



## City of Lake Elmo

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Lake Elmo, Minnesota 55042

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### NOTICE OF MEETING

The City of Lake Elmo  
Planning Commission will conduct a meeting on  
**Monday, June 27, 2011, at 7:00 p.m.**

### AGENDA

1. Pledge of Allegiance
2. Approve Agenda
3. Approve Minutes
  - a. None.
4. Public Hearing
  - a. ZONING TEXT AMENDMENT: Consideration of an ordinance to amend Chapter 154.015 to 154.021 (Administration: Administrator, Duties of the Zoning Administrator, Variances, Conditional Use Permits, Interim Use Permits, Amendments and Fees) to bring information up to date.
5. Business Item
  - a. A Presentation/Training Session by the American Planning Association – “Design Review for Officials”
6. Updates
  - a. City Council Updates
    - i. Bremer Bank PUD Amendment – Approved
    - ii. South of 10<sup>th</sup> Street – Vision Statement and Goals
    - iii. Planning Commission Composition
  - b. Staff Updates
  - c. Commission Concerns
7. Adjourn

ITEM: Review and Discussion

SUBMITTED BY: Kyle Klatt, Planning Director

REVIEWED BY: Kelli Matzek, City Planner  
Nick Johnson, Planning Intern

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**SUMMARY AND ACTION REQUESTED:**

The Planning Commission is asked to review and recommend approval of proposed changes to the "Administrative" section of the Zoning Ordinance. The proposed update of this section of code will reflect the recent changes the Minnesota State Legislature made to a City's statutory authority to grant variances. The most significant change made to the State Statutes is the removal of the term "hardship" from the variance sections and the replacement of this term with "practical difficulties". The effect of this change is to make the issuance of variances a more viable option to communities than if the hardship language were left in place.

**BACKGROUND:**

In July of 2009, the Minnesota Supreme Court made a decision in the case of *Krummenacher v. City of Minnetonka* that resulted in a much more strict interpretation of the State Statutes regarding variances than cities had typically been using. As a result of this case, Cities across the State, including Lake Elmo, were required to use a much more conservative approach to drafting findings related to variances. Therefore, the ultimate affect of the court case, was to hold the issuance of variances to a much higher threshold than previously, and greatly limited any flexibility from zoning regulations.

In order to address the lack of flexibility that existed in the wake of the court decision, the Minnesota State Legislature has revised the section of State Statues pertaining to variances to allow some additional flexibility for City's that wish to consider variances from zoning regulations. The primary language that was changed is noted below:

**HARDSHIP:** "Hardship" as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use if used under the conditions allowed by the official controls; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality.

***[this language was removed and replaced with]***

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

Staff is recommending that the Planning Commission consider changes to the City's Zoning Ordinance that mirror the new Statutory provisions, and that will ultimately allow for greater flexibility in dealing with requests for exceptions to the City's zoning regulations. Although the proposed ordinance would eliminate the problematic language concerning "hardship", the other criteria that were used for granting

variances would still need to be met, including: 1) that circumstances unique to the property in question exist and were not created by the landowner and 2) the variance will not alter the essential character of the locality.

Staff has attached the full text of the amendments to the State Statutes that were adopted by the State legislature for consideration by the Planning Commission. The original text of the City ordinance is included as part of the proposed ordinance (and shown as deleted text).

**RECOMMENDATION:**

Staff is recommending that the Planning Commission recommend approval of the amendments to the variance provisions of the Zoning Ordinance as documented in the attached draft language.

**ATTACHMENTS:**

- 1. Proposed Ordinance Amendments
- 2. Revised MN State Statutes: Variances
- 3. League of MN Cities Handout: Variances Q and A

**ORDER OF BUSINESS:**

- Introduction ..... Planning Director
- Report by staff..... Planning Director
- Questions from the Commission.....Chair & Commission Members
- Open the Public Hearing..... Chair
- Close the Public Hearing ..... Chair
- Call for a motion.....Chair Facilitates
- Discussion of Commission on the motion.....Chair Facilitates
- Action by the Planning Commission .....Chair & Commission Members

PROPOSED ORDINANCE AMENDMENTS – VARIANCES  
Lake Elmo Planning Department Draft 6/27/11

**§11.01 Definitions.**

~~—————~~ **HARDSHIP.** The proposed use of the property and associated structures in question cannot be established under the conditions allowed by the city's zoning regulations and no other reasonable alternative use exists; that the plight of the landowner is due to the physical conditions unique to the land, structure, or building involved and are not applicable to other lands, structures, or buildings in the same zoning district; and that these unique conditions of the site were not caused or accepted by the landowner after the effective date of the city's zoning regulations.

**§154.017 Variances.**

~~(A) *Hardship.*~~ A request for variance from the literal provisions of this chapter may be granted in instances where their strict enforcement would cause undue hardship. An **UNDUE HARDSHIP** means that the property cannot be put to reasonable use if used under the conditions allowed by the zoning code; that the plight of the landowner is due to circumstances unique to the property and not created by the landowner, and that the variance, if granted, will not change the essential character of the neighborhood. Economic considerations alone shall not constitute a hardship. The City Council may not permit as a variance any use that is not permitted under this chapter for property in the zone where the affected person's land is located.

~~—————~~ ~~(B) *Temporary use variance.*~~ A variance may be permitted for the temporary use of a 1 family dwelling as a 2 family dwelling, provided that:

~~—————~~ ~~(1) *Prior existence.*~~ The dwelling has existed for at least 10 years, and the multiple use existed before the adoption of this code; and

~~—————~~ ~~(2) *Septic.*~~ The septic system meets or exceeds current septic system regulations.

~~—————~~ ~~(C) *Application.*~~ An application for a variance shall be filed with the Zoning Administrator.

~~—————~~ ~~(1)~~ The application shall be accompanied by a fee in the amount set forth from time to time by resolution of the Council, and development plans showing such information as the Zoning Administrator may reasonably require for purposes of this chapter.

~~—————~~ ~~(2)~~ The application shall contain sufficient information to determine whether the proposed variance will meet all applicable development standards if the variance is granted. In all cases, the completed application shall include:

~~—————~~ ~~(a)~~ Name and address of the applicant;

~~\_\_\_\_\_ (b) The legal description of the property involved in the request for variance, including the street address, if any, of the property;~~

~~\_\_\_\_\_ (c) The name and address of the owners of the property and any other person that has a legal interest in the property;~~

~~\_\_\_\_\_ (d) A site plan drawn to scale showing the property dimensions;~~

~~\_\_\_\_\_ (e) Location of all existing and proposed buildings and their size, including square footage;~~

~~\_\_\_\_\_ (f) Curb cuts, driveways, access roads, parking spaces, off-street loading areas, and sidewalks;~~

~~\_\_\_\_\_ (g) The variance requested and the reasons for the request; and~~

~~\_\_\_\_\_ (h) A list of the abutting property owners~~

~~\_\_\_\_\_ (4) *Planning Commission review.*~~

~~\_\_\_\_\_ (a) The Zoning Administrator shall, upon the filing of a completed application for a variance, refer the matter to the Planning Commission.~~

~~\_\_\_\_\_ (b) The Zoning Administrator shall notify the applicant and the abutting property owner(s) of the time and place of the hearing. The notice shall be served on the person by mail, provided the notice shall be mailed at least 10 days preceding the date of the hearing.~~

~~\_\_\_\_\_ (c) The Planning Commission shall make written findings for all variance applications and shall state in the findings the reasons for its recommendation to the City Council.~~

~~\_\_\_\_\_ (d) The Planning Commission may recommend to the City Council conditions if granting of a variance which may reasonably be determined to be necessary to protect adjacent properties, preserve the public health, safety, and welfare, and comply with the intent and purposes of this chapter. The Planning Commission may also recommend conditions and requirements deemed necessary to ensure compliance with the terms of the variance.~~

~~(5) *City Council action.* The City Council shall receive the recommendation of the Planning Commission and shall take final action on the variance request within 60 days of the city's receipt of a completed application, unless the review period is otherwise extended pursuant to the applicable state regulations.  
(1997 Code, § 300.06 Subd. 3) (Am. Ord. 97-95, passed 11-7-2001)~~

- A. *In General.* The board of Adjustment shall have the power to grant variances to the provisions of this chapter under the following procedures and standards.
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 Section 154.017, Subd. E.
- B. *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.
- C. *Application Requirements.* An application for a variance shall be submitted to the Zoning Administrator and accompanied by such information as follows:
1. Name and address of the applicant;
  2. The legal description of the property involved in the request for variance, including the street address, if any, of the property;
  3. The name and address of the owners of the property and any other person that has a legal interest in the property. The applicant shall supply proof of ownership of the property for which the variance is requested, consisting of an abstract of title or registered property certificate, certified by a licensed abstractor, together with any unrecorded documents whereby the petitioners acquired legal or equitable ownership;
  4. A site plan drawn to scale or a certified survey if required by the City showing:
    - a. Property dimensions;
    - b. Locations of all existing and proposed buildings and their size, including square footage;
    - c. Existing and proposed septic systems;
    - d. Curb cuts, driveways, access roads, parking spaces, off-street loading areas, and sidewalks; and
    - e. Other information as deemed necessary for the request.
  5. The variance requested and the reasons for the request; and
  6. The application form shall be accompanied by an accurate list showing the names and the mailing address of the record owners of all property within

a minimum of 350 feet of the property for which the variance is sought; verified as to accuracy by the applicant.

- D. Review Requirements. The Planning Commission shall hold a public hearing on each complete application for a variance with the following procedure:
1. The Zoning Administrator shall, upon the filing of a completed application for a variance, refer the matter to the Planning Commission.
  2. The Zoning Administrator shall notify the applicant and the applicable property owner(s) of the time and place of the hearing. The notice shall be served on the person by mail, provided the notices shall be mailed at least 10 days preceding the date of the hearing.
  3. The Planning Commission shall make written findings for all variance applications and shall state in the findings the reasons for its recommendations to the Board of Adjustment.
  4. The Planning Commission may recommend to the Board of Adjustment conditions if granting of a variance which may be reasonably determined to be necessary to protect adjacent properties, preserve the public health, safety, and welfare, and comply with the intent and purposes of this chapter. The Planning Commission may also recommend conditions and requirements deemed necessary to ensure compliance with the terms of the variance.
  5. Board of Adjustment Action. The Board of Adjustment shall receive the recommendation of the Planning Commission and shall take final action on the variance request.
- E. Required Findings. Any action taken by the Board of Adjustment to approve or deny a variance request shall include the following findings:
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.
    - a. 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.

2. Unique Circumstances. The problem for the landowner/applicant which the proposed variance is intended to correct must be due to circumstances that are unique to the property in question and was not created by the land owner/applicant.
  3. Character of locality. The proposed variance will not alter the essential character of the locality in which the property in question is located.
  4. Adjacent properties and traffic. The proposed variance will not impair an adequate supply of light and air to property 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.
- F. Conditions. The Board of Adjustment may impose such restrictions and conditions upon the property that is the subject of the variance as may be necessary to comply with the standards established by this chapter or to reduce or minimize the effect of such variance upon other properties in the neighborhood and to better carry out the intent of the variance.
- G. Effect of denial. No application by a property owner for a variance shall be submitted to the Board of Adjustment within a six (6) month period following a denial of such a request unless, in the opinion of the Board, new evidence of change in circumstances warrant it.
- H. Expiration. A variance shall be deemed to authorize only one particular use and shall expire if work does not commence within twelve (12) months of the date of granting such variance or if that use ceases for more than six consecutive months.
- I. Revocation. The Board of Adjustment may revoke a variance if any conditions established by the Board as part of granting the variance request are violated.



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State of Minnesota HOUSE OF REPRESENTATIVES

EIGHTY-SEVENTH SESSION

HOUSE FILE No. 52

January 10, 2011

Authored by Peppin, Smith, Nelson, Mahoney, Westrom and others

The bill was read for the first time and referred to the Committee on Government Operations and Elections

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
1.8 shall have the exclusive power to order the issuance of variances from the terms of any
1.9 official control including restrictions placed on nonconformities. Variances shall only be
1.10 permitted when they are in harmony with the general purposes and intent of the official
1.11 control ~~in cases when there are practical difficulties or particular hardship in the way of~~
1.12 ~~carrying out the strict letter of any official control;~~ and when the terms of the variance
1.13 are consistent with the comprehensive plan. ~~"Hardship" as used in connection with the~~
1.14 ~~granting of a variance means the property in question cannot be put to a reasonable use~~
1.15 ~~if used under the conditions allowed by the official controls; the plight of the landowner~~
1.16 ~~is due to circumstances unique to the property not created by the landowner; and the~~
1.17 ~~variance, if granted, will not alter the essential character of the locality. Variances may be~~
1.18 granted when the applicant for the variance establishes that there are practical difficulties
1.19 in complying with the official control. "Practical difficulties," as used in connection with
1.20 the granting of a variance, means that the property owner proposes to use the property in a
1.21 reasonable manner not permitted by an official control; the plight of the landowner is due
1.22 to circumstances unique to the property not created by the landowner; and the variance,
1.23 if granted, will not alter the essential character of the locality. Economic considerations
1.24 ~~alone shall do not constitute a hardship if a reasonable use for the property exists under~~

3.1 ~~shall do not constitute an undue hardship if reasonable use for the property exists under~~  
3.2 ~~the terms of the ordinance. Undue hardship also includes practical difficulties. Practical~~  
3.3 ~~difficulties include, but is are~~ not limited to, inadequate access to direct sunlight for solar  
3.4 energy systems. Variances shall be granted for earth sheltered construction as defined in  
3.5 section 216C.06, subdivision 14, when in harmony with the ordinance. The board of  
3.6 appeals and adjustments or the governing body as the case may be, may not permit as a  
3.7 variance any use that is not ~~permitted~~ allowed under the zoning ordinance for property in  
3.8 the zone where the affected person's land is located. The board or governing body as the  
3.9 case 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 and mitigating requirements in the granting of variances to insure compliance ~~and~~ to  
3.12 protect adjacent properties, and to protect the public health, safety, or the environment.

3.13 **EFFECTIVE DATE.** This section is effective the day following final enactment.



## 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