

Vilas County Board of Adjustment
Trout River Cranberry Company Minutes
April 23, 2009
Lac du Flambeau Town Hall



Members Present:

Glyn Roberts – Chair
Don Huntley – Vice-Chair
Dick Peterson
Marty Ketterer
John Barron

Others Present:

Richard Teske
Applicant
Trout River Cranberry Company Owner

4679 Hwy 51 N
Boulder Jct, WI 54512

Mark Goldsworthy
Agent

4680 Hwy 51 N
Boulder Jct, WI 54512

Gretchen Watkins
Lac du Flambeau Band of Lake Superior
Chippewa Indians Water Resource Specialist

PO Box 67
Lac du Flambeau, WI 54538

Bryan Hoover
Lac du Flambeau Band of Lake Superior
Chippewa Indians

PO Box 67
Lac du Flambeau, WI 54538

Sue Ackland
Town of Lac du Flambeau Zoning Administrator

109 Old Abe Rd.
Lac du Flambeau, WI 54538

Tom Blake
Wisconsin Department of Natural Resources

107 Sutliff Ave.
Rhineland, WI 54501

Mary Greenman
Vilas County Assistant Zoning Administrator

330 Court St.
Eagle River, WI 54521

Gayle Hoffman
Vilas County Deputy Zoning Administrator

330 Court St.
Eagle River, WI 54521

Martha Milanowski
Vilas County Corporation Counsel

330 Court St.
Eagle River, WI 54521

David Sadenwasser
Board of Adjustment Secretary

330 Court St.
Eagle River, WI 54521

Richard McCutchin

4350 CTH H
Boulder Jct, WI 54512

Mr. Roberts calls the meeting to order at 10:06 a.m.

Mr. Roberts explains the reasons for holding this hearing.

Mr. Huntley reads the public notice.

Mr. Roberts explains that an onsite inspection has been held by the Vilas County Board of Adjustment (the Board) and explains the rules governing the meeting.

Mr. Huntley swears in Dick Teske, owner of Trout River Cranberry Company, of Boulder Junction, WI.

Mr. Teske begins by noting the three criteria that must be met in order to grant a variance. First he speaks to unnecessary hardship and states that he feels this has been created by the conflicts between and vagueness of state and county laws regarding cranberry growers. He notes that he has an opinion from his attorney that a permit is not needed to build these structures, as the pumps are effectively a dam and that any structures erected to enclose them are a part of the pump. He states that the County has still decided that permits are needed to construct the structures. He then states that the inability to protect his equipment is part of the unnecessary hardship.

Mr. Teske then speaks to unique features of the land. He states that the pumps need to be as close to the water course as possible because placing them away from the water source can cause clogged pumps.

Mr. Teske then speaks to the effect on the public interest. He states that the public interest will not be adversely affected because in terms of safety and aesthetics the building will actually improve the situation, as the buildings will look better than an exposed motor and equipment on the edge of the lake. He also notes that there are no other homeowners on either lake or the river and that all buildings on those bodies of water are owned by his company.

One letter of correspondence, from Bill and Sue McCutchin, 4185 CTH H, Boulder Jct, WI 54512, dated April 20, 2009, and speaking against the variance, is read into the record.

Mr. Roberts questions if the letter was actually for the Vilas County Board of Adjustment as it was addressed to the Lac du Flambeau Zoning Board and Zoning Administrator.

Mr. Sadenwasser states that the letter was handed directly to him to be given to the Board.

Mr. Huntley swears in Gayle Hoffman, Vilas County Deputy Zoning Administrator, of Eagle River, WI.

Ms. Hoffman states that she denied Mr. Teske a permit to erect the requested structures on February 27, 2009 due to Vilas County Shoreland Zoning Ordinance (the Ordinance) Article 5.1(B) and Vilas County General Zoning Ordinance Article 4.7(G), both of which require a 75 foot setback from the ordinary high water mark (OHWM) for all structures with the exception of boathouses. She states that Mr. Teske submitted a letter from his attorney dated December 1, 2008, stating his opinion that the structures should be exempt from shoreland zoning due to Wisconsin State Statute 94.26 (Wisconsin cranberry laws) which covers “drains, ditches, and dams” but does not cover actual structures.

Exhibit 1, entitled Cranberry Construction Projects: US Army Corps of Engineers and Wisconsin Department of Natural Resources Permit Information, is entered by Ms. Hoffman.

Ms. Hoffman states that Exhibit 1 is a packet of information regarding cranberry marsh construction projects that was developed in cooperation with the Wisconsin State Cranberry Growers Association (WSCGA), the United States Environmental Protection Agency (EPA), the United States Army Corp of Engineers (CoE), and the Wisconsin Department of Natural Resources (DNR). She notes that there is a section that specifically relates to shoreland and flood plain zoning that states “although some cranberry activities...are specifically exempt from shoreland zoning regulations the construction of buildings or other structures is not exempt and may require a shoreland zoning permit from the county.” She then explains that this information came from an Internet site that Ms. Ackland found online.

Ms. Hoffman notes that Mr. Teske is taking the same action as he did in 1997 when he received a variance for five (5) steel pole buildings for pump protection.

Me. Roberts asks if Ms. Hoffman is aware of any similar requests made in other counties in Wisconsin.

Ms. Hoffman states that she is not.

Mr. Ketterer inquires about the effect of Exhibit 1. He notes that it was developed through the cooperation of several different agencies but asks if it is a state statute.

Ms. Hoffman answers that it is not a state statute but was developed in September of 2008 and was available on a DNR website regarding waterways and permitting. Mr. Ketterer asks if this means that the WSCGA, EPA, CoE, and DNR have reviewed the Wisconsin cranberry laws and concluded that shoreland or flood plain zoning is the way that the statutes should be interpreted.

Ms. Hoffman states that is correct.

Mr. Ketterer asks if this packet was purely informational to explain what they have agreed was the intent of the Wisconsin cranberry laws.

Ms. Hoffman states that is correct, and notes that the Board has a copy of Wisconsin State Statute 94.26 in their informational packet. She states that from what she has read it does not specifically address structures at all.

Mr. Ketterer states that the reason he was asking is that there are conflicting opinions from attorneys regarding the issue.

Ms. Hoffman states that Exhibit 1 was the only information that she was able to find regarding the applicability of shoreland zoning to cranberry growers.

Mr. Peterson states that in response to Mr. Roberts' question, in Oneida County there are no restrictions on structures for cranberry growing.

Mr. Huntley asks if this means they would allow the buildings.

Mr. Peterson states that is correct.

Mr. Huntley swears in Tom Blake, Wisconsin Department of Natural Resources, of Rhinelander, WI.

Exhibit 2, a letter regarding the DNR position on the variance, is entered by Mr. Blake.

Mr. Blake reads Exhibit 2 into the record and explains some of the wording within.

Mr. Blake states that Mr. Teske stated that his pumps need to be located as close to the water as possible for the business, but that the criterion is a unique property feature, which means a feature of the land. Mr. Blake also states that while Mr. Teske testified that there are no neighbors on the lakes or the river they are still public resources open to use by all members of the public. He mentions aspects such as scenic beauty, water quality, and habitat.

Mr. Huntley swears in Mary Greenman, Vilas County Assistant Zoning Administrator, of Eagle River, WI.

Ms. Greenman states that she is not at the hearing to speak either for or against the variance request. She then states that the intent of the Ordinance is to keep structures beyond 75 foot from the OHWM. She reviews for the benefit of the Board the task that is before them, and notes that the decision of the Board must be defensible and encourages that the Board expound on the reasoning behind any decision that they make. She notes the opinion of Vilas County Corporation Counsel Martha Milanowski

regarding the structures and reiterates some of the other pieces of evidence that have been submitted.

Mr. Peterson asks how the Town of Lac du Flambeau voted on this issue.

Ms. Greenman states that she does not know and the Board should ask that of Sue Ackland.

Mr. Ketterer asks if the 1997 variance was for three pump structures and states that he saw some structures on the property that were not a part of that variance hearing.

Ms. Greenman states that she does not know the specifics of the 1997 variance.

Mr. Ketterer states that he has heard some comments about temporary structures or covers for the pumps and notes that there are more than three (3) permanent structures on the property at the present time.

Ms. Milanowski states that question is best posed to Mr. Teske.

Mr. Ketterer asks Ms. Greenman if temporary structures are allowed under the Ordinance.

Ms. Greenman responds that temporary structures are allowed but they must be moveable and may not be situated for a term of longer than thirty (30) days. She states that they would still require a permit.

Mr. Huntley swears in Sue Ackland, Town of Lac du Flambeau Zoning Administrator, of Lac du Flambeau, WI.

Mr. Roberts asks Ms. Ackland if the Town has processed anything regarding this variance.

Ms. Ackland states that she received the application from Mr. Teske and that a meeting has been scheduled but has not yet been held. She states that therefore there is nothing to bring to the Board from the Town.

Mr. Ketterer states that he saw more than three (3) permanent structures at the onsite.

Mr. Teske responds that the 1997 variance allowed for five (5) permanent structures on three (3) sites.

Mr. Ketterer states that there were corrugated steel enclosures around some of the existing pumps that are being discussed in this variance.

Mr. Teske responds that in 1997 there were five (5) permanent structures permitted and that on two (2) of the pumps visited in the onsite there are temporary structures that he

built around the pumps. He states that he did not get a permit for the temporary structures and just built them to enclose the engines. He states that the temporary structures are not adequate protection and that they will be removed if the new structures are allowed.

Mr. Huntley swears in Richard McCutchin of Boulder Junction, WI.

Mr. McCutchin states that the Ordinance requires a 75 foot setback and as such he would like the variance to be denied. He states that he believes that Mr. Teske knows the rules regarding the pump houses and should have to adhere to them regardless of the hardships he claims.

Mr. McCutchin then speaks about flooding concerns on his property that he feels can be attributed to the Trout River Cranberry Company and its operations.

The Board questions Mr. McCutchin about his flooding concerns.

Ms. Milanowski advises the Board to discuss only the application and variance issues at hand regarding the structures within the 75 foot setback.

Mr. Huntley swears in Gretchen Watkins, Lac du Flambeau Band of Lake Superior Chippewa Indians Water Resource Specialist, of Lac du Flambeau, WI.

Ms. Watkins states that the Lac du Flambeau Band of Lake Superior Chippewa Indians (the Tribe) owns the opposite side of Great Corn and Little Corn Lakes, and that they use both lakes and the Trout River for hunting and gathering resources. She states the Tribe has been studying the lakes since the cranberry growing operation began and that they believe the structures would impair water quality if erected, and so would like the variance to be denied.

Ms. Watkins states that the Tribe requests the following condition be attached if the variance is granted: all rainwater must be captured and infiltrated into the ground.

Exhibit 3 and Exhibit 4, Best Management Practices for Capturing and Infiltrating Rainwater, are entered by Ms. Watkins.

Mr. Huntley asks what the Tribe gathers from the lakes.

Ms. Watkins responds that there are medicinal resources gathered from the lakes and there is wild rice gathered from the Trout River.

Mr. Roberts states that the Board will now begin discussion of the variance request.

Mr. Roberts notes that the Wisconsin cranberry laws date from the Civil War era and have provided a great deal of protection to the cranberry industry, but have come face to face with more recent legislation regarding shoreland protection. He states that the

situation keeps revolving and coming back before the Board. He also notes that much has changed in terms of pumping and irrigation technology in the 142 years since the Wisconsin cranberry laws were enacted.

Mr. Huntley states that he feels this issue does not belong before the Board as it is a legal issue. He states that he is unsure how the decision will be written in a way that will make any sense.

Mr. Ketterer states that he believes that the job of the Board is not to discuss the inconsistencies between the state statutes and county ordinances, but to focus solely on the Ordinance as it stands and how this application can be handled under those guidelines.

Ms. Milanowski advises the Board to discuss each of the three variance criteria based on the information that is before the Board.

Mr. Teske states that he did not need a permit to construct the existing pumps, which he feels are much more detrimental than the proposed structures would be. He states that he feels the buildings that house the pumps are part of the pieces of equipment, which did not need a permit.

Mr. Roberts asks how Mr. Teske would address the concerns about runoff from the buildings.

Mr. Teske states that the buildings are small and that most of them will be sloped away from the lakes so that the rainwater will be running onto the ground, not directly into the water. He also states that the structure proposed near the river will be approximately 45 feet from the water.

Mr. Huntley notes that one of the buildings will be sloped towards the water according to the submitted plans and asks if that can be changed.

Mr. Teske replies that the building in question is actually an addition to an existing building that already slopes towards the water.

Mr. Barron asks about the intake sizes and volume of the pumps, and whether or not they need to be primed.

Mr. Teske responds that three of the pumps are flood pumps that range from 12,000-18,000 gallons/minute with 24 inch intakes. He states that they do not need to be primed, but the pumping capacity depends on the height of the lift.

Mr. Barron asks if an alternate location would cause the lift to be greater, impairing the pumping abilities.

Mr. Teske states that a flood pump may be located away from the water source but it would require a large canal to provide it with enough water to operate.

Mr. Barron asks if it would be possible to have a two (2) foot intake pipe running to the pump from the water source as opposed to a large canal.

Mr. Teske states that he does not know the answer to that question. He states that at the Trout River location he has a four (4) foot underground intake pipe for a two (2) foot pump. He states that each location would have to be looked at individually.

Mr. Barron states that he is trying to determine if placing the pumping equipment back from the water would cause a “pumping hardship.”

Mr. Roberts asks if the Trout River pump is located where it was allowed by the Wisconsin cranberry laws.

Mr. Teske answers yes.

Mr. Barron asks what types of activities will occur inside these proposed buildings.

Mr. Teske states that repairs and maintenance will occur within the buildings, and that they will also be used for heating the engines in the winter. He notes that the current temporary enclosures are not adequate for these purposes.

Mr. Huntley asks if the buildings will be insulated.

Mr. Teske responds that they will not but that he rarely needs to heat the engines, perhaps one time each year.

Mr. Roberts asks Ms. Watkins to respond to the question of contamination of runoff from the buildings.

Ms. Watkins states that she is not familiar with the sites or the design of the buildings. She also states that it is correct that the rainwater will carry runoff from the land into the lake, and that it will focus the water in a way that causes more impact than if it were hitting the ground directly. She notes that at times the drawdown of the lakes can be so great as to expose the shoreline to a greater degree than normal, which can lead to increased erosion. She notes that it is a simple thing to place gutters on a building and direct the rainwater appropriately.

Mr. Ketterer reads from the conclusion of the 1997 variance findings regarding unnecessary hardship.

Mr. Ketterer states that the applicant stated the pumps are located in the current location for better use of his cranberry marsh, which amounts to a self created hardship. He notes that aesthetically it is much better to have the engines covered, and that if it were his business he would like to have them covered for protection purposes as well. He states that there are cranberry growers who have their pumps located much greater distances

from the OHWM, and that it was Mr. Teske's choice to place the pumps near the water and to exercise the full extent of what the Wisconsin cranberry law allows, which is a self created hardship. He states that to not cover the pumps does not cause a reduction of use of his property.

Ms. Milanowski reminds the Board that the 1997 variance was granted under a different legal standard for determining hardship. She states that the job of the Board today is not to determine if the applicant has reasonable use of the property, but to determine if compliance with the Ordinance is unnecessarily burdensome to the applicant.

Mr. Peterson speaks to the qualities of the area, and notes that exposed pumps are more objectionable than buildings. He states that the public interest would be well served by granting the variance.

The Board discusses the nature and history of the Wisconsin cranberry laws.

Mr. Ketterer reiterates his position regarding the unnecessary hardship.

Mr. Peterson asks how long the 75 foot setback has been in place.

Ms. Greenman states that the 75 foot setback has been in place in some form since the 1960s, and certainly was in place before 1997.

Mr. Roberts states that he agrees with Mr. Ketterer regarding the lack of an absolute hardship being present.

Mr. Huntley states that he agrees but feels the pumps should still be covered.

Mr. Barron states that to move the pumps would certainly cost a great deal but money can not be considered a hardship.

Ms. Milanowski states that the issue is whether compliance with the regulations would be unnecessarily burdensome. She states that there is no reason to put the pump house at 75 feet and not move the pumping equipment, so it must be looked at as a whole. It also must be looked at as to whether it is possible to move the pumps in each location, and each location is different.

The Board discusses the evolution of cranberry harvesting with Mr. Teske, noting that at the time the Wisconsin cranberry laws were enacted there were no mechanical pumps used to cranberry production.

Ms. Milanowski discusses with the Board that they are convened only to consider the variance at hand, not to argue exceptions to the Wisconsin cranberry laws.

Mr. Huntley notes that the pumps have been working in that location for over ten years already.

Mr. Roberts states that the Board cannot dictate where the pump is located since the Wisconsin cranberry laws allow it to be practically anywhere.

Mr. Ketterer states that, regardless of the Wisconsin cranberry laws, cranberry growers still must comply with the Ordinance. He notes that the pumps could have been located beyond the 75 foot setback but the operator voluntarily placed them within the setback area. He states that the property has no unique features that would preclude moving the pumps to another location.

Mr. Roberts states that originally the property was forest land that was logged off, so the pumps could have been placed in other locations when the marsh was constructed. He states that while the current placement is within the rights granted by the Wisconsin cranberry laws, that does not mean that local shoreland protection ordinances should be discounted or disregarded.

Mr. Teske notes that the original law written was the Wisconsin cranberry law, and that two (2) cases were taken to the Wisconsin Supreme Court and they ruled that if the Legislature wanted the DNR to regulate structures they would have given them that power.

Mr. Ketterer states that the Board is convened today to interpret the Vilas County Shoreland Ordinance, and that they cannot use state law to justify their decision.

Mr. Roberts states that he feels this is an issue for the courts to decide and that the variance should be turned down because the request conflicts with the Ordinance. He states that the applicants desire to protect his equipment is understandable but that was not taken into consideration when locating the pumps.

Mr. Barron asks if there is any question with the definition of a structure.

Mr. Huntley responds that there is not.

Mr. Teske states that his attorney opines that the pump houses are not structures.

Ms. Milanowski advises that this is not an ordinance interpretation and the definition of a structure is not being challenged.

Mr. Huntley states that he does not feel the variance can be granted.

Mr. Roberts states that he agrees with the opinion of Mr. Ketterer regarding the hardship.

Mr. Roberts asks if the Board is ready to vote on the variance.

The Board generally agrees that they are.

Ms. Milanowski advises the Board that they must discuss all three (3) variance criteria: Unnecessary hardship, unique property features, and impact on the public interest.

Mr. Peterson states that he discussed the public interest.

Mr. Huntley states that meeting one (1) criterion of the three (3) required is not enough to grant the variance.

Mr. Roberts states that the public interest would have been best served if the pumps could have been located outside of the setback.

Mr. Barron asks why the pumps were not enclosed when they were originally set.

Mr. Teske answers that he could not afford it at that time.

Mr. Ketterer states that he struggled with how this would impact the public interest. He states that aesthetically he would like to have that equipment covered, and that he feels the buildings will not add any impervious surface as there are already concrete pads located at the sites.

Ms. Milanowski states that the Board must consider the purpose of the Ordinance, and part of that concerns runoff.

Mr. Ketterer asks if all three (3) conditions must be met to grant a variance.

Mr. Milanowski answers that is correct.

Mr. Ketterer reiterates his stance on unnecessary hardship and states that he cannot make up his mind about the impact on the public interest.

Mr. Barron and Mr. Ketterer discuss issues regarding the public interest.

Ms. Milanowski reiterates that to grant the variance all three (3) variance criteria must be met.

Mr. Ketterer moves to deny the variance because no hardship is present as the pumps could be located beyond the 75 foot setback requirement, however the applicant placed them voluntarily within the setback for his own convenience; there are no unique property features that preclude the pumps from being located outside of the setback area; and despite the fact that the public interest may not be harmed by the installation of buildings to cover the pump structures. Mr. Huntley seconds.

Roll call vote on motion to deny variance request:

Glyn Roberts -	In favor
Don Huntley -	In favor

Dick Peterson - Opposed
Marty Ketterer - In favor
John Barron - Opposed
Motion carried (3-2). Variance denied.

Mr. Peterson moves to adjourn. Mr. Ketterer seconds.

Glyn Roberts - Aye
Don Huntley - Aye
Dick Peterson - Aye
Marty Ketterer - Aye
John Barron - Aye
Motion carried (5-0). Meeting adjourned at 11:40 am.