

LAKE COUNTY BOARD of ADJUSTMENT
January 14, 2009
Meeting Minutes

MEMBERS PRESENT: Mike Marchetti, Jack Meuli, Tim McGinnis

STAFF PRESENT: Sue Shannon, Joel Nelson, LaDana Hintz, Lita Fonda

Tim McGinnis called the meeting to order at 4:00 pm.

Officers were selected for 2009:

Motion made by Tim McGinnis and seconded by Jack Meuli to appoint Mike Marchetti as chairman. Motion carried, all in favor.

Motion made by Jack Meuli and seconded by Mike Marchetti, to appoint Tim McGinnis as vice-chairman. Motion carried, all in favor.

Tim handed the role as chair over to Mike.

Motion made by Jack Meuli and seconded by Tim McGinnis to approve the December 10, 2008 meeting minutes as written. Motion carried, all in favor.

NIELSEN VARIANCE:

LaDana Hintz presented the staff report. She noted that one additional letter of public comment had been received and handed out to the Board.

Jack asked if the parcel wasn't 10 acres on account of the road. Sue didn't think they could answer that question. It was created as a 9.75-acre tract. Jack asked if it was sold that way. Sue affirmed. Jack said other piece had to be somewhere and was probably in the road. The road had to come out of something.

Marc Carstens spoke on behalf of the applicant. The applicants had a different viewpoint, and he provided a handout to accompany that viewpoint that responded to points in the variance process. The Board was okay with this. He covered the points in the handout. Tim asked if the hardship stemmed from an error with the boundary line adjustment, why not fix it on a new certificate of survey. Then they'd have their 10 acres. He thought this was out of the league of the Board of Adjustment. Marc thought the concerns would be answered when he concluded his comments. He said he couldn't fix the survey, and it was very complicated. He proceeded with the handout. He thought misinformation existed, since in the Density Regulations, there's a 10% allowance for situations, that doesn't apply in the Upper West Shore zoning regulations. He completed presenting the handout.

Public comment opened.

James Chapman: He said when they sold the property in 2007 to the Nielsens, it was understood that it would be what it is, basically a 10-acre tract, and not divided. He was surprised that when they started to build, everything was at one end of the 10 acres. The Nielsens found out they

didn't have enough to make two 5, and offered to buy 16' more of his property so they could divide. He didn't go along with that. It was recently put up for sale, but it didn't move. The owner stated they were liquidating and would be gone in 3 years' time. In the meantime, he talked to Paddy. Paddy said the County would like a 10' easement so eventually they could widen the road. James gave that. The 10' easement lies in between the Niensens' lot and the 20' being disputed. James' understanding of what Lake County Abstract found was that this strip of property belongs to him. He didn't have too much objection about what was happening here because it didn't affect him too much either way. If there's a 5-acre limitation, if you break that down to less, you set a precedent. There are a couple of letters on record from his daughters who are not in favor of this. One daughter has adjoining property, and the other is next to her.

Crystal Nielsen: She said they originally looked at buying a 20-acre parcel, and he suggested dividing it into 5's. They couldn't afford that. They bought the 10. With the times going down, they can't sell the house where they live right now, so they thought they should sell the property. The only way they could get their money back was to split it into two 5's, but it's 9.75 acres. They should have investigated this when they bought the property. She did want to make clear that it was suggested to buy the 20 and split it into 5's.

Public comment closed.

Jack didn't see why they're concerned with 0.25 acres when the land that was in it went to the road. He thought the variance should be granted.

Mike asked how hard it is to fix a mistake in the survey, and if it was deeded instead of an easement. How hard is that to actually repair and bring back to what it should be, if that's what it should be? Sue said that question had not been asked, so that determination has not been made. It would most likely take some review by the Clerk and Recorder office, and the County Attorney office in order to define a procedure for correction.

Jack thought some of the road was probably from this property.

Tim said he was on the other side. It seemed like the only thing they really had to go on was a COS, which says 9.758 acres. He didn't know where you'd draw the line otherwise. If there's a 10-acre minimum, that's what it is. If it was misrepresented by the seller, then hopefully they'd do the honorable thing and sell the land so it is 10 acres or somehow go through Sands Surveying and get it so there's a plat that says 10 acres. He wasn't comfortable making a decision against a COS.

Mike leaned towards Tim's view. He didn't want to set a precedence saying now we can go less than what the zoning district has determined to be the minimum size. Then they could have all sorts of requests, and he didn't want to go there. He thought the best thing to do was to either work on getting the 16' or get the County to determine how to fix the mistake if there was a mistake. He didn't want to be in the position of judging on that.

Tim and Jack reiterated their positions.

Mike said he'd almost agree with Jack about the area taken out for the road, except for the fact that this property was bought after any mistakes were made, and the owners knew the size of the lot. He guessed that before they signed the paperwork, they knew the exact size and also knew the limitations of the Upper West Shore zoning.

Tim said he didn't disagree with Jack, but it's outside of the Board's scope of work to determine that. Jack thought the variance was brought before the Board and they should do something with it.

Motion made by Tim McGinnis and seconded by Mike Marchetti to deny the variance with the staff report, application materials and findings of fact, included in the denial. Two votes in favor of the denial (Tim McGinnis, Mike Marchetti) and one vote opposing the denial (Jack Meuli).

Sue noted that 3 affirmations are needed to deny or approve it, in order for it to be a valid action. The motion would either fail for lack of Board action, or the item could be continued until there are enough Board members present to make an official action. The Board would need to decide how they would like to proceed.

Tim asked for clarification on the first option. Sue thought the item would automatically not be approved because there aren't enough Board members voting to approve it. Marc said the applicants would prefer a continuation. The Board was okay with this.

Mike thought it would be nice to find out the procedures to correct the survey, if there was an error in it. Sue said she couldn't guarantee that in 30 days. Mike summarized that the item would be continued for 30 days until the next Board of Adjustment meeting.

LOUQUET CONDITIONAL USE:

LaDana Hintz presented the staff report and attachments.

Tim asked if the guest house has always been more than 1000 feet. LaDana said they weren't changing it at this point. Mike asked how the 22% impervious surface was calculated. He was curious about the differences in calculations. LaDana said it looked like the applicants may have used the wrong square footage, which threw off the calculations on the impervious surface coverage. She suggested the agent could speak to that. Tim asked if they didn't need the conditional use for the impervious surface, then why deal with it at all. Would this be just because they asked for it? LaDana confirmed. If they don't need it at this point, the Board would deny the request.

Paul Bishop spoke on behalf of the applicant. He was the architect for the project. He spoke to the premature start of construction. They initially submitted a zoning conformance application. Staff reviewed it and pointed out they had identified sections of slope that did exceed 25%. A conditional use permit would be required. He'd initially thought the approval would be speedy, and there was a series of miscommunications with the construction people. They were unaware excavation was considered construction. He apologized for that. Whatever vehicle the Board and staff wished to use to deal with the impervious surface issue was fine with them. They could

retract the application or it could be denied. He believed it was a drafting error, and agreed with the staff calculation.

Tim thought the big thing about the slope deal was the lakeshore. Paul agreed. Jack said it would be simplest to withdraw the application for the conditional use on the impervious surface. Sue noted this was up to the applicant. At the time the staff report was drafted, they weren't able to confirm the number with Paul. Paul said if they can verbally withdraw it, they would do that at this time. Mike repeated to make it clear that the conditional use for impervious coverage between 30% and 49% has been withdrawn.

Public comment opened: None offered. *Public comment closed.*

Mike noted the remaining two conditional use permits would be voted on separately. The first would be on the conditional use for the guest house with greater than 1000 square feet of living area. Tim noted they weren't increasing a nonconformance.

Motion made by Tim McGinnis, and seconded by Jack Meuli, to approve the conditional use request for a guest house larger than 1000 square feet, with staff report, conditions and findings of fact included. Motion carried, all in favor.

Motion made by Jack Meuli, and seconded by Mike Marchetti, to approve the conditional use request for disturbance of slopes greater than 25%. This would include the staff report, conditions and findings of facts. Motion carried, all in favor.

BROOKS VARIANCE REQUEST:

Mike highlighted that separation would be kept between the Brooks variance request and conditional use request. Joel Nelson presented the staff report and attachments for the variance.

Jack asked if it was included with the previous approval that treated timber was not allowed. Joel affirmed it was discussed that there was a treated lumber wood retaining wall at the January 2008 Board of Adjustment meeting. Because a variance hadn't been noticed, it couldn't be reviewed at that meeting. There was a condition that required the wall to contain no treated wood in the portions that were located in the 50' buffer area. Tim asked if Joel received a response for weighing the benefits of a 10-year untreated wall as compared to a 50-year treated wall. Joel replied that no experts responded. Jack asked if tearing the wall out now would cause pollution into the lake. Joel said hopefully it would be done in a manner that wouldn't cause pollution into the lake. The owner would need to use best management practices and take every measure necessary to avoid letting the debris enter the lake.

Mike Brooks spoke on behalf of his application. He introduced Jim Henjum from APEC and Dick Schultz, a relative. He referred to his letter to make clear why he thought he qualified for a variance. He summarized and highlighted points in the letter, covering a sequence of events that led to the installation of the wall, of which he estimated 95% was in the lakeshore buffer zone. He said the hardship was a combination that included the land, which is glacial silt and always moving. He referred to a letter from the highway department he received after flooding in the 1980's, where it was mentioned the vibration from the highway causes the ground to shift. The

vibrations from storms on the shore could be felt at the house. He summarized he felt he qualified for being before the Board. Knowing what he knows now, he was looking for time, so when the time came to again continue to try to do the right thing, he could get the material in there that would comply with the spirit and the letter of the zoning regulations. In the interim, he wanted to avoid economic disaster. Per the information on copper naphthenate, he said there was a threat but it was manageable. One study said the migration of copper naphthenate was negligible in wetlands. He referred also to pg. 17 of one of the provided studies regarding pilings in the water. They've taken soil samples, which came back less than the threshold.

Tim asked how much time Mike Brooks would like when he said earlier that what he was asking for was time to meet the letter of the law. Mike explained the ground is alternately wet and dry. When the neighbor plows the road, which needs to be done, the spoil goes into the barrow pit, which clogs the culvert, which dams the barrow pit, so the water runs eventually down under their property where the '80's flood was, and blows out the grounds. The ground hasn't moved since summer, but he's expecting another blowout if the barrow pit stays full of water. The wall saved the pollution from going in the lake. Tim pointed out the letter of the law is that there's no treated wood in the buffer zone. Mike B guessed that within 7 years he could get something decent that would stay, look okay and fit into the character of the place. He offered to take periodic soil samples and confirm that there isn't migration. If there is migration, he said they'd remediate, digging up the soil or pulling out the boards, or whatever they have to do then.

Public comment opened: None offered. *Public comment closed.*

Tim mentioned this is a very dynamic area. His concern was that even though it's not allowed to have treated wood in there, it's so active there that maybe the treated wood does help. If there's time to engineer it, then give the applicant more time to do it, maybe 5 years instead of 6 months. Jack was thinking along the same lines. He thought pulling that out right now might be a negative. Tim added he didn't want to allow everyone to use treated wood in the buffer zone. Tim noted the forces going on in that particular area were pretty intense, and he felt it was, in fact, a unique situation and a unique lot. Sue asked about the enforcement, and ensuring that in 5 years, someone inspects. She didn't know what it would look like—maybe a deed restriction filed recognizing an agreement with some sort of language where staff and developer work on the agreement with the County Attorney's office and a representative for the developer, and if an agreement can't be reached it would come back to the Board.

Mike M said were he to err, he'd choose to err on the side of protecting the environment, but he also understood the economic problems with trying to take out this substantial wall. He agreed with Jack that doing it all at once would probably cause more problems with getting silt and pollution into the lake than if a nice plan were done, using best management practices and slowly removing it. He agreed with trying to figure out a 5-year plan, as long as the plan included that the applicant start at the lakeside of that wall first, and then work the way back up. He clarified that he saw this as being done in 5 years. Tim thought that economically, the owner would want to do it all at once.

Mike B said if it looked like the wall really was leaching stuff into the lake, then they would remediate according to a plan they'd work out then. If it isn't leaching, he was looking for 5 years undisturbed to allow it to settle and heal, both his wallet and the land.

Tim thought they'd deny the variance but give more time. Jack said he'd like to see this redone by 5 years, and supervised by someone who knows something. Tim said he'd like to see it monitored, and if there is diffusion of copper, it would need to be done sooner. Mike B asked for approval of the variance with conditions. Tim replied he was concerned about setting precedence here, and would rather deny the variance, and then give the time to deal with it. Mike B thought this was a great compromise.

Sue asked about the soil samples, and a schedule for monitoring. Mike B suggested twice a year after each of the wet seasons, so after spring and maybe 6 months later. Tim thought one test a year at the end of the wet season would be good. Doing more would be fine. Jim H noted there's a storm water collection spot at the bottom, and that would be a good test location. Mike M pointed out that having read the study, the soil density in a wetland is typically very different that what they're going through with moraine. He has read EPA studies about some of the east lakeshore septic problems. Because of the moraine, the effluent is getting to the lake faster than was ever anticipated. He would go with every 6 months for the monitoring. Sue said the stormwater retention area is in the lakeshore protection zone. Mike B said it would be just outside the 20'. Sue thought it looked within the 20'. She thought the applicants should propose a plan for the County to review, for where they're going and when they're going, based on the soils and infrastructure that are there, and potentially allow for a 3rd party review, if staff feel they don't have the qualifications to review it.

Mike B thought they'd have an engineer take the soil sample and ship it to the lab in Billings. Sue clarified she was talking about the agreement for when and where to monitor based on the site conditions. She wasn't referring to the lab results. Tim summed that the Board didn't need to define the monitoring plan right now.

Mike summed the Board can make a recommendation to deny the variance, and also to allow 5 years to correct the problem and have the treated lumber removed from the wall and untreated lumber put in there, and that a plan be delivered that identifies soil sample rates, when and how they're going to be taken and what distances from the wall, and those kinds of things. The County Planning will review and make an approval to that plan. Mike B commented the replacement wall may not be timber, depending on the technology at the time. Mike M stressed that it would need to be approved material, and Sue highlighted that they'd need to get a permit when they do the work on the wall.

Summary so far from Lita and Sue: *The Board is considering denying the variance; recommending a 5-year timeframe for the changeover to compliance; having a plan delivered for the County to look at and approve, possibly by a 3rd party, a permit would be required for the work on the wall; and the plan has to include soil sampling, monitoring rates and some sort of remediation measures for if and when it hits the threshold.*

Mike M asked if the plan for the soil monitoring could be delivered within 60 days. Mike B agreed. Mike M listed that this would include sampling, frequency, method of sampling, how far from the water he'd be testing, and also remediation methodology for if a threshold was reached for the copper moving away from the wall. Mike B asked if the remediation could be planned and approved at the time the threshold was broken, so it could be based on the circumstances at that time and where it is. Board members expressed they had no problem with that. Sue said language could be included that if a problem occurs, this is the landowner's responsibility. They would want the agreement to include disclaimers to this effect. Ultimately, it would be the landowner's responsibility to come up with the effective remediation.

Motion made by Tim McGinnis, and seconded by Jack Meuli, to deny the variance, as written by staff and with the staff materials and findings of fact, and including the annotations on the plan and conditions as discussed. Motion carried, all in favor.**

*(**Note: A deed restriction was added to the variance later in the meeting, with the agreement of the landowner. For details, please see the summary of modifications for the Brooks conditional use request, listed on pg. 10 of these minutes.)*

BROOKS CONDITIONAL USE REQUEST:

Mike B commented that he agreed with most of the conditions in the staff recommendations, which begin on pg. 17. With condition #2, he felt his contract with APEC Engineering should have had a sentence saying that they would supervise the job to meet the conditions and the approval of the County. He talked to Jim Henjum, who is drafting an updated contract. They will get that done and get a copy to the County. He requested that the temporary log wall be allowed to stay in place for, at most, another 2 years after the end of this approval, to 2012. Jim was available to answer questions about the stability of the wall as it stands.

Sue asked Mike B specifically what he was requesting. Would this be a change to condition #7? Mike said the original plan said they'd replace the log wall. They'd like to leave it in place. Joel explained that #7 discussed a 6-month timeline from the current project approval to replace it. Mike B explained that #7 required monthly reports from the engineer. Elsewhere, quarterly reports are required for other reasons. Mike B asked the Board to consider consolidating the engineer reports into a quarterly report. Also, this requires that 6 months after the current project approval period is over, he has to reapply to replace the log wall. He asked for more time, to increase this from 6 months to 24 months. He suggested submitting a tentative plan to show the wall replacement within 6 months, and within 18 months after that, the new structure be put in place. Sue noted the way it's written, they'd have to submit an application within 6 months. That application approval would typically have a timeframe attached to it for the job completion. She said the plan cannot be tentative—it has to be what they are proposing. Mike B said he preferred putting the plan in closer to the installation of the wall since technology, ground conditions and all sorts of things tend to shift. Sue suggested if the Board wanted to consider that, that there's a continuing monitoring during that additional timeframe. Mike B agreed, and again suggested quarterly.

Mike M felt okay about 18 months, but 24 were getting far out there. Given that Mike B said he didn't want to be continually ripping up this project, and that he's asking for the extensions to

have more time to replace walls, Sue asked if he didn't feel that he was going to have to be revegetating after he did that work. Mike B replied they were trying to maximize a number of variables, one being economic, and another being how much ground you want to tear up at any given time. They wouldn't have to mess with the lower part of the road right away. They could put the replacement wall in a couple of years down the road and the lower part of the bank would be able to continue to heal. When it came time to take out the treated wall, they'd be kind of driving by the log wall replacement and not disturb the ground there. The plan looks like localized destruction of the vegetation etc, and allows focus on that area while doing minimum damage on the rest of the slopes. He saw this as a rolling phased approach, which would allow him to address things within his means but gets them all to the desired end state.

Given the discussions on time, Mike M wanted to be sure that should the property be sold, the next owner/buyer would understand the conditions that have been set, and that they would have to comply. He suggested that wording be included in an approval if given, to make sure that these conditions are actually met in the future. Jack checked with Sue that a deed restriction could actually go on the property. She affirmed. Mike checked with the Board, confirming that they were fine with quarterly reports.

Regarding the number of months in which a new application would be submitted, Mike B said the approval period ends January 2010. With 18 month, the plan would be due in mid year 2011, and completed at the beginning of 2012. He thought a little longer into the building season would be better, for the summer of 2012. Mike M checked that applications typically would have an anticipated completion date. Sue said they did agree about a revision on #7 in the second sentence that *the engineer shall provide the Planning Department quarterly reports regarding the stability of the temporary log structure until the wall is replaced.*

Mike B brought up the vegetation plan in #11. On the really steep slopes, he said it wasn't possible to get trees there. The birch that were there are dead and gone. He wanted to try to plant on mini-terraces, but he wasn't sure he could meet those percentages. He wanted to be able to do what made sense on any particular spot. Tim said it could be averaged over the whole area, so the current percentages could work. Mike B thought that would be okay.

Jim Henjum from APEC spoke about the slope, which is dynamic. It couldn't be stopped from moving, so they do their best to stabilize it and stop some failure planes. He referred to #15 on pg. 15. He said it was a little more complex. What they've planned to do is backfill the walls close to the top of the wall, maybe 6 inches below. To try to get on the slopes and do grading is not possible. The only activity up there would be the terracing that Mike B discussed and trying to get vegetation to grow and help with erosion control and get that stabilized. Tim asked if he was asking for a change in #15. Jim said he wasn't, unless they were being asked to do something. He assumed the condition wasn't asking for the slope to be graded, or if there was an expectation from the County to meet some standard from ASCE or SEI puts out. Unless the County is looking for something specific, he assumed they wouldn't disturb the hillside.

Sue explained they were trying to do what they can to get this back to a stable state. A lot of the activity occurring on the slope is due to the disturbance and removal of vegetation. She asked what he would suggest at this point. Mike B felt this was an assumption that the erosion was

caused by the excavation. He did the excavation because there was a problem and he was trying to address it. Sue thought this was a conflict here in the point of view. Vegetation helps soils be stable. There's been a lot of activity on the property. Mike B said the steepest slopes without vegetation weren't moving. Sue said the ultimate objective for both parties was to get it as stable as possible. If his suggestion is continued monitoring based on the existing slope, she thought the way this was stated, it does suggest there's some sort of standard they're going to meet.

Jim said for stabilizing, they already have the wall in place. It probably needs some modification, backfilling that wall, and maybe backfilling or doing some graduated slope at the base. They haven't done slope stability analysis or geotechnical borings, since there's a pretty big cut there and they can tell what the material is for the most part. They're not going to hold the bank back. If it wants to go, it'll go, and a lot of people will have problems along that stretch. They're going to stabilize the local area that's been disturbed.

Sue asked if the existing treated wood wall that has to be replaced in 5 years has to be backfilled. Jim said a lot of it is backfilled from the erosion. When you're talking about excavating behind it, it might be 3 feet, just enough to get the lagging out and get new lagging in. Sue checked that he was saying the erosion that's occurred will suffice, and there won't be additional backfill needed at this time. He said this was correct for most of it.

Mike B brought up a point with condition #9. The County contended the roadway was destroyed, and must comply with the current zoning regulations. He contended that it wasn't destroyed. The condition was okay, but he asked the wording be changed from roadway or 6'-wide path to something neutral. He was committed to planting in the area, but didn't want to agree that it wasn't a road anymore. Tim said what he got from this was that the roadway was an identifier and not a legal definition. Mike B felt that whether it was a roadway or not had significant ramifications. Jack asked if he agreed it shouldn't exceed 6'. Mike B replied that he needed at least 8 to 10' to get equipment down there and use as a road when he needed to. Jack asked if it could be used for construction but doesn't become a road down to the lake. Sue said this was what they were trying to do. It's currently stated as a roadway on that plan, and that is a concern. The buffer strip doesn't allow roadways down to the lakeshore. It allows a 6' winding path, so that's why they've suggested that. Jack could see both sides.

Sue thought by leaving it as a path, he could design the vegetation to allow 8' between cedar bushes or whatever, so in circumstances where it was necessary to get equipment down there, he could do that. For everyday use, we're looking for no greater than 6' wide winding path. Mike B said the road was grandfathered, and the new documents say it no longer exists. He thought they could do what they needed without the language being so specific. Tim thought this was out of the scope here.

Mike M said #9 on pg. 12 and 13 addresses issues of #9 on pg. 18. He didn't see how whether they call it a roadway or not, what the staff recommendations would cause him as far as being able to use that for lake access. Tim repeated that he thought it was used to define an area rather than a use. Mike B said that was fine as long as it didn't have legal ramifications down the road. Dick Schultz commented that for the 52 years he's lived there, the roadway has been there. It's the only access to get down there. He thought the whole thing would be in the lake were it not

for the money and effort spent to keep it held up. Mike M said he'd like to close the floor to public comment and return to the Board for recommendations or comments.

Mike M checked about the amendments to the conditions the Board had discussed:

- The second sentence of #7 shall state that *the engineer shall provide the Planning Department quarterly reports regarding the stability of the temporary log structure until the temporary structure has been replaced.*
- Further down in #7, the six months for coming back for a new application would be changed to 18 months.
- Sue noted the change discussed in #15 on pg. 19 to remove the portion that said “as set forth by the American Society of Civil Engineers and Structural Engineering Institute (ASCE/SEI) adopted standards”. Mike M agreed.
- Tim reminded about a condition for a deed restriction, and he asked if one could also apply to the variance. Sue asked Mike B if he would agree to a deed restriction regarding the variance denial with the conditions about the 5 year timeframe. This would be a document to alert future property owners so they would know. Mike B agreed.

Motion made by Tim McGinnis, and seconded by Jack Meuli, to grant the conditional use with the staff report, application materials, findings of fact, and conditions as modified above. Motion carried, all in favor.

OTHER BUSINESS:

Motion made by Tim McGinnis, and seconded by Jack Meuli to adjourn. Meeting adjourned at 6:27 pm.