

**Town of Duluth
Planning Commission
Meeting Minutes
8/27/09**

The meeting was called to order at 7:00 p.m. by Commission Chair, Dave Chura.

Roll Call: Present: Dave Chura, Jan Green, Yvonne Rutford, Barb Crow, Bill Lannon, Seth Levanen

Absent: Mike Kahl

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

The Agenda for the evening was approved without changes.

The minutes from the July 23 meeting were approved without changes.

Jan Green pointed out that the Town's website shows that Planning & Zoning meets on Thanksgiving Day. The actual date for the meeting is November 19th.

New Business

Greg Schendel from Odyssey Development distributed their new plan for the Stoney Point subdivision so Commission members could look at it before the open house on September 3rd. He said that they worked to incorporate suggestions and ideas from the December 2008 working session they had with the Commission. He gave Sue the variance request tonight and will email the electronic version.

The two issues that require a variance are 1) clearing and grading for slope stability and toe placement, and 2) setting the homes within 125 ft of the shoreline.

They have preliminary approval from the Township for the subdivision plat. They put the county's approval (the county denied it without prejudice) on hold until they were able to deal with the variance issues. They believe that they can just pick the subdivision process up from where they left off. Once the county approves it, the Township gets it again as the final plat and then has final approval on it.

The lot lines remain the same for the new plan.

Jan asked where the sewer line would come in.

Greg said that it will come from the main sewer line that follows County Highway 61 and there will be 3 lines that will follow the 3 driveways.

Old Business

There was a discussion of variance criteria based on the case law examples that Sue and Dave Chura put together.

Jan pointed out that Dave Mount had said that the language for practical difficulty as used in these examples does not clearly apply to townships. But the language is in our Ordinance and we should not ignore that.

Dave Chura said that Dave was reiterating Tim Strom's comments that there was no case law that made it clear that it does apply to townships. But Tim also said that this seems like the direction that the courts are going.

Sue said that our Ordinance language is taken from the Minnesota State Statute language. When they revised the Ordinance Tim said that township planning and zoning is authorized under Chapter 462. Jan said that there are also other ordinances and laws in the Statutes, especially in Chapter 394, that apply to townships.

Dave Chura said the focus of the discussion should be on particular hardship, undue hardship and practical difficulty as applied when discussing and deciding a variance.

Jan said that the more recent cases do not take a hard line that hardship is only if there is no other reasonable use for your land. The more recent cases give a little more deference to reasonableness or practical difficulty.

Dave Chura said that in Case 18 from the handout, there is a discussion about whether or not the board erred in not "applying the practical difficulty as an alternate standard for granting the variance" given that it was an area variance rather than a use variance. Practical difficulty would apply to a use variance, not an area variance.

Jan pointed out that some of the cases were hard to interpret because the excerpts are taken completely out of context.

Undue hardship is a more stringent standard than practical difficulty. Jan said that undue hardship means that you cannot grant a variance unless there is no reasonable use of the property without the variance. However, reasonable use can be interpreted many ways.

Dave Chura read from Case 12 regarding factors for consideration for allowing a variance. This case is also referenced in a document on the subject from MAT that Tim had forwarded to Dave. Dave said he will email this to Commission members. He felt that in the past the Commission has been more "tied" to the hardship language than we need to be and we could be more flexible about it.

Jan said that they often consider whether a variance request is excessive in terms of the amount of deviation from the Ordinance and whether there are other alternatives that could be considered.

Sue presented some of the variances the Commission has ruled on in the past year. The Bieraugel case involved a hardship, but in the decision it states that the variance does not meet the vision of the CLUP (Comprehensive Land Use Plan). Generally speaking, both Ken Butler and Tim Strom have said that judges tend to look at the process – they are not so concerned about what the decision was but more about how it was made and if it is based on the Ordinance and the CLUP.

In the Odyssey decision, the Commission talked about the relationship of their variance request to the CLUP. The Commission went through each decision point based on what was in the Ordinance and CLUP.

Dave Chura read that landowners are not barred from making a variance request even if they were aware that they would need a variance before they purchased the property. So some language may be related to the fact that people have a right to ask for a variance, not about whether or not it should be granted.

Yvonne was interested to find that precedents are not taken into consideration in these cases.

Barb asked how variance requests for nonconforming lots and structures play into a Commission decision. If the owners knew it was nonconforming when they purchased it and now want a variance, how does the Commission take that into consideration?

Sue said that Article IV of the Ordinance talks about it. It doesn't necessarily play into the decision, it just makes it that much more specific about what can and cannot be done. But people can ask for the variance.

Jan noted that in the Case 1 from the handout, dated 1985, the property had not been properly researched before it was purchased and the court said that makes the property owner's predicament self-imposed.

Sue said that John Kessler often talks to realtors about nonconforming structures and nonconforming lots. People want to know what can be done with a piece of property before they buy it. This research helps insure that property owners don't end up in a situation where they need a variance to use their property in the way that they had anticipated.

Planning Director Report

Sue Lawson presented the Planning Director Report.

She reiterated that the open house for Odyssey to present their variance request for the Stoney Point Cottage subdivision was scheduled for September 3rd at 7 p.m. at the Town Hall.

The Worden's 5232 property has been sold, so we are no longer involved in that lawsuit.

Sue has heard nothing more on the Bieraugel lawsuit. The last she knew was that Andresen was going to draft notes from the conversation they had at the site with the Bieraugels, their attorney and Dave Mount, Mike Kahl and Sue.

Regarding short-term rentals (STRs), Sue said that there was a discussion at the last Board of Supervisors meeting. The Board would like to meet with the Commission at their October 22nd meeting to look at putting conditions into the Ordinance that would be helpful for making decisions for permitting STRs and for enforcing what is decided. Otherwise, for the time being, the Ordinance stands as written.

Sue said she talked with the Board a little about community mediation. She got a sense from board that they thought it would be a good idea.

The Community Center school pavilion and the restroom facilities are done. The school's fall festival and the dedication of the pavilion will be on September 18th. The Musser grant for reclaiming the soil is nearing the end.

The planning for Township facilities was put on hold over the summer. It will probably resume in October.

To date for 2009, there have been 22 Land Use Permits issued. During the same period in 2008 22 were issued and in 2007 18 were issued. Permit applications have been coming in regularly over the last few weeks.

Chair Report

Dave Chura had nothing new beyond the case law material that had been discussed earlier in the meeting to report.

Old Business (continued)

Yvonne presented the report she, Mike Kahl, and Barb Crow had prepared, with Stephan Gorney’s help, on wind energy in the Township.

The report started by going through the Ordinance to see where wind energy is currently addressed. They proposed new language to include in the Ordinance to address the issues uncovered in their research. Previous Commission discussions focused on wind generation, but Yvonne said it became apparent as they researched the topic, that we need to expand that discussion to include solar and other types of alternative energy. We would need language in the Ordinance to distinguish between large-scale systems and small-scale systems. Suggested language to be included Under General Provisions was that small-scale systems that do not exceed the maximum allowable building height and that do not produce more than 30 kw of energy not require a permit.

Systems exceeding 35’ in height or generating more than 30 kw would require a land use permit and a variance. Systems that generate more than 30 kw are large and would not generally be found in a residential area. They are more commonly commercial applications. Large-scale wind or solar farms would be regulated under “Utility Facilities” in the Ordinance.

The group looked at suggestions from the Wind Energy Association to develop a set of performance standards to include in the Ordinance. The performance standards would include standards for size, setbacks, sound, access, and abandonment.

Yvonne said that sound and rural ambience were considered important performance standards. At the property line, the noise generated by a turbine should not exceed rural ambient noise levels.

Barb explained how decibels are measured. For every one integer increase in the decibel level, the actual noise is doubled. The average ambient rural decibel level, wind in trees, birds, traffic, etc., is about 30 decibels. At 30 decibels, the generator noise mingles with other ambient noises. When the wind is turbulent and gusting, the noise level of a turbine increases. It also increases when the power is out – it has to keep the power it is generating from going back into the grid and potentially injuring utility workers working on the line.

The Commission decided to take time to review the report and decide at a later meeting what to do next.

Public Hearing -- Pierson Variance Request

Dave Chura opened the hearing by reviewing the Communication Agreement and the process for the public hearing. Once the Commission reaches a decision, the meeting will break for a few minutes while the decision is written up and signed. If the decision is approved, a \$46 filing fee will also be due at that time.

Sue Lawson started by reviewing the standards in the Ordinance that apply to the SMU-6 zone district, which is the district the Pierson's property is in. Their property is adjacent to the Nokomis restaurant on the east side.

In the Ordinance, the required setback for the side yard in the SMU-6 zone district is 35 ft. Prior to the 2005 Ordinance changes, the requirement was 20 ft. The Piersons are requesting a variance from the side yard setback. Their home, as it currently sits, is 15 ft from the side yard. They would like to put an addition on the existing home that would be 22 ft from the side yard. This does not meet the 35 ft required in the current Ordinance, but would have met the 20 ft required in the previous Ordinance.

In the Ordinance, the height of an addition is limited in this zone to a 2 ft increase over the original structure height. This was meant to allow for increased insulation capacity. The Piersons are asking for a variance from 2 ft to 9 ft above the height of the original structure.

Commission members discussed different options for the site. It is not possible to move the addition over, and by doing so meet the required setback, because of the location of the well.

Wayne Dahlberg, who designed the proposed addition, presented the Pierson's plan. They are proposing to add about 850 to 860 sq ft to the existing structure. The addition would be a 3 stall garage with a master bedroom and a small deck above the garage, extending to above the main living space. The main entrance would be moved to the east side of the addition and would open to an entryway with a stairway to the upper level.

He said the addition was designed to save the existing structure and adapt it to make a suitable retirement home. The Piersons grew up in the French river area and their brother lives in the house to the east. The proposed addition will continue to fit the character of the neighborhood.

The design was limited by the well and a power pole on the east side of the property. They placed the garage at the back of the structure so that it can barely be seen from the front of the property. They could shift the whole thing to the east, but then the turn from the driveway to the garage would be too tight. There is also a drainage swale right behind the planned addition. If they moved the footprint back, it would be on the sloped area of the swale.

The neighboring house to the east is very close to the Pierson's east lot line. And existing buildings on the west side are also very tight to the property line.

The existing house is about 1½ stories and has minimal attic space. They wanted to minimize the footprint of the house by going up instead of out. It would be impossible to get adequate space for an entry and master bedroom on the main level on a 105 ft wide lot. If they were able to build within the setbacks, they could go to 35 ft in height.

Yvonne asked why they weren't asking for a variance for the increase in the footprint. On page 45 of the Ordinance under Section 3A, Conditions for Enlargement, it says that the proposed addition cannot

exceed the ground floor area by more than 25%. There was a discussion on the interpretation of the requirements in this section. If the addition met the setback requirements, it could be 75% larger without a variance. The footprint of the proposed addition would be roughly double the existing square footage.

Wayne said that once you ask for a variance on your sideyard setback requirements, then it goes back to what is governed by lot coverage. The wording is the same as it was in the previous Ordinance and it has always been interpreted that way.

Sue said that if the Commission doesn't agree with the way it has been interpreted, they could request a variance for the increase in size, requiring a new hearing. A second option is that even if the Commission agrees with the interpretation they can still determine that the size has increased more than will fit with character of the neighborhood and put a condition on the variance limiting the size.

Dave Pierson said that they have owned the property for about 7 years. His brother owns the adjacent property. The two properties have been owned by his family since 1967. He said that the garage will include covered space for his boat. The addition of living space is relatively small.

There were no comments from the public.

Jan moved to close the hearing, Yvonne seconded the motion and the motion passed unanimously.

Commission Discussion:

Bill felt that the addition would fit into the neighborhood and looked like an improvement.

Dave Chura asked the Commission to consider how it meets or does not meet the practical difficulty and hardship standards stipulated by the Ordinance.

Jan moved that the addition, with the variances, will not alter the essential character of the neighborhood. It has circumstances that are unique to it: 1) the age of the home, 2) the substandard lot that was created at the time the home was built, and 3) locations of the well, power pole and swale. It is a reasonable use. They would not be able to expand the house without the variances. She thinks it would be unreasonable to deny the variance. Bill seconded the motion.

Yvonne said that she was concerned about the size increase. She said that the practical difficulty is occurring in part because of the extent to which they want to increase the size of the home. The setbacks could be met if the addition were smaller.

Jan said that the location of the well was a practical difficulty and that placing a detached garage further back on the lot would not be possible because of the drainage in that part of the lot and this is a condition that is unique to this site.

Dave Chura asked what the depth of garage was.

Wayne said it was 26' plus shop space. This was practical and would also be enough room to store the boat which is 32 ft long. The new entry provides visual strength and disguises the garage.

Barb asked if the garage could be situated so that it faced north.

Wayne said that it could, but that it would require more driveway. It would also be subject to more ice build up.

Jan asked if the trees in the area were taller than the proposed construction.

Dave Pierson said that they were.

Jan said that they would buffer the proposed addition aesthetically from the property to the west.

Dave Chura, referring back to Yvonne's question, asked if there are other examples where if one variance is approved, another applicable variance doesn't have to be met. Such as getting a variance for the setback in this case, and then not needing a variance for the larger footprint. If they get the first variance are they no longer nonconforming?

Sue said that if they could meet the setbacks, they would have to adhere to the increase limits for the footprint. But since they can't meet the setbacks, they have to apply for a variance for that. The limit on the size of the footprint applies to an over-the-counter permit, but not to a variance situation.

The interpretation we are using is that if you can meet the footprint increase limits and the required setbacks, you can just get an ordinary Land Use Permit.

Yvonne asked why then they were requesting a variance for the height of the construction? It seems that the same interpretation would apply to that.

Seth pointed out that if they built a detached garage instead of the attached garage proposed, they could meet the footprint increase requirements.

Barb said that if you read the first sentence of the section (Section 3A, Conditions for Enlargement): "A nonconforming structure may be enlarged or altered in a way that does not increase the non-conformity provided that..." and *then* you read the 3 conditions that follow, it makes sense. *Only if you are dealing with an addition that does not increase the nonconformity do the conditions apply.* Commission members agreed that this reading made sense and supported the historical interpretation.

The motion passed unanimously. The Commission took a short break while Sue prepared the findings of fact and had the Chair sign the document. She then read the decision out loud. A motion was made to accept the findings of fact. The motion passed unanimously.

Public Hearing -- Hastings Variance Request

Sue presented the details of the variance request. The Hastings' property is in zone district MUNS-4. The minimum road setback for this zone is 100 ft. The Hastings have requested a 12 ft variance from that -- they would like to place their building 88 ft from the centerline of the road. They are building on a vacant lot; all new construction. Their building envelope is limited by sloping terrain to the south and west of the proposed garage and to the south and east of the proposed home site.

Wayne Dahlberg, who is also the architect for this project, presented the details of the plan. The approach to the site comes off of Pioneer Road. Pioneer Road slopes off steeply on either side of the driveway into the property. Accessing the property from this level part of the Pioneer Road requires building on this specific flat area of the property. It is a fairly small building envelope. They will

need to make a minor adjustment to a swale that carries water from a culvert that directs water from the other side of Pioneer. They don't want to create erosion issues by encroaching onto the slope for their building. The site is currently wooded and they intend to leave as much of the woods intact as possible for privacy. The buildings are positioned slightly askew to take advantage of the site.

Jan said she walked back into the site. She saw two blue flags and asked what they indicated.

Dave Edblom, who will be the contractor for the project, said one of the blue flags represents the proposed corner of the garage where it would sit 88 ft from the centerline of the road. The other one is the front of the garage.

Bill asked why the garage wasn't closer to the house or in front of the house.

Wayne said that if it were closer to the house, there would not be enough room to maneuver.

Dave Edblom said that the garage could not be in front of the house because of the grade.

It was pointed out that the drawing of the site plan showed the garage as being placed 88 ft from the edge of the road. Wayne said that it should have been drawn to the center of the road.

The lot is 20 acres but the lower part has a lot of springs – it is not all wetland, but is intermittently wet. They felt that it was best to stay up on top. This also helps minimize driveway coverage. There is a physical way to come in off of Ryan Road, it but would be close to a half mile to get to the base of the hill where they would build.

Dave Edblom said that a site analysis was done by a septic evaluator. There is 2 ft of unsaturated soil where they are proposing to site the mound, so the footprint of the mound is much less than it would be if it were placed farther down on the property.

Jan asked if they would be able to screen the mound from the road.

Wayne said that the tree cover goes closer to the road than the property line does.

Dave Edblom said that the trees are deciduous so you will see the mound from the road at some times of the year. The yard will not go all the way to the road.

Public Testimony:

Dale Lewis spoke. She lives across the road and just up the hill from the proposed building site. She said that she respects the challenges of the building site and approves of their plan. The trees and steepness will hide the buildings from the road.

Barb moved to close the hearing, Bill seconded and the hearing was closed by unanimous vote.

Commission Discussion:

Bill felt that they had a difficult site and their proposed plan was reasonable, given the site. He moved to approve the variance.

Jan seconded the motion and made a friendly amendment to the motion to provide reasoning. She said the construction, as shown with the variance, will not alter the character of the surrounding locality. There are unique circumstances to the property, particularly the steep slope. Disturbance of the slope, if the garage was moved back, would create erosion and runoff problems. The amount of variance is reasonable. The practical difficulty is the lay of the land which is unique to this piece of property – it is a topographical limitation.

Bill accepted the friendly amendment. Bill moved again to approve the variance, Jan seconded and it passed unanimously.

The Commission took a short break while Sue prepared the findings of fact and had the Chair sign the document. She then read the decision. A motion was made to accept the findings of fact. The motion passed unanimously.

There were no concerns from the audience and the meeting was adjourned at 9:39 p.m.

Attachments:

Odyssey plan

Case law compilation

MAT document ref by Chura

Pierson variance application

FOF Pierson

Hasting variance application

FOF Hastings