

Case No. A061696

STATE OF MINNESOTA

IN SUPREME COURT

Cyril Stadsvold and Cynara Stadsvold,

Appellants,

v.

County of Otter Tail, Board of Adjustment,

Respondent.

RESPONDENT OTTER TAIL COUNTY'S BRIEF AND APPENDIX

Nathan L. Seeger, No. 208152
Nathan Seeger Law Office
128 West Junius Avenue
Fergus Falls, MN 56537
Telephone: 218-739-4621
Attorney for Appellants Stadsvold

Michael T. Rengel, No. 169432
Pemberton, Sorlie, Rufer & Kershner, P.L.L.P.
110 North Mill Street
P.O. Box 866
Fergus Falls, MN 56538-0866
Telephone: 218-736-5493
Attorneys for Respondent Otter Tail County

Scott Simmons, No. 244983
Association of Minnesota Counties
125 Charles Avenue
St. Paul, MN 55103-2108
Telephone: 651-224-4433
Amicus Curiae Association of Minnesota Counties

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).

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	2
LEGAL ISSUE	3
STATEMENT OF FACTS	4
ARGUMENT	8
I. OTTER TAIL COUNTY REASONABLY REQUIRED A VARIANCE UNDER THE SHORELAND MANAGEMENT ORDINANCE OF OTTER TAIL COUNTY	
II. THE OTTER TAIL COUNTY BOARD OF ADJUSTMENT WAS REASONABLE AND NOT ARBITRARY AND CAPRICIOUS IN DENYING THE VARIANCE REQUEST	
III. THE RECORD IN FRONT OF THE OTTER TAIL COUNTY BOARD OF ADJUSTMENT WAS COMPLETE	
CONCLUSION	27
APPENDIX AND ITS INDEX	28

TABLE OF AUTHORITIES

	<u>PAGE</u>
Cases	
<u>Appeal of Kenney</u> , 374 N.W.2d 271 (Minn. 1985)	21, 22, 23
<u>County of Lake v. Courtney</u> , 451 N.W.2d 338, 340 (Minn.App. 1990).....	8
<u>Graham v. Itasca County Planning Com'n</u> , 601 N.W.2d 461, 467, 468 (Minn.App. 1999).....	15, 18, 19, 20
<u>Gurtek v. Chisago County</u> , 1988 WL 81554 *1 (Minn.App. 1988)	25, 26
<u>Hibbing Taconite Co. v. Minnesota Public Serv. Com'n</u> , 302 N.W.2d 5, 9 (Minn. 1980).....	8, 23
<u>Ivancovich v. City of Tucson Bd. of Adjustment</u> , 529 P.2d 242, 249 (Ariz.App. 1974)	19
<u>Luger v. City of Burnsville</u> , 295 N.W.2d 609, 612 (Minn. 1980)	15, 19
<u>McCaleb v. Jackson</u> , 307 Minn. 15, 239 N.W.2d 187 (Minn. 1976).....	9
<u>Merriam Park Community Council, Inc. v. McDonough</u> , 297 Minn. 285, 292, 210 N.W.2d 416, 420 (Minn. 1973)	19, 20
<u>Mohler v. City of St. Louis Park</u> , 643 N.W.2d 623, 632 (Minn.App. 2002)	18
<u>O'Brien v. Douglas County Bd. of Com'rs</u> , 2005 WL 3291395 *4 (Minn.App. 2005)	19
<u>Rowell v. Board of Adjustment of the City of Moorhead</u> , 446 N.W.2d 917, 921, 922 (Minn.App. 1989).....	14, 17, 19, 20
<u>Sibley v. Inhabitants of the Town of Wells</u> , 462 A.2d 27, 30 (Me. 1983)	18, 19
<u>State v. United States Fidelity & Guaranty Co.</u> , 303 Minn. 131, 226 N.W.2d 322 (Minn. 1975)	9
<u>SuperAmerica Group, Inc., a Div. of Ashland Oil, Inc. v. City of Little Canada</u> , 539 N.W.2d 264 (Minn.App. 1995) (rev. den. Jan. 5, 1996)	26
<u>Swanson v. City of Bloomington</u> , 421 N.W.2d 307, 312-313 (Minn. 1988)	8, 23, 26
<u>Tuckner v. Township of May</u> , 419 N.W.2d 836, 838 (Minn.App. 1988).....	17
<u>VanLandschoot v. City of Mendota Heights</u> , 336 N.W.2d 503, 508 n. 6 (Minn. 1983).....	14
<u>White v. Minnesota Dep't of Natural Resources</u> , 567 N.W.2d 724, 730 (Minn.App. 1997).....	26
Statutes	
Minn.Stat. §394.33	21
Minn.Stat. §462.357, Subd. 6(2).....	19
Minn.Stat. §645.16 (1984)	9

LEGAL ISSUE

WHETHER THE OTTER TAIL COUNTY BOARD OF ADJUSTMENT WAS REASONABLE IN DENYING THE APPELLANTS' AFTER THE FACT VARIANCE APPLICATION, WHEN THE APPELLANTS' CONSTRUCTED DWELLING AND GARAGE WAS IN VIOLATION OF THE SHORELAND MANAGEMENT ORDINANCE OF OTTER TAIL COUNTY?

STATEMENT OF FACTS

Appellants Cyril and Cynara Stadvold are owners of Lot 6 of Walvatne Addition, on Blanche Lake, classified as a recreational development lake in Everts Township. Record No. 000004. The area of Lot 6 of Walvatne Addition is approximately 17,900 feet pursuant to the information from appellants' application for a site permit submitted to Otter Tail County Land and Resource Management. Record No. 000004.

Appellants intended to construct a dwelling and garage and applied for a site permit. Under the Shoreland Management Ordinance of Otter Tail County, on recreational development lakes there is a requirement for 10 foot setbacks from lot lines and 20 foot setbacks from road right of ways. Record No. 000063. In applying for the site permit, the appellants' application set forth setback to lot lines of 10 feet and 10 feet, and setbacks from the road right of way of 20 feet, which would conform to the Shoreland Management Ordinance of Otter Tail County and would not require a variance. Record No. 000004. Based on the site permit application, the site permit was issued and construction of the dwelling and garage started. However, on July 11, 2005, when the building of the garage and dwelling was near completion, the appellants were cited for a violation based on an inspection by an Otter Tail County Land and Resource Management official because, based on the inspection, the dwelling instead of being located 10 feet from the lot line and 20 feet from the road right of way as set forth in the site permit application, was only 5 feet from the lot line and 16 feet from the road right way. Record No. 000004; 000025. Further, the garage, instead of being located 10 feet from the lot line and 20 feet from the road right of way, was only 9 feet from the lot line

and 5 feet from the road right of way. Record No. 000025. A survey later done by David A. Anderson after the violation was discovered showed that the garage was actually 10.6 feet from the lot line in compliance with the setback provision in the Shoreland Management Ordinance of Otter Tail County, but the dwelling was located only 5 feet from the lot line and 16.7 feet from the road right of way and the garage was located only 5.1 feet from the road right of way. Record No. 000029.

On August 8, 2005, the appellants applied for a variance from these three violations to the setback requirements under the Shoreland Management Ordinance of Otter Tail County. Record No. 000028. The hearing on the request for a variance from the property setback requirements was held on Thursday, September 1, 2005, in front of the Otter Tail County Board of Adjustment. Record No. 000030-50. Proper notice was given prior to the meeting and no written comment was submitted prior to the meeting. Record No. 000030-36.

At the meeting, the appellants claimed that their builder, Richard Hochstein, did not attempt to find or verify the correct property lines when he located the house and garage on the property and that, therefore, their variance from the three violations should be approved. Record No. 000043. The builder, Richard Hochstein, was present at the hearing and pointed out that the survey was not completed until after the dwelling and garage were constructed. Record No. 000043. The builder claimed at the meeting that the appellants placed the corner stakes at the lot, not him, and further stated that it is his practice of never pounding corner stakes on an undeveloped lot and that he always leaves this up to the homeowner. Record No. 000043-44. Appellants stated at the meeting that

they did not remember staking the corners and thought if there were corners already on the lot they were from 1969. Record No. 000045. Appellant Cyril Stadvold, who is an architect, explained that his drawings showed the proper setbacks and that he "was hoping that my builder would have verified that." Record No. 000045. The Otter Tail County Board of Adjustment Chair explained that it has been the history of the Board to require the owner to know where his property lines are, that they do not require a survey, but it is the owner's responsibility "when you come before this Board, not the contractor's, nobody else's, just yours to know where your property lines are." Record No. 000045. Additional comment was provided by the appellants and the builder. Record No. 000042-50.

The Otter Tail County Board of Adjustment, after review of the record and hearing the testimony at the meeting, voted unanimously to deny the variance as requested, finding that there was no adequate hardship unique to the property which would allow for the granting of the variance and based their findings on the following:

- "1.) the requested variance would not have been approved had the request been submit [sic] prior to the project being started, and
- 2.) the applicants' [sic] have adequate room on their property to obtain a reasonable use of their property without the granting of the variances as requested." Record No. 000028-A.

The District Court upheld Otter Tail County's decision finding the Otter Tail County Board of Adjustment was reasonable and not arbitrary or capricious nor contrary to law in regards to their decision to deny the variance. The appellants appealed the Otter Tail County Board of Adjustment's decision to the Court of Appeals. The Court of

Appeals affirmed the decision of the Otter Tail County Board of Adjustment finding that the Otter Tail County Board of Adjustment used the proper standard and was reasonable and not arbitrary or capricious in denying the variance to the appellants. Appellants have now appealed this decision to the Minnesota Supreme Court.

ARGUMENT

I. OTTER TAIL COUNTY REASONABLY REQUIRED A VARIANCE UNDER THE SHORELAND MANAGEMENT ORDINANCE OF OTTER TAIL COUNTY

The appellants never argued at the September 1, 2005 Otter Tail County Board of Adjustment meeting that a variance was not required. When a governmental entity acts in a quasi-judicial capacity by receiving and weighing evidence and making factual findings, those decisions should be upheld if they are reasonable and not arbitrary and capricious. Hibbing Taconite Co. v. Minnesota Public Serv. Com'n, 302 N.W.2d 5, 9 (Minn. 1980). The appellants had full opportunity to comment and present this argument for the Otter Tail County Board of Adjustment for determination at the September 1, 2005 Board meeting but failed to do so. Appellants failed to raise these issues in front of the Otter Tail County Board of Adjustment and have provided no reason for their failure to do so. These claims should be dismissed. Swanson v. City of Bloomington, 421 N.W.2d 307, 312-313 (Minn. 1988) (holding additional evidence is only allowed when it is material and there was a good reason for failing to produce it at the hearing before the board). The Otter Tail County Board of Adjustment was reasonable in requiring a variance.

Regardless, Otter Tail County is responsible for following and enforcing the terms of the Shoreland Management Ordinance of Otter Tail County. Zoning ordinances must be construed according to their plain and ordinary meaning. County of Lake v. Courtney, 451 N.W.2d 338, 340 (Minn.App. 1990). Under Article III, Section 4A, "Minimum Shoreland Ordinance Standards for Lakes. . .," the Shoreland Management Ordinance of

Otter Tail County provides that all lots on lakes shall have setbacks from lot lines on lakes for single family residence of a 10 foot setback from lot lines and a 20 foot setback for right of ways. Record No. 000063. Article IV, Section 13B, "Exemptions," provides:

"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." (Emphasis added). Record No. 000078.

An ordinance will be construed so as to give effect to all of its parts. Minn.Stat. §645.16 (1984); State v. United States Fidelity & Guaranty Co., 303 Minn. 131, 226 N.W.2d 322 (Minn. 1975). The court will also avoid reading into an ordinance unnecessary terms. See McCaleb v. Jackson, 307 Minn. 15, 239 N.W.2d 187 (Minn. 1976). The "lot width" is clearly designated as being 150 feet on a recreational development lake and the "lot area" is 40,000 square feet, which a grandfathered non-conforming lot such as the appellants would be exempt from. Record No. 000063. However, under the plain and ordinary meaning, nowhere within the Shoreland Management Ordinance of Otter Tail County is there language that states that a nonconforming lot is also exempt from setbacks or for that matter all other Ordinance provisions as argued by the appellants.¹ This Ordinance provision is not ambiguous, it is very clear. This is further supported by Article I, Section 2, "Purpose," which provides

¹ Compare this provision, Article IV, Section 13B, with Article IV, Section 13A, the paragraph before, which provides for specific language stating objects such as poles, towers, telephone booths, wires, cables, conduits, vaults, pipelines, laterals, or other similar distributing equipment are "exempt from all the provisions of this Ordinance." Article IV, Section 13B does not provide this language and therefore the other provisions of the Ordinance do apply to grandfathered nonconforming lots as has been the practice in Otter Tail County.

that "[t]he purpose of this Ordinance is to regulate the use and orderly development of shorelands in Otter Tail County. . ." and Article I, Section 4, "Compliance," which states that "[n]o structure located in Otter Tail County and. . .lying within the Shoreland Management Districts [property located within 100 feet from ordinary high water level of a lake]. . .shall be erected or altered which does not comply with the regulations of this Ordinance. . ." Record No. 000055. This is also further supported in the Ordinance directing a county official to only issue a site permit, to both conforming and nonconforming lots, only when all "the terms of this Ordinance [are] met." Article V, "Administration," Section 1B, Record No. 000079. There is no reference to a grandfathered nonconforming lot to be treated differently than other lake lots except as specifically provided for in Article IV, Section 13B of the Shoreland Management Ordinance of Otter Tail County. It has been Otter Tail County's practice to require grandfathered nonconforming lots to conform to setback requirements. In three areas the location of the appellants' buildings did not conform to the Ordinance setback requirements. Therefore, Otter Tail County was reasonable in requiring appellants to secure a variance for these three areas where the dwelling was located only 5 feet from the lot line (Shoreland Management Ordinance of Otter Tail County requires 10 foot setbacks) and 16.7 feet from the road right of way and the garage was located only 5.1 feet from the road right of way (Shoreland Management Ordinance of Otter Tail County requires 20 foot setbacks from right of ways).

If the Court were to entertain the appellants' argument that the appellants do not need a variance because a site permit was issued (despite the fact that inaccurate

information was supplied), then in this case, and other cases throughout Otter Tail County, there would be absolutely no limits to where the appellants' buildings could have been built or others on nonconforming lots. If this line of reasoning was followed, any nonconforming lot owners, including the appellants, are exempt from all setback rules and therefore an applicant could build a home right on the property line with no setbacks, even though the specific site permit issued to the appellants required them to conform to these requirements stating that the appellants' house and garage would be 10 feet from the lot lines and 20 feet from the right of ways. Record No. 000004. This defeats the purpose of the Shoreland Management Ordinance of Otter Tail County "to regulate the use and orderly development of shorelands in Otter Tail County." Record No. 000055. Revocation of the site permit is not needed; appellants only need to conform to the terms of the site permit providing for conforming setbacks pursuant to the site permit application submitted to Otter Tail County.

Even if for sake of argument Article IV, Section 13, "Exemptions," could be construed for allowing exemptions to setbacks if a site permit was issued, inherent in this provision and other provisions within the Shoreland Management Ordinance of Otter Tail County, or for that matter any other state, county, or municipal ordinance or regulations, is that the applicant will provide Otter Tail County with accurate information in their application for a site permit prior to issuance of that permit. It is undisputed that appellants provided incorrect information on their site permit application to Otter Tail County. Appellants' site permit application clearly provided that both the house and the garage would be located the proper setback distances from the lot lines (10 feet) and road

right of way (20 feet) which are the proper setbacks under the Ordinance. Record No. 000063. Pursuant to the past practice of Otter Tail County, the County would never have issued a site permit in the first place if the application for the site permit had been accurate and had stated that in three locations the recognized setbacks would not be followed. A site permit was only granted for a home and garage that conformed to the setback requirements and this did not. It cannot be disputed that appellants violated the terms of their site permit.

In Otter Tail County's Application for Site Permit form, the County specifically requires a property owner, before issuing a site permit, to attest in their site permit application to the following:

"I hereby certify that the information contained herein is correct and agree to do the proposed work in accordance with the description above set forth and according to the provisions of the Ordinances of Otter Tail County, Minnesota. . . Permission is hereby granted to the above named applicant to perform the work described in the above statement. This permit is granted upon express condition that the person to whom it is granted, and his agent, employees and workmen shall conform in all respects to the Ordinances of Otter Tail County, Minnesota. This permit may be revoked at any time upon violation of said Ordinances." (Emphasis added). Record No. 000004.

This Application for Site Permit was signed by Cyril Stadsvold, the appellant, on November 8, 2001, specifically designating on the application that the "Setback to Right of Way" would be "20 Ft" and the "Setback to Lotline" would be "10 Ft. & 10 Ft." Record No. 000004. To now find that the appellants are not required to secure a variance because they have a site permit under false pretense would be unjustified and would set dangerous precedence in Otter Tail County and state-wide. Otter Tail County has 1,046 lakes in the County, arguably more lakes than any other county within the state. Otter

Tail County has always held applicants responsible for knowledge of their boundary lines. To claim that Otter Tail County is responsible for knowing the lot lines of each individual lot on each individual lake would be an unreasonable and very costly burden on the County. Under the Shoreland Management Ordinance of Otter Tail County, Article V, Section 1A, "Site Permits," it states:

"The *applicant* shall notify the Administrative Officer once the building footings have been constructed for an inspection. Prior to these inspections, the *applicant shall stake* out all lot lines and road right-of-ways." (Emphasis added). Record No. 000079.

The appellants seem to infer that it was the inspector's job to locate the property lines and stakes; however, as this provision makes clear, the inspector is utilizing what the appellants have marked as their property stakes. The burden is on the applicants, the appellants, to provide the inspector with the correct staking and the inspector then measures accordingly. Appellants were mistaken about the location of their property lines and provided inaccurate information to Otter Tail County and proceeded to build not only their house, but also their garage, far over these setback lines contrary to what they stated in their application. The only way Otter Tail County could even verify all the boundary lines would be requiring a survey whenever any construction is done. However, most times a property owner usually knows the location of the boundary lines or at least builds far enough away from the boundary lines to be safe so to have such a requirement would often result in an unnecessary expense. However, when construction is close to the setbacks certainly it is wise for the property owner to verify the boundary lines, which is what the appellants should have done here. Certainly, the appellants could have verified

their lot lines and avoided this problem by getting a survey prior to building, but they chose not to. Appellants did not get a survey until after the construction was completed and they were notified that there were problems with the location of their house and garage. Record No. 000029. The practice in Otter Tail County and probably all other counties in Minnesota is to put the burden on the applicant to provide accurate information to Otter Tail County on their site permit application and to accurately point out the boundary locations to a county inspector. To shift this burden as the appellants seem to suggest would be unreasonable and costly to Otter Tail County and would no doubt have state-wide impact on other counties, municipalities, and governing agencies.

Otter Tail County was reasonable and not arbitrary or capricious in requiring the appellants to secure a variance.

II. THE OTTER TAIL COUNTY BOARD OF ADJUSTMENT WAS REASONABLE AND NOT ARBITRARY AND CAPRICIOUS IN DENYING THE VARIANCE REQUEST

Reasonableness of a board's denial of a variance is measured by the standards set out in the applicable zoning ordinances. VanLandschoot v. City of Mendota Heights, 336 N.W.2d 503, 508 n. 6 (Minn. 1983); Rowell v. Board of Adjustment of the City of Moorhead, 446 N.W.2d 917, 921 (Minn.App. 1989). The Otter Tail County Board of Adjustment has broad discretion to grant or deny variances, and the court reviews the exercise of this discretion to determine whether it was reasonable. VanLandschoot v. City of Mendota Heights, 336 N.W.2d 503, 508 (Minn. 1983).

Under Article V, Administration, Section 5, "Variances from Standards," of the Shoreland Management Ordinance of Otter Tail County, a variance shall be permitted

only "when there are practical difficulties or particular hardship in the way of carrying out the strict letter of the Ordinance." Under the Shoreland Management Ordinance of Otter Tail County, a "hardship" means:

1. the property in question cannot be put to a reasonable use if used under the conditions allowed by the Ordinance;
2. the plight of the landowner is due to circumstances unique to the property not created by the landowner; and
3. the variance, if granted, will not alter the essential character of the locality. Record No. 000082.

"To establish a hardship, a property owner must satisfy each part of [this] three-part test. . ." Graham v. Itasca County Planning Com'n., 601 N.W.2d 461 (Minn.App. 1999). The property owner applying for a variance carries a "heavy burden" to justify granting the variance (the burden is not on the Board in denying a variance as the appellants have attempted to argue throughout their brief). Luger v. City of Burnsville, 295 N.W.2d 609, 612 (Minn. 1980). Appellant Cyril Stadsvold's only comment to the Otter Tail County Board of Adjustment during the September 1, 2005 Board meeting was that he was mistaken about the location of his boundary lines. Record No. 000042-50. In applying the standards in the Shoreland Management Ordinance of Otter Tail County, this is not enough to satisfy the "heavy burden" to justify the granting of a variance. Clearly, the property owners in this case failed to present evidence to the Otter Tail County Board of Adjustment to satisfy the first two factors of this three part-test set forth in the Shoreland Management Ordinance of Otter Tail County.

In applying the first part of the hardship test, that the property cannot be put to a reasonable use under the conditions allowed by the Shoreland Management Ordinance of

Otter Tail County, it was discussed by the Otter Tail County Board of Adjustment at the September 1, 2005 meeting how that prior to construction this property was a vacant lot and that despite the property being substandard, there was still plenty of room to put both a reasonable sized garage and house on the property without the need for variances. Record No. 000039. Appellant Cyril Stadvold is an architect, no doubt acquainted with buildings, and zoning and setback requirements. This problem could have been averted if the appellants just had a survey of the property before the building and garage were built so they knew where in fact their property lines were located, rather than getting a survey after the building and garage were already constructed. The appellants' architectural drawings submitted to the Otter Tail County Board of Adjustment showed incorrect boundary line and setback measurements showing that the setbacks would conform to the Ordinance when in fact they did not. Record No. 000001-3. These drawings still make it fairly clear that there is adequate room on the lot to build a reasonably sized home in similar size to the one built and utilizing correct setbacks, but the primary reason that the house was in violation of the setbacks was due to the unusual shape of the dwelling and the location of the garage constructed by the appellants. Id.

The Otter Tail County Board of Adjustment stated at the hearing that they approach after the fact variance applications the same as before the fact variance applications in addressing whether the variance should be granted. Record No. 000043. Here, the Otter Tail County Board of Adjustment was clear that if the appellants came to the Otter Tail County Board of Adjustment before building this dwelling and garage with a vacant lot and requested a variance from three setback requirements when there was

plenty of room for a home and garage to be built, that they would not grant the variance. Record No. 000046. The appellants may criticize the Otter Tail County Board of Adjustment as being unfair in this approach, but the application and analysis is well within the Otter Tail County Board of Adjustment's discretion under the Shoreland Management Ordinance of Otter Tail County and only makes sense, since it discourages people from purposely violating the Shoreland Management Ordinance of Otter Tail County and approaching the Otter Tail County Board of Adjustment after the fact in using the excuse that because the building is already constructed, that this should be a factor in the Otter Tail County Board of Adjustment's determination. To allow a different standard of review for before the fact variance applications compared to after the fact variance applications would not only encourage dishonesty in Otter Tail County but would do so state-wide by allowing for a lesser standard if a violation is "after the fact." "The county has broad discretionary power to deny an application for variance." Tuckner v. Township of May, 419 N.W.2d 836, 838 (Minn.App. 1988); See Rowell v. Board of Adjustment of the City of Moorhead, 446 N.W.2d 917, 921 (Minn.App. 1989) (holding reasonableness of a board's denial of a variance is measured by the standards set out in the applicable zoning ordinances). The Otter Tail County Board of Adjustment was reasonable in treating an after the fact variance application the same as a before the fact variance application.

Under the second part of the three-part test, that the plight of the landowner is due to circumstances unique to the property not created by the landowner, it is clear that the appellants failed to present evidence at the Otter Tail County Board of Adjustment

meeting on September 1, 2005, showing that this was due to circumstances unique to the property. The appellants' only reason for building this dwelling and garage in violation of three setbacks is because they were unaware of their property lines. Record No. 000045. In a similar case in front of the Court of Appeals in Graham v. Itasca County Planning Com'n, where a property owner was under the mistaken belief that he was able to divide his property under the zoning ordinance and he could not, the Court of Appeals was clear that a property owner's erroneous belief is not a hardship because a property owner's beliefs are not circumstances unique to the property. Graham v. Itasca County Planning Com'n, 601 N.W.2d 461, 467 (Minn.App. 1999); see also Mohler v. City of St. Louis Park, 643 N.W.2d 623, 632 (Minn.App. 2002) (holding that a property owner's beliefs are not circumstances unique to the property).

As discussed, the property was already large enough to put a reasonably sized dwelling and garage on the property with proper setbacks. See Sibley v. Inhabitants of the Town of Wells, 462 A.2d 27, 30 (Me. 1983) ("Mere fact that the lot is substandard is not a unique circumstance."). The appellants failed to present any evidence at the hearing regarding circumstances that the Otter Tail County Board of Adjustment could consider unique to the property. The only information that the appellants supplied the Board was that they did not know where their property lines were and they proceeded to build a house and garage in violation of the Shoreland Management Ordinance of Otter Tail County. Clearly, under the Shoreland Management Ordinance of Otter Tail County, the appellants were responsible for knowing their property line locations. Article V, "Administration," Section 1A (requiring the applicant to properly stake lot lines and road

right of ways); Record No. 000079. "Economic considerations alone shall not constitute an undue hardship if reasonable use for the property exists under the terms of the ordinance." Minn.Stat. §462.357, Subd. 6(2). See O'Brien v. Douglas County Bd. of Com'rs, 2005 WL 3291395 *4 (Minn.App. 2005) *citing* Ivancovich v. City of Tucson Bd. of Adjustment, 529 P.2d 242, 249 (Ariz.App. 1974) (hardship standard must refer to characteristics of the land in question and not personal considerations). The property owner applying for a variance carries a "heavy burden" to justify granting the variance and therefore, the Otter Tail County Board of Adjustment was reasonable in denying the variance under this factor. See Luger, 295 N.W.2d at 612.

In applying the practical difficulty standard, Courts have held that the practical difficulty standard must refer to characteristics of the land in question, rather than conditions personal to the owner of the land. O'Brien v. Douglas County Bd. of Com'rs, 2005 WL 3291395 (Minn.App. 2005). The appellants' only claim has been that their lot is substandard, but the Minnesota Court of Appeals has been clear that the fact that a lot is substandard is *not* a unique circumstance. Graham v. Itasca County Planning Com'n, 601 N.W.2d 461, 467 (Minn.App. 1999) (emphasis added) *citing* Sibley v. Inhabitants of the Town of Wells, 462 A.2d 27, 30 (Me. 1983). In both Rowell and Merriam Park Community Council, Inc. v. McDonough, the practical difficulties were only granted based on the unique characteristics of the lands and not personal reasons or error of the applicant. Rowell v. Board of Adjustment of the City of Moorhead, 446 N.W.2d 917 (Minn.App. 1989) (applying the plight of the landowner is due to circumstances unique to the property not created by the landowner under the practical difficulty analysis and

finding that the existing church has only a three-foot setback because it was built before the enactment of the present ordinance and that this was a unique circumstance not created by the landowner); Merriam Park Community Council, Inc. v. McDonough, 297 Minn. 285, 292, 210 N.W.2d 416, 420 (Minn. 1973) (upholding variance because of the unusual size and shape of the lot and the setback requirement being unique to the tract). Further, the Court of Appeals in Graham found that practical difficulty could be a separate basis for granting a variance, but noted that the Court of Appeals in Rowell only used practical difficulty as the first part of a three-part hardship test. Graham v. Itasca County Planning Com'n, 601 N.W.2d 461, 468 (Minn.App. 1999) *citing* Rowell v. Board of Adjustment of the City of Moorhead, 446 N.W.2d 917, 922 (Minn.App. 1989). In the case at bar, the lot was vacant and had enough room under the Shoreland Management Ordinance of Otter Tail County to construct a house and a garage on the lot. A review of the record shows that the evidence supports the Otter Tail County Board of Adjustment's decision. The Board properly considered the difficulty that strict enforcement of the Ordinance would create, particularly appellants' need for the variance in order to have their house and garage in the location that they were built. Appellants have failed to show any reason under the practical difficulty standard justifying a variance due to their ignorance of their property lines, which is personal to the owner and not a characteristic of the land. Appellants' circumstances do not qualify under the practical difficulty standard; therefore, the Otter Tail County Board of Adjustment was reasonable in denying the variance under the practical difficulty standard since the appellants did not present any evidence to meet this standard.

Appellants erroneously attempt to rely and compare the Appeal of Kenney case in claiming that the Otter Tail County Board of Adjustment should have considered additional factors not in the Shoreland Management Ordinance of Otter Tail County, since this was an after the fact variance. However, this is a complete misinterpretation of the Minnesota Supreme Court's holding, is clearly distinguishable from our case, and would result in absurd requirement if adopted. Appeal of Kenney, 374 N.W.2d 271 (Minn. 1985). Appeal of Kenney was a very fact specific case where an applicant provided accurate information to a township for a permit and the township proceeded to issue the permit based on their own mistake to the applicant and then on reliance of that permit the applicant proceeded in remodeling and constructing his boat house increasing its value over fifty percent, after which, it was found that there was a more restrictive county ordinance provision and the township's issuance of this permit was in obvious error. Id.; Minn.Stat. §394.33 (stating that a township may not enforce land use controls less restrictive than county controls). Since the township incorrectly issued a permit based clearly on the township's mistake, the Court only confirmed that the county had power to issue a variance in this matter under the standards of that county's ordinance and "urged" the board to consider eight factors in their decision based on equities. Appellants claim that the Appeal of Kenney now somehow establishes additional standards, not in the Shoreland Management Ordinance of Otter Tail County, that the Otter Tail County Board of Adjustment "must" consider as argued in appellants' Court of Appeals briefing, and "should" consider as argued in appellants' Supreme Court briefing, in entertaining an

application for all after the fact variances.² This is wholly unfounded. To be very clear, an after the fact variance application typically occurs when an applicant has proceeded in constructing or altering their property in direct violation of the Shoreland Management Ordinance of Otter Tail County and later, after the damage is done and the violation is discovered by Otter Tail County, the landowner seeks a variance from the standards such as in the case at bar. These applicants are clearly in the wrong from not first getting a variance before altering their property. If these factors in Appeal of Kenney were always considered in all after the fact variance applications, it would only encourage people to construct or alter their property contrary to the Shoreland Management Ordinance of Otter Tail County and hope that they either are not caught in the violation or else rely on additional standards that would be beneficial to them in going in front of the Otter Tail County Board of Adjustment pursuant to an after the fact variance application. This makes no sense and encourages dishonesty. Appeal of Kenney is clearly distinguishable from this case because in our case, the appellants provided inaccurate information to Otter Tail County on their site permit application that their home would comply with the setback requirements, and Otter Tail County in turn issued a site permit based on a house meeting the setback requirements. Once the house was built, the home did not meet these setback requirements as alleged in the application. This was based on the fault and failure

² See Appellants' Brief, Court of Appeals, October 18, 2006, page 24, stating that "In addition to the standards set out in the ordinance, the Supreme Court has ruled that a board of adjustment *must* consider the equities in favor of the landowner when entertaining an application for an *after-the-fact variance*." (Emphasis added); see Appellants' Brief, Supreme Court, October 17, 2007, page 12, stating that "Land owner equities *should* be considered in *after-the-fact variance applications*." (Emphasis added).

of the applicants/appellants to know where their boundary lines were located and not based on the fault of the municipality as in Appeal of Kenney. The circumstances in Appeal of Kenney is one of very few exceptions where a county might consider "equities" if the applicant provides accurate information and then the municipality errors in issuing a permit. This is not the case here. Therefore, the Otter Tail County Board of Adjustment was not required to address these factors at the hearing and to do so would encourage dishonesty not only in Otter Tail County but state-wide.

The Otter Tail County Board of Adjustment was reasonable under the Shoreland Management Ordinance of Otter Tail County, both under the hardship standard and the practical difficulty standard, in denying a variance to the appellants.

III. THE RECORD IN FRONT OF THE OTTER TAIL COUNTY BOARD OF ADJUSTMENT WAS COMPLETE

The Minnesota Supreme Court was very clear that a Court should receive additional evidence only on substantive issues raised and decided by the board if the Court determines the additional evidence is material and there was a good reason for failing to produce it at the hearing before the board. Swanson v. City of Bloomington, 421 N.W.2d 307, 312-313 (Minn. 1988). The appellants have not provided any good reason why their numerous allegations and claims were presented in their brief but were not presented in front of the Otter Tail County Board of Adjustment. Once again, the Otter Tail County Board of Adjustment is acting in a quasi-judicial role by receiving and weighing evidence and making factual findings, much like a court. Hibbing Taconite Co. v. Minnesota Public Serv. Com'n, 302 N.W.2d 5, 9 (Minn. 1980). To now bring up

myriad of issues with little basis that were not brought up to the Otter Tail County Board of Adjustment for them to consider, without any reason, should not be allowed. As the transcript makes clear, the appellants were given a full opportunity to present their information to the Otter Tail County Board of Adjustment at their hearing but the majority of issues now brought up in appellants' briefing were never presented to the Board at their hearing without any reason as to why.

Appellants' reference to other lots in their briefing is absolutely irrelevant. Appellants did not bring this up at the Otter Tail County Board of Adjustment hearing and obviously, each property has individual circumstances unique to that property that go into the Otter Tail County Board of Adjustment's decision. In addition to the unique circumstances of each lot, what the appellants also failed to mention in their briefing and description of these lots is that while these lots were also nonconforming lots, it is very likely in a neighborhood such as this involving such an old plat that these lots that previously received variances did so because they most likely already had buildings on them that existed before the Shoreland Management Ordinance of Otter Tail County was adopted. In those cases, there was most likely a limited area where structures could be located because of the location of existing buildings. In the present case, appellants had a vacant lot with plenty of room to build a house and garage in any area on the lot that would conform with the setback requirements and therefore, a variance was not warranted. Regardless, references to these lots should be ignored as sufficient information was not part of the record.

Appellants' reliance on affidavits in their appendix must also be ignored. This information was never raised in front of the Otter Tail County Board of Adjustment before or during the hearing as the record is clear, except the fact that the appellants were unclear as to the location of their property lines. Further, if these affidavits are being reviewed, the appellants continue to provide false information in "swearing under oath" in Appellant Cyril Stadvold's affidavit that "[t]he practical difficulty and particular hardship of complying with the Shoreland Ordinance setbacks is that the house and the garage *are already built in accordance with the Site Permit.*" Appellants' Appendix A-60, paragraph 17 (emphasis added). This statement is false. The applicants stated in their site permit that the house and garage were going to be in compliance with the setbacks. Neither the house nor the garage was in compliance and three setback violations occurred.

The verbatim transcript is also clear that the Otter Tail County Board of Adjustment addressed the deficiency in these two factors at the hearing and in their formal findings, which the Otter Tail County Board of Adjustment adopted, holding that:

"...no adequate hardship unique to the property had been shown that would allow for the granting of the variance as requested and noted the following: 1.) the requested variance would not have been approved had the request been submit[ted] (sic) prior to project being started, and 2.) the applicants' have adequate room on their property to obtain a reasonable use of their property without the granting of the variances as requested." Record No. 000039.

"The record will likely be clear and complete in a case where the Board has made formal findings contemporaneously with its decision and there is a verbatim transcript of the proceedings." Gurtek v. Chisago County, 1988 WL 81554 *1 (Minn.App. 1988)

citing Swanson v. City of Bloomington, 421 N.W.2d 307, 313 (Minn. 1988). The two small spots where the transcript was inaudible does not all of sudden make the record inadequate because the transcript, record, and findings as a whole clearly set forth the Otter Tail County Board of Adjustment's rationale and findings in denying the variance application. Gurtek v. Chisago County, 1988 WL 81554 *1 (Minn.App. 1988) (holding that although there may be minor deficiencies in identifying speakers or background sounds, the record, on the whole, is clear and complete). A verbatim transcript is not even essential. See, e.g., SuperAmerica Group, Inc., a Div. of Ashland Oil, Inc. v. City of Little Canada, 539 N.W.2d 264 (Minn.App. 1995) (rev. den. Jan. 5, 1996) (finding a clear and complete record when the public meeting was recorded and summarized in prepared minutes).

The transcript makes it clear that the Otter Tail County Board of Adjustment allowed for full comment by the appellants at the Otter Tail County Board of Adjustment hearing, considered all additional testimony at the hearing, considered all the information and documentation that was presented to the Board as part of the record, and also considered their onsite viewing of the lot in coming up with their decision. "If an administrative agency engages in reasoned decisionmaking, the court will affirm, even though it may have reached a different conclusion had it been the factfinder." White v. Minnesota Dep't of Natural Resources, 567 N.W.2d 724, 730 (Minn.App. 1997). The record in front of the Otter Tail County Board of Adjustment was complete and their decision should be upheld.

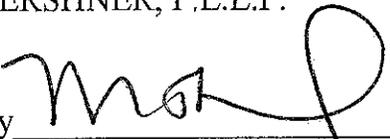
CONCLUSION

Otter Tail County respectfully requests that this Court uphold the Otter Tail County Board of Adjustment's decision to deny the variance request.

Respectfully Submitted,

PEMBERTON, SORLIE, RUFER &
KERSHNER, P.L.L.P.

Date: November 16, 2007

By 

Michael T. Rengel, No. 169432
Attorneys for Respondent Otter Tail County
110 North Mill Street, P.O. Box 866
Fergus Falls, Minnesota 56538-0866
Telephone: 218-736-5493

MTR:NJH:sb
2005-3320
11/16/2007