

**WAUKESHA COUNTY BOARD OF ADJUSTMENT  
SUMMARY OF MEETING**

The following is a Summary of the Board of Adjustment Meeting held on Wednesday, April 14, 2010, at 6:30 p.m. in Room AC 255/259 of the Waukesha County Administration Center, 515 W. Moreland Blvd., Waukesha County, Wisconsin, 53188.

**BOARD MEMBERS PRESENT:** Ray Dwyer  
Robert Bartholomew  
Tom Day  
Nancy Bonniwell  
Rob Schuett

**BOARD MEMBERS ABSENT:** Walter Schmidt

**SECRETARY TO THE BOARD:** Nancy M. Bonniwell

**OTHERS PRESENT:** Sheri Lieffring, Senior Land Use Specialist  
Kathy Gutenkunst, BA10:007, attorney  
John Mann, BA10:007, father of owner  
Heather Cobb, BA10:007, owner  
Robert Welcenbach, BA08:046, attorney  
Donald Dysland, BA08:046, owner

The following is a record of the motions and decisions made by the Board of Adjustment. Detailed minutes of these proceedings are not produced, however, a taped record of the meeting is kept on file in the office of the Waukesha County Department of Parks and Land Use and a taped copy is available, at cost, upon request.

**SUMMARIES OF PREVIOUS MEETINGS:**

Mr. Day *I make a motion to approve the Summary of the Meeting of March 10, 2010.*

The motion was seconded by Mr. Bartholomew and carried 3-0. Mr. Dwyer and Ms. Bonniwell abstained as they were not present at last month's meeting.

**NEW BUSINESS:**

**BA10:007 NATHANIEL AND HEATHER COBB:**

Ms. Bonniwell *I make a motion to **approve** the request, in accordance with the Staff's recommendation, as stated in the Staff Report and for the reasons stated in the Staff Report, with the following changes:*

*Condition No. 1 shall be amended to read: “This Decision repeals conditions No. 1, 3, 7 & 8 of the Boards Decision dated September 15, 2009 (BA09:030).”*

*A condition shall be added to read: “The existing garage must be removed within 45 days of issuance of the Zoning Permit for the new garage.”*

The motion was seconded by Mr. Bartholomew and carried 4-0. Mr. Day had recused himself from this case.

The Planning and Zoning Division staff’s recommendation was for **approval** of the requested variance from the floor area ratio requirements and approval of the requested special exception from the accessory floor area ratio requirements of the Ordinance subject to the following conditions:

1. This Decision repeals conditions No. 1, 7 & 8 of the Boards Decision dated September 15, 2009 (BA09:030).
2. The owner must obtain a minimum of 2,301 sq. ft. of land from the Common Area Parcel. This will result in a floor area ratio of approximately 16.8%.
3. All other conditions of BA09:030 (Decision Sheet dated September 15, 2009) remain in effect.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

Conditions No. 1 and 8 are proposed for removal from the Board’s previous Decision because those conditions reflected the need to comply with the floor area ratio requirement. Condition No. 7 is proposed for removal for clarification as it conflicted with the Board’s previous Decision to approve the special exception from the accessory floor area ratio requirements. The conditional approval of this request with the recommended conditions, will allow the owner to construct a new two-story garage on the subject property that will fit in with the existing topography causing minimal land disturbance for its construction. The current location of the garage is the most logical and conforming location for an accessory building on the property. The location is conducive to a two-story structure and the owner has obtained as much land as possible from his neighbors, so the floor area ratio variance is justified. Furthermore, the Board has previously granted variances from the offset, shore setback, floodplain setback, accessory building height, and lot size requirements, as well as a special exception from the accessory building floor area ratio requirements to allow the construction of this garage. Due to a calculation error during the public hearing, the floor area ratio variance was not granted as it was thought it wasn’t necessary. It is clear from review of the hearing audio tapes that the Board’s intent was to allow the construction of the

garage. The owner has indicated that he would be able to acquire as much as 2,301 sq. ft., but that he only wants to acquire 1,274 sq. ft. However, the Board should require that as much land as possible is transferred to minimize the required variance. Variances should only be granted to provide the minimum relief necessary to obtain a reasonable use of the property; not to accommodate the personal preferences and needs of the current property owner. For all of the above reasons, the approval as conditioned is within the purpose and intent of the Ordinance.

### **OTHER ITEMS REQUIRING BOARD ACTION:**

#### **BA08:046 DONALD AND SUSANNE DYSLAND:**

The Circuit Court remanded the above-referenced case back to the Waukesha County Board of Adjustment (BOA) for further proceedings consistent with its decision dated January 14, 2010. The Court affirmed the decision of the BOA in denying the variance, but remanded the case for further fact-finding to supplement the reasoning in the Record. Specifically, the Court concluded that the Board failed to demonstrate on the Record its reasoning for its determination regarding calculations under the Fifty Percent Rule for materials and labor to the nonconforming structure.

The discussion was limited to the instructions of the Court. No new evidence was taken and the BOA utilized the Record from the prior hearing. The BOA allowed counsel and staff the opportunity to prepare and submit written arguments and Proposed Findings of Fact to the Board in advance of the hearing. Additionally, counsel and staff were given time during the meeting to present oral arguments. The Board was not unanimous in its view of a few items to be included in the 50% calculation, but by a majority vote the Board agreed separately on each item and the final vote on the Findings and Reasoning was unanimous. Based upon the prior Record, the submission of materials before the hearing, and oral arguments during the hearing, the BOA made the following Findings and Reasoning:

1. The BOA previously found that the fair market value of the nonconforming structure being called a cottage or guesthouse was \$18,566 based upon the tax assessment records presented by Staff. The Circuit Court affirmed the calculation and reasoning for this value and on remand the BOA utilizes this amount in its calculations.
2. Section 3(o)2.A of the Shoreland and Floodland Protection Ordinance, often referred to as the Fifty Percent Rule, states:

Non-conforming structures:

- i. No structure shall be modernized, expanded or enlarged except in conformity with the applicable district regulations or by order of the board of adjustment if such total repairs equal or exceed fifty (50) percent of the current fair market value.

3. The Waukesha County Shoreland and Floodland Protection Ordinance regulations regarding nonconforming structures differ from those the Supreme Court addressed in the case of Marris v. City of Cedarburg, therefore, the language of Marris is a guideline, but this BOA must examine the facts of this case against the terms of the local ordinance.
4. The cost of materials and labor which modernized, expanded or enlarged the structure is found to be \$27,943 based on the calculation and reasoning set forth in the Record. The amounts are taken from Record Item 3, Page 3 entitled “Non-conforming Structure and Use Worksheet” and from the Record, including the oral discussions of the BOA on April 14, 2010. Not all the materials and labor amounts shown on the worksheet were found to be subject to the Fifty Percent Rule.

Cost of Materials and Labor included in the Fifty Percent Rule:

Walls and Insulation	
Drywall Entire Interior	\$ 426
Windows & Doors Exterior/Interior	
Replaced Window	\$ 260
Replaced Door	\$ 500
Electrical	
Circuit Panel – new	\$ 80
GFI’s – new	\$ 12
Receptacles – new	\$ 35
Heating and Ventilation	
Space Heaters – install heater	\$ 280
Baseboard Heat – install heater	\$ 50
Miscellaneous Expenses	\$ 3,000
Labor	\$
4,800	
Sewer installation and hook-up	<u>\$18,500</u>
	<b>Total \$27,943</b>

5. Walls and Insulation: The worksheet lists 50 sheets of drywall measuring 4 feet by 12 feet. The BOA finds that this is a substantial quantity of dry walling for such a small structure and this type of overall structural work is a modernization to the structure.
6. Windows & Doors Exterior/Interior: The photographs in the record showing the window and door replacements lead the BOA to categorize these as modernization because the size or location of windows and doors has changed and this is a structural alteration. For example, a large pull-up garage door was removed, the wall rebuilt, a smaller entry door installed and exterior siding replaced.

7. **Electrical**  
The installation of new electrical circuit panels, GFIs and 14 receptacles leads the BOA to conclude that this electrical work was significant new work to the entire structure and not just repair or maintenance. The electrical and re-wiring work modernizes the service to the structure and contributes to the longevity of the nonconforming structure.
8. **Heating and Ventilation**  
The installation of heat sources is not repair or ordinary maintenance. The BOA considers the heating work to be modernization because the heat sources are new to the structure.
9. **Miscellaneous Expenses**  
The BOA has limited information regarding the miscellaneous expenses listed by the Dyslands for \$3000. All of this cost is included against the Fifty Percent Rule because the amount seems reasonable for the categories of work included in the Fifty Percent Rule. Also, nowhere else on the worksheet do the Dyslands list materials used to install the improvements, such as nails, drywall tape, electrical wire, etc.
10. **Labor**  
The BOA has limited information regarding the cost of labor because the Dyslands provided the total number of hours and cost of \$9,600 without a breakdown. The BOA compared the amount of labor attributable to the work qualifying under Fifty Percent Rule to the total amount of labor. The BOA estimated this to be about half, therefore, the BOA found that one-half of the labor and, thus, one-half the labor cost of \$9,600 (or \$4,800) would be included in the calculation under the Fifty Percent Rule. The BOA did not pro-rate the cost of labor to the cost of the materials.  
  
Some members of the BOA questioned the credibility of the labor cost provided by the Dyslands, indicating that the number of hours seemed low for all the work performed to the structure. Also, some members did not believe that the number of hours seemed to account for the necessary preparatory work, especially regarding the category of interior drywall work.
11. **Sewer installation and hook-up**  
The Dysland's Application for a variance (Record Tab 1) indicates that in November of 2007 the City of Oconomowoc required the Dyslands to install sewer service to the cottage structure, which to date has cost \$12,500 and is expected to cost another \$6,000. The BOA finds that installing a new connection to municipal sewer falls within the category of modernization in the Ordinance, regardless of whether the landowner sought it out or the municipality required it. This change modernizes the services to the structure and contributes to the longevity of the nonconforming structure.
12. **The total cost of materials and labor attributable to modernization, expansion or enlargement of the nonconforming structure is \$27,943. Fifty Percent of the fair market value of the**

structure is \$9,283 (.50 x \$18,566). Therefore, the work performed to the nonconforming structure violates the fifty percent rule of Section 3(o)2.A of the Shoreland and Floodland Protection Ordinance.

13. Based upon the reasons previously stated in the record, the new materials submitted and oral discussions conducted on April 14, 2010, and for the findings and reasoning set forth above, the BOA confirms its prior decision to deny the requested after-the-fact variance to the Fifty Percent Rule for nonconforming structure.

The Planning and Zoning Division staff's written arguments and proposed Findings of Fact are as follows:

On January 14, 2010, the Circuit Court remanded this case back to the Board of Adjustment for findings on how the Board arrived at the monetary figures used to determine whether a 50% variance was even needed. The Board of Adjustment has requested both Staff and the landowner submit a written argument and Proposed Findings of Fact to the Board.

It needs to be first established that the Board of Adjustment determined that this building is currently worth \$18,566, which is the Fair Market Value based on the Town's assessment records. The 50% provision in the Ordinance addresses the improvement of non-conforming structures and is designed to balance private property rights and the public interest to eventually have structures comply with the publically adopted Ordinance. A community has the right to expect that the Ordinance requirements will be eventually complied with and that nonconformities that were in existence at the time of the passage of the Ordinance will eventually be eliminated. To accomplish this balance, the Ordinance allows a property owner reasonable maintenance and repair to prevent deterioration of non-conforming buildings and uses that were in existence when the Ordinance was passed. However, the Ordinance limits the amount of work that can be done to these structures to prevent extending their lifetimes indefinitely and to ensure that the nonconformity is eventually eliminated. The 50% rule prohibits the modernization, expansion or enlargement of an existing non-conforming structure if the total improvements exceed 50% of the structure's current fair market value. Also, in the Supreme Court Case of Marris v. City of Cedarburg, 176 Wis. 2d 14, 498 N.W.2d 842 (1993), the Court found any work that converts an existing building into a new or substantially different building, work that would affect the structural quality of the building, or improvements that contribute to the longevity or permanence of the structure should count towards 50%. The Court further provided items that would not be applied to the 50% Limit might be:

- The installation of acoustical ceilings
- The installation or replacement of insulation
- Repair of an existing plumbing or electrical system

Based on this, the following would also generally not be included toward the 50% limit:

- Replacement of siding

- Replacement of shingles
- Replacement of windows or doors same size as the existing windows or doors being replaced
- Painting of exterior and interior walls

Using this guidance, staff utilized the Worksheet Mr. Dysland provided in assessing the following materials towards the 50% limit:

- All work associated with dry walling the interior of the entire building (\$426.00). The dry walling was counted as it was a substantial component of converting this building from a storage building to a living unit.
- Replacement of a window of different size than the window being replaced (\$260.00).
- Replacement of a door of different size than the door being replaced (\$500.00).
- Miscellaneous expenses (\$3000.00). This was counted because the owner did not establish what these costs were. It was assumed that this reflected the cost of lumber and other building-type materials, since there was no allowance in the worksheet for these items. Staff did not count items such as cabinets, sinks, flooring, carpet, siding, and shingles, even though it could be reasonably argued that these items were part of this building's conversion to a substantially different structure.

The owner also supplied a fair market value estimate for labor of \$9600.00 and did not break out this estimate out for the different parts of the job. The petitioner has suggested that staff should have used a corresponding percentage of labor to the percentage of materials counted toward 50%. However, labor does not directly correspond to the material cost and therefore that is not a reasonable approach. Further, Mr. Dysland had the opportunity to break this cost out on the worksheet, but chose to state it as a lump sum. Any attempt to disseminate this number would have been purely conjecture by staff. It should be further noted that the total labor and material cost attributed towards 50% was \$13,786.00. The number \$13,786.00 has been continually stated by the petitioner as the only cost associated with the improvements, however, the cost of the sewer hookup (\$18,500.00) must also be included and the need to include this cost was discussed on the record at the public hearing. Further, it seems unnecessary to further break out the labor number for the following reasons:

1. The labor and material costs appear very low for the work performed. This is based on the dozens of cost estimates the County receives and reviews every year. It should also be noted that all estimates were provided directly by the owner without any accompanying documentation or receipts, contractor verification, etc. This is very unusual. However, staff did not ask for a revised estimate or additional documentation due to the fact that 50% was already exceeded even with the unverified and very low cost estimate.
2. The sewer hookup is not included in the \$13,786.00 figure previously itemized. However, the cost of the sewer hookup must be counted towards the 50% figure, as well, because it was a significant factor in conversion of this building from an accessory storage building to a

3. guesthouse/cottage/living unit (i.e. “a substantially different building”). Again, 50% of the value of the building was exceeded even without including the sewer cost in the base figure. However, the sewer hookup adds an additional \$18,500, which brings the project total to \$32,286.00, which far exceeds the total current value of the building.
4. For argument sake, using the petitioner’s logic, the counted materials cost constitutes 42% of the total material cost. 42% of the stated labor cost of \$9,600.00 is \$4,032.00. Therefore, 42% of the materials and labor cost counted toward 50% would be \$8,218.00, which is 44% of the value of the building **after** the remodeling took place (\$18,566.00). Any reasonable person can conclude that this clearly must exceed 50% of the value of the building prior to its recent major remodel and conversion from an accessory storage building to a guesthouse/cottage/second living unit.

It is important to note that this request was made after-the-fact, so establishing the exact value of the building prior to the work was impossible. However, tax records from 2004 indicate that this building had a value of \$13,600, and this information is part of the record. However, it is unknown if any of the unpermitted work was completed at the time of that assessment.

Since the conversion of the building is an important consideration when determining what should have been counted against the 50% provision, staff offers the following to support their position that this building was utilized for storage by this property owner and at least two previous property owners (dating back to at least 1989) prior to the recent conversion; therefore, the rights to the non-conforming use were terminated long ago. The Ordinance states that if a non-conforming use had ceases for at least 12 consecutive and/or 18 cumulative months in a 3-year period, any rights to the previous non-conforming use are terminated. Section 3(o)(2)(B) states that any future use must then conform to the use regulations of the district. Based on the evidence, it is also clear the building was recently converted from an accessory storage building to a guesthouse/cottage/second living unit and that all work that contributed to the conversion must be counted toward the 50% rule.

The following is considered evidence that this structure was utilized for many years as an accessory storage building prior to its recent conversion by Mr. Dysland:

1. Plat of Survey dated May 16, 1989 which labels this building as a “shed” (submitted by Donald Dysland). This survey is included as part of the Record.
2. Property listing dated May 29, 1996 which describes this structure as “an extra storage building”. This listing is also included in the Record.
3. Letter from Diane Higgins (previous owner to Donald Dysland) indicating that the previous owner to her utilized this building for storage. This letter also states that the building was in disrepair and needed major repair. Ms. Higgins purchased this property in 1996. This letter is part of the Record.

4. Donald Dysland himself admits that he used this building only for storage for several years before he remodeled and converted it to a separate living unit/"guesthouse". He stated this on the Record at the public hearing.
5. Photograph submitted by a neighbor dated January 8, 2003 which shows a garage door on the west side of this building. This photograph is contained in the Record.
6. Verbal testimony from both adjacent neighbors (Charles Stelter and Ronald Borowski) at the public hearing on August 27, 2008, indicated that the building had not been utilized as a separate living unit or guesthouse for as long as either of them has lived there. Mr. Stelter's family has owned his property for several decades. Mr. Stelter purchased the property from his Mother in 2000-2001. Mr. Borowski purchased his property from Diane Higgins in 2000-2001. Mr. Dysland purchased his property from Diane Higgins in 2002-2003.

In summary, all of the above information lays out the reasoning for how the Board can arrive at the monetary figures used to establish that a 50% variance is required. See attached Exhibit A for staff's proposed findings of fact.

#### Waukesha County Staff Proposed Findings of Fact (Exhibit A)

1. The building in question is currently has a Fair Market Value of \$18,566 according to the Town assessment records. This reflects the value after several thousand dollars worth of work was done to the building. The building was worth significantly less prior to this work.
2. The total cost for improvements counted towards 50% is valued at \$4,186.00 for materials, \$9600.00 for labor, and \$18,500.00 for the sewer hookup, for a total of \$32,286.00, based on information provided by the petitioner. This constitutes 173% of the current fair market value of the building.
3. Even if labor is prorated to the same percentage of the materials cost, this would place the project cost at \$26,718.00 (\$4186 for materials, \$4032 for labor, and \$18,500 for the sewer), which is 144% of the current fair market value of the building.
4. Even if the labor is prorated, and the sewer hookup cost is discounted, the total cost for improvements counted towards 50% is \$8,218.00 (\$4186 for materials and \$4032 for labor) which constitutes 44% of the current fair market value of the building. Any reasonable person can conclude that this clearly must exceed 50% of the value of the building prior to its recent major remodel and conversion from an accessory storage building to a guesthouse/cottage/second living unit.
5. Based on all of the above information, a variance from the 50% provisions of the Ordinance is required.

A transcript of these proceedings is attached as an addendum.

**BA08:020 MICHAEL AND MARIE O'BRIEN:**

Mr. Bartholomew                      *I make a motion to **table** the request since the petitioner did not appear.*

The motion was seconded by Mr. Day and carried unanimously.

The Planning and Zoning Division staff's recommendation was for **approval** of a 2-year extension to the deadline for obtaining a Zoning Permit; therefore the Zoning Permit must be obtained by May 29, 2012. However, the owners should be aware that if the Ordinance is amended before the Zoning Permit is obtained, all provisions of the amended Ordinance (including, but not limited to floor area ratio and open space) must be complied with or additional variances will be required.

**ADJOURNMENT:**

Mr. Bartholomew                      *I make a motion to adjourn this meeting at 9:17 p.m.*

The motion was seconded by Mr. Day and carried unanimously.

Respectfully submitted,

Nancy M. Bonniwell  
Secretary, Board of Adjustment

Addendum