

## SHEBOYGAN COUNTY BOARD OF ADJUSTMENTS MINUTES

Administration Building  
508 New York Avenue  
Sheboygan WI

**December 17, 2014**

**Called to Order: 1:00 PM**

**Adjourned: 2:28 PM**

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

ABSENT: First Alternate Jerry Roshe

ALSO PRESENT: Board Second Alternate Scott Miller, Kay Lorenz, Kathryn Fabian, Matt Mrochinski, Attorney Crystal Fieber, Samuel Schmitt, Kathleen Schmitt, Charles Born (Town of Lima Chairman)

Chairperson Pfaller called the meeting to order and called the roll. He indicated there was consideration of seating Second Alternate Scott Miller due to the absence of Joseph Stodolka at the December 13, 2014 site visit, but Mr. Stodolka has assured the Chairman he has done substantial investigation of the property.

Kay Lorenz verified the agenda was posted on December 8, 2014 at 2:30 PM in compliance with the open meeting law.

Mr. Blindauer made a motion to approve the minutes of the October 15, 2014 Board of Adjustments meeting. Motion seconded by Mr. Stodolka. Motion carried.

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

Mr. Pfaller opened the hearing for the variance requests of Samuel & Kathleen Schmitt, Case #V-14-03-F, for property located at N4485 State Highway 32, Section 12, in the Town of Lima. There are two parts to this variance and they will be handled separately. One is **an after-the-fact variance to the 75-foot setback** of the Sheboygan County Shoreland Ordinance for a gazebo which includes a patio with a fire pit, and the second is a variance of the Sheboygan County Shoreland Ordinance to install a new patio adjacent to the existing home which would not meet the 75-foot setback requirements.

Mr. Pfaller called Samuel & Kathleen Schmitt forward to provide testimony. Mr. Pfaller provided an overview of the procedures for the hearing and asked the applicants if they understood the procedures.

Mr. Pfaller acknowledged the items of correspondence received for the record to confirm Samuel & Kathleen Schmitt had received and read them: October 16, 2014 letter from Matt Mrochinski; December 8, 2014 Staff Report from Matt Mrochinski; and December 17, 2014 email and letter from Dale Rezabek, Wisconsin Department of Natural Resources. A letter dated October 27, 2014 from Heather Pendleton, Account Representative for Maritime Insurance was provided today by Mr. & Mrs. Schmitt which will go into the record as a public comment. Mr. & Mrs. Schmitt acknowledged they had received and read each of the items of correspondence.

Mr. Pfaller asked for comments from the Board members regarding the site visit on Saturday, December 13, 2014 at 9:00 A.M.:

- Mr. Blindauer – He indicated what he saw was what was described in the paperwork received. Matt clarified that the patio and gazebo area exceeds the maximum 200 square feet of floor area allowed within the setback area. Having the solid wall does not cause it to be a nonconforming structure.
- Mr. Gartman – The photos submitted were helpful. They had it marked well. He stated this situation is pretty simplistic regarding the evidence.
- Mr. Stodolka – Apologized for missing the site visit, but reviewed the documentation, photographs, and maps provided and feels very comfortable going forward in hearing this matter.
- Mr. Moehring – Stated it is a well-maintained property. One concern is the steep grade to the creek and the buffer zone that needs attention.
- Mr. Pfaller – Preparation was well done, information provided was good, and it is a beautiful and well-maintained property.

Mr. Born arrived after the public comment period and was asked if he had anything to add regarding the variance request. Mr. Born stated he was not certain if a building permit was obtained from Town of Lima. He had heard about the gazebo at the recent Town of Lima Board meeting. A copy of the Staff Report was provided to him. Chairman Pfaller asked that he take some time to read it and he will ask him later if he has more questions.

Chairman Pfaller asked the Schmitt's to provide their rationale for requesting the two variances. Mr. Schmitt indicated they were aware of the Shoreland Ordinance when they built the house, but completely forgot about it when they built the gazebo/patio using free materials. They wanted it located in an area where their kids would have a place where they could be out of the way of the parents and parents could be out of the way of the kids. They wanted to take advantage of the views of their property and want to use their land. The hardship is that where they placed their home, it leaves only a small area to have a patio. They wanted a nice area for chairs in order to sit and enjoy the area--they want to entertain and the area to look nice. Mr. Schmitt indicated a permit from the Town of Lima wasn't taken out because projects under \$500 do not require a permit. He did not take out a permit because the materials used were free other than the patio pavers. Mrs. Schmitt added that the property was in her husband's family for 80+ years. After the parents were gone, they bought the property from her husband's uncle but were not aware of all the permitting requirements until the house was being planned. She indicated the Ordinance had changed since then because at one time they were able to put a patio in the back, but it was never drawn in the plan. They also wanted to put in a pool and patio last year, but the permit request was denied. It was at that point they were informed the Ordinance had changed. Chairman Pfaller asked if the Schmitt's had read the Shoreland Ordinance. Mr. Schmitt indicated he has read the Ordinance several times, but doesn't understand it. He did receive something from the DNR explaining why the law is in place.

Mr. Born indicated this project is under \$500 because materials were given to them. If they would have applied for a permit with the Town of Lima, the Town would have caught it at that point because the Town of Lima permits need to be approved by the County.

Mr. Gartman asked when the gazebo was built. Mr. Schmitt stated July, 2014. Mr. Gartman pointed out that in May, 2014 the Schmitt's applied for a permit to add a pool and patio, which was denied, and there was also a history of applying for a permit for the dwelling in 2009. Mr. Gartman commented that twice the Schmitt's had experience working with County Planning and he found it difficult to understand how these experiences wouldn't have made the Schmitt's aware. Mr. Schmitt indicated they were aware of the Shoreland Ordinance, but they just got going on the project and forgot about the permit requirement.

Mr. Blindauer indicated his issue is that they did not apply for a permit. He indicated that having free materials does not take away from the value of the completed structure. Mr. Gartman agreed with Mr. Blindauer.

Mr. Moehring asked if the structure is free-standing. The Schmitt's indicated the posts are in pea gravel down about 3'.

Mr. Stodolka stated we live in Sheboygan County and are blessed with beautiful natural areas and watershed. Part of our task is helping to protect that. It's understandable that people would want to use their properties to the best advantage, but there are significant restrictions. This is an elaborate structure and patio area that has been built well within the setback areas.

Coding Administrator Matt Mrochinski commented that the lot on which the house is built was created in 2009 through the certified survey process that required approval from Town of Lima and Sheboygan County. Had indicated he had a copy of an email correspondence from the surveyor at that time indicating the preliminary certified survey map was submitted to the County Planning office and in that email the survey does note several issues going on here. The navigable tributary at the time the certified survey map was proposed was mapped as an ag waterway, meaning that the surrounding land use was non-structural ag. Although it may exhibit the characteristics of a navigable waterway, there was no stream history so the waterway was ag exempt—not considered navigable. Mr. Mrochinski stated that is not unique to Sheboygan County. It is a state-wide designation for those types of waterways; however, when the land use changes to anything other than non-structural ag, the waterway then gets looked at by the DNR and they make a determination as to whether the waterway meets the physical definition of a navigable waterway. In the email, the surveyor notes that the ag waterway is listed as such, ag. However, they would set it up to assume someday it will become navigable. It has defined banks, etc. The surveyor goes on to say that the intended buyer understands this and intends to place his house at least 75' from the ordinary high water mark. Mr. Mrochinski stated it would appear that even prior to Mr. and Mrs. Schmitt owning the property, there was discussion of the tributary and potential for it to be navigable. Over the course of the certified survey map and approval, and prior to permits being issued, the DNR did an onsite visit and it was determined to be navigable and a Shoreland permit was subsequently obtained by Mr. and Mrs. Schmitt to construct the house. Mr. Gartman asked if there were restrictions discussed beyond the house at that time. Mr. Mrochinski indicated the permit was for the house based on the plans. He indicated prior to January, 2013 when the Ordinance changed, patios were exempt from the Shoreland setback provided they met certain criteria. The Ordinance changed in January, 2013 and that provision was removed because the state did not allow the patio exemption any longer. Prior to January, 2013 the Ordinance did contain the same provisions for an open-sided structure and the 200 square foot maximum within the setback but not any closer than 35 feet provided specific standards are complied with.

Mr. Stodolka asked Mr. Mrochinski if there was a way to build the patio using pervious versus impervious material. Mr. Mrochinski stated pervious patios would still have to comply with the setback. The Ordinance has a provision for landings, stairways and walkways provided they don't exceed five feet in width to be exempt from the setback, and staff did have that discussion with Mr. Schmitt with respect to a porch or a landing off the patio door with a stairway or a walkway down to a patio that complied with the setback.

Chairman Pfaller asked Mr. Born if he had anything else to add. Mr. Born said he understands that not issuing a permit is not what this hearing is about.

Mr. Gartman reiterated the importance of the obtaining a building permit.

Mr. Schmitt indicated he hopes this goes their way and they are sorry they didn't get the permits from the Town of Lima and Sheboygan County. He wanted to get moving on the project and they wanted to enjoy their land.

Mr. Pfaller read the standards for a variance in Sheboygan County and explained the process to Mr. & Mrs. Schmitt.

There being no further comments, Mr. Pfaller closed the Public Hearing relating to the after-the-fact variance request for the gazebo/patio at 1:47 p.m.

**Deliberation:**

***Unnecessary Hardship:***

**Mr. Stodolka made a motion to find that an unnecessary hardship has not been found as to the gazebo and patio.** Not just because the variance was applied for after-the-fact, but because it's a large and elaborate structure within 38 feet of the OHWM, there are other uses for the property, and perhaps they can design or plan a gazebo and patio structure that can comply. Motion seconded by Mr. Moehring. Discussion ensued.

- Mr. Blindauer asked about the area variance and whether the Board can put conditions on the approval. Corporation Counsel indicated, "yes".
- Chairperson Pfaller suggested the Board deal with this based on what they know and what is there. If the variance request is denied, the applicant has the option of going back to the County to make the structure compliant. Corporation Counsel indicated, "yes".
- Mr. Moehring asked for clarification on the motion—if a hardship has not been found, Board members should vote "yes". Corporation Counsel clarified it is a negative motion, so if Board members are voting to deny based on the unnecessary hardship the vote should be "yes" in agreement with the motion.

**ROLL CALL VOTE:**

Mr. Blindauer – Yes, Mr. Gartman – Yes, Mr. Stodolka – Yes, Mr. Moehring – Yes, Mr. Pfaller – Yes. Motion carried.

Mr. Pfaller asked Mr. and Mrs. Schmitt if they understand that this failed.

The Board took a short recess at 1:52 p.m.

The meeting re-convened at 2:01 p.m.

Chairman Pfaller indicated Corporation Counsel reminded him the Board needed to go through the remaining legal standards for the gazebo/patio. Deliberation on the after-the-fact variance continued:

***Spirit of the Ordinance:***

Mr. Stodolka indicated the spirit of the ordinance is to help protect the land overall, and structures and large areas can be quite degrading because of the run-off.

**Mr. Stodolka made a motion that granting the variance would not meet the spirit of the ordinance.** Motion seconded by Mr. Gartman. There was no discussion.

**ROLL CALL VOTE:**

Mr. Moehring – No, Mr. Stodolka – Yes, Mr. Gartman – Yes, Mr. Blindauer – Yes, Mr. Pfaller – Yes. Motion carried.

**Substantial Justice:**

Corporation Counsel provided the definition of substantial justice to assure the meaning was understood—it is the minimum relaxation of dimensional standards to allow for the use of the property.

**Mr. Stodolka made a motion that substantial justice would be done by denying the variance.** Motion seconded by Mr. Gartman. Discussion ensued.

- Mr. Moehring indicated we are dealing with two different things—the patio area being inside the setback and the size. There are some things the owners could do to make it compliant.
- Mr. Stodolka also indicated it should be noted that there are alternatives that can be done by the owners of this property that might bring them into compliance. If there is no way they could use or change that, there would be a different answer to this.

**ROLL CALL VOTE:**

Mr. Blindauer – Yes, Mr. Gartman – Yes, Mr. Stodolka – Yes, Mr. Moehring – Yes, Mr. Pfaller – Yes. Motion carried.

**Contrary to public interest:**

**Mr. Gartman made a motion that granting the variance would be contrary to the public interest.** Motion seconded by Mr. Stodolka. There was no discussion.

**ROLL CALL VOTE:**

Mr. Moehring – Yes, Mr. Stodolka – Yes, Mr. Gartman – Yes, Mr. Blindauer – Yes, Mr. Pfaller – Yes. Motion carried.

**The after-the-fact variance request for the gazebo and patio is denied.**



Mr. Pfaller opened the hearing for Samuel & Kathleen Schmitt, Case #V-14-03-F to **request a variance** to the Sheboygan County Shoreland Ordinance regarding a new patio for the property located at N4485 State Road 32, Section 12, in the Town of Lima.

Mr. Pfaller asked Mr. and Mrs. Schmitt to come forward to provide testimony on the patio. Mr. Schmitt will be building the patio out of pavers similar to what was used in the fire ring area. Mrs. Schmitt asked if it matters what the patio materials are made of. She indicated they prefer a patio over a deck, a flat surface to the ground. Chairman Pfaller clarified they are requesting to install an impervious patio and stoop of 535 square feet, 20’ by 25’, that would be concrete or pavers.

Code Administrator Matt Mrochinski had nothing to add.

Mr. Born stated he was sure they would be applying for permit for the patio with the Town of Lima. He said the Town of Lima would require a plan including type of materials.

Mr. Gartman asked if there’s anything additional—would there be a request for another variance. Mrs. Schmitt stated no.

Mr. Moehring asked Mr. Mrochinski to clarify if the change to a navigable waterway was made after the house was built. Mr. Mochinski indicated it was prior to the house being built. There was a Shoreland Floodplain Zoning Permit authorizing the home construction. He confirmed the 75-foot mark was already marked at that time. Mr. Moehring asked if there is a difference between a framed structure and impervious materials—could he put a deck off the back porch. Mr. Mrochinski indicated that the impervious surface standard, or lot coverage, versus setback

are two different issues. The structure still has to comply with the ordinary high watermark setback whether it is pervious or impervious.

Mr. Stodolka indicated the Schmitt's stated they didn't want a deck, but prefer a patio. Mr. Stodolka suggested other option for configuring so it would be outside of the setback and asked the Schmitt's if they had looked into that option. The Schmitt's indicated a patio is their personal preference. Mr. Stodolka noted that the letter from the insurance company requires a step. Mr. Mrochinski reviewed alternatives with the owners in October.

There being no further comments, Mr. Pfaller closed the Public Hearing relating to the patio variance request at 2:18 p.m.

**Deliberation:**

***Unnecessary Hardship:***

**Mr. Stodolka made a motion that an unnecessary hardship is not found and the variance be denied.** Motion seconded by Mr. Blindauer. Discussion ensued.

- Mr. Stodolka stated he could not make a motion finding unnecessary hardship because there are other choices that could be done for the use of this property. The preference is a patio, which would fall outside of the statutes in this case.

ROLL CALL VOTE:

Mr. Blindauer – Yes, Mr. Gartman – Yes, Mr. Stodolka – Yes, Mr. Moehring – Yes, Mr. Pfaller – Yes. Motion carried.

***Spirit of the Ordinance:***

**Mr. Gartman made a motion that the spirit of the ordinance would be violated by approval of the variance because there are other options.** Motion seconded by Mr. Blindauer. Discussion ensued.

- Mr. Stodolka indicated it's more of a chipping away of intrusions into the setback areas and didn't think it would be against the spirit of the ordinance to grant the variance. The spirit of ordinance is not violated by granting the variance if it weren't due to the prior finding.
- Mr. Moehring indicated he feels the homeowners are landlocked regarding what they can and cannot do. It is difficult to take away the ability to put on a patio, but the house was built after knowing what the laws were and there may have been things done differently when it was first planned with the contractor.

ROLL CALL VOTE:

Mr. Moehring – Yes, Mr. Stodolka – No, Mr. Gartman – Yes, Mr. Blindauer – Yes, Mr. Pfaller – Yes. Motion carried.

***Substantial Justice:***

**Mr. Gartman made a motion that substantial justice has not been met to grant the variance.** The rationale is justifying the hardship—it was a preference for a patio—and there were ideas from other Board members as to how they could comply by constructing a deck instead of a patio and getting it away from the required setback. Motion seconded by Mr. Moehring. There was no discussion.

ROLL CALL VOTE:

Mr. Blindauer – Yes, Mr. Gartman – Yes, Mr. Stodolka – No, Mr. Moehring – Yes, Mr. Pfaller – Yes. Motion carried.

***Not contrary to public interest:***

**Mr. Stodolka made a motion that granting the variance would be contrary to public interest.** Motion seconded by Mr. Blindauer. Discussion ensued.

- Mr. Stodolka indicated it is the chipping away and repetitive incursions into the setback areas that are supposed to be protected. Because of that, granting the variance would be contrary to public interest.
- Mr. Gartman repeated the key is the chipping away. It is very restrictive property. There are a lot of property owners that are affected by these laws. You have to be compliant.
- Mr. Pfaller stated private property is a wonderful thing in this country. All landowners, especially in this county because there are so many rivers, tributaries, farms, cropland, and homes on lakes have a responsibility to everyone else in this county that uses our water for any purpose. Even though it's a private piece of property it affects a lot of people—the public interest. We don't want to set precedence.
- Mr. Gartman added he knows how difficult this is for the owners.

**ROLL CALL VOTE:**

Mr. Blindauer – yes, Mr. Gartman – yes, Mr. Stodolka – yes, Mr. Moehring – yes, Mr. Pfaller – yes. Motion carried.

**The variance request is denied.**

**Mr. Blindauer made a motion to adjourn.** Motion seconded by Mr. Gartman. Motion carried.

Kay Lorenz  
Recording Secretary

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Eugene Blindauer  
Board Secretary