

Jeff Mursau

STATE REPRESENTATIVE • 36TH ASSEMBLY DISTRICT

Senate Committee on Sporting Heritage, Small Business, and Rural Issues SB 387- county shoreland zoning ordinances relating to fences near public highways

July 21, 2021

Chairmen Stafsholt and Committee Members:

Thank you for the opportunity to testify in support of Senate Bill 387, which relates to county shoreland zoning ordinances with respect to fences near public highways. I appreciate your willingness to bring this bill forward.

Every county in Wisconsin is required to have a Shoreland Zoning Ordinance, which includes a shoreland setback area of 75 feet, and provides that a county ordinance may not prohibit the construction of certain structures within the setback area. Those structures include such things as boathouses, utility lines and poles, satellite dishes, walkways that provide pedestrian access to a waterway, gazebos, and patios, as long as these structures meet certain requirements. **Currently, there isn't any exemption for a fence within a setback area near a public highway.** In certain instances a fence would be appropriate for safety and privacy along a busy highway.

Under this bill, a fence along a public highway that meets the following criteria would be added to the list of exempt structures from the setback requirements:

- Fence is no taller than 15 feet
- Located at least two feet landward of the ordinary high-water mark, entirely outside of the highway right-of-way, no less than 10 feet from the edge of a roadway, and no more than 40 feet from the edge of a roadway or highway right-of-way, whichever is greater
- Fence is generally perpendicular to the shoreline

I'm introducing this bill after the issue was brought to my attention by a constituent who is here with us today. He lives on a state highway that was undergoing a reconstruction project by the Department of Transportation (DOT) in 2016. The constituent's mature treeline needed to be removed to accommodate the expansion and an agreement was made between the owner and DOT to install a fence once the project was completed. The constituent was granted approval for a fence by DOT and received a building permit from the local town. He went on to build the fence without knowing or being told by either permitting entity that because of the nearby creek, he was subject to shoreland zoning ordinances. He only became aware of it when he received a letter from the county saying he was in violation and either the fence needed to come down or he would be subject to daily fines until he was in compliance.

Our constituent then applied for a variance, which was denied. He appealed the decision and despite testimony from DOT and a letter from DNR saying the property had met the necessary considerations for granting a variance, he was denied again. The county simply felt their hands were tied because of current state statutes and an exemption for a fence wasn't allowed. It was then that we began working with DNR on language that would allow for a fence in certain instances while maintaining the intent of our shoreland zoning laws.

I'd like to acknowledge and thank the DNR, DOT, and Legislative Council for all the help they provided along the way. The Assembly companion bill had a positive hearing earlier this month and I anticipate an executive session on the bill in the near future.

Once again, thank you for holding a public hearing on this important piece of legislation. I am happy to answer any questions you may have.



MARY FELZKOWSKI

STATE SENATOR • 12TH SENATE DISTRICT

Testimony on SB-387

Chairman Stafsholt and members of the Committee on Sporting Heritage, Small Business and Rural Issues, thank you for allowing me to testify on Senate Bill 387.

Currently, certain structures that are allowed within the shoreland setback area include such things as boathouses, utility lines and poles, satellite dishes, walkways that provide pedestrian access to a waterway, gazebos, and patios – as long as the structures meet certain requirements. This bill would exempt the construction of fences from state shoreland zoning setback standards in an extremely narrow number of circumstances.

Later on today, you will hear testimony from a constituent of ours who will walk you through a scenario where this exemption would come into play, in the meantime, I'd like to explain why we've proposed this as a bill.

The state of Wisconsin allows for counties to issue variances, or circumvent the state standard when they believe a situation doesn't take into effect circumstantial evidence. This works great when counties are willing to make exceptions to the regulations in order to benefit their constituents. Unfortunately and fortunately, not all counties are fine with doing that.

SB-387 would allow for Wisconsin counties to permit privacy fences on properties without the added pressure of circumventing state government.

This bill would permit a fence that is no taller than 15 feet; that is located at least two feet landward of the ordinary high-water mark, entirely outside of a highway right-of-way, no less than 10 feet from the edge of a roadway, and no more than 40 feet from the edge of a roadway or highway right-of-way, whichever is greater; and that is generally perpendicular to the shoreline.

The longest fence anyone can build would be 40 feet at max, starting from the edge of the highway right of way, making sure that this is only applied to provide property owners with privacy.

We would like to thank the Department of Transportation and the Department of Natural Resources for working with us on this. It's not too often you find both parties supporting an issue that tends to be controversial. This bill would be a win for Wisconsin property owners and a testament to bipartisan democracy. Thank you for your time.

Tom Buelteman SB 387 Hearing Presentation

First, I would like to thank everyone involved that worked to make this Hearing possible; and those who are participating for their time and effort to do so. Time is valuable and I feel this Hearing is time well spent.

Our residence is approximately 6.5 miles north of Marinette on State Highway 180. The front of our house faces Hwy 180. The back of the house is against the Menominee River. The North side of the house faces an un-named creek.

State Highway 180 was rebuilt in 2016. I would like to note that we fully supported this project as the highway had badly needed the rebuild. We greatly appreciate the rebuilt highway. Due to this reconstruction the WI DOT purchased some of our property to extend the ROW. Due to that purchase an existing Tree Line of Mature Evergreens had to be removed. That was to facilitate the Hwy Construction and replacement of a box culvert for the un-named creek. That tree line provided some privacy and traffic noise reduction. The money from the sale of the ROW property was used to erect an 8-foot tall poly vinyl fence.

Our house was built in the mid 1950s. We moved in in 1977. At that time there was much less traffic on Hwy 180. I used to joke we could play basketball on the highway and not worry about cars. That was not far off. And is not the case today. In the late 1980s we started to grow our Evergreen Tree Line. We raised three children in this house. The tree line helped us provide a boundary for the children not to go beyond. So not only did the tree line provide privacy, traffic noise reduction, it also helped provide some measure of Safety. Our children are now grown. And we now have two grandchildren, hoping for more. Once again, a barrier, in this case a fence, is greatly needed and appreciated.

In the 1950s certainly, none of the existing Shoreland Zoning laws existed. Maybe none existed. We can see many Personal Residences and Commercial Properties that were previously built not meet modern Zoning requirements. Our residence is one of them. Boarded on the east/back of the house 30-feet from OHWM of the Menominee River, on the north side of the house 76-feet from the OHWM of the un-named creek. And only 75-feet between the highway and the front of our house.

Fencing or barriers are a common practice used by WI DOT to enhance safety, and to provide a measure of privacy and noise control. Passenger vehicle and Semi-Tractor trailer traffic on State Highway 180 is now many times over what it was when the house was built in the 1950s and when we moved in in 1977. I would expect the traffic will only increase as Fincantieri Marinette Marine continues to expand. We do not have time to regrow a tree line. A Fence was the most logical solution to get us back to near where we were before the highway rebuild.

The WI DNR does not oppose the installation of the fence.

In a letter dated September 12, 2019 from Mr. Dale Rezabek, WI DNR, Shoreland Specialist:

- Quote—"This fence does not prohibit migration of wildlife along the waterway. There does not appear to be much watercraft travel in this creek. The fence has been built on the road side of the property, and is not on the main navigable portion of the Menominee River, so the impact to natural scenic beauty is minimal."

The entire letter from Mr. Rezabek, WI DNR, is included in my packet.

In an email dated January 10, 2020 from Mr. Dale Rezabek Shoreland Specialist:

- Quote—"I can tell you now that in my letter of 09/12/19, my comment about no harm to the public interest for natural scenic beauty was for viewing from the waterway, and that the department not being opposed to granting a variance is based on the shoreland zoning standards in NR 115 and relate to protecting the Public Trust for Waterways."

The entire email from Mr. Rezabek is included in my packet.

Pictures of the existing fence are included for your information.

I am asking for your support of Bill SB 387 to become Law. As Wisconsin moves forward with Highway improvements it should be expected that instances such as ours will occur. Wisconsin has a reputation for protecting and enhancing the Quality of Life for its residents. SB 387 will help to help insure that end goal.



September 12, 2019

Board of Adjustment,
Marinette County
Marinette County Courthouse
1926 Hall Ave.
Marinette, WI 54143-1717

Subject: Variance Application, Buelteman Property Case, Town of Porterfield, Marinette County

Dear Board Members,

The Department of Natural Resources (department) has received the notice for the September 18, 2019 public hearing concerning the variance request submitted for the Buelteman property. The variance request is for a fence that has been constructed 14 feet from the ordinary high water mark of a tributary creek to the Menominee River. The Marinette County Shoreland ordinance requires accessory structures to be 75 feet from the ordinary high water mark of navigable waterways.

As the Board reviews these variance requests, please keep in mind that the applicant has the burden of proving that their application meets all of the statutory requirements for the granting of a variance for each variance request. That is, the applicant must prove that they will suffer unnecessary hardship if the provisions in the county's shoreland zoning ordinance are literally enforced. The Wisconsin Supreme Court has made it clear that proof of unnecessary hardship by itself does not entitle an applicant to a variance. All of the statutory variance criteria must be satisfied in order to grant a variance. They are:

Unique physical limitations: The applicant must demonstrate that unique physical limitations (wetlands, steep slopes, streams, rock outcroppings) or special conditions of the property exist that prevent compliance with ordinance regulations. The physical limitations must be unique to the property in question and not generally shared by other properties in the area. When determining if compliance is prevented, the whole parcel must be considered. In that the property is bounded by the Menominee River and also the creek, that means there is a 75 foot setback from the OHWM from both the River and the creek. The creek divides the lot and few lots along the river share this restriction of having multiple 75-foot setbacks and a creek that divides the property.

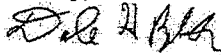
No harm to public interests: The applicant must demonstrate that the variance will not result in harm or be contrary to public interests. The Board must consider the impacts of the proposed project as well as the cumulative impacts of similar projects on the interests of the neighbors, the community, and the general public. These interests are listed in the purpose statement of the ordinance and, for shoreland zoning, include protection of public health, safety and welfare, maintenance of clean water, protection of fish and wildlife habitat, and preservation of natural scenic beauty. **This fence does not prohibit migration of wildlife along the waterway. There does not appear to be much watercraft travel in this creek. The fence has been built on the road side of the property, and is not on the main navigable portion of the Menominee River, so the impact to natural scenic beauty is minimal.**

Unnecessary hardship: The applicant must demonstrate that if the variance is not granted, an unnecessary hardship exists. The applicant may not claim unnecessary hardship because of conditions which are self-imposed or created by a prior owner (for example, building a home in compliance and then subsequently constructing a deck without a permit). Courts have also determined that economic or financial hardship does not justify a variance. When determining whether unnecessary hardship exists, the Board must consider the property as a whole, rather than just a portion of the

parcel. The conditions that this property experiences by having a creek divide the lot and having two water setbacks, is not a condition that has been self-created and also makes strict conformity with the setbacks unnecessarily burdensome.

It is the responsibility of the Board of Adjustment to assure that the statutory standards for the granting of a variance are met. The standards help to ensure protection of the public interest, including the preservation of water quality and fish and wildlife habitat along lakes and rivers. Wisconsin's navigable waterways are held in trust for all people to enjoy. The shoreland setback is important to protect the water quality, natural scenic beauty and the fish and wildlife habitat of Wisconsin's waterways. The Department would not be opposed to a variance issued for this case. The Department appreciates your commitment to Marinette County's water resources and protection of public interests for future generations.

Sincerely,

A handwritten signature in black ink, appearing to read "Dale Rezabek".

Dale Rezabek
Shoreland Specialist

Cc: File
Kay Lutze, Shoreland Policy Coordinator

Variance Decision Appeal Hearing

From: Rezabek, Dale H - DNR (dale.rezabek@wisconsin.gov)

To: tombuelteman@yahoo.com

Cc: kay.lutze@wisconsin.gov

Date: Friday, January 10, 2020, 09:28 AM CST

Hello Mr. Buelteman,

In your BOA decision appeal hearing on Monday, the judge does a BOA hearing record review, he looks at the BOA decision document and all hearing testimony, and he will validate if all three of the statutory criteria were considered correctly or not by the BOA. If he finds fault, he will not invalidate the decision but he will remand it back to the BOA to do another hearing. No new material can be submitted for the judge's review, only what is on record for the September hearing and that includes the BOA justification for their decision and their rationale must be clearly stated (the department has not yet received the BOA decision document from the county, so we do not know their rationale for their decision), and he will check to see that all variance hearing procedures have been followed correctly. I can tell you now that in my letter of 09/12/19, my comment about no harm to the public interest for natural scenic beauty was for viewing from the waterway, and that the department not being opposed to granting a variance is based on the shoreland zoning standards in NR 115 and relate to protecting the Public Trust for waterways.

Thanks, Dale

We are committed to service excellence.

Visit our survey at <http://dnr.wi.gov/customersurvey> to evaluate how I did.

Dale Rezabek, P.G.

Shoreland Specialist

Waterways and Wetlands Compliance Team

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