains dimensional standards at least as restrictive as those in the county and does not allow land uses in particular areas that are not allowed by the county.

2. Adopt separate controls apart from shoreland management that address a township's concerns. A township cannot simply call its ordinance something different from "shoreland management" and then effect controls that are essentially those found in shoreland management. If it achieves the functions of shoreland management, it is shoreland management. Otherwise, such actions would just add to the confusion.

Township land use controls are considered permissible within a county-designated shoreland area if they address general zoning and land use issues and are not in conflict with shoreland and county regulations (as strict or stricter than both) and apply to all like properties within the township.

For clarity of purpose and ease of administration, it is best when a township limits itself to certain generic areas of concern that apply to the full township such as roads, uniform lot sizes or restrictions on clear cutting, etc. and depends upon the county for the more detailed management required under the three state mandated land use programs in DNR. Through such an adaptive approach, a township can help ensure that all parties involved are being treated equitably.

3. Contract with the county or adjacent municipality through joint powers agreement on the sharing of services and cooperative management of shoreland areas. This can work either way. Counties that are overtaxed with work might contract with a township to undertake certain work within its boundary. Cooperative agreements enhance the coordination and communication of all involved. They help to define roles and accomplish common tasks. One example from Cass County involves a number of townships that formed a joint powers agreement to establish surface water use controls in an area of common interest.

4. Continue to work with the county to develop and implement countywide shoreland management controls that meet the needs of the township. Temporary setbacks and disagreements among local governments can be expected. However, the established tools of comprehensive land use planning and local water planning are most effective when applied at the county level with smaller units like townships or watershed basins incorporated as subsets. With its own limited resources, the DNR is also better able to serve the combined needs of a county than the separate needs of a number of townships.

Conclusion

DNR Waters acknowledges the desire that some townships have for the enactment of stricter standards than those of its county. We suggest four alternatives on how these concerns can be met and still conform to the established "all or nothing" approach found in the Shoreland Rules. Should a township choose to adopt portions of shoreland controls that are not in compliance with the rules, they do so at their own risk and without the legal, technical and administrative support that DNR Waters provides to Local Governmental Units that have formally adopted shoreland management controls that are in substantial compliance with the rules and statutes.

Shoreland Management Position on Township Zoning

P. H. Otterson
January 14, 2003

Issue: A township seeks to adopt partial shoreland controls because of the county's failure to adopt stricter shoreland controls based upon the comprehensive plan that it adopted earlier. This paper is a review of the established policy and how it evolved.

Shoreland Rules

When read in its entirety, M.R. 6120.3900, Subp. 4a not only requires that township controls be consistent and at least as restrictive as the county, but that they "will only be considered to be consistent with county controls if they cover the same full range of shoreland management provisions covered by the county.." In addition, a township must demonstrate to the county board that its proposed ordinance and administration is at least as restrictive as the county's and must provide for administration and enforcement at least as effective as county implementation. The final part of this section covers notification procedures and ends, "[a]fter adequate shoreland management controls are adopted by a township, property owners must only obtain necessary permits and approvals as required in the township shoreland management controls. Property owners do not have to obtain similar permits or approvals under the county's shoreland controls."

Statement of Need and Reasonableness (SONAR)

The SONAR noted that existing rules did not deal specifically with townships because Minnesota Statutes were directed specifically to counties and cities to adopt minimum shoreland standards, and that these are the primary planning and zoning authorities in the state with few exceptions. Townships do have the authority to zone, and some have been successful while others less so. "The problem with the zoning authority of townships is an issue of capability and accountability. The shoreland program is not a small undertaking for a local unit of government when you consider all aspects of the program." *The Shoreland Update Project Report No. 2* (1984) found that townships frequently adopt only portions of the shoreland program leaving the county to administer other portions. This can lead to confusion, poor shoreland management, unnecessary overlap, litigation, and, in some instances, gaps in shoreland controls.

Shoreland Update Project Report No. 2 (1984)

The report noted the growing number of townships and small municipalities managing shoreland programs as a source of concern. In general, townships are not managing their shoreland programs as effectively as counties for the following reasons:

- a lack of access to professional assistance (small tax base limits allocations for professional assistance)
- can be parochial in their approach (different standards applied to non-residents)
- minimal involvement by DNR
- greater likelihood that lakes will cross jurisdictional boundaries (administrative problem plus issues of consistency across one lake body)

- some townships are hostile to land use management and shoreland management in particular
- limited fiscal and administrative resources is the biggest problem.

There are similar problems with small cities except that they usually have a much smaller land mass than a township. “Increasing numbers of townships and small municipalities in shoreland management could make effective monitoring and assistance by field staff problematic at best.” The report also indicated it was not clear what oversight authority a county has of a township once it assumes its own control.

July 9, 1990, letter from DNR to counties re: township zoning requirements in SLM

Letter referenced an April 29, 1977 ruling of Attorney General who found it would be an “unnecessary burden on an individual.. to require him to obtain permits from both town and county where compliance with the town’s ordinance effectively amounts to compliance with the county’s ordinance.” The letter went on to state how this interpretation included both the Floodplain Management and State Wild and Scenic River Program. “If a township elects to administer and enforce one of these programs, it must elect to administer and enforce them all as they occur within the township boundary.”

Shoreland Issues Resolution Memo, November 30, 1990

Township zoning. All or nothing approach. “Townships cannot selectively choose what they want to administer. If a township elects shoreland management, it is responsible for the full program, and must also elect floodplain management and wild and scenic river program, if within its boundary. Along with the responsibility, the township must demonstrate to the county that it has the capability and funds to properly administer its zoning authority at a level as strict or stricter than the county’s. This does not prevent the township from contracting out certain services ... to the county or another appropriate party. Ultimate responsibility and accountability, however, must rest with the township. The rule is not intended to limit township zoning, but to ensure a uniform and effective approach to administration of the State’s lake and river resources. It also encourages county, town and city government to consider partnerships on local administration ... Once the new shoreland rules are adopted by the county, the county ordinance will take precedence until such time as the DNR certifies a town ordinance.”

Nov. 28, 1990, Letter from Bill Clapp, AGO, to Veryl Morrell, Zoning Administrator, Steele County on township zoning

Clapp put forward the following points which support the “all or nothing approach”:

- Concurrency. The Legislature doesn’t intend that a landowner be subject to two ordinances at once.
- County has priority over town in zoning (Berggren v. Town of Duluth, 1981).
- Administration. Town is responsible for administering and enforcing its ordinance, but can contract these functions to the county. However, the county is not obligated to enforce a township ordinance (Scinocca v. St. Louis Co., 1979).

- Relative Restrictiveness. “Because split administration would be a mess, the sounder position is that the town ordinance is in its entirety of no effect unless all its provisions satisfy M.S. 394.33.”

Partial town ordinances lead to administrative confusion and are not comprehensive. The Legislature expects a zoning authority to have a comprehensive plan and ordinances which implement it.

Land Use Operating Manual, 1990

p. 4-11. Township Ordinance Adoption. Lists the provisions of 6120.3900, 4a followed by statement: “Operationally, the DOW will apply the above provisions to townships that adopt floodplain or wild and scenic river ordinances. Central office staff should be contacted when townships indicate an interest in pursuing zoning activities. Regional staff will review the township’s ordinance following the approval procedures specified..”

Township Zoning Policy, St. Louis County, 1990 – 1991

The county position was that a township is sovereign from a county once it exercises its land use authority. Therefore there is a difference between townships already doing their zoning and those wishing to do so. The county is no longer concerned with township activities (has no oversight) once a township exercises its zoning authority.

Jaschke memos and Sium letter to St. Louis County, Feb. 25, 1991, defined established policy based on 1977 Attorney General’s Opinion, but clarified “all or nothing” approach to apply to an individual project, e.g. construction of a building should require only one building permit. It saw other actions such as the construction and oversight of sewage treatment systems as being separate but related actions. “The responsibility for the approval of the building permit would rest with the township even though the actual sanitary inspection might have been performed by a county sanitarian.” “How the county chooses to work with its townships—through contracts, joint powers or other agreements—is up to the county and townships to decide.”

May 14, 1992, Memo from Lokkesmoe to WMO on Township Zoning, All or Nothing Position

Formed a workgroup made up of Sium (chair), Schultz, Fick, Homuth and Reg. II rep. Howard Christman to develop a position paper to be done by July 1, 1992. Committee met, but did not develop a paper. Memo closed: “Any work with townships will be on a time available basis, depending on the workload and priorities of the area and region.”

Adopting Enforceable Ordinances, Rebecca S. Anderson, 2000

(A paper presented at the annual conference of the Association of Minnesota Townships). The county is obligated to enforce county ordinances, but not township ordinances unless it has contracted with the township to do so (M.S. 394.32). A township can become a part of plat approval by creating a planning commission. Once a planning commission has been established, the county board may not approve a plat unless approval is obtained from the town board (M.S. 505.09, Subd. 1). Developer agreements involving both county and township approval offer another alternative to separate zoning controls.