

Fairview Township Planning Commission
Monday, October 3 and Tuesday October 4, 2011- Hoveida

In attendance: Ken LaPorte, Tom Dechmann

Meeting called to order at 3:00 PM by Chairman Ken LaPorte.

Rebecca Hoveida

Parcel: 14-443-0140

Application submitted "After the fact" to be permitted to retain a storage structure located 30 feet from the lake, a five feet wide stairway to the lake and a patio located 52 feet from the lake. The parcel contains 1.3 acres riparian to Sylvan Lake.

The Fairview Planning Commission had an opportunity to review the property on October 3rd with the Cass County Planning Commission/ Board of Adjustment, and again on October 4th.

The Fairview Planning Commission had an opportunity to discuss the application and composed the following letter:

To: Paul Fairbanks

October 4, 2011

Re: Rebecca Hoveida Variance Application

Parcel: 14-443-0140

2171 Red Oak Drive SW

Application submitted "after the fact", to be permitted to retain a storage structure located 30 feet from the lake, a five feet wide stairway to the lake and a patio located 52 feet from the lake. The parcel contains 1.3 acres riparian to Sylvan Lake.

The Fairview Township Planning Commission had an opportunity to review the Hoveida property on October 3rd with the Board of Adjustment, and again on October 4th.

In reference to the Storage Shed: Cass County Land Use Ordinance 1126.1 is perfectly clear when stating all structure setbacks must be a minimum of 75 feet on a General Development lake, such as Sylvan. The storage shed must be moved beyond the 75 foot setback.

In reference to the Stairway: Cass County Land Use Ordinance 1126.6 states that all stairways and/or walkways shall not exceed four feet in width on residential lots. Fairview Township believes the stairway within the 75 foot setback of the lake needs to meet the maximum width as stated in the Ordinance. The stairway beyond the 75 feet (or the platform leading to the patio) may remain as constructed.

In reference to the Patio: Cass County Land Use Ordinance 1126.7 states that patios and platforms within the structure setback require a shoreland alteration permit and the encroachment toward the OHWM does not exceed 15% of the structure setback. The waterside edge of the existing patio is approximately 52 feet from the OHWM on this General Development lake. Fairview Township would have no objection to allowing the patio to encroach 15% into 75 foot setback area.

The Planning Commission appreciates the expense and efforts the Hoveidas have gone to in creating an environmentally sensitive oasis. The native shrubs, rain gardens and no mow

grasses are all essential to good lake stewardship and should be commended. Unfortunately, they are not integral to the "after the fact" variance before the Commission today.

*Sincerely,
Fairview Township Planning Commission*

The following are the findings of the Cass County Planning Commission/ Board of Adjustment at their regular meeting on October 10, 2011 in Backus:

Hoveida, Bahman & Rebecca,
Fairview Township on property described as Lot 24, Blk 1, "Timber Ridge Third Addition", Section 36-134-30 located at 2171 Red Oak Drive SW.

An application submitted to be allowed to retain as Lot 24, Blk 1, "Timber Ridge Third Addition", Section 36-134-30, PID # 14-443-0140 located at 2171 Red Oak Drive SW. An application submitted, "after the fact", to be allowed to retain a storage structure located 30 feet from the lake, a five feet wide stairway to the lake and a patio located 52 feet from the lake. Section 1126.1 A. of the Land Use Ordinance requires structures to be located 75 feet from a lake classified General Development (GD), Section 1126.6 of the Land Use Ordinance of the Land Use Ordinance requires that stairways to be not more than four feet wide, and Section 1126.7 of the Land Use Ordinance requires that a patio not be setback from the lake less than 15 % of the structure setback which in this instance is 63 feet. The parcel contains 1.3 acres riparian to Lake Sylvan (GD).

PC members were at the site 10/03/11. 57 notices of the application were mailed. 13 responses, including Fairview Township, all save one urging denial of the application were received. The application was discussed and reviewed with Rebecca Hoveida and the Trevor Kemper.

MS/P Moore/Gardner - Ballenthin/No, Bliss/Yes, Fitch/No, Gardner/Yes, Gould/No, Moore/Yes Sundberg/No to approve the application as submitted for the "after the fact" for the activities located upon PID # 14-443-0140 upon review of Section 800 of the Land Use Ordinance (01/10/10) along with criteria contained in M.S. 394.27, Subdivision 7. Motion failed.

MS/P Ballenthin/Gould - Ballenthin/Yes, Bliss/No, Fitch/Yes, Gardner/Yes, Gould/Yes, Moore/No, Sundberg/Yes to deny the application as submitted for the "after the fact" for the activities located upon PID # 14-443-0140 upon review of Section 800 of the Land Use Ordinance (01/10/10) along with criteria contained in M.S. 394.27, Subdivision 7 with the following findings and conditions.

Findings:

1. The lot was platted in 1974 with the residence constructed in 1992.

2. The width of the walkway was measured 10/03/11 at 60 inches and the patio at 52 feet from the lake.
3. The storage structure is less than 75 feet from the lake.
4. The applicant had knowledge that a permit was required for the walkway and patio because applicant had applied to Cass County for a permit in June 2011 for a deck expansion. The applicant's statement that she thought a permit was needed from the DNR is not credible based upon the applicant's prior permit application to Cass County.
5. The applicant had knowledge that approval by a third party was required because the proposed improvements require approval as set forth in the Covenants and Declarations governing the plat of "Timber Ridge Third Addition" of which the property is a part and the applicant failed to obtain that approval.
6. There is no evidence that the cost of compliance in moving the storage structure and correcting the violations relating to the walkway and patio as set forth in the conditions are excessive or unreasonable.
7. Approval of "after the fact" variance except as permitted in the conditions will alter the essential character of the neighborhood because of the lack of similar structures in the development of which the property is a part.
8. Allowance of the "after the fact" variance as requested except as permitted in the conditions is unreasonable.

Conditions:

1. The storage structure shall be moved to a distance at least 75 feet from the lake.
2. Shore vegetation shall be maintained in its existing type, configuration, and density or as determined by ESD shall be installed and maintained in a buffer area, subject to a 14 feet wide lake access area. The applicant shall submit a written plan for a native vegetation buffer to reduce/eliminate nutrient run-off to the lake which shall have written approval by ESD. The plan shall include a schedule for implementation and an estimate of the cost to implement. The plan shall include a buffer within an area defined in the plan and approved by ESD.
3. Applicant consents to inspection of the property from time to time by ESD to verify compliance with conditions.
4. The property must be returned to compliance with the requirement of the Land Use Ordinance no later than 06/30/12.
5. The stairway within the 75 feet setback must comply with the maximum width as prescribed by Section 1126.1 of the land Use Ordinance.
6. The stairway beyond the 75 feet setback may remain as constructed.
7. The patio may encroach to the lake not more than 15 % of the 75 feet setback

The following is copy of the findings of the 9th Judicial District Court in the suit of the Hoveidas vs Cass County Board of Adjustment, October 2012

RECEIVED OCT 29 2012

State of Minnesota
Cass County

District Court
Ninth Judicial District

Court File Number: **11-CV-11-2507**

Case Type: Appeal from Administrative Agency

Notice of Filing of Order

JAY THOMAS SQUIRES
300 U S TRUST BUILDING
730 SECOND AVENUE SOUTH
MINNEAPOLIS MN 55402

Bahman Hoveida & Rebecca Hoveida vs. Cass County Board of Adjustment

You are notified that on October 23, 2012, the following was filed:

Findings of Fact, Conclusions of Law and Order

Dated: October 24, 2012

Amy L. Turnquist
Court Administrator
Cass County District Court
300 Minnesota Ave PO Box 3000
Walker MN 56484
(218) 547-7200

cc: MARK ANDREW SEVERSON

A true and correct copy of this notice has been served by mail upon the parties herein at the last known address of each, pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

FILED

STATE OF MINNESOTA

OCT 23 2012

IN DISTRICT COURT

COUNTY OF CASS

NINTH JUDICIAL DISTRICT

**COURT ADMINISTRATION
CASS COUNTY**

Bahman Hoveida and Rebecca Hoveida,

File No. 11-CV-11-2507

Appellants,

vs.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
ORDER AND PARTIAL
JUDGMENT**

Cass County Board of Adjustment,

Respondent.

The above-entitled matter came on an administrative appeal before the Honorable John P. Smith, Judge of District Court, at the Cass County Courthouse, Walker, Minnesota, on September 18, 2012.

Mark Severson, Thomas Law, P.A., 34354 County Road 3, P.O. Box 430, Crosslake, Minnesota, appeared on behalf of appellants Bahman and Rebecca Hoveida.

Jay T. Squires, Ratwik, Roszak, & Maloney, P.A., 730 Second Avenue South, Suite 300, Minneapolis, Minnesota, appeared on behalf of respondent Cass County Board of Adjustment.

SUMMARY OR THE DECISION

The Cass County Board of Adjustment's decision to deny appellants' three after the fact variance requests is affirmed in part and remanded in part.

CONTENTIONS OF THE PARTIES

Appellants contend that the Planning Advisory Board/Board of Adjustors disregarded their explanations and evidence offered to show why they did not seek prior approval of the projects and that the Planning Advisory Board/Board of Adjustors acted arbitrarily and capriciously when it denied appellants' three after-the-fact variance requests.

Respondent contends that the Court must defer to the Planning Advisory Board/Board of Adjustors' denial of appellants' variance requests and that the denial must be upheld so long as

the Court determines the Planning Advisory Board/Board of Adjustors acted in good faith and within the broad discretion accorded it under the law.

ISSUE

Did the Cass County Planning Advisory Board/Board of Adjustors act reasonably in denying appellants' three after-the-fact permit requests?

FINDINGS OF FACT

1. Appellants own a 1.3 acre property on Lake Sylvan legally described as Lot 24, block 1, Timber Ridge Third Addition ("Property") and located in Cass County, Minnesota.
2. Appellants hired Trevor Kampen, an independent contractor, to make various improvements to the Property in the summer of 2011.
3. Neither Kampen nor appellants sought Cass County approval prior to erecting the improvements which are the subject of this appeal.
4. Appellants submitted an after-the-fact permit request to Cass County for three variances on or about September 21, 2011.
5. The first request sought to retain a storage shed constructed 30 feet from the lakeshore.
6. The second request sought to retain a five foot wide stairway to the lake.
7. The third request sought to retain a patio constructed within the lake setback area.
8. Appellants' three variance requests were noticed for a hearing before the Planning Advisory Board/Board of Adjustors ("PAC/BOA") on October 10, 2011. Surrounding property owners and the Township received notices as required by Minnesota law.
9. The PAC/BOA received some fifteen letters opposing appellants' permit request.
10. The PAC/BOA visited the Property on October 3, 2011.
11. The PAC/BOA considered appellants' three after-the-fact variance requests at its October 10, 2011 meeting.
12. The PAC/BOA denied appellants' requests.
13. Appellants filed a timely administrative appeal in Cass County District Court.

PRINCIPLES OF LAW

Minn. Stat. 394.27, Subd. 7.

The board of adjustment shall have the exclusive power to order the issuance of variances from the requirements of any official control including restrictions placed on nonconformities. Variances shall only be permitted when they are in harmony with the general purposes and intent of the official control and when the variances are consistent with the comprehensive plan. Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the official control. "Practical difficulties," as used in connection with the granting of a variance, means that the property owner proposes to use the property in a reasonable manner not permitted by an official control; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone do not constitute practical difficulties. Practical difficulties include, but are not limited to, inadequate access to direct sunlight for solar energy systems.... No variance may be granted that would allow any use that is not allowed in the zoning district in which the subject property is located. The board of adjustment may impose conditions in the granting of variances. A condition must be directly related to and must bear a rough proportionality to the impact created by the variance.

DISCUSSION

Appellants argue that the PAC/BOA's denial of the three after the fact variance requests was arbitrary, unreasonable, and not supported by Record evidence. Section 801.3 of the Cass County Land Use Ordinance ("Ordinance") requires that "In ruling on a variance request, the PAC/BOA shall make written statements of fact upon the following considerations and Minnesota Statutes, Chapter 394.27, Subd. 7:

- A. The property in question cannot be put to a reasonable use if used under the conditions allowed by the official controls.
- B. The plight of the landowner is due to circumstances unique to the property not created by the landowner.
- C. The variance, if granted, will not alter the essential character of the locality.
- D. The need for the variance is not justified by economic considerations alone.

Variances may be granted when the applicant for the variance established that there are practical difficulties in complying with the official control. Minn. Stat. § 394.27, Subd. 7.

“‘Practical difficulties’ as used in connection with the granting of a variance, means that the property owner proposes to use the property within a reasonable manner not permitted by an official control; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality.” *Id.*

In situations where a party seeks a variance after already violating a provision of a zoning ordinance, the supreme court recommended considering the following additional factors: the applicant's good faith; the applicant's attempt to comply with the ordinance; the applicant's investment in the construction; whether the construction was completed; whether similar structures existed in the area; and whether the benefit to the public in denying the variance outweighs the burden on the applicant to comply with the zoning ordinance. *In re Stadsvold*, 754 N.W.2d 323, 333 (Minn. 2008).

The conditions set forth in section 801.3 of the Ordinance and the practical difficulties definition in Minn. Stat. § 394.27, Subd. 7 are nearly identical in scope and purpose, which is to provide local government a means to reign in imprudent developments. This case involves three after-the-fact variances, which were all denied by the PAC/BOA. The Court's review of the administrative record reveals that the PAC/BOA made sufficient findings with respect to their denial of appellants' storage shed and stairway variance requests.

The Storage Shed Variance

The PAC/BOA did not act unreasonably, arbitrarily, or capriciously in denying appellants' application to allow placement of the storage shed within the setback area. Appellants' decision to place the storage shed so close to the lake runs afoul of both the conditions in Ordinance 801.3 and the practical difficulties standard in Minn. Stat. § 394.27,

Subd. 7. The gist of appellants' argument for approval of the storage shed's location within the setback area is that health conditions make it difficult for appellant Rebecca Hoveida to carry tools, equipment, and recreational effects to the lake shore from beyond the setback area. The Court is sympathetic with appellant Rebecca Hoveida's ailments, but it must make its judgment based upon the Ordinance and Minnesota's statutes.

The record is void of any showing that the shed cannot be placed in an alternate location that conforms to the setback requirements of the Ordinance. Convenience alone is not a sufficient ground for granting a variance request and it is not reasonable to expect the PAC/BOA to grant setback applications that cause as much acrimony as the placement of unnecessary structures so close to the lake.

There is also ample evidence to support the PAC/BOA's finding that there is nothing so unique about the property that it would be unreasonable to deny the request. Appellants' plight is a physical limitation which makes it difficult for appellant Rebecca Hoveida to carry various items from beyond the setback area to the lake. There is nothing about the property which makes it impossible for the placement of the shed in a conforming area.

The third relevant consideration is that the variance will not alter the essential character of the locality. The record reveals that the placement of the shed required approval from both the PAC/BOA and the Timber Ridge Third Addition homeowner's association. This requirement evidences a concern from association members regarding the erection of buildings within the setback area. The numerous comments from adjacent and area landowners lend credence to the gravity of this concern. The placement of storage sheds within the setback area creates non-essential structures in close proximity to the lake. It was not unreasonable for the PAC/BOA and other members of the Timber Ridge Third Addition to worry that their view of the shoreline from

the lake could become cluttered with buildings should the PAC/BOA agree to the variance. It is clear that Timber Ridge Third Addition homeowners value the setback requirement and the scenic views it affords those who enjoy recreation at the lake. The placement of a shed within the setback requirement would alter those views, and could very well change the character of the locality.

The Stairway Variance

Appellants also sought an after-the-fact variance to keep their non-conforming staircase, which leads from the home to the lake. The Ordinance limits the width of staircases within the setback area to four feet. Appellants constructed a staircase that was five feet in width for reasons related to appellant Rebecca Hoveida's physical ailments. The Court reiterates its sympathy with appellant's physical condition but there is nothing in the Ordinance or Minn. Stat. § 394.27, Subd. 7, which allows the PAC/BOA or this Court to make decisions based on considerations that are personal to the applicant. The record is void of any affirmative showing that a four foot staircase within the setback area would prevent the reasonable use of appellants' property, would create a plight caused by the unique characteristics of the lot, or would offend the essential character of the locality.

Appellants make a great fuss over their good faith efforts in obtaining the requisite permits and appellants' counsel focused on the additional *Stadsvolt* factors applicable to after-the-fact variance cases. It is the Court's understanding that these factors are relevant additional considerations in after-the-fact matters but do not negate the need to show how a requested variance arose because of a practical difficulty. Thus, the after-the-fact considerations are relevant if and only if the appellant has shown a practical difficulty exists.

The PAC/BOA's denial stated that its members relied on section 801.3 of the Ordinance and Minn. Stat. § 394.27, Subd. 7 in reaching their decision. The administrative record supports their conclusion insofar as appellants failed to show a single practical difficulty under Minn. Stat. § 394.27, Subd. 7.

The Patio Variance

Appellants also seek an after the fact variance to obtain a permit for their non-conforming patio. Whether a local zoning body's decision is reasonable is measured against the standards set forth in the applicable ordinance. *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 n. 6 (Minn.1983). The record is lacking in a coherent explanation for why the patio does not qualify for a variance and must be remanded to the PAC/BOA for additional findings consistent with section 801.3 of the ordinance, Minn. Stat. § 394.27, Subd. 7, and the after the fact *Stadsvolt* factors should the PAC/BOA find that one or more practical difficulties exist. The primary focus of the inquiry should center on the reason for the patio's size and location, with a secondary emphasis on the fact that appellants failed to pull a permit before construction.

CONCLUSIONS OF LAW

1. The Cass County Planning Advisory Board/Board of Adjustors did not act unreasonably in denying appellants after-the-fact variance requests for a storage shed within the setback area and for non-conforming steps within the setback area.
2. The Cass County Planning Advisory Board/Board of Adjustors decision to deny appellant's three after-the-fact variance requests was supported evidence in the administrative record.
3. The PAC/BOA did not make sufficient findings in accordance with the Ordinance and Minn. Stat. § 394.27, Subd. 7 in denying appellants' after-the-fact variance request to keep their non-conforming patio.

IT IS HEREBY ORDERED:

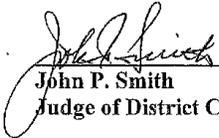
The Cass County Planning Advisory Board/Board of Adjustors' decision to deny appellants' after-the-fact variance requests for a storage shed within the setback area and for a non-conforming stair is AFFIRMED.

The PAC/BOA shall review appellants' application with respect to the non-conforming patio and make specific findings in accordance with Ordinance 801.3 and Minn. Stat. § 394.27, Subd. 7.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 23, 2012

BY THE COURT:



John P. Smith
Judge of District Court

The following are the minutes of the Cass County Board of Adjustment from their meeting on January 14, 2013 in which they reviewed the findings of the 9th Judicial District Court. Hoveida, Rebecca, Fairview Township - discussion of the District Court decision Hoveida v. Cass County to remand patio denial findings to Planning Commission for review.

MS/P Moore/Kostial to amend and supplement Hoveida patio variance denial findings with additional findings as presented by Kostial.

Findings - 10/10/11:

1. The lot was platted in 1974 with the residence constructed in 1992.
2. The width of the walkway was measured 10/03/11 at 60 inches and the patio at 52 feet from the lake.
3. The storage structure is less than 75 feet from the lake.
4. The applicant had knowledge that a permit was required for the walkway and patio because applicant had applied to Cass County for a permit in June 2011 for a deck expansion. The applicant's statement that she thought a permit was needed from the DNR in not credible based upon the applicant's prior permit application to Cass County.
5. The applicant had knowledge that approval by a third party was required because the proposed improvements require approval as set forth in the Covenants and Declarations governing the plat of "Timber Ridge Third Addition" of which the property is a part and the applicant failed to obtain that approval.
6. There is no evidence that the cost of compliance in moving the storage structure and correcting the violations relating to the walkway and patio as set forth in the conditions are excessive or unreasonable.
7. Approval of "after the fact" variance except as permitted in the conditions will alter the essential character of the neighborhood because of the lack of similar structures in the development of which the property is a part.
8. Allowance of the "after the fact" variance as requested except as permitted in the conditions is unreasonable.

Findings - 01/14/13:

1. The patio does not rise to the level of "structure" or improvement essential to the applicant's reasonable use of the property.
2. The patio does not abut the residence.
3. It has not been established that the non-conforming patio's encroachment into the minimum lake setback, was meant to address any "practical difficulties or circumstances unique to the property" that could otherwise have been accomplished while complying with the Land Use Ordinance/official controls.
4. The location and size of the patio is not in harmony with either the general purpose or intent of the official controls or consistent with the Cass County Comprehensive Plan both of which are meant to promote reasonable preservation or enhancement of the natural environment particularly in the shoreland areas as well as minimizing run-off erosion and sedimentation.
5. The applicant has produced no convincing evidence that it would be unreasonably

difficult or costly to modify the patio's dimensions and/or design so that it complies with condition # 7. of the October 10/2011 Cass BOA variance denial which allowed for a minimum lake setback for the patio of approximately 64 feet from the OHWL rather than the 75 feet required by the Land Use Ordinance.

Conditions - 10/10/2011:

1. The storage structure shall be moved to a distance at least 75 feet from the lake.
2. Shore vegetation shall be maintained in its existing type, configuration, and density or as determined by ESD shall be installed and maintained in a buffer area, subject to a 14 feet wide lake access area. The applicant shall submit a written plan for a native vegetation buffer to reduce/eliminate nutrient run-off to the lake which shall have written approval by ESD. The plan shall include a schedule for implementation and an estimate of the cost to implement. The plan shall include a buffer within an area defined in the plan and approved by ESD.
3. Applicant consents to inspection of the property from time to time by ESD to verify compliance with conditions.
4. The property must be returned to compliance with the requirement of the Land Use Ordinance no later than 06/30/12.
5. The stairway within the 75 feet setback must comply with the maximum width as prescribed by Section 1126.1 of the land Use Ordinance.
6. The stairway beyond the 75 feet setback may remain as constructed.
7. The patio may encroach to the lake not more than 15 % of the 75 feet setback.