

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:

Variance request by Potokar Trust and Patricia J. Potokar, Owners, and Richard A.M. Potokar, Inc., designer/agent. (Page 4).

Appearing: Richard Potokar

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

Appearing: Matthew Mabee.

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P R O C E E D I N G S

1
2 MR. STEINKE: We're going to call the
3 meeting to order at 10:20. This is a public
4 hearing open to the public. Anyone may address the
5 Board providing they are recognized by the
6 chairperson -- I'm the chairperson; my name is Phil
7 Steinke -- identify yourself, and as long as you're
8 signed in on our sheet. You both signed in? Okay.

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

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

19 MR. HOLSCHBACH: Yes, they have.

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

24 MR. HOLSCHBACH: Would you like me to
25 read it? Before I get going real much into it, I

1 wanted to mention that we have two variance
2 requests this morning, and in your packet I did
3 send out information as to what a variance all
4 entails.

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

10 To qualify for a variance an applicant
11 has the burden of proof to demonstrate that all
12 three criteria defined in state statutes and
13 outlined below are met, and that's the unnecessary
14 hardship, unique property limitations, and then no
15 harm to the public interest, and for an area
16 variance, unnecessary hardship exists when
17 compliance would unreasonably prevent the owner
18 from using the property for a permitted purpose,
19 leaving the property owner without any use that is
20 permitted for the property or would render
21 conformity with such restrictions unnecessarily
22 burdensome, and for hardship due to unique property
23 limitations, unnecessary hardship must be due to
24 unique physical limitations of the property such as
25 steep slopes or wetlands that prevent compliance

1 with the ordinance, and I'm just reading parts,
2 snippets of this, and then No. 3 was that there
3 should be no harm to public interest, so a variance
4 may not be granted which results in harm to public
5 interest, and the interests that are included in
6 our ordinance are promoting and maintaining public
7 health, safety and welfare, protecting water
8 quality, protecting fish and wildlife habitat,
9 maintaining natural scenic beauty, minimizing
10 property damages, ensuring efficient public
11 facilities and utilities, requiring eventual
12 compliance for nonconforming uses, structures and
13 lots, and any other public interest issues.

14 I just wanted to go over those. Those
15 are things we need to be looking at this morning,
16 so our first request this morning is the request
17 for a variance to Section 7.0310 of the Ozaukee
18 County Shoreland & Floodplain Zoning Ordinance by
19 Potokar Trust and Patricia J. Potokar, owners, and
20 Richard Potokar Inc. as designer/agent, to
21 construct building additions and modifications to
22 the existing residence within the existing 53 feet
23 setback of Lake Michigan bluff closer than the
24 current 86 feet calculated setback from the Lake
25 Michigan bluff.

1 The property is located in the Town of
2 Port Washington. It's in the NW 1/4 of the SE 1/4
3 of Section 11, Tax Key No. 07-011-14-005.00. The
4 site address is 4236 High Point Beach Road, Port
5 Washington, and with us this morning we have
6 Richard Potokar.

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

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

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

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

22 My wife has been living here for two
23 years now, taking care of our grandsons in
24 Whitefish Bay, and the house presents some problems
25 with accessibility with the stairway between the

1 levels, and so by incorporating a stairway within
2 the house itself we would take out a bedroom, and
3 so we were looking to bring the laundry room up to
4 first floor, and as the requirements develop, we
5 look to include a dinette space and an entry, a
6 covered entryway on both sides of the current
7 house, and one of those covered porches would be
8 within the current setback, would be within the
9 current setback, but would be in violation of the
10 county setback of 75 feet, but we would stay within
11 our 53-foot setback.

12 And the other portion is a screened porch
13 that would be attached to the house, would also
14 be -- half of it would be within the 75-foot
15 setback, and one thing I forgot to show this
16 morning was where the 86-foot setback is. It's
17 actually on the other side of that one wing that
18 you walked around, so we are building a master
19 bedroom and the entry and the garage and another
20 covered entrance all on the other side of the
21 86-foot setback, which would be -- none of that
22 would be in violation of the bluff setback.

23 And I pointed out that our neighboring
24 properties, the one to the north, which is my
25 brother and sister-in-law, they are 30 feet from

1 the bluff setback, and then the neighbor to the
2 south is about 40 feet to the bluff setback, and
3 ours being at 53-foot setback is much larger than
4 the two neighboring, so even though we're building
5 within that, within the county setback, we are much
6 further away from the bluff setback than our
7 neighboring properties.

8 If you were to actually tear the house
9 down and go by the 86-foot setback, the bluff
10 setback, it would be a different -- a totally
11 different house because you lost the grade of the
12 site and you would wind up having an entrance at
13 the lower level because it would be pushed back so
14 far towards the road that there would be a big
15 change in the overall development of that site
16 which would be totally different from all the other
17 properties on that road so it would wind up being a
18 taller structure, so by abiding by the current
19 53-foot setback we're not really changing any of
20 the overall development of the site.

21 The additions that we're talking about
22 are very small. One is 111 square feet, the other
23 is 130 square feet, and the screened porch is only
24 145, so it's only 386 square feet, and really, it's
25 actually less than that because half of that

1 screened porch is not in the -- in the 75-foot
2 setback.

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

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

25 MR. STEINKE: Thank you for that. Andy,

1 I think you should probably read that letter before
2 we have any discussion.

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

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

7 MR. HOLSCHBACH: Oh, I'm sorry.

8 MR. POTOKAR: Thank you.

9 MR. HOLSCHBACH: The letter is from
10 Donald Stark. This is regarding 4236 High Point
11 Beach Lane.

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

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

25 "Because of a less than ten-foot

1 change the setback rules here at all, so I'm
2 thinking this letter is sort of moot. I realize
3 there's a little overlap with the addition on
4 there, but we're not changing the county variances.

5 MR. HOLSCHBACH: No.

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

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

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

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

24 MR. STEINKE: Okay. It doesn't say that
25 in the staff report.

1 MR. CASTNER: So absent -- because it's a
2 legal nonconforming structure, absent a variance it
3 could not be added.

4 MR. HOLSCHBACH: That's exactly correct.
5 He never pursued a variance, and we at the
6 department could not--

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

10 MR. HOLSCHBACH: Yes.

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

13 MR. HOLSCHBACH: Yes.

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

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

21 MR. STEINKE: I suppose, and precedent.

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

24 MR. HOLSCHBACH: There's a lot of legally
25 nonconforming structures.

1 MR. CASTNER: So, you know, precedent
2 shall -- effect of a variance would be potentially
3 great.

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

9 MR. CASTNER: And uniqueness.

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

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

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

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

21 The reason that uniqueness is one of the
22 elements of consideration is that if the situation
23 is not unique, if it's spread through an area,
24 other nearby properties, for example, then the
25 proper remedy is to make a public policy decision,

1 make a legislative decision and amend the zoning
2 ordinance to allow for or not allow for whatever is
3 the issue, and that avoids what could -- if it's
4 not unique it becomes special interest zoning, so
5 uniqueness is always I think an important issue.

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

15 MR. STEINKE: Okay.

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

18 MR. POTOKAR: Page 3?

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

22 MR. POTOKAR: Do you want me to--

23 MR. STEINKE: Go over those, please.

24 MR. POTOKAR: So the variance of the
25 Ozaukee County Zoning Ordinance is requested

1 because: No. 1, strict application of the
2 regulations would produce unnecessary hardship
3 because of not being able to build required
4 accessible living spaces in appropriate site
5 locations where grade is level. Site slopes nine
6 feet up from the road to the top of the bluff edge
7 down. House is built into the slope with the first
8 floor level with the top of the bluff with only one
9 side of the garage exposed at the ground (basement)
10 level.

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

20 And No. 3, the variance would not change
21 the character of the neighboring properties and is
22 not against public interest because the current
23 development pattern does not change since existing
24 setback is maintained. Thus, no change to the
25 property character. Contrary, if the 86-foot

1 setback was to be enforced, changes to the house,
2 including total replacement, would be detrimental
3 to the environmental character and public interest.
4 Amount of impervious surface is nearly the same as
5 existing and substantially under the 15% maximum.

6 MR. STEINKE: Thank you.

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

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

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

19 MR. HOLSCHBACH: Exactly.

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

25 I don't know historically what went -- I

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

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

13 MR. HOLSCHBACH: My -- you know,
14 certainly I wasn't around when the ordinance was
15 initially developed to include bluff setbacks.

16 Certainly my thought process as I've
17 worked on this throughout many years, a lot of it's
18 a safety issue, a bluff preservation issue.
19 Certainly it's a viewshed issue.

20 I know in our ordinance we talk about the
21 purpose of the whole shoreland-floodplain
22 ordinance, and a lot of what I touched on when I
23 talked about the variance requirements and so on
24 and so forth, I -- a lot of it is safety. You want
25 to ensure public safety. You don't want people

1 building on the edge of the bluff and having damage
2 to their structures, nor to people below. You want
3 to try to preserve the integrity of that landscape
4 as well.

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

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

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

24 MR. CASTNER: So it's really sort of
25 unpredictable.

1 MR. HOLSCHBACH: I would say this, and
2 this is my opinion. The Lake Michigan bluff is a
3 dynamic situation. You have areas where the bluff
4 sometimes appears stable, right? I mean you'll
5 have nice trees growing, and I've seen this, and
6 all of a sudden you have an event; maybe it's a
7 heavy rainfall or whatever, and you'll have big
8 chunks of it just slough down to the bottom.

9 Maybe it will be a 30-foot patch, maybe
10 it will be 50 feet, maybe five feet, but it's a
11 dynamic situation as we all know. It's always
12 changing. It's eroding away.

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

20 MR. HOLSCHBACH: Well, the ordinance
21 looks at the height of the bluff and then the angle
22 of repose of the bluff, and then the setback is
23 determined at a -- everyone back then when that was
24 developed, and again, that's before my time, but
25 it's you can assume like a two-and-a-half to one

1 slope is a stable slope, so when you look at the
2 height of the bluff and the lateral angle of
3 repose, it will set you back to where that
4 two-and-a-half/one slope is.

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

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

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

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

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

23 MR. POTOKAR: Okay.

24 MR. HOLSCHBACH: And it's a county
25 regulation. It's not one of these statewide

1 regulations that you have to have a bluff setback.
2 Some counties do not have a bluff setback. Ozaukee
3 County chose to.

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

9 MR. HOLSCHBACH: Right.

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

13 MR. HOLSCHBACH: No.

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

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

23 MS. TOMTER: We're really looking at
24 three criteria. We should probably just take a
25 look at that.

1 MR. STEINKE: We're really only dealing
2 with the front additions because the rest are
3 outside of that 86 feet of--

4 MS. TOMTER: Right.

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

7 MR. HOLSCHBACH: Right. That's not an
8 issue. It's the screened porch and -- two screened
9 porches.

10 MR. POTOKAR: And the covered--

11 MR. STEINKE: And the covered walkway.

12 MS. TOMTER: Right.

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

17 MS. TOMTER: I think we could.

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

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

24 MR. HUBING: I second.

25 MR. STEINKE: There's a motion and a

1 second, so now any more discussion on it? Anybody?

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

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

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

17 MS. TOMTER: Are we voting at this point?

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

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

22 (Vote taken.)

23 MR. STEINKE: Opposed?

24 MR. CASTNER: No.

25 MR. STEINKE: Motion's passed, 3 to 2.

1 MR. HOLSCHBACH: Who made the motion to
2 approve?

3 MS. TOMTER: I did.

4 MR. HUBING: I seconded.

5 MR. HOLSCHBACH: Okay.

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

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

13 * * *

14 STAFF REPORT:

15 Department findings:

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

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

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

25 4. The submitted report from Giles

1 Engineering Associates, Inc. indicates that the
2 proposed building additions are not considered to
3 have an impact on the stability of the Lake
4 Michigan bluff at the site.

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

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

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

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

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

20 10. The direction of this department is
21 to regulate impervious surface standards to protect
22 water quality and prevent pollution of navigable
23 waterways. The current and proposed
24 post-development impervious surface coverage will
25 be at under 15%. No mitigation will be required

1 under Section 7.0600 of the County Shoreland and
2 Floodplain Zoning Ordinance. All future surveys
3 associated with this proposed project will indicate
4 post-construction impervious surface area.

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

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

15 13. Per State Statute 59.692(4)(b), the
16 department (DNR) may not appeal a decision of the
17 county to grant or deny a variance under this
18 section, but may, upon the request of a county
19 board of adjustment, issue an opinion on whether a
20 variance should be granted or denied.

21 The department holds no opinion regarding
22 the issuance of a variance provided that the Board
23 of Adjustment can validate the variance test.
24 Please see the attached handout, "Variances",
25 Chapter 15 of the Zoning Board Handbook, 2nd

1 Edition 2006, of which a copy is provided. To
2 qualify for a variance, the applicant must
3 demonstrate:

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

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

12 Staff recommendations:

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

20 2. A mitigation plan shall be submitted
21 to the department for review and approval. Said
22 plan shall include mitigation measure(s) consistent
23 with Section 7.1001 of the County Shoreland and
24 Floodplain Zoning Ordinance necessary to offset the
25 impervious impact of the proposed structure. These

1 obligations shall be evidenced via deed
2 restriction. Mitigation measures must commence
3 within one year of the recording date of the above
4 deed restriction and be concluded within two years.

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

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

21 5. Any variance or permit granted by the
22 Board of Adjustment shall expire within 180 days
23 after issuance unless substantial work has
24 commenced pursuant to such grant. The permit may
25 be extended for a maximum of 180 additional days

1 for good and sufficient cause. Variances and
2 permits granted by the Board shall run with the
3 life of the structure or use, provided the
4 construction authorized by the Board is completed
5 while the variance or permit is still valid.

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

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

13 * * *

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

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

21 MR. HOLSCHBACH: The 30-day period is if
22 there's somebody that would challenge the result
23 here this morning. It's kind of a waiting-type
24 period. Certainly we say that the applicant can
25 proceed with his own -- at your own risk, but if

1 someone were to step forward and legally challenge
2 it, that would put a stay on your work.

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

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

10 MR. POTOKAR: Okay.

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

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

18 MR. POTOKAR: Okay.

19 MR. HOLSCHBACH: All right. Thank you.

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

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

25 MR. HOLSCHBACH: Sure. Our next request

1 then is from Matthew and Shelly Mabee. This is a
2 request for a variance to Section 7.0306 of the
3 Ozaukee County Shoreland & Floodplain Zoning
4 Ordinance, like I said, by Matthew and Shelly
5 Mabee, owners, to construct a detached garage
6 located east of the primary residence closer than
7 75 feet from the ordinary high water mark of a
8 navigable stream.

9 It's in the Town of Cedarburg. It's in
10 the NW 1/4 of the NW 1/4 of Section 15, Tax Key No.
11 03-015-06-012.00. Site address is 7494 Devonshire
12 Drive, Cedarburg.

13 I know we have Matthew with us here this
14 morning.

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

18 MR. MABEE: Thank you. So it's an
19 auxiliary structure that's roughly 32 feet from
20 east to west towards the front of the house, and
21 then 36 feet deep towards the north or the rear of
22 the house offset from the current garage roughly
23 according to the town setback requirements of ten
24 feet from the existing structure, and then the
25 structure is proposed to fill in roughly four and a

1 half feet of fill to bring the building pad up to
2 the level of the existing driveway, so then that
3 fill and some of the northeast corner is in a flood
4 fringe area and the structure and then the variance
5 from the setback from the navigable waterway, the
6 drainage ditch that's to the east of the property,
7 and the current house is already within the 75-foot
8 setback, because when the house was constructed in
9 1976 that ordinance or that law was not -- I don't
10 know what the setback was before that, but
11 currently as it's built, it is -- right now that
12 75-foot setback is required, and the structure
13 cannot be built in front of the house because of
14 the township ordinance that no auxiliary structure
15 can be built in front of the primary dwelling.

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

19 MR. HUBING: Well, I see the 15-foot
20 easement for the drainage easement, and what gives
21 me a little concern is that back far corner on the
22 right, it's 26 feet if I'm looking at his drawing
23 right from the property line? And with that 15
24 foot, when you subtract it you only got 11 feet
25 between the easement and the corner of the

1 building. Now if you're four feet high, a 3:1
2 slope, that gives you 12 feet. You're overlapping
3 by a foot, so now we're into that easement for that
4 drainage, and that gives me a little heartburn. I
5 think there's an issue there. Probably not a good
6 issue.

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

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

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

25 MR. HOLSCHBACH: And that was one step

1 that -- that would be the next step when we're
2 looking at, you know, the placement, if this was
3 approved, the placement of the fill in the
4 floodplain, which we had mentioned, and certainly I
5 understand where you're coming from.

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

8 MR. HOLSCHBACH: Right.

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

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

17 MR. MABEE: Correct.

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

1 to the south and attaching it to the house.

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

6 MR. MABEE: Yes.

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

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

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

20 I mean it's--

21 MR. STEINKE: It's right there.

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

24 MR. MABEE: Right.

25 MS. TOMTER: --where we can't -- we can't

1 jump over that.

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

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

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

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

13 MR. STEINKE: On the side of the house.

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

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

18 MS. TOMTER: Right.

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

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

25 MR. HOLSCHBACH: You still have to have

1 the unnecessary hardship.

2 MS. TOMTER: Right. Right.

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

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

21 Should that house have been built so
22 close to the lake? No, probably not, but it was
23 and it's done, and that's the same thing with your
24 house so, you know, the garage thing is an issue on
25 variances and that's just in the rulings and I

1 don't know how we get past that.

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

7 MR. MABEE: But I'm still within the
8 75-foot setback. The 75-foot setback is already
9 into the house which is located on this site plan,
10 and then my septic field is to the north of the
11 property so you can't build any auxiliary structure
12 there, which is also in the flood fringe area, and
13 then if I was to build where the current shed is
14 located, an auxiliary structure, the amount of
15 impervious pavement that would be required to move
16 things in and out would be detrimental to the
17 flood -- it would be adding to the flood zone or
18 adding to that, and I don't want to do that at all,
19 so this would just be adding a hundred -- or a
20 thousand square feet of impervious pavement with
21 the roof, and the driveway would all stay the same
22 as it's currently situated.

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

25 MR. MABEE: Is the drainage ditch to

1 the--

2 MR. HOLSCHBACH: And that's what we're
3 supposed to be looking at, are the unique physical
4 property impacts. Are there wetlands that are
5 preventing a hardship? Steep slopes? That sort of
6 thing.

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

10 The hardship is unique among neighboring
11 properties due to the narrow, elongated lot shape
12 that is abutted to the navigable waterways on two
13 sides, the east side and the north side, and the
14 residence's central position within that lot. The
15 lot also differs from neighboring properties due to
16 the slope from the front of the yard to the back of
17 the yard. Further, the home was constructed prior
18 to the easement -- the enactment of the 75-foot
19 setback; therefore, the hardship was not
20 self-created but was created by the setback
21 limitations after the primary structure was
22 constructed, so the uniqueness is the slope that is
23 from the road to the creek and the position of the
24 current structure, and the county put the drainage
25 ditch where it is.

1 MR. STEINKE: But the drainage ditch was
2 preexisting; it was there before -- when this house
3 was built, that drainage ditch. When the roads
4 went in that ditch went in so it could drain to the
5 creek, so that was there when the house was
6 constructed. The 75-foot setback might have
7 changed.

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

11 MR. HOLSCHBACH: The variance is just the
12 setback.

13 MR. STEINKE: Setback?

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

16 MR. STEINKE: With yourself. Okay.

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

19 MR. STEINKE: Okay.

20 MR. CASTNER: What's the distinction
21 between this and the Potokar situation, especially
22 if the garage is attached to the house? The
23 house -- the Potokars' was an addition to the
24 house. Here we have a nav stream, there they have
25 a bluff, a nav lake.

1 MS. TOMTER: You're saying if you're
2 looking at an addition to the house, what would be
3 the difference, not a separate feature.

4 MR. CASTNER: Yes.

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

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

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

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

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

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

1 do we?

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

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

8 MR. HUBING: I think so too. I agree.
9 If he would have been planning to attach to the
10 house I wouldn't have an issue with this, I really
11 don't, but I think right now we do have an issue.

12 I think it is against public interest the
13 way it states here with that slope going into the
14 easement. It could cause an issue down the road
15 with the hundred-year flood, rains. I'm not sure
16 who knows, and you're right, we should have had a
17 cross-section to see how that looks, that slope.

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

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

24 MR. MUELLER: Stay down in front there.

25 MR. HUBING: You know, if he doesn't

1 touch that slope or make it any worse, I'm inclined
2 to go along with it, if you decided to do that, but
3 the way it's standing now, I think for me anyhow, I
4 would say no to what's out there now. What's
5 proposed I should say.

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

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

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

19 MR. HUBING: That's true.

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

22 MR. STEINKE: Since the house already has
23 a garage, they're having a hard time -- we're
24 having a hard time. If the house didn't have any
25 garage to start with it would be easier for a

1 hardship, but because you're using it for an
2 auxiliary structure and you're storing a boat in
3 it, it doesn't make it -- You storing your boat is
4 not a hardship to the situation.

5 MR. MABEE: I understand.

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

10 MR. MABEE: Right.

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

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

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

17 MR. MABEE: Taller than?

18 MR. STEINKE: Than your standard garage?

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

22 MR. CASTNER: I think if Ziervogel was an
23 unreasonable hardship then this is, so it would
24 qualify, but -- if it's attached to the house, but,
25 you know, as far as uniqueness, this is probably

1 more unique than the other case was because there's
2 a row of houses on the bluff, but I guess I would
3 vote for it if it were attached to the house and
4 out of the flood fringe from the stream, out of the
5 easement too.

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

12 MR. CASTNER: We could also table it.

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

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

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

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

25 MR. MABEE: I would appreciate that.

1 MR. STEINKE: So let's have a motion one
2 way or the other to table or to vote on it then.

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

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

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

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

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

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

20 MS. TOMTER: Rich just did.

21 MR. STEINKE: Oh, he did?

22 MR. MUELLER: I made a motion.

23 MR. STEINKE: Motion to accept?

24 MS. TOMTER: No, he made a motion to
25 deny.

1 MR. STEINKE: Oh, to deny? Okay. Is
2 there a second?

3 MS. TOMTER: I second that.

4 MR. STEINKE: Any more discussion on it?
5 All in favor?

6 (Vote taken.)

7 MR. STEINKE: Opposed? Motion's denied.
8 And we've given you some guidance as to what to
9 come back with.

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

12 MR. MABEE: Sure.

13 MR. MUELLER: Change your configuration.

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

17 MS. TOMTER: I move to approve those.

18 MR. STEINKE: Is there a second?

19 MR. MUELLER: Second.

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

22 (Vote taken.)

23 MR. STEINKE: Opposed? Motion carried.

24 Board of Adjustment member term
25 expirations.

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

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

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

14 MR. HUBING: I'm okay with it.

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

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

23 MR. HOLSCHBACH: Okay. Thank you.

24 MR. MUELLER: If I can.

25 MR. STEINKE: Any other communications

1 and miscellaneous?

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

4 MR. STEINKE: Okay. Any other matters?
5 That's it. All right. I'll entertain a motion to
6 adjourn.

7 MR. HUBING: So move.

8 MR. STEINKE: Second?

9 MR. MUELLER: I'll second.

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

12 (Vote taken.)

13 MR. STEINKE: Opposed? Motion carried.

14 MR. HOLSCHBACH: Thank you everyone.

15 MR. STEINKE: Thank you.

16 (Proceedings concluded at 11:18 a.m.)

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1 STATE OF WISCONSIN)
) ss.
2 OZAUKEE COUNTY)

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

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

16 IN WITNESS WHEREOF, I have hereunto
17 affixed my official signature and seal of office, this
18 15th day of May, 2019 at Port Washington, Wisconsin.

19

20

21 _____
LIANE M. BARANEK
22 Notary Public
State of Wisconsin

23

24

25 My Commission Expires:
October 7, 2021.

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