

ONEIDA COUNTY BOARD OF ADJUSTMENT
PUBLIC HEARING SUMMARY
AUGUST 11, 2022
COMMITTEE ROOM #2, 2ND FLOOR
ONEIDA COUNTY COURTHOUSE

Chair Lee called the meeting to order at 1:00 PM in accordance with the Wisconsin Open Meeting Law.

Roll call of Board members present: Mr. Hansen, “here”; Mr. Albert, “here”; Mr. Ross, “here”; Mr. Pazdernik, “here”; Mr. Viegut, “here”; and Mr. Lee, “here”.

Members absent:

County staff members present: Karl Jennrich, Zoning Director; Todd Troskey, Assistant Zoning Director; Chad Lynch, Assistant Corporation Counsel; and Julie Petraitis, Program Assistant.

Other individuals present: See Sign in Sheet.

Chair Lee stated that the meeting will be held in accordance with Wisconsin open meeting law and will be tape-recorded and sworn testimony will be transcribed. The Board of Adjustment consists of five regular members and two alternates. Anyone wishing to testify must identify themselves by name, address, and interest in the appeal and shall be placed under oath.

Chair Lee swore in Karl Jennrich, Zoning Director; Todd Troskey, Assistant Zoning Director; and Kevin Shulfer.

Chair Lee stated the procedure for the hearing would be testimony from the Appellant(s), then the County, any public comment; back to the Appellant (s), County and then close the meeting from any further testimony. The Board will then deliberate. If they have any questions they will ask them and ask that only address that question. The Appellant(s) may stay for the deliberation.

Chair Lee informed the Appellant (s) how the hearing will be handled. He stated that the Board has to consider the three criteria, in which all three need to be met in order to grant a variance and the Appellant should be sure to address those in their testimony.

Prior to the public hearing the Board conducted an onsite inspection between 10:00 and 10:30 a.m. on August 11, 2022 at 7007 Birch Rd. further described as Section 1, T38N, R7E, PIN LT 14-10, Town of Lake Tomahawk, Oneida County, Wisconsin. Along with the Board of Adjustment, Kevin Shulfer, owner, his attorney Greg Stacker, a neighbor, and Todd Troskey, Assistant Zoning Director were present at the site. Observations by the Board: The property boundaries were not staked but obvious; the road and right-of-

way were not staked, but was not a consideration; well and sanitary facilities located, no; outline of proposed construction marked, no, not applicable; there were no structures other than a boathouse. The ordinary high water mark was somewhat uncertain. There were no proposed structures on the site. In terms of topography and condition of the land surface, erosion was not visible. The shoreline was filled with rock and gravel. Other observations, gravel fill all along the shoreline. The Board questioned the definition of ordinary high water mark (OHWM) and received the definition from the DNR Code.

Attorney Stacker began by deferring to Mr. Lynch, Assistant Corporation Counsel, as there may be some late developments that the Board should be apprised.

Corporation Counsel, Chad Lynch, stated that after discussing and exchanging documents and emails with Attorney Stacker, he believes there is an agreement for the after-the-fact fee of \$750.00 to be paid and a permit will be filled out with the Zoning Department. They will outline what exactly was done and where it was done. Based on the owners reasonable reliance of a 2020 email from the Wisconsin Department of Natural Resources (WDNR) about where the ordinary high water mark (OHWM) was, at that time, Counsel does not believe any of the fill is within the area that would have to be removed. It is the County's position that there not be a variance granted at this time or any fill be removed.

Mr. Lee asked where the County and DNR agreed the OHWM is.

Mr. Lynch stated that based on an email from the WDNR, in 2020, the OHWM is located at the 1590 contour.

Mr. Lee asked if that is where the boulders are on the shoreline.

Mr. Lynch replied that it is in the water. The boulders, to the best of his guess, are approximately 60' from the OHWM; the 1590 elevation. That was in 2020, which is when the work was done. There have been subsequent emails in 2022, which may indicate a different position, but the County is not in a position to dispute the 1590 location at this time.

Mr. Pazdernik asked if there is any documentation that shows the elevation marker, other than an email saying it.

Mr. Lynch stated there is the Oneida GIS map...interrupted.

Mr. Ross asked if they should just close the hearing.

Mr. Lynch said that would be his recommendation. He is not looking to proceed with the hearing and request anything be removed.

Mr. Lee stated that for discussion they would assume the OHWM is out in the water, which is hard for the Board to accept. What about the boulders that are along the lot line, that are perpendicular to wherever the OHWM is?

Mr. Lynch said that if the OHWM is at the 1590 elevation there would be 15' of that perpendicular wall that would be within 75', which begs the question if they are removed what will happen with the fill. Will it wash into the lake? It is the position of the County that the first 15' would be within the 75'.

Mr. Albert stated that they would have to be removed.

Mr. Lynch said that might cause more harm. It may wash into the lake or onto the neighbor's property.

Mr. Albert asked if there was no variance request for the 15 feet to be removed.

Attorney Stacker said there is two ways to analyze that question. The first is to the extent that a variance would be required to retain 15 feet. Yes, they did apply for that in the appeal. The second is their position is that the perpendicular rock is not considered a structure, by definition. The County does consider it a structure, but the Appellant does not agree with that. The State Statute, regarding the definition of rip rap, it precisely meets exactly what you saw out there today. It is the piling of rock, but it was not constructed with any type of anchoring system, rebar or manufactured material. The appellant's position is that riprap is not considered a structure. However, to the extent that a variance would be required is what they included in their appeal?

Mr. Albert stated that they have a different issue before them than what was before them based on the appeal submitted.

Attorney Stacker replied that their position is that as he understands it the filling and grading aspect of the violation was in the 35' vegetative buffer zone. That 35' is also out in the water. That becomes a non-issue. The placement of a structure within 75', which is the issue, where exactly is the OHWM. From November 2020 until today, they have maintained that it is the elevation 60' out in the water. He believes they meet the criteria to grant a variance.

Mr. Lee asked the County to present their position.

Mr. Ross added he would like to hear the County's position on filling wetlands.

Mr. Jennrich stated that at this time Staff has not done any soil borings. When the WDNR was on the site, the County asked them if there was a violation, not only where was the OHWM they also asked them if there was any wetland fills. At that time, the WNDNR did not come back and say there was any wetland filling of the area. He has no definitive proof of whether or not wetlands have been filled. Until soil borings are done, you do not know. Typically, wetland aspects of those types of violations are deferred to the WDNR. In this specific case, no soil borings were done to determine where or if there were wetlands present, at least to the location that were filled. Mr. Jennrich added that when the Department got involved in the enforcement case the DNR was saying that

the OHWM was at the 1590' contour. There was Staff turnover and the correspondence was not thoroughly reviewed to see that determination, at that time.

The County has not done any work on that site to ascertain where the OHWM is. Either the County can set it or the DNR can set it. In this instance, the County has no proof where it may or may not be. That is why the County is deferring the 1590' contour. The County has been consistent in the position that the rocks piled the way they are, are considered a structure and need to meet the 75' setback. Again, in this instance, if you remove the rocks what do you have. Do you want to have an earthen wall? What do you want to have to hold in the fill so it does not continually wash out into the lake?

Mr. Albert asked if it is typical for the County to adopt the DNR's determination of the OHWM.

Mr. Jennrich stated that they try to come as close together as they can.

Mr. Albert said there were two determinations and is wondering why the County is accepting the 1590-foot determination.

Mr. Jennrich stated that in his opinion they have to because they have no scientific or data gathering evidence on where the OHWM is. The problem with this site is the fact that the County came in after-the-fact. The work was done already.

Mr. Ross asked if the fill was there when they went out to the site.

Mr. Jennrich stated they were dealing with a violation at the time. The County believed there was a filling and grading violation. There was no shoreland alteration permit. Because of the magnitude of the work done the County got the DNR involved. Mr. Jennrich stated that he is accepting the 1590' OHWM determination as of today because he may not have been fully knowledgeable that was in the file. The County has not done its data gathering to tactfully disagree on where the OHWM is.

Mr. Hansen stated that he is looking at Mr. Jennrich's letter from July where it said the DNR, with the County, has established the OHWM at the shoreline. Therefore, there is two conflicting opinions from the DNR.

Mr. Troskey said that was the second email from the WDNR, in March of 2022.

Mr. Jennrich stated that staff was discussing enforcement with the committee and wanted reconfirmation of the OHWM. The County is accepting the 1590' contour as the OHWM.

Mr. Lee confirmed with Counsel that the case that was before the Board is no longer before them.

Mr. Lynch stated that after the clarification and because there were staff turnover in the Zoning Department, the individuals that received the emails in 2020 of the 1590' contour line are no longer with the Department. He does not believe Mr. Jennrich or Mr. Troskey

were aware of the initial email stating the 1590' contour until it was brought to their attention today. Mr. Lynch stated his legal opinion is that he does not feel comfortable proceeding at the next step in Court.

Mr. Albert asked if there is an appeal for a variance to consider at this time.

Mr. Lynch replied that the current appeal would cover hearing the variance case for the 15' of rock that would need a variance.

Mr. Albert asked that based on the confusion if they need to restate the request of the appeal and what the variance is in terms of being requested. It is different from what they have before them today.

Mr. Lynch stated that would be the appropriate way to go.

Mr. Lee asked Mr. Jennrich if the Zoning Department was interested in pursuing the 15 feet.

Mr. Jennrich replied that this is the problem with dealing with after-the-fact situations.

Mr. Ross stated that the work was done without permits.

Mr. Lee asked the appellant what their intentions are at this point.

Attorney Stacker informed the Board that his understanding is, depending on the outcome of the hearing today, would be to put down enough dirt and replant it to make it look aesthetically as close to as what it was before and make it beautiful for the surrounding area. They certainly would not do any more rockwork. There are emails that went back and forth with the DNR that show that Mr. Shulfer went through all the appropriate steps to do what he did. His intent is to put enough black dirt in and put vegetation back in.

Mr. Lee stated that the Board is not particularly happy with the situation but given the information and advice from legal counsel, it is not inappropriate for them to not do anything.

The ordinance violations cited by the Oneida County Planning & Zoning Department (OCPZD) in Appeal No. 21-007 concerned filling and grading within 35 ft. of the Ordinary High Water Mark (OHWM) of Hodstradt Lake in the Town of Lake Tomahawk. The entire violation was dependent on the determination of the OHWM. Determination of such was conducted by the OCPZD and the Wisconsin State Department of Natural Resources (DNR). These determinations differed substantially. The OCPZD determination was at the shoreline where the appellant had placed large boulders for riprap. The original DNR determination was the same, but a later determination was "made after visiting the site, reviewing historic aerial imagery, SWDV wetland/waterway mapping, as well as Oneida County lidar and contour maps, it is the department's determination that the OHWM is at or near the 1590 elevation", out in the water from the current shoreline and riprap. Thus,

“the riprap located on the shoreline is exempt from a permit”. The OCPZD deferred to the subsequent DNR determination, thus making the case for violations mute. The Board of Adjustment (BOA) therefore had no choice but to make no decision in the matter and close the hearing.

Motion by Norris Ross, second by Phil Albert to adjourn the meeting.

ORDER AND DETERMINATION

On the basis of the testimony and other evidence in this matter, and the above findings of fact, the Oneida County Board of Adjustment orders that:

Appeal # 21-007 of Kevin and Tammi Shulfer is a no decision.

1:30 p.m. Chair Lee adjourned the meeting.

A handwritten signature in black ink, appearing to read "Harland Lee". The signature is fluid and cursive, with a long horizontal stroke at the bottom.

HARLAND LEE
CHAIRMAN

Date of Decision: August 11 ,2022
Decision Filing Date: August 19, 2022

Copies furnished to: Appellant, Oneida County Zoning Director, Oneida County Corporation Counsel, Oneida County Planning & Zoning Committee, Town Clerk, DNR Northern Region, Members of Board of Adjustment, Northwoods River News, Lakeland Times, Vilas County News-Review, Hodag Buyer’s Guide/Our Town, WOBT/WRHN Radio, WHDG Radio, WXPR Public Radio, WJFW TV-12