

## **BEFORE THE DANE COUNTY BOARD OF ADJUSTMENT**

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Appeal of Alan Birkle, regarding the property located at 2784 Waubesa Ave in the Town of Dunn.

Appeal No. 3714

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### **BRIEF OF DANE COUNTY ZONING ADMINISTRATOR**

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Alan and Holly Birkle own the property located at 2784 Waubesa Ave Town of Dunn. The Dane County Zoning Division issued a shoreland zoning permit on November 6, 2020 to allow the teardown and rebuild of a single family residence on the property. An inspection on May 11, 2021 revealed that a retaining wall had been placed within the vegetative buffer zone near the shoreline of Lake Waubesa. This information was relayed to Assistant Zoning Administrator, Hans Hilbert, on May 12, 2021, and after review of the information it was determined that a retaining wall had been developed which was not permitted. On May 25, 2021 a notice of violation was sent to the property owner. Alan Birkle, represented by Elizabeth Stephens, appeal the decision of the Zoning Administrator that the alleged violation exists.

### **STATEMENT OF FACTS**

1. Alan and Holly Birkle are the owners of the property located at 2784 Waubesa Ave in the Town of Dunn.
2. The property is located entirely within 300 feet of Lake Waubesa and therefore entirely within the shoreland zoning district.
3. On June 26, 2020 the Dane County Zoning Division processed a shoreland zoning permit application submitted by Alan Birkle.
4. During the period between June 26 and August 24, 2020 there were communications between Dane County Zoning, Dane County Land and Water Resources, Alan Birkle, and Mr. Birkle's engineer, Peter Fortlage including submissions of revised site plans.
5. The original nor revised site plans submitted as part of the shoreland zoning permit application did not include a retaining wall near the shoreline.
6. On August 24, 2020 a shoreland zoning permit review letter was issued to Alan Birkle stating the conditions needing to be met for the permit to be issued, as well as the conditions that would be placed on the permit.
7. On November 6, 2020 Dane County Zoning issued shoreland zoning permit DCPSHL-2020-00063 to Alan Birkle.
8. An inspection was made on May 11, 2021 by Dane County Water Resource Specialist, Jason Tuggle.
9. On May 12, 2021 Jason Tuggle send an e-mail to Hans Hilbert stating that large slab limestone boulders had been installed near the shoreline.
10. A notice of violation letter was sent to the property owner on May 25, 2021 stating that the development of a retaining wall was not included as part of DCPSHL-2020-00063 and corrective action is required.

### **METHODOLOGY**

Dane County Code of Ordinances section 11.99(1)(b)1. States, "1. Shoreland Zoning Permits. Within the shoreland, shoreland-wetland and inland-wetland districts, the zoning administrator shall require approved shoreland zoning permits before any of the following activities occur: a. Any new construction or placement of permanent or temporary structures,..."

DCCO 11.015(42) defines a structure as "anything constructed or erected, the use of which requires permanent or temporary location on the ground, or attached to something having a permanent or temporary location on the ground, including but not limited to any building, dwelling, manufactured building, manufactured home, mobile

home, house trailer, recreational vehicle, boathouse, boat shelter, advertising sign, deck, patios, driveways, fences, retaining walls, or other improvements or any part of such structure. A structure includes any permanent or temporary appurtenance attached thereto.

Per DCCO 11.03(2)1. Structures shall be setback at least 75 feet from the ordinary high water mark of a waterway unless they are exempt structures or minor structures. Exempt structures are limited to broadcast signal receivers, walkways, boathouses, utility facilities, and stormwater devices. Minor structures are limited to a total of 200 square feet per property and must maintain at least a 35 foot setback from the ordinary high water mark of a waterway.

The application form for a shoreland zoning permit lists items required to be shown on an accompanying site plan, including: property lines with dimensions, all existing structures, any proposed structures, all impervious surfaces, all vegetative areas, the ordinary high water mark, and topographic data. The application requires the applicant's signature under a statement that reads, "I, the undersigned, hereby make application for a shoreland zoning permit and certify to the accuracy of the information. I further certify I am the property owner, or a duly authorized representative, and may sign this permit application on the behalf of the owner(s) of said property."

The shoreland zoning permit application and site plan that was used to establish the August 24, 2020 review letter did not contain any reference to a retaining wall near the shoreline on the property. Had the plan contained a new structure, other than an exempt or minor structure, within 35 feet of the ordinary high water mark the permit would have been denied. The August 24, 2020 review letter stated that prior to the issuance of the shoreland zoning permit, a shoreland erosion control permit is required for land disturbing activity, and a shoreland mitigation permit, including establishment of a vegetative buffer, is required due to an increase to the impervious surface ratio of the property and the inclusion of a minor structure (screen room) attached to the house. In addition, the letter stated that an approved shoreland zoning permit will be issued with two conditions, "1. No change of topography within 5 feet of a property line. 2. No disturbance of the vegetative buffer zone unless it is part of an approved shoreland mitigation permit."

The shoreland zoning permit application was signed by Alan Birkle on June 9, 2020, and subsequently permit DCPSHL-2021-00063 was signed, dated, and initialed by Mr. Birkle on November 7, 2020 acknowledging both the conditions of the permit and the statement above the signature line which reads, "I, the undersigned, am the owner of the property...I certify that the work to be performed, as part of this zoning permit, will be constructed as noted on the submitted plans and comply with the applicable zoning ordinances. I understand that failure to comply with any provision or condition of this permit renders this zoning permit null and void and subject to enforcement action."

### **APPELLANT ARGUMENT**

The appellant, more or less, argues three points. The first, that the limestone blocks are legally placed because they were shown on a plan submitted to Dane County Land and Water Resources as part of a shoreland mitigation permit application. Mr. Bickle claims that the condition on the shoreland zoning permit related to disturbance of the vegetative buffer zone grants approval to place structures in the vegetative buffer zone with an approved shoreland mitigation permit, but ignores that in placing a retaining wall he has also violated the remaining condition prohibiting change of topography within 5 feet of a property line. Regardless, the appellant fails to demonstrate the retaining wall was properly approved. DCCO 11.99(3) provides the director of Land and Water Resources, or her designee, the authority to enforce sections 11.05 (shoreland erosion control and shoreland mitigation permits), 11.12 (shoreland mitigation performance standards), and 11.13 (Technical Standards and Specifications). The director, or designee, is also afforded the powers and duties to administer shoreland erosion control permits, shoreland mitigation permits, and farm conservation plans. In contrast, DCCO 11.99(1) grants the Zoning Administrator [under the Dane County Planning and Development Department] the authority to enforce and administer 11.02, 11.03, 11.04, 11.06, 11.07, 11.08, 11.09, 11.10, and 11.11 and provides the powers and duties to the Zoning Administrator, or his designee, to administer shoreland zoning permits, navigable waters, and wetlands. The Zoning Administrator, or his designee, is the sole entity with the authority to approve shoreland zoning permits, including the setback requirements for structures found in DCCO 11.03. As the director of Land

and Water Resources, or her designee, did not have the authority, power, or duty to approve a structure as part of a shoreland zoning permit, this is an invalid argument.

Second, they argue that the limestone blocks are not a retaining wall, but rather are riprap. Riprap is commonly used for riparian stabilization and, due to its interface with a waterway, is regulated by the Wisconsin Department of Natural Resources and State Statute 30.12(1g)(jm):

“Riprap in an amount not to exceed 200 linear feet that is placed in a river or inland lake, or in an amount not to exceed 300 linear feet that is placed in a Great Lakes water body, and to which all of the following apply:

1. The riprap is clean fieldstone or quarry stone with a diameter of no less than 6 inches and no greater than 48 inches.
2. The toe of the riprap does not extend more than 8 feet waterward of the ordinary high-water mark.
3. The final riprap slope is not steeper than one foot horizontal to 1.25 feet vertical.
4. The riprap does not reach an elevation higher than 36 inches above the ordinary high-water mark or above the storm-wave height, as calculated using a method established by the department by rule, whichever is higher.
5. No fill material or soil is placed in a wetland and, aside from riprap and, under subd. 7., gravel, no fill material or soil is placed below the ordinary high-water mark of any navigable waterway.
6. The riprap follows the natural contour of the shoreline.
7. Filter fabric or clean-washed gravel is used as a filter layer under the riprap.”

As riprap is placed within the lake bed, below the ordinary high water mark of the waterbody, and cannot exceed an elevation higher than 36 inches above the ordinary high water mark, or storm-wave height, the limestone blocks do not meet the requirements of riprap under SS 30.12. The appellant does not make any other case that the limestone block is not a structure subject to shoreland zoning regulation.

Lastly, they argue that the May 25, 2021 violation notice did not cite specific sections of DCCO Chapter 11. The letter provides a sufficient explanation that Chapter 11 provides that a retaining wall is a structure which requires a setback from the ordinary high water mark. The actual violation notice was “your development does not comply with the approved shoreland zoning permit”. In signing the approved shoreland zoning permit on November 7, 2020, Mr. Birkle had already acknowledged “I certify that the work to be performed, as part of this zoning permit, will be constructed as noted on the submitted plans and comply with the applicable zoning ordinances. I understand that failure to comply with any provision or condition of this permit renders this zoning permit null and void and subject to enforcement action.” This alone should suffice as adequate notice.

### **SUMMARY**

A shoreland zoning permit was issued for a development on Mr. Birkle’s property. Upon inspection, it was determined that portions of the development did not comply with the approved shoreland zoning permit. Mr. Birkle claims that there is no such violation, but fails to demonstrate that the retaining wall was authorized as part of the shoreland zoning permit, is something other than a structure not required to meet shoreland setback requirements, or that he was given adequate notice or instruction to correct the violation.

### **FINDINGS OF FACT**

I respectfully request that the Dane County Board of Adjustment make the following Findings of Fact:

1. Shoreland zoning permit DCPSHL-2021-00063 did not authorize a retaining wall near the shoreline at 2784 Waubesa Ave in the Town of Dunn.
2. Only the Zoning Administrator, or his designee, has the authority to approve a structure as part of a shoreland zoning permit.
3. Mr. Birkle’s signature acknowledged “I, the undersigned, hereby make application for a shoreland zoning permit and certify to the accuracy of the information. I further certify I am the property owner, or a duly authorized representative, and may sign this permit application on the behalf of the owner(s) of said property.”

4. Mr. Birkle's signature acknowledged "I, the undersigned, am the owner of the property...I certify that the work to be performed, as part of this zoning permit, will be constructed as noted on the submitted plans and comply with the applicable zoning ordinances. I understand that failure to comply with any provision or condition of this permit renders this zoning permit null and void and subject to enforcement action."
5. Mr. Birkle's initials acknowledged the two conditions of the shoreland zoning permit: "1. No change of topography within 5 feet of a property line. 2. No disturbance of the vegetative buffer zone unless it is part of an approved shoreland mitigation permit."
6. A retaining wall is a structure for purposes of shoreland zoning regulation and is required to be setback per DCCO 11.03.
7. Mr. Birkle constructed a retaining wall within the required setback to the ordinary high water mark of Lake Waubesa on this property.

### **CONCLUSION**

With the aforementioned evidence, I respectfully request that the Dane County Board of Adjustment make the following conclusion:

1. The limestone block retaining wall is an unpermitted, illegal structure located within the required setback to the ordinary high water mark of Lake Kegonsa.
2. The retaining wall must be removed to bring the property in to compliance with Dane County Shoreland Zoning Regulations.

### **LIST OF EXHIBITS**

1. Shoreland zoning permit application review letter dated August 24, 2020
2. Shoreland zoning permit DCPSHL-2020-00063 file
3. E-mail string between Jason Tuggle and Hans Hilbert beginning May 12, 2020.
4. Shoreland violation notice letter dated May 25, 2021.
5. Chapter 11, Dane County Code of Ordinances.