

Winnebago County Planning and Zoning Department

NOTICE OF PUBLIC HEARING

BOARD OF ADJUSTMENT

October 31, 2023

TO WHOM IT MAY CONCERN:

The applicant(s) listed below has filed a Notice Of Appeal which is regulated by one or more of the following ordinances: Chapter 23, the Town/County Zoning Code, Chapter 26, the Floodplain Zoning Code, and Chapter 27, the Shoreland Zoning Code.

The Winnebago County Board of Adjustment will be holding a public hearing on October 31, 2023 at 5:30 PM in Conference Room 120 of the County Administration Building located at 112 Otter Ave, Oshkosh, WI.

All interested persons wishing to be heard at the public hearing may appear in person or via Zoom using the meeting information below. A direct link to the Zoom Meeting is available on the Winnebago County Meetings and Agenda calendar on the above indicated date.

Zoom Meeting Information Link: <https://www.co.winnebago.wi.us/planning-and-zoning/boa-meeting-links>

Additional Instructions can be found at: <https://www.co.winnebago.wi.us/planning-and-zoning>.

For further detailed information concerning this notice, contact the Town Clerk or the Winnebago County Zoning office, where the application is available for viewing.

INFORMATION ON APPEAL REQUEST

Application No.: 23-AP-01

Applicant: JEL, LLC

Agent: Jane Landretti, Stafford Rosenbaum LLP

Location of Premises: 4532 Bellhaven Ln

Tax Parcel No.: 002-0010-03-01

Legal Description: . Being all of Lot 1 of CSM-7621, located in Government Lot 2 of Section 7, Township 18 North, Range 16 East, Town of Algoma, Winnebago County, Wisconsin.

Explanation: Applicant is appealing a decision made by Winnebago County Planning & Zoning Staff to deny a permit for a retaining wall located in the shoreyard setback area.

DESCRIPTION:	CODE REFERENCE:	REQUIRED:	PROPOSED:
Recognizing that there may be situations where a property owner or another party believes that the zoning administrator made an error in administering a zoning code, the state legislature established a mechanism to allow a review of the alleged error by the board of adjustment. This division describes the requirements and procedures for reviewing an alleged administrative error.	23.7-251	NA	NA

APPEAL INITIAL STAFF REPORT

Chapter 23 Winnebago County Town/County Zoning Code – Division 13 "Administrative Appeal"

Location:

Property Address: 4532 Bellhaven Ln, Oshkosh, WI 54904.

Tax Parcel Number: 002-0010-03-01

Explanation:

Applicant is appealing a decision made by Winnebago County Planning & Zoning Staff to deny a permit for a retaining wall located in the shoreyard setback area.

Staff Decision:

DENIAL

Reasons for Staff Decision:

A retaining wall does not have open sides and therefore is not an exempt structure as described in **Chapter 27, Article 6, Section 6.1(1)(b)(3)**. A retaining wall is included in the definition of a structure in the Chapter 27: Shoreland Zoning Code, Article 15(2) & (27). A retaining wall is not an open-sided structure. Retaining walls have sides that vary in height depending on the amount of soil being retained. A retaining wall is no different than a fence that has sides and is not an exempt structure.

Applicable Code:

Chapter 27, Article 6, Section 6.1(1)(b)(3).

NOTIFICATION LIST

Owner: **X**

DOT: -

Applicant: **X**

Hwy Dept.: -

City of: -

Airport Director - Winnebago: -

Town of: **ALGOMA**

Airport Director - Outagamie: -

WDNR (Shoreland): - **X**

Other: -

WDNR (Floodplain): -

Jane R. Landretti

222 West Washington Avenue, Suite 900
P.O. Box 1784
Madison, WI 53701-1784
J.Landretti@staffordlaw.com
(608) 210-6302

July 24, 2023

Via electronic and U.S. mail delivery

Ms. Julie Barthels
Winnebago County Clerk
112 Otter Avenue
Oshkosh, WI 54901
JABarthels@winnebagocountywi.gov

Re: 4532 Bellhaven Lane, Oshkosh, Wisconsin
Administrative Appeal of Special Zoning Permission Request

Dear Ms. Barthels:

Our firm represents Jason Lindemann, who is the owner of the above-referenced property. I am writing to appeal the July 18, 2023, decision (“Denial”) by Assistant Zoning Administrator Daniel R. Lefebvre, denying Mr. Lindemann’s special zoning permission request for a retaining wall.

On July 10, 2023, we requested a special zoning permission for a retaining wall pursuant to Wis. Stat. § 59.692(1v). The County denied that request, stating that “a retaining wall does not qualify as an open sided or screen structure. The Winnebago County Chapter 27 allowance, as stated in the ordinance, is for gazebos, decks, patios, and screenhouses.” July 18, 2023, Denial.

The County erred with its Denial. A “county shall grant special zoning permission for the construction or placement of a structure on property in a shoreland setback area if” it satisfies conditions specified in statute. Wis. Stat. § 59.692(1v). The term “structure” under this section means “a principal structure or any accessory structure including a garage, shed, boathouse, sidewalk, stairway, walkway, patio, deck, **retaining wall**, porch, or fire pit. Wis. Stat. § 59.692(1)(e) (emphasis added). Winnebago County must grant special zoning permission for a structure, including a retaining wall, to be placed in a shoreland setback area if it complies with the conditions set forth in Wis. Stat. § 59.692(1v).

L:\DOCS\035934\000001\APPEAL\3YR701003.DOCX
0724231607

Madison Office

222 West Washington Avenue
P.O. Box 1784
Madison, Wisconsin
53701-1784
608.256.0226
888.655.4752
Fax 608.259.2600
www.staffordlaw.com

Milwaukee Office

1200 North Mayfair Road
Suite 430
Milwaukee, Wisconsin
53226-3282
414.982.2850
888.655.4752
Fax 414.982.2889
www.staffordlaw.com

July 24, 2023

Page 2

As we indicated on our attached site plan, Mr. Lindemann's retaining wall meets the statutory requirements for a special zoning permission because:

- (1) It is located at least 35 feet landward from the ordinary high water mark, including where it is nearest the water; and
- (2) The floor area of all the structures in the shoreland setback area will not exceed 200 square feet; and
- (3) The structure is not enclosed and has open sides; and
- (4) Mr. Lindemann's plan included a vegetative buffer zone that covers at least 70 percent of the half of the shoreland setback area that is nearest the water, in compliance with the vegetation standards set forth in Wis. Admin. Code § NR 115.05(1)(c)2. a. through e.

The Denial does not dispute that the retaining wall meets any of the applicable statutory criteria. The Denial asserts that the County Ordinance exempts "structures" such as gazebos, decks, patios, and screenhouses, from setback requirements, but not retaining walls. Winnebago County Ordinances, Chapter 27, § 6.1(1). This is in contrast to the statute's **express** provision that a "structure" includes a retaining wall and must be granted special zoning permission if it meets the applicable criteria. *Id.*

A county shoreland zoning ordinance may not regulate a matter more restrictively than a matter that is regulated by a statutory shoreland zoning standard. Wis. Stat. 59.692(1d)(a). While a local government may enact ordinances in the same field and on the same subject covered by state legislation, it may only do so "where such ordinances do not conflict with ... state legislation." *Fox v. Racine*, 225 Wis. 542, 546, 275 N.W. 513 (1937). Therefore, where "the state has entered the field of regulation, municipalities may not make regulation inconsistent therewith" because "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden." *Fox*, 225 Wis. at 545, 275 N.W. 513. Here, the legislature has expressly determined that retaining walls are exempt from setback requirements in the shoreland zoning area so long as they satisfy certain criteria. By eliminating "retaining walls" from the list of exempted structures, the County's shoreland zoning ordinance is more restrictive than state law. The ordinance cannot be more restrictive than state statutes. Therefore, the County erred by applying impermissible requirements for the Denial.

Alternatively, the Denial was improper because the County misinterpreted its own ordinance. As an initial matter, when interpreting ordinances, the Board of Adjustment "shall resolve an ambiguity in the meaning of a word or phrase in a zoning ordinance or shoreland zoning ordinance in favor of the free use of private property." Wis. Stat. § 895.463. With this guiding

July 24, 2023
Page 3

principle in mind, the County Ordinances include retaining walls as structures exempt from setback requirements in the shoreland area.

The County exempts “Open-sided and screened structures such as gazebos, decks, patios and screen houses in the shoreland” area from setback requirements. Winnebago County Ordinances, Chapter 27, § 6.1(1). The County interpreted that provision to only exempt “gazebos, decks, patios and screen houses.” However, that restrictive interpretation is not consistent with the actual ordinance. The term “such as” means “to introduce an example or series of examples.” <https://www.merriam-webster.com/dictionary/such%20as>. A list of examples is a non-exhaustive list. Indeed, courts find that using the similar phrase “include” “denominates a nonexclusive list.” *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶64, 382 Wis. 2d 1, 913 N.W.2d 131. Consequently, the list of examples for exempted open-sided structures is non-exhaustive.

Further, even the County’s own ordinances adopt the state definition of “structure” to mean “a principal structure or any accessory structure including a garage, shed, boathouse, sidewalk, walkway, patio, deck, **retaining wall**, porch or firepit.” Winnebago County Ordinances, Chapter 27, § 15.0(27). Thus, reading this together with the exempt structure ordinance, County ordinances would exempt an open sided retaining wall that complies with the statutory conditions. This is especially true since any ambiguity in the ordinance must be interpreted in favor of the free use of property. Thus, County ordinances must include retaining walls as an exempt structure from setback requirements in the shoreland area, and the Denial was incorrect.

By filing this appeal, the timelines in the Denial are stayed pursuant to Winnebago County Shoreland Zoning Code 23.4-255, and Wis. Stat. § 59.694(5). Accordingly, we do not intend to remove the retaining wall, return the area to its previous elevation, nor to seed and mat it by August 1, 2023 as indicated in the Denial.

We look forward to the opportunity to appear before the Winnebago County Board of Adjustment regarding this appeal. Please don’t hesitate to reach out with questions.

Very Truly Yours,

STAFFORD ROSENBAUM LLP



Jane R. Landretti

JRL:pcl

Attachments: Request for Special Zoning Approval and Vegetative Restoration plan, 7.10.2023
Denial, 7.18.2023

Code Interpretation Chapter 23, Article 7, Division 19

Exempt Structures: Chapter 27: Shoreland Zoning Code, Article 6, Section 6.1(1)(b)

Date: August 15, 2023

Requested By: Atty Jane R. Landretti

(b) Open-sided and screened structures such as gazebos, decks, patios and screen houses in the shoreland setback area that satisfy the requirements in § 59.692(1v), Stats:

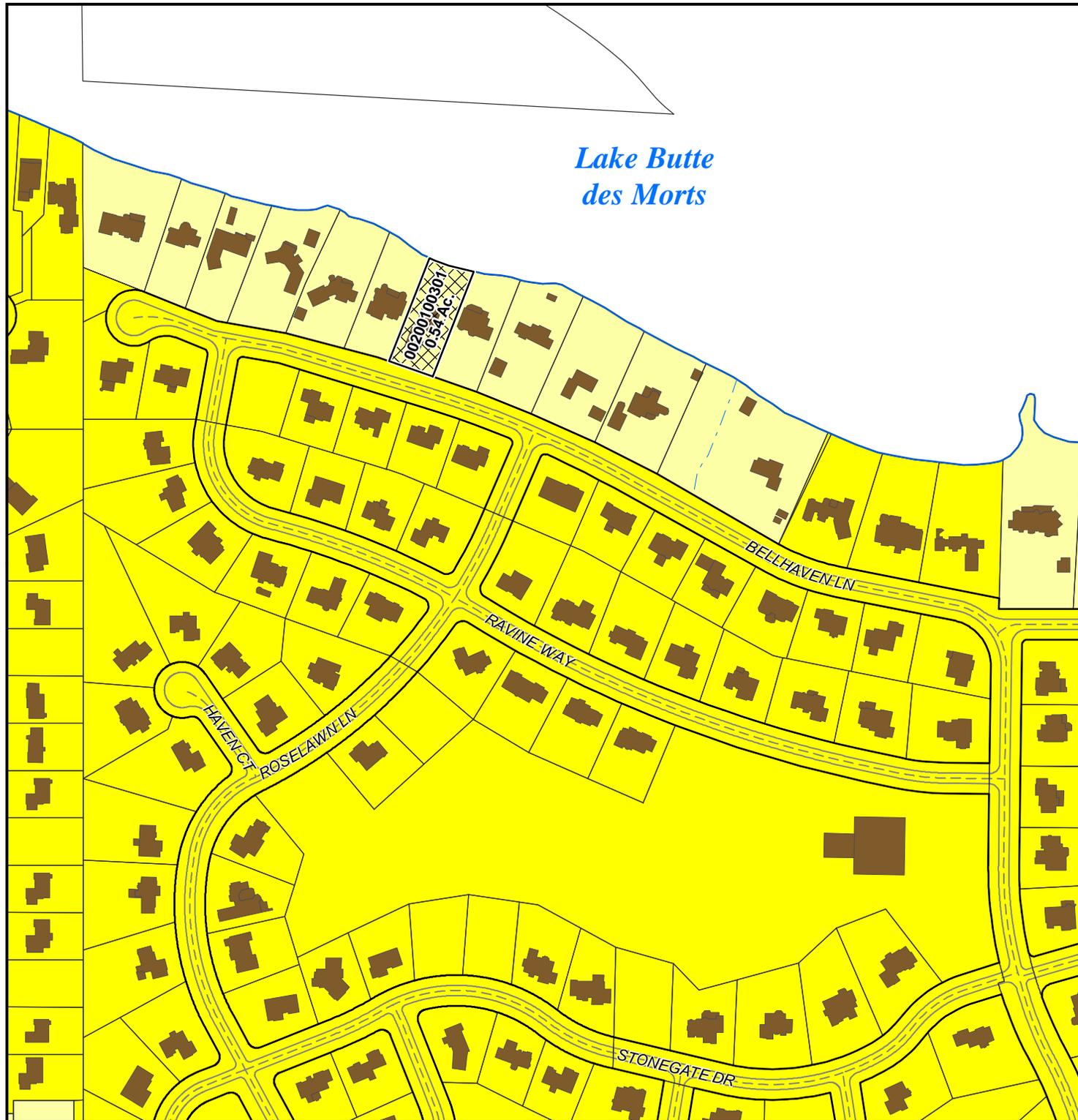
- (1) The part of the structure that is nearest to the water is located at least 35 feet landward from the ordinary-high water mark.**
- (2) The floor area of all the structures in the shoreland setback area will not exceed 200 square feet.**
- (3) The structure that is the subject of the request for special zoning permission has no sides or has open or screened sides.**
- (4) The county must approve a plan that will be implemented by the owner of the property to preserve or establish a vegetative buffer zone that covers at least 70% of the half of the shoreland setback area that is nearest to the water. The design of the vegetative buffer zone shall follow the standards for the establishment of a primary buffer, as described in section 13 of this ordinance. 3**

The question is why is a retaining wall not considered an exempt structure?

INTERPRETATION:

A retaining wall does not have open sides and therefore is not an exempt structure as described in **Section 6.1(1)(b)(3)** above.

ANALYSIS: A retaining wall is included in the definition of a structure in the Chapter 27: Shoreland Zoning Code, Article 15(2) & (27). A retaining wall is not an open-sided structure. Retaining walls have sides that vary in height depending on the amount of soil being retained. A retaining wall is no different than a fence that has sides and is not an exempt structure.



Lake Butte
des Morts

00200100301
0.54 Ac.

Application #23-AP-01

Date of Hearing:

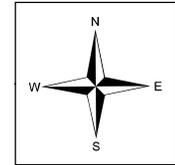
October 31, 2023

Owner(s):

JEL LLC

Subject Parcel(s):

00200100301



Winnebago County
WINGS Project

Scale

1 inch : 300 feet

County Zoning Districts

R-1	PDD	B-1
R-2	A-1	B-2
R-3	A-2	B-3
R-4	I-1	M-1
R-8	I-2	Town Zoning

City of Oshkosh Extraterritorial
Zoning Jurisdiction

Incorporated Area

