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June 28, 2016

VIA EMAIL ONLY

East Gull Lake Planning Commission / Board of Adjustment
c/o Rob Mason, City Administrator / Zoning Administrator
10790 Squaw Point Road
Brainerd, MN 56401

Re: Variance Application of Bob and Carol Faye Muller
Our File No.: 4296-001

Dear Board Members:

The purpose of this letter is to express the strong objections of property owners Timothy and Elaine Engel (hereinafter, the "Engels") to the variance application filed by property owners Bob and Carol Faye Muller (the "Applicants"). Applicants' request for variance of the setback and height requirements set forth in the East Gull Lake Land Use, Zoning and Subdivision Ordinance (hereinafter, the "Ordinance") does not demonstrate the existence of any practical difficulties as required under Minnesota Law. Therefore, the Engels respectfully requests that the Board deny the Applicants' request for a variance.

Facts

Applicants acquired title to the property located at 11333 East Steamboat Bay Road, East Gull Lake, Minnesota 56401 (hereinafter, the "Subject Property") in approximately 1981. It appears that the Applicants conveyed title to Ms. Carol Faye Muller individually in 1987. Prior to Applicants acquiring title to the Subject Property, the owner, Mr. Alex Artimovitch, conveyed title to the property located at 11339 East Steamboat Bay Road, East Gull Lake, Minnesota 56401 (hereinafter, the "Engel Property"), to Mr. Ed Bebenroth (title to the Engel Property was later acquired by the Engels). The Artimovitch conveyance, which occurred prior to the adoption of the current setback requirements in the City of East Gull Lake, resulted in the Applicants' detached garage being located a mere five feet (5') from the property line between the Subject Property and the Engel Property. Additionally, the principal structure on the Subject

Property is approximately forty-one feet (41') from the ordinary high water level (the Ordinance requires a principal structure on a sewer lot to be at least fifty feet (50') from the OWH).

Currently, the Applicants have a principal structure, a three hundred eighty-four (384) square foot detached garage, a one thousand four hundred twenty-six (1,426) square foot pole shed with a three hundred forty-eight (348) square foot storage shed, and a three hundred and eighty-four (384) square foot boathouse. If the variance is granted, the total square footage of all of Applicants' accessory structures will be two thousand five hundred forty-two (2,542) square feet.

On June 15, 2016, Applicants submitted an Application for a Variance to the City of East Gull Lake Planning Commission / Board of Adjustment. It appears the Applicants desire to destroy and reconstruct the existing detached garage (which, again, is currently nonconforming) with a proposed addition to join the newly constructed garage to the main house. Applicants propose to construct the new garage in the same basic footprint as the current detached garage, so as to continue the nonconformity, but also intend to increase the height of the garage from approximately eleven feet (11') to twenty-seven feet (27'). Applicants state that the need for an attached garage is due to the Applicants' age and retirement.

According to the construction diagram drawn by TJ Specialty, the current impervious surface coverage over the Subject Property is approximately twenty-three percent (23%) of the total lot size of the Subject Property from East Steamboat Bay Road to Gull Lake. With the proposed addition, the impervious surface coverage jumps to at least twenty-four percent (24%), and could be as much as twenty-seven and one-half percent (27.5%) of the same area.

Lastly, it appears that Applicants propose to use a survey conducted in 1993, rather than obtain an updated survey.

Variations Generally

The State of Minnesota grants cities, such as the City of East Gull Lake (hereinafter, the "City"), the statutory authority to regulate by ordinance, the "location, height width, bulk, type of foundation, number of buildings and other structures" located in the territorial jurisdiction of the City. Minn. Stat. § 462.357 subd. 1 (2016). The City has adopted such a zoning ordinance, which explicitly states that "[e]xcept as this Ordinance specifically provides, no structure shall be erected, converted, enlarged, reconstructed or altered and no structure or land shall be used for any purpose or in any manner which is not in conformity with this ordinance." East Gull Lake Land Use, Zoning & Subdivision Ordinance (EGLO), § 8.4-1(3). The City's Land Use Ordinance states that:

Variations shall be decided within the required time frame with consideration for the following:

- A. The strict interpretation of the Ordinance would create undue hardship, and

- B. The strict interpretation of the Ordinance would be impractical because of circumstances relating to lot size, shape, topographic or other characteristics of the property not created by the land owner, and
- C. The deviation from the Ordinance with any attached conditions will still be in keeping with the spirit and intent of the Ordinance, and
- D. The variance will not create a Land Use not permitted in the zone, and
- E. The Variance will not alter the essential character of the locality, and
- F. The Variance is not for economic reasons alone, but reasonable use of the property does not exist under the Ordinance.

EGLO § 8.10-6(5). However, it is the intention of the City Ordinance to grant the authority provided by Minn. Stat. §§ 462.351 to 462.364. EGLO Section II – Intent and Purpose. The current version of the Ordinance articulates the old “undue hardship” standard for variances; Minn. Stat. § 462.357 now gives the “practical difficulties” test, which is as follows:

Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance and when the variances are consistent with the comprehensive plan. Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the zoning ordinance. “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 the zoning ordinance; 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. Economic considerations alone do not constitute practical difficulties. Practical difficulties include, but are not limited to, inadequate access to direct sunlight for solar energy systems.

The Minnesota Supreme Court has determined that the “undue hardship” standard used in the City Ordinance is more demanding than the “practical difficulties”. Krummenacher v. City of Minnetonka, 783 N.W.2d 721, 729-30 (Minn. 2010) (concluding, “that the “undue hardship” standard in [a prior version of] Minn. Stat. § 462.357, subd. 6, is more demanding than the “practical difficulties” standard”). It follows, therefore, that by showing that the Applicants’ variance request cannot pass the practical difficulties test, it cannot meet the undue hardship standard set forth in the Ordinance.

Violations of the Ordinance

The Subject Property is zoned as “R-3”, which is “Shoreland Residential – Medium Density”. The relevant zoning requirements are as follows:

| <u>Use</u> | <u>Setback</u> |
|---|-------------------------------------|
| Setback, OWH – minimum feet | 50' |
| Setback, side – feet, minimum | 10' |
| Impervious Surface – maximum | 20% |
| Accessory Structure Size – Square feet, maximum, cululative | 1,280 for parcels 2.5 acres or less |
| Building height, principal Structure - feet, maximum | 40' |
| Building height, accessory structure - feet,maximum | 24' |

It must also be noted that, in calculating the impervious surface coverage, “[w]hen a lot is divided by a street (property owner is unable to use that portion of their parcel due to the street) in the R-3 zoning district, the maximum impervious coverage shall not exceed 20% for the riparian portion of the lot”. EGLO § 8.5-5(7)(B) (emphasis in original text); EGLO § 8.4-3(6) (stating same and further stating that the “[t]otal maximum riparian/non-riparian is 20% impervious for the entire lot”). Even without the proposed addition the total impervious surface area is approximately twenty-three percent (23%). With the proposed addition added, the total impervious surface area would be twenty-four percent (24%) of the riparian portion of the Subject Property.

Further, as stated above, the total square footage of all of Applicants’ accessory structures is two thousand five hundred forty-two (2,542) square feet. The maximum cumulative square feet for accessory structures is one thousand two hundred eighty (1,280) square feet. EGLO § 8.5-5(6).

As stated above, the current setback requirements from the OWH are that all structures be at least fifty feet (50’). The principal structure on the Subject Property is a mere forty-one feet (41’). It is not expected that the Applicants bring the principal structure compliant with the current setback requirements, but it should be noted that the principal structure represents one of many currently non-conforming structures on the Subject Property.

“Where a parcel is voluntarily redeveloped to the extent that 50% or more of the footprint building area, above the foundation, on the parcel, is removed, all non-conforming structures on the parcel must be modified to conform to the Ordinance.” EGLO § 8.4-4(2). The Ordinance also states that a “non-conforming structure is destroyed, by any cause, to an extent exceeding 50% of its estimated market value, as indicated in the records of the county assessor immediately prior to destruction, and no zoning or building permit has been applied for within 180 days, the structure or its replacement shall thereafter conform to this Ordinance.” EGLO § 8.4-4(5). Applicants are completely destroying, and then reconstructing the garage. Under the Ordinance, the replacement garage should be reconstructed to comply with the current setback requirements.

The Ordinance allows a “one-time addition to a non-conforming principal structure” subject to several conditions, including that the “size of the addition shall not exceed 50% of the size of the structure it is being added to”. EGLO § 8.4-4(10). According to the construction drawings by TJ Specialty Construction Company, LLC, the existing principal structure is approximately one

thousand four hundred seventy (1470) square feet. The proposed addition and garage (if both structures are then to be considered part of the principal structure) would be a total of eight hundred twenty-two and one-half (822.5) square feet, which is fifty-six percent (56%) of the size of the principal structure.

EGLO § 8.4-4(10) also states that “[t]he total footprint of the structure, once the addition is completed, shall not exceed 2,500 square feet, including decks, porches, patios and other projections.” The total square feet of the principal structure, the proposed addition, the garage, and the attached deck will be two thousand six hundred thirty-two and one-half (2,632.5) square feet. Not only is this clearly a violation of the EGLO, but it does not appear that the Application for a Variance requests a variance from this proposed violation.

EGLO § 8.4-4(10) also requires that “[t]he height of the addition shall not exceed the height of the existing structure.” EGLO § 8.4-4(10). In the present matter, Applicants propose increase the height of the garage to twenty-seven feet (27’). The exact height of the principal structure is unknown, although it is believed to be approximately twelve feet (12’) tall. It is clear from the drawings provided by TJ Specialty Construction, LLC that the principal structure is much less than twenty-seven feet (27’).

The General Purpose and the Comprehensive Plan

Minnesota Statute 462.357 requires that a variance be in harmony with the general purposes and intent of the City’s Ordinances and consistent with the City’s comprehensive plan. Id. at subd. 6. This requirement is echoed in the Ordinances. EGLO § 8.2-1(2) (stating, “[t]his Ordinance is adopted for the purpose of . . . inaugurating and effectuating the goals of the Comprehensive Plan”). The stated purpose of the City’s Ordinance is to:

(1) Protecting the public health, safety, comfort, convenience and general welfare.

* * * *

(3) Promoting order in development by dividing the area of the City into zones and regulating therein the location, construction, reconstruction, alteration and use of the structures and land.

(4) Conserving the natural and scenic beauty and attractiveness of the City, for the health and welfare of the public.

(5) Providing for adequate light, air and access to property by regulating the use of the land and buildings and the bulk of structures in relation to surrounding properties.

(6) Providing for the administration of the provisions of the ordinance and defining the authority and duties of the Administrator, Planning Commission, Board of Adjustment and City Council under this ordinance.

EGLO § 8.2-1. The proposed variance would allow an increase to the already non-compliant impervious surface area on the Subject Property, would allow the continued violation of the current setback requirements even though presented the opportunity to correct said violations, and would result in a twenty-seven foot (27') garage, which is itself a violation of the Ordinance, and which is proposed to be constructed in front of the bedroom window of the Engel Property. Each runs contrary to the stated purpose of the City's Ordinance.

Practical Difficulties

As stated above, “[v]ariations may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the zoning ordinance.” Minn. Stat. § 462.357 subd. 6. “Practical difficulties,” as used in connection with the granting of a variance, means the following:

1. That 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 (2016). “Economic considerations alone do not constitute practical difficulties.” Id.

Applicants’ proposed use of the Subject Property is not reasonable. To be clear, Applicants purchased the Subject Property with structures that predate the adoption of the current setback requirement, so it is reasonable to use the current structures in their current state. But it is unreasonable to not only continue the current violations when there is an opportunity to cure such violations, but to augment the current violations and even increase the number of violations. Applicants state that the need for the proposed construction is to accommodate their age and health concerns, but request variance to construct an additional living space above (so, upstairs) to the current principal residence. It seems contradictory to cite age-related health concerns as a reason for the needed variance, but then to construct a structure that is unusable for many afflicted with age-related impediments.

It should be noted that the dimensions of the proposed addition demonstrate that there is an alternative that accomplishes the goals of the Applicants and would bring the Subject Property closer to compliant. The proposed addition is 21.5’x23’; the current garage is 16’x24’. If the current garage were demolished and the proposed addition was constructed as a garage, not only would it be attached to the house (satisfying Applicants’ need for an attached garage), but the structure could be constructed so as to be compliant with all current setback requirements.

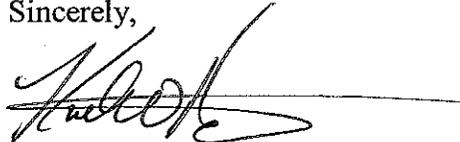
The “plight” of the Applicants is their own creation. Again, the fact that the structures currently violate the Ordinance is not the fault of the Applicants. But to construct a twenty-seven foot (27’) garage, which not only impedes the view of the lake from the Engel Property, but will also

result in an additional violation of the Ordinance, is the Applicants' own creation. Similarly, the building of the proposed addition unnecessarily increases the impervious surface area, augmenting Applicants' current violation of the Ordinance. There is not a plight, only the desires of the Applicants.

Lastly, if the variance is granted, the resulting structure will alter the essential character of the locality. No one else has a garage that is twenty-seven feet (27') tall. Not only will a twenty-seven feet (27') tall garage be an eye-sore from the lake, but will also impede the view of the lake from the Engel Property bedroom.

The foregoing analysis of the practical difficulties test demonstrates, not just the absence of any practical difficulties, but that the variance requested by the Applicants is unnecessary. If you have any questions or concerns, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kurt W. Porter', with a horizontal line extending to the right from the end of the signature.

Kurt W. Porter

KWP

cc: Timothy and Elaine Engel