

VILLAGE OF FONTANA ON GENEVA LAKE  
WALWORTH COUNTY, WISCONSIN  
(Official Minutes)

SPECIAL MEETING of the PARK COMMISSION  
Wednesday, April 28, 2010

Chairperson Cindy Wilson Lobdell called the meeting of the Park Commission to order at 6:00 pm in the Meeting Room at the Village Hall, 175 Valley View Drive, Fontana, Wisconsin.

**Park Commissioners present:** Trustee Cindy Wilson, Sharon O'Brien, Jill Wegner, Laura Coates, Sarah Lobdell (arrived at 6:11 pm)

**Park Commissioners absent:** Dan Green, Sharon Conklin

**Also present:** Charles Harrett, Trudy Havens, Administrator/Treasurer Kelly Hayden, Library Director Nancy Krei, Rob Ireland, Laurie Larson, Attorney Robert Leibsle, Village Clerk Dennis Martin, Ron McCormack, Joseph McHugh, Gary Neilson, Building Inspector/Zoning Administrator Ron Nyman, Tom O'Brien, Trustee Peg Pollitt, Margaret Reuland, Village Attorney Dale Thorpe, Tom Whowell, Jeff Wilson

**General Business**

**Park Permit Application Filed by Jose D. Corona, Duck Pond Recreation Area, Saturday, May 8, 2010, 20 People for Birthday Party, 3:00 to 6:00 PM**

There are no conflicts scheduled at the Duck Pond and the application is complete. If the applicant decides to use the kitchen, a \$75 fee will be required.

O'Brien/Wegner 2<sup>nd</sup> made a MOTION to recommend Village Board approval of the Park Permit application, and to authorize the use of the kitchen if the required fee is paid, and the MOTION carried without negative vote.

Chairperson Wilson called for a recess in the meeting until 6:11 pm, when Sarah Lobdell arrived at the meeting.

Chairman Wilson called the meeting back to order at 6:11 pm.

**Consider Action – Appeal Brought by Mr. Joseph McHugh of the Geneva Lake Conservancy Pursuant to Section 18-28(i) of the Municipal Code As to a Tree Removal Determination for the Neilson/Havens Property at 403 North Lakeshore Drive, Tax Parcel No. SS&G 00006**

Wilson asked Attorney Thorpe to explain the hearing procedure. Thorpe stated that Geneva Lake Conservancy Executive Director Joseph McHugh filed an appeal under Section 18-28 (i) of the Municipal Code with regard to a tree removal permit issued for a large oak tree on the Gary Neilson/Trudy Havens property at 403 N. Lakeshore Drive; however, the ordinance does not specify the hearing procedure. Thorpe stated that since the Park Commission is not a quasi-judicial body, sworn testimony will not be taken and the commission will not be able to deliberate in closed session. Thorpe stated that the Park Commission's role will be to listen to evidence presented by Building Inspector/Zoning Administrator Ron Nyman, McHugh and the property owners and their representatives, and to make a determination if the ordinance as written was followed. Thorpe stated that the Park Commission will make a yes or no determination to the Village Board, and if the determination is no, the reasoning should be provided. Thorpe stated that the Village has to make sure that the property owner's rights and due process rights are being adhered to and that the hearing is fairly conducted. Thorpe stated that following the hearing, if the petitioner wants to appeal the matter further, there are more formal avenues such as the Zoning Board of Appeals. Thorpe stated that the hearing is not a public hearing and no audience participation should be allowed. Thorpe stated that the only purpose for the Park Commission members that night was to determine if Nyman followed the ordinance when determining the tree in question fit the definition of a nuisance tree. Thorpe stated that the burden of proof is on the petitioner to prove that the building inspector/zoning administrator was wrong. Thorpe stated that the hearing format will begin with an explanation of the file and the determination by Nyman; a presentation by McHugh; a presentation by Neilson and Havens and their representatives; a chance for McHugh to present a rebuttal; and then a chance for the commission members to ask questions. Thorpe stated that since the Park Commission is not a quasi-judicial body, the deliberation and decision must be made in open session. Thorpe then entered into the record affirmative answers from McHugh and from Neilson and Havens and their attorney, Robert Leibsle, that they were satisfied with the notice they received of the hearing date and time;

that they had adequate time to prepare; and that they agree to the hearing format as described by Thorpe. Thorpe also had the Park Commission members enter into the record that they were all unbiased on the issue and that they were prepared to make a decision on the appeal. Nyman then presented the documents submitted by the applicants for the permitting process. Nyman stated that the applicants began meeting with the Village staff last fall and three Conditional Use Permits were approved by the Village Board February 1, 2010. Regarding the tree removal permits for the residential construction project, Nyman stated that the plan is to cut down 31 of 108 "protected" trees on the lot. Nyman stated that since only 27 percent of the protected trees were proposed to be cut down, a conditional use permit for the tree removal was not required. Nyman stated that the ordinance calls for a CUP if 30 percent or more of the protected trees on a lot are proposed to be cut down. Nyman stated that the tree in question did not require a tree removal permit under the current ordinance because it was determined to be a "nuisance tree," which is defined in the ordinance as: "A nuisance tree is any tree that is diseased, dead, injured or in danger of falling to the extent that said tree's continued presence threatens the immediate health or safety of nearby persons or property." Nyman stated that the ordinance also allows for the applicant to apply for a tree removal permit for the tree being appealed under the "protected tree" parameters of the regulations and a permit could be issued to take the tree down under those parameters. Attorney Thorpe then read into the record an inspection report on the subject tree that was prepared by The Care of Trees, Crystal Lake, IL. The second report was requested by the Park Commission. The report submitted by The Care of Trees Certified Arborist Tom Paulsen states that the age of the tree being appealed is estimated to be over 200 years old and it is his recommendation that the "tree be removed as I don't think it is reasonable to expect it to survive the construction this close to its structure." McHugh stated that his appeal is specific to Nyman's decision on Monday, April 19, 2010 to make a determination that the tree in question could be classified as a "nuisance tree" under the terms of the ordinance. McHugh stated that he would like to appeal that the process was not followed and the decision to call the tree in question a nuisance tree was wrong. McHugh stated that Nyman did not have adequate information to make the determination that the tree could be classified as a "nuisance tree." Gary Neilson stated that he and his wife have owned property and resided in the Village of Fontana for more than 20 years, and they care about the community. Neilson stated that it has been their intent since they first considered purchasing the lot to work with the Village and within the parameters of the Municipal Code. Neilson stated that they hired McCormack & Etten Architects, Attorney Robert Leibsle and Certified Arborist Jeff Wilson of Wachtel Tree Science to assist them with the approval process for their residential construction project. Neilson stated that they own other property in the Village and over the years, they have planted more than 20 new trees on those properties and have never cut one tree down. Neilson stated that the subject lot is a very tough lot to plan for residential construction because of a stream that runs through the lot and because of a sewer easement. Architect Ron McCormack then presented exhibits of the lot that depict the building envelope, and stated because of the stream, the utility easement, the topography of the lot and the desire to save large clusters of trees, the building site was very limited. McCormack stated that the final site that was approved was selected because it caused the least amount of disruption to all of the trees on the lot. Neilson then presented an aerial photograph of the north shore and subject lot that he had shot from a helicopter last summer when he was considering purchasing the lot. Neilson stated that he wanted to review a photo of the tree canopy prior to making a decision on purchasing the lot and beginning to plan for the construction of a new residence. Neilson stated that they initially wanted to save the tree in question; however, when the village staff informed him that the proposed site of the residence had to be moved back off a utility easement area, it was no longer possible to attempt to try to save the tree. Neilson stated that he also wanted to point out that two of three support cables that were installed in the tree at some time in the past have now snapped, which is evidence further than what was submitted by the arborists that the tree limbs are continuing to split apart and are in danger of falling, with or without the construction project. Jeff Wilson of Wachtel Tree Science stated that his company is not in business to cut down trees for construction projects. Wilson stated that he only works on projects that are planned to save as many of the existing trees as possible. Wilson then presented the reports and documents he used to make the determination of the tree being appealed. Wilson stated that the initial goal of the applicants was to save the tree in question. Wilson stated that upon review, the initial site of the house probably also would have caused enough disturbance to the tree's root system that the tree would not have survived the construction process. Wilson stated that the two snapped cables mentioned by Neilson provide evidence that the tree has been and will continue to split apart. Wilson stated that he also used a Resistograph at the base of the tree and located some very large hollow spots in the trunk. Wilson stated that he also observed that the base of the tree shows growth in areas where trees that are falling down grow more wood to help keep them from falling. Wilson stated that the tree is definitely at risk of falling. Wilson stated that the other evidence that the tree is beginning to die is three areas of die-back at the

top of the tree. In his report, Wilson stated that he estimated the age of the tree to be 130 to 160 years old. Wilson stated that the only way to be certain of the age is to cut it down and count the rings. Wilson said he also could have taken a boring to estimate the age of the tree, but he used a method in which you take a similar tree of the same species and come up with a calculation based on years per inch of growth. Neilson stated that the report Wilson just presented was based on work completed back in November. Neilson stated that he had the work completed not to justify the tree being cut down, they were trying to preserve it. Neilson stated that the tree is not dead yet, but it is not safe. Attorney Leibsle stated that the appeal filed by McHugh appears to be related to the approval procedure that is spelled out in the village ordinance, and the dispute is a matter between the Geneva Lake Conservancy and the Village. Leibsle stated that his clients followed the proper, legitimate approval process to obtain the required permits and they did not influence the procedure. Leibsle stated that his clients started the planning process with the goal of saving the tree, but they could not. Leibsle stated that as well as the tree qualifying under the ordinance as a nuisance tree that does not require a permit for removal, his clients also could obtain a tree removal permit for the tree under other provisions of the ordinance. For instance, Leibsle stated that the tree is located in the approved building footprint of the new residence. Leibsle stated that there are at least two other provisions in the ordinance that would enable his clients to apply for and receive a tree removal permit. Leibsle stated that the stop work order Nyman placed on the tree is not right and there are three to four provisions in the Village ordinance that allow for its removal. Leibsle stated that his clients would like to have the tree removed as soon as possible so the residential construction project can be resumed. McHugh stated that he did not have any rebuttal items and he agrees with the assessment by Leibsle that the issue at hand is a procedural problem with the current ordinance. McHugh stated that the tree is not dead or dying so Nyman should not have made the determination that the tree is a nuisance tree. McHugh stated that the approval process evolved out of the statement made at the April 5, 2010 Village Board meeting that the tree is dead, diseased or dying, and Nyman didn't have enough information at the time the tree removal permits were issued. Nyman stated that he stands by his determination that the tree is a nuisance tree under the ordinance and it does not require a tree removal permit to cut down a nuisance tree. Nyman stated that it is important to keep in mind that the entire definition of a nuisance tree is: "A nuisance tree is any tree that is diseased, dead, injured or in danger of falling to the extent that said tree's continued presence threatens the immediate health or safety of nearby persons or property." Nyman stated that even if the tree weren't deemed a nuisance tree, the applicants could obtain a tree removal permit under three different sections of the Natural Resources Conservation (Tree) Ordinance. Wilson stated that the Village may have to consider further amendments to the Tree Ordinance. O'Brien stated that she agrees the ordinance may have to be amended again in order to address the procedural concerns. Wegner stated that she feels that if the tree is cut down, it should have to be subject to the tree replacement terms of the ordinance. Thorpe stated that from the statements made during the hearing he would suggest that the commission consider a motion to recommend to the Village Board that direction be given to staff to reconsider the nuisance tree designation of the subject tree, but that the commission does find and does recommend to the Village Board that the subject tree is eligible for a tree removal permit that could be issued the next day. Thorpe stated that the motion would allow both sides to move forward. O'Brien/Lobdell 2<sup>nd</sup> made a MOTION to recommend to the Village Board that direction be given to Village staff to reconsider the nuisance tree designation of the subject tree, but that the commission does find and does recommend to the Village Board that the subject tree is eligible for a tree removal permit immediately. The MOTION carried without negative vote. Laura Coates abstained because it was her first meeting and she was not yet familiar with the Tree Ordinance.

Thorpe stated that since the appeal hearing was not a public hearing, he suggested that the Park Commission allow members of the audience make statements if desired. Charles Harrett stated that he started the whole issue because of his passion for the tree. Harrett asked Neilson and Havens if they would consider donating a portion of the cut down tree to the Village for display at the Mill House Pavilion or another municipal site. Neilson stated that they will work with the Village and donate a "slice" of the tree to the Village.

### **Adjournment**

O'Brien/Wegner 2<sup>nd</sup> made a MOTION to adjourn the meeting at 7:20 pm, and the MOTION carried without negative vote.

Note: These minutes are subject to further editing. Once approved by the Park Commission the official minutes will be on file at the Fontana Village Hall.

Approved: 5/19/10