

STATE OF MINNESOTA
COUNTY OF HUBBARD

DISTRICT COURT
NINTH JUDICIAL DISTRICT

Case Type: Other Civil / Declaratory Judgment

Ed Mutsch, Hubbard County Coalition of Lake Associations, and The Middle Crow Wing Lake Association,

Court File No.: 29-CV-10-363
Judge Paul Rasmussen

Plaintiffs,

v.

**PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT**

The County of Hubbard, The County of Hubbard Board of Adjustment, Daniel J. Rehkamp, and Donna M. Rehkamp,

Defendants.

INTRODUCTION

STATEMENT OF DOCUMENTS COMPRISING THE RECORD

STATEMENT OF DISPUTED FACTS

- 1. The County Board Did Not Approve Eleven Boat Slips For The Resort In 2005.**
- 2. The County Board Did Not Limit The Rehkamps To Three Boat Slips Out Of Deference To The Board Of Adjustment.**
- 3. The County Board Did Not Pass A Resolution Indicating That It Would Support The Board Of Adjustment Granting The Variance.**
- 4. The Rehkamps' Request For The Variance Did Not Seek Relief From The Requirements of Section 1013 of the Shoreland Ordinance.**
- 5. Facts Were Presented To The Board Of Adjustment That Supported The Denial Of The Variance.**

6. **The Evidence In The Record Did Not Demonstrate That The Variance Was Necessary To Lessen The Impact On The Lake.**
7. **The Evidence Does Not Support A Finding That There Were Not Feasible Alternatives To Avoid The Variance.**
8. **The County's Environmental Services Officer Did Not Merely Make A Mistake In Advising The Board Of Adjustment That It Was Obligated To Deny The Variance.**
9. **There Is No Evidence In The Record That The Rehkamps' Use Of Eleven Boat Slips Has Been Without Harm To Their Neighbors, The Lake, Or The Environment.**
10. **Mass Confusion Existed Amongst The Members Of The Board Of Adjustment In Determining Whether To Grant The Variance.**

ARGUMENT

I. **LEGAL STANDARD.**

II. **THE COURT SHOULD CONCLUDE THAT PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS IN THIS ACTION.**

- A. **Plaintiffs Are "Aggrieved Persons" That May Challenge The County's Granting Of The Variance.**
- B. **Plaintiffs Have Standing To Pursue Their Declaratory Judgment Claim.**
- C. **Plaintiffs Have Not Waived, Nor Are They Estopped From Pursuing, Their Claims In This Action.**

III. **THE COURT SHOULD CONCLUDE, AS A MATTER OF LAW, THAT THE COUNTY IMPROPERLY GRANTED THE REHKAMPS A USE VARIANCE TO MODIFY THE CRITERIA THAT THE REHKAMPS NEEDED TO SATISFY TO RECEIVE THE CUP FOR THE RESIDENTIAL PUD.**

- A. **The Residential PUD Is A Conditional Use Under The Shoreland Ordinance That Is Permitted Only With The Issuance Of A CUP For The Use.**
- B. **The County's Modification Of The Criteria For The Approval Of A Conditional Use Constituted A Use Variance.**

1. **A variance that modifies the criteria that must be satisfied for the approval of a conditional use is a use variance.**

- a. Rule v. Iowa County Board of Adjustment
- b. Belvoir Farms Homeowners Association, Inc. v. North
- c. Nassau Children’s House, Inc. v. Board of Zoning Appeals Of The Incorporated Village Of Mineola
- d. Norris v. Chester Township Board of Trustees

2. The County lacked authority to grant the Rehkamps a use variance.
3. The Court should reject the County’s argument that the Variance is an area variance.

IV. THE COURT SHOULD CONCLUDE THAT THE RECORD DID NOT JUSTIFY THE BOARD OF ADJUSTMENT GRANTING THE REHKAMPS AN AREA VARIANCE.

A. The Board Of Adjustment Was Mistaken As To The Applicable Law When It Granted The Variance.

B. The Board Of Adjustment’ Engaged In An Improper Legislative Act When It Granted The Variance.

1. Reduction in the negative impacts on the Lake resulting from the approval of the Residential PUD.
2. Shoreland Ordinance’s unequal treatment of Planned Unit Developments.
3. Rehkamps’ longstanding use of eleven boat slips.

C. Applying The *Stadsvold* Factors, The Court Should Conclude That The Board Of Adjustment Acted Unreasonably In Concluding That The Rehkamps Had Shown “Practical Difficulties” That Supported The Granting Of The Variance.

1. Substantial variation from the requirements of the Shoreland Ordinance.
2. Impact on governmental services.

3. Substantial change in the character of or substantial detriment to the neighborhood.
 4. Feasible alternatives to alleviate the need for the Variance.
 5. Cause of the need for the Variance.
 6. Interests of Justice
- V. THE COURT SHOULD CONCLUDE, AS A MATTER OF LAW, THAT THE COUNTY HAS PROPERLY APPROVED ONLY THREE BOAT SLIPS FOR THE RESIDENTIAL PUD.
- A. The County Board Has Exclusive Jurisdiction To Approve Conditions For CUPs.
 - B. The Board Of Adjustment Did Not Amend The CUP For The Residential PUD When It Granted The Variance.
 - C. The County Board's Resolution Regarding The Variance Did Not Amend The CUP.
- VI. THE COURT SHOULD REFUSE TO GRANT THE REHKAMPS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF AGAINST THE REHKAMPS.

CONCLUSION