

July 29, 2020

Minutes of the Board of Adjustment meeting and Public Hearing with site inspection conducted on July 22, 2020 at 5160 Bonnie View Road in the Town of Florence, Florence County, WI.

Scott Wolf called the meeting to order and took roll call.

Members present: Mike Bednarski, Dennis Christian, Rich Wolosyn, Helen Stratton-Alternate

Members absent: None

Present at site visit: Greg Seibold - Seibold Law Office, Suzanne Kulik, Joe Kulik, Tim Bomberg - Town of Florence Chairperson, Scott Wolf - Zoning Administrator and Trish Kelly - Assistant Zoning Administrator

Present at Public Hearing: Steven Garbowicz - Corporation Counsel, Greg Seibold - Seibold Law Office, Suzanne Kulik, Joe Kulik, Tim Bomberg - Town of Florence Chairperson, Scott Wolf - Zoning Administrator and Trish Kelly - Assistant Zoning Administrator

Wolf opened nominations for Chairperson for the Board of Adjustment Committee. Mike Bednarski nominated Rich Wolosyn for Chairperson and moved that nominations be closed and that a unanimous ballot be cast for Rich Wolosyn. Second by Mike Bednarski. Vote taken, all ayes. Motion carried.

Rich Wolosyn then opened nominations for Vice-Chairperson for the Board of Adjustment Committee. Mike Bednarski nominated Dennis Christian for Vice-Chairperson, and moved that nominations be closed and that a unanimous ballot be cast for Dennis Christian. Second by Rich Wolosyn. Vote taken, all ayes. Motion carried.

Chairperson Rich Wolosyn asked for a motion to approve the agenda, **motion by Dennis Christian to approve the agenda, second by Mike Bednarski, vote taken, all ayes, motion carried.**

Site inspection of property with discussion. Wolf stated that on August 26, 2019 an anonymous letter was dropped off at the office notifying him of a porch addition towards Keyes Lake. Wolf visited the site later that afternoon to investigate the concern, and found that an addition to a deck was being built toward Keyes Lake. No permit was previously granted for the deck addition, and was found to be in non-compliance with Section 5.1 of the Florence County Shoreland Wetland Zoning Ordinance. At that time, Wolf informed the property owner that removal of the addition would be required or apply for an After-the-Fact Variance. Chairperson Rich Wolosyn asked if the measurements were accurate. Wolf responded that on the day of initial site inspection, measurements were taken in accordance with the proposed plan.

Motion by Mike Bednarski to adjourn site inspection and reconvene in the Courthouse at 501 Lake Avenue, Town of Florence, Florence County, WI, second by Dennis Christian, vote taken all ayes, motion carried.

Chairperson Rich Wolosyn asked for a motion to approve the minutes of the meeting and public hearing conducted on October 30, 2019. **Motion by Dennis Christian to approve the minutes of the meeting and public hearing conducted on October 30, 2019. Second by Mike Bednarski, vote taken all ayes, motion carried.**

Chairperson Rich Wolosyn announced *Public Hearing VAR-20200001*, request an After-The-Fact Variance to retain a 193 square foot deck expansion towards the Ordinary High Water Mark of Keyes Lake resulting in a 56-foot setback from the Ordinary High-Water Mark. Property is part NE ¼, NE ¼, Section 36, Township 40 North, Range 17 East, Town of Florence, Florence County, WI. Property address is 5160 Bonnie View Road. Request submitted by Joseph Kulik.

Correspondence was read from Dale Rezabek, Department of Natural Resources. Mr. Rezabek stated in his letter that per the information provided in the application they received, the department does not believe the applicant can demonstrate meeting the three statutory criteria for granting a variance. The applicant rebuilt a portion of an existing damaged 251 square foot deck and then completed an expansion of 193 square feet of deck which is closer to the ordinary high water mark of the lake than the existing deck.

As the Board reviews the variance request, please keep in mind that the applicant has the burden of proving that their request meets all of the statutory requirements for granting the variance. That is, the applicant must prove that they will suffer unnecessary hardship if the provisions in the county's shoreland zoning ordinance are literally enforced. The Wisconsin Supreme Court has made it clear that proof of unnecessary hardship by itself does not entitle an applicant to a variance. All three statutory variance criteria must be satisfied in order to grant a variance. *Unique physical limitations* which are unique to the property in question and not shared by other properties in the area. When determining if compliance prevented, the whole parcel must be considered. The applicant noted that other nearby properties have a flat slope to the waterfront, not as steep as this property.

No harm to public interest in that the applicant must demonstrate that the variance will not result in harm or be contrary to public interests. The Board must consider the impacts of the proposed project as well as the cumulative impacts of similar projects on the interests of the neighbors, the community, the resources, and the general public. These interests include protection of public health, safety and welfare, maintenance of clean water, protection of fish and wildlife habitat, and preservation of natural scenic beauty. The expansion of an accessory structure within the setback area and additional impervious surfaces can increase the amount of surface storm water runoff that can get into the lake, which can have an adverse effect on water quality by increasing the amount of warmer water reaching the lake, along with additional suspended sediments containing nutrients that can adversely affect water quality, and may not be in the public interest unless runoff can be managed with vegetation or other methods to allow runoff to slowly infiltrate into the soil.

Unnecessary hardship: The applicant may not claim unnecessary hardship because of conditions which are self-imposed or created by a prior owner. Courts have also determined that economic or financial hardship does not justify a variance. When determining whether an unnecessary hardship exists, the Board must consider the property as a whole, rather than just a portion of the parcel. The property already had an existing deck, and the deck was expanded without inquiring if a permit was needed and whether the expansion would be allowed, hence a self-created hardship. (Letter on file in Zoning Office.)

Correspondence was then read from Michael Boettcher, Stanley and Betty Nowak, Greg Wadge, Bruce and Janis Glaus, and Joan Swanson who are neighbors to the applicant and were notified of the public hearing. All letters stated they have no objection to the deck extension as submitted. (Letters on file in Zoning Office.)

Wolf noted for the record, an existing portion of the deck that was not known at the original site visit due to the removal of a portion of the deck along with the railing. This was noted by the property owner at the site visit. Wolf measured during the site visit an existing shelf structure on the railing, as described by property owner, was 1-foot, 10-inches closer to ordinary high water mark.

Attorney Greg Seibold, representing the applicants said it is important to note that the Kuliks never had any intent to flout the ordinance requirements to get a variance. They in fact didn't know that they needed to get a variance or land use permit in order to extend their deck. They actually made the modification as part of repairs, that they had to do, when a tree fell on the deck. His clients are from Texas. They bought the property up here so they could be closer to their Daughter and Grandchildren, and were not natives of the area and not aware of the ordinances by virtue of living here for any amount of time. The purpose of the modification was to increase the functionality of the outdoor space for Mr. Kulik, who has a progressive disabling disease which is Guillain-Barre' Syndrome, which affects his mobility. The home is small on two levels and because of his physical limitations he is unable to regularly use the lower level or the cement patio area down below. Given the original size of the deck it was very small and he had very little ability to use the outdoor area on the lakeside because of the steepness of the slope. Most of the lakeside of the house is unusable by Mr. Kulik. As you noticed while at the site, there are encasement windows that extend out into the deck and allows very little room to move about with a table on the deck. Even with the deck extension at its nearest point, it is still farther away from the lake than both neighboring properties. Neither of the neighbors, or extended neighbors as you heard from the letters submitted, have any objection. The only thing the Kuliks have done since being notified, is put up a railing for safety purposes.

Wolf commented the railing was discussed at the site that day, that the railing be put up due to a safety hazard and was allowed.

Attorney Greg Seibold said there was an erosion issue under the area where the deck addition was placed. Extending the deck actually helps protect that area and prevents further erosion and does protect the runoff into the lake. The uniqueness is this is a very steep property, with the narrow lot there is no way to expand to the side without encountering side setback issues. The hardship is the lack of utility of the existing deck and the property without expansion, because of Mr. Kulik's physical limitation. That is a hardship beyond his control. He asks that the Board look beyond the DNR letter for their perceived authority.

The applicant, Mr. Kulik had no further input. Tim Bomberg, Chairperson for the Town of Florence said he didn't see where the Town would object.

Chairperson Rich Wolosyn had one question before we got to the Board Members for their comments and concerns. He asked Attorney Greg Seibold if this was a request under the Americans with Disability Act (ADA). Seibold said ADA applies to public accommodations and this isn't a public accommodation. So this is not directly reliant on ADA, but the argument is that it is related to the applicant, because of his disability. There are other provisions that would apply, according the ordinance, if there is documentation from a Medical Physician that there is a physical limitation. Wolf commented the ordinance allows for ADA requirements under Section 5.4 (f), (2) of the Shoreland Wetland Zoning Ordinance and only applies to stairways, walkways and lifts, not necessarily to an access structure on a deck. Wolf said he has had conversation with Steve Garbowicz, Corporation Counsel on the matter.

Steve Garbowicz, Corporation Counsel said the comment without no evidence of a disability is something the court can take into account, you may suffer from what you've told us, but generally if you make the argument that you have a disability, that requires a modification to the ordinance. You would have to present some proof from a Doctor as to how you are disabled, what you are requesting, how that is impacted by your disability and the need for the change. As of today, we do not have any medical information pertaining to your disability, I am not denying you have one, but generally as a County we have to confront that situation and provide document to the court.

Attorney Greg Seibold said the request isn't made reliant under the ADA requirements. The physical limitations are a basis for the undue hardship argument. If you want my client to supplement his request with some medical proof because there is doubt as to the truth, we can certainly do that, but this is an undue hardship, not an ADA hardship.

Wolosyn said when we talk about an unnecessary hardship, this is about the lot, the parcel, the building, the structure and the use, and not about the individual.

Steve Garbowicz, Corporation Counsel, said there are present actual physical conditions applying to the lot, the parcel, the back of the building, the structure and the use is another possible factor. What you have to find here is that there is a hardship, that this lot is of such a nature that it creates an unnecessary hardship requiring this deck to be extended as it has. He said he hasn't heard anything about that as of yet. Yes, it is steep, from what I've read and from what I've heard, the deck has been extended to make Mr. Kulick's use of the deck more reasonable than it would be if the deck was not extended.

There was conversation amongst the Board regarding changing out the windows on the deck to double hung windows or slider windows, so there is passage behind the table and chairs on the deck. The Board also discussed adding onto the deck sideward of the home.

Steve Garbowicz, Corporation Counsel requested that the Board of Adjustment review the findings and vote on each of the criteria needed to grant a variance, with a final motion and vote at the end.

The standards for a variance are as follows. The Board of Adjustment shall consider the following standards for granting a variance. The burden of proof at all times remains with the applicant to establish that the proposed variance meets the following standards:

Unnecessary hardship does not exist as there are other options that can increase the functionality of the structure, such as changing out the windows so they don't swing out into the deck, to double hung windows or slider windows so there is passage behind the table and chairs, this would make it solvable for more room. The owner could add on to the existing deck by building it sideward of the home, away from the water. **Motion by Dennis Christian that an unnecessary hardship does not exist, second by Mike Bednarski, vote taken, all ayes, motion carried.**

Unique property limitations do not exist as the slope is in not unique to this specific property, as there is steep slope on the neighboring properties as well. The addition to the deck didn't help or stop the slope of the property. **Motion by Mike Bednarski that unique property limitations do not exist, second by Dennis Christian, vote taken, all ayes, motion carried.**

Conditions not self-created. The existing deck is usable without the addition. Other options are available other than extending the deck toward the water to make the deck more usable. **Motion by Dennis Christian that the conditions were self-created as the owners had other options available, second by Mike Bednarski, vote taken, all ayes, motion carried.**

No harm to public interest. This is contrary to the ordinance to grant an After-The-Fact Variance, as we usually encourage people to see the Zoning Administrator before they take their own actions to construct what they want, that may be contrary to the zoning ordinances. Granting the variance would be contrary to public interest. **Motion by Mike Bednarski that the addition is contrary to the ordinance and not in the public interest, second by Dennis Christian, vote taken, all ayes, motion carried.**

Motion made by Dennis Christian to deny Variance VAR-20200001 with the above findings, for the request for an After-The-Fact Variance to retain a 193 square foot deck expansion towards the Ordinary High Water Mark of Keyes Lake resulting in a 56-foot setback from the Ordinary High-Water Mark, second by Mike Bednarski, vote taken, all ayes, motion carried. The variance is denied.

Motion by Mike Bednarski to adjourn, second by Dennis Christian, vote taken all ayes, motion carried.

Respectfully submitted,

Scott Wolf,
Zoning Administrator

RW/tk