

**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, Cindy Hunt Webster, and Josh Wilcox

**ABSENT:** Commissioner Bob Werneiwski

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

**MINUTES OF October 15, 2019**

Webster made the correction that she was previously the Advisory Volunteer Board Chair of the Minnetonka Community Education Center. Motion by Webster, seconded by Nagle, to approve the minutes of September 17, 2019 with the correction noted by Webster. Motion carried 6-0.

**PUBLIC HEARINGS**

**Consider the variance requests of Michael and Kris Hickey, property owners, to exceed the maximum permitted grade alteration in order to construct a new house on the property at 3216 Robinsons Bay Road.**

Chairman Studer introduced the agenda item.

Cooney presented the staff report. Summary: Cooney said the property owners have applied for a variance to exceed the maximum permitted grade alteration in order to construct a new house on the property the property at 3216 Robinsons Bay Road. He said the parcel is 46,204 square feet in size and zoned R-2. He stated that the existing non-conforming house, built in 1933, will be removed.

Cooney said that Section 1312.04 of the city ordinance limits the maximum grade alteration on a property to 3 feet and that the applicants are proposing to raise the grade in the front yard by as much as 9 feet in some areas. He said that the elevations in the front yard will be significantly altered with many areas seeing alterations of 6 to 8 feet. Cooney said that the primary purpose of the grade change is to limit the number of steps between the garage level and main floor. Cooney noted that this also allows for fewer steps at the front entry. Cooney noted that the grade changes also have the potential to improve the wet driveway issue in the low lying areas at the front of the property.

Cooney said that the property sits between Lake Marion and Lake Minnetonka with much of the front yard at an elevation below 932. He noted that the elevation gradually increases in elevation towards the north property line and that there is a high area on the property where the existing house sits with elevations between 938 and 944. Cooney said that the existing driveway area has been muddy and wet all summer long, and staff clearly understands the need to elevate the driveway grade and elevate other low areas on the property.

Cooney said that the principal justifications for land alteration restrictions are to limit properties from circumventing the house height limitations by building up the grade around a property, or altering overall drainage patterns in a significant or detrimental way. He said that neither staff or the city engineer feels that the information provided by the applicant gives sufficient information regarding potential negative stormwater impacts to the neighboring properties.

Cooney said that the applicant submitted drainage area summaries that show the before and after conditions of the drainage areas for the property and that the maps show that a much larger portion of the area of the property would drain towards Lake Minnetonka than existing conditions. He said that this may work conceptually, but there is not enough information provided to make a determination.

He said that while there is clearly less impervious area directed towards the Lake Marion side of the property, there is also much less water storage area on this side of the property. Cooney pointed out that on the proposed drainage map, the existing 932 contour runs through the corner of the proposed garage, but the new 932 contour is proposed to be moved closer to the tree in the SE corner of the property. He said that the water that might otherwise sit in this area is pushed to the edge of the property, and potentially to the neighbor's property. Cooney said that some kind of modeling is necessary to show that the reduced storage area is more than offset by the reduced stormwater coming to this area.

Cooney said that to make a determination, the city engineer asked for the following:

- Hydrocad modeling for a 100 year rain event.
- A survey or grading plan showing the locations of the downspouts and the locations/elevations of the outlets for the downspouts for the property.

Cooney said that the city engineer felt that some kind of outlet (with a backflow prevention device) to Lake Marion would be very beneficial to the drainage of the property but that he and staff recognize that this is private property and that the city cannot require improvements to be placed on an adjacent private property.

Cooney said that he has concerns about the magnitude of the grade changes for the property, but also recognizes that some kind of grading variance is necessary to build beyond the existing house footprint while also helping manage the water issues for the property. He said that the elevations for the property are transitional between the higher property directly to the north which sits on a building pad at an elevation of 964, and the low-lying property immediately to the south with a high elevation of 934. Cooney noted that the proposed grading for the property will maintain that transitional character with driveway elevations at 940. He said that for those reasons he is supportive, conceptually, of the proposed grading.

But, Cooney said that the principal justifications for land alteration restrictions are to limit properties from circumventing the house height limitations by building up the grade around a property, or altering overall drainage patterns in a significant or detrimental way and that he does not feel that the drainage issue has been sufficiently addressed with the information provided. Cooney said that if the modeling and site plan information requested above were to be provided and it was demonstrated that the drainage issues on the property were adequately managed, staff would support the variance request. He said that, at this point, he does not feel that a recommendation of approval is justified.

Cooney said that he recommends denial of the variance requests of Michael and Kris Hickey to exceed the maximum permitted grade alteration by up to 6 feet for the property at 3216 Robinsons Bay Road, as proposed based on the following findings:

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

No. The principal justifications for land alteration restrictions are to limit properties from circumventing the house height limitations by building up the grade around a property, or altering overall drainage patterns in a significant or detrimental way. The applicant has not adequately demonstrated that the proposed grading will not have negative stormwater runoff impacts for the neighboring properties.

Is the variance consistent with the comprehensive plan?

No. The request is consistent with the Comprehensive Plan's Housing Elements Goals and Policies which encourages safe, healthy and quality housing, and proper stormwater runoff management is essential to safe, healthy, quality housing.

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

No. Some type of grading variance may be justified for this property, but the proposed grading has the potential for negative stormwater runoff impacts for the adjacent properties. Creating negative stormwater impacts do not constitute a reasonable use of the property.

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

Yes. The front half of the property sits at an elevation of 932 or lower. The low areas on the Lake Marion side of the property are prone to flooding and drainage issues. The existing building pad is at an elevation of 938, and expanding the footprint a new house would require a significant grade alteration (either up or down) to create a larger building pad.

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

No. In terms of elevation, the property is a transitional property between the higher property directly to the north which sits on a building pad at an elevation of 964, and the low-lying property immediately to the south with a high elevation of 934. The proposed elevations maintain the transitional character of the property.

Cooney concluded his staff report.

Daly said that he has a business relationship with the applicant but that he does not have involvement with this particular project. He said that, for those reasons, he would participate in discussions but would not vote on the request.

Wilcox asked about the two engineering reports, one from HGA and one from Anderson that seem to conflict. Cooney said that the HGA reports were generated by the neighbors and the Anderson reports were generated by the applicant. Cooney said that it would be best to follow the recommendation of the city engineer.

Cooney said that the floodplain fill issue has been raised by the city engineer as well as the HGA engineer.

Webster asked about reports being provided after the variance. Cooney said that the applicant has made assurances that additional details would be provided if a variance were granted, but the city does not have that information currently.

Sven Gustafson of Stonewood Builders and Peter Eskuche of Eskuche design, contractors for the applicants, introduced themselves to the Planning Commission.

Gustafson said that additional information was being requested via e-mail even today and that it is dependent on the final design. Webster said that it is important to have that information. She said that the grading plan presented to the Planning Commission should be the final design.

Webster asked what information was missing. Cooney said the city needs to see a plan that shows the downspouts and where they outlet on the lake side. Cooney said that the other missing information is the "elevation of inundation" which tells the elevation at which the water would pool. He said knowing that would allow the city to determine if the water pools on the applicant's property or the neighbor's property.

Eskuche said that to know that information there would need to be very precise engineering data in the southeast corner. Cooney said some information was provided showing less water going to the east portion of the property, but the Hydrocad report would provide the input assumptions and the elevation of information.

Eskuche said that it has been a very wet year. Studer said that the city needs to see something on paper for the engineering.

Webster said that the grade change is significant she can read a plan and that it is a lot of dirt. She said that at the last meeting the applicant stated that there would be 1 to 2 truckloads of fill brought in. She said 9 feet of dirt would be hauled in on a private road that was just built. Webster asked about the settling of the fill. Gustafson said it would be compacted as they set it, and that the house would sit on helical piers to help prevent settling.

Webster asked where the water was going to go. Eskuche showed diagrams of the property showing which water would go which direction. Gustafson said that 44% less water would go towards Lake Marion than before. Eskuche said that some of the grading would also direct the water towards Lake Minnetonka.

Webster asked if they could guarantee that the water would not go to the neighbor's property. Gustafson said that the neighbors admit that the water is the worst that it has ever been. He said that the applicants have the most vested interest to ensure that water does not go onto the neighbor's property. Gustafson said that there would have to be a lot of pooling to get over the road. Webster asked about a drain to lake Marion. Gustafson said it wouldn't work since there is not positive drainage.

Wilcox asked about fill in the floodplain. Gustafson said that there is less hardcover draining to the Lindahl's property based on the removal of impervious areas. He said that the only change that a denial of a variance would provide is a change in the height of the garage and how much of the house sits above grade.

Studer asked about a culvert that was clogged. Gustafson said that they did not locate one and if there were one it would not drain.

Cooney asked about the floodplain fill. He said the Minnehaha Creek Watershed District considers 931.9 to be the floodplain elevation and that fill below that is considered floodplain. Cooney said much of the proposed grade change is below 932 and that any fill below the floodplain would need to be accounted for in other areas of the floodplain. He asked if that would impact the grading proposal.

Eskuche said that they are not proposing to fill many areas below 932 and that does not have much to do with the variance request.

Eaton noted the city engineer's comments about the possible floodplain fill.

Studer said that everything south of the driveway is 932 or lower. Eskuche showed the areas of proposed fill. Gustafson said that the depth of fill does not change the conditions in the southeast corner, and that less impervious area is going to that corner.

Wilcox asked about a pump. Gustafson said that pumps break.

Eaton asked about the drainage improvements in spite of the grade change. Gustafson said that the impervious areas draining to the Lake Marion side of the property are much less. He said that the property is a victim of the rest of the neighborhood as to how the neighborhood drains.

Wilcox asked about the Hydrocad report and why that could not be provided. Gustafson said that it is a matter of timing.

Daly asked about a diagram that shows the drainage for the property. Eskuche said additional water from the regraded hill to the north could also improve the drainage.

Studer said that his concern is that there is a new low point and that low point is now on the neighbor's property. He said that it is where the water pools that matters.

Nagle said that he sees no elevation on the south property to determine where the water would end up.

Studer said that he wants to see where the water that comes to the Lake Marion side will sit. He said that would help make an informed decision.

Michael Brandvold and Mattie Miller of Anderson Engineering, engineer for the applicant, introduced themselves.

Brandvold said that the drainage areas are what they are and that there is some fill to start the elevation of the driveway. Brandvold said that there is about a 55% reduction of impervious runoff to the Lake Marion side of the property. He said that regarding the Hydrocad, they had rough numbers but they are not ready. He said that there is fill taking up some storage area, but also less water coming to the area. He said that they can make it work by providing some retaining walls to maintain the storage area. He said that it is a timing issue, but a solvable problem.

Miller said that the preliminary numbers show a modest change, but that can be adjusted to work. Eskuche said that retaining walls on the side of the driveway could help maintain storage volume. Studer said that he would like to see a model showing existing versus proposed.

Nagle asked about moving the driveway north. Eskuche said that it might create a steeper driveway.

Studer opened the public hearing.

Kathy Murphy, 3200 Robinsons Bay Road, said that she wants the applicants to be happy. She said that she has never seen the plan that was shown at this meeting and that it would be nice to get the information in a timely manner. She showed an elevation of the 932 elevation and how substantial that area is today. Murphy said that the area is a bathtub and that if you make the tub smaller you'll hold less water.

Ray Mithune, 3266 Robinsons Bay Road, said that he has lived in the city for 50 years. He thanked the Planning Commissioners. He said that he is worried for the Lindahl's if the road flooded. He said that the Luther property has created runoff problems. He said more homework is needed.

Norm Rickeman, 3200 Robinsons Bay Road, said that their level of confidence for the project is low. He said they are being told it will be better, and he thinks there needs to be a second opinion. He said that he just wants to know where the water is going to go, but he believes there is a solution. He said that the Lee's own the road and that the property owners can't divert water onto private property.

Daly asked if the road has ever flooded. Mark Anderson, 3120 Robinsons Bay Road, said that the road has never flooded.

Studer closed the public hearing.

Eaton said that there are questions that the city does not have answers to. He said that they are potentially making the property better, and that he is open to approval if that information is provided.

Nagle said that there is not enough information. He said that he is concerned about the southeast portion of the property. He said is opposed until he sees additional information.

Webster said that she does not support the magnitude of the request and that she does not see a compelling reason for the scale of the request. She said that they can make this house work without a variance.

Studer said that the plans are a step in the right direction, but that more information is needed about the location of the flooding. He said that he was less concerned about the elevation change and that some kind of grading needs to be done for the property.

Daly said the project team is listening to the concerns and making positive progress. He said that the calculations will make the determination. Daly said that the water issues are a practical difficulty. He said that there have been other variances that have been granted in the past that might have been less reasonable.

Wilcox said that there is not a practical difficulty that the grade needs to be changed by 9 feet. He said that if there was information that showed that this would be a benefit to the neighborhood he could be supportive.

Motion by Studer to recommend denial of the request based on the recommendation and findings of staff. He said this recommendation is due to lack of information. Motion was seconded by Webster. Motion carried 5-0 with Daly abstaining.

**Consider the variance requests of Cory and Heather Lepper, property owners, to encroach into the lake yard setback, encroach into the front yard setback, encroach into the north and south side yard setbacks, exceed the maximum permitted grade alteration, and exceed the maximum permitted impervious surface area in conjunction with the construction of a new house at 20580 Summerville Road.**

Chairman Studer introduced the agenda item.

Cooney presented the staff report. He said that the property owners are building a new house on the property. Cooney said the design of the house is such that there are proposed encroachments into all yard setbacks and that the applicant is also seeking variances for impervious surface area. Cooney noted that the existing legal nonconforming property is highly nonconforming for lake yard setback and impervious surface area. He said the property is 14,241 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 from the OHW. He noted that the proposed pool is as close as 66.3 feet and the proposed house is as close as 81.8 feet from the OHW. Cooney said the applicant is seeking a variance to encroach 33.7 feet into the required lake yard setback. He stated the existing house on the property has a closest encroachment of 49.2 feet, with a deck that is approximately 28 feet from the OHW.

Cooney said that Section 1302.05(3) of the city ordinance requires a minimum front yard setback of 35 feet and the closest encroachment of the proposed house is 10.8 feet.

He said that the property has a depth of 198.5 feet and subtracting the required setbacks leaves a buildable area of 63.5 feet. Cooney said he thinks the buildable area is too shallow to allow for a house with an attached garage and that some degree of variance seems justified in this case. He said that, given the substantial improvements to the proposed setbacks from existing conditions in the lake yard and the long street end of Summerville Road leading into the property, staff is supportive of this aspect of the request.

Regarding the side yard setbacks, Cooney said that Section 1302.05(3) of the city ordinance requires total combined side yard setbacks of 25 feet with a minimum side yard setback of 10 feet. He said that the applicant is proposing a south side yard setback of 8.5 feet and north side yard setback of 9.9 feet and is seeking a variance of 1.5 feet from the south side yard setback, and 5.1 feet from the north side yard setback. Cooney said that the existing setbacks are 14.5 on the north side and 2.5 on the south side, and the proposed combined setbacks are a slight improvement from existing conditions.

Cooney noted that the south side yard encroachment for the house is due to the proposed cantilever, otherwise this setback would be conforming. He said that while this setback is a significant improvement

from existing conditions, it would still be his recommendation to eliminate the cantilever in order to avoid this variance.

Cooney said that the applicant is requesting flexibility from the north side yard setback due to the property being adjacent to a 10-foot-wide city fire lane at the end of Summerville Road. He said that he has no objection to this as a general concept in providing flexibility for an otherwise limited lot, he said that struggles with the idea of a side yard setback variance for a new house on a 70-foot-wide lot. He said that there are many challenging 50-foot-wide lots within the city, and this seems like an avoidable variance. He said that the lot width is substantial enough to support a generous home without the need for a variance and the fire lane situation would be simply an allowance to build a wider house.

Cooney said that Section 1302.05(2) of the zoning ordinance limits the maximum impervious coverage of the property to 25%. He said the applicant is proposing an impervious surface area of 41.6% and is seeking a variance to exceed the maximum impervious surface area by 16.6%. Cooney noted that, currently, the property is at 44.2% impervious area.

He said that, as a 14,241 square foot lot, it is not necessarily a small lot. He noted that a zoning code compliant 20,000 square foot R-3 lot is allowed 5,000 square feet of impervious surface area. He said that if 20580 Summerville were given the full 5,000 allotment of impervious area, the impervious percentage for the property would be 35.1%. He noted that one contributing factor for the excess impervious surface area is that the low elevations of the property do not support a full basement and some components of the house need to be hosted above grade, which drives up the building footprint area.

Cooney acknowledged that all variances are unique, but in 2016 the city did grant a comparable impervious surface area for a comparably sized property at 20200 Lakeview Avenue. He said that the property is a 15,019 square foot lot with existing conditions at the time of 48.8% impervious. He said that the applicant was granted impervious surface area variance of 41.2%. Cooney noted that one mitigating factor in that request was an 1,136 square foot existing lake yard deck, but he noted that property was able to support a basement. Cooney said that in 2016, the city also granted an impervious surface variance of 29.45% for the 32,699 square foot R-2 property at 20760 Linwood Road, partially due to the fact that the low elevations on the property were not conducive to building a basement.

Cooney said that a portion of the property's stormwater will be directed to the mitigation system under the driveway and that a portion of the property's stormwater is proposed to be connected to the city storm sewer that leads toward the lake. He said that the city would need to approve this connection. Cooney said that the storm sewer along the fire lane is being upgraded next year to an 18-inch diameter pipe and that the culvert under Summerville Road is being upsized from a 10 inch pipe to a 12 inch pipe.

Cooney said that the city engineer did have related to how the overflow is handled. If the street culverts are blocked there is no way for the excess water to get to the lake and that ponding in the street or neighboring properties is a possibility. Cooney noted the engineer's concern that the water is being pushed to the street without a clear path to the lake if the culverts become blocked.

Cooney said that the applicant is proposing to install a number of items within the public right-of-way including portions of a paver driveway, trench drains, and a hard connection to the city storm sewer that leads to the lake. He said that an agreement waiving the city from any liability for damage from these improvements would be required. Cooney said the city would need to review and approve the agreement prior to the start of construction.

Cooney said that he is generally supportive of the lake setback, and front setback variance requests. He said that the property seems wide enough to support a new house without variances and the presence of the fire lane does not alter that fact, nor should it serve as a windfall for the property owner build a wider house.

He said that he struggles with the degree of the impervious surface area request, since the request is substantially over the 25% limitation. He said that since the low elevation for the property prevents a full basement from being built on the property, the above grade areas of the house must support those components. Cooney said that taking the existing impervious conditions, low elevation, and substandard lot size into account, staff sees sufficient justification for supporting the impervious surface request as proposed.

Cooney said that he recommends denial of the variance requests to encroach into the south side yard setback by 1.5 feet for the and encroach into the north side yard setback by 5.1 feet for the proposed house on the property at 20580 Summerville Road, as proposed, based on the following findings:

**FINDINGS BASED ON THE REVIEW AND APPROVAL PROCESS IN SECTION 1315 OF THE ORDINANCE:**

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

No. The purpose and intent of the ordinance is to allow the orderly development and redevelopment of property within the city and when the ordinance standards cannot be met, it outlines the procedures to vary from these standards. In this case, the property is wide enough to support conforming setbacks without the need for a variance.

Is the variance consistent with the comprehensive plan?

No. The request is consistent with the Comprehensive Plan's Housing Elements Goals and Policies which encourages housing that respects the natural environment of the community and maintains or exceeds Department of Natural Resources shoreline standards.

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

No. The width of the house is not reasonable given the already generous lot width.

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

No. At 70 feet in width, the property is wide enough to support a 45-foot-wide house without a variance. The presence of the adjacent fire lane does not alter that fact (and might only come into play as a mitigating circumstance for a lot that did have unique circumstances).

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

No. The proposal is an improvement for the property to the south and, due to the fire lane and location of the property, would be largely be unnoticed by neighbors.

Cooney said that he recommends approval of the variance requests to encroach into the lake yard setback by 33.7 feet, encroach into the front yard setback by 24.2 feet, encroach into the south side yard setback by 7 feet for the proposed retaining wall, and exceed the maximum permitted impervious surface area by 16.6% as proposed.

The recommendation is conditioned that:

The applicant provides an agreement, subject to the city's review and approval, waiving the city from any liability for damage to the applicant's right-of-way improvements

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.

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

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

Yes. The purpose and intent of the ordinance is to allow the orderly development and redevelopment of property within the city and when the ordinance standards cannot be met, it outlines the procedures to vary from these standards. The lot depth only allows for 63.5 feet of buildable area, which is insufficient for a modern house. The purpose and intent of the grading restrictions is to prevent grading changes that circumvent the house height limitations or alter the overall drainage patterns in a significant or detrimental way, neither of which is the case for this proposal.

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.

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

Yes. Aspects of the request put the property to use in a reasonable manner. The grading is a reasonable response to the low elevations of the property and the surrounding properties. The impervious areas are slight reductions from existing conditions with significant mitigation provided. The lake yard and front yard setbacks are reasonable given the shallow lot depth, existing conditions, and long street end at Summerville Road.

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

Yes. The property only has a buildable lot depth of 63.5 feet which is insufficient for a modern house. Additionally, there is a long access in the public right of way at the front of the property where Summerville Road splits into three separate driveways. The proposal is an improvement from the setback conditions on the lake side of the property. Regarding the impervious surface area, the proposal is a reduction from existing impervious conditions. The property is 71% of the minimum lot size. Also, the property sits low elevation which does not support a basement, so typical basement components need to be hosted on the main and second levels of the house. Regarding grading, the property is low and flat and the applicant is attempting to create positive drainage off of the property while also attempting to raise the elevation to be more consistent to the neighboring property to the north.

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 in scope and scale to other properties within the community.

Cooney concluded his staff report.

Wilcox asked about the city right-of-way. Cooney said the city needs to take the lead, but it can be collaborative resolution. Wilcox asked if that could be a condition. Cooney said yes.

Cory and Heather Lepper, applicants, introduced themselves.

Cory Lepper said that they have built 24 houses in the city. He said that they bought the property 5 years ago and evaluated the property. He said that the property is in a tricky area for drainage. He said that the area collects water from about 4 acres of property and it is kind of a bathtub. Lepper said that they are trying to resolve the general issues for this street end.

Heather Lepper said they are building the property to the north and the drainage for both is being considered at the same time, but that is a separate architect and owner.

Webster said that she has an issue with the pool in the 100 foot setback and will vote no on that aspect. She said she is open to considering the rest of the proposal. She said that she also has an issue with the impervious area. Cory Lepper said the pool is 3.7% of the impervious area.

Wilcox said that the impervious is less and the house is further from the lake.

Nagle said that he has concerns with how the proposal impacts with the existing property to the north.

Studer said that we need to consider the property on its own.

Heather Lepper said that they can work with the city and help fix a major problem on Summerville Road. She said that the previous property owners did not like each other. Cory Lepper said that they will clean the plantings from the fire lane.

Daly asked about the updated survey, and asked if they were dropping the house. Cory Lepper said that the garage is lower, but the house is not, and that the pool is lower as well. He said that dropping the grade helped everything and removed the retaining walls.

Daly asked if this was a 2.5 story house. Heather Lepper said that there is a small attic space with 7.5 foot ceilings.

Webster asked about mechanicals. Cory Lepper said that there are some mechanicals on all levels. Heather Lepper said that it was also about safety from inclement weather.

Webster asked if there is enough information. Cooney said that how the private and public aspects work together and manage the overflow needs some coordination. Cory Lepper said that the work would be collaborative.

Cooney said that the mitigation is sufficient, but that the overflow is a question.

Daly said that, after 24 homes without a variance, why a variance on this site. Lepper said that the side yard requests are more about separation, but that the 100 foot lake yard is also a tricky issue.

Daly said that the applicant mentioned that the area is a bathtub, but that their impervious area is still high.

Heather Lepper said that they are working to change the runoff area for the better.

Webster said that she has an issue with the lake yard setback. Nagle said that the impervious area is an issue. Webster said that the new construction should allow for something conforming at least on the lake side.

Cooney asked Cory Lepper about the lot line issue raised by the neighbors. Cory said that the title work is clear, but there is an issue on the vacation of the alley.

Studer opened the public hearing.

Dan Goodrich of 20500 Summerville Road said that he is excited to have the Leppers as new neighbors. He said that the water drains in a portion of his yard. Goodrich asked about the impervious area and how it got so high. Nagle said that it was probably that way prior to the ordinance limitations.

Goodrich asked about the fire lane and that no one can walk down there now since it is blocked by plantings. McNeill said that is really only for city access. Goodrich asked if they are building into the fire lane. Studer said they were not.

Tom Erdmann of 20425 Lakeview Avenue said he had a few concerns. He said that a house 8 or 9 feet from the property line is too close. He said he is concerned about the garage being 10 feet from the street which is too close. He said that pavers in the street are inappropriate and signal private ownership of public property. He said that he does not support private property on public fire lanes and is glad that

will be taken care of. He said he supports looking at the drainage issues for the end of the street. Erdmann said that he was happy to see the house pulled back from the lake. He said that he does not think the swimming pool without a deck passes the smell test and it will eventually be impervious.

Jason Cole of 20575 Summerville Road said that he has spent time and energy trying to manage water in the area. He said all the water exits through the fire lane. He said that fixing the drainage issue would be a huge victory. He said that opening the fire lane would also be welcome. He said that they are improving access to the property.

Allison Wertz, property owner at 20560 Summerville said that there will not be a driveway in the fire lane. She said she is excited for the project and for the water improvements.

Studer closed the public hearing.

Wilcox said that a lot of good work is being done and that he is okay with most of what was proposed except for the side yard setbacks.

Daly said that a new house is a clean slate and that he struggles with the number of variances. He said he is not supportive of the pool from a setback and hardcover standpoint.

Studer said that he thinks the stormwater is a regional problem for the street and this will help. He said that he sees the property moving towards conformity. He said he is not concerned about the north side setback. He said it is a nice design.

Webster said she had concerns with the pavers going into the street. She said that the property with a new house is a clean slate and that the pool is a non-starter for her.

Nagle said that he agrees that the lake setback is a big issue. He said he opposes the pool and would like to see the screened porch eliminated too. He supports the fire lane improvements. He said he doesn't have an issue with the side yard setbacks or the front setback.

Eaton said that he is more in agreement with Wilcox and Studer. He said that he doesn't have as much of an issue with the pool.

Webster asked about separating aspects of the variances. Cooney said that the easiest thing to do would be to make a motion that approves the plan without the pool.

Motion by Webster to recommend approval with the project as proposed based on the recommendation and findings of staff with the condition that the pool be removed from the proposal. Motion was seconded by Nagle. Motion carried 4-2 with Studer and Wilcox voting against.

**Consider the conditional use permit request of Lake Minnetonka Care Center to expand the legal nonconforming use of the property as a nursing home at 20395 Summerville Road.**

Chairman Studer introduced the agenda item.

Cooney presented the staff report. Cooney said the Lake Minnetonka Care Center (LMCC) operates a nursing home at 20395 Summerville Road which has been in continuous operation since at least 1958 and that the LMCC has made application to build a new building on the property. He said the existing building is substandard under current nursing home regulations (Minnesota Rules Chapter 4658 Department of Health Nursing Homes), and the applicant proposes to construct a new building on the property to meet those standards. Cooney said the new building would have a 7,570 square foot footprint with a total square footage of 14,954.

Cooney said the use of the property as a nursing home is not a permitted use within the district. He said that since the use of the property predates the zoning ordinance, the use is granted legal nonconforming status under state law and can remain in operation at its current location. He said that with few exceptions state law prohibits the amortization of a legal nonconforming use.

Cooney said that, per Minnesota Statute 462.357 Subd. 1e, legal nonconformities, including the lawful use or occupation of land or premises existing at the time of an amendment to the zoning ordinance, may be continued through repair, replacement, restoration, maintenance, improvement, but not including expansion.

Cooney noted that state law does mandate several uses that must be allowed within single-family residential zoning districts but the proposed facility does not fall into one those listed categories.

Cooney said it is the opinion of the City Attorney that a nonconforming use cannot be expanded without somehow providing a mechanism for expanding that use. He said while a variance may be granted for the spatial requirements of the property (building footprint, impervious area, etc.), it is not an appropriate tool for expanding the nonconforming use of the property. Cooney noted that, even if the proposed expansion of the nursing home did not exceed zoning district requirements in any way, some mechanism would be needed to permit any expansion of the nonconforming use of the property.

Cooney said that in the opinion of the City Attorney, the only mechanism to allow the expansion of the LMCC on the property to any extent is via a Conditional Use Permit (CUP). He said city code Section 1305.01 requires that all uses of land must be made in conformity with Section 1305, and allows by CUP uses that are not enumerated within Section 1305. He said per city code Section 1320.01, the city code gives flexibility to grant a CUP to additional uses not specifically designated within the zoning code. He said a CUP would specify the conditions and extent to which the use could operate on the property and that the CUP would be tied to the property and could be transferred to future owners. Cooney noted that the City Attorney has stated that the CUP is only intended to be the mechanism that would allow the nonconforming use to expand, and that the issuance of the CUP in no way makes the use a conforming use. He said that further expansions of the facility or discontinuance of the facility would still be viewed via the laws regulating legal nonconformities.

Cooney read from Section 1320.03 of the city code which states, "*Evidence. In considering a request for a Conditional Use permit, the Council must be supplied with and consider evidence of the effect of the proposed use on the plan for development of the community; the character and development of the neighborhood; the health, safety, and welfare of occupants of surrounding lands; existing and anticipated traffic conditions, including parking facilities, on adjacent streets; and the effect on property values of the subject premises and in the surrounding area.*"

Cooney said that the existing facility serves 21 residents and that the facility has been in continuous operation since at least 1958. He said he spoke with Bob Dahle, the Program Director of Engineering Services at the Minnesota Department of Health, who confirmed that the facility has served at least 18 residents since 1960 and would have been set at its current number of residents since at least 1985.

Cooney said the current footprint of the existing building, garage, and deck is 3,948 square feet. He said that while the number of residents will remain the same, the new building would have a 7,570 square foot footprint. Cooney noted that Mr. Dahle confirmed that the age of the existing building (1910) would make it cost-prohibitive to retrofit and that it may not even be possible to do so.

Cooney said that the square footage of the proposed building is driven, to a certain extent, by state requirements. He said that, for example, 8-foot-wide hallways are a state and federal requirement. He said that minimum room square footage, toilets, dining rooms, day rooms, activity rooms all have

minimum square footage requirements. He stated that waivers may be granted for certain aspects of a facility, but it would depend on the specific circumstances. Cooney stated that Mr. Dahle pointed out that the minimum space requirements required by regulations are already quite small.

Cooney listed some of the relevant nursing home minimum size standards. He said that he acknowledges that the minimum sizes are quite small, but that the proposed building exceeds minimum standards in several ways:

- All bedrooms are single occupancy, while regulations require that only 5% of the rooms be single occupancy. The remainder may be double occupancy.
- All bedrooms have their own toilet, while regulations state that a toilet may be shared by up to 4 beds.
- Proposed single occupancy rooms are a minimum of 131 square feet and a maximum of 161 square feet. So, at least some rooms exceed minimum standards.
- Staff estimates that the total area set aside for dining, dayroom, and activities is 48 square feet per bed, with a minimum of five square feet per bed for each type of area. (Minimum required is 840 sf; proposed is approximately 1008.)

Cooney said that he does not begrudge the applicant from requesting beyond the minimum requirements for the residents, but notes the above only to point out that the building could, in theory, be smaller.

Cooney said that some of the first complaints staff received from residents for the proposal were related to public safety. He said that, Per Section 1320.03, in considering a request for a Conditional Use permit, the city must consider evidence related to "*the health, safety, and welfare of occupants of surrounding lands.*" He said that he asked Police Chief Cory Johnson to put together a public safety memo to detail their interactions with the LMCC's residents and the impacts on the community.

Cooney said the footprint of the existing building would be nearly double (92% larger) and exceed the maximum allowable structure footprint size allowed by the zoning code by 68%.

He said that there is no doubt that the existing building is substandard by current nursing home standards, and that the new building would better serve the occupants of the building. He said he recognizes that the space that exceeds minimum state nursing home standards will only serve to further enhance the well-being of the residents of the Lake Minnetonka Care Center. He said that he also recognizes that market conditions play a role in providing care above minimum standards and that a new facility may require greater amenities coupled with higher fees simply to make the project financially viable.

But, Cooney said, there is nothing within Section 1320.03 for CUP evidence consideration that allows the city to take those advantages to the occupants of the building into consideration. He said the factors for consideration are only how the building would impact the community, the character of the neighborhood, and other primarily external impacts to the community. He said that, when considering those factors, staff can only conclude that the change from a well-integrated retrofitted large house, to a more institutionally sized (albeit newer) building would have a negative impact on the residential character of the neighborhood. Cooney said that it may be the reality that any facility that best meets the needs of the residents would be at odds with a building that integrates appropriately within the residential character of the community. He said that whether or not those two goals are mutually exclusive is debatable, but in the opinion of staff the institutional scale, multifamily character, and commercial nature of the proposed facility is incongruous with the existing single-family residential character of the surrounding community.

Cooney said that he recommends denial of the Conditional Use Permit request of the Lake Minnetonka Care Center to expand to expand the legal nonconforming use of the property as a nursing home in conjunction with a new building and parking lot at 20395 Summerville Road, as proposed based on the following findings:

The effect of the proposed use on the plan for development of the community:

The proposed use will have no effect on the plan for development of the community. The surrounding community is fully-developed with single-family residential properties, and the proposed use will not have an impact the nature of that development.

The effect of the proposed use on the character and development of the neighborhood:

The change from a well-integrated retrofitted large house, to a more institutionally sized building would have a negative impact on the residential character of the neighborhood. It is easy to overlook the use of the current building due to the inconspicuous nature of the building and its residential character. It will be very obvious once the new facility is constructed that it is a commercial/multifamily residential operation. Summerville Road is a relatively small residential street within Deephaven and has only 21 total properties, and the amount of impact will be disproportionate to the residents of the street.

The effect of the proposed use on the health, safety, and welfare of occupants of surrounding lands:

Since the quantity of residents is not changing, nor are the proposed staffing levels, staff does not expect any *changes* to the health, safety, and welfare of occupants of surrounding lands. But there are existing public safety concerns for the property raised by residents and the Deephaven Police Department. The conditions are not expected change based upon the proposed use, but it is reasonable to consider existing health, safety, and welfare impacts.

The effect of the proposed use on existing and anticipated traffic conditions, including parking facilities, on adjacent streets:

Since the quantity of residents is not changing, nor are the proposed staffing levels, staff does not expect any changes to anticipated traffic conditions, including parking facilities, on adjacent streets.

The effect of the proposed use on property values of the subject premises and in the surrounding area:

The city assessor reviewed the proposal and concluded that the changes would have a neutral impact on surrounding property values. He said that replacing the old, existing building would have a net positive impact but that the scale of the new building would have a net negative impact, and that taken together the proposal would be neutral for surrounding property values.

Cooney concluded his staff report.

Jeff Sprinkel, administrator and owner of the Lake Minnetonka Care Center, said he has owned the business since 1987. He said that the building is approximately 110 years old. He said that they are proposing only having 21 residents.

Dave TeBrake of Miller Architects, architect for the applicant said that the building is an established business within the neighborhood. He said that the property is 153% of the minimum lot size but that many of the properties in the area are smaller than the minimum lot area. He said that the structural footprint scaled to the property would be 6,885 square feet. TeBrake said that they are asking for 7,570 structural footprint. He said that the density would be similar in density as a percentage of lot coverage with the adjacent properties.

TeBrake said that there are limitations driving the footprint size. He said that the market demand is for a single room with its own bathroom. He said that the plans include larger rooms simply to add character to the building. TeBrake said that the old building is not as safe as a new building and that a new building would provide a safer environment for the residents.

TeBrake said that, while the impervious areas are a larger percentage than other variance properties, they are flexible in how they help mitigate impervious areas with alternate paving systems.

TeBrake played a video of employees and residents offering supportive comments for the Lake

Minnetonka Care Center proposal.

TeBrake said that a new facility would also attract a more traditional clientele that may not be able to climb stairs. He said that the retaining wall in the back would create the effect of a 1-story building on the back side of the property.

TeBrake said that there are passages in the Comprehensive Plan that support what they are trying to do with this building.

Studer said that the Planning Commission needs to act first on the CUP and then on the variance.

Wilcox asked how many residents could be served under the new building. Sprinkel said that the new rooms are too small and could only support 1 resident and that his license does not allow for more than 21 residents.

Wilcox asked about resident turnover. Sprinkel said he would not force a resident out, but there is turnover and that a new facility would appeal to a wider clientele, such as people with mobility issues. Wilcox asked about activity space. Sprinkel said that there is only one common room in the building, and that the new building would allow for dining and activities to take place in different rooms at the same time.

TeBrake stated that there are also gender issues with filling vacancies when rooms are shared.

Eaton asked about rate changes that would take place. Sprinkel said that their lowest rate is \$4,200 per month and the highest rate is \$7,600 per month. He estimated that the new rates would increase by \$35 to \$40 per day. He said his rates are currently in the bottom 25% of nursing homes.

Eaton said that the new rates would price out new residents. Sprinkel said that the resident's rates are paid through medical assistance which is true for 90% of his residents.

Webster said that she read through the state report on the website and raised concerns about the findings. She said that she appreciates that this is in the community, but there were also issues raised in the police report. She asked if the residents needs are being met or if this is about profit.

Sprinkel said that if it were about money, he would sell the property right now. He said that they are a for-profit facility. He said that the new building would not preclude any of the existing residents from being in the facility. Sprinkel said that every resident in every nursing home is considered a vulnerable adult by statute. He said that he wants to give the residents have as much autonomy as they can and that is evaluated on a case-by-case basis. He said that he does not want to run a prison. He said that sometimes the boundary between freedom and what is a risk for the resident is not always clear at the outset.

Webster said that she has concerns that some of the residents have literally been lost and if staff should be managing this issue. She asked if the building needs to be this large.

Sprinkel said that the single most important amenity is single rooms with private bathrooms. He said that the Minnesota Department of Health application is a competitive funding application and a shared living arrangement proposal would be highly unlikely to be approved for funding. He said that is driving the size of the building.

Webster asked about fewer residents in a smaller building. Sprinkel said that the economics of it would probably not work. He said that they are the smallest freestanding nursing home in the state of Minnesota.

Eaton asked what will happen to the residents during construction. Sprinkel said that they would live in the existing facility while the new one is being built. Eaton asked about selling the property. Sprinkel said that he has not looked at that option. Eaton said this is very expensive property and that a less expensive property or a properly zoned property might make sense.

Daly asked about the current structure. Sprinkel said that there are 3 triple rooms, 5 double rooms, and 2 individual rooms. He said that there are 4 toilets that are used for residents and staff. Sprinkel said that staff varies from 1 to 6 with more during the day and less on holidays and overnight.

Daly asked about the licensing. Sprinkel said that memory care would be a different license and could be paired with a nursing home. He said that they have 24-hour nursing care whereas assisted living is not required to.

Daly asked about parking. Sprinkel estimated 9 or 10 spaces including the garage. Daly asked about the proposed parking. Sprinkel said it was 9 spaces and that the state has no requirements and that Deephaven does not have specific nursing home requirements for parking.

Daly asked about facility waivers. Sprinkel said that they have room size waivers, and that the hallways are covered under an annual health, life, safety inspection.

Studer opened the public hearing.

Cami and Stephen Warner, 20420 Western Road, said they have lived in Deephaven for 3 years. Stephen Warner said that he did not think any additional privileges should be given just because it is a legal nonconforming use. He said that the property disregards the R-3 zoning protections. He said that a commercial building shoehorned into the lot is not aligned with the zoning. He said this proposal benefits one owner over all of the other owners.

Michelle Dowley, of 20390 Western Road, said that they would be directly behind the proposed buildings. She said that they moved here for the quaintness and safety. She said that the CUP runs with the property that could be taken up by a future owner. She said that the commercial use of the property does not provide a benefit to the neighborhood. She said that there is excessive garbage on the property. She said that there is a risk of medical waste. Dowley was appalled at the police report that showed approximately two hundred 911 calls. She also noted the lack of appropriate levels of staffing. She said that 31% of the 911 calls were made for non-emergency issues that seemed due to lack of appropriate staffing. She said that a large commercial building would have a negative impact on the property values.

Gabe Claypool, 20330 Western Road, said this is a commercial business which does not belong on the property.

Alan Mello, 20390 Summerville Road, says he has lived directly across from the care center for the last 12 years. He said that he understands the needs to have facilities such as this. He said that the rights of the residential neighborhood should take precedent over the commercial expansion in the residential neighborhood. He said that he would support their operation at the current location and size, but that perhaps a better fit for the LMCC would be a lot that would better fit the needs of the residents.

Joe Haugslund, 4240 Northern Road, said that the building is too big. He showed images of traffic on the street from the food service vehicles and referenced other vehicle traffic cause by the LMCC. He said that the building housing 21 people seems like a lot for the structure. He said that he would like to understand the financing of a \$4.5 million building. Wilcox said that the financing is a good question, but not part of the Planning Commission's purview.

Nate Hammer, 19670 Hillside Street, said that he was moving to Summerville Road in the near future. He said that state reviews have found that the facility was deficient. He said that there will be pressure to

increase the residents due to the increase in costs. He said that he would like the property to move toward zoning code compliance.

Dan Goodrich, 20500 Summerville Road, he said that this building is way too big for the street.

John Woodburn, 20400 Summerville Road, said that there are vulnerable adults but also vulnerable children. He said that there are a lot of vulnerable children within a two block radius of the facility.

Mark Grieger, 20345 Park Place, said that he is a realtor and that there is no way that the facility would improve the property values on the street.

Brian Frost, 4225 Northern Road, said that the property should move towards compliance with the zoning ordinance. He said that there should be no special privileges just because they exist in the neighborhood. He said that he was skeptical that they would not increase the number of residents.

Mary McGovern, 20295 Cottagewood Road, said that this is not a typical nursing home. She said that it serves residents with legitimate mental health needs. She said that a resident doesn't have to be elderly to be at the facility.

Studer closed the public hearing.

Eaton said that he is not in favor of expanding this facility in any way. He this is a great plan, but at the wrong location. He acknowledged that the nursing home is allowed to stay as-is.

Daly asked about the definition of expansion. Cooney said that any expansion of the use of the property is a CUP, regardless on whether or not a variance is required.

Nagle asked if a bigger structure on the same footprint would require a CUP. Cooney said that massing is an expansion. Webster said that they could rebuild if it burned down. Cooney said that is correct.

Nagle said that this is a good design for 21 residents in 21 rooms. He said it is a nicer facility than the 110 year old facility. He said that he does not see a resolution to the problem on the current site.

Webster said that she is torn, since she is grateful the residents are able to live in a place that feels like home more than an institution. But, she said that she is against the expansion to this degree. She said that she does not know what the answer is.

Studer said that this would disrupt the community and that he could not support the expanded impacts.

Wilcox said that he is sympathetic to the business owner who is trying to make life better for the residents. He said that he realizes it is a hard business to make money at when relying on government funding. He said that he appreciates the work. Wilcox said that he could not see allowing the CUP in a residential zone.

Daly said that the lot size is not so unique to the neighborhood and that other lots of this size do not require this kind of massing and parking lot areas. He said that it does not fit within the character of the neighborhood. Daly said that there are also concerns about the welfare of the occupants of the neighborhood.

Motion by Studer to recommend denial of the conditional use permit request based on the recommendation and findings of staff. Motion was seconded by Eaton. Motion carried 6-0.

**Consider the variance requests of Lake Minnetonka Care Center to exceed the maximum permitted grade alteration, exceed the maximum permitted impervious surface area, and exceed**

**the maximum allowable structural footprint in conjunction with the construction of a new building at 20395 Summerville Road.**

Chairman Studer introduced the agenda item.

Studer opened the public hearing.

Cami Warner, 20420 Western Road, said that the building is a commercial building in a residential area and there are not commercial setback requirements.

Studer closed the public hearing.

Motion by Studer to recommend denial based on the findings that, as a prerequisite to considering the variance requests, the expanded nonconforming use must first be allowed by CUP; and since the Planning Commission recommended denial of the CUP, the variance requests must also be recommended for denial. Motion was seconded by Webster. Motion carried 6-0.

**LIAISON REPORT**

McNeill said that the Minnetonka Community Education Center was approved. She said that the outlet location was moved for the drainage. She said that there would be some more impacts for the new drainage location in terms of pipe and tree removal. McNeill said that construction would not be allowed during load limits without a letter of credit.

Wilcox asked about the progress on Deephaven Court. McNeill said that there has not been progress on that property.

**ADJOURNMENT**

Motion by Eaton to adjourn the meeting. Motion seconded by Studer. Motion carried 6-0. The meeting adjourned at 10:32.

Respectfully submitted,  
Dale Cooney  
Zoning Coordinator