

BOARD OF ADJUSTMENT MINUTES

Sheboygan County Administration Building
508 New York Avenue
Sheboygan, WI

December 21, 2022

Called to Order: 1:02 PM

Adjourned: 2:45 PM

MEMBERS PRESENT: Mark Pfaller (Chair) , Ed Harvey, Charles Born, Pete Scheuerman, Kenneth Sonntag

OTHERS PRESENT: Attorney Paul Dirkse (Asst Corp Counsel, for the BOA), Kathryn Fabian (P&C), Megan Nasgovitz (recording secretary), Marjean Pountain (2nd alternate), Faris Martini, Attorney Joe Voelkner (for the applicant), Will Coultis, Kevin Stange (P&C), Aaron Brault (P&C)

Chairperson Pfaller called the meeting to order and called the roll. Chairperson Pfaller seated alternate Charles Born (member BJ Reenders previously indicated he would be absent due to a conflict of interest).

Megan Nasgovitz reported that the meeting notice was posted on December 15th, 2022 at 11:00 AM in compliance with the open meeting law.

There were no public comments regarding non-agenda items.

Mr. Harvey made a motion to approve the minutes from the September 21st, 2022 Board of Adjustment meeting. Mr. Born seconded the motion. Motion carried with no opposition.

Chairperson Pfaller opened the hearing (Case No. V-22-05-F) for the application for a variance to the 75-foot setback from the ordinary high water mark (OHWM) of Lake Michigan for the construction of a deck failing to meet the requirements of Section 72.15(1)(a)1. of the *Sheboygan County Shoreland Ordinance*.

Chairperson Pfaller provided an overview of the procedures for the hearing and asked the applicants if they understood the procedures.

Chairperson Pfaller ensured that the owner and attorney had received the staff report, the letter from Kathryn Fabian dated May 3, 2022 and a letter from Dale Rezabek of the WDNR.

Chairperson Pfaller asked for comments from the board members regarding the site visit:

- Mr. Harvey noted that he saw the property, existing structure, and the laid-out plan of where the proposed deck would be. He stated that what it all comes down to is hardship and that there is room for a deck to be added, but it would have to be a different shape to stay within the setback.
- Mr. Scheuerman stated that he agrees with Mr. Harvey.
- Mr. Born noted that it was a relatively small lot and relatively small house with the septic system in front of the house. He added that the existing porch could be remodeled within the existing footprint without a variance.

- Mr. Sonntag agreed that it was a small lot with a house that is shoehorned in already. He stated that the deck can be rebuilt in the existing footprint, so he is unsure about a variance with the setback requested.
- Mr. Pfaller agreed with everyone else.

Chairperson Pfaller asked for public comments.

Will Coultis, neighbor of Mr. Martini, noted that he was here as an interested party. He questioned how many variances were going to be issued along the lakefront, noting that the setback is already less than it used to be at 100ft. He stated that the house is on a small lot, it already has a lovely deck, but to go beyond the 75 ft setback is always an issue. He closed saying that we have a setback rule, and we need to live by that rule.

Mr. Sonntag questioned if setback averaging could be used for this property what the setback would be. Ms. Fabian clarified that setback averaging only applies to new principal structures and, therefore, would not be applicable to this variance request.

Chairperson Pfaller called Mr. Martini and Mr. Voelkner to speak. Mr. Voelkner referenced a letter he wrote dated September 21, 2022. Copies of the letter were made, distributed to the board and added to the case file. Mr. Voelkner confirmed the other materials that were in the application packet. He expressed displeasure at receiving the DNR letter today, noting that he can't review that letter during the hearing. The copies of Mr. Voelkner's letter were handed out to board members, and a few minutes were taken for everyone to read through. Chairperson Pfaller confirmed that everyone had a chance to finish reading before continuing.

Mr. Voelkner stated that the main objection he was hearing from the board members was the issue of unnecessary hardship. He stated that, in his experience, it is the hardest criteria to judge because it varies from case to case. He said the structure has a small footprint, it is a small lot, and there is less space than the neighbors in terms of areas to use. He claimed that the hardship is twofold; the footprint is small and the 75 ft setback, if it were constructed how proposed, would interfere with the Martini's and their neighbors use of the property. He stated that if a variance is not granted, the property would require a significant amount of new construction which would disrupt neighbor access to the lake through an existing easement along the north property line. He added that if there is new construction, it will also disrupt the wildlife and terrain that is unique on the property. Mr. Voelkner questioned if there were other variances granted based on what Mr. Coultis stated earlier. Mr. Coultis clarified that he was not aware of any particular variance in the neighborhood. Mr. Voelkner made further statements that he was not given all the information, at which point Chairperson Pfaller responded that Mr. Coultis is not an expert, but that Ms. Fabian's staff report had provided him with all historical records of the property that were on file.

Mr. Voelkner continued stating that the deck would not encroach on aquatic life or spawning grounds and that natural beauty is subjective. He noted that the building materials would be consistent with neighboring uses. He stated that they are asking for a relaxation of the 75ft setback by 31ft, and, when looking at neighboring properties, that is consistent with where they have built. He stated he did not believe that there is an identifiable harm to public interest and there would be no health or safety risk to the public that he could identify. He concluded that the deck isn't a complex project that would take years and years to complete, it will be consistent with neighbors, and if there is foreseeable harm, he can't see what it is. He said there are not cumulative effects of other variances that might be granted based on this, because no one else

is banging down the door of the board to make similar requests. Mr. Voelkner then read a letter written by Mr. Seif Martini.

Mr. Voelkner questioned Mr. Faris Martini, co-owner of the property. Mr. Voelkner asked when the house was built, to which Mr. Martini responded that it was constructed around 2015, before they owned it. Mr. Voelkner asked how large the deck was, to which Mr. Martini responded he was not sure, but maybe around 200 sq ft. Mr. Martini described the deck as angled out from the house, noting that his dad worked with Oostburg Lumber to expand the deck plans to include screening in the first floor and making it two floors so it would be more usable throughout the whole year. Mr. Voelkner asked what construction materials were being used, to which Mr. Martini responded that he didn't know the specific material, but they were up to Oostburg Lumber standards. Mr. Martini noted that the property was originally shared by all neighbors and then they sold it, but an easement was kept on the property that allows neighbors to access the lakefront. Mr. Martini showed on the survey where the easement was located along the northern edge of the property. He noted that one of the alternatives would be to build a deck on that side of the house, but the easement might cause issues with that. Mr. Born asked if the easement was written into the deed as that is an important point. Mr. Martini answered that he was not sure. Chairperson Pfaller asked Mr. Voelkner if he had seen it. Mr. Voelkner replied that he had the deed, but did not know if it has an easement. Attorney Dirkse added that there could be an easement that might not be shown.

Mr. Voelkner asked, if they had to build in an alternate location, would that have some affect on how that easement is used, to which Mr. Martini responded, if the construction is on the north side of the house, then yes, it would have more of an affect. Mr. Voelkner asked, outside of today, if Mr. Martini has been contacted by any of the neighbors. Mr. Martini stated no. Mr. Voelkner asked Mr. Martini if he saw any potential harm from constructing this, to which Mr. Martini responded that he was biased, but no. Mr. Voelkner asked Mr. Martini if he read the WDNR communication. Mr. Martini responded that yes, he read it today, but he would have liked to have more time to digest it. Mr. Voelkner asked Mr. Martini to read the paragraph about public interest in the DNR letter and asked if there was anything there that he thought would be an issue. Mr. Martini responded no.

Mr. Voelkner stated he had no more questions for Mr. Martini. Mr. Martini, stated that the way the law sets the case out is through these four different elements, but he believes that they are not four totally different things but rather four things that overlap. He stated that unnecessary hardship incorporates a lot of the other elements in it in a lot of ways. He explained that they could knock down the entire structure and have a whole new footprint just based on where the neighbors are in setback averaging, which would be closer than where they are proposing the deck now. He stated that it would be a much bigger disturbance and the neighbors would be much more concerned about that. He noted that it seemed a little strange, just the way that the ordinance is written, that they could build a new house there, but not a new deck there. He stated that it seemed reasonable to be able to build a deck when they could build a whole new house that covers that area. In light of that fact, he feels that the variance request is within the spirit of the ordinance. Mr. Martini closed by stating that if they have to go back to the drawing board they will, but they thought these plans were reasonable and aesthetically pleasing.

Chairperson Pfaller asked each of the board members to address any closing thoughts or questions that they may have for the applicant:

- Mr. Born stated that they were here because the setback is 75ft. He could tear the whole house down and build it at the average setback, but the deck would have to be within the

average. He noted that the DNR letter states that the existing deck can be rebuilt with a second story if they do it in the existing footprint. He noted that ultimately it comes down to wanting a larger deck. Mr. Martini added that it would be hard to add a second story with the shape it is now. He stated that would be a substantial change, and it would not be easy to reconfigure the plan. Mr. Born concluded by stating that he is always worried about setting a precedent, noting that if they just grant variances because people want them, the setback becomes less and less.

- Mr. Sonntag stated that the part that bothers him is that because it is an addition they can't build, but if it was new construction they could. He stated however that the ordinance states 75 ft, so that's what they have to work with.
- Mr. Harvey reiterated that setback averaging is not applicable to the deck because it is not a new primary structure. Mr. Sonntag added that when the deck was built, it was probably built along the 75 ft line which may have been at the angle of the shoreline.
- Mr. Scheuerman asked what the Intermediate Traverse Line shown on the property survey was. Mr. Harvey explained that it is likely another name for a Meander Line. Discussion ensued on how the average setback for a property was measured. Ms. Fabian added that the measurements are taken on the adjacent properties to the nearest point on the roof or overhang. Mr. Scheuerman also noted that he agrees with Mr. Sonntag about the codes not really aligning, but it doesn't matter if it makes sense, that's what the ordinance says. He reminded the group that they are not dealing with building a whole new house, that's not why they were there today. He noted that he appreciated Mr. Martini's point, but they are working with a 75 ft setback for this variance hearing. Mr. Martini stated this it is kind of crazy that the ordinance has that gap, and stated that the board does have the power to grant a variance, since this discrepancy in the ordinance casts a shadow over all four of the criteria. Mr. Scheuerman noted that when you purchased the house, you get what you buy. He added that it was not as if a tree fell or some other event that took this part of the deck off, it just never existed. He closed by stating it is a nice house, but it just is not quite what they would really like.

Ms. Fabian provided some background information on the history of the ordinance stating that the setback for Lake Michigan used to be 100ft from an elevation of 582.7' -which the DNR established based on the water stains on break walls in the marina. Setback averaging was allowed on inland waterbodies only at that time. In 2012, the ordinance was redone and property owners got to choose to measure 75 ft from the toe of the dune or 100 ft from 582.7'. This was in effect until 2015 when Act 55 was enacted, and now we are stuck with the requirements found in NR 115. This means we have to measure 75 ft from toe of the dune and allow setback averaging on all waterbodies. Ms. Fabian noted that the setback can fluctuate with the dune, which is why the department requires a survey done within a year of permit issuance. Mr. Voelkner asked where in Act 55 does it say that new construction is different from additions. Ms. Fabian responded that in NR 115 it says a reduced setback is only allowed for new principal structures.

Chairperson Pfaller asked the board if there were any last questions, and there were none.

Deliberation & Vote:

Attorney Dirkse recommended that the board look at each question individually. He recited the standards of unnecessary hardship, spirit of the ordinance, substantial justice, and public interest.

Is a variance justified owing to special conditions of the property?

ROLL CALL VOTE: Mr. Pfaller – N, Mr. Harvey – N, Mr. Sonntag – N, Mr. Scheuerman – N, Mr. Born - N

Does an Unnecessary hardship exist?

ROLL CALL VOTE: Mr. Born – N, Mr. Harvey – N, Mr. Sonntag – Y, Mr. Scheuerman – N, Mr. Pfaller – N

Will the Spirit of ordinance be upheld by granting this variance?

Mr. Harvey commented that this is the argument of the applicant, but the ordinance has always been this way. He stated there is no question that the public is benefitted by the ordinance or we would all be out of work and none us would be here. He stated that they are justified in holding with the ordinance, and that is where the discussion starts and ends.

ROLL CALL VOTE: Mr. Born – N, Mr. Harvey- N, Mr. Sonntag – N, Mr. Scheuerman – N, Mr. Pfaller – N

Does the variance grant substantial justice to the property?

ROLL CALL VOTE: Mr. Pfaller – N, Mr. Harvey – N, Mr. Sonntag – N, Mr. Scheuerman – N, Mr. Born – N

Will the variance harm the interest of the general public?

ROLL CALL VOTE: Mr. Pfaller – Y, Mr. Harvey – Y, Mr. Sonntag – N, Mr. Scheuerman – Y, Mr. Born – N

Since all of the necessary standards were not met, the variance request is not granted.

Mr. Scheuerman made a motion to adjourn. Motion seconded by Mr. Sontag. Motion carried with no opposition.

Mark Pfaller, Chairman

Megan Nasgovitz, Recording Secretary