

SHEBOYGAN COUNTY BOARD OF ADJUSTMENTS MINUTES

Administration Building
508 New York Avenue
Sheboygan WI

May 20, 2015

Called to Order: 1:00 PM

Adjourned: 2:49 PM

MEMBERS PRESENT: Mark Pfaller, David Gartman, Eugene Blindauer, Joseph Stodolka

ABSENT: Ken Moehring

ALSO PRESENT: Board First Alternate Jerry Rosche, Second Alternate Scott Miller, Kay Lorenz, Attorney Crystal Fieber, Code Administrator Matt Mrochinski, Zoning Administrator Kathryn Fabian, Alayne Bosman, Mark Nessim, Nancy Rosche, Kevin Widder

Chairperson Pfaller called the meeting to order and called the roll. Second Alternate Scott Miller was seated due to the absence of Ken Moehring.

Kay Lorenz verified the agenda was posted on May 12, 2015 at 10:45 AM in compliance with the open meeting law.

Mr. Gartman made a motion to approve the minutes of the April 15, 2015 Board of Adjustments meeting. Motion seconded by Mr. Blindauer. Motion carried 4-0 with Joseph Stodolka abstaining because he was not in attendance at the April 15th meeting.

There were no public comments regarding agenda or non-agenda items.

Mr. Pfaller opened the hearing for the variance request to the Sheboygan County Shoreland Ordinance from Mark & Ingy Nessim, Case #V-15-02-F, for the property located at N7450 County Road J, Section 32, in the Town of Rhine on Crystal Lake.

Mr. Pfaller called Mark Nessim forward to provide testimony. Mr. Pfaller provided an overview of the procedures for the hearing and asked the applicant if he understood the procedures.

Mr. Pfaller acknowledged the items of correspondence received for the record to confirm Mr. Nessim had received and read them: March 31, 2015 letter from Matt Mrochinski; May 8, 2015 Staff Report from Kathryn Fabian; May 12, 2015 letter from Mrs. Jeanne Petermann; and May 19, 2015 letter from Dale Rezabek, Wisconsin Department of Natural Resources. Mr. Nessim acknowledged he had received and read each of the items of correspondence that are part of the record.

Mr. Pfaller asked for comments from Board members regarding the site visit on Saturday, May 16, 2015 at 9:00 A.M.:

- Mr. Stodolka – The main thing he noticed was the extreme slope of the property down to the water. It was easily over 100 feet from the location of the existing deck down to the water. Other than the terrain and the existing steps, he noted the closeness of the other existing properties to the home. It was noted in the report that it qualified for a reduction in the 75-foot setback to 66.6 feet because of the existing development's patterns of the structures. Everything else seemed to be well constructed.
- Mr. Miller – His observations were similar. The slope jumped out right away and the closeness of neighboring properties makes it a unique situation.

- Mr. Gartman agreed with their observations.
- Mr. Blindauer agreed with their observations.
- Mr. Pfaller – Stated he has done a few things on that lake and that side is exceedingly steep and properties are close. It's also very close to the road. It's a challenging site. Almost 3-4 doors down on either side have the same situation. The property is in good shape.

Chairman Pfaller asked Mr. Nessim to provide an overview of the project—what he wants to do, how he wants to do it, how the issues came about, what his plans are and how he'd like to address some of the issues. Mr. Nessim stated the impetus of the project is that the back close to the waterfront is very steep. He wanted to have some room for his family to be close to the house yet to be far enough away from the water where he doesn't have to worry about his kids running around close to the water—a place where they can enjoy the waterfront in the evening and still be close to the house. He indicated he doesn't have much space so is requesting a modest increase in the extension of the deck to allow for space to sit and enjoy the water view. He indicated they originally thought about adding a second level to the deck so he wouldn't encroach on the ordinary high water mark (OHWM) setback requirement, but he needed more depth to the deck in order to have furniture and more livable space. With regards to the project itself, he requested to make an adjustment because after the site visit and based on the letter he's now reading he wants to withdraw the request for a concrete base. He had added an alternative in the application for a wood frame support as opposed to a concrete base and stated it would be better for the purposes of his application and approval that he withdraws the concrete base from the application. Mr. Nessim discussed substantial justice for the property. He stated if you look at the other properties in the area there are several nonconforming structures, one example being that there is a deck right off the waterfront next door and is actually a deck that is similar in size to what he would like except that his would be closer to the house. The property on the other side of his home has a bi-level deck with similar dimensions in depth that he would like to enjoy. The substantial justice to the property entails him using the property similar to his neighbors and others on the lake use their property. The proposal he is requesting is a minimal relaxation. He doesn't think it will harm the public interest, and he believes there will be no damage to the site lines for the adjacent properties. It won't harm any trees in the process of construction. Currently on the slope there are only weeds growing. He stated that to not allow this variance request would be an unnecessary hardship. He would like to have that space close to the house where his family can enjoy the outdoors and the waterfront, which is why you buy property on the lake. The slope is severe. He recalled during the onsite inspection he nearly fell on the slope. It is not usable property and building a deck on such a steep slope is reasonable use of the property.

With regard to withdrawing the concrete base from the project, Mr. Pfaller believes the Board can approve or deny this request and ask for an addendum/special condition. Attorney Fieber stated that is appropriate. She heard the property owner respond to some public comments in written correspondence that were made and, in response to that, he is going to modify his request. She stated it is appropriate for the Board to consider. Attorney Fieber agreed wording relating to withdrawing the concrete base should be included in a motion.

Mr. Nessim had no further comments at this time.

There were no public comments.

There were no comments from Code Administrator Matt Mrochinski or Zoning Administrator Kathryn Fabian.

Comments from the Board:

- Mr. Blindauer - none
- Mr. Gartman – none
- Mr. Miller – Indicated he heard Mr. Nessim say he had just read the letter from his neighbor, Mrs. Petermann, and Mr. Miller wondered if Mr. Nessim knew why the neighbor was objecting. Mr. Nessim replied that he didn't know and wished he'd had the opportunity to talk with her. She doesn't state a reason in the letter why she's strongly opposed. He stated the property she owns is the non-conforming structure he mentioned earlier.
- Mr. Stodolka – He asked Mr. Nessim how long he'd owned the property. Mr. Nessim replied 2.5 years. Mr. Stodolka stated he noticed there's a sanitary lift station to the west that is behind the setback area. He asked if the Nessim's have looked at building a deck in that area. Mr. Nessim stated it's a very small space and it's a shared lift station with the neighbor to the west. He wasn't certain with setback requirements from the west lot line what he could or could not do. He hadn't considered it—the area is flat, but it's a small space.
- Mr. Pfaller – Indicated he was glad Mr. Stodolka had brought up building the deck in another area. Mr. Pfaller noted that, during the site visit when Mr. Nessim talked about things he wanted to do, Mr. Nessim's plans seemed unorganized. Mr. Pfaller stated there are areas of the property that could possibly be considered as an alternate site, although design and location are up to the property owner. He reminded Mr. Nessim the Board has to look at this as an individual site and the nuances that are specific to this site, not the neighbors and what they have done. The Board doesn't have documentation to know if the neighbors have variances or the year their construction was completed. He referred to Mr. Nessim's testimony earlier about what his neighbors have, and stated that is very possible and sounds fair, but the Board cannot consider them in its decision. Mr. Nessim interjected he understood because they are non-conforming, but are legal because they were there before. Mr. Nessim wanted to make the point that it does show how people are using their property and what constitutes reasonable use of the property. He further stated that reasonable use goes to substantial justice to the property. Mr. Pfaller said he understood Mr. Nessim's thought process, but may not agree with the end result. Mr. Pfaller again reiterated that during deliberations the Board will be discussing this situation and the conditions Mr. Nessim is specifically asking for.
- Mr. Miller noted language in the March 31, 2015 letter from Matt Mrochinski that explains "legal non-conforming principle structures may be expanded vertically provided the following requirements" and asked if any mitigation had been planned if the variance was granted. Matt Mrochinski interjected and explained mitigation practices are required to increase impervious surface area and to offset the impacts to the waterway as the result of the impervious surface. Mr. Pfaller stated the key word is "offset". He indicated Mr. Nessim is over the maximum for impervious surfaces now. Matt Mrochinski continued by stating that, in this instance, the proposal would result in a reduction of impervious surface, so at this point impervious surface isn't an issue, the setback is the issue. The ordinance doesn't require mitigation for setback. He stated that if this board felt this variance request passed all the necessary tests, it is his belief the Board could grant a variance conditioned upon mitigation. Mr. Nessim stated he is taking the opportunity to mitigate himself hoping that improving the perviousness would help with the overall application. Mr. Nessim also referred to the survey included with the application with regards to the area to the west of the house and walked through it with the Board. He pointed out the multiple retaining walls and the shared lift station.
- Mr. Gartman asked about the west side as a possibility. Would building there conform with the property line setbacks in the Town of Rhine? His concern was the closeness of the neighbor. Matt Mrochinski reminded the Board that the reduced OHWM setback

applies to principle structures. The deck attached to the residence is considered an extension of the principle structure. If the suggestion is exploring other areas, if a deck is detached—an accessory structure—it has to comply with the 75-foot setback to the OHWM. Mr. Gartman didn't want to suggest an option that wouldn't be allowed by the municipality. Matt Mrochinski added the only exception to the 75-foot setback would be an open sided or screen sided structure, minimum of 5 feet from the principle structure, at least 35 feet from the OHWM, with the total floor area of all structures within the setback not exceeding 200 square feet. The stairways and walkways would be exempt.

Mr. Pfaller asked if Mr. Nessim understood that the Board must look at his specific situation and the Board cannot give any direction—the direction is up to him. Mr. Nessim stated he understood and stated that what Matt Mrochinski just mentioned regarding an exempt open-sided or screen sided structure is something he and his wife could do as a specific exemption under the ordinance. Mr. Nessim stated he still wants to proceed with the variance request despite other options.

Mr. Nessim had no other comments and understands this is his last opportunity to comment. He thanked the Board for coming to the property and giving him a chance to apply for the variance. Mr. Pfaller stated on behalf of the Board that the Board thanked him for providing the information and for his due diligence.

There were no other comments from the Board.

Mr. Blindauer made a motion to go into closed session. Motion seconded by Mr. Gartman. Roll call vote: Blindauer – yes; Gartman – yes; Miller – yes; Pfaller – yes; Stodolka – no. Motion carried.

The Board went into Closed Session at 1:40 p.m.

Mr. Gartman made a motion to go back into Open session. Motion seconded by Mr. Stodolka. Roll Call vote: Blindauer – yes; Gartman – yes; Miller – yes; Pfaller – yes; Stodolka – yes. Motion carried.

The Board went back into Open session at 2:05 p.m.

Mr. Pfaller closed the Public Hearing relating to the variance request.

Deliberation:

Unnecessary Hardship:

Discussion ensued.

- Mr. Stodolka indicated this was the Board's primary discussion in closed session including questioning Attorney Fieber on the legalities. There has been a lot of discussion regarding the special conditions of property. There are significant special conditions—the slope. There is an existing deck although not as large as the petitioner likes, so there isn't a complete hardship. The property can be used and the deck can be used although not as large as preferred. We're talking about literal enforcement of this ordinance and the changes of moving the setback to 66.6 feet from 75 feet because of the existing structures being grandfathered in and using an average setback. Part of this deck already violates that setback. If this were just a request for a variance for rebuilding a damaged deck that violates the setback requirement, then he would find it would be an unnecessary hardship. Given that there is an existing deck, even with the slope of the property, this property was purchased with a full view of what existed and he doesn't believe there is an unnecessary hardship that would warrant granting this variance.

- Mr. Miller indicated there are some interpretations that can be varied. He definitely thinks it falls into the category of special conditions because of the slope. He doesn't feel it is self-created because the slope is already there and that's what makes it a special situation. The existing deck is barely usable because it is so small, so it's not unreasonable to make it larger. Because of the uniqueness of property, there are not a lot of options. Even some of the options discussed would run into a situation where there would be other setback issues. If the owner wanted to do an open structure of up to 200 square feet, he doesn't see too many options with the slope. Even if it was built closer to the lake—closer to the 35-foot setback—there would be more of an obstruction and view situation than what the proposal includes. He sees that there is an unnecessary hardship if we deny it.
- Mr. Gartman stated he has not totally decided, but is weighing, as is Mr. Miller, about the extreme slope of the property. Slope is a mild word for it—it's almost a cliff type of situation. He stated he may be willing to weigh more than in other situations the Board has had in the past. Regarding alternatives, it didn't seem like there were a lot of them, and any setbacks—be it County or local municipality—if they are existing he wouldn't determine those alternatives to be viable options. Mr. Pfaller clarified that the municipality's setback requirements are not part of this deliberation nor of the variance. It will be up to Mr. Nessim to secure permits from the municipality if this variance is granted.
- Mr. Blindauer said after viewing the property, because of the steep slope there's very little room on either side and flat surfaces are almost non-existent. It would be an unnecessary hardship if the Board were to deny this variance.
- Mr. Pfaller stated he sees this situation differently. There are other alternatives to do what Mr. Nessim wants to do and desires to do on this piece of property—that being having a place where his kids are safe and can be watched. All of those are exceedingly valid points. He doesn't think all the possibilities have been looked at—there are other options. When talking about unnecessary hardship, Mr. Nessim chose that space, albeit it's good, it works, it's nice; however, he thinks there are other possibilities.

Attorney Fieber recited the standard of unnecessary hardship.

- Mr. Gartman discussed the extreme slope of the property—the uniqueness of that. He heard Attorney Fieber state the phrase about not having reasonable use. Mr. Nessim has owned the property for a while—is it reasonable or not?
- Mr. Stodolka said he doesn't think that if the Board denied the variance it would be denying reasonable use of the property.

Mr. Blindauer made a motion that denying the variance would cause an unnecessary hardship to the land owner. Motion seconded by Mr. Miller.

- Mr. Pfaller said because Board members have different opinions, it is beneficial for each of the members to understand what the others are thinking. He stated that if you look at the survey and visualize the site, when you're walking out onto the deck that's there now—which is extremely narrow and overlooks a precipitous drop—there is a door that goes onto the deck. If you would use that deck as a walkway and go to the west rather than down, the owner wouldn't have a problem. The owner could add up to 200 square feet and provide a bigger area that complies. The potential is there of having an open sided gazebo. There's nothing in the statute that says an open sided gazebo has to be at 3 feet above grade or 20 feet above grade. There could be a permeable deck walkway to the gazebo and it could be 15 or 20 feet off of that precipitous drop and be legal, solving the problem. Members looked at the survey and Mr. Pfaller explained the gazebo option. He sincerely believes that, architecturally, there is another option that exists that would be legal.
- Mr. Stodolka said part of this presupposes the right to build a deck with a view of the lake even though it encroaches into the setback. Mr. Pfaller interjected it's not a right, it's an opportunity. Mr. Stodolka said, technically, you could build a deck on the north side of

the building. Mr. Pfaller indicated using the conditions and options within the guidelines of the Shoreland Ordinance, it seems Mr. Nessim has the option on the lakeside to build it in another place.

- Mr. Gartman's personal assessment of the property is that the slope troubles him, but he considers personal responsibility—the purchase of the property and using it for several years. He respects Mr. Pfaller's background, skills and knowledge. In weighing all of the comments from Board members it is a difficult decision.
- Mr. Pfaller stated he wants members to feel comfortable with their own thought process.
- Mr. Blindauer stated he worked in construction for 40 years and doesn't think there is another place to put it.

ROLL CALL VOTE: Mr. Stodolka – no, Mr. Miller – yes, Mr. Gartman – no, Mr. Blindauer – yes, Mr. Pfaller – no. Motion failed with 3 nays and 2 ayes.

Spirit of the Ordinance:

Attorney Fieber recited the standard of spirit or intent of the ordinance.

Discussion ensued.

- Mr. Stodolka stated that spirit of the ordinance is about restricting encroachment into the setback area. As such, granting the variance would not observe the spirit of the ordinance.
- Mr. Blindauer stated his feeling was in the other direction because of the lay of the land, the steepness and where the house is located. He stated if the high water mark ever gets up that high we'd all be in trouble. He looks at the safety and health issues which would benefit from this variance.
- Mr. Gartman agrees with Mr. Stodolka regarding spirit of the ordinance.

Mr. Gartman made a motion that granting the variance would not be within the spirit of the ordinance. Motion seconded by Mr. Stodolka. Following discussion of the motion wording, Mr. Stodolka withdrew his second.

Mr. Gartman made a motion that denying the variance request would be within the spirit of the ordinance. There was discussion of the intent of the motion wording. Attorney Fieber interjected and offered it would be acceptable to make a motion that the variance observes the spirit of the ordinance, and if members don't agree with the statement they should vote "no". If agree, vote "yes".

Mr. Gartman withdrew his motion.

Mr. Pfaller made a motion that granting this variance would be within the spirit and intent of the ordinance. Motion seconded by Mr. Blindauer.

- Mr. Miller stated with the safety and further maintenance it helps safe and healthful conditions. As far as the shore cover, it contains weeds and the angle of that slope will get enough sunlight that vegetation will grow there, so he thinks it is still within the spirit of the ordinance.
- Mr. Pfaller agrees.
- Mr. Blindauer agrees—especially the public safety, convenience and maintenance.
- Mr. Gartman stated it is a challenge, but agrees.
- Mr. Stodolka stated again that spirit of the ordinance is to prevent encroachment into the setback area, so he doesn't feel granting the variance would be within the spirit of the ordinance.

ROLL CALL VOTE: Mr. Stodolka – no, Mr. Miller – yes, Mr. Gartman – yes, Mr. Blindauer – yes, Mr. Pfaller – yes. Motion carried 4-1.

Substantial Justice:

Attorney Fieber recited the standard.

Mr. Stodolka made a motion that granting a variance in this case would grant substantial justice to the property for all the reasons we've discussed about safety and the slope. Motion seconded by Mr. Blindauer.

Discussion ensued.

- Mr. Miller agrees and stated Mr. Nessim would be able to use it in a similar way to how neighboring properties are used. The neighboring properties have decks that are larger and more usable. This goes along with what the neighbors are doing.
- Mr. Pfaller agreed substantial justice would be done. He doesn't agree that everybody has a deck like this, but it's unusual to have the precipitous drop on that side of the lake.
- Mr. Blindauer agrees with Mr. Miller in that what Mr. Nessim is proposing would put him more in line with neighboring properties.
- Mr. Gartman had no comment.

ROLL CALL VOTE: Mr. Blindauer – yes, Mr. Gartman – yes, Mr. Miller – yes, Mr. Stodolka – yes, Mr. Pfaller – yes. Motion carried unanimously.

Contrary to public interest.

Attorney Fieber recited the standard.

Discussion ensued.

- Mr. Stodolka stated other than the encroachment into the setback he sees no harm to public interest.
- Mr. Blindauer stated it wouldn't do any harm to the public.
- Mr. Gartman agrees.
- Mr. Pfaller stated he thinks that of all the issues we're dealing this, putting the deck where Mr. Nessim wants it would benefit the general public. Right now that is a bed of weeds that is almost impossible to maintain. It's steep and there are box elders, ragweed and poison ivy. Putting a deck over that with a pervious surface would solve the problems of uncontrollable weed growth.

Mr. Miller made a motion that granting this variance will not harm the public interest. Motion seconded by Mr. Blindauer.

ROLL CALL VOTE: Mr. Stodolka – yes, Mr. Miller – yes, Mr. Gartman – yes, Mr. Blindauer – yes, Mr. Pfaller – yes. Motion carried unanimously.

The variance request is denied.

Mr. Gartman made a motion to adjourn at 2:49 PM. Motion seconded by Mr. Stodolka. Motion carried.

Kay Lorenz
Recording Secretary

Eugene Blindauer
Board Secretary