

In attendance:

R. Welcenbach, T. Matt, J. Tredwell, K. Marlin and D. Tuttle.

Ms. Marlin and Mr. Matt sat in the audience.

Also Present:

City Attorney E. Larson, Planner & Community Development Director N. Fuchs and Clerk/Treasurer K. Tarczewski.

1. Call to Order and Pledge of Allegiance

Mr. Welcenbach called the meeting to order at 6:04 p.m.

2. **Deliberation** and Possible Action Regarding the Petition of **TYLER J. PINTER** for the Property Located at **W267N2965 PETERSON DRIVE** (PWC 0930-026) Previously Heard on Wednesday, February 13, 2019 for the following:

- 2.1 **Section 17.0411** to allow side yard setbacks of 5.2 feet from the north property line and 3.0 feet from the south property line, opposed to the RS-7 District minimum side yard setback of 8.0 feet for a two story dwelling
- 2.2 **Section 17.0410e(4)** to allow for the sum total of the first floor area of the principal building and all accessory buildings to exceed 30 percent of the lot area
- 2.3 **Section 17.0435f** to allow a principal building to be located within 75-feet of the floodplain boundary
- 2.4 **Section 17.043c(5)** to allow a building/structure to be located within 75-feet of the floodplain boundary
- 2.5 **Section 17.0436d** to allow for an increase in lot coverage

Mr. Welcenbach stated the purpose of tonight's meeting was to deliberate on the testimony given last week in regards to the variance requests of Mr. Pinter. He said no more testimony will be allowed.

Attorney Larsen stated he would like the opportunity to provide legal background, on behalf of the City staff, when the Board enters into their deliberations. He said he felt it was appropriate if the applicant wanted to make some legal arguments as well. Mr. Pinter asked if giving testimony was closed. Attorney Larsen confirmed that it was. He said he was requesting the opportunity to give legal arguments based on the testimony to assist in the Board's deliberation.

Mr. Welcenbach agreed that would be helpful due to the amount of issues before the Board. Mr. Tredwell had no objections and Ms. Tuttle stated it would be incredibly helpful.

Mr. Larsen introduced himself stating he was a partner from the Municipal Law and Litigation Group. He said he was there on behalf of City staff to outline the issues in the case. He said the applicant has asked the Board to grant variances to the City codes requirements. He said the Board's jurisdiction is whether or not those will be granted.

Attorney Larsen stated there are considerations under Wisconsin Statutes and City code the Board members could consider. He said the first thing the Board should determine is whether or not the variances are “use” or “area” variances. He handed out copies of the statute to the Board members and the applicant.

He said an “area” variance is a modification to a dimensional, physical or locational requirement such as a setback, frontage, height, bulk or density restriction for a structure that is granted by the Board of Appeals. To apply for an area variance, the applicant must demonstrate that strict compliance with a zoning ordinance would unreasonably prevent the property owner from using the property for a permitted purpose or would render conformity with the zoning ordinance unnecessarily burdensome.

He directed the Board to look at the green highlighted area that lists the standards that need to be considered before granting a “use” or “area” variance. He said the variances 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 practical difficulty or unnecessary hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done. Attorney Larson said the property owner bears the burden of providing that unnecessary hardship is based on conditions unique to the property, rather than considerations personal to the property owner, and that the unnecessary hardship was not created by the property owner.

Attorney Larson stated he believes the determination of the Board is a simpler issue than it is being made it out to be. He said if this is a case of an “area” variance they only need to focus on whether or not the petitioner has demonstrated that strict compliance of the City’s ordinances would unreasonably prevent them from using their property for a permitted use. He asked the Board to consider whether or not the petitioner could have a house that complies or not. He asked if the City’s ordinances were unreasonable to have them comply. He instructed them to look to the spirit of the ordinances.

Attorney Larson stated one of the variance requests is a specific exception. He stated 17.0411 states the RS-7 single family residential district is intended to accommodate only existing single-family residential uses or parcels within the older, established areas of the City where such uses are located on lots or parcels of land which are within predominantly residential areas. Any single-family residential use or structure existing in the RS-7 zoning district shall be considered to be a conforming use but may not be altered to change the principal use and may only be structurally altered in conformance with the requirements set forth, etcetera, etcetera.

Attorney Larson reminded the Board that they are not legislators. He stated they are judges during this quasi-judicial hearing. He told the members that they have to look at the evidence presented and determine whether or not the petitioner has shown that under this variance standard, they are entitled to the variance. He stated the Board is not tasked with redesigning the petitioner’s home nor is it to suggest legal arguments. Attorney Larson stated it is staff’s belief that the petitioner did not meet the standard. He said they could build quite a large home on that lot, fully in compliance with the code. They are not entitled to a variance.

Ms. Tuttle stated she understands that they are tasked to apply the law but wants to make sure she has a clear standard of the law. She asked what if the City’s ordinance is not controlling and there is another piece of law that supersedes the City’s code. Attorney Larson stated the Board was asked to grant a variance on specific City code section, not other legislation.

Attorney Larson stated there is a separate process that could be initiated to appeal. He said they would have to dispute the application of this law to their situation, but that's not what they asked for. Ms. Tuttle asked for confirmation on what Attorney Larson said, by asking, *"If the petitioner asked this Board to consider a staff decision that the ordinance applied and therefore the answer was no. They would have had to appeal the decision, not ask for a variance"*. Attorney Larson confirmed that was correct. He directed her to the handout he submitted earlier.

Mr. Tredwell stated he appreciates Attorney Larson's input as it reinforces a seminar he recently attended.

Mr. Pinter questioned why, when he approached the City of Pewaukee and explained what his intent was, they suggested he apply for a variance. Mr. Welcenbach stated it wasn't up to the City to give him legal advice.

Mr. Welcenbach asked Mr. Pinter if he wanted to make a legal argument regarding his variance and address the standards that the Board would be looking at this evening.

Mr. Pinter asked if the City Attorney looked at the purposed building area survey, because he seems to have the opinion, along with the City Planner, that he is able to build an esthetically pleasing home that the neighbors won't object to as well as fitting the needs of his family. He said he highly challenged that notion.

Mr. Welcenbach stated blocking the neighbors' view is one of the standards he would personally be looking at.

Mr. Pinter stated the total buildable area is 1,525 square feet, but would mean the front of the house would have a goofy angle. He said within the 1,525 square feet he would have to put the minimum of 900 square feet on the first floor plus the garage. He said they are a family of six.

Attorney Larson reminded the Chairman that Mr. Pinter was not sworn in and the Board should not be listening to any more testimony. He said the notice and agenda specifically stated that. Attorney Larson stated we should be limiting ourselves to legal arguments.

Mr. Welcenbach asked if there were any other legal factors Mr. Pinter would like to address. Mr. Pinter stated he has a hardship because he cannot build a home on this buildable space.

Ms. Tuttle stated she was looking at one of the surveys and it shows the building area. She asked if that shows the maximum allowable space if the setbacks were applied. Mr. Pinter stated that was correct. She asked if that was just the footprint, not the total square footage. Mr. Pinter again stated that was correct. She said what appears to be unique to her is that the setback measurement of 75 feet from the high-water mark or FEMA flood plain is in the neighbor's yard. She said there would be so much more space if that was in a straight line and not in the "V" shape that it is now. She said she saw that as a unique feature of this parcel that limits his buildable area. She asked what part of the structure ends at the 75 feet mark, and questioned if it was the deck or is it the foundation of the home. Mr. Fuchs stated the deck would be considered a structure.

Attorney Larson stated there is a home on the property now. If Mr. Pinter doesn't want that home or if it is not a good use of his money to repair it, how can he say there is no reasonable use, when he is living there?

Mr. Pinter stated every contractor that has been to the house quoting repairs stated 'fixing the home is completely unreasonable'. He told Mr. Fuchs that his 'belief' that the deck was part of the structure, furthers his point that he has to fit a garage, a 900 square foot home and a deck inside this available building pad.

Ms. Tuttle asked which ordinance standards the Board uses to grant variances; the ones provided by Mr. Fuchs or Attorney Larson. Attorney Larson stated he didn't think they were different. He said the ordinance may have a few additional case law standards. He added that financial hardship is not adequate to prove a variance. The fact that it may cost more is not unique to the property.

Mr. Pinter asked about the definition of "reasonable". He said it's not reasonable to do that.

Ms. Tuttle suggested going through each request for a variance and applying the standards. She said the dialog is important to the process. Mr. Welcenbach stated he was fine with that but didn't want to isolate the issues and wanted to look at the big picture as well.

Item #2.1 Section 17.0411 to allow side yard setbacks of 5.2 feet from the north property line and 3.0 feet from the south property line, opposed to the RS-7 District minimum side yard setback of 8.0 feet for a two story dwelling – Mr. Tredwell stated the petitioner has a 50-foot lot and the current structure is grandfathered-in, having different standards for side setbacks and area. He said the proposed home is 40-foot wide. He said the homeowner should have done his due diligence and researched what would be allowable for a new home. He said he was inclined to stay with the existing setbacks of 8-feet per side. Mr. Pinter stated currently it is at 7.9 and 2 for a small portion of the garage.

Mr. Welcenbach stated what is being proposed is 5.2 feet from the north and 3.0 feet from the south. He said there is an existing home there and they are asking for a variance to change that which may restrict the neighbor's view and may be contrary to public interest.

Mr. Pinter stated the variance itself isn't what the issue is, it is the view. He stated the view will be affected more if he doesn't get the variance. He said he understands the setbacks were established for the purpose of police and fire access, which is not the instance in his case. Ms. Tuttle stated the idea is that an emergency vehicle has to get in between the structures to potentially reach the second story. She said based on the testimony, that is not an issue because the other home next to him is built further away because it is on a double lot and the other lot beside him has no home built on it and feels the intent is consistent. She said as far as "absence of detriment" the definition states no variance shall be granted that will create substantial detriment to adjacent property. She further stated adjacent means on each side of Mr. Pinter's property, or that will materially impair or be contrary to the purpose and spirit of this Ordinance. She said she doesn't see how that applies either. She said the Board has to find exceptional circumstances or they can't grant the variance. She said she goes back to the dip in the elevation and having less area to work with.

Mr. Welcenbach stated there is an existing house there and, it may have been different if it was a vacant lot. He said the petitioner has to prove undue hardship. Mr. Tredwell stated the current house is in need of repairs, but according to the City Attorney, financial hardship does not rise to the level of unnecessary hardship.

Ms. Tuttle stated the petitioner could do all the necessary repairs within the footprint of their home.

Mr. Welcenbach referenced the staff recommendations related to exceptional circumstances and economic or financial hardship. He said to some extent this is a self-imposed hardship, because there is an existing structure that they want to tear down and build something larger that is contrary to code.

Mr. Tredwell stated the existing structure is far larger than what the petitioner could rebuild. He stated the Board can't make their decision based on the repair costs to the current house in comparison to the cost of building a new home. Ms. Tuttle stated she agreed, and added, unless the house could not be repaired.

Mr. Pinter started speaking about the foundation contractors that had come out to his home, but Attorney Larson objected to him trying to add testimony. Ms. Tuttle stated she remembered him testifying about his foundation being beyond repair at the last meeting. Mr. Pinter continued by stating he was referencing previous testimony he made regarding his foundation and drainage issues which required helical piles that would extend further outside his foundation and encroach more on the side yard setbacks on both the north and south side.

Mr. Welcenbach made a motion to deny the variances for the side yard setbacks. Mr. Tredwell agreed. Ms. Tuttle was not in favor of that motion. (2-For, 1-Against).

Item #2.2 Section 17.0410e(4) to allow for the sum total of the first floor area of the principal building and all accessory buildings to exceed 30 percent of the lot area - Mr. Welcenbach stated the difference between 30% and 30.96% did not appear to be substantial since it was less than 1% over. **Mr. Welcenbach moved to approve the variance.** Mr. Tredwell and Ms. Tuttle both agreed (3-For, 0-Against).

Item #2.3 Section 170435f to allow a principal building to be located within 75-feet of the floodplain boundary – Ms. Tuttle asked if they had the distance between the furthest shore location of the Wills' house and the baseline. Mr. Pinter stated it was 3 feet off of the 100 year flood plain.

Ms. Tuttle stated there was an averaging rule that is applied when your neighbors are closer to the flood plain than you are, by averaging the structures from the flood plain of the two adjoining neighbors. She said in this case there is a structure on one side and vacant land on the other. She asked if they would then take the full 75-feet.

Attorney Larson said that conversation was not an appropriate discussion for the Board members to have since they are not legislators. They only have to determine whether or not the petitioner met the standard for granting a variance.

Mr. Pinter stated that same rule should apply to the side yard setback and the 100-year flood plain, meaning if this Board feels he has a hardship and they want to grant a variance from the 100-year flood plain that should also apply the hardship to the side yard setbacks because it is the same argument.

Attorney Larson stated he was addressing a different matter and would not remark on Mr. Pinter's comments.

Mr. Welcenbach stated he wanted to know what the actual ordinance states. Mr. Fuchs stated there are two separate variance requests; one is a floodplain zoning district requirement and the other is the shoreland overlay district that has the 75-foot setback requirement and contains the averaging language. He said under the F-1 District, no new walled buildings or structures, including manufactured mobile

homes and walled enclosures, shall be allowed within or within a distance of 75 feet from the boundary of a base floodplain.

Ms. Tuttle asked for clarification that there was no averaging rule for the floodplain. Mr. Fuchs stated that was correct. He referenced page 95 of the zoning code.

Mr. Welcenbach stated averaging would not apply and that it appears that they just have to look at the 75 feet and determine if a variance is appropriate or not.

Ms. Tuttle stated she believes the City's ordinances can't be more restrictive than DNR rules and indicated that when there isn't a structure on a parcel the 75 foot setback is used. Mr. Welcenbach stated the Board should base their decision on the ordinances.

He asked how much closer to the floodplain the petitioner is proposing to put their new house. Mr. Fuchs stated the proposed home would be 24.5 feet from the flood plain and the deck would be 13.3 feet Mr. Tredwell added the existing house is 25 feet from the flood plain.

Mr. Welcenbach stated he would be in favor of granting the variance. He said he thought it would be a hardship to fit a home into that small space. Ms. Tuttle and Mr. Tredwell were also in favor. (3-For, 0-Against).

Mr. Pinter wanted to know why he got that variance for the floodplain and was denied the variance for the side yard setbacks when the same hardship argument is being applied. Ms. Tuttle stated there is various criteria to make their determinations and what she heard regarding the side yard setbacks had a negative impact on the public.

Item #2.4 Section 17.043c(5) to allow a building/structure to be located within 75-feet of the floodplain boundary – Mr. Welcenbach stated this was similar to the last item. Mr. Tredwell asked how this one differs from the last. Mr. Welcenbach stated there is no averaging allowed. Ms. Tuttle stated they did not base their decision on averaging.

Ms. Tuttle stated she noticed in the staff report that when a floodplain variance is granted, the Board shall notify the applicant in writing that it may increase risk to life and property and flood insurance premiums could increase up to \$25.00 per \$100.00 per coverage.

Mr. Welcenbach asked if the survey showed the difference was between the 75 and 100 year flood plain. Mr. Fuchs stated both sections reference the 100 year flood plain. He said essentially it appears to be the same request. Mr. Tredwell agreed.

Ms. Tuttle stated the last item they took action on did not have the averaging rule and this one does. She said since they didn't rely on it last time she didn't think they'd need it this time.

Mr. Welcenbach stated he moves to approve the variance for this item. Ms. Tuttle stated she concurs and Mr. Tredwell stated he votes in favor. (3-For, 0-Against)

Item #2.5 Section 17.0436d to allow for an increased in lot coverage

Mr. Fuchs stated the applicant sent him a revised survey showing that the front portion of the lot adjacent to Peterson is all asphalt and they were proposing to remove a portion of that to reduce the lot coverage from 50.5% down to approximately 45%. Mr. Pinter stated that was only if he could build that home in that space which is no longer the case.

Ms. Tuttle asked whether or not they could consider pervious surfaces and / or approve subject to conditions. Attorney Larson stated they could impose conditions but they have to consider the application that was submitted regardless if there was a back and forth between the petitioner and Planner because nothing was agreed upon. He said the petitioner's testimony was based on their variance request of 50.5%.

Mr. Pinter asked how that would even be applied since the proposal he submitted includes a 40-foot wide house. He said those numbers are garbage at this point. He said he is dumbfounded. He said he couldn't understand why there was a conclusion of a hardship in one instance but not the others. Mr. Tredwell stated that decision was a combination of public interest and Mr. Tredwell was cut off at this point. Mr. Pinter stated public interest had nothing to do with the variance and had to do with the view from across the street. Mr. Pinter stated his neighbor actually sat in his kitchen and acknowledged that the reasons for the setbacks on the sides were for emergency vehicles and there was no issue with that. He said his issue was with the view.

Mr. Welcenbach disagreed. He said that's why he denied the setback for the side yard because it wasn't in the public interest. He told Mr. Pinter just because he applies for a variance doesn't mean he is entitled to it. He has to prove the standards within the ordinances.

Ms. Tuttle stated she remembers reading something about mitigation measures. She asked Mr. Fuchs to explain. He stated the ordinance in the shoreland overland district allows for 20% of lot coverage for permanent structures and 7.5 % for driveways, parking areas, walkways, patios, and other similar impervious surfaces. He said another section of the ordinance states the applicant may go up to 35% total coverage, taking the principle buildings, accessory structures and impervious surfaces with mitigation. That part of the code describes mitigation as the planting of trees or shrubs on the waterway side of the structure, constructing rain gardens, and detention or retention ponds that would collect the storm water runoff. He said these mitigation measures do get reviewed by the Engineering Department.

Ms. Tuttle stated since the structure has to be reduced in width, the applicant may be closer to the 35%; if asphalt is reduced. She said she doesn't feel she has enough information to make a decision.

Mr. Tredwell asked what the current impervious area was.

Mr. Pinter asked if he could discuss the matter with Mr. Matt and have him reconsider his public opinion to see if there would be a reconsideration of that variance. Mr. Welcenbach stated he didn't think we could reopen the testimony and they have to make a decision on what is before them. He said he probably could apply for an amended variance.

Attorney Larson stated he would have to look at the code, but the Board should not advise the property owner on how to do that.

Mr. Pinter tried to hand out a new proposal where he would move the house over 5-feet. Mr. Welcenbach stated this was outside of the variance request. Mr. Larson agreed and said the Board was there to talk about the variance and apply the law. The Board needs to stick to their jurisdiction. He said they were not there to help the petitioner find a way to build the house that he wants.

Mr. Welcenbach stated it was hard to make the decision on what the variance is at this point since the house can't be built as proposed. He suggested denying it until the petitioner resubmits revised plans. Mr. Welcenbach asked if there was a time limit. Mr. Fuchs stated the Board of Appeals must decide

on the application for variance within 30 days after the final hearing and the variances expire within six months unless substantial work has commenced pursuant to such grant.

Mr. Welcenbach stated he'd vote to deny item #5. Ms. Tuttle stated she didn't think they could approve it since they did not have actual dimensions and area. Mr. Treadwell agreed. He said he'd like to also see the new plan with the other impervious areas indicated on the plan.

Mr. Pinter stated assuming all the other variances would have been granted he did submit an amendment to his proposal. It had a total square footage of 5,549 for all the buildings and impervious space. He said in an attempt to work with the City of Pewaukee he did remove the asphalt apron too. Attorney Larson stated since it was not entered into evidence, no action could be taken.

Ms. Tuttle asked Mr. Fuchs when he received the amendment. He stated it was sent via email on Saturday, February 16th and he received it on the 18th. Mr. Fuchs stated the testimony was closed so essentially this becomes a new variance request and it would have to go through the same notification procedures.

Mr. Welcenbach stated he would vote no on item #5. Ms. Tuttle asked if there was any other consideration that could be given. Mr. Larson stated the Board has to act on the petitioner's original request of lot coverage of 55.5%. Ms. Tuttle stated she voted no, and Mr. Treadwell concurred. (0-For, 3-Against)

Attorney Larson asked for clarification. He said it was his assumption that these actions were based upon the materials submitted including the house design and the footprint shown. Given some of the variances were granted and some were denied, it was his understanding they were based on the specific drawings. Ms. Tuttle asked what the purpose of his question was. Attorney Larson stated his purpose was to be clear with the applicant. Did the Board tell him that he can have 31% coverage on this lot and that he can have whatever distance from the floodplain that he showed even though he comes back with a completely different building that you have not seen? It might have a completely different impact on the community but might meet the floodplain setbacks that you approved and the 31% coverage that you approved. Or is it specific to the plans that they were shown?

Mr. Welcenbach acknowledged his concerns. He said he thought it would be based on what the proposed dwelling was. He said he thought since there was no variance given on the side yard setback they would need to reapply for a variance based on that.

Mr. Treadwell stated the petitioner would have to conform to the code on other aspects of his structure.

Attorney Larson stated typically the variances are tied to the specific proposal brought to you. Mr. Welcenbach stated in his mind it was tied to the proposed dwelling.

Ms. Tuttle stated she felt there was an outcome that she wasn't seeing and she wanted to know the implication of her answer. Mr. Fuchs asked from a staff perspective, if the applicant came in with a completely different home but met the approved variance can a permit be issued. Were the variances given specific to the original proposed home or can he build whatever he wants as long as it fits within the variances. Ms. Tuttle stated he has to change his plans based on the decisions made today. Mr. Fuchs stated he could narrow the house and have it a similar design or it could be a completely different structure. Mr. Pinter stated it would still need the City's approval before a building permit would be issued. Ms. Tuttle stated she feels it should be substantially similar to what they originally looked at.

Attorney Larson stated it wouldn't be unheard of if staff asked the Board to reconvene and confirm that the new plans are substantially similar. He suggested making the variances contingent upon any structure being built has to be substantially similar to what was submitted. Any questions on whether it is or isn't can be brought back to the Board to consider.

Mrs. Pinter stated given the parameters they were given, they can't build a completely different home with the space that they have due to their hardship.

Mr. Welcenbach stated the concern he would have is whether or not the garage, house, boathouse and deck are to be in substantially similar locations and dimensions. He said all the variances were granted except the side yard setbacks. There was additional discussion regarding this issue.

Attorney Larson again suggested the variance being conditioned upon any construction based on the variances that are granted being in substantial conformity with the plans submitted and if there are questions in staffs' mind of whether or not they are, it would be brought back to the Board to determine.

Mr. Welcenbach moved to make it contingent upon the petitioner submitting an additional plan as to what they are going to do and if it is not substantially compliant it should come before the Board for a final decision. He said the variances should actually be contingent upon the Board knowing what they are going to do with it. Ms. Tuttle concurred as did Mr. Tredwell. (3-For, 0-Against).

Mrs. Pinter asked if it would be another meeting before the three Board members that are currently present and not before the other members who were not in attendance at the original testimony. Attorney Larson stated the Board would typically have the same members present but there may be extraordinary circumstances that might require different members being present.

3. Adjournment

A motion was made and seconded, (R. Welcenbach, J. Treadwell), to adjourn the meeting at 7:53 p.m. Motion Passed: 3-For, 0-Against.

Respectfully Submitted

Kelly Tarczewski
Clerk/Treasurer