

**MINUTES  
PUBLIC HEARING BEFORE THE  
SAWYER COUNTY BOARD OF APPEAL  
July 20, 2021**

**Board of Appeals**

Al Gerber - Chairman  
Laura Rusk – Vice Chairman  
Mark Olson  
Steve Kelsey  
Dee Dobilas  
Gordy Christians  
Jim Tiffany

**Zoning Administration**

Jay Kozlowski, Zoning & Conservation Administrator  
Pat Brown, Assistant Zoning Administrator  
Kathy Marks, Deputy zoning & conservation Administrator

**PRELIMINARY MATTERS**

- 1) 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, Olson, Kelsey and Dobilas. Kozlowski, Brown and Marks are present from the Zoning Office.
- 2) Statement of Board and Hearing Procedures. 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.
- 3) Statement of Hearing Notice. 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 Sawyer County Gazette.
- 4) Approval of the June 15, 2021 Minutes. Motion by Rusk to approve the June 15, 2021 minutes, second by Olson. All in favor.

**VARIANCE APPLICATIONS**

1) A Public Hearing for the Town of Bass Lake. VAR #21-005. Owner: Dean & Heide Miller. Part of Government Lot 4, Lot 3 CSM 12/357 #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 1' 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 Shoreland Setbacks of the Sawyer County Zoning Shoreland-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 would be for an A-T-F Variance of a 1' shoreline setback for the elements previously described. Kozlowski reads the application, staff report, Town opinion w/conditions and Neighbor opinion letters. Jeremy Hill, contractor for the Miller's speaks in favor of the application. That the plans show the walkways and setbacks. Miscommunication over the width of the walkway. Feels the Miller's variance should be granted. Discussion with Board and Kozlowski. Dean Miller, owner speaks in favor of the application with adding improvements of 2 rain gardens and removing a cement walkway and making it pervious. The Dwelling is not a Boathouse and has never been a Boathouse. We have owned since 1994. Met with Pat Brown and contractor for an onsite inspection for options. The DNR found no infraction on OHWM. Heide Miller, owner speaks of the plans submitted in August and permitted in September. Deb Ruetiman, Bass Lake property owner speaks in favor of the application. Chris Fullerton, Bass Lake property owner speaks in favor of the application. Alf Sivertson, Bass Lake property owner and former COLA board member speaks against the application. Kevin Horracks, President of COLA speaks in against the application. Ann Harris, Bass Lake resident speaks against the application. No other audience comments. Dean Miller, owner states that they believe they did nothing wrong and that is was a miscommunication. Discussion by Board is held with Kozlowski and Brown. Element #2 no discussion. Element #3 Sidewalk termination is discussed. Dean Miller, owner states that with the ice berms the walkway had deteriorated and washed away. Kevin Horracks, President of COLA states that all 3 elements should be treated all the same. Does the plan show gutters and rain gardens? Heide Miller, owner states that they have hired a landscaper and are working with the Sawyer County Conservation Department, also gutters will be installed but are not available as of yet with the supply shortages. Deb Reuitman, Bass Lake property owner is in favor of all three requests. Jeremy Hill, contractor says that the old pictures show the concrete and to leave it as is for the lake protection. No other comments. Discussion by Board held with Kozlowski.

Motion by Olson to approve in part with conditions. Element #1 to deny. The construction of a patio/walkway area that is outside of the existing footprint area of the existing cantilever portion. Element #2 to approve, this has 2 specific expansions related to the same area. First is the relocation of an existing retaining wall not within the existing footprint. This existing retaining was relocated further from the water. Second request is by moving the retaining wall further back a smaller portion of walkway was added. The approximate size of walkway expansion area is 11' x 4' triangular portion. Element #3 to approve is for 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. Approved with the following 5 conditions: 1. Remove the 1 foot of walkway on the lake side from the existing walkway replaced up to the edge of the first step (no removal from the landing

in front of the steps) utilizing best shoreline protection practices. 2. Remove 1 foot of walkway on the lake side from the new walkway not in the same existing walkway area utilizing best shoreline protection practices. 3. The “cement sidewalk on the plans” named on the Miller’s Variance application to be replaced with a pervious surface of either a TREX or crushed stone walkway. 4. Two rain gardens are to be installed so gutters and downspouts will drain into the rain gardens and be captured. The rain garden plans need to be filed with and approved by Sawyer County Zoning. 5. The conditions listed for approval must be completed by November 30, 2021.

#### Findings of Fact:

Element #1 The variance would be contrary to the public interest and would not be in compliance with the spirit and intent of the Sawyer County zoning Shoreland-Wetland Protection Ordinance applicable sections: For the purpose of promoting the public health, safety, convenience and welfare, and promote and protect trust in navigable waters this ordinance has been established to:

1.31 Further the maintenance of safe and healthful conditions and prevent and control water pollution through: (4) Limiting impervious surfaces to control runoff which carries pollutants.

1.32 Protect spawning grounds, fish and aquatic life through: (3) controlling shoreline alternations, dredging and lagooning.

1.33 Control Building sites, placement of structures and Land Uses through: (3) Setting minimum building setbacks from waterways.

1.34 Preserve and restore Shoreland vegetation and natural scenic beauty through: (2) Preventing shoreline encroachment by structures.

A literal enforcement of the terms of the Sawyer County Zoning Shoreland-Wetland Protection Ordinance Section 6.1 Shoreland Setbacks would not result in unnecessary hardship as stated: Require the prior granting of a variance for any new structures not within the existing footprint of the existing structures closer than 75’.

Elements #2 and #3. With conditions the variance Elements #2 and #3 would not be contrary to the public interest and would be in compliance with the spirit and intent of the Sawyer County Zoning Shoreland-Wetland Protection Ordinance applicable sections: for the purpose of promoting the public health, safety, convenience and welfare, and promote and protect the public trust in navigable waters this ordinance has been established to:

1.31 Further the maintenance of safe and healthful conditions and prevent and control water pollution through: (4) Limiting impervious surfaces to control runoff which carries pollutants.

1.32 Protect Spawning grounds, fish and aquatic life through: (3) controlling shoreline alterations, dredging and lagooning.

1.33 Control building sites, placement of structures and Land Uses through: (3) Setting minimum building setbacks from waterways.

1.34 Preserve and restore Shoreland vegetation and natural scenic beauty through: (2) Preventing shoreline encroachment by structures.

A literal enforcement of the terms of the Sawyer County Zoning Shoreland-Wetland Protection Ordinance Section 6.1 Shoreland Setbacks would result in unnecessary hardship as stated: Require the prior granting of a variance for any new structures not within the existing footprint of the existing structures closer than 75’.

Conclusions of Law:

Elements #1. Based on the contents of the variance application, the Sawyer County Zoning Shoreland-Wetland Protection Ordinance, the Town Comprehensive Plan, State law, and the testimony and exhibits entered into the record the variance does not meet all three of the following tests:

1. Unnecessary Hardship. That the hardship does not consist of a situation where, in the absence of a variance, compliance with the strict letter of the restrictions governing area, setback, frontage, height, bulk or density will unreasonably prevent the owner from using the property for a permitted purpose (use) or would render conformity with such restrictions unnecessary burdensome (area). The hardship is self-created. Claimed Zoning told applicants they could expand the patio/walkway out to include the “1 foot overhang” of the cantilever structure and relied on that for the submitted plans. The expansion to include area under overhang was ultimately missed by Zoning and received erroneous approval. Ultimately constructing the expanded patio/walkway outside of existing footprint. Zoning contests applicants were told they could expand to include area under overhang.

In established case law we find justification for our finding:

1. Neither Wisconsin case law nor Wis. Stat. 59.694(7)(c) distinguishes between before-the-fact and after-the fact variances.

2. Snyder, Appellant, V Waukesha County Zoning Board of Adjustment, Respondent, Supreme Court of Wisconsin. Appellant argues that the hardship caused by the existence of the porch is not self-created because he relied upon assurances of the building inspector. To allow this contention would constitute estoppel of the municipality from enforcing its zoning ordinance. The rule of the law in this state is clear that no such estoppel may arise against a municipality for the unauthorized acts of its officers. *Town of Richmond V. Murdock*, 70 Wis.2d 642, 653-54, 235 N.W.2d 169, 171-72 (1966). Even if the inspector issued a building permit, such a permit would have been void as issued for a structure which is forbidden by the ordinance. Rathkopf, *The Law of Zoning and Planning* 56-1 (3d ed. 1972). A building permit cannot confer the right to violate the ordinance. *Jelinski v. Eggers*, 34 Wis.2d 85, 93, 148 N.W.2d 750, 755 (1967). Thus, the mere statements or assurances of the building inspector cannot confer such a right. The appellant is charged with knowledge of the zoning ordinance, *State ex rel. Markdale Corp. v. Board of Appeals*, supra at 162, 133 N.W.2d at 798, and thus may not successfully contend that the existence of the porch, constructed without first obtaining a variance, is not a self-created hardship. The Applicants stance is not persuasive as an unnecessary hardship and therefore the unnecessary hardship step is not met for Element #1.

2. Unique Property Limitation. That the application has demonstrated as unnecessary hardship due to a condition unique to the property and not personal to the applicant. Property has a unique shoreland characteristic property limitation of having a structure allowed within 1 foot of the lakebed which prevents compliance with the ordinance. The property has a structure that was in existence prior to zoning and under current State Law is allowed to expand in the same footprint vertically (up and down) without a variance. Therefore, the unique property limitation is met for Element #1.

3. No Harm to Public Interest. That the applicant has not demonstrated that the variance will not be contrary to the public interest and will not undermine the purpose(s) of the ordinance. The variance will cause harm to:

a. The maintenance of safe and healthful conditions and prevent and control water pollution through limiting impervious surfaces to control runoff which carries pollutants.

- b. Protect spawning grounds, fish and aquatic life through controlling shoreline alterations, dredging and lagooning.
  - c. Control building sites, placement of structures and land uses through setting minimum building setbacks from waterways.
  - d. Preserve and restore shoreland vegetation and natural scenic beauty through preventing shoreline encroachment by structures.
- Granting a variance would increase the impervious surface area, not protect spawning grounds, fish and aquatic life, not control placement of structure minimum setback from waterway, and cause shoreline encroachment.
- Therefore, the no harm to public interest is not met for Element #1.

#### Element #2 and #3

Based on the contents of the variance application, the Sawyer County Zoning Shoreline-Wetland Protection Ordinance, the Town Comprehensive Plan, State law, and the testimony and exhibits entered into the record the variance does meet all three of the following tests:

1. Unnecessary Hardship. That the hardship does consist of a situation where, in the absence of a variance, compliance with the strict letter of the restrictions governing area, setback, frontage, height, bulk or density will unreasonably prevent the owner from using the property for a permitted purpose (use) or would render conformity with such restrictions unnecessarily burdensome (area).

There is an unnecessary hardship present that is not the basis of economic gain or loss and that absent a variance, conformity with the strict letter of the restrictions would be unnecessarily burdensome.

Neither Wisconsin case law nor Wis. Stat. 59.694(7)(c) distinguishes between before-the-fact and after-the-fact variances.

In reference to variance Element #2 listed, the area of expansion outside of the existing retaining wall that resulted from squaring up the retaining wall would be compensated for through the removal of 1 foot of walkway on the lake side from the existing walkway replaced up to edge of first step (no removal from landing in front of steps which is allowed). Granting the variance with conditions on a walkway expansion area of an 11' x 4' triangular portion would provide for having more impervious surface area removed from the lakeshore and be further from lakeshore than triangular portion which would result in a net gain on lakeshore.

In reference to variance

Element #3 listed, there is evidence presented that that shows a walkway was present in the past but is undeterminable as to the exact size. The area of expansion to be allowed with condition of only being allowed to extend 4 feet from the base of structure would provide for less impervious surface on the lakeshore and further from the lakeshore.

This applicant(s) stance is persuasive for an unnecessary hardship being present and therefore the unnecessary hardship step is met for Element #2 and element #3 listed.

2. Unique Property Limitation. That the applicant has demonstrated an unnecessary hardship due to a condition unique to the property and not personal to the applicant:

Property has a unique shoreland characteristic property limitation of having a structure allowed within 1 foot of the lakebed which prevents compliance with the ordinance. The property has a structure that was in existence prior to zoning and under current State Law is allowed to expand in the same footprint vertically (up and down) without a variance. The variance conditions for #2 and #3 listed provide for the new expansions to be further away from the lakeshore.

Therefore, the unique property limitation is met for Element #2 and Element #3 listed.

3. No Harm to Public Interest. That the applicant has demonstrated that the variance will not be contrary to the public interest and will not undermine the purpose(s) of the ordinance. The variance with conditions will not cause harm to:

- a. The maintenance of safe and healthful conditions and prevent and control water pollution through limiting impervious surfaces to control runoff which carries pollutants.
- b. Protect spawning grounds, fish and aquatic life through controlling shoreline alterations, dredging and lagooning.
- c. Control building sites, placement of structures and land uses through setting minimum building setbacks from waterways.
- d. Preserve and restore shoreland vegetation and natural scenic beauty through preventing shoreline encroachment by structures.

Granting a variance Element #2 and #3 with conditions listed would not increase the impervious surface on the lakeshore since gaining more removal of impervious surface on the lakeshore than allowing further from lakeshore through conditions. With conditions listed protect spawning grounds, fish and aquatic life, through requiring structure to be 1 foot off the shoreline. With conditions listed would control the placement of structures with a 1 foot further setback from waterway. With conditions will not cause shoreline encroachment since the public interest is receiving 1 foot less of impervious surface on lakeshore with conditions.

Therefore, the no harm to public interest limitation is met for Elements #2 and #3 listed.

Rusk seconds the Motion. Discussion held by Board. Vote of 2 to 3. Motion fails.

Motion by Gerber to approve the Variance as presented, second by Dobilas. Discussion held by Board. Vote of 3 to 2. Motion to approve carries. Findings of Fact: 1) There is no change in use in the Zone District. 2) It is not harmful to the rights of others. 3) It is not detrimental to the health and community of the lake.

#### **NEW BUSINESS**

1) Notified Board of two cases for next month and that they may listen to audio of the appeal. Discussion regarding recuse and abstaining from a case.

2) Any other business that may come before the Committee for discussion. None

#### **ADJOURNMENT**

Motion to adjourn by Rusk, second by Olson. All in favor.

Minutes prepared by Kathy Marks, Deputy Zoning & Conservation Administrator.