

State of Minnesota
Crow Wing County

District Court
Ninth Judicial District

Court File Number: **18-CV-11-5395**

Case Type: Civil Other/Misc.

Notice of Filing of Order

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In the Matter of Grant of a Variance by Crow Wing County Board of Adjustment to Bay Lake Townhome Association

You are notified that an order was filed on this date.

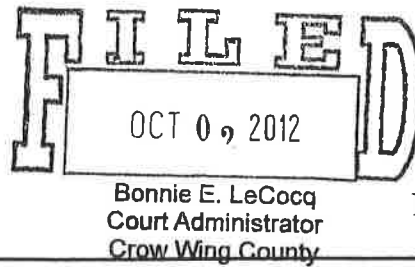
Dated: October 3, 2012

Bonnie LeCocq
Court Administrator
Crow Wing County District Court
213 Laurel Street, Suite 11
Brainerd MN 56401
218-824-1310

cc: THOMAS A FITZPATRICK
PAUL DONALD REUVERS

A true and correct copy of this notice has been served by mail upon the parties herein at the last known address of each, pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

STATE OF MINNESOTA
CROW WING COUNTY



IN DISTRICT COURT
NINTH JUDICAL DISTRICT

In the Matter of Grant of a Variance by the
Crow Wing County Board of Adjustment to
Bay Lake Townhome Association

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, ORDER
FOR JUDGMENT AND
JUDGMENT**

File No.: 18-CV-11-5395

The above-entitled matter came on for motion hearing on July 3, 2012, before the Honorable Kristine R. DeMay, Judge of District Court, at the Crow Wing County Judicial Center in Brainerd, Minnesota. Appearances were as follows:

Kimberly Middendorf, Assistant Attorney General, appeared on behalf of the Minnesota Department of Natural Resources.

Paul D. Reuvers, Attorney at Law, appeared on behalf of the Crow Wing County Board of Adjustment.

Thomas A. Fitzpatrick, Attorney at Law, appeared on behalf of the Bay Lake Townhome Association.

Based upon all of the files, records, and proceedings herein, and the written submissions and oral arguments of counsel, this Court makes the following:

FINDINGS OF FACT

1. The Bay Lake Townhome Association (Association) is a planned unit development (PUD) located on Bay Lake in Crow Wing County. The property was originally approved

for development as a PUD by the Crow Wing County Board of Commissioners in 1982. The development has 30 units, but only 14 mooring spaces, or boat slips, were approved with respect to the property.

2. The Association property was developed by Adolph and Carroll Kukowski. The Kukowskis own Bay Lake Marine, which is adjacent to the Association property.
3. On January 1, 1981, the Kukowskis signed a Declaration of Covenants with respect to the Association property stating that there shall be a maximum of 14 boat slips and that all other boats and trailers may be stored at the adjacent Marina area.
4. For several years, Ruttgers Resort owned and rented the 16 units that did not have boat slips. In 2010, the 16 units were purchased by an individual for resale.
5. Because the 16 units without boat slips were hard to sell, the Association brought the issue before the Development Review Team, which is a Crow Wing County committee that does a preliminary review of variance requests.
6. In September 2011, the Association applied for a variance allowing one boat slip for each of the 30 units on the property.
7. The Crow Wing County Board of Adjustment held a public meeting on November 17, 2011, to consider the variance application. A transcript of proceedings regarding Request for a Variance by the Bay Lake Townhome Association, Crow Wing County Board of Adjustment November 17, 2011, was submitted into evidence.
8. At the meeting, the Association submitted letters from several residents of Bay Lake, none of whom opposed the variance. The DNR did not make a recommendation, but submitted an email addressing its concerns should the variance be granted. The variance was opposed by Bay Lake Township.

9. The Association's arguments at the public meeting addressed the inconvenience of landing boats for daily use and the benefits that allowing one slip per unit would have for Bay Lake. The BOA heard arguments that those without permanent docks must keep their boats on trailers and launch them each day they desire to go boating, and that the only public access launch is .25 miles away from the property. The Association claimed that traffic would be reduced if the variance was granted. The Association also contended that the risk of spreading invasive species would be reduced if each unit was allowed a slip.
10. The Association noted that the entire development is taxed as lakeshore property and that no distinction is made for units without boat slips.
11. There is one other PUD on Bay Lake called the Oaks. The Oaks reportedly has 18 units and 18 boat slips.
12. The Association estimated there to be over 900 boats docked on Bay Lake. Thus, the Association argued that granting the additional mooring spaces would not affect the culture or health of the lake. Several photographs of other docks on the lake were submitted at the meeting to support the Association's argument.
13. The Association noted that it is possible to construct a private boat ramp on the property and that doing so would not violate any ordinance.
14. Board of Adjustment member, Michael Dubay, noted his concern that the need for the variance did not involve anything more than an economic purpose and that the Association's alternative was to construct a boat ramp. Mr. Dubay further indicated that the first time he became aware of a non-economic based argument for the variance was on October 15th when Mr. Fitzpatrick came to the township board.

15. The Association recognized that the boat ramp was an alternative, just not a preferred alternative because it is still inconvenient and doesn't help prevent the spread of invasive species.
16. Board of Adjustment member, Don Hales, stated that he is the chairman of the supervisors on Bay Lake and that he was aware that several years ago owners came to Bay Lake Township and discussed the need for boat slips in order to sell the property and he noted that he had some problems with the way the case was being presented. Mr. Hales also later noted that "It's a very shallow, very fragile part of Bay Lake." Mr. Hales then mentioned possibly being able to support a plan for two configurations for docking with only allowing an additional seven boat slips because more permanent boats on the lake is a good thing, but 16 more in a wetland area is not a good thing. With regard to the argument on the prevention of Zebra mussels, Mr. Hales indicated that he believed the proposal was not going to stop Zebra mussels from being spread to Bay Lake.
17. Mr. Fitzpatrick noted his frustration with Mr. Hales having served on both the township board and now presiding as chairman at the Board of Adjustment hearing on the variance request.
18. At the meeting, Crow Wing County Land Services Supervisor Chris Pense noted that under the current Crow Wing County Land Use Ordinance, only seven boat slips would be permitted for the property based on the amount of shoreland on the first tier of the property.
19. The BOA was also informed that six units on the property have garages that could be used to store boats and that there are five parking spaces for boats.

20. After deliberating, the BOA made the following findings:

- a. That the variance request is in harmony with the purposes and intent of the land use ordinance:
 - i. It allows development by preserving the economic and natural environmental values of shorelands;
 - ii. It does not increase the impervious surface coverage;
 - iii. Every unit should have a permanent mooring site; and
 - iv. It limits the amount of transient boat traffic in and out of the lake and reduces the risk of spreading invasive species and erosion in the lake.
- b. That the variance is consistent with the comprehensive plan:
 - i. It minimizes spreading of invasive species with permanent mooring sites;
 - ii. Conditions of approval prohibit an on-site boat ramp and protect wetlands and shoreline buffer;
 - iii. Property owners should be allowed their riparian rights and reasonable use which includes a permanent mooring space based on similar uses on the lake; and
 - iv. It minimizes the adverse effect of development county-wide on Crow Wing County's water resources by only asking for one mooring space per unit.
- c. That the Association is proposing to use the property in a reasonable manner not permitted by the land use ordinance:
 - i. Allowing permanent mooring sites for all the owners of the townhouses is a reasonable use in this case. Addition of the slips will have no measurable

- impact on the lake quality or public health, safety, or welfare. Over 900 boats already have slips on Bay Lake;
- ii. Most developed riparian lots on Bay Lake have boats and docks;
 - iii. There are similar mooring slips on the adjacent property; and
 - iv. There are only two PUDs on Bay Lake. The Bay Lake Townhomes were approved for 30 units with 14 permanent mooring sites. The other PUD, the Oaks on Bay Lake, was originally approved for 18 units and a restaurant. They were approved for 24 mooring sites, which included six sites for the restaurant and 18 for the units. Each unit received a permanent mooring space.
- d. That the need for a variance is due to circumstances unique to the property and not created by the property owner because:
- i. It is a Planned Unit Development/Association that was developed and approved by previous property owners;
 - ii. Approval would protect the wetlands, location and size of dockage with conditions; and
 - iii. The topography and location of riparian wetlands limits size and location of dockage.
- e. That issuance of the variance will maintain the essential character of the locality because:
- i. It is in character with existing lakeshore use;
 - ii. The applicant can apply for a Shoreland Alteration Permit to install a boat ramp above the ordinary high water level of Bay Lake. If the variance is

- approved, a condition could be no on-site launching ramp will be permitted. This will better protect the lake from the threat of introduction of new invasive species into Bay Lake;
- iii. There is similar dockage on the adjacent property; and
 - iv. There was not one comment from the public opposing the variance except for Bay Lake Township.
- f. That the need for a variance involves more than economic considerations because:
- i. It will minimize the use of the public access and protect water quality and the environment of Bay Lake from in and out boat launching traffic and activity;
 - ii. It will eliminate practical difficulties associated with the need to launch and retrieve boats for each day of use for people with disabilities. It was noted during public testimony that there is at least one person with disabilities who owns a unit and cannot load or unload a boat on their own;
 - iii. It will eliminate unsightly boat parking at the development. It was noted during the public testimony that there is limited area at the development for the parking of trailers in a secure location;
 - iv. Property owners have riparian rights, pay lakeshore property taxes, and should have the right to a permanent mooring slip; and
 - v. If approved, conditions adopted will protect the quality of the lake, the wetlands, address and mitigate environmental issues and the location and design of the dockage.

21. Ultimately, the application was approved with the following conditions:

- a. That no launching ramp shall be allowed on the property;
- b. That the design of the dockage shall be approved by staff of Crow Wing County Environmental Services and located on the westerly part of the property;
- c. That the dockage shall be designed and located in a manner that it does not encroach into in-lake natural habitat;
- d. That the dockage shall not create a navigational hazard or interfere with the public's right to use the surface waters;
- e. That the dockage shall not encroach into adjoining property owner's riparian area;
- f. That the existing shoreland buffer is to be maintained with an access allowed to dock; and
- g. Dockage to be located as far west on the property as possible.

22. The Crow Wing County Ordinance at issue in this matter became effective April 22, 2011. In making its decision, the BOA did not consider the variance criteria enumerated in section 9.4 of the Crow Wing County Land Use Ordinance set forth below.

23. On April 2, 2012, the DNR filed a Notice of Motion and Motion for Summary Judgment. The DNR states that the decision of the BOA to grant a variance to the Association was unreasonable and factually unsupported by the record. Specifically, the DNR contends the decision was unreasonable because it was contrary to the stated purposes and intent of the land use ordinance and it was inconsistent with the comprehensive plan; both have as their goal the protection of the County's lakes and rivers.

24. The DNR also asserts that the BOA's finding of practical difficulties concerning compliance with the ordinance is unreasonable and factually unsupported by the record.

The DNR argues that the Association did not propose to use the property in a reasonable manner not permitted by the ordinance as there are other options, such as launch ramps, for individuals without slips. According to the DNR, the PUD unit owners are not lakefront owners, and there are only six riparian lots on the property. The DNR also argues that the mooring slips on adjacent property are for commercial purposes and thus are not comparable as they are subject to different regulations.

25. According to the DNR, the Association failed to demonstrate that its plight is due to circumstances unique to the property and not created by the landowner. The DNR asserts that there is nothing unusual about PUD owners having less than one slip per unit. Further, the owners purchased their units knowing that there were only 14 slips. Finally, the DNR asserts that a change in ownership does not affect the property itself and that conditions designed to protect wetlands do not make it unique.
26. Regarding the essential character of the locality, the DNR argues that the BOA's findings were unreasonable and factually unsupported by the record. The DNR again reiterates that neighboring docks are commercial rather than residential and thus are not properly compared to the variance the Association sought. The DNR also argues that lack of opposition does not justify the grant of a variance.
27. The DNR argues that the BOA's decision to grant the variance was motivated by economic considerations alone. The DNR points to a Development Review Team meeting that took place on August 8, 2011, in which it was noted that it has been difficult to sell units without having a mooring space for each unit.

28. The DNR states that because the BOA findings on practical difficulties were unreasonable and not supported by the evidence, the BOA's decision to grant the variance should be vacated.
29. Lastly, the DNR contends that the BOA's failure to consider the variance criteria set forth in the ordinance is arbitrary and capricious.
30. On May 2, 2012, the Crow Wing County Board of Adjustment filed a Notice of Motion and Motion for Summary Judgment. As an initial matter, the BOA argues that the Crow Wing County Land Use Ordinance in effect at the time of the variance application was invalid as the variance criteria were contrary to the standard for granting a variance set forth in section 394.27, subdivision 7, Minnesota Statutes.
31. Regarding the statutory framework contained in section 394.27, the BOA states that the variance is in harmony with the ordinance's general purposes and intent, and is consistent with the comprehensive plan. The BOA argues that it made a finding that the variance would decrease the number of boats going in and out of Bay Lake and thus, the goal of preserving the quality of the lake would be served. The BOA also points out that the variance was granted with several conditions meant to protect the lake.
32. The BOA also argues that the proposed property use was reasonable. According to the BOA, there will probably never be another PUD on Bay Lake. The Oaks was approved for one slip per unit and also is allowed six spaces for a restaurant. Therefore, the addition of 16 slips is reasonable.
33. The BOA states that it is unfair that the Association has 16 owners who are paying lakeshore property taxes, but do not have a permanent mooring. Further, with 900 boats

on the lake, the BOA asserts that the variance will not have a measurable quality on lake health.

34. According to the BOA, the variance is needed due to circumstances unique to the property, not created by the owner. The BOA states that the owners of the adjacent property created the development and the current owners had no control over the project. The BOA also asserts that the property was originally rented by Ruttger's to transient individuals who, if they boated at all, launched daily. Finally, the BOA states that invasive species were not a concern in 1982, when the development was approved for 14 slips.
35. The BOA argues that the variance will maintain the essential character of the locality as there is one other PUD on the lake with one slip per unit and individual lake owners frequently have multiple docks and boat lifts. The BOA points out that there were no objections to the variance by neighboring property owners.
36. Finally, the BOA states that the grant of the variance involved more than economic considerations. The BOA acknowledges that the slips may add economic benefit to the Association, but the variance will also relieve owners of the inconvenience of launching their boat daily should they choose to enjoy the lake.

Based upon the foregoing, the Court makes the following:

CONCLUSIONS OF LAW

1. Minnesota Rule of Civil Procedure 56.03 provides that a motion for summary judgment should be granted only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law."

Minn. R. Civ. P. 56.03. There are no disputed facts in this matter as it involves a review of the record pertaining to a board of adjustment's grant of a variance.

2. Mindful of the interest in preserving and enhancing the quality of surface waters, and preserving the natural and economic values of shorelands, the Legislature has mandated that local governments with shoreland adopt ordinances that meet or exceed standards set forth in the model rules promulgated by the DNR. Minn. Stat. §§ 103F.201, 103F.211, 103F.215.
3. The board of adjustment shall have exclusive authority to order the issuance of variances. Minn. Stat. § 394.27, subdiv. 5.
4. All decisions by the board of adjustment in granting variances shall be final, except any aggrieved party shall have the right to appeal in the district court in which the land is located. Minn. Stat. § 394.27, subdiv. 9.
5. The model rules governing PUDs divide the development area into tiers based on distance from the water, with more density allowed in tiers furthest from the lake or river. *See* Minn. R. 6120.3800, subp. 4, 5. The rules provide that:

The number of spaces provided for continuous beaching, mooring, or docking of watercraft must not exceed one for each allowable dwelling unit or site on the first tier. Launching ramp facilities, including a small dock for loading and unloading equipment, may be provided for use by occupants of dwelling units or sites located in other tiers.

Minn. R. 6120.3800, subp. 5(B)(3)(c).

6. The Crow Wing County Land Use Ordinance addresses PUDs, although it uses the term "conservation developments." *See* Ordinance § 46.2. The Ordinance, like the model rules, provides that "the number of allowable continuous watercraft mooring spaces for conservation developments abutting public waters shall not exceed the number of

allowable dwelling unit lots in the first tier.” Ordinance § 33.11(B)(5). As noted in the record, under both the state statute and the local ordinance, the Association would be entitled to no more than 7 boat slips.

7. In considering the grant of a variance, a board of adjustment must consider the standards set forth in section 394.27, subdivision 7, Minnesota Statutes, as well as any additional criteria set forth in the county’s ordinance. *See Earthburners, Inc. v. Carlton County*, 513 N.W.2d 460, 463 (Minn. 1994).
8. There are two types of variances: use and area variances. The “practical difficulty” standard applies to area variances. *In Re Stadsvold*, 754 N.W.2d 323 (Minn. 2008).
9. Regarding the granting of variances, Minnesota law provides:

Variances shall only be permitted when they are in harmony with the general purposes and intent of the official control and when the variances are consistent with the comprehensive plan. Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the official control. “Practical difficulties,” as used in connection with the granting of a variance, means that the property owner proposes to use the property in a reasonable manner not permitted by an official control; 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 do not constitute practical difficulties....

Minn. Stat. § 394.27, subdiv. 7.

10. Pursuant to the Findings of Fact issued by the BOA, the Board noted that:

“A variance may be granted by the Board of Adjustment when it is found that strict enforcement of the Land Use Ordinance will result in “practical difficulty” according to Minnesota Statute 394.27 Subdivision 7. The Board of Adjustment should weigh each of the following questions to determine if the applicant has established that there are “practical difficulties” in complying with regulations *and standards set forth in the Land Use Ordinance.*”

11. The Board correctly noted in the Findings of Fact that, in addition to considering the statutory factors, the zoning authority must also apply the practical difficulties standard to

the relevant provisions of the local zoning ordinance. The zoning authority must also “articulate the reasons for its ultimate decision.” *Stadsvold*, 754 N.W.2d at 331. The BOA; however, failed to consider the factors set forth in the Ordinance.

12. At the time of the November 2011 hearing, the Crow Wing County Land Use Ordinance provided that the BOA could grant a variance if it determined that there were “practical difficulties” based on the following criteria:

- a. How substantial the variation is in relation to the requirement;
- b. The effect the variance would have on government services;
- c. Whether the variance would effect a substantial change in the character of the neighborhood or would be a substantial detriment to the neighboring properties;
- d. Whether the practical difficulties can be alleviated by a feasible method other than a variance – economic considerations can be considered;
- e. How the practical difficulty occurred, including whether the landowner created the need for the variance; and
- f. Whether in light of all the other factors, allowing the variance would serve the interests of justice.

Ordinance § 9.4(A). The criteria have since been amended such that they are now substantially similar to the standards set forth in section 392.27, subdivision 7, Minnesota Statutes.

13. The court’s role in evaluating the grant of a variance is to determine whether “the zoning authority was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and to determine whether the evidence could reasonably support or justify the determination.” *In re Stadsvold*, 754 N.W.2d 323,

332 (Minn. 2008) (quoting *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980)). When determining reasonableness, courts ascertain whether the board's decision was arbitrary and capricious or whether the reasons given were legally sufficient and have a factual basis. See *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416-417 (Minn. 1981); see also *Sagstetter v. City of St. Paul*, 529 N.W.2d 488, 491 (Minn. 1995).

14. As stated above, the BOA was required to consider the factors enumerated in the Ordinance when deciding to issue the Association a variance. However, the BOA failed to do so. The DNR asserts that this failure renders the BOA's decision arbitrary and capricious. The BOA, however, contends that the Ordinance was preempted by statute; specifically, section 394.27, subdivision 7, as quoted above.
15. To determine whether an ordinance is preempted by statute, Minnesota courts apply the following standard:
 - a. As a general rule, conflicts which would render an ordinance invalid exist only when both the ordinance and the statute contain express or implied terms that are irreconcilable with each other;
 - b. More specifically, it has been said that conflict exists where the ordinance permits what the statute forbids;
 - c. Conversely, a conflict exists where the ordinance forbids what the statute expressly permits;
 - d. It is generally said that no conflict exists where the ordinance, though different, is merely additional and complementary to or in aid and furtherance of the statute.

Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813, 816-817 (Minn. 1966) (citations omitted). With respect to part (d) above, the Court in *Mangold* noted its decision in *State v. Clarke Plumbing & Heating, Inc.*, where an ordinance was upheld despite the existence of a less broad, but similar statute on the basis that the local government could have determined that greater restrictions were necessary given the community's size. *Id.*; see also *State v. Clarke Plumbing & Heating, Inc.*, 56 N.W.2d 667 (Minn. 1952). Like the ordinance in *Clarke Plumbing & Heating*, the Crow Wing County Land Use Ordinance does not conflict with the statute; it merely imposes additional or supplementary requirements that may be justified by local conditions.

16. Because the Ordinance was not preempted by statute, the BOA's failure to consider the factors set forth in the Ordinance renders its decision to grant the Association a variance arbitrary and capricious.
17. Notwithstanding that the decision of the BOA was arbitrary and capricious, in addition to considering the Ordinance; the BOA was required to consider the standard set forth in section 394.27, subdivision 7, Minnesota Statutes, as quoted above. One such factor is whether "the plight of the landowner is due to circumstances unique to the property not created by the landowner..." Minn. Stat. § 394.27, subdiv. 7. The Court concludes that the BOA erred in its application of the law when it found that the alleged practical difficulties were due to circumstances unique to the property.
18. The BOA's first finding pertaining to uniqueness was that the Association is a PUD that was developed by previous owners. The standards relating to boat slips identified above apply to all PUDs in Crow Wing County. There is nothing in the BOA's findings or in the record establishing that the Association is unique from other PUDs. Were all PUDs

granted variances simply because they are PUDs, the rule governing PUD moorings contained in Minn. R. 6120.3800, subp. 5(B)(3)(c), would be rendered moot. There is nothing unusual about PUDs having less than one boat slip per unit. Furthermore, these units were purchased knowing that 16 units did not have boat slips. The fact that the units were sold does not create uniqueness.

19. The BOA's other findings also do not establish that the Association's circumstances are unique. The BOA found that approval would protect the wetlands, but this does not establish uniqueness. The Board's assertion that by allowing the County to dictate what type of dock to install would help protect the wetland does nothing to establish how the circumstances are unique to the property. The BOA also found that the topography and location of riparian wetlands limits the size and location of dockage. The record is unclear how this supports the finding of uniqueness.

20. The parties raise additional arguments concerning the application of section 394.27, subdivision 7. However, given that the BOA erred in its application of the law concerning its findings on uniqueness, those arguments are not addressed.

Based upon the foregoing, the Court makes the following:

ORDER


IT IS HEREBY ORDERED:

1. That the Department of Natural Resources' motion for summary judgment is GRANTED.
2. That the Crow Wing County Board of Adjustment's motion for summary judgment is DENIED.
3. That the Crow Wing County Board of Adjustment's grant of a variance to the Bay Lake Townhome Association is hereby REVERSED.

LET JUDGMENT BE ENTERED ACCORDINGLY

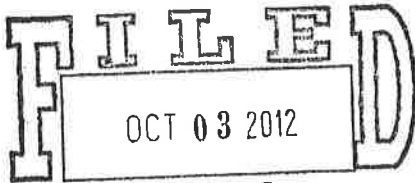
BY THE COURT:

Dated: 10-2-12




Kristine R. DeMay
Judge of District Court

I hereby certify that the above Conclusions of Law constitute the Judgment and Decree of the Court.



Bonnie E. LeCocq
Court Administrator
Crow Wing County

Bonnie LeCocq,
District Court Administrator



By: Deputy