



# Sawyer County

## Agenda

**Zoning Board of Appeals Meeting**  
**Tuesday, February 21, 2023 @ 5:00 PM**  
**Large Courtroom; Sawyer County Courthouse**

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### 1.

The public is strongly encouraged to access the public hearing remotely due to public health and safety concerns. To view or participate in the virtual meeting from a computer, iPad, or Android device please go to <https://zoom.us/j/91511740175>. You can also use the dial in number for listening only at 1-312-626-6799 with the Webinar ID: 915.1174.0175. If additional assistance is needed please contact the Zoning & Conservation Department at 715-634-8288 prior to the meeting.

### 2. PRELIMINARY MATTERS

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- a. Call to Order and Roll Call
- b. State of Committee and Hearing Procedure & Statement of Hearing Notice
- c. Approval of Minutes from October 18, 2022.  
[10-18-2022 BOA Minutes](#)

### 3. VARIANCE APPLICATIONS

- a. None

### 4. NEW BUSINESS

5 - 12

- a. VAR#21-005: Circuit Court overturned Board of Appeals (BOA) decision. BOA to accept Circuit Court Decision thus denying variance OR BOA to appeal Circuit Court Decision. (Discussion/Action)  
[2-21-23 Court Papers for BOA](#)
- b. Any other business that may come before the Board for discussion.

### 5. ADJOURNMENT

**MINUTES**  
**PUBLIC HEARING BEFORE THE**  
**SAWYER COUNTY BOARD OF APPEAL**  
**Tuesday October 18, 2022 at 6PM**

**Board of Appeals**

Al Gerber, Chairman  
Laura Rusk, Vice Chairman  
Steve Kelsey  
Dee Dobilas  
Gordon Christians  
Jim Tiffany  
Joe Beran

**Zoning Administration**

Jay Kozlowski, Zoning & Conservation Administrator  
Kathy Marks, Deputy Zoning & Conservation Administrator  
Michelle Harris, Zoning Secretary

**PRELIMINARY MATTERS**

a) Call to Order and Roll Call

Gerber called the Public Hearing before the Sawyer County Zoning Board of Appeals to order at 6:00 P.M. in the Sawyer County Courthouse, 10610 Main St., Hayward, Wisconsin. Roll is called finding present: Gerber, Rusk, Christians, Dobilas and Beran Absent: Tiffany and Kelsey. Kozlowski and Harris are present from the Zoning office. Marks is absent.

b) Statement of Board and Hearing Procedures and Statement of Hearing Notice.

Those wishing to speak will be afforded the opportunity provided they identify themselves. Gerber gave order of submitting files to BOA, taking testimony, and making a decision. He requests orderly procedure and gives appeal deadline. The Public Hearing Notice was published as a Class 2 Notice in accordance with Chapter 985 of the Wisconsin Statutes in the Sawyer County Record and Gazette.

c) Approval of July 19, 2022 meeting minutes. Motion by Christians to approve the July 19, 2022 meeting minutes, second by Dobilas. All in favor.

**VARIANCES**

a) A Public Hearing in the Town of Ojibwa. VAR #22-005. Owner: Joe Salter & James Scheffler. Part of the S ½ of the NW ¼, Outlot 4 CSM 16/267 #4146; S06, T39N, R06W; Parcel #020-639-06-2309; Tax ID# 21012; .34 total acres; Zoned Residential/Recreational Two (RR-2). Application is for the Construction of a 2 story 20' X 20' primary dwelling (22' x 22') with eaves. This structure is proposed to have a 55' setback at the closest point to the centerline of Chippewa Flowage Road (a Town Road). Also, this proposed primary dwelling is to be located on an Outlot of certified survey map #4146 with no additional language indication on the survey map for the intent of the lot. Variance is requested as Section 4.21(3), Sawyer County Zoning Ordinance, Setback Requirements on Highways and Roads would require the prior granting of a variance for

any structure less than 63' to the centerline of a Town Road. The proposed variance is requesting a 55' setback at the closest point to the centerline of Chippewa Flowage Road. Also, per Sawyer County Subdivision Control/Condominium Ordinance Section 2.0(U) Definition of Outlot- may not be used as a building site unless it is in compliance with the restrictions within this ordinance. Also, Section 3.10 of same subdivision ordinance states outlots created on a CSM shall be accompanied with a statement of purpose or use of the out. There is no language specified on the survey map that states the intent of the outlot and owner's where under the impression that they could build on the lot. Prior granting of a variance for Section 2.0(U) Subdivision Ordinance is also being requested to build on the outlot even though the intent of the outlot was never disclosed when the initial survey map was recorded in 1995. Kozlowski reads the application, staff report, Town opinion and neighbor opinions. Joe Salter, owner speaks in favor of the application. Discussion held with Board, Kozlowski and Salter. No other comments. Alex Greene, Shady Nook Resort speaks of concerns of the parking on the Town Road. Discussion by Board and Kozlowski. Gerber states Findings of Fact: There is no change of use in the zone district. There is no harm or damage to the rights of others. There are conditions unique to the lot, not to the application. Motion by Gerber to approve the application as presented for the variance to be closer to the Town right-away and override the outlot designation. Discussion held by Board, Second by Rusk. Kozlowski states for the record that there is no annotation on the CSM. No discussion. All in favor 5 to 0.

b) A Public Hearing in the Town of Radisson. VAR #22-006. Owner: Thomas & Carolyn Ogle. Part of Government Lot 3; S09, T39N, R07W; Parcel #022-739-09-5306; Tax ID#23094; .210 total acres; Zoned Residential/Recreational One (RR-1). Application is for: Construction of a single story 28' x 38' primary dwelling with attached 8' x 28' porch (32' x 50' with eaves total) AND a 26' x 27' (29' x 30' with eaves) detached garage. The proposed primary dwelling is to be located 13' at the closed point to the Right-Of-Way to a Town Road and 40' to the centerline. The proposed primary dwelling is also to be located 10' at the closest point to the rear property line. The proposed accessory structure (garage) is to be located 55' at the closest point to the centerline of a Town Road. The proposed accessory structure (garage) is also to be located 10' at the closest point to the rear property line. Variance is requested as: Section 4.21(3), Sawyer County Zoning Ordinance, Setback Requirements on Highways and Roads would require the prior granting of a variance for any structure less than 63' to the centerline of a Town Road or 30' from the Right-Of-Way. The proposed variance for the primary dwelling is requesting a 40' setback at the closest point to the centerline of Brecke Lane and 13' to the ROW. The proposed variance for the accessory structure is requesting a 55' setback to the centerline of Brecke Lane. Also, per Sawyer County Zoning Ordinance Section 18.0 Dimensional Requirements would require the prior granting of variance for any structure located less than 40' to a rear property line. Both the proposed variance for the primary dwelling and accessory structure are requesting a setback distance of 10' at the closest point to the rear property line. Kozlowski reads the application, staff report, Town opinion, neighbor opinion. Tom Ogle, owner speaks in favor of the application, Discussion held with Board and Kozlowski. Carolyn Ogle, owner speaks of concerns of the easement road and opinion letters. Discussion by Board held. Motion by Rusk to approve the application as presented. Second by Beran. No additional discussion held. All in favor 5 to 0. Findings of Fact: There is a necessary hardship including the 50% rule. It is not damaging to the rights of others. Proximity to the road is no problem. Improvements to the property will be positive. There are unique physical limitations to the property.

c) A Public Hearing in the Town of Bass Lake. VAR #22-007. Owner: Frank & Diane Dowell. Part of Government Lot 4, Lot 4 CSM 5/296 #1053, Lot "A" CSM 5/326 #1068; S21, T40N, R09W; Parcel #002-940-21-5407; Tax ID #3505; 1.48 total acres; Zoned Residential/Recreational One. Application for: Construction of a single story 26' x 30' detached garage (28' x 32') with eaves. This structure is proposed to have a 27.5' setback at the closest point to Windigo Lake and a 10' setback at the closest point to C/L of a private road easement. Variance requested as: Section 6.1, Sawyer County Zoning Shoreland Wetland Protection Ordinance, Shoreland setbacks would require the prior granting of a variance for any structure less than 75' to the OHWM. The proposed variance is requesting a 27.5' setback at the closest point to the OHWM of Windigo Lake. Additionally, Section 4.21 (6), Sawyer County Zoning Ordinance, Setbacks Requirements on Highways and Roads setbacks would require the prior granting of a variance for accessory structures less than the requires 30' from C/L of a private driveway that is 33' or less in width. The proposed variance is requesting a 10' setback at the closest point to 1 16.5' private road easement. Kozlowski reads the application, staff report, Town opinion, neighbor opinions and DNR opinion letter. Frank Dowell, owner speaks in favor of the application. No comments. Discussion held by Board, Kozlowski, and Dowell. No other comments. Motion by Christians to deny the application. Findings of Fact: It is unique to the property owner and self-imposed hardship. It is for self-convenience for the owner and there are other options to the owner, second by Gerber. Discussion held. Christians amends motion to also use the Town denial and DNR letter of denial. Second by Gerber. All in favor to deny the application 5 to 0.

#### **NEW BUSINESS**

a) 2023 Meeting Dates. Jay presents the proposed 2023 meeting dates. Discussion held Motion by Christians to approve the calendar as presented, second by Gerber. All in favor 5 to 0. Discussion regarding start time of meeting. Christians amends his motion to include new start time of 5pm for the 2023 calendar year. Second by Gerber. No discussion. All in favor 5 to 0.

b) Any other business that may come before the Board for discussion. None.

#### **ADJOURNMENT**

Gerber to adjourns the meeting at 7:35 pm.

Minutes by Michelle Harris, Zoning Secretary and Kathy Marks, Deputy Zoning & Conservation Administrator



A. The applicants are Dean and Heidi Miller

B. The applicants are the owner's of 6953N Wolfe Point Lane, Hayward, WI.

C. Petitioner for Writ of Certiorari that was remanded is LAC COURTE OREILLES LAKES ASSOCIATION, INC.

D. This matter, by stipulation, was remanded to the Board of Appeals for proper decision and finding.

#### CONCLUSIONS OF LAW

1. The lot that the house sits on is substandard in size and predates the zoning requirement for minimum lot size

2. The house that sits on the lot in question is immediately adjacent to Lac Courte Oreilles Lake and is persisting nonconforming use.

3. The improvements installed on the property were based on detailed plans submitted to the Zoning Office, and Zoning Applicant believed it complied with the current ordinance.

4. The reconstruction, removal of a one-foot wide by five-foot thick by thirty-one-foot in length slab, cannot be effectively mitigated and would cause substantial harm to the environment.

5. Granting this variance will have no impact on neighboring properties or property in the Lake Community.

6. It makes a bad situation that existed before the reconstruction of this house better by reducing/eliminating erosion and run off; it adds stability to the shoreline and, therefore, to the improvements that the land supports.

7. This will not set a precedent for future decisions because the facts and circumstances, in this case, are unique.

The substantive discussion by the Board regarding this matter from the Transcript (Document no. 18, pgs. 5-11) states as follows:

**Jay Kozlowski, Zoning Administrator,** Second is the Variance application for the Town of Bass Lake. VAR #22-001. Stipulation and Order to Remand for Reconsideration consistent with applicable Law. Owner: Dean & Heidi Miller. Part of Government Lot 4, Lot 3 CSM12/357 #3034; S06, T39N, R08W; Parcel #002-839-06-5404; .260 total acres; Zoned Residential/Recreational One (RR-1). Application requested: 3 specific elements of an after-the-fact variance request. 1) The construction of a patio/walkway area that is outside of the existing footprint area of the existing cantilever portion. *This would be viewed as a 1' x 21' expansion area of the patio and wing-wall closer to the water.* 2) The second element of the request has 2 specific expansions related to the same area. First is the relocation of an existing retaining wall not within the existing foot print. This existing retaining wall was relocated further from the water. The second specific request is by moving the retaining wall further back a smaller portion of walkway was added. The approximate size of the walkway expansion area is an 11' x 4' triangular portion. 3) Is the expansion of a walkway area that is approximately 1.5' x 5'. There was an existing walkway which was allowed for replacement

and expansion of the patio area underneath the cantilever portion. *However, there was a small gap where there wasn't an existing walkway area which has now expanded.* All of these setbacks would be measured at V to the OHWM of Lac Courte Oreilles at the closest point. All other setbacks would be met. Variance requested as: All of the variance elements would be subject to the Section 6.1 Shore land Setbacks of the Sawyer County Zoning Shore land-Wetland protection ordinance would require the prior granting of a Variance for any new structures not within the existing footprint of the existing structures closer than 75'. This proposed request is an A-T-F Variance of a 1' shoreline setback for the elements previously described. The Board got all the requested information, you have the packets from the last time. You hopefully had time to read the transcripts also provided in that as well as the remanding back for reconsideration by circuit court Judge. That is what I have as far as to read into record and I guess it is up to the Chairman and Corporation Council as if you're wanting to take new or additional testimony or whether or not you're wanting a summary of previous events from the applicant or those in opposition. I will defer to Corporation Council and the Chairperson. (Emphasis added).

....

... **Alan Gerber, Chairman.** There's a Motion and a second to the very, to the second Motion. Discussion on the Motion. I don't think we're setting any type of precedent here. **Steve Kelsey, Board Member.** I will say the reason I would go along with the variance is because of the point made that I think tearing that out and changing that may be more detrimental to that shoreline than what we have right now. It's a. **Mark Olson, Board Member.** How'd they get all the old concrete out there, you take a concrete saw you cut a one foot line all the way down and you cut. **Steve Kelsey, Board Member.** That's Five feet, that's five feet deep one foot thick. **Mark Olson, Board Member.** Yeah you take out one foot one foot one. That was all I had. Concretes, by hand with buckets. **Al Gerber, Chairman.** Someone might make the argument that okay, now everybody's going do this. They'll just over build and then come back and say if it would do more harm than good to take it out again and I don't think that argument would hold water. **Mark Olson, Board Member.** Well I'd go back to the old boys network years and years ago on Zoning, it was who you knew and what you got passed and people cut down all the trees on the shoreline and they got a \$500.00 fine and they had a lake view that lasted them forever. And you got to replant trees so you plant little saplings that take 30 years to grow up and you're dead and buried but I mean there's a lot of that that went on back when I first got involved in Zoning but that's just my opinion. **Al Gerber, Chairman.** That, I don't agree that that scenario still exists. Any further discussion? Okay, I'll call for vote. All those in favor of leaving the variance request intact and as pretended, signify by saying aye. **Dee Doballs, Board Member.** Aye. **Al Gerber, Chairman.** Aye. Steve's was an Aye. All those opposed same sign. **Mark Olson, Board Member.** Aye. **Laura Rusk, Vice Chairman.** Aye. **Al Gerber, Chairman.** Two oppose, let the record reflect that the variance was approved by a motion of three to two. Findings of Fact. There's no change of use in the zone district. It's not harmful to the rights of others. And it is not detrimental to the health and community of the lake. **Mark Olson, Board Member.** I would just ask maybe, just because you never know what will happen that you maybe expand on those three reasons why if it goes to court. **Al Gerber, Chairman.** Now? **Mark Olson, Board Member.** Yeah. **Al Gerber, Chairman.** No, somebody wants to question that they can. **Mark Olson, Board Member.** Okay. **Al Gerber, Chairman.** Alright, I think there's other businesses that come for the board?

....

**Alan Gerber, Chairman.** Ok. Part of this three step test that we try to apply to each variance request. Asks if there are conditions unique to the property? And in this case I believe that there are. The property is very small in size, I believe it is only 70' or less on the front and less than 40' in the back. That lot size creates a unique property limitation. Another unique

limitation or character on this site is the proximity of the existing dwelling to the shoreline. As far as harm to public interest? The evidence that was presented that showed zero impact to the neighbor's properties, nor negative impact to the aquatic species, plants, or habitat. One of the positive effects of the proposed dwelling there is rain gutters have been installed and rain gardens. There is virtually no runoff now going down towards the lake, like what happened to the previous structure. The statement that Steve had made earlier cutting away a 5' retaining wall would be very, in my opinion, and my judgement would be very detrimental to the lake with possibility of pollution going into the lake by taking that retaining wall out. Leaving it there is a lot less harm then, I don't think there is any harm at all, potential for debris, to fall into beyond the ordinary high water mark of Lac Courte Oreilles. Rebuilding in an existing footprint is a permitted use. A hardship would be created if no rebuild was allowed. There had been some discussion in the previous testimony that this was a boathouse? That was being turned into a dwelling? And I don't recall any testimony that showed the most recent use was a boathouse. Or a former use, one of the old pictures we saw showed a sliding glass patio door facing the lake near the lake level. Certainly no boat could be taken in or out of there. Any further discussion? Hearing none. I'll make a motion to permit the variance request as submitted. All three of the requested changes, if changes is the correct word.

.....  
**Alan Gerber, Chairman.** Ok, a motion has been made, is there a second to the motion?

**Dee Dobalis, Member.** I'll second.

**Alan Gerber, Chairman.** Second by Dee Dobalis.

**Alan Gerber, Chairman.** Discussion on the motion.

**Laura Rusk, Vice Chairman.** Well, here is my discussion. Sorry it's in the transcript. The same discussion. I think and I am a stickler on it because that's how we are suppose to look at these after-the fact variances. Which indeed there is and I know extenuating circumstances in this instance. There certainly were but, looking at it I feel that what Mark had put forth last time was a reasonable, reasonable solution which solved the majority of the problems. And again the question is if this had come to us asking for a variance to do exactly what was done. We would have said No, no that won't fly. I remain the same as I was the last time.

**Alan Gerber, Chairman.** Laura do you think that taking it out solves anything? I mean....

**Laura Rusk, Vice Chairman.** But that is not our job. That's not the way I look at our job.

**Alan Gerber, Chairman.** I respect that.

**Laura Rusk, Vice Chairman.** In States Statues, don't say mull it over in your mind and if it would be any worse or any better they tell us we need to look at it as an after-the-fact variance as if had not happened yet and what would your decision be. And that's how I feel, I cannot change that. I think that's what we are suppose too do. And I also don't think that cutting off a portion of it would cause any detriment to the lake either. Its solid concrete, if it got cut it's not a major problem for the lake. But that's oblivious is not the wishes of the Board.

**Alan Gerber, Chairman.** Well, it may be the wishes of the Board, but I don't share the same opinion.



**Laura Rusk, Vice Chairman.** I know.  
**Alan Gerber, Chairman.** Any other discussion?

**Thomas J. Duffy, Corporation Council.** I think there is some dispute as to whether that Laura thinks that there is no harm in cutting the one V off to do it, the motion that Mark was.

**Laura Rusk, Vice Chairman.** That's not really my whole point but.

**Thomas J. Duffy, Corporation Council.** I just want to zero in on your positions, and Al's response to it. No, no I'm saying give your position again, I don't want to tell them what your position is.

**Laura Rusk, Vice Chairman.** My comment about whether it would be detrimental to the lake that if to cut off 1' section is not my main reason for saying "No". That a solution was offered and we were told look at after-the-fact instance as if it never had happened. That they came to us and that this is what we want to do. We would and all would agree. We would say "No, you can't do that!" So that is how we are suppose to react, the way I believe we are suppose to react to it. My position is not so much about the adverse effect of cutting off the X'. I'm looking at it as an after-the-fact variance that we would not have granted.

**Thomas J. Duffy, Corporation Council.** You want to respond to that?

**Alan Gerber, Chairman.** No, I understand Laura's position completely. Don't necessarily agree with it. But, because as you stated Laura, there are many, many other circumstances that has gotten us to this point.

**Laura Rusk, Vice Chairman.** Correct.

**Alan Gerber, Chairman.** The whole footprint deal. The approval of the plans and all that.

**Thomas J. Duffy, Corporation Council.** The one point that I want to make other members have something to say. You should chime in before the vote is taken verses after. So, if you have some concerns what the motion is or not. I think now is the time to put in your two cents worth.

**Gordon Christians, Alternate Member.** My sentiments, I can see the point of putting cement there and look at the aspect of the lake there. That ice heave there must be pretty severe? And some, not every year. You're going to get, I think eventually, even with the cement that they poured you're going to get an ice heave anyway. You're going to get it blown out eventually. Just because it piles up there. But in the mean time I guess I would go along with Mark's motion of taking 1' off and the rest would be ok. As a partial way to meet the requirements of the getting it under the footprint. I don't know how deep the footing is? If the need to dig down into the soil? Is the footing, you really can't see that though.

**Thomas J. Duffy, Corporation Council.** I think that, do you know how deep it is?

**Jay Kozlowski, Zoning Administrator.** I believe there was previous testimony from Jeremy Hill that it was 5' thick from top to bottom from top. Members talking over each other.

### **Issue and Standard of Review**

The issue before the Court is whether the Board properly exercised the discretion afforded to it after the first remand. On a writ of certiorari, a court's review is limited to:

(1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.

*Snyder v. Waukesha County Zoning Bd. Of Adjustment*, 74 Wis.2d 468, 475, 247 N.W.2d 98 (1976).

The Board's decision is given a presumption of correctness and validity, and this Court may not substitute its own discretion for the Board's. *Id.* at 476.

Variance procedure in zoning law serves several essential purposes: to prevent otherwise inflexible zoning codes from precipitating regulatory takings; to provide a procedure by which the public interest in zoning compliance can be balanced against the private interests of property owners in individual cases; and, most broadly, to allow a means of obtaining relief from the strict enforcement of zoning restrictions where individual injustices might occasionally occur." *Outagamie County*, 244 Wis.2d 613, ¶¶ 44–47.

*State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI 23, ¶ 17, 269 Wis. 2d 549, 560, 676 N.W.2d 401, 406.

Our legislature has delegated counties and their respective boards of adjustment discretion to grant variances.

Consistent with these principles, Wis. Stat. § 59.694(7) vests county boards of adjustment with the following authority to grant zoning variances:

To authorize upon appeal in specific cases variances from the terms of the ordinance that will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

Wis. Stat. § 59.694(7)(c).

*Id.* at 561.

Boards are to consider certain well defined concepts when making its determinations.

The following judicial rules of unnecessary hardship are well-established: The hardship must be based on conditions unique to the property rather than considerations personal to the property owner. *Snyder*, 74 Wis.2d at 479; *see also* 3 Kenneth H. Young, *American Law of Zoning* §§ 20.35–20.40 (4th ed.1996); 3 Edward H. Ziegler, Jr., *Rathkopf's Law of Zoning and Planning* § 58:18 (2003). The hardship cannot be self-created. *Snyder*, 74 Wis.2d at 476; *see also Outagamie County*, 244 Wis.2d 613, ¶ 24; 3 Ziegler, *supra* § 58:21; 3 Young, *supra* § 20.44–47. The board of adjustment is to evaluate the hardship in light of the purpose of the zoning restriction at issue. *Snyder*, 74 Wis.2d at 473; *see also Outagamie County*, 244 Wis.2d 613, ¶ 24; *Id.*, ¶ 74, (Crooks, J., concurring). A variance cannot be contrary to the public interest. *Arndorfer*, 162 Wis.2d at 256; *see*

also *Outagamie County*, 244 Wis.2d 613, ¶ 24. The property owner bears the burden of proving unnecessary hardship. *Arndorfer*, 162 Wis.2d at 253; see also *Outagamie County*, 244 Wis.2d 613, ¶ 50. While these general principles help guide the board's discretion, they do not establish the meaning of the term "unnecessary hardship" or provide a legal standard for determining whether it has been proved.

By definition, all variances depart from the purpose of the zoning ordinance and implicate the public interest, because they permit something that is otherwise strictly prohibited. But they do so to varying degrees and levels of acceptability, depending on the type of variance requested and the nature of the zoning restriction in question. As such, courts have long recognized a distinction between use variances, which permit a landowner to put property to an otherwise prohibited use, and area variances, which provide exceptions from such physical requirements as setbacks, lot area, and height limits. *Snyder*, 74 Wis.2d at 474-75, 247 N.W.2d 98; see also *Outagamie County*, 244 Wis.2d 613, ¶¶ 34-36.

*Id.* at 561-62.

The Board acknowledged the error of the zoning office and even went so far as to comment that, had this request been made prior to construction, it most likely would have been denied. However, the Board reasonably articulated two propositions: 1) whether the remedy to remove the encroachment would be more harmful than the violation, and 2) a more nuanced issue which almost appears to be a *de minimus* argument, i.e. whether a one foot violation is so egregious as to require strict enforcement of the ordinance.

As a general rule, the law in Wisconsin does not recognize a distinction between a variance for a proposed act and a variance after the creation of a nonconforming structure. Neither Wisconsin case law nor Wis. Stat. § 59.694(7)(c) delineates a difference as a matter of law. In addition, if a municipality issues a permit that was not otherwise in accordance with the applicable ordinance, the rule of law in this state is clear that the unauthorized acts of municipal officers do not estop a municipality from enforcing its ordinances enacted pursuant to its police power. *State ex rel. Westbrook v. City of New Berlin*, 120 Wis.2d 256, 262, 354 N.W.2d 206, 209 (Ct. App. 1984); *Snyder*, 74 Wis.2d 468, 476-77. In other words, the landowners in this case are not entitled to rely upon the approval of their set of plans that otherwise violates the shoreland ordinance.

#### **Application of Law to the Facts**

To establish a need for an area variance, there must be a showing that "compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." *Ziervogel*, 269 Wis. 2d 549, ¶33 (quoting *Snyder*, 74 Wis. 2d at 475). Furthermore, the hardship must be unique to the property and not personal to the owner and cannot be self-created. *Id.*

The Board made a point of focusing on a remedy to the violation (i.e removal) as being worse than allowing the nonconforming structure to stand. While that point may ultimately be true, it does not change the law governing area variances. Exercising broad discretion

to reach a desired result still requires at least a tacit compliance with applicable law. This Court sympathizes with the quandary the Board was facing. It may be possible that remediation of the site would likely cause greater disturbance to the surrounding aquatic and terrestrial environment, although there is virtually no evidence to support this observation. However, an unnecessary hardship must not be self-created, must be unique to the particular property and not personal to the landowners. These are prerequisite findings based on the evidence. In this case, the record does not support a finding on these prerequisites.

In this case the Board made virtually no attempt to discuss the concept of an unnecessary hardship and even if one made particular effort to infer from the record that it did, it never addressed whether the hardship was personal or self-created. There was discussion about the uniqueness of the property as being very small, but that fact has no bearing on the issue before the Board. A pre-existing structure could have been improved, but it could not be expanded. The issue is the expansion of a pre-existing structure, not the size of the lot. In that regard, the error by zoning officials in not catching the overbuild in the plans submitted does not change the fact that the error was created by the landowners' agent/builder. The only conceivable hardship here is that the expanded nonconforming use is difficult to remove now that it is in place. Assuming that it is an unnecessary hardship, that hardship was created by the owners and builder expanding the allowable footprint either intentionally or negligently. The hardship is not the error of the zoning administrator. Also, the hardship is not unique to the land, as the land and building could have been improved within the existing footprint. Thus, this hardship, if this is one, is uniquely personal to the landowners, as they created it in the first place.

Whether the violation is so insignificant as to not justify enforcement, that issue was not well developed and currently has no support in the law of variance. Whether a higher court desires to expand area variances because of a de minimus impact is an issue this Court could not determine based on the record before it.

Therefore, as a matter of law the landowners cannot satisfy the definition of an unnecessary hardship based on the record and the Board's circumvention of that fact results in it proceeding on an incorrect theory of law. Based on that alone, the Court has no choice but to reverse the Board's decision and remand the matter for further proceedings in accordance with this decision.