

## **Variances in Shoreland Management: Statutory and Judicial Interpretations**

**DNR Division of Ecological and Water Resources, P. H. Otterson, 24 August 2010**

A local government's authority to regulate the development and use of private lands within its boundaries rests with the enabling legislation for counties and municipalities found in Minn. Stat. 394 and 462, respectively. While there are certain differences in both wording and administrative processes, there are also areas of broad agreement that apply to both forms of local government:

- Variances must be in harmony with the general purposes and intent of the local controls and consistent with the comprehensive plan;
- "Hardship" as used in connection with the granting of a variance means the property cannot be put to a reasonable use if used under the conditions allowed by the local controls;
- The plight of the landowner is due to circumstances unique to the property not created by the landowner; and
- The variance, if granted, will not alter the essential character of the locality.
- Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of the ordinance.
- No variance may be granted that would allow any use that is prohibited in the zoning district in which the subject property is located.
- The board of adjustment may impose conditions in the granting of variances to ensure compliance and to protect adjacent properties and the public interest.

The municipal statutes refer to "undue hardship." The county statutes call it "practical difficulties or particular hardship." This distinction in wording formed the basis for the 2008 Supreme Court decision (Stadsvold) that applies to county variances. The 2010 Supreme Court decision (Krummenacher) examined the statutory definition of "hardship" (the property cannot be put to a reasonable use if used under the conditions allowed by local controls) and concluded that the meaning was clear as written and must be applied as such in determining hardship. Here is a summary of the two cases:

1. Stadsvold v. County of Otter Tail Board of Adjustment (June 19, 2008). This case involved an after-the-fact variance that was denied by the local government, upheld by both the District Court and Court of Appeals and overturned by the Minnesota Supreme Court. Contrary to all other court decisions that had been made before, the Supreme Court distinguished between "practical difficulties" and "particular hardship" found in Minn. Stat. 394.27, Subd. 7. "Practical difficulties," a lower standard, applied to dimensional standards on the site (area variances), whereas "particular hardship" applied to standards of use (use variances). The Court failed to note that use variances are specifically forbidden in Minnesota Statutes. The Court identified six factors under the practical difficulty standard for local governments to follow in making their decision, but cautioned that the legislature has limited the authority to grant variances to "exceptional circumstances"-- a less rigorous standard for area variance should not be "automatic or easy to obtain."

2. Krummenacher v. City of Minnetonka (June 24, 2010). In this case, the Minnesota Supreme Court overturned a variance that had been granted by the City of Minnetonka and upheld by both the District Court and Court of Appeals. The Supreme Court examined the recent legislation affecting nonconforming structures found in Minn. Stat. 462.357, subd. 1e that allows a nonconforming structure to be continued through repair, replacement, restoration, maintenance or improvement, *but not including expansion*... The Court determined that the addition of a second story to a detached garage constituted a “vertical expansion.” Further, it struck down an oft-cited case, *Rowell v. Board of Adjustment of Moorhead* (Minn. App. 1989) in which the Court of Appeals had interpreted the “undue hardship” section of Minn. Stat. 462.357, subd. 6 as requiring that the property owner need only demonstrate that the intended use was reasonable and not that the land could not be put to any other reasonable use. In this case, Justice Gildea called attention to the plain language of the statute even though the “reasonable manner” standard had been in use for over 20 years. It should be noted that Justice Gildea also wrote a Concurrence to Justice Page’s decision on the Stadsvold case in which she stated that, although she concurred with the decision, “... we long ago recognized that we are not to add words to statutes or otherwise judicially legislate ... Such restrictions should be made by the legislative branch, not the judicial branch.”

The Minnesota Sun Newspapers recently polled a number of Metropolitan communities to determine the impact of the recent decision on them. Please note that this is by no means just a shoreland issue; in fact, none of the cases mentioned are shoreland cases:

<http://mnsun.com/articles/2010/08/13/news/fw/fw12variances.txt>

In light of the 2010 Krummenacher decision, it is likely that the Legislature will be asked to clarify the enabling statutes for both counties and municipalities in Minn. Stat. 394 and 462 on how such matters should be resolved. As noted by Justice Gildea above, it is appropriate that the Legislature and not the Judiciary make this clarification. Similar clarification in earlier legislation regarding contiguous nonconforming lots of record resulted in amendments to both sets of statutes with input from the Association of Minnesota Counties, League of Minnesota Cities and Department of Natural Resources, among others. While it appears to be a new issue, the distinction between “practical difficulties” and “undue hardship” has always been a consideration in the shoreland rules. For example, topographic relief and the existence of structures on adjacent lots are both considered as being valid grounds for granting variance to structure setback.