

Worden Public Hearing
November 10, 2010

Present: Wendy Meierhoff, Dave Mount, Danny Tanner
Absent: Stephen Dahl, Mary Ann Sironen

Also present: Wordens Attorney Kim Maki, Ms Maki's assistant Jenny, Planning Commission Director Sue Lawson, Planning Secretary Beth Mullan, Clerk Ann K. Cox, Township Attorney Tim Strom, Don McTavish, Leon and Darlene Kahlstorf, Bill Mittlefehldt.

Meeting was called to order at 6:37 PM

The matter this evening is an appeal by Edward and Shawn Worden who are appealing a revocation of their short term rental conditional use permit (CUP) at 5249 Greenwood Road. This meeting is being recorded. Chairman Dave Mount introduced members of the BoA board, attorney Tim Strom and the Town Clerk.

- A sign-up sheet was made available in the event a member of the audience would like to speak at this hearing.
- Rules for the meeting are: Comments are to be factual, respectful and no personal attacks.

Ms Maki's arguments:

1 Base issue: The Worden's do not believe they need a CUP a short term rental. They were working as a short term rental before the zoning ordinance was changed. A request was made by Ms Maki to place this on record in the event they need to appeal the results of this hearing.

2. Procedural issues. The Worden's were not given sufficient notice of the hearing and were not allowed to be heard. They were not provided with the information that their CUP would be up for review that evening, and they were not notified their CUP was up for revocation at that particular meeting. They choose not to come they thought if there were any problems they could respond to any issues that would come up.

Case law is clear a CUP is a protectable property interest. The clients should have been notified that their CUP was up for revocation, they were not able to make an informed decision whether they should attend the meeting or not. See Ponce VS city of St. Paul (site is 2007 WL 276 9677). In the Worden case they were not given adequate notice of the possible revocation.

When the Planning Commission gave the only gave the Worden's 15 days to appeal their CUP, this violated their rights. (section #4). (Ms. Maki was informed by the Town that sections of the ordinance governing appeal were amended to 15 days in 2009, and Article 9 Section 8 was repealed.) Upon better understanding the current ordinance, Ms. Maki withdrew the issue.

3. Bill Lannon's vote on the issue. Mr. Lannon owns a lodging facility within close proximity to the Worden Property. Mr. Lannon should have recused himself from the vote, once Mr. Lannon was removed from the vote the Commission would have only had 3 voting members, which does not constitute a quorum, and the vote would have failed.

4. Fee. We believe a \$1000.00 fee is unconstitutional because of its size. It only costs \$500.00 to appeal to the Court of Appeals; we believe there is nothing that fee does except to discourage people from appealing to the BoA.

Ms. Maki: We do not believe the facts upon which the decisions were made are not the whole picture because the Worden's were not at the hearing. The complaints were not based upon factual information, none were verified. The second condition, the 6 person limit on occupancy, was violated on 2 specific incidences. The Worden's resolved the first one satisfactorily (July of 2009). They (the Worden's) refuted that there had been a violation to the Planning Commission; the Worden's sent documentation that there was not a violation to the Planning Commission.

Dave Mount read Ms Worden's e-mail regarding this incident in its entirety, clarifying that it admitted that there had been a violation.

Dave Mount: The town has acknowledged that for some period of time there were 8 people there. After the Town notified the Worden's of the violation, we presume the Worden's must have asked 2 of the people to leave. The second incident was July 31, 2010.

Ms. Maki: You cannot be there every single moment to make sure every restriction is observed. What the Worden's have done is to make sure they have done the best they can do to achieve compliance in every single case. What more do the Worden's have to do to make sure their short term rental complies with what the Township wants? Based on facts the revocation was illegal for the reasons stated, we believe the decision by the Planning Commission should be reversed and the CUP reinstated.

Dave Mount opened Public Testimony.

Bill Mittlefehldt: This is the second time the property and their managers have put the Township through this.

We have property rights but property rights are not unlimited. The CUP says in effect we respect your property rights but these are the 11 conditions you must meet. As soon as the CUP conditions were set they were immediately violated.

This is poor management because the owners live 200 miles away. The contact lives ¼ mile away down the road and might not have been aware of the violations. The key is not just the 30 violations that took place from 2008 – 2010. Maybe the icing on the cake was when the Hells Angels moved in, they were doing circles on our property, the Worden's might not have been aware of the problem. The Mittlefehldt's called the police. The Worden's were in Litchfield which is 200 miles away; you cannot manage property well from that distance. 22 residents signed a petition from the area requesting the permit be pulled. We hope you will respect the residents who signed the petition but we need respect shown. The Worden's are likely not aware when additional guests are snuck in because they are not there. Poor management is shown. The community is wasting time on this.

No other members of the public wished to speak.

Ms Maki: Mr. Mittlefehldt spoke on general concerns of safety for the community, they brought up no law. The law is clear, CUP's cannot be revoked on the basis of neighbor concerns, they are not sufficient.

Mr. Mittlefehldt: At one stage there were 3 squads on the road glaring at the Hells Angels. Every morning the Hells Angels left at 6:00 AM and their engine noise was a violation. Again maybe the Worden's are not aware, but due to poor management style they have violated the 11th condition. I don't believe Ms Maki's rebuttal will hold up on appeal.

Dave Mount closed Public Testimony.

Dave Mount: Proposed we discuss each element of the Worden's appeal individually. The Board would not vote on the issues individually, but will come back at the end and consider the package as a whole.

Dave Mount: Asked Attorney Tim Strom to not wait to be called upon. If there are legal standards or arguments of concern he should raise them, and keep us within bounds of what we are here to talk about. While the larger topic of short term rental is a matter of debate in the Town right now, that isn't what we are here to talk about tonight. We are here to talk about the revocation of the Worden's CUP. We are not here to decide whether it was a good decision for the Planning Commission to permit this short term rental, the Worden's received a valid CUP for short-term rental from the Town. The matter before the board is the revocation of the CUP by the Planning Commission was justified and should be upheld..

Tim Strom: The Planning Commission decided there were violations to the CUP. The Planning Commission felt they were enough to revoke the CUP.

Dave Mount: Perhaps we should start with the last issue, the matter of the fee.

Tim Strom: The law on that issue is primarily § 462.353 subd 4, a portion of the municipal zoning act that deals with fees. What does the service cost and what is the fee? What I see in the law is that you need to have something of a nexus to what it costs the zoning authority. I charge this town a home town discount to represent the town. Today I went back to review numerous items before this meeting and easily spent 10 hours. \$1000 does not come close to what it really costs; it is a nexus to what it really costs. Based on experience and other appeals, in excess of \$1000 in costs to the Town can be expected and therefore complies with the statute.

Danny Tanner: Perhaps when they do this in municipalities they are salaried, they are there all the time they would likely do and absorb part of the cost. We are not here all the time.

Dave Mount: When we instituted the fee, we also included in the ordinance the ability to return a portion of the fee to the extent the Board feels the appellant prevailed on appeal. An example might be if this Board found that there was an error. We included language to not penalize people if the Board was sympathetic to the appeal.

Dave Mount: Next, the grandfather issue.

Tim Strom: The Board of Adjustment has twice rejected this argument before. The Worden's applied late in 2007, the CUP was issued to them January 2008 establishing conditions for the property. When the application was given, under the ordinance the Worden's had the right to challenge the CUP. They (Worden's) did not do that, they did not exhaust the remedies given to them and instead they began operating under the CUP. In September 2008 they took an appeal to the BoA, the BoA reversed the Planning Commission's revocation. As part of that hearing the Worden's raised the grandfather issue, but that was not part of the issue that was appealed. By the time the Worden's raised the grandfathering issue it was timed out. Statutes allow the Town to regulate a grandfathered use through a CUP, and may impose reasonable conditions. In March 2009 the Wordens came before the BoA again, and again raised the argument they were grandfathered and didn't need a CUP. Again they were told they could have appealed the CUP at the time it was issued, but no appeal was brought within the appropriate appeal period. Paul Voge, former chair of the BoA, stated there was not a grandfathered use with the CUP, it should have been appealed early in 2008.

Danny Tanner: In reality then the Planning Commission did not err in the CUP.

Tim Strom: The Worden's could have done a number of things at the time, but they failed to stand on their rights. They applied for, received, and began operations under the CUP.

Danny Tanner: Would a court agree with that?

Tim Strom: I believe a court would agree that, the Worden's did not exhaust their options.

Wendy Meierhoff: You can still put regulations on a grandfathered use.

Tim Strom: You are not immune from zoning if you are grandfathered in. There is a simpler answer to the question, there is a time for appealing and you didn't appeal. You can't change your position at this point in time. I can never promise you what a judge would do but I can say I believe strongly that this argument would fail.

Dave Mount: Next item adequate notice.

Dave Mount: The planning commission failed to give the Worden's adequate notice. The July 8th letter was read in its entirety. Guidance Tim as to what would constitute adequate notification?

Tim Strom: We start out with a term quasi judicial; take a certain set of facts and then apply laws to those facts. The granting of a CUP, or the denial of a CUP is a quasi judicial decision. What the courts have said

about that in a case (Barton) is that reasonable notice and a right to be heard is due process of any situation. Was there reasonable notice and was there an opportunity to be heard?

Dave Mount: Setting aside the night the Planning Commission met and decided on revocation, the current appeal process is certainly a process where you have a right to be heard. Is this meeting is a right to be heard? The BoA has all the powers of the Planning Commission. They (the Worden's) have the right to say they disagree; they have the right to provide documents, to say I believe the Planning Commission is wrong. They say they didn't argue their case and weren't notified, but they do have the right to argue their case this evening at this meeting.

Wendy Meierhoff: the July 8th date, they said the meeting was going to be August 26th, they gave them a month and a half notice, the letter said the CUP was going to be reviewed.

Tim Strom: the packet of documents should be part of the record of this BoA. There was notice in the letter of the date time and place of the meeting, there was note made of the zoning ordinance stating there is a possibility of the CUP being revoked.

Wendy Meierhoff: Should they have been notified of the complaints of the community?

Tim Strom: That is what they are arguing.

Wendy Meierhoff: Dave Mount has told them through e-mail of a lot of things that were going on.

Dave Mount: What constitutes a violation? Taking example of the July 2009, there were more overnight guests than was greater than the 6 that was allowed. When the Wordens were told about it, it was corrected. In my mind, from a common sense perspective, it was still a violation; it was a violation that was corrected but it was still a violation that doesn't go away. To take this to an extreme, if every night of the year there were extra renters (hypothetical to make a point), and the Town called the Wordens and they rectified it, it would still be a violation, just a violation that was addressed. The violation was brought to a close but it still happened.

Danny Tanner: If I was a short term renter and lived 200 miles away how could I guarantee that 6 people are currently renting.

Tim Strom: Your question is if in my opinion would it still be a violation? Yes it would still be a violation. You could perhaps improve your management practice but it still is a violation.

Danny Tanner: How could you guarantee you had only 6 renters? One of the conditions was that there would be a local caretaker, to make this stick, that person would then have to visit every time it was rented to keep it from being a violation. It is almost impossibility when you have no one there to monitor the guests. I am not suggesting it is not a violation but from a universal stand point it is not possible.

Tim Strom: As Mr. Mittlefehldt alluded to, there is no reason to search for bad or evil it is simply a bad management practice. It is almost an admission that they cannot observe the conditions of their rentals.

Wendy Meierhoff: When I have rented a house for the weekend there has been a management person who brings us to the house and gives us the keys, gives us the rules. It is just a little bit more work, instead of a lock box which doesn't seem to be working well.

Dave Mount: The local contact is Jay Zink

Ms Maki: We thought this was a review of the Planning Commission's decision which is why the Worden's were not here; they are not here to argue their rental practices.

Dave Mount: You brought this argument in. In my e-mail exchange I have had with Ms. Worden, there is a clear implication from her that insuring compliance is not their responsibility it is the Town's. She apparently feels if there is a problem it is the Town's responsibility to get in touch with the Worden's to allow them to correct the problem. It should be clear that it is not the job of the Town to police the Worden short term rental, conditions were given, the Worden's need to comply.

Tim Strom: It is difficult for me to take the position that it isn't a violation for me because the Town didn't complain. There is an underlying theme; if there is a problem with the property the Town should notify the Worden's.

Dave Mount: Is a violation still a violation if the Wordens don't know about it? If the Worden's are not informed does that mean the violation should be excused?

Tim Strom: That should be a decision for the Board. Is it something so hard to detect you need the Town to tell you of the violation?

Danny Tanner: As a general rule, I don't see how you could have a long term management of a hotel from a long distance. It is impossible.

Dave Mount: The issue of notice and timing of the appeal has been withdrawn.

Dave Mount: The next issue of alleged conflict of interest (Bill Lannon) was not in the brief. The question is, if there are four of the seven Commissioners present, but one of the four has to recuse himself, is it still a quorum? Or would it be that you are failing to meet a quorum as Ms Maki suggested?

Tim Strom: There are 7 members on the Planning Commission so a quorum is 4. Had Mr Lannon recused himself from the vote would that mean they had not a quorum? I don't know the law on this issue, I have not reviewed it. I am generally aware that Bill Lannon has an ownership interest in the motel that sits next to the former Lakeview Castle and that property rents rooms. The Worden's have an interest in renting to people. If their permit is revoked then it alludes to a possible commercial interest for Mr. Lannon. I am not prepared to offer an opinion. The vote was unanimous, 4 – 0. The question is, had Mr. Lannon not been involved, would your colleagues carry the vote anyway so no harm had been done? Is there a process? It would be improper for me to give an opinion at this time.

Dave Mount: Is there anymore discussion on that issue? We are not bound to reach a decision this evening. We have two more issues to discuss 1. does the assertion of a conflict exist. Assume for the sake of discussion there was a conflict, that Bill should have recused himself. If he had recused himself and the vote would have been 3 – 0 would that have been a legal vote? If someone that (hypothetically) had a conflict still voted does that poison the decision? If there was not a quorum of the Planning Commission at that time, should it be sent back to the Planning Commission? The other question is whether the process is strictly a review of the record on the CUP or should there be additional evidence presented? It might be a matter of sending it back to the Planning Commission.

Sue Lawson: I would have to look at the ordinance but the Planning Director has the right to revoke.

Tim Strom: Ms. Maki is stating the Planning Commission is incorrect, they should not have voted. Does it really matter to this Board?

Wendy Meierhoff: even if we question the vote and there is an issue, should we cover our bases and allow the Worden's the opportunity to present their arguments again?

Dave Mount: If the Board finds the vote improper did you (Ms Maki) come with a remedy in mind?

Ms. Maki: I think a lot of issues would be resolved if the Worden's have the opportunity to discuss their issues. They were upset because they felt they hadn't been adequately notified, if they had the opportunity to present evidence it would take care of some of the issues.

Tim Strom: Does it behoove anyone to take a step backward and send it back to the Planning Commission? If everyone is given a chance to speak their piece and re-discuss before this Board, does it really matter if it goes back to the Commission?

Ms Maki: I think it would be a good idea for everyone, the scope of the BoA would be clarified. We believed this would be just a review of what the Planning Commission did.

Wendy Meierhoff: But that is what we did this evening.

Ms Maki: Mr. Strom brought up that this was the venue for the Worden's to bring forth additional argument.

Tim Strom: What is the appropriate remedy here?

Dave Mount: We have been dealing with peripheral stuff. The real issue is, were there violations and if there were, were they enough to support a revocation? I'm not interested in anyone not having a chance to be heard. I had not considered the confusion about what we were doing here tonight. Under the ordinance we have, I believe, all the authorities of the Planning Commission (read from the Zoning ordinance). If we push on and try to reach a decision tonight we have to deal with the alleged violations. It seems where this is heading is to rehear the matter.

Tim Strom: It seems to me if we are willing to reconvene at a later date, have the neighbors come in, have the Worden's come in and say "yes it was" or "no it wasn't." Some of the issues we have discussed are not really germane from a legal stand point. Mr. Lannon's alleged conflict; my gut says this really doesn't mean much. I believe the other issues need to be discussed. Did the Wordens not show up because they didn't know they should? Those questions may become germane.

Danny Tanner: Are you saying it would be in the best interest to hold an additional meeting?

Tim Strom: I believe it is in the best interest for the Town to hold an additional meeting. I think opening up to a hearing of that type takes longer but makes for a much more solid record if it is taken before a judge. The revocation itself did not start the 60 day rule. When the appeal was filed October 1st, that is then asking for approval from the governmental unit, that begins the 60 day rule. We request an extension, roughly speaking it might be February 1st but it can be extended longer by mutual agreement.

Wendy Meierhoff: I don't have any issues with the meetings but I would prefer to have it all discussed here and decisions made here before it goes before a court. I want to cover ourselves as a Town.

Dave Mount: With regard to the conflict issue, whether something improper was said or done, or if that wasn't the case, it doesn't matter if we re-hear the matter..

Wendy Meierhoff: If can we have one more round, we can be done and resolve the issue.

Dave Mount: From the standpoint of hearing the evidence there may also be records the Town has. The Township police have been involved once or twice; their information has not been included in this record. There have been two incidences where Township Officials have been involved in the more than 6 visitors. The Township Police have had numerous calls, that is not in the record. But it could be added if we are going to rehear the matter.

Mr. Mittlefehldt: You have the authority to make a decision this evening. Can the appeal board act independently? The Worden's are not here, another case of poor management

Dave Mount: Our interest is in protecting the Town. It is a matter of what is advisable to the Town.

Tim Strom: If the Worden's and others come in and you assess their demeanor and credibility, that gives you a better chance to decide were there violations. We are in a situation where either way the issue could go to court, both sides want to bring this issue to a head one way or the other. If we are going to end up in a lawsuit, we want the Town Board to make that decision. Hopefully, re-hearing the matter would make some of these other issues fall to the wayside. The alternative remedy would be to send it back to the Planning Commission, and if they take the same action, then it would be sent back to the BoA again, so in essence it would be saving a step. When you have a Board of Appeal here you have the powers of the Planning Commission and can make a decision.

Wendy Meierhoff: Lets get it done in January. We can come back and re-talk.

Danny Tanner: I am also leaning to having another meeting in January.

Dave Mount: Can we reconvene in the next three weeks?

Wendy Meierhoff: I am not available in December, after the first of the year I am great.

Tim Strom: I would encourage you to set a date.

Wendy Meierhoff: January 3, 4, 5th are available.

Ms. Maki: (in an attempt to call the Worden's for their availability) the Worden's didn't answer, she will let us know tomorrow.

Dave Mount: we have our Board meeting tomorrow night, we should know by tomorrow night

Tim Strom: Pick a night. We are simply going to recess tonight and reset to another night.

Dave Mount: We can set a date tonight and reschedule if necessary tomorrow at the Town Board meeting. Can we set a date and add into the motion an alternate date?

Tim Strom: We can say the meeting will reconvene 6:30 p.m. January 4th; if the Worden's have a conflict we will reconvene January 5th. We can say it is December 8th if we are informed the Worden's will not be available we will then reconvene on January 5th.

Dave Mount made a motion that we recess the hearing until December 8th at 6:30 p.m. at the Duluth Township Community Center also known as the North Shore Community School in the library or an alternate room to be announced unless the Worden's or their legal representative cannot attend on December 8th, in which case it will be held January 4th 2011 at 6:30 at the Duluth Town Hall.

Tim Strom: we need to amend the motion that Ms. Maki needs to inform the clerk within 2 days.

Dave Mount amended his motion to say that we will recess the hearing until December 8th at 6:30 p.m. at the Duluth Township Community Center also known as the North Shore Community School in the library or an alternate room to be announced unless the Worden's or their legal representative cannot attend on December 8th at which case it will be held January 4th 2011 at 6:30 at the Duluth Town Hall; Ms Maki will notify the clerk within 2 days if December 8th will work for her clients. Wendy Meierhoff seconded. Motion passed unopposed.

Meeting recessed at 8:40 PM.