

**Decision on DNR's Request for Reconsideration
By Bayfield County Board of Adjustment**

Case No. 2

March 30, 2006, Meeting

Danny Lee Bourassa has requested a hearing on the DNR's request for reconsideration of the January 26, 2006, Board of Adjustment Meeting 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 a stream 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. The Board of Adjustment has responded to the request of the DNR that the decision on navigability in the Bourassa case be reconsidered because the Board applied the wrong legal standard in determining the navigability. The Board feels they applied the proper legal standard.
2. The Board used the standard in the DeGayner Company, Inc. vs. Department of Natural Resources, 70 Wisc.2d 936 (1975). The Board considered whether the stream in question had a definable bed and bank and also whether it was navigable in fact.
3. The Board understands that navigability in fact means that it is capable of floating any boat, skiff, or canoe of the shallowest draft used for recreational purposes.
4. The Board has also considered that the stream does not have to be navigable at all times but only on a reoccurring basis. The Board has specifically considered the language read to it by its legal counsel from the DeGayner case regarding navigability that says,

“If it is ordinarily subject to periodical fluctuations in the volume and height of its water attributable to natural causes, and reoccurring as regularly as the seasons, and if its periods of high water and navigable capacity ordinarily continue a sufficient length of time to make useful as a highway, it is subject to the public easement.”

5. The Board not only was very aware of the DeGayner Case and was provided that information prior to the original hearing on this matter, but has considered a number of other DNR publications on navigability and items that were included in the exhibits and set forth in the original decision.
6. The Board has also considered the numerous charts, maps, and other extensive testimony at the original hearing. The Board has also considered the comments of DNR representative Mr. Spangberg; the applicant, Mr. Bourassa; and Bayfield County Zoning and Planning Administrator, Karl Kastrosky, on a hearing on reconsideration that occurred on March 30, 2006.
7. The Board agreed to reconsider the matter but not to consider new evidence, because there was no request that they consider new evidence, among other reasons.
8. The Board realizes that the navigability standard has been updated since the earlier navigability determination of this stream in 1962 by the Conservation Department, a predecessor to the DNR. That 1962 determination of non-navigability was considered by the Board, but the Board understands that there are updated standards that apply to navigability. The Board did not feel that the prior determination of navigability was at all determinative in this case.
9. At the original hearing in December, Mr. Bourassa testified that Mr. Spangberg told him to cut the brush along the stream and he would float a boat down it. The brush was cut but a boat was never floated down it by Mr.

Spangberg or anyone else. At the original hearing, the Board repeatedly asked if anyone had actually floated a boat down this stream, and no one had.

10. The testimony, both from the DNR and the Bayfield Zoning Department at the time of the original hearing, was strictly opinion evidence of navigability by people who had never navigated the stream and by people who had never even seen the stream in its state of high water.
11. In short, the Board feels that there was a lack of proof and that the stream was not established to be navigable.
12. There was also other substantial evidence at the original hearing indicating that this stream was not originally a natural stream and was a farm drainage ditch. This stream did not exist in the original survey and on some of the earliest maps. The stream was shown on other maps after agricultural settlement. This is an area of extensive agricultural ditching. The Board is not sure whether this was a drainage ditch or not, but the testimony was at least as persuasive that it was an agricultural drainage ditch.
13. The Bayfield County Board of Adjustment does not have an investigative arm. They must make decisions based upon the evidence brought before them, and here the evidence failed to establish navigability.
14. The navigability determination does protect a stream, but it also provides for numerous restrictions within a certain distance of that stream. That is an important decision that must be based upon some definite evidence that simply was not established here. For all of the above reasons, the DNR request for reconsideration is denied and the prior decision of this Board is affirmed.

Decision:

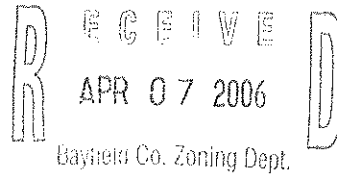
For all of the above reasons, the DNR request for reconsideration is denied and the prior decision of this Board is affirmed.

This Motion for Reconsideration was heard by board members Gordon, Tetzner, Lupa, Collins, and Wiesner. Mr. Collins and Mr. Wiesner were not present at the prior hearing of the Board although both of them reviewed the written record. Therefore, the Board has directed counsel to prepare this opinion, but has also directed that it be sent as soon as possible to all of the board members, including the two board members that were present in December and are not present at this hearing, that being Mr. Rasmussen and Mr. Matis. Mr. Matis and Mr. Rasmussen will be provided a transcript of the reconsideration hearing. The Board further determines that this decision will not be final until such time as the five original Board members that heard this case sign this decision and send it back. The motion further provides that counsel is directed that if this is not the way that the Board members choose to have this done, they should contact counsel and the matter will be re-noticed for another hearing.

Motion made by Stephen Collins; seconded by Kerry Tetzner.

VOTE: 5 Yes, 0 No.

DATED: April 7th 2006.



Thomas Gordon

Members Present: Stephen Collins, Chairman; Kerry Tetzner; Philip Lupa, Leroy Wiesner, Thomas Gordon.

Also Present: Michael Fauerbach, Attorney for B.O.A.; Karl Kastrosky, Director of Planning & Zoning, John Spangberg, Department of Natural Resources.

VOTE: 5 Yes, 0 No.

DATED: April 6, 2006.

Stephen W. Collins

Members Present: Stephen Collins, Chairman; Kerry Tetzner; Philip Lupa, Leroy Wiesner, Thomas Gordon.

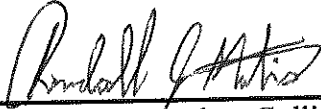
Also Present: Michael Fauerbach, Attorney for B.O.A.; Karl Kastrosky, Director of Planning & Zoning, John Spangberg, Department of Natural Resources.

(BOURASSA)

*Need
Original
signature?
Mike Fauerbach
said NO*

VOTE: 5 Yes, 0 No.

DATED: April 10, 2006.



Members Present: Stephen Collins, Chairman; Kerry Tetzner; Philip Lupa, Leroy Wiesner, Thomas Gordon.

Also Present: Michael Fauerbach, Attorney for B.O.A.; Karl Kastrosky, Director of Planning & Zoning, John Spangberg, Department of Natural Resources.

Members Present: Stephen Collins, Chairman; Kerry Tetzner; Philip Lupa, Leroy
Wiesner, Thomas Gordon.

Also Present: Michael Fauerbach, Attorney for B.O.A.; Karl Kastrosky, Director of
Planning & Zoning, John Spangberg, Department of Natural Resources.

Philip T Lupa
cd-21-c-6

VOTE: 5 Yes, 0 No.

DATED: April 21, 2006.

Kerry Tetzner

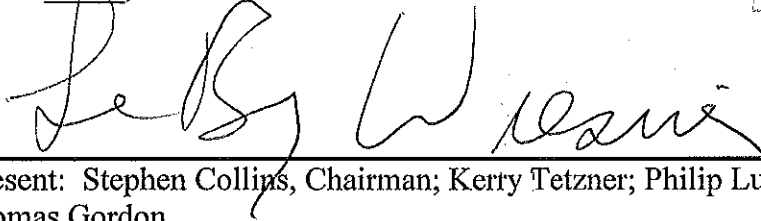
Members Present: Stephen Collins, Chairman; Kerry Tetzner; Philip Lupa, Leroy Wiesner, Thomas Gordon.

Also Present: Michael Fauerbach, Attorney for B.O.A.; Karl Kastrosky, Director of Planning & Zoning, John Spangberg, Department of Natural Resources.

VOTE: 5 Yes, 0 No.

DATED: April 27, 2006.

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Members Present: Stephen Collins, Chairman; Kerry Tetzner; Philip Lupa, Leroy Wiesner, Thomas Gordon.

Also Present: Michael Fauerbach, Attorney for B.O.A.; Karl Kastrosky, Director of Planning & Zoning, John Spangberg, Department of Natural Resources.