

Decision on Request and Variance

By Bayfield County Board of Adjustment

Case No. 2

January 26, 2006, Meeting

Danny Lee Bourassa has requested a hearing before the Board as allowed in Section 13-1-102(c)(1) of the Bayfield County Zoning Ordinance. This request is to appeal a navigable determination from the Bayfield County Planning and Zoning Department as well as John Spangberg, Water Management Specialist, Wisconsin Department of Natural Resources and pending outcome of the Board's decision also seeks a variance from terms of Section 13-1-4(c)(6) a-e and Section 13-1-32(b).

13-1-40(c)(6)(a-e) states;

- (6) Damaged or destroyed nonconforming structures, buildings and structures nonconforming as to shoreland zoning provisions and which are damaged or destroyed or destroyed by a natural event, including, but not limited to, violent wind, vandalism, fire, or flood may be reconstructed provided that:
 - a. Damage which is due to an intentional act of the owner may only be repaired in conformity with this Chapter 13 of the Zoning Ordinance.
 - b. The owner must establish the specific extent of the damage to a structure and its improvements;
 - c. Repair and reconstruction shall be limited to that part of a structure and its specific improvements which are actually damaged and similar building materials shall be utilized;
 - d. Repair and reconstruction shall be in compliance with all other provisions of applicable ordinances; and
 - e. The mitigation requirements of Section 13-1-40(b) Paragraph (5) above shall apply.

Applicant wishes to reconstruct a 24 foot x 32 foot structure at the original location which is 51 feet from a stream and interconnected ponds. Section 13-1-32(b)(c) states the building setback from Class III waters, rivers and streams is 100 feet. Applicant seeks a variance to replace a structure which was destroyed by fire 51 feet from the stream in question. Property is a 34.49 acre parcel (I.D. # 048-1044-02) described as a parcel in the S ½ of the NE ¼, Section 31, Township 48 North, Range 8 West, in the Town of Tripp, Bayfield County, Wisconsin.

Findings of Fact and Conclusions of Law:

1. Mr. Bourassa requests two things; first an appeal from the navigability determination made by the Bayfield County Planning and Zoning Department, as well as John Spangberg of the Wisconsin DNR. If the stream is navigable, then Mr. Bourassa requests a variance allowing him to reconstruct a structure on the existing foundation where the prior structure burned down. The Board believes that they must first determine whether or not the stream is navigable.
2. Prior to the hearing, the Board's counsel provided material to the Board regarding the definition of navigability, including the Degayner case and materials from the Wisconsin Department of Natural Resources handouts on waterways and wetlands. The Board has also considered additional information provided by Assistant Zoning Administrator Casina, consisting of the Bayfield County Ordinance and the Wisconsin Administrative Code referring to navigability. These materials are contained in Exhibits B-3, B-4, B-5, and B-6.
3. On approximately June 29, 1962, Wisconsin Conservation Department employee, Harold Kurnan, did a private fish hatchery inspection of these premises and determined that there was no navigable water on the property. This was part of Exhibit B-1 and was also contained in Exhibit B-2. The Wisconsin Conservation Department was a predecessor organization to the Wisconsin DNR.
4. The same report by Mr. Kurnan stated that the stream in question had an average depth of four inches and an average width of 15 inches.
5. The Town Board's recommendation, which is part of Exhibit B-1, is in favor of allowing rebuilding of the structure. The recommendation states that Town Board Chairman Mark Santikko was on the site on November 30, 2005, and that was after a rainy period with spring thaw-like conditions. At that time he stated that the stream was 20 inches wide on average and six to eight inches deep at the deepest part.
6. Assistant Zoning Administrator Casina indicated that he felt that the stream was navigable based upon a definable bed and bank and that the stream, at least at some times of the year, could float the smallest recreational craft. However, Mr. Casina indicated that he had never actually floated anything down the stream and he didn't know anyone else that had.
7. DNR Water Specialist Spangberg testified that in his opinion the stream is navigable, but he also had not ever floated anything down the stream.
8. The Board has considered Exhibit B-9, Mr. Spangberg's letter, and also two maps that were attached to that letter.
9. Mr. Spangberg minimized the prior 1962 determination of non-navigability because he felt that the standards had changed but he didn't indicate how those newer standards had caused a different result in this particular case.
10. Karl Kastrosky, Bayfield County Zoning and Planning Administrator, indicated that there were no fish in the stream and that the stream was not large enough to be a public highway.

11. The Board has considered that in the Degayner case the stream had been repeatedly navigated by canoe and that has never been done in this case based upon evidence before the board.
12. The Board feels that the best evidence, and only evidence presented by a person that saw a probably reoccurring normal high water level of the stream, is that it would be 20 inches in width and six inches in depth during times of reoccurring high water, based upon the information from Town Chairman Santikko who would appear to be a disinterested witness on this point.
13. The Board has considered all of the maps and aerial photos that were provided. The Board has particularly looked at those maps that were attached to Exhibit 9, the letter from Mr. Spangberg. That original survey map showed that this stream was not present in 1860.
14. The Board has also considered Exhibit No. 10, the 1906 map obtained from the Bayfield County archives. That map indicates at that time the land was owned by a lumber company and the stream in its present configuration did not exist.
15. The Board also looked at the 1929 map provided by both the applicant and Mr. Spangberg. Mr. Spangberg had a version attached to Exhibit No. 9. In the 1929 map, after agricultural settlement, the stream was shown to exist.
16. The Board cannot determine with any certainty based upon this information whether this was a farm drainage ditch, and the Board finds that it was at least as likely that it was a farm drainage ditch as it being some sort of a natural stream.
17. The Board has considered the opinion evidence of Mr. Spangberg and Mr. Casina regarding navigability of the stream, but the Board also has considered past opinions of navigability in regards to this stream. In 1962, the DNR said it was not navigable. Based upon Mr. Scholl's memo of October 7, 1996, from the DNR, (part of Exhibit B-1) it seems that there was uncertainty about whether this was navigable. The DNR now appears to be certain that it was, in fact, navigable as of 2006.
18. The Board also has considered the testimony of Mr. Bourassa that the water from the stream that was being used to flow into his trout pond was so inadequate in amount and warm in temperature that it would not be enough to allow him to raise the trout.
19. Based upon all of the above, the Board finds that this stream in this particular location is not navigable under the appropriate legal standards in Exhibits B3 to B6 and Mr. Bourassa is entitled to rebuild the building on the entire slab, 24 feet by 32 feet, based upon Section 13-1-40(c)(6)(a-e) of the Bayfield County Ordinance.
20. As an alternative basis to allow rebuilding, the Board considers the fact that based upon Exhibit B-1, on May 23, 1996, Mr. Morgan a Bayfield County Assistant Zoning Administrator filled in a portion of the application for permit and indicated that the setbacks were okay.
21. Mr. Bourassa indicated that he received verbal permission from Mr. Morgan to increase the size of the building from 24' by 24' to 24' by 32'.

22. Present Zoning and Planning Administrator, Karl Kastrosky, agreed that if the stream was navigable, then this setback determination was clearly in error.
23. In reliance upon the permit from the Bayfield County Zoning Department, Mr. Bourassa constructed a hunting cabin on this property, which later burned down through no fault of his own.
24. If a variance is necessary in this case, the Board finds that it would create an unnecessary hardship for Mr. Bourassa if he were not allowed to rebuild on the 24 by 32 slab. Part of this unnecessary hardship would relate to the existence of the slab on the property as it now exists. Part of the unnecessary hardship would also relate to the fact that he was previously permitted by the Zoning Department to do this, whether correctly or incorrectly. An additional basis for the hardship would be that the property was determined by the DNR in 1962 not to have any navigable water on it whatsoever.
25. In determining whether an unnecessary hardship exists in this case, the Board has considered whether the setback in this case would unreasonably prevent the owner from using the property for its permitted purpose and would render conformity of the restriction unnecessarily burdensome. Given these facts and the pre-existing slab, strict enforcement of the ordinance would unreasonably prevent the owner from using the property for a permitted purpose.
26. The Board has also considered the purpose of the Zoning restriction in question, which is to protect streams and other bodies of water.
27. The Board has considered the nature of this stream and the fact that it doesn't provide either a public highway or good fish habitat.
28. The Board has considered the effect on the property and the effect of the variance on the neighborhood and finds there would be no ill effect.
29. The Board has considered the larger public interest, including the recommendation of the Town Board, and finds that a variance in this situation, if one in fact is required, that the public interest would not be harmed.

Decision:

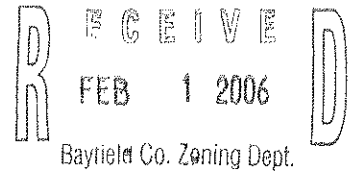
For all of the above reasons, the Board determines as follows:

1. This stream is not navigable for the reasons stated above, and the applicant is entitled to rebuild on the full 24 by 32 foot slab.
2. If it is later determined by some other entity that this stream is navigable, then the Board determines that for the above reasons, a variance should be granted.
3. If the variance does have to be granted, then the Board finds that the following mitigation should occur; a) storm water management plan, b) a silt fence should be constructed until revegetation has occurred between the slab and the stream, c) there should be a buffer zone between the building and the stream.
4. All of the above mitigation would need to be approved by the Ashland/Bayfield/Douglas/Iron County Land Conservation Department.

Motion made by Kerry Tetzner; seconded by Phillip Lupa.

VOTE: 4 Yes, 1 No, board member Matis voting no.

DATED: January 31st, 2006



A handwritten signature in cursive script that reads "Randy J. Matis".

Members Present: Randy Matis, Chairman, Thomas Gordon, Phillip Lupa, Kerry Tetzner, Dennis Rasmussen.

Also Present: Michael Fauerbach, Attorney for B.O.A.; Karl Kastrosky, Director of Planning and Zoning; Doug Casina, Assistant Zoning Administrator; John Spangberg, Department of Natural Resources, Travis Tulowitzky, Land Use Specialist.