

APPROVED
Minnetonka Beach Planning Commission Meeting Minutes
August 26, 2019

1. Call to Order

Chair Haag called the meeting to order at 7:04 pm.

2. Roll Call

Present: Chair Haag, Commissioners Anderson, Halverson, Howarth, Naylor. Absent: Breazeale, Vice Chair Moriarty.

Also in attendance: Council Liaison Enlow

Staff in attendance: Susanne Griffin, City Administrator and Phil Carlson, Zoning Administrator, Justin Templin, attorney representing City in litigation

3. Approve Agenda

(Anderson motion, Naylor second to approve the agenda; all ayes). Motion passed.

4. Approve Minutes: June 24, 2019 and August 19, 2019

(Howarth motion, Halverson second to approve the minutes of the regular Planning Commission meeting of June 24, 2019, all ayes). Motion passed.

(Naylor motion, Anderson second to approve the minutes of the special Planning Commission meeting of August 19, 2019 as amended, all ayes). Motion passed.

5. PUBLIC HEARING

5.1. **Variance Request – Average Minimum Lakeshore Setback – 2217 Huntington Point Road East (Schussler)**

Zoning Administrator Phil Carlson stated that the applicant is asking for a variance to build a pool and deck in the front lake setback, that extends into the AMLS, at a corner would be more than one foot off the ground. Patio and terraces can be no more than a foot off the ground without a variance. Schussler's contractor previously applied for and was approved for a pool permit but due to the soil conditions which were wet like quicksand. They looked at soil conditions in other parts of the yard and found a better location to the north, but the new location would encroach on the AMLS.

He directed members to the report in the packet dated August 26th where he reviewed the comprehensive plan guidance and city code criteria for variances. Administrator Carlson stated that the use of a pool and deck is certainly reasonable in this community but rising higher than one foot in the AMLS is the question. The unique circumstances here could be the soils which are different than other areas of the yard which he also deemed reasonable. He discussed whether the request would alter the essential character of the locality. In this case there are trees along both lot lines and the property to the north already has a pool at a much higher elevation.

Carlson reviewed his recommendation which is that the use is typical and reasonable for this area, that the soil conditions create a practical difficulty not created by the applicant, and that the proposed deck and pool would not interfere with lake views or alter the character of the locality.

He reviewed the options that the Planning Commission had and provided motion templates for those options. He is recommending approval, but it is up to the Planning Commission to decide what to recommend to the City Council.

Chair Haag opened the public hearing at 7:15 pm

Comments from the public:

Kyle Hunt, Kyle Hunt & Partners, 10321 Heidi Lane, Chanhassen spoke on behalf of the applicants along with Al Musech from Kyle Hunt as well. He stated he has worked on this property five different times over the years with four different owners since 1994. The original architect was Edwin Lundy who designed Lutsen Lodge and the Landscape Arboretum. Hunt stated that when they were doing some of the original work on the home, the neighbor to the north told a story about this area being a marsh when she was a child that was filled in which explains the soil conditions. Earlier soil borings varied as well so it is true that the soils are a unique characteristic of the property.

Commission Naylor asked about the depth of pool which will be 5.5 feet, originally designed to be six feet but lowered it to minimize the impact. Naylor's question was whether if they sunk the pool even more into the ground would they still need the variance. Hunt explained how the property slopes to the lake and that pools need to be level. They are lifting it out of the ground as much as possible so the pool can be level and still avoid the water mitigation. He reviewed the cross section view also that Administrator Carlson provided in his report.

Commissioner Howarth clarified the height with the pool and the deck which would be approximately one foot above grade on one end and about 2.5 feet on the other end. Commissioner Anderson was thankful for the special meeting that was held on the site which was very beneficial to clearly understand the request and conditions in person. Mr. Hunt was thankful for commissioner's attendance as well.

Chair Haag closed the public hearing at 7:26 pm.

Commissioners discussed the request and determined that the request seemed reasonable, the pool was made as shallow as possible and it didn't appear to block views. Chair Haag said the applicants made an effort to minimize the impact.

(Naylor motion, Anderson second that the Planning Commission recommends that the City Council approve the variance to build a swimming pool that encroaches into the AMLS at 2217 Huntington Point Road East as presented and with the Findings of Fact in the Planner's report dated August 26, 2019,) Ayes: Anderson, Halverson, Howarth, Naylor, Haag. Nays: None). Motion passed.

Findings of Fact for Approval are stated here:

1. Adding a swimming pool and patio to the existing home is a reasonable use of the property.
2. The soil conditions are a condition of the property not created by the applicant and constitute a practical difficulty in meeting the AMLS, both in terms of the more difficult construction techniques and potential harm to the structural integrity of the existing home.
3. The extension of the swimming pool approximately 6' to 14' beyond the AMLS will not alter the essential character of the neighborhood. The existing tree cover and higher elevation of neighboring property provide adequate screening and protect the lakeshore views.
4. The request meets the criterial for granting a variance in Section 2.4(C)(4) of the zoning code.

Chair Haag stated that the matter would proceed to the September 9th City Council meeting with their recommendation for approval.

6. New Business

6.1. Administrative Appeal dated October 19, 2015 submitted by Nell Mathews and Max Hacker

Chair Haag stated that the court remanded this case back to the Planning Commission for review. Zoning Administrator Carlson stated that this issue was remanded back to the city by the Court of Appeals. The administrative appeal was raised originally in 2015 and was sent directly to the Board of Appeals at that time. He explained the process of how the zoning administrator reviews applications and interprets city code. In 2015 the zoning administrator at that time determined that the request did not need a variance. The Mathews/Hackers appealed that decision. It went to the Board of Appeals, which in Minnetonka Beach is the city council. At that time, the Board of Appeals accepted the zoning administrator's decision. They appealed through District Court and then the Court of Appeals. The District Court affirmed the Board of Appeals decision. The Court of Appeals affirmed the District Court's decision on all but one claim which was that the Planning Commission should have been given an opportunity to review the appeal.

Carlson stated that he has read the November 9, 2015 zoning administrator (Gozola) report which laid out the rationale for his interpretation of the code and decision and recommended that the council uphold his decision. The report had nine findings which supported his recommendation. Carlson stated that he reviewed that report and the reasoning, rationale and decision seemed reasonable and appropriate. He recommended that they receive that report, accept those nine findings and pass it on to the city council, recommending they uphold the decision of the zoning administrator.

Carlson stated that there were different ordinances in 2015, and the record shows the detail of those ordinances. Something that surfaced recently was a report from another Planning consultant which came to a different conclusion. That report was not available in 2015 and shouldn't be considered now. Even if it were available in 2015, his opinion is that Gozola's report is reasonable.

He recommends they accept the nine findings in Gozola's report and affirm that recommendation to Board of Appeals. He stated that this was not a public hearing, but is an item before the Planning Commission, he is giving his opinion, and it would be reasonable to allow the persons involved to speak to the commission, but they are not obligated to take comments from anyone else.

Justin Templin was in attendance representing the city to answer legal questions. Chair Haag asked the commissioners if they understood the process. Haag then allowed representatives of the appellant an opportunity to address the commission.

Patrick Steinhoff, 220 South 6 Street, Minneapolis – representing Nell Mathews and Max Hacker. He stated he was there to convey to the commission their opinion on what the commission should do procedurally. He stated he disagreed with Mr. Carlson. His clients believe that the Planning Commission should undertake a review and report. The appeal raises issues of legal nonconforming uses, most notably impervious surface coverage which came out of a zoning code which was confusing and poorly written but had been in place for some time. He stated that in this case a patio was built up to the property line for no good reason and these should be dealt with by the Planning Commission and not delegated to staff. He stated they have a responsibility to consider this issue.

He stated that the city violated state statute regarding the Board of Appeals. His clients want the Planning Commission to review the application and just review the original report. He previously submitted a letter which was in the packet requesting that the commission review the appeal application and make a report to the City Council acting as the Board of Appeals. His clients propose they appoint Richard Krier who was zoning administrator prior to Mr. Gozola to review the appeal documents. He was the city zoning administrator for a long time. He was not personally involved in the original application or appeal. They tried to get him involved in the litigation, but the city objected.

In summary, his clients want the Planning Commission to do its job and report to the Board Adjustment and Appeal and if they decide to designate someone to do it for them, they would recommend Dick Krier.

Santiago Abraham – 2637 Arcola Lane – they are the current homeowners of house being discussed. They have been dealing with this matter since they bought the home in December of 2016. At that time

there was no lawsuit pending, and no disclosure of a pending lawsuit which was filed within a month of their purchase. Since then they have been dealing with the stress of this situation and have spent money. He believes the city has also spent up to \$60,000 for what they believe is a frivolous lawsuit.

The patio was built by the previous owner in the fall of 2015. Three sides of the patio are zero inches off ground and one side is under 12 inches and not a structure. The patio was 75 feet from the lake and the code required no side setback which was later changed in the code to five feet. He clarified that the patio was not built right up to the property line as Mr. Steinhoff stated but is about 5.5 feet away. The hardcover argument was upheld in both the District Court and Court of Appeals and they remain legal non-conforming which was reconfirmed by Been Gozola when they installed steps in September 12, 2017.

In the District Court their findings were that the city won every count. On page 33 of that order, it states the "Board's decision to deny Plaintiffs' appeal had a rational basis and was not unreasonable, arbitrary or capricious because it was based on Mr. Gozola's report".

The Appeal Court ruling affirmed on all counts except on regarding due process quoting from the Court of Appeals document (page 14) regarding the Board not making a decision without the Planning Commission or designee having a reasonable opportunity to review and report to the Board, and that Mr. Gozola was not officially authorized to the Commission to report to the Board which is why they were here today. He expressed appreciation for their consideration, and they would like this matter settled as soon as possible so they can move on.

Commissioner Anderson asked about the timing of the lawsuit and building of the patio. Abraham stated that patio was in when they bought the home and the lawsuit filed initially without them being a party to it even though it impacted them.

Nell Mathews – 2643 Arcola Lane – Mathews stated that this has been a long painful process for them. She stated that when he closed, she told Santiago about everything, the lawsuit pending and stated he wasn't joined initially because they were hoping the city would work it out with them. She believes that Gozola failed to properly address the city's legal non-conforming issues. She stated that they didn't know at the time of the appeal that Mr. Gozola miscalculated and misrepresented the amount of impervious surface to the Board of Appeals, and that she found out after the fact by looking in the property files. She stated he did not disclose that the deck was illegally removed and showed photos to the commissioners.

She stated that the planner didn't disclose that the deck was illegally removed, and they really don't know how big the deck was but estimated it at 192 square feet. The code requires simultaneous demolition permits and building permits to rebuild a nonconforming use so they know the square footage of the new use. She showed a photo of what it was replaced with which was a 400 square foot plus stone patio, or a 206% increase in area, an enlargement of a non-conforming use which is also contrary to ordinance. She said it extended past the AMLS and extended into the side setback which the deck did neither. She also mentioned that the patio was installed over a city storm sewer so the previous zoning administrator would have required an easement over the surface.

In summary, she stated there is an expansion of a non-conforming use, expansion of hardcover which was misrepresented as less hardcover, and non-conformance with zoning code which required a non-conforming use have simultaneous demo and building permits.

She stated that it is important that the facts and accurate information are presented to the governing body which is what they have been asking for since 2015. They previously brought this information to the city's attorney and that the appeal of a what they believed was a city planner error should have gone to the Planning Commission, but the city fought it.

She stated that this is not about the Abrahams, but whether the Planning Commission is going to advise on land use. She stated she embraced Mrs. Abraham when they moved in. She described how the patio affects them and what she believes is contrary to the comprehensive plan.

She is asking them to review this issue as does the planner they hired to review the case, and that the city should require a variance for this patio and hold a public hearing and public input given. She thanked

the commissioners for their consideration and asked them to do a review of the case and not just affirm the previous planner's report which they disagree with.

Santiago Abraham spoke again stating they have two little kids so their whole yard is a social space. They understand that with smaller lots neighbors will see each other's space and belongings. He clarified again that the patio is not placed up to lot line and stated they were planting new plantings for screening.

He stated he wanted to correct misstatements that were presented about hardcover, the patio being in the AMBS and encouraged accurate facts be considered.

Chair Haag stated that he believed enough comments have been made to understand the facts and background.

Commissioner Anderson stated that she hasn't talked to the appellant for two weeks because she knew this was on the agenda.

She asked about the hardcover issue and what she described as "banking" hardcover and removal of the deck and other items. She didn't agree with doing that and she thought hardcover had been exceeded in this case and, if that were true, a variance should have been required.

She characterized the process as having many disagreements over a long period of time. She stated with the commission getting the information for the first time, it's difficult to make a recommendation based on her interpretation of the reports. She stated that the issues rest with them and they need to make a recommendation to council. If what she said about hardcover is true it should have been a variance.

She also stated that she doesn't think the Hacker's should be charged anything.

She recommended that the case go back to Phil Carlson to study all of the issues and come back to the Commission with a recommendation and his own findings. She feels it deserves further investigation.

Carlson stated that this is within their right to do, but he stated that the commission routinely bases their recommendations on the written materials that are presented as does the District Court and the Court of Appeals. She asked his opinion on the hardcover issue and he responded that the approach is to look at property as a whole and determine the intent of the ordinance. He believes that based on the information from the previous planner that was presented to the Board of Appeals and then to two separate courts that the approach was reasonable, and he recommends they pass it along to the Board now.

Council Liaison Enlow asked him if he had all the information as presented would he come to the same conclusion. Carlson stated that he doesn't think that is the question before them but rather is the analysis presented to the Board and the District Court and the Court of Appeals reasonable. He said it is possible that someone could come to a different conclusion. But he stated that the analysis was reasonable with a reasonable interpretation of the code, and they should forward it to the Board affirming the decision.

Chair Haag stated that Carlson has done his homework on this case and he wouldn't support this recommendation without full consideration as would anyone working for the city. Carlson stated again that he believes the approach and determination were reasonable and two courts agreed. Commissioner Anderson's closing comment was that she is concerned about this setting a precedent. She stated that she feels there is a great disparity and doesn't think it was handled as well as it could be. Carlson stated that the city could always look at the code going forward to determine if there are provisions that they feel should be changed.

Commissioner Naylor clarified whether they were being asked to determine if this was a sound process and decision or if they were being asked to reconsider all the facts. Carlson stated that they can agree that it was a reasonable approach and re-ratify it, or they can reconsider all the facts.

Council Liaison Enlow asked Justin Templin to respond to Naylor's question who stated that this was not a case where Court of Appeals spelled out a specific process for the Planning Commission but that the

Planning Commission has an opportunity to review and report in a 60 day window. He stated that what Carlson is recommending is that after reviewing the Gozola report he came to a conclusion and recommendation that it was a reasonable decision. Carlson and the Board of Adjustments made the same conclusion; the District Court also concluded that Gozola and city were correct in code interpretation. The Court of Appeals looked at procedural issues so while two courts reviewed but only the District Court reviewed on the substance and merits of that case and that was Judge Dawson.

Chair Haag stated that these are difficult and challenging decisions which they understood they would face when becoming commissioners and someone will probably be unhappy. He believes that there has been due process and doesn't want to drag this out further and that the process and decision was reasonable. He stated he trusts Carlson's decision and trusted Gozola's decision and this is a reasonable recommendation.

Anderson misinterpreted a comment made by Carlson who clarified that what he said was that what Gozola presented was a reasonable interpretation of the facts and analysis and that the commission could make a decision based on the information they have.

Commissioner Anderson made a motion to refer to this back to the Board of Appeals and that they were not asking for any changes to be made, but then rescinded the motion.

Justin Templin stated that the commission has the opportunity to report back to the Board of Appeals that they endorse the Gozola report, and believe it is a reasonable conclusion and uphold the decision, or they can issue no report at all, and that all the Court of Appeals said was they needed an opportunity to review, but they can direct it any way they want.

(Naylor motion, Halverson second that based on the information provided in the 2015 Gozola report the analysis and decision made previously were reasonable and to forward this information to the Board of Adjustment and Appeals; all in favor.) Motion passed.

7. Reports

- 7.1. Chairperson – Chair Haag had no report but thanked everyone for their consideration in this case.
- 7.2. Commissioner Reports- No further reports -
- 7.3. Council Liaison Enlow reported on actions of the August City Council meeting including: Livingston playground proposal, access path to the raised median issue, HCRRA easement for \$14K, donation policy amended and is pending review by city attorney, capital improvement program approved with a few changes related to access paths, water plant improvements, water tower added, \$4.2 million for remaining 4" water main replacement. Council asked city engineer to submit proposal for tower and plant improvements, fee schedule approved with an increase in water rates but same as Lafayette Ridge rates, commended commissioners on their work, especially today.
- 7.4. Building Permit Report – Received and filed.

8. ADJOURNMENT

(Anderson motion, Naylor second to adjourn; all ayes). Motion passed.

Chair Haag adjourned the meeting at 8:43 p.m.

PUBLIC IN ATTENDANCE – The following individuals signed the sign-in sheet (or were in attendance): Jill Bartel, Nell Mathews, Max Hacker, Matthew Hacker, Kyle Hunt, Al Musech, Andrew Myers, Patrick Steinhoff, Steve & Sunhi Schussler, Sandra Nielsen, Jody Sperduto, Jill Bartel, Santiago Abraham.

Minutes respectfully submitted by City Administrator Susanne Griffin.

Susanne Griffin, City Administrator