

BISMARCK PLANNING & ZONING COMMISSION
MEETING MINUTES
June 26, 2024

The Bismarck Planning & Zoning Commission met on June 26, 2024, at 5:00 p.m. in the Tom Baker Meeting Room in the City-County Office Building, 221 North 5th Street. The meeting was held in person and via Zoom. Chair Schwartz presided and was present in the Tom Baker Meeting Room.

Commissioners present were Brian Bitner, Robert Field, Cole Johnson, Amber Larson (via Zoom), Daniel Lukens (via Zoom), Gabe Schell, Mike Schmitz (via Zoom), Mike Schwartz, Trent Wangen.

Commissioners Sheldon Sivak and Paul Zent were absent.

Staff members present were Brady Blaskowski – Building Official, Jannelle Combs – City Attorney, Ben Ehreth – Community Development Director, Sarah Fricke – Senior Administrative Assistant, Isak Johnson – Planner, Daniel Nairn – Planning Manager, Lauren Oster – Planner, and Jenny Wollmuth – Senior Planner.

MINUTES

Chair Schwartz called for consideration of the minutes of the May 22, 2024 meeting.

MOTION: Commissioner Bitner made a motion to approve the minutes of the May 22, 2024 meeting, as presented. Commissioner Wangen seconded the motion, and it was unanimously approved with Commissioners Bitner, Field, Johnson, Larson, Lukens, Schell, Schmitz, Schwartz, and Wangen voting in favor of the motion.

Chair Schwartz called for consideration of the minutes of the special meeting of May 15, 2024.

MOTION: Commissioner Bitner made a motion to approve the minutes of the May 15, 2024 special meeting, as presented. Commissioner Schmitz seconded the motion, and it was unanimously approved with Commissioners Bitner, Field, Johnson, Larson, Lukens, Schell, Schmitz, Schwartz, and Wangen voting in favor of the motion.

CONSIDERATION

**3. HAY CREEK TOWNSHIP SECTION 25, AUDITOR'S LOT S-3
ZONING MAP AMENDMENT**

MOTION: Commissioner Wangen made a motion to approve consent agenda item 3, calling for a public hearing as recommended by staff. Commissioner Bitner seconded the motion, and it was approved with Commissioners Bitner, Field, Johnson, Larson, Lukens, Schell, Schmitz, Schwartz, and Wangen voting in favor of the motion.

**PUBLIC HEARING
ZONING ORDINANCE TEXT AMENDMENT
HOME OCCUPATIONS**

Chair Schwartz called for the continued public hearing on a zoning ordinance text amendment regarding home occupations.

Mr. Nairn provided an overview of the proposed amendment including changes specifically requested by residents at the special May 15 meeting of the Planning and Zoning Commission.

Commissioner Johnson noted that outside storage was not limited in areas zoned A – Agriculture. He also noted that the restrictions on trucks requiring a CDL still do apply to areas zoned Agriculture.

Chair Schwartz opened the public hearing.

Tyson Austin, a resident with a home business, asked whether there is an allowance for time to grow shrubs and trees to provide screen coverage for storage of equipment. Mr. Nairn explained that in the landscaped buffer yard referenced does allow for growth of the landscaped buffer yard ordinance referenced does allow for growth of vegetation over time. Mr. Austin asked if there are restrictions on the number of employees he has that do not work on site. Mr. Nairn stated that the ordinance does not restrict the number of offsite employees.

Linea, a resident, stated she does not believe any homes should be allowed to run businesses as they are loud and disruptive to neighborhoods.

Ellen, from the Institute for Justice, spoke about local policy's effect on small businesses. She stated the Institute for Justice supports the ordinance as written.

Bob Blotski, an ETA resident and small business owner, stated he does not believe the City should have any authority in the ETA.

Commissioner Field asked if the ordinance puts a limit on industrial equipment storage. Mr. Nairn replied that there is no limit on the number of equipment and storage in rural zoning districts, the limit only applies to CDL level vehicles and the percentage of lot coverage.

Monte Sicble, Apple Creek Township, stated that he supports home businesses and referenced a speaker from the public meeting of May 15. Mr. Nairn responded by explaining the language change regarding allowing trailer storage on grass was directly related to that resident's comment.

There being no further questions or comments, Chair Schwartz closed the public hearing.

Commissioner Wangen asked if a business such as Rising Star Ranch would require a special use permit for ranching equipment. Mr. Nairn explained that it is within a PUD with its own rules written to allow certain activities such as hayrides.

Commissioner Field stated he will not acknowledge the City's rules as an ETA resident.

Commissioner Schell stated that it is important to understand that the rules have been rewritten to be much less restrictive than the current ordinance. It is also much less restrictive than Burleigh County's ordinance regarding home-based occupations.

Commissioner Bitner indicated that he opposes the City's authority over the ETA and will also not acknowledge this ordinance or any others enforced by the City.

Commissioner Wangen stated that he has spoken with ETA residents that do not support City authority over the ETA and many did not know they were in the ETA.

Commissioner Johnson stated that, whether or not commissioners agree with the ETA, it does exist and is not the topic on the agenda. He said that he knows a rural business owner who will be able to expand as a home occupation once this ordinance passes.

Commissioner Wangen congratulated and thanked staff for all the hard work that they've done and made a lot of positive changes. However, based on of the group of people he represents being opposed to any city regulation of the ETA, he will oppose.

Commissioner Larson stated she is impressed with the work of the staff listening to all of the frustrations and productive feedback that was brought forward and the adjustments that have been made to the ordinance. She stated that she lives in the city and is also a county taxpayer. Her business started out of her home, so she understands the concerns. She voiced frustration with the discussions on whether the city should have authority over the ETA, as this commission is not the platform to make that type of change and it takes away from the discussions at hand.

Chair Schwartz stated that he has owned property in the county and currently lives within city limits and said there are rules everywhere and city growth is a fact of life. He said he has not seen anything that will force a business to shut down. He reminded all attendees of the meeting that the main point is to be a good neighbor. He believes staff has responded to residents' requests.

Commissioner Field stated the ordinance does nothing for the residents who do not want businesses in their neighborhoods. Commissioner Johnson replied that the references to noise in the proposed ordinance will help for those experiencing noise disturbances.

MOTION: Commissioner Schmitz made a motion to approve the zoning ordinance text amendment. Commissioner Larson seconded the motion, and it was approved with Commissioners Johnson, Larson, Lukens, Schell, Schmitz, and Schwartz voting in favor of the motion. Commissioners Bitner, Field, and Wangen voted against the motion.

PUBLIC HEARING – PLANNED UNIT DEVELOPMENT AMENDMENT MISTY WATERS, LOTS 30-36 AND 38-39, BLOCK 1

Chair Schwartz called for the public hearing on the planned unit development (PUD) amendment for Misty Waters, Lots 30-36 and 38-39, Block 1. The property is located northeast of Bismarck, east of 80th Street NE and on the north side of 43rd Avenue NE (E ½ of E ½ of SW ¼ of Section 16, T139N-R79W).

Commissioner Schmitz recused himself from the public hearing on this item because one of the applicants is an employee of his. He then asked other commissioners to recuse themselves if they had a relationship with any of the parties involved. The commissioners discussed the level of relationship to cause a possible bias of vote. City Attorney Combs stated that a commissioner should recuse him or herself if a conflict of interest exists whether familial or financial and the commission will make the decision on whether a conflict exists. After the discussion, all commissioners participated in the public hearing.

Ms. Wollmuth provided an overview of the request and stated that, as a cumulative result of all findings contained in the staff report, City of Bismarck staff find that the proposed PUD amendment would not adversely impact the public health, safety, and general welfare.

Ms. Wollmuth said, based on the findings, staff recommends approval of the PUD amendment for Misty Waters, Lots 30-36 and 38-39, Block 1, as presented.

Chair Schwartz opened the public hearing.

Michael Gunsch, Houston Engineering, gave an overview of the request and stated the applicants' homes were approved by city staff and the HOA and that all required permits were obtained for building the homes.

Randy Bakke, attorney for the Sellers, one of the applicants, made a statement that the decision by the North Dakota Supreme Court affects his clients along with the other eight applicants and other homeowners. The Sellers received permission to build from the City and HOA and have now been mandated to tear down their home, either completely or partially. The ruling reduces the buildable square footage, therefore diminishing fair market value and taxable value of the properties.

Shawn Grinolds stated that 73% of residential lot owners in Misty Waters have signed and recorded an amendment to the Restrictive Covenants to establish rear yard setbacks for all bay lots to be the inland edge of the drainage easement for each lot. He said this will make the rules consistent with historical interpretations.

Commissioner Bitner asked if the 2005 LOMR line is the same line affecting the applicants. Jackie Lundstrom, another Misty Waters resident, had to remove part of her house because of the confusion with the setback.

Mr. Grinolds stated that this hearing will not affect the current litigation. The City and HOA's interpretation is different than the State Supreme Court. The homeowners followed every rule that FEMA, the City, and the HOA told them. The ruling affects eight homeowners but only one is facing possible destruction of their home. The court may dismiss the case if the decision of the commission is to approve the PUD amendment. He said it is in direct violation of the restrictive covenants and is stalling development in Misty Waters.

Randy Bakke stated that a LOMR line can be moved because it is based on elevation.

Commissioner Bitner asked if the court date could be moved to extend time. Mr. Bakke said the court denied his request for an extension. Commissioner Bitner then asked staff how 17 homes were determined when the letters were mailed to property owners that were potentially in violation. Mr. Ehreth explained that after a comprehensive review using aerial photography, staff determined which homes may be in violation. Mr. Ehreth then said notice

was mailed to property owners that the city could send a land surveyor to determine whether the property is in violation, or they could hire a private land surveyor. Staff received responses from eight of the 18 owners notified. Of those eight, four were found to be in violation. There are 10 remaining homeowners to be surveyed and the City does not have a land surveyor employed at this time.

Bill Harry, hired by the insurance company of the HOA, asked the commission to support the PUD amendment and indicated approval will not end the lawsuit. The ramifications of denying the request include determination of financial responsibility for tearing the house down; the cost will likely fall on the homeowners.

Jason Sellers, the homeowner being sued to tear his house down, stated he made sure before building that he had every approval from the city and HOA. He has spent the past four years fighting to save his home. He said his home cannot be modified and his lot will not be buildable. He then stated that approval will bring his and several other homes into compliance and asked the commission to approve.

Commissioner Bitner asked why there are only eight applicants on this PUD amendment request and if more could be added. Mr. Bakke said many residents are not affected at this time, but approval will benefit all of Misty Waters' residents.

Mr. Ehreth stated that the public hearing can be continued if other impacted properties want to be included in the PUD amendment.

Commissioner Johnson said the line is the setback on the original plat and he understands the confidence to build based on the line and elevation information.

Jordan Anderson, the builder of the Seller home, stated a court dismissed the Berger's lawsuit against him for this build. He obtained approval from the HOA and the Architectural Review Committee (ARC). He explained that he built the property above the floodplain to make certain that he met FEMA requirements.

Teresa Reis, a Misty Waters resident, stated her home is within the LOMR line and the LOMR line was never identified by the developers or her real estate agent. She said she was assured by both, that the elevation of 1640 feet was the setback.

John Erickson, a Misty Waters resident, stated that the LOMR line being the setback is not right and would not make sense on his lot.

Jeff Anderson, a Misty Waters board member, said his home is on the river side of Misty Waters and he has concerns about the uncertainty of the setback. He believes it slows development and he knows builders and owners are delaying their builds.

Doug Schmidt, a prior board member, asked whether individuals could apply for a PUD amendment or a variance. Mr. Ehreth stated the current action is appropriate and explained that applying for a variance would require an identified hardship. Mr. Schmidt stated that he does not support this request. Commissioner Schell stated that this request only includes Dream Circle lots, minus the Bergers' lot. Commissioner Bitner said variance requests are not heard by this commission. Michael Gunsch said economic hardship is not considered a hardship for a variance.

Nicole DeKrey, one of the applicants, is a vacant lot owner. She has not been able to sell her lot because the State Supreme Court ruling makes the buildable area too small. She asked the commission to approve their request.

Shea Miller, the Berger's attorney, stated the issue is that the original PUD had the setback at 30 feet, then the 2006 PUD amendment established the setback as the 2005 LOMR line. The North Dakota Supreme Court decision was the 2005 LOMR line. She said the fault is with the property owners and their agents. She believes this PUD amendment will provide no benefit to Misty Waters. The Bergers' home's value has reduced because the Sellers' home is 50 feet past the setback. She said the commission's decision should be made based on facts, not emotions and supporting this project removes the Berger's remedy for their losses while denying the request will allow the court to make the decision. Ms. Miller then referred to the PUD amendment request as spot zoning. She said allowing an encroachment 50 feet beyond the setback does not promote harmony for the development. She said the Sellers received approval based on an outdated PUD document. Ms. Miller went on to explain that there is no evidence that the drainage easement was ever the setback, and that the Sellers were contacted by the neighbor's attorney at the time and informed they were building over the setback; chose to ignore because of approvals from the City and HOA; and continued building. She then said the North Dakota Supreme Court heard all of the same arguments before making its decision. She questioned staff on the current and proposed zoning maps looking the same. Mr. Nairn explained that because the area will remain a PUD, the color coding would not change, only the language for the lots included in the PUD amendment request would change. Ms. Miller requested that the documents handed out by Attorney Bakke be dismissed by the commission. Ms. Combs explained that it is standard practice to accept documents as public comment during meetings.

Commissioner Johnson asked Ms. Miller to verify that the decision made today will affect the court's decision. Ms. Miller explained that the judge said the outcome could possibly make the lawsuit moot.

Chair Schwartz asked when the Berger's house was built, and Commissioner Bitner asked if the Berger's were aware of the LOMR line being the setback when they built. Ms. Miller said in 2008, when the house was built, the Bergers were aware of the setback being the LOMR line.

Chair Schwartz called for a 10-minute recess.

Tamara Berger, the plaintiff in the aforementioned lawsuit, stated her house plans included the LOMR as the setback. She said the ARC forms had been signed without review. She explained that in Misty Waters, each lot is unique in shape and size. She contacted her neighbors, the Sellers, when the property was staked for building and told them the house would be past the setback. She then said the Sellers had tried to build on a different lot in Misty Waters but decided not to after they learned the buildable size and that the first house shows the LOMR as the setback.

Mr. Bakke stated that the Planning and Zoning Commission, not a court, decides on an amendment to a PUD. He said that City records show a 2006 request to move the LOMR and FEMA approved; 17 years later the North Dakota Supreme Court decided that the LOMR is a static line. He then said the jury trial will decide financial damages and the lawsuit does not affect other property owners, only the Sellers.

Darren Berger stated he requested the HOA and the Sellers to stop construction, but Jason Sellers is the President of the HOA and the builder's father is the Vice President and his request was ignored.

Michael Gunsch said that the setback not showing on a lot survey was a surveyor issue and that surveyor has since retired. He then said that maps change frequently and have nothing to do with this issue.

Rich Skjonsby, a real estate investor, purchased his property in Misty Waters in 2006 after asking the developer, Steve McCormick where on the lot he was able to build. He said he received no contact from the HOA on amended covenants. He asked the commission to deny the request.

Tamara Berger returned to say that the applicants' claim that lots are unbuildable is false and that many several-thousand square foot homes exist within the LOMR setbacks.

Jerry Ketterling said he has lived in Misty Waters for 12 years. He was provided the LOMR as the setback in his closing documents. He stated the HOA meets once a year to elect board members. He doesn't believe members of an HOA should be financially responsible in a lawsuit. He feels the City should apologize for its error in the application of the setback.

Matt Geiger explained the inconsistency of the setback since the beginning of the development of Misty Waters. He said several homes are out of compliance, but he doesn't want to hurt neighbors. He asked the commission to approve the PUD amendment.

Commissioner Wangen asked Mr. Geiger how he knew the rear yard setback when he built his house. Mr. Geiger replied that his house was so far forward, it was never a question for him. Mr. Geiger mentioned that Jackie Lundstrom, who has to cut off part of the back of her house because of the setback confusion, has signed and is supportive of this amendment to the PUD because she doesn't want the same thing to happen to anyone else. Ms. Miller explained that the amendment to the restrictive covenants was to change the LOMR, not that the setback and the signatures are being challenged.

Pat Spillman stated he is a registered engineer and that he believes the City is to blame for providing inaccurate information at the time the building permit was submitted. He talked about the drainage ditch not remaining and sand not working for stormwater. Mr. Spillman ended stating he opposes the PUD amendment request.

There being no further comments, Chair Schwartz closed the public hearing.

Commissioner Schmitz asked Ms. Combs for confirmation of the accusation of spot zoning. Ms. Combs explained that spot zoning, according to case law, indicates a lot is singled out for discriminatory or different treatment compared to other, surrounding lots without a clear, reasonable basis for the proposed changes. Spot zoning does not apply in this case because rather than one lot being singled out for a change, multiple lots are potentially changing while one nearby lot is not changing.

Commissioner Bitner stated he has never seen an amendment of a PUD within a PUD and does not know if it is allowed. He said he isn't comfortable making this decision.

Commissioner Schell said he would prefer to take a more comprehensive look at this; possibly incorporating more lots. Mr. Ehreth said a staff-initiated zoning map change is possible to replace the PUD but would need to go through the zoning map amendment process.

Commissioner Bitner then asked how much time is needed to possibly help more people who are out of compliance. Commissioner Schmitz said the earliest would be the end of August.

Ms. Combs stated that because the application for the PUD amendment request includes specific legal descriptions, the City has no jurisdiction to add legal descriptions to the request. Commissioner Johnson said a neighborhood-wide approach would make the decision easier and Commissioner Bitner agreed. Commissioner Wangen voiced his concern about the unintended consequences of the Planning and Zoning Commission taking action on the request. Commissioner Schell reminded the commission members that their decision only applies to the applicants, not the neighbors. Commissioner Schmitz said the LOMR was never a metes and bounds line until the North Dakota Supreme Court ruled it so. Commissioner Larson said a LOMR line is not consistently used as a setback line.

MOTION: Commissioner Johnson made a motion to deny the PUD amendment for Lots 30-36 and 38-39, Block 1, Misty Waters. Commissioner Field seconded the motion, and it was approved with Commissioners Bitner, Field, Johnson, Larson, Lukens, Schwartz, and Wangen voting in favor of the motion. Commissioners Schell and Schmitz voted against the motion.

PUBLIC HEARING – ZONING MAP AMENDMENT PART OF NORTHERN SKY ADDITION, AND ALL OF NORTHERN SKY SECOND ADDITION FIRST REPLAT

Chair Schwartz called for the public hearing on the zoning map amendment from the CA – Commercial and RT – Residential zoning districts to the CG – Commercial zoning district for Part of Northern Sky Addition, and all of Northern Sky Second Addition First Replat. The project area is located in northwest Bismarck, in the northwest quadrant of the intersection of North Washington Street and Ash Coulee Drive.

Mr. Johnson provided an overview of the request and stated that, as a cumulative result of all findings contained in the staff report, City of Bismarck staff find that the proposed zoning map amendment would not adversely impact the public health, safety, and general welfare.

Mr. Johnson said, based on the findings, staff recommends approval of the zoning map amendment from the CA – Commercial and RT – Residential zoning districts to the CG – Commercial zoning district for Part of Northern Sky Addition, and all of Northern Sky Second Addition First Replat, as presented.

Chair Schwartz opened the public hearing.

Landon Niemiller, Swenson Hagen, offered to answer any questions.

There being no comments or questions, Chair Schwartz closed the public hearing.

MOTION: Commissioner Bitner made a motion to approve the zoning map amendment from the CA – Commercial and RT – Residential zoning districts to the CG – Commercial zoning district for Part of Northern Sky Addition, and all of Northern Sky Second Addition First Replat. Commissioner Johnson seconded the motion, and the motion was unanimously approved with Commissioners Bitner, Field, Johnson, Lukens, Schell, Schmitz, Schwartz, Larson, and Wangen voting in favor of the motion.

PUBLIC HEARING – SPECIAL USE PERMIT APPLE CREEK FARM

Chair Schwartz called for the public hearing on a special use permit to allow a major agriculture recreation use on Part of the SE1/4 of Section 5, T138N-R79W, Apple Creek Township (750 80th Street SE).

Ms. Wollmuth provided an overview of the request and stated that, as a cumulative result of all findings contained in the staff report, City of Bismarck staff find that the proposed special use permit would not adversely impact the public health, safety, and general welfare.

Ms. Wollmuth said, based on the findings, staff recommends approval of the special use permit to allow a major agriculture recreation use on Part of the SE1/4 of Section 5, T138N-R79W, Apple Creek Township, as presented.

Chair Schwartz opened the public hearing.

ReNay Zundel, the applicant, explained that they plan to hold four events per year. They have no intention of allowing weddings, agricultural related events only. She explained they held a family wedding previously and agrees with her neighbors that it was much too loud and went too late into the night.

There being no further comments or questions, Chair Schwartz closed the public hearing.

MOTION: Commissioner Wangen made a motion to approve the special use permit to allow a major agriculture recreation use on part of the SE1/4 of Section 5, T138N-R79W, Apple Creek Township. Commissioner Bitner seconded the motion, and it was unanimously approved with Commissioners Bitner, Field, Johnson, Larson, Lukens, Schell, Schmitz, Schwartz, and Wangen voting in favor of the motion.

PUBLIC HEARING – SPECIAL USE PERMIT APPLE CREEK COTTAGE

Chair Schwartz called for the public hearing on a special use permit to allow an accessory dwelling unit on part of the SE1/4 of Section 5, T138N-R79W, Apple Creek Township (750 80th Street SE).

Ms. Wollmuth provided an overview of the request and stated that, as a cumulative result of all findings contained in the staff report, City of Bismarck staff find that the proposed special use permit would not adversely impact the public health, safety, and general welfare.

Ms. Wollmuth said, based on the findings, staff recommends approval of the special use permit to allow an accessory dwelling unit on part of the SE1/4 of Section 5, T138N-R79W, Apple Creek Township, as presented.

Chair Schwartz opened the public hearing.

ReNay Zundel, the applicant, stated they will be renting this through AirBNB.

Monte Sicble, Apple Creek Township Chair, said the township did not have a chance to discuss these proposals so he is unable to make a recommendation.

There being no further comments or questions, Chair Schwartz closed the public hearing.

MOTION: Commissioner Bitner made a motion to approve the special use permit to allow an accessory dwelling unit on part of the SE1/4 of Section 5, T138N-R79W, Apple Creek Township. Commissioner Field seconded the motion, and it was unanimously approved with Commissioners Bitner, Field, Johnson, Larson, Lukens, Schell, Schmitz, Schwartz, and Wangen voting in favor of the motion.

OTHER BUSINESS

ADJOURNMENT

There being no further business, Chair Schwartz declared the Bismarck Planning & Zoning Commission adjourned at 11:15 p.m. to meet again on July 23, 2024.

Respectfully submitted,



Sarah Fricke
Recording Secretary



Mike Schwartz
Chair