

**CALL TO ORDER:** Chairman John Studer called the meeting to order at 7:00 p.m.

**PRESENT:** Chairman John Studer, Commissioners John Daly, Jeff Eaton, Doug Nagle, Bob Werneiwski, and Josh Wilcox

**ABSENT:** Cindy Hunt Webster

**OTHERS PRESENT:** City Council Liaison Melissa McNeill and Zoning Coordinator Dale Cooney

**MINUTES OF April 16, 2019**

Motion by Daly, seconded by Eaton, to approve the minutes of April 16, 2019 as written. Motion carried 6-0.

**PUBLIC HEARINGS**

**Public hearing to consider the variance requests of Ellen Michelson, property owner, to exceed the maximum permitted impervious surface coverage, exceed the maximum permitted grade alteration, and to encroach into the minimum required lake yard setback in conjunction with home additions at 19680 Lakeview Avenue.**

Chairman Studer introduced the agenda item.

Cooney presented the staff report. He said that the property owner is building additions to the existing house which triggers impervious area, grading, and setback variance requests. Cooney said that the legal nonconforming house is built on a peninsula with a lakeshore setback on two sides of the property. He noted that the setbacks overlap such that there is no buildable area within the setbacks. Cooney said that the property is nonconforming for impervious area and that the impervious area will be reconfigured and slightly reduced as part of this proposal. Cooney said that the property is an 18,133 square foot R-3 property.

Cooney said that Section 1302.05(3) of the city ordinance requires a minimum lake yard setback of 100 feet. He said portions of the house are as close as 26 feet and the entire house is located within the lake yard setback and that the applicant is seeking a variance to encroach as much as 74 feet into the lake yard setback. He said that the maximum encroachment would remain the same even as the additions change the overall total encroachment for the property. Cooney said that the property was granted a variance to expand to the existing house footprint in 2008.

Cooney said that the existing nonconforming house would be modified in a number of ways including several cantilevers, a covered screened porch, and an altered roof height. He said that the footprint of the house is generally staying the same but for the cantilever additions and the modification of the deck footprint. He said that the most significant impact will be the change in roof peak height. Cooney said that the peak of the roof will be raised by as much as 8 feet at the walkout level, with a height of 35.5 feet and that the height from the main level would be 26.9 feet. He said that the overall massing of the house will increase, but within zoning code limitations.

Cooney said that the other significant change would be converting the deck on the front of the house to a covered screened porch. He said that a portion of this area is already screened, and the remainder of the unenclosed portion would be covered and screened.

Cooney said Section 1302.05(2) of the zoning ordinance limits the maximum impervious coverage of the property to 25%. He said that the applicant is proposing an impervious surface area of 35.4% and is seeking a variance to exceed the maximum impervious surface area by 10.4%. Cooney noted that the

property is at 36.5% impervious area and that the impervious areas are being reconfigured and slightly reduced as a part of the proposed changes.

Cooney said that the property was granted an impervious surface coverage variance in 2008 to go up to 30.6% but that since that time, it appears that there was a landscaping project that illegally expanded hardcover to its current extent. He said that the unapproved project included stone steps, a patio, and stone steps down to the lake. He said that, while it is possible that this hardcover expansion was reviewed and approved by staff, there is no record of it in the property file. Cooney said that staff approval would have been irrelevant since the expansion would have been subject to a variance.

Cooney noted that the property is 90% of the minimum lot size for an R-3 property, so it is only slightly undersized. He said that on the one hand, staff could envision a number of areas to minimize hardcover on the property, but that on the other hand, the existing property owner had no involvement in the hardcover expansion and purchased the property with the assumption that the improvements were legal. He pointed out that the property primarily drains to the lake and he is unaware of any resident complaints related to stormwater. Cooney said that the applicant is proposing significant mitigation for the property to bring the property to a net impervious area of less than 25%.

Cooney said that it was his opinion that, in this particular location, managing water quality is more important than managing water quantity. He said that, unlike other interior lots within Deephaven where stormwater has the possibility to impact adjacent neighbors, in this case the lot primarily drains directly into the lake. Cooney said that the volume of water running off of the property is not as important as the quality of the water that enters the lake. He said that, in this case, the proposed mitigation would offer pre-treatment of the water before it enters the lake.

Cooney said that, based on the excess impervious areas, Section 1353 of the zoning code requires a mitigation volume of 247 cubic feet, and the applicant is proposing a capacity of 300 cubic feet of mitigation.

Cooney said that Section 1312.04 of the zoning ordinance requires a variance for any grade alteration greater than three feet at any point. He said the applicant is proposing grade alteration of up to 4.5 feet, and is seeking a variance of 1.5 feet from the maximum permitted grade alteration. He said that the applicant is proposing to regrade areas of the yard to accommodate reconfigured steps and an expanded flat yard area. Cooney said that portions of the grade adjacent to the retaining wall for the yard area are altered by just over 4 feet.

Cooney said that the small shed on the property appears to have been illegally constructed in approximately 2015. He said the shed is constructed in the lake yard setback and is subject to a variance. Cooney said that the city may order that the shed be removed, or the city may make it legal by adding its approval to the resolution related to this request. He said that, in his opinion, the shed is a low-value, illegal encroachment into the lake and should be removed.

Cooney said that he has typically regulated entry pillars and gates under the fences/walls regulations which are not subject to setback requirements of structures as long as they are compliant with the height and setbacks required for fences/walls. He said that he would condition any approval on compliance with these regulations.

Cooney said that he recommends approval with conditions of the variance request to encroach into the lake yard setback by up to 74 feet, exceed the maximum allowable impervious surface area by 10.4%, and exceed the maximum permitted grade alteration by up to 1.5 feet, for the property at 19680 Lakeview Avenue, as proposed.

He said that his recommendation is conditioned that:

- The illegal, nonconforming shed on the property be removed.

- Entry monuments and gate comply with the fence/wall regulations in city code Section 1310.08, notably as they relate to height and setback requirements.
- The applicants complete the stormwater management improvements to meet the requirements and specifications of the city engineer.
- The applicants enter into a maintenance agreement with the city to ensure the long-term operation and maintenance of the stormwater management improvements. The maintenance agreement shall be executed and recorded against the parcel.

Cooney said that his recommendation is based on the following findings:

(a) Is the variance in harmony with the purpose and intent of the ordinance?

Yes. Strict adherence to the ordinance would render the property unbuildable, and therefore reasonable accommodations need to be made. The grade changes will have no impact on drainage to the neighboring properties, while the quantity of impervious areas is an existing condition on the property with stormwater that primarily drains directly into the lake.

(b) Is the variance consistent with the comprehensive plan?

The request is consistent with the Comprehensive Plan's Housing Elements Goals and Policies which encourages safe, healthy and quality housing that respects the natural environment of the community.

(c) Does the proposal put property to use in a reasonable manner?

Yes. A single family home, consistent with the building limitations is reasonable. The grading is a reasonable response to the steep grades of the property. The impervious areas are slight reductions from existing conditions with significant mitigation provided.

(d) Are there unique circumstances to the property not created by the landowner?

Yes. The legal nonconforming house is built on a peninsula with a lakeshore setback on two sides of the property. The setbacks overlap such that there is no buildable area within the lake yard setbacks. The impervious conditions are existing conditions on the property, which primarily drain directly into the lake. The existing topography leaves little opportunity for a yard area without exceeding the city's grading limitations.

(e) Will the variance, if granted, alter the essential character of the locality?

No. The proposal would not alter the essential character of the locality. The proposal is similar to conditions that exist today on the property.

Cooney concluded his staff report.

Studer asked if there was a list of approved mitigation systems. Cooney said there is not.

Daly asked about the city engineer comments on the pervious pavers. Studer said that it is a maintenance issue and that permeable pavers clog. Cooney said they can install the pavers but they would not get credit. Cooney said that the downspouts could be directed to underneath the pavers and that would work to the city engineer's satisfaction as a French drain. Daly said that he was basically engineering the system for them and that some more information needed to be provided.

Eaton asked about mitigation from the previous variance on the property. Cooney said that mitigation was not a requirement at that time.

Nagle asked about runoff to the lake from downspouts and other drainage. Cooney said that downspouts and sump pumps can be directed into the lake without any kind of pretreatment.

Wilcox asked what items were being changed to reduce the hardcover. Cooney said that they were making several changes to the driveway and walkway areas.

Wilcox asked about the enforcement of the hardcover excess. Cooney said that it was illegal and that the city has some options on how lenient they would like to be under the circumstances.

Nagle asked about the illegal hardcover additions. Cooney referenced the 2008 survey versus the 2019 survey.

Wilcox asked about the HOA access. Cooney said that we can approve the plans from a city perspective, but that does not invalidate the HOA's ability to review and approve the changes. Cooney said that the city does not want to deliberately ignore HOA input either.

Petra Schwartze, architect for the property owner, said she is available to answer any questions.

Studer asked about the stormwater management plan. Schwartze said that it shows two fields that capture roof runoff. She said it was a schematic drawing and that they are happy to modify it to the city's requirements. Daly said that there would be a new roof and all new gutters and that those should be connected to the mitigation system.

Daly asked about removing the shed. Schwartze said that is not a problem.

Wilcox asked about removing 5% impervious area. Schwartze said that the turnaround in the driveway could be removed and the most of the side parking area as well. Daly said 1087 square feet would need to be removed.

Nagle asked about what was new and what was existing for the house. Schwartze talked through the changes with Nagle.

Daly asked if there was any background research into the property and what the owners intentions were. Schwartze said that they did not look at the history of the property. She said that the goal is to reorganize the property and the house to make it meet the needs of the owner. She said that there was a desire for a shingle style home. Schwartze also said that the changes evolved due to the difficulty integrating a new roof for the covered porch into the existing roof.

Daly asked about the year the original house was built. Schwartze said that she did not know. Daly said that there is some skepticism about a remodel of this scale becoming a defacto new house.

Nagle asked about any lower level changes. Schwartze said that they were dropping a portion of the basement slab under the living room.

Eaton asked if the boardwalk is maintained by the HOA. Daly said that it is maintained by the HOA.

Studer opened the public hearing. Hearing no public comments, Studer closed the public hearing.

Wilcox said that he would like to reduce the impervious areas to what was approve in 2008.

Daly said that it is unfortunate that there is illegal impervious that is not the new owner's fault and that they tried to work within existing conditions. But, he said that this is a unique property that is close to the water. He said that he worried about the velocity of water coming off of the new roof. Daly said that they should propose some reductions for hardcover and get closer to the 2008 variance. He said that he did not have an issue with the house redesign and setback request.

Studer said that he agreed, and that he agreed with the water quality issue raised by staff. He said that he would like to see it move closer to the 2008 approval such as the shed and the side yard parking area. He said that he did not have any problems with the proposed redesigned house. Studer said that he has concerns about the proposed mitigation since it is incomplete at this point and it doesn't really detail how

it meets the code requirements. He said that he had concerns about the system being under the driveway since servicing the system would require removal of the driveway and inspection of the system is difficult. He said that the mitigation plan needs more work.

Werneiwski said that he agreed with the other commissioner's comments.

Nagle said that he is in favor of a more maintenance-free mitigation system. He said that he likes the design of the house. He said that he is sensitive to lakeside additions and that he wants to make sure that there are no further encroachments than what was legally approved. He said that he would like to see the shed removed and the property meet the 2008 hardcover limitation.

Eaton said that he generally agrees with the other comments made. He likes the design, but would like to see the hardcover reduced and shed removed.

Wilcox asked about the grading permit. Nagle said that he is having trouble understanding the scale of the changes.

Daly suggested that the applicant provide the following additional information for the city council: a graphic grading plan showing the depths of the grade change and where the variance areas are; a demolition plan showing those portions of the exterior that will be removed; and hardcover information, particularly regarding the removal of the boardwalk that is not permitted by the HOA. Schwartz said that the survey is pretty clear on the hardcover areas.

Nagle asked about the construction timeline. Schwartz said that they were working for a fall construction date.

Motion by Daly to recommend approval with conditions of the setback variance request based on the recommendation, conditions, and findings of staff, and denial of the impervious surface area and grading variance requests as proposed. Daly further moved that the applicant provide additional information for the city council to include 1) a graphic grading plan showing the depths of the grade change and where the variance areas are; 2) a demo plan showing those portions of the exterior that will be removed; and 3) hardcover information, particularly regarding the removal of the boardwalk that is not permitted by the HOA. Daly said that the recommendation is for the applicant get closer to the impervious limit that was approved via variance in 2008. Motion was seconded by Studer. Motion carried 5-1 with Nagle voting against.

## **NEW BUSINESS**

### **Consider modifying impervious surface regulations to include assumed inclusions for impervious surface areas.**

Chairman Studer introduced the agenda item.

Cooney presented the staff report. He said that, in April, the Planning Commission reviewed a proposal for an impervious surface variance at 19120 Park Avenue and that the builder had built the house to the maximum allowable impervious surface area leaving no allowance for a rear yard deck or patio. Cooney said that the City Council has requested that the Planning Commission explore ordinance revision options to prevent this type of situation in the future.

Cooney asked if there should there be an ordinance amendment requiring a mandatory hardcover allocation for certain features whether or not they are proposed to be constructed at the time of a building permit application? He said that the most common occurrences staff can think of are the narrowed driveway and lack of rear yard amenities such as a patio or deck. Cooney said that staff is only aware of

one other Lake Minnetonka area city that includes a required hardcover allocation, the City of Orono, and he included a printout of their impervious regulations.

Daly said that this is really an issue for new spec home builders. He said that the city needs to look out a little bit for the property owner.

McNeill said that this could be a way to minimize variance requests which the community frowns upon. She said that that the city could assume that there is a deck if there is a door to nowhere.

Studer said that he struggles with a one-size-fits-all requirement and that he is not a fan of cities dictating design requirements.

Nagle said that the door was put there for a purpose. Daly said that most of the time additional impervious would be put there illegally. Studer said that if someone is going to do it, they don't need to pull a permit. McNeill said that it would be to prevent the spec builder from building to max hardcover and passing on the issue the buyer.

Wilcox said that this would really only catch the new home builders, not existing homes.

Studer asked about driveway width requirements. Cooney said the city currently does not have any and that there are so many possible configurations it would be difficult to mandate a width without a lot of explanations and exceptions.

Studer said that the Orono example would not have prevented narrow driveways. McNeill said that is just an example from a different city. Studer he understands the patio concerns, but asked if it was common enough to require an ordinance.

Eaton said that the massing on a house would need to be reduced to accommodate these changes and that is a good thing from the community perspective. McNeill said that she agrees, but that is a somewhat different issue.

Cooney said that it is possible that this builder knew that the lot size would possibly allow for a variance, but didn't want to go through the process and if it was important enough to the homeowner figured they could do it.

McNeill said that it puts the city in an awkward position to protect the homeowners from the spec builder's behavior even if a variance might not be warranted.

Studer asked if it is a common enough problem to require an ordinance. Nagle said that they are gaming the system.

Daly said that this would only apply to the Shoreland Overlay District.

Werneiwski said that he would be in favor of a 500 square foot allocation for hardcover exclusive of the house and driveway.

Nagle asked if the builder needed to detail how the builder would handle a door to nowhere. McNeill said that it needs to be in the city code since it is not in the building code.

Studer said that if the number is set at 100 square feet, someone will come in and ask for a variance for a 200 square foot patio. Wilcox said this would help alleviate some of the requests.

Wilcox said that the hardcover use doesn't need to be itemized, but instead there could just be the reservation of a certain square footage for other uses. Werneiwski said it could be 2% of the lot size reserved for other hardcover uses.

Studer asked if we could follow Orono and exclude the first 100 feet of deck from hardcover calculations. McNeill said that she was not in favor of that. Studer said that he has trouble dictating design on these things.

Werneiwski said that he would be fine recommending reservation of 2% of hardcover for items other than the house and driveway for new construction.

The Planning Commission discussed if this would apply to only new construction or to substantial remodels as well. Studer said that for a remodel, the city is dealing with a homeowner and existing conditions and that it is the spec builders that are pushing the envelope.

Nagle said that he was supportive of reserving 2% of the hardcover on new houses. Cooney asked if the 2% reservation would be for future hardcover expansion or 2% for non-house and non-driveway uses.

The Planning Commission agreed that the 2% was for non-house and non-driveway uses.

**Consider modifying city code to 1) include escrows/financial guarantees for building projects, 2) to allow for administrative citations.**

Cooney said that this topic of building and code enforcement was brought up at the April Planning Commission meeting. He said that Commissioner Wilcox has looked into the issue and provided some information and recommendations for the Planning Commission's consideration.

Studer asked about Certificate of Occupancy. Daly said that only applies to new construction. Studer said that most of what he read from Wilcox's information seems to apply only to commercial projects. Studer said that he would be absolutely opposed to having a large financial guarantee and that it is not the city's place to hold a private individual's money while they construct a house.

Werneiwski asked if the city council has asked the Planning Commission to review this. McNeill said no. Werneiwski said that he would like to have the idea presented to the City Council before the Planning Commission spends too much time trying to draft a rule that may not be wanted. McNeill said that the Planning Commission can be proactive and suggest changes.

Wilcox said that it would just be a concept put to the City Council at this point and not a detailed plan or draft ordinance.

Studer asked about current enforcement requirements. Cooney said that every violation of the zoning code is a misdemeanor if the person is found guilty. He said that, unfortunately, the due process portion of enforcement needs to go through the courts and can take a lot of time for enforcing a minor violation. Cooney said that this is the same for all cities.

Studer asked who is responsible for attorney fees. Cooney said that the city is. Nagle said that is a bad enforcement process.

Wilcox said that escrow funds could help recoup legal fees and administrative fines could help enforcement earlier in the process. Studer asked under what circumstances would an escrow be required. Wilcox said that is up for discussion.

McNeill asked what would happen with enforcement on a hardcover excess like the Planning Commission reviewed this evening. Cooney said that he would start with a letter, and then a citation, and would take

the appropriate next steps until the matter was resolved. He said that usually the matters are resolved before court. Cooney said that escrow could help prevent issues for things in the system, but administrative fines could be levied for any violators.

Daly said that if a property is over allowable hardcover on an as-built survey, it is easier to get compliance if there is an escrow.

Studer says that he sees this all the time in the commercial building process, but he is less supportive of requiring escrows for individual homeowners. Studer said that the escrow would only keep the already honest people honest and the dishonest people will still violate the law.

Wilcox said that an escrow could be tied to a building permit of a certain amount to ensure compliance. Daly asked about requiring changes prior to the sale of a property. Studer asked if the city can just put a lien on a property like that.

Cooney said that this kind of escrow will impact all of the people, not just the bad actors and that it might have an impact on property sales or building permitting. He said that renovating a house or building new is an investment in the city and the city needs to be careful about putting too many road blocks into the process. McNeill said these are guardrails, not roadblocks.

Cooney said that Woodland requires a street escrow on projects, and that it can help expedite things since people want their money back. Daly said that escrows are very common.

Nagle asked what if a house was built in a setback. Wilcox said that the escrow could be used as an incentive to correct on the front end, or to pay attorney fees to fight potential legal challenges.

Daly said that Minnetonka Beach requires foundation permits to limit the downside risk of a completed house being built within a setback. Daly said that he would like at least bring the issue to the City Council to get their opinion.

Cooney said that, as soon as a Certificate of Occupancy is issued, there is not much the city can do if they chose to violate the law at that point. Studer said that the escrow fee is just keeping already honest people honest and won't catch the bad actors. Studer said that the people applying for the permits are not necessarily the ones the city needs to worry about. Wilcox said that is not a reason to not try and make things better. Daly said that a penalty can provide some prevention.

Cooney said that escrow is one thing, and administrative fines are a bigger process issue since it could be more broadly applied. Eaton said that he likes administrative fines since they would only punish the violators and not add costs for everyone.

Studer said perhaps there should be a form or agreement that notifies them of potential penalties and legal fees if something is not built according to code. Eaton liked bringing the awareness of penalties to people's attention on the front end. Nagle said that he liked that essentially a contract is being signed.

McNeill recommended that Wilcox make a brief presentation to the City Council.

#### **LIAISON REPORT**

McNeill presented the liaison report. She said that 19120 Park Avenue variance was approved. She said that Cooney presented an updated Comprehensive plan.

McNeill said that much of the rest of the conversation at the City Council was about bonding for the Minnetonka Boulevard project. Studer asked about costs. McNeill said that cost is preliminary but that the bonding is for approximately \$1.5 million. Studer said that the road must cost more than that.

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**ADJOURNMENT**

Motion by Werneiwski to adjourn the meeting. Motion seconded by Nagle. Motion carried 6-0. The meeting adjourned at 9:12.

Respectfully submitted,  
Dale Cooney  
Zoning Coordinator