

Becker County Board of Adjustment
March 10, 2004
Appeal Meeting
Corrected Minutes

Present: Members Jerome Flottesmesch, Tom Oakes, Harry Johnston and James Elletson; Zoning Staff Patricia Johnson and Debi Moltzan; Assistant County Attorney Gretchen Thilmony.

Harry Johnston, Vice Chairman, called the meeting to order at 7:30 p.m.

FIRST ORDER OF BUSINESS: Thomas Potts. Appellant appeals the decision of the Planning and Zoning Administrator of December 18, 2003 for the following reasons:

1. That no site permit was required pursuant to Section 18, Subd.1, inasmuch as the owner simply sought to repair the foundation and footings and did not change the exterior dimensions of a building or structure, which, pursuant to the specific terms of the Ordinance, does not require a site permit.
2. Lot 4, Alison Shores, is grand fathered as a buildable lot pursuant to the terms of the Becker County Ordinance, including, but not limited to, Section 17, Subd.5, 6, 7, 8 and 9.
3. The interpretation amounts to inverse condemnation in violation of the constitutional right against taking of private property for public purposes guaranteed under the Federal and State Constitutions.

The appellant prays for reversal of the decision of the Zoning Administrator and issuing an Order permitting him to build a new footing under an existing grand fathered cabin. This is for the property described as Lot 4, Alison Shores; Section 24, TWP 140, Range 39; Height of Land Township. PID No. 15.0391.000.

Johnston outlined the procedure for the meeting; the Boards duty and responsibilities; and the two issues to be addressed. Johnston stated that the two main issues that need to be addressed are (1) whether Lot 4 is a grand fathered buildable lot pursuant to Section 17 of the Ordinance; and (2) whether the action taken (and requested) by Tom Potts as to the foundation is an alteration that falls under the definition of structural alteration, Section 4, Subd.2; Section 17, Subd.5; and Section 18, Subd.1. In deciding Issue #2, it necessarily addresses Tom Pott's appeal, which alleges that no site permit was required to take the action Mr. Potts seeks to take.

Johnson entered into the record the contents of the file, which were being used to consider this appeal. This information included:

1. Notice of Appeal
2. History of Property
3. Letter to Potts from P. Johnson dated 12/18/03
4. Letter to P. Johnson from Potts dated 11/25/03
5. Letter to Potts from D. Moltzan dated 07/30/03

6. Copy of Deeds showing Lots 4 through 10 of Alison Shores in the same ownership.
7. Copy of Plat of Alison Shores
8. Copies of pictures showing work beginning before permits obtained.
9. Copies of the following Zoning Ordinance Sections:
 - a. Section 17, Nonconforming Uses
 - b. Section 4, Definitions #14, #76, & #112
 - c. Section 18, Subd.1, Site Permit Definition
 - d. Section 20, Board of Adjustment Powers, Appeals & Procedure
10. Dictionary definition of foundation and base
11. Picture of cabin before work began

Zenas Baer, attorney for Potts, explained the appeal to the Board. Baer also stated that he was pleased to see that Ms Kalil would not be participating on the Board due to a personal conflict with Mr. Potts and requested that she have no input or discussion on the issue.

Baer stated that, without a question, the lot in question is a buildable lot. The lot was a lot of record when the Zoning Ordinance was enacted. The cabins are nonconforming and it is not known if there is a problem with the impervious coverage. In October, Potts wanted to firm up the foundation and put in a different support system under the cabin. There would be no change to the exterior dimensions and no change in the footprint of the cabin. Photos show a deteriorating foundation that must be altered to make it safe. The Potts are not trying to sell or develop the property, just make what they have more livable. After the contractor began the work, he was shut down by the Zoning Staff and has abided by that decision. Potts is now appealing the denial of the Staff's decision.

Baer stated that he knows that he duties of the Board are not easy, but the Board must make a decision fairly and evenly, to enforce the Zoning Ordinance.

Baer stated that he wanted to take the Board through the Zoning Ordinance and show them why a site permit was not needed under the Ordinance. First Section 18, Subd.1. This allows alterations. Potts is simply firming up a foundation, putting in a new foundation. It would not be rational to require everyone to get a permit for an alteration; the staff would be overburdened. The intent is quite clear; no site permit is needed. Secondly, Section 17, Nonconforming uses and amortization of stick built structures. Structures would be discontinued over a period of time. Subdivision 6 of this Section states that residential alterations are allowed. This is an alteration. Black's Dictionary defines alteration as changing, making different, make different from what it was. Webster's Dictionary defines alteration as being in the state of alter, make different in detail but not substance. Potts just wanted to make this structure more permanent and put into safe condition.

Baer further stated that the basis of the denial decision was lots of record. Nothing in the letter addresses anything but a lot of record. Subdivision 9 does not prohibit putting in

footings, it prohibits the lot from being sold or developed. It does not say anything about improving nonconforming uses.

Baer then invited the Board to look at a March 2, 2004 case law referring to advertising signs. The case went to the Court of Appeals between Clear Channel and St. Paul. In this case law, it states that there are three basic interpretations of the rules. They are (1) construe the Zoning Ordinance to plain and ordinary meaning; (2) construe the Zoning Ordinance strictly against the County and in favor of the property owner; (3) look at the Ordinance's underlying policy goals, maintain individual property owner's rights.

Baer stated that if a decision cannot be made tonight, that is ok. The Board must make the proper decision, there is no basis to affirm the Administrator's decision and it should be reversed.

Johnson asked if the Zoning Staff or County Attorney had any information to add. Thilmony stated that she was there for legal counsel. Johnson stated that within the packets of information, it depicts the activity on the property and previous applications. Johnson further stated that a site permit is required based on a structural change as defined in Definition #112. A site plan would provide the information necessary to determine whether or not Lot 4 is a lot of record. In Section 17, Subd. 9, which Baer referred to but failed to mention, was the portion that states that contiguous substandard lots shall be considered as one lot. It is the intent of the Ordinance that eventually substandard lots will come into compliance. Until a complete site plan is submitted, no determination can be made on any matter.

Thilmony wanted to clarify a statement made by Baer. Baer referred to Johnson's letter stating that the sole denial was Subsection 9, but the letter implies more sections of the Ordinance.

Baer stated that Definition #112 refers to structural alterations but does not include footings and nowhere does it say that structural changes cannot be made, as long as the footprint is not changed. Alterations are permitted if the livability is improved and the number of units is not changed.

Johnson referred to the case law and interpretation of the law. Johnson then read a definition from Merriam-Webster Dictionary of Law defining foundation as the lowest and supporting part or member of a wall, including the base course and footing courses, in a frame house, the whole substructure of masonry. Our interpretation has historically been that structural changes require a site permit.

Oakes questioned if the new foundation would alter the height of the structure. Baer stated that the finished project would be the same height. Oakes further stated that the Board has been very fussy with structural changes within the shore impact zone. Baer stated that there is nothing in the nonconforming section to reflect this. Johnson stated that Section 6 refers to new construction only.

Flottemesch stated that a determination must be made as to whether or not this project is a major structural change and if it needs a site plan. If there are several contiguous lots in the same ownership, then it is treated as one lot, but without a proper site plan, this determination cannot be made. If the determination is that a major structural change, then a site permit or even a variance may be needed.

Elletson questioned how many lots were contiguous. Johnson stated that Lots 4 through 10 were in the same ownership. Elletson referred to Section 17, Subd.8, which refers to nonstructural changes. Elletson felt that it must be decided if this project is structural or nonstructural. Elletson referred to the inspection report of 10/2003 in which the contractor told the inspector that the footing and foundation was to be replaced. Elletson stated that it is the consensus of everyone that the structure in question is nonconforming. Island Lake is a recreational development lake. New lots require 150 feet of lake frontage and 40,000 sq ft of lot area. Each one of these lots is 75 feet of lake frontage and approximately 18,000 to 20,000 sq ft of lot area. Elletson asked Johnson if a site plan has been received or if a request for a variance has been received. Johnson stated that neither was received.

Baer questioned the Board as to whether or not the tour meeting was a public meeting because he was unaware of that meeting. Johnson stated that it is a public meeting and announced publicly.

Baer stated that the decision as to whether or not this project is a structural change or not does not play into the dynamics.

Flottemesch stated that he was confused as to exactly what needed to be decided. Thilmony stated that the appeal asked to reverse Johnson's decision, which asked for a site plan. Flottemesch then asked if it was correct to assume that if they felt Johnson was correct, then a site plan is needed to make a decision on what could be done with the cabin and if they felt Johnson was wrong, then no permit was needed. Johnson stated that was correct but reminded them that the appeal did contain two parts – (1) reverse the decision and (2) issue a permit.

Baer stated that it was incorrect to assume that the next step was to submit the site plan. Potts still had the right to appeal the Board's decision to District Court. Baer stated that if Potts submits a site plan, then only one structure will be allowed on six lots.

Flottemesch stated that there may be some misconception about the property. When the Board viewed the property, they found three cabins on the combined lots; one garage, which may or may not have living quarters; one recreational vehicle; and one machine shed, which may or may not have living quarters.

Thilmony restated that a decision had to be made if Potts can replace the footing or if Johnson's letter will be upheld.

At this time, Johnston closed the testimony and further Board discussion was held.

Elletson stated that in the four plus years he has been on the Board, the Board has tried to improve nonconforming situations. When nonconforming structures are enlarged or structural changes made, a variance is required. Nonstructural maintenance does not come up. Flottesmesch stated that contiguous nonconforming lots become one and are dealt with as one lot. Flottesmesch further stated that on this basis, if anything is to be done, a site plan is needed to determine what can be done either by variance or by permit. Flottesmesch restated that the first thing that needs to be done is to decide what is allowed as a permitted use under Ordinance, does the foundation need a variance, and whether or not a site plan is needed.

Johnston stated the contiguous substandard lots could be reconfigured into 3 conforming lots. Johnston further stated that there seem to be contradictions in the Zoning Ordinance, which need to be addressed in the future, but for now, the Board must be consistent with past decisions. Elletson agreed that the language needs to be clarified for the future, but the Board must be consistent with the interpretation and they have always said that structural changes or enlargement of a nonconforming structure requires a variance and permit.

Flottesmesch stated that what was left of the foundation looked good, except where it was knocked out for the beams. The foundation looked good with no cracks or heaves. Flottesmesch stated that replacing a few cracked blocks is repair, but jacking up a structure, removing the existing foundation and putting in a new foundation is a major structural change, which needs a permit and/or variance.

Johnston felt that a site plan is needed to make the final determination as to what could be done. Flottesmesch and Elletson agreed.

Motion: Flottesmesch made a motion that the Board of Adjustment agrees with the Planning and Zoning Administrator's decision that a complete site plan is required. Based on the work completed so far, there are major structural changes, which would require a site permit. The location of the structure is in the shore impact zone and the structure is a nonconforming structure, which also requires a site permit. Lots 4 through 10 are all contiguous nonconforming lots in the same ownership, which may be considered as one buildable lot. A site plan of Lots 4 through 10 is needed to make a determination. Oakes second. All in favor. Motion carried.

Baer questioned a statement made earlier about the decision does not prevent Potts from doing what he wants and the clarification of that statement. Flottesmesch stated that it will not be known if Potts can replace the foundation under the cabin until the site plan has been submitted, a determination made from that site plan, and Potts follow the proper steps, whether a variance is required or a permit can be issued.

Since there was no further business to come before the Board, Oakes made a motion to adjourn the meeting. Elletson second. All in favor. Motion carried.

Harry Johnston, Vice Chairman

ATTEST

Patricia L. Johnson, Administrator