

**VILLAGE OF GERMANTOWN
BOARD OF ZONING APPEALS
MEETING MINUTES
January 13, 2016**

CALL TO ORDER: The meeting was called to order at 5:30 p.m.

ROLL CALL: Chair White, Members Filla, Fritsche, Schleif and Hansen were all present. Community Development Director Retzlaff, Attorney Sajdak, Clerk Goeckner and Deputy Clerk Tamborino were also present.

APPROVAL OF MINUTES: *Motion (Filla/Schleif) to approve the minutes of November 18, 2015. Motion carried.*

Chair White read the policy and procedures of the Board of Zoning Appeals.

PUBLIC HEARING:

To hear any and all parties, their attorneys or agents, for or against the application filed by **QAISAR MANZOOR, PROPERTY OWNER**, for an appeal: (1) of a decision by the Village of Germantown Zoning Administrator regarding the retaining wall that constitute a code violation of Section 17.41(6) of the Zoning Code; and/or (2) for a variance from the provisions of Section 17.41(6) that requires a 10' wall height retaining wall have a minimum 10' setback from the adjacent property line of the property located at **W210N11120 Mountbrooke Drive**.

Chair White opened the Public Hearing at 5:35 p.m.

Attorney, Daniel Sargeant of Schloemer Law Firm introduced himself as council for the appellant. The appellant, Qaisar Manzoor, W210N11120 Mountbrooke Drive, Germantown, WI was sworn in.

Mr. Manzoor, owner of the property for approximately 15 years is requesting a variance from the setback requirement stating the property is an odd shaped lot with approximately 143 feet in front and 59 feet in back. Along the south boundary line was a 30 year old retaining wall made out of railroad ties along the driveway. The driveway started to slope, shift and crack. Cosmetically it was in very bad shape. The driveway sits about 10 feet higher than the adjacent lot. Six pictures were submitted and placed on file. Mr. Manzoor stated in July he made inquiries at the Village of Germantown's Building Inspection department speaking with Building Inspector Mike Guttmann for replacing the driveway and retaining wall. Mr. Manzoor, along with a contractor, wanted to know if he needed a permit and what the requirements were if he wanted to add an extra garage and how far it needed to be away from the boundary. Mr. Guttmann gave him a copy of the Plat Survey for the property along with his business card and two cards of surveyors. Mr. Manzoor called both and got a more detailed survey done. Mr. Guttmann told Mr. Manzoor he needed to be 20 feet away from the lot line to build an extra garage. Mr. Manzoor also asked if he needed a permit to build the retaining wall. Mr. Guttmann said a permit is not required but to be safe build the retaining wall about a foot away from the lot line. Mr. Manzoor came to the Village Hall a second time to speak with the Building Inspector because he lost the information and asked similar questions. This time he asked more questions about the retaining wall and was never told about the height or setback requirements.

Mr. Manzoor hired a different contractor to complete the retaining wall and driveway than the one that came with him to Germantown's Inspection Department. He also had a complete survey of his lot completed so he would know exactly where his lot lines were. The stakes were put in and the project started. Fill was added to bring the lot up to grade. Additional pictures were submitted to show the project construction.

Attorney Sargeant asked the appellant if he feels he has a safer driveway and approach to the garage now that he brought the slope up to grade. Mr. Manzoor stated he was trying to make it look nice because he lives in a nice neighborhood and felt like he was doing everything the way he was supposed to be doing it.

Member Filla asked if the wall is where the original wall is. Mr. Manzoor stated no, a survey was done and the original wall was closer to his house than the new wall.

Chair White asked if the timber wall was the same height as the new retaining wall. Mr. Manzoor stated no it sloped and then the timbers were there. Now fill was brought in to level the lot so the retaining wall is higher. Chair White also asked if the wall could have been built where the timber was. Mr. Manzoor said he was building based on information he received from the Building Inspector and using his property as much as he could. Mr. Manzoor stated he would have done it differently given the correct information. He was following what was given to him.

Member Hansen asked if we have information of the discussion from the Building Inspector. Village Attorney Sajdak said there is case law that deals with this circumstances of error of a Building Inspector giving wrong information, and read the Snyder vs. Waukesha County Board of Adjustment 1976 Supreme Court Case.

Appellant's Attorney Sargeant read a slightly different view with a 2007 Accent Developers LLC vs the City of Menomonie Board of Zoning Appeals case. If a municipal official makes a mistake that is relied upon by a developer, it can be reason for BOZA to grant the variance.

Village Attorney Sajdak asked the appellant if he looked at the zoning code at all before building the wall. Mr. Manzoor stated no he talked to Mr. Guttmann the Building Inspector to get the information.

Second witness Alan Carter was sworn in by Chair White. Attorney Sargeant asked his occupation and if he was present with Mr. Manzoor at the Germantown Building Inspection department during the conversation with Mike Guttmann. Mr. Carter stated he is a contractor and was present for the conversation regarding setbacks and code for building a retaining wall. Carter also stated Mr. Guttmann said no setbacks but recommended a foot for maintenance and no permits were required. We also asked about adding on to the garage and wanted to check the setbacks on that also. Attorney Sargeant asked if Mr. Carter received the contract for the job. Mr. Carter stated no he did not but came to testify.

Third witness Barry Remich was sworn in by Chair White. Barry Remich was hired by Qaisar Manzoor to complete the retaining wall. Mr. Remich did not get any information from the Building Inspection department. He solely relied on the information from Mr. Manzoor.

Barry Remich gave an overview of the project. The wall is needed for better use of the property and the safety issue of backing out of the garage. In icy conditions you would not be able to walk out without sliding down. Discussion occurred on the details of the retaining wall and the location. Main reason for retaining walls is to make unusable land usable. All that was there previously was brush, timber, weeds and rocks. The difference between the location of the old wall and the location of the new wall is about 7-8 feet further away from the owner's house. The height is not 10 feet. It is about 7-8 feet high.

Village Attorney Sajdak asked how far away the wall is from the lot line and if Mr. Remich looked at the Village Code. Mr. Remich responded with two feet away from the lot line at the base and no he did not look at the Village Code. He relied solely on what he was told by Mr. Manzoor.

Chair White asked the cost of the project. Mr. Manzoor stated approximately \$40,000.

Chair White invited anyone else in favor of the appeal to speak. No others present wished to speak.

Community Development Director/Village Planner and Zoning Administrator Jeff Retzlaff was sworn in by Chair White. CDD Retzlaff presented the Village's information. A timeline of events with supporting documents and pictures were shown and distributed to the committee. On September 18, 2015 a complaint was received about a 3-5' brick retaining wall being constructed along lot line from front to back yard. Village staff went to site on September 21, 2015 had a discussion with the contractor on site, took photos, observed wall up to 8' high with setback of 20" from property line. Staff advised contractor to stop work. Property owner stated he had met with building inspector and told no permit required if not permanent structure. On September 24, 2015 discussion with property owner advising that while no permit is required for a retaining wall, there is a setback for walls over 3' high. Code violation notice was issued September 28, 2015. November 5, 2015 the variance appeal was filed. The retaining wall setback requirements are printed in section 17.41(6) of the Village Code, Residential Accessory Use section which indicates retaining walls shall meet the following setbacks from all property lines: (a) Side Yard. The minimum distance equal to or greater than the height of the retaining wall above the lowest finish yard grade. This is a provision added in July 2010. In summary, the variance appeal is to reduce retaining wall setback from 10' to 20-24". These are estimates.

Member Fritsche asked if a retaining wall is 3' or less is there a setback requirement. CDD Retzlaff answered the setback is for over 3'.

Chair White asked what changed the zoning code in 2010. Retzlaff responded with construction of a retaining wall and the other was an above ground pool with surrounding deck. Both cases, structures were being placed right on the adjoining lot line which created complaints. Chair White asked is the reason for the setback because if the wall falls, it won't fall on the neighbor's property. Retzlaff said no it's more for maintenance, and the bulkiness of the wall the higher the view of it from the downward side.

Village Attorney Sajdak asked Retzlaff if the property otherwise complies. Retzlaff stated there is one other minor exception. The driveway is old and beat up and looks like the original driveway. There is currently a 5' setback for driveways in the Village Code, so if the driveway were to move they would need to meet the 5' setback requirement but everything else complies.

Chair White invited anyone opposed to the appeal to speak. Vicki and Robert Lentz, W210 N11080 Mountbrooke Drive, were sworn in by Chair White. Vicki Lentz does not want a conflict with neighbor but wants to protect the value of their property. Questions of the neighbors getting the proper permits from the Village and authorizations from the home owner's association prompted their complaint of the retaining wall. Qaisar Manzoor did speak with them about the project but they were under the understanding that everything was going to be replaced the way it was not completely rebuilt. Pictures were submitted showing the view from their lot showing drainage openings in the wall onto their property which is also violation of the code. Additional pictures of the views were shown and placed on file. Lentz's interpretation of the conversations with Mr. Manzoor regarding the retaining wall was similar replacement of the tiered wall with small brick. Since construction began November 2, 2015, they have water in their basement. They went to the home owner's association and found out the wall was never approved there. After talking to a realtor, Lentz's heard that due to the wall being as big as it is and as close to their house as it is with drainage pipes draining onto their lawn would decrease the value of their property. Attorney Sargeant objected to the comment saying that is hearsay, the realtor is not present to speak. Village Attorney Sajdak stated even though this is a quasi judicial hearing it is a less formal process and the rules of evidence do not apply. Chair White stated his objection is noted, but Ms. Lentz can proceed. Vicki Lentz stated The Home Owner's Association has chosen to remain neutral. She then read a copy of an email sent to the Village from the president of the Home Owner's Association stating nothing was ever approved because nothing was ever submitted. Vicki Lentz also had copies of the Home Owner's Association guidelines and bylaws. Additional comments by her stated the construction of this wall creates liability on their part due to the height of the wall. Children playing on the wall could fall onto their property, if something happens to the wall and it falls onto their property it could hurt someone. They feel strongly the contractor should have checked into the code requirements further instead of relying on the home owner's understanding. Ms. Lentz read the Findings portion of the Board of Zoning Appeals stating no variance to the provisions of this chapter shall be granted by the Board unless it finds, beyond a reasonable doubt, that all the following facts and conditions exist and so indicates such and subsection D) states Preservation of Property Rights and E) says Absence of Detriment.

Chair White asked the opponent regarding the picture from the kitchen window, if the wall was built according to the setback requirement, would the view be any different. Ms. Lentz stated no, not at all.

The committee asked if they had the water infiltration looked at and how long have they lived there. Ms. Lentz stated no, they want to see what happens here and they have lived there for 23 years.

Community Development Director Retzlaff asked regarding the water issue during rain events has anything been draining from the new wall or coming out of the pipes to cause the basement water. Ms. Lentz stated no, but she wasn't watching it on a regular basis. We had drain tile replaced from a different issue about 15 years ago. There was an outdoor shower from a prior owner that used subsurface tiles which is fixed now.

Chair White asked if there was anyone else that wishes to speak. No one present wished to speak.

Qaisar Manzoor spoke again to comment on some of the opponent's discussion. He also had water issues and fixed them. Mr. Manzoor said he spoke with Dennis Johnson from the Home Owner's Association who came over and looked at the wall and said go ahead do what you want. Mr. Manzoor stated he had several conversations with Robert Lentz telling him exactly what he was planning on for building a retaining wall.

Attorney Sargeant stated they are asking for the variance on two points, the slope presented safety issues and the Building Inspector's mistake of giving incorrect information. Mr. Manzoor would not have done the job this way if he knew it was incorrect.

Chair White declared the public hearing closed at 7:40 p.m. stating the Board will go into deliberation and follow the five findings of facts, discussing each one as we go.

DELIBERATION AND ACTION BY THE BOARD:

Discussion followed:

- Empathy for Mr. Manzoor regarding cost of project
- Will moving structure to required setback make a difference
- The code is written for a purpose and the wall could have been built with that setback requirement.

Conclusions of Law:

1. The variance will be contrary to the public interest and will not be in accord with the spirit of the Zoning Code because it could be built with the setback requirements. The safety issues to the adjacent parcel will be a problem.
2. There are not exceptional, extraordinary or unusual conditions or circumstances that apply specifically to this lot or parcel, use, structure or intended use that do not apply generally to other property or uses in the same district because the entire subdivision has slopes and hills. It is not necessary for the owner to build the retaining wall in the chosen location. The wall can be built with the required setback.
3. The variance is not necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same district because other properties in the same district have the same issues and a compliant retaining wall could have been built without the variance.
4. The variance will create substantial detriment to adjacent property, will be contrary to the public safety or interest because of the aesthetic views from the neighbor's property.

5. A literal enforcement of the terms of the Zoning Code would not result in a practical difficulty or unnecessary hardship to the applicant because the hardship is purely economical.

Chair White stated having failed to find in favor of the appellant beyond reasonable doubt in order to grant the variance we must deny the request for the variance.

MOTION (Fritsche/Schleif) to deny the request for a variance based on the findings of facts, discussion and testimony offered during the course of this Board of Zoning Appeal hearing. Roll call vote all in favor of the denial, motion carried.

Chair White declared a recess at 8:00 p.m.
The meeting reconvened at 8:07 p.m.

PUBLIC HEARING

To hear any and all parties, their attorneys or agents, for or against the **APPEAL** as filed by **GERALD BARSON, PROPERTY OWNER**, seeking a variance from the rear yard setback requirements of the Germantown Municipal Code to reduce the minimum 25' rear yard setback for the purpose of repairing and replacing the existing deck on the property located at **W164N11075 Kings Way**.

Chair White opened the public hearing at 8:10 p.m. Appellant Gerald Barson, W164N11075 Kings Way, Germantown, WI was sworn in.

Mr. Gerald Barson, owner of the property for 25 years is seeking a variance from the rear yard setback requirement of 25' for the purpose of repairing and replacing his existing deck. It is a 30 year old wooden deck that is rotting and the support posts are buckling. Mr. Barson hired someone to do the job, went to the Village Building Inspection department to pull a permit. The Building Inspector rejected the permit and told us our house is illegal. A permit was never taken out for the original deck. Mr. Barson's wife went to the Village and found there was an original permit for the house and deck with original notes from the building inspector. Mr. Barson stated they are trying to fix the deck and wasn't looking for a variance because we are replacing the original deck that was approved 30 years ago. Mr. Barson wasn't happy with the inspection department telling him his house and deck were not legal and the whole subdivision is illegal.

Chair White asked what the project entails. Mr. Barson said he wants to replace the posts. The builder says to do that it's better to take the whole deck down and build it up again. They are not looking for anything different or bigger, just replacing it in the exact footprint with new wood. The sunroom on the back of the house is part of the original plan. The property line to the back is adjacent to a lake. The original builder built several of the homes in the subdivision and did not follow the setback requirements and it was all approved by the building inspector at that time. The 25' setback was not in place 30 years ago.

Community Development Director Retzlaff, still under oath, distributed documents to the committee and gave brief history of the property and Esquire Estates subdivision. The original home was constructed in 1987 and non-compliant with the 25' rear yard setback as well as other homes in the same vicinity. There is no record of permit approval for the existing deck although there are notes on the plans from the building inspector. CDD Retzlaff read his memo to the Building Inspector dated November 3, 2015 stating after spending an hour researching this property, it appears the developer constructed numerous homes including decks that did not meet the minimum side and rear setback requirement in the Esquire Estates subdivision. A building permit was issued in violation of the zoning code for the dwelling with a rear yard setback of 21 feet as shown on the plat of survey without final inspection and occupancy permit. If the owner wants to construct a deck any closer than the existing 21' rear yard setback, the owner will have to file a variance appeal with the Board of Zoning Appeals. November 12, 2015 a variance appeal was filed.

Member Fritsche asked if all other homes in this subdivision were approved and did not have to go to Board of Zoning Appeals for a variance. Mr. Retzlaff stated that is correct, they did not.

Discussion followed regarding what is required for the 25' setback, why is there a 25' setback requirement, any additional requirements for shoreland/wetland setbacks, common areas, attached decks versus floating decks.

Member Schleif asked if it is legal for these property owners in this subdivision to replace a post or two at a time even though the dwelling and deck are non-conforming. CDD Retzlaff stated a building permit would be required when it is considered a non-conforming status. But that is what we need to determine, whether or not what the village did in the past, with regard to approving not only the decks but the dwellings to be closer than the required setbacks that were in existence in the 1980's as it is today that qualifies as a legal non-conforming structure. When residents start replacing components of that dwelling, the code says you are required to comply unless you get a variance. CDD Retzlaff stated in his opinion, he would approve the deck because the deck was permitted at time of construction and they are replacing it now because of deterioration, but the Board needs to make the final decision.

Chair White invited anyone to speak in favor of the appellant.

James Kiepert, W164N11087 Kings Way, Germantown, WI stated he is in favor of granting the variance.

Mary Kiepert, W164N11087 Kings Way, Germantown, WI was sworn in to state she is upset to see how upset her neighbors are after speaking to the Building Inspector. The Village should want residents to keep up their property. Don't penalize people on things that were approved and now need to be replaced.

Dennis Myers, N115W20309 Woodland Dr, Germantown, WI was sworn in and stated he is the Village Trustee for this District and feels the three foot difference is insufficient because of the water on the other side. He does not see a problem with this.

Chair White invited anyone to speak in opposition of this appeal.

Village Attorney Sajdak had some follow up questions to Community Development Director Retzlaff asking if he knew the history of the zoning code found within the current municipal code which was codified in 2002. Retzlaff stated he does not know the history of the zoning code and did not look back at what the code requirements were during the construction of this home. He relied on the information in the property folder from his predecessors. There is a letter dated 1985 in one of the files to Joseph Nighbor, Village Building Inspector, from Marshall Paust, Village President, stating he recommends the building permit be issued for one of the homes in the subdivision even though the setback was only 15-1/2 feet. The building permit was then issued. No variance process was taken; it was simply a matter of village officials deciding to approve it.

Some of the lots are so small, building inspectors were not going to be issuing permits due to non-compliance. They applied for Conditional Use Permits to the Village Board and they were granted without any direction. Now when we receive these applications that are not conforming, we have to say something and let the resident know otherwise we would be doing the same thing that was done in the past, which was not correct.

The Village Attorney asked the Planner if the Board were to make a decision to say these are legal non-conforming structures, what does that mean. Planner Retzlaff explained if it is deemed to be non-conforming, they can continue to replace as needed but would not be able to expand.

Discussion followed deciding if it is better for the applicant if the Board decides to make a motion for Building Inspection error to grant legal non-conforming use versus granting a variance and it was decided that granting a variance lasts forever where the non-conforming use could be taken away.

Chair White closed the public hearing at 9:23 p.m.

DELIBERATION AND ACTION BY THE BOARD:

Most of the discussion occurred during the Public Hearing.

Conclusions of Law:

1. The variance will not be contrary to the public interest and will be in accord with the spirit of the Zoning Code because there are common areas, green areas, and a pond.
2. There are exceptional, extraordinary or unusual conditions or circumstances that apply specifically to this lot or parcel, use, structure or intended use that do not apply generally to other property or uses in the same district because it was all permitted and the rear setback abuts a lake, and there's the strip of common area between them.
3. The variance is necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same district because of all the properties on the encroachment.

4. The variance will not create substantial detriment to adjacent property, and will not be contrary to the public safety or interest.
5. A literal enforcement of the terms of the Zoning Code would result in a practical difficulty or unnecessary hardship to the applicant because it would be a hardship to deprive him of the deck he had when the house was built.

MOTION (Schleif/Filla) to grant the request for a variance to Mr. Barson for repairing and replacing the existing deck on the same foot print on the property located at W164N11075 Kings Way based on the findings of facts, discussion and testimony offered during the course of this Board of Zoning Appeals hearing. Roll call vote, all in favor of granting the variance, motion carried.

ADJOURNMENT: MOTION (Fritsche/Schleif) to adjourn the meeting at 9:40 p.m. Motion carried.

Respectfully submitted,

Timmerly Tamborino
Deputy Clerk

Minutes noted with corrections by overstrikes for omission and underscores for additions. Approved on: February 10, 2016.