STATE OF WISCONSIN
OZAUKEE COUNTY
LAND & WATER MANAGEMENT DEPARTMENT
BOARD OF ADJUSTMENT

May 8, 2019 - 10:20 a.m.
Ozaukee County Administration Center
Port Washington, Wisconsin
Reported by: Liane M. Baranek, RMR

Board Members Present:

Philip E. Steinke, Chairman
Stephen L. Castner, Vice Chair
Richard Mueller
Marjie Tomter
Robert Hubing

Also Present:

Andy Holschbach, Land & Water Management Department

Agenda:

Appearing: Richard Potokar

Variance request by Matthew and Shelly Mabee, Owners, (Page 31).
Appearing: Matthew Mabee.

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PROCEDINGS

MR. STEINKE: We're going to call the meeting to order at 10:20. This is a public hearing open to the public. Anyone may address the Board providing they are recognized by the chairperson -- I'm the chairperson; my name is Phil Steinke -- identify yourself, and as long as you're signed in on our sheet. You both signed in? Okay.

Adequate time will be provided to address the Board regarding the requests today. The hearing is being recorded by the court reporter. Therefore, I ask you not to interfere, interrupt or interject comments while another person has the floor. Please speak at the time of -- pace that the court reporter can accurately record the meeting. Thank you.

Has the press been notified and various interested parties been notified, Andy?

MR. HOLSCHBACH: Yes, they have.

MR. STEINKE: All right. So we'll take it in the order of the agenda. The first one today, Andy, will be the request for a variance for Potokar.

MR. HOLSCHBACH: Would you like me to read it? Before I get going real much into it, I
wanted to mention that we have two variance requests this morning, and in your packet I did send out information as to what a variance all entails.

There's two types of zoning variances. There's an area variance and a use variance. This is actually an area variance because it's dealing with setbacks, and I just wanted to go over what the criteria are for granting a variance.

To qualify for a variance an applicant has the burden of proof to demonstrate that all three criteria defined in state statutes and outlined below are met, and that's the unnecessary hardship, unique property limitations, and then no harm to the public interest, and for an area variance, unnecessary hardship exists when compliance would unreasonably prevent the owner from using the property for a permitted purpose, leaving the property owner without any use that is permitted for the property or would render conformity with such restrictions unnecessarily burdensome, and for hardship due to unique property limitations, unnecessary hardship must be due to unique physical limitations of the property such as steep slopes or wetlands that prevent compliance.
with the ordinance, and I'm just reading parts, snippets of this, and then No. 3 was that there should be no harm to public interest, so a variance may not be granted which results in harm to public interest, and the interests that are included in our ordinance are promoting and maintaining public health, safety and welfare, protecting water quality, protecting fish and wildlife habitat, maintaining natural scenic beauty, minimizing property damages, ensuring efficient public facilities and utilities, requiring eventual compliance for nonconforming uses, structures and lots, and any other public interest issues.

I just wanted to go over those. Those are things we need to be looking at this morning, so our first request this morning is the request for a variance to Section 7.0310 of the Ozaukee County Shoreland & Floodplain Zoning Ordinance by Potokar Trust and Patricia J. Potokar, owners, and Richard Potokar Inc. as designer/agent, to construct building additions and modifications to the existing residence within the existing 53 feet setback of Lake Michigan bluff closer than the current 86 feet calculated setback from the Lake Michigan bluff.
The property is located in the Town of Port Washington. It's in the NW 1/4 of the SE 1/4 of Section 11, Tax Key No. 07-011-14-005.00. The site address is 4236 High Point Beach Road, Port Washington, and with us this morning we have Richard Potokar.

MR. STEINKE: We went out and looked at the property. Would you like to give us any other information besides what you've given us out there?

MR. POTOKAR: No. There is a narrative I think in your documents which pretty much spells out what the intention is here.

MR. HOLSCHBACH: I think for the record it would be good to maybe talk a little bit more, and then I have to remember to read a letter that I have from an adjoining neighbor.

MR. POTOKAR: Okay. Well, again, the intention here is that both my wife and myself are getting older. We -- my wife is retired and I'm looking to retire in a few years, and we would like to live in this location permanently.

My wife has been living here for two years now, taking care of our grandsons in Whitefish Bay, and the house presents some problems with accessibility with the stairway between the
levels, and so by incorporating a stairway within
the house itself we would take out a bedroom, and
so we were looking to bring the laundry room up to
first floor, and as the requirements develop, we
look to include a dinette space and an entry, a
covered entryway on both sides of the current
house, and one of those covered porches would be
within the current setback, would be within the
current setback, but would be in violation of the
county setback of 75 feet, but we would stay within
our 53-foot setback.

And the other portion is a screened porch
that would be attached to the house, would also
be -- half of it would be within the 75-foot
setback, and one thing I forgot to show this
morning was where the 86-foot setback is. It's
actually on the other side of that one wing that
you walked around, so we are building a master
bedroom and the entry and the garage and another
covered entrance all on the other side of the
86-foot setback, which would be -- none of that
would be in violation of the bluff setback.

And I pointed out that our neighboring
properties, the one to the north, which is my
brother and sister-in-law, they are 30 feet from
the bluff setback, and then the neighbor to the
south is about 40 feet to the bluff setback, and
ours being at 53-foot setback is much larger than
the two neighboring, so even though we're building
within that, within the county setback, we are much
further away from the bluff setback than our
neighboring properties.

If you were to actually tear the house
down and go by the 86-foot setback, the bluff
setback, it would be a different -- a totally
different house because you lost the grade of the
site and you would wind up having an entrance at
the lower level because it would be pushed back so
far towards the road that there would be a big
change in the overall development of that site
which would be totally different from all the other
properties on that road so it would wind up being a
taller structure, so by abiding by the current
53-foot setback we're not really changing any of
the overall development of the site.

The additions that we're talking about
are very small. One is 111 square feet, the other
is 130 square feet, and the screened porch is only
145, so it's only 386 square feet, and really, it's
actually less than that because half of that
screened porch is not in the -- in the 75-foot setback.

I also submitted the geotechnical report by Giles Engineering which coincided with the development of this project as far as it would not be a detriment to the bluff. There was a statement made by the engineer that these additions are small and would not have any effect on the overall bluff stability.

You can see from photographs, and these are photographs from the county, that there hasn't been a lot of changes in the bluff in this area over time, you know, and they date back to 1941, so I don't really fear that there would be any problem with the bluff and where the house stands right now, and with these additions I don't think there would be much of an impact on that bluff, and I've seen it over the 20 years, even when I purchased the site with the two slumps that they involve, those two slumps have stabilized with vegetation and there's a lot of good cedar trees on that bluff that make that bluff very stable, so I'm not really concerned about the stability of the bluff.

Anything else?

MR. STEINKE: Thank you for that. Andy,
I think you should probably read that letter before we have any discussion.

MR. HOLSBACH: Okay. I'll pass this letter out. This is to the Ozaukee County Board of Adjustment.

MR. POTOKAR: Could I get a copy of that?

MR. HOLSBACH: Oh, I'm sorry.

MR. POTOKAR: Thank you.

MR. HOLSBACH: The letter is from Donald Stark. This is regarding 4236 High Point Beach Lane.

"Dear Board Members: I reside at 4204 High Point Beach Lane, the property to the south of the subject property. I am writing to comment on the variance application before you. My comments are as follows:

"When remodeling my house, a proposed five-foot by five-foot rain awning over a new doorway on the west side of the house was rejected because it was outside the building footprint. Additionally, I was not allowed to construct a laundry room addition to the west (non-bluff) side of my home in the area where a prior deck had existed.

"Because of a less than ten-foot
encroachment on the bluff setback, I had to configure a new detached garage in a long narrow 15 by 50-foot layout with the doors on the short sides to be within the building envelope allowed. This resulted in an awkward layout and a considerably costlier garage.

"I own an empty lot between my house and the subject property. The compliant building envelope causes the lot to be nearly unbuildable because of the envelope's long narrow shape along the west edge of the property. A variance to the bluff setback would add a large amount of value to this lot.

"If variances are granted to the bluff setback requirement on the Richard Potokar property, I will welcome the opportunity to submit my plans for a new family room/office addition and rain awning to my existing nonconforming house and to begin marketing my empty lot with a more desirable nonconforming building envelope based on the precedent that your approval of this application would set.

"Thank you, Donald Stark."

MR. STEINKE: All right. Comments.

MS. TOMTER: We're not really looking to
change the setback rules here at all, so I'm thinking this letter is sort of moot. I realize there's a little overlap with the addition on there, but we're not changing the county variances.

MR. HOLSCHBACH: No.

MR. STEINKE: And his letter said he's nonconforming already, where our department findings says the property is a legally conforming lot in the project, so there's two different issues here actually.

They're not the same issue. One's conforming, one's nonconforming. The letter here says he -- he says his house is a nonconforming, and the staff report on the findings here says the subject property is a legally existing conforming lot and the project as proposed can only be constructed with a variance by the Board, but the lot is legally conforming, where he's saying his lot was not conforming.

MR. CASTNER: The lot is legally conforming, but is the house legally conforming?

MR. HOLSCHBACH: No. The house would be considered a legally nonconforming.

MR. STEINKE: Okay. It doesn't say that in the staff report.
MR. CASTNER: So absent -- because it's a legal nonconforming structure, absent a variance it could not be added.

MR. HOLSCHBACH: That's exactly correct.

He never pursued a variance, and we at the department could not--

MR. CASTNER: But the same thing is true of the subject property, right? The house is legal nonconforming?

MR. HOLSCHBACH: Yes.

MR. CASTNER: And the variance is the only route.

MR. HOLSCHBACH: Yes.

MR. STEINKE: And we really have to look at these on a case-by-case basis. What the neighbor did or didn't do is not really completely relevant to this property. To an extent. He didn't apply for a variance.

MR. CASTNER: It's relevant to the extent of uniqueness.

MR. STEINKE: I suppose, and precedent.

MR. CASTNER: In fact, apparently all the structures along there are legal nonconforming.

MR. HOLSCHBACH: There's a lot of legally nonconforming structures.
MR. CASTNER: So, you know, precedent shall -- effect of a variance would be potentially great.

MR. HOLSCHBACH: I think for variances, well, you do have to look at the specifics of each individual request and you really need to focus on those three items that I read about earlier to grant the variance.

MR. CASTNER: And uniqueness.

MR. HOLSCHBACH: The uniqueness of the property, the hardship.

MR. CASTNER: It's a three-legged stool.

MR. HOLSCHBACH: Right, and it's always good when we look at variances in the Board's discussion to address those three concerns or issues that we need to address.

MR. CASTNER: Yeah, and I think that the reason -- and, you know, Wisconsin's law -- Wisconsin law of variances is not unique. Most states have similar provisions in their law.

The reason that uniqueness is one of the elements of consideration is that if the situation is not unique, if it's spread through an area, other nearby properties, for example, then the proper remedy is to make a public policy decision,
make a legislative decision and amend the zoning ordinance to allow for or not allow for whatever is the issue, and that avoids what could -- if it's not unique it becomes special interest zoning, so uniqueness is always I think an important issue.

MR. HOLSCHBACH: And I know when we meet with the applicants regarding variances we mention that, you know, the burden of proof relies on the applicant to address the unnecessary hardship aspect of it, the uniqueness of the property and so on, and I know in Mr. Potokar's application you have done so, so I probably should look at that and give Mr. Potokar the opportunity to address those three issues. I think that would be good.

MR. STEINKE: Okay.

MR. HOLSCHBACH: The application, it's kind of hid away in this--

MR. POTOKAR: Page 3?

MR. HOLSCHBACH: Yeah. If you look at the front page on the bottom there, there's the items 1, 2 and 3.

MR. POTOKAR: Do you want me to--

MR. STEINKE: Go over those, please.

MR. POTOKAR: So the variance of the Ozaukee County Zoning Ordinance is requested
because: No. 1, strict application of the regulations would produce unnecessary hardship because of not being able to build required accessible living spaces in appropriate site locations where grade is level. Site slopes nine feet up from the road to the top of the bluff edge down. House is built into the slope with the first floor level with the top of the bluff with only one side of the garage exposed at the ground (basement) level.

The hardship created is unique among neighboring properties and is neither financial nor self-created because neither of the two neighboring properties meet the minimum setback, with the north neighbor at about 30 feet and the south neighbor at about 40 feet from the bluff edge versus this property at 53 feet (most distant from the bluff.) Hardship does not arise from financial or self-created reasons.

And No. 3, the variance would not change the character of the neighboring properties and is not against public interest because the current development pattern does not change since existing setback is maintained. Thus, no change to the property character. Contrary, if the 86-foot
setback was to be enforced, changes to the house, including total replacement, would be detrimental to the environmental character and public interest. Amount of impervious surface is nearly the same as existing and substantially under the 15% maximum.

MR. STEINKE: Thank you.

MR. HOLSCHBACH: So generally the most challenging is the unnecessary hardship aspect of this.

MR. CASTNER: Well, what's the purpose of the ordinance in the first place? Is it aesthetic in terms of preserving the view from the lake of the shore, or is it public safety in terms of preventing property damage or devaluation due to further bluff subsidence?

I think we ought to identify what the purpose is, because if we grant the variance we're stepping away from that purpose.

MR. HOLSCHBACH: Exactly.

MR. CASTNER: And, on the other hand, if we're looking at saying a number of properties exhibit the same issue, how could -- could an amendment of the ordinance address the purpose, you know, better.

I don't know historically what went --
don't recall historically what went into -- I assume bluff preservation is part of the issue and I don't think the ordinance really addresses it, addresses tolerance by way of setback. In other words, it assumes that if the building is set back a certain distance that the risk of damage to the building through bluff subsidence is acceptable. Public policy standpoint. If it's nearer, then it's, you know, it's not acceptable.

Is that something that should be re-looked at from the standpoint of the ordinance in order to--

MR. HOLSCHBACH: My -- you know, certainly I wasn't around when the ordinance was initially developed to include bluff setbacks. Certainly my thought process as I've worked on this throughout many years, a lot of it's a safety issue, a bluff preservation issue. Certainly it's a viewshed issue.

I know in our ordinance we talk about the purpose of the whole shoreland-floodplain ordinance, and a lot of what I touched on when I talked about the variance requirements and so on and so forth, I -- a lot of it is safety. You want to ensure public safety. You don't want people
building on the edge of the bluff and having damage to their structures, nor to people below. You want to try to preserve the integrity of that landscape as well.

MR. CASTNER: So the question arises why not revisit the distance in the slope requirements with respect to the bluff and say well, experience has been good, we haven't lost any houses over the bluff, therefore they can be closer from a public policy standpoint rather than -- rather than individual nonconforming variances.

MR. HOLSBACH: You know, but historically there are homes that are really close to the bluff, and I have seen some nightmarish-type situations where homes have been relocated. Not many, but some have been relocated. I have seen the stress of individuals when they hear the bluff go down during the night.

Certainly our Lake Michigan bluff is dynamic. SEWRPC did a bluff stability -- or a bluff analysis, and a lot of areas they'll show it's like -- the lateral recession rate of the bluff will be like two or three feet per year.

MR. CASTNER: So it's really sort of unpredictable.
MR. HOLSBACH: I would say this, and this is my opinion. The Lake Michigan bluff is a dynamic situation. You have areas where the bluff sometimes appears stable, right? I mean you'll have nice trees growing, and I've seen this, and all of a sudden you have an event; maybe it's a heavy rainfall or whatever, and you'll have big chunks of it just slough down to the bottom. Maybe it will be a 30-foot patch, maybe it will be 50 feet, maybe five feet, but it's a dynamic situation as we all know. It's always changing. It's eroding away.

MR. CASTNER: So the ordinance requirements in terms of lateral distance setback from the bluff and pitch of the bluff and so forth, where did that come from? I mean somebody did a study and determined that certain standards would reasonably protect public safety and anything less would not?

MR. HOLSBACH: Well, the ordinance looks at the height of the bluff and then the angle of repose of the bluff, and then the setback is determined at a -- everyone back then when that was developed, and again, that's before my time, but it's you can assume like a two-and-a-half to one
slope is a stable slope, so when you look at the
height of the bluff and the lateral angle of
repose, it will set you back to where that
two-and-a-half/one slope is.

MR. STEINKE: So you're saying the 86
feet is not standard all over because it depends on
what the slope of the bluff is.

MR. HOLSCHBACH: Oh, yeah. It changes
from site to site, yeah, and I mean over the years
we've had some folks talk about how maybe we should
add a few more feet further back still for some of
these structures.

You know, is it right, is it wrong, the
ordinance, how it's set up? I don't know, but that
was -- that's the logic behind the measuring of the
height and the angle of repose. It gives you that
two-and-a-half to one slope setback.

MR. POTOKAR: But if you apply this
calculation, which was generated what? In what
year? The bluff calculation, what year was that?

MR. HOLSCHBACH: You know, I'm going to
guess, I'm going say probably in the '80s.

MR. POTOKAR: Okay.

MR. HOLSCHBACH: And it's a county
regulation. It's not one of these statewide
regulations that you have to have a bluff setback. Some counties do not have a bluff setback. Ozaukee County chose to.

MR. POTOKAR: So if you apply that to my property, it would probably be about 80% of that house is in that bluff setback, but that house has been sitting there since the '20s or '30s, so then you have to question what's the logic here.

MR. HOLSCHBACH: Right.

MR. POTOKAR: It's been there that long, so are you now going to say to somebody move your house at this point?

MR. HOLSCHBACH: No.

MS. TOMTER: That would come in with a new lot if someone wanted to build. This isn't really an issue for you at this point in time I don't think.

MR. CASTNER: We're not equipped to say whether -- at this point to say whether the ordinance requirements are reasonable and valid and based on science or not, but they are what they are.

MS. TOMTER: We're really looking at three criteria. We should probably just take a look at that.
MR. STEINKE: We're really only dealing with the front additions because the rest are outside of that 86 feet of--

MS. TOMTER: Right.

MR. STEINKE: So what he wants to do to the back of the property is just put--

MR. HOLSBACH: Right. That's not an issue. It's the screened porch and -- two screened porches.

MR. POTOKAR: And the covered--

MR. STEINKE: And the covered walkway.

MS. TOMTER: Right.

MR. HUBING: It would seem to me that all three were -- he covered all three of them. I don't see any issue with it at all. Do we vote or--

MS. TOMTER: I think we could.

MR. STEINKE: If we're ready. Why don't we get a motion on the table and we'll discuss the motion and then we'll take it from there. So if somebody wants to make a motion?

MS. TOMTER: I'll move that we grant the variance as requested.

MR. HUBING: I second.

MR. STEINKE: There's a motion and a
second, so now any more discussion on it? Anybody?

MR. CASTNER: I'll vote no because it's not unique. Other properties have the same issues and it's a -- it represents a broad departure from the ordinance and I think it should be addressed legislatively in terms of an amendment to the ordinance regarding all but existing nonconforming structures on the bluff.

MR. STEINKE: I would tend to agree with you that--

MR. MUELLER: I think the setbacks by ordinance and adhering to that, it doesn't apply to every case. I think each case should be taken individually, and this case certainly with him being higher than anybody around him, he certainly qualifies for that.

MS. TOMTER: Are we voting at this point?

MR. STEINKE: You want to discuss any more or should we call the vote? Do you have anything to add, anybody?

Okay. I'll call the vote. All in favor?

(Vote taken.)

MR. STEINKE: Opposed?

MR. CASTNER: No.

MR. STEINKE: Motion's passed, 3 to 2.
MR. HOLSCHBACH: Who made the motion to approve?

MS. TOMTER: I did.

MR. HUBING: I seconded.

MR. HOLSCHBACH: Okay.

MR. STEINKE: Motion approved. It will be subject to the criteria of the county zoning ordinance now. You'll be dealing with Andy. There is a time frame where it can be appealed also. Do we need to read that into the record?

MR. HOLSCHBACH: It's up to you, Mr. Chairman.

* * *

STAFF REPORT:

Department findings:

1. The subject property is a legally existing conforming lot, and the project, as proposed, can only be constructed upon the issuance of a variance by this Board.

2. The submitted bluff survey indicates a minimum required bluff setback of 86 feet.

3. The submitted survey indicates that the existing structure is located 53 feet from the top of the Lake Michigan Bluff.

4. The submitted report from Giles
Engineering Associates, Inc. indicates that the proposed building additions are not considered to have an impact on the stability of the Lake Michigan bluff at the site.

5. Although this property has associated regulatory floodplain of Lake Michigan, the project area is outside the 100-year floodplain.

6. The proposed structure is not concurrent to any mapped wetlands. The proposed structural locations should cause no negligible impact to wetland areas.

7. A properly managed construction site will pose no adverse impacts to wildlife habitat.

8. Historically, the footprint of the current structure has remained unchanged since it was constructed in 1941.

9. Prior to the construction of the proposed structure, a Shoreland Permit would be required.

10. The direction of this department is to regulate impervious surface standards to protect water quality and prevent pollution of navigable waterways. The current and proposed post-development impervious surface coverage will be at under 15%. No mitigation will be required.
under Section 7.0600 of the County Shoreland and Floodplain Zoning Ordinance. All future surveys associated with this proposed project will indicate post-construction impervious surface area.

11. Since this lot was created prior to the effective date of any county ordinance and the bluff setback requirement was enacted at a later date, it would appear that strict application of the ordinance is limiting on any eastward expansion of the existing structure.

12. Because the proposed land use is permitted within the zoning district, it would appear that the development of this site is consistent with neighboring properties.

13. Per State Statute 59.692(4)(b), the department (DNR) may not appeal a decision of the county to grant or deny a variance under this section, but may, upon the request of a county board of adjustment, issue an opinion on whether a variance should be granted or denied. The department holds no opinion regarding the issuance of a variance provided that the Board of Adjustment can validate the variance test. Please see the attached handout, "Variances", Chapter 15 of the Zoning Board Handbook, 2nd
Edition 2006, of which a copy is provided. To qualify for a variance, the applicant must demonstrate:

1. Unnecessary hardship; 2. Hardship due to unique property limitations; and 3. No harm to public interests.

Should the Board decide to grant the variance request to construct additions to a legally existing nonconforming structure 53 feet from the Lake Michigan bluff, the department requests the following recommendations:

Staff recommendations:

1. The applicant must be aware that an appeal period extends for 30 days after this hearing. During that period, any interested party can appeal the decision, either approved or denied, to circuit court. A Shoreland Permit will not be issued by this department until the appeal period has expired.

2. A mitigation plan shall be submitted to the department for review and approval. Said plan shall include mitigation measure(s) consistent with Section 7.1001 of the County Shoreland and Floodplain Zoning Ordinance necessary to offset the impervious impact of the proposed structure. These
obligations shall be evidenced via deed restriction. Mitigation measures must commence within one year of the recording date of the above deed restriction and be concluded within two years.

3. Follow the Proposed Residence Additions section relating to site grades and stormwater in the Conclusions and Recommendations from the submitted Giles Engineering Associates, Inc. report.

4. If applicable, erosion control provisions at least as effective as those in technical standards developed by the Wisconsin DNR under subchapter V of Chapter NR 151, Wis. Adm. Code shall be installed immediately downgrade from the project site to prevent sediment delivery to the navigable water bodies and keep soil onsite. These controls must be maintained until the soil is adequately revegetated or otherwise protected to prevent erosion. Once the vegetation is adequate to prevent erosion, the barriers shall be removed.

5. Any variance or permit granted by the Board of Adjustment shall expire within 180 days after issuance unless substantial work has commenced pursuant to such grant. The permit may be extended for a maximum of 180 additional days
for good and sufficient cause. Variances and permits granted by the Board shall run with the life of the structure or use, provided the construction authorized by the Board is completed while the variance or permit is still valid.

6. All required state, federal and local permits must be acquired before the start of the project.

7. Any significant changes and/or revisions to the proposed project must be resubmitted to the Board of Adjustment for review and approval before being implemented.

* * *

MR. STEINKE: Okay. Well, you'll be dealing with Andy I guess because there's other criteria too that will be from the staff report, so it's approved subject to the criteria in the staff report.

MR. POTOKAR: What actually happens during the 30-day period?

MR. HOLSCHBACH: The 30-day period is if there's somebody that would challenge the result here this morning. It's kind of a waiting-type period. Certainly we say that the applicant can proceed with his own -- at your own risk, but if
someone were to step forward and legally challenge it, that would put a stay on your work.

MR. POTOKAR: And can you tell me what effect -- what if the DNR decides they don't like it?

MR. HOLSBACH: This isn't a state regulation, it's a county regulation, so I wouldn't foresee the DNR stepping in here in a situation like this.

MR. POTOKAR: Okay.

MR. HOLSBACH: So there is that 30-day period. You know, it's an appeal period that gives people the opportunity to weigh in on the Board's decision.

Now I don't know if you've heard from anybody. Certainly we've heard from your neighbor, and that's the only person that we had heard from.

MR. POTOKAR: Okay.

MR. HOLSBACH: All right. Thank you.

MR. POTOKAR: Thank you. Thank you for all your help.

MR. STEINKE: Okay. We have a second request for a variance. You want to read that into the report, Andy?

MR. HOLSBACH: Sure. Our next request
then is from Matthew and Shelly Mabee. This is a
request for a variance to Section 7.0306 of the
Ozaukee County Shoreland & Floodplain Zoning
Ordinance, like I said, by Matthew and Shelly
Mabee, owners, to construct a detached garage
located east of the primary residence closer than
75 feet from the ordinary high water mark of a
navigable stream.

It's in the Town of Cedarburg. It's in
the NW 1/4 of the NW 1/4 of Section 15, Tax Key No.
03-015-06-012.00. Site address is 7494 Devonshire
Drive, Cedarburg.

I know we have Matthew with us here this
morning.

MR. STEINKE: Would you like to give us a
brief overview for the record that she's going to
take notes on?

MR. MABEE: Thank you. So it's an
auxiliary structure that's roughly 32 feet from
east to west towards the front of the house, and
then 36 feet deep towards the north or the rear of
the house offset from the current garage roughly
according to the town setback requirements of ten
feet from the existing structure, and then the
structure is proposed to fill in roughly four and a
half feet of fill to bring the building pad up to
the level of the existing driveway, so then that
fill and some of the northeast corner is in a flood
fringe area and the structure and then the variance
from the setback from the navigable waterway, the
drainage ditch that's to the east of the property,
and the current house is already within the 75-foot
setback, because when the house was constructed in
1976 that ordinance or that law was not -- I don't
know what the setback was before that, but
currently as it's built, it is -- right now that
75-foot setback is required, and the structure
cannot be built in front of the house because of
the township ordinance that no auxiliary structure
can be built in front of the primary dwelling.

MR. STEINKE: Thank you. Any comments?
We went and had our field trip. We all looked at
the property. Comments? Bob?

MR. HUBING: Well, I see the 15-foot
easement for the drainage easement, and what gives
me a little concern is that back far corner on the
right, it's 26 feet if I'm looking at his drawing
right from the property line? And with that 15
foot, when you subtract it you only got 11 feet
between the easement and the corner of the
building. Now if you're four feet high, a 3:1 slope, that gives you 12 feet. You're overlapping by a foot, so now we're into that easement for that drainage, and that gives me a little heartburn. I think there's an issue there. Probably not a good issue.

MS. TOMTER: I think looking at the rules for granting a variance there has to be some significant hardship if we don't grant it, and a second garage doesn't usually qualify as a hardship.

I think that's a major issue here. Sadly, but the way I'm reading the law, that's the issue.

MR. CASTNER: I think the -- we don't have a depiction of the flood fringe of the little creek and the proximity of it to the proposed garage site, and we also don't have an engineering drawing of the extension of the fill at the floor level laterally from the garage and the slope beyond that, the 3:1 or whatever it needs to be, so we don't have information to tell us whether the fill is going to extend into the flood fringe there, and I think we probably--

MR. HOLSCHBACH: And that was one step
that -- that would be the next step when we're looking at, you know, the placement, if this was approved, the placement of the fill in the floodplain, which we had mentioned, and certainly I understand where you're coming from.

MR. CASTNER: But I think it's relevant to the variance itself.

MR. HOLSBACH: Right.

MR. CASTNER: And we also on-site talked about an alternative location of the garage, moving it forward and attaching it to the house.

Now I just need some clarification. The existing overhead door on the garage and the house opens to the east, and if an addition were built, then there wouldn't be any direct access into that existing garage.

MR. MABEE: Correct.

MR. CASTNER: So you'd end up with what I presume would be the new structure which would provide -- which would open to the south and would be two-car width, so you said that the proposed use would be to store a boat and a workshop and a car, so the question is whether -- or how that could be done if the existing overhead door was -- entrance was lost by moving the new garage structure further
to the south and attaching it to the house.

I assume that, you know, a workshop area could go there or something, and then wheeled vehicles would go in the new part. Is that a fair assumption?

MR. MABEE: Yes.

MS. TOMTER: And I don't think we need to advise, as much as we could, you know, ways to rebuild this, but I guess I--

MR. CASTNER: The relevancy is that it would relocate the proposed structure relative to the fill relative to the stream.

MS. TOMTER: I'd just like to read this. It says "The unique physical property limitations such as steep slopes or wetlands that prevent compliance with the ordinance. The circumstances of an applicant, such as a growing family, elderly parent or desire for a larger garage are not legitimate factors in deciding variances."

I mean it's--

MR. STEINKE: It's right there.

MS. TOMTER: Also what else is a factor here, this is like unfortunately there--

MR. MABEE: Right.

MS. TOMTER: --where we can't -- we can't
jump over that.

MR. HOLSCHBACH: And it's up to the applicant to provide that proof that you have a hardship.

MR. MABEE: So the -- if I go off what you just said, but then talking about attaching it to the primary structure--

MS. TOMTER: You don't need a variance to do that.

MR. MABEE: I do need a variance because I'm within 75-foot setback of the navigable waterway.

MR. STEINKE: On the side of the house.

MS. TOMTER: That would be a new variance application then, correct?

MR. HOLSCHBACH: I mean we can see where this goes.

MS. TOMTER: Right.

MR. STEINKE: But that takes it out of the--

MS. TOMTER: It takes it out of the floodplain, removes the need for all that -- a huge amount of fill, saves two giant trees which would make two huge holes.

MR. HOLSCHBACH: You still have to have
the unnecessary hardship.

MS. TOMTER: Right. Right.

MR. MABEE: So the unique -- the --
because the house was placed where it was in 1976,
when I looked at the unique -- the unnecessary
hardship, that the house currently wouldn't have
been constructed where it was and then it would
have been pushed up the hill to the south and then
would have allowed for auxiliary structures to be
constructed at that time, and because the ordinance
was approved after the house was constructed it
limits -- the hardship is the -- it allows me no --
I cannot improve my property any further because of
this setback.

MS. TOMTER: Those are the questions you
got to ask a realtor when you buy a property.
That's a huge inconvenience, but because that took
place before you bought the house -- You bought
what you bought and you can't go back, and there's
a lot of what-ifs, you know.

Should that house have been built so
close to the lake? No, probably not, but it was
and it's done, and that's the same thing with your
house so, you know, the garage thing is an issue on
variances and that's just in the rulings and I
don't know how we get past that.

MR. MUELLER: You can't say that you can't improve your lot because if you change the size and the location of your garage, you still could get it on that lot. You're going back 36 feet.

MR. MABEE: But I'm still within the 75-foot setback. The 75-foot setback is already into the house which is located on this site plan, and then my septic field is to the north of the property so you can't build any auxiliary structure there, which is also in the flood fringe area, and then if I was to build where the current shed is located, an auxiliary structure, the amount of impervious pavement that would be required to move things in and out would be detrimental to the flood -- it would be adding to the flood zone or adding to that, and I don't want to do that at all, so this would just be adding a hundred -- or a thousand square feet of impervious pavement with the roof, and the driveway would all stay the same as it's currently situated.

MR. HOLSCHBACH: So what would you say are the unique physical property limitations?

MR. MABEE: Is the drainage ditch to
MR. HOLZCHBACH: And that's what we're supposed to be looking at, are the unique physical property impacts. Are there wetlands that are preventing a hardship? Steep slopes? That sort of thing.

MR. MABEE: Is the slope of the property, the elongated and the shape -- the lot -- I can just read this:

The hardship is unique among neighboring properties due to the narrow, elongated lot shape that is abutted to the navigable waterways on two sides, the east side and the north side, and the residence's central position within that lot. The lot also differs from neighboring properties due to the slope from the front of the yard to the back of the yard. Further, the home was constructed prior to the easement -- the enactment of the 75-foot setback; therefore, the hardship was not self-created but was created by the setback limitations after the primary structure was constructed, so the uniqueness is the slope that is from the road to the creek and the position of the current structure, and the county put the drainage ditch where it is.
MR. STEINKE: But the drainage ditch was preexisting; it was there before -- when this house was built, that drainage ditch. When the roads went in that ditch went in so it could drain to the creek, so that was there when the house was constructed. The 75-foot setback might have changed.

Also you're really asking -- the variance is for the 75-foot setback, but also that you're putting fill into the floodplain.

MR. HOLSCHBACH: The variance is just the setback.

MR. STEINKE: Setback?

MR. HOLSCHBACH: Yeah. We deal with the floodplain fill.

MR. STEINKE: With yourself. Okay.

MR. HOLSCHBACH: We're looking just at the setback.

MR. STEINKE: Okay.

MR. CASTNER: What's the distinction between this and the Potokar situation, especially if the garage is attached to the house? The house -- the Potokars' was an addition to the house. Here we have a nav stream, there they have a bluff, a nav lake.
MS. TOMTER: You're saying if you're looking at an addition to the house, what would be the difference, not a separate feature.

MR. CASTNER: Yes.

MR. HOLSCHBACH: Well, certainly all the same aspects of our ordinance apply like we did with Potokar; you know, the scenic beauty--

MR. CASTNER: It seems like, you know, if this was attached -- if this garage was attached to the house, the question is how do we distinguish that from the Potokar situation.

MR. HOLSCHBACH: Here the 75-foot setback is a statewide reg -- I mean there's a difference there perhaps. It's a statewide setback that's been established to protect the natural beauty of a shoreland area for the public to enjoy, whereas the water quality, safety, all those types of things still apply, and with Potokar, I mean that's a county rule per se.

MR. CASTNER: Well, it's an ordinance, it's a law.

MR. HOLSCHBACH: But I mean it's not a statewide-enacted--

MR. CASTNER: But we don't discount the value just because it's county rather than state,
do we?

MR. HOLSBACH: No, no, no, no, no, not at all. I'm just pointing out the difference in where those came from.

MR. CASTNER: If it was attached to the house I think it would be a distinction without a difference.

MR. HUBING: I think so too. I agree. If he would have been planning to attach to the house I wouldn't have an issue with this, I really don't, but I think right now we do have an issue. I think it is against public interest the way it states here with that slope going into the easement. It could cause an issue down the road with the hundred-year flood, rains. I'm not sure who knows, and you're right, we should have had a cross-section to see how that looks, that slope.

MR. CASTNER: So from a guidance standpoint and not from a vote standpoint, if the applicant were to come back with any alternative with the addition to the house, what do we think?

MR. HUBING: If he doesn't touch the existing slope of what's out there right now?

MR. MUELLER: Stay down in front there.

MR. HUBING: You know, if he doesn't
touch that slope or make it any worse, I'm inclined
to go along with it, if you decided to do that, but
the way it's standing now, I think for me anyhow, I
would say no to what's out there now. What's
proposed I should say.

MR. STEINKE: Richard, you had something
to say?

MR. MUELLER: Well, I think if he'd just
shift the sides a little and stay out of the
floodplain along here he could build -- instead of
putting a bank he can do, you know, footings. I
mean it's not a hardship because he could change
the configuration and get it in that lot basically.

MR. HOLSCHBACH: The most challenging
aspect is the hardship. I mean if we go back to
the drawing board with a new area we still have to
be looking at what the hardship is in this
situation.

MR. HUBING: That's true.

MR. HOLSCHBACH: I mean we have to be
able to address that.

MR. STEINKE: Since the house already has
a garage, they're having a hard time -- we're
having a hard time. If the house didn't have any
garage to start with it would be easier for a
hardship, but because you're using it for an
auxiliary structure and you're storing a boat in
it, it doesn't make it -- You storing your boat is
not a hardship to the situation.

MR. MABEE: I understand.

MR. STEINKE: And the size of it is
rather large too, but I assume that's to get the
boat in and everything and the tongue of the
trailer and all that.

MR. MABEE: Right.

MR. STEINKE: It's a good size boat.

MR. CASTNER: Well, the Ziervogel case,
which kind of rearranged the standard, that was a
ten-foot height increase.

MR. STEINKE: I guess my question, part
of that is, is this going to be a lot taller?

MR. MABEE: Taller than?

MR. STEINKE: Than your standard garage?

MR. MABEE: No. I cannot build any
taller than the existing structure which is 14 feet
from the slope.

MR. CASTNER: I think if Ziervogel was an
unreasonable hardship then this is, so it would
qualify, but -- if it's attached to the house, but,
you know, as far as uniqueness, this is probably
more unique than the other case was because there's a row of houses on the bluff, but I guess I would vote for it if it were attached to the house and out of the flood fringe from the stream, out of the easement too.

MR. STEINKE: Well, I guess what we should do now is we can discuss -- Let's get a motion on the table and then we can either vote it up or down, so if someone wants to make a motion to accept this and then we'll just take it and vote on it one way or the other.

MR. CASTNER: We could also table it.

MR. HOLSCHBACH: You could table it. You can give the applicant an opportunity to bring back the plan.

MR. STEINKE: It is not a guarantee that we're going to approve it, though, just so you understand; we're not voting on it either way.

MR. HOLSCHBACH: You need to vote on the table too.

MR. STEINKE: Right. But I mean if we table it, and I don't want to give him the impression that if he brings it attached it's an automatic, but that's the Board's leaning.

MR. MABEE: I would appreciate that.
MR. STEINKE: So let's have a motion one way or the other to table or to vote on it then.

MR. CASTNER: And it should be understood that what we're looking for on a resubmission is the cross-section with the fill.

MR. HOLSCHBACH: We can be sure to do that.

MR. HUBING: The trouble is when you table this, then aren't you saying we need more information before we can make a decision?

MR. STEINKE: And wouldn't this be a new application, is my point.

MR. HOLSCHBACH: Personally I think it would be better if it was a new application versus tabling it, have an up or down vote. That was my thought.

MR. STEINKE: Okay. I think that makes more sense. So let's get a motion on the table to either accept or--

MS. TOMTER: Rich just did.

MR. STEINKE: Oh, he did?

MR. MUELLER: I made a motion.

MR. STEINKE: Motion to accept?

MS. TOMTER: No, he made a motion to deny.
MR. STEINKE: Oh, to deny? Okay. Is there a second?

MS. TOMTER: I second that.

MR. STEINKE: Any more discussion on it?

All in favor?

(Vote taken.)

MR. STEINKE: Opposed? Motion's denied.

And we've given you some guidance as to what to come back with.

MR. MUELLER: Get it out of the floodplain, flood fringe, whatever.

MR. MABEE: Sure.

MR. MUELLER: Change your configuration.

MR. STEINKE: All right. Going down to the approval of the February 8th, 2017 meeting minutes.

MS. TOMTER: I move to approve those.

MR. STEINKE: Is there a second?

MR. MUELLER: Second.

MR. STEINKE: Richard, second. All in favor say aye.

(Vote taken.)

MR. STEINKE: Opposed? Motion carried.

Board of Adjustment member term expirations.
MR. HOLSCHBACH: I wanted to point out that Richard, your term on the board expires June 30th of this year, as well as Bob's, and I'm hoping you both would agree to another term. We don't meet that often. It's nice to have people with some experience serve on the board. I'm twisting your arm a little bit.

MR. MUELLER: The trouble is, you know, I'm no spring chicken any more. My hearing ain't so good any more.

MR. HOLSCHBACH: It has to work for you certainly. You're a valued board member, you both are.

MR. HUBING: I'm okay with it.

MR. HOLSCHBACH: Okay. What I'll do is let our county administrator know, and what they do is they take that to the county board, and Richard, are you okay or--

MR. MUELLER: Well, see if you can find somebody else. If you can, I'd just as soon not be on it again, you know, but if you don't find anybody, then I'll serve.

MR. HOLSCHBACH: Okay. Thank you.

MR. MUELLER: If I can.

MR. STEINKE: Any other communications
and miscellaneous?

MR. HOLSCHBACH: No, I don't have anything else.

MR. STEINKE: Okay. Any other matters?

That's it. All right. I'll entertain a motion to adjourn.

MR. HUBING: So move.

MR. STEINKE: Second?

MR. MUELLER: I'll second.

MR. STEINKE: Moved and seconded, no discussion. All in favor say aye.

(Vote taken.)

MR. STEINKE: Opposed? Motion carried.

MR. HOLSCHBACH: Thank you everyone.

MR. STEINKE: Thank you.

(Proceedings concluded at 11:18 a.m.)
STATE OF WISCONSIN

) ss.

OZAUKEE COUNTY

I, LIANE M. BARANEK, Notary Public in and for the State of Wisconsin, do hereby certify that the foregoing proceedings were taken before me at the time and place set forth in the caption thereof; that the foregoing proceedings were reported by me stenographically in shorthand; and that the foregoing proceedings constitute a true and accurate transcription of my original machine shorthand notes taken upon the hearing to the best of my ability.

I FURTHER CERTIFY that I am not a relative or employee or counsel to any of the parties hereto, nor a relative or employee of their counsel, and have no interest in the outcome or events of said action.

IN WITNESS WHEREOF, I have hereunto affixed my official signature and seal of office, this 15th day of May, 2019 at Port Washington, Wisconsin.

LIANE M. BARANEK
Notary Public
State of Wisconsin

My Commission Expires:
October 7, 2021.