



The City That Soars!

REQUEST FOR PLANNING COMMISSION ACTION

Meeting Date	June 28, 2011
Agenda Item	1
Title	Ordinance amending the Falcon Heights variance code to be consistent with new Minnesota statute
Submitted By	Deborah Jones, Staff Liaison

Description	Falcon Heights city code needs to be updated to conform to changes in state law with respect to variances.
Background	<p>The 2010 Minnesota Supreme Court decision on <i>Krummenacher vs. the City of Minnetonka</i> had a major impact on the ability of cities to grant variances, requiring a much stricter standard than had been the practice for many years. As the League of Minnesota Cities Legislative Update put it, the Court <i>narrowly interpreted the definition of "undue hardship" and held that the "reasonable use" prong of the "undue hardship" test is not whether the proposed use is reasonable, but rather whether there is reasonable use in the absence of the variance. This is a much stricter standard, which considerably limits variance opportunities.</i></p> <p>The complete Legislative update is at http://www.lmc.org/page/1/varianceruling.jsp</p> <p>In April 2011, the Governor signed into law a new statute that returns to the "reasonable manner" understanding that was in use before the Krummenacher ruling. (http://www.lmc.org/page/1/variancebill.jsp) During the interim Falcon Heights did not have any variance cases.</p> <p>Falcon Heights city code needs to be kept consistent with state law. The proposed ordinance, attached, will bring the code up to date with respect to this change.</p>
Budget Impact	None
Attachment(s)	<ul style="list-style-type: none"> • Proposed ordinance amending Section 113-415 (clean and with mark-up showing changes) • Existing Section 113-62 Variances • Minnesota H.F. 52, effective May 6, 2011 • Published notice of the hearing on this matter • Reference materials from the League of Minnesota Cities
Action(s) Requested	<ul style="list-style-type: none"> • Hold a public hearing on the proposed ordinance • Make a recommendation to the City Council

**AN ORDINANCE AMENDING CHAPTER 113
OF THE CITY CODE CONCERNING VARIANCES**

THE CITY COUNCIL OF THE CITY OF FALCON HEIGHTS ORDAINS:

SECTION 1. Section 113-62 of the Falcon Heights City Code is amended to read:

Sec. 113-62. Variances.

(a) *Definitions.* The following words, terms and phrases, when used in this section, shall have the meanings ascribed to them in this subsection, except where the context clearly indicates a different meaning:

Practical difficulties mean the same as that term defined in Minn. Stats. § 462.357, as may be amended, meaning that the property owner proposes to use the property in a reasonable manner not permitted by this Chapter, the plight of the landowner is due to circumstances unique to the property not created by the landowner, and a variance, if granted, shall not alter the character of the locality. Economic considerations alone shall not constitute practical difficulties. Practical difficulties include but are not limited to, inadequate access to direct sunlight for solar energy systems.

Variance means a modification of or variation from the provisions of this chapter consistent with the state enabling statute for municipalities, as applied to a specific property and granted pursuant to the standards and procedures of this chapter.

(b) *Purpose.* The purpose of this section is to provide the procedure and criteria for variances.

c) *Application.*

(1) Any owner of property or a person holding a contract to purchase property, or an optionee holding an option conditioned solely on the grant of a variance, or the duly authorized agent of such appellant, may make application for a variance. The application shall be made on forms prepared by the zoning administrator.

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- Deleted: undue hardship if a reasonable use of the property exists under the terms of this chapter.
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- Deleted: , except that a variance shall not be used for modification of the allowable uses within a district and shall not allow uses that are prohibited.
- Deleted: for deviations from the literal provisions of this chapter in instances where strict enforcement would cause undue hardship because of circumstances unique to the individual property under consideration, and to grant such variances only when it is demonstrated that such actions will be in keeping with the spirit and intent of this chapter.

(2) The application shall contain the legal description of the property, the zoning district in which it is located, a brief statement of the reasons the variance is requested, a statement of the ownership interest therein of the applicant and the names and addresses of the owners of all abutting property as listed on the current real estate tax rolls. The application shall be verified.

(d) ~~USE Variances prohibited. Variances may not be approved for a use that is not allowed in the zoning district where the property is located.~~

Deleted: No variance may be granted for a use of any property different from that permitted by this chapter.

(e) *Review criteria.* The city council shall not approve any variance request unless they find that failure to grant the variance will result in practical difficulties on the applicant, and, as may be applicable, all of the following criteria have been met:

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~~(1) The variance would be in harmony with the general purposes and intent of this Chapter.~~

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~~(2) The variance would be consistent with the comprehensive plan.~~

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~~(3) That, there are practical difficulties in complying with this Chapter.~~

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~~(4) That the granting of the variance will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety.~~

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~~(4) That the requested variance is the minimum action required to eliminate the practical difficulties.~~

Deleted: (2) That the conditions upon which an application for a variance is based is unique to the parcel of land for which the variance is sought and are not applicable, generally, to other property within the same zoning classification.¶

~~(5) Variances shall be granted for earth sheltered construction as defined in Minnesota Statutes § 216C.06, Subdivision 14, when in harmony with this Chapter. Variances may be approved for the temporary use of a one family dwelling as a two family dwelling.~~

¶ (3) That the purpose of the variance is not based exclusively upon a financial hardship, or a desire to increase the value or income potential of the parcel of land.¶

¶ (4) That the alleged difficulty or hardship is caused by this chapter and has not been created by any persons having an interest in the parcel of land and is not a self-created hardship.¶

(f) *Conditions.* The city may attach conditions to the grant of the variance. ~~A condition must be directly related to and must bear a rough proportionality to the impact created by the variance.~~

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(g) *Procedure.*

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(1) All applications for variances shall be referred to the planning commission for study and recommendation to the city council.

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(2) Within 60 days, the planning commission shall forward its recommendations to the city council; if no recommendation is transmitted within 60 days after referral of

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the application for variance to the planning commission, the city council may take action without further awaiting such recommendation.

(3) Variances are granted or denied by motion of the city council.

(h) *Termination.* The violation of any condition of the variance shall be the basis for the City Council, following a hearing, to terminate the variance. If the property is not used or improvements substantially begun within a period of one year after the decision granting the variance, unless the variance decision provides otherwise, the variance shall be terminated. Unless the city council specifically approves a different time when action is officially taken on the request, approvals which have been issued under the provisions of this section shall expire without further action by the planning commission or the city council, unless the applicant commences the authorized use or improvement within one year of the date the variance is issued; or, unless before the expiration of the one-year period, the applicant shall apply for an extension thereof by completing and submitting a request for extension, including the renewal fee as established by city council. The request for extension shall state facts showing a good faith attempt to complete or utilize the approval permitted in the variance. A request for an extension not exceeding one year shall be subject to the review and approval of the zoning administrator. Should a second extension of time, or any extension of time longer than one year, be requested by the applicant, it shall be presented to the planning commission for a recommendation and to the city council for a decision.

SECTION 2. EFFECTIVE DATE: This ordinance shall take effect from and after its passage.

ADOPTED this _____ day of _____, 2011, by the City Council of Falcon Heights, Minnesota.

CITY OF FALCON HEIGHTS

BY: _____
Peter Lindstrom, Mayor

ATTEST:

Justin Miller, City Administrator/Clerk

ORDINANCE NO. _____

CITY OF FALCON HEIGHTS
RAMSEY COUNTY, MINNESOTA

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OF THE CITY CODE CONCERNING VARIANCES**

THE CITY COUNCIL OF THE CITY OF FALCON HEIGHTS ORDAINS:

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Sec. 113-62. Variances.

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Practical difficulties mean the same as that term defined in Minn. Stats. § 462.357, as may be amended, meaning that the property owner proposes to use the property in a reasonable manner not permitted by this Chapter, the plight of the landowner is due to circumstances unique to the property not created by the landowner, and a variance, if granted, shall not alter the character of the locality. Economic considerations alone shall not constitute practical difficulties. Practical difficulties include but are not limited to inadequate access to direct sunlight for solar energy systems.

Variance means a modification of or variation from the provisions of this chapter consistent with the state enabling statute for municipalities, as applied to a specific property and granted pursuant to the standards and procedures of this chapter.

(b) *Purpose.* The purpose of this section is to provide the procedure and criteria for variances.

(c) *Application.*

(1) Any owner of property or a person holding a contract to purchase property, or an optionee holding an option conditioned solely on the grant of a variance, or the duly authorized agent of such appellant, may make application for a variance. The application shall be made on forms prepared by the zoning administrator.

(2) The application shall contain the legal description of the property, the zoning district in which it is located, a brief statement of the reasons the variance is requested, a statement of the ownership interest therein of the applicant and the names and addresses of the owners of all abutting property as listed on the current real estate tax rolls. The application shall be verified.

(d) *USE Variances prohibited.* Variances may not be approved for a use that is not allowed in the zoning district where the property is located.

(e) *Review criteria.* The city council shall not approve any variance request unless they find that failure to grant the variance will result in practical difficulties on the applicant, and, as may be applicable, all of the following criteria have been met:

(1) The variance would be in harmony with the general purposes and intent of this Chapter.

(2) The variance would be consistent with the comprehensive plan.

(3) That, there are practical difficulties in complying with this Chapter. .

(4) That the granting of the variance will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety.

(4) That the requested variance is the minimum action required to eliminate the practical difficulties.

(5) Variances shall be granted for earth sheltered construction as defined in Minnesota Statutes § 216C.06, Subdivision 14, when in harmony with this Chapter. Variances may be approved for the temporary use of a one family dwelling as a two family dwelling.

(f) *Conditions.* The city may attach conditions to the grant of the variance. A condition must be directly related to and must bear a rough proportionality to the impact created by the variance.

(g) *Procedure.*

(1) All applications for variances shall be referred to the planning commission for study and recommendation to the city council.

(2) Within 60 days, the planning commission shall forward its recommendations to the city council; if no recommendation is transmitted within 60 days after referral of

the application for variance to the planning commission, the city council may take action without further awaiting such recommendation.

(3) Variances are granted or denied by motion of the city council.

(h) *Termination.* The violation of any condition of the variance shall be the basis for the City Council, following a hearing, to terminate the variance. If the property is not used or improvements substantially begun within a period of one year after the decision granting the variance, unless the variance decision provides otherwise, the variance shall be terminated. Unless the city council specifically approves a different time when action is officially taken on the request, approvals which have been issued under the provisions of this section shall expire without further action by the planning commission or the city council, unless the applicant commences the authorized use or improvement within one year of the date the variance is issued; or, unless before the expiration of the one-year period, the applicant shall apply for an extension thereof by completing and submitting a request for extension, including the renewal fee as established by city council. The request for extension shall state facts showing a good faith attempt to complete or utilize the approval permitted in the variance. A request for an extension not exceeding one year shall be subject to the review and approval of the zoning administrator. Should a second extension of time, or any extension of time longer than one year, be requested by the applicant, it shall be presented to the planning commission for a recommendation and to the city council for a decision.

SECTION 2. EFFECTIVE DATE: This ordinance shall take effect from and after its passage.

ADOPTED this _____ day of _____, 2011, by the City Council of Falcon Heights, Minnesota.

CITY OF FALCON HEIGHTS

BY: _____
Peter Lindstrom, Mayor

ATTEST:

Justin Miller, City Administrator/Clerk

Sec. 113-62. Variances.

- (a) *Definitions.* The following words, terms and phrases, when used in this section, shall have the meanings ascribed to them in this subsection, except where the context clearly indicates a different meaning:

Undue hardship means the same as that term defined in Minn. Stats. § 462.357, as may be amended, meaning that the property in question cannot be put to a reasonable use if used under the conditions allowed by this chapter, the plight of the landowner is due to circumstances unique to the property not caused by the landowner, and a variance, if granted, shall not alter the character of the locality. Economic considerations alone shall not constitute an undue hardship if a reasonable use of the property exists under the terms of this chapter. Undue hardship may also include inadequate access to direct sunlight for solar energy systems.

Variance means a modification of or variation from the provisions of this chapter consistent with the state enabling statute for municipalities, as applied to a specific property and granted pursuant to the standards and procedures of this chapter, except that a variance shall not be used for modification of the allowable uses within a district and shall not allow uses that are prohibited.

- (b) *Purpose.* The purpose of this section is to provide for deviations from the literal provisions of this chapter in instances where strict enforcement would cause undue hardship because of circumstances unique to the individual property under consideration, and to grant such variances only when it is demonstrated that such actions will be in keeping with the spirit and intent of this chapter.
- (c) *Application.*
- (1) Any owner of property or a person holding a contract to purchase property, or an optionee holding an option conditioned solely on the grant of a variance, or the duly authorized agent of such appellant, may make application for a variance. The application shall be made on forms prepared by the zoning administrator.
 - (2) The application shall contain the legal description of the property, the zoning district in which it is located, a brief statement of the reasons the variance is requested, a statement of the ownership interest therein of the applicant and the names and addresses of the owners of all abutting property as listed on the current real estate tax rolls. The application shall be verified.
- (d) *Variances prohibited.* No variance may be granted for a use of any property different from that permitted by this chapter.
- (e) *Review criteria.* The city council shall not approve any variance request unless they find that failure to grant the variance will result in undue hardship on the applicant, and, as may be applicable, all of the following criteria have been met:
- (1) That, because of the particular physical surroundings, shape, or topographical conditions of the specific parcel of land involved, a particular hardship to the owner would result, as distinguished from a mere inconvenience, if the strict letter of the regulations were to be carried out.
 - (2) That the conditions upon which an application for a variance is based are unique to the parcel of land for which the variance is sought and are not applicable,

generally, to other property within the same zoning classification.

- (3) That the purpose of the variance is not based exclusively upon a financial hardship, or a desire to increase the value or income potential of the parcel of land.
 - (4) That the alleged difficulty or hardship is caused by this chapter and has not been created by any persons having an interest in the parcel of land and is not a self-created hardship.
 - (5) That the granting of the variance will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety.
 - (6) That the requested variance is the minimum action required to eliminate the hardship.
 - (7) That it does not involve a use which is not allowed within the respective zoning district.
- (f) *Conditions.* The city may attach such conditions to the grant of the variance as it shall determine will be necessary or desirable to bring it within the purpose and intent of the chapter.
- (g) *Procedures.*
- (1) All applications for variances shall be referred to the planning commission for study and recommendation to the city council.
 - (2) Within 60 days, the planning commission shall forward its recommendations to the city council; if no recommendation is transmitted within 60 days after referral of the application for variance to the planning commission, the city council may take action without further awaiting such recommendation.
 - (3) Variances are granted or denied by motion of the city council.
- (h) *Termination.* The violation of any condition of the variance shall terminate the variance. If the property is not used or improvements substantially begun within a period of one year after the decision granting the variance, unless the variance decision provides otherwise, the variance shall be terminated. Unless the city council specifically approves a different time when action is officially taken on the request, approvals which have been issued under the provisions of this section shall expire without further action by the planning commission or the city council, unless the applicant commences the authorized use or improvement within one year of the date the variance is issued; or, unless before the expiration of the one-year period, the applicant shall apply for an extension thereof by completing and submitting a request for extension, including the renewal fee as established by city council. The request for extension shall state facts showing a good faith attempt to complete or utilize the approval permitted in the variance. A request for an extension not exceeding one year shall be subject to the review and approval of the zoning administrator. Should a second extension of time, or any extension of time longer than one year, be requested by the applicant, it shall be presented to the planning commission for a recommendation and to the city council for a decision.

(Code 1993, § 9-15.03)

State law references: Variances, Minn. Stats. § 462.357, subd. 6(2).

Secs. 113-63--113-82. Reserved.



Minnesota Senate

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KEY: ~~stricken~~ = removed, old language. underscored = added, new language.

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H.F. No. 52, 1st Unofficial Engrossment - 87th Legislative Session (2011-2012) Posted on Apr 14, 2011

- 1.1 A bill for an act
- 1.2 relating to local government; providing for variances from city, county, and town
- 1.3 zoning controls and ordinances;amending Minnesota Statutes 2010, sections
- 1.4 394.27, subdivision 7; 462.357, subdivision 6.
- 1.5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:
- 1.6 Section 1. Minnesota Statutes 2010, section 394.27, subdivision 7, is amended to read:
- 1.7 Subd. 7. **Variances; hardship practical difficulties**. The board of adjustment shall
- 1.8 have the exclusive power to order the issuance of variances from the ~~terms requirements~~
- 1.9 of any official control including restrictions placed on nonconformities. Variances shall
- 1.10 only be permitted when they are in harmony with the general purposes and intent of the
- 1.11 official control ~~in cases when there are practical difficulties or particular hardship in~~
- 1.12 ~~the way of carrying out the strict letter of any official control, and when the terms of~~
- 1.13 ~~the variance variances are consistent with the comprehensive plan. "Hardship" as used~~
- 1.14 ~~in connection with the granting of a variance means the property in question cannot be~~
- 1.15 ~~put to a reasonable use if used under the conditions allowed by the official controls; the~~
- 1.16 ~~plight of the landowner is due to circumstances unique to the property not created by the~~
- 1.17 ~~landowner; and the variance, if granted, will not alter the essential character of the locality.~~
- 1.18 Variances may be granted when the applicant for the variance establishes that there
- 1.19 are practical difficulties in complying with the official control. "Practical difficulties,"
- 1.20 as used in connection with the granting of a variance, means that the property owner
- 1.21 proposes to use the property in a reasonable manner not permitted by an official control;
- 1.22 the plight of the landowner is due to circumstances unique to the property not created by
- 1.23 the landowner; and the variance, if granted, will not alter the essential character of the
- 1.24 locality. Economic considerations alone shall do not constitute a hardship if a reasonable
- 2.1 use for the property exists under the terms of the ordinance practical difficulties. Practical
- 2.2 difficulties include, but are not limited to, inadequate access to direct sunlight for solar
- 2.3 energy systems. Variances shall be granted for earth sheltered construction as defined in
- 2.4 section 216C.06, subdivision 14, when in harmony with the official controls. No variance
- 2.5 may be granted that would allow any use that is ~~prohibited~~ not allowed in the zoning
- 2.6 district in which the subject property is located. The board of adjustment may impose
- 2.7 conditions in the granting of variances to. A condition must be directly related to and must
- 2.8 bear a rough proportionality to the impact created by the variance insure compliance
- 2.9 and to protect adjacent properties and the public interest. The board of adjustment may
- 2.10 consider the inability to use solar energy systems a "hardship" in the granting of variances.
- 2.11 **EFFECTIVE DATE.**This section is effective the day following final enactment.
- 2.12 Sec. 2. Minnesota Statutes 2010, section 462.357, subdivision 6, is amended to read:
- 2.13 Subd. 6. **Appeals and adjustments.** Appeals to the board of appeals and
- 2.14 adjustments may be taken by any affected person upon compliance with any reasonable

- 2.15 conditions imposed by the zoning ordinance. The board of appeals and adjustments has
- 2.16 the following powers with respect to the zoning ordinance:
- 2.17 (1) To hear and decide appeals where it is alleged that there is an error in any
- 2.18 order, requirement, decision, or determination made by an administrative officer in the
- 2.19 enforcement of the zoning ordinance.
- 2.20 (2) To hear requests for variances from the ~~literal provisions of the ordinance~~
- 2.21 ~~in instances where their strict enforcement would cause undue hardship because of~~
- 2.22 ~~circumstances unique to the individual property under consideration, and to grant such~~
- 2.23 ~~variances only when it is demonstrated that such actions will be in keeping with the spirit~~
- 2.24 ~~and intent of the ordinance. "Undue hardship" as used in connection with the granting of a~~
- 2.25 ~~variance means the property in question cannot be put to a reasonable use if used under~~
- 2.26 ~~conditions allowed by the official controls, requirements of the zoning ordinance including~~
- 2.27 ~~restrictions placed on nonconformities. Variances shall only be permitted when they are in~~
- 2.28 ~~harmony with the general purposes and intent of the ordinance and when the variances are~~
- 2.29 ~~consistent with the comprehensive plan. Variances may be granted when the applicant for~~
- 2.30 ~~the variance establishes that there are practical difficulties in complying with the zoning~~
- 2.31 ~~ordinance. "Practical difficulties," as used in connection with the granting of a variance,~~
- 2.32 ~~means that the property owner proposes to use the property in a reasonable manner not~~
- 2.33 ~~permitted by the zoning ordinance; the plight of the landowner is due to circumstances~~
- 2.34 ~~unique to the property not created by the landowner; and the variance, if granted, will not~~
- 2.35 ~~alter the essential character of the locality. Economic considerations alone shall do not~~
- 3.1 ~~constitute an undue hardship if reasonable use for the property exists under the terms of~~
- 3.2 ~~the ordinance. Undue hardship also includes practical difficulties. Practical difficulties~~
- 3.3 ~~include, but is are not limited to, inadequate access to direct sunlight for solar energy~~
- 3.4 ~~systems. Variances shall be granted for earth sheltered construction as defined in section~~
- 3.5 ~~216C.06, subdivision 14 , when in harmony with the ordinance. The board of appeals and~~
- 3.6 ~~adjustments or the governing body as the case may be, may not permit as a variance any~~
- 3.7 ~~use that is not permitted allowed under the zoning ordinance for property in the zone~~
- 3.8 ~~where the affected person's land is located. The board or governing body as the case~~
- 3.9 ~~may be, may permit as a variance the temporary use of a one family dwelling as a two~~
- 3.10 ~~family dwelling. The board or governing body as the case may be may impose conditions~~
- 3.11 ~~in the granting of variances to insure compliance and to protect adjacent properties. A~~
- 3.12 ~~condition must be directly related to and must bear a rough proportionality to the impact~~
- 3.13 ~~created by the variance.~~
- 3.14 **EFFECTIVE DATE.**This section is effective the day following final enactment.

Please direct all comments concerning issues or legislation
to your [House Member](#) or [State Senator](#).

For Legislative Staff or for directions to the Capitol, visit the [Contact Us](#) page.

[General questions or comments.](#)

last updated: 04/15/2009

CITY OF FALCON HEIGHTS, MINNESOTA

PUBLIC HEARING NOTICE

NOTICE IS HEREBY GIVEN, that the Falcon Heights Planning Commission will meet on June 28, 2011, at 7:00 p.m. at Falcon Heights City Hall, 2077 Larpenteur Avenue West, Falcon Heights, Minnesota 55113, to consider amendments to the City's Zoning Ordinance, Chapter 113 of the City Code. The amendments, if approved, would change the criteria for the approval of variances. All persons who desire to speak on this issue are encouraged to attend and will be given an opportunity to be heard at this meeting. Additional information can be obtained by contacting the City of Falcon Heights at (651) 792-7600.

Dated: June 13, 2011.



Justin Miller, City Administrator/Clerk
City of Falcon Heights, Minnesota



Gov. Dayton Signs Variance Legislation into Law

The changes, which are now in effect, may require some cities to change ordinances or statutory cross-references.

(Published May 11, 2011)

The League and a long list of allies are finally able to celebrate having a fix in place to restore city variance authority. After a long and contentious session working on resolving this issue, the final version of HF 52 was supported by the League and passed unanimously by the Legislature.

On May 5, Gov. Dayton signed **2011 Minnesota Laws, Chapter 19** ([Link to: https://www.revisor.mn.gov/laws/?id=19&doctype=chapter&year=2011&type=0](https://www.revisor.mn.gov/laws/?id=19&doctype=chapter&year=2011&type=0)), amending **Minnesota Statutes, section 462.357, subdivision 6** ([Link to: https://www.revisor.mn.gov/statutes/?id=462.357](https://www.revisor.mn.gov/statutes/?id=462.357)) to restore municipal variance authority in response to *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721 (Minn. June 24, 2010). The law also provides consistent statutory language between **Minnesota Statutes, chapter 462** ([Link to: https://www.revisor.mn.gov/statutes/?id=462](https://www.revisor.mn.gov/statutes/?id=462)) and the county variance authority of **Minnesota Statutes, section 394.27, subdivision 7** ([Link to: https://www.revisor.mn.gov/statutes/?id=394.27](https://www.revisor.mn.gov/statutes/?id=394.27)).

In *Krummenacher*, the Minnesota Supreme Court narrowly interpreted the statutory definition of “undue hardship” and held that the “reasonable use” prong of the “undue hardship” test is not whether the proposed use is reasonable, but rather whether there is a reasonable use in the absence of the variance. The new law changes that factor back to the “reasonable manner” understanding that had been used by some lower courts prior to the *Krummenacher* ruling.

The new law was effective on May 6, the day following the governor’s approval. Presumably it applies to pending applications, as the general rule is that cities are to apply the law at the time of the decision, rather than at the time of application.

The new law renames the municipal variance standard from “undue hardship” to “practical difficulties,” but otherwise retains the familiar three-factor test of (1) reasonableness, (2) uniqueness, and (3) essential character. Also included is a sentence new to city variance authority that was already in the county statutes: “Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance and when the terms of the variance are consistent with the comprehensive plan.”

So in evaluating variance requests under the new law, cities should adopt findings addressing the following questions:

- Is the variance in *harmony with* the purposes and intent of the *ordinance*?
- Is the variance *consistent with* the *comprehensive plan*?
- Does the proposal put property to use in a *reasonable manner*?
- Are there *unique circumstances* to the property not created by the landowner?
- Will the variance, if granted, alter the *essential character* of the locality?

Some cities may have ordinance provisions that codified the old statutory language, or that have their own set of standards. For those cities, the question may be whether you have to first amend your zoning code before processing variances under the new standard. A credible argument can be made that that the statutory language pre-empts inconsistent local ordinance provisions. Under a pre-emption theory, cities could apply the new law immediately without necessarily amending their ordinance first. In any regard,

it would be best practice for cities to revisit their ordinance provisions and consider adopting language that mirrors the new statute.

In addition, the new law clarifies that conditions may be imposed on granting of variances if those conditions are directly related to and bear a rough proportionality to the impact created by the variance.

If you have questions about how your city should approach variances under this new statute, you should discuss it with your city attorney or contact **Jed Burkett**, LMC land use attorney, at jburkett@lmc.org ([Link to: mailto:jburkett@lmc.org](mailto:jburkett@lmc.org)) or (651) 281-1247, or **Tom Grundhoefer**, LMC general counsel, at tgrundho@lmc.org ([Link to: mailto:tgrundho@lmc.org](mailto:tgrundho@lmc.org)) or (651) 281-1266.

Read the current issue of the Cities Bulletin ([Link to: http://www.lmc.org/page/1/cities-bulletin-newsletter.jsp](http://www.lmc.org/page/1/cities-bulletin-newsletter.jsp))

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State Supreme Court Narrowly Interprets Variance Authority

The court ruling holds cities to a much stricter standard, which considerably limits variance opportunities.

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The Minnesota Supreme Court recently issued a decision that changed the longstanding interpretation of the statutory standard for granting zoning variances.

In the case of *Krummenacher v. City of Minnetonka*, the Supreme Court narrowly interpreted the definition of “undue hardship” and held that the “reasonable use” prong of the “undue hardship” test is not whether the proposed use is reasonable, but rather whether there is reasonable use in the absence of the variance. This is a much stricter standard, which considerably limits variance opportunities.

The decision

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

The Supreme Court examined the statutory definition of “undue hardship” in *Minnesota Statutes, section 462.357* ([Link to: https://www.revisor.mn.gov/statutes/?id=462.357](https://www.revisor.mn.gov/statutes/?id=462.357)), and concluded that city authority to issue a variance is limited to those very rare cases where the property cannot be put to “a reasonable use” without the variance. This establishes a high threshold for both the city and the property owner when considering variance requests.

The Supreme Court reviewed the parallel county authority that allows for a variance in situations of “practical difficulties” or “hardship.” The Supreme Court found that the city authority was more limited because it did not contain the “practical difficulties” provision. The 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.”

Impact of the decision

Because of the far-reaching nature of the decision, there are probably at least four responses that cities should think about—at least until a legislative correction can be achieved:

- The city should re-evaluate the criteria that it has 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 grant.
- In circumstances where the city council believes the grant of a variance is appropriate, the city should take great care to make detailed finding describing why the grant of the variance is necessary to provide the property owner with a reasonable 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.
- If a city routinely grants variances, this may be an indicator that it may want to re-examine its zoning code to ensure that standards, setbacks, uses, and other requirements are consistent with the city council's current vision for the community. In short, the court's decision should act as an encouragement to cities to review their land use practices.
- Cities may want to 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 action

The restrictive court decision has caused a number of League members to call for a legislative response. The decision, its impact, and a possible legislative response will be discussed in the League's Improving Service Delivery Policy Committee this summer. It is anticipated that the League will support a legislative change to provide cities with greater flexibility—perhaps something similar to the county authority.

Read the current issue of the Cities Bulletin (*Link to: <http://www.lmc.org/page/1/cities-bulletin-newsletter.jsp>*)

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VARIANCES

Frequently Asked Questions
(Reflects 2011 law change)

What is a variance?

A variance is a way that a city may allow an exception to part of a zoning ordinance. It is a permitted departure from strict enforcement of the ordinance as applied to a particular piece of property. A variance is generally for a dimensional standard (such as setbacks or height limits). A variance allows the landowner to break a dimensional zoning rule that would otherwise apply.

Who grants a variance?

Minnesota law provides that requests for variances are heard by a body called the board of adjustment and appeals; in many smaller communities, the planning commission or even the city council may serve that function. A variance decision is generally appealable to the city council. For more information, see [Minn. Stat. § 462.357](#).

When can a variance be granted?

A variance may be granted if enforcement of a zoning ordinance provision as applied to a particular piece of property would cause the landowner “practical difficulties.” For the variance to be granted, the applicant must satisfy the statutory three-factor test for practical difficulties. If the applicant does not meet all three factors of the statutory test, then a variance should not be granted. Also, variances are only permitted when they are in harmony with the general purposes and intent of the ordinance, and when the terms of the variance are consistent with the comprehensive plan. For more information, see [Minn. Stat. § 462.357](#).

What kind of authority is the city exercising?

A city exercises so-called “quasi-judicial” authority when considering a variance application. This means that the city’s role is limited to applying the legal standard of practical difficulties to the facts presented by the application. The city acts like a judge in evaluating the facts against the legal standard. If the applicant meets the standard, then the variance may be granted. In contrast, when the city writes the rules in zoning ordinance, the city is exercising “legislative” authority and has much broader discretion.

What is practical difficulties?

Practical difficulties is a legal standard set forth in law that cities must apply the when considering applications for variances. It is a three-factor test and applies to all requests for variances. To constitute practical difficulties, all three factors of the test must be satisfied. For more information, see [Minn. Stat. § 462.357](#).

This material is provided as general information and is not a substitute for legal advice.
Consult your attorney for advice concerning specific situations.

What are the practical difficulties factors?

The first factor is that the property owner proposes to use the property in a reasonable manner. This factor means that the landowner would like to use the property in a particular reasonable way but cannot do so under the rules of the ordinance. It does not mean that the land cannot be put to any reasonable use whatsoever without the variance. For example, if the variance application is for a building too close to a lot line, or does not meet the required setback, the focus of the first factor is whether the request to place a building there is reasonable.

The second factor is that the landowner's problem is due to circumstances unique to the property not caused by the landowner. The uniqueness generally relates to the physical characteristics of the particular piece of property, that is, to the land, and not personal characteristics or preferences of the landowner. When considering the variance for a building to encroach or intrude into a setback, the focus of this factor is whether there is anything physically unique about the particular piece of property, such as sloping topography or other natural features like wetlands or trees.

The third factor is that the variance, if granted, will not alter the essential character of the locality. Under this factor consider whether the resulting structure will be out of scale, out of place, or otherwise inconsistent with the surrounding area. For example, when thinking about the variance for an encroachment into a setback, the focus is how the particular building will look closer to a lot line and if that fits in with the character of the area.

Are there are other factors a city should consider?

Yes. State statute provides variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance, and when the terms of the variance are consistent with the comprehensive plan. So, in addition to the three-factor practical difficulties test, a city evaluating a variance application should make findings as to (1) whether or not the variance is in harmony with the purposes and intent of the ordinance, and (2) whether or not the variance is consistent with the comprehensive plan.

What about economic considerations?

Sometimes landowners insist that they deserve a variance because they have already incurred substantial costs or argue they will not receive expected revenue without the variance. State statute specifically notes that economic considerations alone cannot create practical difficulties. Rather, practical difficulties exists only when the three statutory factors are met.

What about undue hardship?

"Undue hardship" was the name of the three-factor test prior to a May 2011 change of law. Effective May 6, 2011 Minnesota Laws, Chapter 19, amended [Minn. Stat. § 462.357, subd. 6](#) to restore municipal variance authority in response to *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721 (Minn. June 24, 2010). In *Krummenacher*, the Minnesota Supreme Court interpreted the statutory definition of "undue hardship" and held that the "reasonable use" prong of the "undue hardship" test was not whether the proposed use is reasonable, but rather whether there is a reasonable use in the absence of the variance.

What did the 2011 law change?

The 2011 law changed the first factor back to the “reasonable manner” understanding that had been used by some lower courts prior to the *Krummenacher* ruling. The 2011 law renamed the municipal variance standard from “undue hardship” to “practical difficulties,” but otherwise retained the familiar three-factor test of (1) reasonableness, (2) uniqueness, and (3) essential character. The 2011 law also provides that: “Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance and when the terms of the variance are consistent with the comprehensive plan.”

Can a city grant a use variance?

Sometimes a landowner will seek a variance to allow a particular use of their property that would otherwise not be permissible under the zoning ordinance. Such variances are often termed “use variances” as opposed to “area variances” from dimensional standards. Use variances are not generally allowed in Minnesota—state law prohibits a city from permitting by variance any use that is not permitted under the ordinance for the zoning district where the property is located. For more information, see [Minn. Stat. § 462.357](#).

Is a public hearing required?

Minnesota statute does not clearly require a public hearing before a variance is granted or denied, but many practitioners and attorneys agree that the best practice is to hold public hearings on all variance requests. A public hearing allows the city to establish a record and elicit facts to help determine if the application meets the practical difficulties factors.

What is the role of neighborhood opinion?

Neighborhood opinion alone is not a valid basis for granting or denying a variance request. While city officials may feel their decision should reflect the overall will of the residents, the task in considering a variance request is limited to evaluating how the variance application meets the statutory practical difficulties factors. Residents can often provide important facts that may help the city in addressing these factors, but unsubstantiated opinions and reactions to a request do not form a legitimate basis for a variance decision. If neighborhood opinion is a significant basis for the variance decision, the decision could be overturned by a court.

What is the role of past practice?

While past practice may be instructive, it cannot replace the need for analysis of all three of the practical difficulties factors for each and every variance request. In evaluating a variance request, cities are not generally bound by decisions made for prior variance requests. If a city finds that it is issuing many variances to a particular zoning standard, the city should consider the possibility of amending the ordinance to change the standard.

When should a variance decision be made?

A written request for a variance is subject to Minnesota’s 60-day rule and must be approved or denied within 60 days of the time it is submitted to the city. A city may extend the time period for an additional 60 days, but only if it does so in writing before expiration of the initial 60-day period. Under the 60-day rule, failure to approve or deny a request within the statutory time period is deemed an approval. For more information, see [Minn. Stat. § 15.99](#).

How should a city document a variance decision?

Whatever the decision, a city should create a record that will support it. In the case of a variance denial, the 60-day rule requires that the reasons for the denial be put in writing. Even when the variance is approved, the city should consider a written statement explaining the decision. The written statement should explain the variance decision, address each of the three practical difficulties factors and list the relevant facts and conclusions as to each factor.

Can meeting minutes adequately document a variance decision?

If a variance is denied, the 60-day rule requires a written statement of the reasons for denial be provided to the applicant within the statutory time period. While meeting minutes may document the reasons for denial, usually a separate written statement will need to be provided to the applicant in order to meet the statutory deadline. A separate written statement is advisable even for a variance approval, although meeting minutes could serve as adequate documentation, provided they include detail about the decision factors and not just a record indicating an approval motion passed.

Can a city attach conditions to a variance?

By law, a city may impose a condition when it grants a variance so long as the condition is directly related and bears a rough proportionality to the impact created by the variance. For instance, if a variance is granted to exceed an otherwise applicable height limit, any conditions attached should presumably relate to mitigating the affect of excess height. For more information, see [Minn. Stat. § 462.357](#).

What happens to the variance once granted?

A variance once issued is a property right that “runs with the land” so it attaches to and benefits the land and is not limited to a particular landowner. A variance is typically filed with the county recorder. Even if the property is sold to another person, the variance applies.

Jed Burkett 2011/06