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### Via Email Only

Duluth City Council  
City Hall, Room 330  
411 West 1<sup>st</sup> Street  
Duluth, MN 55802

Re: Park Point Marina Inn/Appeal of Variance Denial  
Our File No. 31309.000

Ladies and Gentlemen:

We represent Park Point Marina Inn (the “Inn”), applicant for a variance under Uniform Development Code (UDC) § 50-15.6.E.2 for purposes of expansion of the Inn.

The Inn was constructed pursuant to an application approved in 2012, and runs 238 feet along Minnesota Avenue. At the time the building was constructed, virtually no view of the lake existed due to existing buildings. The pictures demonstrating the lack of view were presented to the Planning Commission, as the UDC clearly intends to protect existing views of the lake, not to create new views. The Inn removed the unsightly buildings, and the Inn was constructed almost entirely behind the building areas that had previously blocked views of the lake. Thus, the Inn had little to no impact on views of Lake Superior. In addition, the Inn was carefully designed to meet the purpose and intent of the UDC, to be aesthetically pleasing, and to respect the design of the historic boat club facility that had been at the site. Pictures of the Inn and the boat club facility are attached for comparison. When the Inn was first built, there were plans in place for future expansion that provided for the original construction as well as the expansion to be oriented toward the lake as required by the UDC. The Inn is now working toward that expansion.

The applicable ordinance requirements and directives pertaining to the expansion project require that development be visually and functionally oriented toward the waterfront of Lake Superior, the harbor and the St. Louis River to the maximum extent possible so that users of buildings and associated outdoor areas have direct views and physical access to the waterfront, are best summarized as follows:

- The purpose of this standard is to protect public views—i.e. to protect existing views, not to create new views.
- The standard provides that development should face the waterfront to the maximum extent feasible.

These requirements and directives have been respected in planning for original construction and expansion of the Inn. There was very little to no view of the waterfront through this property, so there is little or no view to protect, and specifications for the expansion aim to respect the required waterfront orientation to the maximum extent possible.

### **Procedural Background**

Initially, when our clients began pursuing expansion of the Inn, we felt that a variance was unnecessary as our analysis suggested that the Inn was not subject to the 200-foot obstruction limitation due to the buildings and other obstructions that were on the property when the original construction was planned. Thus, instead of pursuing a variance, our clients submitted a permit application. The permit application was denied, and we appealed. That permit denial was affirmed by the Council, and the Council suggested that a variance should be sought.

Though we still believed that a variance was unnecessary due to the previously existing obstructions on the property, we pursued a variance at the Council's recommendation, which was denied by the Planning Commission. Following the denial, we initiated an administrative suit. That suit is on hold pending this appeal of the variance denial to the Council.

### **Uniform Development Code**

The primary issue here is the interpretation of the provision of UDC § 50-15.6.E.2, which seeks to protect views and provides that the maximum width of a primary structure shall be 200 feet, and application of the applicable variance criteria.

The ordinance in question contains a specific exception:

THESE REQUIREMENTS SHALL NOT APPLY TO PORTIONS OF BUILDINGS THAT DO NOT BLOCK PUBLIC VIEWS OF LAKE SUPERIOR, THE HARBOR AND THE ST. LOUIS RIVER FROM THE CLOSEST LANDWARD PUBLIC STREET RUNNING APPROXIMATELY PARALLEL TO THE WATER DUE TO TOPOGRAPHY OR THE LOCATION.

When the Inn was originally constructed, much of the structure was exempted from §50-15.6.E.2 as the existing buildings were already causing a blockage of lake views. Only a small portion of the Inn represented a previously unblocked view (see attached maps, demonstrating that the Inn is only applying for a 14.6 foot variance). As a result, we believe the UDC allows for the further development of the Inn. However, the Planning Commission and the staff took the position that the exception does not apply to the Inn.

### **Variance Standards**

Section 50-37.9 of the UDC addresses the criteria to be considered for issuance of a variance. In its report, the Commission recommended denial of the Inn's variance application based on three criteria. First, that there has been no showing of practical difficulties. Second, that there have been no showings of special circumstances. Third, that there has been no showing that a variance is necessary for the enjoyment of a substantial property right. Contrary to the Commission's view, we believe that proper application of the variance criteria should result in the Inn's application being approved.

#### **Special Circumstances/Practical Difficulties (Variance Criteria #1 - #3)**

The special circumstances/practical difficulties issues under the UDC arise together in this instance. The Inn's circumstances are unique because (1) it is not actually on waterfront property; (2) all similar properties (other hotels) in the vicinity are longer than 200 feet and subject to different zoning codes; (3) the Inn property, particularly to the north, is polluted; and (4) the Inn sits on a site that has had significant obstructions of the lake view in the past, and continues to have existing obstructions. The key difficulties faced by the Inn in expanding are caused by a) unpredictable soil contamination and unknown debris on the northern end of the property and b) the fact that removal of the maintenance building would harm the business.

The attached soil report prepared by ICECOR fully documents and explains the practical difficulties of development on the Inn's site due to soil contamination and debris on the northern end of the property. The report specifically opines that a northward expansion would constitute a "practical difficulty." Pictures of the property, demonstrating the practical difficulty posed by the soil condition, are attached. While the planning staff and Commission determined that the soil contamination and debris created only a financial burden for the Inn, staff did conclude that if there were wetlands, excessive or exposed bedrock, or steep slopes, a variance would be warranted. In reality, those issues that would warrant a variance are financial burdens as well, virtually indistinguishable from the contamination and debris in this instance.

Soil issues such as contamination and debris have provided bases for variances in this area in the past. It should be noted that the soil contamination and debris were in no way caused by the Inn, but rather by prior owners of the property. The Inn's proposed expansion represents a much better solution for expansion both as a practical and environmental matter in light of the existing soil issues. This is particularly so given the fact that if the Inn were to expand in the northerly direction suggested by the Planning Commission, every unit of the Inn would be in violation of the UDC as there would be no way to orient the expansion to provide for direct views and access to the lake.

With respect to the maintenance building, a northward expansion of the Inn would necessarily result in its removal to comply with the UDC. Removal of the building would cause business difficulties and would compromise the sail racing and tourist sailing in the nearby harbor. This negative impact to existing tourist infrastructure would constitute an additional practical difficulty or special circumstance.

In addition, as noted above, the site of the Inn has historic value, and the Inn was purposefully designed to resemble the historic boat club that was located on the property. Building to the north as suggested by the Commission would not only result in the removal of the large maintenance building,

but would also destroy the design of the Inn, rendering it unable to respect the design of the historic boat club.

It should also be noted that the variance application requests a variance of only 14.6 feet, as demonstrated on the attached TKDA maps—not the 100 feet suggested by the planning staff. Expansion of the building in any other direction than is currently planned would require a much broader variance than a mere 14.6 foot allowance.

**Enjoyment of Substantial Property Right (Variance Criteria #4)**

Finally, there is the enjoyment of a substantial property right issue. The Commission has asserted that the current use of the property represents “substantial enjoyment.” However, the staff interpretation of the UDC results in the creation of new views of the lake being created, rather than the protection of existing views. Thus, the staff interpretation falls outside of the scope and purpose of the UDC, and interferes with the enjoyment of a substantial property right that the owners of the Inn site have always held. This staff interpretation, going beyond preservation of existing views, thus constitutes a taking.

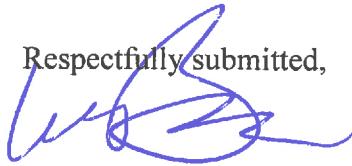
A plain language interpretation of the UDC allows the Inn to proceed with the development being requested. Under the plain language of the UDC, the fact that the lake views were obstructed by past structures allows our clients the extra room for expansion. By refusing to allow for the expansion, a use consistent with the plain language of the controlling law, the Commission has effectively deprived the Inn owners of their property rights, thereby preventing the Inn owners from substantially enjoying their property.

In addition, due to the soil contamination and the location of the maintenance building, our clients are not able to exercise substantial enjoyment of their property that they would otherwise be able to absent the existence of these conditions. A variance of 14.6 feet is necessary to allow that enjoyment without causing environmental damage or harming existing tourist infrastructure.

**Conclusion**

We firmly believe that the Inn is exempted from the 200-foot limitation in the UDC, based on the plain language of that provision exempting portions of a building for the obstructions that were in place on the property. However, if the Council believes that a variance is necessary, application of the UDC variance provisions should result in approval of the Inn’s variance application, as the variance criteria that apply in this situation are met. We therefore ask that the Council allow the Inn to move ahead with its expansion.

Respectfully submitted,



William M. Burns

WMB/hlh  
Enclosures

c: City Clerk  
Mr. Keith Hamre  
Mr. Steven Robertson