

## VARIANCES REQUESTS AND THE “UNDUE HARDSHIP” ANALYSIS: THE MINNESOTA COURT OF APPEALS AFFIRMS A RECENT VARIANCE DECISION BY THE CITY OF MINNETONKA.

By Ryan J. Wartick, Esq.

For many property owners and contractors the proposition of applying to a City for the grant of a variance can be a daunting one. There can be extensive red tape, including presentations to the city planning commission and counsel, as well as the need to obtain approval from other state agencies. Also, neighbors and citizen groups may fight a proposed variance because of the impact it will have on the neighborhood. As a result, it is extremely important to understand the criteria for granting a variance and how local governments and Courts apply these standards. Understanding these standards will increase your chances of a successful application and help avoid potential pitfalls in the process.

Under Minnesota law, an applicant for a variance must show that strict enforcement of an ordinance would cause a property owner to suffer an “undue hardship.” Minn. Stat. § 462.357, subd. 6. Undue hardship is defined to include three factors:

(1) lack of reasonable use without the variance;

(2) unique circumstances not shared by neighboring properties and not created by the landowner; and  
(3) maintenance of the essential character of the locality, despite the variance.

Minn.Stat. § 462.357, subd. 6(2). A variance is only permitted when an applicant demonstrates all three factors. Nolan v. City of Eden Prairie, 610 N.W.2d 697, 701 (Minn.App.2000), review denied (Minn. July 25, 2000).

Set out below is a brief discussion of each factor, and then a discussion of how the Minnesota Court of Appeals applied the factors in a recent case involving the City of Minnetonka. The case at issue is Krummenacher v. City of Minnetonka, 768 N.W.2d 377 (Minn. Ct. App. 2009).

In *Krummenacher*, a neighbor challenged a variance granted by the City of Minnetonka for the construction of a garage. The garage had a flat roof that leaked over the years. The property owner proposed upgrading the garage with a pitched roof, which would allow for use of the space above the garage. The property owner did not intend to alter the footprint of the garage. As a result, the city required a variance because the work constituted an expansion of an existing non-conforming structure. The neighbor opposed the variance because the garage would obstruct his view and allegedly lower his property value. The Court of Appeals applied the three factors set out above and determined that the variance was property granted because the owner

demonstrated “undue hardship.”

### What Constitutes Lack of Reasonable Use?

First, a land owner seeking a variance must show that the proposed use is reasonable. The statutory undue-hardship requirement “does not mean that a property owner must show the land cannot be put to reasonable use without a variance” Rowell v. Bd. of Adjustment of Moorhead, 446 N.W.2d 917, 922 (Minn.App.1989). Instead, it means that the property owner must show that “he would like to use the property in a reasonable manner that is prohibited by the ordinance.” Id.

In *Krummenacher*, the Court held that the proposed use was reasonable because the applicant simply wanted to pitch the roof. The only encroachment into the setback area was the portion of the roof pitch which extended from the structure. Otherwise, the garage complied with local height ordinances and the footprint of the structure would not be altered. Additionally, the Court suggested that the property owner could not continue to use the garage without the variance because the existing roof leaks. As a result the Court held that the proposed use of the property was reasonable.

### What Constitutes Unique Circumstances?

Minnesota statutes require a showing that “the plight of the landowner is due to circumstances unique to the property.” Minn.Stat. § 462.357, subd. 6. Courts often look to the physical conditions of the land in determining whether a unique circumstance exists. Merriam Park Cmty. Council, Inc. v. McDonough, 297 Minn. 285, 290-91, 210 N.W.2d 416, 419-20 (1973), overruled on other grounds by NW College v. City of Arden Hills, 281 N.W.2d 865, 868 (Minn.1979). However, the mere fact that a lot is substandard is not a unique circumstance. Mohler v. City of St. Louis Park, 643 N.W.2d 623 (Minn. Ct. App. 2002). Furthermore, a property owner's purchase of land based on an erroneous belief regarding a City's ordinances is not a circumstance unique to the property. Graham v. Itasca, 601 N.W.2d 461, 467-468 (Minn. Ct. App. 1999),


In *Krummenacher* the Court held that there was undue hardship “due to the topography of the site, width of the lot, location of the driveway and existing vegetation.” Because of these conditions it was difficult, if not impossible, to move the garage to a space on the property that would enable the applicant to replace the flat roof with a pitched roof without violating the front yard setback ordinance. As a result, the Court held that the plight of the landowner was due to circumstances unique to the property.

### What Constitutes a Change in the Essential Character of the Neighborhood/Locality?

An applicant must also show that the proposed use of the property will not change the essential character of the neighborhood. This is a fact based determination which hinges largely on the type of structures in the neighborhood, any efforts made by the landowner to blend the property in with the neighborhood, as well as the history of variance grants. See e.g., Rowell v. Board of Adjustment of the City of Moorhead, 446 N.W.2d 917 (Minn. Ct. App. 1989) (Church's promise to plant trees, place planters along the facade of addition, and preserve existing courtyards and playgrounds, was sufficient to assure that variance would not alter the essential character of the locality.)

In *Krummenacher*, the City Council approved the variance because the original garage is a concrete block, 40-50 year old structure right next to the road. City council members opined that the city was getting a significant improvement to the neighborhood in exchange for granting the variance. The objecting neighbor argued that because there are no other nonconforming garages in the neighborhood with a second level, the variance would change the essential character of the locality. However, the Court held that the lack of identical nonconforming uses is not dispositive of whether adding a pitched roof would alter the character of the neighborhood, and the proposed structure would not change the essential character of the locality.

### How Can Hellmuth & Johnson Help With Your Variance Request?

A well-prepared property owner or contractor should be mindful of the factors supporting “undue hardship” before proceeding with obtaining a variance. Working with attorneys at Hellmuth and Johnson to prepare a well reasoned application and presentation can help increase your chances of success, as well as prevent future pitfalls down the road. Similarly, if you are considering contesting a variance, the undue hardship analysis is critical to your chances of winning the fight. Being involved at every stage of the process and lodging your objection in a thoughtful manner, will help ensure that your voice is heard and your concerns are taken into consideration. 

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## AS THE ECONOMY GROWS GREENER, OPPORTUNITIES GROW WITH IT

By Michael J. Viola, Esq.

During a time when the economic environment has negatively impacted commercial real estate development, it is an increasingly common occurrence to hear about "alternative" or "clean" energy projects moving forward with ever increasing urgency. These projects can take the form of the development of wind energy farms, solar energy development and "clean water" projects. A phenomenon commonly referred to as the "greening" of the U.S. economy has presented entrepreneurs and developers with opportunities that will continue to be driven by talk of climate change and the need to find mechanisms to revitalize the economy. For example, the state of Minnesota has mandated that twenty-five percent (25%) of the state's energy must be produced from "eligible energy technology" or renewable sources by the year 2025. Minn. Stat. § 216B.1691, Subd. 2a.

While alternative energy projects present complexities inherent in the evolving technologies, they follow the same progression as any commercial development project.

There is typically a development (or acquisition) phase in which the feasibility of the project is assessed, sites are targeted and the various rights are obtained by the developer from landowners, through the use of leases, easements or option agreements. Considerable thought, planning and anticipation must be given to zoning and permitting issues during this time (especially within the context of agricultural property) in order to keep the project on schedule. This phase accompanies the negotiation and drafting of contracts regarding access to transmission systems (known as interconnection agreements) and the sale of the energy being produced (known as power purchase agreements). Legal counsel experienced with the management and implementation of real estate development projects can be a valuable member of the team required to complete these steps and move into the construction and operation phases of the project.

The issues associated with developing and constructing renewable energy projects are complex and need fast-paced resolution. At Hellmuth & Johnson, PLLC, we represent developers involved on a variety of real estate development projects and construction issues.



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### H&J ATTORNEYS NAMED TO 2010 MINNESOTA RISING STAR® LIST

Recognized Among top 2.5% Attorneys in State

Hellmuth & Johnson, PLLC announced that Minnesota Law & Politics magazine has named four firm attorneys to the 2010 Minnesota Rising Star® list. The attorneys were recognized in the December 2009 issues of Minnesota Law & Politics, Twin Cities Business and Mpls/St.Paul Magazine.

The attorneys named to the 2010 list are: Matthew J. Franken, Joel A. Hilgendorf, Christopher R. Jones, and Anthony T. Smith.

Representing the top 2.5 percent of attorneys in the state as selected by their peers, the "Rising Star" list recognizes the accomplishments of attorneys who have practiced for 10 or less years and are 40 years of age or younger.

To learn more about the "Rising Stars", we invite you to visit their biographies on our website at [www.hjlawfirm.com](http://www.hjlawfirm.com).

### H&J ADDS NEW ATTORNEYS

Please help us welcome the following attorneys:

**Gary Fuchs** joins us as a Partner practicing in real estate law, construction and civil litigation, eminent domain and mediation/arbitration.

**Raymond Bonnabeau** joins us as a Partner practicing in information technology and eCommerce.

**Elizabeth Rein** joins us as an Associate practicing in real estate law, construction and litigation.

**Susan Anderson** joins us as an Associate practicing in estate planning and trust law.

You can learn more about them at [www.hjlawfirm.com](http://www.hjlawfirm.com) 