

## **Board of Zoning Appeals**

### **Working Draft Minutes**

**November 8, 2023**

Members Present: Gordon Kinder, John Robertson, Ken Brost, Blake Draper  
Members Absent: Art Luetke, Joe Rademacher (Alternate), Jeff Sorenson (Alternate)

Staff Present: Andrew Bremer, Jim Trebian, Kong Thao

#### **1. CALL TO ORDER**

Kinder called the meeting to order at 5:00 p.m with a quorum of regular members present. No alternate members were in attendance at the meeting. There were no conflicts of interest with the Board members reported.

#### **2. PUBLIC APPEARANCES.**

Attendees in the meeting room did not wish to speak at this time. There were not attendees virtually.

#### **3. APPROVAL OF MINUTES.**

- a. Motion to approve the minutes of the October 3, 2023 Board of Zoning Appeals meeting. Motioned by Robertson and seconded by Brost to approve the October 3, 2023 Board of Zoning Appeals minutes. Motion passes 4-0.

#### **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 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.

Prior to Staff's Summary of the Appeal, Matthew Fleming, Murphy Desmond Lawyers, the attorney representing the Applicant (hereby referred to as Attorney Fleming), requested items 5a. and 7a. from the agenda item be combined to avoid repeated opening statements. Bremer affirmed there could be duplicate testimony, however, recommended maintaining the agenda as presented as they are two separate appeal applications, and each application was noticed as a separate public hearing. Kinder upheld the agenda for the meeting as presented for two separate public hearings. Bremer provided summary on the agenda item indicating with photos, approximate location and dates of the associated outdoor storage structures and order to remove.

Kinder opened the public hearing at 5:11 p.m.

**Applicant Opening Statement.** Attorney Fleming began his opening statement by referencing the Village Code's definition of structure, then stating the racks in question are not a permanent structure on the property and are movable as necessary. Attorney Fleming states the racks do not extend or expand the legal nonconforming use that exists on the property because of the existing use. Attorney Fleming references *Crowley v. Knapp*, 94 Wis. 2d 421 1980, a Supreme court case as a rebuttal to the Village Attorney's letter included in the packet.

**Staff Opening Statement.** Bremer stated the situation arose when Staff and the Building Inspector observed the construction of the structures without a valid building permit or site design review permit. A letter was sent on August 1<sup>st</sup>, 2023 notifying the owner that the structures constituted an unlawful expansion and an illegal expansion of the nonconforming use. Bremer affirms the associated racks fall within the Village's definition for a structure, with the opinion supported by the Village Attorney in his memo. Continuing, Bremer stated the structures do require a permanent location to be used and disassembly and relocation of the structures still maintains a permanent location when used on the property. Bremer references Village Ordinance and State Statutes related to prohibitions on the expansion of legal nonconforming uses and the exception regarding alterations to existing structures within the limits of the 50% assessed value, but not the allowance of new structures that expand a nonconforming use.

**Applicant Case.** Eli Bliffert, Vice President of Bliffert Lumber and Hardware, Owner of Chase Lumber and Fuel spoke for their application. Bliffert recited the oath. Attorney Fleming prompted Bliffert's testimony by asking a series of questions. Attorney Flemming asked Bliffert to state his name and employment. Further Attorney Flemming asked Bliffert about his presence for the meeting and understanding of the opening statements provided. Bliffert stated yes. Attorney Flemming asked what Bliffert's association was with the property and his understanding of the meeting concerning the Administrative Appeal. Bliffert stated they own and operate the lumber yard on the property. Attorney Flemming asked Bliffert to describe the uses regarding the lumber racks. Bliffert confirmed the racks are for the safe storage of lumber material on the property. Attorney Flemming asked to provide detail on the location where the racks were placed, how was the area historically been used, prior to the racks. Bliffert stated that in speaking with current employees at that location, there have been lumber where the racks were for more than 50 years. Attorney Flemming asked if he was present or involved in the construction of the racks. Bliffert affirmed he was present and involved during that process. Attorney Flemming asked if the racks were movable. Bliffert confirmed the racks to be movable and not permanent citing for example that relative to the activity at their location, they are moved according to the season or moved as needed. Attorney Flemming asked why the racks are located where they are currently. Bliffert stated the selected location is because of their convenience and safety to the area based on the activity on the property. Attorney Flemming asked if the racks can be moved and placed in other parts of the property. Bliffert affirmed that the racks are movable, not permanent, and can be moved every week

if desired. Attorney Flemming asked if the racks are commonly used among other lumber yard industries. Bliffert confirmed they are the most common racks used, and Bliffert uses them among his other 11 sites.

Zoning Administrator Cross Examination. Bremer inquired if there were existing racks on the property prior to Bliffert's acquisition of the property at the locations in question. Bliffert confirmed they were new racks.

BZA Questions. Brost asked Bliffert if they were aware the Village did not want the business at the location. Bliffert affirmed they knew about the nonconforming use of the property. Robertson asked Bliffert if he understood what legal nonconforming was. Bliffert affirms he does as he owns another parcel of land that is legal nonconforming in the City of Oak Creek. Draper asked Bliffert about the activity necessary to move the racks. Bliffert stated with the use of onsite forklifts.

There were no redirect questions from the Applicant or Attorney Flemming.

Zoning Administrator's Case. Bremer's comments highlighted several items included in the staff summary report addressing the applicant's rationale for allowing the structures to improve curb appeal, snow removal, safety as not sufficient to grant the appeal; the Village Attorney's letter, identifying the racks as structures, and requirements for site design review permit proceedings with the Plan Commission per each potential relocation of the structures. Bremer states the structures are what expand the nonconforming use and therefore his reasons for the Administrative Appeal's denial. There were no witnesses for the Zoning Administrator, but mention that the Village Building Inspector, Jim Trebian, was attending the meeting via ZOOM and is available for any questions or testimony if needed.

Applicant Cross Examination. Attorney Flemming asked Bremer if the Village did not want the business at the location. Bremer stated the question was a matter of opinion by the Board member and not reflective of the Village or its staff, followed by references to existing plans and existing zoning for the property which do not plan for a lumber yard at this location or allow it as a permitted or conditional use. Attorney Flemming asked if the future of the site is not for indefinite continued use of a lumber yard. Bremer affirmed. Attorney Flemming asked if it is the Village's intention to force the business off its site? Bremer stated no. Attorney Flemming asked if it is the Village's contention that any relocation on a legal nonconforming parcel constitutes a legal nonconforming use. Bremer stated the contention is the addition of the new structure represents an expansion of the nonconforming use which is not allowed under Village ordinances or State Statutes. Trebian recited the oath before Attorney Flemming asked Trebian if he heard Bremer's testimony on the Wisconsin commercial building code applies to the racks. Trebian stated he did not hear that testimony, but by ordinance and definition, the racks are a structure, but not stated as commercial building code. Attorney Flemming asked Trebian, to his knowledge, if there was any provision of the Wisconsin commercial building code provides standards for the racks. Trebian commented that he would be unable to answer

the question as it is a large code, and unaware he would be answering questions related to the commercial code.

**BZA Questions.** Brost asked Bremer about the implications of new zoning districts for existing businesses that are not included. Bremer stated that new zoning would render the existing business a legal nonconforming use and the business can continue to operate under the municipal ordinance and state statutes. Robertson asked if the outcome have been the same if the Owners completed the necessary forms (building permit and site design review permit). Bremer stated the actions would have still required a variance process. Draper asked Bremer to provide rationale as to why the racks are a structure. Bremer stated that the racks can be bolted to the ground if not already and referenced the Village Attorney's letter and their rationale as consistent with his opinion.

**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.

**Opinion Testimony Rebuttal by Applicant and Zoning Administrator.** Attorney Flemming asked Bliffert to clarify if the racks were bolted or affixed to the ground. Bliffert stated the racks are not bolted to the ground, but they run a spike down when they are erected to help hold them up. Bremer asked Bliffert if the racks have the potential to be bolted down. Bliffert stated they can be bolted to concrete.

**Applicant's Closing Statement.** Attorney Flemming's closing statement included the discussion had with legal nonconforming use and its intended process while not intended to force a business out, the lengthy procedures with obtaining the permits as mentioned, the Village's ordinance definition, and that restating the racks are not permanent structures. Attorney Flemming states for the Board to affirm the applicant's appeal.

**Zoning Administrator's Closing Statement.** Bremer's closing statement included his shared opinion, supplemented by the Village Attorney's review, identifying the racks as structures by the definition, and therefore require a building permit for an accessory structure. Whether they are a principle structure or accessory structure, they require a building permit under the zoning code, and as such would require a site design review permit. To state the racks are not structures and not require permits, implies the any number of racks can be erected on the property. This could substantially change the property by increasing the nonconforming use on the property. With what was provided in the staff report, there is enough evidence for the administrative appeal to be denied.

Kinder closed the public hearing at 5:56 p.m.

## 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.

The Board's discussion on the item included past storage activities on the property, continued operation of businesses, the interpretation of the racks and if they can be considered a structure, procedural duties of the Board as a body rather than a legislative approach, the opinions regarding what a permanent structures is, and the ambiguity of the subject.

Brost motioned to approve the administrative appeal filed by Chase Lumber concerning an order to remove several exterior shelving structures located at 5417 Long Street, McFarland, WI in the C-C Central Commercial zoning district. Robertson seconded the motion.

Draper voted aye with reasons citing the definition of a structure as reasonings why the rack is not considered a permanent structure, as they are not affixed or permanently attached to the ground. Robertson voted aye with reasons on interpreting the item as not a permanent structure because it can be moved, while the interpretation remains ambiguous. Brost voted aye with reasons that he did not interpret the racks as permanent structures. Kinder voted nay with reasons interpreting the racks as structures, the ambiguity of the racks, while also being avoidable as it was self-imposed given their proximity to the Village. Additionally, Kinder stated that the Village was not intended to relocate a non-conforming business, while the construction of any moveable or otherwise, does not align with the code. Motion passes 3-1 with Kinder voting nay.

## 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.

A short recess was taken from 6:14pm - 6:17pm following item 6a.

Kinder opened the public hearing at 6:18 pm. Bremer provided a summary for the request and included the results from 6a. There were no attendees in the room wishing to speak and none attending on zoom. On behalf of the Owner, Attorney Flemming withdrew the Area Variance Application given the Administrative Appeal was approved. Staff accepted the withdrawal. Kinder closed the public hearing at 6:20 PM.

## 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.

Agenda item withdrawn.

## 9. SCHEDULE NEXT MEETING DATE.

- a. To be determined.

10. ADJOURNMENT.

Brost motioned to adjourn, seconded by Robertson. Motion passed 4-0. Meeting adjourned at 6:21 p.m.