



STAFF REPORT

DATE: 8/20/2019

REGULAR

MOTION

TO: City Council

FROM: Ken Roberts, Planning Director

AGENDA ITEM: **Variance – Direct Access for a Place of Worship**

REVIEWED BY: Ben Prchal, City Planner

BACKGROUND:

The City has received a request from Rev. John Burns of the Carmelite Hermitage for a variance from the City Code requirement about having direct access for a place of worship. He is making this request in order to add a chapel to the Carmelite's site located at 8249 Demontreville Trail.

On December 3, 1991, the City Council approved a variance from the section of the City Code about having frontage a public road for the Carmelite Monastery. The Carmelites made this request so they could construct a building on their parcel (which does not have frontage on a public road). (See attached City Council Resolution 91-40).

On August 12, 2019, the Planning Commission held a public hearing about this request. The Planning Commission reviewed the applicant's request and application materials, took testimony from several interested parties and then made a recommendation that the City Council should approve the variance as requested.

ISSUE BEFORE CITY COUNCIL:

The City Council is being asked to review and make decision about the variance request about the City Code requirement for direct access for the Carmelites proposed chapel.

VARIANCE REQUEST DETAILS/ANALYSIS:

Deadline for Action: Application Complete – 7/12/2019
60 Day Deadline – 9/11/2019
Extension Letter Mailed – N/A
120 Day Deadline – N/A

Variance Request: The Carmelite Hermitage of the Blessed Virgin Mary requests a variance from the direct access requirement for places of worship as outlined in Section 154.600(B)(2) of the City Code.

Reason for Request. The reason for the variance request is to facilitate the construction of a chapel on their site. The City Code requires places of worship (such as chapels and churches) to have “direct access” to a public street classified by the Comprehensive Plan as a major collector or arterial. The Carmelites property does not have frontage on Demontreville Trail but there is an existing easement and driveway across the neighboring property to the north that provides their property with access to Demontreville Trail. The Comprehensive Plan classifies Demontreville Trail as a major collector street.

The applicant believes their existing access to Demontreville Trail (with the easement) meets the direct access requirement of the City Code. If the City Code said that places of worship are required to have access to a major collector or arterial street, then the Carmelites site would meet that access requirement.

REVIEW AND ANALYSIS/DRAFT FINDINGS

An applicant must establish and demonstrate compliance with the variance criteria set forth in Lake Elmo City Code Section 154.109 before the City may grant an exception or modification to city code requirements. These criteria are listed below, along with comments from Staff about the applicability of these criteria to the applicant’s request.

- 1) **Practical Difficulties.** A variance to the provision of this chapter may be granted by the Board of Adjustment upon the application by the owner of the affected property where the strict enforcement of this chapter would cause practical difficulties because of circumstances unique to the individual property under consideration and then only when it is demonstrated that such actions will be in keeping with the spirit and intent of this chapter. Definition of practical difficulties - “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.

***FINDINGS:** The addition of a chapel to Carmelites site has been planned since at least 1991 when the City first approved a Master Plan for their site. The Carmelites have been using the easement to Demontreville Trail for access to the site since that time. Adding another driveway or access to the Carmelites property would be a practical difficulty as the only public street their property has frontage on is Hidden Bay Trail to south. A new driveway would be about 1,500 feet in length, would require extensive tree removal and grading and would be an access onto a local street – not a collector or arterial street as the City Code requires for places of worship.*

The use of the existing driveway for access to Demontreville Trail for the proposed chapel on their site is a reasonable use of the property and the existing access.

- 2) **Unique Circumstances.** The plight of the landowner is due to circumstances unique to the property not created by the landowner.

***FINDINGS:** According to the applicant, the existing lot layout with the access easement to Demontreville Trail has been in place since 1904. This is a unique situation with circumstances not created by the landowner or the current land users – the Carmelite Monks.*

- 3) **Character of Locality.** The proposed variance will not alter the essential character of the locality in which the property in question is located.

***FINDINGS:** The proposed variance will allow the Carmelites to use the existing driveway (that currently provides access to their site) for access for the proposed chapel. By using the existing*

driveway that has been in place for many years, the Carmelites will not be altering the essential character of the locality (or area) in which their property is located.

Conversely, adding another driveway to their site that would have access onto a local, neighborhood street would change the character of that locality and area of the City.

- 4) Adjacent Properties and Traffic.** The proposed variance will not impair an adequate supply of light and air to properties adjacent to the property in question or substantially increase the congestion of the public streets or substantially diminish or impair property values within the neighborhood.

FINDINGS. *The proposed variance to allow the use of the existing driveway and easement for access for the proposed chapel will not impair an adequate supply of light and air to properties adjacent to the subject property, increase congestion of public streets or substantially diminish or impair property values within the neighborhood.*

Conversely, as I noted above, if the applicant added another driveway to access the streets to the south of their site, such a driveway would increase the congestion on the local public streets near their property.

FISCAL IMPACT:

Staff has not found that the proposed variance will have any impact to the City.

OPTIONS:

The City Council may:

- Approve the proposed variance.
- Approve the proposed variance with conditions.
- Deny the proposed variance, citing findings of fact for denial.

RECOMMENDATION:

Staff and the Planning Commission recommend approval of the request from Rev. John Burns of the Carmelite Hermitage for a variance (an exception) from the City's requirement for direct access to a major collector or arterial street for a place of worship for the property located at 8249 Demontreville Trail.

“Move to adopt Resolution 2019-058 approving the request from Rev. John Burns of the Carmelite Hermitage for a variance (an exception) from the City's requirement for direct access to a major collector or arterial street for a place of worship for the property located at 8249 Demontreville Trail.”

ATTACHMENTS:

- 1) Variance request narrative dated July 12, 2019 (4 pages)
- 2) Proposed Site Plan
- 3) Resolution 91-40 - Variance resolution
- 4) Letter dated 8-7-2019 from Larkin Hoffman
- 5) Letter dated 8-9-2019 from Eric Lipman

6) Resolution 2019 - 058

Land Use Application – Variance

12 July 2019

Property Location

All of Government Lot 4 in Section 9, Township 29 north, Range 21 west, City of Lake Elmo, Washington County, Minnesota, according to government survey containing 59.4 acres of land. Also the south 30.6 acres of Government Lot 4 in Section 4, and of the southwest quarter of the southeast quarter of said Section 4, all in Township 29 north, Range 21 west, according to government survey, being the south 688 feet thereof.

Detailed Reason for the Request

In 1954, the Discalced Carmelite Nuns of Saint Paul, a non-profit corporation under the laws of the State of Minnesota, were looking for property upon which to build a permanent monastery. They were advised of the property which they now own and entered into negotiations with the owners of the property.

On 2 February 1954, Phillip C. Mackey and his wife Bernadine R. Mackey conveyed their property, along with its easement, to the Discalced Carmelite Nuns of Saint Paul by warranty deed, dated that day, and filed for record in Washington County, Minnesota, on 4 February 1954. As part of their deed of purchase, they obtained a right of way across the neighboring property to the north (owned by the Jesuit Retreat House) which gave them access to Demontreville Trail. This right of way has existed since 1904. At the time that the Carmelite Nuns purchased their property, the right of way across the Jesuit property was the only access from a public road to the Carmelite property, and it remains the only access today. The Carmelite Nuns have used this right of way continuously for 64 years.

In 1987 Carmel of the Blessed Virgin Mary (aka Carmelite Hermitage, Carmelite Hermitage of the Blessed Virgin Mary) was incorporated in the State of Minnesota as a community of Carmelite Priests and Brothers. In December of 1991, the City of Lake Elmo approved a master plan for the Carmelite Hermitage consisting of four phases: Phase 1, consisting of a community building and garage was constructed in 1991/92. Phase 2, consisting of a central courtyard with covered walkways (cloister) was constructed in 2001/2002. Phase 3 consists of a chapel and is the building we would now like to construct. Phase 4 will consist of a guest building and library. We hope to commence Phase 4 around 2022. Additionally, in 1991 the City of Lake Elmo granted a variance to the Carmelite Hermitage because the Hermitage also uses the easement over Jesuit land to access Demontreville Trail. The Jesuit Retreat House made no objection to the variance. The Carmelite Fathers and Brothers have used the easement continuously for 32 years.

In the intervening years, the Carmelite Hermitage has built four new buildings. In 2007, it requested and received an amendment to its master plan to add an additional building. This building was built in 2008. In none of the four construction projects did the City of Lake Elmo require the Carmelite Hermitage to obtain an additional variance. We maintain that our variance is valid for all buildings shown on the master plan which was approved by the City Council in 1991. City practice towards our Hermitage is evidence of our interpretation.

The Carmelite Hermitage wishes to construct its chapel, shown as phase three on its master plan. An objection has been raised by the Jesuit Retreat House that the Carmelite Hermitage needs a new variance to proceed with its chapel project because it does not meet the CUP requirements established by the City in 2000 and amended in 2006. Since there is doubt about the scope and language of the original variance as well as doubt about the meaning of the word *direct* in the City's CUP requirements, City staff have suggested that we apply for a new variance that will clarify all issues related to access to our property. In a spirit of cooperation, we have agreed to apply for a new variance.

Variance Request, Practical Difficulties:

The Carmelite Hermitage of the Blessed Virgin Mary requests a variance from the direct access requirement of Section 154.600(B)(2) of the City Code. It further requests that the variance apply to all 90 acres of the property owned by the Discalced Carmelite Nuns of St. Paul and that the variance apply to all buildings currently existing on the property as well as all buildings shown on its approved master plan which remain to be built.

Strict enforcement of the City Code requiring direct access creates not only a practical difficulty but a serious hardship in that we would be unable to complete our monastery as planned and approved in 1991 by the City of Lake Elmo. In 1991, The City Council recognized the hardship that existed with regard to access to our property, and the Council granted us a variance at that time.

2. a.

Owner of Record

Discalced Carmelite Nuns of Saint Paul
8251 Demontreville Trail
Lake Elmo, MN 55042
651-777-3882

Officers of the Corporation

Sr. Angela Barrett
Sr. Maravillas Schwab
Sr. Rose Zaleski

Applicant

Carmelite Hermitage of the Blessed Virgin Mary
8249 Demontreville Trail
Lake Elmo, MN 55042
651-779-7351
carmelbvm@gmail.com

Officers of the Corporation

Reverend John Burns
Br. Joseph Bubanko
Br. Christopher Burnside

2.b.

Legal Description of the Property

All of Government Lot 4 in Section 9, Township 29 north, Range 21 west, City of Lake Elmo, Washington County, Minnesota, according to government survey containing 59.4 acres of land. Also the south 30.6 acres of Government Lot 4 in Section 4, and of the southwest quarter of the southeast quarter of said section 4, all in Township 29 north, Range 21 west, according to government survey, being the south 688 feet thereof.

PID

0902921120002

Parcel Size

90.109 acres

3,924,760 square feet

Existing Use of the Land

Religious. Two monasteries reside on the property whose members engage in a life of prayer, worship, gardening, arts, and crafts.

Current Zoning

Public Facility (PF)

2.c.

Section 154.600(B) (2) a. "Direct access is provided to a public street classified by the Comprehensive Plan as major collector or arterials."

2.d.

The Carmelite Hermitage of the Blessed Virgin Mary requests a variance from the direct access requirement of Section 154.600(B)(2) of the City Code. It further requests that the variance apply to all 90 acres of the property owned by the Discalced Carmelite Nuns of St. Paul and that the variance apply to all buildings currently existing on the property as well as all buildings shown on its master plan which remain to be built.

2.e.

In December of 1991, the City of Lake Elmo approved the master plan of the Carmelite Hermitage consisting of four phases: Phase 1, consisting of a community building and garage was constructed in 1991/92. Phase 2, consisting of a central court yard with covered walkways (cloister) was constructed in 2001/2002. Phase 3 consists of a chapel and is the building we would now like to construct. Phase 4 will consist of a guest building and library. Additionally, the City of Lake Elmo granted a variance to the Carmelite Hermitage in 1991 since the Hermitage also used the easement over Jesuit land to access Demontreville Trail. The Jesuit Retreat House made no objection to the variance.

An attorney for the Jesuit Retreat House sent a letter to the City Attorney contending that the variance of 1991 is not valid for the construction of the chapel because the CUP code enacted by the City in 2000 and amended in 2006 requires direct access to a collector road or major arterials. The City Attorney stated that an argument can be made that we do not have direct access. Furthermore the City Attorney contends that the 1991 variance applied only to the building

which we built in 1991. We dispute this interpretation because it contradicts the practice of the City to date. We have built several buildings since 1991, including one in 2007 which required an amendment to our master plan, and in none of these cases did the City require a new variance.

At a meeting with the City Attorney and the Director of Planning held at City offices on 2 July 2019, we stated our point of view. Nevertheless, we agreed to apply for a new variance in order to clarify all issues related to access to our property.

2.f.

The circumstances of our property are quite unique in that the property has never bordered a public road since it was divided from the property to the north in 1904. At that time, an unrestricted easement through the northern property was given in order that the southern property could have access to Demontreville Trail. The Discalced Carmelite Nuns received this easement as part of their deed of purchase.

In 2011 the Carmelite nuns acquired three small lots that border their property as well as Hidden Bay Trail. The lots are undeveloped and have no driveways into them. Hidden Bay Trail is not a collector road or major arterial street. It is not suitable as an access road to our property.

Strict enforcement of the City Code requiring direct access creates not only a practical difficulty but a serious hardship in that we would be unable to complete our monastery as planned and as approved by the City of Lake Elmo in 1991.

2.g.

Our plight was in no way created by ourselves; it is rather the result of the division of the property in 1904. Our circumstances were recognized as unique by the City Council in 1991, and for this reason the Council granted us a variance.

2.h.

Far from altering the essential character of the neighborhood, granting a variance will maintain the essential character of the neighborhood as it has always been since the Carmelite Nuns purchased the property in 1954. Building a driveway to Hidden Bay Trail would alter the neighborhood and is vehemently opposed by our neighbors on Hidden Bay Trail and Birch Bark Trail.

RESOLUTION 91-40

A RESOLUTION GRANTING A VARIANCE TO THE CARMELITE MONASTERY
FROM SECTION 301.090 I OF THE LAKE ELMO MUNICIPAL CODE
(FRONTAGE ON A PUBLIC ROAD)

WHEREAS, the Carmelite Monastery submitted an application dated September 27, 1991 for a variance from Section 301.090 I of the Lake Elmo Municipal Code in order to be able to construct a building on a parcel which does not have frontage on a public dedicated road; and

WHEREAS, the City Council, sitting as the Board of Adjustment and Appeals held a public hearing pursuant to Section 301.060 C. 3. of the Lake Elmo Municipal Code on November 19, 1991 to consider such application; and

NOW, THEREFORE, BE IT RESOLVED that the Lake Elmo City Council makes the following findings:

1. The applicant is the owner of the property legally described as follows:

All of Government Lot 4 in Section 9, Township 29, Range 21, according to government survey containing 59.4 acres of land. Also the South 30.6 acres of Lot 4 in Section 4, and the South West quarter of the South East quarter of said Section 4, all in Township 29, Range 21, being the Sough 688 feet, more or less, thereof.

2. The applicant has a private recorded easement which allows access to the north to DeMontreville Trail N. In order to connect to a public road on the south or east side of the property, it would be necessary for applicant to acquire a private easement and incur substantial road construction costs due to the existing topography.

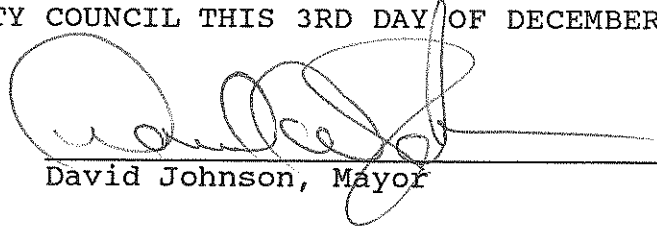
3. The City's Law Enforcement Officials and the City's Fire Chief have advised the City that the private road is constructed in such a manner to support emergency vehicles; that they can gain access to such private roadway by notifying applicant, and in an emergency circumstance, if necessary, by cutting any security device on the access gate; and that the private road system is designed to facilitate the turn-around of emergency vehicles.

4. This property is located in the PF (Public Facility) zoning district and there are no other parcels in the PF zoning district in similar circumstances.
5. The applicant's property is part of an overall campus currently served by a private easement to a public road.
6. The granting of the variance requested will not confer on the applicant any special privileges denied by this ordinance to owners of property in the same zoning district.
7. The building proposed to be constructed will house up to 14 additional people, but due to the nature of this religious community, there will be less than the normal amount of traffic.
8. The requested variance is the minimum variance which would be required to alleviate the hardship.
9. The construction of a building on this site, to be used as a monastery, will not be materially detrimental to the City's zoning ordinance.

NOW, THEREFORE, the City Council hereby grants a variance to the Carmelite Monastery from the provisions of Section 301.090 I., subject to the following conditions:

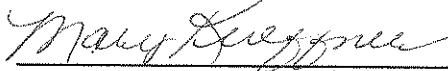
1. If the access gate is locked, the City's emergency personnel shall be provided with a key.
2. The City's emergency personnel shall be advised of the names and telephone numbers of on-site residents who can provide access to the site.
3. The private access road shall be maintained at all times, during all seasons, in a manner which allows access of emergency vehicles and shall be able to support emergency vehicles.
4. The Applicant shall comply with all State Building Standards and Safety Codes.
5. The City shall not be liable for damages incurred due to the use of wire cutters, or similar tools, when their use is necessary to gain access to property.
6. Any further expansion on this property shall comply with the then current zoning regulations.

ADOPTED BY THE CITY COUNCIL THIS 3RD DAY OF DECEMBER,
1991.



David Johnson, Mayor

Attest:



Mary Kueffner, City Administrator



Larkin Hoffman

8300 Norman Center Drive
Suite 1000
Minneapolis, Minnesota 55437-1060

GENERAL: 952-835-3800
FAX: 952-896-3333
WEB: www.larkinhoffman.com

August 7, 2019

Ken Roberts, Planning Director
City of Lake Elmo
3800 Laverne Avenue North

VIA E-MAIL AND
U.S. MAIL
(kroberts@lakeelmo.org)

Re: Jesuit Retreat House Response to Notice of Hearing dated July 31, 2019
CUP Applications Filed May 24, 2019
Variance Application Filed July 12, 2019

Dear Mr. Roberts:

This letter is offered on behalf of the Jesuit Retreat House in response to a Public Hearing Notice (the "Notice") dated July 31, 2019 relating to the variance application of the Carmelite Hermitage of the Blessed Virgin Mary (the "Hermits") dated July 12, 2019 and the continued conditional use permit ("CUP") application dated May 24, 2019. The variance and CUP applications will come before the City Planning Commission on Monday, August 12, 2019 at 7:00 p.m. The Hermits request a variance from the City Code requirement that a house of worship must have "direct access . . . to a public street classified by the Comprehensive Plan as major collector or arterial." *See* City Code § 154.600(B)(2)(a).

1. The CUP Record.

Jesuit Retreat House has previously offered substantial evidence and argument in opposition to the Hermits' CUP application for the proposed house of worship, including letters dated June 20, 2019 and June 24, 2019. We respectfully request that all evidence, testimony, and argument offered in the matter of the CUP application referenced above be expressly incorporated herein and made a part of the record. This correspondence contains Jesuit Retreat House's objections to the Hermits' variance application. Jesuit Retreat House reserves the right to offer additional evidence and argument until the final decision on these applications.

2. The Variance Application.

The Hermits bear the burden of proof to demonstrate practical difficulties sufficient to justify a deviation from a direct access requirement for a house of worship in the PF District. The variance application fails to support or adequately address four vital variance criteria. First, the Hermits have offered no evidence that there are truly unique circumstances relating to the Carmelite Property. Second, any hardship to the Hermits is self-imposed because the Hermits have known for decades that they would need direct access to a major collector or arterial street to construct a public chapel, but they failed or refused to take action to secure that access. Third,

any hardship stems from the Hermits' economic concerns, which are not a proper consideration in these proceedings. Fourth, while the Hermits concede that traffic associated with the proposed public chapel would alter the status quo, they wholly ignore the detrimental effects that grant of the variance would have on the Jesuit Retreat House. Moreover, by seeking a variance from an access requirement, the Hermits are impermissibly requesting a use variance, which is forbidden by City Code and State law. Jesuit Retreat House respectfully requests that both Hermits' land use applications before the City be denied.

3. Criteria Governing Variance Application.

To grant the variance application, the Planning Commission must find that the application satisfies the City Code, as well as state law. The variance application does neither. Pursuant to City Code § 154.109(A)(1):

A request for a variance from the literal provisions of this chapter may be granted in instances where their strict enforcement would cause practical difficulties because of circumstances unique to the individual property under consideration and then only when it is demonstrated that such actions will be in keeping with the spirit and intent of this chapter. All requests for variances shall be reviewed in accordance with the required findings listed in § 154.109.F.

The City Code defines "practical difficulties" to mean "that the property owner proposes to use the property in a reasonable manner not permitted by an official control." City Code § 154.109(F)(1)(a). The "unique circumstances" must "be due to circumstances that are unique to the property in question and that were not created by the land owner/applicant." City Code § 154.109(F)(2). The proposed variance must not "alter the essential character of the locality." City Code § 154.109(F)(3). "Locality" is defined as, among other things, all property within 350 feet of the subject property and all parcels abutting the subject parcel. City Code § 154.109(F)(3)(a).

Minnesota law defines "practical difficulties" to include: (1) "the property owner proposes to use the property in a reasonable manner not permitted by the zoning ordinance"; (2) "the plight of the landowner is due to circumstances unique to the property not created by the landowner"; and (3) "the variance, if granted, will not alter the essential character of the locality." Minn. Stat. § 462.357, subd. 6. "Economic considerations alone do not constitute practical difficulties." *Id.*

4. The Hermits Failed to Demonstrate Practical Difficulties Warranting a Variance.

The variance application fails to satisfy four essential variance criteria: first, the Hermits have proven no relevant unique circumstances relating to the property; second, the Hermits' alleged hardship is self-inflicted; third, the variance application is impermissibly motivated by the Hermits' desire to avoid the expense associated with procuring an alternate vehicle access; and fourth, the proposed use would alter the essential character of an abutting legal parcel owned by Jesuit Retreat House. These deficiencies are discussed further below.

a. *There are no circumstances unique to the property.*

The Hermits argue that “[t]he circumstances of [the] property are quite unique in that the property has never bordered a public road since it was divided from the property to the north in 1904.” See Hermit Variance Land Use Application (“Application”) ¶ 2.f. This assertion lacks all candor. The Carmelites own *three parcels* that abut Hidden Bay Trail N. Specifically, the Carmelites own parcels with the following Parcel ID numbers: 0902921240001; 0902921130021; and 0902921130020. Images from the Washington County property viewing website tool (<http://maps.co.washington.mn.us/propertyviewer/>) showing the boundaries of these parcels and their abutting position to Hidden Bay Trail are enclosed. The Carmelites acquired these properties nearly ten years ago. The Carmelites are not landlocked and, contrary to the Hermits’ assertion, do border a public road.

If a landowner asserts that its lot is somehow distinct from neighboring properties, it must prove that the lot is genuinely different from neighboring parcels. See, e.g., *Continental Prop. Grp. v. City of Wayzata*, No. A15-1550, 2016 WL 1551693, at *1 (Minn. Ct. App. April 18, 2016) (rejecting developer’s uniqueness argument where other properties were subject to the same zoning ordinances). The Carmelite property is a mostly flat rectangular parcel of 30 acres with no wetlands, easements or other development constraints. There is nothing unique about the Carmelite Property. The Hermits have not met their burden of proof to show that there is any unique circumstance about the Carmelite property.

Even if the Carmelites were landlocked (which they are not), the lack of access makes the Hermits’ property a poor location for a church open to the public. Moreover, it appears that there are a number of landlocked parcels in close proximity to the Carmelite Property to the west, across Lake Demontreville. Furthermore, whether the Carmelite Property has bordered a public road since 1904 is an irrelevant fact, because the direct access requirement from which the Hermits seek a variance concerns only whether the connecting road is a major collector or arterial street. Hermits offer no evidence concerning the uniqueness of a property not being bordered by a collector or arterial street. The obvious purpose of such a requirement is that houses of worship draw traffic and the City has made a legislative policy decision that houses of worship must have direct access to public streets designed to handle anticipated traffic in order to minimize disruption to neighboring property owners and users.

b. *Any hardship is self-imposed.*

The Hermits contend that denial of the variance would be a “serious hardship in that we would be unable to complete our monastery as planned and as approved by the City of Lake Elmo in 1991.” Application ¶ 2.f. The notion that the Hermits have any legitimate reliance interests weighing in favor of the application is unfounded and refuted by the record. When in the 1990s the Hermits began establishing themselves on the Carmelite Property, they knew that there was a direct access requirement. Indeed, the Hermits sought a variance from that requirement when they proceeded with construction of Phase 1 of the Hermits’ 4 phase development plan. Phase 1 involved construction of a common area, kitchen, and living space.

The Hermits argue that, because the City granted the 1991 variance, the Hermits should not be required to obtain another variance for the Public Chapel. See Application ¶ 2.e. Yet the 1991

variance approval placed weight upon the fact that “The building proposed to be constructed will house up to 14 additional people, but due to the nature of this religious community, there will be less than the normal amount of traffic.” The 1991 variance clearly was not considering traffic effects associated with a public chapel of unknown size and occupancy to be constructed three decades in the future. Again, at that time, the Hermits were only proceeding with construction of Phase 1—improvements that accommodated a small group of hermits living quiet, insular lives.

Although the City granted the variance, in doing so it adopted a condition that: “[a]ny further expansion on this property shall comply with the then current zoning regulations.” At no time have the Hermits offered explanation as to why this unambiguous City stipulation was not followed, or why it should be ignored now.

In an e-mail from the Lake Elmo City Attorney dated June 24, 2019, the city attorney confirmed that the 1991 variance has no bearing upon the present variance application:

I know that the Carmelites are trying to argue that the 1991 variance that was approved by the City applied not only to the building that they were constructing at the time, but to other buildings in their master plan. However, from reading the City’s resolution approving the variance, I think that it is very clear that the City was only granting the variance with respect to that building and not other buildings in the master plan.

E-mail of Sarah J. Sonsalla to Ken Roberts dated June 24, 2019 (enclosed). Jesuit Retreat House agrees.

Nor does the City’s 1991 approval of the site plan support the Hermits’ position. On information and belief, the Hermits provided no specific information regarding Phases 2-4 of the development when it sought approval of the site plan. City codes and ordinances required that before construction could proceed on subsequent phases of development (i.e., Phases 2-4), the City would need to review and approve each phase. It is the Hermits’ present desire to construct a public place of worship that triggers the “direct access” requirement. City Code § 154.600(B)(2)(a).

The Hermits have known for three decades that they would need to satisfy the direct access condition to construct a Public Chapel. But they did nothing to resolve this known deficiency, and now assert that their lack of action to resolve the issue is a hardship. Any hardship the Hermits would sustain through denial of the variance application is self-imposed. The variance application should, therefore, be denied. *See* Minn. Stat. § 462.357, subd. 6 (requiring that, for a variance to issue, the “plight of the landowner” must not have been “created by the landowner.”).

c. *The variance application is motivated by economic considerations.*

A variance applicant’s economic considerations are not a proper basis upon which to grant a variance. Minn. Stat. § 462.357, subd. 6. The Hermits object to being required to find alternate access to the Public Chapel because it would allegedly pose an economic hardship for the

Hermits to create such access. This argument is not a legitimate reason to grant a variance under Minnesota law.

“[A]n applicant’s mere desire for a variance, even when motivated by practical or economic reasons, does not constitute a practical difficulty.” § 6:8. Area and use variances—Practical difficulty, 1 Zoning & Plan. Deskbook § 6:8 (2d ed (citations omitted); see *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 695 n. 8 (1976) (internal parentheses omitted) (acknowledging that it is hornbook law that “mere diminution of market value or interference with the property owner’s personal plans and desires relative to his property is insufficient to . . . entitle [a landowner] to a variance[.]”) (citing 8 E. McQuillan, *Municipal Corporations* § 25.44, p. 111 (3d ed. 1965)). “Disappointment in the use of property does not constitute exceptional difficulty or unusual hardship[.]” *Frances Erica Lane, Inc. v. Bd. of Zoning Appeals of Town of Stratford*, 88 A.3d 580, 589 (Conn. App. Ct. 2014) (citation omitted; internal emphasis removed).

The Hermits’ economic considerations should form no part of the City’s deliberations on the variance application. Minn. Stat. § 462.357, subd. 6.

d. *The proposed use would impermissibly alter the essential character of the locality.*

A variance application must not “alter the essential character of the locality.” City Code § 154.109(F)(3). The Hermits contend that “[f]ar from altering the essential character of the neighborhood, granting a variance will maintain the essential character of the neighborhood as it has always been since the Carmelite Nuns purchased the property in 1954.” Application ¶ 2.h. However, by the Hermits’ admission, the Hermits currently receive only 1-2 visitors per day. Hermit Land Use Application dated May 24, 2019 § 2d(i). The Hermits project that once the public chapel is open, they will receive between 10 and 15 visitors on most days and up to 30 visitors “on a few occasions in the calendar year.” See *id.* §§ 2d(i), 2e(xi). It is believed that on a typical day, the Discalced Carmelite monastery has fewer than ten visitors. Hence, by the Hermits’ estimation, the amount of traffic to the Carmelite Property will at least *double*.

Traffic associated with the Public Chapel would unacceptably alter the essential character of Jesuit Retreat House. Traffic associated with the Public Chapel will inevitably increase noise, distraction, dust, pollution, and safety issues on the Jesuit Property. These deleterious effects would materially impair Jesuit Retreat House’s operations and continued viability as a retreat center. As expressed in the August 6, 2018 correspondence of Ron Snyder, D.D.S.: “Any increase in traffic on the Jesuit property would seriously undermine the primary purpose of [the] men’s retreat center – solitude. Silence makes Jesuit Retreat House unique in its retreat offerings. If silence is interrupted . . . then the retreat house los[es] its purpose and could very well change its offerings to the committed men within their community.”

The Public Chapel will generate traffic, noise, and related effects that would be detrimental to Jesuit Retreat House and its 3,000 annual retreatants. The effects associated with the proposed use would be incompatible with the silence and solitude of retreat that has existed on the Jesuit Property for approximately 70 years. The Hermits’ variance application acknowledges that

“[b]uilding a driveway to Hidden Bay Trail *would alter the neighborhood*,” a claim that is impossible to reconcile with the Hermits’ assertion that there will be no detrimental effect on the Jesuit Retreat House. Application ¶ 2.h (emphasis added). The variance application must be denied in order to protect the Jesuit Retreat House’s essential, longstanding, and preexisting character as a silent retreat house.

5. The Variance Application Seeks an Unlawful Use Variance.

The City Code and state law forbid “use variances.” The City Code states:

Use Variances Prohibited. A variance shall not be granted for any use that is not a listed permitted or conditional use under this chapter for property in the zone where the property is located.

City Code § 154.109(B). Likewise, Minnesota law mandates that “[t]he board of appeals and adjustments or the governing body as the case may be, may not permit as a variance any use that is not allowed under the zoning ordinance for property in the zone where the affected person’s land is located.” Minn. Stat. § 462.357, subd. 6.

Rathkopf’s Law of Zoning and Planning explains the difference between a “use” variance and a “non-use” or “area” variance as follows:

With a “use” variance, the owner is allowed to engage in a use of the land prohibited by the zoning ordinance. With a ‘nonuse,’ or ‘area,’ variance, the owner still must comply with the zoning ordinance’s limitations on the use of the land but is allowed to build or maintain physical improvements that deviate from the zoning ordinance’s nonuse limitations.

3 Rathkopf’s The Law of Zoning and Planning § 58:4 (4th ed.). The law holds that variances to modify vehicle access are use variances, not area variances. *See Nuckel v. Borough of Little Ferry Planning Bd.*, 26 A.3d 418, 424 (N.J. 2011).

In the present case, granting the Hermits a variance to modify the access would allow a use at a location that would otherwise not be allowed. The use of the Carmelite property for a house of worship is not a permitted use in this zone. It is only allowed pursuant to a conditional use permit where all of the findings are satisfied based upon facts in the record *CR Investments v. Village of Shoreview*, 304 NW2d 320, 325 (MN S. Ct. 1982). One of the conditions that must be met to obtain a conditional use permit is the requirement that the property have direct access to a major collector or arterial street. Ignoring this condition under the guise of granting a variance is the illegal granting of a use variance—the property cannot be used for this purpose, but for the meeting of the required conditions. Therefore, the granting of this variance is a patently illegal use variance.

Mr. Ken Roberts
August 7, 2019
Page 7

6. Conclusion.

For all the reasons set forth herein and argued previously, Jesuit Retreat House respectfully requests that both of the Hermits' land use applications before the City be denied.

Sincerely,

/s/ Bryan J. Huntington

Bryan J. Huntington, for
Larkin Hoffman

Direct Dial: 952-896-3370

Direct Fax: 952-842-1747

Email: bhuntington@larkinhoffman.com

Enclosures:

1. E-mail of Sarah J. Sonsalla to Ken Roberts dated June 24, 2019
 2. Images from Washington County Property Viewer website
- cc: Timothy J. Keane, Esq. (via e-mail only) (tim.keane@kutakrock.com)
Sarah J. Sonsalla, Esq. (via e-mail only) (ssonsalla@kennedy-graven.com)

4830-2917-6734, v. 1

August 9, 2019

BY ELECTRONIC AND FIRST CLASS MAIL

Members of the Planning Commission
City of Lake Elmo
3800 Laverne Avenue North
Lake Elmo, Minnesota 55042

Re: Planning Commission Meeting Scheduled for August 12, 2019
Agenda Item 4(a) – Conditional Use Permit for the Carmelite Hermitage

Dear Commission Members:

I live in the Tri-Lakes Area of Lake Elmo and write to you in **support** of the Carmelite Hermitage's request for a Conditional Use Permit and a variance from the direct access requirements of the City's Zoning Code.

The Hermitage's proposal for a chapel is a good one and the Commission should approve the Staff Recommendation for Agenda Item 4(a) as it was written.

I. The Hermitage has the Right to Use the Shared Driveway

A key point to remember when analyzing the Hermitage's request is that the driveway easement between the Hermitage and Demontreville Trail *is a property right that the Carmelites paid money to purchase*. It made the parcel worth buying.

Likewise, as detailed on page 3 of the Staff Report, the driveway easement has been in place for one-hundred and fifteen years and predates the arrival of the Jesuit Retreat House by more than four decades. The Carmelites purchased the Hermitage property knowing that it had the right to access to Demontreville Trail and the Jesuits purchased their Retreat House property knowing that such an easement existed.

The fact that the Jesuits no longer wish to share what is legally a "shared driveway,"¹ is shameful, but irrelevant. The Carmelites have a legal right to use the easement for their own travel to and from Demontreville Trail and to invite their guests to do likewise. The Commission should act to vindicate these rights.

If pressed on this point by the Jesuits, the Commission should ask them to explain why they are entitled to invite an average of 50 guests each and every week to travel across the shared driveway,² but the Carmelites should not be permitted to invite 42

¹ See *generally Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786, 789 (Minn. 1970).

² See Letter of Timothy J. Keane to Director Ken Roberts, at 2 (June 24, 2019).

guests of their own at any time. There is no good or reasonable answer to that question; the Jesuits know this; and you should too.

II. Granting a Direct Access Variance is Appropriate

While the Hermitage proposal satisfies the direct access requirements of the Zoning Code (because the easement grants direct access from the Hermitage parcel to a collector road),³ issuance of the variance is still useful. A variance removes all doubt.

Further, issuing an access variance is appropriate because the Hermitage's proposed chapel is not designed to be, nor likely to operate, like the "places of worship" contemplated by the Zoning Code. Unlike other churches in Lake Elmo, the proposed chapel is meant to support to the monastic life of the parcel's residents.⁴ In that way, the general "places of worship" provisions of our Code are a poor fit for the special features of this proposal. That mismatch makes granting the variance a good idea.

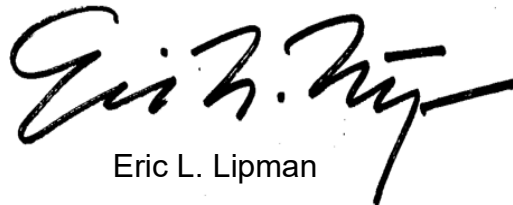
Lastly, the requested variance is closely aligned with the purposes of our Zoning Code. The direct access requirements are intended to:

assure maintenance and preservation of the established rural character of the city by preserving agricultural land, woodlands, corridors, and other significant natural features, and provide buffering between PF and residential or other uses.⁵

In this case, supporting very modest and lawful uses of the existing driveway (as opposed to the burdens associated with carving a new $\frac{3}{4}$ -mile asphalt driveway through precious woodlands) "preserv[es] agricultural land, woodlands, corridors, and other significant natural features, and provide buffering between PF and residential or other uses."⁶ If the Zoning Code could talk, it would tell you to approve the Staff Recommendation.

For all of these reasons, the Commission should approve the Staff Recommendation for Agenda Item 4(a) as it was written.

Very truly yours,



Eric L. Lipman

³ Lake Elmo City Code § 154.600 (B)(2)(a) (2019).

⁴ See Application, at Section 2e (x) (May 24, 2019).

⁵ Lake Elmo City Code § 154.600 (A) (2019).

⁶ *Id.*

**CITY OF LAKE ELMO
WASHINGTON
COUNTY
STATE OF MINNESOTA**

RESOLUTION NO 2019 - 058

*A RESOLUTION APPROVING A VARIANCE TO ALLOW THE CONSTRUCTION OF A
CHAPEL OR PLACE OF WORSHIP ON THE PROPERTY LOCATED AT 8249
DEMONTREVILLE TRAIL BY USING AN EXISTING DRIVEWAY FOR ACCESS TO
DEMONTREVILLE TRAIL*

WHEREAS, Reverend John Burns, representing the Carmelite Hermitage (the “Applicant”) of 8249 Demontreville N, Lake Elmo MN 55042, Washington County, Minnesota (the “Property”) has submitted an application to the City of Lake Elmo (the “City”) for a variance or an exception to the City Code requirement about having direct access to a collector or arterial street for a chapel or place of worship; and

WHEREAS, the applicant is requesting City approval to allow the use of an existing driveway to Demontreville Trail for access to their site for the construction of a chapel or place of worship on their property; and

WHEREAS, the Carmelites property is landlocked but has access to Demontreville Trail via an existing driveway that is located in an easement that crosses an adjoining property; and

WHEREAS, the Carmelites have used the existing driveway to Demontreville Trail for access to their property since at least 1967; and

WHEREAS, the requested access request will not change the character of the area; and

WHEREAS, notice has been published, mailed, and posted pursuant to the Lake Elmo Zoning Code, Section 154.109; and

WHEREAS, the Lake Elmo Planning Commission held a public hearing about the variance on August 12, 2019; and

WHEREAS, the Lake Elmo Planning Commission has submitted its report and recommendations with respect to the requested variance to the City Council as part of the City Staff Memorandum dated August 20, 2019; and

WHEREAS, the City Council considered the access variance request at its August 20, 2019 meeting; and

NOW, THEREFORE, based on the testimony elicited and information received, the City Council makes the following:

FINDINGS

- 1) That the procedures for obtaining a variance are found in the Section 154.109 of the Lake Elmo Zoning Code.
- 2) That the applicant met all the variance application and submission requirements of Section 154.109 of the Lake Elmo Zoning Code.

- 3) That the proposed variance includes the following component:
 - a) That the existing driveway that provides access to the Property from Demontreville Trail be allowed to also serve as the access for the proposed chapel or place worship on the applicant's property.
- 4) With respect to the proposed variance for the use of the existing driveway for access for the proposed chapel, the strict enforcement of the City's zoning regulations will cause practical difficulties and the Applicants propose to use the Property in a reasonable manner not permitted by an official control.

The addition of a chapel to Carmelites site has been planned since at least 1991 when the City first approved a Master Plan for their site. The Carmelites have been using the easement with a driveway to Demontreville Trail for access to the site since that time. Adding another driveway or access to the Carmelites property would be a practical difficulty as the only public street their property has frontage on is Hidden Bay Trail to south. A new driveway would be about 1,500 feet in length, would require extensive tree removal and grading and would be an access onto a local street – not a collector or arterial street as the City Code requires for places of worship.

It is recognized that the existing driveway that serves the property connects to the public street and as such, its proposed use for a chapel will not be impactful on public infrastructure, thus the Applicants would be using the Property in a reasonable manner. The use of the existing driveway for access to Demontreville Trail for the addition of a chapel to their site is a reasonable use of the property and the existing access.

- 5) With respect to the proposed variance for the use of the existing driveway for access for the chapel, the plight of the Applicants is due to circumstances unique to the Property not created by the Applicants.

According to the applicant, the existing lot layout with the access easement to Demontreville Trail has been in place since 1904. This is a unique situation with circumstances not created by the landowner or the Applicant – the Carmelite Monks. Therefore, this criterion has been met with respect to the variance for using the existing driveway for access for the proposed chapel.

- 6) With respect to the proposed variance for using the existing driveway for access for the proposed chapel, the proposed variance will not alter the essential character of the locality in which the Property is located.

The proposed variance will allow the Carmelites to use the existing driveway (that currently provides access to their site) for access for the proposed chapel. By using the existing driveway that has been in place for many years, the Carmelites will not be altering the essential character of the locality (or area) in which their property is located. Therefore, the use of the existing driveway will not alter the essential character of the neighborhood and this criterion has been met.

Conversely, adding another driveway to their site that would have access onto a local, neighborhood street would change the character of that locality and area of the City.

- 7) With respect to the proposed variance to allow the use of the existing driveway and easement for access for the proposed chapel, the proposed variance will not impair an adequate supply of light and air to properties adjacent to the subject property, increase congestion of public streets or substantially diminish or impair property values within the neighborhood. Therefore, this criterion has been met.

Conversely, as noted above, if the applicant added another driveway to access the streets to the south of their site that would increase the congestion on the local public streets near their property.

CONCLUSIONS AND DECISION

- 1) Based on the above findings that show the applicant has met all the City variance criteria with respect to the variance for having direct access to a collector or arterial street for a chapel or a place of worship, the City of Lake Elmo hereby approves the Applicants application for a variance or exception from the City standard requiring a place of worship or a chapel to have direct access to a collector or arterial street, subject to the following conditions:
- a) The Applicant shall secure any required zoning approvals, permits and plan approvals from the City and other applicable jurisdictions for the construction of the chapel and the associated site improvements;
 - b) The Applicant upgrade the driveway in the area of the proposed chapel to include the parking areas and the required storm water management systems as shown on the project plans for the chapel.

Passed and duly adopted this 20th day of August 20, 2019 by the City Council of the City of Lake Elmo, Minnesota.

Mayor Mike Pearson

ATTEST:

Julie Johnson, City Clerk