

NO. A06-1696

State of Minnesota  
 In Supreme Court

Cyril Stadvold and Cynara Stadvold,  
*Appellants,*

v.

County of Otter Tail, Board of Adjustment,  
*Respondent.*

BRIEF OF AMICUS CURIAE  
 ASSOCIATION OF MINNESOTA COUNTIES

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## INTRODUCTION

The Association of Minnesota Counties (“AMC”) is a voluntary statewide organization made up of Minnesota’s 87 counties. It is the mission of AMC to assist its members with issues related to local governance. To accomplish this mission, AMC works closely with the legislative and administrative branches of Minnesota state government.<sup>1</sup> Specifically, AMC works with counties involving the adoption, enforcement and modification of laws that affect the counties. AMC represents the position of the counties before state and federal government agencies and the citizens of the state.

The issues presented in this case involve important zoning principles regarding the standard to apply and factors to weigh when zoning authorities consider applications for “after the fact” variances. The variance process is important to local governments because variances grant landowners permission to do something that would otherwise be prohibited. In this brief AMC will provide the context within which Minnesota counties currently exercise their authority when making variance decision and the policy and legal reasons behind those practices. AMC is most concerned about the impact that requiring different

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<sup>1</sup> AMC received contribution in the preparation of the brief and binding costs from Minnesota Counties Insurance Trust. MCIT is a joint powers entity that provides risk management advice and coverage for land use cases for its county members, which includes Otter Tail County.

standards and considerations may have on the counties' ability to regulate and enforce their land use standards.

### **STATEMENT OF LEGAL ISSUES, CASE, FACTS AND STANDARD OF REVIEW**

AMC agrees with the Statement of Legal Issues, Statement of the Case, Statement of Facts and Standard of Review contained in the Respondent's Brief.

### **ARGUMENT**

The County Planning Act provides authority for a county to hire a planning director and other staff to administer and oversee land use. The rationale behind municipal zoning power is to provide land use planning necessary to promote and protect the interests of the entire community and that individual rights must be balanced against the greater good. *See Generally, Austin v. Older*, 278 N.W.2d 727, 730 (Minn. 1938)(finding that the purpose of zoning restrictions is to keep property uses within territorial confines and limit the continuance of nonconforming uses.) Counties may develop a comprehensive plan and adopt official controls to further the purpose and objectives of the comprehensive plans. *See*, Minn. Stat. §§ 394.232, 394.24. Comprehensive plans or land use plans consider existing governmental, social, economic, demographic, environmental and cultural situations in the county. Plans may also discuss trends on these facts and establish goals and objectives in how the county can react to and influence these trends.

Generally official controls or zoning ordinances consist of zoning text and a zoning map. The text describes the geographic districts, type of land uses allowed or prohibited in each district and also establishes parameters within which development must be constructed.

People seeking permission to construct and/or develop property in a manner inconsistent with these regulations may do so in a variety of ways. The first is a zoning amendment. A zoning amendment (rezoning) can change the zoning ordinance or map and can be requested by a landowner or by the county itself to address changing circumstances. A landowner may seek a variance from the zoning ordinance when wanting to construct a structure which exceeds one of a variety of area requirements, such as a setback, height restriction or area restriction. A conditional or special use permit is requested when a person wishes to use a property in a manner that is not generally allowed by the zoning ordinance, but which may, with certain conditions, be an acceptable and consistent use.

Implementation of a land use plan and management program involves the establishment of a Planning Commission and Board of Adjustment. The Planning Commission generally advises the county regarding the development of the comprehensive plan and reviews development proposals. The Board of Adjustment is authorized by statute and responsible for:

- (1) hearing and deciding appeals from an order or decision made by the zoning administrator;

(2) hearing and deciding requests for variances from the zoning ordinance;

and

(3) reviewing applications for special use permits.

Minn. Stat. § 394.27.

Often times, such as the situation in this case, zoning regulations are part of a county's shoreland management program. The Shoreland Management Program mandates that all counties and cities enforce land use regulations within 1,000 feet of all lakes and 300 feet of all rivers in the state. The purpose of shoreland regulation is to promote the health, safety, order, convenience and general welfare of the community and to preserve and enhance the quality of surface waters, preserve the economic and natural environmental values of shoreland. It is also to provide for the wise utilization of water and related land resources. Finally, it provides a penalty for violations. The regulations address issues such as lot sizes suitable for development, septic system placement and types of land uses appropriate for shoreland areas.

A. THE COURT OF APPEALS CORRECTLY UPHELD THAT A VARIANCE WAS REQUIRED UNDER THE OTTER TAIL COUNTY ORDINANCE.

In this case, the Appellants applied for a site permit to construct a house on a grandfathered non-conforming lot located in Otter Tail County's Shoreland Management Program. During the process, Appellants never contested the fact that a site permit, which requires compliance with the setbacks, was required. In

fact, Appellants applied for a site permit indicating that they would comply with the requirements. Appellants failed to do so.

According to the Otter Tail County ordinance, a grandfathered non-conforming lot of record of less than the minimum lot size may still be built on, provided a site permit is obtained. A-24. In order to obtain a site permit, "the terms of this ordinance shall be met." A-25. Many counties have similar requirements for non-conforming lots. Non-conforming lots may be built on, but subject to other standards as established by the county. As articulated in Respondent's brief, the plain language of the ordinance requires such compliance. Resp. Brief p. 8-10.

In their brief Appellants state, "[m]oreover, the nature of a grandfathered non-conforming lot makes it practically difficult for the lot to comply with the setbacks because it is narrower in width and smaller in area than that of a conforming lot." App. Brief. p.10. Appellants are basically arguing that a non-conforming lot should be a *per se* hardship in terms of variance applications. As evidenced by the uncontested facts of this case, Appellants had the ability to construct a residence that met all the setback requirements. Therefore no hardship exists. This Court should not create a presumptive hardship in law where one does not exist in fact. Such a decision would strip the duly delegated authority to a Board of Adjustment to determine on a case by case basis whether or not a variance is necessary or appropriate. It would have the state-wide impact of

requiring a Board of Adjustment to grant a variance whenever a lot is non-conforming.

The same analysis applies to Appellants' statement regarding the alleged non-conforming exemption being a possible a trade off to avoid a "a takings claim" by the landowners. App. Brief. p. 10. *See Generally, Wensmann Realty Inc. v. City of Eagan, 734 N.W.2d 623 (Minn. 2007)*(recognizing that a takings claim may result from a land use regulation that leaves no reasonable use of the property and therefore has an unduly severe impact on the legitimate interests of the property owner.) There is nothing in the record to support Appellants' claim that the county intended grandfathered non-conforming lots to be excepted from all other requirements to avoid a takings claim. This argument is even less persuasive in light of the fact that the Appellants, who own a non-conforming lot, have reasonable use of their land. Reaching such a conclusion, could lead other landowners, who own non-conforming lots, to demand automatic variances, which would place an onerous burden on Otter Tail County and all other counties in the state.

Finally, Appellants argue that because they obtained a site permit, as required by the ordinance, the county is either precluded from requiring a variance or should be required to issue the variance as a matter of law. If such an argument prevails, it could hinder all counties and other regulating entities ability to enforce regulations where the landowner makes representations that it will comply with regulations and then fails to do so. In this case the Appellants applied for a site

permit and represented to the county that they would comply with the setback requirements. They failed to do so and should not be rewarded.

If Appellants are automatically entitled to a variance because they had previously obtained a site permit based on inaccurate information, it would encourage landowners statewide to apply for a permit, state in that permit application that they were going to comply with land use regulations, violate such regulations and then argue that a variance must be granted because it had previously obtained a lawful permit. This would lead to an absurd result and would turn land use regulations and enforcement on its head across the state. It would also run contrary to public policy behind the creation of zoning and land use management.

B. THE OTTER TAIL COUNTY BOARD OF ADJUSTMENT APPLIED THE CORRECT STANDARD.

When a Board of Adjustment grants a variance, it essentially overrides the law in circumstances which are not contrary to the public interest. Generally if a variance is granted, the deviance from the ordinance should be as minimal as possible.

As discussed in several treatises, the public policy behind this rule is that:

The general rule is that variances and exceptions are to be granted sparingly, only in rare instances and under peculiar and exceptional circumstances. Otherwise, zoning regulations would be emasculated by exceptions until all plan and reason would disappear and zoning in effect would be destroyed. Moreover, prospective purchasers of property would have little confidence in nominal standards and would

hesitate to purchase in a zoned area, where the zoning meant little in view of arbitrary, free and easy grants of variances by a zoning board. A variance should be strictly construed and granted only in cases of extreme hardship where the statutory requirements are present. Indeed, because a variance affords relief from the literal enforcement of a zoning ordinance, it will be strictly construed to limit relief to the minimum variance which is sufficient to relieve the hardship. A board should not grant a variance greater than the minimum necessary to afford relief.

8 McQuillen Mun. Corp. § 25.162 (3<sup>rd</sup> ed.) *See also* 3 *Anderson's Am. Law. Zoning* § 20:86 (4<sup>th</sup> ed.).

It is important to remember that variances apply to the land and are not personal to the owner. 3 A. Rathkopf, *The Law of Planning and Zoning* § 58:18-58:20 (2006). Hardships must pertain to the nature of the property rather than the character of the owner. *Id.* Thus when granting a variance, the county must consider the present and future effect of such variances on that property and neighboring property.

In Minnesota, a Board of Adjustment's authority to grant a variance is governed by Minn. Stat. § 394.27, subd. 7, which states:

**Variances; hardship.** The board of adjustment shall have the exclusive power to order the issuance of variances from the terms of any official control including restrictions placed on nonconformities. Variances shall only be permitted when they are in harmony with the general purposes and intent of the official control in cases when there are practical difficulties or particular hardship in the way of carrying out the strict letter of any official control, and when the terms of the variance are consistent with the comprehensive plan. "Hardship" as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use if used under the conditions allowed by the official controls; the plight of the landowner is due to circumstances unique to the

property not created by the landowner; 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 exists under the terms of the ordinance. *No variance may be granted that would allow any use that is prohibited in the zoning district in which the subject property is located.* The board of adjustment may impose conditions in the granting of variances to insure compliance and to protect adjacent properties and the public interest. The board of adjustment may consider the inability to use solar energy systems a "hardship" in the granting of variances.

Minn. Stat. § 394.27, subd. 7 (emphasis added.)

A review of the key cases addressing this statute is helpful to highlight the current practice in the counties and the state-wide implications of adopting the Appellants' assertion that a lesser standard of "practical difficulties" must apply to area variances and "particular hardship" must apply to use variance.

The plain language of the statute prohibits a variance for any use that is prohibited in the zoning district in which the subject property is located. In *In Re Kenney*, this court addressed whether or not the statute prohibited the Board of Adjustment (BOA) from issuing a use variance for a nonconformity. In finding that the BOA had authority, this Court noted that the statute grants the BOA exclusive power to issue variances from the terms of any official control including restrictions placed on nonconformities. *In re Kenney*, 374 N.W.2d 271, 274 (Minn. 1989). "Nonconformity" is defined as any legal use, structure or parcel of land already in existence, recorded or authorized before the adoption of official controls or amendments thereto that would not have been permitted to become

established under the terms of the official controls as now written, if the official controls had been in effect prior to the date it was established, recorded or authorized. *Id.* at 274, citing Minn. Stat 394.22, subd. 8. The Court concluded that because the BOA had authority to grant variances for “non-conformities,” which includes non-conforming uses, it had authority to grant variances for any non-conformity. The clause forbidding use variances would apply however to any other official control of property uses, restrictions on nonconforming uses being an exception. *Id.* The Court found it unnecessary to read the use/area variance distinction into variance applications for non-conformities. *Id.* *In Re Kenney* did not address the “practical difficulties or undue hardship” language.

After this case, the Court of Appeals dealt with several variance cases. The cases recognize that there is a difference between use variances and area variances and discussed the “practical difficulties or undue hardship” language in general terms. *See Graham v. Itasca County Planning Comm’n*, 610 N.W.2d 461 (Minn. App. 1999)<sup>2</sup> (refusing to consider a landowner’s argument that practical difficulty may have been an alternative basis for the granting of an area variance because the landowner failed to raise it to the board or the district court.); *Steinkraus v. Cook County Board of Adjustment*, 2007 WL 2417283 (Minn. App. 2007)(applying “hardship” factors to variance application); *Campbell v. Wright County Bd. of Adjustment*, 2005 WL 2129340 (Minn. App. 2005)(applying hardship factors to

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<sup>2</sup> It is worth noting that Appellants’ never asserted before the commission that a lesser standard “practical difficulties” should apply.

variance application.); *Warner v. Olmstead County Board of Adjustment*, 1995 WL 389255 (Minn. App. 1995). However none of the cases have held that the “practical difficulties” is a less stringent standard that must be applied to area variances. None of the cases define “practical difficulties.” The discretion has rightfully been placed with counties and the board of adjustments.

Also, what often gets hidden in these opinions is that use variances are prohibited by statute. If the courts have recognized a BOA’s authority to consider a use variance application, it has been because the BOA has independent authority under another portion of the statute, such as with non-conformities, or that the use is not prohibited by the zoning district, but rather another part of the zoning ordinance. *See In Re Kenney*, 374 N.W.2d 271; *Kismet Investors, Inc. v. County of Benton*, 617 N.W.2d 85, 90 (Minn. App. 2000)(Use variance application permitted where landowner’s use was not prohibited by the zoning district, but rather was prohibited by the adult-use sections of the development code.)

In support of their argument for a mandatory less stringent standard, Appellants rely heavily on *Kismet Investors, Inc. v. County of Benton*, 617 N.W.2d 85, 90 (Minn. App. 2000). In *Kismet*, the Court of Appeals, citing a New York case, *In re Village of Bronxville*, 1 A.D. 2d 236, N.Y.S. 2d 906, 908 (1956), found support for the proposition that “practical difficulties” should apply to area variances whereas “particular hardship” should apply to use variances.<sup>3</sup> The New

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<sup>3</sup> In *Snyder v. Waukesha County Zoning Board of Adjustment*, 247 N.W.2d 98 (WI 1976), the Wisconsin Supreme Court discussed what standard to apply to variance

York case involved a Bronxville Building Zone Ordinance, which according to the case, was similar to almost every zoning ordinance. *Id.* at 237. The ordinance authorized its local board to grant a variance either (1) upon proof of practical difficulties or unnecessary hardship, or (2) in its discretion, without proof of practical difficulties or unnecessary hardship, in specifically enumerated cases and under specific conditions. *Id.* at 237-238. Unlike the Minnesota statute however, the ordinance does not prohibit use variances. *See Generally*, N.Y. Town Law § 267-B. In fact some other states that have differing standards for use variances and area variances do not have a statute or ordinances that prohibit use variances. *State of WI v. Waushara County Board of Adjustment*, 679 N.W.2d 514 (WI 2004)(Recognizing a “no reasonable use” standard for use variances and an “unnecessary hardship” standard for area variances when interpreting a variance statute that does not prohibit use variances and authorizes variances when enforcement of the ordinance will result in *practical difficulty or unnecessary hardship*.); *Boccia v. City of Portsmouth*, 855 A. 2d 516, 522 (N.H. 2004)(When interpreting a statute that allows use and area variance applications, recognized two different “unnecessary hardship” standards.); *Jenney v. Durham*, 707 A.2d

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applications (this case was decided two years after the Minnesota legislature adopted the dual language.) In that case, the Court cited a well-regarded treatise which stated “The overlapping of the concepts of practical difficulty and undue hardship in so many factual situations and the lack of real reason for treating the two situations differently, has caused courts to treat the two terms as if they were synonymous...” 2 Rathkopf, *The Law of Zoning and Planning* 45-20 (3d ed. 1972).

752, 757 (Del.Super. Jan 17, 1997)(applying two different standards to use variance and area variance. Use variances are not prohibited by statute.)

As previously noted, Minnesota only authorizes one type of variance: an area variance. Accordingly, any argument that “practical difficulties” must apply to area variance because “particular hardship” applies to use variance would lead to an absurd result. The question would be why would the legislature create a standard to apply to something that it prohibits in the same section. Such an interpretation would essentially render the hardship definition obsolete. Furthermore, such an interpretation would require reading the area versus use variance distinction into the variance statute dealing with non-conformities that this court previously found unnecessary. *In Re Kenney*, 374 N.W.2d at 274.

Also, creating and mandating a lesser standard of practical difficulties for “area variances” in the variance statute would be a significant deviation from current land use practice in Minnesota. As noted above, use variances are not authorized in Minnesota. Accordingly, the current practice in many Minnesota counties is to not accept applications for use variances. It is common to apply a single standard to the applications. Many of the ordinances are modeled after Minn. Stat. § 394.27. The creation of a mandatory less stringent standard for an area variance would have the effect of requiring many counties statewide to revise their ordinances and change the acceptable course of practice and standards that has been approved by Minnesota courts on many different occasions. *See Generally, Graham v. Itasca County Planning Comm’n*, 601 N.W.2d 461

(applying hardship factors to an area variance application); *Steinkraus v. Cook County Bd. of Adjustment*, 2007 WL 2417283 (applying hardship factors to an area variance application); *Campbell v. Wright County Board of Adjustment*, 2005 WL 2129340 (applying hardship factors to an area variance application). It would also reduce the counties and landowners' ability to rely on the consistent application of the current zoning restrictions.

Regardless, it is important that several factors remain constant during the consideration of any variance application. For example, appellants make an argument that a variance is minimal based on the set back distance from the traveled portion of the roadway. Such an argument fails to recognize that variances run with the land. Therefore it is important to not only look at the current use of the area, but the future use. The right of way for the road provides for future expansion and development of that road, if needed and later deemed appropriate. If counties only look at the current use of the road and/or area, it would erode their ability to plan for the future and protect the rights and future use of the land of all its citizens. Such actions would effectively erode the purpose of zoning in the first place. Variances are exceptions to land use plans, both current and future plans.

Also any standard adopted by this Court should require that the hardship be unique to the nature of the property and not a hardship created by the owner. These requirements are consistent with statutory requirements and caselaw. *See Graham v. Itasca County Planning Comm'n*, 601 N.W.2d at 468 (A landowner's

erroneous belief is not a hardship because a landowner's beliefs are not circumstances unique to the property.), *Kismet v. County of Benton*, 617 N.W.2d at 92 (plight must be unique to the land); *Rowell v. Board of Adjustment of the City of Moorehead*, 4446 N.W.2d 917, 922 (Minn. App. 1989)(rev. den. Dec. 15, 1989).

C. THE DISCRETION TO TREAT AN AFTER THE FACT VARIANCE THE SAME AS A BEFORE THE FACT VARIANCE RIGHTFULLY RESTS WITH THE BOARD OF ADJUSTMENT.

It is completely permissible for Board of Adjustments to treat after the fact variances the same as before the fact variances. This principal was acknowledged as far back as 1948. In *Newcomb v. Teske*, 30 N.W.2d 354, (Minn. 1948), this Court when reviewing the Board of Adjustment's decision, stated that the landowners situation "is to be considered as if no work had been done." *Id.* at 227. This decision makes practical sense. As previously noted, counties implement zoning regulations so that all citizens may rely on certain standards (barring hardship) in the development of their area. If landowners are permitted to make decisions to save money, such as not obtaining a survey and later use this decision as the sole basis for a variance, it erodes all incentive to take the cautionary steps to ensure that the landowners are in compliance with the representations they made to the county. Stripping the counties authority to treat after the fact variances as before the fact variances would strip counties of the

authority to determine the application of variances on its merits. It would encourage landowners to build first and ask permission later.

### CONCLUSION

If Appellants' arguments are adopted, the decision would fundamentally change the way counties consider variance applications in Minnesota. It would encourage landowners to disregard their representations to the counties or not to take the appropriate steps to ensure compliance with those representations. For the reasons set forth in this brief, the Association of Minnesota Counties respectfully request that this Court uphold the Court of Appeals decision.

Respectfully submitted,

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