

## **HUBBARD COUNTY**

### **Planning Commission/Board of Adjustment Meeting Minutes**

6:00 p.m. on Monday, November 26, 2018

Vice-Chair Mark Petersen opened the meeting with the following additional members present: Ted VanKempen and Tim Johnson. Also present were Environmental Services Director Eric Buitenwerf and ex-officio Planning Commission member and County Board Vice-Chair Dan Stacey.

Petersen started the meeting by reading the procedure by which the meeting of the Planning Commission/Board of Adjustment will be conducted to the audience.

#### **Planning Commission:**

**Approval of Minutes:** October 22, 2018 meeting

VanKempen made a motion to approve the minutes as presented.

Johnson seconded the motion that carried unanimously 3 – 0.

**Old Business:** None.

#### **New Business:**

**Minor Subdivision Application by Robert Roberts:** Part of Section 11, Township 145, Range 35, Fern Township, Parcel 08.11.00500. Applicant is requesting to subdivide property into two tracts. A minor subdivision is required because 5 years have not passed since the property was last subdivided by administrative subdivision.

No applicant was present.

Petersen opened for public comment.

No public comment was given.

Petersen closed public comment.

VanKempen made a motion to approve the application.

Petersen seconded the motion that passed 3-0

**Minor Subdivision Application by David and Julie Johnson:** Part of the South Half of the Southeast Quarter of Section 4, Township 143, Range 32, Lakeport Township. Parcel ID 19.04.02220. Applicants are requesting to subdivide 31 acres into 4 tracts.

David Johnson, 25903 420<sup>th</sup> Street, Guthrie, MN, presented the application.

Johnson said we are all aware, since we were out there last time for the variance because of the five year time frame, now I am proposing a minor subdivision to take a parcel that is not 31 acres; it is 25 or 26, into four separate parcels. Two of them are

already separated by the road, the north two. There are two fives together that I am looking to separate. We would have four parcels out of this tract. I do have the site inspections for the septic approved. I have enclosed the dimensions for each lot with the paperwork I believe you have.

Petersen stated it looks to me like all the requirements have been met.

Petersen opened for public comment.

No public comment was given.

Petersen closed public comment.

VanKempen made a motion to approve the application.

Johnson seconded the motion that passed 3-0.

**Shoreland Management Ordinance Amendment Application by Travis Guida:** Proposed amendment to Section 401, Table 1 of the Shoreland Management Ordinance to add an aerial adventure park as a conditional use on recreational development classified lakes.

Travis Guida, 24250 Shady Ridge Drive, Laporte, MN, presented the application.

Guida said we are looking to amend the Shoreland Ordinance to include an aerial adventure park as a possible use.

VanKempen asked can you give us a little background on how this came about?

Guida responded when we first had applied for a conditional use permit, because there wasn't such a thing as a use of an aerial adventure park, we were granted a conditional use under the umbrella of an expansion of Eagle Beach resort. My wife, her family, runs that resort. All of the businesses are run entirely separate. To not interfere with any development that the resort might propose in the future and to not interfere with any development or future growth that our business might have, we would like to keep them entirely separate and amend the Ordinance.

Guida added after speaking with Mr. Buitenwerf, one of the intended uses includes this aerial adventure park, but we have often clients coming, looking for accommodations. We often would have a need to host our staff, if we are hiring a seasonal staff member for the summer. Therefore we may consider building a structure. If it is something I could bring for you to entertain, would we be able to include under the use of an aerial adventure park, the capacity to provide overnight accommodations for groups as well?

VanKempen replied I think, we can ask Buitenwerf for guidance, but I think they would have to be two separate issues.

Buitenwerf said that is typically how it would be handled, but not to say that you couldn't develop a type of use that would integrate the two. That would also be, as would it be with

any of the possible amendments that might be proposed, it would be subject to and pending Department of Natural Resources approval as well.

VanKempen asked Buitenwerf can you give us a little background as to why we are here tonight for this, why we just couldn't grant a variance for something like that?

Buitenwerf said the ordinance, as well as statute and case law interpretation does not allow a variance to be granted for a new use, which this would be considered. It wouldn't be viewed as a legal, nonconforming use. Only legal, nonconforming uses are allowed by the ordinance and statute and case law to be entertained for variances.

VanKempen added we are looking at adding a use to Section 401 of the Shoreland Management Ordinance to create a new use or a new category?

Buitenwerf replied correct.

Petersen asked Buitenwerf the conditions that we might want to put on this would not all have to be formalized tonight at this meeting? We would be recommending it to the County Commissioners for approval and if they were to approve this it could come back to us to formalize what, if we do develop this new category, what conditions would be part of that.

Buitenwerf responded that would be the recommendation from the department, to take up the proposal from the applicant tonight in general, in terms of a concept, possibly flesh out what you might call the type of use, whether you keep it contained to that of what is proposed with an aerial adventure park or if you wanted to broaden it to a larger category of uses that could encompass that as one of many and then decide what type of use you want to consider that to be a conditional use or a permitted use and make that recommendation to the County Board. I would then present that to the County Board to see if they are supportive of the proposal and if they would be, then I would imagine they would then direct the Planning Commission to work on the matter more in depth in terms of developing specific language as to how that use would be allowed to operate in terms of any performance conditions that you might wish to place on that type of a use. That is the process I can anticipate being used.

Petersen asked would that limit the applicant until those conditions are formalized, as far as using the property currently or would they be operating under the old agreement until those conditions are formalized?

Buitenwerf answered if the County entertains the proposal and amends the ordinance accordingly, then we would have to wait for the ordinance to be amended and then the applicant would make application in whatever form is determined appropriate and then go through that approval process for that application. We have had that conversation prior and Mr. Guida is aware that he is looking at several months for this time line to unfold in an ideal circumstance.

Guida asked if we continue to go along this process, the original use would still be applicable though, is that correct? We would still be able to operate under the original use, not with any further expansion.

Buitenwerf replied I don't know, that is where we left the issue. I said if we wanted to investigate that further, I would have to enlist the research of legal counsel.

Guida continued I am not suggesting that we would be doing any expanding, I just want to make sure that while the process is playing out with the Board, with the Planning Commission as well as the County Board, that if we had a group that wanted to come in January, we would still be able to operate under that use that is currently approved. Or is that what you are saying?

Buitenwerf replied that is what I am saying, I am not sure. Once it came to our attention that your use is intended and has been operating separately from the resort, that prompted a number of questions that I have to run by legal counsel before I am able to speak as to what may or may not be allowed to occur.

VanKempen added that was going to be my question, if you are open for business now?

Guida answered we haven't had any groups that have been there since that conversation. I did not realize that we would not be allowed to continue the use. We don't have anyone else that is planning on coming right now, but we will in the spring so I would want to make sure we were ready if possible before then.

VanKempen said when do you anticipate you would be open?

Guida responded usually it is the beginning of April.

Petersen opened for public comment.

No public comment was given.

Petersen closed public comment.

VanKempen said it is hard with the applicant here today, to set up a special ordinance or a part of the ordinance to satisfy just tonight. If we are going to be opening up the ordinance for some adaptation, we should maybe look at more than just the aerial park. We were given some examples in our packets. Most of them were under the heading of an outdoor recreational facility and looking through our ordinance, there are a lot of things that aren't covered. Examples are swimming pools, skating rinks, climbing walls, bungee jumping, disk golf courses, paintball facilities, mini golf, all these things could be under this heading and I think going from there in future discussions, we could talk about lot sizes and parking and lighting, etc. I don't know how far we need to go tonight, but my feeling is that this is something we should look into.

Johnson added I agree with the use to be amended for an aerial park.

Petersen said it sounds like we would be in favor of recommending this to the Board, but we won't be able to formalize any of this tonight. We can do that without putting any verbiage here to the recommendation.

Buitenwerf said what I would suggest would be giving some general framework to your recommendation, whether you would want to limit it strictly to what is proposed of an

aerial adventure park or if you want to entertain that as one of multiple potential uses that would be under a larger umbrella of a type of use. And then if you would like that as a conditional use or a permitted use or a use that is allowed with special conditions if those are met without going through a CUP. Then also whether or not you want it limited to the recreational development classification of lake as proposed in the application or if you wanted to consider it on other water body classifications as well. Those would be the general aspects that the County Board would be interested in hearing your thoughts on.

VanKempen asked so basically we should amend the ordinance to allow some types of outdoor recreational facilities that may include an aerial adventure park.

Guida added an aerial adventure park is a general classification in our industry. A ropes course could be another classification.

VanKempen clarified so something that could include rope courses, disk golf courses, climbing walls, towers, golf courses and mini golf courses, zip lines, sports fields, etc. My thought is this might not be a fit for a natural environment lake, but the recreational development lake and I believe we only have one general development lake in the county.

Buitenwerf replied yes we only have Kabekona Bay of Leech Lake that is classified GD.

VanKempen said I am not sure that single lake needs to be added to the list, but that is something my fellow Board members could elaborate on.

Johnson asked are we going to stick to just aerial or all of those things he listed to recommend to the Board, or do you have to repost and advertise to everybody that we are talking about that?

Buitenwerf answered you would be able to make a recommendation to say ropes course only or a broader type of use that would encompass that as one of multiple potential uses.

Petersen asked is anything we do here to recommend to the County Board amendable upon further review by us if it gets thrown back to us? I feel that I would need more time to review this and come up with a finalized list as opposed to trying to give them something tonight that I think off the top of my head. I am sure that I will think of something else or maybe want to take something off that I initially proposed. It's not finalized and it can be amended if it comes back to us?

Buitenwerf replied yes. The Board may choose to amend whatever recommendation you make if they elect to direct it back to you to work on in further detail. Or they may say no to the idea. Then there is also an amendment process that we go through with the public hearings where the public is able to provide comment on the proposed amendment if it reaches that point, which may lead to language changes at that point in the process as well.

VanKempen added Buitenwerf you also talked about whether it would have to be a conditional use permit or if we would have special recommendations to the ordinance? For me, I think a conditional use permit might be a good idea on a larger scale operation.

If you have someone want to open up a batting cage, do we need a conditional use permit or are special provisions enough for that? It is hard to define tonight how narrow we want to recommend to the Board.

Johnson said I am with VanKempen on that. Adding more than the aerial in an outdoor amendment to our ordinance and create something down the road. I would agree with conditional use.

VanKempen asked Buitenwerf do you need something more formal?

Buitenwerf replied it would be nice to formalize it in the form of the motion you would vote upon.

VanKempen made a motion to forward to the Hubbard County Board of Commissioners a recommendation that we amend the Shoreland Management Ordinance Section 401 for uses to look at adding a use under the possible heading of "outdoor recreational facilities" that may include rope courses, swimming pools, disk golf, paintball facilities, sports fields, mini golf, golf courses, etc. as a conditional use on recreational development lakes.

Petersen seconded the motion that passed 3-0.

#### **Board of Adjustment:**

**Approval of Minutes:** October 22, 2018 meeting

VanKempen made a motion to approve the minutes as presented.

Johnson seconded the motion that carried unanimously 3-0.

**Old Business:** None.

#### **New Business:**

**Variance Application 38-V-18 by Larry and Renee Hills:** Lot 3 and part of Lot 2, Birch Point, Section 16, Township 140, Range 33, Nevis Township on Lake Belle Taine, a recreational development lake. Parcel 21.38.00200. Applicants are requesting two after-the-fact variances - Part 1: Sections 507.1 and 702 of the Shoreland Management Ordinance (SMO) for a residential structure whose lowest floor is not at least 3' above the lake's highest known water level and that intensified the structure's ordinary high water mark setback relative to the nonconforming structure it replaced, and Part 2: Section 904.6 of the SMO to exceed the 25% of lot area impervious surface area threshold.

Trevor Nicklason, 24563 200<sup>th</sup> Street, Nevis, MN, and Brent Nicklason, 25275 State Hwy 34, Nevis, MN, presented the application.

Trevor Nicklason said when the project was constructed; the ordinary high water mark was used to set the elevation of the lowest floor. It is 3'6" above ordinary high water. We were supposed to go to the highest known water level, which is 1.44' higher than the ordinary high water. The crawl space has a slab and there is mechanical equipment down in the crawl space area. Filling it with sand is not a good option. If it had to be done we

would have to move the mechanical equipment. It would create too much dust. I know that was mentioned as a possible solution in the original letter. We are asking that it be allowed to remain in place as is. The second part of the variance is regarding the density of 25% impervious surface. After construction, as a result of the construction and a rain event that washed out the old driveway, which were two concrete paths running down the hill, it had to be replaced. We had some crushed asphalt hauled in so the grass down the middle is no longer there. Also at that time, two parking areas down below were enlarged. That pushed us over the impervious surface threshold. We are asking for those to remain as well. If we have to do something different we can look into options there as well.

VanKempen said tonight we are just addressing the residence's lowest floor is not at least 3' above the lake's highest known water level and the impervious surface calculations?

Buitenwerf replied in addition to the structure being closer by measurement to the ordinary high water than what the previous structure was that it replaced.

Trevor Nicklason added that was part of what we had addressed in the site visit. In regards to that, the new structure and the old structure are in the same proximity to the lake. The only thing that changed was the mark measuring the ordinary high water. When the initial mark was placed, in between permit application time and in review of it, a new mark was set using a different benchmark. There is one existing mark and the difference in elevation is roughly 12" from the old ordinary high water to the new ordinary high water. The new cabin is not closer to the lake than the old cabin was; the only thing that has changed is how we are measuring it.

Petersen asked Buitenwerf I noticed in some of the notes and staff report that your staff was saying it seemed that the new house was no closer than the original building that was tore down and that was established to be 84' from ordinary high water?

Buitenwerf replied yes, based on the application photos that were submitted, they show before and after of the previous structure placement relative to the existing structure. We don't have extremely concrete information, but based on that, it certainly appears the structure is largely in the location of the prior structure.

Petersen asked the original was thought to be 84' back from ordinary high water?

Buitenwerf answered 84' is correct.

Petersen said I am a little confused then, if I take into account somewhere else, perhaps in the applicant's paperwork, about a change in the benchmark that happened in 2016. Is there some confusion there because your second time out after the initial establishing of where that was, could it have changed?

Buitenwerf responded I don't have specific dates of when the DNR changed its benchmark location on the public access. All I can say is that between the times of the original site visit by Bryan Haugen from the department when he measured the 84'

setback to when we went out this summer and measured the new structure's ordinary high water mark setback that the DNR had updated and placed a new benchmark at the access. The former benchmark was a metal stake in a tree and the tree was in deteriorating condition so they replaced that with a new benchmark that is set in the concrete solidly that is less susceptible to tampering.

VanKempen asked the mark that you were using, do you know approximately when that was set? Was that the mark that was set in 2015?

Trevor Nicklason said yes, the one set by Haugen. I don't know exactly when he set it, but before we started construction.

VanKempen added there is a site inspection request form here from July 10<sup>th</sup>, 2015. I am assuming that the site inspection must have been when they set the flag and mark a specific setback, OHW location for the new construction. Buitenwerf, would the person who set the marks in 2015 have been the same person that set them just recently when it was checked for violation or not?

Buitenwerf replied yes the same staff person conducted both measurements, which was Assistant Director Bryan Haugen.

VanKempen asked is there a possibility that he could have set them in two different locations, even though at the time you set them, more than two years apart, he felt they were correct at the time he set them?

Buitenwerf answered I don't think the issue is that he accurately located the ordinary high water mark both times, but being able to recreate the exact location of where the original ordinary high was located and the measurement was then taken from that point. Recreating that point was what isn't known as to how accurate the new point of measurement is relative to the point of measurement in 2015. We use orange wire flags to mark the OHW location and when we went out this year to again measure the new structure's ordinary high water mark setback, that flag was no longer there.

Petersen asked Buitenwerf can you give me a little insight on your staff report here on the second page, second paragraph where it says it would not take much to get a different rod reading elevation measurement with a laser level when moving the rod just a foot or two in any direction when locating the OHW.

Buitenwerf replied when we locate the ordinary high water mark on a property, we use a laser level. We start out by going to the site of the benchmark, which is typically a public access. That has a set elevation and then we get that elevation relative to the water level. There are frequent water level readings that the DNR provides which then help us know where the water level elevation is. Then you do the math with those two elevations to then determine where the ordinary high would be so you can then go to the property, set up your laser again, take the elevation of the water, determine where the ordinary high needs to be relative to that and then locate the ordinary high on the property that you are looking



to do so on. My statement as to the ability to get a different rod reading elevation for the ordinary high, if you move the rod every few feet as due to the characteristics of that lot being very flat and also because of being so flat and subtle, you can move your rod a foot one way and get a different elevation than you do moving it another so it's not a steep slope or it's just acute where here is an ordinary high and it can't be anywhere else.

Petersen asked on a flat lot it sometimes can produce variables in that reading, at least slightly, because it is flat?

Buitenwerf replied right, or coupled with vegetative cover. If you have any type of vegetative cover that doesn't allow you to see the exact soil surface, that can easily lead to undulations that you can't pick up visually.

Petersen opened for public comment.

Paul Swenson, 24608 200<sup>th</sup> Street, Nevis, MN, said there is a lot to cover that has been addressed here. One issue is the rain event that wiped out the driveway, etc. It was a significant rainfall but I went back through two years of records, before construction and after and I find an equal number of days with rainfall approaching three inches. Before construction occurred, we would have a slight collection of water at a shared spot along the property line. It would dissipate in relatively short order. Post construction, you see in the pictures, with a lot of rain, we had a lot of water that moved to the lake, but we also have evidence that with an inch and a half of rain, we had as much as 10 ½ inches of water on our side of the property line. The evidence is marked by a debris line on my lower unit of my boat. The water has been shifted due to construction and it has been shifted to us. What brought all of this to light was in the spring it felt too close. I want to address whether the house moved. It is "largely" in the same spot or "pretty much" in the same spot, I think the ordinance says it must be in the same spot. I have tried to figure out a way to show if it is there or isn't. The site map for both the permit application and this variance application is missing one very crucial mark and that is the setback to the north property line. That would have told you if it moved or not. We don't have that on either map, even though the map says it's a must. The mark on the south side shows 84' from the cabin. You were at the site visit and saw the applicant measure from the house to that stake at 96'. I don't know what moved, but the issue is lack of consistency in measurements. To the issue of the floor, there is no mark on the property for the last known high. They calculated off a defective ordinary high mark that can move significantly. We need to get accurate marks across the entire property. I never did understand why we had a mark on ours. I mowed around it for a couple of years and when I suggested that things seemed too close, let's measure, then the stake disappeared. I thought we might need that in the future so I marked it with a stone. It was seen by staff at the site visit. The topographic map shows pre construction; our lots were on par with elevations. We are not on par any longer. The applicant's lot sits significantly higher. We have to remedy this water that is moving off of their property to ours.

Petersen asked Swenson I want to make sure that you are not going over anything that you have already introduced into the record, as we already have it here. If you have

anything new to add to what you have stated we will listen to that, but we try not to repeat ourselves.

Swenson said one new fact is in looking at impervious surface. Part of the findings of fact addresses the issue of was it caused by the applicant or the applicants agents and as near as I can tell, the only impervious surface on the property that was not created by the owner of the property currently totals 756' out of that entire 8,000+ sq. ft. It is that intensity of stormwater flow in the lowest part of the lot around the buildings that is causing our problem. In the staff report, talking about the character of the neighborhood, does the variance alter the character and the staff report refers to a year-round home to the south and a seasonal home like ours to the north and one to the north of us. The difference is that the lot furthest to the north and the lot to the south of this property are both conforming lots. They have lakeshore in excess of 200'. When you take a 2,000+ sq. ft. home and stick it on a 90' lot, scale comes into play and it has a drastic effect on the impervious surface formula.

VanKempen asked Swenson the photos that you provided us showing the flooding on your lot along with the Hills lot, was the driveway altered before or after that rain?

Swenson replied the driveway was altered after that. I don't believe the 1700 sq. ft. on the driveway contributes to this flooding problem. It occurred before the driveway was covered up with asphalt.

Petersen closed public comment.

Trevor Nicklason asked do we want to address the low spot at all? I think there is a very simple solution. The water before went through Mr. Hills property. Now there is a low spot that holds water so what we could do is create a swale to eliminate the low spot and that would eliminate the problem all together. It is probably about two yards worth of dirt; it is certainly not more than seven. If we were to do something like that, would we need to apply for a shoreland alteration permit or could we just do it as part of this construction?

Petersen said before we have Buitenwerf answer that question, I want to ask you specifically if you are proposing that, where you would put it. Give me some specifics about how you would do that.

Trevor Nicklason answered it would have to be right at the location of the current fence. It would be on Mr. Hills' property. That is the most logical way to deal with the low spot. I don't know if that is something we want to address here today.

Petersen continued you are proposing, perhaps in the area on the applicant's side of the fence you would swale from that low parking area towards the lake.

Trevor Nicklason replied the property line is roughly a couple feet on the other side of the fence.

Petersen added I would like to get Buitenwerf's opinion on if there would be additional permits required if they propose to do that and we entertain that idea.

Buitenwerf responded we would have to look at the quantity and the location of the project relative to the ordinary high water mark setback. With the quantities that they are talking, with that area more than likely being within setback, that volume would likely be able to be handled with a permit. We would need to see something specific as to the location and volume within the first 50' from the ordinary high and then also the volume from the 50'-100' setback as that determines whether it can be done with a permit or if a variance is needed. With the rough numbers that Mr. Nicklason provided just now, that would likely fall within the permissible thresholds.

Petersen said you would need something that actually shows the depth and the width of that cut so you can establish what the volume would be that would be removed there.

Buitenwerf replied yes.

Trevor Nicklason added it is obviously not going to happen now that the ground is frozen, but in the spring we will address that.

VanKempen asked Buitenwerf do we need to break this into three different phases? There is the setback, the 3' elevation and then the impervious surface?

Buitenwerf replied you can certainly do that to keep things orderly and clean.

VanKempen continued and then we would have to come up with findings of fact for each phase?

Buitenwerf answered if each of the three items is handled separately, through a separate motion, yes you would want to have findings for each of those three motions.

VanKempen said I am thinking that the impervious surface issue is one separate phase. Do we combine the setback and the elevation in one or have that separate?

Johnson added I think if we use that benchmark possible flaw we could combine it because it is hand in hand.

Petersen asked combining setback and 3' separation? Is that what you are saying?

Johnson commented we can do it separate too, that is fine. Which one would you start with?

VanKempen said my thought is the setback. Also included in our packet is an application for permits from 1999 for the garage and on that application the drawings show the cabin as 81' from the lake and the deck would be 52' from the lake. I am assuming these were measurements made by the homeowner and not by staff, but I wanted to use this as an

example of how the measurements could be different even though the end result might be the same. Looking at the photos and the measurements from the site visit last Thursday, I had a feeling that the lake side of the home doesn't appear any closer than the old cabin was.

Johnson added I agree with VanKempen. The pictures to me lined up, looking at the trees and I agree that the new structure is very close if not on where the existing structure was.

VanKempen said if we had an aerial photo from the old cabin and a current one that could possibly be like an overlay to show us if there is or isn't a big difference but I don't know if those are available.

Buitenwerf responded what is on the screen is the 2017 May flight that shows the prior cabin but we don't have aerial imagery that captures the new structure.

VanKempen asked the orange line is just the 1430 elevation marking.

Buitenwerf answered the line you are referencing is the 1430 elevation from the LiDAR data layer which was laser elevation imagery that the State collected and provided to the County several years ago.

VanKempen continued the yellow line then is basically the property line?

Buitenwerf answered that is roughly indicating the location of the shoreline but it's not to be taken as the gospel of where that shoreline is located.

VanKempen agreed because you can see a dock to the right hand side of the picture and it is quite a ways away from the blue line.

Johnson added would you say that the 1428 elevation is close to the ordinary high water mark?

Buitenwerf replied the elevation where the water intersects the land is subject to human interpretation by the folks that process the LiDAR data for the state. There are things such as emergent vegetation, near shore wetlands, that affect exactly where that line is so they are doing their best to locate it but that contour line in particular is one that is more susceptible to human interpretive calls than the other contour lines. There is some degree of variability due to the vegetative cover so when they shot the LiDAR data, they took reference elevation points in different types of vegetative cover; deciduous cover versus evergreen coniferous cover versus open high grass land so they used those as references when they are analyzing this data because as you can see on a property like this, you have a mixture of coniferous and deciduous tree cover. The laser is going to go through all those types of vegetation differently. It is way more involved than what I can describe as to the math they use to figure out how those lasers go through those types of vegetation and make adjustments for that when they draw out the contour lines.

Petersen added I would be comfortable separating one and two from three if you are thinking along those lines. We would need a motion to go that route.

Johnson made a motion to approve an after-the-fact variance for the residential structure to be located at its current 77' ordinary high water mark setback.

VanKempen seconded the motion that passed 3-0.

The Board adopted the staff report finding of fact for questions 4 and 5 and provided answers for questions 1, 2 and 3 and also for the after-the-fact findings of fact questions 1-6.

## **Findings of Fact**

### **Ordinary High Water mark setback**

1. Is the variance in harmony with the general purposes and intent of the official controls?

Yes ( X ) No ( )

Why or why not? The new structure was built in the footprint of the existing structure's location.

2. Is the property owner proposing to use the property in a reasonable manner not permitted by an official control?

Yes ( X ) No ( )

Why or why not? The owner is using it as a residential use on a parcel that is predating the Shoreland Management Ordinance.

3. Is the need for a variance due to circumstances unique to the property and not created by the current or prior property owners?

Yes ( X ) No ( )

Why or why not? The lot was created before the Shoreland Management Ordinance.

4. Will the issuance of the variance maintain the essential character of the locality?

Yes ( X ) No ( )

Why or why not? The property has been and will remain in a seasonal single family dwelling use. The two lots north of this lot are also in seasonal single family residential use. The adjacent lot to the south is year-round single family residential use as is the backlot across the road to the west. The house and detached garage on this lot are typical structures found on riparian residential lots and are of an average size relative to the size of these structures on the lots in the locality.

5. Does the stated practical difficulty involve more than just economic considerations?

Yes ( X ) No ( )

Why or why not? Economics were not cited in the application as a difficulty.

If the Board of Adjustment answers yes to all 5 questions for a variance in the first instance, thereby finding that all of the criteria set forth in Section 1103, Item 1, parts 1 through 5, of the Shoreland Management Ordinance are met, then the following additional criteria may be considered and weighed by the Board of Adjustment in determining whether to grant or deny a request for the after-the-fact variance:

1. Why did the applicant fail to obtain the required permit or comply with the applicable official control before commencing work? Was there any attempt to comply with the applicable official controls?

Yes ( X ) No ( )

Why or why not? The applicant did have a permit and took measurements from what he felt was the correct stakes.

2. Did the applicant make a substantial investment in the property before learning of the failure to comply with the applicable official controls?

Yes ( X ) No ( )

Why or why not? The new structure was a substantial investment.

3. Did the applicant complete the work before being informed of the violation of applicable official controls?

Yes ( X ) No ( )

Why or why not? There was a permit granted.

4. Are there structures, circumstances, or conditions in the area similar to those that are the subject of the variance request?

Yes ( X ) No ( )

Why or why not? Belle Taine is known for undersized lots and lots that predate the Shoreland Management Ordinance.

5. Based on all of the facts, does it appear to the Board of Adjustment that the applicant acted in good faith?

Yes ( X ) No ( )

Why or why not? The applicant applied for a permit and tried to comply with all the setbacks where he thought that the correct markings were in place.

6. Would the benefit to the county appear to be outweighed by the detriment the applicant would suffer if forced to remove the structure?

Yes ( X ) No ( )

Why or why not? The detriment would be a lot for having to move the structure.

VanKempen asked Buitenwerf if the applicant was allowed to rebuild in the former footprint and not make it more nonconforming, did this also include the elevation or is the elevation a separate issue. You would have to build to the 3' separation; you couldn't build to what the existing cabin had been at?

Buitenwerf replied the prior elevation of the structure floor level, if it didn't comply with the 3' requirement, the new structure could have been constructed to that elevation. I don't know what the prior structure's elevation is to have that for comparison. It is a question you can ask the applicants if they have information documenting that.

VanKempen asked what kind of foundation did the old cabin have?

Brent Nicklason replied it was a dirt crawl space.

VanKempen asked do you feel like you put the new crawl space at the same elevation?

Brent Nicklason answered to be honest; I would say it is lower. The other crawlspace was basically built on grade and then the finished floor was roughly a foot and a half or two feet above the crawlspace.

VanKempen asked you said there is mechanical equipment in the crawlspace currently?

Brent Nicklason replied the crawl space was built with a 4' frost wall and there are footings and a poly vapor barrier and to protect that vapor barrier, we poured concrete down there. It is a sealed crawlspace. We have a hanging furnace underneath the floor system and then we have a gas, tank less water heater down there and the pressure tank for the well and an air exchanger and sump pit. There is a floor drain in the floor going to the sump pit.

VanKempen added so basically there is a concrete floor in the crawlspace?

Brent Nicklason replied yes.

VanKempen asked what would you say is the distance from that floor to the joists up above?

Brent Nicklason answered it is roughly 44".

VanKempen clarified so you have a 44" crawl space?

Brent Nicklason replied yes.

Johnson stated I think the intent of that rule is to protect the owner and the structure from water damage. It is at 2.3' and I think it is fine.

Johnson made a motion to approve an after-the-fact variance for the current elevation of the residential structure's crawlspace floor which is 2.3' above the lake's highest know water level instead of the required 3'.

Petersen seconded the motion that passed 3-0.

The Board adopted the staff report findings of fact for questions 4 and 5 and provided answers for questions 1, 2 and 3 and also for the after-the-fact findings of fact questions 1-6.

## Findings of Fact

### Elevation

1. Is the variance in harmony with the general purposes and intent of the official controls?

Yes ( X ) No ( )

Why or why not? The new structure was built in the footprint of the existing structure's location. The crawlspace they put in was to take care of equipment. The applicant felt that they had constructed it at 3'6".

2. Is the property owner proposing to use the property in a reasonable manner not permitted by an official control?

Yes ( X ) No ( )

Why or why not? The property will be used as a residential use, the same as the existing structure at more than a 2' separation from the highest known water level to the lowest floor.

3. Is the need for a variance due to circumstances unique to the property and not created by the current or prior property owners?

Yes ( X ) No ( )

Why or why not? Belle Taine is unique given the highest known water level that it has. The benchmark could be in question.

4. Will the issuance of the variance maintain the essential character of the locality?

Yes ( X ) No ( )

Why or why not? The property has been and will remain in a seasonal single family dwelling use. The two lots north of this lot are also in seasonal single family residential use. The adjacent lot to the south is year-round single family residential use as is the backlot across the road to the west. The house and detached garage on this lot are typical structures found on riparian residential lots and are of an average size relative to the size of these structures on the lots in the locality.



5. Does the stated practical difficulty involve more than just economic considerations?

Yes ( X ) No ( )

Why or why not? Economics were not cited in the application as a difficulty.

If the Board of Adjustment answers yes to all 5 questions for a variance in the first instance, thereby finding that all of the criteria set forth in Section 1103, Item 1, parts 1 through 5, of the Shoreland Management Ordinance are met, then the following additional criteria may be considered and weighed by the Board of Adjustment in determining whether to grant or deny a request for the after-the-fact variance:

1. Why did the applicant fail to obtain the required permit or comply with the applicable official control before commencing work? Was there any attempt to comply with the applicable official controls?

Yes ( X ) No ( )

Why or why not? The applicant did have a permit and took measurements from what he felt was the correct stakes.

2. Did the applicant make a substantial investment in the property before learning of the failure to comply with the applicable official controls?

Yes ( X ) No ( )

Why or why not? The new structure was a substantial investment.

3. Did the applicant complete the work before being informed of the violation of applicable official controls?

Yes ( X ) No ( )

Why or why not? There was a permit granted.

4. Are there structures, circumstances, or conditions in the area similar to those that are the subject of the variance request?

Yes ( X ) No ( )

Why or why not? Belle Taine is known for undersized lots and lots that predate the Shoreland Management Ordinance.

5. Based on all of the facts, does it appear to the Board of Adjustment that the applicant acted in good faith?

Yes ( X ) No ( )

Why or why not? The applicant applied for a permit and tried to comply with all the setbacks where he thought that the correct markings were in place.

6. Would the benefit to the county appear to be outweighed by the detriment the applicant would suffer if forced to remove the structure?

Yes ( X ) No ( )

Why or why not? The detriment would be a lot for having to move the structure.

Petersen asked are you thinking that the swale you would cut would totally take care of that low water issue there. Have you shot any elevations from that parking area and down closer to the lake elevation to feel confident that a swale cut would alleviate that ponding that we see there.

Trevor Nicklason replied yes and I have spoke with an engineer about possible fixes and that was the most viable option for the situation.

Petersen asked who did you speak with?

Trevor Nicklason answered Terry Freeman. I think it is Northern Consulting in Walker. That would be grass and it would not add to the impervious surface obviously.

Petersen continued so once the swale was finished, you would seed it and it would be a grass surface then.

Trevor Nicklason responded yes.

Petersen mentioned to VanKempen you and I noted out there that gutter on the back of the garage.

VanKempen added I would still like to address the square footage here because it is 2,236 sq. ft. over what is allowed. That seems to be a substantial amount. I think if the impervious surface area wasn't as great as it is, I still think there could have been a substantial rain event that could still be flooding and pooling. I like your idea about the swell to elevate some of that. At the lot viewal I did notice the garage which is of substantial size. It seems like the gutters were only on the non lake side heading towards the low spot. That could increase the problems there. I personally would like to see the impervious surface area brought more in line plus some of these other measures to correct some of that water problem.

Johnson asked which side of the fence is lower?

Trevor Nicklason replied I have not shot grade on Mr. Swenson's property.

Johnson continued from what I saw at lot viewal, I agree with the public comment that it has historically always had water. I want to make sure that when we are talking about this, there could still be water left if there is a lower side on either side of the fence.

Brent Nicklason added I am not belittling the impervious surface, it is over. Getting it down to 25% isn't going to help the situation. It will help, but we have a low spot and it's not like it is a new low spot. It has been there for years and as water pools and sediment drains, that percolation of that low spot is reducing every time that there is sediment that washes into it. It is becoming a wet spot and it's not going to drain. The drainage in that low point is not going to improve. The change in elevation due to this new structure, drained the common water between the two properties. All of the water prior to construction was

draining on the Hills' property from both properties. No elevation change happened on the property to the north, the only elevation change happened on the subject property. So Mr. Hills' was the drain for both properties. I think the solution is to put a drain for both properties on that property line.

Trevor Nicklason added doing it all on one side for permitting purposes is going to make more sense.

Petersen asked VanKempen if you would like to see this impervious surface reduced closer to allowable limits, do you have any suggestions on how we get there?

VanKempen answered one of the things that appears to have changed is the driveway turnaround area. It looked to me like it is just a couple of feet away from the fence?

Larry Hills replied I believe it is 3'.

VanKempen said I believe by ordinance it should have been 10'.

Hills responded we could replant that back to grass.

VanKempen added that is my thought, if you could remove some of the impervious driveway areas, reseed it. I know that it is hard, the driveway going up and down the hill area that was in the past two tire track areas is now all crushed asphalt.

Hills explained it was just a seasonal cabin and now it is a year round residence.

VanKempen said I think we still need to get down to the 25% and I would leave that up to the applicant how he wants to get there. I know there was a concrete patio with a picnic table.

Hills added that is 12'x12'. We could eliminate that. There is another one closer to the shoreline, we could eliminate that.

VanKempen said some of the driveway turnaround area. You do have a couple of other out buildings. Half log sided one and a blue shed. I am not sure what you have stored in there and I don't know what your needs are for storage because your garage is of substantial size. 1,670 sq. ft. I don't think you should have to remove any buildings unless it is just the storage sheds.

Hills added the one between the neighbor's lot line and the garage. It is a blue shed that has a little lean on it. We could take that down I guess. As far as the barn that is in the front of the house, I would hate to take that down. I would like to leave that. I could take those three pieces out and seed that part of the yard to grass. I don't know if I can get to 25%, but I can get it better. Unless you want the driveway put back to two cement slabs like it was and a pad up at the top of the hill.

Johnson said I think the driveway would be just fine being graveled. The two lane is problematic. That is why it failed.

Petersen said for me I would be a little more in favor of switching that gutter around in the back of the garage so we have drainage away.

Johnson asked how are we handling the proposal of the engineered drain?

Petersen added that is a question I have for Buitenwerf. If we want something more formal from the applicant's builder as to what they are proposing. Does that mean this gets tabled until we get a formal proposal? What is your feeling on the best way to handle that? We are speculating on what they could do, but we are not seeing anything concrete.

Buitenwerf replied the department would always recommend having a specific proposal before you that you could review and act upon. If that is something you wanted to entertain, I would recommend tabling and giving them a specific time period in which to provide that information for your consideration.

Petersen added I am in favor of that myself because I would like to see that impervious surface reduced. Maybe we could ask for that as another part of this proposal, as to what you could do to get that down closer, if not to the 25%. For me personally, I would like to see that gutter on the rear of the garage reversed so it drains on the other end and it is flowing away from that parking area. It is going to reduce the pressure that the swale will take.

VanKempen said redirecting the gutters and the swale, that could be considered a mitigating factor to allow more impervious surface. Like we were saying, without having calculations, you don't know what you are willing to give up and what you are going to do in exchange for having more impervious surface.

Petersen asked to table this with those recommendations; I just make a motion to do so?

Buitenwerf replied yes and I was just doing the calculations here as far as upcoming meetings. The latest we could potentially entertain that information without going afoul of the 60 Day Rule, unless the applicants wanted to sign an indefinite time period extension form, which I have and they can look at if they want to, as far as what the County can extend its review to, the furthest out would be the January meeting. The December meeting, with it being the 17<sup>th</sup> of the month, they might be able to get something in by then, but in order for us to have it in time to get to you for review we would need it at least a week prior to that so that would give them a week and a half or two weeks tops to be able to provide that information.

Johnson asked would you be able to get an engineer to be able to look at that with you in that time span?

Trevor Nicklason answered I think so.

Johnson continued or you can sign the time extension.

Hills said I think you should sign the time extension so you make sure you have enough time.

Trevor Nicklason agreed we will sign the time extension.

Petersen asked Buitenwerf when does that put it to then? If they do the extension how much leeway does that give them then?

Buitenwerf explained the 60 Day Rule has two mechanisms for extending the review period beyond the initial 60 days from the application date. One would be for the County to give notice to the applicant within the first 60 days that it is extending its review and then we can extend our review for up to a maximum of up to 120 days with written notice, which would allow us to go up until the January meeting. The other option is that the applicant can provide written notice to the County indicating that they are granting us additional time for our review of their application. Then they have two options there and we have a form for each option. The first would be they can specify exactly the amount of additional time they want to give the County. The other form has an indefinite time period to it so it just says that the County can take as much time as is needed to properly complete its review and action on the application.

VanKempen said my thought is since it is winter time and you aren't going to be moving the earth, this time of year would be the indefinite. To make sure there is plenty of time to get everything done.

Johnson said I agree with that.

Buitenwerf added I am finishing the form that I will give to the applicants to review. I would recommend that we get their signature on that form so we know that is in hand before the Board makes a motion to table, and then in your tabling motion I would also encourage you to be specific in listing the information that you are looking for and also if giving them a particular meeting date by which you would like that information provided so that they have something to target as far as when to submit that too.

Buitenwerf said I have received the indefinite time period extension form signed by the applicant's agent so we have that.

Petersen asked that would be part of the conditions then, of tabling this?

Buitenwerf replied no, it is more of just a procedural item to note for the record that we have received that so we aren't going to run into any issues with the 60 Day Rule in terms of when we need to take action on the application.

Petersen made a motion to table the after-the-fact variance request to exceed the 25% impervious surface area threshold with the following conditions:

1. Applicants will submit a proposal for reduction of impervious surface area on the property.
2. The gutter on the south side of the garage will be modified to direct the roof runoff such that it does not go toward the low spot on the property located north of the garage along the north property line.
3. Applicant will submit an engineered plan for the proposed swale to run from the low spot on the property toward the lake that includes elevation and volume of material information.
4. Applicant will submit any additional proposals for mitigating the stormwater issue on the property.
5. The above-listed four items must be submitted by March 25, 2019 so that this portion of the application, as amended, can be reconsidered by the Board of Adjustment no later than at its April 22, 2019 meeting.

VanKempen seconded the motion that passed 3-0.

**Variance Application 39-V-18 by Michael and Lisa Bell:** Lot 7, Block G, Pine Haven Beach, Section 17, Township 139, Range 34, Hubbard Township on Long Lake, a recreational development lake. Parcel ID 14.38.07100. Applicants are requesting an after-the-fact variance from Sections 703 and 904.6 of the Shoreland Management Ordinance for a lakeside deck that does not comply with the 30' minimum ordinary high water (OHW) mark setback or the maximum allowed 15% of the residential structure's OHW mark setback encroachment toward the OHW, and that causes the property to violate the 25% of lot area impervious surface area threshold.

Maria Pretzer, Pretzer Law, 104 Park Avenue N, Suite 204, Park Rapids, MN, presented the application.

Pretzer stated at this time the applicants are requesting that this matter be tabled to a later meeting. There was some discussion of this at the site visit with the Board members. It was pointed out to us, the applicant and to myself, on November 15<sup>th</sup> by staff members that our application lacked the south lot line setback, the distance from the deck to the south lot line. Upon consultation with my client, it was learned that he does not know precisely where the south lot line is. Further inquiry is needed to determine where that lot line is, so in fact, we can determine if the deck as built violates the 10' setback and if so, by how much. It is our intention to make contact with a surveyor to determine where that lot line is. We have done some background work about looking on the Hubbard County GIS to see if there are surveys from the area that would help us with that. We have pulled the

plat maps, but at this point we have been unable to determine precisely where that south lot line is and as such would like some more time to be able to do that so we can have a complete resolution of the matter to include whether a side lot line encroachment issue is present.

Petersen asked Buitenwerf this request is at our discretion as to whether we choose to table this variance application tonight, or we can go on with it if we choose? Do we have that latitude here?

Buitenwerf answered you do and the reason I say that is, the Board having seen the site during the lot viewal, has been able to see the proximity of the structure on the lot to the south of this property relative to the deck and no matter where the property line is between those two structures, it is clear to me that the deck does not meet the 10' side lot setback. So if the Board felt that there is sufficient information and depending on what your thoughts are toward the application, you may say that you are comfortable acting on it without knowing precisely what that distance is, having seen things first hand. Or you could say no that distance is a key piece of information that you would want to know specifically before taking action on it. That is the reason it is up to you which way you would like to go.

Pretzer added as we discussed at the site visit, there was an existing concrete stairs and a concrete landing on the south side of the house where the door comes out. That was deteriorating and there were no hand rails. My client did remove that. He insists that where the deck has been built does not encroach any further towards the south lot line than that previously existing concrete pad that was there.

Petersen mentioned I am struggling a little bit here with wondering what difference that will make in how I take into consideration the lake side portion of the deck which, if I remember and understand correctly was denied in a previous application. My own feeling is that seems to be a side bar issue I am not so concerned with right now as the fact that the rest of the structure.

VanKempen said I would like to ask the Bells why they went ahead and built and didn't get a permit. Questions like that can't be answered because they are not here tonight. I do have some pictures from variance request 22-V-17 from 2017 and in one of the pictures here they show the steps that you mentioned that had been deteriorating and had the hand rail removed. You can see the well head right there. They have a marking here of roughly 7'. It is hard to determine if that is correct or not. Then you go to some of the current pictures here. There is the same well head and the edge of the deck and the stairs. Looks to me like it is closer to the property line than the old concrete steps were besides obviously taking up much more space along the whole side of the building up to the well head. The applicant knew from last year that the greatest they could go would be 15' towards the lake and they have exceeded that. I know that there is a patio door on the lake side, but that looks not to be original, like something the applicant had installed himself perhaps, creating a need for a step on that side of the house. I personally don't think I need any more information, but I don't know how my fellow board members feel.

Johnson added I would want to know where that property line is myself just so it was all done at once.

Petersen said by not knowing, we can't really finalize this one way or the other, without that knowledge?

Buitenwerf replied that is not what I was saying earlier. It clearly doesn't meet the setback, to what degree we don't know for sure. That may or may not be the main consideration of the Board or there may be other reasons that in the Board's mind are significant enough to outweigh that and make it not be critical to know that setback. I know there are folks in attendance that probably want to provide comment so I would suggest we see what they have to say in case that sheds any further light on that issue.

Petersen opened for public comment.

Sara Swanson, Thomason, Swanson and Zhan Law Office, 120 North Main Ave., Park Rapids, MN. I represent Helen Zibit. Her property is located at 13254 Beach Haven Road so that is the lot directly to the south of the applicants' lots. The applicant I believe has three of the 50' lots. This particular lot as I understand it is farthest to the north and his other two lots are in between this lot in question and my client's lot. She lives in St. Louis, MO and is not able to be here tonight, but asked that I share a letter that she wrote to share with the Board. I will just preface it that she is explaining the situation. Essentially her concern is for a pattern of disregard for the neighborhood, particularly because of how he has treated their common boundary line, but also as well as ignoring the denial of the variance request from 2017. This is the letter she wrote to me to share with the Board.

Swanson read the letter from Helen Zibit, 13254 Beach Haven Drive, Park Rapids, MN.

"In June 2016 I was making preparations to go to Long Lake for the summer. I had been reassured by my neighbor and nephew that all was in order and the cleanup around the outside had been done by the two young men who live nearby. Unfortunately that was when I experienced the first symptoms of an illness that made it impossible to travel that summer. By the next summer I had made some improvement and spent about ten days at Long Lake. That summer my focus was on some major repairs to the inside of my cabin as well as this summer. My neighbors however pointed out a change outside which was the placement of a number of small pine trees very close to the north side of my house. After thinking about how to respond, I decided to write Mike Bell, who I had met very briefly when he purchased the property next door. I sent it to the address next door, but a week or so later it was returned to me as an incorrect address."

Swanson adds Zibit admittedly did not make an attempt to resend the letter to him.

Swanson continues reading the letter by Helen Zibit.

"By this time I had noted some other changes that were displeasing. He had obliterated a strip of garden which ran along the property line on the north. He had then covered the entire area with grass right up to the north wall of my house. This meant that I no longer had the hard surface pathway that I could walk safely with my cane or walker. Then I saw that he had put stairs and a dock right next to my dock area. It has boats there and it does



not seem in any way connected to his large house which has its own large docking area. At this point I am feeling very encroached upon. I viewed the notice sent out as a way that I could protest what appears to be a disregard of the normal life of our neighborhood. I fear a deterioration of water quality with more use and more boats, and deterioration of the neighborhood due to the over concentration and over use of his property if he is granted a variance. I fear that he will try to build up the smaller house on the north so that it will meet his needs whatever they might be. Respectfully submitted, Helen Zibit.”

Swanson continued I don't know if you have any questions. I can certainly answer for Helen, but essentially she just wanted her opinion to be heard about the disregard for the neighborhood, for her common boundary line as well as building this deck after it had been denied. I do also want the Board to know I have spoken with Ms. Pretzer and outside of this context; we will be dealing with the trees and some of the concerns for the common boundary lines that I do anticipate will be addressed.

Petersen closed public comment.

Petersen asked out of curiosity, VanKempen did ask and I don't know if your clients have shared with you about the building of this deck when they were denied. Any thoughts conveyed to you by them as far as their reasoning for doing so.

Pretzer responded I think that there are several points to be made here. Some of this information is addressed in your packet. Yes he applied for a variance for a much bigger project and was denied. According to what my client tells me, he was encouraged to go big and then scale back if needed. He went big and was denied in its entirety. Based on that, he felt that he could scale back and he did. As you look at the 2017 application, part of that application was to cover and enclose the back area. That is not part of this application. The deck has been significantly reduced from what was proposed in 2017. He does make reference in his application it was to be 547 sq. ft. and he reduced it to 294 sq. ft. He also reduced the distance that the deck protruded out from the side from 7'6" to 7' and the protrusion towards the shoreline from 10' to 8'6". I think what my client was attempting to accomplish was the repair of something that was deteriorating on the side of his house and the lack of handrails that he felt he couldn't put in without doing something like this. He has several elderly relatives that he said were having issues accessing the house and he felt that this was an improvement that would benefit the property. As to those sliding glass doors to the lake side, we discussed this at the site visit. He did make that modification to the property after he bought the property. I think that in my client's defense, what he did choose to do in building a much smaller deck, he used environmentally friendly materials. Yes the decks are impervious surfaces, but this deck, the water is going through and grass is growing still beneath it. Environmentally friendly materials don't require staining. The way that the railings were done was such to not obstruct the view of the water or anybody looking across the property. It was done to be as unobtrusive as possible. In my client's application he talks about the improvements that have been made to the property, how his project was modified significantly smaller, how he has attempted to reduce impervious area by removing some of the concrete. His driveway is now dirt and planted grass. He has plans in place and is willing to do what the Board would direct as far as reducing his impervious area. He is not that far above the 25%. He has every intention to install rain barrels and catch basins and to do additional

gutters. Some options that he is open to as well is making the roof of his garage a green roof as a way to reduce impervious area. Ultimately if it came down to the garage or the deck, he would rather have the deck. He has sufficient storage elsewhere. I know that my client included in his application people who have a deck or multiple decks. I think that having a deck on your lake property is a reasonable use of that property. This particular deck comes very close to being able to meet the requirements of Section 703. Where we run up on the issue is the setback from the OHW mark. This particular deck is 29' 6" and it needs to be at least 30' so we are really close there. As far as the 15%, I believe after speaking to staff and doing some calculations of my own, the deck as it encroaches towards the water is about 2 ½ feet closer than it should be. In the event that my client could have met all five of the criteria of Section 703, he wouldn't have needed a variance at all for this particular deck. It was very important to my client to have a deck and I think it is a reasonable use of the property. It is a small unusually shaped parcel so by its nature, the building had to be built closer to the water.

VanKempen asked Buitenwerf even without the deck, the lot would have been just over the 25% impervious surface area, would he have been able to, by permit, build a deck on the lake side that was 15% of the distance to the lakeshore?

Buitenwerf explained because the lot was already over the 25% impervious surface threshold, a variance would have been required from that part of the ordinance, which is Section 904.6 in order to construct the deck, whether or not it was proposed in a way that would meet the criteria for a deck addition to a nonconforming structure.

VanKempen continued the concrete steps that he removed; would he have been able to just build that or would he have needed a permit to if he would have built the exact same size steps?

Buitenwerf answered in regard to the former concrete stoop that provided ingress/egress to the cabin, which would have been able to be reconstructed without a permit due to its size. The department typically allows a 4'x4' platform to be constructed as a means of providing a safe ingress/egress to a structure without need of a permit, anything larger than 4'x4', we require a permit.

VanKempen clarified so to build a lakeside deck per permit, he would have had to already remove some of the impervious surface area somewhere else on the lot?

Buitenwerf replied correct.

Petersen asked VanKempen your question was in order for him to build that deck and meet that impervious surface, which would have been a conforming deck that would have met setback, is that what you are implying?

VanKempen responded yes.

VanKempen said it sounds to me that either way he was going to need a permit. The only way he could have gotten a permit is if there was already impervious surface removed somewhere else and he could have got underneath that 25% threshold.

Buitenwerf agreed.

VanKempen made a motion to deny the application and adopt the staff report findings of fact.

Petersen seconded the motion that passed 3-0.

### Findings of Fact

1. Is the variance in harmony with the general purposes and intent of the official controls?

Yes ( ) No ( X )

Why or why not? The lot is only 6,628.8 sq. ft. in size and the 25% impervious surface area threshold is already exceeded on the property before the illegally constructed deck is factored in. The deck exceeds the allowed 5.7' lakeward expansion from the cabin by 2.8' and encroaches ½' into the 30' minimum OHW setback allowed for a lakeside deck on a nonconforming cabin that predates the ordinance. No definite mitigating measures are offered in the application to offset the additional impervious surface area which brings the lot's impervious surface area percentage to 29.98 and aesthetic impact of a deck this close to the water.

2. Is the property owner proposing to use the property in a reasonable manner not permitted by an official control?

Yes ( ) No ( X )

Why or why not? While a small deck would be reasonable if it allowed the property to still comply with the 25% impervious surface area threshold, the constructed deck is excessive for the lot's size and its related constraints on space, width, and impervious surface area.

3. Is the need for a variance due to circumstances unique to the property and not created by the current or prior property owners?

Yes ( ) No ( X )

Why or why not? The need for the variance is caused by the current owner via the size of deck constructed and by the prior owner who obtained the 1996 variance that allowed the detached garage to be constructed which put the property over the 25% impervious surface area threshold and resulted in a condition being placed on that variance that disallowed future additions to the cabin and garage because of the 25% impervious surface area requirement in Section 904.6 of the Shoreland Management Ordinance. The owner in 1996 was aware of the lot's impervious surface area limitation, weighed the options, and chose at that time to put the lot's limited allowed impervious surface area toward having a garage on the property

instead of other improvements such as a deck on the cabin. Permittable options exist if a smaller deck would be constructed and other impervious surface area on the lot was removed so that the lot complied with the 25% requirement.

4. Will the issuance of the variance maintain the essential character of the locality?

Yes ( X ) No ( )

Why or why not? A number of the homes in the locality were constructed prior to the ordinance at similar ordinary high water mark setbacks. Lakeside decks are common accessory features on these homes. The locality consists of a mixture of seasonal and year-round single family residential uses. The deck would not harm the area's residential character.

5. Does the stated practical difficulty involve more than just economic considerations?

Yes ( X ) No ( )

**Miscellaneous:**

**Communications:** Buitenwerf said next month we will have an Ordinance Amendment Application to propose a marina use on a general development lake classification. That would be the Planning Commission item and then the Board of Adjustment, we have six variance items.

**Adjournment:**

Petersen made the motion to adjourn.

The motion carried unanimously 3 – 0.

The meeting adjourned at 8:21 p.m.

Respectfully submitted,

Staci Harvey

Recording Secretary