

# 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 requested a variance 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. You are receiving this notice because this application or petition for action: 1. affects area in the immediate vicinity of property which you own; 2. requires your agency to be notified; 3. requires your Town to be notified; or 4. requires you, as the applicant, to be notified.

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 VARIANCE REQUEST

**Application No.:** 2023-VA-6470

**Applicant:** AMES, RICHARD & PAMELA

**Agent:** WESENBERG, CHET WESENBERG ARCHITECTS, WESENBERG HOMES

**Location of Premises:** 3270 SHOREWOOD DR

**Tax Parcel No.:** 018-1908, 018-1907

**Legal Description:** Being all of Lots 87, 88 and 89 in the Replat of Oakwood Beach Plat, located in Government Lot 4 of Section 6, Township 18 North, Range 17 East, Town of Oshkosh, Winnebago County, Wisconsin.

**Explanation:** Applicant is requesting a variance for a sub standard road setback requirement.

DESCRIPTION:	CODE REFERENCE:	REQUIRED:	PROPOSED:
The road setback from the nearest point of any structure shall be at least 30 ft.	Chapter 23 Exhibit 8-2	Street yard: 30 ft	Street yard: 20 ft

## INITIAL STAFF REPORT

**Sanitation:** Existing; Municipal

**Overlays:** Shoreland, floodplain

**Current Zoning:** R-2 Suburban Low Density Residential

**Surrounding Zoning:** North: Lake Winnebago; South: R-2; East: R-2; West: R-2;

**Code Reference:** Chapter 23 Exhibit 8-2

**Description of Proposed Use:** Applicant is requesting a variance for a sub standard road setback requirement.

### **THE FOLLOWING INFORMATION HAS BEEN PROVIDED BY THE OWNER/APPLICANT**

**Describe your project, include the proposed dimensions and setbacks:** 14' wide addition to the side of the existing home creating a main floor master suite and new entry to home. Front and rear dimensions align with the existing home front and rear walls with a rear covered porch extending beyond and fitting in the shoreline setback and a green house on the street side aligning with the front of the house that does not conform with the setback.

**Describe how compliance with the requirement in question unreasonably prevents or restricts development of a permitted use on the property:** The existing home at 3266 Shorewood DR, which will be demolished for this addition, is currently setback 5'-0" from the roadway. The new addition on to 3270 Shorewood DR. will be setback 20'-0" (four times the existing structure's setback) from the street. This addition will be providing a new, more accessible entrance with provisions for a covered ramp allowing for future access allowing the homeowner to age in place and accommodating visiting family members with mobility issues.

**Describe the unique physical characteristics or limitations that prevent the property from being developed in compliance with the requirement in question:** The neighborhood this project is built in lies on a peninsula that already limits projects to meet the new requirements established after most existing structures were built. The homeowner has lived at this location for 64 years and has not found any issues with the neighboring non-compliant existing buildings and hopes to continue to live here with an improvement to the property accommodating their health limitations.

**Describe how the granting of the requested variance will not harm the public interest or have adverse affects on surrounding properties:** Not all of the neighboring existing buildings do not comply with the current setbacks. The addition to 3270 will result in the removal of the non-compliant structure at 3266 and will increase the setback at that location by 15'-0".

### **SECTION REFERENCE AND BASIS OF DECISION**

**Basis of Decision: Town/County Zoning Code: 23.7-234**

When making its decision, the Board of Adjustment shall consider each of the following standards:

- (1) The requirement in question would unreasonably prevent the property owner from using the property for a permitted purpose or would render conformity with such requirement unnecessarily burdensome and such circumstances were not self-created.
- (2) The subject property has unique physical characteristics or limitations that prevent the property from being developed in compliance with the requirement in question.
- (3) The granting of the variance will not be contrary to or harm the public interest given the general purposes of the zoning regulations and the specific purposes of the requirement in question.

The board shall grant a variance only if the board can make an affirmative finding for all of the criteria listed in this section.

## **Floodplain Zoning Code**

### **26.6-7 Variances**

(a) **Review criteria.** The Board of Adjustment may, upon appeal, grant a variance from the standards of this chapter if an applicant convincingly demonstrates that (1) literal enforcement of this chapter will cause unnecessary hardship; (2) the hardship is due to adoption of the floodplain chapter and unique property conditions, not common to adjacent lots or premises—in such case the chapter or map must be amended—; (3) the variance is not contrary to the public interest; and (4) the variance is consistent with the purpose of this chapter in s. 26.1-5.

(b) **Additional criteria.** In addition to the criteria in subsection (a), to qualify for a variance under FEMA regulations, the following criteria must be met: (1) The variance shall not cause any increase in the regional flood elevation; (2) Variances can only be granted for lots that are less than 0.5 acres and are contiguous to existing structures constructed below the regional flood elevation; (3) Variances shall only be granted upon a showing of good and sufficient cause, shall be the minimum relief necessary, shall not cause increased risks to public safety or nuisances, shall not increase costs for rescue and relief efforts, and shall not be contrary to the purpose of the chapter.





(c) **Limitations.** A variance shall not (1) grant, extend, or increase any use prohibited in the zoning district; (2) be granted for a hardship based solely on an economic gain or loss; (3) be granted for a hardship which is self-created; (4) damage the rights or property values of other persons in the area; (5) allow actions without the amendments to this chapter or map(s) required in s. 26.6-4; or (6) allow any alteration of an historic structure, including its use, which would preclude its continued designation as an historic structure.

## **Shoreland Zoning Code**

### **27.14.8 Variances**

(a) **Generally.** The Board of Adjustment may, upon appeal, grant a variance from the standards of this chapter if an applicant convincingly demonstrates that (1) literal enforcement of this chapter will cause unnecessary hardship; (2) the hardship is due to unique property conditions, not common to adjacent lots or premises; (3) the variance is not contrary to the public interest; and (4) the variance is consistent with the purpose of this chapter.

KEY

-  SILT FENCE
-  TRACKING PAD
-  DRAINAGE ARROW
-  TOW TOP OF WALL



SITE PLAN

SCALE: 1/16" = 1'-0"



SHOREWOOD DR  
LOTS 85-89

SITE PLAN  
ISSUE DATE:  
NOVEMBER 30, 2022

REVISION DATE:  
JUL 7, 2023  
AUGUST 1, 2023

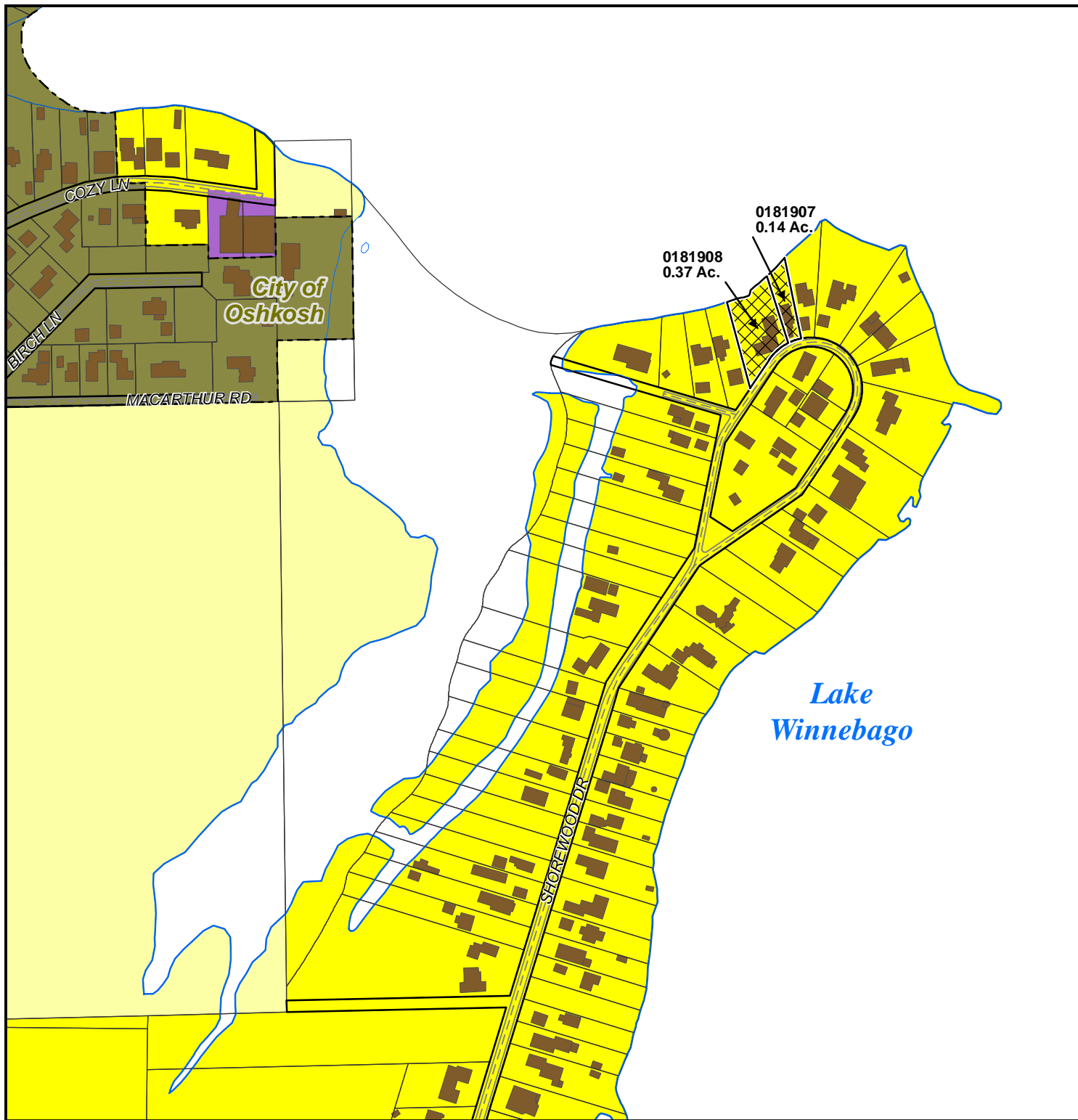
PROJECT NUMBER:  
2239

SHEET NUMBER

C1

FIELD VERIFY: ALL DIMENSIONS  
DATA BEFORE PREPARATION  
CONSTRUCTION  
DATE: 11/30/2022  
@Wesenberg Homes  
The design, drawings and specifications are prepared by the architect and are intended to be used in accordance with the contract documents. The contractor is responsible for verifying all dimensions and conditions in the field before construction. The architect is not responsible for any errors or omissions in the drawings or specifications.



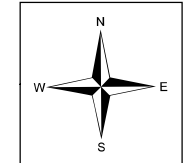


**Application #23-VA-6470**

Date of Hearing:  
**October 31, 2023**

Owner(s):  
**AMES, RICHARD E /  
 AMES, PAMELA M**

Subject Parcel(s):  
**0181907 & 0181908**



Winnebago County  
 WINGS Project

**Scale**  
 1 inch : 300 feet

**County Zoning Districts**

R-1	<b>PDD</b>	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**

○ = SITE

Application #23-VA-6470

Date of Hearing:

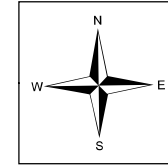
October 31, 2023

Owner(s):

AMES, RICHARD E /  
AMES, PAMELA M

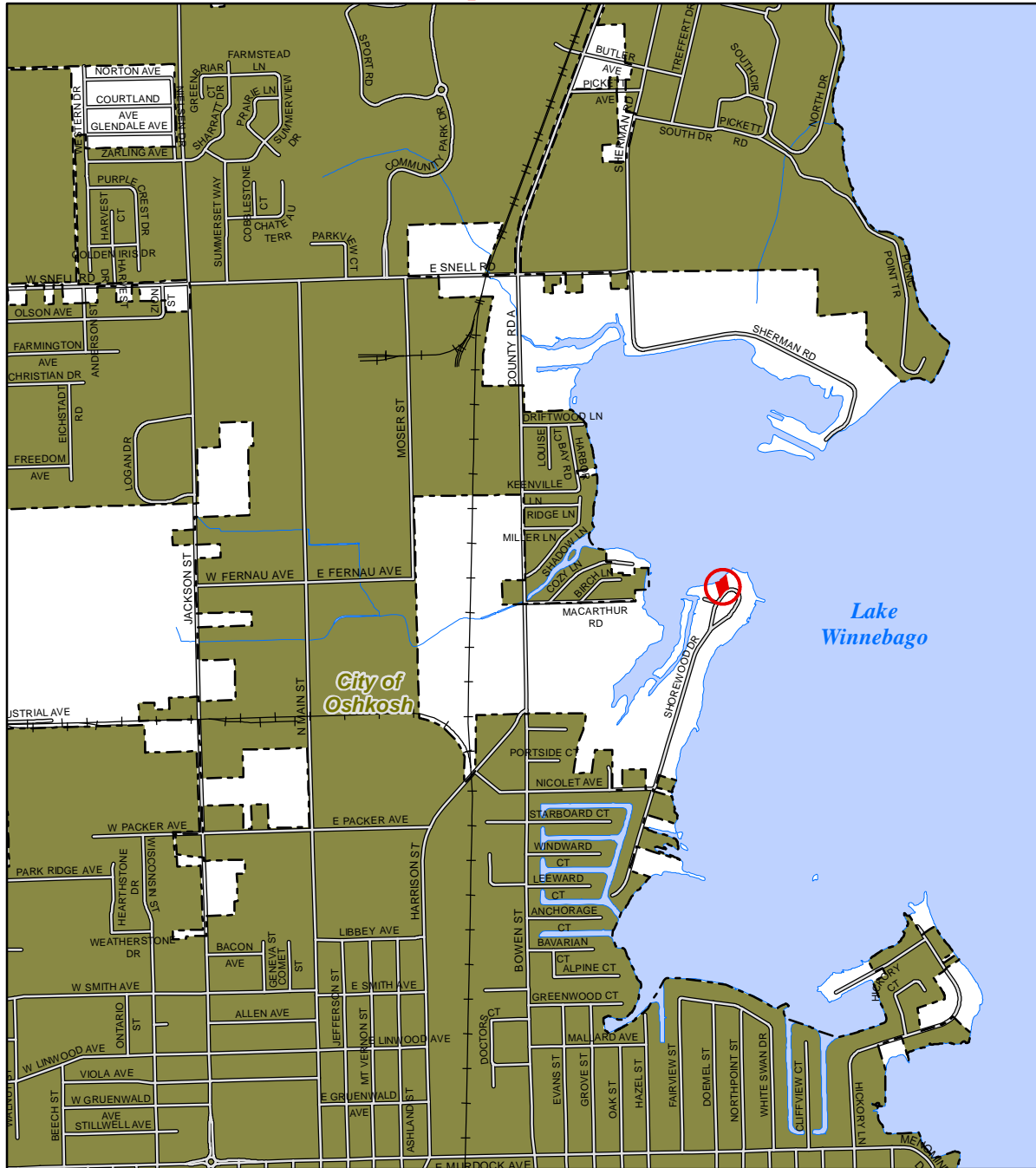
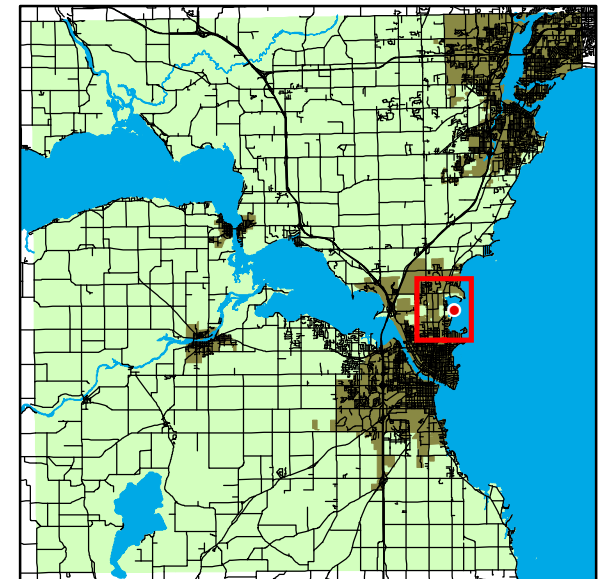
Subject Parcel(s):

0181907 & 0181908



Winnebago County  
WINGS Project

● = SITE



1 inch : 2,000 feet

WINNEBAGO COUNTY

# Winnebago County Planning and Zoning Department

## NOTICE OF PUBLIC HEARING

### BOARD OF ADJUSTMENT

October 31, 2023

#### TO WHOM IT MAY CONCERN:

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#### 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): -



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](mailto: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).

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0724231607

**Madison Office**

222 West Washington Avenue 608.256.0226  
P.O. Box 1784 888.655.4752  
Madison, Wisconsin Fax 608.259.2600  
53701-1784 [www.staffordlaw.com](http://www.staffordlaw.com)

**Milwaukee Office**

1200 North Mayfair Road 414.982.2850  
Suite 430 888.655.4752  
Milwaukee, Wisconsin Fax 414.982.2889  
53226-3282 [www.staffordlaw.com](http://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

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:**

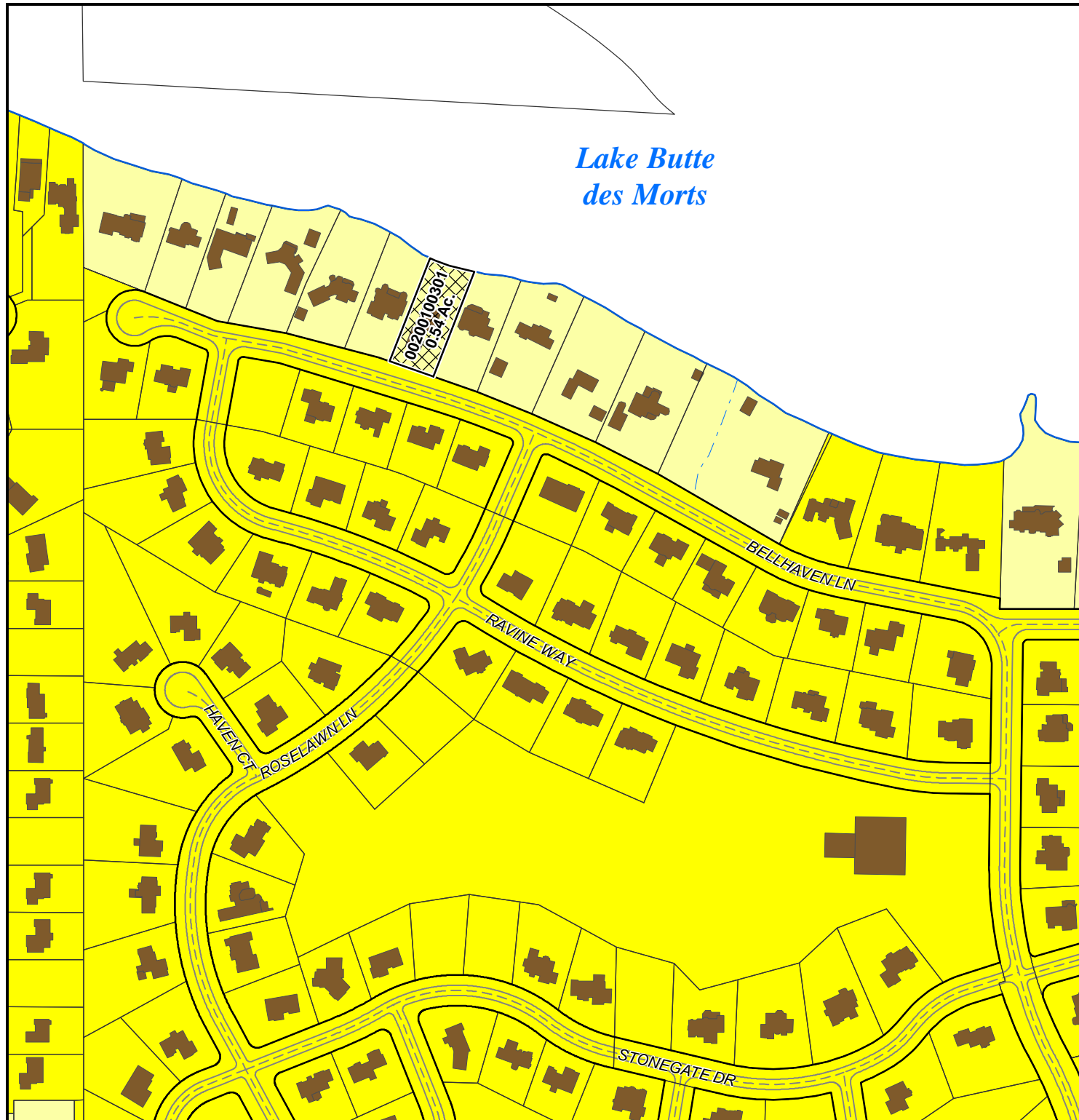
- (1) The part of the structure that is nearest to the water is located at least 35 feet landward from the ordinary-high water mark.**
- (2) The floor area of all the structures in the shoreland setback area will not exceed 200 square feet.**
- (3) The structure that is the subject of the request for 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:

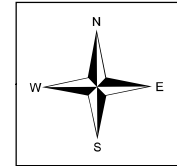
October 31, 2023

Owner(s):

JEL LLC

Subject Parcel(s):

00200100301



Winnebago County  
WINGS Project

**Scale**

1 inch : 300 feet

**County Zoning Districts**

R-1	<b>PDD</b>	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

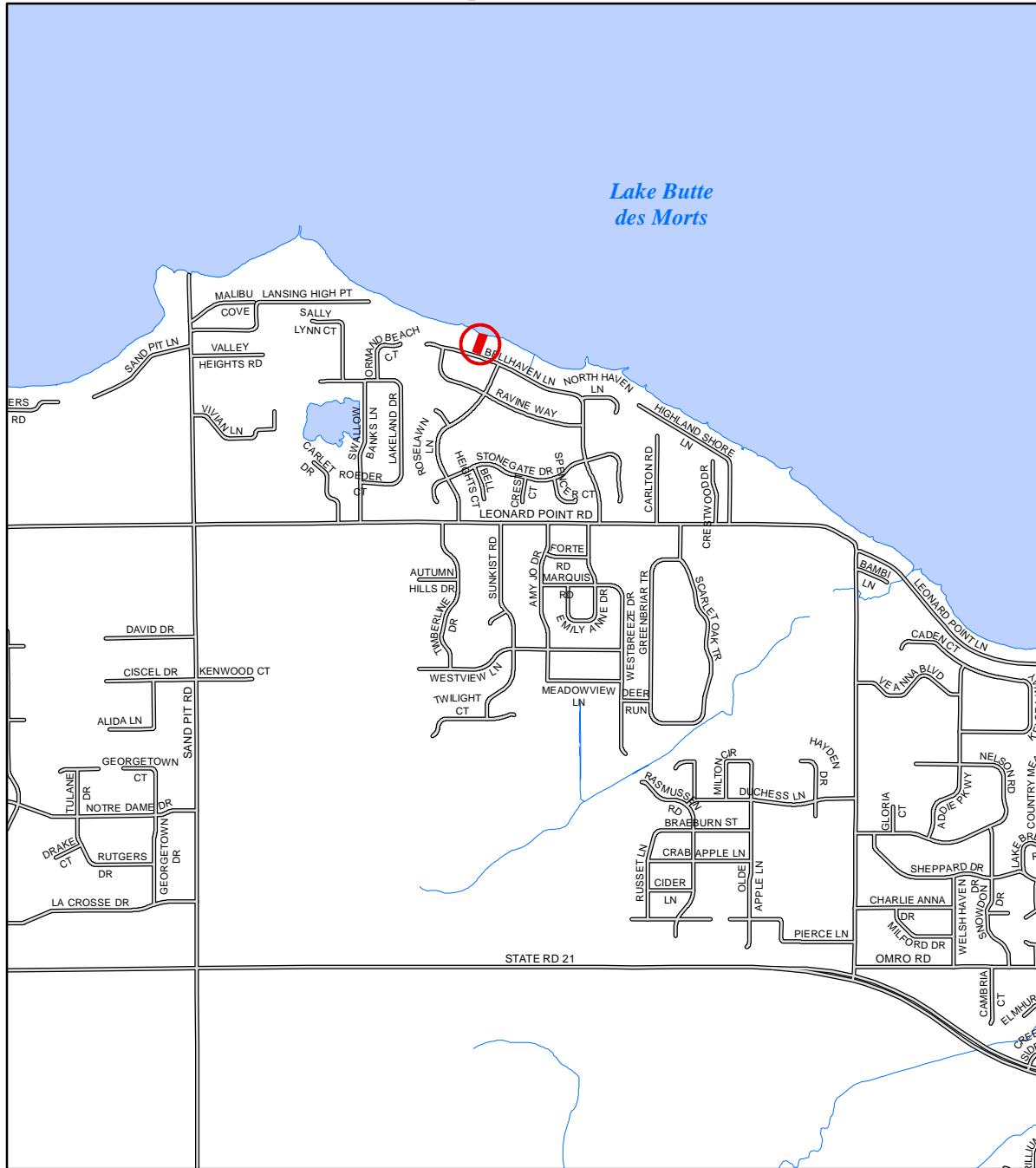
○ = SITE

Application #23-AP-01

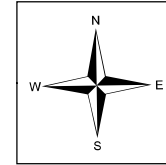
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00200100301

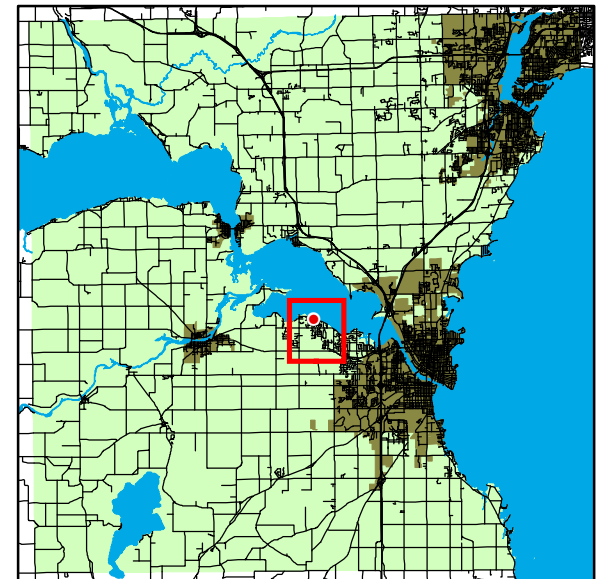


Lake Butte  
des Morts



Winnebago County  
WINGS Project

● = SITE



1 inch : 2,000 feet

WINNEBAGO COUNTY