Monday, September 9, 2019 6:30 PM
CITY OF MINNETONKA BEACH
BOARD OF ADJUSTMENT AND APPEALS MEETING MINUTES

Roll Call: Chair Jaci Lindstrom, Board Members: Tracey Breazeale, Susan Enlow, Steve Howarth, and Andrew Myers.

Staff Present: City Administrator Susanne Griffin, City Clerk Heidi Honey, Zoning Administrator Phil Carlson, City Attorney Justin Templin

1. Mayor Lindstrom called the meeting to order at 6:30 p.m.

2. New Business – Administrative Appeal dated October 19, 2015 submitted by Nell Mathews and Max Hacker (Mathews Hacker v. City of the Village of Minnetonka Beach)

Lindstrom provided a brief summary as follows. In August of 2015, the former property owners at 2637 Arcola Lane replaced a deck with a patio. City staff determined that only a grading permit was required under City Code. Nell Mathews and Max Hacker, owners of the neighboring property, appealed the staff decision, challenging the staff's interpretation of city code related to patios, setbacks, and hardcover. The Council, sitting as the Board of Adjustment and Appeals, denied the appeal.

The appellants sued the City. The Hennepin County District Court granted the City's motion for summary judgment on all counts. Appellants appealed that ruling to the Minnesota Court of Appeals. The Court of Appeals affirmed the District Court judgment on all points except one. The Court of Appeals found that the City should have provided the Planning Commission with an opportunity to review the matter before the Board of Adjustments made a decision. The Minnesota Supreme Court declined the appellants petition for review of the decision, which means that the Court of Appeals decision was the final order in the litigation.

The City's litigation counsel informed the Planning Commission about the case and provided the original 2015 packet of materials. The Planning Commission met and unanimously concluded that the City's former zoning administrator Ben Gozola's 2015 report and analysis was reasonable and recommended that the Board of Adjustments and Appeals accept his conclusions.

Zoning Administrator Carlson stated that this is a continuation of the appeal process of the Zoning Administrator's decision in 2015. The part of the process that had been missing was that the appeal should have gone before the Planning Commission. It was recently considered at the Planning Commission meeting August 26, 2019. Carlson reviewed Gozola's report for that meeting and found Gozola's decisions and nine findings to be reasonable given the facts and city ordinances at that time. Carlson recommended that the Planning Commission uphold Gozola's decision. He then stated that the timing of deck removal and replacement within a year to replace the non-conforming hardcover was covered in Gozola's report and the District Court summary and ruling. He went on to state that the District Court ruled that Gozola's interpretation of the facts and city ordinance was reasonable. Carlson agreed with that as well. He recommendation was for the Board accept Gozola's findings and his interpretation as reasonable and uphold the decision to deny the appeal, as stated in Carlson's report in the packet dated September 9, 2019. Carlson then answered questions about hardcover and setbacks.

Nell Mathews, 2643 Arcola Lane, stated that the Board is considering their appeal from 2015 because the Court of Appeals has reversed the previous Board of Adjustment and Appeals decision and referred it back. She explained that the property has been owned by three different owners over the last five years and there have been changes in people involved in the process. The first owners illegally removed the deck and did not simultaneously obtain a permit for replacement, the second owners started installation of a patio without the appropriate permits, and the planning consultant no longer works for the city. She stated that the city attorney who advised the Board in November 2015 and Mr. Carlson did not look at the underlying facts. The zoning ordinance has changed but the Board needs to apply the previous zoning ordinance to their decision.

Mathews discussed that the lots are narrow and the project should have been discussed with the neighbors. Mathews then stated all surveys were after the fact and it was assumed that the removed deck could be replaced with a nonconforming patio without a variance. She stated the city's former consultants should have monitored this more closely and should have enforced the ordinances. She is asking the board to fix the mess by granting the appeal.

She then discussed the Board's decision in 2015 stating Gozola recommended dismissal of the appeal and the Board deferred to his recommendation based on his expertise and no examination if he was correct or gave complete facts. Based on that, Mathews does not think the Board did its job. She went on to say this appeal is an administrative decision and that this Board needs to look at the underlying decision because deferring judgement of the decision maker, then the appeal is pointless. She also stated that Gozola did not address or identify issues in his report: if the applicant correctly measured pre and post pervious surface area, if the applicant correctly counted the deck impervious surface coverage, and if the simultaneous permits required by the previous ordinance were issued. She then stated a previous Board member Bartel would have approved the appeal if this information was presented. She also said the Planning Commission did not analyze the merits of the appeal, they adopted Gozola's recommendation based on Mr. Carlson addressing the reasonableness of Gozola's recommendation but not if it was correct. It undermines the purpose of the administrative appeal which was for the Board to decide if the decision was right or wrong, not if the decision maker acted reasonably. She then stated that they are entitled to a decision based on the merits. The project should have required a variance and their consultant planner agrees with that based on the old zoning code. She asked the Board to grant their appeal and rescind the approvals for the project.

Santiago Abraham, 2637 Arcola Lane, stated that they bought house in part due to the patio and have no interest in changing it. When they purchased the home, there was no lawsuit pending, no disclosure of a pending lawsuit, and the house sat on the market for 10 months with no lawsuit. A lawsuit was filed a month after they bought the house. Since then, they have spent thousands of dollars defending this and believe it is a frivolous lawsuit which has caused them a lot of stress. He believes the city has incurred $165,000 in legal fees and spent a lot of time on it. He stated that all relevant facts have already been presented and deemed reasonable by the prior and current zoning administrators, the prior and current city attorneys, the 2015 Board of Appeals, the District Court and reaffirmed by the Planning Commission last month. The Appeals Court stated they affirmed the District Court except with regard to whether the city complied with the statutory requirement in determining the appellant's administrative appeal, which meant Gozola presenting to the Board without the Planning Commission authorization.

He then stated the facts that were reaffirmed. The patio was built in 2015. It is under 12 inches and not a structure. It is 75 feet from the lake. It is seven feet from the property line with one section five feet from the property line. The steps were built to the patio in 2017 and the hardcover was reaffirmed then. He recapped the 2015 Board of Appeals and stated it was reaffirmed that the hardcover credit was allowed and quoted from page 5 of the minutes, "Both city code and state statute allow repair, replacement or restoration of the deck as it was removed less than a year ago." The District Court and zoning administrator rejected the claim that the structure was expanded. The decking removed seven months prior was discussed as was the legality of swapping hardcover. The city attorney concurred with Gozola's assessment.

Abraham then recapped the District Court ruling stating the city won on all counts and Mathews again argued hardcover including the prior deck not counting and hardcover credit and lost. Abraham stated the board based its decision to deny the appeal on Mr. Gozola's conclusion that hardcover would be reduced on the site. He then quoted page 33 of the District Court ruling, it states the "Board's decision to deny the Plaintiffs' appeal had a rational basis and was not unreasonable, arbitrary or capricious because it was based on Mr. Gozola's report. Plaintiffs take issue with Mr. Gozola's recommendation, but they do appear to be reasonable interpretations of the facts and applicable ordinances." He went on to say the Appeals Court ruling affirmed on all counts with the one exception and if Mr. Gozola had been officially authorized to represent the Planning Commission to the Board, we would not be here right now.

The Planning Commission corrected the process error in August 2019. At the Planning meeting August 2019, Mr. Carlson reaffirmed Gozola's analysis and his recommendation was sent to the Board of Appeals. He went on to say Mrs. Hacker has a history of misstatements. She misrepresented hardcover increase at the August 2019 Planning meeting. Her attorney stated the patio was on the property line, which it is not. He then stated the misstatements must be corrected to ensure a fair representation of facts and understanding of the situation. He then stated 93 square feet were removed, an as-is survey was completed when the steps were built, he feels his entire yard is a social space, he disagreed with Ms. Mathews comment that, "the Board did not do its job". Mr. Abraham thanked the Board for their time.

Myers went to the Planning Commission meeting where they had a thorough discussion and came to unanimous decision. Howarth reviewed the findings of fact and found it difficult to dispute the decision of Planning Commission. Breazeale reviewed the findings of fact and does not think the decision that was made justifies an appeal. Enlow agreed the matter was thoroughly discussed. She stated that the Landform opinion is based on Mathews interpretation that the patio is a structure but, by code, it is not so the information is not applicable and it's too late to bring it up. She thinks the appeal should be denied.

Myers motion, Enlow second to adopt Resolution 2019-38 Denying the October 19, 2015 Land Use Appeal Submitted by Nell Mathews and Max Hacker Pertaining to an Improvement Project on Real Property Located at 2637 Arcola Lane. Ayes: Breazeale, Enlow, Howarth, Myers. Nays: **none**. The motion carried.

City Attorney Justin Templin stated that this was the last step of the litigation that had to be completed. The Planning Commission had an opportunity to review and this Board had to vote again on the appeal. All steps have been taken and this should close the matter.

3. Adjournment

Myers motion, Howarth to adjourn the Board of Adjustment and Appeals meeting. All ayes, motion carried.

Mayor Lindstrom adjourned the Board of Appeals meeting at 7:04 pm.

PUBLIC IN ATTENDANCE – The following individuals signed the sign-in sheet:

Respectfully submitted,

_____

Heidi Honey, City Clerk