

**TOWN OF DULUTH
ST. LOUIS COUNTY, MINNESOTA
TOWN BOARD/BOARD OF ADJUSTMENT**

**DECISION ON APPEAL FROM PLANNING COMMISSION
REGARDING 5249 GREENWOOD ROAD (EDWARD AND SHAWN WORDEN)**

The Duluth Town Board, sitting as the Board of Adjustment (“BOA”) pursuant to the Town’s zoning ordinance, heard an appeal by Edward and Shawn Worden regarding the Town Planning Commission’s decision to terminate the conditional use permit (“CUP”) for their property located at 5249 Greenwood Road. Hearings were held on November 10 and December 8, 2010, and January 25, February 3, and February 17, 2011.

Issue Regarding “Grandfathering”

The Wordens claim they were engaged in short-term rental at the property before obtaining the CUP, and argue that short-term rental use was “grandfathered in” and so cannot be regulated as a CUP. The Wordens made that same argument previously in BOA proceedings in September 2008 and March 2009. The BOA rejected that argument in both proceedings. The primary rationale was the Wordens applied for a CUP in late 2007, the Planning Commission issued the CUP in January 2008, and the Wordens had the right under the Zoning Ordinance to challenge the CUP or its conditions, if they so desired, by making a timely appeal to the BOA within the timeframe allowed by the zoning ordinance. They did not commence a timely appeal. Instead, they accepted the CUP and its conditions, have operated pursuant to it for three years, and successfully defended the CUP against an earlier Planning Commission revocation.

It is too late for the Wordens to challenge the January 2008 CUP, and this appeal is not and cannot be considered as an appeal from the issuance of the CUP in January 2008. Additionally, as the BOA observed in September 2008, even if the use was “grandfathered in,” such uses can be subject to reasonable zoning regulations pursuant to a CUP.

Issue Regarding Fee for Appeal to BOA

The Wordens claim the \$1000 fee to appeal from the Planning Commission’s decision is excessive.

Fees for administering zoning approvals “must be fair, reasonable, and proportionate to and have a nexus to the actual cost for the service for which the fee is imposed.” Minn. Stat. 462.353, subd. 4. The \$1000 fee has such a nexus. It costs the town \$395 for the Board to meet, and there are expenses for publication of notice, administrative time, and legal services. The expenses of this appeal, involving five meetings of the BOA, will exceed \$1000 by a considerable amount, and most BOA appeals result in costs and expenses in excess of \$1000.

Issue Regarding Notice of Planning Commission Review

The Wordens admit they received notice that the Planning Commission was going to review their CUP, but claim they did not realize the Commission might, in the course of reviewing their CUP, revoke it. During these BOA hearings the Wordens were allowed to present evidence and make arguments about whether CUP violations occurred and, if so, what the appropriate remedial action should be. *If* there were deficiencies in the Planning Commission's notice—and the BOA does not concede that—those have been rectified by appropriate notice and an opportunity to be heard in the course of these BOA proceedings.

Issue Regarding Alleged Conflict by Planning Commission Member

The Wordens claim a member of the Planning Commission had or may have had a conflict of interest and should have recused himself from the Commission's proceedings. But the Wordens have been able to present their evidence and arguments to the BOA about whether there were violations and, if so, what the appropriate remedial action should be. *If* the Planning Commission member had a conflict of interest and *if* it required recusal, that member has not been involved in the BOA proceedings and any alleged conflict has been rectified by the BOA conducting these hearings and making its own decisions upon the issues.

Issue Regarding Time for Appeal from Planning Commission to BOA

The Wordens claimed the Planning Director's September 7, 2010 letter informing them they had fifteen days in which to appeal the Planning Commission's decision was incorrect and that the Zoning Ordinance allows thirty days for an appeal. But the Zoning Ordinance was amended in 2009 to allow a fifteen day appeal period (Art. XIV, Section 3 (A) (1)) so the letter was correct. The timeliness of their appeal has not been an issue here.

Issues Regarding CUP Violations and Appropriate Remedial or Enforcement Action

As to the merits of the appeal, there are essentially two issues: (1) were there violations of the CUP and, if so, (2) what is the appropriate remedial or enforcement action?

The BOA finds there were violations of the CUP. Condition 8 says "[t]he total number of occupants at one time is limited to six (6) which corresponds to two people per bedroom." There were at least two occasions when more than six occupants stayed overnight at the property. Condition 8 says "[q]uiet hours from 10:00 PM until 7:00 AM will be posted and adhered to." Although the testimony and evidence about violations of quiet hours was less concrete than that about occupancy-limit violations, it is apparent there have been some violations of the quiet hours restrictions.

The Zoning Ordinance and the statute under which it was adopted both provide that a “conditional use permit shall remain in effect as long as the conditions agreed upon are observed.” Art. IX, Section 6 (D); Minn. Stat. 462.3595, subd. 3. The BOA does not believe this means a CUP must be automatically terminated if there is a violation, and believes it has a reasonable discretion when considering the appropriate remedial or enforcement action for a CUP violation.

The appropriate remedial action here presents a difficult question. In considering the appropriate remedial action the BOA has weighed a number of factors.

There are factors which would justify revoking the CUP, as the Planning Commission did, and those include the following:

1. The Wordens have argued at times, in essence, that the Town should have been more active in conveying complaints about violations to them. That is not the Town’s responsibility or function. The Town does not have the desire, resources, or ability to manage the Wordens’ property for them. It is the Wordens’ responsibility to see the CUP conditions are obeyed.

2. The violations to a large extent are a management problem. The Wordens live in Litchfield, are unable to exercise much effective day-to-day direct management, and have very little face-to-face contact with their renters. Their local contact person provides some oversight of the property.

3. In their appeal brief, the Wordens write, “[I]t is impossible for the operator of a short-term rental based out of a single-family residence to be at the property at all times to ensure that all rules or regulations are observed.” This appears to at least implicitly concede the business cannot consistently operate in accordance with the agreed-upon conditions in the CUP and that future violations are likely to occur.

4. The conditions that were violated are important ones. Too many renters or excessive noise before 7:00 in the morning or after 10:00 in the evening is disruptive of this primarily residential neighborhood.

5. Those conditions cannot in and of themselves be modified in a meaningful way. The BOA does not believe it can, in fairness to the neighborhood, amend the CUP to allow more renters or decrease the hours for quiet time.

6. The Wordens’ CUP was previously revoked in June 2008 but the BOA set aside the revocation in September 2008 concluding, in essence, that although there may have been violations the Wordens had substantially complied with the CUP conditions. That previous “second chance” makes it more difficult for the BOA to now allow a “third chance.”

However, there are countervailing factors that argue against revoking the CUP. Those include:

1. The proven violations involve a relatively small number of occurrences, especially in light of the property being rented since January 2008.
2. Some of the violations or alleged violations complained about by the neighbors were not shared with the Wordens or their local contact person at or near the time of their occurrence but, instead, were first brought to light during the Planning Commission's 2010 review of the CUP. It is difficult for someone to attend to a problem if they are not aware it is occurring. The Wordens have the responsibility of monitoring their property. That said, if the neighbors had addressed their complaints initially to the Wordens or their local contact person the violations and alleged violations might have been addressed in a more meaningful fashion.
3. As noted previously, much of this appears to be a management problem. Monitoring the property and its renters more actively, either by the Wordens or their local contact, personally meeting with them, and instructing and emphasizing to them the existence and importance of restrictions such as quiet time and occupancy limits might prevent or at least decrease future violations. Similarly, establishing better communication or avenues for communication from the neighbors (or others) to the Wordens or their local contact would be helpful.

The CUP conditions were and are an attempt to strike a reasonable balance between the Wordens' legitimate desire to operate a short-term rental business and the neighboring residents' legitimate desire to avoid undue disruption from those business activities. It would not be unreasonable to conclude, as the Planning Commission did, that the CUP should be revoked. The BOA believes a more reasonable enforcement action is to amend the CUP to add conditions. The additional conditions are intended to create more control and supervision over the property, put it on a more "professional" basis, increase the role and responsibilities of the owner and local contact person in meeting with, educating, and monitoring renters, make the owner and local contact person more accessible to neighborhood (or other) complaints, and more active in responding to, resolving, and documenting complaints.

Accordingly, it is ORDERED:

1. The short-term Conditional Use Permit for 5249 Greenwood Road (Lot Five (5) Block fourteen (14) Greenwood Beach, Duluth Township) is amended.
2. The document attached hereto describes the additional conditions for the Conditional Use Permit.

3. The BOA Chair, Clerk, and attorney are directed to attend to drafting, filing, and recording such papers as are necessary to amend the CUP in accordance with this decision and its attachment.

Dated: _____, 2011

TOWN OF DULUTH
BOARD OF ADJUSTMENT

By:

Dave Mount
Chair

I hereby attest that the above is a decision of the Duluth Town Board sitting as the Board of Adjustment, duly made on _____, 2011.

Ann Cox
Town Clerk