

**LAKE COUNTY BOARD of ADJUSTMENT**  
**November 18, 2009**  
**Meeting Minutes**

**MEMBERS PRESENT:** Clarence Brazil, Sue Laverty, Mike Marchetti, Tim McGinnis

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

Mike Marchetti called the meeting to order at 4:00 pm

**Motion by Sue Laverty, and seconded by Mike Marchetti, to approve the November 18, 2009 meeting minutes. Motion carried, 3 in favor (Clarence Brazil, Sue Laverty, Mike Marchetti) and 1 abstention (Tim McGinnis).**

**KELLY CONDITIONAL USE—MASUMOLA**

LaDana Hintz presented the staff report. (See attachments to minutes in Nov 09 meeting file for staff report.) LaDana highlighted changes since the date of the staff report. The guest house has been removed and the garage is now attached to the main single-family residence. Impervious surface is still proposed to be expanded. On page 5, #2 dealt with the guest house, which has been removed. Item #3 addressed the guest house as a non-conforming structure. #4 points out they can only have one single-family dwelling, which is why they have redesigned the structure. Regarding #5 and the impervious surface coverage, the proposed construction including the driveway and the garage will result in a 37% impervious surface coverage of the buildable area of the lot.

Mike M asked if the impervious surface has been recalculated since the removal of the guest house. LaDana clarified with Mike that the coverage was 25% with the guest house, and went down from the 25%. Then additional coverage was added with the addition of the garage and everything. The 37% is the coverage number. LaDana noted this one was a little different in that they have the concrete and asphalt driveway to add to the impervious surface.

Hu Beaver spoke on behalf of the applicant. He said the main thing adding to the impervious surface is the road and the circle drive. It's on the upper flat area. The drainage is going to be into the lot. There's a lot of space in the lot. The setbacks aren't included in the calculation. It's been presented well.

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

Sue L asked about the late change. Looking at exhibit #5, LaDana explained to attach the buildings, the deck shown would be enclosed so the buildings are attached, and there would be doors off of the bedroom into that hallway.

**Motion by Clarence Brazil, and seconded by Sue Laverty, to approve the conditional use with staff recommendations. Motion carried, all in favor.**

## **SANDERS/MANY SPRINGS VEGETATIVE BUFFER STRIP VARIANCE—EAST SHORE**

Joel Nelson presented the staff report. (See attachments to minutes in Nov 09 meeting file for staff report.)

Tim checked his understanding that recent state law suggested buildings being turned into condominiums aren't really being subdivided. Sue S explained there are exemptions for condominiumizing existing structures in their criteria. This property doesn't meet those criteria so it needs to go through subdivision review.

Mark Johnson, the project architect spoke on behalf of the applicants. They submitted the variance for the vegetative buffer strip with a reasonable expectation of approval. The property has been in existence with its current owners for 10 years, and they have implemented upgrades and improvements to the property. The existing buffer strip is in its current condition as a result of the past development and approvals that the current owners have gone through. He overviewed the current proposal to convert the 12 present rental units to 6 units plus a single-family residence. Bar and restaurant would be kept as they exist presently. To meet DEQ approval, they have to submit a stormwater runoff plan, and also submit for sanitation approval. This will necessarily result in a secondary treatment facilities being built on the properties. This will allow the existing drainfield to be used, when going from a transitional motel use to a residential use, which requires a higher rate or standard. They will maintain the current limited use of the property, which is used from May to September. There are no changes to add docks, to change within the buffer strip, or to change infrastructure.

Mark said the variance application seemed appropriate in this sense. This was different from most subdivisions where property is subdivided, and use and development increases. They would reduce the amount of usage and increase the level of environmental protections through their sanitations system. Another unique aspect of this property that makes a variance appropriate is that all stormwater is handled on the back side of the buildings. Anything that gets past the primary system had to get through the buffer zone that's there right now. He didn't think it made sense in this case that they'd have to upgrade to the new standard since they weren't proposing to make changes in that zone. If they weren't going for subdivision, he's been informed by staff that they could get a lakeshore development permit to rebuild the seawall without having to provide a vegetative buffer strip. He didn't think it made much sense that they needed to provide a buffer here, where they're proposing to do nothing in the lakeshore, versus the other situation where there was potential harm and they wouldn't have to provide a buffer. He thought the unique nature of the project really made a variance applicable. From the standpoint of the public interest, water quality was the issue they'd already protected and they will continue to advance protection. They felt a hardship was involved here. The current buffer was being used as an integral part of the property. Those are public areas where people spend time. Removing that and replacing it with this other system would be a hardship on the business. It takes away one of the amenities which is one of the prime attributes to their business. They would maintain and enhance the protections that are there.

Tim asked about the restaurant. Mark replied the restaurant and bar will be under condominium ownership as well. It will function as it does right now. Tim asked about the building age.

Mark said they varied in age, ranging probably from building in the 1960's to within the last 10 years. Tim and Mark touched on some additional building details and ages. John Thomas noted for the original building, the residence, he found a newspaper from 1956 in the cinder blocks.

Mark confirmed for Tim the condominiums would be seasonal use only, and not used in the wintertime. Tim asked if the water was turned off. Mark described that the water right is described during that timeframe, and that's the timeframe they use it. They draw lake water, which goes through a treatment system in the restaurant area. It's a fairly elaborate treatment system, and it would receive some minor upgrades in the approval process.

Sue L checked that they felt they could limit private ownership to only occupying the privately owned condos during certain periods. He confirmed. The period and use would remain in effect. There's going to be conditions and that will be in the CC&R's. John T said it would probably be purchase contract. The water usage was April through October. Tim checked that this would not be a problem to have that as a deed restriction.

John Thomas, from A 2 Z Engineering, also spoke on behalf of the applicant. He touched on the 3 variance criteria from MCA (Montana Code Annotated). The first was the public welfare has to be served. The granting of the variance can't be in contrary interest to the welfare of the general public. With a vegetative buffer, a big area of concern is the environmental impacts of it. In this case, with the situation of the buildings already being located fairly close to the lake and the buildings are [inaudible], the stormwater will be handled back, and they will submit a plan to DEQ for review that deals with the stormwater issued. One of the advantages of a vegetative buffer is stormwater is allowed to sheet flow off of a big slope and run right into the lake, and it can carry things with it that a vegetative buffer would mitigate. In this case, there's not going to be that quantity of stormwater getting to the lake, so the mitigating factor of the buffer is not necessarily applicable. Soil erosion is another thing vegetative buffers are good for. This is a well-maintained lawn in a very small area. Most of the surfaces are not erodable surfaces. With a big area of lawn, you'd worry about fertilizer and what kind of fertilizer is applied. Fertilizer carried nutrients, primarily nitrogen and phosphorus. In large quantities, this would be a detriment in the lake. The area of lawn here is very small. Further, the impact can be mitigated if you use the right kind of fertilizer (slow release). The lawn was also an existing condition. This was a permitted change in 1999.

John T continued with the second criteria: strict enforcement of the zoning ordinance would result in hardship to the owner. There are a lot of hardships involved if they aren't granted the variance. One is cost of change for an area where 10 years ago they were granted approval to do the way that they did. This cost would be on top of the other improvements, such as going to a level 2 treatment system and implementing the new stormwater plan with just the cost of engineering for that. They're going to do a lot of environmental impact improvements to the area. There's the economic impact to the ability to sell the units. Right now they have a nice, usable lawn area that gives a good lake view. The developer has built with the assumption that they have that lake view. If they plant trees and brush and restore the buffer, there's going to be an economic impact to the value of the land and the viability of the restaurant business. It's not a self-imposed hardship. In this case, they're simply trying to reconvey this property. When

economic conditions change such that the owner needs to utilize it in a different way, he didn't think that was a self-imposed hardship.

John T identified the third criteria as the spirit of the ordinance needs to be met. This was an existing use. You want to guide new use with the ordinance from the regulations. This use had been there for a while. The provision that talked about the vegetative buffer talked about newly subdivided and newly developed properties. In most cases that goes hand in hand, when to subdivide something, you're newly developing it. In this case, there was subdivision but no new development, so it's not opening the floodgate or precedence or a special privilege.

He summarized that he thought this was a perfect case of the applicability of the variance clause in the zoning regulations. The zoning regulations had an intent, and this was a grandfathered condition, and not much is changing. He asked that the Board grant the variance and offered to answer questions.

Tim asked if more impervious surfaces were planned. John T replied no, not in the vegetative buffer area. There were no changes. They didn't want to touch it. Tim asked if they were okay with a condition that there was no more impervious surface. John T said that would be fine and suggested including that only natural slow release fertilizer be used. Sue L suggested none (as far as fertilizer). John T agreed, but wanted to be sure that you've got healthy grass there, not dirt. Sue L asked how it was irrigated now. [Answer inaudible.]

Clarence asked if the seasonal use was strictly because of the water situation. John T this was so in part. Mark thought the other big part was the drive getting down there is steep, so there's an access issue in the winter. It would have to be maintained and plowed, maybe daily, for it to be used during the winter. He thought it was more an issue of being able to draw the water. It's only April through October that they're allowed to draw water from the lake. Clarence asked if there was a possibility of a well being drill and the situation changing. The agents thought this was possible. Mark thought it would be a challenge on the site by virtue of where the septic is located, and the topography. It would be an environmental challenge to get that approved to do so. John T thought on a residential level, for the 2-bedroom house there, the usage was year-round. As far as commercial use, they're not allowed to use it commercially past that October date. Mike summarized that the water right restricted them to those months. Tim noted the exception of the one residence. Sue L asked if it was changed to residential, if this would change the water right. John (?) wasn't sure, and would need to look into that further. The neighbors who own condos year-round next to this (12 privately owned condos to the south), are part of this. They come for the Polar Bear Plunge, but what they do is shut off the water and they don't have running water during the winter in those units. Mark (?) said to change that surface water right would be almost impossible. Tim asked who would be responsible if there was a huge sort of failure, like a septic failure, with the commercial spot. Would that be the homeowners association or just the person leasing the restaurant? John T (?) thought homeowners association, along with maintenance and those things. Mark said this was a benefit of the condominium ownership. It shifted financial responsibility from the single party to multiple parties. It made it easier for those kinds of costs to be covered later.

Casey Ingal spoke for the applicants as the chef/manager of Many Springs, and also as the son of the applicants. His parents were unable to attend due to medical reasons. He distributed some color photographs. (See attachments to minutes in Nov 09 meeting file for staff report.) He gave a statement regarding the lawn. He thought removing it would be a tragic mistake that would have bad effects on the public and business. Many Springs was the only commercial lakefront operation from Woods Bay to Polson. They've had countless incidences of boats being towed to Many Springs for safe harbor and secure dock, along with boaters needing safety from fast moving, powerful storms. They are visible to boaters on the lake in a remote area, and this has proved Many Springs to be one of the safest places to harbor for miles. They had 3 old trees in the area of concern. They made efforts to save those trees, and had to remove them. They did their best to replant the property with native landscaping, trees and shrubs. Along with making the property aesthetically appealing, they also wanted a safe environment available to the public when they need safe harbor. To put in trees and shrubs would block that view not only for the customers looking out, but also for patrons trying to find the location, as well as those broken down or in a bad situation who want to be able to locate them.

*Public comment opened:*

Christi Buffington: She spoke on behalf of the Flathead Lakers, a non-profit education and advocacy organization that works to protect water quality and also to encourage economic development that's consistent with economical integrity. They are currently working to increase awareness about vegetative buffers and their benefits, including economic benefits. She handed out a sheet from which she highlighted the benefits of buffers. (See attachments to minutes in Nov 09 meeting file for staff report.) Her understanding was that much of the 50 feet of the lakeshore buffer was in lawn and impervious surfaces at present. She noted that landscape buffers could be planted to maintain views, strategically placed. People care about Flathead Lake and want it to be clean for swimming, fishing and also because it's beautiful.

She said this proposal's site is called Many Springs for a reason. There are many seeps and springs along the steep slopes here. Some of the water flows just below the ground surface. Some of that water is from the springs that later become seeps. Stormwater runoff or pollutants is not stopped from entering the lake by seawalls or lawns. It's the deep rooted systems that stop the subsurface flow.

She covered the five benefits of shoreline buffers on the handout. For the third point, she noted the homeowners couldn't do much to improve the fish and aquatic life there, but they can improve the habitat for birds through a vegetative buffer with native landscaping and vegetation. Along with the fourth point, she pointed out section E in the staff report does state the lakeshore protection regulations prohibit the use of fertilizers, pesticides and herbicides within the 50 foot vegetative buffer. A nutrient is a nutrient whether it comes from a cow or a synthetic source. With the fifth point on the handout, she thought the homeowners had an incredible opportunity to establish a riparian buffer and vegetated shoreline that could improve water quality but also increase the attractiveness to the site for people looking for that kind of environment in which to live. She offered to answer questions.

Mike M: He asked if the recommendation from the Flathead Lakers was that the buffer strip be emplaced.

Christi B: She affirmed. Also, they were aware the applicant has a premise the lawn would protect the natural resource as much as a vegetative buffer. The Flathead Lakers disagreed with that premise, based on science. Lawn was not an effective vegetative buffer.

Tim M: He asked how the study in the handout in Snohomish County was done.

Christi B: She thought they polled residents and property owners who were coming to that area. She offered to get more information to him about the study.

Tim M: It sold for more?

Christi B: It increases property values. She knew of other studies, in Wisconsin, Maine and Michigan that showed property valuations also increased with buffers. The Lakers would be happy to get him a listing of some of those.

John T: He reiterated they weren't arguing the value of vegetative buffers. He agreed they were valuable. Variances allow for flexibility. In this case, a lot of the issues and benefits with vegetative buffers were mitigated by the site specific conditions. For things like aesthetic improvements and wildlife habitat, there's no question that those could be improved, but this was also an existing thing that was already built, and it's a grandfathered condition in many ways. He thought this needed to be given consideration. They aren't anti-vegetative buffers, but in this case, he didn't think they applied.

*Public comment closed.*

Clarence disagreed that a vegetative buffer added value to a property. He noted he had 1000' of wetland and his land value was less than one down the street without a buffer.

Mike expressed a concern that this has been this way for awhile. He was at an impasse in saying that the buffer strip was needed. It's an existing condition. They were grandfathered and sitting there, so he was having a hard time not allowing this. He's seen the property and he's boated in the area. He had a hard time telling them they now have to take this thing out just because they're being allowed to convert buildings to condos. Tim agreed. It wasn't a new development. It did seem to be a change of ownership only. He thought it was a landmark building. He thought changing to a natural buffer zone would detract from the use of that. He also agreed you could see it in a storm.

Sue L was torn also, but leaning in the other direction. She saw the hardship as economic. Ability to sell and the cost to put it in is economic. It's been there for 40 years the way it is, and that's where she was more torn. It's a change of ownership and use, and it's changing the property, although it's not digging in the dirt and building a new building. The current use would cease to exist as it is. The rules and regulations say they need to put in a vegetative strip.

From her understanding, the Planning Dept would be willing to work closely with the owners to help make it easier for them. She was torn.

Tim thought it was a landmark building, and a buffer would change very much the look of it. He wasn't sure that was for the better. He liked the way it looks now, and he thought they were grandfathered in. To not consider the economic thing and enjoyment of the property for commercial enterprises was a little difficult for him. If you've got a vegetative buffer, there are no weddings there. In that sense, he thought it was something to think about.

Clarence asked if the restaurant was still public, was it owned by the condominium complex. Mark (?) said it could be leased out. If someone were to own the building and restaurant, they could lease it out to a purveyor to come in and run it as a restaurant to the public. Sue L thought they'd said the maintenance would be under the condominium. Mark said they weren't changing the usage of the commercial part of the restaurant. That's what those impervious surfaces are for: tables and chairs. The grassy area was used for weddings, as Tim said, and for the children who came and played. It's such a usable area for customers.

Mike said he would definitely not allow a variance if this were a new subdivision with nothing on the ground there. Because the property was bought in this condition, and this was what was expected at the time the property was purchased, he didn't want to impose a new condition on that property. Sue L said by changing the use, the owners create the triggering affect. Tim disagreed. He thought it was still the same use, with people sleeping in rooms and enjoying the lake. What changes was whether they lease it for the night or if they have it all the time. It was just a different means of conveyance, from a lease to a purchase. Joel said the management could be different. Right now, a family managed the property as a whole. It would change to probably a homeowners association. Subdivision was the triggering mechanism that required a vegetative buffer. Sue detailed this was change of ownership in terms of the management of the property, going from one individual to nine individuals. It's not comparable with someone just buying the property. Tim disagreed. He thought it was still the same use. Clarence agreed with Tim. He thought it would be the same as it was, except different owners would make different decisions on how the property was managed. The Board discussed this further.

**Motion made by Tim McGinnis to grant the variance request with conditions, and to change the findings. Conditions would be for no fertilizer use and no additional impervious surface could be added.**

Sue S thought the property was maxed out on impervious surface. Joel said it was close to 100%. Mike mentioned they also discussed deed restrictions on use. Sue S said she didn't know how that was applicable to the buffer. She preferred that the Board speak to the findings and modifications of the findings in support of their approval.

Tim read beginning on pg. 23. For a, he thought this would be so. They wouldn't be able to use the property [inaudible] with the views. With the buffer, he didn't think the restaurant would be able to use the property as it was, and would give an unfair advantage to those restaurants that do have a vegetative buffer. [Inaudible.] For b, he thought that one of the things the applicant has no control over was that the buildings are where they are. They received a permit for the way

they did it. For c, this was similar to b. For d, he thought the hardship was not created by the applicant. They were permitted for the last building put in. It was a preexisting condition. For e, he thought one part of the hardship was economic, but there were other reasons that were not. For f, Mike commented this property had been like this for a while. Clarence said the variance would definitely not change it adversely. It may change it very slightly. Mike didn't see how it would change anything. Nothing was being done to the property. They're just allowing them to keep the property the way it was. Tim moved on to g, where once again nothing was changing. It's as it is. For h, he said again that they're not doing anything.

Mike said by the findings in review, unless there were contradictory views, he didn't see that by granting this variance, that they were going to violate the findings. He thought it was reasonable and prudent to actually allow this variance to pass. It seemed to meet the conditions here.

Sue S said that from the conversation at last month's meeting regarding the buffer, there was some language considered that if changes were made, a buffer would be implemented in the modified area. That might be a condition that could be added to a motion to grant this approval today, just so it's clear on the record that the Board of Adjustment thought that if there are changes made, the area should be planted with native vegetation, more in line with the buffer requirements and the zoning regulations. Mike agreed. One reason he favored this variance was they're not doing anything to that area. If they were to disturb the area near the lakeshore, he agreed there should be words and conditions that would say those areas would now have to be converted. Sue L said it would put notice on any future owners, whether single or multiple, that modifications in and around that area would have to meet vegetative buffer standards.

The agents for the applicants asked about routine maintenance. They gave a cracked patio stone or seawall as examples. The Board thought that sounded reasonable. Mike wondered about wording. Sue S suggested minor maintenance issues. If it was major maintenance, like the whole patio needed to be replaced, it should need to go into compliance with the regulations. The regulations recognize existing uses, but as they become old and need replacement, they try to get them into compliance. Clarence thought minor maintenance would be something that didn't change the whole look of the structure. Sue L mentioned minor versus major replacement as well. Replacing the whole patio or the whole stairway should be incorporated into incorporating the buffer strip. Sue S added if there was disagreement between the landowner and the Planning staff about what is substantial or minor maintenance, it could come back to the Board of Adjustment, so there's an ability for determination on this. Mike pointed out the new homeowners association could put in a buffer strip any time they wanted, if they thought that would be nice for them. Clarence didn't think replacing a stairway or a deck that was already there would matter as long as they left it the same. Sue L thought minor maintenance work would be replacing something here and there. Joel noted they were essentially talking about a grass lawn. That was what staff recommended replacing with native vegetation, so they're talking about ripping up the grass lawn. They'd have to replace it with native vegetation. He gave an example of Bobcat tracks if they ran a couple of Bobcats tracks down there.

**Motion made by Mike Marchetti to add to Tim McGinnis' recommendation that if the variance is approved, a condition would be put in to mandate that a buffer strip be put in any area within the 50' buffer that is disturbed for reasons beyond minor maintenance.**

Joel asked Mike about a reference to structures and seawall. Mike thought if the seawall was pulled out, it wasn't minor. Joel asked if the owners got a Tribal permit to replace the seawall, then the entire buffer strip would need to be replaced. Sue S said this would be the area that was disturbed, so it would apply to the area behind the seawall. John T (?) asked if that was full replacement or is that if one I-beam or piece of concrete needed to be replaced. Mike said he was referring to full replacement. Sue S reiterated it would be on a case-by-case basis. They'd have to talk to staff, who would say whether they felt the buffer was required or not. They'd have the option to come back and talk with the Board.

John restated that at the point when something needed to be fixed, it would be back in staff's hands. They would check with staff to see if it needed to go further. Sue S explained they would most likely need either a lakeshore or zoning permit to do the work regardless. Mark checked that this was if they were to disturb the buffer. There were ways to build a seawall [inaudible]. Joel asked if they intended to include the patio. Someone replied yes. Casey mentioned the buildings were not 50' from the lake. Sue said there were already provisions to maintain that grandfathered structure.

Joel said they want to regulate the fate of the patio and the seawall. Sue S said they want to regulate the fate of the 50' buffer. Mike said he liked Sue S's definition. Joel thought it was confusing as it existed. There's the patio that has little squares on it, and then there's the patio immediately attached to the buildings, there's the paver stones, the seawall, the area adjacent to the seawall that's concrete. There're a lot of elements and different structures. It was hard for him to figure out what they were getting at.

Mike simplified it: anything within that buffer zone to which they're going to do anything more than maintenance or minor repairs will require coming back to the staff and getting a permit. If it's going to be more than minor then it triggers the clause that they're going to have to do buffer. If they tear a building down that's in the buffer zone, they lose their grandfathering anyway. Joel said except the seawall, and spoke about that. Mike thought replacing half of the seawall was more than minor maintenance. Sue L agreed. Mike said replacing an I-beam or a piece of concrete in it seemed like maintenance. Replacing a significant portion would be different. Replacing all the paver stones would also be more than minor.

Sue S recapped that there was a motion to grant approval with 2 conditions to grant approval. The first condition was no fertilizer. The second is regarding changes.

Clarence Brazil seconded the motion to approve the variance with the two conditions.

**Motion carried, 3 in favor (Tim McGinnis, Clarence Brazil, Mike Marchetti) and 1 abstention (Sue Laverly).**

### **OTHER BUSINESS**

Kurt Moser was present to discuss litigation strategy.

**Motion by Mike Marchetti, and seconded by Sue Lavery, to move into executive session for litigation strategy. Motion carried, all in favor.**

**Motion by Mike Marchetti, and seconded by Tim McGinnis, to end executive session for litigation strategy. Motion carried, all in favor.**

Lita mentioned she'd heard from most people regarding interest in renewing Board positions. For December, notice had been run, and it looked like there would be two items. She asked the Board to give as much notice as possible if they would have attendance challenges in December.

**Motion by Sue Lavery to adjourn, and Clarence Brazil seconded. Motion carried, all in favor. Meeting adjourned at 5:32 pm.**