

State of Minnesota  
Crow Wing County

District Court  
Ninth Judicial District

Court File Number: **18-CV-11-4061**

Case Type: Civil Other/Misc.

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**Notice of:**

<input checked="" type="checkbox"/>	<b>Filing of Order</b>
<input checked="" type="checkbox"/>	<b>Entry of Judgment</b>
<input type="checkbox"/>	<b>Docketing of Judgment</b>

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Richard Larson, Madrienne Larson, DEANNA OLSON, Archie F. Olson, Jr., Carol Cummins et. al. vs  
Crow Wing County Board of Adjustment and The Park at Clearwater Estates

You are hereby notified that the following occurred regarding the above-entitled matter:

- |                                     |  |
|-------------------------------------|--|
| <input checked="" type="checkbox"/> | An Order was filed on September 17, 2012.  |
| <input checked="" type="checkbox"/> | Judgment was entered on September 17, 2012.  |
| <input type="checkbox"/>            | You are notified that judgment was docketed on<br>at in the amount of \$. Costs and interest will accrue on this amount from the<br>date of entry until the judgment is satisfied in full. |

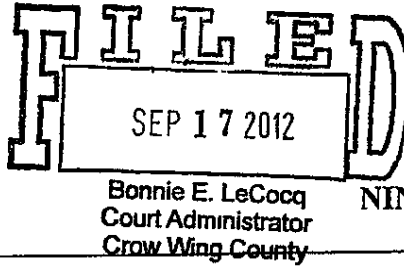
Dated: September 17, 2012

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

cc: STEVEN RICHARD LINDEMANN  
ANDREA BROOKE WING  
The Park at Clearwater Estates

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

STATE OF MINNESOTA  
COUNTY OF CROW WING



IN DISTRICT COURT  
NINTH JUDICIAL DISTRICT

Court File No. 18-CV-11-4061

Richard Larson; Madrienne Larson;  
Archie F. Olson; Deanna Olson; Carol  
Cummins; Steve Lindemann, as trustee  
for the Charles E. and Genevieve B.  
Lindemann Irrevocable Trust; Wesley  
Arseth; Dolores Arseth; Steven McDermott;  
Tina McDermott; and Ann Wyse,

Appellants,

vs.

**ORDER**

County of Crow Wing acting through the  
County of Crow Wing Board of Adjustment,

Respondent,

And

In the Matter of the Grant of a Variance by  
The Crow Wing County Board of Adjustment  
To The Park at Clearwater Estates.

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The above-entitled matter came before the Honorable David J. Ten Eyck, Judge of  
District Court, Ninth Judicial District, pursuant to multiple motions for summary judgment.

Steven R. Lindemann, Attorney at Law, appeared on behalf of the Appellants.

Paul D. Reuvers, Attorney at Law, appeared on behalf of the Respondent.


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

Based upon the file, arguments of counsel, and the record, the Court **HEREBY MAKES  
THE FOLLOWING:**

**ORDER**

1. The Appellants' and the Department of Natural Resources' Motions for Summary Judgment are hereby GRANTED. The decision of the County of Crow Wing Board of Adjustment in this matter is hereby REVERSED.
2. The County of Crow Wing's Motion for Summary Judgment is hereby DENIED.
3. The attached Memorandum is incorporated herein.

Dated: SEP 17 2012.



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David J. Ten Eyck  
Judge of District Court

## Memorandum

This consolidated action stems from a variance issued by the County of Crow Wing Board of Adjustment (“Board”), to The Park at Clearwater Estates (“Clearwater”). This decision, made at a hearing on August 18, 2011, granted the Clearwater Estates’ Homeowners Association’s (“Homeowners Association”) request to add six permanent watercraft mooring sites to its development. Two separate appeals were filed from that decision, one by a group of neighboring homeowners (“Homeowner Appellants”), and one by the Minnesota Department of Natural Resources (“DNR”). By stipulation of the parties and Order of this Court dated November 30, 2011, both appeals were consolidated into the current action.

The DNR, the Board and the Homeowner Appellants have all filed motions for summary judgment. A motion for summary judgment shall be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Summary judgment allows “a court to dispose of an action on the merits if there is no genuine dispute regarding any material facts, and the party is entitled to judgment under the law applicable to such facts.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). All parties agree that this case should be decided on summary judgment. There is an extensive administrative record, and no party argues that there are disputed material facts in this case.

### Factual and Legal Background

#### *The Initial Approval of Clearwater Estates*

Clearwater Estates is a Planned Unit Development (“PUD”), a designation which includes residential townhomes and condominiums. See Minn. R. 6120.2500, subp.12. It is located on Clearwater Lake, in Crow Wing County. The rules governing PUDs in Crow Wing

County ultimately originate from Minnesota Statutes sections 103F.211 and 215, which require that all local governments with shoreland adopt ordinances that meet or exceed the standard set forth in the model rules. These model rules have been promulgated in Minn R. 6120.2500, *et seq.* The model rules governing PUDs divide the development area into tiers based on distance from the water. *See* Minn. R. 6120.3800, Subp.4. The rules then state 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 [i.e. closest to the water] 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). The Land Use Ordinance for Crow Wing County (“Ordinance”), as required by the statute and the rule, addresses PUDs. Like the rule quoted above, the Ordinance allows only the number of permanent mooring spaces as there are allowable units in the first tier. Ordinance § 33.11(B)(5).

Clearwater Estates was originally proposed as a 24-unit PUD. After hearings before the Crow Wing County Planning Commission, a conditional use permit (CUP) was granted, allowing the construction of a 14-unit development in 2005. The CUP approved by the Commission included four permanent watercraft mooring sites as well as a ramp and dock for day use. As required by the Ordinance, the four permanent sites were based upon the number of units which could have been constructed on the first tier of the property.<sup>1</sup>

#### *Clearwater’s Application for a Variance*

After construction of ten of the fourteen approved units, the owners of those ten units formed the Homeowners’ Association and sought the six additional mooring sites at issue in this

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<sup>1</sup> In fact, no units were ultimately built on the first tier, as all the constructed units are set further back from the lake. The parties agree that this is not dispositive, as a PUD is entitled to a mooring space for each “allowable” unit, not each unit actually constructed. Ordinance § 33.11(B)(5); Minn. R. 6120.3800, subp. 5(B)(3)(c).

case. In exchange for the additional mooring sites, the Association offered to forgo construction of the four remaining authorized units. The Homeowners Association formalized this proposal in two separate applications, one to the Crow Wing County Board of Adjustment for a variance to County Ordinance § 33.11(B)(5), which contains the mooring restriction noted above, and the second to the Crow Wing County Planning Commission for an amendment to the CUP to reduce the number of allowed housing units and increase the number of moors.

The Board of Adjustment and the Planning Commission have identical membership, and public hearings on both applications were held on the same day, August 18, 2011, mere minutes apart. Based on this overlap, the parties have stipulated that the records of both meetings shall be considered part of the administrative record in this case. Both applications were granted, and this case is an appeal from the decision of the Board of Adjustment to grant the variance. There is also an appeal from the decision of the Planning Commission, which is stayed pending the outcome of this case.

At the hearing on August 18, 2011, the Homeowners Association acknowledged that all the property owners currently had access to the lake via the boat ramp and day dock, but argued that all should have permanent mooring sites. The Association presented the testimony of one of its property owners, who testified about the inconvenience of taking his boat in and out of the water with a trailer when he wanted to use it. In addition, it was asserted, without evidence, that granting the application would be better for water quality because it would end erosion associated with use of the ramp, and decrease the possibility of the introduction of invasive species via a boat or trailer. The applicants also introduced photographs of the docks and boat lifts of some of the other residents on the lake, with the intent of demonstrating that granting

their request would not alter the character of the lake and that Clearwater Estates owners had less access to the lake than other property owners in the area.

A representative from the Homeowner Appellants was also present at the public hearing, and voiced several objections to the proposal. The Homeowner Appellants argued that Homeowner's Association had not made the required showing that there were practical difficulties complying with the existing rule. Specifically, the Homeowner Appellants noted that the Clearwater Estates property owners had purchased their property with full knowledge that not all of the units would have permanent moors. The Homeowner Appellants also argued that granting the application would alter the essential character of the lake. Additionally, the Homeowner Appellants noted that owners in Clearwater Estates were treated differently from other property owners on the lake because they were owners in a PUD, a higher-density development which is regulated differently than the other properties in the area. Finally, the Homeowner Appellants also argued that Clearwater was in violation of its CUP in several ways.

The Board voted to grant the variance, and made the following findings of fact:

1. Is the Variance request in harmony with the purposes and intent of the Ordinance? Yes.
  - a. The County Ordinance allows development on Shoreland property by preserving the economic and natural environmental values of shorelands (Article 1.2E).
  - b. 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.
2. Is the Variance consistent with the Comprehensive Plan? Yes.
  - a. Protect, preserve and improve the quality of Crow Wing County's lakes, streams and wetlands by minimizing the affects of stormwater runoff with an engineered stormwater plan. (pg 53)
  - b. Minimizes erosion and spreading of invasive species with permanent mooring sites.
3. Is the property owner proposing to use the property in a reasonable manner not permitted by the Land Use Ordinance? Yes.
  - a. Allowing permanent mooring sites for all the owners of the townhouses is a reasonable use.

- b. Other properties on lake have multiple docks and watercrafts based on photos submitted by the applicant at the meeting on 8-18-11.
- 4. Is the need for a Variance due to circumstances unique to the property and not created by the property owner? Yes.
  - a. It is a Planned Unit Development/Association and the conditions were approved by previous property owners.
  - b. The topography is such that the townhomes are located 500 feet from the lake.
- 5. Will the issuance of a Variance maintain the essential character of the locality? Yes.
  - a. The addition of one wing to the existing dock does not alter the character of the locality.
  - b. The additional dockage will be removed from the existing day dock by the landing. This will result in no net gain of dockage.
  - c. For this development does not alter the character of the current dock use.
  - d. In character with existing lakeshore use based on submitted photos by the applicant at the meeting on 8-18-11.
- 6. Does the need for a Variance involve more than economic considerations? Yes.
  - a. Minimizes the use of the access and will protect water quality and the environment. Protects the quality of Clearwater Lake from in and out boat launching traffic and activity.
  - b. Reduction of Units causes a negative cash flow consideration for the development and balances request for considerations.
- 7. What is the Township recommendation? Approve.

Administrative Record, 111-12. Appeals to this Court, by the Homeowner Appellants and the DNR, followed.

### **Standard of Review and Applicable Law**

The role of a court 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 [whether] the evidence could reasonably support or justify the determination.” *In re Stadsvold*, 754 N.W.2d 323 (Minn. 2008) (internal quotations omitted).



With regard to variances, Minnesota law provides that:

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(7). At the time of the hearing in this matter, the relevant Crow Wing County Ordinance provided that the Board could grant a variance if it "determines there are practical difficulties based on the following criteria:

1. How substantial the variation is in relation to the requirement.
2. The effect the variance would have on government services.
3. Whether the variance would effect a substantial change in the character of the neighborhood or would be a substantial detriment to the neighboring properties.
4. Whether the practical difficulties can be alleviated by a feasible method other than a variance – economic considerations can be considered.
5. How the practical difficulty occurred, including whether the landowner created the need for the variance.
6. Whether in light of all the other factors, allowing the variance would serve the interests of justice."

Ordinance § 9.4(A) (Effective April 22, 2011). Subsequent to the hearing in this matter, however, the County Ordinance has been amended such that the Ordinance and statutory factors are now substantially similar.

### **Discussion**

With that background, this Court now turns to the merits. The Appellants make numerous arguments for reversal, which this Court has grouped into two categories: the Board's compliance with the Ordinance, and the Board's compliance with the Statute.

### *Compliance with Crow Wing County Ordinance*

Both the Homeowner Appellants and the DNR argue that the Board erred in failing to make findings consistent with the County Ordinance in place at the time of the application. As quoted above, at the time of the application and the hearing, County Ordinance § 9.4(A) listed six factors that the Board was to consider, while the statute at issue, Minn. Stat. § 394.27(7), contained different considerations. From the Board's findings, also quoted above, it is clear that the Board considered the statutory definition of practical difficulties, but failed to make findings with regard to the six Ordinance factors. The Board does not dispute that it did not consider the Ordinance factors, instead arguing that Ordinance was preempted by the statute.

In considering whether an ordinance is preempted, the Minnesota Supreme Court has established 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. *Power v. Nordstrom*, 150 Minn. 228, 184 N.W. 967, 18 A.L.R. 733.

(c) Conversely, a conflict exists where the ordinance forbids what the statute expressly permits. *Power v. Nordstrom*, supra. A part of the holding of that case was that an ordinance requiring the closing of movie theatres on Sunday was not inconsistent with the state Sunday closing statute since the latter, while not specifically forbidding theatres to open, did not expressly permit them to either.

(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. This rule is illustrated in *State v. Clarke Plumbing & Heating, Inc.*, 238 Minn. 192, 56 N.W.2d 667. That case dealt with an ordinance requiring a license and permits to install heating systems. Defendant was denied a permit because his plans were not prepared by a registered engineer, as required by the ordinance. The court held the ordinance valid despite the existence of a similar statute that did not have as broad a coverage as the ordinance, saying that the city could well have determined that greater restriction was necessary in a community of its size. This was consistent with the statute.

*Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813, 816-817 (Minn. 1966). Of particular note is part (d) of the standard, and the Supreme Court's discussion of *Clarke Plumbing & Heating*. Like the ordinance upheld in that case, the Ordinance here merely imposes additional or supplementary requirements which may be justified by local conditions. For this reason, the Ordinance's requirements were not preempted and it was error for the Board to fail to consider it.<sup>2</sup>

This determination, however, is not sufficient to bring this litigation to a conclusion. As the Ordinance has since been amended to become the functional equivalent of the Statute, if this Court were to vacate and remand with instructions to consider the application in light of the Ordinance, it is clear based upon the Board's findings with relation to the statutory factors that the Board would again grant the application. Similarly, if this Court were to simply reverse, the Homeowner's Association would be free to reapply to the Board, which, again based upon its prior findings, would presumably grant the application. Either way, it seems exceedingly likely that another appeal would follow and this matter would again come before this Court. It is therefore in the interests of judicial efficiency, and will likely save the parties considerable time and expense, for this Court to consider the Appellants' additional arguments for reversal.

#### *Compliance with State Statute*

The Appellants argue that, in addition to failing to consider the Ordinance, the Board also failed to correctly apply the Statute. To support a finding of practical difficulties, an applicant

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<sup>2</sup> The case cited by the Board is not contrary. In *Bd. Of Supervisors v. ValAdCo*, 504 N.W.2d 267 (Minn. App. 1993), the ordinance at issue dealt with a topic, pollution control, which was already subject to extensive state regulation. The locality's decision to create a local permitting requirement in addition to the already existing state permitting process was therefore struck down. This case, in contrast, deals with variances, an area which has always been dealt with at the local level, and for which there is only one permitting process.

must “propose 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.” Minn. Stat. § 394.27(7). The Appellants insist, among other arguments, that the alleged difficulties in this case are not unique to the property, are created by the landowners, and that the variance will alter the essential character of the locality. The statutory language quoted above is relatively new, and there are no appellate decisions interpreting it; however, based upon the plain language of the provision, there are several clear errors of law in the Board’s decision.

The Board erred as a matter of law when concluding that the alleged practical difficulties were due to circumstances unique to the property. As explained above, the Ordinance limiting the Clearwater Estates’ permanent moors was enacted pursuant to state law and regulation. *See* Minn. Stat. §§ 103F.211, 215; Minn. R. 6120.3800, subp. 5(B)(3)(c); Ordinance § 33.11(B)(5). Thus, all PUDs in Crow Wing County are subject to the same rule regarding permanent watercraft moors, and all PUDs in the state are subject to a substantially similar rule. There is nothing in the Board’s findings or in the record establishing that Clearwater Estates is in any way in a unique position relative to any other PUD.<sup>3</sup> If Clearwater Estates is entitled to a variance of the sort granted in this case, there is no reason why every PUD in the state would not be entitled to a similar variance. This exception would eviscerate the rule governing PUD moorings contained in Minn. R. 6120.3800, subp. 5(B)(3)(c), which was promulgated pursuant to statute. This cannot be the correct result.

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<sup>3</sup> This Court has determined that this is the correct basis of comparison with which to evaluate uniqueness. The Board argues that the situation of Clearwater Estates’ property owners is unique when compared to other property owners on Clearwater Lake, who all have the right to permanent moors. However, this is akin to a retail store seeking a variance because it is being treated differently than surrounding residential properties. Clearwater Estates is a PUD, which is a significantly different type of development from the surrounding properties, a fact the Legislature has recognized by regulating them differently, including specific regulations with respect to lake access.

The Board also erred in determining that the alleged practical difficulties were not created by the landowner. The Board correctly noted that the mooring restrictions were put into place before the present owners had purchased their property, but that is not sufficient to establish this element of the definition of practical difficulties. The past owners of the property acceded to the creation of the PUD and the imposition of the accompanying moor restrictions, and the current owners purchased their lots with full knowledge of those restrictions. The mere change of ownership, without any allegation that the purchasers were unaware of the rules, is not sufficient to justify a finding that the practical difficulties were not self-imposed.

The Appellants raise additional arguments, including challenging whether the variance is in harmony with the general purposes and intent of the official control, whether the variance is consistent with the comprehensive plan, and the basis for a number of the Board's factual findings. However, considering the errors of law in the Board's decision identified above, this Court sees no need to consider them. Because the Board failed to consider the provisions of the Ordinance in force at the time of the hearing and erred in its application of the Statute, this Court grants the Appellants' Motions for Summary Judgment, denies the Respondent's Motion for Summary Judgment and reverses the decision of the Board.

*DJT*