

No. A08-1988

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State of Minnesota  
**In Supreme Court**

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Beat L. Krummenacher,

*Appellant,*

vs.

City of Minnetonka and JoAnne K. Liebeler

*Respondents.*

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**BRIEF OF AMICUS CURIAE**  
**LEAGUE OF MINNESOTA CITIES**

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**TABLE OF CONTENTS**

	<b>PAGE</b>
TABLE OF AUTHORITIES.....	ii
LEGAL ISSUES.....	1
INTRODUCTION.....	2
STATEMENT OF THE CASE AND THE FACTS.....	3
STANDARD OF REVIEW.....	3
LEGAL ARGUMENT.....	3
I.    The resolution of this appeal will have a significant, statewide effect on Minnesota cities.....	3
II.   It is good public policy to affirm well-established Minnesota law upholding cities’ discretionary variance authority and upholding the use of record review of municipal zoning decisions.....	5
CONCLUSION.....	9

**TABLE OF AUTHORITIES**

**PAGE**

**MINNESOTA CONSTITUTION**

Minn. Const. art 3, § 1.....7

**MINNESOTA STATUTES**

Minn. Stat. § 462.357, subd. 1(e).....2, 4, 7

Minn. Stat. § 462.357, subd. 6(2).....2, 4, 5

**MINNESOTA CASES**

*Honn v. City of Coon Rapids*,  
313 N.W.2d 409 (Minn. 1981).....4

*Rowell v. Bd. of Adjustment of the City of Moorhead*,  
446 N.W.2d 917 (Minn. Ct. App. 1989).....3, 5, 6

*Swanson v. City of Bloomington*,  
421 N.W.2d 307 (Minn. 1988).....3, 4, 8

*VanLandschoot v. City of Mendota Heights*,  
336 N.W.2d 503 (Minn. 1983).....3, 6

## LEGAL ISSUES

1. Should this Court overrule well-established Minnesota law regarding cities' discretionary variance authority and create a new, rigid test for the reasonable-use factor of the statutory variance test?

The district court and the court of appeals applied well-established law and held that the City's decision to grant the variance was reasonable.

2. Does Minn. Stat. § 462.237, subd. 1(e) strip cities of their discretionary zoning authority by prohibiting them from ever granting a variance to allow the expansion of a nonconforming use?

The district court did not reach this issue. The court of appeals ruled that the City had authority to issue the variance.

3. When municipal proceedings are fair and the record of a city's decision is clear and sufficient to permit informed judicial review, can a city be compelled to respond to unnecessary discovery requests regarding the proceeding?

The district court did not rule on this issue. The court of appeals held that the district court properly denied Appellant's motion to compel discovery.

## INTRODUCTION

The League of Minnesota Cities (League) has a voluntary membership of 830 out of 854 Minnesota cities including the City of Minnetonka.<sup>1</sup> The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy-development, risk-management and advocacy services. The League's mission is to promote excellence in local government through effective advocacy, expert analysis and trusted guidance for all Minnesota cities.

The League has a public interest in this appeal as a representative of cities throughout the state with authority to grant variances pursuant to Minn. Stat. § 462.357, subd. 6(2). The League also has a public interest in this appeal as a representative of cities throughout the state that have conducted their zoning proceedings in reliance on well-established Minnesota law regarding record review of municipal zoning decisions.

In this case, the City of Minnetonka ("City") granted Respondent JoAnne K. Liebeler ("Liebeler") a variance to expand a nonconforming garage. Appellant Beat L. Krummenacher ("Krummenacher") claims the City acted arbitrarily and in violation of Minn. Stat. § 462.357, subd. 1(e) in granting the variance. Krummenacher also claims he is entitled to an order compelling the City to respond to his discovery requests. The City objects to producing documents beyond the record because this is a record-review matter

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<sup>1</sup> Pursuant to Minn. R. Civ. App. P. 129.03, the League certifies that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity besides the League made a monetary contribution to its preparation or submission.

and additional discovery is not permitted under this Court's holding in *Swanson v. City of Bloomington*, 421 N.W.2d 307, 311 (Minn. 1988).

### **STATEMENT OF THE CASE AND THE FACTS**

The League concurs with the City's statement of the case and the facts.

### **STANDARD OF REVIEW**

The League concurs with the City's statement of the standard of review.

### **LEGAL ARGUMENT**

The City's Brief demonstrates why the lower courts' decisions should be affirmed. The League will not repeat the City's legal arguments here. Instead, this brief will focus on the statewide significance of this appeal to cities and on why it is good public policy to affirm well-established Minnesota law upholding cities' discretionary variance authority and upholding the use of record review of municipal zoning decisions.

#### **I. The resolution of this appeal will have a significant, statewide effect on Minnesota cities.**

The resolution of this appeal will have a significant, statewide effect on Minnesota cities because it will impact their authority to grant variances and their ability to rely on a record review of their zoning decisions. The Legislature has delegated to all Minnesota cities authority to grant variances. Minn. Stat. § 462.357, subd. 6(2). Well-established Minnesota law confirms that cities have broad discretionary power when considering variance applications. *See, e.g., VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983); *Rowell v. Bd. of Adjustment of the City of Moorhead*, 446 N.W.2d 917, 921 (Minn. Ct. App. 1989), *rev. denied* (Dec. 15, 1989). All Minnesota cities have

an interest in ensuring that their variance decisions continue to receive the deference they are due under this well-established law.

Krummenacher urges this Court to ignore this well-established law and adopt a new test for the reasonable-use factor of the statutory variance test. *See* Minn. Stat. § 462.357, subd. 6(2). Krummenacher also urges this Court to conclude – in a case of first impression – that Minn. Stat. § 462.357, subd. 1(e) strips cities of their discretionary zoning authority by prohibiting them from ever granting a variance to allow the expansion of a nonconforming use. And finally, Krummenacher asks this Court to ignore its own decisions in *Honn v. City of Coon Rapids*, 313 N.W.2d 409 (Minn. 1981) and *Swanson v. City of Bloomington*, 421 N.W.2d 307 (Minn. 1988) and hold that a city can be compelled to respond to discovery requests even though a district court has determined that the municipal proceedings were fair and that a clear record of the proceedings exists which is sufficient to allow judicial review.

All Minnesota cities have an interest in ensuring that well-established Minnesota law regarding record review of municipal zoning decisions is affirmed. Cities throughout the state rely on this law when conducting their zoning proceedings and have carefully made findings and have borne the expense of producing verbatim transcripts of their proceedings to conform to this law's requirements. Record review allows cities to protect public tax dollars by ensuring that public time and money is not spent on unnecessary discovery demands and trials. This is especially important in these times of economic hardship and cuts to local government aid and city budgets.

**II. It is good public policy to affirm well-established Minnesota law upholding cities' discretionary variance authority and upholding the use of record review of municipal zoning decisions.**

The legislature has delegated authority to Minnesota cities to grant a variance if strict enforcement of zoning regulations would cause "undue hardship." Minn. Stat. § 462.357, subd. 6(2). Undue hardship exists when the property "**cannot be put to a reasonable use if used under 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." *Id.* (emphasis added).

In *Rowell v. Bd. of Adjustment of the City of Moorhead*, a neighboring property owner challenged a city's decision to grant a church's request for a setback variance arguing that there was no undue hardship to support the variance. The court of appeals affirmed the city's decision granting the variance and held that the reasonable-use factor of the undue-hardship test is satisfied when there has been a showing that a "property owner would like to use the property in a reasonable manner that is prohibited by ordinance." *Rowell*, 446 N.W.2d 917, 922 (Minn. Ct. App. 1989) *rev. denied* (Dec. 15, 1989). Both Minnesota courts (see Respondent's Br. at 12-13) and Minnesota cities have relied on this reasonable-use test for the last 20 years when reviewing and when conducting municipal proceedings involving variance requests.

Krummenacher urges this Court to reject this well-established law and adopt a new, rigid test that would hold that a city can only grant a variance if property cannot be put to any reasonable use without the variance – circumstances under which a variance

denial would amount to an unlawful taking. See Appellant's Br. at 13. There is no Minnesota case law to support the new, rigid test Krummenacher proposes. In fact, it was specifically rejected by the *Rowell* court, which concluded that the variance statute "is clearly intended to allow cities the flexibility to grant variances in cases where the constitution does not compel it." *Rowell*, 446 N.W.2d at 922. The new, rigid test Krummenacher proposes is inconsistent with Minnesota law, and there are several reasons why it would be bad public policy to adopt it.

First, the new test Krummenacher proposes would conflict with well-established law that gives cities broad discretion when making zoning decisions. Indeed, Minnesota courts have consistently held that cities have broad discretionary power when considering variance applications. See, e.g., *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983); *Rowell v. Bd. of Adjustment of the City of Moorhead*, 446 N.W.2d 917, 921 (Minn. Ct. App. 1989), *rev. denied* (Dec. 15, 1989).

Second, it would be bad public policy to take away cities' discretion because cities are well situated to make variance decisions. City councilmembers are best able to determine the reasonableness of a variance request because they have first-hand knowledge of their communities and their local zoning standards. Variances involve property-specific decisions, which are best made at the local level by local government officials who have experience making zoning decisions. It is preferable from a public policy point-of-view to have variance decisions made by local government officials that have the flexibility to consider the unique circumstances of the property at issue rather

than to have a rigid rule that compels a particular result and does not take individual circumstances into account.

Third, the new, rigid test *Krummenacher* proposes conflicts with the deferential standard of review for zoning decisions required by constitutional principles of separate governmental power. *See* Minn. Const. art. 3, § 1. It is city councilmembers (and not judges) who have been elected to make the factual determinations involved in zoning decisions. And it is city councilmembers (and not judges) who will be responsible at the ballot box if citizens are unhappy with how local zoning decisions are being made. Property owners should not be allowed to ignore constitutional principles of separate governmental power and entangle courts in second-guessing the numerous factual determinations city councilmembers make when voting on variance requests.

*Krummenacher* also seeks to change Minnesota law by asking this Court to hold that Minn. Stat. § 462.357, subd. 1(e) strips Minnesota cities of their discretionary zoning authority by prohibiting them from ever granting a variance for the expansion of a nonconforming use. *See* Appellant's Br. at 24-29. The League concurs with the City's legal arguments regarding why this interpretation of the statute is erroneous. *See* Respondent's Br. at 18-20. In addition, the same public-policy considerations discussed above also demonstrate why it would be bad public policy to interpret Minn. Stat. § 462.357, subd. 1(e) to abrogate cities' well-established, discretionary variance authority.

The League also concurs with the City's legal argument regarding why *Krummenacher's* motion to compel discovery was properly rejected by the lower courts.

See Respondent's Br. at 20-24. And there are several reasons why it is good public policy to affirm the use of record review of municipal zoning decisions.

First, for over 20 years cities throughout Minnesota have conducted their municipal proceedings in reliance on this Court's well-established law regarding record review. Second, the expense cities have incurred to ensure that their proceedings are eligible for record review will be wasted if this well-established law is overruled. Third, it is fundamentally unfair to allow courts to second-guess municipal zoning decisions based on evidence that was not considered by municipal decision-makers. This Court noted all three of these considerations when it affirmed the use of record review of municipal proceedings in *Swanson v City of Bloomington*.

Amicus [League of Minnesota Cities] advises this court that, in reliance on *Honn*, many cities have borne the expense of verbatim transcripts of their proceedings. These cities have carefully made findings supported by transcribed evidence so that their zoning decisions, if challenged, would not be decided by a court on the basis of evidence never considered by them.

421 N.W. 2d 307, 312 (Minn. 1988). Fourth, it would be bad public policy to abolish record review of municipal proceedings because it would force cities to spend public time and money on unnecessary discovery demands and trials. And finally, it would be bad public policy to allow property owners (who anticipate the need for a second chance with a different decision-maker) to manipulate municipal proceedings to increase their chances of success on appeal. Again, the *Swanson* Court noted both of these concerns.

It becomes clear that this effort and expense [of cities carefully making findings supported by transcribed evidence] would be wasted if every property owner whose zoning request is denied can demand that the case be retried in district court. Such a procedure, if rigidly followed in every case, could lead to the result that a property owner, knowing the composition of a particular city council, might

withhold part of the relevant evidence, knowing it could be put in when the matter came before the district court on review. Thus a city, making every effort to afford a property owner a full and fair hearing and to produce a complete record of the basis of its council's decision, could be thwarted in exercising the power granted it by statute to determine and plan the use of land within its boundaries.

*Id.* In short, this Court should reject Krummenacher's legal arguments seeking to compel the City to respond to unnecessary discovery requests because his arguments are inconsistent with Minnesota law, and they are not based on good public policy.

### CONCLUSION

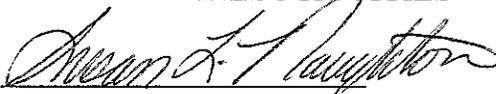
The resolution of this appeal will have a significant, statewide effect on Minnesota cities because it will impact their authority to grant variances and their ability to rely on a record review of their zoning decisions. This Court should reject Krummenacher's legal arguments seeking to change Minnesota law upholding cities' discretionary variance authority and upholding the use of record review of municipal proceedings because Krummenacher's arguments are inconsistent with well-established Minnesota law and are not based on good public policy.

For all of these reasons, the League respectfully requests that this Court affirm the lower courts' decisions.

Dated: December 7, 2009

Respectfully submitted,

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