

**Town of Duluth  
Planning Commission  
Meeting Minutes  
5/28/09**

The meeting was called to order at 7 p.m. by Commission Chair Dave Chura.

Roll call:

Present: Dave Chura, Jan Green, Yvonne Rutford, Mike Kahl, Seth Levanen

Absent: Bill Lannon and Barb Crow

Also present: Sue Lawson, Planning Director, John Kessler, Assistant Planning Director.

The Agenda for the meeting was approved without changes.

The April 23<sup>rd</sup> meeting minutes were approved.

Jan Green wanted to clarify what she had said on lots of record in response to what John Bowen had said at the April meeting. She said that lots of record must meet zoning requirements and if they don't, they require a variance. And that is where we look at hardship. If someone buys a lot of record knowing what the zoning standards are, it is different from someone who owns the lot when zoning changes are made. Purchasing a lot when you know it won't meet zoning requirements is a self-induced hardship. John Bowen was not present and everyone agreed that they hoped that John and Jan would soon both be present at the same meeting and could sort this out with each other instead of through the minutes.

Dean Hammermeister was present to see what the Commission thought about a variance he would like that would allow him to put a garage on his property closer to his side lot line than setbacks in his zoning district, FAM-3, allow. Sue met with Dean at the site.

Dean brought some aerial photos and drawings of the site and his plans to show the Commission. His property is located at 1321 Hegberg Road. The back of the property is mixed forest. To the west and northwest is a cedar swamp mixed with balsam fir. Most of the land is low except for the northern part. His home is located at the first buildable spot on the property. When the property lines were marked before Dean owned the land, they must not have been marked correctly because according to the survey, everything is closer to the eastern lot line than intended and the mound system is partially on Dean's neighbor's property. The former owner, Wesley Purvis, put in the driveway and prepared a site for the garage. This is where Dean would like to go ahead and build the garage because it makes sense for the general layout of his home and outbuildings and because the driveway and garage site are already in place. This site is 35 feet from the property line. The required setback in FAM-3 is 75 feet.

When Dean bought the property, he assumed that this is where he would build the garage. He was not aware that the site was too close to the property line. It seems sensible to him to use the site that is already cleared and prepared. To site it elsewhere on the property would require a lot of further disturbance to the remaining forest. The proposed site also makes sense because of its proximity to the house. The closest alternative site for the garage would require an additional 120 feet of driveway. There is a sand pit and a 15 foot hill between the proposed garage site and the neighboring house, which belongs to Gary Huotari. Huotari's house is 1,060 feet from Dean's house.

Alternative sites for the garage that would meet setbacks were discussed. There are few areas that are high enough for building. Of the sites that could potentially work, one is his yard, which he would prefer to keep as yard and one was the site the county health department designated as the alternative mound site in case the current one failed. An attached garage would result in a roof pitch of only 2 ½ inches. It was suggested he

move the garage site closer to his house so that less of a variance would be needed, but Dean said he needed that space to manage snow and for drainage.

Dave Chura read the 4 criteria that must be considered for a variance on page 90 of the Ordinance:

1. The Planning Commission may authorize a variance from the terms of this Ordinance which will not be contrary to public interest where, owing to special conditions, a practical difficulty or particular hardship would be created by carrying out the strict letter of the Ordinance, and when the terms of the variance are consistent with the spirit and intent of this Ordinance and with St. Louis County's and Duluth Township's Land Use or Comprehensive Plan, if any.
2. "Hardship" as used in connection with the granting of a variance means that the property in question cannot be put to a reasonable use under the conditions allowed by this Ordinance; the plight of the landowner is due to circumstances unique to his property not created by the landowner. The variance, if granted, will not alter the essential character of the locality. Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of this Ordinance. No variance may be granted that would allow any use that is prohibited in the zoning district in which the subject property is located.
3. When in the opinion of the Planning Commission a variance may result in a material adverse effect on the environment, the appellant may be required by the Planning Commission to demonstrate the nature and extent of the effect.
4. It shall be the burden of the applicant to demonstrate sufficient hardship to sustain the need for a variance. Absent a showing of hardship as provided in Minnesota Statutes and this Ordinance, the Planning Commission shall not approve any variance. The Planning Commission may impose conditions in the granting of variances to insure compliance and to protect adjacent properties and the public interest

It was emphasized that economic hardship alone cannot justify a variance; the hardship must be unique to the land.

Jan said that she could understand why he wants to build the garage where he does, but it may be difficult to make an argument that satisfies the criteria required by the Ordinance.

Dean said that the extension of the driveway to put it elsewhere would be an extensive disturbance that would add to the existing disturbance and add to the impermeable surface area.

Dave Mount asked about the language in the Ordinance about not being able to put the property to reasonable use without a variance. The Commission interprets this as meaning that there is no reasonable use of the property without a variance. Could it also be interpreted that it is a reasonable use and terms of the Ordinance would interfere with that reasonable use?

Dave Chura did not think that interpretation would be consistent with the spirit of the Ordinance or with actions the Commission has taken in the past.

Dave Mount also said that the purpose of the setback is not just to have the space, but also to protect adjoining landowners from adjacent activities. The current land use adjacent to the garage site is a gravel pit. The Ordinance and CLUP emphasize preserving landscape. He questioned whether the goals of the CLUP would be best met by placing the driveway elsewhere.

Yvonne said that the Commission had talked recently in a Planning and Zoning meeting about listening to the land and building with respect to land features. Perhaps, in this case, the strict letter of the law would interfere with what makes the most sense for preserving natural features. She felt that Dean had put that kind of consideration into his site plan – consideration of land features, forest, cedars, lowlands, etc.

Sue pointed out that a garage on Dean’s proposed site would provide screening from the gravel pit on the adjacent property and from a sand pit, if that were to be developed.

Dave Chura said that the Commission needed to be careful – a variance request has to be submitted before the Commission can actually decide on it.

Jan said that if Dean did submit a variance request she would like to see further discussion of alternate sites. She said that the variance he had in mind was a fairly large deviation from the setback dictated by the Ordinance.

Sue said that you have to submit the proposal you want, but you should come prepared to discuss alternatives.

Dave Mount said that if the standard for deciding on the variance requires that there is no other reasonable place to build a garage, then Dean shouldn’t bother requesting a variance because he has already told the Commission that there are other places on the property where he could site the garage. So the question is, does granting a variance because of hardship require that there is no alternative? This is the principle that he thinks Dean would like clarification on.

Yvonne agreed that it is a large deviation from the setback for a variance. But to place it elsewhere would involve clearing additional forestland. What determines no other place to put a garage?

Dave Chura said that you could go so far as to question whether a garage is necessary, whether it is a reasonable use. And where do you draw the line as to what is a necessary or reasonable use? What if the next owner wants a four car garage?

Dean said that he was hoping to take from the meeting a feeling of whether it is worth pursuing or not. He has examined alternative sites and this one makes the most sense to him.

Jan said that it is apparent that there is plenty of land there and it might be hard to be convinced that there is no other reasonable site for the garage. She said that when granting a variance, the reasons used have to fit with the Ordinance.

Sue asked if it was necessary to meet every one of the criteria in the Ordinance to grant a variance.

Yvonne read again from the Ordinance X.E.1: “the terms of the variance are consistent with the spirit and intent of this ordinance and with St. Louis County’s and Duluth Township’s land use or comprehensive plan.” This wording encompasses the discussion of combining the natural resource viewpoint with the land use viewpoint.

Dave Chura said he was uncomfortable providing more guidance without having an actual variance request before the Commission. He didn’t want to set a precedent of spending considerable time discussing something that may or may not be submitted.

The Commission wanted Dean to know they were very impressed with the documents Dean had prepared for them. The documents were very clear and had the details they needed for the discussion.

\*\*\*\*\*

Stephen Gorny, 5210 Greenwood Road, was present to talk about wind generators in the Township. He had emailed Sue and John at an earlier date about putting a wind turbine on his property and was informed that they are not allowed under our Ordinance in his zone district, SMU-8. Sue invited him to come to the Planning & Zoning meeting to talk about wind energy. He brought a picture of the turbine he would like to

place on his property. This turbine is on a vertical axis, as opposed to most turbines which are on a horizontal axis. The vertical axis turbines are almost silent, and the moving blades look like a solid line which birds can see and avoid. He said that horizontal axis turbines impact birds because they cannot see the blades as they turn. The noise level of the turbine he is considering is 8 decibels, which he said is the same as a refrigerator. The turbine would be mounted on the roof of his home and would be less than 30 feet tall, below tree line. The turbine also works best in turbulent wind conditions like those existing along the shore. It would be visible from his local gravel road but not from Scenic Highway 61. The turbine is 6 feet wide and 3 feet high. Stephan was hoping that the Township Ordinance would be changed at some point to allow these vertical axis turbines.

There was a discussion of how wind energy is handled in our Ordinance. On page 34 of the Ordinance, windmills are listed under the definition of Utility Facilities. On page 83, there is a reference to windmills and wind generation units under Section 13.C.16 stating that they must meet all setbacks as required in the zone district except that side yard setbacks shall be equal to the height of the windmill. Section 13.C pertains to Private and Commercial Utility Towers. In the Zoning District Land Use Matrix (Table 5.3, pp. 53-55), Utility Facilities are not permitted along the shore. It was felt that the Ordinance was not drafted with the expectation of units like Stephan described. A small wind generator is different from a windmill or a utility facility. The Ordinance was not clear on the issue of wind generators. If the Commission were to look at amending the Ordinance to allow wind generators, perhaps through a Conditional Use Permit or a Variance, some kind of performance standards would be necessary. The performance standards would presumably preclude wind generators that had undesirable characteristics for neighborhood use while allowing for evolving technology.

Sue said if we move forward on changing the Ordinance to specifically allow some wind generators, it should be written such that it would not have to be permitted as a Conditional Use. Having to go through the permitting process for each generator would not be consistent with a CLUP that says we embrace alternative energy. She also said that she would like to see the Commission look at long-term green technology. She sees an opportunity for our township to go forward with some kind of model project.

There was discussion of what the options were for allowing or not allowing Stephan Gorny's generator. On page 53 of the Ordinance under V.4.E it states that "appropriate land use classification for uses not specifically mentioned in this ordinance will be determined by the Town of Duluth Planning Commission." It was agreed that we didn't want to set a precedent without thinking it through. It was thought that perhaps it wasn't a structure under the Ordinance definitions – it doesn't have a footprint and is mounted on the house. As described, this generator would be less annoying than wind chimes or a yard light. But other generators can be very noisy and would not be appropriate for a close neighborhood. One option was to give him a permit for this generator and then take the time to think through the issues and draft new language for the Ordinance that would apply to future green energy projects.

Stephan said that he would be building it himself and there was a three month wait for some parts for the turbine. It was decided that this gave the Commission time to look more comprehensively at wind energy. Yvonne and Mike volunteered to work on it and Stephan also said he would be willing to help. He suggested some web sites that Commission members might find useful: [wepower.com](http://wepower.com) ([wepower.us?](http://wepower.us?)), [awea.org](http://awea.org), and [pacwind.net](http://pacwind.net), which has some sample ordinances.

Dave Chura cautioned that we wouldn't want to suggest that anyone who wants to put something on their house, like an antenna or satellite dish, would need to get a permit. Sue said that it might be a good idea to put something in about "meeting the intent of the Ordinance."

Jan said that it was important when assessing bird damage claims by wind energy promoters, to look at the studies behind the claims to make sure you are getting the whole story.

## Director report

There will be a Public Hearing on Wednesday June 3 at 7 pm on the changes to the Ordinance. These changes include changes to the short-term rental Ordinance, fee changes and minor language corrections.

Dave Mount said that the Board decided to go with the Commission's recommendations, except for driveway permits, which they decided would apply only to Town roads and would be a \$50 permit fee. Appeals of Planning Director decisions would go directly to the BOA. Currently the Ordinance reads that these appeals go to the Commission and then to the BOA.

There was a discussion about the number of meetings Commission members could miss before being removed from the Commission. Dave Mount said the Board thought the current requirement, that members only had to attend one-third of the regularly scheduled meetings, was not enough. Jan and Yvonne both thought that 4 allowed absences would be too strict. Sue suggested that if a member were to miss more than half of the meetings, they would have to justify the absences to the Board when they come up for reappointment. Dave Chura suggested allowances be made for excused vs. non-excused absences.

Seth wanted to know what it would take to get language proposed before the June 3 Public Hearing about the intent of the Ordinance, so that the Commission would have the authority to vary from strict interpretation of the Ordinance and make allowances that would be covered by interpretation of what the Ordinance intends.

Sue felt like that authority was already in the Ordinance.

Dave Chura said that he would like to have an expert on variances come and talk to the Commission. Sue said that no matter who you had, it would be just one opinion because all attorneys would have different opinions. Yet to get the best advice, you would want to engage an attorney. Dave thought that perhaps Minnesota Association of Townships (MATT) might provide training. It was decided to check with both MATT and with our attorney, Tim Strom. Dave Mount said that it might be useful to look at other entities' variance language. The primary problem occurs when interpreting what is in the Ordinance versus what we think the Ordinance intends. Jan said that a lot of the variance language is directly from the State statutes. Seth said that there is case law which provides guidance for meeting the intent of a code as decided by the administrative authority, which would be the Commission.

Dave Chura asked about the appeal process for permits that have been approved by the Planning Director. For instance, if Sue approves a permit and an adjoining landowner wants to appeal, what is the process?

Dave Mount read from page 89 of the Ordinance under X.3.1:

appeals from any order, requirement, decision or determination made by the Planning Director shall be made to the Planning Commission.

The Board is proposing to change this so that any appeals of Planning Director decisions go directly to the BOA so that there is only one appeal step.

The Commission talked about compiling the changes made to the Ordinance and reprinting it. We could hire someone to update it and then find out how much it would cost to reprint it. The document is in Word. The Ordinance refers back to other sections all the time – could it be automated to update all these references within the document? It would be hard to make sure none were missed.

Sue said that the North Shore Management Board (NSMB) is having a forum on erosion control. She will get the date and any additional information on it to people by email.

Sue said that she and two other representatives from the Township met with the Bieraugels at their site to look at alternatives for the site. It was decided that the Bieraugels would put together a summary of concepts they might bring forward and another closed meeting with the Town Board would be held to discuss those. She said that they had this meeting because a judge would be likely to ask the parties involved in a lawsuit to go back and try to work out a solution.

Dave Mount said that the NSMB wants to go back and look at erosion control projects that have been done on the shore and see what has worked and why. They want to create a compilation of these to refer to. It is hard to take humans out of the equation of landscape. We already have structures in place that at some point in the future will have to be protected. He said that the NSMB is a valuable group and if the Commission has ideas for them -- what can they do to better support local government making decisions about the shore -- they would be welcome.

Jan said that she has lived here for fifty years and the most significant erosion she has seen is the slipping of the wall at Stony Point. There is no hard information on how fast the clay shore erodes. It would be interesting to compare photos from the 1930s with current photos.

Dave Chura pointed out that places where erosion is considered part of the natural process and allowed to progress, it is not always aesthetically pleasing. The visual impact of manmade structures put in place to prevent erosion could actually be more aesthetically positive.

#### **Concerns from the audience**

Dave Mount said that there was a brochure on permitting wind turbines that people might be interested in on one of the websites that Stephan Gorny had recommended.

Jan said to be careful when evaluating the information you come across on wind energy as most of the information is put together by wind developers.

Dave Chura asked if Commission members would be interested in starting the monthly meetings at 7:30 for the summer.

Seth made a motion to start the monthly meetings at 7:30 p.m. from May through September. Dave Chura seconded it.

The motion passed.      Ayes: Chura, Levanen, Kahl, Rutford  
Nay: Green

Dave Chura also suggested that in the future, we could take a poll at 9:15 and decide whether to continue the meeting past 9:30 or to adjourn.

The meeting was adjourned at 9:30.