

## STAFF REPORT

<b>Application:</b>	Variance Request related to the construction of t a dwelling/attached garage/patio approx. 20 feet from the top of a bluff (min. 30 ft required).
<b>Applicant and Property Owner:</b>	Noel Nemitz
<b>Agenda Item:</b>	4(a)

### Background Information:

- **Proposal:** The applicants are proposing to construct a new dwelling with attached covered porch/patio and attached garage on a mostly undeveloped lot. The lot contains a bluff which rises sharply before leveling off to a summit. It then slopes back down to a flat area where a tennis court is located on the parcel and eventually to East Burgen Road SE. The applicant purchased both the subject lot and the adjacent lot to the north from the same previous landowner several years ago. The applicant is requesting to build their home in an area where bluff setbacks apply from three sides given that the bluff "wraps" around much of the lot closest to the lake.

The request as described during the Board of Adjustment's site visit has been modified by the applicant since that time. They have indicated that they would move the proposed home/garage/covered porch about 10 feet further back from the bluff and that they would excavate 2 feet less off the top of the bluff than what was previously indicated (to the 1410 elevation rather than to the 1408 elevation).

- **Location:**
  - Property address: XXXX E BURGEN RD SE
  - Sec/Twp/Range: 33-128-37
  - Parcel number(s): 03-2108-235
- **Zoning:** UR - Urban Residential / RS - Residential Shoreland, Burgen Lake (Recreational Development lake)
- **Lot size:** Approx. 71,003 sq ft (1.63 acres) according to .
  - Existing Impervious Coverage: About 0 sq ft (0.00%)
  - Proposed Impervious Coverage: About 7,675 sq ft (10.81%)
- **Septic System Status:** The property is served by a ALASD sewer.
- **Natural Features:**
  - Floodplain: The existing and proposed structures are not within an identified floodplain.
  - Bluff/Steep Slopes: The lot contains a bluff. The proposed structure would be located within the required bluff setback.
  - Wetlands: There are not wetlands that are likely to be impacted by the proposed improvement(s) to the property.

- Current Shoreline Conditions: The shoreline of the property consists of a mostly naturally vegetated bluff.

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**Board of Adjustment Action:** The Board of Adjustment may approve the variance request, deny the request(s), or table the request(s) if the Board should need additional information from the applicant. If the Board should approve or deny the request, the Board should state the findings which support either of these actions.

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**Staff Comments:**

1. The "top of bluff" is defined in a way where it can be determined in one of two ways - 1) by the identification of "a clearly identifiable break in the slope, from steeper to gentler slope above" or 2) by a determination of the upper end of a 50 ft segment with an average slope exceeding 18 percent. Staff has preliminarily determined the top of the bluff by the first method as the elevation of 1410 although whether that is a "clearly identifiable break from steeper to gentler slope" could be debated. The applicant has contacted a surveyor about determining the bluff via the second method but they will not be able to perform that survey work by the May 2 public hearing.
2. A primary question in reviewing this variance is whether moving the house back in the lot where it can meet all bluff setbacks represents a practical difficulty due to the house then not having as good of a view of the lake as it would have if it were placed where proposed.
3. A related conditional use permit is required for the placement of the home where proposed due to the need to move greater than 10 cubic yards of material in a bluff impact zone. The Planning Commission has reviewed that request and recommended approval with conditions.

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**Staff Recommendation:** Based on the findings of fact and discussion listed below, Staff recommends approval of the proposed Variance only if the Board finds that locating the home further back in the lot where it can meet bluff setback requirements represents a practical difficulty (NOTE: It appears that the revised location of the proposed home may meet the bluff setback from the west, but that meeting the bluff setback from the south and north portions of the bluff may not be possible without a more significant move back in the lot - roughly half way between the crest of the hill and where the tennis court is currently located).

If the application or some version of the application is approved, Staff would recommend consideration for the following conditions of approval (or tabling of the application to allow for review of revised plans consistent with the following):

1. That the construction of the home shall be of a slab-on-grade nature, single-story, and constructed such that the peak of the roof does not exceed an elevation of 1428.
2. Erosion and sedimentation control measures must be installed and maintained until the construction areas have been stabilized. These shall include at a minimum silt fences between any areas of disturbance (if there will be any) and the lake as well as to any neighboring properties which are downslope of the disturbed areas. Once disturbed areas are no longer being used for construction purposes, these shall be covered with mulch, erosion control blankets, hydroseed or other forms of temporary cover until vegetation is re-established.

3. The applicant shall submit a permanent stormwater management plan designed to minimize the potential for ongoing erosion or sedimentation and to allow adequate time for infiltration or other treatment of rainwater from the lot prior to it flowing into the lake. These may include directing rain gutters to appropriate areas, rain barrels, establishing or maintaining a buffer of native vegetation along the shoreline, or other acceptable best management practices. Once approved, the plan should be implemented at the time of construction or within a reasonable time period after construction is completed and maintained indefinitely.

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**Applicable Statutes/Ordinances:** See Appendix A.

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**Findings of Fact:** The following findings of fact are presented by Staff for consideration by the Board of Adjustment:

**1) Variances shall only be permitted when they are in harmony with the general purposes and intent of the official control.**

The spirit and intent of the relevant ordinances are as follows:

The spirit and intent of the ordinance's setback requirements between a building or structure and a bluff, according to the DNRs SONAR statement in 1989, is: "The setbacks from bluff tops for structures in all shoreland classes is needed and reasonable to protect bluff tops from adverse environmental impacts of development and construction activities. These impacts can be measured in both physical and aesthetic terms. Physically, development encroachment on bluff tops can lead to accelerated soil erosion and in some cases, slope failure. Aesthetically, development encroachment on bluff tops can compromise or eliminate the natural appearance of this topographical feature in shoreland areas. The 30 foot structure setback from the bluff top provides a minimum distance between the bluff top and the planned or proposed foundations, walls or eaves of a structure for the maneuvering of building materials during construction. Consequently, the preservation of soils can reduce or avoid erosion problems, and preservation and maintenance of vegetation can protect soils, screen development and maintain the natural appearance of bluff areas...It is noted for clarity that the bluff impact zone is established for preservation and management of shoreland vegetation and soils, and all structural development is excluded from this zone, except for stairways, lifts and landings."

Findings Supporting Approval

The proposed improvements would be in harmony with the general purpose and intent of the requirements because the proposed home is a single-story slab-on-grade home that will minimize the excavation in the bluff area and make the home less visible from the lake than several nearby homes due to the nature of the bluff slope and its location behind the bluff.

Findings Supporting Denial

The proposed improvements would not be in harmony with the general purpose and intent of the requirements because it would place a structure within the bluff impact zone which will increase the potential for erosion and make the home more visible from the lake than it would be if it were located on the lot to meet the bluff setbacks.

**2) Variances shall only be permitted when they are consistent with the comprehensive plan.**

Findings Supporting Approval

The granting of the requested variance(s) is not inconsistent with the Comprehensive Plan because it would represent an anticipated use within the relevant zoning district(s). A stormwater management plan is required as part of the approval so as to address issues related to stormwater, the project will not require the removal of substantial numbers of trees and any grading and filling for the project can be adequately managed through the required erosion control practices.

Findings Supporting Denial

The granting of the requested variance(s) would be inconsistent with the Comprehensive Plan because it would result in a structure that is closer to the bluff than adjacent homes and this would be in conflict with the Comprehensive Plan's goal of consistent enforcement of regulations when a practical difficulty has not been shown.

**3) The property owner proposes to use the property in a reasonable manner not permitted by an official control.**

Findings Supporting Approval

The proposed use of the property is reasonable because the proposed home would create less of an impact on the bluff than a home with a basement or a second story and the location of the home behind the crest of the hill will minimize impact on the bluff.

Findings Supporting Denial

The proposed use of the property is not reasonable because the applicant has the option of designing a different layout or location for the home that would minimize or eliminate entirely the need for a variance.

**4) The plight of the landowner is due to circumstances unique to the property not created by the landowner.**

Findings Supporting Approval

The plight of the landowner is due to factors that they did not create because the need for the variance(s) is due largely to the nature of the topography of the lot, which creates a situation where to obtain a reasonable view of the lake requires either locating the home closer to the top of the bluff (as is proposed) or placing the home in a location where the home will either not have a significant view of the lake or where it would have to be elevated on fill to achieve a reasonable view.

Findings Supporting Denial

The plight of the landowner is due to factors that they created themselves because they are building a new home on a mostly unimproved lot and have the ability to construct a dwelling that does not need a bluff setback variance.

**5) The variance, if granted, will not alter the essential character of the locality.**

Findings Supporting Approval

The essential character of the area would not be altered because both the current area and the

proposed use are residential in character. Further, as viewed from the lake, there are several other homes in the immediate area that are significantly more visible from the lake than what this home would be.

Findings Supporting Denial

Allowing the home as proposed will place a building at the top of a bluff where it will be more visible than intended by DNR, County and Township regulations.

**6) Economic considerations alone do not constitute practical difficulties.**

Findings Supporting Approval

Economic considerations are not the only reason the applicant cannot meet the requirements of the ordinance because there are non-economic factors involved, as mentioned above.

Findings Supporting Denial

The primary reason for locating the home as proposed is to maximize the financial and use value of the lot for both the current owner and future owners.

**7) 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.**

Findings Supporting Approval

The proposed use is identified as a permitted use in the zoning district where the applicant's property is located.

Findings Supporting Denial

None

# Appendix A

## Applicable Statutes and Ordinances

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### Minnesota Statutes

#### **462.357 (2016) OFFICIAL CONTROLS: ZONING ORDINANCE.**

##### **Subd. 6. Appeals and adjustments.**

Appeals to the board of appeals and adjustments may be taken by any affected person upon compliance with any reasonable conditions imposed by the zoning ordinance. The board of appeals and adjustments has the following powers with respect to the zoning ordinance:

(1) To hear and decide appeals where it is alleged that there is an error in any order, requirement, decision, or determination made by an administrative officer in the enforcement of the zoning ordinance.

(2) To hear requests for variances from the requirements of the zoning ordinance including restrictions placed on nonconformities. Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance 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 zoning ordinance. "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 the zoning ordinance; 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. Variances shall be granted for earth sheltered construction as defined in section 216C.06, subdivision 14, when in harmony with the ordinance. The board of appeals and adjustments or the governing body as the case may be, may not permit as a variance any use that is not allowed under the zoning ordinance for property in the zone where the affected person's land is located. The board or governing body as the case may be, may permit as a variance the temporary use of a one family dwelling as a two family dwelling. The board or governing body as the case may be 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.

### Alexandria Township/Douglas County Regulations

#### I.VARIANCES.

##### 1.Criteria for Granting of Variances.

a.The Board of Adjustment shall have the exclusive power to order the granting of variances from the terms of this Ordinance, including restrictions placed on nonconformities. Variances shall only be permitted when the following criteria have been met, as determined by the Board of Adjustment:

- i. Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance and when the variances are consistent with the comprehensive plan.
- ii. Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the zoning ordinance.
- iii. "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 the zoning ordinance; 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.
- iv. Economic considerations alone do not constitute practical difficulties.
- v. A variance may not permit any use that is not allowed under the zoning ordinance for property in the zone where the affected person's land is located.
- vi. The Township may impose conditions in the granting of variances provided it is directly related to and bears a rough proportionality to the impact created by the variance.
- vii. Variances shall be issued to the property and are not transferable.

**Alexandria Township/Douglas County Regulations**

SECTION III. ZONING DISTRICT REGULATIONS

D. SHORELAND DISTRICT (RS & CS<sup>1</sup>)

5. Building Setback and Lot Area Requirements and Regulations

The following table establishes the set of dimensional standards that shall be applied within the appropriate zoning districts of Alexandria Township. These standards shall be interpreted as the minimum requirements for each district (see Section III.C.5 for dimensional standards within the Shoreland District).

	<b>Gen. Dev. (GDS)</b>	<b>Rec. Dev. (RDS)</b>	<b>Nat. Env. (NES) A-3</b>	<b>River - Tributary</b>
<b>Side Yard Setback</b>				
Lot existence prior to August 9, 1966	6 ft (3 ft to eaves)	6 ft (3 ft to eaves)	6 ft (3 ft to eaves)	6 ft (3 ft to eaves)
Lot existence on or after August 9, 1966	10 ft (5 ft to eaves)	10 ft (5 ft to eaves)	10 ft (5 ft to eaves)	10 ft (5 ft to eaves)
<b>Lake and River Setback - Buildings/Structures</b>				
Lake sewered prior to Jan 2001 <sup>2</sup>	50	75	150	50

<sup>1</sup> Amended 7/2/2007 (Resolution #07-09)

Lake sewered on or after Jan 2001 <sup>3</sup>	75	100	150	50
Unsewered	75	100	150	100
<b>Structure Setback from Bluff (feet)</b>	30	30	30	30

6. Other Requirements and Regulations

- a. Bluff Impact Zone. Buildings and accessory facilities, except stairways, landings and those items regulated by shoreland alteration permits, must not be placed within this designated area.

**SECTION VII. DEFINITIONS**

**TOP OF THE BLUFF** - The point on a bluff where there is, as visually observed, a clearly identifiable break in the slope, from steeper to gentler slope above. If no break is apparent, the top of the bluff shall be determined to be the upper end of a fifty (50) foot segment, measured on the ground, with an average slope exceeding eighteen percent (18%).

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<sup>2</sup> Lakes Burgen, Geneva, Le Homme Dieu and Victoria were sewered prior to Jan 2001. All properties on these lakes shall be considered "sewered" for the purposes of this regulation, regardless of whether they were actually served with a sewer line prior to January 2001. (Amended 3/21/2011 – Resolution #11-02)

<sup>3</sup> Any lake other than Burgen, Geneva, Le Homme Dieu and Victoria.