

STATE OF MINNESOTA

IN SUPREME COURT

A06-1696

CASE TITLE:

County of Otter Tail,

Respondent,

v.

Cyril Stadvold and

Cynara Stadvold,

Appellants.

APPELLANT'S BRIEF

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

1. Whether the Ordinance's exemption for grandfathered non-conforming lots from the requirement of an area variance applies to Appellant's lot. The Court of Appeals held: exemption inapplicable to Appellants due to the erroneous measurement and attack on their honesty and integrity.

Apposite cases are:

Curry v. Young, 285 Minn. 387, 173 N.W.2d 410 (1969)

Apposite statutory and constitutional provisions are:

The Shoreland Management Ordinance of Otter Tail County, Minnesota IV, 13

2. Whether Appellants were deprived of a fair and complete hearing when Respondent limited the jurisdiction and scope of the hearing to before-the-fact, thus precluding after-the-fact evidence, claims and equities. The Court of Appeals held: limiting jurisdiction and scope of the hearing to before-the-fact was within Respondent's power.

Apposite cases are:

Scott Co. Lumber Co., Inc. V. City of Shakopee, 417 N.W.2d 721 (Minn. App. 1988)

Earthburners Inc. v. County of Carlton, 513 N.W.2d 460 (Minn. 1994)

In re Appeal of Kenney, 374 N.W.2d 271 (Minn. 1985)

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

Apposite statutory and constitutional provisions are:

The Shoreland Management Ordinance of Otter Tail County, Minnesota V, 5

3. Whether Respondent's application of the "hardship" standard rather than the "practical difficulty" standard caused the hearing to be unfair and the decision arbitrary and capricious. Court of Appeals held: Respondent used the correct standard.

Apposite cases are:

Merriam Park Community Counsel, Inc. v. McDonough,
297 Minn. 285, 210 N.W.2d 416 (1973)

Kismet Investors, Inc. v. County of Benton,
617 N.W.2d 85 (Minn. App. 2000)
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In re Appeal of Kenney, 358 N.W.2d 120
(Minn. App. 1985), 374 N.W.2d 271 (Minn. 1985)

Apposite statutory and constitutional provisions
are:

The Shoreland Management Ordinance of Otter Tail
County, Minnesota V, 5

STATEMENT OF CASE AND FACTS

Two years after the Appellants completed the construction of the house and garage on their lake lot, for which they had obtained a Site Permit from Otter Tail County Land Resource Management (LRM), LRM cited Appellants for setback violations of the Shoreland Management Ordinance of Otter Tail County (Ordinance). Appellants applied to the County of Otter Tail Board of Adjustment (BOA) for a variance from the Ordinance. The BOA denied the variance request. Pursuant to Minn. Stat. §394.27, subd. 9, Appellants filed an appeal to the District Court of Otter Tail County, Judge Lisa Borgen presiding. (A-1). Upon the parties' cross motions for summary judgment, the trial court granted the BOA's motion for summary judgment by Order dated June 30, 2006. (A-80). Judgment was entered on August 8, 2006. (A-91). Notice of Appeal was filed with the Court of Appeals. The Court of Appeals affirmed.

The Ordinance became effective October 15, 1971 and requires lots created after that date on recreational development lakes, like Blanche Lake, to have a minimum square footage area of 40,000 square feet and minimum lot width of 150 feet. (A-21, A-30, A-31). The Ordinance grandfathers any non-conforming lot already in existence prior to the adoption of the Ordinance. (A-26). The Ordinance specifically provides an exemption for grandfathered lots: "A structure may be erected on a lot of less than the established minimum area and width, provided the lot

existed by virtue of a recorded plat or deed before October 15, 1971...provided a site permit for the structure is obtained, all sanitary requirements are complied with and the proposed use is permitted within the district." (A-46).

A "Site Permit" is defined as "a permit for the erection and/or alteration of any structure and that is "issued to insure compliance with all requirements of this Ordinance". (A-28). "A Site Permit shall be obtained prior to erecting or installing a new structure." (A-46). The County of Otter Tail Board of Commissioners delegated to LRM the duty and responsibility of issuing site permits and conducting building location inspections. (A-23, A-46). The Ordinance envisions onsite inspections to occur prior to the issuance of the site permit and once the building's footings have been constructed. (A-47). A site permit issued under the Ordinance is the County's permission under the Ordinance. (A-23).

Appellant's Lot 6, Walvatne Addition is a grandfathered non-conforming lot. Walvatne Addition was surveyed, platted, approved by Otter Tail County, and filed for record on November 21, 1969, which is prior to the effective date of the Ordinance. (A-70-71; 9/1/05 Trans. P. 11). Survey pins were placed at Lot 6's two corners at the road right of way, and near the lake on its north and south boundary lines. (A-70-71; see also A-11 and A-14 which note the found monumentation of Lot 6's survey pins). Lot 6 has only 17,900 square feet and 100 feet of lot width,

which is less than the Ordinance's minimum square footage area and lot width. (A-5; A-70, A-71) Lot 6 has similar square footage and lot width as the other lots in Walvatne Addition. (A-70).

Appellants purchased Lot 6 in 1982 from Mr. Stadsvold's father, who purchased it in 1969 from the platter. (9/1/05 Trans. P. 11). It was a vacant lot, and remained so until Appellants developed plans to build their lake home in 2001. (A-56). They met with the building contractor, Richard Hochstein, and told him of the general vicinity of the boundary lines, to verify the lot lines, and to use a metal detector if necessary. (A-57; 9/1/05 Trans. P. 10,12). Appellants gave the building contractor and LRM maps, showing the location and dimensions of Lot 6 and the intended location of the house and garage. (A-6, A-8, A-57; 9/1/05 Trans. P.7, 14).

Appellants filed with LRM an Application for Site Permit on November 8, 2001, and amended their application on May 24, 2002. (A-5, A-6, A-56, A-57). The contractor established the buildings footprints. (A-7). The site permit was approved by LRM on August 8, 2002 for the construction of Appellant's house and garage. (A-5, A-6, A-75, A-76).

Located on the back side of the site permit are the LRM inspection results. (A-6, A-11, A-76). The site permit specifically requires that the LRM "inspector must make all measurements and computations." (Id.). LRM physically conducted

site inspections on October 16, 2002, November 19, 2002 and July 15, 2003. (Id.). On the Site Permit Inspections Result form, the LRM inspector mapped the location of the footings, the location of survey pins and stakes, and the setback distances. Id. The LRM inspector further wrote: "contractor Hockstein tape out from lake to R/W is 179: I measured according." Id. The LRM inspector notated the garage's road right-of-way setback as "26" feet (the Ordinance requires a 20 foot setback), and lot line setbacks as "10.7" feet and "17" feet for the house and "11" feet and "50" feet for the garage (the Ordinance requires a 10 foot setback). (Id.). The building contractor finished the house and garage by July 2003. (9/1/05 Trans. P. 4, 5; A-6, A-76). LRM approved the completed project on July 15, 2003. (A-6, A-76). Other than brief visits, Appellants were not present during the construction as they live and work in Oregon. (9/1/05 Trans. P. 10; A-57).

Appellants were not aware that the house and garage were built in the setback areas for the road right-of-way or the side lot lines until the septic was installed in October 2004. (A-57). The site plans prepared by Appellants showed sufficient room. (Id.; 9/1/05 Trans. P. 14). The house and garage had already been in place for over a year by that time. (9/1/05 Trans. P. 5) Therefore, Appellants hired Anderson Land Surveying, Inc. to re-survey their lot lines, which was done, and which confirmed the septic contractor's conclusion that the house and

garage were built within the setback areas. (A-14). As a result, meetings were held with Otter Tail Area Lake Sewer District and LRM in October 2004 to discuss the survey, the septic system and the set backs. (Id.; 9/1/05 Trans. P. 14; A-58, A-67, A-68). It was decided that the septic's drain field would be placed on the west side of the road, and that there wasn't a problem with the setbacks because a Site Permit had been issued, the house and garage built, and the completed construction had been approved. (Id.).

The road is a plat dedicated 66 foot road right-of-way, but the road has never been constructed, maintained or opened for public use by the township. (A-59,A-70,A-71). The road is an undeveloped ten foot wide path, which is located to the westerly edge of the right-of-way. (A-59). The area west of the road is undeveloped. The road dead ends 100 feet south of Lot 6. Id. The closest edge of the traveled part of the road is approximately 34 feet from Lot 6's property line and 39 feet from the garage of Lot 6. (Id.; A-12).

There are several other lots that have buildings in the setback area with out a variance. (9/1/05 Trans. P. 13; A-73, A-59). In 1995, the BOA granted a road right-of-way setback variance to Lot 4 of Walvatne Addition based upon the sole finding "that there is very little traffic flow in this area." (A-72). On May 15, 2005, the owner of Lot 7 of Walvatne Addition (Appellant's immediate neighbor to the south) applied for a variance from the

road right-of-way setback in order to build a garage within the setback area. (A-73, A-74). At the Board of Adjustment July 7, 2005 hearing on that variance application, the Board found "[h]ardship is a substandard lot of record", that other structures are within the road right-of-way setback, and that the variance "will provide the applicant with the ability to enjoy the same rights and privileges as others in the immediate area." (A-74).

Four days after the BOA granted Lot 7's setback variance request, LRM sent a setback violation notice to Appellants. (A-9, A-11). The house and garage were complete by that time and Appellants had \$236,917.44 invested into those buildings. (A-6, A-60, A-64 to A-66, A-76). Appellants immediately contacted LRM to resolve the issue. Appellants filed an application for variance on August 8, 2005. (A-12 to A-13). As required by the Ordinance, the Board of Adjustment physically inspected Lot 6 and the area affected. (9/1/05 Trans. P. 2; A-51). No record has been provided by Respondent for this part of the hearing process. Mr. Stadvold was present when three of the BOA members inspected Lot 6. (A-59). The owner of Lot 7 was also present and suggested to the board members to "just leave it". Id. Those BOA members told Appellants that it was a substandard lot and that it shouldn't be a problem issuing a variance. Id. The owner of Lot 4 reported that when a fourth board member inspected the premises, he voiced his support of the variance. Id.

The matter was heard before the BOA on September 1, 2005.

(A-13). No neighboring property owner appeared at the hearing or objected to the application. (9/1/05 Trans. PP. 2 - 17). At the hearing, the BOA made the following statements:

Chair: ... "We have physically visited your property so we aren't making decision based only on the application..."

(9/1/05 Trans. P 2).

Chair: ... "I'd like to advise you that we generally treat after-the-fact situations as we would have treated it had it come before us, before the fact."

(9/1/05 Trans. P. 4).

Chair:... "Now did I tell you that we would probably treat the after-the-fact situation?"

Cy Stadsvold: "I understand."

Chair: "I did tell you didn't I? Now do you have your side of the story...."

(9/1/05 Trans. P.9).

"Board Member: I talked to a couple of (inaudible).

Board Member: The reason (inaudible) I didn't because it's so (inaudible) out there. Bad situation.

Board Member: I would not have approved it if it come before it as a brand new construction. There was plenty of room on this lot.

Board Member: Plenty of room.

Board Member: For reasonable use of lot.

Board Member: Squeeze it together a little bit.

Board Member: Because of that I'm going to make a motion that we deny the variance as requested."

(9/1/05 Trans. P. 15).

The BOA denied the variance request. (A-13). Appellants filed their appeal pursuant to Minn. Stat. §394.27, Subd. 9. (A-1)

ARGUMENT

In reviewing the grant or denial of summary judgment, the appellate court determines whether any genuine issues of material fact exist and whether the district court erred in applying the law. Alternberg vs. Board of Supervisors of Pleasant Mound Township, 615 N.W 2d 874, 878 (Minn. App. 2000) (review denied November 21, 2000). The court must view the evidence in light most favorable to the party against whom judgment was granted. Id.

I. Whether the ordinance's exemption for grandfathered non-conforming lots from the requirement of an area variance applies to Appellant's lot.

The interpretation of an ordinance and the application of an ordinance to facts are questions of law, subject to de novo review. Frank's Nursery Sales, Inc. vs. City of Roseville, 295 N.W.2d 604, 608 (Minn. 1980). A zoning ordinance should be construed (1) according to the plain and ordinary meaning of its terms, (2) in favor of the property owner, and (3) in light of the ordinance's underlying policy goals. Id. at 608-609.

The plain language of the Ordinance did not require Appellant's to obtain a variance from the setback requirements. Non-conforming grandfathered lots are exempted from the Ordinance's setback requirements. The Ordinance delegates LRM as its administrator, and empowers it to issue site permits and

conduct building inspections. (A-23, A-47). A site permit must be obtained prior to the construction. (A-46). Onsite inspections are to be conducted prior to the issuance of the site permit and when the building footings have been constructed. (A-47) The purpose of the site permit and the inspections is to insure compliance with the Ordinance. (A-28, A-47). LRM had the authority to issue the site permit to Appellants due to one of three exemptions from the Ordinance. The applicable exemption is found at Article IV General Requirements, paragraph 13 Exemptions, subparagraph B, which provides that structures may be built on grandfathered lots that don't conform to the square footage area and lot width requirements "provided a Site Permit for the structure is obtained, all sanitary requirements are complied with and the proposed use is permitted within the district." (A-23, A-46).

When an applicant complies with the requirement of an ordinance, approval of a permitted use follows as a matter of right. Chanhassen Estates Residents Ass'n. v. City of Chanhassen, 342 N.W.2d 335, 340 (Minn. 1984). In Curry v. Young, 285 Minn. 387, 173 N.W.2d 410 (1969), the owner of a grandfathered non-conforming lot applied for a setback variance. The court held that since "the parcel, being a 'lot of record', was entitled to a variance if the conditions of the zoning ordinance were complied with", the building permit must also be issued. Id. at 415.

Appellant's Lot 6 is a non-conforming grandfathered lot as to square footage area and lot width. As required by the Ordinance, Appellants obtained a site permit from LRM to construct the house and garage and complied with the sanitary requirements. Appellants's use of Lot 6 is for residential purposes, a use permitted under the Ordinance. Under the plain and unambiguous language of the Ordinance, Appellants met all of the elements of the Ordinance's exemption, were entitled to a site permit to build the house and garage, and the site permit was a valid permit. There was no further requirement that Appellants comply with all of the other area requirements, such as setback, or to get a variance from the setback requirements. This is evident by comparison of exemptions A and B, neither of which require compliance with all of the other requirements of the Ordinance, to exemption C which specifically requires compliance with all of the other requirements of the Ordinance. (A-46). Moreover, the nature of a grandfathered non-conforming lot makes it practically difficult for that lot to comply with the setbacks because it is narrower in width and smaller in area than that of a conforming lot. The Ordinance's exemption B may have been a trade off to avoid "taking" claims by non-conforming lot owners when the Ordinance was passed.

To the extent that Respondent argues that such is not the intention of the Ordinance, it would be arguing that the Ordinance is ambiguous. As the drafter of the Ordinance, such

ambiguity is construed against Otter Tail County's alleged interpretation. Zoning ordinances should be construed strictly against the county and in favor of a property owner. Frank's Nursery, 295 N.W.2d at 608. Applying the Ordinance to undisputed facts, Appellants' grandfathered non-conforming lot, which obtained a site permit and complied with the sanitary requirements, has been exempted from the Ordinance and either does not need a variance, or is entitled to a variance as a matter of law.

II. Whether Appellants were deprived of a fair and complete hearing when Respondent limited the jurisdiction and scope of the hearing to before-the-fact, thus precluding after-the-fact evidence, claims and equities.

The scope of review of a zoning decision begins with a consideration of the nature, fairness and adequacy of the proceeding at the local level, and the adequacy of the factual and decisional record of the local proceeding. Swanson v. City of Bloomington, 421 N.W.2d 307, 312-13 (Minn. 1988).

A. Nature, fairness and adequacy of proceedings.

Where the municipal proceeding was fair and the record clear and complete, review should be on the record. Swanson, 421 N.W.2d at 413. The district court should receive additional evidence only on substantive issues raised and considered by the municipal body that is material and that there were good reasons for failure to present it at the municipal proceeding. Id. Where the municipal proceeding has not been fair or the record of that proceeding is not clear and complete, the parties are entitled to

a trial or an opportunity to augment the record in district court. Id. The governmental body must take seriously its responsibility to develop and preserve a record that allows meaningful review by the appellate courts. In re Matter of Livingood, 594 N.W.2d 889, 895 (Minn. 1999).

In this case, the variance application hearing was not fair and complete. The BOA limited the scope of Appellant's presentation of evidence and argument by declaring at the beginning and again in the middle of Appellant's hearing that their application would be treated like a before-the-fact application. (9/1/05 Trans. P. 4, 9) The BOA's declaration prohibited the presentation of three years of facts: i.e., the issuance of a site permit, the three inspections by LRM, good faith reliance on the site permit, the completed construction of the house and garage, the LRM approval of the construction as completed, Appellants' financial investment, etc. "A factual reality cannot be changed or overcome by mere legislative fiat, and a legislative declaration which is clearly contrary to the actual facts will not be recognized or sanctioned in a judicial proceeding." LaCourse v. City of St. Paul, 294 Minn. 338, 200 N.W.2d 905, 909 (Minn. 1972). In addition, the BOA's before-the-fact declaration effectively prohibited any discussion of landowner equities. Land owner equities should be considered in after-the-fact variance applications. In re Appeal of Kenney, 374 N.W.2d 271 (Minn. 1985). (See discussion below).

The BOA has failed to make a clear, complete and adequate record of the Ordinance's required standards and criteria, as well as the BOA's hearing. First, the record fails to address or consider any of the factors of Article V, 5 E of the Ordinance, which the BOA must consider. (See A-50, A-51).

Second, the BOA used the wrong standard by which to measure the variance request. It used a "no adequate hardship" standard. The practical difficulty standard should have been used as discussed in Argument III below.

Third, the Ordinance authorizes physical inspections of the subject property. The BOA stated its inspection was a basis for its decision. However, there is no record or summary of the physical inspection. At the physical inspections, Appellants submit two neighbors and three board members favored the variance.

Fourth, crucial portions of the transcription of the hearing, containing the source of information and reasons that two board members relied upon in making their decision, were inaudible. See 9/1/05 Trans. P. 15. Where matters are relied upon outside the record, its less likely that the proceeding was fair, adequate, clear and complete. See Swanson, 421 N.W.2d at 315, Justice Popovich dissenting.

When the governing body does not follow the criterion of its ordinance, and tries to limit discussion, the record is not adequate, and the property owner is entitled to remand to develop

the record. Earthburners Inc. v. County of Carlton, 513 N.W.2d 460, 461, 462 (Minn. 1994). To prevent further unfairness, the governing body must fully articulate its rationale with specific reference to the local ordinance. Id. at 463. On review, the governing body cannot rely on new reasons to support its initial decision. Interstate Power Company, Inc. v. Nobles County Board of Commissioners, 617 N.W.2d 566, 580 (Minn. 2000). The BOA's hearing was not fair, complete and adequate. At a minimum, Appellants are entitled to remand to develop the record. For the reasons argued below, the BOA's decision must be reversed.

B. Adequacy of Factual and Decisional Record.

Quasi-judicial zoning is reviewed independently of the district court's findings of fact and conclusions. VanLandSchoot v. City of Mendota Heights, 336 N.W.2d 503, 508 (Minn. 1983). The standard of review is to examine the governing body's action to ascertain whether it was arbitrary and capricious, whether reasons assigned do not have the slightest validity or bearing on the general welfare of the immediate area, or whether the reasons given were legally sufficient and had a factual basis. Id. at 508. If the governing body states reasons for its decision, review will be limited to the legal sufficiency and factual basis of those reasons. In re Livingood, 594 N.W.2d 889, 894, footnote 3 (Minn. 1999).

Reasonableness is measured by the standards set out in the ordinance and the nature of the matter under review. Rowell v. Board of Adjustment of the City of Moorhead, 446 N.W.2d 917, 921 (Minn. App. 1989) (review denied December 15, 1989). Where a zoning ordinance specifies standards, and the governing body fails to follow those standards, the denial of the variance is arbitrary as a matter of law. Scott Co. Lumber Co., Inc. v. City of Shakopee, 417 N.W.2d 721, 727 (Minn. App. 1988) (review denied March 23, 1988); Yang v. County of Carver, 660 N.W.2d 828, 833 (Minn. App. 2003); VanLandSchoot, 336 N.W.2d at 508.

Legally sufficient reasons must be grounded in fact. Yang v. County of Carver, 660 N.W.2d 828, 834 (Minn. App. 2003). The appellate court is not bound by the governing body's recitation of the facts where there is no evidence to support its conclusions. LaCourse v. City of St. Paul, 294 Minn. 338, 200 N.W.2d 905, 908, 909 (Minn. 1972). Neither general objections nor unsubstantiated, conclusory, unreasonably vague, or subjective comments are competent evidence to support denial of a variance request. Yang v. County of Carver, 660 N.W.2d at 836 (Minn. App. 2003); C.R. Inv., v. Village of Shoreview, 304 N.W.2d 320, 328 (Minn. 1981). An arbitrary and capricious denial of a permit based on insufficient evidence is grounds for the appellant court to order the issuance of the permit. Yang v. County of Carver, 660 N.W.2d at 836 (Minn. App. 2003).

The BOA's only stated legal reason for denying Appellants' area variance request was "no adequate hardship". (A-18). That is not a legally sufficient reason to be applied to county zoning area variance requests as discussed in Argument III below. Thus, the BOA's decision is arbitrary, capricious and unreasonable, and must be reversed.

To support the reasoning of its decision, the BOA concluded "plenty of room" at the hearing, advised Appellants to "squeeze it together a little bit" at the hearing, and concluded "adequate room" in its written findings. (9/1/05 Trans. P. 15; A-18). These conclusory statements disregard the fact that Lot 6 was only two-thirds the width and less than half the square footage of a conforming lot. These statements ignore the realities of the situation. A site permit had been issued. The house and garage were already built. The house and garage are not capable of being moved. The house has a full concrete basement with in-floor heat and the garage has a concrete foundation. To move them would render them valueless. The BOA's statements further ignore the testimony of the contractor that given the shape, length, width and placement of the structures, there is no room for increased setbacks. (9/1/05 Trans. P.9). See, Curry v. Young, 285 Minn. 387, 173 N.W.2d 410 (1969) (unusual shape and size may render lot valueless if the setback requirement of the ordinance were enforced). Finally, these statements ignore that if the house were moved out of the road right of way and

toward the lake, it would then violate the shoreline setback.

The unreasonableness of the decision is also measured by the nature of the matter under review. Rowell, 446 N.W.2d at 921. The nature of the matter is an after-the-fact area variance request for a house and garage permitted, inspected and constructed under a county issued site permit. Under Appeal of Kenney, 374 N.W.2d 271, 275 (Minn. 1985), landowner equities should be considered, i.e.:

- "1. Whether or not an Appellant acted in good faith;
2. Whether or not Appellant attempted to comply with the law by obtaining a building permit;
3. Whether the building permit obtained violated the law;
4. Whether or not Appellant had made a substantial investment in the property;
5. Whether or not the construction was completed prior to Appellant being informed of its impropriety;
6. Whether or not the property is residential/recreational and not commercial;
7. Whether or not there are similar structures on the lake; and
8. Whether or not a benefit to the County would be outweighed by the detriment to the Appellant if forced to remove the structure."

In Kenney, the landowner's lake lot contained a boathouse, which was a prohibited structure under the county's ordinance.

The landowner obtained a building permit from the township to reconstruct the boathouse, and was mistaken that the township's building permit was legally sufficient. The township's building permit was improperly issued, as the county's ordinance prohibited boathouses and the reconstruction or alteration of boathouses. The landowner relied upon the validity of the township's building permit and did not apply for either a county building permit or variance. After the landowner reconstructed the boathouse and received a complaint from the county, he applied for a county building permit, but was denied. The landowner next applied to the county's board of adjustments, but was also denied. The trial court sustained the board of adjustments decision. The Court of Appeals reversed and remanded. The Supreme Court concurred, and also urged the board of adjustment to consider the equities in favor of granting a variance for the landowner.

In the present case, the BOA excluded the presentation or argument of the Kenney factors at the hearing by declaring before-the-fact treatment of Appellants' variance request. Since the BOA failed to consider the nature of the matter under review (an after-the-fact variance request for construction permitted and inspected by LRM), its decision is unreasonable, and must be reversed with directions that a variance be issued. Had the BOA allowed and considered Kenney factors, it is submitted that only

one reasonable conclusion could be reached i.e., that Appellant's variance request be granted.

(1) Good faith. Appellant's good faith is shown by the various maps, plans and dimensions submitted to the contractor and the LRM in the design, permitting and construction process; the application for a site permit; revision of the application for site permit as required by LRM; allowance of their property to be physically inspected at least three times; and obtaining completed project approval from LRM. The house and garage were completely constructed when the septic contractor found the possible setback error. Appellants hired a surveyor to verify the error, provided the information and the survey to the Sewer District and the LRM, and discussed the setback with LRM officials. LRM indicated that since a site permit had been issued and the construction was completed, there wasn't a problem.

(2) Attempt to comply with the law by obtaining building permit. Appellants not only attempted to comply with the law by obtaining a building permit, but in fact obtained a building permit. LRM inspected the site at least three times. LRM measured, noted and mapped the stakes, survey pins and property corners, the location of the building's footprint, and the side lot and road right-of-way setbacks. LRM found the footings and the structures in compliance with the Ordinance setbacks.

(3) Building permit obtained violated the law. Appellants have a grandfathered non-conforming lot as to its width and

square footage. Such lots are exempted from the Ordinance if a site permit is obtained. (See Argument I above). A site permit was obtained from LRM, and LRM inspected the construction three times. The site permit is permission under the Ordinance. In the event a variance was needed for the setbacks, the site permit permitted that which would otherwise be a violation. Moreover, there is no setback violation where the building in question meets the average setback of other buildings located in the immediate vicinity. State v. Callender, 293 Minn. 451, 197 N.W.2d 216, 218 (1972). Lots 4 and 7 and other lots also have structures in the setback areas.

(4) Substantial investment in the property. Appellants have made a substantial investment in the property. The construction of the house and garage are complete. Appellants invested \$236,917.44 into the construction.

(5) Completion prior to knowledge of impropriety. The house and garage had been complete for 15 months before the setback problem came to Appellant's attention in October 2004. They immediately informed LRM. LRM reviewed the file and said that there wasn't a problem because the site permit had been issued. It wasn't until July 11, 2005 that LRM issued a setback violation notice. The site permit has never been revoked.

(6) Residential or commercial. This is a residential property. It is Appellants' retirement lake cottage.

(7) Similar structures. Several lots near Lot 6 have structures within the setback. Only two of them were issued variances. Appellant are the only ones who received a citation, or whose area variance application has been denied.

(8) Benefit to County versus detriment to Appellants if forced to remove the structure. In granting prior setback variances in Walvatne Addition, the BOA found the road is little used (Lot 4) and hardship due to substandard lot of record. (Lot 7). Appellants Lot 6 is similar to these two lots. Therefore, there is no detriment to the County if Appellants house and garage stay where located. The detriment to Appellants in moving the house and garage is that there is no room to bring in the equipment to move it. To move the house east to get out of the road right-of-way setback, would place the house in the shoreline setback. The basement would have to be destroyed. The house has a full finished basement, with hot water in-floor heat. The cost to move the structures would consume their value.

Finally, on the Kenney factors, Respondent presented no evidence to refute the evidence Appellants presented on the Kenney factors on summary judgment. Respondent asserted innuendo attacking Appellants' honesty and integrity, and argued that the permitted house and garage were not yet complete, despite the evidence that those structures were complete. A party cannot simply relay on general statements, surmise, speculation, mere averements, or assertions in pleadings, but must show by

affidavit or other persuasive proof that specific material fact issues exist. County of Hennepin v. Mikulay, 292 Minn. 200, 194 N.W.2d 259, 263 (1972). There is no genuine issue of material fact on the Kenney factors, and Appellants are entitled to reversal of BOA's decision as a matter of law.

When a zoning decision is arbitrary and capricious due to either the lack of a sufficient stated reason, or the lack of sufficient evidence, the general rule is to remand the case with specific directions to issue the permit. In re the Matter of Livingood, 594 N.W.2d 889, 895 (Minn. 1999). Appellants urge reversal of the BOA's decision with direction either that a variance is not needed or that one must be issued as a matter of law.

III. Whether Respondent's application of the "hardship" standard rather than a "practical difficulty" standard caused the hearing to be unfair and the decision arbitrary and capricious.

Review is limited to the stated reasons of the governing board. In re Livingood, 594 N.W.2d at 894. A decision is arbitrary and capricious if the reasons assigned by the governing body do not have the slightest validity or bearing on the general welfare of the immediate area, or do not have a factual basis supported by substantial evidence. VanLandschoote v. City of Mendota Heights, 336 N.W.2d 503, 508 (Minn. 1983); Graham v. Itasca County Planning Commission, 601 N.W.2d 461, 467 (Minn. App. 1999). Reasonableness is measured by the standards set out in the ordinance and the nature of the matter under review.

Rowell v. Board of Adjustment of the City of Moorhead, 446 N.W.2d 917, 921 (Minn. App. 1989), review denied December 15, 1989). Where a zoning ordinance specifies standards, and the governing body fails to follow those standards, the denial of the variance is arbitrary as a matter of law. Scott Co. Lumber Co., Inc. v. City of Shakopee, 417 N.W.2d 721, 727 (Minn. App. 1988) (review denied March 23, 1988).

The BOA decision is arbitrary, capricious and unreasonable as a matter of law because it failed to follow the standards of the Ordinance and case law. First, it used the wrong standard in denying Appellants' area variance request. The Ordinance states that a variance shall be permitted "when there are practical difficulties or particular hardship in the way of carrying out the strict letter of the Ordinance." (A-50).

"Practical difficulty" is the correct standard to be applied to area variance requests. See, Ordinance V, 5, A; Kismet Investors, Inc. v. Benton County, 617 N.W.2d 85, 90, 91 (Minn. App. 2000). Area variances are distinguished from use variances. A use variance permits a use or development of land other than that prescribed by zoning regulations. In re Appeal of Kenney, 374 N.W.2d 271, 274 (Minn. 1985). An area variance concerns area, height, setback, density and parking requirements. Id. Unlike a use variance, an area variance does not change the character of the area zoned. Id.

Kismet makes several very important distinctions regarding the various statutes and standards for acting on variance requests: (1) that the county zoning variance statute of Minn. Stat. §394.27, subd. 7 has two standards, i.e. "practical difficulty" and "particular hardship", whereas the city zoning variance statute of Minn. Stat. §462.357, subd. 6 (2) only has one, i.e., an "undue hardship"; (2) that even though both statutes define "hardship" similarly, the two statutes use different adjectives, i.e., the county statute uses "particular hardship" whereas the city uses "undue hardship"; (3) that under the county statute, the "practical difficulty" standard is applied to area variance requests of area, height, density, setback, etc. requirements, whereas the "particular hardship" standard is applied to use variance requests; (4) that the "practical difficulties" standard is a lesser showing than "particular hardships"; and (5) that this construction gives practical meaning to both the "practical difficulty" standard and the "particular hardship" standard. Kismet, 617 N.W.2d at 90-91. Examples of practical difficulty are: aesthetic and functional considerations, including coordination and alignment of proposed additions, were practical difficulties justifying area variance, Rowell, 446 N.W.2d at 922; unusual shape and size of lot were sufficient practical difficulties to justify setback variance from 25 feet to three feet, Merriam Park Community Counsel, Inc. v. McDonough, 297 Minn. 285, 210 N.W.2d 416, 420 (1973),

overruled on other grounds, Northwestern College v. City of Horton Hills, 281 N.W.2d 865, 868, n. 4 (1979); variance required where setback requirement would force property owner to build much smaller structure, Curry v. Young, 285 Minn. 387, 396-97, 173 N.W.2d 410, 415 (1969). Therefore the BOA's use of a no "adequate hardship" standard (A-13), or the use of any other hardship standard, constitutes an unreasonable, arbitrary and capricious decision. Practical difficulty was the correct standard.

Second, the BOA failed to consider several factors which the Ordinance requires the BOA to consider when addressing a variance application. The BOA "must also consider", i.e. economic considerations; whether the variance will secure for the applicant a right or rights that are enjoyed by other owners in the same area; whether existing sewage treatments on the same property need upgrading before additional development is approved; whether granting the variance will be contrary to the public interest or damaging to the rights of other persons or to property values in the neighborhood; and whether objections are filed to the variance request. (A-50, A-51).

Third, even if the BOA had used the correct standard and had considered the factors set out in Article V, 5, E of the Ordinance, the record contains no sufficient evidence to support its decision to deny Appellant's area variance request. The record shows no objections by any of the neighbors. Appellant's

sewer system met the Sewer Districts and LRM standards. Appellant's area variance is not contrary to the public interest or damaging to the rights of other persons or to property values in the neighborhood. See Rowell, 446 N.W.2d at 922 (when a structure already exists, an addition will not alter the character of the locality). Appellant's house and garage are 39 feet from the traveled portion of the road. The BOA previously found "very limited traffic flow in this area" when granting Lot 4 a variance. (A-72). The BOA previously found a non-conforming lot as a "hardship" for granting a setback variance to Lot 7. (A-74). The granting of the road right-of-way setback variance will give to Appellants a right that is enjoyed by others, such as Lots 4 and 7 which were granted setback variances and other neighboring lots with structures built in the setback without variances. (9/1/05 Trans. P. 13).

The BOA used the wrong standard, not the "practical difficulty" standard as required by Ordinance V, 5 A and Kismet Investors, Inc. 617 N.W.2d 85, 90, 91 (Minn. App. 2000) (review denied Nov. 15, 2000). The BOA failed to consider the factors set out in the Ordinance V,5,E. Where a zoning ordinance specifies standards, and the governing body fails to follow those standards, the denial of the variance is arbitrary as a matter of law. Scott Co. Lumber Co., Inc. v. City of Shakopee, 417 N.W.2d 721, 727 (Minn. App. 1988) (review denied March 23, 1988). The general principle is that when a zoning authority's decision is

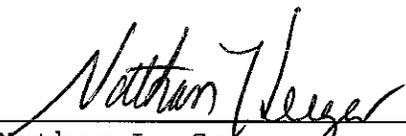
arbitrary because it is unsupported by legally sufficient reasons, or it is unsupported by sufficient evidence, the appellate court should order issuance of the permit and not remand it back to the zoning authority. In re Matter of Livingood, 594 N.W.2d at 895. The BOA's decision must be reversed, with directions that the variance be issued.

CONCLUSION

The clear language of the Ordinance exempts non-conforming grandfathered lots from the application of the Ordinances and its requirements in certain instances. Appellants have met all of the conditions of the exemption and either don't need a variance, or are entitled to a variance as a matter of law. The hearing conducted by the BOA, and the BOA's failure to apply the appropriate standard or to consider the factors required of the Ordinance makes the BOA's decision arbitrary and capricious as a matter of law, in which case this court should order the issuance of a variance.

Respectfully submitted,

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