

SHEBOYGAN COUNTY BOARD OF ADJUSTMENTS MINUTES

Administration Building
508 New York Avenue
Sheboygan WI

January 15, 2014

Called to Order: 1:05 PM

Adjourned: 2:56 PM

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

ALSO PRESENT: Board First Alternate Jerry Rosche, Board Second Alternate Scott Miller, Kay Lorenz, Kathryn Fabian, Matt Mrochinski, Kevin Stange, Attorney Crystal Fieber (representing the Board), Dan Hunt – Wisconsin Department of Natural Resources, Robert Moeller, Matthew Moeller, Erik Jensen, Attorney David Gass

Chairperson Pfaller called the meeting to order and called the roll.

Kay Lorenz verified that the meeting notice was posted on January 7, 2014 at 8:15 AM in compliance with the open meeting law.

There were no public comments regarding non-agenda items.

Eugene Blindauer made a motion to approve the minutes of the October 16, 2013 Board of Adjustments meeting. Motion seconded by Joseph Stodolka. Motion carried 4-1 with David Gartman abstaining since he was not in attendance on October 16, 2013.

Mr. Pfaller opened the hearing for the Moeller Enterprises LLC appeal Case# V-13-02-F for an after-the-fact variance to the Sheboygan County Shoreland Ordinance for the property at 6018 Superior Avenue, Section 18, Town of Sheboygan.

Mr. Pfaller provided an overview of the procedures for the hearing. He read out loud the legal standards for variances and asked for confirmation from applicants that they had read and were aware of the Board's responsibilities.

Mr. Pfaller noted the receipt of the Department's Staff report on the issue and a letter from Mr. Dan Hunt from the Wisconsin Department of Natural Resources dated January 7, 2014. Applicants confirmed they had received a copy of each.

Attorney David Gass, representing the applicant, was called forward and introduced himself. He provided copies of a letter for the record dated January 14, 2014 from Town of Sheboygan Chairman Daniel Hein, which he read out loud.

Mr. Pfaller reported on the site visit on Saturday, January 11, 2014 at 9:00 A.M. David Gartman stated he was absent. He asked if the Board preferred he be replaced with an alternate for the remainder of this hearing. The consensus of the Board was that Mr. Gartman remain seated as long as he had reviewed the meeting documents provided. Mr. Pfaller asked for comments relating to the site visit from the Board members:

- Mr. Blindauer commented on discussion with the applicant about a change in rules over time.

- Mr. Pfaller stated he had the opportunity to convey to Mr. Matt Moeller and Mr. Erik Jensen they did a great job with the property—the architecture is nice, the property is clean and they have respected the property architecturally; however, we are here today to deal specifically with the gazebo.
- Mr. Stodolka noted it was a very large gazebo on the property with full electrical hook ups and lighting. There is asphalt paving to the west of the gazebo seen from the aerial photograph. He stated he will be asking why the gazebo wasn't placed more to the west and further away from the creek.
- Mr. Moehring stated it is an attractive property. His biggest question is why the applicant didn't file for a building permit before they started construction. There would have been room to build it closer to the main building.

Mr. Pfaller asked Robert Moeller, Matt Moeller, Attorney David Gass and Erik Jensen to come forward to provide testimony. Attorney Gass provided background information on the gazebo already constructed on the property. He indicated that in some of the documents that have been delivered there might be a perception that the Moeller's have proceeded with their development, particularly the construction of the gazebo, with some disdain for the setback ordinance or permits. He distributed a 16-page bound set of before and after photographs of the property to be included in the record. Mr. Pfaller allowed Attorney Gass to proceed, although he reminded him this hearing relates specifically to a variance request for the gazebo.

Attorney Gass provided detailed explanations of the photographs, which include various colored line markings. There was discussion about the 75-foot setback area marked on one of the photographs. Mr. Stodolka questioned the amount of the gazebo in the setback area identified on the photograph versus the amount of the gazebo in the setback area identified in the survey. Mr. Pfaller stated we would all agree that a portion of the gazebo is within the setback area.

Attorney Gass explained the Moeller's had the gazebo constructed in 2013 without a permit based on what they believed was correct guidance from Town of Sheboygan officials and indicated that an essential part of the hardship is that they proceeded under good faith belief. The gazebo could be located somewhere else, but for their operation the only area where it makes sense to put it is where it's located, or on that concrete patio. Otherwise, the whole purpose of a gazebo, which is being right next to the natural area, is defeated. The Moeller's ceased construction of the gazebo after receiving the August 22, 2013 letter from the Planning & Conservation Department except to add steps for safety reasons.

Mr. Robert Moeller provided a lengthy explanation as to why they didn't obtain a permit.

Mr. Pfaller noted that if the gazebo was moved to another area there would not be an issue with exceeding the allowable limit of impervious surfaces on the property.

Attorney Gass offered key facts to the Board. Where the gazebo is located was previously an impervious surface. Adding the gazebo does not increase the amount of impervious surface in the setback area. Only a portion of the gazebo is located in the setback area.

Mr. Gartman asked the applicants whether documentation had been requested to confirm the previous areas of impervious surface or whether it is their opinion that these areas previously contained impervious surface. Mr. Jensen noted they alleged that this was the impervious area and they did not exceed that when any of the improvements were constructed.

Attorney Gass summarized by stating the applicant has reduced the amount of impervious surface on the property and is dedicated to the environment. Attorney Gass would like to suggest that granting this variance is in accord with the law. He stated under the circumstances he described, forcing the applicant to remove essentially 10' of the gazebo would be an unnecessary hardship. The spirit of the intent of the ordinance, which is to maintain the flow of water and natural beauty, will not be detracted from by allowing the 10' of the gazebo to remain. There is no injustice done to anyone by leaving the 10' of the gazebo where it is. There is no harm to the public interest in leaving that 10' of the gazebo there when you consider the totality of the circumstances. The applicant respectfully asks that the Board grant the variance. To remove that 10' essentially means remove the gazebo and eliminate that area.

Mr. Matt Moeller remarked there is less impervious surface now.

Mr. Pfaller asked Ms. Kathryn Fabian, Zoning Administrator with the County Planning & Conservation Department, to come forward to provide a brief overview of the history of the property, what occurred, and in what order as outlined in the Staff Report.

Mr. Stodolka interjected that this is an application for a variance of a structure and not for an impervious area, and that discussion relating to impervious area isn't germane to the fact that it is a structure variance the applicants are requesting.

Mr. Gartman asked if the Planning & Conservation Department has a relationship with municipalities so applicants know which agencies to contact. Attorney Gass indicated the applicant was not directed to the County by the Town of Sheboygan officials. Mr. Matt Mrochinski, Code Administrator with the County Planning & Conservation Department, discussed history of relationships with Town Building Permit issuing authorities. Mr. Pfaller added that ultimately, due diligence is the responsibility of the applicant and/or architect.

Mr. Mrochinski addressed open-sided structures. There is a provision in the State Statutes and, as a result, also a provision in the State Administrative Code and the County Shoreland Ordinance, that allows open-sided or screened structures to be constructed within the setback if certain requirements are met. He read out loud the details from the Ordinance identifying the requirement not met in this instance: ALL structures in the shoreland setback area will not exceed 200 square feet.

Mr. Pfaller asked Mr. Dan Hunt from the Wisconsin Department of Natural Resources (DNR) to come forward to review his letter to the Board dated January 7, 2014. He stated that in preparing his letter to the Board he reviewed the plans submitted with the application. He stated he drove by the property today and noted quite a slope from the gazebo to the creek so run off will be even faster. He added that when it comes to these types of structures within the setback, the DNR is always concerned about the impervious areas and run-off. In reviewing the variance requirements, the DNR doesn't see a hardship other than one that is self-imposed because the structure was built without obtaining a permit.

Mr. Stodolka asked when was gazebo was built. Attorney Gass stated summer 2013.

Mr. Stodolka asked for staff clarification on the distance in actual feet the gazebo is within the setback. Mr. Mrochinski provided definition of ordinary high water mark (OHWM) which is the point on the bank or shore of a waterway where, due to the constant or near constant action of water, there is a definable erosion scar or a change in vegetation from aquatic to terrestrial. Mr. Mrochinski is confident with the County's measurement.

He added that whether it is at 64' or 59', the gazebo still doesn't comply with the 75-foot setback. Mr. Stodolka asked if there was any way to mitigate so that gazebo could remain. Mr. Mrochinski stated there is no provision in the Ordinance for mitigation relating to setback.

Mr. Moehring asked about the building being open-sided with a slatted floor so water can drain into ground below and whether that has any impact in mitigation. Ms. Fabian replied it is a roofed structure. Mr. Moehring asked if the applicant could put in a dry well to gather rainwater off the roof. Mr. Mrochinski clarified that this is not an impervious surface issue, but setback from the OHWM.

There were no further questions from Board members.

There being no further comments, Mr. Pfaller closed the public hearing at 2:35 p.m.

Mr. Pfaller asked the Board if they wanted to go into closed session. Mr. Moehring made a motion to go into closed session pursuant to Wis. Stat. 19.85(1)(a) to deliberate. The motion failed without a second to the motion.

Deliberation:

Unnecessary Hardship:

Mr. Gartman made a motion that hardship has not been substantiated to grant the variance request at this time. Motion seconded by Mr. Stodolka.

Discussion ensued. Mr. Stodolka stated it is a hardship, but not an unnecessary hardship. He stated that, contrary to testimony, there are other locations on the property that his gazebo could be placed. It could be placed outside of the setback. The setting of the gazebo was self-inflicted and created by the construction done by the property owners. Under the current law the existing structure doesn't qualify for the exemption due to over 400 square feet being located within the setback area. Whether the gazebo improves the property is not the issue. The issue is whether it complies with the setback requirements. Regardless of how much of the gazebo is in the setback, a significant square footage is in the setback. Mr. Gartman concurs. Mr. Blindauer concurs. Mr. Moehring concurs. Mr. Pfaller concurs.

Roll call vote: Pfaller – yes. Gartman – yes. Blindauer – yes. Moehring - yes. Stodolka – yes. The motion carried unanimously. The variance request is denied.

Mr. Pfaller informed the applicant a letter will be received indicating the variance was denied. County Planning & Conservation Department staff will follow up and work with the applicant on a timeframe to correct the issue.

David Gartman made a motion to adjourn. Motion seconded by Eugene Blindauer. Motion carried.

Kay Lorenz
Recording Secretary

Eugene Blindauer
Board Secretary

