

**Town of Duluth
Planning Commission
Approved Meeting Minutes
May 22, 2014**

The meeting was called to order at 7:05 by Vice Chair Jo Thompson.

Present: Paul Voge, John Schifsky, Jo Thompson, Wayne Dahlberg, Jerry Hauge and Larry Zanko
Absent: Brigid Pajunen

Also present: Sue Lawson, Planning Director and Don Sitter, Town Board liaison

The agenda was approved as written.

The April 24 minutes were approved with the following changes:

Line 144: from sq ft to cu ft

Line 146-147: Change to "...a stormwater management plan *may be needed*."

Tim Strom, attorney for the Township, gave a presentation on the law on grandfathering in Minnesota.

Grandfathering is essentially a use, structure or lot that existed before current zoning that became non-conforming as a result of enactment or amendment of zoning.

People often use the terms non-conformity or non-conforming use. These terms are too broad and include a lot of things that have nothing to do with grandfathering. Grandfathering can be a use, a parcel, a structure, etc. and is the best term for the concept.

Grandfathering is a compromise that allows a pre-existing use, lot or structure to continue. A municipality's goal is for everything in a zone to conform to zoning.

There is also something called the vested rights doctrine. This addresses how far along a project or plan has to be before it is protected from new zoning. In general, the courts have said that there is no vested right in zoning. A project has to be pretty far along before the courts will qualify it for grandfathering. A plan to do something is not going to protect you from a change in zoning.

The zoning authority does have some rights regarding grandfathered uses, structures and lots. They cannot be enlarged. They can be regulated to some degree and, under certain circumstances, be treated as public nuisances. If a grandfathered use or structure is destroyed through some kind of calamity, redevelopment must follow the current zoning ordinance.

Grandfathered uses are subject to reasonable health and safety regulations.

There are five ways grandfathered rights can be lost. 1) Through government seizure by eminent domain, 2) through discontinuance, 3) through destruction, 4) through determination of public nuisance, and 5) by mutual agreement.

If a property is destroyed to the extent of greater than 50 %, the property is then considered unimproved. However, there is a 180 day window to apply for a permit to rebuild and preserve the grandfathered rights. The court has said that when determining the percent of destruction, the entire use is considered. For instance, a stable has three barns and one burn. That is not more than 50% of the operation and the barn can be rebuilt.

Questions

Sue asked how to determine whether something is grandfathered.

Tim said that you have to reconstruct the history according to ordinance enactments and amendments over time. Track the ordinance back as far as you need to.

Sue said that our Ordinance allows for additions and accessory structures on non-conforming lots if they can meet the current setbacks and requirements.

Wayne asked about fire as a calamity and replacing the structure in its nonconformity.

Tim said that until ten years ago, the rule was if the property loses more than 50% of its value, then it cannot be rebuilt. Now there is a 180 day window to acquire a building permit to rebuild. Sometimes some conditions are placed on the rebuilding. This has not been tested in court yet.

John asked what happens in a case like ours where a large area of the Town, namely the Greenwood Road area, is grandfathered and isn't going to change.

Tim said that the Town might consider rezoning it. The goal is to have zoning where everything is in compliance.

Sue said that the Scenic and the Shorecrest were grandfathered and are considered desirable in their neighborhoods, even though the neighborhoods are not commercial. What is desirable in a neighborhood can change.

Director's Report

Sue said that both she and Paul have talked to individuals from ARDC and the Met Council regarding planning for trails.

Paul said that he went to a bike trails conference put on by MNDOT and talked with Brian Anderson of the ARDC. He is the District Planning Director for our area and he said that they just need a letter from the Township asking for aid to get things started.

Sue said to put a letter together and give it to the Town Board to send. She said that she would set up a meeting with the Met Council. Don Sitter said that he will get it on the Board's agenda.

Sue said that she also learned that the Oberstar family has started a foundation to contribute to Safe Routes to School.

There will be a public hearing at the June Commission meeting for a variance for a side yard setback for the folks on Greenwood Road whose garage has become too difficult to access because of the gravel applied to Greenwood Road over time. They want to move the garage back from the road and maintain the setback it is at now, which is four feet.

Sue said that she has had a request for a permit which may require a variance. It is for a residence on McQuade Road in MUNS-4. It is a nonconforming lot of about two acres. They have a 24 x 24 ft patio that is about ten feet from the property line. The required setback for that zone is 50 ft. They want to put a roof over the patio. They are about 150 ft from the next house with vegetation forming a screen between them. The property line has been surveyed. She does not know when the patio was put in, but normally no permit is required for a patio.

Jo said that if they put a roof over it, it becomes a structure.

The Commission agreed that it would be a structure and would require a variance for the setback.

Sue said that the Town has a year from the approval of their Storm Water Pollution Prevention Plan, which was in April, to change the Ordinance to reflect the new rules. She and Val Brady and Jo have been looking at it. They will be forming a work group for this.

Old Business

Structure Size vs Lot Size

Jo said that she thought that the simplest thing to do would be to eliminate all of the accessory structure size categories in the Land Use Table in the Ordinance (Table 5.3) and make accessory structures permitted with performance standards in all zones except FAM-1 and FAM-2 where they would be permitted. Language for screening and solar access is already in the Ordinance. She proposed language restricting accessory structure size to 1000 sq ft or less for lots that are one acre or under and no larger than 2000 sq ft for lots between one and two acres.

Sue asked how this would affect all of the nonconforming lots on Greenwood Road. Many, if not most, of the lots in that area are less than one acre.

Jo said that in those cases, if they wanted an accessory structure greater than 1000 sq ft, they would have to apply for a variance.

John asked if this would be reasonable. He said a lot depends on how a lot is set up. He thinks it would be hard to come up with a formula that would work in all cases.

Jo asked if a lot is less than one acre and the request is for a 1000 sq ft structure, would we want to increase the required setback?

Wayne said that the current side yard setback for an accessory structure is 10 ft, so, in general, it is possible to build a 30 by 35 ft structure and meet the setbacks and lot coverage requirement. Currently, the only place an accessory structure between 1000 and 2000 sq ft would not be allowed is SMU-6. This was handed down from previous Ordinances and Wayne said he didn't know the original intent behind it.

Sue said that currently there is a formula for accessory structures that covers the Greenwood Rd area.

Jo said that it wasn't clear that that formula would work in all situations, for instance if someone wanted a 4000 sq ft structure. She also said that she included a rear yard setback which isn't in the current Ordinance.

Sue said that she thought making parcel size a part of the equation might work.

Wayne said that having a provision for an accessory structure up to 2000 sq ft on a one to two acre lot made sense. There is an issue in that some properties in SMU-6 are larger parcels. This proposal would give them some freedom to build a larger accessory structure, which is probably okay.

Sue summarized: If a lot is smaller than one acre, you would not be able to build an accessory structure larger than 1000 sq ft. If a lot is between one and two acres, you could build an accessory structure up to 2000 sq ft. If a lot is larger than 2 acres, then the formula applies. She asked if this would affect anything already in the Ordinance on nonconforming lots of record.

Paul asked why “recorded parcel” was included in parentheses in C.

Jo said that it seemed to be used interchangeably in SMU-6 where owners own two parcels next to each other that add up to over two acres. Do you consider that one lot? She said that it was her opinion that if someone has two contiguous lots and wants to count them together in order to build a larger structure, they should go to County and have the parcels combined.

Sue said that the parcel lines we have are not necessarily the legal description of the property. Combining two lots into one can make a difference in tax assessment. Then if someone wants to divide those lots later, they have to be able to meet all the requirements and setbacks.

Jo said that if the lots are not combined, they could easily end up in separate ownership. How would we keep track of that?

Jerry agreed that requiring that lots be combined to count together made sense.

Sue said that that could be included as a performance standard: if you have two adjacent parcels and wish to use them both in the calculations, you have to combine them.

Wayne said that we should check to see if it would be legal to require that.

Sue said that for business purposes, someone might not want to encumber one of the parcels.

Jerry said that if you want to keep your lots separate for whatever reason, that is fine, but you cannot then use the separate lots in the calculations.

It was decided that Sue would ask Tim about the legality of requiring people to combine lots in this situation.

Paul asked how we would know if someone is splitting a parcel in a way that would make it nonconforming.

Wayne said that we would not know if they are in violation until someone needs a permit or something.

Sue said that it is stated a number of times in the Ordinance that you may not create a nonconforming lot.

Jo asked if we should establish an upper limit on size at which point a variance would be required.

Wayne said that according to the formula, a 20,000 sq ft building could be built on a 22 acre parcel. That’s a big building. Down in the shore area, that could be an issue.

Paul asked if it should apply that for any parcel over two acres, the maximum allowed impervious surface should be 7%. If 4.5 acres is 7% in MUNS-4, then why should we allow a parcel this size in the shore zone district to be 25%?

Sue said that 25 % of 20 acres is 5 acres. But if it were 10 two acre lots, all developed as two acre lots, it could be the same as 25% on a 20 acre lot. In addition, along the shore, runoff only has about 500 ft to go compared to runoff from further inland, which develops more speed and accumulation as it travels.

Jo said that it depends on conditions and the type of storm – a slow rain is taken up by soil, whereas a big storm event, a torrential rain, doesn’t soak in. There is a lot of water coming off a 20,000 sq ft building. But it still contributes to shoreland erosion.

Paul said that high erosion areas could be a lot worse if impervious surface was increased, but that 25% made sense for one and two acre lots. It's hard to build a home and garage without getting that high. It's 7% for 4.5 acre zone. How was that number decided on?

Sue said that the idea was that it should be adequate for what people typically wanted – a home, a garage and a pole building. There was a feeling at the time that people needed to make choices about how to build on 4.5 acre lots.

John said it would be impossible for the Commission to account for every eventuality. The reason this question originally came up had to do with the size of the accessory structure.

Jo said that she felt that it was important to try to simplify the process so that variances are not required all the time. Would it make sense to establish a maximum size for an accessory structure and anything over that would require a variance?

Wayne said that he was not sure a simple formula would work. There should be a reasonable size limit.

Sue asked what the rationale is for limiting accessory structure size but not home size.

Wayne said it might be more of a matter of what the use of the building is. The original case that made this an issue was for arena. And that started with a request to have horses on the property. No one had any idea that it was a business.

Sue said that most accessory structures are for storage for things like boats, RVs, agricultural equipment, etc.

Paul said that if the Town decided to allow larger accessory structures through a variance process, what would be the practical difficulty or circumstance unique to the property that would make a variance necessary? How would we justify a variance for an accessory structure under the current law?

Sue said that the criteria for granting a variance are pretty specific. If the structure was needed for a business, then a conditional use, with conditions, would be required for the business.

There was concern that if the maximum allowable impervious surface was raised for larger lots, that people might subdivide down the road, and end up with two or more lots with more impervious surface than is allowed by the Ordinance. She suggested considering an overlay over larger parcel areas with different standards for accessory structure size.

Paul asked about just changing the zoning in those areas.

Sue said that there would likely be resistance to requiring bigger lot sizes

It was decided to wait to see what Tim had to say about combining lots and to think about what was covered in tonight's discussion.

Regarding the Town brochure, Sue and John will take a look at it.

Concerns from the audience: None.

The meeting adjourned at 10:05.