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.
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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)* , amending ***Minnesota Statutes*, section 462.357, subdivision 6** *(Link to: 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)* and the county variance authority of ***Minnesota Statutes*, section 394.27, subdivision 7** *(Link to: 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)* or (651) 281-1247, or **Tom Grundhoefer**, LMC general counsel, at **tgrundho@lmc.org** *(Link to: 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)*

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