

In attendance:

K. Marlin, J. Tredwell and D. Tuttle. T. Matt was present but recused himself. R. Welcenbach was absent and excused.

Also Present:

City Attorney S. Riffle, Zoning Administrator N. Fuchs and Clerk/Treasurer K. Tarczewski.

1. Call to Order and Pledge of Allegiance

Ms. Marlin opened the meeting at 6:00 p.m.

2. Discussion and Possible Action to Approve the Zoning Board of Appeals Meeting Minutes Dated February 13, 2019

A motion was made and seconded, (D. Tuttle, J. Tredwell) to approve the meeting minutes dated February 13, 2019. Motion Passed: 3-For, 0-Against.

3. Discussion and Possible Action to Approve the Zoning Board of Appeals Meeting Minutes Dated February 19, 2019

A motion was made and seconded, (J. Tredwell, D. Tuttle) to approve the meeting minutes dated February 19, 2019. Motion Passed: 3-For, 0-Against.

4. Determination of Rehearing of Variance Requests Petitioned by Tyler J. Pinter for the Property Located at W267 N2965 Peterson Drive (PWC 0930-026) Previously Heard at the February 13, 2019 Zoning Board of Appeals Meeting and Decided Upon at the February 19, 2019 Zoning Board of Appeals Meeting

Attorney Riffle stated he is representing the City, not the Zoning Board of Appeals. He said he previously thought the rehearing was going to be an issue until he read the previous minutes and the Board invited the Pinters back to deal with certain issues. Attorney Riffle stated it is the Pinters' right, responsibility and duty to be heard related to the lot coverage. He said an agreement could be made that the Board already made a determination to deny on the side yard off set requirement under 17.0411. He recommended the Board only deal with the determination that is still outstanding.

Attorney Riffle summarized the following actions of the Board related to the Pinter property according to the previous minutes:

Section 17.0411 (*side yard setbacks*) appeal was denied by the Board.

Section 17.0410e4 (*floor area of principal building*) appeal was granted.

Section 17.0435f (*allow principal building 75 feet of floodplain boundary*) appeal was granted.

Section 17.0435c (*allow building/structure 75 feet of floodplain boundary*) appeal was granted.

Section 17.0436d (*increase in lot coverage*) the Board asked applicant to come back.

Mr. Pinter stated he wants to be heard on all the variances on tonight's agenda because changes have been made to his house plans and new variances are needed.

Mr. Fuchs stated the previous setback variance related to the 75 feet and flood plain were granted for 24.5 feet and the applicant is now requesting 22.5 feet.

Mr. Pinter stated the change in plans was to address the concerns of the City and his neighbors including moving the house a foot closer to the lake. Attorney Riffle stated the neighbors' concerns over what they want and don't want have nothing to do with the law. Mr. Pinter stated he was asked to redraw plans that alleviate those concerns. Attorney Riffle stated his review of the minutes was only requesting the Pinters to provide plans because the Board could not discern how it would implicate Section 17.0436d as it related to lot coverage. Attorney Riffle stated Mr. Pinter could jeopardize the Board's previous decisions.

Ms. Marlin stated she does not want to see these variances being piecemealed together by the continuation of new requests to get more of what the applicant wants. Mr. Pinter stated that wasn't his intent and that's why he is asking for all new variances.

Ms. Tuttle asked if the previous variances granted to Mr. Pinter would be null and void. Attorney Riffle suggested if the applicant is asking for a new variance he would be giving up all rights to the previous variances granted.

5. **PUBLIC HEARING** and Possible Action Regarding the Petition of **TYLER J. PINTER** for the Property Located at **W267 N2965 PETERSON DRIVE** (PWC 0930-026) for the following:

- 5.1 **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
- 5.2 **Section 17.0435f** to allow a principal building to be located within 75-feet of the floodplain boundary
- 5.3 **Section 17.0435c** to allow a building/structure to be located within 75-feet of the floodplain boundary
- 5.4 **Section 17.0436d** to allow for an increase in lot coverage

The following individuals were sworn in: Tyler and Brianna Pinter (W267 N2965 Peterson Drive), Thomas Matt (W267 N2930 Peterson Drive), Denny Stone (N29 W26716 Peterson Drive) and Nick Fuchs (W240 N3065 Pewaukee Road).

Mr. Pinter read the following statement – (not edited, in original format):

I would like to speak on three key points tonight. Firstly, the authority to review my application, secondly, the unfair procedures employed by the city concerning my case and lastly, how my application satisfies the standards for a variance.

I requested that the board receives copies of my email strings with Mr. Fuchs, regarding the "determination of rehearing" I hope you all had a chance to review them. I've done a little research of my own on this and found quite the contrary to what the city attorney has suggested.

AUTHORITY TO REVIEW NEW APPLICATION

- As a matter of law, I am able to submit a second application after the first application is denied unless there is an ordinance preventing it.
 - A recent decision by the Wisconsin Circuit Court of Appeals supports this, as well as the case cited by the City Attorney. Here are citations from the case of *O'Connor v. Buffalo County Board of Adjustment*.2014
 - "[A]n individual is free to submit [] application after the first has been denied, as long as he or she is willing to pay a second application fee" *O'Connor v. Buffalo County Board. of Adjustment*, 2014 WI App 60, ¶21
 - The rationale behind this is that "[a] municipality may enact a rule prohibiting a party whose application to the zoning board has been denied from filing a new application absent a substantial change in circumstances." *O'Connor v. Buffalo County Board of Adjustment*, 2014 WI App 60, ¶21; see also *Tateoka v. City of Waukesha Board of Zoning Appeals*, 220 Wis. 2d 656, 661, 672 (Ct. App.1998).

- *Where a municipality fails to enact such a rule, the municipality is prevented from prohibiting a new application.*
- *Pewaukee does not have a zoning ordinance or rule that prohibits a party whose application has been denied from submitting a new application*
- *Even if there were that rule or ordinance, the new application includes*
 - *New plans that establish a substantial change from the prior application, and*
 - *There is a change in conditions such that there is now full support of neighbors and those members of the public that previously raised objections.*
- *To the extent that I am asking to revisit the determination of the side yard variance, there is substantial change in circumstances which was fully explained in my application - the publicly raised concerns regarding the plan have been eliminated and there is no longer public opposition - instead there is now public and neighbor support for the new plans and therefore the Board should review the current application.*

UNFAIR PROCEDURE EMPLOYED

- *At the hearing on February 19, 2019, the Board of Zoning Appeals approved some of the requested variances, but due to the issues raised concluded that the plans for my home would necessarily need to be changed, which would change their analysis.*
- *The Board reviewed and ultimately concluded that the resulting changes in plans would need to be resubmitted to the Board for further determination of the impacted zoning variances.*
- *Because the Board already has approved the resubmission of plans for the home and a rehearing based upon those plans, there is no reopening or a reconsideration necessary. The Board has already approved the hearing.*
- *It was a shock to me to receive an email a week away from the meeting that appears to be the City Attorney attempting to derail the Board consideration of my application based upon inapplicable procedural grounds. Again, the Board specifically requested that I reapply with revised plans.*
- *I have recently met the city to review the application documents in an attempt to gain support. I have sought to address all of my neighbors and any other public considerations with my proposed home construction.*
- *In the process, I have revised the plans several times to seek to cooperate and address all of these concerns, at my personal expense. I believe my plans are consistent with the intent of the ordinances and presents a best possible outcome both for the community and my family, and avoid unnecessary hardship.*
- *Despite the efforts, there has been a coordinated effort within the City to prevent consideration of my application, and most recently to employ tactics to even allow my application to be heard. I do not now what about this application that has garnered this kind of attention, but I am simply asking for the Board who is proper authority in this situation to revise my application as they have instructed me to resubmit.*

What is even more concerning to me than lack relevance to the cases cited by the city attorney relative to my application is the level of attention and scrutiny my application has received and levels at which the city and the city attorney have stooped to derail my application.

1. *The city attorney showed up at the last meeting to how I took it as intimidate the board and myself. It is my understanding that was the first meeting in which the city attorney has attended in 8 years.*
2. *Conveniently, after my last meeting, where the board asked me to redraw my plans and re apply - the city decided to hold a training for the board members on when variances can be granted.*
3. *At a meeting I had with the city to review my plans and hopefully gain support I was told that, despite the board already finding that I do have a hardship unique to my property I would not get any support from the city for plans that include any variances period. I was further told, the city attorney would be present at my next meeting. . . Has the city attorney attended other meetings or just mine?*
4. *Finally, A week before my meeting tonight, Mr. Fuchs sends me an e mail letting me know about case laws the city attorney found that suggest that the board might not be able to hear my application.*

I ask, what have I done wrong? What about my application has garnered this amount of attention from the city? Why are other construction projects not under the much scrutiny?

I realize other projects or granted variances in the city are not a basis for arguments to receive variance on my property however I question how some homes have been built or are still under construction without any variances at all.

If I look to the south of my property to the closest home still under construction, I find the home located at W267 N2907 just 6 houses away from ours. This home was built 24' off the road ROW and should be 30' to meet the ordinance. The homes on both sides are greater than 30' away so averaging does not apply in this situation. I have photos to show if the board would like? I did not receive a letter for a public hearing for this property nor did the property owners receive a variance or have to go through this process.

If I look to the north of my property to the home most recently constructed at N29 W2667, this home has driveway that spans nearly the 45' width of the property and is approximately 60FT long. Considering that, the property also has a 5k SF home and large deck and boathouse there is no way this home falls within the impervious space ordinances. In fact to make matters worse the city acknowledged to me that the home should have had a variance, I ask why did it?

To be clear, I have no issues with either of these homes or the way they are constructed. They are aesthetically pleasing homes that fit the design and function on the neighboring properties. I point to these properties to showcase the amount of attention my application has received relative to other recent and ongoing construction projects nearby.

This city and this board have a long history of working with lakefront property owners to rebuild their homes. The city cannot simply now start digging in the heels and stop working with us to rebuild. The ship has already sailed, half the lake has already been rebuilt. It does not take long to drive around and see that nearly every other newly constructed home has received a variance or perhaps they were able to bypass the process. If the city wants to hold the position and instruct the boards to stop issuing variances the result would be a massive hardship to everyone's property value of homes that have not already been rebuilt. Furthermore, I ask what the purpose of the board would be at that point.

It is my understanding that this board is here to do as they have always done, use good judgment. In the city planner's recommendation to the board, he cites on page 22 that "the applicant may choose to rebuild a new home within the same footprint of the existing home". I find it ironic that the City who has been so adamantly against granting variances suggest to me to rebuild a home that it would require a total of 7 variances to reconstruct and is far more egregious to the ordinances than what I am proposing. At some point when does the common sense come in to play. I do not have an attorney present tonight; I am not here to fight, I want to build a new home. I am asking the board to represent me and use common sense just as what has always been done in the past.

APPLICATION SATISFIES THE STANDARDS FOR VARIANCE

- *The Board's denial of the first variance application for a side setback variance was based upon its consideration of public consideration of public concern expressed by our neighbor to the rear of the home as to the potential for limited sight lines to the lake along the north side yard due to the lower setbacks. The Board's consideration was focused on maintaining an identified purpose of the setback ordinance to address those concerns with aesthetics and public views of the lake.*
- *Based upon the concerns raised by the Board, we reviewed plans with our neighbors, and have developed a plan that alleviates their concerns, increases the aesthetics and sight lines to the lake, and which will address the unnecessary hardships posted by the setback ordinance on our parcel. Our neighbor to the rear has approved this plan and confirmed that it resolves his concerns with sight lines to the lake.*
- *We have submitted a new updated plan showing the differences between the original plans reviewed by the board with the current proposed plan. This updated plan mitigates the concerns raised by our rear neighbor to the north side sight lines by reducing the size of the home and removing approximately 200SF from the home, deck and porch. The lake side of the home is moved slightly closer to the lake by 2ft however, the edge of the home's deck is no lower to floodplain elevation than the original proposal and granted variance*
- *With the area removed from the rear of the street side of the home and with the adjacent lot to the north being an undeveloped community lake access lot, the viewing angle from the road and across the street will be significantly increased, despite maintaining a smaller side setback.*

- *Based upon the Board's approved variances for the Property, and with an 8' side setback, the only options for the home would have been to extend the home closer to the road. While this could have technically complied with the side setback ordinance, it would have resulted in a decrease in the viewing angle to the lake and unnecessary burden on the design and function of our home*
- *Strict compliance with the ordinance would have been unreasonably detrimental to our construction by requiring construction of a home that is unreasonably narrow on the lot preventing a home that is aesthetically pleasing and with interior widths that would greatly impact the layout of the home and unreasonably reduce usefulness.*
- *Lastly, the spirit of the ordinances and this process have been achieved. I could not unilaterally build whatever I wanted to without seeking approval from the public and from the city and board of zoning appeals. My revised application addresses all concerns. Our property is unique, I challenge anyone to find another 50' wide lake lot where the flood plain elevation comes up 80ft on the property from the lake and one with a vacant park reserve on one side and the home on the other side 40' away.*

At the Feb 19th meeting the Board did find that I have a hardship unique to my property however I failed to put forth a remedy to address the hardship that the board could approve, I believe we have a plan that makes sense for everyone without unnecessary hardships imposed by the ordinances to me, my neighbors or the city.

Thank you!"

Ms. Tuttle asked Mr. Pinter to explain what the variance differences between the previous plan and the current plan are. Mr. Pinter stated they are asking for a new floodplain set back which is two feet closer to the floodplain. He said the deck position remains 13.3 feet off the floodplain which is the same as the previous granted variance. He said they reduced the size of the home, deck and porch and were able to cut five feet off the road side of the home to achieve sight lines to the lake from across the street. He said they also eliminated the asphalt apron which extended the full width of the property reducing the impervious surface of the property. He said the side yard setbacks are identical to the original proposal. Mrs. Pinter added they heard a lot of opposition to their previous proposal and believe they addressed the concerns.

Mr. Tredwell stated he sees some of the square footage was by shrinking the house front to back, but the side yard setbacks remained the same. Mr. Pinter stated that was correct.

Ms. Tuttle commented that the original submittal listed the square footage for the house, deck and porch as 3,211 feet and the new proposal lists the square footage as 3,152 feet.

Mr. Matt thanked the Board for their time and consideration. He said the Pinters listened to the concerns and he is now in favor of their proposal.

Mr. Stone stated Mr. Pinter was very courteous and provided him with plans of what he wanted to do and frankly he had no concerns with the first submittal and is fine with the second proposal as well. He said the Board has to be reasonable in their decision making when it comes to variances around the lake.

Mr. Pinter provided the Board with a copy of a letter from Mr. and Mrs. Wills supporting the project.

Mr. Fuchs stated staff continues to recommend denial of the applicant's variance request based on the findings in Chapter 17.1007 of the code. He said there are no exceptional or unusual circumstances. He said there are many substandard lots throughout the City on the lake and that is why the Rs-7 District was created to help accommodate property owners in those areas. He said there are other options to allow for a single family home development on that lot without requiring a variance. He said the owner can build a narrow home, remodel or build on the existing footprint.

Attorney Riffle stated it appears the theme of this case is if the petitioner could get his neighbors on board with project then the variances should be granted, but he said that is not the law. He said variances will not be contrary to the public interest where owing to special conditions a literal enforcement of the provision of the ordinance will result in tactical difficulty or unnecessary hardship so that the spirit of the ordinance shall be observed and public safety and welfare shall be secured and substantial justice done.

He said the old State law was enacted to get rid of all illegal non-conforming structures, to have regularity. He said the legislator saw fit to grant property owners greater rights so they loosened those laws. He said, the Board should be looking at what is being proposed contrary to the code requirements and ask themselves "but for" the requirements of the code is there reasonable use of the property? He said in this case there is 1,525 square feet of buildable area without needing a variance. It would also meet environmental requirements. He reminded the Board that there are reasons for the setbacks in the code. He said the setback from the lake is for the property owner's good as well as protecting the lake against runoff.

He also reminded the Board that if there was an unnecessary hardship created it would have to be unique to the property not to the zoning. He said there are several lots in that area with the same issues as the Pinter's face.

Attorney Riffle stated he has no ill will towards Mr. Pinter, he said he attends meetings when requested to do so. He said he was merely telling the Board what the law is, and he'll deal with it in the circuit court if the Board determines otherwise and the City files an appeal. He asked them to balance the integrity of the ordinance versus whether or not there is a unique aspect of the property.

Attorney Riffle stated the Board is required to look at the minimum variance that would attenuate the unnecessary hardship.

Ms. Tuttle questioned mitigation in relationship to impervious surfaces. Mr. Fuchs stated rain gardens help gather the water and slowly release it. It cleans runs off. Mr. Fuchs stated with the combined lot coverage, the shoreland overlay allows the structures to total not more than 20%. Combined with other impervious surfaces such as a driveway it can increase up to 35%. He said the applicant is still exceeding that. He is currently at 49%.

Again Attorney Riffle stated it was his job is to represent the Zoning Administrator. He again stated the City is opposed to the requested variances because the applicant did not meet the burden of proof.

Ms. Marlin closed the public hearing at this point. She said she was having difficulty seeing what the hardship was related to the side yard setbacks. Ms. Tuttle asked what they were currently. The existing is eight feet on the north side and seven feet on the south. It gets as close as two feet near the garage.

Ms. Tuttle stated she thought it was unique that another structure could not be built on the parcel directly to the north. She said the purpose of the setback ordinance is so that there is harmony between neighbors. She said she could not find what the purpose of each ordinance was to know if the plans were consistent. She said she was less concerned about the side yard setback on the North because the lot next to them won't be built on. Ms. Marlin stated she sees that this is unique but doesn't see the unnecessary hardship the property owner has building within the regulated setbacks. Ms. Tuttle said the ordinance speaks to more than unnecessary hardship. She said it says exceptional, extraordinary or unusual circumstances. Attorney Riffle stated that is old language which is more restrictive.

Ms. Marlin asked if “unnecessary hardship” is unreasonably preventing a property owner from using their property for the permitted purposes.

Ms. Tuttle stated a “preservation of intent” is more for use of the parcel and doesn’t apply.

Ms. Marlin stated the principal use for the structure on this lot is a residential home. She referenced “preservation of intent” to follow what is a permitted use on this lot which is a Rs-7 residential home.

Ms. Tuttle stated she agreed, no variance shall have the effect of permitting a use in any district that is not a stated permitted principle use. Ms. Marlin stated the Board would not be limiting the use by complying with the setback. Ms. Tuttle stated she didn’t think Item a. under staff’s recommendations applies at all.

Ms. Marlin asked if there were exceptional circumstances. Ms. Marlin noted the language in the staff report was more stringent than current law. She said there must be exceptional, extraordinary, or unusual circumstances or conditions applying to the lot or parcel, structure, use, or intended use that do not apply generally to other properties or uses in the same district, and the granting of the variance should not be of a general or recurrent nature as to suggest that the Ordinance should be changed.

Mr. Tredwell stated the exceptional circumstance is that there is a vacant lot next to the subject property. Ms. Tuttle agreed.

Mr. Staven stated everyone has access to this property and they don’t care about the few extra feet.

Ms. Tuttle read the recommendations under Economic or Financial Hardship and Self-Imposed Hardship. She stated no variance shall be granted on the basis of economic or financial gain or loss. Self-imposed hardships shall not be considered as grounds for the granting of a variance. She indicated that she did not recall any financial testimony. Ms. Marlin stated an argument could be made that purchasing a lot that is too small to build a house that you want to build is a self-imposed hardship. Ms. Tuttle stated it was “even-steven”. She said when she sees a house like this it is hard to reconcile. She said she didn’t know if it was easy or difficult to find out what the rules are in respect to your property when you’re buying it. When you’re in a neighborhood and see houses similar to what you want to build it is kind of logical to think it would be an acceptable use. Assumptions are made. Mr. Tredwell agreed.

Ms. Marlin moved on to preservation of property rights. She stated the variance must be necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same district and same vicinity. Mr. Tredwell stated that was straightforward. He said there were already so many non-conforming lots. Ms. Marlin asked if the variance was necessary for the owner to enjoy his property. Ms. Tuttle stated she thought this was too vague to apply.

Ms. Tuttle moved on to the absence of detriment. She said no variance shall be granted that will create substantial detriment to adjacent property or that will materially impair or be contrary to the purpose and spirit of this Ordinance or the public interest.

Mr. Tredwell brought up additional requirements in the floodplain district. Ms. Tuttle asked if this even applied. Ms. Marlin stated she didn’t feel they had all the technical data to decide if it applied. Attorney Riffle stated the burden of proof is on the property owner. Ms. Tuttle stated she didn’t think there would be a lower degree of flood protection based on the side yard setbacks. Mr. Tredwell agreed.

Ms. Marlin stated she didn't think they were getting anywhere and the Board should focus on identifying the unnecessary hardship and what the conditions are that are unique to the property, which she noted the vacant lot to the north was unique. She also mentioned if there was any harm to the public interest it should also be factored in as well.

Ms. Marlin stated she does not see what is unique about the property that it can't meet the side yard setbacks. Ms. Tuttle stated she didn't analyze it the same way. She said she was in favor of the side yard setback variance for the reasons previously stated during the discussion; either the factors were too vague or because the factors didn't apply.

- 5.1 **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

A motion was made and seconded, (D. Tuttle, J. Tredwell) to allow for variances to the side yard setbacks of 5.2 feet from the north property line and 3.0 feet from the south property line. Motion Passed: 2-For, 1-Against (K. Marlin).

Attorney Riffle questioned the measurements. The Board affirmed their motion was correct. Ms. Marlin stated 5.2 feet from the north and 3.0 feet from the south for the garage and the house is 5.0 feet.

- 5.2 **Section 17.0435f** to allow a principal building to be located within 75-feet of the floodplain Boundary

Mr. Treadwell stated he thought this request is substantially similar to the current home and to the original request that was recently granted. Ms. Marlin stated if 5.2 would be granted, the same discussion would apply to 5.3. Everyone agreed.

A motion was made and seconded, (J. Tredwell, D. Tuttle) to allow a principal building to be located within 75-feet of the floodplain boundary. Motion Passed: 3-For, 0-Against.

- 5.3 **Section 17.0435c** to allow a building/structure to be located within 75-feet of the floodplain Boundary

A motion was made and seconded, (J. Tredwell, D. Tuttle) to approve the variance to allow a building/structure to be located within 75-feet of the floodplain boundary.

Motion Passed: 3-For, 0-Against.

- 5.4 **Section 17.0436d** to allow for an increased in lot coverage

Ms. Marlin directed the Board to the letter from the Community Planning and Development Department that says, if the Board is to move forward and approve this variance it would be recommended that the applicant provide mitigation measures consistent with Section 17.0436d(4)a and b subject to review and approval by the Engineering Department. She asked that this language be put in the motion.

A motion was made and seconded, (J. Tredwell, D. Tuttle) to allow for the increased lot coverage contingent upon the property owner providing mitigation measures consistent with Section 17.0436d(4)(a) and (b), subject to review and approval by the Engineering Department. Motion Passed: 3-For, 0-Against.

6. Adjournment – A motion was made and seconded, (K. Marlin, J. Tredwell) to adjourn the meeting at 7:43 p.m. Motion Passed: 3-For, 0-Against.

Respectfully Submitted,

Kelly Tarczewski
Clerk/Treasurer