

Packet Addition
Correspondence

Case No.

901



July 18, 2022

Zoning Board of Appeals
Peninsula Township
13235 Center Rd.
Traverse City, MI 49686

Dear Zoning Board of Appeals Members,

I am writing about the variance request at 9722 Center Road that is scheduled for discussion at your July 19, 2022, meeting. The Watershed Center advocates for clean water in Grand Traverse Bay and works to preserve and protect its watershed. The Zoning Board of Appeals is considering a request that proposes to increase the property's existing non-conformity by increasing its encroachment into the sensitive water's edge setback to build an addition to an existing structure.

This application concerns us because the result of the proposal would be a reduction in the water's edge setback with increased impervious surface in this vital area. Water's edge setbacks are important tools for protecting water quality; therefore, we oppose unsupported setback variances as it weakens rules lawfully enacted by the township to protect sensitive shoreline areas. In addition, as an existing non-conforming use, additional standards and restrictions are intended to prevent extending non-conformity. Those standards are not addressed in the application. We respectfully request that the Board deny the application.

1. Water's edge setbacks and variance standards help protect water quality.

Water's edge setbacks are especially important on the Great Lakes because these lakes demonstrate substantial water level variability, a circumstance that is likely to increase in magnitude with a changing climate future. When structures are built too close to Grand Traverse Bay, they may crumble into the water during high water years, destroying private property and increasing the opportunity to introduce pollutants into the bay. Further, vegetation that is critical for shoreline stabilization and habitat is often reduced or removed by encroachments near the water's edge. Because of Great Lakes water level variability and extremes, coupled with increased storminess, shoreline communities across the Great Lakes are adopting water's edge setback distances of 75 feet or more to ensure resiliency. These considerations support respecting rather than undermining the township's existing water's edge setback standards.

2. The applicant does not meet the Basic Conditions for a variance in Section 5.7.3.

To grant a variance, the Board must find all "Basic Conditions" are satisfied (Section 5.7.3, *Variances*). The Basic Conditions are as follows:

(1) Basic Conditions:

- (a) That the need for the variance is due to unique circumstances or physical conditions, such as narrowness, shallowness, shape, water or topography, of the property involved and that the practical difficulty is not due to the applicant's personal or economic hardship.**
- (b) That the need for the variance is not the result of actions of the property owner (self-created) or previous property owners.**
- (c) That strict compliance with area, setback, frontage, height, bulk, density or other dimension requirement will unreasonably prevent the property owner from using the property for a permitted purpose, or will render conformity with those regulations unnecessarily burdensome. (Because a property owner may incur additional costs in complying with this ordinance does not automatically make compliance unnecessarily burdensome.)**
- (d) That the variance will do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.**
- (e) That the variance will not cause adverse impacts on surrounding property, property values or the use and enjoyment of property in the neighborhood.**
- (f) That the variance shall not permit the establishment within a district of any use which is not permitted by right, or any use for which a conditional use or temporary use permit is required.**

The application provides no basis for the Board to find all these Basic Conditions are met. The rationales offered by the applicant to support the variance are that relaxing the setback will be more consistent with other property owners, the owners want a larger structure but believe building a second story will not be financially feasible or aesthetically pleasing, and they want more room for extended family visits. At bottom, the applicants would like a bigger structure on this small parcel. These factors are not demonstrative of meeting the Basic Conditions.

To the contrary, it appears there is nothing particularly unique about this parcel relative to nearby parcels. While expansion may be preferred, it is a self-created need. The applicant may seek to add a second story to the building or reconfigure the current bathroom to make it more accessible. Applying the standards and denying the variances will not prevent the permitted residential use of the property.

3. This is a non-conforming structure subject to Section 7.5.

The subject parcel is already non-conforming with zoning since the entire home and part of the garage is located within the 60-foot water's edge setback. In general, non-

conforming land uses may not expand because the aim of township zoning is toward the eventual elimination of non-conforming uses. MCL 125.3208; *Austin v. Older*, 283 Mich. 667 (1938). This is so even if expansion would make the parcel more competitive or valuable. *City of Hillsdale v. Hillsdale Iron & Metal Company, Inc.*, 358 Mich. 377 (1960).

The applicant did not address how its variance request satisfies Section 7.5 of the Zoning Ordinance that applies to non-conforming uses and structures. Section 7.5.1 explains the intent and purpose of the zoning provisions applicable to non-conforming structures:

Non-Conforming Structure. It is the intent to allow the continued use of a non-conforming structure. It is also the intent that the Zoning Board of Appeals may grant a variance to move or reconstruct a non-conforming structure where the structure was legally built on parcels that would be otherwise unbuildable due to overlap in the yard requirements. It is not the intent to allow significant increases in the intensity of previously established residential use on otherwise unbuildable lots.

The ordinance allows **repair and reconstruction of damaged non-conforming structures** to allow continued use, but that is not what is proposed here. (Sections 7.5.3 & 7.5.4.) Additions to non-conforming structures are addressed in Section 7.5.5, which provides in its entirety:

Section 7.5.5 Additions to Non-Conforming Structure:

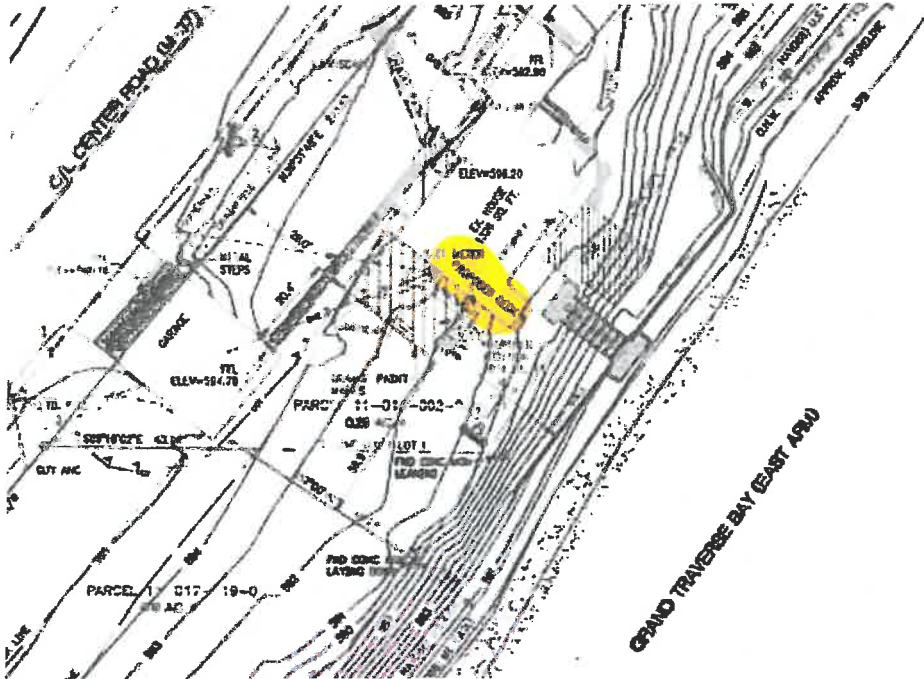
- (1) The Zoning Administrator shall issue a land use permit for an addition to a lawful non-conforming structure provided all of the following are met: (SEE FIGURE 3)
 - (a) the addition is not located in any required yard or ordinary high water mark setback; and
 - (b) in addition to the above yard and ordinary high water mark setback requirements, all other applicable dimensional requirements on the subject parcel shall be satisfied (other than what is lawfully non-conforming).

Because this addition (and the structure) is entirely located within the required ordinary high water mark setback, the Zoning Ordinance does not allow this variance to be issued. Notably, this provision adopted in 2016 by the Township Board is not addressed in the application at all, yet it is fatal to the applicant's proposal.

In summary, the applicant is proposing an addition to a non-conforming structure that would intensify the existing use, which is not permissible under Section 7.5 of Peninsula Township Zoning Ordinance.

4. The application is missing information on shoreline impacts.

Although the site plans included in the online agenda packet are virtually indecipherable, it appears there is a "proposed deck" included on page 18 of the agenda packet:



The application does not address a proposed deck. It is unclear if the deck is the hatched area adjoining what appears to be the back door. It is unclear if there is an existing deck. It is also unclear if there existing stairs to the beach or if that is a proposed new structure. Section 5.7.3 outlines the additional conditions necessary in determining variances for decks within the Great Lakes Ordinary High Water Mark setback. It is unclear if or how these conditions are met.

If the property owners do intend to construct a deck in the water's edge setback, there is no information to conclude the applicant has satisfied the provisions in Section 7.4.4 that limits tree cutting and vegetation removal within 30 feet of the shoreline nor Section 7.4.7(B) of the Zoning Ordinance that regulates certain activities in the flood plain of the Great Lakes and along the shoreline of the lake. It is unclear if the project will comply with the shoreline vegetated buffer standard in Section 7.4.7(B)(6) of the Zoning Ordinance.

The applicant has not requested a variance for a deck along the shoreline, nor demonstrated that a variance would be warranted. This is an additional reason to deny the application.

In sum, the existing home on the parcel already encroaches into the water's edge setback and already has substantial hardening and impervious surfaces in the sensitive shoreline area. This project would exacerbate existing non-conformity. Encroachment into the water's edge setback further reduces ecological functionality at the shoreline and poses a threat during high water years when foreign materials may be introduced into the water. A variance in this case may jeopardize sensitive lands and impair the integrity of the township water's edge setback.

In 2021, Peninsula Township's Zoning Board of Appeals denied this application for good reason as not all Basic Conditions were met. It is not clear the Board addressed the additional limitations in Section 7.5 at that meeting that provide additional bases to deny the application. It appears from the application that this is the same request (page 22 of agenda packet, *Staff Report*). In the last 12 months, the township's rules have not changed nor has the need to protect the sensitive shoreline.

For these reasons, we respectfully request that you deny the application. Thank you for your consideration.

Sincerely,



Heather Smith
Grand Traverse BAYKEEPER®



TJ Andrews
Legal Counsel