

**Town of Duluth
Planning Commission
Approved Meeting Minutes
6/24/10**

The meeting was called to order at 7:03 p.m.

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

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 May were approved without changes.

Public Hearing for remanded Bieraugel variance request

Mike Kahl, Vice Chair of the Commission, took over the hearing as Dave Chura recused himself due to the fact that the property in question is near his property.

Mike began by reading the communication agreement.

Sue Lawson had everyone involved in the hearing introduce themselves. She then introduced the Bieraugel's variance request and reviewed the hearing process. The zone district the property is in is SMU6. As defined in the Ordinance, this district is intended to provide residential and mixed uses consistent with the recreational and natural attributes of Lake Superior, on a suburban-scale lot size. She presented the requirements of this zone district and compared those requirements to the proposal. The minimum lot size is 2 acres and their lot is 1.85 acres. The minimum side yard set back is 35 ft and their proposed set back is 38 ft. The minimum road set back is 110 ft and their proposed road set back is 71 ft. The shore set back is 125 ft from the top of the bluff and their proposal is for 76 ft. The maximum lot coverage is 25% and their proposed lot coverage is 4.8%.

The Bieraugel's original request for a variance for this property was heard in 2008. A number of things have been changed in this most recent variance request. The lot size is the same. The side yard set back has been increased. The road set back was 110 ft, but is 71 ft in the current application. They originally wanted to build closer to the shore and planned on a revetment on the shore, in the process removing 2,082 cu yds of material and hauling in a 1,000 cu yds of rock. They were also going to move the drainage/stream. In addition, the amount of impervious surface has been reduced from the earlier request.

Mary Tietjen, the MAT (Minnesota Township Association) lawyer representing the Township in the matter reviewed how the Bieraugel's variance request ended up back with the Township. The Planning Commission originally heard the variance request in the summer of 2008. At that hearing, the Commission denied the variance under the undue hardship standard. The Bieraugels challenged the decision and the district court judge remanded the matter back to the Commission to rehear it using the practical difficulty standard. There are 6 factors to consider under by practical difficulty:

1. How substantial the variation is in relation to the requirement;
2. The effect the variance would have on government services;
3. Whether the variance will effect a substantial change in the character of the neighborhood or will be a substantial detriment to neighboring properties;
4. Whether the practical difficulty can be alleviated by a feasible method other than the variance (economic considerations may be considered);
5. How the practical difficulty occurred, including whether the landowner created the need for the variance; and
6. Whether, in light of all of the above factors, allowing the variance will serve the interests of justice.

However, today the Minnesota Supreme Court issued a decision regarding the legal standard that should be applied that may have a bearing on this hearing. Mary recommended going ahead and holding the public hearing and then delaying the decision until it can be determined if the decision affects this case. She will go back to the district court and ask if they want to change their ruling in light of the Supreme Court's decision.

At a minimum, the lawyers for both sides should have chance to read it and discuss it and decide if it applies in this case. We can get an extension under the 60 day rule to 120 days.

Sue showed the site plan – there is essentially not a building envelope if you follow all setbacks. So they are requesting a setback variance from the road and a variance from the shore setback. The building plan is 24 by 48 ft with a 16 by 24 ft carport.

Huck Andresen, attorney for the Bieraugels, spoke next. The variance request they are presenting tonight is amended from their previous request. The Bieraugels purchased this property many years ago and had a building permit for it then. They put a septic system in and elected not to build at that time. Then two years ago, the Bieraugels came in and applied for a variance to build on the property. That variance was denied by the Commission. The Township Board of Adjustment (BOA) upheld the denial. The Bieraugels then took the matter to district court. The court decided that the Township had not used the proper standard to decide the variance and remanded it to the Planning Commission to hear again under the proper standard.

In the meantime, they have had numerous meetings and conversations with the Township to try to work out a plan that was more agreeable to everyone. Their first request was for a variance from the required setback from the shore. The amended variance request is for three variances. Because they moved the house back from the shore, they need a variance from the road setback in addition to a lesser variance from the shore setback. They have altered the plan so that they will not have to change the drainage on the site. The trees will remain along Highway 61, screening the home from the highway. It was not until the first hearing that they realized the lot size was not 2 acres. The lot was originally a part of a larger lot that was divided and it was thought at the time that both lots were buildable.

They have shrunk the footprint and added a carport instead of a garage. They felt that they made it as small as they possibly could and still be livable and salable. There is no other location on the property where the home could be sited. The current location is the only location that would work. There is currently an old house trailer there which will be removed. The mound septic system will be removed and they will hook up to North Shore Sanitary District. They believe what they have proposed is fitting with the Township's Comprehensive Land Use Plan (CLUP). Huck does not think that the new Minnesota Supreme Court decision will apply in this case. There is no reason that the Commission cannot approve the variance tonight under either of the

legal standards. They do have the prerogative to delay the decision, as Mary said, until they have a chance to find out if the new ruling has bearing on the case.

He wants to be sure that everyone realizes that even though they are asking for more variances, they are no longer asking for the large variance from the shore setback, so the project no longer requires the revetment and lakeshore alteration. The proposed use of the land does not change the character of the neighborhood. There is no burden on public services. No matter which standard you examine it under, this proposal is acceptable. If the proposal is turned down this time, he said, the Commission is essentially telling his client that the lot is not buildable. The Bieraugels are only trying to exercise a fundamental legal right to put the property to reasonable use. Huck said that some of the comments regarding the project have not had the facts straight. He said that the amended plan is honest and forthright and he urged the Commission to support it.

Yvonne Rutford asked which facts were not correct in the comments received from the public.

Huck said that among the comments they received was one letter in particular that had inaccuracies. They said that the Bieraugels bought the lot knowing that they could not build on it. That is not true -- they had a building permit for it. They also stated that the court denied the original variance request in 2008. That is not true either. The court remanded it back to the Planning Commission. They also said that the structure would be highly visible from the beach and would necessitate some kind of wall on the beach. This is not true either. It concerns him that even though this is only one letter, it could be indicative of how much misinformation is out in the community.

Barb asked about the stability of the bluff. Has any testing been done to evaluate its current slump rate? She is concerned, not just for the Bieraugels, but for future owners. If they were going to live in that house for 50 years, would it still be stable?

Huck said that they wouldn't be bringing the proposal before the Commission if they didn't believe it would be stable. They had Kreck & Ojard do testing at the site and they felt it was stable. They did not have additional soil engineers come in.

Brigid Pajunen said that there is a lot of interest in smaller homes now and it seems as though they could build something smaller.

Huck said that the structure would be well under 2,000 sq ft. Anything smaller would not be viable.

Brigid asked if the Bieraugels will live there, and if not, who will?

Huck said that they once planned to, but not any longer. They don't know who will end up living in the home. He said the site cannot be sold without the capability of building on it.

Mike Kahl asked if there are any potential problems because of the small size of the lot --impacts to the neighborhood or problems hooking into the sewer system.

Huck said the architect and the engineers have looked at the site have not seen any problem.

Barb asked Huck to elaborate on why they believe the proposed project is good for Duluth Township.

Huck said that it is small and unobtrusive, and fits with the character of the existing neighborhood and with the intent of the CLUP. That is what the Township is looking for.

Huck called on Tony Vatalero, a realtor who lives in Normanna Township and sells rural property. He has looked at the property and looked at the drawings. He said that a footprint of less than 1000 sq ft would hinder the salability. In addition, a one car garage is an impediment. The marketability of anything less than what they have proposed would be greatly injured.

Public testimony—

Phil Meany, 5671 North Shore Drive, had already submitted a letter to the Commission (see attached). He wanted to emphasize that the words “erosion hazardous area” were put into the Ordinance to help people make intelligent decisions regarding building on these types of properties. The setbacks are there not as roadblocks but to help people make sensible decisions. He said that they have had experience with the lake and have had to move their house away from it. You don’t come to that decision lightly. If you don’t have room to move your house, you lose it. He said that they have done a lot of digging for various projects over the years and there are a lot of sand/clay combinations that run through the bluff. That is why it’s a hazardous area. You dig a hole and the water rushes into it. You don’t know where these are without core drillings. He believes that the site is not buildable and does not think the Commission should approve the variance.

Gary Zim, 5665 North Shore Drive, lives across the street from the proposed project. He noted that one of the 6 points the Commission was supposed to consider in this decision was to preserve the existing neighborhood. He wants to maintain the wooded character of the area and a tree screen is not enough to preserve that character. How many trees will there be between the structure and the road? He wants to know exactly what kind and how many trees are going to be left versus a promise of leaving trees. This may be outside of the Ordinance, but he feels it should be a factor in the Commission’s decision. The fact that they originally had a permit to build – this was at least 30 years ago. His understanding of State Statutes is that if a property is affected by laws that are enacted after the acquisition of the property, the property owner is supposed to be compensated. He thinks the Commission should consider whether or not the Township wants to own the property just because some neighbors don’t want it to be developed. He also thought that flow analysis should be done. Is the setback based on fact or based on an arbitrary number without an understanding of what the soil type is like at the location and how the water acts on the land at the location? Will this structure remain standing here over the next few years or will the waves be at the foundation level? Also, how can you prevent a future owner from cutting down the trees? There is a tendency to look at things that if you own a property, you don’t want anyone else impinging on it. If that’s the way you feel, you should have bought the lots. You can also have situation on an empty lot where trees are dying and decaying. A lot depends on what the landowner and future landowners there do.

Mike said that it is about 71 ft from the centerline of the road to the edge of the carport.

Gary said that his understanding is that a person’s property begins 30 ft from the center of the road and 40 ft is a reasonable buffer.

Huck said that there is a natural buffer of trees there already. The Commission can put a condition on the permit to preserve that buffer.

Phil Meany asked if there is a well on the property.

Huck thinks there may be one, but is not 100 % certain

In summary, Huck said that they have tried to answer questions and concerns. It is a good plan and it is small and fits with the neighborhood. Please keep it separate from the last variance request, because this one is different and better.

Close of public testimony.

Yvonne moved to postpone making a decision until counsel has had time to review the State Supreme Court decision and see if it has implications. Barb seconded. The motion was approved unanimously.

Bill suggested that any new members who were not on the Commission for the 2008 hearing visit the site before making a decision.

Yvonne had a question regarding the implication of date of purchase of the property ca.1981 and the fact that they had a building permit at that time. Since then, the Township has adopted the CLUP (2002) and updated the Ordinance. The building permit would have expired in one or two years.

Mary said that the fact that a building permit was issued shows that they did not have a sense that the lot was unbuildable. But it does not necessarily give them permanent vested rights to build. It is long ago expired.

Brigid asked why, if they don't intend to live there, they want to build and sell? Why can't they just offer if for sale now – the value of the property has surely increased.

Tony Vatalero said that the lot is not saleable without a variance to build.

Huck said that the law says that a person has a right to use their property in a reasonable manner.

Sue said that in answer to the question about vegetation, on page 57 of the Ordinance, pertaining to Lake Superior Shoreland, it says "Removal of natural vegetation... is restricted and limited to the following: a. The removal of dead, diseased, dangerous, and storm or fire damaged trees, shrubs, and plants." and "b. The trimming and pruning of trees, shrubs and plants."

Barb felt that the aesthetic concerns regarding the property could be addressed. Her primary concern is the property's location in the erosion hazard zone. The requested variance from the shore setback is substantial – from 125 ft to 76 ft -- about 40%. Without an evaluation, they cannot know the erosion rate of the bluff line. Even with an evaluation, the lake is unpredictable and we have no way of knowing the erosion rate of the bluff line. Her concern is not the monetary inconvenience to the Bieraugels but to protect future owners of the home that will be built and to protect the Township from any culpability for problems that future landowners may have resulting from our granting of the variance.

Bill agreed with Barb. He noted that the State recently sold 3 unbuildable lots on the lake to the public. What will happen with those?

Dave Mount asked that if the Commission were to approve a variance, not necessarily this one, what exactly would be approved -- the building footprint?

Sue said that the Town issues land use permits dictating how the land is used, not what the structure looks like. It is permission to set the residence on that piece of land with these setbacks. They are asking for variances from the road setback, the shore setback, and the lot size.

Mary said that conditions could also be placed on it regarding trees, etc.

Sue said that language regarding vegetation is already in the Ordinance and we don't need to further dictate that.

Dave Mount said that other reasonable restrictions could be set to insure that the execution of the variance fit with the intent of the CLUP. The Commission needs to understand that this is an option. Think beyond just the numerical setbacks and think about all of the parameters that would need to be met to insure that it complies with the CLUP. They could build a structure with a different footprint that would meet the setbacks. We are not designing the home, but if size, orientation, etc. of the structure are important to approving the variance, they should be included.

Sue said that another way to consider it is if the setbacks, as determined by the Ordinance and any variances, are met, does it matter what the footprint looks like?

Mary said that whatever they build has to be within the parameters of the setbacks that are approved. Theoretically, someone could build something else as long as it is within those setbacks.

Huck said that they put the plan together after having lots of back and forth with the Township. They put a 1000 sq ft footprint together and are not planning on changing that. It could be tweaked a little, but it is the basic outline of what is going to be there.

Brigid asked if it is true that without a variance there is no possible way to build on that lot.

Dave said yes, the setbacks as they are in the Ordinance, without variance, overlap each other, leaving no place to build.

Barb asked if in 1981 the 1976 Ordinance applied? What were the setbacks in that Ordinance?

Sue said that the building permit appeared to be just a straight up building permit.

John Bowen said that before 1991 when the NSMB came into being the minimum lot size was 1 acre. NSMB doubled this size. The intent was that if you had a lot of record at that time, it would be considered buildable. You would still have to get a variance for the setbacks, but he doesn't think they should have to get a variance for the lot size.

Mike said we need to set a date to continue the hearing. He suggested the next monthly meeting on July 22.

Mary said that if we determine that we need to go back to the district court, we may need more time than that. But we should know that by the next meeting.

Dave Mount suggested that we can put out an announcement on the website with information about when the decision will be.

Mike closed the public hearing.

Planning Director Report

Sue said that permits continue to come in.

The Cheryl Erickson, the DNR person for Mcquade Safe Harbor, contacted her about putting an interpretive sign for the Harbor on the Township side of the Harbor. What would the setbacks and other requirements be? Sue said that the area where they want to place the sign is land that was created when the Harbor was built. She and John will be meeting with her.

A letter was sent to Sue, Dave Chura and Dave Mount from the Mittlefehldts signed by 22 people on Greenwood Road saying “We the undersigned expect the Township to enforce the conditions and the rules that were established when the CUP was allowed. The conditions of the CUP have been violated. The CUP must be terminated. The Township has an obligation to its residents.” The letter mentions the Hells Angels problem they had there last summer.

Dave Mount recalled that their CUP specifies a maximum of 6 renters and there were 8 renters there. The Wordens or their caretakers were notified and it was corrected. One of the issues that has been discussed in the past concerning this property is proportionality and reasonable time to correct. It was his understanding that it is not simply whether a condition is violated, but also the scope and nature of the violation and the reasonableness of the response.

Sue said that a number of letters have been sent to the Wordens and they are aware of the issues. The way the conditions are written and the way the Ordinance talks about this, you tell them they violated something and they have a set time to correct it, and this happens repeatedly. At some point there has to be a decision to follow up and get some legal advice.

Dave Chura asked if we didn't still have to option to have a hearing to revoke their permit.

Sue said that the Commission does not have to be involved, that the Town has the authority to revoke their permit. The Town is the enforcing agent.

John said that you need to talk to law enforcement to find out what went on. The information the Wordens and Mittlefehldts provide is not always as black and white as they present it.

Dave Chura said that other options the landowner has are they could potentially sue the property owner or they could sue the Township to enforce.

Sue said that there is something like this where they could go to court asking the Town to enforce the Ordinance, however it would have to be something that was very clear, not something arbitrary that the Town may or may not do.

Dave Mount said that the Town Board would welcome any recommendations from the Commission on what, if any, action should be taken. There is an issued permit and one well-documented violation of a condition. It has nothing to do with allowing or not allowing STRs.

Dave Chura said that we could consider having a hearing on revoking the Conditional Use Permit. It would give all vested parties a chance to speak. The Commission could then make a recommendation to the Board.

Sue said that was not within the scope of the Commission's duties.

Dave Mount said that so far, there has been no hearing to revoke the CUP, just a letter from Sue.

Bill noted that if not for this particular STR, the Commission would not be constantly revisiting the STR issue.

Dave Chura said that twenty-some members of the Township have spoken out on the subject and we cannot ignore that.

Barb suggested that we have a public meeting with mediated discussion, not a hearing. She thought a hearing would verge on harassment of the owners of the property. We don't know how much of this is true. At a minimum, we need to document what has happened.

Everyone agreed, saying that we needed to have some kind of structured meeting to allow concerned parties to speak. It was thought that a strong mediator would be necessary, and that we might need to hire a conflict resolution professional.

Dave Mount said that the STR permit for that property was revoked once by Sue, but the BOA reversed that decision based on a technicality.

Dave Chura said that we need to either tell the Mittlefehldts that we are not interested in pursuing it anymore and they can take their case elsewhere – to the Town Board or to court -- or we can give it one last shot.

Dave Chura read from page 77 of the Ordinance, IX.6.G: "Conditional uses with conditions will be reviewed periodically by the planning Commission. Where such a use does not continue in conformity with the conditions of the original approval, the permit shall be terminated and such non-compliance shall constitute a violation of this Ordinance."

Yvonne said that enforcement calls for notifying the Wordens about infractions.

Barb suggested that we call an investigative meeting. A number of enforcement actions have been taken – both by the Town and by the police. We need the records of these. We can look at what we have on paper and then send a letter to the Wordens saying that we have reviewed their compliance with conditions and this is what we have. They must then either comply or have their permit revoked. The letter does not need to be open to neighbors.

Sue agreed, but said that getting actual facts can be very difficult. Often the facts involve a degree of opinion. The Mittlefehldts have kept track of the violations that they have observed.

Dave Chura suggested that the public also be invited to bring their documentation.

Bill thought there was no sense in stirring the pot by bringing a lot of people in to give opinions. But if there have been violations, document, document, document. If they step outside the box, revoke.

Dave Chura asked Commission members to think about it between now and the next meeting and we will decide what to do then.

Yvonne said that we need to ask the Mittlefehldts for their documentation. She doesn't want to discount what they have documented. However, we are in a better place legally if we look at the documentation of Sue's interactions regarding the rental and interactions documented by the Township police.

Dave Mount said that he has spent a lot of time talking with the Mittlefehldts. They have issues with their property lines, also, as well as trespassing and theft of "No Trespassing" signs. These are legal matters that are not pertinent to the STR, but they don't always recognize that these are not permit issues. Other allegations that could be relevant include garbage management, and noise during quiet hours. It is difficult to take action on these matters because we don't have any information other than what they are telling us.

Bill asked if we can get any documentation pulled together for review at the next meeting.

Dave Mount asked if we can let the Mittlefehldts know what we are doing. We need to respond in some way.

Chair report

Dave said that he appreciated all the work Barb did on the STR conditions. He asked that everyone take a look at them and possibly discuss them at the next meeting.

Sue said that there could be a hearing at the July meeting for a Conditional Use permit for a wind generator with a 50 foot guyed tower on a 20 acre property at 6412 Bergquist Rd. The generator is a Whisper 200 wind turbine, will be 100-135 ft from the house and 240' from the nearest side yard. It is possible that mature trees would hide the tower, depending on the age of the vegetation.

John Kessler said that we are waiting on a better diagram from him to complete the application.

It was decided to go with a ½ mile radius for the Community Participation Report and for neighbor notifications.

Yvonne asked if we could postpone any decisions on wind generation until we get the language sorted out.

Sue said that we have already gotten the application. There is no moratorium in effect and we can't really delay based on a need for more information from ourselves, only if his application is incomplete.

John said that the Ordinance has perfectly adequate language to decide this one. The new Ordinance won't be out until next year.

Sue said that she will write him a letter telling him what we need and letting him know that we will be providing a list for his CPR.

Adjourn 9:50.