

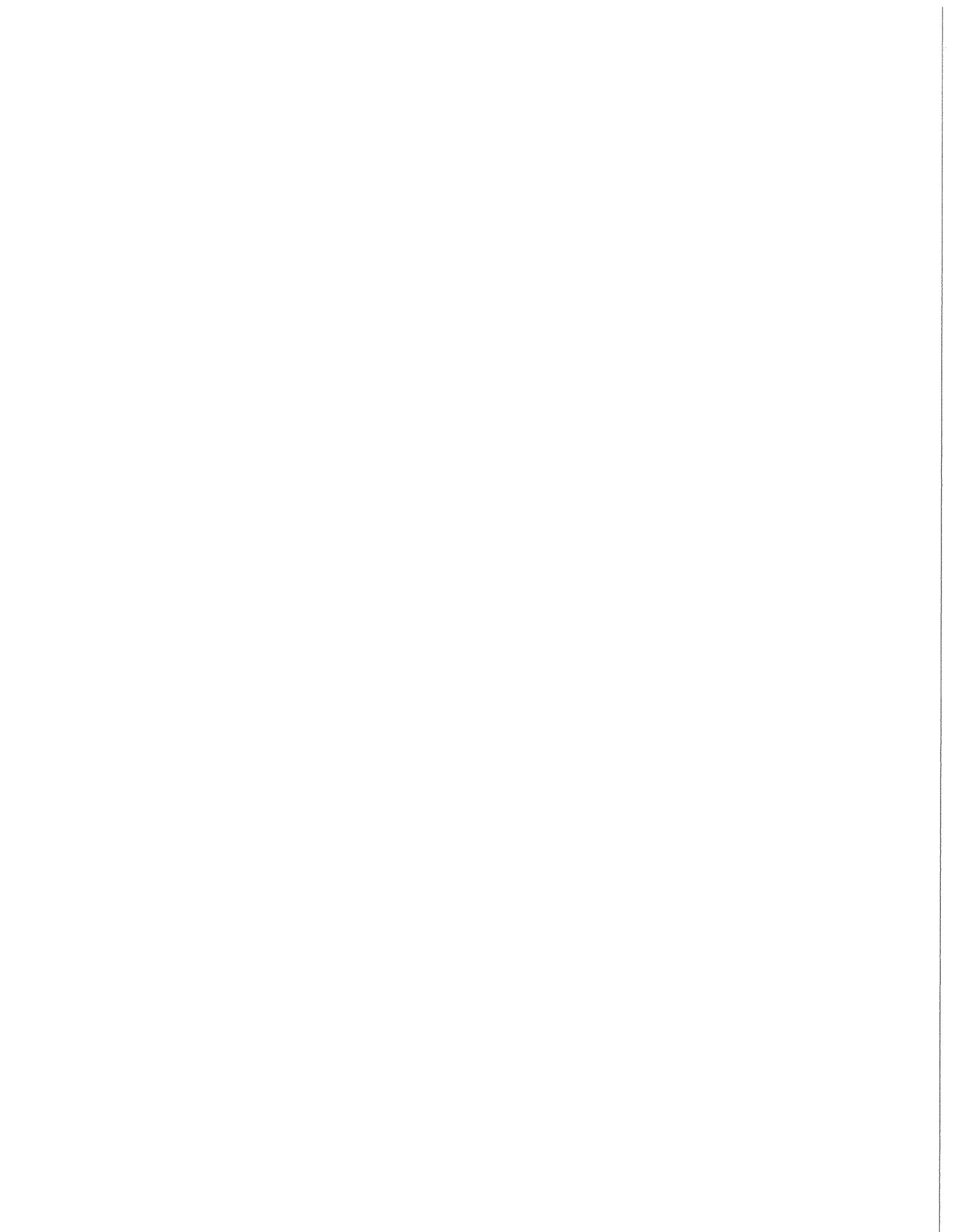
Memo

To: Honorable Mayor and City Council
From: Joe Kohlmann, City Administrator
Date: September 24th, 2013
Re: 20 Old Orchard Lane

Staff has brought more information back to the City Council for their review of the application at 20 Old Orchard Lane. Staff has attached the landscaping plan, the site survey, specifications of the fence, a Memo from the City Attorney addressing the fence, and a final Resolution for adoption.

Council Action Requested:

Motion to adopt the attached Resolution Approving a Variance to Allow for the Installation of a Swimming Pool in the Front Yard of the Property.



RESOLUTION NO. 13-21

**A RESOLUTION APPROVING A VARIANCE TO ALLOW FOR THE
INSTALLATION OF A SWIMMING POOL IN THE FRONT YARD (LAKESIDE)
OF THE PROPERTY
FOR CAROL AND KIM CULP AT 20 OLD ORCHARD LANE**

WHEREAS, the City of Tonka Bay is a municipal corporation, organized and existing under the laws of the State of Minnesota; and

WHEREAS, the City Council of the City of Tonka Bay has adopted zoning regulations in the Municipal Code to promote orderly development and utilization of land within the city; and

WHEREAS, Carol and Kim Culp ("Applicants") own 20 Old Orchard Lane which is legally described as follows:

PARCEL 1: That part of Lot 1, "JOHN F. WILCOX ADDITION" lying easterly of a line and also northerly of the southerly 12 feet of that part of Lot 1 lying easterly of the same line, which line is described as follows: Beginning at a point on the northerly line of said Lot 1, distant 133 feet westerly from the Northeast corner of said Lot 1; thence southwesterly to a point on the southerly line of said Lot distant 133.54 feet westerly from the Southeast corner of said Lot 1.

PARCEL 2: That part of Lot 1, "JOHN F. WILCOX ADDITION" lying westerly of a line and also the southerly 12 feet of that part of Lot 1 lying easterly of the same line, which line is described as follows: Beginning at a point on the northerly line of said Lot 1, distant 133 feet westerly from the Northeast corner of said Lot 1; thence southwesterly to a point on the southerly line of said Lot distant 133.54 feet westerly from the Southeast corner of said Lot 1.

WHEREAS, the Applicants' Property is located within the R-1A zoning district; and

WHEREAS, the Applicants are requesting the following variance:

1. A variance to allow for the installation of a swimming pool in the front yard (lakeside) of the property.

WHEREAS, Kelsey Johnson, City Planner, issued a report dated September 10, 2013 on the application made by the Applicants (Planning Report), analyzing the request made in relation to City Ordinance criteria and made recommendations if the requests were approved by the City Council; and

WHEREAS, the City Council reviewed the variance requests on September 10, 2013, and held a public hearing, following the required notices and publication; and

WHEREAS, neighbors spoke on the Applicant's proposal; and

WHEREAS, the Applicants presented to the Council reasons for their proposal; and

WHEREAS, the City Council, following the public hearing and deliberation on the variance to allow for the installation of a swimming pool in the front yard (lakeside) of the property directed staff to prepare a resolution for its consideration, and having considered the application, the Planning Report, the resolution prepared by staff, and the testimony presented at the public hearing, makes the following findings of fact and conclusions:

1. The proposed use as a single-family home will not change and is consistent with the comprehensive plan.
2. Granting the requested variance will not impair an adequate supply of light and air to adjacent parcels.
3. Granting the variance will not increase congestion in the public street. The use of the property as a single-family home will stay the same and not increase congestion.
4. Granting the variance will not increase the danger of fire or endanger the public safety.
5. Granting the variance will not diminish or impair established property values in the neighborhood. However, locating the swimming pool on the street side of the property may have adverse effects on neighboring property values.
6. Granting the variance will not alter the essential character of the locality. The swimming pool should not reasonably detract from views of the lake from adjacent property. The lakeside of the property presents a much more reasonable location for a swimming pool than the street side of the property in terms of the existing topography and preservation of significant trees.
7. The request for a swimming pool is reasonable given the use as a single-family home.
8. The variance request is in harmony with the general intent of the ordinance and will not lead to an overcrowding of homes. The ordinance states that the lakeside of riparian lots shall be considered the front yard. It also states that accessory structures and uses shall not be permitted in front yards.

NOW, THEREFORE, BE IT RESOLVED, that the City Council of the City of Tonka Bay hereby approves the variance to allow for the installation of a swimming pool in the front yard (lakeside) of the property; as shown on the Plans attached hereto, as Exhibit A (the Plans); and

BE IT FURTHER RESOLVED, that the approval of the requested variances and conditional use permits shall include the following conditions:

1. The applicant shall obtain all necessary permits and approvals from the City of Tonka Bay and other applicable entities with jurisdiction prior to any construction. This includes, but shall not be limited to permits from the Minnehaha Creek Watershed District (MCWD) and the Lake Minnetonka Conservation District (LMCD).
2. The approval of the building permit for the swimming pool is contingent upon the Applicant obtaining a fence permit that meets city code and the swimming pool regulations.
3. The MCWD shall review and approve the final grading plans approved by the City Engineer prior to any work being authorized. Proof of MCWD approval (if needed) shall be provided to the city prior to a building permit being authorized.
4. Erosion control measures shall be shown on the building permit plans and shall be subject to review and approval by the City Engineer.
5. Building of structures (including but not limited to pool equipment storage structures) shall not occur within any existing easements on the property.
6. The applicant shall work with the City Engineer on a plan to treat stormwater on site. Plans for this treatment will be subject to review and approval by the City Engineer prior to issuance of a building permit.
7. The City Engineer shall inspect the property at the property owner's expense during the construction process to ensure on-going compliance with all engineering requirements.
8. The building permit for the swimming pool.
9. The variances shall expire one year from the date of the resolution. City Council approval will be required for any subsequent extension.

PASSED AT A REGULAR MEETING of the Tonka Bay City Council this 10th day of September, 2013.

Motion introduced by Grothe and seconded by Anderson.

Roll call vote:

Ayes –	Anderson, Ansari, Clapp, De La Vega and Grothe
Nays –	None
Absent –	None

Gerry De La Vega, Mayor

ATTEST:

Joseph Kohlmann, Clerk/Administrator

Penberthy Law Offices

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JAMES G. PENBERTHY

MEMORANDUM

TO: Members of the Tonka Bay City Council and Joe Kohlmann

FROM: James G. Penberthy *JGP*

DATE: September 19, 2013

RE: 20 Old Orchard Lane, (the property).
Swimming Pool Fence Permit, Construction of Conflicting Ordinance Provisions

BACKGROUND

On September 10, 2013, the City Council approved the construction of a swimming pool in the front yard of the property. Condition numbered 2 in the Resolution in your packets states:

The approval of the building permit for the swimming pool is contingent upon the Applicant obtaining a fence permit that meets city code and swimming pool regulations.

The city code states in relevant part:

1011.05 FENCING/SCREENING.

Subd. 1. Fence Regulations.

- a. No person shall hereafter construct or cause to be constructed or erected within the City of Tonka Bay, any fence without first making an application for and securing a building permit.
- d. Specific Fence Standards. The height of fence or walls measured from the ground level to the top of the fence or wall, shall be restricted according to the location as follows:
 - 2. Fences or walls on or adjacent to the shoreline of any navigable lake, channel or stream shall not exceed three (3) feet in height. Fences or walls

on or along that portion of a lot line from navigable lake, channel or stream to the rear side of the average building construction line shall not exceed three (3) feet in height.

- e. Swimming Pool Fences. Outdoor swimming pool fences shall be required as follows:
 - 1. All outdoor swimming pools existing and hereafter constructed shall be completely enclosed by a security fence or wall at least four (4) feet but not more than six (6) feet high and located at least four (4) feet from the edge of a pool. The bottom of the fence or wall shall be no higher than four (4) inches above the surface of the ground. Fence openings or point of entry to the pool area shall be equipped with self-closing and self-latching lockable gates.
 - 2. The enclosure for outdoor swimming pools may utilize a wall or walls of a house or building as a part hereof, provided the wall or walls are at least six (6) feet high and the enclosure is completed by a fence or wall conforming to the provisions of 1. herein above.
 - 4. New swimming pools shall not be filled or used until all applicable fencing requirements herein are complied with.

The Applicants have submitted an application for a swimming pool fence permit. The application for the permit meets the requirements for a swimming pool fence. However, the fence applied for violates the height requirements for fences adjacent to the shoreline of the lake and from the shoreline along the lot line to the average building construction line. A swimming pool fence must be at least four (4) feet in height while a fence adjacent to the shoreline and from the shoreline along the lot line to the average building construction line must not exceed three (3) feet in height. The above ordinance provisions conflict with each other.

ISSUE

May effect be given to both of the two ordinance provisions in conflict with each other? If not, is it because the provisions are irreconcilable? If so, does the swimming pool provision prevail?

DISCUSSION

Minnesota Statutes address both issues.

Minnesota Statute Section 645.26 states in relevant part:

645.26 IRRECONCILABLE PROVISIONS.

Subdivision 1. Particular controls general.

When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.

Subd. 2. Clauses in same law.

When, in the same law, several clauses are irreconcilable, the clause last in order of date or position shall prevail.

CONCLUSION

For the purposes of this property only, it is my opinion that the general provisions restricting the fence height to three (3) feet and the special provision requiring a fence height of four (4) feet can be construed together to meet the purposes of both, i.e., sight lines and safety, respectively.

If they are irreconcilable, the special swimming pool provision prevails because it is the clause last in position in the ordinance and because of the statutory mandate that the special provision is treated as an exception to the general provision.