

City Variance Authority

A Supreme Court ruling last year greatly limited cities' authority to grant variances.

During the 2011 legislative session, the League of Minnesota Cities will work to restore that authority. In the meantime, cities must make adjustments.

By Craig Johnson

In the world of law, a single court ruling can suddenly and unexpectedly change decades of precedence. That definitely proved to be true for municipal variance authority last year. In the case of *Krummenacher v. City of Minnetonka*, the Minnesota Supreme Court issued a decision last June that changed the longstanding interpretation of the statutory standard for granting zoning variances. The decision also went counter to 20 years of previous rulings by the Minnesota Court of Appeals.

Background

The City of Minnetonka issued a variance to a residential property owner, permitting the vertical expansion of a legal, non-conforming garage. The city, relying on a 1989 Minnesota Court of Appeals decision and other judicial precedence, concluded that the grant of the variance was appropriate. The city's decision was challenged by an adjacent property owner. Both the district court and the Minnesota Court of Appeals agreed with the city's decision. On June 24, 2010, the Minnesota Supreme Court reversed the Court of Appeals decision, and found the city's variance impermissible.

In *Krummenacher v. City of Minnetonka*, the Supreme Court examined the statutory definition of "undue hardship." The statutes that limit when a variance may be granted are found in *Minnesota Statutes*, section 462.357, subdivision 6, and list three tests that must be met for a variance to be appropriate due to an undue hardship. They are:

- The property in question cannot be put to reasonable use if used under

conditions allowed by the official controls.

- The plight of the landowner is due to circumstances unique to the property not created by the landowner.
- The variance, if granted, will not alter the essential character of the locality.

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able use of the property exists in the absence of a variance. This establishes a high threshold for both the city and the property owner when considering variance requests. Furthermore, it means that in the vast majority of cases, cities do not have the authority to grant a variance to local zoning regulations.

The Supreme Court explicitly recognized that it was changing a longstanding standard that cities have relied on in considering variance requests. In particular, the court specifically rejected a 1989 Court of Appeals interpretation of the phrase "undue hardship," which allowed for the grant of a variance in

circumstances where the "property owner would like to use the property in a reasonable manner that is prohibited by the ordinance."

The Supreme Court stated that "unless and until the Legislature takes action to provide a more flexible variance standard for municipalities, we are constrained by the language of the statute to hold that a municipality does not have the authority to grant a variance unless the applicant can show that her property cannot be put to a reasonable use without the variance."

Counties in opposite position

The Supreme Court also reviewed the parallel county authority that allows for a variance in situations of "practical difficulties" or "hardship," which are found in *Minnesota Statutes*, section 394.27, subdivision 7. The court found that the city authority was more limited because it did not contain the "practical difficulties" provision found in that section.

Counties, meanwhile, have been adapting to a change in how that same section of law functions for them after a 2008 Supreme Court opinion (*Stads-vold v. County of Ottertail Board of Adjustments*). The court distinguished between "practical difficulties" and "particular hardships," the terms used in that section of law, and the types of variances to which each apply.

The court applied the more easily met standard—practical difficulties—to area variances where a property owner is seeking to avoid a lot restriction set in ordinance, such as a setback, fencing, height, density, or parking space. The court applied the more stringent

requirement—particular hardship—to use variance requests, which are requests to use the property in a way that is not otherwise allowed under adopted zoning regulations. The court reached this conclusion despite the fact that the statute specifically states that use variances are forbidden. The court went on to define a list of tests that would determine when a practical difficulty exists.

That ruling left counties in the exact opposite position of cities. In many cases, counties feel they have no option but to grant area variance requests, since “particular hardship” is no longer allowed to be used as a test in those cases, and because of the broad description given of what constitutes “practical difficulty.”

Interim impacts

Many cities have ordinances that are drafted to provide a solid baseline that protects public health, safety, and welfare while leaving room for appropriate exemptions that do not jeopardize those goals. They often allow for variances in cases where the standard cannot be reasonably met, the problem was not caused by the actions of the property owner, and the exception will not change the nature of the neighborhood.

The *Krummenacher* decision has left cities with the choice of hoping their variances aren’t challenged, making significant and complicated changes to how they have drafted their ordinances, or simply refusing to consider granting any variances until the Legislature resolves the issue. This means that a project that might have previously qualified for a variance cannot move forward in most communities right now. City officials are very concerned about what that could mean for badly needed economic and residential development projects.

This ruling gets even more problematic when coupled with state land use regulations. Many of those rules, such as state shoreland regulations and metropolitan land use regulations, are written intentionally to use the variance procedure to identify cases where a special case justifies a different solution within set parameters. In light of *Krummenacher*, the authority to grant variances in those cases is limited, which makes some of the standards unintentionally restrictive.

Because of the far-reaching nature of the decision, there are at least four

responses cities can consider to keep their regulatory systems functional until a legislative correction can be achieved:

- **Reevaluate the variance criteria.** Cities are reevaluating the criteria they have historically used in deciding whether or not to grant a variance. The Supreme Court’s decision limits a city’s discretion. The ruling limits the authority to circumstances where the property owner can demonstrate that there is not a reasonable use of the property absent the variance.
- **Make sure reasons for variances are clear.** In circumstances where the city council believes a variance is appropriate, the city must take great care to make a detailed finding describing why the grant of the variance is necessary to provide the property owner with a reason-

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able use of his or her property. What constitutes a reasonable use of property is not defined and may differ depending on the unique circumstances of the property and attributes of various communities.

- **Reexamine the zoning code.** If a city routinely grants variances, this may be an indicator that it may want to reexamine its zoning code to ensure that standards, setbacks, uses, and other requirements are consistent with the city council’s current vision for the community. Some cities are using this ruling as an opportunity to review their land use practices.
- **Build in flexibility.** Cities can build greater flexibility into their existing conditional use permit, planned unit development, and setback regulations to explicitly afford greater

latitude to allow “variance-like” approvals under the zoning code. For instance, a city might establish alternative setback requirements to allow for construction that is consistent with neighborhood attributes.

Legislative solution

As noted by the comments of Chief Justice Gildea in the *Krummenacher* opinion, legislative action will be needed to restore the flexibility for municipalities to grant variances. Ideally, local government variance authority language that is clear, consistent, and well-defined will come out of this legislative session. While the legislation is not expected to be controversial, the League of Minnesota Cities has made this a priority issue to be resolved as quickly as possible in the 2011 legislative session. A quick resolution will help avoid confusion for city officials and the public, prevent needless changes to systems that functioned well, and avert costly litigation.

The need for this legislation also provides an opportunity to redraft the county and city variance authority language found in their respective sections of law to make them consistent. The League’s initial proposed legislative solution will likely make identical most of the language in *Minnesota Statutes*, section 462.357, subdivision 6 (2) and *Minnesota Statutes*, section 394.27, subdivision 7. This would eliminate confusion and the need for judicial cross-references about which wording, standards, and tests apply to cities and counties.

During the legislative interim, the League has worked with cities, counties, municipal law experts, and other interested parties to determine how to amend current statutes to clarify the issue for the courts. The goal is to do this without substantially changing the authority as it was understood prior to the *Krummenacher* case. The proposed legislation will use the term “practical difficulties” as the test for area variances, and will define what that term means for the purposes of granting variances.

To read the League’s policy on this issue (SD-23), access the *2011 City Policies* at www.lmc.org/policies.

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