

EUREKA TOWNSHIP

**DAKOTA COUNTY
STATE OF MINNESOTA**

**Planning Commission Special Meeting
Scotts Miracle-Gro
August 22, 2017**

Call to Order

Chair Sauber called the Special Meeting to order at 7:00PM. Planning Commission members present were Nancy Sauber, Ralph Fredlund, Randy Wood and Bill Funk. Township Attorney Chad Lemmons was also in attendance. Deputy Clerk Cheryl Murphy recorded the minutes.

Hyponex Corporation – Scotts Miracle –Gro

Chair Sauber called the Planning Commission Special Meeting to order at 7:00 PM. Chair Sauber stated that the special meeting was called to review the Hyponex or Scotts Miracle-Gro request in preparation to give it to the Board under statute as the Board of Adjustments and Appeals. The Planning Commission will then review it and it has to be acted on in 60 days. The Planning Commission decision will be made tonight and any written explanation of the decision will be given to the people requesting the reconsideration.

Chair Sauber stated that the Planning Commission has before them a letter from Andria Beckham representing Scotts Miracle-Gro. The Commission also has a building application permit, the original site plans that were part of the Settlement Agreement, and another site plan that shows the proposed building that Scotts Miracle-Gro would like to build. The Commission has the online property data information, a copy of the Settlement Agreement and the Commission has memos from our Township Attorney, Chad Lemmons.

Chair Sauber asked the representatives from Hyponex if they would come to the microphone and make any statements they wish to make.

Ben Patrick, 22447 Highview Avenue, stated that Scotts Miracle-Gro is trying to go to the right avenues of the Settlement Agreement in order to get this building on the Scotts Miracle-Gro property. Part of the Settlement Agreement was future changes and going through the Township. Scotts Miracle-Gro wants to play by the rules and get that change made and hopefully communicate a little better with everyone here.

Mr. Patrick stated that Scotts Miracle-Gro is not changing the use of the property but they are taking the things they already have and moving it inside. If anything it is the opposite

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of expansion. We are trying to make less of an impact on the Township by moving things inside. There would be less of an impact with noise, worker safety in the winter because a lot of the things are frozen in the winter and we will be able to thaw inside, and also less impact with the roads around us. We store things at Scotts and Cloverleaf and we would not have to be going back and forth to get things that we could now store internally.

Chair Sauber stated that his application includes warehouse space as well as office space.

Mr. Patrick stated that it was another concern for them. Right now Scotts has a temporary office space in a trailer for five employees. From a severe weather standpoint and a safety standpoint they would not have to go outside to get to a safety shelter.

Chair Sauber pointed out that Scotts Miracle-Gro is proposing 400,000 square feet of asphalt pavement on their application. The proposed site plan shows new concrete, but the application just talks about asphalt. Chair Sauber also stated that there are three different areas of new concrete and noticed that the driveway part is blackened in.

Mr. Patrick stated that he believes that could probably be a clerical error as 40,000 square feet sounds more like it.

Karen Marty, stated that she is representing Scotts in the event litigation is necessary. She stated that the way the form is written, Alex [Allen] may have intended to express that the driveway approach and the parking lot is 400,000 square feet and the paved part is asphalt.

Commissioner Funk stated that there is a note on Page 10 that states that the total amount of impervious surface is 80,000 square feet.

Chair Sauber stated that would be an issue to be looked at.

Attorney Lemmons stated that it sounds like it is simply a typographical error. He stated that the Township would allow Scotts Miracle-Gro to adjust that figure.

Chair Sauber stated that it is 40,000 square feet of new paving, either asphalt or concrete, plus an 11,840 square foot building. That is in excess of an acre of new impervious surface.

Chair Sauber went on to say that the Scotts proposal is for warehouse with office, paving part of the surface, and the warehouse and office would be the same use for right now. Chair Sauber stated that based off the input the Planning Commission received from the Township attorney, She would like to go through a number of things:

- Building Permit Application. The size of the building that Scotts is proposing exceeds the limit on acreage that is over six acres. The 10.999 acres was eliminated to say, six or more in the Ordinance so there is not a cap on the non Ag-acreage as there had been before. Anything that is six or more acres is limited to 10,000 square feet of accessory building. What Scotts is proposing exceeds the limit.

- The addition of pavement and a structure comes up to more than an acre. The VRWJPO should have been gone to before the applicant came to us. Scotts is in the Vermillion River Watershed and the authority was taken back to the VRWJPO. The Planning Commission cannot proceed on anything until we have heard from the VRWJPO. Anything that would increase that much impervious surface would need the Storm Water Pollution Prevention Plan (SWPPP) adjustment and being that it is over an acre, I would think it also needs an NPDES to make the changes. Those are technical things about the application and then we get to the Ordinance that affects the property.

Chair Sauber said that Ordinance 3 is our Zoning Ordinance that, in addition to the Mining Ordinance, regulates our land use in the Township of Eureka. If you look on Page 46, Ordinance 3, Chapter 1, Section 3 it says:

“No structure shall be erected, converted, enlarged, reconstructed or altered, and no structure or land shall be used for any purpose nor in any manner which is not in conformity with the provisions of this Ordinance.”

If you turn to Page 50, Ordinance 3, Chapter 2, Section 1, Agricultural District, B, Permitted Uses and Structures, it states:

“The following uses are permitted uses and structures in the Agriculture District:

- 1. Any and all forms of commercial agriculture and commercial horticulture, as defined by this Ordinance.*
- 2. Agricultural buildings and accessory structures to agricultural buildings.*
- 3. Farm drainage and irrigation systems.*
- 4. Forestry, grazing and gardening.*
- 5. Sing-family dwelling.*
- 6. Accessory structures to single-family dwelling, such as detached private garages, decks, swimming pools, non-illuminated signs, fences, tool sheds and other such structures for the storage of domestic supplies and equipment. Mobile homes, trucks, semi-trailers, trailers, recreational vehicles (RVs), and campers, shall not be used as storage structures.*
- 7. Historic Sites.*
- 8. Home occupations.*
- 9. Private stables.*
- 10. Private dog kennels.*
- 11. Cell phone towers or wireless communication facilities.*
- 12. Accessory Solar Energy Systems.*

Chair Sauber continued and said that under the Settlement Agreement there is a description of what the use consists of. On Page 1 of 4 of the Settlement Agreement dated September 28, 2010:

“Description of Current Use: The Property is currently used for processing, bagging, palletizing and storing soil, rock, and mulch. Landscaping boulders and palletized concrete landscaping block are brought onto the property for storage. These Landscaping Products are trucked to the Property and stockpiled outside. The soil is broken up and screened outside and then a loader empties product into an inside hopper and is conveyed to a secondary screening system. Over-sized soil product is conveyed outside for reprocessing, and fine soil product proceeds to the bagging system. Mulch to be colored is loaded into an inside hopper, conveyed to the coloring machine and then is conveyed back outside to stockpiles. Dried mulch is loaded into an outside hopper and conveyed to a bagging machine inside the building. The rock is loaded into an outside hopper and is conveyed directly to the bagging machine. The Landscaping Products are processed by automated machines and then palletized. The loaded pallets are stretch wrapped and then roll on a conveyor outside the building where the pallets are picked up by forklift and stacked on the Property. The bagged and palletized Landscaping Products are stored on the Property until forklifts load them onto semi-tractor/trailers to fill customer orders. There will be no direct retail sales of Landscaping Products on the Property.”

Chair Sauber said it is not a permitted use.

Chair Sauber stated in Ordinance 3, Chapter 2, 1C, it lists the conditional uses and structures. Scotts Miracle-Gro use is not a conditional use.

It is not a:

- *Church, cemetery, airport, school, local government building and facility.*

It is not a:

- *Agricultural service establishment primarily engaged in performing agricultural or horticultural service on a fee or contract basis.*

It is not a:

- *Public utility or public service structure.*

It is not a:

- *Wind energy conversion system.*

It is not a:

- *Cell phone tower or wireless communication facility.*

It is not an:

- *On-site advertising sign larger than 50 square feet in size.*

It is not a:

- *Sign illuminated by a fixed light or lights.*

It is not a:

- *Single-family dwelling on a Pre-1982 Lot-of-Record.*

It is not a:

- *Feedlot.*

It is not a:

- *Ground-Mounted Accessory Solar Energy System.*

It is not a:

- *Off-site advertising sign larger than fifty (50) square feet.*

Chair Sauber stated again that it is not a conditional use. Chair Sauber stated that it is not an interim use.

- *Mining and extraction operations provided that they otherwise satisfy the requirements of the Mining Ordinances.*
- *Personal use airstrips as defined by the Federal Aviation Administration.*

Then in Section E, Prohibited Uses and Structures:

- *All other uses and structures, which are not specifically permitted as a right or by Conditional Use Permit or Interim Use Permit, including public stables and boarding of dogs, shall be prohibited.*

Chair Sauber continued saying that under the Building Permit part of our Ordinance, Ordinance 3, Chapter 4, Section 3, Performance Standards for Commercial Operations it talks about off-street parking and it also says, "*All commercial operations shall comply with the Ordinances.*" So it must comply with all Township Ordinances.

In Ordinance 3 that regulates the use of land, Chapter 4 of Ordinance 3 governs the issuance of building permits by the town. Section 3 of Chapter 4 sets forth the Performance Standards which commercial operations must satisfy before a building permit will be issued. Among those standards is compliance with all Township Ordinances applicable to commercial uses.

Chair Sauber commented that the applicant uses the property for sorting, grinding, bagging of mulch and soil for resale. The proposed structure is to act as a warehouse and office space for the applicant's present commercial operation.

Chapter 2, Section 1B of Ordinance 3 sets forth the permitted uses and structures in the town. The use of the property set forth is not a permitted use. The proposed structure is not a permitted structure.

Chapter 1, Section 3 of Ordinance 3 provides that no structure shall be erected that does not conform to the provision of Ordinance 3. The Settlement Agreement that was executed in the matter of the Town of Eureka, being Country Stone and Soil of MN, Inc. and Friedges Holdings, Inc., Dakota County District Court File No. 19HA-CV-09-3468, does not acknowledge the then use or present use as a permitted use, a conditional use, an interim use or a legal non-conforming use. That Settlement Agreement contains no term that allows for the construction of additional structures. The building proposed by the

applicant is not permitted pursuant to those provisions of Ordinance 3 that I just went through. Therefore the applicant is not entitled to the building permit applied for. Chair Sauber also added the fact that adding a building is an expansion. Chair Sauber believes there is case law that says even if you have outside materials and you erect a building simply to store those materials inside, that is an expansion. Saying that adding another building to that property is not an expansion, in my view, is erroneous.

At this point Chair Sauber stated she would like to hear from anyone else on the Planning Commission who might want to offer something.

No Commission members responded.

Karen Marty stated that she would like to respond as well.

Ms. Marty stated that she believes the Planning Commission has misread the Settlement Agreement. It is a legal document and Ms. Marty believes an attorney and a judge may have a different reading of it than the Planning Commission does. The Settlement Agreement does not state that this use is frozen. It does not state that this use is a legal non-conforming use. It states that there is a case being settled and as part of that settlement this use is now legal. It is not categorizing it as permitted, conditional, accessory, interim, or legal non-conforming. It just says this use is legal now.

Ms. Marty went on to say that what Scotts is proposing at this time is to alter the use, which alteration is legal, even for legal non-conforming uses to reduce the impact. There is case law that states you have something that is non-conforming and you are intending to reduce the impact on the surrounding properties and the Township, and it may still be legal non-conforming. That is a permitted change.

Ms. Marty stated that she strongly disagrees with the Planning Commission's position that Scotts may not make any change to the site whatsoever. She doesn't imagine that the Township has somebody out there counting the number of pallets on the ground or the number of trucks going in and out the door to make sure it is exactly the same as it was when this case was settled in 2010. Uses do not stay totally static.

The proposal here is to reduce the impact. That is what Scotts is seeking to do. They want to move some of the noisy things indoors. It would be quieter. They want to reduce truck traffic on the Township streets and roads. There will be less dust and less wear and tear on the Township. They want to reduce the back-up beepers. They are going to move the broken and damaged bags and packaging. They want to move that all indoors so there will be less risk of escaping plastic. It will make the property a whole lot more esthetically pleasing as well. She would think the neighbors and the Township would appreciate that.

If the Township has a specific problem with the building permit application tell us. We can fix that. If it is simply zoning, I believe the Township is in error and Scotts Miracle-Gro is prepared to go to court on that point.

The role of the Planning Commission tonight is actually confusing. I know the Planning Commission has been thrown into this position to hear an appeal from the Town Board to the Board of Adjustments and Appeals. There is a lot of case law saying you cannot do that. A Board of Adjustments and Appeals cannot hear an appeal from a Town Board decision. That must go to court. The Town Board could have reconsidered, but they refused to. They said no, they are going to do this appeal. The Planning Commission does not have to do anything here tonight because the Planning Commission does not have a role here. The Planning Commission is being stuck in the middle and they don't belong there.

Attorney Lemmons probably knows this. There is only one book on Minnesota Land Use out there and it is provided free to Bar Association members. Ms. Marty stated that she wrote that book knows this law. Whether this is a legal non-conforming use or permitted use or some special use, under the Settlement Agreement, what Scotts is proposing to do is completely within the legal parameters of what they can do to reduce the use. Yes, if they were adding a building where there were no buildings, adding a building where there were no uses, adding a building out of the blue, that is something else. Scotts will remove an existing building and put this building in place. This will be larger because they are going to move some other items indoors. It will result in fewer complaints and issues and a lot less nuisance for the Township residents.

Ms. Marty went on to say that the one thing she does not understand is how everyone missed on this point. She will just mention it because it is so obvious. The Settlement Agreement goes through in several sections that the main thing that is a concern for the Township is performance standards. In the Settlement Agreements there is a paragraph that states "Future Changes to Use or Property." That is an extraordinary statement. It is so contrary to what Scotts is being told here today by the Township Attorney. There is obviously an expectation that there will be future changes to the use or property. They understood that when they wrote this agreement, otherwise they would not have put this paragraph in the Settlement Agreement:

"Future Changes to Use or Property. *If changes are made to the Use or Property in the future, the Operator will cooperate with the Township to determine whether a permit or environment review is required by law and, if so, Operator will follow the process prescribed by such law(s). Operator will implement whatever monitoring, control, and mitigation measures as may be called for by applicable governmental jurisdictions to the extent they have authority under law to impose such measures."*

Ms. Marty went on to say that is what Scotts is trying to do. They are trying to cooperate with the Township to find out what is necessary.

When Alex [Allen] came in he was told he needed a building permit. He is putting up a pole barn not even as big as the agricultural ones. He got a building permit and then he was put through a number of processes and here we are tonight. It states in the Settlement Agreement he will cooperate with the Township. That is what we are trying to do. Being told that a use that is legal and they cannot alter in any way whatsoever because that is going to be deemed an expansion is silly. Let's get something that is esthetically pleasing for the Township. That is what Scotts is trying to do. That is all I have to say.

Chair Sauber stated that before she asks the Attorney for comment, the Settlement Agreement had a site plan given because this use. . .

Mr. Marty stated, not because it has a site plan given. Do not assume.

Chair Sauber stated that she was involved in the Settlement Agreement. The site plan sketched out what was there at the time. The hours of operation, etc. All those conditions were put on there for the Township. I would like to ask Mr. Lemmons to add anything to our comments.

Attorney Lemmons stated that the first point he would like to make is this. In reviewing the Settlement Agreement, nowhere does it state that the use described in the Third Paragraph on the First Page under 'Description of Current Use' is a permitted use, conditional use, interim use or non-conforming use. All the Settlement Agreement has said is it identifies what the current use is and it states that the Township is estopped from challenging that use. In return the defendants, Country Stone, Friedges and anyone who purchases the property from those individuals are estopped from challenging the Ordinance. There has never been a determination of what exactly this use is in terms of it being legal or illegal. It is simply an agreement that the Township will not challenge the use as described in the Settlement Agreement. That is all it is.

Attorney Lemmons went on to say that to state that it is a legal use is incorrect because it has never been determined. It was never agreed to by the Township, it was never asked to be agreed to by the defendants because they didn't raise it in the Settlement Agreement, which they had a hand in drafting.

Attorney Lemmons stated he would also point out the paragraph that Hyponex has been hanging their hat on. Section F does not state that the property owner has the right to apply for new permits. It simply states that the Township and the then-property owners will discuss what permits, if any, are required. It doesn't say they will be granted and it doesn't even say they will be considered. The point is this: The Settlement Agreement is clear that all that was done is the Town agreed it would not make any further legal challenges against the use that existed at the time the Settlement Agreement was adopted, and in return the landowners would no longer challenge the validity of Ordinance 3.

It is basically a standstill agreement. As to the procedure, it was discussed at the Board meeting on August 8, 2017. The letter that was received from Hyponex dated June 29, 2017, called for an appeal. On August 8, 2017, we went through the statute regarding appeals. There are three separate statutes that discuss appeals by the Town Board. They also discussed the position of what the Board of Adjustments and Appeals has to do. At that time it was determined with Alex present and agreeing to what the procedure would be. This meeting was called for the sole purpose of seeing to it that the Township had conformed with the statutory requirements and that is why are doing this. If Hyponex wished to challenge the decision of the Town Board denying the building permit, they should have brought a lawsuit. Instead, they elected to follow the appeals procedure.

The Township is simply following the statutory procedures as laid out. As to whether or not the use can be expanded, it is my opinion still, that at the time the Settlement Agreement was signed, and Mr. Lemmons was not a party to the drafting of this, there is nothing that allows for expansion. There is nothing that allows for alteration. As Mr. Lemmons reads this, it is simply an agreement, a contract which says your present use can continue and the Township will not challenge it. In return Scotts Miracle-Gro will not challenge our Ordinance. That is all it says.

Chair Sauber stated that is also her understanding of it. In that case we can move on to a motion.

Chair Sauber moved that the Planning Commission recommend to the Board that it uphold the denial of approval of the building permit. The appeal would be denied for the reasons that were gone through by Chair Sauber and given to the appellant in writing this evening.

Commissioner Fredlund seconded. Motion carried unanimously.

Chair Sauber stated that the meeting would recess while the Attorney writes out the findings.

EUREKA TOWNSHIP SPECIAL PLANNING COMMISSION MEETING

Held August 22, 2017

In Re: Appeal of Denial of Hyponex Corporation's Building Permit Application for Accessory Building

The meeting was called to order at 7:00 p.m. on August 22, 2017, at the Eureka Town Hall. Members present were Chair Nancy Sauber, Commissioners Julie Larson, Ralph Fredlund, Bill Funk, and Randy Wood. Based upon the testimony taken and documents produced the Planning Commission hereby makes the following Findings of Fact;

FINDINGS OF FACT

1. Ordinance 3 of the Eureka Town Code regulates land use in the Town of Eureka.
2. Chapter 4 of Ordinance 3 governs the issuance of building permits by the Town. Section 3 of Chapter 4 sets forth the performance standards which a commercial operation must satisfy before a building permit will be issued. Among those standards is compliance with all Township Ordinances applicable to commercial uses.
3. The Applicant uses the property for sorting, grinding, and bagging of mulch and soil for resale to garden centers. The proposed structure is to act as a warehouse and office space for the Applicant's present commercial operation.
4. Chapter 2, Section 1 B of Ordinance 3 sets forth the permitted uses and structures permitted in the Town. The use of the property set forth above is not a permitted use. The proposed structure is not a permitted structure.
5. Chapter 1, Section 3 of Ordinance 3 provides that no structure shall be erected which does not conform with the provisions of Ordinance 3.
6. That the Settlement Agreement executed in the matter of *Town of Eureka v. Country Stone & Soil of Minnesota, Inc. and Friedges Holdings, Inc.*, Dakota County District Court File No. 19HA-CV-09-3468 does not acknowledge the then use, or the present use as a permitted use, a conditional use, an interim use, or a legal nonconforming use.
7. That the Settlement Agreement contains no term allowing for the construction of additional structures.
8. That the building proposed by the Applicant is not permitted pursuant to the provisions of Ordinance 3 set forth above. Therefore the Applicant is not entitled to the building permit applied for.

9. That the proposed structure has an area of 11,840 square feet. That Paragraph C of Section 7, Chapter 4, Ordinance 3 only allows an area of 10,000 square feet. The proposed structure therefore exceeds the maximum permitted area for an accessory building.
10. The Vermillion River Watershed Joint Powers Organization (VRWJPO) was not consulted before the application came before the Planning Commission or Town Board. It is a requirement that VRWJPO has reviewed and possibly permitting before the Township can consider the application.
11. With the addition of more than an acre of impervious surface, the Storm Water Pollution Preservation Plan for the site would need review and a possible adjustment.
12. With the addition of more than an acre of impervious surface, a National Pollution Discharge Elimination (NPDES) is required under State law.

That pursuant to the above Findings, the Planning Commission of the Town of Eureka hereby recommends denial of the building permit applied for by Hyponex Corporation to construct an accessory building on the property located at 22447 Highview Avenue, Lakeville,

Meeting adjourned at 9:15 PM.

Respectfully submitted,

Cheryl Murphy
Deputy Clerk

Minutes for the Planning Commission Special Meeting of August 22, 2017 approved on November 6, 2017.