

**Town of Duluth
Planning Commission
Meeting Minutes
9/25/08**

The meeting was called to order by Chair Dave Chura at 7:02.

Roll was called: All Commission members were present: Dave Chura, Yvonne Rutford, Janet Green, Michael Kahl, Bill Lannon and Dave Miller.

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

The Agenda for the evening's meeting was reviewed and approved.

The August meeting minutes were approved with minor corrections from Jan Green, including clarification on ownership of land on public waters. She said the rule from the DNR is that public water is from the ordinary high water level (OHWL), and the OHWL is determined by the DNR. Kim Maki, an attorney from the firm representing the Bieraugels, felt that the rule was that the landowner owned to the ordinary low water mark, but that the DNR has the right to regulate up to the OHWL. It was determined that since it was in the minutes, and represented what was said by an individual, no additional interpretation was needed at the present time.

Because his property is adjacent to the Bieraugel property, Dave Chura recused himself from the Commission prior to beginning the continuation of the Public Hearing and Vice Chair, Michael Kahl took over as Chair at that point.

Public Hearing on Bieraugel Land Use Variance Permit request, continued from August 28, 2008

Sue recapped what happened at the Bieraugel Public Hearing at the August 28, 2008 Planning and Zoning Commission meeting. Following the applicant's presentation and public testimony, the Commission decided they needed more information before making a decision. The applicant has submitted the requested information.

Sue then reviewed the basic requirements for setbacks and lot coverage for lots in Zone District SMU-6 and read from the Zoning Ordinance, Article 4, Section 4 which deals with lots of record. Lots of record are considered buildable if they meet a number of criteria as outlined in the Ordinance. Lots in Zone District SMU-6 which existed prior to the enactment of the Lake Superior Management Area controls in August of 1991 may be considered buildable if they meet the following 4 conditions:

- a. The use is permitted in the zoning district.
- b. The lot has been in separate ownership from abutting lands at all times since it became substandard.
- c. The lot was created compliant with official controls in effect at the time.
- d. Sewage treatment and setback requirements of the ordinance are met.

Sue said that conditions a and b are met. A building permit exists from 1981 for the lot, which indicates that condition c is met. And the variance currently applied for is the variance required for condition d.

The size of the lot has been determined to be 1.85 acres.

The variance request is for a variance from the 125 ft setback. The applicants feel the property could not be put to any other reasonable use and that they did not create the hardship.

Sue then showed a drawing of what the building envelope, as determined by required setbacks, would look like without the variance: essentially there is not a buildable envelope. A 65 ft culvert would be put in that would change the water course on the property. The drainage would be moved because otherwise the drainage would go under the house. As the setbacks currently exist, when applied to the lot they overlap and do not allow room for building.

The cross-section drawing also showed that the 110 ft setback from the OHWL would terminate right by the house; the 125 ft setback from the bluff line would go past the home site; and the 110 ft setback from the road would terminate at the house site as well.

The criteria on which the decision for or against the variance would be based was shown but not read.

Discussion:

Jan Green wanted to know if the applicant owns the parcel.

Kim Maki, from the law firm representing the applicant, said that the Bieraugels have owned it since 1981.

Jan Green presented a motion to deny the variance because:

- It is a non-conforming lot.
- There is a hardship because of topography, but the request is for a very large variance – approximately 75 ft. Other home placements or size alternatives were not given, so there was no flexibility for the Commission.
- The variance would require extensive shoreline revision that would not be consistent with the Duluth Township Comprehensive Land Use Plan (CLUP) and therefore, not in the public interest. No figures were given for the amount of material to be removed along the shore, but based on the drawings, it appears to be a substantial amount. The OHWL was not given on any of the diagrams. Any alteration below the OHWL would require a permit from the DNR. Water course changes and erosion mitigation were not detailed.
- The information was not provided in a timely fashion, and was not always in a readable format. Provided information was not always clear or accurate. No accurate diagram of the parcel was provided. The Township's variance application requires a complete and accurate description of the parcel at the time of the application and this was not provided.

Dave Miller seconded the motion.

Discussion:

Yvonne Rutford said that the variance would not be consistent with Policies 3d, 3e, 4, and 5 from the CLUP. But she did not think that frustration with the submitted documents should be a part of the motion.

The motion to deny the variance was voted on. The vote was unanimous to deny the variance.

At Sue's request, the Commission affirmed that the language expressing dissatisfaction with the provided information remain in the motion.

Vice Chair, Michael Kahl summarized, saying that because the applicant failed to meet criteria for the decision and failed to demonstrate sufficient hardship, the variance was denied.

For the Finding of Facts document, Sue Lawson proposed using Jan Green's document, Findings and Reasons for Denial, after insertion of Section 3d from page 14 of the CLUP, as an additional reason for denial.

A motion was made by Yvonne to accept these reasons for the decision with the addition suggested by Sue. It was seconded by Jan Green and passed unanimously. Another motion was made by Dave Miller giving Mike Kahl authority to sign the document once it was prepared. Yvonne seconded and it passed unanimously.

Dave Chura returned to his position as Chair of the Commission after the close of the Public Hearing.

Planning Director Report

Sue went to the North Shore Management Board Technical Assistance Committee meeting. There had been a request that once a portion of shoreline was stabilized, it be removed from the erosion hazard classification area. The Committee said no, it did not make sense to do this. The DNR hydrologist cited examples of floodplains and levees that failed in New Orleans as examples of areas that had been fixed and then failed. The Committee will forward the recommendation against the reclassification of stabilized shoreline to the NSMB. It appeared clear to those at the meeting that the reason behind requesting this reclassification was to get around setbacks.

The Committee looked at 3 projects that ARDC wanted to do. One of them was the creation of nodes along the shore designated for more intensive development. ARDC has mapped locations for the nodes and made recommendations for land use within them, but nothing has been done to discourage development between the nodes. Currently, the entire shore from Duluth Township to the Canada border is zoned for 2 acre lot sizes. Second, they are developing a GIS portal similar to that which John Geissler has created through Boulder Lake Management Area. They are trying to put one together for the whole shore. And third, they are interested in sponsoring more workshops.

John Kessler wondered if the nodes were originally placed in a broad, general fashion, potentially encompassing a large area, but Sue said that they did pin down the actual locations of the nodes. The criteria used for placing the nodes was not overly rigorous. The definition of a node is an area of concentration of development and infrastructure. They are trying to look at the shore as a whole, but they have made no allowances for between the nodes. Most of nodes are placed where some development or potential for development already exists. For instance, the locations of McQuade Harbor, the intersection of Homestead and Hwy 61, Knife River, Two Harbors, etc are indicated as nodes. Some towns included as nodes in Cook County, Tofte and Lutsen, for instance, are creating town plans to concentrate development and preserve rural lands. Castle Danger had been designated as a node but Silver Creek Township said no.

We applied for and got a Star grant. Through this grant we got audio/visual equipment. We also have powered speakers. These will be useful for training and education. We could also use them for community programs – movies, etc.

The Board of Adjustment upheld decision re: Odyssey Development and overturned the Commission's denial of the Worden's CUP for a short-term rental.

Dave Miller expanded, saying that the BOA felt that the time given for the Wordens to do the work required by the Commission was reasonable. The minutes from that meeting will be distributed.

Sue said she has received a letter from a party on the shore saying the Wordens have been renting their property for 2 or 3 days at a time which is not in compliance with the parameters established by the Commission for their CUP. Sue said that it would be hard to enforce this kind of thing.

The Commission needs help with a couple of issues. The first is a vigorous study of the issue of short-term rentals. The Town Board has approved a 6 month moratorium on short-term rentals. We can have volunteers meet privately to study the issue, or we could have the whole Commission look at it.

Dave Chura outlined how the Commission went about deciding how to regulate adult use businesses in the Township. A couple of Commission members worked with Tim Strom and Sue to put together information, including what other communities have done, and to draft a recommendation. They then brought that information to the whole Commission for approval and alterations.

Sue said that the Commission can also hold an open house to take comments. There is probably a lot more interest in the short-term rental issue now than there was when it was originally included in the current Ordinance.

Sue said that the Zoning Ordinance also needs to be updated. We need to look at costs – especially what things are costing us, such as variance and CUP requests. We can no longer just attach a fee structure; the costs have to be a part of the Ordinance. A fee structure is only okay if you make less than \$5,000 a year in fees. There are also other changes that need to be made to the Ordinance, so we may as well do it all at one time.

Dave Chura emphasized that it would be a good idea to consider what future costs are likely to be and incorporate those now so that we will not have to go through the process of changing the Ordinance again for a while after this.

Sue said that in addition to some minor mistakes in the Ordinance that need to be addressed, we also need to update the information on the 30/60 day time limit.

Dave Mount noted that the deadline to get information into the November Township Newsletter is October 23. So if the Commission wants to have an open house on the short-term rental issue, they may want to decide before that deadline so it can be announced in the newsletter.

A couple of open house ideas were discussed. One that Sue discussed was to have a table for each Commission member so each member could meet with individuals and get their input on the issue. Each member would be responsible for taking notes and reporting back to the Commission as a whole. This would be much faster than allowing everyone who wanted to speak on the issue to address the entire Commission. Another possible style of open house would be to break up into small groups and then each group could report to the Commission.

Dave Chura said he would put together a poll to find a November date for an open house. In the meantime, a small committee could meet with Sue and John to research the issue. Mike Kahl and Bill Lannon volunteered to help Sue.

Jan Green and Dave Chura will check to see if the Township Association has anything that would help. They did not when we last worked on it, but it's possible that they have something now.

Sue asked for volunteers to work on the fee structure. John Kessler volunteered.

Dave Chura also asked that we look for other changes that need to be made to the Ordinance.

Dave Mount said that the Town constable suggested that the Board look at firearm use, especially high powered rifle use, between freeway and the lake. They will be having a public hearing on this. The State has rules – no shooting within 500’ of a residence without permission of the resident – but it is difficult to enforce.

Sue presented the ideas that have been developed for the Master Site Plan for the Community Center.

One alternative was to attach community center space to the school on the north side of the building. The east side of the building would be expanded to create 2 new classrooms. There is an emphasis in all the alternatives on creating a swale for runoff and replanting the area. There would be a pond for ice skating and a tree nursery would be placed on the current rink site.

The second alternative was to move the community center space across the swale. The rest of the plan would be basically the same. Moving forward with the first alternative would not necessarily preclude doing the second or third alternative at a later date.

The third alternative was to put the community center on Lismore Road.

The Building Assessment Team, along with the Town Board, made the decision to move forward with the first alternative.

Dave Mount said that the joint space for the Community Center and the school would go in first. Through reconfiguring of uses and sharing of spaces, the architect was able to come up with areas for arts and theater and an adult sized meeting room. Spaces would be designed for school use during the day and community use at night. There would also be a separate entrance for this space so that access to the school would be limited.

Sue noted that the plan was amenable to expansion and change in the future. She also said that another grant will be applied for for \$20,000 for landscape construction, including creating the swale and some playground areas.

Chair Report

Dave Chura reported that a working group consisting himself, Sue Lawson, and Dave Mount, met with Bob Ryan and Greg Schendel of Odyssey to talk about new ideas. One of the big issues was whether or not the Township could continue to work with Odyssey if Odyssey were to file an appeal. If not, could we agree to extend the deadline for filing an appeal? Ken Butler said that once an appeal is filed we cannot work together and the Ordinance does not allow for extensions to the deadline. Odyssey also wanted to know if they could work with the Township, even if an appeal was underway, if there was an agreement in place to not use any of the comments, etc from the working group in court. The Town Board would need to make this decision.

Dave Mount said that there is a meeting of the Town Board on Sept 30 on this subject. They needed to weigh the risks and/or benefits to the Township of conducting working sessions with Odyssey on alternatives at the same time that a court appeal is moving forward. This is a public meeting and any comments would be welcome. It is not clear where the responsibility for this lies between the Planning and Zoning Commission and the Town Board. It seems that because there is a chance that the Township will be sued, the responsibility becomes the Board’s.

Bill Lannon asked if it was appropriate for members of Planning and Zoning to give input.

Dave said that he sees no problem with that. The Commission is not currently judging or hearing anything on Odyssey. If the Board decides to work with Odyssey, whether or not they are filing an appeal, it would then come back to Planning and Zoning. The idea behind the working session would be to develop an understanding between Odyssey and the Commission regarding the Commission’s concerns about the development of the site, hopefully enabling Odyssey to bring forward an application that would address the concerns of the Commission and be acceptable to both parties.

Dave Chura wanted to clarify the purpose of the Town Board September 30 meeting. The only purpose of the meeting is to decide if it is appropriate for the Township to be involved in working discussions with Odyssey while Odyssey is suing the Township.

Jan asked if the township attorney for this matter, Ken Butler, would be there.

Dave Mount said that he was not available because there are very few available dates before the deadline for filing an appeal (October 2) that also meet posting deadlines for a public meeting. He said he has been talking with Ken to get his input on the matter. Dave said that typically, when a lawsuit is underway, the involved parties don't talk. But Odyssey has proposed drafting a legal document that would keep the discussion process entirely separate from the legal proceedings. The Township has to decide if they are willing to do that and if it is appropriate.

Jan Green said that she thought it could be useful to have the discussion but that there are issues that went into the Commission's original decision which are out of the Commission's control. An example is the county's wetland delineations which is a major issue that we have no control over.

Bob Ryan from Odyssey spoke. He said that they could submit a new proposal at any time regardless of whether or not they file an appeal. But they don't want to keep bringing proposals that won't be acceptable to the Commission. They have that property and they plan to do something with it. At past meetings Commission members have indicated that they wish they could sit down and talk it over. He said that it is not unusual to have discussions while a lawsuit is going forward and that often a judge won't even hear a lawsuit unless the parties have first gone to arbitration or tried to settle. The meetings would still be open meetings. He said that their attorney said that they have to file the appeal; that you file the appeal and then ask for a stay. The stay indicates that the filing deadline has been met, but that they are not yet going to start the process. By definition, the appeal pertains only to the hearing, so nothing occurring after the hearing would affect the appeal. The appeal is strictly on the decision so there would be no additional risk to the Township entailed by talking with Odyssey. Bob said that they will need to bring another proposal forward. They would just like to have a better idea of what would be agreeable to the Commission.

New Business

Sue Lawson outlined a situation on Stony Point that she wants Commission input on. She said that there is a person that owns four cabins off of Alseth Road on Stony Point on a lot that is less than 2 acres, but which is a lot of record. They are all livable cabins. The owner plans to remove one of them from the site, tear two of them down and move the fourth to the back of the lot as an auxiliary structure. They then want to build a dwelling that is approximately the size of two of the cabins. Meeting the setbacks would not be a problem. The owners have currently used it as a vacation spot but now want to move up and need year-round living space. Their plan is to build a home on the lot and use the one cabin as a guest cabin. She wanted to be sure that it was okay for them to have an auxiliary structure for family members and that it was okay to move the cabin they want to use for the auxiliary structure.

Jan Green read the definition for a guest cottage: it is a non-commercial dwelling for temporary guests.

Yvonne Rutford felt that as long as setbacks are met, there is not an issue.

Sue said that they have been coming up for more than 50 years. They have tried to establish the property line to east and have also tried to buy more land.

The Commission felt that this use complied with the Ordinance and it would not be a problem.

Concerns from the Audience

There were no concerns from the audience.

John Kessler reported that the last few inquiries he has had have been for dwellings, not accessory structures.

Jan Green requested that everyone on the Commission be provided with a list of Commission members, including phone numbers, addresses, etc.

Yvonne Rutford put together a draft copy of what the Community Participation Report should look like to be included with the Conditional Use Permit application package. Everyone thought it looked good and it was agreed to add it to the application package.

It was moved to adjourn the meeting and the meeting adjourned at approximately 9:40.