

Wednesday, November 8, 2023

5:00 PM

McFarland Municipal Center
Community Room

AGENDA

You are invited to this meeting through a Zoom webinar. The public may attend in-person or remotely through the webinar or telephone options listed below.

PLEASE CLICK THE LINK BELOW TO JOIN THE ZOOM WEBINAR:

<https://us02web.zoom.us/j/81660473058>

Or by Telephone: +1 (312) 626-6799

Webinar ID: 816 6047 3058

Press *9 to raise/lower hand. Press *6 to mute/unmute.

1. CALL TO ORDER, ROLL CALL.

2. PUBLIC APPEARANCES.

- a. This is an opportunity for members of the public to address the Board of Zoning Appeals for items that are not on the agenda. Please remember this is a hybrid meeting conducted in person and through the Zoom online meeting platform. Meeting attendees wishing to address the Board about items not on the agenda may do so at this time. Zoom attendees should type their name and address in the Question and Answer feature within the Zoom online meeting platform at this time. Members of the public who are present in person and wish to address the Board should fill out a public comment form and turn into the meeting chairperson. When you are called upon to speak, state your name, address, and provide your comments to the Board for their consideration. Please adhere to the 3-minute time limit. Additionally, you may send your public comments to community.development@mcfarland.wi.us to be included as part of the meeting.

Members of the public may also speak during their selected agenda item as they designate on the public comment form or in the Question and Answer feature on Zoom.

3. APPROVAL OF MINUTES.

- a. Motion to approve the minutes of the October 3, 2023 Board of Zoning Appeals meeting.

4. ANNOUNCEMENT OF PROCEEDINGS

- a. Review of meeting proceedings

5. PUBLIC HEARING

- a. Public Hearing on an Administrative Appeal filed by Chase Lumber concerning an order to remove several exterior shelving structures located at 5417 Long Street, McFarland, WI as an illegal expansion of a nonconforming use in the C-C Central Commercial zoning district.

6. BUSINESS.

- a. Discussion and action on an Administrative Appeal filed by Chase Lumber concerning an order to remove several exterior shelving structures located at 5417 Long Street, McFarland, WI as an illegal expansion of a nonconforming use in the C-C Central Commercial zoning district.

7. PUBLIC HEARING

- a. Public Hearing on an Area Variance Application filed by Chase Lumber concerning the placement of several exterior shelving structures located at 5417 Long Street, McFarland, WI. Property zoned C-C Central Commercial zoning district.

8. BUSINESS

- a. Discussion and action on an Area Variance Application filed by Chase Lumber concerning the placement of several exterior shelving structures located at 5417 Long Street, McFarland, WI. Property zoned C-C Central Commercial zoning district.

9. SCHEDULE NEXT MEETING DATE.

- a. To be determined

10. ADJOURNMENT.

Any person who has a qualifying disability as defined by the Americans with Disabilities Act that requires the meeting or materials at the meeting to be in an accessible location or format should contact the McFarland Municipal Center at (608)838-3153, 5915 Milwaukee Street, McFarland, Wisconsin, or village.clerk@mcfarland.wi.us by 2:00 p.m. at least 5 business days prior to the meeting so that any necessary arrangements can be made to accommodate each request. If the meeting or request is less than 5 business days from the meeting, requests for accommodations may still be made and reasonable efforts will be made to accommodate each request.

Board of Zoning Appeals

Working Draft Minutes

October 3, 2023

Members Present: Gordon Kinder, Art Luetke, John Robertson, Ken Brost, Blake Draper

Staff Present: Andrew Bremer, Jim Trebian, Kong Thao

1. CALL TO ORDER

Kinder called the meeting to order at 5:00 p.m. then asked Bremer to provide an explanation for conflicts of interest.

2. PUBLIC APPEARANCES.

There were no attendees in the meeting room and none attending virtually.

3. APPROVAL OF MINUTES.

- a. Motion to approve the minutes of the August 24, 2023 Board of Zoning Appeals meeting. Motioned by Draper and seconded by Brost to approve the August 24, 2023 Board of Zoning Appeals minutes. Motion passes 5-0.

4. ANNOUNCEMENT OF PROCEEDINGS

Bremer provided background on the purpose and authority of the Board of Zoning Appeals, the announcement of proceedings, and procedure for the meeting as included in packets.

5. PUBLIC HEARING

- a. Public Hearing on a request by CHS for a variance to the front yard setback requirements of Sec. 62-72 for the M-IC Zoning District to construct an approximate 15' x 14'6" building addition at 4103 Triangle Street, McFarland, WI.

Bremer provided summary of the request made by CHS and indicated to the Board approximate location of the proposed addition.

Kinder opened the public hearing at 5:08 p.m.

Applicant Opening Statement. Derek Pirkl, applicant and Terminal Supervisor for CHS, recited the oath before providing his opening statement. Pirkl provided a summary of the request, referencing the site's need for the addition and the benefits to the drivers. Pirkl shared the conditions of the existing practices for the site and how the addition would improve workflow activities.

Staff Opening Statement. Bremer began summary of the staff report then went back to recite the oath before proceeding. Bremer indicating Staff support for the request, while

also mentioning that Jim Trebian, the Village Building Inspector, is attending the meeting via ZOOM and is available for any questions or testimony if needed. Bremer mentioned also that the application would require a site/design review permit from the Plan Commission at their upcoming meeting on October 17, 2023, clarifying the need for both Board of Zoning Appeals and Plan Commission approvals.

Applicant Case. Kevin Sorg, Bachmann Construction, recited the oath before providing the applicant's case. Sorg commented on the Village's setback requirement, purpose of the addition, and feasibility of the selected site. Russ Kowalski, GMK Architects, was in attendance in the community room as the architect of record for the building submittal. Kowalski did not speak. There were no witnesses called by the Applicant. Bremer asked the Applicant if there were any known Wisconsin DNR setback requirements to the existing bollards adjacent to the addition, used for the monitoring wells. Pirkl is unsure of any setback requirements but will follow up with their environmental team on the topic prior to the Plan Commission site design review meeting. Kinder opened the meeting to comments or questions from the Board. The Board did not have any questions for the Applicant.

Staff Case. Bremer provided staff summary addressing Staff comments related to the zoning code's six standards for a variance. Staff did not find any concerns with the six standards and are in support of the application as submitted following up on the earlier question on proximity concerns to the monitoring wells. Kinder opened the meeting to comments or questions from the Applicant and the Board for Staff. The Applicant and the Board did not have any questions for Staff.

Kinder surveyed the public for any opinion testimony. Bremer stated the Department did not receive any letters or testimony prior to the publication of the meeting's packet or the meeting. There were no attendees in-person and virtual who wished to speak on the item. The Applicant and Staff did not have any rebuttal statements. The Applicant and Staff did not have any closing statements.

Kinder closed the public hearing at 5:26 p.m.

6. BUSINESS.

a. Discussion and action on a request by CHS for a variance to the front yard setback requirements of Sec. 62-72 for the M-IC Zoning District to construct an approximate 15' x 14'6" building addition at 4103 Triangle Street, McFarland, WI.

Kinder surveyed the Board members for discussion on the item. Luetke and Roberston did not have any concerns or comments. Brost stated the application to be a reasonable request. Draper and Kinder concurred with Staff's opinions as provided in the staff report regarding justification for the approval, including:

1. The layout of the petroleum tanks predates the Village zoning regulations and the characteristics of those tanks and related apparatus, including applicable federal safety

design requirements, limit locations on the property to place the restroom addition in compliance with the front yard setback requirements.

2. Alternative locations for the construction of an accessory structure within the property would diminish the effective use and intent of the restroom addition.
3. The request for a variance places the addition as far back from the front lot line as possible within the existing site constraints.
4. The desire for the building addition is not financially motivated.

Brost motioned to approve the variance request to the front yard setback requirements of Sec. 62-72 for the M-IC Zoning District to construct an approximate 15' x 14'6" building addition at 4103 Triangle Street, McFarland, WI. Motion was seconded by Luetke. Motion passes 5-0.

7. SCHEDULE NEXT MEETING DATE.

- a. To be determined.

8. ADJOURNMENT.

Brost motioned to adjourn, seconded by Luetke. Motion passed 5-0. Meeting adjourned at 5:30 p.m.

Board of Zoning Appeals - Announcement of Proceedings

This script is meant to be reviewed at the beginning of the Board of Zoning Appeals meetings so that applicants and members of the public who are not familiar with Board of Zoning Appeals learn 1) what a Board of Zoning Appeals is 2) what Wisconsin laws require that Board of Zoning Appeals base their decisions on and 3) what to expect during a Board of Zoning Appeals public hearing.

The Board of Zoning Appeals (BZA) functions like a court, and must follow state laws and local zoning ordinances. The BZA cannot change or ignore any part of the zoning ordinance or state laws, but must apply the laws as written. The BZA may only grant a variance, special exception or administrative appeal if the applicant provides evidence showing that they meet all of the standards for that decision. The legal standards the BZA will use to decide on each Area Variance application have been provided to the applicant and are found within Sec. 62-366(e) of the Village of McFarland Municipal Code of Ordinances, and as provided on page three.

- Opening of Public Hearing.** The public hearing will be opened by the Chair.
 - Witness appearing during the public hearing will be asked to state their name, address, and the following oath:

I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth, and nothing but the truth.

- Summary of Appeal.** Village Staff will summarize the appeal requested.
- Opening Statements.** Either party can waive their opportunity for an opening statement. Please adhere to a 5-minute time limit.
 - Applicant (or applicant's agent)
 - Zoning Administrator
- Applicant's Case.** The applicant shall present its case including the reasons and evidence to support why they think they meet the standards for approval of the application. Please adhere to a 15-minute time limit.
 - Witnesses. The applicant may call witnesses.
 - Zoning Administrator Questions. Village Staff may ask questions of the applicant or their witnesses (cross examination).
 - BZA Questions. The BZA may ask questions of the applicant, its agents, or Village staff (examine witnesses).
 - Applicant Redirect. Applicant may provide re-direct testimony of their witnesses.
- Zoning Administrator's Case.** The Village Zoning Administrator, or representative, will review the staff report in the meeting packet and summarize reasons and evidence to support or deny the application. Please adhere to a 15-minute time limit.
 - Witnesses. The Zoning Administrator may call witnesses. Any witnesses of the Zoning Administrator will be sworn in before testifying.
 - Applicant Questions. The Applicant may ask questions of Village Staff or their witnesses (cross examination).

- BZA Questions. The BZA may ask questions of the applicant, its agents, or Village staff (examine witnesses).
- Zoning Administrator Redirect. Village Staff may provide re-direct testimony of their witnesses.
- Opinion Testimony (general public).** The Board of Zoning Appeals may accept opinion testimony and written testimony from interested parties, which shall not be subject to cross-examination, however, any party may introduce any rebuttal testimony addressing any factual issues raised.
 - Written Testimony. Public statements provided to Village Staff prior to the meeting will be read or included in the meeting packet.
 - In-Person Testimony. Members of the public may present opinion testimony for or against the appeal application. Please adhere to a 3-minute time limit.
 - Virtual (Zoom) Testimony. Members of the public may present opinion testimony for or against the appeal application. Please adhere to a 3-minute time limit.
- Opinion Testimony Rebuttal**
 - Applicant. The Applicant may provide rebuttal testimony addressing any questions for factual issues raised during the opinion testimony.
 - Zoning Administrator. The Zoning Administrator may provide rebuttal testimony addressing any questions for factual issues raised during the opinion testimony.
- Closing Statements.** Either party can waive their opportunity for a closing statement. Please adhere to a 5-minute time limit.
 - Applicant
 - Zoning Administrator
- Close the Public Hearing.** The Chair will close the public hearing.
- Business.** The BZA will deliberate the application or appeal and decide¹ whether the applicant has met the standards for approval. Final decisions shall be made by a majority of the members present. In making its determination, the BZA shall state reasons for the BZA's determination.

The Board of Zoning Appeals shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony. Basic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact. Objections to evidentiary offers and offers of proof of evidence not admitted may be made and shall be noted in the record.

Following the meeting Village Staff will provide a written summary of the BZA's decision to the applicant. Any person aggrieved by any decision of the BZA may present to a court of record a petition, duly verified, setting forth that such decision is illegal and specifying the grounds of the illegality. Such petition shall be presented to the court within 30 days after the filing of the decision in the offices of the Board of Zoning Appeals.

¹ Per Sec. 62-365(a) the BZA shall render its decision either at the termination of the hearing or within 30 days thereafter.

Sec. 62-366(e) Standards for Granting Area Variances.

- (1) Unnecessary hardship. Variances shall be granted only where the applicant demonstrates the existence of an unnecessary hardship. An unnecessary hardship exists where compliance with the strict letter of the restrictions governing the property would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. When considering any variance, the Board of Zoning Appeals shall determine whether the particular restriction in question is unnecessarily burdensome in light of the underlying purpose of that restriction. The purpose of the regulation shall be the primary concern, not the burden upon the property owner. Variances may not be granted where they are contrary to the public interest or where granting the variance would violate the spirit of the regulation. A use variance may not be granted unless it is proved that there can be no reasonable use of the property absent a variance. The Board of Zoning Appeals shall consider the following factors to determine whether an unnecessary hardship exists to justify issuance of an area variance:
 - a. The purpose of the zoning restriction in question;
 - b. The effect of the restriction on the property; and
 - c. The effect of a variance on the neighborhood and the larger public interest.
- (2) Hardship may not be self-imposed. Variances may not be granted to remedy self-imposed hardships.
- (3) Hardships must be unique to the property. Where the same hardship is imposed upon other properties in the zoning district, a variance shall not be granted.


VILLAGE OF
McFarland
SUMMARY SHEET

MEETING DATE: Wednesday, November 8, 2023

SECTION: Business

DEPARTMENT: Community Development

CONTACT: Andrew Bremer, Comm & Eco Dev Director

AGENDA ITEM: Public Hearing on an Administrative Appeal filed by Chase Lumber concerning an order to remove several exterior shelving structures located at 5417 Long Street, McFarland, WI as an illegal expansion of a nonconforming use in the C-C Central Commercial zoning district.

PREVIOUS ACTION:

No previous BZA action on the requested Administrative Appeals application.

ISSUE SUMMARY:

On or about April 28, 2023, Bliffert Lumber (Eli Bliffert, Owner) acquired the Chase Lumber business located at 5417 Long Street. Prior to closing on the property, the applicant's title company requested a zoning review letter for the property. The Zoning Administrator provided a letter dated April 17, 2023 (refer to packet), providing notification that Lumber Yards are not a permitted or conditional use in the C-C Central Commercial zoning district and therefore the use of the property was as a legal non-conforming use.

On July 26, 2023, the Zoning Administrator and Building Inspector observed the construction of three blue exterior storage structures on the property without a valid building permit or site design review permit. The Zoning Administrator subsequently provided a letter dated August 1, 2023 (refer to packet), notifying the owner that the three blue exterior storage structures constituted an unlawful expansion of a legal non-conforming use (refer to reference photos in the packet). The letter included the required notice to either remove the structures or file an Administrative Appeal as allowed under Village ordinances. The owner opted to file an Administrative Appeal and the Zoning Administrator allowed the structures to temporarily remain pending the outcome of the Administrative Appeal as allowed under Village ordinances.

This appeal was originally scheduled for the BZA's October 3, 2023 meeting; however, the owner's attorney (Attorney Fleming) requested a postponement of the Administrative Appeal in order to also submit an Area Variance Application and to consider both applications at the same BZA meeting. The Zoning Administrator agreed to the postponement.

The packet includes the Administrative Appeal Application provided by the owner's agent, Julie Walther. Note, that Walther completed Section 2(A) Administrative Appeal of the BZA application. Walther also completed Section 2(C) Area Variance, Standards for Granting a Variance mistakenly believing this section also needed to be completed. In follow-up communication with Ms. Walther, she indicated that the responses under Section 2(C) are intended to supplement the responses under Section 2(A). This was deemed acceptable by the



Zoning Administrator.

The application submitted by Walther includes statements of support regarding granting the Administrative Appeal in order to *"help with curb appeal, snow removal, and safety."* In the Zoning Administrator's opinion, these are not sufficient reasons to grant the expansion of a legal nonconforming use. Aesthetics are subjective and in this case, expanding the use of the property to include tall storage structures increases the visibility of these materials from public view, which in-turn reduces the aesthetic quality of the property. Staff also notes that the packaging materials are often left loose and blowing in the wind, which has a negative noise and visual impact on the neighborhood and larger public interest. In addition, the applicant has failed to demonstrate why issues of aesthetics, snow removal, and safety wouldn't be better addressed by moving the materials within any of the many existing storage buildings on the property. The Village does not outright ban the alternation of existing structures to improve accessibility, although Village Zoning regulations and Wisconsin Statute 62.23(7)(h) limits the repairs and alterations of existing buildings and structures for a nonconforming use at 50% of assessed value. Case in point, in August of 2023, the Building Inspector approved a building permit to replace an existing 10' wide overhead door with an 18' wide double sliding door to an existing storage building on the property. This accessibility alternation to an existing building was permitted within the 50% limits of assessed value provided under Village Zoning ordinance and State Statutes. The applicant also notes that another business in the Village, Foundation Building Materials (4412 Terminal Drive) has the same or similar types of shelving on their black top. The applicant correctly notes that this business is not in the Central Commercial zoning district and therefore it is not applicable to this application.

The packet also includes a memorandum from Attorney Fleming supplementing the Administrative Appeal application filed by Walther. Noting, Attorney Fleming's memorandum includes information intended to supplement both the Administrative Appeal Application (Agenda Item 5.a. and 6.a.) and the Area Variance Application (Agenda Item 7.a. and 8.a.), if the BZA determines the storage racks are an unlawful expansion of a nonconforming use.

The packet also includes a letter from Village Attorney Evans addressed to the Zoning Administrator dated October 30, 2023. Attorney Evans reviewed the Administrative Appeal application, and Attorney Fleming's memorandum, and provided an opinion in support of the Zoning Administrator's recommendation to deny the Administrative Appeal Application.

For those reasons stated in the August 1, 2023 Zoning Administrator letter and the October 30, 2023 Attorney Evans letter, the Zoning Administrator recommends denial of the Administrative Appeal Application.

FINANCIAL/BUDGET IMPACT:

VILLAGE PLAN REFERENCE:

The property is identified within the Downtown Future Land Use category on Map 6 of the Village's Comprehensive Plan.

ORDINANCE REFERENCE:



Sec. 62-4 Definitions

Sec. 62-71 Permitted or Conditional Uses - Commercial Districts

Division 62-II-2, Subdivision III, Nonconforming Buildings, Structures and Uses

Division 62-II-5 Appeals

BOARD, COMMISSION OR COMMITTEE RECOMMENDATION:

This agenda item is presented for discussion only.

ATTACHMENTS:

1. 5417 Long Street, McFarland_Zoning Violation Ltr_08.01.2023
2. 5417 Long Street_BZA Admin App_08.22.2023
3. 5417 Long Street_Att Evans Ltr_10.30.2023
4. 5417 Long Street Reference Photos



www.mcfarland.wi.us/communityandeconomicdevelopment | 5915 Milwaukee St, McFarland, WI 53558 | 608.838.3154

August 1, 2023

Eli Bliffert
Bliffert Lumber & Hardware
1014 E. Chambers Street
Milwaukee, WI 53212
eli@bliffertlumber.com

ALSO VIA EMAIL

RE: 5417 Long Street, McFarland, WI - Chase Lumber Zoning Violation & Removal Order

Mr. Bliffert,

On July 26th, 2023, the Jim Trebian (McFarland Building Inspector) and myself observed the construction of exterior accessory building material storage racks and exterior security cameras at Bliffert Lumber's Chase Lumber property located at 5417 Long Street. Having no building or zoning permits on file for these improvements with the Department, the Building Inspector and I issued a verbal stop work order to your contractors and property manager.

Later that afternoon, the Department received an electrical permit for the security cameras and the Building Inspector has since approved that permit to resolve that issue.

Concerning the storage racks, upon review of the Zoning Code, [Sec. 62-4 Definitions, Subdivision VI Accessory Uses and Structures](#), and [Sec. 62-310 Site/Design Review](#) it was determined that the storage racks are considered accessory structures, whether bolted or unbolted to the ground surface. Thus, they require approval of a Site Design Review permit from the Plan Commission and a building permit from the Building Inspector. However, as previously explained in the attached letter dated April 17, 2023, as provided to your acquisition title insurer, the lumber business is a non-conforming use in the Village's Central Commercial Zoning District as Lumber Retailing Yards ([2007 NAICS Code 444190](#), as and most recently revised [2022 NAICS Code 444180](#)) is neither a permitted or conditional use in the C-C District per [Sec. 62-71 Permitted or Conditional Uses – Commercial Districts](#), of the Village's Zoning Code. Per [Subdivision III Nonconforming Buildings, Structures and Uses](#), and [Wis. Stat. 62.23\(7\)\(h\)](#) nonconforming uses may not be expanded. Upon review of relevant codes and statues, and upon further consultation with the Village Attorney, Village Staff have determined that the additional accessory storage racks constitute an expansion of the non-conforming use which is prohibited. Per, [Sec. 8-525\(a\)](#) of the Building Code, and [Sec. 62-311](#) of the Zoning Code, all cited violations shall be corrected within 30 days after written notification. You are hereby notified to remove the structures from the property on or before September 5, 2023.

Alternatively, you may be able to relocate the storage racks inside an existing building(s), upon completion and approval of a building permit, provided that said relocation does not constitute an expansion of an existing building in violation of Subdivision III Nonconforming Buildings, Structures and Uses, and Wis. Stat. 62.23(7)(h). If you desire to proceed with this alternative, you are hereby notified to provide a building permit on or before the September 5, 2023 removal deadline.

Per [Sec. 8-526](#) of the Building Code, and [Sec. 62-362\(a\)](#) of the Zoning Code, any person feeling aggrieved by an order or determination of the Building Inspector or Zoning Administrator may appeal from such order or determination to the Board of Zoning Appeals (BZA). Per Sec. 62-362(a) such appeal shall be taken within the reasonable 30 days of the alleged grievance or judgement in question by filing with the officer from whom the appeal is taken a notice of appeal specifying the grounds thereof, together with payment of the filing fee established by the Village Board. Per [Sec. 62-362\(b\)](#), if you desire to appeal the order to remove the structures they may remain in place until such time as a determination has been made concerning your appeal application. You are hereby notified of a deadline of September 5, 2023 to file a complete appeal application and filing fee if so desired. Enclosed is a copy of the appeal application and BZA letter to potential applicants. Both forms are also available on the Department's website under [Permit Forms & Checklists](#) for electronic completion.

Please let me know if you have additional questions regarding this matter.

Sincerely,



Andrew Bremer, AICP
Community & Economic Development Director
Village of McFarland Zoning Administrator

Cc: Jim Trebian, McFarland Building Inspector

Enc: First American Title Insurance Company Zoning Letter Request
McFarland Board of Zoning Appeals Letter to Potential Applicant
McFarland Board of Zoning Appeals Application

Photo of storage racks:





www.mcfarland.wi.us/communityandeconomicdevelopment | 5915 Milwaukee St, McFarland, WI 53558 | 608.838.3154

April 17, 2023

Manjunatha A.N.
Commercial Title Assistant
National Commercial Services
25 West Main Street, Ste. 400
Madison, WI 53703
mnagaraju@firstam.com

VIA EMAIL ONLY

RE: 5417 Long Street, Chase Lumber Zoning Review Letter

Thank you for your enclosed letter regarding the request for information on the Village of McFarland's current zoning classifications pertaining to the property:

Chase Lumber & Fuel Co Inc.
5417 Long Street
McFarland, WI 53558

1. Zoning Classification of Property

Within your letter, you requested the Village zoning classification for all the parcels listed in Exhibit A of your letter. This includes parcels:

- 154/0610-031-6801-9
- 154/0610-031-6812-6
- 154/0610-031-6823-3
- 154/0610-031-6834-0
- 154/0610-031-6851-9
- 154/0610-031-6862-6
- 154/0610-031-6873-3
- 154/0610-034-0287-2

The eight (8) listed parcels above are all zoned C-C Central Commercial under the Village's Zoning Code.

2. Uses Allowed in the C-C District

Refer to [Sec. 62-71](#) of the Village Zoning Code for a full list of permitted and conditional uses in the C-C District. Note, per footnote #2 of Sec. 62-71, all uses that are permitted or conditional in C-G (Commercial General) are permitted or conditional in the C-C Central Commercial District. "Lumber Yards" are not listed as a permitted or conditional use within the C-G or C-C districts. The most applicable North American Industry Classification System (NAICS 2007 Edition) Code is 4441 "Building Materials and Supplies Dealers". Per Sec. 62-71, "Building materials (fully enclosed only)", NAICS Code 444100, is also not a permitted or conditional use in the C-G or C-C districts. Therefore, the existing use is classified legal non-conforming.

3. Bulk Standards

Your letter requested additional information on setback requirements, height requirements, and number of parking spaces required.

3(a & b) Setback and Height of Building(s) Requirement

There are no minimum or maximum setback or building height requirements for principal structures in the C-C District. Please refer to [Sec. 62-72 Bulk Standard – Commercial Districts](#) of the Village Zoning Code for additional information. Minimum or maximum setbacks and building height requirements are considered on a case-by-case basis within the C-C district during the Site/Design Review permit application approval process. Refer to [Sec. 62-310 of the Village Zoning Code](#) regarding additional information on Site/Design Review. Per [Sec. 62-227 of the Village Zoning Code](#), accessory buildings and structures are limited to 15 feet in height and shall not be located nearer than 10 feet from the rear lot line. Based on the Alta/NSPS Land Title Survey provided by First American Title Insurance Company, completed by Isthmus Surveying LLC (fieldwork February 19, 2023) there are portions of an existing building that extend across the parcel lines onto the adjacent railroad property making the building non-conforming to the setback requirements of the Village's Zoning Code.

3(c) Number of Parking Spaces Required

Per [Sec. 62-172\(j\)](#), parking spaces required are advisory only within the C-C Districts. Minimum or maximum off-street parking requirements are considered on a case-by-case basis as part of the Site/Design Review permit application approval process. Sec. 62-172(j) does not specifically list "Lumber Yards". Similar uses for off-street parking identified in this section's table may include:

- Industrial – 1 space/1.3 employees
- Cartage and express facilities 1 space/vehicle operated plus 1 space/2 employees.
- Office – 1 space/300 square feet per gross floor area
- Warehouses – 1 space/2 employees; and

4. Open Zoning Code Violations

There are no open zoning code violations at this time associated with this property.

5. Special Permits, Conditions, Variances or Ordinance associated with this property.

From our records, there are no special permits, outstanding conditions, variances or ordinances associated with this property.

Please let me know if you have additional questions regarding zoning regulations for this property.

Sincerely,



Andrew Bremer, AICP
Community & Economic Development Director

cc: Kong Thao, Associate Planner
Karen Knoll, Community Development Specialist

Enc: First American Title Insurance Company Zoning Letter Request

Disclaimer

It is understood that this form issued is subject to error and omissions and shall not be binding upon the Village of McFarland. In accordance with Wis. Stat. 19.35, you are entitled to examine the public records in the Department Office and verify the information listed herein.



First American Title Insurance Company
National Commercial Services
25 West Main Street, Suite 400, Madison, WI 53703
(608)204-7409 (608)204-7414

To: First American Title Insurance Company and Chase Lumber and Fuel Company, Inc.

Re: Real property located at Multiple Parcels, Mcfarland, WI described on the attached Exhibit "A"

1. According to applicable zoning ordinances and any amendments, this property is classified ZONE:

2. The following USES are allowed under that classification**:
 3. The building(s) conform to all applicable zoning ordinances, including but not limited to those ordinances limiting the use of the land or establishing requirements for:
 - (a) Setback requirements of the land.

Front:

Side:

Rear:
 - (b) Height of the building(s) requirement.

 - (c) Number of parking spaces requirement.
4. Open Zoning Code Violations:

5. Any Special Permits, Conditions, Variances or Ordinances that apply to the Property:

6. Please attach appropriate ordinances.

It is understood that the lender, owner and Title Company will rely on this certification in connection with the purchase, financing or construction of improvements upon the property.

Dated: April 07, 2023

By: _____
Title

Exhibit A
Legal Description

Order No.: NCS-1163500-MAD

Property Location: Multiple Parcels, Mcfarland, WI

Tax Parcel No(s): 154/0610-031-6801-9, 154/0610-031-6812-6, 154/0610-031-6823-3, 154/0610-031-6834-0, 154/0610-031-6851-9, 154/0610-031-6862-6, 154/0610-031-6873-3 and 154/0610-034-0287-2

The land referred to is described as follows:

PARCEL I:

LOT ONE (1), BLOCK TWENTY-EIGHT (28), VILLAGE OF MCFARLAND, IN THE VILLAGE OF MCFARLAND, DANE COUNTY, WISCONSIN.

FOR INFORMATIONAL PURPOSES ONLY:

TAX PARCEL NO. 154/0610-031-6801-9

PARCEL II:

LOT TWO (2), BLOCK TWENTY-EIGHT (28), VILLAGE OF MCFARLAND, IN THE VILLAGE OF MCFARLAND, DANE COUNTY, WISCONSIN.

FOR INFORMATIONAL PURPOSES ONLY:

TAX PARCEL NO. 154/0610-031-6812-6

PARCEL III:

LOT THREE (3), BLOCK TWENTY-EIGHT (28), VILLAGE OF MCFARLAND, IN THE VILLAGE OF MCFARLAND, DANE COUNTY, WISCONSIN.

FOR INFORMATIONAL PURPOSES ONLY:

TAX PARCEL NO. 154/0610-031-6823-3

PARCEL IV:

THE FOLLOWING DESCRIBED PARCEL IS PART OF LOT 4, BLOCK 28, ORIGINAL PLAT OF MCFARLAND, AND PART OF STOUGHTON STREET AS PLATTED IN THE ORIGINAL PLAT OF THE VILLAGE OF MCFARLAND, DANE COUNTY, WISCONSIN, MORE FULLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF LOT 4, BLOCK 28, ORIGINAL PLAT OF MCFARLAND;
THENCE S26°26'36"W, ALONG THE EASTERLY LINE OF STOUGHTON STREET AS NOW DEDICATED, 32.40 FEET TO A POINT 1.00 FEET SOUTHWESTERLY OF AN EXISTING BUILDING;
THENCE N62°00'33"W, PARALLEL TO AND 1.00 FEET FROM SAID BUILDING, 2.10 FEET TO A LINE WHICH IS 1.00 FEET NORTHWESTERLY OF THE NORTHWESTERLY END OF SAID BUILDING;
THENCE N28°00'49"E, PARALLEL TO AND 1.00 FEET NORTHWESTERLY OF SAID BUILDING, 32.41 FEET TO THE WESTERLY EXTENSION OF THE SOUTHERLY LINE OF LONG STREET;
THENCE S60°45'00"E, ALONG THE SOUTHERLY LINE OF LONG STREET, 1.21 FEET TO THE NORTHWEST CORNER OF LOT 4, BLOCK 28, AND THE POINT OF BEGINNING OF THIS DESCRIPTION.

FOR INFORMATIONAL PURPOSES ONLY:

TAX PARCEL NO. 154/0610-031-6834-0

PARCEL V:

LOT ONE (1), BLOCK TWENTY-NINE (29), VILLAGE OF MCFARLAND, IN THE VILLAGE OF MCFARLAND, DANE COUNTY, WISCONSIN.

TOGETHER WITH A TRIANGULAR TRACT OF LAND BEGINNING AT THE NORTHEASTERLY CORNER OF LOT 1, BLOCK 29, ORIGINAL PLAT OF MCFARLAND; THENCE SOUTHWEST TO THE SOUTHEAST CORNER OF SAID LOT 1; THENCE SOUTHEASTERLY TOWARD THE SOUTHWEST CORNER OF LOT 4, BLOCK 28, ORIGINAL PLAT OF

MCFARLAND, 8 FEET; THENCE NORTHEAST TO THE POINT OF BEGINNING. THIS TRACT OF LAND IS TO BE EXCHANGED FOR AN EQUAL TRACT OF LAND TO BECOME PUBLIC STREET RIGHT-OF-WAY FROM LOT 4, BLOCK 28

FOR INFORMATIONAL PURPOSES ONLY:
TAX PARCEL NO. 154/0610-031-6851-9

PARCEL VI:
LOT TWO (2), BLOCK TWENTY-NINE (29), VILLAGE OF MCFARLAND, IN THE VILLAGE OF MCFARLAND, DANE COUNTY, WISCONSIN.

FOR INFORMATIONAL PURPOSES ONLY:
TAX PARCEL NO. 154/0610-031-6862-6

PARCEL VII:
LOT THREE (3), BLOCK TWENTY-NINE (29), VILLAGE OF MCFARLAND, IN THE VILLAGE OF MCFARLAND, DANE COUNTY, WISCONSIN.

FOR INFORMATIONAL PURPOSES ONLY:
TAX PARCEL NO. 154/0610-031-6873-3

PARCEL VIII:
OUTLOT 137, ASSESSOR'S PLAT OF THE VILLAGE OF MCFARLAND, IN THE VILLAGE OF MCFARLAND, DANE COUNTY, WISCONSIN.

FOR INFORMATIONAL PURPOSES ONLY:
TAX PARCEL NO. 154/0610-034-0287-2

Dear Applicant,

Before completing your application to the McFarland Board of Zoning Appeals (BZA), it is important to understand the purpose and function of the BZA, its authority and the limits on its authority. This letter is intended to inform you of those details.

The BZA is not the Village Board, but a separate board whose members are appointed by the Village Board, and which functions in many respects like a court. For that reason, it is often referred to as a quasi-judicial body. Its role is to apply local ordinances and related state laws to specific appeal and variance requests. The BZA must apply existing ordinances as they are written and does not have authority to amend or repeal any provisions of the zoning ordinance. Ordinance proposals, revisions, and adoptions are legislative functions reserved by state law for the Village Board.

A matter may come before the BZA in one of three ways. First, any aggrieved person affected by an administrative decision of a zoning or building inspection officer may appeal that decision to the BZA. This is referred to as an **Administrative Appeal**.

Second, a **Use Variance**, may be granted if any applicant can prove that there can be no reasonable use of the property absent a variance. Per, Sec. 62-366(d) of the Municipal Code of Ordinances, the BZA shall not grant a use variance in Floodplain or Wetland and Conservancy Districts. In all other districts, no use variance shall be granted unless the applicant has first petitioned for a zoning amendment or a conditional use permit, if applicable, and upon a showing that no lawful and feasible use of the subject property can be made in the absence of such variance. Any use variance granted shall be limited to the specific use described in the BZA decision and shall not permit variances in yard, area, or other requirements of the districts in which located.

Third, and most common, an applicant may seek an **Area Variance**. An area variance means a modification to a dimensional, physical, or locational requirement such as a setback, frontage, height, bulk, or density restriction for a structure that is granted by the BZA. To qualify for an area variance, the burden of proof is on the applicant requesting the variance. The aggrieved party must provide evidence which satisfies all three parts of the standards for granting a variance under Sec. 62-366(e), of the Municipal Code of Ordinances, 1) Unnecessary hardship, 2) Hardship may not be self-imposed, and 3) Hardship must be unique to the property.

To further explain these criteria, an unnecessary hardship exists where compliance with the strict letter of the restrictions governing the property would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. In considering whether an unnecessary hardship exists the BZA shall consider the following factors a) the purpose of the zoning restriction in question, b) the effect of

the restriction on the property, and c) the effect of a variance on the neighborhood and larger public interest. Variances may not be granted to remedy self-imposed hardships. An example of a self-created hardship would be excavating a pond on a vacant lot, then arguing there is no suitable location for a home. Finally, unique to the property can refer to the physical limitations of the property, such as steep slopes or proximity to wetlands that prevent compliance with the ordinance.

A variance may not be granted where they are contrary to public interest or where granting the variance would violate the spirit of the regulation. Concerns over the most profitable use of a parcel are not proper grounds for granting variances. Neither are circumstances of an applicant, such as a growing family or the need for a larger garage. Nearby ordinance violations, prior variances, or lack of objections from neighbors do not provide a basis for granting a variance.

We hope the information presented in this letter helps you in preparing your application to the BZA. Please contact our office if you have any questions.

Community & Economic Development Department



www.mcfarland.wi.us/communityandeconomicdevelopment | 5915 Milwaukee St, McFarland, WI 53558 | 608.838.3154

**Application for Administrative Appeal,
Use Variance, and Area Variance**

TO: The Board of Zoning Appeals, Village of McFarland, WI

Per Sec. 62-363(e), a filing fee of \$450.00 is required with each application submittal. The Applicant is responsible for publication fees and notification charges, plus actual legal, engineering and financial consulting costs incurred by the Village, to be billed later. No permits can be issued until all monies owed are paid. Filing fee is non-refundable.

NOTE: The Village recommends all Applicants read the "Letter to Applicants" as supplemental to the purpose and intent of this application. Applicants are encouraged to submit additional pages to answer application questions in full as needed.

Name of Appellant/Applicant _____

Address _____

**Owner's name/address
(if different than Applicant)** _____

Phone _____

Email _____

Address of Property _____

Parcel No. _____

Lot # _____

Lot Size _____

Current Use of Property _____

Proposed Use of Property _____

Zoning Classification _____

Applicants should complete Sections #1, #3, and #4 and either Sections 2A, 2B, or 2C on the following pages.

- 1) **Prior Appeals/Variations.** Has there been a past appeal or application with respect to this property? Yes No (If yes, provide a summary of the previous appeal below.)

Disposition of previous appeal: _____

Date of decision in previous case: _____

How does this appeal differ from the previous request?

- 2) **Stating the purpose and grounds of your appeal.**

Check the box (A, B or C) which best meets the relief request of your appeal then answer only those questions within that section. You may include an attached sheet with your response if there is not enough space.

(A) Administrative Appeal.

This request is for a review of zoning ordinance and/or petition of order, requirement, decision, or determination of administrative official. Please include any additional documentation, letters or forms you received which is associated with this appeal. Use the lines provided below stating the reasons why you claim this order, requirement, decision, or determination is erroneous.

- 1) Date of notice of such decision received by applicant: _____

- 2) In the lines below, provide a summary of the order of administrative official from which appeal was taken:

- 3) In the lines below, provide reasoning why the requirement, decision, or determination is erroneous.

(B) Use Variance

Any use variance granted shall be limited to the specific use described in the BZA decision and shall not permit variances in yard, area, or other requirements of the districts in which located.

- 1) Is this property located in a designated Floodplain or Wetland and Conservancy District? Yes No

- 2) Has the applicant previously applied for a zoning amendment or a conditional use permit? Yes No

(If yes, provide the following information in the lines below.)

Date when request was determined: _____

Was this request approved? Yes No

Describe the specific proposed use of the subject property for which a use variance is requested:

- 3) Describe why no lawful and feasible use of the subject property can be made in the absence of such a variance.

(C) Area Variance.

An area variance is a request for a modification(s) to a dimensional, physical, or locational requirement such as setback, frontage, height, bulk, or density restriction for a structure.

Describe the area variance you are requesting, including the specific section(s) of the Zoning Code:

Sec. 62-366(e) Standards for Granting a Variance. In the lines below, answer each question thoroughly for each item listed. For the Board- of Zoning Appeals to grant a variance, it must find that all conditions are met.

1. Unnecessary Hardship.

- a. The Purpose of the Zoning Restriction in Question. The Board of Zoning Appeals shall determine whether the particular restriction in question is unnecessarily burdensome in light of the underlying purpose of that restriction. The purpose of the regulation shall be the primary concern, not the burden upon the property owner. The granting of the variance should not be so general or recurrent in nature as to suggest the Zoning Code should be changed. Describe why granting of the variance will not undermine the general intent and purposes of the Zoning Code and the specific purpose of the regulation in question?

- b. The Effect of the Restriction on the Property. An unnecessary hardship exists where compliance with the strict letter of the restrictions governing the property would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. Describe the effect of the zoning restriction on your property and how this impacts the reasonable use of your property or would render conformity unnecessarily burdensome?

- c. The Effect of a Variance on the Neighborhood and Larger Public Interest. Describe why granting of the variance will not be detrimental to the public welfare or injurious to the other property or improvements in the neighborhood in which the property is located.

2. **Hardship May Not Be Self-Imposed.** Variances may not be granted to remedy self-imposed hardships. Describe why you feel the hardship is not self-imposed?

3. **Hardship Must Be Unique To The Property.** Where the same hardship is imposed upon other properties in the zoning district, a variance shall not be granted. 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. The conditions upon which a petition for a variance are unique to the property for which the variance is being sought and that such a variance is necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same district and vicinity. Describe the circumstances that exist which make this issue unique to the property?

4. **Purpose Must Not Be Financially Motivated.** Describe why the purpose of the variance is not based exclusively upon a desire to increase the value or income potential of the property?

- 3) **Site Inspection.** Do you grant permission for the Board of Zoning Appeals and staff, either individually or as a group, to enter onto the subject property for a site inspection?
 Yes No
- 4) **Site Plan.** Per Sec. 62-363(c) of the Municipal Code of Ordinance, each application for appeal must be accompanied by a scale drawing showing the location and size of property, existing improvements, all abutting properties, and improvements thereon and the requested change or addition.

DISCLAIMER

I hereby swear that all of the above statements and the statements contained in any papers or plans submitted herewith are true to the best of my knowledge and belief.

Signature of Applicant

Date



www.mcfarland.wi.us/communityandeconomicdevelopment | 5915 Milwaukee St, McFarland, WI 53558 | 608.838.3154

**Application for Administrative Appeal,
Use Variance, and Area Variance**

TO: The Board of Zoning Appeals, Village of McFarland, WI

Per Sec. 62-363(e), a filing fee of \$450.00 is required with each application submittal. The Applicant is responsible for publication fees and notification charges, plus actual legal, engineering and financial consulting costs incurred by the Village, to be billed later. No permits can be issued until all monies owed are paid. Filing fee is non-refundable.

NOTE: The Village recommends all Applicants read the "Letter to Applicants" as supplemental to the purpose and intent of this application. Applicants are encouraged to submit additional pages to answer application questions in full as needed.

Name of Appellant/Applicant	Julie Walther
Address	2175 McCoy Rc. Sun Prairie, WI 53590
Owner's name/address (if different than Applicant)	Eli Bliffert 1014 East Chambers St. Milwaukee, WI 53212
Phone	414-406-1927
Email	eli@bliffertlumber.com
Address of Property	Chase Lumber 5417 Long St. McFarland, WI 53558
Parcel No.	Several Parcel #'s see list below
Lot #	_____
Lot Size	_____
Current Use of Property	Lumber Yard
Proposed Use of Property	Lumber Yard with Exterior Shelving
Zoning Classification	C-C Central Commercial

Applicants should complete Sections #1, #3, and #4 and either Sections 2A, 2B, or 2C on the following pages.

Parcel numbers:
 154/0610-031-6801-9
 154/0610-031-6812-6
 154/0610-031-6823-3
 154/0610-031-6834-0

Parcel numbers (continued):
 154/0610-031-6351-9
 154/0610-031-6362-6
 154/0610-031-6873-3
 154/0610-034-0287-2

- 1) **Prior Appeals/Variances.** Has there been a past appeal or application with respect to this property? Yes No (If yes, provide a summary of the previous appeal below.)

Disposition of previous appeal: _____

Date of decision in previous case: _____

How does this appeal differ from the previous request?

- 2) **Stating the purpose and grounds of your appeal.**

Check the box (A, B or C) which best meets the relief request of your appeal then answer only those questions within that section. You may include an attached sheet with your response if there is not enough space.

(A) Administrative Appeal.

This request is for a review of zoning ordinance and/or petition of order, requirement, decision, or determination of administrative official. Please include any additional documentation, letters or forms you received which is associated with this appeal. Use the lines provided below stating the reasons why you claim this order, requirement, decision, or determination is erroneous.

1) Date of notice of such decision received by applicant: August 1, 2023

2) In the lines below, provide a summary of the order of administrative official from which appeal was taken:

Our storage racks are considered accessory structures, whether bolted or unbolted, according to zoning code 62-4 and 62-310. We failed to due proper zoning review and building permit. Adding the racking constitutes an expansion of a nonconforming property.

3) In the lines below, provide reasoning why the requirement, decision, or determination is erroneous.

We already use this space for material storage. The use of the racking makes the storage more visually appealing and safer.

(B) Use Variance

Any use variance granted shall be limited to the specific use described in the BZA decision and shall not permit variances in yard, area, or other requirements of the districts in which located.

- 1) Is this property located in a designated Floodplain or Wetland and Conservancy District? Yes No

- 2) Has the applicant previously applied for a zoning amendment or a conditional use permit? Yes No
(If yes, provide the following information in the lines below.)

Date when request was determined: _____

Was this request approved? Yes No

Describe the specific proposed use of the subject property for which a use variance is requested:

- 3) Describe why no lawful and feasible use of the subject property can be made in the absence of such a variance.

(C) Area Variance.

An area variance is a request for a modification(s) to a dimensional, physical, or locational requirement such as setback, frontage, height, bulk, or density restriction for a structure.

Describe the area variance you are requesting, including the specific section(s) of the Zoning Code:

Sec. 62-366(e) Standards for Granting a Variance. In the lines below, answer each question thoroughly for each item listed. For the Board- of Zoning Appeals to grant a variance, it must find that all conditions are met.

1. Unnecessary Hardship.

- a. The Purpose of the Zoning Restriction in Question. The Board of Zoning Appeals shall determine whether the particular restriction in question is unnecessarily burdensome in light of the underlying purpose of that restriction. The purpose of the regulation shall be the primary concern, not the burden upon the property owner. The granting of the variance should not be so general or recurrent in nature as to suggest the Zoning Code should be changed. Describe why granting of the variance will not undermine the general intent and purposes of the Zoning Code and the specific purpose of the regulation in question?

It is not our intent to expand but rather to better utilize the space we have. We are already using the black top for storage of our large bulky materials. This would help with the curb appeal, snow removal and safety. Yet, by allowing the shelving units it would not detract from the property.

- b. The Effect of the Restriction on the Property. An unnecessary hardship exists where compliance with the strict letter of the restrictions governing the property would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. Describe the effect of the zoning restriction on your property and how this impacts the reasonable use of your property or would render conformity unnecessarily burdensome?

It doesn't allow us to have the materials up off the ground in a safe, structured environment. It makes snow plowing and snow removal much more difficult. It helps eliminate trip hazards.

- c. The Effect of a Variance on the Neighborhood and Larger Public Interest. Describe why granting of the variance will not be detrimental to the public welfare or injurious to the other property or improvements in the neighborhood in which the property is located.

The neighborhood and larger public interest would certainly like the looks of a well maintained and organized lumber yard. We have been trying extremely hard to improve the appearance of our lumber yard. We have painted buildings, sealed black top, fixed buildings that were damaged. The shelving units would be just one more step in the process of keeping our location organized and clean.

2. **Hardship May Not Be Self-Imposed.** Variances may not be granted to remedy self-imposed hardships. Describe why you feel the hardship is not self-imposed?

We already own the material. It has already been there for many years.
We aren't changing our inventory. The only thing we are asking for is shelving that will make the site more functional and cleaner.

3. **Hardship Must Be Unique To The Property.** Where the same hardship is imposed upon other properties in the zoning district, a variance shall not be granted. 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. The conditions upon which a petition for a variance are unique to the property for which the variance is being sought and that such a variance is necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same district and vicinity. Describe the circumstances that exist which make this issue unique to the property?

In the Village of McFarland but not in the Central Commercial District is a business called, Foundation Building Materials. They have this same type of shelving on their black top. These shelving units are unique to companies that have large bulk materials that don't fit well in buildings and yet need them readily available on site with easy access.

4. **Purpose Must Not Be Financially Motivated.** Describe why the purpose of the variance is not based exclusively upon a desire to increase the value or income potential of the property?

We will have no financial gains by putting up the portable shelving units.
We will have the expense of purchasing the units. This is strictly a tool used to organize and help maintain a clean environment, help with safety concerns and become more efficient. If requested we can move the shelving units to a different location on the lot where the unit would be easily accessible. The goal is to make our location as aesthetically pleasing as possible while allowing for a safe working atmosphere.

- 3) **Site Inspection.** Do you grant permission for the Board of Zoning Appeals and staff, either individually or as a group, to enter onto the subject property for a site inspection?
 Yes No
- 4) **Site Plan.** Per Sec. 62-363(c) of the Municipal Code of Ordinance, each application for appeal must be accompanied by a scale drawing showing the location and size of property, existing improvements, all abutting properties, and improvements thereon and the requested change or addition.

DISCLAIMER

I hereby swear that all of the above statements and the statements contained in any papers or plans submitted herewith are true to the best of my knowledge and belief.



Signature of Applicant

8/21/23

Date

Dane County Map



August 16, 2023

□ Parcels

Parcels

0 30 60 120 Feet



Memorandum



To: Village of McFarland Board of
Zoning Appeals; c/o Andrew Bremer, Director
Community & Economic Development

From: Matthew J. Fleming

Re: Bliffert Appeal and Variance

Date: 12 October 2023

Bliffert Lumber operates the lumber yard business commonly and historically known as Chase Lumber that straddles Milwaukee Street between Long Street and the railroad tracks. Zoned C-C Central Commercial, the business operates as a pre-existing legal nonconforming use.

Bliffert seeks to retain the use of three lumber storage racks it has placed on its property in order to more neatly, safely and conveniently store product in locations where such storage has historically occurred. These storage racks are not structures as defined by Village ordinances, nor do they represent an expansion of a legal nonconforming use. Accordingly, the Zoning Administrator's determination to treat them as construction of new, unlawful nonconforming structures was in error.

Alternatively, if the Board determines that the Zoning Administrator's determination was correct, a variance should be issued. It is an unnecessary hardship to prohibit the use of these racks. The racks provide a material benefit to the ongoing legal nonconforming use in terms of aesthetics, safety and convenience while at the same time does not impact any of the concerns underlying the rule against erection of new structures to serve a nonconforming use.

I. The Storage Racks Do Not Violate Village Ordinances.

The foundation of the Zoning Administrator's determination is that the storage racks constitute "structures" under the Zoning Code. The term "structure" is defined under Section 64-4(144) as follows:

(144) Structure. Anything constructed or erected, the use of which requires a permanent location on the ground or attached to something having a permanent location on the ground.

The storage racks at issue do not require a permanent location on the ground. Nor are they attached to anything having a permanent location. The storage racks are movable and can be placed in a number of configurations on the property. They happen to be placed in the areas where lumber has historically been stored as placed directly on the ground and where it is most convenient for the operation of the business, but they are in no sense "permanent" as, say, a building, or the canopy structure that sits on the easternmost parcel.

Nor does use of these racks represent an expansion of a legal non-conforming use. First, the racks are being used in areas that have historically been used for product storage. No new activity is occurring as a result of the racks. Rather, it is the same activity that is merely occurring in a more attractive, safe, and convenient manner.

Moreover, it is well established that a mere increase in volume or intensity of a use does not constitute an unlawful expansion of a legal nonconforming use. *Waukesha Cty. v. Seitz*, 140 Wis. 2d 111, 121, 409 N.W.2d 403, 408 (Ct. App. 1987). In *Seitz*, Seitz had historically run a lake resort and marina with cottage rentals, boat livery, and sale of fuel, bait and minor motor repair. Over the years:

Seitz's dry-docking facility has expanded from three to five boats in 1969 to the current level of fifty-four boats. In 1980, Seitz expanded his pier from the 1969 length of 80 feet to 120 feet. In 1981, Seitz again extended his pier to the current length of 192 feet. Today, Seitz is able to wet-dock up to thirty-five boats. In 1985, Seitz changed the name of the business to "Pewaukee Marina."

Id. at 114.

Despite these substantial physical changes to the business, the court held that this was not an unlawful expansion of a nonconforming use. Only where an increase in volume, intensity or frequency of use is coupled with some element of identifiable change or extension, will an enlargement invalidate a legal nonconforming use. *Id.* at 117. These increases were simply a change in the volume, intensity or frequency of the nonconforming use that already existed. *Id.* at 121. As restated in *Waukesha Cty. v. Pewaukee Marina*, 187 Wis. 2d 18, 27, 522 N.W.2d 536, 540 (Ct. App. 1994) (Seitz II):

We conclude that the correct reading of *Seitz I* is this: if there is an identifiable change in the use, the enlargement is illegal. If the expansion is a result of a mere increase in the historically allowed use, the enlargement or expansion will be allowed subject to regulatory markers.

Here, the nonconforming use is as a lumber yard. Using racks to store lumber is not an identifiable change in the use. It is, at most, "a mere increase in the historically allowed use." We believe, however, that the racks even fall short of that standard because the storage that the racks facilitate has been occurring anyway. This is but a change in the manor of conducting that same storage – a change that does not alter the fundamental underlying use and does nothing to extend the life of that use.

II. If the Racks are Unlawful Nonconforming Structures, a Variance is Warranted.

Variations, broadly speaking, come in two varieties, use variations and area variations.

A use variance is one that permits a use other than that prescribed by the zoning ordinance in a particular district. An area variance has no relationship to a change of use. It is primarily a grant to erect, alter, or use a structure for a permitted use in a manner other than that prescribed by the restrictions of a zoning ordinance.

State ex rel. Ziervogel v. Wash. Cty. Bd. of Adjustment, 2004 WI 23, ¶21, 269 Wis. 2d 549, 676 N.W.2d 401, citing 3 Yokley, supra § 20-3, at 20-8-9; see also 3 Ziegler, supra, 58.4.

The application before the Board does not seek to change the use of the property. The existing use as a lumber yard is permitted as a legal nonconforming use and will not change. Rather, the variance is sought to be able to use the subject lumber racks pursuant to the existing legal nonconforming use. Accordingly, the request is for an area variance.

When considering an area variance, the question of whether unnecessary hardship exists is best explained as ‘[w]hether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.’ ” *Ziervogel*, at ¶7, quoting *Snyder*, 74 Wis.2d at 475, 247 N.W.2d 98. When deciding whether this standard is met the Board is required to consider “the purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and the larger public interest.”

Case law is clear, that unnecessary hardship must be determined with reference to the purpose of the ordinance. *Ziervogel*, at ¶7. The threshold question is not whether a hardship is so significant that it deserves to be remedied. Rather, the question is whether any identified hardship is “unreasonable” or “unnecessary” in light of “the purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and the larger public interest.” *Ziervogel*, at ¶7. “By definition, all variations depart from the purpose of the zoning ordinance and implicate the public interest, because they permit something that is otherwise strictly prohibited. But they do so to varying degrees and levels of acceptability, depending on the type of variance requested and the nature of the zoning restriction in question.” *Ziervogel*, at ¶21.

Thus, if a hardship is severe and the impact on the purpose of a regulation is relatively minor, the variance may be appropriate. Where the impact of a variance on the purpose of a regulation is material, it is possible that no degree of hardship may be sufficient as to be

considered “unnecessary.” Similarly, where little to no adverse impact on the purpose of an ordinance would be experienced, a relatively minor hardship may justify a variance.

In this case, while the hardship imposed by being prohibited from using the racks, while far from existential for the business, it is not immaterial. The racks allow for storage of product that is neater in appearance than simply stacking, safer for employees and customers, and also provides more convenient access to the product. Their use is common for a lumber yard.

The main purpose of the restriction as we understand it is to serve the general policy against extending the life of a legal nonconforming use. Legal nonconforming uses are not intended to exist indefinitely. These racks, however, do not contribute to the longevity of this lumber yard use at this location. The condition and utility of the property as a whole and the buildings and other structures on the property in conjunction with market conditions are going to determine how long this property will continue in its current use. These racks will have no effect on these considerations. While the racks may contribute to marginal efficiency, any such effect is miniscule compared to these other factors.

Nor will use of these racks create any adverse effects on neighboring property. The racks do not significantly change the appearance of the property and, to the extent they do, they create a more orderly appearance. They are largely viewable, however, only from the street. No other neighboring property or use occurring on neighboring property has any significant view into the area where the racks are used.

CONCLUSION

The subject storage racks are neither a structure, nor do they constitute an expansion of a legal nonconforming use. Rather they represent a minor increase in the historically allowed use – a different approach to outdoor lumber storage consistent with the existing legal nonconforming use.

Alternatively, a variance is appropriate. The racks are typical of a lumber yard use and allows for a neater, safer and more convenient way to store product. Balanced against the hardship of being unable to use them is the non-existent impact on the purpose of any regulation preventing them. They will not contribute to the extended life of the lumber yard use and will not impact neighboring property in any conceivably material way. The hardship imposed is truly unnecessary.

Thank you for your consideration.

REUTER, WHITISH & EVANS, S.C.

Attorneys at Law
44 East Mifflin Street, Suite 306
Madison, Wisconsin 53703

ALLEN D. REUTER
BARBARA O. WHITISH (1953-2013)
DANIEL J. EVANS
DAVID D. RELLES
KEVIN F. MILLIKEN (Of Counsel)

TELEPHONE
(608) 250-9053

FACSIMILE
(608) 250-9054

October 30, 2023

Andrew Bremer, AICP
Community & Economic Development Director
Village of McFarland
5915 Milwaukee Street
P.O. Box 110
McFarland, WI 53558

Re: Chase Lumber Appeal to BZA and Variance Request

Dear Mr. Bremer:

Per your request, I have analyzed whether the new outdoor racks at the Chase Lumber property in the Village are an extension of a legal nonconforming use. In addition, since Chase Lumber has appealed your decision on this issue, and has requested an area variance as alternative relief, I address its request for a variance and some general points on the administrative appeal process. My role in this matter is in advisory capacity for Village staff, and not as legal counsel for the Board of Zoning Appeals (BZA). In administrative appeals, the BZA acts independently from Village staff in a quasi-judicial capacity.

I. Background

On or about July 26, 2023, Chase Lumber installed three storage racks at its property by Milwaukee Street and Long Street (the Property). The Property is located in the Village's C-C Central Commercial District. Although lumber yards are not a permitted or conditional use in the C-C Central Commercial District, Chase Lumber's operations are allowed to continue as a legal nonconforming use.

Two of the new racks are approximately 50' in length, and the third rack is 20' in length. As I understand, the racks are approximately 20-30' feet in height, and carry four storage racks per side of each rack unit (8 racks per unit). The racks are located outdoors. I understand that prior to the installation of these racks, this area on which the racks are located may have been used to store lumber and/or other building materials from time to time, but storage was made directly on the ground and in a smaller volume than the capacity provided by the new racks.

Two of the new racks appear as shown in photograph directly below, while the same location, prior to the installation of the racks, is shown in the subsequent photograph.



I address two main items; first, whether the new racks constitute an unlawful expansion of a legal nonconforming use at the Property, and second, whether an area variance would provide a remedy allowing for the racks to remain on the Property. For the reasons I explain below, I agree with your analysis that the new racks are an unlawful physical extension of a legal nonconforming use. With respect to the application of an area variance, it is likely that Chase Lumber created any hardship on which it now bases its request for an area variance, and there does not appear to be a valid basis to grant an area variance.

Because Chase Lumber is also appealing your decision to the BZA, I also briefly address the procedure in that appeal, as well as Chase Lumber's memorandum, particularly its position that the racks are not "structures" under the Zoning Code.

I am not addressing any Site Design Review, and the lack of the applicant seeking a building permit prior to installing the racks at the Property. I mention this because a building permit is required for new structures, and for commercially zoned properties, a Site Design Review is required as part of the permitting process. That review process considers, among other things, the underlying zoning restrictions of the subject property. With respect to Chase Lumber's appeal of the Zoning Administrator's decision, its appeal is focused on whether the installation of the outdoor racks is an unlawful expansion of a legal nonconforming use, but the fact remains that no building permit has been applied for or issued for the new racks, nor has a review of the site plan been completed. The underlying site plan, and the related zoning review, would have been completed had Chase Lumber applied for a building permit prior to the installation of the new racks.

II. Appeal Process. An applicant appealing a decision by the zoning administrator has the burden of proof to demonstrate that the administrative decision is incorrect or unreasonable. In essence, an appeal from the zoning administrator involves the interpretation of the zoning code. When making its decision, the BZA has all the powers of the person making the administrative decision, and the Board may reverse, confirm, or modify the decision appealed. The UW Extension Zoning Board Handbook is an excellent resource for the BZA on the appeal process.¹

Consistent with that guidance, the BZA should initially determine whether the relevant zoning code provisions are ambiguous. If the BZA determines the applicable zoning provisions are ambiguous, then it will determine the meaning of the terms. In most cases, the meaning of an ordinance can be determined by the literal reading of the text, and so therefore are not ambiguous. Consistent with the Handbook, the following steps may be used in this process:

1. *Apply a plain meaning rule to interpreting the zoning code.* This generally means that you follow the definition provided in the code, or if no definition is given, the dictionary meaning of the words. Technical words should be used in their technical sense.
2. *Harmonizing.* If terms are ambiguous, they must be interpreted to give effect to the primary legislative purpose of the ordinance.
3. *Addressing conflicting provisions.* When two provisions conflict, they should be interpreted to give effect to the primary legislative intent of the ordinance, to the extent reasonable.
4. *Avoid surplus language.* Ordinances should be interpreted to give effect to every provision. Interpretations that render part of an ordinance meaningless should be avoided when possible.

¹ A PDF version of the manual may be found at <https://www3.uwsp.edu/cnr-ap/clue/Pages/publications-resources/Zoning.aspx> . Administrative appeals are addressed in Chapter 13 of the manual.

5. *Policy history.* Members of the BZA should consider interpretations made by staff, counsel and the parties to a proceeding, but should remember that the Board is primarily responsible for interpreting the meaning of the Zoning Code. The Handbook provides “The potential interests and motives of those presenting testimony in an appeal should be examined to establish the relative merit of their testimony.”

Once the meaning of the applicable zoning code provisions are determined, the BZA will consider the underlying facts, and in this case whether the new racks are an unlawful extension of an otherwise legal nonconforming use. Although I address relevant criteria in considering the new racks as an expansion of a legal nonconforming use, the Board will make its own determination on this appeal. Because the decision by the BZA can be appealed, it is generally good practice to keep an accurate record of the appeal hearing.

III. Definition of Structure. Chase Lumber contends that the racks are not “structures” under the Zoning Code. In my opinion, whether the racks are “structures” under this definition is not very relevant as to whether the racks are an unlawful expansion of a legal nonconforming use, as an unlawful expansion of a legal nonconforming use can occur with temporary structures as well as permanent ones, and even without new structures, though in this case we are addressing the racks as structures.

“Structure” is defined in the Zoning Code as:

Anything constructed or erected, the use of which requires a permanent location on the ground or attached to something having a permanent location on the ground.

As stated above, when reading ordinances and statutes, courts have directed that if the language of an ordinance or statute is plain, we give the language its “common, ordinary and accepted meaning.” *State ex. Rel Kalal v. Circuit Court for Dane County, 2004 WI 58.* A dictionary may be used to guide the common, ordinary meaning of words. As to the how “structure” is defined in the Zoning Code, nothing in the wording of the definition is unusual or confusing.

The racks are clearly “structures” under the Zoning Code definition. The racks are constructed/erected at the Chase Property. The racks are stationary and have a permanent location on the ground when used as racks. Given the large size of the racks, it is hard to imagine how the racks could not be considered structures. Even if the racks could be dismantled and moved to another location of the Property, this would not change the fact that the racks require a fixed location on the ground when used, and, importantly, are clearly intended by Chase Lumber to have a permanent/fixed location at the Property for the purpose of storing a higher volume of lumber than was previously stored, and to make access easier to this material. The racks are clearly not buildings, which are defined in the Code as “enclosed” structures permanently affixed to a property.

I note that temporary structures are also defined under the zoning code, to include movable structures not designed for human occupancy or the protection of goods. The racks, as constructed, do not appear moveable, and are used in part for the protection of lumber, and therefore would not come under the definition of “temporary structure.” However, for purposes of argument, even if the racks were considered temporary structures, Chase Lumber is still unlawfully expanding the legal nonconforming use by having and using the new racks at the Property, temporary or otherwise. One can unlawfully expand a legal nonconforming use with temporary structures as well as permanent ones.

Another general rule when interpreting statutes and ordinances is that the language is interpreted in the context in which it is used; not in isolation but as part of a whole, in relation to the language of the surrounding statutes and ordinances. Ordinances are also read reasonably to avoid absurd results. *See State ex. Rel Kalal*. Applying this rule Zoning Code, we interpret these definitions in the context of how used in the Zoning Code. It is no surprise that the clear intent under *Subdivision III Nonconforming Buildings, Structures and Uses* of the Zoning Code that nonconforming uses be phased out over time. It would be an absurd reading of the ordinance to allow for nonconforming uses to be expanded by “non-structures” or some other construct that would not come under the definition of “building” or “structure” because this is contrary to the intent to phase out the nonconforming use over time.

IV. Legal Nonconforming Uses

A legal nonconforming use is a use in which an owner may continue to use a property that is otherwise not permitted under applicable zoning regulations. Land use qualifies as nonconforming if there is active and actual use of the land that existed prior to commencement of the zoning ordinance and that use has continued to the present. However, the spirit of zoning is to restrict and eventually eliminate a nonconforming use.

Wisconsin’s zoning laws provides in part that, with respect to nonconforming uses:

The continued lawful use of a building, premises, structure or fixture *existing* at the time of the adoption of amendment of a zoning ordinance may not be prohibited although the use does not conform with the provisions of the ordinance. The nonconforming use may not be extended. The total structural repairs or alterations in such a nonconforming building, premises, structure, or fixture shall not during its life exceed 50 percent of the assessed value of the building, premises, structure, or fixture unless permanently changed to a conforming use.

Wis. Stat. § 62.23(7)(h) (emphasis added).

The status of a legal nonconforming use in essence “grandfathers” certain uses incompatible with subsequently enacted zoning regulations. The Village Zoning Code similarly provides that, under 62-150, any lawfully existing building, structure or use which does not conform to the regulations of the district in which it is located may be continued subject to certain

restrictions. The zoning code does not contemplate the provision of new structures and buildings being constructed furthering a legal nonconforming use, as new structures are inconsistent with the restriction on repairs and alterations to the existing structures, and the intent that the nonconforming use will be phased out over time.

Generally, nonconforming uses are limited and are not to be enlarged in derogation of the present zoning restrictions. See *Waukesha County v. Pewaukee Marina, Inc.*, 187 Wis. 2d 18 (Ct. App. 1994). Enlarging or extending a legal nonconforming use is not permitted. The Wisconsin Court of Appeals succinctly summarized this point:

While a mere increase in the volume, intensity or frequency of a nonconforming use is not sufficient to invalidate it, if the increase in volume, intensity or frequency of use is coupled with some element of identifiable change or extension, the enlargement will invalidate a legal nonconforming use.

Lessard v. Burnett Cnty. Bd. of Adjustment, 2002 WI App 186, ¶ 24.

An increase in frequency or volume based on, for example, a higher demand of a service or product by customers, would likely not be viewed as an unlawful extension of a legal nonconforming use. However, an enlargement or extension of the use based on some "identifiable" change or extension is not permitted. For example, in *Waukesha County v. Pewaukee Marina, Inc.*, the extension of a docking facility to include a retail store was something more than the increase in historically allowed use of the marina, and was not allowed.

I note that some property owners attempt to rely on the holding of *Waukesha v. Seitz*, 140 Wis. 2d 111(1987), as allowing for physical extensions of a nonconforming use. The *Seitz* case involved the expansion of a marina to include new docks. The Court found that the added docks were, based on the evidence presented, not an unlawful extension of a legal nonconforming use. The Court qualified its decision though based on the poor record and evidence presented in the case:

We note, however, that whether this type of structural expansion invalidates a nonconforming use is expressly controlled by statute and ordinance, neither of which was alleged or proven in this case. . . . The record is devoid of any allegation or evidence indicating that *Seitz's* pier expansion has somehow violated these legislative markers.

Seitz at 119-121.

A subsequent court holding noted that *Seitz* did not directly address the issue whether a physical enlargement of a nonconforming use invalidates it; that issue is controlled by ordinance and statute, which was not an issue before the court in *Seitz*.

A close reading of *Seitz* reveals, however, that it did not directly address the issue whether a physical extension or physical enlargement of a nonconforming use invalidates it. . . . Therefore we do not read *Seitz* as protecting the physical extension of a nonconforming use. A later case that refers to “expansion of a legal nonconforming use” refers to increase volume and frequency. *Racine County v. Cape*, 2002 WI App 19.

Lessard v. Burnett Cnty. Bd. of Adjustment, 2002 WI App 186.

V. The New Outdoor Racks

Applying the law to the new outdoor racks installed by Chase Lumber at the Property, I agree with your determination that the new racks are an unlawful extension of an otherwise legal nonconforming use. The racks are new structures designed to hold significantly more volume than what was previously stored outside at the Property at this same location. The racks constitute a physical extension and enlargement of the legal nonconforming use by being new, relatively large structures, increasing the storage and material capacity on the Property. Following the guidance in the *Lessard* case referenced above, the new racks are an identifiable change to the Property. For clarity’s sake, I want to distinguish that an increase in lumber and other building product being stored on the Property based on an increase in demand is probably not be an unlawful extension of the nonconforming use. But here there is an “element of identifiable change or extension”, namely the installation of the new outdoor racks on the Property.

Wisconsin Statute § 62.23(7)(h), limits the repairs and alterations of existing buildings and structures for a nonconforming use at 50% of assessed value. That monetary limitation on repairs would have significantly less meaning if a property owner could simply install new structures for purposes of continuing a legal nonconforming use. As Wisconsin Courts have stated, “*the spirit of zoning is to restrict a nonconforming use and to eliminate such use as quickly as possible.*” *City of Lake Geneva v. Smuda*, 75 Wis.2d 532 (1977). New structures, like the outdoor racks installed at the Property, are simply not contemplated as a reasonable continuation of a legal nonconforming use.

In summary, the new racks are likely in violation of the following:

1. The requirement that a building permit be issued, which requires a Site Design Review.
2. Village Ordinance 62-311, which prohibits the unlawful improvement or use of land in violation of the Zoning Code. Again, lumber yards are not listed as permitted or conditional uses in the Central Commercial Zoning District. The exception for nonconforming uses is limited to existing buildings and structures under the provisions of 62-150.
3. Wisconsin Statute § 62.23(7)(h), which does not expressly allow for the construction of new buildings or structures for the continuation of a legal nonconforming use, rather,

the law simply permits repairs up to 50% of the assessed value of those buildings and structures existing at the time the property becomes legal nonconforming under the applicable zoning regulations.

At some past point its operations as a lumber yard became nonconforming to the current C-C Commercial Central District. Per Wis. Stat. § 62.23(7)(h), Chase Lumber can continue to operate its lumber yard with the then existing buildings and structures, though the repairs and alterations are limited up to 50% of the assessed value of the buildings and structures. Nowhere does Wis. Stat. § 62.23(7)(h) provide authority for an owner to construct “new” buildings and structures, and that same law clearly provides that “[T]he nonconforming use may not be extended. The new outdoor storage racks are not a “repair” or “alteration” of a structure that existed at the time the lumber yard became a legal nonconforming use.

VI. Request for Variance

As alternative relief to its appeal of the zoning administrator’s decision, Chase Lumber is requesting it be granted an area variance. An area variance is described under Wisconsin Law as “a modification to a dimensional, physical, or locational requirement such as a setback, frontage, height, bulk or density restriction for a structure that is granted by the board of appeals.” See Wis. Stat. § 62.23(7)(e)7.a. To compare, a “use variance” means an authorization by the board of appeals for a purpose that is otherwise not allowed or is prohibited by the applicable zoning ordinance. *Id.* Chase Lumber has requested only an area variance. (I would note that an application for a “use variance” requires the applicant to initially request a zoning code change, but that is not an issue for the current application).

The McFarland Zoning Code provides a process in which variance requests are considered by the BZA. When considering an application for an area variance, the Board will consider the applicable Zoning Code provisions and the following:

1. Is there an unnecessary hardship, that is, will compliance with the ordinance unreasonably prevent the owner from using the property for a permitted purpose? Wis. Stat. § 62.23(7)(e)7.d. provides that a property owner bears the burden of proving “unnecessary hardship.”
2. Are there unique physical limitations of the property, such as steep slopes or wetlands, that prevent compliance with the ordinance?
3. Is there a harm to the public interest in granting the variance? Pursuant to the Zoning Board Handbook previously referenced, examples of public interests in considering a variance application can include the goal of maintaining public health and safety, as well as requiring eventual compliance for nonconforming uses.

I address item 1., unnecessary hardship further below, but for item 2., there does not appear to be any allegation that physical limitations of the Property prevent compliance with the Zoning Code. As to item 3., the harm to the public interest is clear, given the matter involves a legal nonconforming use, and the public interest in phasing out the legal nonconforming uses. A

variance under these circumstances could reasonably be viewed as inconsistent with that public interest.

As to whether there is an unnecessary hardship, an unnecessary hardship exists where compliance with the strict letter of the restrictions would be unnecessarily burdensome. When considering any variance, the BZA is to determine whether the particular restriction in question is unnecessarily burdensome in light of the underlying purpose of that restriction. Further, variances may not be granted to remedy self-imposed hardships. The question of whether unnecessary hardship exists is best explained as whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, and bulk of density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. *Snyder v. Waukesha County Zoning Board of Adjustment*, 74 Wis. 2d 468, 475 (1976).

From the application, it is not clear for what bulk restrictions Chase Lumber is seeking a variance. The owner is presently using the property for an allowed use (as a legal nonconforming use as a lumber yard). An area variance does not address the underlying problem with the extension of a legal nonconforming use.

For arguments sake, even if Chase Lumber faced an unnecessary hardship based on bulk standard, setbacks or similar requirements, an “unnecessary hardship” cannot be self-imposed. In *Snyder v. Waukesha County Zoning Board of Adjustment*, the Court of Appeals reviewed a decision from the Board of Appeals who denied an area variance for a new deck. The court determined that practical difficulties or hardships do not include conditions personal to the owner, but rather to the conditions especially affecting the lot in question. For similar reasons, the Court in *Block v. Waupaca County Board of Adjustment*, 305 Wis.2d 325 (Ct. App. 2007) concluded that an owner’s desire for an area variance to retain a non-conforming deck was based on a personal inconvenience rather than an unnecessary hardship.

Similarly, for Chase Lumber, the request for an area variance relates more to convenience for the owner rather than an unnecessary hardship. The fact is that the lumber yard has operated at its present location for many years, and the area on which the racks are now installed was used for material storage in the past. But again, it is not clear what restrictions Chase Lumber is seeking a variance for. To the extent that the racks were installed, and it is now a hardship for Chase Lumber to move them, this hardship is self-imposed.

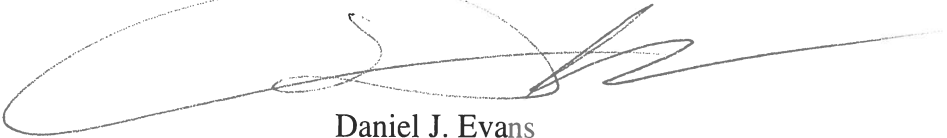
Hypothetically, an area variance, even if granted, would not remedy the “use” problem in that the racks are a physical extension of a legal nonconforming use. One legal treatise on zoning provides that a variance to allow extension of a nonconforming use has been treated as a use variance. Kenneth H. Young, 3 *Anderson's Law of Zoning* § 20.06 (4th ed.1996), cited by *State v. Outagamie Cnty. Bd. of Adjustment*, 2001 WI 78. Chase Lumber seems to be seeking the benefits of rezoning or a use variance, rather than an area variance, but again Chase Lumber has not applied for a use variance.

Conclusion

In summary, I concur with your determination that the racks installed at the Property are an extension of a legal nonconforming use, and the racks should be removed from the Property. Regarding the request for the area variance, to the extent that the racks are a hardship for Chase Lumber to move, this hardship is self-imposed. Based on the information submitted by Chase Lumber, there is no basis to grant an area variance.

I conclude by reiterating that the BZA will have to make its own determination on these matters, but in my opinion you are correct in your interpretation and application of the Zoning Code to the questions presented by Chase Lumber’s new racks.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel J. Evans", with a long horizontal flourish extending to the right.

Daniel J. Evans

2022 Aerial






VILLAGE OF
McFarland
SUMMARY SHEET

MEETING DATE: Wednesday, November 8, 2023

SECTION: Business

DEPARTMENT: Community Development

CONTACT: Andrew Bremer, Comm & Eco Dev Director

AGENDA ITEM: Discussion and action on an Administrative Appeal filed by Chase Lumber concerning an order to remove several exterior shelving structures located at 5417 Long Street, McFarland, WI as an illegal expansion of a nonconforming use in the C-C Central Commercial zoning district.

PREVIOUS ACTION:

ISSUE SUMMARY:

Background regarding this agenda item, including applicable attachments, is provided under Agenda Item 5.a.

FINANCIAL/BUDGET IMPACT:

VILLAGE PLAN REFERENCE:

ORDINANCE REFERENCE:

BOARD, COMMISSION OR COMMITTEE RECOMMENDATION:

Staff recommended motion:

Motion, second, to deny the Administrative Appeal Application as submitted.

For those reasons stated in the August 1, 2023 Zoning Administrator letter and the October 30, 2023 Attorney Evans letter, the Zoning Administrator recommends denial of the Administrative Appeal Application. In summary, specific justification for the denial of the Administrative Appeal includes:

1. The shelving racks are clearly structures under the Zoning Code definition, did not exist prior to their installation in July of 2023, and present an identifiable illegal expansion of a legal non-conforming use as Lumber Retailing Yards are neither a permitted or conditional use within the C-C Central Commercial zoning district.
2. The Village Zoning Code does not contemplate the provision of new structures and buildings being constructed furthering a legal nonconforming use, as new structures are inconsistent with the restriction on repairs and alterations to the existing structures, and the intent that the nonconforming use will be phased out over time.
3. Wisconsin Statute 62.23(7)(h) does not expressly allow for the construction of new buildings or structures for the continuation of a legal conforming uses, rather, the law simply permits repairs up to 50% of the assessed value of those buildings and structures



existing at the time the property becomes legal nonconforming under the applicable zoning regulations.

ATTACHMENTS:

None


VILLAGE OF
McFarland
SUMMARY SHEET

MEETING DATE: Wednesday, November 8, 2023

SECTION: Business

DEPARTMENT: Community Development

CONTACT: Andrew Bremer, Comm & Eco Dev Director

AGENDA ITEM: Public Hearing on an Area Variance Application filed by Chase Lumber concerning the placement of several exterior shelving structures located at 5417 Long Street, McFarland, WI. Property zoned C-C Central Commercial zoning district.

PREVIOUS ACTION:

The BZA is scheduled to take action on a separate Administrative Appeal Application for the same storage structures prior to acting on the Area Variance Application.

ISSUE SUMMARY:

On or about April 28, 2023, Bliffert Lumber (Eli Bliffert, Owner) acquired the Chase Lumber business located at 5417 Long Street. Prior to closing on the property, the applicant's title company requested a zoning review letter for the property. The Zoning Administrator provided a letter dated April 17, 2023 (refer to packet), providing notification that Lumber Yards are not a permitted or conditional use in the C-C Central Commercial zoning district and therefore the use of the property was as a legal non-conforming use.

On July 26, 2023, the Zoning Administrator and Building Inspector observed the construction of three blue exterior storage structures on the property without a valid building permit or site design review permit. The Zoning Administrator subsequently provided a letter dated August 1, 2023 (refer to packet), notifying the owner that the three blue exterior storage structures constituted an unlawful expansion of a legal non-conforming use (refer to reference photos in the packet). The letter included the required notice to either remove the structures or file an Administrative Appeal as allowed under Village ordinances. The owner opted to file an Administrative Appeal and the Zoning Administrator allowed the structures to temporarily remain pending the outcome of the Administrative Appeal as allowed under Village ordinances.

This appeal was originally scheduled for the BZA's October 3, 2023 meeting; however, the owner's attorney (Attorney Fleming) requested a postponement of the Administrative Appeal in order to also submit an Area Variance Application and to consider both applications at the same BZA meeting. The Zoning Administrator agreed to the postponement.

The packet includes the Area Variance Application provided by Attorney Fleming, including responses to the standards under Sec. 62-366(e). The packet also includes a memorandum from Attorney Fleming supplementing the Area Variance Application. Noting, Attorney Fleming's memorandum includes information intended to supplement both the Administrative Appeal Application (Agenda Item 5.a. and 6.a.) and the Area Variance Application (Agenda Item 7.a.



and 8.a.), if the BZA determines the storage racks are an unlawful expansion of a nonconforming use.

It should be noted that neither the Area Variance Application or Attorney Fleming's memorandum state what bulk requirement of the Zoning Code (e.g. lot size, minimum setbacks, maximum height, etc.) the applicant is seeking relief from. The owner is presently using the property for an allowed use (as a legal nonconforming use as a lumber yard). An area variance does not address the underlying problem with the expansion of a legal nonconforming use.

Chase Lumber seems to be seeking the benefits of rezoning or a use variance incorrectly through an area variance.

The application submitted by Attorney Fleming includes statements of support regarding granting the Area Variance in order to *"allow for more organized, neat and easily accessible storage in places where product has already been historically places."* Attorney Fleming also notes that *"stacking product on the ground rather than using storage racks, results in less tidy appearance and more difficult access to product."* In the Zoning Administrator's opinion, allowing for more organized, neat and easily accessible storage is not sufficient reasons to grant the expansion of a legal nonconforming use. Aesthetics are subjective and in this case, expanding the use of the property to include tall storage structures increases the visibility of these materials from public view, which in-turn reduces the aesthetic quality of the property.

Staff also notes that the packaging materials are often left loose and blowing in the wind which has a negative noise and visual impact on the neighborhood and larger public interest. In addition, the applicant has failed to demonstrate why having organized, neat, and easily accessible storage couldn't be better addressed by moving the materials within any of the many existing storage buildings on the property. The Village does not outright ban the alternation of existing structures to improve accessibility, although Village Zoning regulations and Wisconsin Statute 62.23(7)(h) limits the repairs and alterations of existing buildings and structures for a nonconforming use at 50% of assessed value. Case in point, in August of 2023, the Building Inspector approved a building permit to replace an existing 10' wide overhead door with an 18' wide double sliding door to an existing storage building on the property. This accessibility alternation to an existing building was permitted within the 50% limits of assessed value provided under Village Zoning ordinance and State Statutes.

Attorney Fleming states that *"the owner has done nothing to create these circumstances."* On the contrary, the owner's illegal installation of the storage racks is self-imposed. Attorney Fleming states that *"use of the property is unique". No other property relies on outdoor storage of product in the same manner and operates as a legal nonconforming use."* The fact that Chase Lumber is a legal nonconforming use is not justification to meet the intent of the "uniqueness standard" as the prohibition on expansion of legal nonconforming uses under Village ordinance and State Statute does not contemplate the provision of new structures and buildings.

The packet also includes a letter from Village Attorney Evans addressed to the Zoning Administrator dated October 30, 2023. Attorney Evans reviewed the Area Variance Application, and Attorney Fleming's memorandum, and provided an opinion in support of the Zoning Administrator's recommendation to deny the Area Variance Application.



For those reasons stated in the August 1, 2023 Zoning Administrator letter and the October 30, 2023 Attorney Evans letter, the Zoning Administrator recommends denial of the Area Variance Application.

FINANCIAL/BUDGET IMPACT:

VILLAGE PLAN REFERENCE:

The property is identified within the Downtown Future Land Use category on Map 6 of the Village's Comprehensive Plan.

ORDINANCE REFERENCE:

Sec. 62-4 Definitions

Sec. 62-71 Permitted or Conditional Uses - Commercial Districts

Sec. 62-72 Bulk Standards - Commercial Districts

Sec. 62-227 Accessory Uses, Buildings or Structures

Division 62-II-2, Subdivision III, Nonconforming Buildings, Structures and Uses

Division 62-II-5 Appeals

BOARD, COMMISSION OR COMMITTEE RECOMMENDATION:

This agenda item is presented for discussion only.

ATTACHMENTS:

1. 5417 Long Street_BZA Area Variance App_10.11.2023
2. 5417 Long Street_Att Evans Ltr_10.30.2023

- 1) **Prior Appeals/Variations.** Has there been a past appeal or application with respect to this property? Yes No (If yes, provide a summary of the previous appeal below.)

There is a pending appeal to be heard along with this variance request.

Disposition of previous appeal: N/A

Date of decision in previous case: N/A

How does this appeal differ from the previous request?

This variance request is to be considered as an alternative to the appeal.

- 2) **Stating the purpose and grounds of your appeal.**

Check the box (A, B or C) which best meets the relief request of your appeal then answer only those questions within that section. You may include an attached sheet with your response if there is not enough space.

(A) Administrative Appeal.

This request is for a review of zoning ordinance and/or petition of order, requirement, decision, or determination of administrative official. Please include any additional documentation, letters or forms you received which is associated with this appeal. Use the lines provided below stating the reasons why you claim this order, requirement, decision, or determination is erroneous.

1) Date of notice of such decision received by applicant: _____

2) In the lines below, provide a summary of the order of administrative official from which appeal was taken:

3) In the lines below, provide reasoning why the requirement, decision, or determination is erroneous.

(B) Use Variance

Any use variance granted shall be limited to the specific use described in the BZA decision and shall not permit variances in yard, area, or other requirements of the districts in which located.

- 1) Is this property located in a designated Floodplain or Wetland and Conservancy District? Yes No

- 2) Has the applicant previously applied for a zoning amendment or a conditional use permit? Yes No
(If yes, provide the following information in the lines below.)

Date when request was determined: _____

Was this request approved? Yes No

Describe the specific proposed use of the subject property for which a use variance is requested:

- 3) Describe why no lawful and feasible use of the subject property can be made in the absence of such a variance.

(C) Area Variance.

An area variance is a request for a modification(s) to a dimensional, physical, or locational requirement such as setback, frontage, height, bulk, or density restriction for a structure.

Describe the area variance you are requesting, including the specific section(s) of the Zoning Code:

If the lumber racks put in use for the property are considered unlawful nonconforming structures, we ask that they be allowed by variance.

Sec. 62-366(e) Standards for Granting a Variance. In the lines below, answer each question thoroughly for each item listed. For the Board- of Zoning Appeals to grant a variance, it must find that all conditions are met.

1. Unnecessary Hardship.

- a. The Purpose of the Zoning Restriction in Question. The Board of Zoning Appeals shall determine whether the particular restriction in question is unnecessarily burdensome in light of the underlying purpose of that restriction. The purpose of the regulation shall be the primary concern, not the burden upon the property owner. The granting of the variance should not be so general or recurrent in nature as to suggest the Zoning Code should be changed. Describe why granting of the variance will not undermine the general intent and purposes of the Zoning Code and the specific purpose of the regulation in question?

The property operates as a legal nonconforming use. The lumber racks at issue merely allow for more organized, neat and easily accessible storage in places where product has already been historically places.
The racks do not expand a legal nonconforming use.

- b. The Effect of the Restriction on the Property. An unnecessary hardship exists where compliance with the strict letter of the restrictions governing the property would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. Describe the effect of the zoning restriction on your property and how this impacts the reasonable use of your property or would render conformity unnecessarily burdensome?

No discernible adverse impact is created nor is any legal nonconformity expanded. In turn, stacking product on the ground rather than using storage racks, results in less tidy appearance and more difficult access to product.

- c. The Effect of a Variance on the Neighborhood and Larger Public Interest. Describe why granting of the variance will not be detrimental to the public welfare or injurious to the other property or improvements in the neighborhood in which the property is located.

See above.

2. **Hardship May Not Be Self-Imposed.** Variances may not be granted to remedy self-imposed hardships. Describe why you feel the hardship is not self-imposed?

The owner has done nothing to create these circumstances.

3. **Hardship Must Be Unique To The Property.** Where the same hardship is imposed upon other properties in the zoning district, a variance shall not be granted. 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. The conditions upon which a petition for a variance are unique to the property for which the variance is being sought and that such a variance is necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same district and vicinity. Describe the circumstances that exist which make this issue unique to the property?

The use of the property is unique. No other property relies on outdoor storage of product in the same manner and operates as a legal nonconforming use.

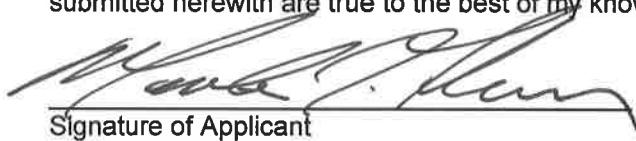
4. **Purpose Must Not Be Financially Motivated.** Describe why the purpose of the variance is not based exclusively upon a desire to increase the value or income potential of the property?

The motivation is to improve aesthetics and access to product already stored outdoors.

- 3) **Site Inspection.** Do you grant permission for the Board of Zoning Appeals and staff, either individually or as a group, to enter onto the subject property for a site inspection?
 Yes No
- 4) **Site Plan.** Per Sec. 62-363(c) of the Municipal Code of Ordinance, each application for appeal must be accompanied by a scale drawing showing the location and size of property, existing improvements, all abutting properties, and improvements thereon and the requested change or addition.

DISCLAIMER

I hereby swear that all of the above statements and the statements contained in any papers or plans submitted herewith are true to the best of my knowledge and belief.



Signature of Applicant

10/11/23

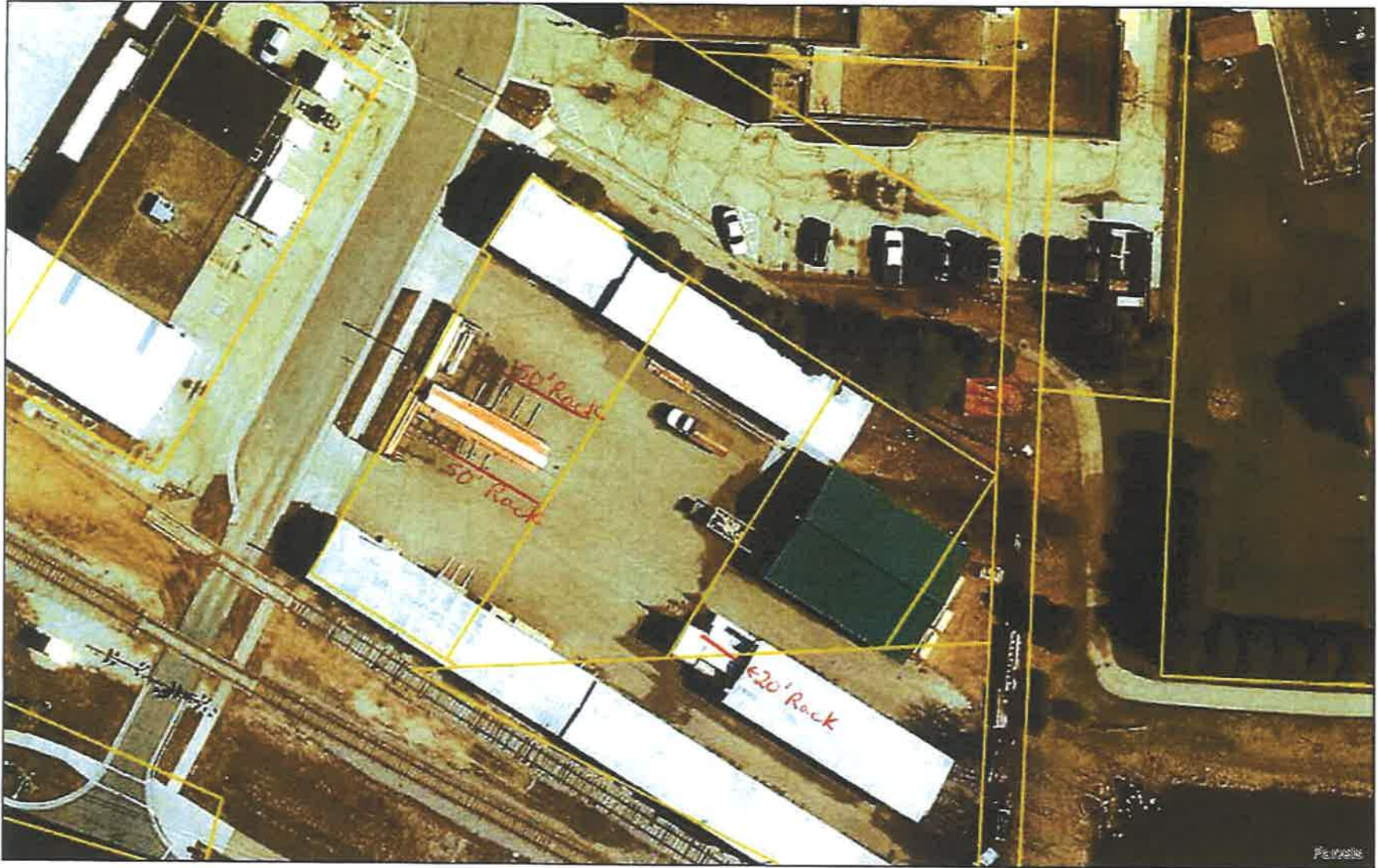
Date

Bliffert Application Parcel Numbers

154/0610-031-6801-9
154/0610-031-6812-6
154/0610-031-6823-3
154/0610-031-6834-0
154-0610-031-6351-9
154-0610-031-6862-6
154/0610-031-6873-3
154/0610-034-0287-2

4874-3051-2518, v. 1

Dane County Map



August 16, 2023

 Parcels



Memorandum



To: Village of McFarland Board of
Zoning Appeals; c/o Andrew Bremer, Director
Community & Economic Development

From: Matthew J. Fleming

Re: Bliffert Appeal and Variance

Date: 12 October 2023

Bliffert Lumber operates the lumber yard business commonly and historically known as Chase Lumber that straddles Milwaukee Street between Long Street and the railroad tracks. Zoned C-C Central Commercial, the business operates as a pre-existing legal nonconforming use.

Bliffert seeks to retain the use of three lumber storage racks it has placed on its property in order to more neatly, safely and conveniently store product in locations where such storage has historically occurred. These storage racks are not structures as defined by Village ordinances, nor do they represent an expansion of a legal nonconforming use. Accordingly, the Zoning Administrator's determination to treat them as construction of new, unlawful nonconforming structures was in error.

Alternatively, if the Board determines that the Zoning Administrator's determination was correct, a variance should be issued. It is an unnecessary hardship to prohibit the use of these racks. The racks provide a material benefit to the ongoing legal nonconforming use in terms of aesthetics, safety and convenience while at the same time does not impact any of the concerns underlying the rule against erection of new structures to serve a nonconforming use.

I. The Storage Racks Do Not Violate Village Ordinances.

The foundation of the Zoning Administrator's determination is that the storage racks constitute "structures" under the Zoning Code. The term "structure" is defined under Section 64-4(144) as follows:

(144) Structure. Anything constructed or erected, the use of which requires a permanent location on the ground or attached to something having a permanent location on the ground.

The storage racks at issue do not require a permanent location on the ground. Nor are they attached to anything having a permanent location. The storage racks are movable and can be placed in a number of configurations on the property. They happen to be placed in the areas where lumber has historically been stored as placed directly on the ground and where it is most convenient for the operation of the business, but they are in no sense "permanent" as, say, a building, or the canopy structure that sits on the easternmost parcel.

Nor does use of these racks represent an expansion of a legal non-conforming use. First, the racks are being used in areas that have historically been used for product storage. No new activity is occurring as a result of the racks. Rather, it is the same activity that is merely occurring in a more attractive, safe, and convenient manner.

Moreover, it is well established that a mere increase in volume or intensity of a use does not constitute an unlawful expansion of a legal nonconforming use. *Waukesha Cty. v. Seitz*, 140 Wis. 2d 111, 121, 409 N.W.2d 403, 408 (Ct. App. 1987). In *Seitz*, Seitz had historically run a lake resort and marina with cottage rentals, boat livery, and sale of fuel, bait and minor motor repair. Over the years:

Seitz's dry-docking facility has expanded from three to five boats in 1969 to the current level of fifty-four boats. In 1980, Seitz expanded his pier from the 1969 length of 80 feet to 120 feet. In 1981, Seitz again extended his pier to the current length of 192 feet. Today, Seitz is able to wet-dock up to thirty-five boats. In 1985, Seitz changed the name of the business to "Pewaukee Marina."

Id. at 114.

Despite these substantial physical changes to the business, the court held that this was not an unlawful expansion of a nonconforming use. Only where an increase in volume, intensity or frequency of use is coupled with some element of identifiable change or extension, will an enlargement invalidate a legal nonconforming use. *Id.* at 117. These increases were simply a change in the volume, intensity or frequency of the nonconforming use that already existed. *Id.* at 121. As restated in *Waukesha Cty. v. Pewaukee Marina*, 187 Wis. 2d 18, 27, 522 N.W.2d 536, 540 (Ct. App. 1994) (Seitz II):

We conclude that the correct reading of *Seitz I* is this: if there is an identifiable change in the use, the enlargement is illegal. If the expansion is a result of a mere increase in the historically allowed use, the enlargement or expansion will be allowed subject to regulatory markers.

Here, the nonconforming use is as a lumber yard. Using racks to store lumber is not an identifiable change in the use. It is, at most, "a mere increase in the historically allowed use." We believe, however, that the racks even fall short of that standard because the storage that the racks facilitate has been occurring anyway. This is but a change in the manor of conducting that same storage – a change that does not alter the fundamental underlying use and does nothing to extend the life of that use.

II. If the Racks are Unlawful Nonconforming Structures, a Variance is Warranted.

Variations, broadly speaking, come in two varieties, use variations and area variations.

A use variance is one that permits a use other than that prescribed by the zoning ordinance in a particular district. An area variance has no relationship to a change of use. It is primarily a grant to erect, alter, or use a structure for a permitted use in a manner other than that prescribed by the restrictions of a zoning ordinance.

State ex rel. Ziervogel v. Wash. Cty. Bd. of Adjustment, 2004 WI 23, ¶21, 269 Wis. 2d 549, 676 N.W.2d 401, citing 3 Yokley, supra § 20-3, at 20-8-9; see also 3 Ziegler, supra, 58.4.

The application before the Board does not seek to change the use of the property. The existing use as a lumber yard is permitted as a legal nonconforming use and will not change. Rather, the variance is sought to be able to use the subject lumber racks pursuant to the existing legal nonconforming use. Accordingly, the request is for an area variance.

When considering an area variance, the question of whether unnecessary hardship exists is best explained as ‘[w]hether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.’ ” *Ziervogel*, at ¶7, quoting *Snyder*, 74 Wis.2d at 475, 247 N.W.2d 98. When deciding whether this standard is met the Board is required to consider “the purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and the larger public interest.”

Case law is clear, that unnecessary hardship must be determined with reference to the purpose of the ordinance. *Ziervogel*, at ¶7. The threshold question is not whether a hardship is so significant that it deserves to be remedied. Rather, the question is whether any identified hardship is “unreasonable” or “unnecessary” in light of “the purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and the larger public interest.” *Ziervogel*, at ¶7. “By definition, all variations depart from the purpose of the zoning ordinance and implicate the public interest, because they permit something that is otherwise strictly prohibited. But they do so to varying degrees and levels of acceptability, depending on the type of variance requested and the nature of the zoning restriction in question.” *Ziervogel*, at ¶21.

Thus, if a hardship is severe and the impact on the purpose of a regulation is relatively minor, the variance may be appropriate. Where the impact of a variance on the purpose of a regulation is material, it is possible that no degree of hardship may be sufficient as to be

considered “unnecessary.” Similarly, where little to no adverse impact on the purpose of an ordinance would be experienced, a relatively minor hardship may justify a variance.

In this case, while the hardship imposed by being prohibited from using the racks, while far from existential for the business, it is not immaterial. The racks allow for storage of product that is neater in appearance than simply stacking, safer for employees and customers, and also provides more convenient access to the product. Their use is common for a lumber yard.

The main purpose of the restriction as we understand it is to serve the general policy against extending the life of a legal nonconforming use. Legal nonconforming uses are not intended to exist indefinitely. These racks, however, do not contribute to the longevity of this lumber yard use at this location. The condition and utility of the property as a whole and the buildings and other structures on the property in conjunction with market conditions are going to determine how long this property will continue in its current use. These racks will have no effect on these considerations. While the racks may contribute to marginal efficiency, any such effect is miniscule compared to these other factors.

Nor will use of these racks create any adverse effects on neighboring property. The racks do not significantly change the appearance of the property and, to the extent they do, they create a more orderly appearance. They are largely viewable, however, only from the street. No other neighboring property or use occurring on neighboring property has any significant view into the area where the racks are used.

CONCLUSION

The subject storage racks are neither a structure, nor do they constitute an expansion of a legal nonconforming use. Rather they represent a minor increase in the historically allowed use – a different approach to outdoor lumber storage consistent with the existing legal nonconforming use.

Alternatively, a variance is appropriate. The racks are typical of a lumber yard use and allows for a neater, safer and more convenient way to store product. Balanced against the hardship of being unable to use them is the non-existent impact on the purpose of any regulation preventing them. They will not contribute to the extended life of the lumber yard use and will not impact neighboring property in any conceivably material way. The hardship imposed is truly unnecessary.

Thank you for your consideration.

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October 30, 2023

Andrew Bremer, AICP
Community & Economic Development Director
Village of McFarland
5915 Milwaukee Street
P.O. Box 110
McFarland, WI 53558

Re: Chase Lumber Appeal to BZA and Variance Request

Dear Mr. Bremer:

Per your request, I have analyzed whether the new outdoor racks at the Chase Lumber property in the Village are an extension of a legal nonconforming use. In addition, since Chase Lumber has appealed your decision on this issue, and has requested an area variance as alternative relief, I address its request for a variance and some general points on the administrative appeal process. My role in this matter is in advisory capacity for Village staff, and not as legal counsel for the Board of Zoning Appeals (BZA). In administrative appeals, the BZA acts independently from Village staff in a quasi-judicial capacity.

I. Background

On or about July 26, 2023, Chase Lumber installed three storage racks at its property by Milwaukee Street and Long Street (the Property). The Property is located in the Village's C-C Central Commercial District. Although lumber yards are not a permitted or conditional use in the C-C Central Commercial District, Chase Lumber's operations are allowed to continue as a legal nonconforming use.

Two of the new racks are approximately 50' in length, and the third rack is 20' in length. As I understand, the racks are approximately 20-30' feet in height, and carry four storage racks per side of each rack unit (8 racks per unit). The racks are located outdoors. I understand that prior to the installation of these racks, this area on which the racks are located may have been used to store lumber and/or other building materials from time to time, but storage was made directly on the ground and in a smaller volume than the capacity provided by the new racks.

Two of the new racks appear as shown in photograph directly below, while the same location, prior to the installation of the racks, is shown in the subsequent photograph.



I address two main items; first, whether the new racks constitute an unlawful expansion of a legal nonconforming use at the Property, and second, whether an area variance would provide a remedy allowing for the racks to remain on the Property. For the reasons I explain below, I agree with your analysis that the new racks are an unlawful physical extension of a legal nonconforming use. With respect to the application of an area variance, it is likely that Chase Lumber created any hardship on which it now bases its request for an area variance, and there does not appear to be a valid basis to grant an area variance.

Because Chase Lumber is also appealing your decision to the BZA, I also briefly address the procedure in that appeal, as well as Chase Lumber's memorandum, particularly its position that the racks are not "structures" under the Zoning Code.

I am not addressing any Site Design Review, and the lack of the applicant seeking a building permit prior to installing the racks at the Property. I mention this because a building permit is required for new structures, and for commercially zoned properties, a Site Design Review is required as part of the permitting process. That review process considers, among other things, the underlying zoning restrictions of the subject property. With respect to Chase Lumber's appeal of the Zoning Administrator's decision, its appeal is focused on whether the installation of the outdoor racks is an unlawful expansion of a legal nonconforming use, but the fact remains that no building permit has been applied for or issued for the new racks, nor has a review of the site plan been completed. The underlying site plan, and the related zoning review, would have been completed had Chase Lumber applied for a building permit prior to the installation of the new racks.

II. Appeal Process. An applicant appealing a decision by the zoning administrator has the burden of proof to demonstrate that the administrative decision is incorrect or unreasonable. In essence, an appeal from the zoning administrator involves the interpretation of the zoning code. When making its decision, the BZA has all the powers of the person making the administrative decision, and the Board may reverse, confirm, or modify the decision appealed. The UW Extension Zoning Board Handbook is an excellent resource for the BZA on the appeal process.¹

Consistent with that guidance, the BZA should initially determine whether the relevant zoning code provisions are ambiguous. If the BZA determines the applicable zoning provisions are ambiguous, then it will determine the meaning of the terms. In most cases, the meaning of an ordinance can be determined by the literal reading of the text, and so therefore are not ambiguous. Consistent with the Handbook, the following steps may be used in this process:

1. *Apply a plain meaning rule to interpreting the zoning code.* This generally means that you follow the definition provided in the code, or if no definition is given, the dictionary meaning of the words. Technical words should be used in their technical sense.
2. *Harmonizing.* If terms are ambiguous, they must be interpreted to give effect to the primary legislative purpose of the ordinance.
3. *Addressing conflicting provisions.* When two provisions conflict, they should be interpreted to give effect to the primary legislative intent of the ordinance, to the extent reasonable.
4. *Avoid surplus language.* Ordinances should be interpreted to give effect to every provision. Interpretations that render part of an ordinance meaningless should be avoided when possible.

¹ A PDF version of the manual may be found at <https://www3.uwsp.edu/cnr-ap/clue/Pages/publications-resources/Zoning.aspx> . Administrative appeals are addressed in Chapter 13 of the manual.

5. *Policy history.* Members of the BZA should consider interpretations made by staff, counsel and the parties to a proceeding, but should remember that the Board is primarily responsible for interpreting the meaning of the Zoning Code. The Handbook provides “The potential interests and motives of those presenting testimony in an appeal should be examined to establish the relative merit of their testimony.”

Once the meaning of the applicable zoning code provisions are determined, the BZA will consider the underlying facts, and in this case whether the new racks are an unlawful extension of an otherwise legal nonconforming use. Although I address relevant criteria in considering the new racks as an expansion of a legal nonconforming use, the Board will make its own determination on this appeal. Because the decision by the BZA can be appealed, it is generally good practice to keep an accurate record of the appeal hearing.

III. Definition of Structure. Chase Lumber contends that the racks are not “structures” under the Zoning Code. In my opinion, whether the racks are “structures” under this definition is not very relevant as to whether the racks are an unlawful expansion of a legal nonconforming use, as an unlawful expansion of a legal nonconforming use can occur with temporary structures as well as permanent ones, and even without new structures, though in this case we are addressing the racks as structures.

“Structure” is defined in the Zoning Code as:

Anything constructed or erected, the use of which requires a permanent location on the ground or attached to something having a permanent location on the ground.

As stated above, when reading ordinances and statutes, courts have directed that if the language of an ordinance or statute is plain, we give the language its “common, ordinary and accepted meaning.” *State ex. Rel Kalal v. Circuit Court for Dane County, 2004 WI 58.* A dictionary may be used to guide the common, ordinary meaning of words. As to the how “structure” is defined in the Zoning Code, nothing in the wording of the definition is unusual or confusing.

The racks are clearly “structures” under the Zoning Code definition. The racks are constructed/erected at the Chase Property. The racks are stationary and have a permanent location on the ground when used as racks. Given the large size of the racks, it is hard to imagine how the racks could not be considered structures. Even if the racks could be dismantled and moved to another location of the Property, this would not change the fact that the racks require a fixed location on the ground when used, and, importantly, are clearly intended by Chase Lumber to have a permanent/fixed location at the Property for the purpose of storing a higher volume of lumber than was previously stored, and to make access easier to this material. The racks are clearly not buildings, which are defined in the Code as “enclosed” structures permanently affixed to a property.

I note that temporary structures are also defined under the zoning code, to include movable structures not designed for human occupancy or the protection of goods. The racks, as constructed, do not appear moveable, and are used in part for the protection of lumber, and therefore would not come under the definition of “temporary structure.” However, for purposes of argument, even if the racks were considered temporary structures, Chase Lumber is still unlawfully expanding the legal nonconforming use by having and using the new racks at the Property, temporary or otherwise. One can unlawfully expand a legal nonconforming use with temporary structures as well as permanent ones.

Another general rule when interpreting statutes and ordinances is that the language is interpreted in the context in which it is used; not in isolation but as part of a whole, in relation to the language of the surrounding statutes and ordinances. Ordinances are also read reasonably to avoid absurd results. *See State ex. Rel Kalal*. Applying this rule Zoning Code, we interpret these definitions in the context of how used in the Zoning Code. It is no surprise that the clear intent under *Subdivision III Nonconforming Buildings, Structures and Uses* of the Zoning Code that nonconforming uses be phased out over time. It would be an absurd reading of the ordinance to allow for nonconforming uses to be expanded by “non-structures” or some other construct that would not come under the definition of “building” or “structure” because this is contrary to the intent to phase out the nonconforming use over time.

IV. Legal Nonconforming Uses

A legal nonconforming use is a use in which an owner may continue to use a property that is otherwise not permitted under applicable zoning regulations. Land use qualifies as nonconforming if there is active and actual use of the land that existed prior to commencement of the zoning ordinance and that use has continued to the present. However, the spirit of zoning is to restrict and eventually eliminate a nonconforming use.

Wisconsin’s zoning laws provides in part that, with respect to nonconforming uses:

The continued lawful use of a building, premises, structure or fixture *existing* at the time of the adoption of amendment of a zoning ordinance may not be prohibited although the use does not conform with the provisions of the ordinance. The nonconforming use may not be extended. The total structural repairs or alterations in such a nonconforming building, premises, structure, or fixture shall not during its life exceed 50 percent of the assessed value of the building, premises, structure, or fixture unless permanently changed to a conforming use.

Wis. Stat. § 62.23(7)(h) (emphasis added).

The status of a legal nonconforming use in essence “grandfathers” certain uses incompatible with subsequently enacted zoning regulations. The Village Zoning Code similarly provides that, under 62-150, any lawfully existing building, structure or use which does not conform to the regulations of the district in which it is located may be continued subject to certain

restrictions. The zoning code does not contemplate the provision of new structures and buildings being constructed furthering a legal nonconforming use, as new structures are inconsistent with the restriction on repairs and alterations to the existing structures, and the intent that the nonconforming use will be phased out over time.

Generally, nonconforming uses are limited and are not to be enlarged in derogation of the present zoning restrictions. See *Waukesha County v. Pewaukee Marina, Inc.*, 187 Wis. 2d 18 (Ct. App. 1994). Enlarging or extending a legal nonconforming use is not permitted. The Wisconsin Court of Appeals succinctly summarized this point:

While a mere increase in the volume, intensity or frequency of a nonconforming use is not sufficient to invalidate it, if the increase in volume, intensity or frequency of use is coupled with some element of identifiable change or extension, the enlargement will invalidate a legal nonconforming use.

Lessard v. Burnett Cnty. Bd. of Adjustment, 2002 WI App 186, ¶ 24.

An increase in frequency or volume based on, for example, a higher demand of a service or product by customers, would likely not be viewed as an unlawful extension of a legal nonconforming use. However, an enlargement or extension of the use based on some "identifiable" change or extension is not permitted. For example, in *Waukesha County v. Pewaukee Marina, Inc.*, the extension of a docking facility to include a retail store was something more than the increase in historically allowed use of the marina, and was not allowed.

I note that some property owners attempt to rely on the holding of *Waukesha v. Seitz*, 140 Wis. 2d 111(1987), as allowing for physical extensions of a nonconforming use. The *Seitz* case involved the expansion of a marina to include new docks. The Court found that the added docks were, based on the evidence presented, not an unlawful extension of a legal nonconforming use. The Court qualified its decision though based on the poor record and evidence presented in the case:

We note, however, that whether this type of structural expansion invalidates a nonconforming use is expressly controlled by statute and ordinance, neither of which was alleged or proven in this case. . . . The record is devoid of any allegation or evidence indicating that *Seitz's* pier expansion has somehow violated these legislative markers.

Seitz at 119-121.

A subsequent court holding noted that *Seitz* did not directly address the issue whether a physical enlargement of a nonconforming use invalidates it; that issue is controlled by ordinance and statute, which was not an issue before the court in *Seitz*.

A close reading of *Seitz* reveals, however, that it did not directly address the issue whether a physical extension or physical enlargement of a nonconforming use invalidates it. . . . Therefore we do not read *Seitz* as protecting the physical extension of a nonconforming use. A later case that refers to “expansion of a legal nonconforming use” refers to increase volume and frequency. *Racine County v. Cape*, 2002 WI App 19.

Lessard v. Burnett Cnty. Bd. of Adjustment, 2002 WI App 186.

V. The New Outdoor Racks

Applying the law to the new outdoor racks installed by Chase Lumber at the Property, I agree with your determination that the new racks are an unlawful extension of an otherwise legal nonconforming use. The racks are new structures designed to hold significantly more volume than what was previously stored outside at the Property at this same location. The racks constitute a physical extension and enlargement of the legal nonconforming use by being new, relatively large structures, increasing the storage and material capacity on the Property. Following the guidance in the *Lessard* case referenced above, the new racks are an identifiable change to the Property. For clarity’s sake, I want to distinguish that an increase in lumber and other building product being stored on the Property based on an increase in demand is probably not be an unlawful extension of the nonconforming use. But here there is an “element of identifiable change or extension”, namely the installation of the new outdoor racks on the Property.

Wisconsin Statute § 62.23(7)(h), limits the repairs and alterations of existing buildings and structures for a nonconforming use at 50% of assessed value. That monetary limitation on repairs would have significantly less meaning if a property owner could simply install new structures for purposes of continuing a legal nonconforming use. As Wisconsin Courts have stated, “*the spirit of zoning is to restrict a nonconforming use and to eliminate such use as quickly as possible.*” *City of Lake Geneva v. Smuda*, 75 Wis.2d 532 (1977). New structures, like the outdoor racks installed at the Property, are simply not contemplated as a reasonable continuation of a legal nonconforming use.

In summary, the new racks are likely in violation of the following:

1. The requirement that a building permit be issued, which requires a Site Design Review.
2. Village Ordinance 62-311, which prohibits the unlawful improvement or use of land in violation of the Zoning Code. Again, lumber yards are not listed as permitted or conditional uses in the Central Commercial Zoning District. The exception for nonconforming uses is limited to existing buildings and structures under the provisions of 62-150.
3. Wisconsin Statute § 62.23(7)(h), which does not expressly allow for the construction of new buildings or structures for the continuation of a legal nonconforming use, rather,

the law simply permits repairs up to 50% of the assessed value of those buildings and structures existing at the time the property becomes legal nonconforming under the applicable zoning regulations.

At some past point its operations as a lumber yard became nonconforming to the current C-C Commercial Central District. Per Wis. Stat. § 62.23(7)(h), Chase Lumber can continue to operate its lumber yard with the then existing buildings and structures, though the repairs and alterations are limited up to 50% of the assessed value of the buildings and structures. Nowhere does Wis. Stat. § 62.23(7)(h) provide authority for an owner to construct “new” buildings and structures, and that same law clearly provides that “[T]he nonconforming use may not be extended. The new outdoor storage racks are not a “repair” or “alteration” of a structure that existed at the time the lumber yard became a legal nonconforming use.

VI. Request for Variance

As alternative relief to its appeal of the zoning administrator’s decision, Chase Lumber is requesting it be granted an area variance. An area variance is described under Wisconsin Law as “a modification to a dimensional, physical, or locational requirement such as a setback, frontage, height, bulk or density restriction for a structure that is granted by the board of appeals.” See Wis. Stat. § 62.23(7)(e)7.a. To compare, a “use variance” means an authorization by the board of appeals for a purpose that is otherwise not allowed or is prohibited by the applicable zoning ordinance. *Id.* Chase Lumber has requested only an area variance. (I would note that an application for a “use variance” requires the applicant to initially request a zoning code change, but that is not an issue for the current application).

The McFarland Zoning Code provides a process in which variance requests are considered by the BZA. When considering an application for an area variance, the Board will consider the applicable Zoning Code provisions and the following:

1. Is there an unnecessary hardship, that is, will compliance with the ordinance unreasonably prevent the owner from using the property for a permitted purpose? Wis. Stat. § 62.23(7)(e)7.d. provides that a property owner bears the burden of proving “unnecessary hardship.”
2. Are there unique physical limitations of the property, such as steep slopes or wetlands, that prevent compliance with the ordinance?
3. Is there a harm to the public interest in granting the variance? Pursuant to the Zoning Board Handbook previously referenced, examples of public interests in considering a variance application can include the goal of maintaining public health and safety, as well as requiring eventual compliance for nonconforming uses.

I address item 1., unnecessary hardship further below, but for item 2., there does not appear to be any allegation that physical limitations of the Property prevent compliance with the Zoning Code. As to item 3., the harm to the public interest is clear, given the matter involves a legal nonconforming use, and the public interest in phasing out the legal nonconforming uses. A

variance under these circumstances could reasonably be viewed as inconsistent with that public interest.

As to whether there is an unnecessary hardship, an unnecessary hardship exists where compliance with the strict letter of the restrictions would be unnecessarily burdensome. When considering any variance, the BZA is to determine whether the particular restriction in question is unnecessarily burdensome in light of the underlying purpose of that restriction. Further, variances may not be granted to remedy self-imposed hardships. The question of whether unnecessary hardship exists is best explained as whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, and bulk of density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. *Snyder v. Waukesha County Zoning Board of Adjustment*, 74 Wis. 2d 468, 475 (1976).

From the application, it is not clear for what bulk restrictions Chase Lumber is seeking a variance. The owner is presently using the property for an allowed use (as a legal nonconforming use as a lumber yard). An area variance does not address the underlying problem with the extension of a legal nonconforming use.

For arguments sake, even if Chase Lumber faced an unnecessary hardship based on bulk standard, setbacks or similar requirements, an “unnecessary hardship” cannot be self-imposed. In *Snyder v. Waukesha County Zoning Board of Adjustment*, the Court of Appeals reviewed a decision from the Board of Appeals who denied an area variance for a new deck. The court determined that practical difficulties or hardships do not include conditions personal to the owner, but rather to the conditions especially affecting the lot in question. For similar reasons, the Court in *Block v. Waupaca County Board of Adjustment*, 305 Wis.2d 325 (Ct. App. 2007) concluded that an owner’s desire for an area variance to retain a non-conforming deck was based on a personal inconvenience rather than an unnecessary hardship.

Similarly, for Chase Lumber, the request for an area variance relates more to convenience for the owner rather than an unnecessary hardship. The fact is that the lumber yard has operated at its present location for many years, and the area on which the racks are now installed was used for material storage in the past. But again, it is not clear what restrictions Chase Lumber is seeking a variance for. To the extent that the racks were installed, and it is now a hardship for Chase Lumber to move them, this hardship is self-imposed.

Hypothetically, an area variance, even if granted, would not remedy the “use” problem in that the racks are a physical extension of a legal nonconforming use. One legal treatise on zoning provides that a variance to allow extension of a nonconforming use has been treated as a use variance. Kenneth H. Young, 3 *Anderson's Law of Zoning* § 20.06 (4th ed.1996), cited by *State v. Outagamie Cnty. Bd. of Adjustment*, 2001 WI 78. Chase Lumber seems to be seeking the benefits of rezoning or a use variance, rather than an area variance, but again Chase Lumber has not applied for a use variance.

Conclusion

In summary, I concur with your determination that the racks installed at the Property are an extension of a legal nonconforming use, and the racks should be removed from the Property. Regarding the request for the area variance, to the extent that the racks are a hardship for Chase Lumber to move, this hardship is self-imposed. Based on the information submitted by Chase Lumber, there is no basis to grant an area variance.

I conclude by reiterating that the BZA will have to make its own determination on these matters, but in my opinion you are correct in your interpretation and application of the Zoning Code to the questions presented by Chase Lumber’s new racks.

Sincerely,

A handwritten signature in black ink, appearing to read 'Daniel J. Evans', with a long horizontal flourish extending to the right.

Daniel J. Evans


VILLAGE OF
McFarland
SUMMARY SHEET

MEETING DATE: Wednesday, November 8, 2023

SECTION: Business

DEPARTMENT: Community Development

CONTACT: Andrew Bremer, Comm & Eco Dev Director

AGENDA ITEM: Discussion and action on an Area Variance Application filed by Chase Lumber concerning the placement of several exterior shelving structures located at 5417 Long Street, McFarland, WI. Property zoned C-C Central Commercial zoning district.

PREVIOUS ACTION:

ISSUE SUMMARY:

Background regarding this agenda item, including applicable attachments, is provided under Agenda Item 7.a., and Zoning Administrator letter dated August 1, 2023 under Agenda Item 5.a.

FINANCIAL/BUDGET IMPACT:

VILLAGE PLAN REFERENCE:

ORDINANCE REFERENCE:

BOARD, COMMISSION OR COMMITTEE RECOMMENDATION:

Staff recommended motion:

Motion, second, to deny the Area Variance Application as submitted.

For those reasons stated in the August 1, 2023 Zoning Administrator letter and the October 30, 2023 Attorney Evans letter, the Zoning Administrator recommends denial of the Area Variance Application. In summary, specific justification for the denial of the Area Variance Application includes:

1. The shelving racks are clearly structures under the Zoning Code definition, did not exist prior to their installation in July of 2023, and present an identifiable illegal expansion of a legal non-conforming use as Lumber Retailing Yards are neither a permitted or conditional use within the C-C Central Commercial zoning district. It is in the public interest to phase out nonconforming uses rather than allow expansion of nonconforming uses.
2. The Applicant has failed to identify what applicable bulk regulations of the Zoning Code to which the storage structures require an area variance. There does not appear to be any physical limitations of the property to prevent compliance with the Zoning Code or continuation of the use. The Applicant seems to be seeking the benefits of rezoning or a



use variance incorrectly through an area variance application.

3. The hardship is self-imposed and the request is substantially based on convenience for the owner rather than an unnecessary hardship.

ATTACHMENTS:

None