

BOARD OF ADJUSTMENT MINUTES

Sheboygan County Administration Building
508 New York Avenue
Sheboygan, WI

January 18, 2023

Called to Order: 1:02 PM

Adjourned: 3:32 PM

MEMBERS PRESENT: Mark Pfaller, Ed Harvey, Charles Born, Pete Scheuerman, Kenneth Sonntag (left at 2:50)

OTHERS PRESENT: Assistant Corporation Counsel Paul Dirkse, Kathryn Fabian (Planning & Conservation), Megan Nasgovitz (BOA Recording Secretary), BJ Reenders (applicant's surveyor), Marjean Pountain (2nd alternate), Kristy Carmody, Steve Peskie, Christy & Steve Myers (remote), Rita Harmeling, Al Harmeling, Doug Hamilton, and David Huenink (Town of Holland)

Chairperson Pfaller called the meeting to order and called the roll. Chairperson Pfaller seated alternate Charles Born due to member (Reenders having a conflict).

Ms. Nasgovitz reported that the meeting notice was posted on January 10th, 2023 at 2:30 PM 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 December 21, 2022 Board of Adjustment meeting. Mr. Born seconded the motion. Motion carried with no opposition.

Chairperson Pfaller opened the hearing for the application for a variance to the 75-foot setback from the ordinary high water mark (OHWM) of a navigable Lake Michigan tributary stream for the construction of a new residence at 47' 11" from the OHWM. Said construction failing to meet the requirements of Section 72.15(1)(a) 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 went through all the documents one by one ensuring that all parties had received them.

A1: September 21, 2022 Board of Adjustment minutes

A2: Submission of the Myers construction plans dated November 2, 2022

A3: Nov 3, 2022 Sheboygan County Shoreland Permit Application

A4: Nov 3, 2022 Conditions to the Sheboygan County Shoreland Permit #77-22

A5: Letter from Ms. Fabian dated December 13, 2022

A6: Petition of Appeal to BOA for current hearing application dated December 21, 2022

A7: Memorandum from Distinctive Design

A8: Ms. Fabian's staff report dated January 6, 2023

A9: Letter to BOA from Steven and Christy Myers dated January 11, 2023

A10: Site plan, with 2-8-22 Cedar Creek Surveying date, showing new construction plans received on January 14, 2023

A11: Survey from 2-8-22 (different from A10) has a red line added at 63 ft and triangles representing the ordinary high watermark received January 17, 2023

A12: Survey dated 8-25-22 received on 9-17-22 part of construction documents from previous application for a variance

A13: Two pages, show revised building plans (C100)

A14: Letter received January 18, 2023 from Leigh Hoftiezer, neighbor.

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

- Mr. Scheuerman was unable to attend.
- Mr. Sonntag stated they witnessed the new footings that were in, where they are placed, and that they tried to figure out exactly what lines they were looking at out there based on the surveys.
- Mr. Harvey stated that the meeting was worthwhile and gave an understanding of what had actually happened as well as how it had happened.
- Mr. Born noted he saw the lot and the new footing was up.

Mr. Pfaller then asked other members of the audience who were at the site visit for their comments:

- Mr. Peskie stated that he appreciates the board coming out again to look at the property, noting that he answered some questions on site and is here to answer more that may arise.
- Ms. Pountain stated that they observed where the house had been and where the footings now are.

Chairperson Pfaller asked for public comments.

Rita Harmelink, neighbor, stated that over the past 20 years living next to the property she has observed how the stream meanders back and forth- at least 350 ft. She stated that most of the time it is dry and there are weeds growing in it. She added that there have always been two existing buildings on the property, well before the Myers were there, which are still there with no erosion, so that doesn't seem to be a problem. She noted that the Myers spent a lot of time to blend the house design into the environment, even the colors they chose add to the landscape.

David Huenink, town of Holland chair, submitted to the record as A15 and read aloud a letter to the BOA dated January 18, 2023 which consists of three sheets, the third sheet being an enlargement of the setback. He read the first two pages into the record.

Doug Hamilton, neighbor, was present but stated he did not wish to comment at this time.

Mr. Pfaller then called the applicants and their design team to speak noting that he is asking what happened, why it happened, and who made these decisions.

Mr. Reenders, Cedar Creek Surveying, stated that the initial err starts with the survey. He noted that A10 is the original survey, but the field work was done last January. He stated that usually the toe of the rocks is used to measure the OHWM for Lake Michigan, so when you look at the waterway on the south, it is labelled edge of ice. He stated that it did not occur to him or his team that the unnamed stream was navigable. He stated that if there is standing water they show it on the survey, but the limits of their topography go to property line, so that's where they stopped. Had they known it was navigable, they would have surveyed all the way to Lake

Michigan. He noted that over time the survey was submitted to the design team, as a baseline to the setback, and it didn't occur to him until the stop order that they did not do a determination of the waterway. He apologized for missing that and noted that, in hindsight, they should have done it because they would have had a real OHWM to use. He pointed out on A11 that the triangle marks along the edge of ice were now labeled OHWM as marked by flags placed by the county after the footings and foundations were already in place. He explained that the red shows where the original house and deck footprint were. Mr. Pfaller asked Mr. Reenders if he put both the red and the black lines on the survey. Mr. Reenders responded that, yes, the black line was the original line and the red is based on clarifying questions from the board at the on-site meeting. Mr. Pfaller asked if he thinks it is difficult to mark this line and is this mistake something that happens often. Mr. Reenders responded that it is a wide delta, which could change direction with weather events. He stated that they do a lot of OHWM determinations, and it is challenging when Lake Michigan rises because that changes the OHWM, but in a few years it can move back. He noted that when it is clear they make the determination, but if they have questions they defer to the county they are working in.

Mr. Peskie next thanked the board and apologized that they are back here for another hearing. He stated that they have a serious situation they are trying to amend and hope to move forward. He explained that they have raised the house based on a variance approval which they thought had measurements included on, however, as we now know, the measurements from the house are not from what the county has designated as the OHWM. He stated that at the September BOA meeting they were granted a variance after discussion of a larger structure including porch and patio area that they eliminated at the board's request. With that, they updated and resubmitted plans after the variance had been approved. He stated that they feel that this has upheld the spirit of what the board is here to do. He noted that Ms. Fabian was onsite in December looking at the septic system and checked the foundation as well, at which point she determined that they were not within the variance parameters and called the contractor immediately. Mr. Peskie stated that after hearing from the contractor he called Ms. Fabian to see what could be done to resolve the issue and work was stopped immediately at that point. He stated that they have the lake, the waterway, and the road bisecting the property, which leaves only about 8% of the lot as buildable area if they follow all of the setbacks as shown in the C100 plan. Attorney Dirkse noted for clarification that the plan that was handed out called C100 was dated '1-5-23' but the date of the plan in the application packet is different. Mr. Peskie explained that the hashed area in red is the legally buildable area considering all of the setbacks. He also pointed out that the area on the west side of the road is about 2ft lower than the area on the eastern side of Cottage Drive and abuts what is considered a wetland. Mr. Pfaller asked if Mr. Peskie put the lines on this design or if Mr. Reenders did. Mr. Peskie responded that they did that. Mr. Pfaller clarified that it was not a surveyed line, so that is was their best guess. Mr. Peskie responded, yes, looking to the west the wetland and the low-lying area has not been delineated yet, but they feel that it would be surveyed as wetlands, making it unbuildable. He stated that without a variance, they are prevented from building even a modest three-bedroom house with a one car garage. In terms of spirit of the ordinance, he thinks that it has no detrimental effects to shoreland, lake or wildlife. He stated that keeping what is there would have less impact than removing and redoing the foundation in terms of area of impact from trucks. He also noted that what was built is less than what the Shoreland Ordinance allows for impervious surface area. In terms of substantial justice, he feels it is consistent to the use and functionality of other parcels in the area. He feels that there is no harm to the public interest, and having more trucks and heavy equipment go back to the site would actually cause more harm to the public interest. He closed by stating that it is a small unnamed waterway and mistakes were inadvertently made. He stated that they have been talking with county staff for nine months about the requirements so that they had everything needed, but, unfortunately,

they are back here today due to some mistakes. He pointed to A11 showing the footprint of what is actually in place today, stating that it shows they are in compliance. He stated that they were granted a variance, but they have a measurement that did not meet where the new foundation is put in place, so they are asking to grant a variance to the new measurement and move forward with building the house.

Mrs. Myers added that years ago she and her husband became members of Ozaukee Washington Land Trust, which tracks the lake front and works with citizens as citizen scientists. She stated that they removed invasive species in a flat bed in that water way clearing out mustard plants and that they are very conscientious about the land and have been since they moved in. She also noted that the waterway is dry most of the year, it does vary and that this is their permanent home.

Mr. Myers added that he would like to apologize to Ms. Fabian and Attorney Fieber for his harsh words born out of frustration that were made before he really learned what happened. He stated that he didn't learn until Friday that the survey did not purport the OHWM. He apologized for his words and tone, but wanted to assure board that there was never any intent to mislead or misinform, they just measured from the wrong point. He stated that they are building in conformity with what they thought was the right point, and that they are in exactly the location permitted by the board, building exactly what they proposed to build. He explained that they want it to be done correctly and legally in conformity with all the relevant ordinances, and that it was also important to their lender that everything was correct. He stated that even if the board was looking at this as an entirely new matter, which would result in a 47 or 48 foot variance, all the conditions that supported the variance in September still apply. He stated that they have an unnecessary hardship due to all the setbacks on the property creating a very small buildable area, which is roughly half of what the ordinance allows from an impervious surface standpoint. He stated that none of the problems were caused by them or the previous owner, that's just how the property is laid out. He acknowledged that there has been some discussion that this is a very flat waterway, but although it meets the standard of being navigable, it has never been navigated. He believes that a lot of the factors in the ordinance do not apply; there is no fishing or recreation and it would have limited if any affect on that or water pollution or safety. He said the factors apply to this lot and this lot alone. He also noted that one of the goals of the county is moving in a direction that promotes non-conforming structures to become conforming. He stated that the home they tore down was non-conforming, and if they are allowed to build this, it will be a conforming use. He asked that this mistake be corrected, allowing them to build on this location on this lot even though they are measuring at a point that is different. He closed by thanking the board for their time and consideration.

Mr. Pfaller asked what the setback is for a building on Cottage Drive and if it is a private road. Mr. Huenink responded that there are no setback requirements from the town as it is a private road. Mr. Pfaller asked does the HOA have setbacks on Cottage Drive? Mr. Myers responded no, not that he is aware of. He believes that the road is a hardship because it cuts off a substantial portion of the lot. Mr. Hamilton clarified that the road is a series of easements along the west side of properties to Lower Smies Road which is a public road.

Mr. Pfaller asked Attorney Dirkse to clarify what was decided on last hearing. Attorney Dirkse suggested that there seems to be some discrepancy between what was requested and what was granted. Based on the votes, he noted that it was a close call on the decisions last time, and that the applicant has the right to have a new variance request heard, not to rehash the last one, and therefore we should focus on the new maps and information. We are here to talk about the rule of 75 ft, as that is the measurement they are asking to be lessened, so the board can

give an answer as of today moving forward, rather than spending hours discussing what happened in the past. He stated what needs to be decided is where the line in the sand is going to be of where the structure can be built and where it cannot.

Mr. Pfaller asked each of the board members to address any questions that they may have for the applicant:

- Mr. Scheuerman stated that during this process, he recalled that they would have been able to rebuild on the footprint per the ordinance. He questioned, on A11, would the deck be considered a structure or is it treated differently? Ms. Fabian clarified that a new structure needs to have the same form and structure, so a house needs to be constructed as a house and a deck needs to be reconstructed as an outdoor living area. Mr. Scheuerman continued that, looking back in the minutes, when they as a body granted a variance to the 75 ft setback at 63.5 ft, they granted at a distance and not to a specific site plan. He stated that regardless of what the plan showed, the variance was for 63.5 ft. Attorney Dirkse added that he did not attend that hearing, but based on his review of the minutes and application he believes yes, the board granted a variance to 63.5 ft. Mr. Scheuerman clarified that the measurement was to be made at 90 degrees to the closest point of the OHWM. Ms. Fabian responded that was correct.
- Mr. Harvey stated that he questions the response to both of Mr. Scheuerman's questions. He stated that he believes the intention back in September was that they asked for a much larger variance and we discussed what the setback would be if we removed that room, with the intention of allowing a certain portion of the house to stay, but requiring them to remove part of the plan to get there. He stated that his recollection is that the intention was to allow a variance to that point with the setback being measured to the setback to the house. He stated that we have heard testimony that they are within inches of that point, not 20 ft which is what we seem to be looking at here. He again asked if it was the intention to give a variance to 63.5 ft or to the northern most corner of the house. He pointed out on a survey that the dimensions of the room and the house after they subtracted to the setback is only a difference of a few inches. However, that is different than what Attorney Dirkse took from the minutes.
- Mr. Sonntag stated that this is a unique property with an unnamed waterway that is probably more grief than it is worth as it takes this lot to a place of not being very usable. He noted that, historically, it sounds like the creek is not variable. He agreed with Mr. Scheuerman that the minutes do sound like they decided on 63.5 ft from the closest point, no matter where that point is. He noted that in the minutes last time, he made a motion to allow a 50 ft setback, but the committee decided that 63.5 ft was a better number. He went on to thank Ms. Fabian for doing her job adding that his was going to be a tough decision. He stated that he believes the 63.5 ft decision was made based on the OHWM, and he doesn't think an unnamed creek should have such an effect on a property, his viewpoint on that hasn't changed, but that's the rule.
- Mr. Born stated that he has spent 30 years on a town board, and if they strictly adhere to everything, the whole property is unbuildable. He noted, however, that there was a house there. He stated that when he was on the variance committee, if someone tore the garage down first and then later asked to rebuild, they wouldn't know where the old structure was. In this case, he thought, the new footprint looks pretty much the same as the old one. He noted that they took the deck off, and they took the screened porch off. He concluded that the line was measured to the wrong place, but they knew that the structure was there before and the new one is not that different.

Mr. Pfaller stated that there are alternatives. Somehow, somewhere from a design standpoint that 63.5 ft got lost. He noted that it should have been caught early in the design stages that they were only 47 ft and not gone on because at this level it is a bigger deal. He noted that he was concerned about this from the standpoint of setting a standard that the variances are flexible based on what happens during the building. Mr. Pfaller read from the September 21, 2022 minutes previous discussion during the deliberation and vote, "Mr. Sonntag inquired if they eliminated the screened porch from the plan how far of a setback would be required. Mr. Peskie said it would be about 63.5 ft. from the OHWM." Mr. Pfaller noted that is where the 63.5 ft got legs. He said without a scale or without the OHWM, you cannot make a statement, so they were not given enough information in the first place. He noted that he sees alternatives as this is not a small lot, and even though a lot of it is not buildable, there is a lot of room between existing structures and the road. It is not a desirable place to build, but it exists. He conceded that building by Lake Michigan would be more aesthetically pleasing, but there was space further back.

Mr. Pfaller noted that one board member is leaving in 5 minutes and the other alternate had already left as well, but noted that they will still have a quorum. Attorney Dirkse stated that he did not realize this would be an issue, but they do still have a quorum.

Mr. Pfaller asked Mr. Peskie and Ms. Carmody when they were making the design how and why did the 63.5 ft number get lost? Mr. Peskie replied that mistakes were made, but they worked with the county every step of the process. He explained that they took the edge of ice as the OHWM, but in the meeting when he said it would be about 63.5 feet, it wasn't an exact number because he didn't have the exact tools with him to provide an accurate number.

Mr. Pfaller explained on committees one of the things members think about is setting a precedent. He stated that if they establish a criteria for certain projects, someone else is going to come in and say you did it for them, so why can't we do it. He noted that they are doing this as fairly as they possibly can with as much information as they can possibly gain.

Mr. Born added that they started out at 40 ft, then instead of measuring where the 40 ft came from, they just took the deck off the house, then they took the screen porch and the fireplace off which landed them at 63.5 ft, but still no one established the point they started from. He concluded that they never talked about where the measurement was from.

Mr. Scheuerman noted that the OHWM could have small discrepancies, but they have a 20ft discrepancy here. He asked, if they measure perpendicular to the OHWM, were the setback measured perpendicular to high water line to corner of the house, would they have a valid variance now that they can rely on and enforce.

Attorney Dirkse responded that he does not think that they do, which is why we are here right now. He noted that a few issues were run up the flagpole at the prior meeting, but at the end of the day it was very clear that the issue is the setback from the OHWM based on the September 21, 2022 minutes which read, "Attorney Fieber stated that a setback has been established at 63.5 ft. from the OHWM as the minimal relief necessary, and they will be voting based on that number". He added that the goal is to be clear about the relief being granted, because at the end of the day that is the standard. He stated that today we are here to get this body on the same page to make that decision.

Mr. Scheuerman added that in a perfect world, when they granted 63.5 ft that would have been laid out on a survey before it was granted.

Mr. Pfaller added that they have to disregard that the footing and foundation is there in making their decision.

Mr. Pfaller pointed out on the second page of the September 21, 2022 minutes there is a discussion in the middle of the page where Mr. Sonntag asked about measurements, and he belabored the point that the southeast corner was the closest point to the OHWM and where ever the line was drawn, it would have to be to the closest point. In the minutes, Mr. Peskie said that the closest corner of sunroom is 51.7 ft from OHWM. Ms. Fabian also said in the minutes that distance needs to be measured from the OHWM. Mr. Pfaller noted that this discussion about the OHWM at the September meeting took place before there was even any discussion about removing patio and sunroom. Additionally, he noted that A13a is the original survey, but on A13b the edge of water was extended further to the southeast and the measurement is shown to comply. He stated that it looks like somebody just extended that line instead of finding out where the OHWM is.

Mr. Pfaller asked who drew that extended edge of water line on A13b. Mr. Peskie responded that the line was an offset from the line that was the edge of ice on the official survey. Mr. Pfaller stated that by looking at this, these lines are everywhere which is confusing. Depending on which line is used, they might be in compliance, but on A16, it looks like they are not compliant.

Attorney Dirkse added that as best as he can read it, instead of 75 ft they can construct only at 63.5 ft from the stream. He noted that it is unfortunate that at that time they did not know where the stream was. On A16 we now know where the OHWM is, and the variance granted is there. He noted that if the applicant wants to contest the placement of the OHWM they could, but he does not believe that is what they are doing. He concluded that 63.5 ft is clearly the starting point, and that's where we are at

Mr. Sonntag left the meeting.

Mr. Pfaller asked if would it be fair to say that we should take A16 as what is going on and the other surveys should go?

Attorney Dirkse responded that it seems that on A13a topograph from Cedar Creek Surveying, there is a line on there measured mostly perpendicular from edge of the proposed new constructions that is 63.5 ft and there were assumptions that this was being granted for the variance. However, in his opinion although the measurement is close, that was not the variance that was granted because they are measuring from the wrong place.

Mr. Pfaller confirmed, is A16 is correct? Attorney Dirkse responded that he believes so, and he thinks the county agrees. Mr. Pfaller instructed the board to look at A16 as they continue to come to a decision.

Mr. Born clarified that 47' 11" ft is the distance being requested. Ms. Fabian responded yes, that was correct. Mr. Pfaller asked Ms. Carmody if the distance line shown in A16 was her line or Mr. Reenders' line. Ms. Carmody responded that they put Mr. Reenders' line in their plan. Mr. Peskie clarified that they took the information provided and it was overlaid onto their design. Mr. Pfaller stated that the 47' 11" is the accurate number then.

Mr. Pfaller individually asked Ms. Fabian, Mr. Reenders, Mr. Peskie and Ms. Carmody if they had anything else to add. Each person asked stated that no, they did not. Mr. Pfaller then asked the board if they had any closing comments or questions:

- Mr. Scheuerman stated that he wished this had been caught sooner.
- Mr. Harvey stated he had nothing to add.
- Mr. Born stated he had nothing to add.

Mr. Scheuerman asked Ms. Fabian if there was any possibility of a deviation that would make this change on where the OHWM is. Ms. Fabian responded that they could have the DNR come in and check, but she was pretty confident in her location of the OHWM. She noted that if there is a variance from where it is marked, it would be a couple inches, not 20 ft.

Mr. Pfaller closed the public portion of the meeting and prepared the board for voting.

Deliberation & Vote:

Mr. Pfaller focused everyone on the A16 survey, stating that looking at the drawing, the OHWM is only 47' 11" from the construction. He noted that from the survey it was clear where the 63.5 ft line was as well as 75' which was marked by a hashed area. He clarified that the variance that was granted on September 21, 2022 moved the allowable buildable area from the northern most hashed line at 75 ft down to the 63.5 ft line, so the question for the board is do these legal standards apply to justify moving all the way to the southernmost line at 47' 11". Attorney Dirkse recited the standards of unnecessary hardship, spirit of the ordinance, substantial justice, and public interest stating the board could discuss each one individually and then vote on it.

Does this property have unique or special conditions that prevent compliance with the ordinance?

ROLL CALL VOTE:

Mr. Scheuerman – N, Mr. Pfaller – Y, Mr. Born - Y, Mr. Harvey – Y

Does an unnecessary hardship exist?

Mr. Born questioned if the surveyor's admittance to not finding the actual OHWM make it a hardship. Mr. Scheuerman responded that it was not self-imposed, so it is a hardship to remove foundation. He stated that there was no malice; it was a mistake- who's mistake we don't know- but, at this point in the game, it is a hardship. When we reviewed the September 21, 2022 minutes we decided 63.5 ft. He continued to say that they came, they asked for a variance, they received one in good faith and somewhere there was an error made, so now they are asking for another 20 ft. Mr. Scheuerman expressed uncertainty that this is a self-imposed hardship, stating that ultimately someone is accountable for a building and what they do during the construction, which is the homeowner. He closed in saying that he wished there was more of a clear-cut definition of a self-imposed problem.

ROLL CALL VOTE:

Mr. Born - Y, Mr. Harvey - Y, Mr. Scheuerman – Y, Mr. Pfaller – Y

Will granting the variance maintain the spirit and intent of the ordinance?

ROLL CALL VOTE:

Mr. Harvey - Y, Mr. Scheuerman – Y, Mr. Pfaller – Y, Mr. Born - Y

Does the granting of this variance give the property substantial justice?

ROLL CALL VOTE:

Mr. Pfaller – Y, Mr. Born – Y, Mr. Harvey – Y, Mr. Scheuerman – Y

Is granting this variance going to harm the public interest?

ROLL CALL VOTE:

Mr. Scheuerman – N, Mr. Pfaller – N, Mr. Born – N, Mr. Harvey – N

Attorney Dirkse announced that the variance request has been granted. He noted that the variance is to allow the building to be constructed as shown on plan A16 at 47'11" from the OHWM. He asked if anyone has any questions or disputes, to which there were none.

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

Mark Pfaller, Chairman

Megan Nasgovitz, Recording Secretary