

**Town of Duluth  
Planning Commission  
Approved Meeting Minutes  
5/27/10**

The meeting was called to order at 7:00 p.m.

Roll call: **Present:** Dave Chura, Yvonne Rutford Bill Lannon, Barb Crow, Jan Green and Brigid Pajunen, Michael Kahl

Also present: Sue Lawson, Planning Director; John Kessler, Assistant Planning Director; and Dave Mount, Town Board representative to the Commission.

The evening's agenda was reviewed and approved.

The minutes from April were approved with two changes. On page 6 "dump a load of debris there to protect Alseth Road" should be Stony Point Road, not Alseth, and strike the last sentence on the last page, "Only the highest one will pass."

### **Planning Director Report**

Sue Lawson said that the Town Board decided against the rezoning request for the property located at the corner of Alseth Road and Highway 61, which is what the Commission had recommended. She asked Dave Mount for a summary since she had not been present at the meeting.

Dave said that the decision was not based on the specific business proposal, but was based on the finding that the zoning district would not be consistent with the neighborhood and that the three requirements for a zoning district change were not met.

He said the Board had a long discussion about whether the larger goals of the Comprehensive Land Use Plan (CLUP) were well served by the Ordinance. Is the sort of commercial activity allowed by the Ordinance in the SMU zone district compatible with the intent of the SMU area?

Sue suggested that the Commission look at commercial districts on the shore. Many articles have been written about commercial zoning on shore land. There are other ways to deal with commercial zoning on the shore that might be better than what we are doing. One model is new urbanism, which promotes creating a community with a town-like center. The Commission could look at the literature for ideas to apply to our situation. Community Resources Planning, Inc. (the same group that produced the Model Wind Energy Ordinance) and Mississippi had some good resources. She will bring in some of the information she has found. The idea is to create a small town environment instead of strip-mall-like extended spread.

The attorney for the Township for the Bieraugel case, Mary Tietjen, says that the Bieraugels will be submitting an amended application instead of a new one if that's okay with the Town. If we get the materials in time, we will have the hearing in June. Ms. Tietjen will be there.

Dave Mount said that at the hearing, the judge focused on whether alternatives had been offered to the Bieraugels or if there had been any discussion on what might make their proposal more acceptable to the Commission. The judge used to be a mediator. The sticking points in the original proposal were: changes to the shoreline, the position of the structure on the site, and the size of the structure. When the judge remanded it to the Commission, the Commission could have opted to rehear the original proposal, but that would have put the Commission in the position of trying to develop some conceptual changes to move it forward. It

seemed like it was in everyone's best interest to let them revise their application to address some of the concerns.

Dave Chura asked if a new application would mean a new fee for the hearing and the start of a new 60 day clock.

Dave Mount said that he doesn't know if the 60 day rule applies on remand. But our attorney said that it was reasonable to treat the plan as though it falls under the 60 day rule. The clock will start on the day we receive their amended proposal.

Jan Green said that she had been concerned about the completeness of their engineering drawings and documents at the original hearing. The drawings should show proper scale. There were no specifics on erosion mitigation activities. Would construction stop at the property line or would Bluebird Landing be chewed up in the process? The drawings did not show how they planned to tie the shoreline alteration in on either side of the property. To start the 60 day clock, the Planning Director has to deem that the submitted application is complete.

Sue said that we are in new territory with this decision that the Commission rehear the request.

Dave Mount said that because it is new territory, it would probably be a good idea to discuss the process beforehand. He said that we didn't reject the original application as incomplete. We are extending the opportunity to amend the application as a courtesy. He felt that the Commission should only request additional information from them if it is necessary for making a decision.

We have to have their application by June 8 to hear it at the June 24 meeting.

Dave Chura said that because the Bieraugel property is adjacent to his property, he will recuse himself from the hearing. He also said that everyone should look at the site before the hearing.

There was a discussion about who would be absent at the June 24 meeting and what it would take to insure that a quorum was present. It would be costly and poor form to cancel at the last minute. Perhaps the hearing could be held but the decision could be delayed. The 60 days can be extended to 120 days.

Sue went to the NSMB meeting. She met someone there from the Twin Cities who may be able to help the Krooks with their manure management plan. She was looking into that. The NSMB was looking at planning and zoning from an ecological/ecosystem point of view. A consultant from St. Cloud was at the meeting with information. There was a good discussion about it and the Board decided to try it. They were going to submit an LC&R proposal to fund it.

Jan said that she has the list of LC&R proposals and doesn't recall seeing one from the NSMB.

The Commission looked briefly at the May budget report (see attached). Dave Chura said that it should be distributed to the Commission every month when available. It was determined that the report showed activity through to the most recent Town Board meeting, when the bills for the month are typically paid.

### **Chair Report**

Dave Chura referred to the work plan that the Commission had put together earlier in the year. He hopes that the Commission can work down the list and take care of items on it each month that time permits. At this meeting the plan is to look at wind energy and at the issue of undue hardship versus practical difficulty.

## Wind Energy Discussion

Yvonne Rutford started by saying that the wind energy committee's document was prepared last August (see attachment). The first part of the document is where in the Ordinance reference to wind energy already occurs. They then identified where in the Ordinance language for wind energy would need to be inserted and drafted that language. The first is a definition for Small-Scale, Non-Commercial Renewable Energy Systems in Definitions. Then in Article III under General Provisions they proposed to insert that Land Use Permits would not be required for systems below 35 ft in height and that did not produce more than 30 kilowatts. Performance standards would still apply.

In Article V, small-scale, non-commercial renewable energy systems would need to be inserted into the Zoning District Land Use Matrix and then would need to be further broken out into systems that don't exceed 35 ft in height or 30 kW versus those that do. Also to be inserted would be a reference to wind or solar farms with a redirect to see requirements for "Utility Facilities" elsewhere in the Ordinance.

In Article VIII, Performance Standards, they proposed to add a Section 19 for standards for small-scale, non-commercial renewable energy systems. They followed the same outline as other Performance Standards. Stephan Gorny recommended setting the sound limit at 30 db, which is the average rural ambient noise level. They also set standards for height, energy production, setbacks and access. Additional standards were set for those systems exceeding 35 ft in height concerning compliance with FAA regulations, and procedure to be followed in the event of abandonment of a wind turbine.

Jan was concerned about systems that were higher than 35 ft. What are "imaginary airspace surfaces described in FAR Part 77 of the FAA guidance on airspace protection" that the proposed language refers to? She said that towers over 200 ft have to be lighted and lighting and guywires are a major concern for migratory birds.

Brigid Pajunen located the FAR Part 77 language on the internet and read from it.

Sue asked why weren't guywires addressed? Guywires are required for some tower construction methods.

Jan said that the combination of lights and guywires is what causes problems for migrating birds. The light attracts them at night, especially during cloudy or foggy conditions, and then they fly around, hitting the guywires and sometimes each other. She said the critical issue is siting – a good site should be a prerequisite before even applying. Lights also have a significant impact on neighbors.

Barb Crow said that the Ordinance already requires that towers under 100 ft must not be lighted.

Sue thought that the Ordinance already limited the height of towers to less than 100 ft by the shore. But we need to establish an upper limit for other areas.

It was decided that there should be no lights on towers unless it can be shown that they will not interfere with migratory birds or unless required by the FAA.

When asked why we decided that we needed to change the language in the Ordinance, Sue said that technology has changed since the Ordinance was written and people can now have small scale wind power turbines.

Bill Lannon asked if we should include restrictions on guywires. Should they be more restrictive than other areas of the state because of our location in the migratory bird path?

Dave Mount said that we need to be careful whenever we think of saying “no something.” It is more effective to put in standards regarding what you are trying to prevent. This helps keep you from being painted into a corner when an acceptable use is proposed. So maybe say “no guywires unless it can be demonstrated that there will be no impact to migrating birds.”

Jan said that that sounded good but it is easy to end up in a situation where you have doubts, but “experts” say that they know everything and that you know nothing. She said that the language she would prefer would be no towers over 200 ft and no guywires on towers over 35 ft. Night migration occurs at higher altitudes.

Brigid said that the language we are developing is for residential areas. We have time to work on some of the higher tower issues because we already have some language in the Ordinance for commercial applications. We should focus on residential area use for now.

Barb went back to the definition: small-scale, non-commercial renewable energy systems are “for the primary purpose producing energy for on-site consumption.” Does that mean that you cannot have a grid-tied unit that sometimes produces more energy than is used and then sells that energy back to the grid?

Dave Chura suggested using the language from definitions in the Model Wind Energy Ordinance that Sue had provided (see attached): “Non-commercial WECS – A WECS less than 100 kW in total name plate generating capacity.” But make it 30 kW.

Jan said that some ordinances only allow one unit on a lot. This standard would not be intended to prohibit selling back to the grid.

It was decided to limit to one per parcel and if someone wanted to install more than one they would need a CUP or variance.

Barb asked about excavation that might be connected with installing an energy system –should that be permitted?

Yvonne said that language covering excavation is elsewhere in the Ordinance.

Sue said that she thought it might be useful to require permits – even if there was no cost for them – to provide data for future use. She asked why they recommended that a variance be required for systems exceeding the general restrictions and not a Conditional Use Permit? Both stay with the land.

Dave Mount said that in this case, the variance would be a use variance, so perhaps a CUP would be better.

Yvonne asked if there was a cost difference. She said that we want to encourage alternative energy per the CLUP.

Barb suggested that “Large-scale” be inserted before “Renewable Energy Systems, Wind or Solar Farms.” She asked, if when determining setbacks we should use other language for when the use is near a shoreline or on bluffs – language about the visual impacts from lake or rivers? And she suggested that under Article VIII.D, minimum setbacks be equal to the total extended height of the system multiplied by 1.1. Under Abandonment, she proposed that removal of both the turbine and the tower and maybe the foundation, too, be required to return the land to its original condition.

Bill asked how often this was likely to come up -- how efficient and effective are wind turbines in our area?

Dave Chura said that Stephan Gorny, who had started this process by wanting to put a turbine on his residence near the shore and was helping to advise the wind energy group, said they were effective.

Jan said that she would like to see the section rewritten to clearly differentiate between 35 ft or less and 35 ft or more and commercial. It should be a three part system.

Yvonne said they would change variance to CUP. They would sort systems by category, as Jan suggested. All are Conditional Use, but have to meet xx conditions for whichever category they are in. All must be outside migratory bird paths and no strobe lights are permitted.

Dave Mount said that if we are going to ask people to get CUPs we need to include criteria on which their proposal will be judged.

Dave Chura said that when we get the language back we can vote on it. We can vote on and approve each item on the work plan as it is completed. Then when we send all of the Ordinance changes to the Board, each part will have been approved by the Commission.

### **Undue Hardship versus Practical Difficulty**

Jan briefed the Commission on the memo she sent out regarding undue hardship versus practical difficulty. The authority for our Ordinance is from Minnesota State Statutes Chapters 366 and 462. There is no mention in these chapters of practical difficulty – it is all undue hardship. In our Ordinance we took some of the language from the St Louis County Ordinance, which uses practical difficulty and not undue hardship. This is how it ended up in our Ordinance. She read from the Ordinance, Article I.3.A.: “The intent of the Ordinance is to establish comprehensive land use regulations for the Town of Duluth in accordance with the provisions of Minnesota Statutes Chapters 366 and 462...” Jan recommends that we amend our Ordinance to use the undue hardship language from State Statutes Chapter 462. However, she said, practical difficulty is a lesser standard in the eyes of the law.

Sue also pointed out that we need to talk about this for the upcoming June hearing

Jan said that the State Supreme Court made a ruling (the Stadsvold decision) that looked at the standards of practical difficulty versus undue hardship. They said that “‘Hardship’ as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use if used under the conditions allowed by the official controls; 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.” Undue hardship language is also fleshed out in State Statute Chapter 462. If someone buys a parcel that does not meet zoning standards, they have created the hardship themselves. The problem is that many lots on the shore are grandfathered in. The Bieraugels have owned their lot since before the current Ordinance was created.

Jan asked if we could get advice on the fact that the transfer of the Bieraugel property to another owner is the basis for their request.

On another subject, Jan said that after the discussion about erosion on Stony Point that came out of the rezoning hearing, the City – following some prodding from Judy Gibbs and Jan – is going to move some of the large rocks that block cars in one area and place them such that you cannot take trailers down on the east end of the Point and at the foot of Alseth Road.

Also, Pawlenty vetoed a game and fish bill that had a list of tax-forfeited lands on public waters approved for sale. On this list were Lot 4 in Greenwood Beach and Lot 22 in Wonderland, both in Section 17. These lots would need special permission from the State to be sold because of their location on public water.

And lastly, Jan wanted to know why we have such a large gypsy moth infestation at the old Clover Valley School? Nobody had any insights.

Dave Chura said he and Dave Mount would work on defining short-term rental language for the June meeting and Jan and Barb would work on language for short-term rental conditions. And the wind energy group would redo the language for their document per the discussion this evening.

The meeting adjourned at 9:07 p.m.

Attachments:

- May Budget Report
- Draft Small-Scale, Non-Commercial Renewable Energy Systems document
- Model Wind Energy Ordinance