



**AGENDA OF THE
PLANNING COMMITTEE MEETING**

**CITY OF BIRCHWOOD VILLAGE
WASHINGTON COUNTY, MINNESOTA
April 24th, 2025
7:00 P.M.**

Planning Committee

Andy Sorenson, Chair
Mike Kramer, Secretary
Michelle Maiers
Michael McKenzie
Casey Muhm
Ryan Hankins, Council Liaison

APPROVE AGENDA

OPEN PUBLIC FORUM

ANNOUNCEMENTS

APPROVE MINUTES---Meeting of March 27th, 2025 was cancelled

A. Variance Review for 425 Lake Ave

Hold Public Hearing

A. Review Findings by Marcus Johnson, City Engineer*

i. 302.050, Impervious Surfaces and Lot Coverage.

1. Assign Conditions

2. Approve or Deny Variance*

ii. 302.055.2.a.4, Land Disturbance Activity Standards – no grading or filling
shall be permitted within 20 feet of the OHWL of the lake.

1. Assign Conditions

2. Approve or Deny Variance*

* Denotes items that have supporting documentation provided

iii. 302.055.2d7b3, requires protective buffer strip of vegetation at least 16.5' back from the OWHM.

1. Assign Conditions

2. Approve or Deny Variance*

iv. Approve Findings of Fact

1. Is the request reasonable with the general purposes and intent of the ordinance? Why or why not?
2. Are there special conditions or circumstances that are peculiar to the land, structure, or building involved? Why or why not?
3. Were the special conditions or circumstances created by the applicant's action or design solution? Why or why not?
4. Will granting a variance result in any increase in the amount of water draining from the property? Why or why not?
5. Will granting the variance impair an adequate supply of light and air to adjacent property, or unreasonably diminish or impair established property values within the surrounding area, or in any other respect impair the public health, safety, or welfare of the residents of the City? Why or why not?
6. A variance must not be granted simply because there are no objections or because those who do not object outnumber those who do?
7. Is the applicant proposing a reasonable use for the property under terms of the Zoning Code? Why or why not?

B. Correcting Variance Document-131 Wildwood Ave

Review variance document for 131 Wildwood Ave*

ADJOURN

* Denotes items that have supporting documentation provided



Real People. Real Solutions.

3507 High Point Drive North
Bldg. 1 Suite E130
Oakdale, MN 55128

Ph: (651) 704-9970
Bolton-Menk.com

MEMORANDUM

Date: 4-21-2025
To: City of Birchwood Village
From: Marcus Johnson, Bolton & Menk
Subject: 425 Lake Avenue Variance
City of Birchwood Village
Project No.: ON1.131471

Planning Commission,

After reviewing the application. It is Bolton and Menk's recommendation to consider the retaining walls as de minimis. Additionally, it is recommended the steps and the platform to be constructed with previous options. The retaining wall would help the erosion problem and slow the water run-off to help in containing the water within the property, while making the property still functional to the homeowner. Without showing an increase in impervious surfaces, Bolton and Menk does not see a need for a variance for a impervious surface at this time.

Sincerely,

Bolton & Menk, Inc.

Marcus Johnson PE
Associate Project Engineer

435 Lake Ave



**CITY OF BIRCHWOOD VILLAGE
VARIANCE APPLICATION**

207 Birchwood Ave., Birchwood, MN 55110
651-426-3403 • info@cityofbirchwood.com

FOR OFFICIAL USE ONLY

(per Minn. Stat. 15.99)

Application Received Date: _____

Amount Paid: \$ _____

Date of Payment: _____

Payment Type:

- Cash
- Check (Number: _____)
- Credit Card

Application Complete:

Yes

No - Other

Deficiency: _____

Date of Determination: _____

Date Notice of Deficiency Sent: _____

☐ Application Withdrawn by Applicant
Date: _____

- ☐ Variance Deadline Extended, because:
- ☐ Applicant requested extension.
- ☐ City staff require additional time to evaluate the application.
- ☐ The state or another agency must review the application.
- ☐ The application was received too late for city staff to process and place on the agenda of the next Planning Commission meeting.

Date Variance Extension Letter Sent: _____

Length of Extension: _____ days

Completed applications for variances submitted on or before the **first of each month** will generally be considered by the Planning Commission at its next meeting on the fourth Thursday of that month. Applications submitted after the first of the month will generally be considered the following month.

Upon recommendation of the Planning Commission, the City Council will consider and decide the variance application.

A. Applicant's Name:

Carson Schifsky

Telephone: 651.260.3248

Home:

Work/Cell:

B. Address (Street, City, State, ZIP):

PO Box424 Lake Elmo MN 55042

C. Property Owner's Name (If different from above):

Robert davidson

Telephone

Home: _

Work/Cell: (651) 900-9289

D. Location of Project:

425 Lake Avenue

E. Legal Description:

SubdivisionName LAKEWOOD PARK 3RD DIVISION Lot 5 Block 1 SubdivisionCd 25442 Subdivision
Name LAKEWOOD PARK 3RD DIVISION Lot 4 Block 1 SubdivisionCd 25442
THE EAST HALF OF LOT 4, BLOCK 1, LAKEWOOD PARK THIRD DIVISION,
WASHINGTON COUNTY, MINNESOTA. ALSO: LOT 5, BLOCK 1, LAKEWOOD PARK THIRD
DIVISION, E

F. Description of Proposed Project:

Retaining Wall construction and steps access to lake.

G. Specify each section of the City Code for which a variance is sought. (Variances are not to be granted for the provisions of 301.050 but instead may be granted for other sections of chapters 200 or 300 that cause the existing or proposed structure or use to be non-conforming).

H. Explain how you wish to vary from the applicable provisions of the ordinance:

1. 302.050, Impervious Surfaces and Lot Coverage. 2. 302.055.2.a.4, Land Disturbance Activity Standards – no grading or filling shall be permitted within 20 feet of the OHWL of the lake.
3. 302.055.2d7b3, requires protective buffer strip of vegetation at least 16.5' back from the OWHM.

I. Please attach a site plan or accurate survey as may be required by ordinance, a Plot plan drawn to scale showing existing and proposed new and changed structures on the lot, and existing structures on adjacent lots.

J. Please answer the following questions as they relate to your specific variance request:

1. In your opinion, is the variance in harmony with the purposes and intent of the ordinance?

☒ Yes

☐ No

Why or why not?

Helping prevent erosion of the hillside into the lake.

2. In your opinion, is the variance consistent with the comprehensive plan?

☒ Yes

☐ No

Why or why not?

No major changes affect the comp plan.

3. In your opinion, does the proposal put property to use in a reasonable manner?

☒ Yes ☐ No

Why or why not?

Yes, we are adhering to as many ordinances as we can to build a wall that will help prevent erosion.

4. In your opinion, are there circumstances unique to the property?

☒ Yes ☐ No

Why or why not?

Hillside is very steep and washing out. This creates a maintenance issue.

5. In your opinion, will the variance maintain the essential character of the locality?

☒ Yes ☐ No

Why or why not?

The wall features will be aesthetically pleasing and help maintain the character of the neighborhood.

K. Are other governmental permits required for the project, including requirements of the Rice Creek Watershed District? Please attach copies of permits, or evidence they are unnecessary.

☐ Yes ☒ No

Which permits are required?

L. After the proposed project, will the impervious surface of the lot exceed 25 percent?

☒ Yes ☐ No

Please include the information in the following table.

	EXISTING	PROPOSED	CHANGE
1. Total Square Footage of Lot	12,713		
2. Maximum Impervious Surface			
3. Roof Surface	3,832		
4. Sidewalks			
5. Driveways			
6. Other Impervious Surface	182	284	
7. Total of Items 3-6	4,014		
8. Impervious Surface Infiltrated			
9. Item 8 subtracted from Item 7			
10. Percent Impervious Surface			2.2%

The Planning Commission and City Council must make affirmative findings on each of the five criteria in question J in order to grant a variance. The applicant for a variance has the burden of proof to show that all of the criteria have been satisfied.

The City and its representatives accept no responsibility for errors and/or damages caused due to incomplete and/or inaccurate information herein. It is the responsibility of the applicant to ensure the accuracy and completeness of this information.

304.020 Variance Application Requirements. Before consideration of a variance, an application for variance shall be made on forms provided by the City Clerk. The application shall be accompanied by the required information described below and by all required fees. Each application must include at a minimum:

- a) The legal description and address of parcel.
- b) Name, address, and phone number of applicant (and of the owner if owner is not the applicant).
- c) Plot plan drawn to scale. Elevation contour lines are required.
- d) Plan showing existing and proposed new and changed structures on the lot.
- e) Existing structures on adjacent lots.
- f) A certificate by a registered professional land surveyor verifying the location of all buildings, setbacks, and building coverage.
- g) A certificate by a registered professional land surveyor certifying other facts that in the opinion of the City are necessary for evaluation of the application.
- h) A separate enumeration of each section of the code to which a variance is requested along with a demonstration that the criteria set forth in section 304.040 are met for each enumerated section.
- i) Evidence demonstrating compliance with regulations of other governmental units when required by provisions of this code, State Law, or regulations of other governmental units. Non-limiting examples of government units which may have applicable regulations include the State of Minnesota, Rice Creek Watershed District, Minnesota Department of Natural Resources, White Bear Lake Conservation District, and the Minnesota Pollution Control Agency.
- j) Other documentation as applicable and as required by the City Code for the type of variance sought (see for example the impervious surface requirements of 302.050)

STAFF REPORT

Meeting Date(s): April 24, 2025 Planning Commission
May 13, 2025 City Council

Scope: Variances – See Report
Applicant: Schifsky Companies, LLC

Representative: Carson Schifsky
Property Location: 425 Lake Avenue

Report prepared by Ben Wikstrom, Planning Consultant

ATTACHMENTS

1. Application
2. Letter of Approval for previous variances (2024)
3. City Engineer's letter
4. Plans
5. Pictures

BACKGROUND

Schifsky Companies, LLC (Carson Schifsky) has applied for multiple variances to allow construction of a retaining wall on the property located at 425 Lake Avenue.

The property can be seen in the aerial below, taken from the Washington County GIS website:



SURROUNDING USES

North: White Bear Lake
East: Single-family home
South: Lake Avenue and City park
West: Single-family home

In 2024, the applicant received approval of two variances, to allow construction of a retaining wall within the 50-foot setback from the Ordinary High-Water Line, and to allow the wall to exceed 4' in height. At that meeting, it was determined that the project would need additional variances. After review of the plans and the discussion at the meeting, and conference with the City Attorney, it was determined that variances to the following sections of the zoning ordinance were necessary:

1. 302.050, *Impervious Surfaces and Lot Coverage*.
2. 302.055.2.a.4, *Land Disturbance Activity Standards – no grading or filling shall be permitted within 20 feet of the OHWL of the lake*.
3. 302.055.2d7b3, *requires protective buffer strip of vegetation at least 16.5' back from the OWHM*.

It should be noted that at the time of approval of the 2024 variances, the intent of the property owner had changed from a more typical retaining wall to a boulder wall; since that time, the owner has decided to revert, or change, to a retaining wall using stone and mortar. Renderings show the proposed wall later in this report. The approval letter did not state the materials required for construction of the wall; while the aesthetic is important to the character of the neighborhood as part of the variance approval, the City does not mandate certain materials for construction and did not require a boulder wall following the 2024 hearings that approved the location and height. More information can be found in the "ADDITIONAL STAFF COMMENTS" portion of this report.

RELATION TO ORDINANCE

As always, variances are to be considered in relation to the criteria listed in the ordinance.

SUBD. 1.

A. Variances shall only be permitted

- i. when they are in harmony with the general purposes and intent of the ordinance and*
- ii. when the variances are consistent with the comprehensive plan.*

B. Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the zoning ordinance.

SUBD. 2. "Practical difficulties," as used in connection with the granting of a variance, means that:

- i. Special conditions or circumstances exist which are peculiar to the land, structure, or building involved.*
- ii. The condition which result in the need for the variance were not created by the applicant's action or design solution. The applicant shall have the burden of proof for showing that no other reasonable design solution exists.*
- iii. The granting of a variance will result in no increase in the amount of water draining from the property.*
- iv. Granting the variance will not impair an adequate supply of light and air to adjacent property, or unreasonably diminish or impair established property values within the surrounding area, or in any other respect impair the public health, safety, or welfare of the residents of the City.*
- v. No variance shall be granted simply because there are no objections or because those who do not object outnumber those who do.*
- vi. Financial gain or loss by the applicant shall not be considered if reasonable use for the property exists under terms of the Zoning Code.*

Perhaps a clearer understanding of how “practical difficulties” are determined is found by a League of Minnesota Cities summary of their relation to State Statute:

A. Practical difficulties

“Practical difficulties” is a legal standard set forth in law that cities must apply when considering applications for variances. It is a three-factor test and applies to all requests for variances. To constitute practical difficulties, all three factors of the test must be satisfied.

1. Reasonableness

The first factor is that the property owner proposes to use the property in a reasonable manner. This factor means that the landowner would like to use the property in a particular reasonable way but cannot do so under the rules of the ordinance. It does not mean that the land cannot be put to any reasonable use whatsoever without the variance. For example, if the variance application is for a building too close to a lot line or that does not meet the required setback, the focus of the first factor is whether the request to place a building there is reasonable.

2. Uniqueness

The second factor is that the landowner’s problem is due to circumstances unique to the property not caused by the landowner. The uniqueness generally relates to the physical characteristics of the particular piece of property, that is, to the land and not personal characteristics or preferences of the landowner. When considering the variance for a building to encroach or intrude into a setback, the focus of this factor is whether there is anything physically unique about the particular piece of property, such as sloping topography or other natural features like wetlands or trees.

3. Essential character

The third factor is that the variance, if granted, will not alter the essential character of the locality. Under this factor, consider whether the resulting structure will be out of scale, out of place, or otherwise inconsistent with the surrounding area. For example, when thinking about the variance for an encroachment into a setback, the focus is how the particular building will look closer to a lot line and if that fits in with the character of the area.

The items from the ordinance to which the applicant has applied for variances are listed in the “VARIANCES” section of this report, in the following pages.

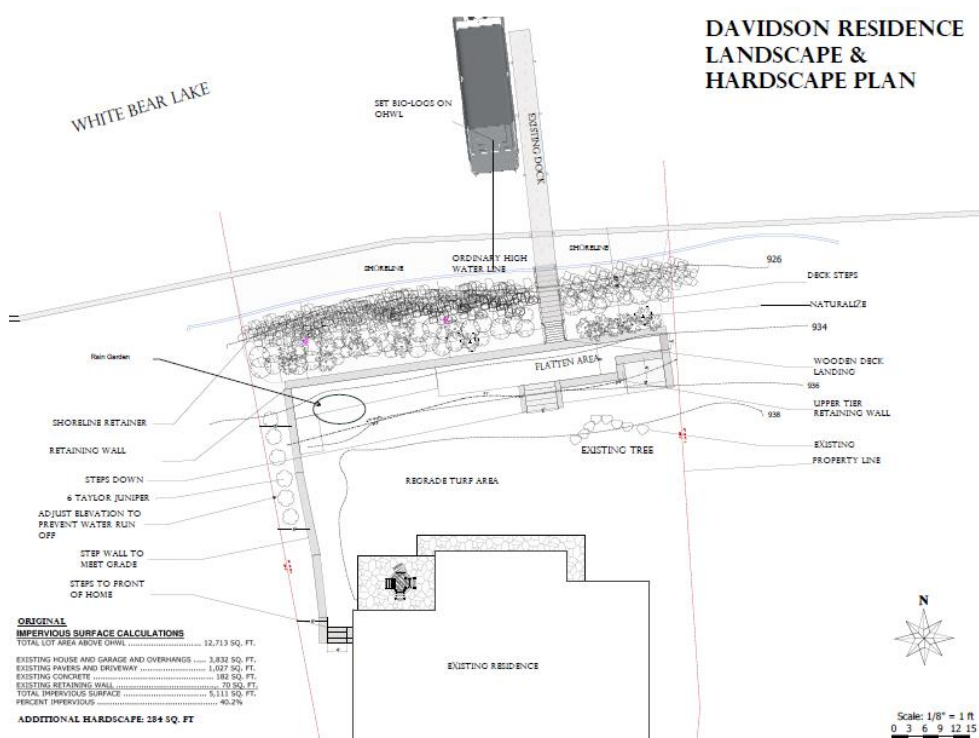
PROPOSED CONSTRUCTION

The applicant is proposing to construct the retaining wall to mitigate erosion problems that are occurring on site. The area of impact is shown on the pictures below, followed by a rendering of the site and wall.





Some clarification will be needed from the applicant regarding the changes in proposed materials, as well as the tiering of the wall and locations. The plan submitted is shown here (as always, see the attachments for a clearer depiction):



VARIANCES AND STAFF ANALYSES

Each of the requested variances is listed below, followed by staff comment.

1. 302.050, Impervious Surfaces and Lot Coverage

The prevailing requirement as found in the variance section of the impervious surface ordinance is the following, under the stormwater management list:

302.050(6)(a)v. For variances, documents that the rate and volume of stormwater runoff from the property from a hundred-year storm is not increased after the proposed project has been completed.

The impervious surface increase is due only to the top of wall; the applicant has stated that no additional hardsurface will be constructed. Many cities will not consider the minimal width of the top of a retaining wall as increased impervious surface, as the impact on stormwater management – which was the impetus for impervious surface ordinance development – is negligible and the construction of these walls will help to mitigate the erosion problems. However, Birchwood Village does not specify any such exceptions within the ordinance, and the City Council directed staff to require a variance for that increase in impervious surface following the 2024 approvals.

The City Engineer has provided a comment letter, explaining the historical precedent and correlative reasoning used for measurement of the impact of impervious surfaces in similar situations. The Engineer believes that the top of wall would create a de minimis impact on the stormwater management near the lake. Nonetheless, as part of the building permit review, staff will ensure that the direction of flow, the rain garden placement and design, the buffer strip, etc. will not create additional, unfiltered drainage into White Bear Lake. That requirement will be reflected as a condition, stated in the approval letter sent to the applicant, should the item pass.

Regardless of the precedent and consequent measurement, and because the variance may be technically required, the following should be stated: it is the opinion of staff that the 284 square foot increase in impervious surface is reasonable considering the positive impact of the wall on erosion; that it is not a result of actions by the property owner; and that it will not negatively impact the character of the neighborhood. The addition of the rain garden, buffer strip, and native plantings at the base of the wall will enhance the filtration of any water resulting from the addition of the wall width, as well as providing aesthetic relief to the wall massing. These opinions will be reflected as findings should they be required for approval.

2. 302.055.(2)(a)4. Land Disturbance Activity Standards – no grading or filling shall be permitted within 20 feet of the OHWL of the lake

This variance is necessary as a matter of procedure, as any construction of the wall will occur within the 20-foot setback. During the previous meetings, it was determined that a separate variance from this requirement was necessary, rather than as part of the variance to allow the construction of the wall within the 50-foot OHWL setback.

Staff views this request as reasonable considering the location of the existing slope and necessary placement of the wall to mitigate the erosion problem; agrees that the proposed location is not a result of any action by the applicant, as can be seen in the pictures of the existing shoreline; and doesn't view the proposed land disturbance or placement of the wall as having a negative impact on the character of the neighborhood.

3. 302.055.(2)(d)(7)(b)iii, Land Disturbance Activity Standards - requires protective buffer strip of vegetation at least 16.5' back from the OWHM

The top of wall, as proposed, is measured to be 15.5' from the OHWL, while the bottom of the wall will be slightly closer. There will be a protective buffer strip, as can be seen in the renderings and the planting plan, which will accomplish the intended goal and be behind the rip rap of the shoreline.

If the location of the wall is allowed, this variance request is seen as reasonable, not resulting from any action by the landowner, and not in conflict with the character of the neighborhood.

APPLICANT COMMENT

See the application (attached) for comments from the applicant related to the variance requests.

ADDITIONAL STAFF COMMENTS

The applicant worked with the City to ensure application for the remaining necessary variances. In an email to the applicant, staff made the following observation of the process that will be followed prior to construction of the wall.

“Also, note at the end of City Code Section 301.070, the language that states the following:

NOTE: A separate Conditional Use Permit is not required for a land disturbance activity in conjunction with construction as part of a building permit as granted. However, as part of the Building Permit Application, the applicant shall provide information required pursuant to Section 306.030 and shall follow all provisions of Sections 302.050 IMPERVIOUS SURFACES and 302.055 LAND DISTURBANCE ACTIVITY STANDARDS.”

As stated earlier in the report, the design of the wall has changed from a boulder wall (at the time of earlier variance approvals) back to a stone/block and mortar design. The renderings show a good depiction of the proposed materials. One adjacent neighbor was concerned with the height of the wall and hard corner near their property, but the City Council approved a variance to the wall height and was appeased by the change to a boulder wall. As stated earlier, in a letter outlining the findings for approval, no mention of the boulder-type construction was made, so the applicant can change the design.

One other item mentioned in the approval letter from 2024 was the possibility of a variance being required for reconstruction of the steps and landing. The applicant has stated that the steps and landing will be the same size as the existing, and preferably in the same location (if possible, considering design and stability factors). Any change will be minimal, according the applicant, and not an expansion. This will be listed as a condition of approval, as well, assuming the variances are approved.

Concerning the current applications, the proposed retaining wall meets the criteria for the variances, and will address a problem with erosion that is evident on the site. The applicant must receive approval from the Rice Creek Watershed District (was in process last year, and may be complete), and any approval of the variance should be contingent on receiving that approval. Any other applicable approvals (WBCD, DNR) are also required prior to construction.

STAFF RECOMMENDATION

Staff recommends approval of the variances at 425 Lake Avenue, based on the following findings:

1. A retaining wall is necessary to mitigate an erosion problem on the slope to the lake within the OHWL setback.
2. A retaining wall is a reasonable request to mitigate the problem.
3. The character of the neighborhood would not be altered with approval of the variances.
4. Neighborhood property values will not be diminished with approval of the variances and construction of the wall.
5. The slope of the property, creating the need for the wall and variances, was not established by the applicant.
6. If the applicant receives approval of all necessary jurisdictional permits, the City concurs that the proposed construction is necessary and reasonable.
7. The deck area to be replaced must be of the same size as or smaller than the existing structure.
8. The City Engineer must approve the design of the wall and stormwater management plan at the time of building permit review.

Findings will be determined following the Planning Commission's discussion and recommendation, and passed on to the City Council for inclusion in any letter of approval or denial.

To: Birchwood Planning Commission
From: Ryan Hankins
Re: Correcting 131 Wildwood Ave. variance grant

I provided a similar document to the council in April. In case you didn't watch the meeting, I think you may wish to discuss the city code. I would avoid discussion of the merits of the variance, beyond a general discussion of the code itself. The issue is as follows.

The variance application for 131 Wildwood Ave. sought approval to increase the structure's height. The requested variance pertained to height restrictions; however, variances are not required when a structure already conforms to the height code. The applicants have clearly stated that their proposed structure conforms to the height code.

However, the proposed structure may exceed the height of the previously existing non-conforming structure within the OHWL (ordinary high water line) setback. Because Birchwood's code does not allow such an expansion, a variance to the setback code is required. The applicable variance is determined by the ordinance that the expansion does not conform to (the setback requirement), rather than the direction of the expansion (a vertical increase in height). The variance recommended by the city planner and subsequently granted by the council was for the height restriction (302.045), likely because the expansion was vertical. However, the appropriate variance should be for the setback requirement (302.020), as the expansion occurs within the setback.

My understanding is that the intent of the applicant was to apply for this variance, and the intent of the council, if not its action, was to grant the variance to allow vertical expansion within the setback. My experience with planning and zoning in Birchwood has been to err on the side of dotting t's and crossing i's.

Although staff should not issue a building permit without all necessary variances, if one were issued in error, the city, the applicant, and the contractor could face legal and financial risks. While this may seem like a minor procedural detail, a similar issue in Minnetonka led to a major legal dispute: <https://www.twincities.com/2010/10/10/garage-dispute-heads-to-court-again/>. As of that article's publication fifteen years ago, Minnetonka had already spent \$31,000 defending itself.

In another case, in Minneapolis, a permit was improperly granted for a replacement structure, and the existing structure was demolished, but the permit was revoked for the replacement because the replacement did not meet code. Minneapolis was found negligent: <https://law.justia.com/cases/minnesota/supreme-court/1989/c7-87-1394-2.html>

An example demonstrating the application of code and a tale of Woodbirch

First, a few terms.

A *conformity* or *conforming structure* is one that meets the requirements in city code.

A *non-conforming structure* is one that does not meet the code in some way. The *non-conforming portion* of a structure or *non-conformity* is the portion that exceeds the particular requirement.

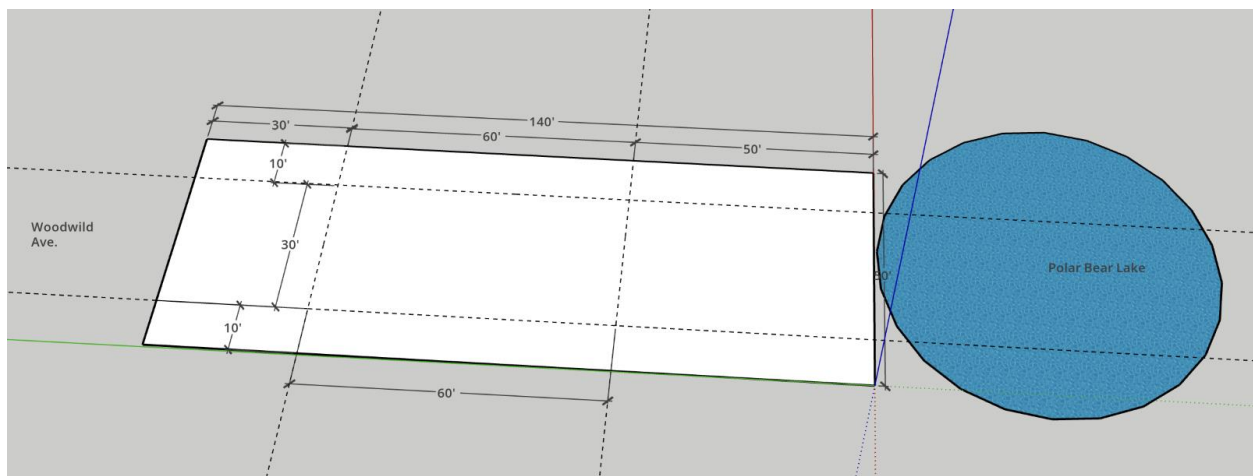
A *variance* makes a new non-conformity legal. It does not make a non-conformity conforming.

A non-conforming structure can be legal in one of two ways. First, it could have been created before the requirement was created. Second, it could have been allowed by variance. In both these cases, these structures are *legally non-conforming*. It's not relevant to our purposes, but a structure built (even with permits) that violates the zoning code is an *illegal non-conforming structure*.

Now, consider the following drawing of a small lakefront lot in the City of Woodbirch Village, which has an identical city code to our own. At the left is Woodwild Ave. and to the right is Polar Bear Lake. Above and below the property are neighboring lots.

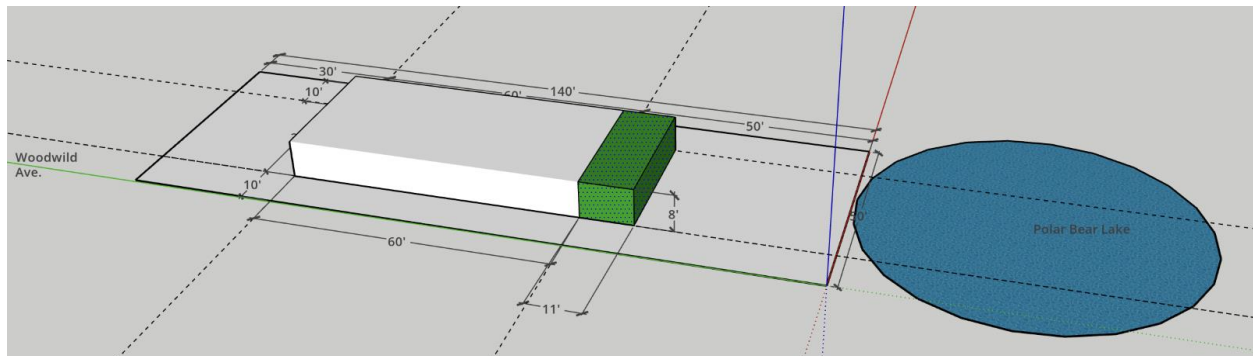
The lot itself is very small: 140 feet deep and 50 feet wide. The setbacks are shown on the plan. They are 10 feet from the neighboring properties, 30 feet from Woodwild Ave. and 50 feet from Polar Bear Lake (from its ordinary high-water line).

The dotted-line rectangle in the middle of the lot composes the conforming area that could be used for construction in Woodbirch.

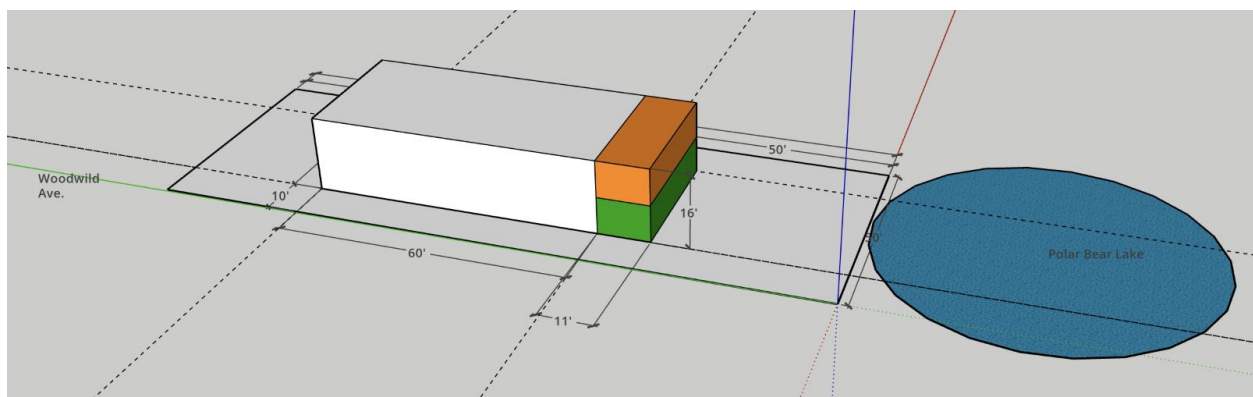


Now consider a structure on the lot. We can say it's a house. The structure was constructed long before zoning codes existed. It is simplifying to draw it as a box. The lot and structure now look like this (see below). The structure was constructed legally, because no zoning code was in place at the time of its construction. Because of that, it is legally non-conforming, and the non-

conforming portion of the structure (in green) is 30 feet across the lot, 8 feet high (one story) and extends (encroaches) 11 feet into the setback from Polar Bear Lake.



Now consider that, under current zoning code, its owner, Woody Birch, proposes to add a second story to the structure. The height of the entire structure is increased by 8 feet to 16 feet, including an expansion in the non-conforming area. This increase within the setback is shown in orange (see below).



The question is: how is this regulated under the zoning code? For simplicity, the height of the structure, with the addition, is well below the height code. To characterize the proposed change to the structure: the structure is being expanded by 8 feet in the vertical direction. Similarly, the non-conforming portion of the structure is being expanded by 8 feet in the vertical direction.

Minnesota Statute applies (*italics mine*). It reads, in parts:

Minnesota Statute 462.357 Subd. 1e. **Nonconformities.**

- (a) Except as otherwise provided by law, any nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an additional control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, but *not including expansion* [...]
- (b) Any subsequent use or occupancy of the land or premises shall be a conforming use or occupancy. *A municipality may, by ordinance, permit an expansion* or impose upon

nonconformities reasonable regulations to prevent and abate nuisances and to protect the public health, welfare, or safety. [...]

Thus, no expansion of a non-conformity is allowed, unless the city creates an exception to allow an expansion. Woodbirch's zoning code was written considering this. Woodbirch's non-conforming code (301.050(C)) says (*italics mine*):

A non-conforming pre-existing structure or non-conforming pre-existing use may not be moved or expanded except:

1. If the expansion or move brings the non-conforming pre-existing structure or use into conformance with the zoning code; or
2. The conforming portion of a non-conforming structure *may be expanded provided that such modification or expansion does not increase the portion of the structure that is non-conforming*, and provided that the modification otherwise conforms to the provisions of the zoning code; or
3. The non-conforming portion of a non-conforming structure may be modified *so long as the modification does not increase the horizontal or vertical size* of the non-conforming portion;

That means that it is conforming under Woodbirch's zoning code to increase the height of the conforming portion of the structure (under exception 2 above). However, the structure may not be expanded (including vertically) within the setback without a variance. It could also be reduced in size (under exception 3 above). In this case, the variance that is needed is not to the height code. Both the existing and proposed structures conform to the height code. The variance that is needed to make the expansion of the non-conformity legal is to the setback code because the restriction in city code that prevents that expansion is the setback code, and no exception exists for the expansion to the non-conforming portion of a structure within a setback (including a vertical one) under the non-conforming use code.

The League of Minnesota Cities states that this is the purpose of a variance:

A variance is a way that cities may allow an exception to part of a zoning ordinance. It is a permitted departure from strict enforcement of the ordinance as applied to a particular piece of property. A variance is generally for a dimensional standard (such as setbacks or height limits). A variance allows the landowner to break a dimensional zoning rule that would otherwise apply. [<https://www.lmc.org/resources/land-use-variances/>]

It is certainly understandable to reason that a variance to the height code is needed, because both the proposed expansion and height are vertical, but a variance to the height code is only needed where an expansion of the structure would cause a portion of the structure to exceed both the height required to conform to code, and the height of any pre-existing structure. While the proposal in Woodbirch illustrated here exceeds the height of the pre-existing structure, the

proposed structure conforms to the height code and variances to the height code are not required to create a conformity with the height code.

However, a vertical expansion within a setback requires a variance to the setback code. Thus, to legally accommodate the proposed vertical expansion, Woody must secure a variance that specifically addresses the setback violation.