

Monday, October 10, 2023 6:00 PM
CITY OF MINNETONKA BEACH
BOARD OF ADJUSTMENT AND APPEAL MEETING MINUTES

Roll Call: Mayor Joe Pagano; Council Members: Tracey Breazeale, Chris Dovolis, Jennifer Halverson, Jason Mohr; Treasurer Chris Zinn

Staff Present: City Administrator Heidi Honey, City Clerk Jane Burgess, Public Works Superintendent Jason Hilgers, and Zoning Administrator Phil Carlson

1. Mayor Pagano called the meeting to order at 6:01 p.m.

Mayor Pagano explained the process for the Board of Adjustment and Appeal meeting. This meeting will focus on the Paine Appeal and Public Hearing. He thanked everyone for coming, being prepared, and noted that this meeting is a great sign that the process in government and the system is working. Everyone here is making a difference in the betterment of the community.

2. Public Hearing – Appeal the Decision of the Zoning Administrator Regarding a Fence at the Lafayette Club – Appellants: Lindsay and Laura Paine.

Lindsay Paine of 2663 Woodbridge Rd. spoke as the Appellant. He stated that the Lafayette Club operates under a Conditional Use Permit (CUP) in Minnetonka Beach, which means that any improvement or change needs to follow the CUP process. He quoted Carlson's July 20th email, which is a 180 degree change from his June 30th email, stated that the Lafayette Club fence installed near Hole #7 abutting 2669 and 2663 Woodbridge Rd is exempt from the CUP process. It is customary for this type of facility and similar to other fences on the course. Paine agreed that while there are fences that exist between homes and golf courses, but they are not customary. He has seen fences playing golf all over the country, and he has never seen a fence like this that obstructs the view of nearby homes of a golf course. He added that this fence is unique not customary, as it obstructs and abuts residential properties on a golf course. Paine stated that there is nothing like this on a golf course. Every other project, fence, or change at the Lafayette Club has done has required an amendment to their CUP. This has been their past practice so this fence should not be an exception. Paine stated that the Planning Commission unanimously voted to recommend that this project for proposed use at the Club should follow the CUP process with an application, zoning administrator's review and recommendation, and the Planning Commission's review and recommendation with includes, importantly, public input. The City Council then reviews Planning's recommendation for consideration. This process is the core of the CUP under which the Lafayette Club operates in our community.

Zoning Administrator Carlson stated that this issue comes down to a few key provisions. The Planning Commission in their discussion pointed to the fact that with the CUP process, any change in the permit needs to follow the process. However, fences do not require permits in Minnetonka Beach. A fence can be put up as long as the Zoning Ordinance rules are followed. Carlson stated that among the Zoning Code rules it states that, "Fencing for a recreational facility is exempt from those rules." The one recreational facility in the City is the Lafayette Club. This fence meets the height limit and meets the customary fencing for that type of facility and is exempt and it is as though those rules were written for the Club. He stated that this type of fencing exists at many other recreational facilities including golf courses. The issue is not if residents like it or not. He added that his job and the Board's job is to interpret the code as it is written. His July letter stated that he interpreted the code to say this is a permitted fence and does not need a CUP amendment.

Lafayette Club – Rita Howarth, past president of the Lafayette Club, stated that the Club was established in 1882 and the golf course in 1889. The Club sits on 40 acres and provides a lot of green space to the

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City. There are 850 members and the Club been a good neighbor in the community. She added that 2.5 years ago, the lot near Hole #7, renamed 2669 Woodbridge Rd., was sold. In 2000, the Club had an agreement with the Sherman's, who owned the lot. Easements were granted to the Lafayette Club which gave use of that lot for golfers. The buyer of the lot, Sven Gustafson, was granted access to the lot to remove trees prior to the City's Tree Removal moratorium going into effect. At that time, the Club's Grounds Crew expressed concerns about golf balls that were landing on that property. The Club conducted a survey and had 8-10 golf members, long-hitting men with low handicaps, and had them hit balls toward the lot and a diagram showed where their balls landed. This determined that where the proposed house would be built the homeowner and home would be in danger of being hit by balls. The head golf pro and another golfer hit balls to see if they could reach the house site and they could.

Howarth added that she and Steve Doyle met with Sven Gustafson, who owned the property, over two years ago. They shared their plans with Gustafson for erecting a safety fence. Gustafson then sold the lot to the Birkholz's. Howarth added that over the last 2.5 years, she and Doyle met with the Paines (of 2669 Woodbridge Rd), and Bill Whiteley (of 2657 Woodbridge Rd.) for various reasons including understanding the easements the Club shared with the Shermans and now the Birkholz's. They discussed the legal evaluation to confirm that the lot was a buildable lot, and the golf balls that were landing in the Paine's garden. Howarth stated that they met with Paines on various occasions about the fence dating back to October of 2021. A temporary fence was erected in 2021 to protect the Club's greens from heavy equipment when Gustafson was going to take the trees down.

She added that less than a month later and future meetings, she, along with Club GM Malsbary and Doyle met with Paine's to discuss the Club's fencing options. She said the Paine's have mentioned several times that they were unaware of the Club's intent. Howarth stated that they have assured the City, the Birkholz's and the Paines, that this fence was a unanimous decision by the Club Board and Lafayette Club management. The sole intent is to protect the property, the people, and Lafayette club members from errant golf ball damage.

Howarth stated that in September of 2021, she contacted Administrator Honey and Carlson requesting guidance for fence options. After two months of communicating with Carlson, Honey, Burgess, Amundsen and Offerman, Howarth stated that at no time did anyone raise a question or concern, based on Carlson's determination, that they could not install the fence. She added that former Mayor Lindstrom was aware of the fence and had spoken to both the Birkholz's and Malsbary about it. Howarth stated that she is actually very surprised that they are at this meeting today. She stated that Honey worked with Paines on the fence issue and had asked Howarth if the original plan was deviated from which Howarth told her that it had not. She added that the project was put on hiatus while they worked through legal issues with the Birkholz's as the Club's cart bridge was on their property. Howarth stated that for more than two years they were granted permission to install the fence. When the Birkholz's decided to sell the property, the Club offered to buy it but that was unsuccessful. Howarth questioned the Planning Commissioner's comment about never seeing fences such as this one on other golf courses. She added that she shared photos of other fences like this and they have a list of other ones. The Club has no intention of putting a fence around the entire perimeter of their golf course – they are only trying to protect that property. Howarth stated that they have been as transparent as possible and have shared their communications over the last few years with Club members, Birkholz's and Paines. She stated that they empathize with the Paines that they don't like fences, but golf balls can pass through that area at any point so that is why the fence is where it is and is the type of fence that it is.

Jacob Saufley of Larkin Hoffman, attorney representing the Lafayette Club, spoke next. He distributed to the Board of Adjustment and Appeal a use table for accessory permitted uses in the City, which was not included in the packet. He stated that the fence is a permitted accessory use and allowed by matter of right, without additional conditions or review. Planning Commission discussed a change of use that

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would have a permit associated with it, which he added is confusing with discussing a Conditional Use Permit (CUP). Saufley passed out a second handout of a land use table from the City's Comprehensive Plan showing the land being used as a county club from the City's Comprehensive Plan. He added that the City's Zoning code states that as well. He disagrees with the Planning Commission's determination that there was a change in use and the Lafayette Club golf course as it still is a golf course.

Saufley stated that the City's Attorney said that when making an improvement in a property subject to a conditional use permit, sometimes there are amendments to CUP's and sometimes there are not. He stated that he feels that the Planning Commission did not understand that, and he disagrees with the commission's comment that a CUP amendment is always made. He stated that this is not right if there is no significant change of use, which he stated there is no change in the operation of the golf course. Saufley added that the Club erected an accessory structure with this fence and is allowed by right to do so as nothing else changed in the operation. Golf is played as usual there.

Saufley stated that at the City's Planning Commission meeting, they discussed with Carlson this chain link fence is not normal or customary for a golf course. Saufley disagreed with that statement and said it is an acceptable protective measure. He added that the City's Zoning code is very clear stating that the zoning administrator has the authority to interpret the zoning code and make technical decisions that are administrative in nature such as this. Saufley stated that Carlson determined that this fence is a minor change and did not require an amendment.

He stated that the Planning Commission also discussed ambiguity in the zoning code. In Minnesota, when confronted by an ambiguous process, you cannot disregard legal advice or a determination by staff unless you have substantial, evidentiary facts stating otherwise. He added that Minnesota law states that when confronted by an ambiguous process, a decision needs to be made that is most favorable to the property owner and most unfavorable to the City. Saufley stated that the Board of Adjustment and Appeal must decide if there is competent material and substantial evidence that Zoning Administrator Carlson was wrong in his decision. He added that Carlson got it very right. The fence meets the standard and should be approved as they are permitted for use in this City. He stated that the Planning Commission based their findings on conjecture, opinion, and not a lot of facts. The appellant made statements tonight that are reasonable but not legally correct in this process including that a CUP needs to be amended for every activity done at the Club. Saufley brought a stack of other prior decisions to the meeting where CUP amendments were required due to the City Code. None of them include fences unless they are part of a much larger project like the City attorney described as a significant change in use. These include expansion of a club house, addition of a patio, tennis courts etc., and in many cases large fences were required so they required a variance due to the magnitude of the project. Saufley concluded that this fence is a "by right" fence, 8 feet tall, and clearly allowed by code. He added that the Planning Commission had a lot of discussion but were not focused on the "right" question which is finding material evidence that showed that Carlson made the wrong decision.

Dovolis asked Saufley about the CUP amendment #2010-37 regarding safety fence installed along the Dakota Trail, if the amendment was necessary, and if that fence set a precedence or not. Saufley stated that every piece of property is unique and every question unique requiring individual review. Dovolis asked for clarification as to why that fence required an amendment unless it was perhaps larger than 8 feet or perhaps the placement of it was an issue. Dovolis added asking if this fence being discussed at this meeting is different in nature than the 2010 fence or customary. Saufley stated that he understood the 2010 fence to be part of the Three Rivers Park bridge construction project. Saufley also stated that if the Lafayette Club and golf course were being constructed today, it may be required that a fence be installed for safety reasons and mitigate risk to the property. Dovolis said this doesn't seem to be a part of a larger project and is a stand-alone item.

Howarth stated the 2010 fence was part of the cart path bridge construction project.

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Council member Breazeale stated that she thinks that a chain link fence was installed as part of the construction of the Dakota Trail project. She recalls that fence installation was to protect the people using the new trail from golf balls, and a CUP amendment was required due to new use of the property. She added that in this case, the land use changed from golf course use to a home development on the lot. The Club should have come forward to see if a CUP amendment was required. Saufley stated that Council Member Breazeale is not correct with that statement.

Saufley replied to Breazeale's comments by stating that she does not understand the CUP amendment process.

The fence is an accessory to use. It is not the fence that drives the conditional use, it's the use that drives the fence. He also added that the 2010 fence was paid for by Three Rivers Park District.

Breazeale stated that when the Dakota Trail went in, the Lafayette Club wanted a fence to protect people on the trail and they applied for an amendment to their CUP for this. This situation 13 years ago was very similar to this one.

Mohr asked how many non-temporary fences have been installed at the Lafayette club – in other words, permanent, since 2010. Malsbary stated that the Club replaced a fence along the driving range in spring of 2023 and extended it by adding 75 feet to the 460-foot fence. This fence is 10 feet tall, black, and chain link.

Dovolis asked if Three Rivers mandated the fence installation in 2010. Howarth confirmed this stating that there was an agreement between the Lafayette Club and Three Rivers dated 9/15/2008. They discussed whether the trail required the fence and Pagano confirmed this from information he received from former Mayor Abdo.

Planning Commission Chair Breazeale spoke stating that the commission was asked if a CUP amendment was necessary to install the fence. He said that their decision for the Club to amend their CUP for this was unanimous and based on facts. He explained Section 632 of the Zoning Code and added that the word customary is subject to interpretation. The commission discussed if a fence like this one is customary. In the 1998 subdivision of this property, it was confusing as this lot is landlocked, and the front yard determination was confusing. It was declared that the front yard faces the golf course. Breazeale researched if on golf courses is it customary for a golf course to put up a fence facing the front yard of a home from the golf course. He stated that golf courses where he plays do not have fences facing the front yards of homes. He added that the Planning Commission discussed that this fence does not meet the definition of customary. He then referred to City Code and explained that because this property has commercial use it does not fall under the same rules as residential properties. Breazeale stated that the City's definition of conditional use is use that after in-depth review and appropriate conditions are provided, then it is determined if zoning allows for this to exist. Also considered with conditional uses is if the structure or land use conforms to the existing neighborhood and land use, and to the Comprehensive Plan while ensuring there is compatibility between the proposed use and the surrounding properties. The code states that any change in conditional use shall require a CUP amendment. The Planning Commission discussed if this fence is this a change in conditional use. Breazeale explained the conditional use process that the zoning administrator collects the relevant information, reviews it to see if it is in line with the Comprehensive Plan, then the request goes to the Planning Commission, then there is a public hearing, Planning's recommendation then goes to City Council who is the only governing body who can make decisions on conditional use. The Planning Commission determined that since the fence is fronting the golf course therefore the fence is the change. As Planning has been working on DNR compliance and updating the City's zoning code this fence, along with the other fence near the driving range, located within the shore impact zone, needs to be reviewed.

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The meeting entered the deliberation phase. Treasurer Zinn cannot vote, and he stated that he had no comments as he was not at the meeting the month prior.

Mohr stated that he had no comments, but he is ready to vote.

Halverson had no comments and was prepared as she attended the Planning Commission meeting.

Breazeale stated that she has concerns when decisions come before the Planning Commission and City Council, she likes to consider the precedence being set for future decisions. She stated that she fully understands that each situation is unique, and this one is about protecting a homeowner from danger. She stated that she would expect decisions made now in the City to be the same decisions made in the future. Council follows this consistency process with variance requests as well. If it was customary that CUP amendment would have taken place in past, then it should be done now for consistency. This issue should have been looked at in that way.

Dovolis stated that although he does not like the fence, he feels that the process was followed properly. They are not using the property differently. Nothing has changed and the Club is the same. He stated that the Club followed the City's rules with no change of use and installed a fence. Clubs usually have fences. Dovolis stated that the Council is tasked to review if the proper procedure was followed. He added that with this particular fence, just because it is not wanted does not show we did not follow procedure.

Pagano stated that what impacted him the most are the three criteria on Table 3-2-1 Summary of the Roles of Decision-Making Bodies included in the meeting packet. They are: the intent of the ordinance, any substantive issues, and procedural issues. Using this as a basis, although not exclusively, #1 the CUP process begins with a decision if an amendment application is required. #2 the determination is made if the amendment is warranted, and #3 determine the stipulations. These ordinances were designed for the Council and Planning to follow the process and come to a conclusion. He added that these ordinances identify who makes recommendations and who makes decisions. As it relates to a CUP amendment, the decision is with City Council who would hold a public hearing, the D column, and the recommendation comes from the zoning administrator, who is the R column. Pagano stated that Carlson did a very thorough and complete review and recommendation. Section 3.2.5 Zoning Administrator B.(3) Review, approve, conditionally approve or deny applications for Building Permits and other administratively reviewed permits or applications as may be required by this ordinance. The intent of the chart is to direct significant decisions of land use to City Council. He stated that he sees the issue that City Council should have made the decision if a CUP amendment was needed at the outset.

Administrator Honey stated that the Council can adopt one of the two resolutions approving or denying the Paine appeal or they can come back in 60 days with a new Resolution to approve or deny.

Dovolis asked if all future fences to be built will automatically follow the CUP amendment process. Pagano stated that all will be treated individually, and the Council will make the decision.

Mohr motion, Breazeale second to adopt Resolution 2023 – 37 approving the Paine appeal to the Zoning Administrator's decision on the fence at the Lafayette Club abutting 2663 and 2669 Woodbridge Rd. Mohr aye, Halverson aye, Breazeale aye, Dovolis nay. The motion passed 3-1.

Follow up action: Add Stipulation of Considerations. Carlson stated that the Board of Adjustment and Appeal voted that the Lafayette Club needs to apply for a CUP amendment.

Dovolis motion, Mohr second approving that the Lafayette Club fence abutting 2663 and 2669 Woodbridge Rd. should go before the CUP amendment process. The City Administrator is directed to

inform the Lafayette Club that they need to apply for a CUP amendment for the fence on hole #7. consistent with original CUP in 1989. All ayes, the motion carried.

3. Adjourn

Halverson motion, Breazeale second to adjourn the Public Hearing and Board of Adjustment and Appeal Meeting. All ayes, the motion carried.

The meeting adjourned at 7:12 pm.

PUBLIC IN ATTENDANCE – The following people signed the attendance sheet: Greg Malsbary, Steve Doyle, Arlyn and Nancy Birkholz, Jeff Breazeale, Lindsay and Laura paine, Sven Gustafson, Rita Howarth, Lori Dovolis, Kim Petersen. There also was a man in attendance who did not sign the attendance sheet.

Respectfully submitted,

Jane Burgess, City Clerk