

MINUTES OF A PUBLIC HEARING CONDUCTED BY THE ST. LOUIS COUNTY BOARD OF ADJUSTMENT HELD VIRTUALLY VIA WEBEX AND IN-PERSON AT THE ST. LOUIS COUNTY GOVERNMENT SERVICES CENTER, LIZ PREBICH ROOM, VIRGINIA, MN ON THURSDAY, DECEMBER 8, 2022.

10:37 AM – 12:05 PM

Board of Adjustment members in attendance: Tom Coombe
Steve Filipovich
James McKenzie
Dave Pollock
Roger Skraba
Ray Svatos
Diana Werschay, Chair

Board of Adjustment members absent: None

Also present: Matthew Johnson, Director of Planning and Community Development Department

Decision/Minutes for the following public hearing matters are attached:

NEW BUSINESS:

A. Ursalyn Fena and Jerome Bakke, S25, T56N, R15W (Colvin)

OTHER BUSINESS:

Motion by Skraba/McKenzie to approve the minutes of the November 10, 2022 meeting.

In Favor: Coombe, McKenzie, Pollock, Skraba, Svatos, Werschay – 6

Opposed: None – 0

Abstained: Filipovich - 1

Motion carried 6-0-1

Jenny Bourbonais, Acting Secretary, stated there will be no January 2023 hearing.

Jenny Bourbonais added that the Planning Department is in the process of hiring three new Land Use Planners.

NEW BUSINESS:

Case 6341 – Ursalyn Fena and Jerome Bakke

The only hearing item was for Ursalyn Fena and Jerome Bakke, property located in S25, T56N, R15W (Colvin). The applicant is requesting an appeal to the Board of Adjustment per St. Louis County Zoning Ordinance 62, Article VIII, Section 8.6, concerning the Director’s determination not to allow a new application for a variance per St. Louis County Zoning Ordinance 62, Article VIII, Section 8.10 A.1. *Jenny Bourbonais*, St. Louis County Land Use Manager, reviewed the staff report as follows:

- A. The applicant is appealing to the Board of Adjustment per St. Louis County Zoning Ordinance 62, Article VIII, Section 8.6, concerning the Director’s determination not to allow a new application for a variance per St. Louis County Zoning Ordinance 62, Article VIII, Section 8.10.A.1, on the grounds that the new application is not significantly different from an earlier application denied in 2016.
- B. In 2016, the applicant applied for relief from St. Louis County Zoning Ordinance 62, Article IV, Section 4.3, to exceed, after-the-fact, the maximum height allowance for a nonconforming principal structure located in the shore impact zone.
- C. The Board of Adjustment denied the 2016 variance request. The applicants now seek to submit a new application for a variance pursuant to St. Louis County Zoning Ordinance 62, Article VIII, Section 8.10.A.1, which applies when a “new application is . . . significantly different from [an] earlier application.”
- D. The St. Louis County Planning and Community Development Director with County Attorney assistance determined that the applicants’ new application did not satisfy this standard.
- E. The property contains a dwelling, garage, sauna and shed. There is a current certificate of compliance on file for the existing sewage treatment system.

Jenny Bourbonais reviewed the timeline of events as follows:

- A. On October 13, 2016, an after-the-fact land use variance heard. The request was for relief from St. Louis County for an after-the-fact variance to increase structure height, and a request for the dwelling height was raised from 18.33 feet to 24.5 feet.
 - a. The structure is located 28 feet from the Ordinary High Water Level (OHWL) within the shore impact zone, where the height of the structure would be limited to 20 feet.
 - b. The 2016 after-the-fact variance request was denied by the St. Louis County Board of Adjustment.
- B. On October 28, 2016, the decision notice of the St. Louis County Board of Adjustment was sent to the applicants informing them of the denial of the after-the-fact variance request. Alternatives to the variance included removing the roof and dormers and reducing the height to the 20 feet allowed in the current location within the shore impact zone or moving the structure to a more conforming location that may allow the height to remain at 24.5 feet.
- C. On November 13, 2019, the Minnesota Department of Natural Resources (DNR) issued a Public Waters Work Permit (2019-2913) to re-install riprap to restore shoreline erosion (per DNR application). While riprap has been placed along the shoreline, the setback to the structure has not significantly changed based on staff site review and measurements.
- D. On August 3, 2022, another after-the-fact variance application was received for consideration by the County. After review of the application, supplemental information and staff conducting a site visit, it was determined that the setback of the dwelling to the Ordinary High Water Level had not substantially increased and that the new variance application was not significantly different from the 2016 application.
- E. On August 22, 2022, a letter regarding the determination was sent to the applicants.
- F. On September 13, 2022, a letter from the applicant’s attorney was received by the Planning Department, requesting staff meet to re-measure the setback. Staff concluded the measurements taken were accurate and did not re-visit the site.

G. On October 2, 2022, a letter from the applicants was received by the Planning Department taking exception to the determination and requesting appeal to the Board of Adjustment.

Jenny Bourbonais reviewed the facts and findings as follows:

A. Official Controls:

1. St. Louis County Zoning Ordinance 62, Article VIII, Section 8.10 provides the criteria for allowing a new request for a variance when a previous request has been denied by the Board of Adjustment. Section 8.10 New Application after Denial states:
 - a. Basis for a New Application: The Director may permit a new application for a project previously acted upon by the Board of Adjustment or Planning Commission based on at least one of the following criteria:
 1. The new application is determined by the Director to be significantly different from the earlier application.
 2. The intent of the standards for rehearing listed in Section 8.9 above are met.
 3. New state, federal, or local regulations are in effect which would alter the review of the application by the decision-making body.
 4. Development pattern of the area has changed in a manner which would alter the findings made by the decision-making body.
 5. The decision-making body in its original decision stated terms for reapplication.
2. The standards referenced in Section 8.9 include:
 - a. An irregularity in the proceedings of either body whereby the Director determines that the person requesting the rehearing was deprived of a fair hearing, and that if the irregularity had not taken place, the decision-making body would have likely made a different decision.
 - b. Misconduct of a member of the decision-making body.
 - c. Material evidence newly discovered which, with reasonable diligence, could not have been found and produced at the hearing and that would have likely resulted in a change in the final outcome of the decision.
 - d. Errors of law occurring at the hearing and objected to at the time of the hearing.
 - e. Conditions have changed requiring a re-examination of the original conditions of a permit.
3. Authority for determining whether a new application for variance may be allowed when a previous application has been denied rests with the Director of Planning and Community Development.
4. However, an aggrieved individual may appeal the Director's decision to the Board of Adjustment pursuant to Section 8.6.A.1, provided such appeal is received within 45 days of notification of the Director's decision (Section 8.6.A.3).

B. Other Factors:

1. The subject property is currently a Minnesota Power lease. Other than a riprap project related to shoreline erosion, little effort has been made to bring the property into compliance since the 2016 after-the-fact variance denial. The applicants have had correspondence with staff on alternatives and chose to pursue a second after-the-fact variance request, which was determined to not be significantly different from the 2016 application.

2. Since the date of the report sent to the Board of Adjustment, the Department of Natural Resources has provided correspondence indicating the point of measurement and elevation of the Ordinary High Water Level was not changed by work done under Public Waters permit 2019-2913.
3. Authorization of Public Waters permit specifically did not include fill materials for filling waterward of the Ordinary High Water Level or creating additional upland in excess of the erosion control sloping.

Jenny Bourbonais noted three items of correspondence from Craig J. Wainio and Daniel E. Lindskog in support of, and Kim Boland, Minnesota Department of Natural Resources, with information about the Ordinary High Water Level and Public Waters 2019-2913 permit. These items were provided to the Board of Adjustment prior to the hearing.

BOARD OF ADJUSTMENT DETERMINATION

If the Board of Adjustment affirms the Director's determination that the new application for a variance is not significantly different from the earlier application denied in 2016, the applicants will not be allowed to submit the new application.

If the Board of Adjustment reverses the Director's determination that the new application for a variance is not significantly different from the earlier application denied in 2016, the applicants will be allowed to submit the new application.

The applicants, Ursalyn Fena and Jerome Bakke, were present.

Greg Gilbert, 1831 East 8th Street, Duluth, applicant friend and representative, stated the variance application was originally submitted so the landowners could move forward with this issue. If this variance is not approved, the structure will need to be moved. Economic hardship is not the standard. Today's standards are significant. There is a difference from the distance measured from the cabin to the shoreline. In 2016, that distance was 28 feet. Now that distance is 38 feet. There was no riprap in 2016 and the shoreline was receding. The question is: has there been a significant change? How does one define significant?

A variance approval would include conditions. They want the opportunity to work with staff to come up with conditions that will uphold the variance and preserve the integrity of the lake.

Ursalyn Fena, 2562 Eskeli Road, Makinen, handed out her presentation. In 2012, their shoreline began degrading because of the flooding. In 2016, there was no sod underneath a section of walkway and some of the walkway has been cut back because the slab could no longer exist in the same location it had been in 2012. By 2016, they were concerned about the shoreline and they had a leaking roof. They prioritized their roof. They made mistakes when repairing their roof and added dormers that increased the roof height. Their variance in 2016 was denied. The roof of their house is too high in the front, but not that high in the back. They were facing financial trouble and could not afford to move the cabin. There was no other real choice but to move their house. They could not have another variance unless their request significantly changed or unless they moved the house. It was difficult to figure out what to do from there. It would have been \$70,000 in 2016. The mover would not confirm the structure could withstand being moved. They waited and worked

to get out of debt while knowing they may need to access money. They were also watching the shoreline erode and were losing ground.

They contacted the Minnesota Department of Natural Resources and applied for a Public Waters permit. Kim Boland was on site, gave them advice, and helped them scale back their project. They asked for up to 55 cubic yards of fill material to re-stabilize the shoreline. They were granted this permit with the understanding they would minimize fill to a practicable level, which means the amount necessary to execute the effort. The person who did the work used about 50 cubic yards of fill. In order to stabilize the bank, there was a lot added in, in order to complete this project.

They were allowed to use a three-to-one pitch to create the riprap on a four-foot bank which is 12 feet out. They went about 10 feet out. This is how they feel they have changed their setback. They did not change the Ordinary High Water Level. This work was done in June 2020. Steps were added the next year. Pictures show that the existing eyelets are now further back from the shoreline than they were prior to the new riprap.

No other call-in users, present audience members or other virtual attendees spoke.

The *Board of Adjustment* discussed the following:

- A. Board member *Filipovich* asked what would happen if another hearing were not allowed. *Jenny Bourbonais* stated that staff will continue to work with the landowners to resolve any outstanding issues. There has been recent correspondence on alternatives that could be taken to bring the property into compliance. No new land use permits can be issued on the property because of these existing violations.
- B. Board member *Coombe* stated while Kim Boland, Minnesota Department of Natural Resources, stated the riprap and fill did not change the Ordinary High Water Level as measured, stabilizing the bank has now changed the Ordinary High Water Level. The pictures show this has changed. *Jenny Bourbonais* stated the riprap has been improved to prevent further erosion, but the setbacks have not significantly changed. No land has been added landward or waterward. The shoreline may look different, but no land was added that would increase the setbacks.
- C. Board member *McKenzie* asked staff originally measured the shoreline setback at 28 feet in 2016. *Jenny Bourbonais* stated yes. Board member *McKenzie* asked if staff had the same measurement now. *Jenny Bourbonais* stated yes.
- D. Board member *Werschay* stated a permitted foundation was added under the cabin. Did anyone tell the applicant that their cabin was located in the shore impact zone? *Ursalyn Fena* stated no. *Jerome Bakke* stated no one at the time the land use permit was granted told them to move their structure back. There was no conversation about the shore impact zone. There was a misunderstanding obtaining the permit because they were raising the structure three feet for the new foundation. They were told they could not go to 30 feet in height.
- E. Board member *McKenzie* asked if the contention between the measures was resolved. *Jerome Bakke* stated no. The photographs clearly show a significant difference in the distance from the water to the cabin. The Ordinary High Water Level has not changed, but the distance between the shoreline and the cabin has changed.

- F. Board member *McKenzie* stated the 2016 sketch and the 2022 sketch are the same except for new distances. The new sketch shows 38 feet from the corner of the cabin to the Ordinary High Water Level. *Jerome Bakke* added this was measured from the corner of the foundation. Staff did their measurements when they were not home. *George Knutson*, Land Use Planner, stated he took the measurements on site. He determined which part of the structure or foundation would be the closest point to the lake. He measured from the left side of the front deck straight out to the lake. With the location of the riprap, determining the Ordinary High Water Level is not one hundred percent accurate, but staff uses their experience in measuring from that closest point. *Ursalyn Fena* stated this is the same location where they took the measurement to get their 38 foot measurement. She does not understand how staff's measurement was the same as 2016. They just want to bring their house into permitted compliance. They are not against working with the County.
- G. Board member *Pollock* stated the Ordinary High Water Level is a determined level. Is there really a 10 foot difference in the measurements? *Ursalyn Fena* stated yes. The three-to-one slope helped bring this about. Board member *Pollock* stated that there is a mark where the Ordinary High Water Level is and could likely be within the riprap. *Ursalyn Fena* stated Minnesota Power has the Ordinary High Water Level marked on their website now. They no longer vary the depth of the water but keep it one foot below or one foot above that level.
- H. Board member *McKenzie* asked if the applicants' measurement was taken from the corner of the house. *Ursalyn Fena* stated they measured from the same location as where staff measured from, to the left of the door underneath windows. Board member *McKenzie* stated staff measured 33 feet from this location.
- I. Board member *McKenzie* asked if the foundation to left is beveled. *Jerome Bakke* stated the entire structure faces southeast and the foundation is all flush except for the front corner which is angled because of the tree in front of the structure. This is the reason why they asked for the land use permit to raise the cabin. The tree root was causing the cabin to shift, and they could no longer open or close their windows.
- J. Board member *Pollock* stated the roof pitch changed when the dormers were added. Was this done at the same time as the foundation? Board member *Werschay* stated the foundation was done in 2013. Staff should have informed the applicants that this structure was in the shore impact zone. *Jenny Bourbonais* stated there was no discussion at that time because there was no proposal to change structure height, including an increased roof height, at that time. The after-the-fact variance was for the height increase done without a land use permit.
- K. Board member *Werschay* asked if a foundation would be allowed under a structure located in the shore impact zone. *Jenny Bourbonais* stated that there is a difference between what is allowed when repairing a foundation or to replace the foundation. There was no proposal for roof height at that time. There might have been some discussion with the applicant because they were told they could not build over 30 feet in height so it could be assumed discussion on the structure being located in the shore impact zone took place.
- L. Board member *Coombe* asked when the shore impact zone was changed on General Development lakes from 37.5 feet to 50 feet. *Jenny Bourbonais* stated this was not changed in ordinance that 37.5 feet would be allowed with standards in place. The shore impact zone has always been 50 feet. A deck would be allowed at 37.5 feet with additional standards in place.

- M. Board member *Coombe* stated there is a mix of measurements between 28 feet, 33 feet and 38 feet from the shoreline. There is enough information that should allow these applicants to return for a variance rehearing.
- N. Board member *Skraba* stated it does not matter what staff says but what the Board of Adjustment decides.
- O. Board member *McKenzie* asked how many measurements were taken by staff. *George Knutson* stated he took two different measurements from the same location on the structure. The first measurement was done to the top of the riprap which was 28 feet and the second measurement was done to the bottom of the riprap which was 33 feet.
- P. Board member *McKenzie* stated staff indicated the same 28 foot measurement from the cabin to the Ordinary High Water Level that was taken in 2016. This is too narrow a measurement.
- Q. Board member *Werschay* stated the applicants may not have been informed enough.
- R. *Matthew Johnson*, Planning and Community Development Director, stated the applicants should be given credit for spending the money to restore their shoreline. It is also the responsibility of the applicant to know what the height requirement is, even if that was not what they had applied for. The setback is the real issue here. Even if the appeal is won, the applicants will have a challenge to get a variance approved without moving the structure back.
- S. Board member *Pollock* asked if staff is saying the shoreline setback is 28 feet or 33 feet? *Matthew Johnson* stated the Department of Natural Resources sets the shoreline setback and Planning Department staff went out and measured from the cabin to the shoreline. There will need to be some mitigation. There was nothing in the 2022 variance request that said the applicants are willing to meet the standards halfway.
- T. Board member *Svatos* stated there has been a significant change to the shoreline as far as the photographs go. Board member *McKenzie* stated that there is not that much of a change between the photographs.
- U. Board member *Filipovich* stated the applicants should have the right to come back with a variance. They have the choice and there is a risk they may not get their variance. That is up to them.

DECISION

Motion by *Skraba/Coombe* to reverse the Director's determination that the new application for a variance is not significantly different from the earlier application denied in 2016. The applicants will be allowed to submit a new application

In Favor: Coombe, Filipovich, Skraba, Svatos, Werschay - 5

Opposed: McKenzie, Pollock - 2

Motion carried 5-2

Motion to adjourn by Coombe. The meeting was adjourned at 12:05 p.m.