

AGENDA

Eau Claire County

- BOARD OF LAND USE APPEALS •

Date: Monday, November 14, 2022

Time: 5:30 p.m.

Location: Eau Claire County Courthouse, 721 Oxford Ave, Room 1277, Eau Claire, Wisconsin 54703

*Event link below can be used to connect to meeting and interact (by the chair) from computer or through the WebEx Meeting smartphone app.

Join WebEx Meeting: <https://eauclairecounty.webex.com> Meeting ID: 2596 668 9290

Password: KTmCypFe722

*Meeting audio can be listened to using this Audio conference dial in information.

Audio conference: 1-415-655-0001 Access Code: 25966689290##

For those wishing to make public comment, you must e-mail Holly Weigand at holly.weigand@eauclairecounty.gov at least 60 minutes prior to the start of the meeting.

**Please mute personal devices upon entry*

1. Call to Order and confirmation of meeting notice
2. Public Comment (**15 minute maximum**)
3. Public Hearings
 - a. A request to appeal staff's decision to concur with the Wisconsin Department of Natural Resources that the drainageway at E 11381 County Road D is non-navigable. (Town of Lincoln) APP-0001-22 / Discussion – Action
 - Exhibit 1: Administrative Appeal Staff Report **Pages 2-3**
 - Exhibit 2: Administrative Appeal Application Materials **Pages 4-11**
 - Exhibit 3: September 09, 2022 Final WDNR Navigability Determination **Page 12**
 - Exhibit 4: September 21, 2022 WDNR Navigability Determination Summary **Pages 13-34**
 - Exhibit 5: July 25, 2022 WDNR Initial Desktop Navigability Determination **Pages 35-38**
 - Exhibit 6: Planning and Development Staff Concurrence with WDNR (September 09, 2022) **Page 39**
 - Exhibit 7: Additional information submitted by the applicant November 07, 2022 **Pages 40-65**
 - b. **Withdrawn** – A 75-foot variance request to the county's shoreland structure setback requirements to allow for the construction of a clear span bridge over Bears Grass Creek. (Town of Lincoln) VAR-0003-22
4. Review/Approval of May 23, 2022 Meeting Minutes / Discussion – Action **Pages 66-67**
5. Adjourn

Prepared by: Holly Weigand

Please note: Upon reasonable notice, efforts will be made to accommodate the needs of disabled individuals through sign language, interpreters or other auxiliary aids. For additional information or to request the service, contact the County ADA Coordinator at 715-839-6945 (FAX) 715-839-1669 or (TDD) 715-839-4735 or by writing to the ADA Coordinator, Human Resources Department, Eau Claire County Courthouse, 721 Oxford Ave., Eau Claire, Wisconsin 54703

EAU CLAIRE COUNTY BOARD OF LAND USE APPEALS STAFF ANALYSIS AND RECOMMENDATIONS - APP-2022-01

DATED PREPARED: November 9, 2022

PUBLIC HEARING DATE: November 14, 2022

PETITIONER: Dessy Johnson, E10840 County Road J, Fall Creek, WI 54742

PROPERTY OWNER: Christian Borntreger, E11381 County Road D, Fall Creek, WI 54742

SITE ADDRESS: E11381 County Road D, Fall Creek, WI 54742

PROPERTY DESCRIPTION:

The NE ¼ of the NW ¼ lying South of County Road D, of Section 25, Township 26 North, Range 8 West, Town of Lincoln, Eau Claire County, Wisconsin; Except lands conveyed for Highway purposes.

PARCEL SIZE: +/- 52.6 acres

ZONING DISTRICT: A-P, Agricultural Preservation District, Shoreland Overlay District.

AUTHORITY AND APPEAL ANALYSIS:

Under Section 20.14.005 A.2, the Board of Land Use Appeals has the authority to hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement or administration of this ordinance (shoreland overlay). Such appeal shall be made within 30 days, as provided by the rules of the board, by filing with the officer whose decision is in question, and with the Board of Land Use Appeals, a notice of appeal specifying the reasons for the appeal.

When reviewing an appeal of an administrative decision made by the committee, the board, based on case law, should consider the following in its deliberations:

- The board's determination shall affirm, reverse, vary or modify the order, requirement, decision or determination appealed, in whole or part, or shall dismiss the appeal for lack of jurisdiction or prosecution.
- The board can consider new evidence, or the board may consider the evidence in the record of the committee hearing.

REQUEST AND BACKGROUND

Request:

This hearing is necessitated by an appeal filed by Attorney Adam Jarchow on behalf of Dessy Johnson October 5, 2022. The appeal was a result of a navigability determination made by the Planning and Development Department, which was a concurrence with a navigability determination completed by the Wisconsin Department of Natural Resources September 09, 2022. The petitioner believes the determination is in error based on mapping presented on the USGS quadrangle map indicating an intermittent stream may be located onsite.

Background:

On September 09, 2022, the Department of Planning and Development (the Department) concurred with the Wisconsin Department of Natural Resources (WDNR) navigability determination of an agricultural drainageway. The determination on September 09, 2022 reversed a desktop determination the WDNR completed July 25, 2022. The reversal came after additional historical information and specific site conditions were considered. The final WDNR determination decided the drainageway in question is in fact non-navigable. The determination was followed up with an additional determination summary dated September 21, 2022 further explaining how the determination was made. Specific site determinations are completed when there is a discrepancy between approximate mapping and

actual site conditions. Section 20.02.001 D of the shoreland overlay specifically states the WDNR will make a final determination when any questions arise. Which reads as follows: *Determinations of navigability and ordinary high-water mark location shall initially be made by the Land Use Manager. When questions arise, the Land Use Manager shall contact the appropriate office of the WDNR for a final determination of navigability or ordinary high-water mark.* A proper navigability determination was made adhering to the procedure outlined in title 20.

It is also important to note Title 20 regulates areas within 300 feet to navigable streams and rivers. There has been no indication this agricultural drainage way was ever identified as a river or stream dating back to the original 1838 land survey. There was no river, stream, or water identified on the map or within the survey’s narrative. It was also noted that there is no identifiable bed and bank during a site visit September 1, 2022.

ADJACENT ZONING & LAND USE:		
	ZONING	LAND USE
North:	A-P	Residential – Agriculture
West:	A-P	Residential – Forested
South:	A-P	Agriculture
East:	A-P	Agriculture

APPLICABLE SHORELAND OVERLAY REGULATIONS:

Section 20.01.001 Purpose. This section outlines the counties requirement to administer the shoreland protection overlay district. Title 20 is adopted pursuant to the authorization in Wis. Stat. § 59.692, to effectuate the policies and purpose(s) outlined in Wis. Stat. § 281.31.

Section 20.02.001D Determination of navigability. This section describes that the Land Use Manager makes the navigability determination and if any questions arise the WDNR will make a final navigability determination.

20.14.005 A.2 Board of Land Use Appeals. It shall hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement or administration of this ordinance.

RECOMMENDATION:

Staff recommends that the board affirm the WDNR navigability determination and the department’s concurrence with the determination dated September 09, 2022 stating the agricultural drainage way in question is not navigable, the board should not stay the decision.

EXHIBITS

1. Staff report
2. Application materials
 - a. Request for appeal
3. Final WDNR navigability determination dated September 9, 2022
4. WDNR navigability determination summary dated September 21, 2022
5. WDNR initial desktop navigability determination dated July 25, 2022
6. Planning and Development staff concurrence with WDNR September 9, 2022 navigability determination
7. Additional information submitted by the applicant November 7, 2022

October 5, 2022

Department of Planning and Development
Eau Claire County Courthouse
721 Oxford Ave, Room 3344
Eau Claire WI 54703

Re: Administrative Appeal

Sent via courier

Dear Sir or Madam:

Enclosed please find an Administrative Appeal Application with attachments and our check in the amount of \$525.00.

We previously emailed the enclosed to both Rodney Eslinger, Planning and Development Director and Richard Eaton, Assistant Corporation Counsel for their review prior to filing; however, we did not receive any indication that the application is incomplete or otherwise insufficient. If, upon receipt of the enclosed, you find any deficiency, kindly let us know immediately so we may supplement it with any additional information you require.

In addition, it is our understanding that Attorney Anders Helquist has been in contact with Attorney Sharon Mcilquham with regard to a legal action that will be filed against the Wisconsin Department of Natural Resources relating to the same subject matter as the appeal. We request this appeal be stayed until that action has been concluded. Please confirm.

Enclosed is a copy of this correspondence. Please file stamp and return the same in the self-addressed stamped envelope provided.

Thank you.

Sincerely,

JARCHOW LAW, LLC



Adam M. Jarchow

Enclosures

C: Sharon Mcilquham, Corporation Counsel via email only
Richard Eaton, Assistant Corporation Counsel via email only
Rodney Eslinger, Planning and Development Director via email only



Department of Planning and Development
 Eau Claire County Courthouse
 721 Oxford Avenue, Room 3344
 Eau Claire, Wisconsin 54703
 (715) 839-4741

Office Use Only

Application Accepted:	
Accepted By:	
Receipt Number:	
Scheduled Hearing Date:	

ADMINISTRATIVE APPEAL APPLICATION

Property Owner Name: Dessy Johnson	Phone# (612) 282-8975
Mailing Address: E10840 County Rd J Fall Creek WI 54742	
Email Address: dessyjohnson@q.com	

Agent Name: Adam Jarchow, Jarchow Law, LLC	Phone# (715) 263-4200
Mailing Address: PO Box 117 Clear Lake WI 54005	
Email Address: adam@jarchowlaw.com	


SITE INFORMATION

Site Address: E 11381 County Road D Fall Creek WI 54742	
Property Description: <u>NE</u> $\frac{1}{4}$ <u>NW</u> $\frac{1}{4}$ Sec. <u>25</u> , T <u>26</u> N, R <u>08</u> W, Town of <u>Lincoln</u>	
Zoning District: A-P Agr Preservation	Code Section(s):
Overlay District: Check Applicable	<input type="checkbox"/> Shoreland <input type="checkbox"/> Floodplain <input type="checkbox"/> Airport <input type="checkbox"/> Wellhead Protection <input type="checkbox"/> Non-Metallic Mining
PIN #(s): <u>18012</u> - <u>2</u> - <u>260825</u> - <u>210</u> - <u>0001</u> _____ - <u>2</u> - _____ - _____ - _____ _____ - <u>2</u> - _____ - _____ - _____ _____ - <u>2</u> - _____ - _____ - _____	

GENERAL APPLICATION REQUIREMENTS

- Applications will not be accepted until the applicant has met with department staff to review the application and determine if all necessary information has been provided. All information from the checklist must be included.
- A detailed written statement that specifically identifies what is being appealed.
 - Written argument that supports the appeal.
 - The applicant must flag/stake the property/project corners and label them accordingly (e.g. NE Lot corner, NE building corner).
 - A scaled site plan of the site and surrounding area for a distance of 100 feet, including buildings and other structures. Also, include the proposed addition/structure/location of septic system, well, driveway, property lines, navigable water ways, wetlands, floodplains, slopes in excess of 20% , and any other unique limiting condition of the property. All maps and engineering data to be no larger than 11" x 17".
 - Provide a \$525.00 application fee (non-refundable), make checks payable to the Eau Claire County Treasurer or online payments.

I certify by my signature that all information presented herein is true and correct to the best of my knowledge. I give permission for the staff of the Eau Claire County Department of Planning and Development to enter my property for the purpose of collecting information to be used as part of the public hearing process. I further agree to withdraw this application if substantive false or incorrect information has been included.

Owner/Agent Signature  Date 10/05/2022

Administrative appeals to the Board of Land Use Appeals shall be in accordance with Section 18.31.020 C of the Eau Claire County Zoning Code. At the public hearing, the applicant may appear in person or through an agent or an attorney of his/her choice. The applicant/agent/attorney may present testimony, evidence and arguments in support of the application. All site plans, pictures, etc. become the property of the Department, and will remain in the file.

ADMINISTRATIVE APPEAL APPLICATION
Re: Borntreger Navigability Determination

Written Statement of what is being appealed

We are appealing the County's determination that the drainageway on the property at E 11381 County Road D, Fall Creek, Wisconsin is a non-navigable waterway. This appeal is being filed in a timely manner as it is filed within 30 days of the date of the determination (correspondence from Rodney J. Eslinger, Planning and Development Director, dated September 9, 2022).

Written argument supporting appeal

In early 2019, Daniel and Ruth Borntreger purchased the property that is in the subject matter of this appeal. Prior to that, Kurt and Wendy Folkers resided there. In 2004, their barn on the property burned down. Folkers were not allowed to rebuild the barn where it originally was because they were told by the Department of Natural Resources ("DNR") and/or Natural Resources Conservation Services "(NRCS)" that the stream located behind the barn was ruled navigable.

The barn burned down in 2004 and in the spring of 2005, DNR and/or NRCS came to the property to evaluate the stream concerning the proposed re-building site. The departments floated a canoe in the waterway and declared it a navigable waterway. Because of the navigability, the Folkers were not allowed to rebuild their barn where it once stood (see photo from 2005 attached hereto as Exhibit A).

Recently, when Ms. Johnson asked the County about the navigability of this waterway, she was informed by the County that DNR Agent, Dan Koich ruled it non-navigable when the Folkers owned it. When she requested documentation concerning this, she was informed they didn't have any and they then claimed it was not navigable because the Eau Claire County GIS map did not show the stream.

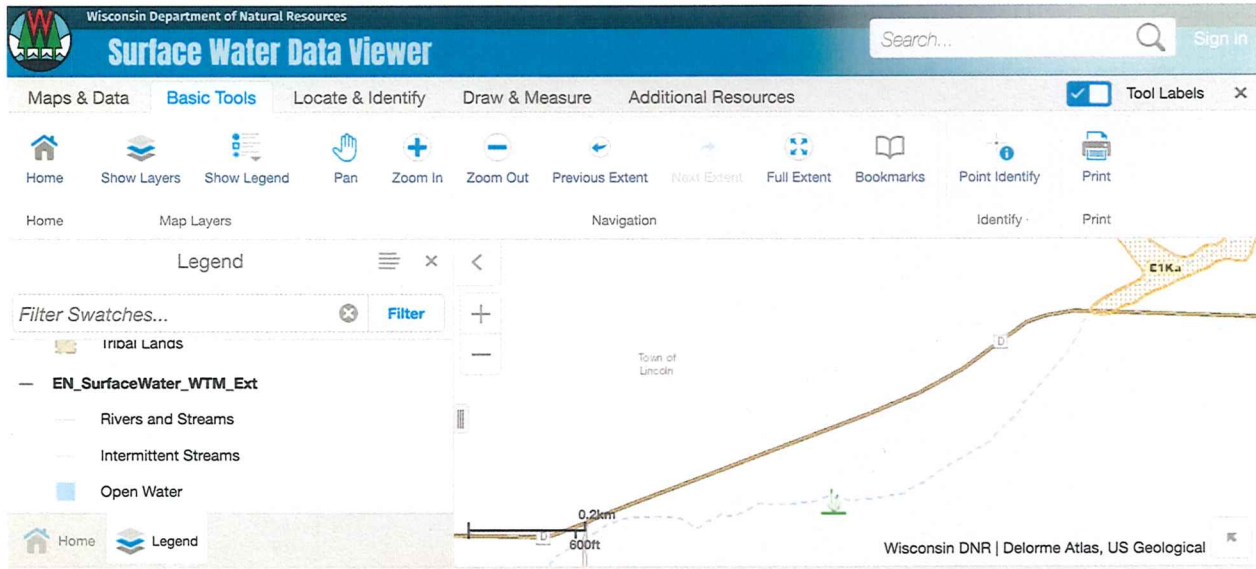
However, according the Eau Claire County's Shoreland Protection Overlay, navigability is not determined via the GIS Map but rather the USGS quadrangle map – which clearly shows the stream. (see map attached hereto as Exhibit B).

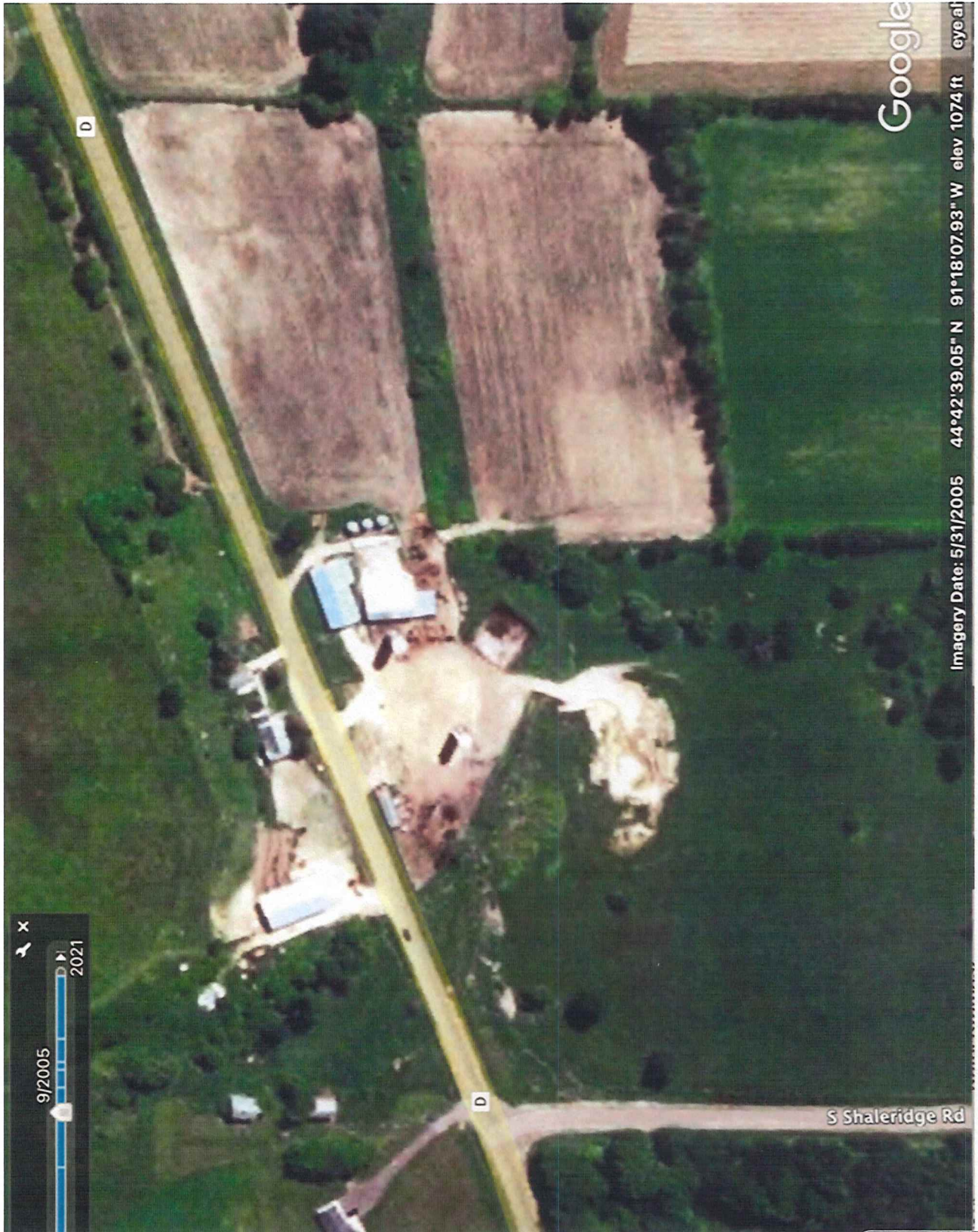
Eau Claire County Shoreland Protection Overly District Section 20.02.001(B) states that: "Within three hundred (300) feet of the ordinary high-water mark of navigable rivers or streams, or to the landward side of the floodplain, whichever distance is greater. Rivers and streams in Eau Claire County shall be presumed to be navigable if they are designated as perennial waterways or intermittent waterways on United States Geological Survey quadrangle maps (1:24,000). Flood hazard boundary maps, flood insurance rate maps, flood boundary-floodway maps, county soil survey maps or other existing county floodplain zoning maps shall be used to delineate floodplain areas. (See Wis. Admin. Code §NR 115.03(8)) "

Since 2019 Eau Claire County's Planning and Development Department has approved multiple Land Use Permits in close proximity to the intermittent stream without consideration of Eau Claire County's Title 20 Shoreland Protection's designation as "presumed to be navigable if they are designated as perennial waterways or intermittent waterways on the USGS quadrangle maps). Prior to approving the LUPs Eau

Claire County did not consult the DNR or refer to the Wisconsin DNR Surface Water Data Viewer which Eau Claire County's Title 20 incorporated to identify shoreland and wetland. The Wisconsin DNR Surface Water Data Viewer identifies the waterway as an intermittent stream. Attached below

Eau Claire County Shoreland Protection Overlay District Section 20.02.002 Shoreland-wetland maps. The most recent version of the Wisconsin Wetland Inventory as depicted on the WDNR Surface Water Data Viewer is made part of this ordinance. The maps can be viewed at: <http://dnrmaps.wi.gov/SL/Viewer.html?Viewer=SWDV&runWorkflow=Wetland> (Ord. 160-23, Sec. 22, 2017)





EXHIBIT

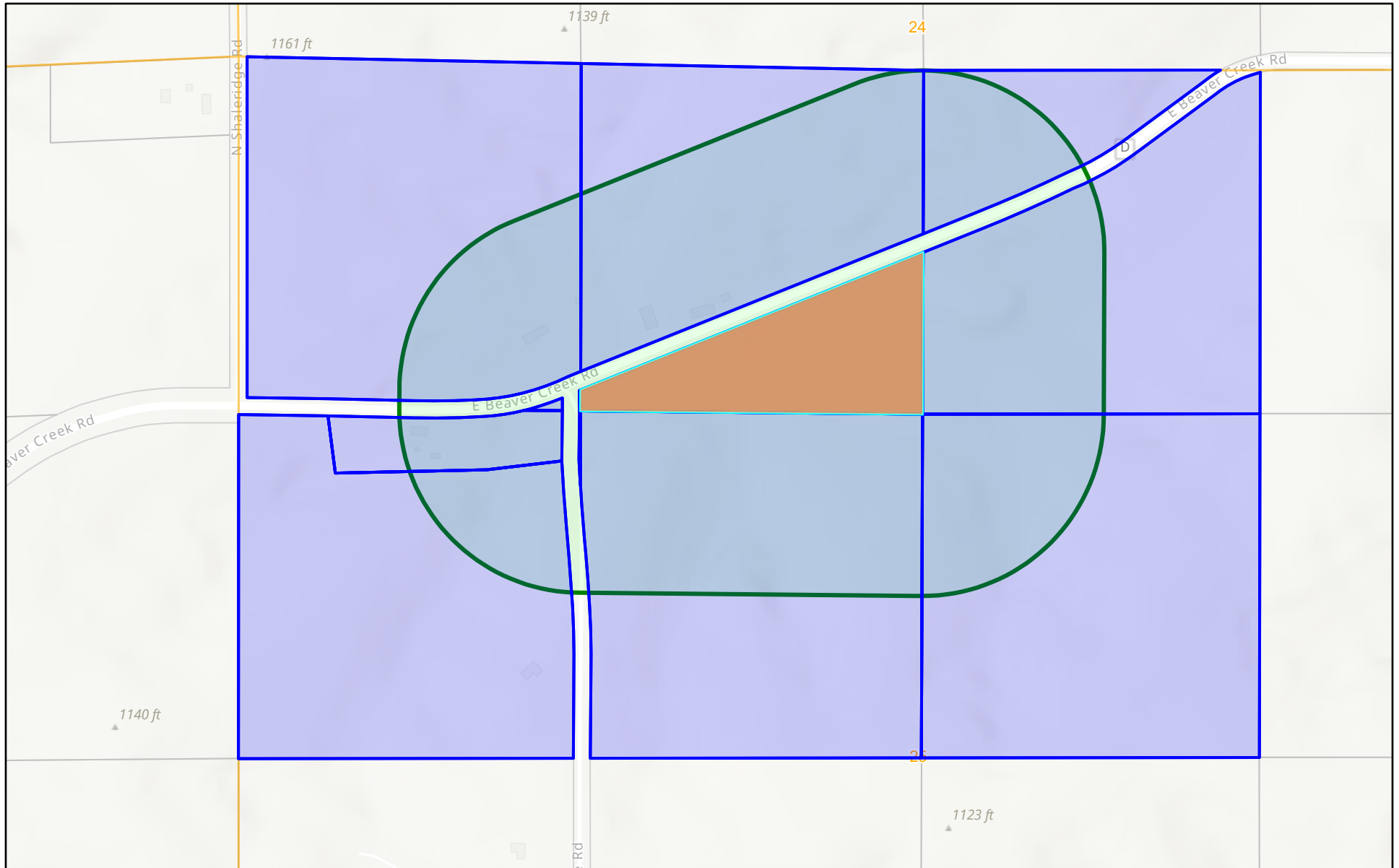
tabbles'

Page 8




A

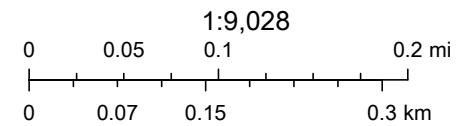


Public Notification



10/24/2022, 10:44:37 AM

-  County Boundary
-  Tax Parcel
-  Section



Esri, NASA, NGA, USGS, FEMA, Esri Community Maps Contributors, © OpenStreetMap, Microsoft, Esri, HERE, Garmin, SafeGraph,

FirstName LastName	Address	City State Zip
BEN BORNTREGER	E 11381 COUNTY ROAD D	FALL CREEK WI 54742-4129
CHRISTIAN S BORNTREGER	E11381 COUNTY ROAD D	FALL CREEK WI 54742-4129
CAMERON FOLKERS	E 11350 COUNTY ROAD D	FALL CREEK WI 54742-4129
RUSSELL KRENZ	S 8400 COUNTY ROAD K	FALL CREEK WI 54742-4103
DANIEL S BORNTREGER	S9230 S SHALE RIDGE RD	FALL CREEK WI 54742-4121
SHAWN M & ROXANNE L BOCHMAN	S 8710 S SHALE RIDGE RD	FALL CREEK WI 54742-4128
NICHOLAS DAVID KRALL	E11171 COUNTY HIGHWAY D	FALL CREEK WI 54742

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
1155 Pilgrim Rd.
Plymouth, WI, 53073

Tony Evers, Governor
Preston D. Cole, Secretary
Telephone 608-266-2621
Toll Free 1-888-936-7463
TTY Access via relay - 711



09/09/2022

Ben Bublitz
Eau Claire County
[sent electronically to County]

INF-WC-2022-18-02691

RE: Request for Navigability Determination, for WBIC 5014382, Borntreger, E11381 County Road D, Fall Creek, located in the Town of Lincoln, Eau Claire County.

Dear Mr. Bublitz

Thank you for visiting this site to take stream measurements and photos. In Wisconsin, the Supreme Court has defined a navigable waterway as one which has a defined bed and banks and carries enough water to float a canoe or other watercraft during the spring high water periods. Based on this definition and the conditions observed at the site, the stream on the Borntreger property has been determined to be not navigable from S Shaleridge Rd to County Rd D. This determination is based on specific site conditions and supersedes the previous desktop determination that I made in error by just reviewing aerial photos.

It is clearly documented by your site visit that there is not a defined bed and banks on the Borntreger property. Immediately downstream of the Borntreger's the waterway was converted to an NRCS grassed waterway more than 30 years ago. There is also a water control structure on the downstream end of the waterway. It is my understanding that past determinations by DNR and County staff also determined this waterway to be non navigable.

If you have any questions about this determination, please call me at (920) 893-8531 or you can reach me by email at Kathleen.Kramasz@wisconsin.gov.

Sincerely,

Kathi Kramasz
Water Management Specialist



Navigability determination and site history for:

Borntreger: E11381 CTH D Fall Creek, NE NW S 25, T26N, R8W

Summary

In Wisconsin, the definition of a navigable stream comes from a State Supreme Court Case. In 1975, the State Supreme Court determined that a navigable stream has a defined bed and banks and carries enough water to float a canoe or similar watercraft during the Spring freshets. Both criteria must be present although the Court said that the ability to float a canoe does not have to be present all year.

On 9/1/22 Eau Claire County staff visited the property to take photos and measure the stream. According to the County staff there had been over 3" of rain in the area the weekend prior to the site visit. Several photos were taken but no measurements were done because the County staff was not able to find a defined bed and banks throughout the site. Based on the information provided at the site visit, the DNR determined that the desktop navigability determination was incorrect and that the site conditions showed that there is no defined bed and banks on this property so the stream cannot meet the definition of a navigable waterway. DNR revised the previous determination to not navigable.

At Ms. Johnson's request DNR has reviewed decades of site history to ensure that any activity done by landowners has not impacted whether the stream is navigable. The DNR has developed a timeline of events for this site and has determined that no past work done by any landowner has impacted the navigability of this waterway.

At this time, based on site conditions, DNR has determined this waterway to be not navigable.

Previous navigability determinations

DNR call intake was requested to do a desk top navigability determination for this site through an email from Ms. Dessy Johnson. Kathi Kramasz, WMS reviewed USGS maps, Original Government Survey Maps, and air photos of the site. There were enough years of air photos showing a stream channel that appeared to be a defined bed and banks and the stream appeared on the USGS maps as an intermittent stream so based on a desktop review Ms. Kramasz determined the waterway to be navigable. Desktop navigability determinations are meant to be protective of navigable waterways to meet the State's affirmative duty to protect navigable waters in the State but do not supersede actual field determinations based on site conditions. See Attachment 1 for historical aerial photos.

Ben Bublitz of Eau Claire County Zoning was copied on the desktop navigability determination and let Ms. Kramasz know that there had been a previous determination by the DNR/Eau Claire County that this stream did not meet the definition of a navigable stream. In 2007 Eau Claire County did a county wide navigability study in conjunction with DNR staff. Rather than creating records for each stream that was looked at, Eau Claire County recorded navigable streams on the County GIS site. The stream on the Borntreger property was recorded as being non navigable. There are no DNR records of the County wide navigability determinations.

Navigability conditions can change over time so Ms. Kramasz requested that the County perform a site visit to document the current conditions for a final navigability determination. Mr. Bublitz and other staff walked the waterway from S. Shaleridge Rd to the eastern property line and took photos. They were not able to measure any stream bed or banks because the waterway does not have a defined bed and banks. Based on this site visit, the DNR revised the desktop navigability determination and considers this waterway as non navigable because it does not have a defined bed and banks. See Attachment 2 for the photos taken by Mr. Bublitz

Stream history

S. 30.10, Wis Stats, includes additional interpretation for Declarations of navigability. In 30.10(4)(c) it states:

(c) Notwithstanding any other provision of law, farm drainage ditches are not navigable within the meaning of this section unless it is shown that the ditches were navigable streams before ditching. For purposes of this paragraph, "farm drainage ditch" means any artificial channel which drains water from lands which are used for agricultural purposes.

Generally, DNR uses the Original Government Survey maps, historical aerial photos, historical Bordner surveys and historical USGS maps to determine whether a farm drainage ditch was a navigable stream before ditching.

The stream on the Borntreger property has the following history:

- Not shown as a stream on the original government surveys
- First appears as an intermittent waterway without meanders on the 1927 USGS map
- Can see some meandered channel on the 1939 aerials but also channel from north of County Rd D is visible. Part of waterway east of the Borntreger property line was already a grassed waterway. Channel is more defined downstream of barn area.
- Waterway shown as "ditch" on the Bordner survey
- Stream shown as intermittent on current USGS maps but manure storage area that was constructed between 1972 and 1980 lies over the stream line as shown on the USGS maps.

Based on this historical information, the stream history on the Borntreger property is undetermined. Before DNR could consider this a navigable stream under S. 30.10, Wis Stats additional information would be needed to show that this ditch that is not on the original government surveys and was partially converted to a grassed waterway prior to 1939 was a navigable stream before ditching. Attachment 3 contains the historical maps and aerial photos referenced in this section.

Site History

DNR did an extensive review of the history of the work that was done on this property. Eau Claire County reviewed their records as well. This is a timeline of work that has been done/permits that have been issued at this site:

1939 – downstream area already converted to grassed waterway. Eastern crossing in place
1970 – around this time EC County first adopted shoreland zoning regulations
1975 – DeGaynor decision that gives current definition of navigability
1972-1980 Barn north of Cty Rd D constructed. Square manure storage area constructed over intermittent stream line shown on USGS maps and area of darker channel on 1972 aerials. Channel may have been relocated to south around area.
1980-1999 3rd barn/structure added between two existing structures on S side property
1999 – property transferred from Welke to Folker
2004 – Folkers barn destroyed by fire. According to Mr. Folker, the Farm Service Agency told them that under their Farm Plan the barn should not be rebuilt because the manure storage area was too close to a waterway. According to Mr. Folker, FSA staff came to the site and floated the area in a canoe. No County permits were applied for to rebuild the barn but this could likely have been allowed under S. 59.692(1s), Wis Stats (this statute was amended in 2014 and is no longer applicable)
2005 – two western structures removed, site graded, western crossing constructed. According to Mr. Folker the grading that was done was to bury the burned barn and he constructed a second western crossing with 2 plastic culvert. No DNR chapter 30, Wis Stats, permits were applied for and no County shoreland zoning permits were applied for.
2007 – Eau Claire County did county wide nav study with DNR. Marked non navigable streams on the parcel records. this waterway marked as not navigable
2007 – Folkers applied for variance from road setback to do work on north side of County Rd D. Eau Claire County was able to provide a copy of that variance from their records
2011 – new fences constructed, former barn area used for hay storage
2019 – Land Use Permit issued by Eau Claire County to Folkers for a construction trailer to be used for ag. storage. Structure has been removed from property since 2019
2020 – land transferred to Borntreger
2020 – New single-family dwelling permit issued by Eau Claire County to Borntreger
2020 – Land Use permit issued by Eau Claire County for new calf barn to Borntreger
2021 – Land Use permit issued by Eau Claire County for greenhouse to Borntreger
2021 – Land Use permit issued by Eau Claire County for milkhouse addition to an existing barn to Borntreger
2021 – Conditional use permit application for a sawmill. Approved by Committee, but the permit was appealed, and the County Board of Land Use Appeals overturned the decision

Here is a copy of S. 59.692(1s) prior to the revisions:

(1s) (a) Restrictions that are applicable to damaged or destroyed nonconforming structures and that are contained in an ordinance enacted under this section may not prohibit the restoration of a nonconforming structure if the structure will be restored to the size, subject to par. (b), location and use that it had immedi-

ately before the damage or destruction occurred or impose any limits on the costs of the repair, reconstruction or improvement if all of the following apply:

1. The nonconforming structure was damaged or destroyed after October 14, 1997.
2. The damage or destruction was caused by violent wind, vandalism, fire, flood, ice, snow, mold, or infestation.

Chapter 30, Wis Stats

Chapter 30, Wis Stats, requires permits for work in and near navigable waterways. DNR does not have any record of permits having been applied for at this property. Work that has been done at this site in the past that would have required Chapter 30 permits if the waterway was considered navigable include:

- Channel relocation for the work that was done between 1972 and 1980 to construct the manure storage area in the flow line of the waterway (30.195)
- Culvert permits for the western crossing that was constructed by Mr. Folker in 2005 (30.123)
- Grading permits for the work that was done to bury the burned barn building in 2005 (30.19)

Under S. 30.19(1m) an enlargement of the waterway to construct an ag pond such as that constructed by Mr. Borntreger is exempt from needing a permit:

- (1m)** EXEMPTIONS. A person is exempt from the permit requirements under this section for any of the following:
- (a)** The construction or repair of any public highway.
 - (b)** Any agricultural use of land.

Land ownership from County files:

Kurt and Wendy Folker purchased the land from Welke in 1999
Ownership transferred to Folker Family Farms in 2018
Land Contract was issued to Cameron Folker in 2019
Sold to Borntreger in 2020

Attachment 1 Historical Aerial Photos:

1939





1966



1972



1980



1999



2005





2010





2013



2014



2018



2018-2020



2021



Attachment 2 – Photos from 9/1/22 Eau Claire County Site Visit



Site 1



Site 2



Site 3



Site 4



Site 5



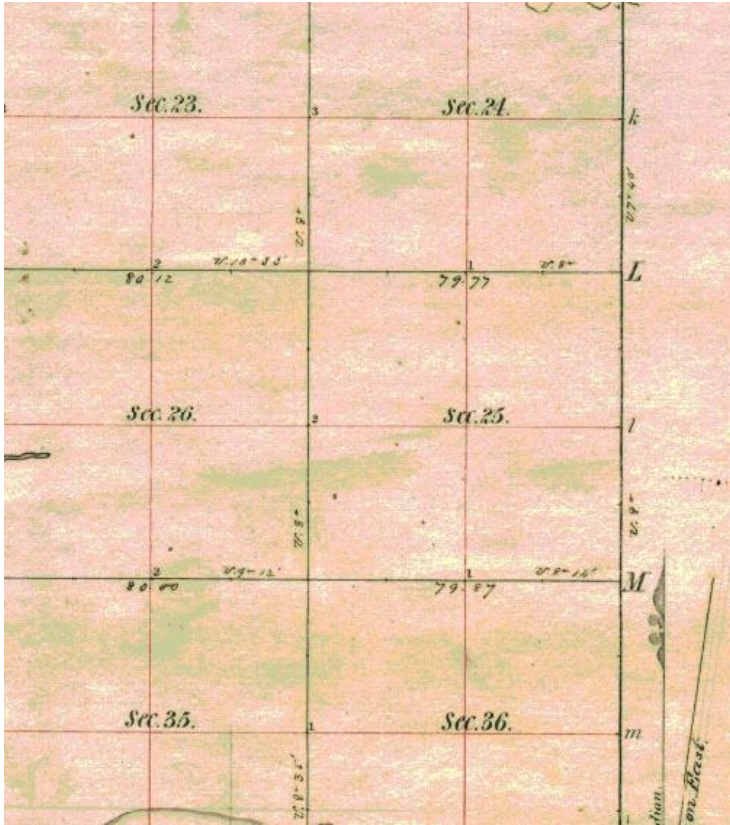
Site 6





Attachment 3 Stream History Documents

Original government survey



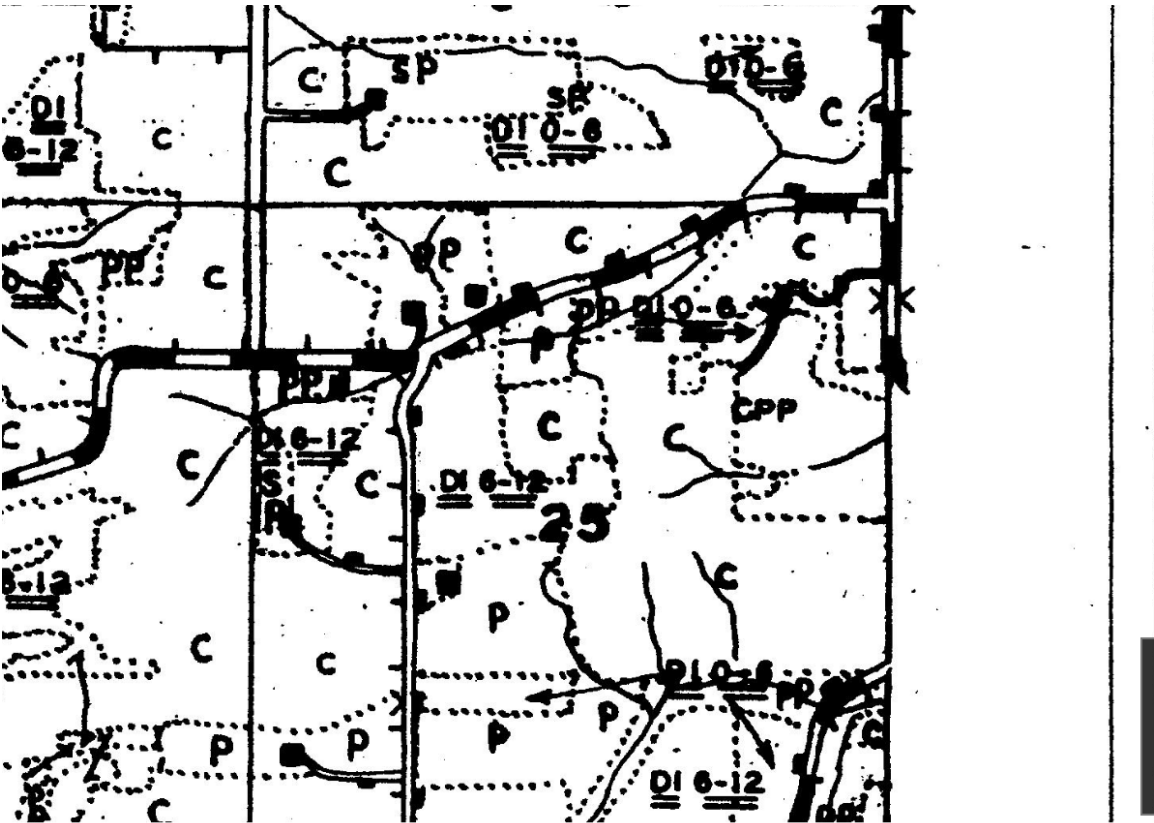
1927 USGS



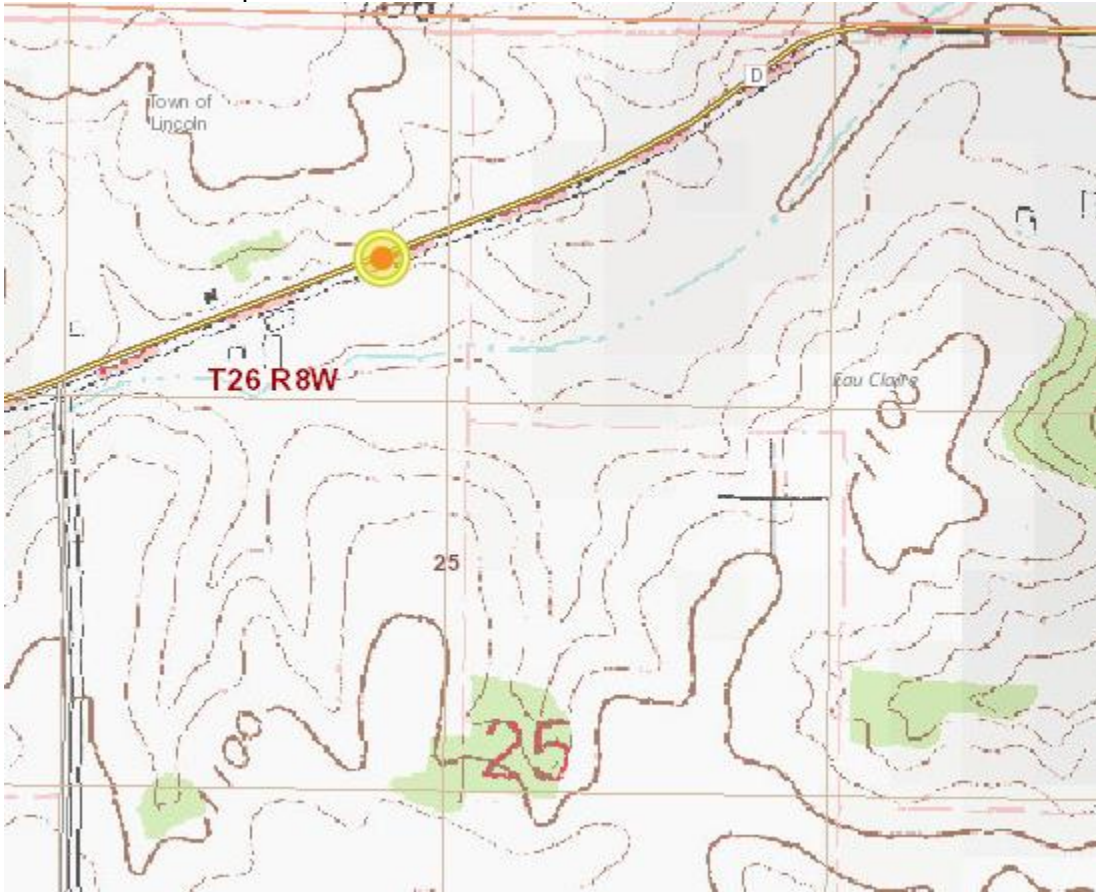
1939 Aerial



Bordner Survey



Current USGS Map

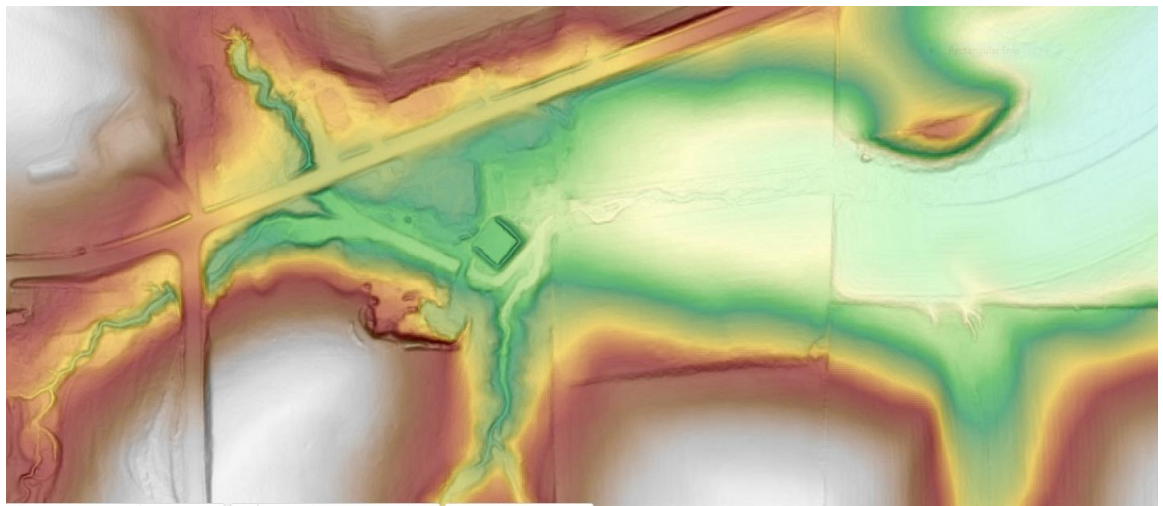


Current DNR SWDV Map





Digital Elevation Model showing Manure Storage area



Holly Weigand

From: Dessy Johnson <dessyjohnson@q.com>
Sent: Monday, July 25, 2022 11:00 AM
To: Rod Eslinger; Ben Bublitz
Cc: Harvey, Amanda L - DNR
Subject: Fwd: Navigable Stream

WARNING!! This email originated outside Eau Claire County. Do not click any links or attachments unless you know the sender.

Cc the wrong "Amanda" in previous email

Begin forwarded message:

From: Dessy Johnson <dessyjohnson@q.com>
Subject: Fwd: Navigable Stream
Date: July 25, 2022 at 9:25:26 AM CDT
To: Rod Eslinger <rod.eslinger@co.eau-claire.wi.us>, Ben.Bublitz@co.eau-claire.wi.us
Cc: "Amanda.Dehmlow@wisconsin.gov" <Amanda.Dehmlow@Wisconsin.gov>

I reached out to the WI DNR regarding the stream traversing on property E11381 County Road D, Fall Creek, WI 54742. Kathleen Kramasz from the DNR confirmed that the stream in question is navigable (attached below). I confirmed her assessment of "carries enough water during the spring to float a canoe or similar watercraft" by responding with the image below. Please call me to discuss. (612)282-8975. Thank you Dessy Johnson



Begin forwarded message:

From: "Kramasz, Kathleen M - DNR" <Kathleen.Kramasz@wisconsin.gov>
Subject: RE: Navigable Stream
Date: July 25, 2022 at 7:35:27 AM CDT
To: Dessy Johnson <dessyjohnson@q.com>
Cc: "Harrington, Dan - DNR" <Dan.Harrington@wisconsin.gov>, "jared.grande@co.eau-claire.wi.us" <jared.grande@co.eau-claire.wi.us>



Dessy, it does appear that this waterway has a defined bed and banks and carries enough water during the spring to float a canoe or similar watercraft. We would consider this a navigable Trib to Fall Creek.

Please let me know if you have any additional questions

We are committed to service excellence.

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

Kathi Kramasz

Phone: (920) 893-8531

Kathleen.kramasz@wisconsin.gov

From: Dessy Johnson <dessyjohnson@g.com>

Sent: Friday, July 22, 2022 8:42 PM

To: DNR WMS Public Inquiry <DNRWMSPublicInquiry@wisconsin.gov>

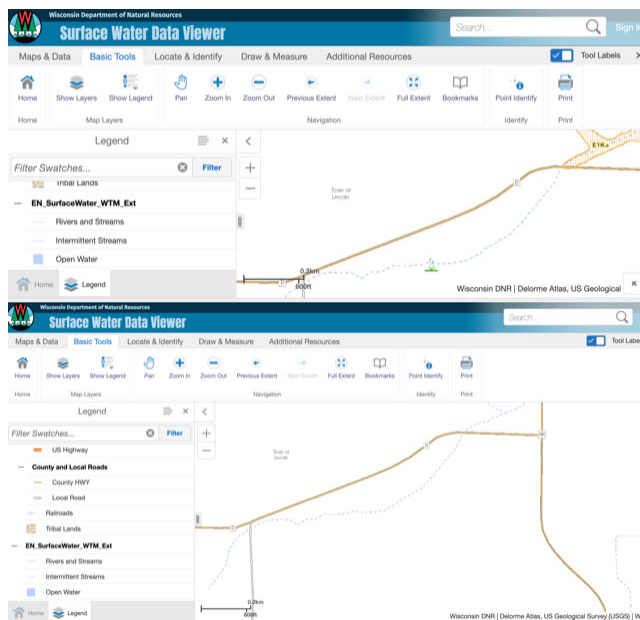
Subject: Navigable Stream

CAUTION: This email originated from outside the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi

Regarding stream on property located at E11381 County Road D, Fall Creek, WI 54742

I have a question if this is identified as DNR Navigable Stream. From what I see from the DNR Surface Water Data Viewer website and USGS Map, it is navigable but I want to confirm with your office. Thank you



WI DNR Open Data

24k Hydro Flowlines (Rivers/Streams)

WI DNR Data Curator
Wisconsin Department of Natural Resources

Feature Layer
24k Hydro Flowlines
dnr.wi.gov

View Map Download More

Summary

Linear Features representing streams, rivers and artificial flow through water.

Flowlines include all line features from the US Geological Survey's 1:24,000-scale topographic map series such as perennial and intermittent streams etc. A large portion of the WDNR's Waterbody Identification Codes (WBIC) have been added to the line work along with officially recognized water body names from the USGS Geographic Names Information System (GNIS) database. Flowlines were created with M (measures) values to accommodate placement of user data through a linear referencing system.

Details

- Dataset Feature Layer
- August 9, 2017 Info Updated
- August 16, 2021 Data Updated

USGS
topoBuilder Application v: 1.2.0

Map Types
Select an OnDemand Topo type, click Next

7.5-Minute Topo

WI DNR Open Data

Resources

Summary
Linear Features representing streams, rivers and artificial flow through water.

View Full Details

Details

- Dataset Feature Layer
- August 9, 2017 Info Updated
- August 16, 2021 Data Updated
- August 9, 2017 Published Date
- 302,961 Records View data table
- Public Anyone can see this content
- Custom License View license details

302,961 records

WI DNR Open Data

Resources

Summary
Linear Features representing streams, rivers and artificial flow through water.

View Full Details

Details

- Dataset Feature Layer
- August 9, 2017 Info Updated
- August 16, 2021 Data Updated
- August 9, 2017 Published Date
- 302,961 Records View data table
- Public Anyone can see this content
- Custom License View license details

302,961 records

24k Flowlines

OBJECTID	1301476
SW_ID	2162804
RIVER_SYS_NAME	Unnamed
RIVER_NAME	Unnamed
RIVER_SYS_WBIC	5114382
STREAM_ORDER	1
ORIG_HRZ_SRC_YR	1973
ORIG_HRZ_COLL_MTH	Surveying or Vectoring Technique
R_CODE	

Planning and D... | 63786481800... | (2d) Ellen D... | 24k Hydro Flow... | transfer large... | best document... | UPDATE TO MACOS MONTE... | Get new FaceTime features, SharePlay, and Test.

data-wi-dnr.opendata.arcgis.com/datasets/675680554735440e98ab3ac6b197064?explore#location=44.710628%2C-91.303607%2C15

WI DNR Open Data

Resources

Summary
Linear features representing streams, rivers and artificial flow through water.

[View Full Details](#)

Details

Dataset
Feature Layer

August 9, 2017
Info Updated

August 16, 2021
Data Updated

August 9, 2017
Published Date

302,961 Records
[View data table](#)

Public
Anyone can see this content

Custom License
[View license details](#)

I want to use this

302,961 records

24k Flowlines

OBJECTID	1301666
SW_NO	21628604
RIVER_SYS_NAME	Unnamed
RIVER_SYS_WBFC	Unnamed
RIVER_SYS_WBFC	014382
STREAM_ORDER	1
ORG_HAZ_SRC_YR	1973
ORG_HAZ_COLL_MTH	Scanning or Vectoring Technique
S_CODE	

Planning and D... | 63786481800... | (2d) Ellen D... | 24k Hydro Flow... | transfer large... | best document... | UPDATE TO MACOS MONTE... | Get new FaceTime features, SharePlay, and Test.

data-wi-dnr.opendata.arcgis.com/datasets/675680554735440e98ab3ac6b197064?explore#location=44.710628%2C-91.303607%2C15

WI DNR Open Data

Resources

24k Hydro Flowlines (Rivers/Streams)

WI DNR Data Curator
Wisconsin Department of Natural Resources

Summary
Linear features representing streams, rivers and artificial flow through water.

[View Full Details](#)

Details

Dataset
Feature Layer

August 9, 2017
Info Updated

August 16, 2021
Data Updated

August 9, 2017
Published Date

302,961 Records
[View data table](#)

Public
Anyone can see this content

I want to use this

302,961 records

File | J:\henry\deasyjohnson\Downloads\WI_Brackett_20220605_001058_TM_gno.pdf

Brackett, WI, 24000, Quad, 20220605, USGS

1 / 1 | 400%

From: Rod Eslinger
Sent: Friday, September 9, 2022 10:50 AM
To: Janet King
Cc: Dessy Johnson; Ben Bublitz; Kramasz, Kathleen M - DNR; dan.harrington@wisconsin.gov
Subject: RE: Navigable Waters
Attachments: borntreger not nav.pdf

Mrs. King,

Please find a letter from Kathi Kramasz, Water Management Specialist with the Wisconsin Department of Natural Resources regarding the navigability determination of the drainageway on the property at E 11381 County Road D, Fall Creek, Wi. Ben Bublitz, Land Use Manager, and I concur with Kathi's finding on non-navigable drainageway on this property.

Thank you,

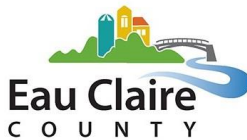
Rodney J. Eslinger

Planning and Development Director

721 Oxford Ave., Suite 3344 • Eau Claire, WI 54703

Direct: 715-839-1657 **Cell:** 715-210-2436 **Fax:** 715-831-5802

Email: rod.eslinger@eauclairecounty.gov



Planning and Development

"I've learned that something constructive comes from every defeat." - Tom Landry

From: Janet King <janet@jarchowlaw.com>
Sent: Thursday, September 8, 2022 1:00 PM
To: Rod Eslinger <Rod.Eslinger@eauclairecounty.gov>
Cc: Dessy Johnson <dessyjohnson@g.com>
Subject: Navigable Waters

WARNING!! This email originated outside Eau Claire County. Do not click any links or attachments unless you know the sender.

Mr. Eslinger:

Attached please find correspondence from Attorney Jarchow. We look forward to your response. Thank you.

Janet R. King
Paralegal
janet@jarchowlaw.com

JARCHOW LAW, LLC

PO Box 117

360 4th Street

Clear Lake WI 54005

715-263-4200 (O)

715-263-2980 (F)

Office hours are Mon – Thurs

8:00 AM to 4:00 PM

www.jarchowlaw.com



November 7, 2022

Eau Claire Board of Land Use Appeals
Eau Claire County Government Center
721 Oxford Ave
Eau Claire WI 54703

Re: Administrative Appeal – Dessy Johnson/Jarchow Law, LLC
Board of Land Use Appeals November 14, 2022

Dear Board:

On or about October 5, 2022, our office filed an Administrative Appeal regarding the County's determination that the waterway on the property located at E 11381 County Road D in Fall Creek, Wisconsin is a non-navigable waterway. At that time, we advised that a legal action would be filed against the Wisconsin Department of Natural Resources ("DNR") relating to the same subject matter and requested that the appeal be stayed until that action had been concluded. The Petition for Judicial Review was filed with Eau Claire County Circuit Court on October 27, 2022. Attached as Exhibit A is a copy of that document (22 CV 491).

Our office was advised that the staff was reluctant to unilaterally stay the appeals process but if the Board of Land Use Appeals wanted to stay it, they could make that decision at the next meeting. We believe the next scheduled meeting is November 14, 2022. **We respectfully request that the Administrative Appeal be stayed pending the outcome of the court case.** A stay will help prevent the waste of resources and potentially conflicting decisions.

If the Board decides not to stay the appeal, we are supplementing the appeal application we previously filed, with important additional information for the Board's consideration.

As an initial matter, we note that to some extent, the Board of Land Use Appeals has already spoken on this matter. At a CUP hearing last year, relating to the same property, the Board overturned the issuance of a CUP at this same property for a "sawmill". A significant reason for the Board's action related to the waterway at issue in this appeal. At that hearing, Chairman Randy Stutzman's summary included his determination that the waterway is an intermittent stream. Chairman Stutzman noted that he had been by the property "dozens of times" and he noted the persistent existence of standing water, which then flows under County Road D to Fall Creek.

EXHIBIT

7

The determination of the Zoning Administrator runs contrary to the prior action of this Board relating to the CUP, as well as relating to the navigability of the waterway.

In addition, we believe certain items raised in the Petition for Judicial Review are important for the Board to consider. For convenience, below, we quote the following passages from the attached Petition for Judicial Review:

12. In Wisconsin, for a waterway to be navigable, it must be a waterway that has a defined bed and bank and can float a canoe or other small watercraft on a recurring basis, e.g., during the spring freshets/thaw. See DeGayner & Co., Inc. v. Dep 't. of Nat. Res., 70 Wis. 2d 936 (1975); Wis. Admin NR 341.

13. The WDNR's "FAQ" on their Waterway Jurisdiction Determinations webpage is consistent with DeGayner, which provides, "Navigable waterways do not need to be navigable at all times but only on a regularly recurring basis, such as during spring runoff periods."

14. The WDNR's "FAQ" on their Waterway Jurisdiction Determinations webpage further discusses navigability determinations and notes, "navigable waterways that have been manipulated are still considered navigable even when the manipulation may cause some of the defining navigability characteristics to be masked." Further, "Obstructions that are natural or artificial and create challenges to navigation or passage are common and do not change the basis of navigability."

19. In the spring 2005, DNR and/or NRCS came to the property to evaluate the stream concerning the proposed re-building site for the barn, a canoe was floated in the Waterway during that visit, and it was declared navigable.

20. Prior to the Determination, the WDNR Surface Water Viewer maps showed a waterway traversing directly adjacent to the proposed sawmill site. The maps show a waterway at the "24K" level, that the stream is classified as intermittent, and is also shown to be a cool-cold headwater (Exhibits C, D, and E).

21. Site photos taken by Petitioner's legal counsel on September 27, 2021 from South Shaleridge Road facing east towards the Bomtreger property show the Waterway meanders and has water coursing through that meander. (Exhibit F).

22. Other photos taken by Petitioner also show water sufficient to float a canoe and a defined bed and bank of the Waterway. (Exhibit G).

23. The WDNR's Decision was based off an Eau Claire County staff site visit that was not made during the spring freshets, and was made contrary to the applicable Wisconsin law, statutes including Wis. Stat. § 30.10, administrative code provisions, guidance, policies, procedures, rules, or practices applicable to navigability determinations, as well as previous navigability determinations for this Waterway.

26. The WDNR's Determination eliminates the classification of the Waterway as navigable, removes the Waterway from the public trust along with potential recreational and other uses, and accordingly, aggrieves the Petitioner and other members of the public.

27. Further, Petitioner lives in proximity to the Waterway, and the consequences of the Decision will result in the allowance of industrial-style land uses within three hundred (300) feet of the Waterway that will disturb Petitioner's use and enjoyment of her property related to noise, lower property values, aesthetics, and other losses and damage.

28. Kramasz stated the Waterway is a tributary to Fall Creek. The WDNR's Trout Stream maps classify Fall Creek as a Class 2 Trout Stream. The allowance of industrial-style land uses within three hundred (300) of the Waterway, when such Waterway is clearly documented as flowing off the Bomtreger property and is a tributary to Fall Creek, will result in further environmental damage from storm water runoff and other contaminants into Fall Creek and adjoining lands and further harms the public and the Petitioner.

In addition, since filing the Administrative Appeal, we have learned that the GIS mapping tool is not as good for determining navigability as the, the Environmental Sensitive Area Map. Peter Strand, Eau Claire County's GIS Administrator, advised that if property has any of the environmentally sensitive indicators, such as flood plan, hydric soils, wetland or steep slopes, the property would require further investigation by the DNR for navigability. Attached as Exhibit B is a copy of the subject property using the Environmental Sensitive Area Map and as you can see, the property contains both hydric soil and steep slopes.

We believe there is substantial evidence that the waterway, which is the subject matter of this appeal (and 22 CV 491) is, in fact, a navigable waterway. Please distribute this letter and information to all Board Members for their review and decision. Thank you.

Sincerely,

JARCHOW LAW, LLC



Adam M. Jarchow

Enclosures

FILED
10-05-2022
Clerk of Circuit Court
Eau Claire County, WI
2022CV000491
Honorable Beverly
Wickstrom
Branch 6

STATE OF WISCONSIN
CIRCUIT COURT
EAU CLAIRE COUNTY

DESTRINA JOHNSON,

Petitioner,

v.

WISCONSIN DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

Case No. _____

Case Code: 30607
Administrative Agency Review

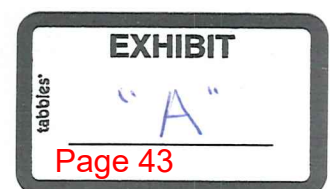
PETITION FOR JUDICIAL REVIEW

Destrina Johnson (“Petitioner”), by her attorneys, Weld Riley S.C., petition this Court pursuant to Wis. Stat. §§ 227.52 and 227.53, as more particularly set forth below, to review the Wisconsin Department of Natural Resources’ September 9, 2022 Navigability Determination for WBIC 5014382, Borntreger, E11381 County Road D, Fall Creek, located in the Town of Lincoln, Eau Claire County (the “Decision”) issued to Ben Bublitz with Eau Claire County. A copy of the Decision is attached as Exhibit A.

In support of this Petition for Judicial Review, the Petitioners allege and state as follows:

CHALLENGED DECISION

1. The WDNR’s Decision, in relevant part, reversed its own navigability determination made on July 25, 2022 for the same waterway. In a September 9, 2022 letter sent to Ben Bublitz with Eau Claire County, Kathleen or Kathi Kramasz (“Kramasz”), a Water Management Specialist with the WDNR, determined the waterway was “not navigable from S.



Shaleridge Rd to County Rd D” and “supersedes the previous desktop determination that [she] made in error by just reviewing aerial photos.” (Exhibit A).

PARTIES

2. Petitioner Destrina Johnson resides at and owns approximately 40 acres of real property in fee simple in the Town of Lincoln, Eau Claire County, Wisconsin, having an Eau Claire County mailing address of E10840 County Road J, Fall Creek, Wisconsin 54742 (the “Property”).

3. Respondent WDNR is a department of the government of the State of Wisconsin created pursuant to Wis. Stat. § 15.34, and has its principal place of business at 101 South Webster Street, Madison, Wisconsin. Respondent is an agency within the meaning of Wis. Stat. § 227.01(1) and as that term is used throughout Wis. Stat. ch. 227.

JURISDICTION AND VENUE

4. The Decision is an “administrative decision” under Wis. Stat. § 227.52, and is therefore subject to judicial review pursuant to the provisions of Chapter 227, Wis. Stat. and Wis. Stat. § 30.209(3)(a).

5. Venue for this proceeding properly lies in Eau Claire County, Wisconsin pursuant to Wis. Stat. § 227.53(1)(a)3.

6. This Petition is timely filed before the expiration of the 30-day deadline for filing a Petition under Wis. Stat. §§ 227.52 and 227.53(1)2m.

BACKGROUND

7. The waterway running from S. Shaleridge Rd to County Rd D (hereafter “Waterway”) is located in the Town of Lincoln, Eau Claire County, Wisconsin.

8. Before the WDNR’s Decision, a landowner (Borntreger) sought a conditional use permit from Eau Claire County to engage in sawmilling activities. The Waterway

traverses and is adjacent to the Borntreger property and the Waterway is within three hundred (300) feet of the proposed conditional use. Eau Claire County granted the conditional use permit.

9. Petitioner appealed the issuance of the conditional use permit to the Eau Claire County Board of Land Use Appeals (“Appeals Board”) and on November 15, 2021, the Appeals Board reversed Eau Claire County’s decision to grant the conditional use permit, based in part on the navigability of the Waterway and the failure of Eau Claire County to consider compliance with County ordinances related to the presence of the Waterway, including, but not limited to, the shoreland protection overlay district.

10. Upon information and belief, since the November 15, 2021 conditional use permit reversal, Eau Claire County, through its Planning Department, has issued or will issue one or more land use permits or other permitting authorization to Borntreger, acting as if the Waterway is not navigable.

11. On or around July 22, 2022, Petitioner asked the WDNR whether the Waterway was navigable.

12. In Wisconsin, for a waterway to be navigable, it must be a waterway that has a defined bed and bank and can float a canoe or other small watercraft on a recurring basis, e.g., during the spring freshets/thaw. *See DeGayner & Co., Inc. v. Dep’t. of Nat. Res.*, 70 Wis. 2d 936 (1975); Wis. Admin NR 341.

13. The WDNR’s “FAQ” on their Waterway Jurisdiction Determinations webpage is consistent with *DeGayner*, which provides, “Navigable waterways do not need to be navigable at all times but only on a regularly recurring basis, such as during spring runoff periods.”

14. The WDNR’s “FAQ” on their Waterway Jurisdiction Determinations webpage further discusses navigability determinations and notes, “navigable waterways that have

been manipulated are still considered navigable even when the manipulation may cause some of the defining navigability characteristics to be masked.” Further, “Obstructions that are natural or artificial and create challenges to navigation or passage are common and do not change the basis of navigability.”

15. On July 25, 2022, Kramasz made a finding and/or issued a navigability determination that the Waterway was navigable (“July 2022 Navigability Determination”) (Exhibit B). Kramasz stated, in relevant part, “it does appear that this waterway has a defined bed and banks and carries enough water during the spring to float a canoe or similar watercraft. We would consider this a navigable Trib [sic] to Fall Creek.” *Id.*

16. A picture of the Waterway included with the email chain accompanying the WDNR’s July 2022 Navigability Determination shows the obvious and clear navigability of a portion of the Waterway in the spring thaw, which shows the Waterway is capable of floating a canoe or other small recreational watercraft (Exhibit B). Historical aerial photos also show stream meanders and defined channelized areas for a bed and bank on the Waterway.

17. After an abnormally dry summer, on or around September 1, 2022, Eau Claire County staff conducted a field visit of the Waterway and after that field visit, the WDNR reversed its July 2022 Navigability Determination.

18. Before Borntregers purchased the property in 2019, the previous owners of the Borntreger property had a barn that burned down in 2004 and they were not allowed to rebuild the barn where it originally was because they were told by the WDNR and/or Natural Resources Conservation Services (“NRCS”) that the Waterway located behind the barn was ruled navigable.

19. In the spring 2005, DNR and/or NRCS came to the property to evaluate the stream concerning the proposed re-building site for the barn, a canoe was floated in the Waterway during that visit, and it was declared navigable.

20. Prior to the Determination, the WDNR Surface Water Viewer maps showed a waterway traversing directly adjacent to the proposed sawmill site. The maps show a waterway at the “24K” level, that the stream is classified as intermittent, and is also shown to be a cool-cold headwater (Exhibits C, D, and E).

21. Site photos taken by Petitioner’s legal counsel on September 27, 2021 from South Shaleridge Road facing east towards the Borntreger property show the Waterway meanders and has water coursing through that meander. (Exhibit F).

22. Other photos taken by Petitioner also show water sufficient to float a canoe and a defined bed and bank of the Waterway. (Exhibit G).

23. The WDNR’s Decision was based off an Eau Claire County staff site visit that was not made during the spring freshets, and was made contrary to the applicable Wisconsin law, statutes including Wis. Stat. § 30.10, administrative code provisions, guidance, policies, procedures, rules, or practices applicable to navigability determinations, as well as previous navigability determinations for this Waterway.

NATURE OF PETITIONERS’ INTEREST AND FACTS SHOWING PETITIONERS AGGRIEVED

24. Petitioner realleges all prior allegations.

25. Under Wisconsin’s public trust doctrine, navigable waters are held in trust for the public. *See Rock-Koshkonong Lake Dist. v. State Dep’t of Nat. Res.*, 2013 WI 74, ¶ 78. The public trust doctrine establishes standing for citizens seeking to vindicate the public trust. *State v. Deetz*, 66 Wis. 2d 1, 13 (1974).

26. The WDNR's Determination eliminates the classification of the Waterway as navigable, removes the Waterway from the public trust along with potential recreational and other uses, and accordingly, aggrieves the Petitioner and other members of the public.

27. Further, Petitioner lives in proximity to the Waterway, and the consequences of the Decision will result in the allowance of industrial-style land uses within three hundred (300) feet of the Waterway that will disturb Petitioner's use and enjoyment of her property related to noise, lower property values, aesthetics, and other losses and damage.

28. Kramasz stated the Waterway is a tributary to Fall Creek. The WDNR's Trout Stream maps classify Fall Creek as a Class 2 Trout Stream. The allowance of industrial-style land uses within three hundred (300) of the Waterway, when such Waterway is clearly documented as flowing off the Borntreger property and is a tributary to Fall Creek, will result in further environmental damage from storm water runoff and other contaminants into Fall Creek and adjoining lands and further harms the public and the Petitioner.

29. On the basis of the facts and allegations as set forth above, the applicable laws, administrative code provisions, guidance, policies, procedures, rules, or practices were not followed in issuing the Decision, and Petitioners are aggrieved.

GROUND FOR REVIEW

30. Petitioners reallege all prior allegations.

31. The Wisconsin Legislature has provided a remedy to those adversely affected by an administrative decision under Wis. Stat. § 227.52 et seq.

32. A petition for circuit court review of an administrative decision must be filed within thirty (30) days. Wis. Stat. § 227.53(1)(a)(2m).

33. The Decision was issued on September 9, 2022 and this Petition for Judicial Review of the Decision is timely.

34. The grounds under Wis. Stat. § 227.57 compelling reversal and remand of the Decision include, without limitation, the following:

- (a) In issuing the Decision, the WDNR engaged in a material error in procedure or a failure to follow prescribed procedures and fairness of the proceedings or the correctness of the proceedings has been impaired. Wis. Stat. § 227.57(4).
- (b) In issuing the Decision, the WDNR erroneously interpreted a provision of the law and a correct interpretation of the law compels remand to the WDNR under a correct interpretation of the law so it issues the decision as it was required by law to do. Wis. Stat. § 227.57(5).
- (c) There are no official Findings of Fact issued in the Decision, but to the extent the WDNR found or relied on certain facts to issue the Decision, the facts should have compelled the WDNR to not issue the Decision. Wis. Stat. § 227.57(7).
- (d) In issuing the Decision, the WDNR has improperly exercised its discretion, failed to exercise its discretion, or is outside the range of discretion delegated to the WDNR. The Decision is also inconsistent with an agency rule, an officially stated agency policy, or practice. Wis. Stat. § 227.57(8).

ADVERSE EFFECT ON PETITIONERS

35. Petitioners reallege all prior allegations.

36. The Petitioners are substantially aggrieved by the Decision, and their substantial interests are injured in fact, threatened with injury, and are adversely and irreparably affected by the Decision because, for the reasons outlined above and other reasons that may be

determined through these proceedings, the Decision is not based on substantial evidence, is contrary to law, ignores proffered facts, and is contrary to WDNR procedures or practice.

REQUEST FOR STAY

37. Petitioners request a stay of the Decision, which would result in an automatic reversion to the July Navigability Determination, which found the Waterway is navigable. The Decision, and the subsequent ability of Borntreger to engage in additional land disturbing activities or apply for and obtain a conditional use permit for activities within three hundred (300) feet of the Waterway are not automatically stayed through the filing of this Petition for Judicial Review, and pursuant to Wis. Stat. § 227.54, the Petitioner requests this Court issue a stay of the Decision during the pendency of these proceedings.

38. A stay is appropriate here because the Petitioner is likely to prevail on the merits. For the reasons set forth above, the WDNR exceeded its authority issuing the Decision.

39. A stay is necessary to protect the Petitioner.

40. A stay will not unduly burden the WDNR or Petitioner because, to Petitioner's knowledge, Borntreger have not reapplied for a conditional use permit for saw milling operations, though they may do so in the future.

41. A stay is further warranted because there is no other adequate remedy at law for the Petitioner.

RELIEF REQUESTED

WHEREFORE, Petitioner respectfully requests that the Court grant the following relief pursuant to Wis. Stat. §§ 227.52, 227.54, 227.57(4), (5), (7), (8) and (9):

- (1) Declaring the WDNR's Decision be reversed, set aside, or vacated, and remanded to the WDNR, including instruction for the WDNR to conduct an on-site navigability determination during the spring run-off, as required by

DeGayner & Co., Inc. v. Wisconsin Dept of Natural Resources, 70 Wis. 2d 936 (1975);

- (2) Ordering the July Determination to be the final navigability determination for this Waterway;
- (3) Ordering such interlocutory or final relief as is necessary to preserve the interests of the Petitioner and other members of the public;
- (4) The Petitioner's costs and attorneys' fees; and
- (5) Such other and further relief as the Court deems just and proper.

Dated this 5th day of October, 2022.

WELD RILEY S.C.

By: 

Anders B. Helquist

State Bar No. 1070854

Weld Riley S.C.

3624 Oakwood Hills Parkway

Eau Claire, WI 54701

715-839-7786

ahelquist@weldriley.com

Dated this 5th day of October, 2022.

WELD RILEY S.C.

By: 

John Robert Behling

State Bar No. 1036097

Weld Riley S.C.

3624 Oakwood Hills Parkway

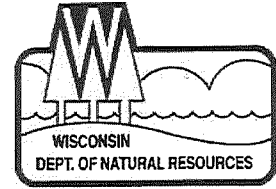
Eau Claire, WI 54701

715-839-7786

jbehling@weldriley.com

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
1155 Pilgrim Rd.
Plymouth, WI, 53073

Tony Evers, Governor
Preston D. Cole, Secretary
Telephone 608-266-2621
Toll Free 1-888-936-7463
TTY Access via relay - 711



09/09/2022

Ben Bublitz
Eau Claire County
[sent electronically to County]

INF-WC-2022-18-02691

RE: Request for Navigability Determination, for WBIC 5014382, Borntrreger, E11381 County Road D, Fall Creek, located in the Town of Lincoln, Eau Claire County.

Dear Mr. Bublitz

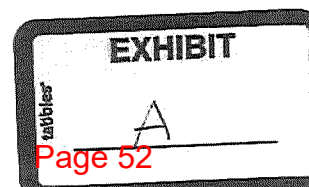
Thank you for visiting this site to take stream measurements and photos. In Wisconsin, the Supreme Court has defined a navigable waterway as one which has a defined bed and banks and carries enough water to float a canoe or other watercraft during the spring high water periods. Based on this definition and the conditions observed at the site, the stream on the Borntrreger property has been determined to be not navigable from S Shaleridge Rd to County Rd D. This determination is based on specific site conditions and supersedes the previous desktop determination that I made in error by just reviewing aerial photos.

It is clearly documented by your site visit that there is not a defined bed and banks on the Borntrreger property. Immediately downstream of the Borntrreger's the waterway was converted to an NRCS grassed waterway more than 30 years ago. There is also a water control structure on the downstream end of the waterway. It is my understanding that past determinations by DNR and County staff also determined this waterway to be non navigable.

If you have any questions about this determination, please call me at (920) 893-8531 or you can reach me by email at Kathleen.Kramasz@wisconsin.gov.

Sincerely,

Kathi Kramasz
Water Management Specialist



DJ

From: Dessy Johnson dessyjohnson@q.com
Subject: Fwd: Navigable Stream-EC County Rod Eslinger and Ben Bublitz 2nd attempt
Date: August 22, 2022 at 2:27 PM
To: Adam Jarchow adam@jarchowlaw.com

Begin forwarded message:

From: Dessy Johnson <dessyjohnson@q.com>
Subject: Fwd: Navigable Stream
Date: July 25, 2022 at 9:25:26 AM CDT
To: Rod Eslinger <rod.eslinger@co.eau-claire.wi.us>, Ben Bublitz <Ben.Bublitz@co.eau-claire.wi.us>
Cc: "Amanda.Dehmlow@wisconsin.gov" <Amanda.Dehmlow@Wisconsin.gov>

I reached out to the WI DNR regarding the stream traversing on property E11381 County Road D, Fall Creek, WI 54742. Kathleen Kramasz from the DNR confirmed that the stream in question is navigable (attached below). I confirmed her assessment of "carries enough water during the spring to float a canoe or similar watercraft" by responding with the image below. Please call me to discuss. (612)282-8975. Thank you Dessy Johnson



Begin forwarded message:

From: "Kramasz, Kathleen M - DNR" <Kathleen.Kramasz@wisconsin.gov>
Subject: RE: Navigable Stream
Date: July 25, 2022 at 7:35:27 AM CDT
To: Dessy Johnson <dessyjohnson@q.com>
Cc: "Harrington, Dan - DNR" <Dan.Harrington@wisconsin.gov>, "jared.grande@co.eau-claire.wi.us" <jared.grande@co.eau-claire.wi.us>

Dessy, it does appear that this waterway has a defined bed and banks and carries enough water during the spring to float a canoe or similar watercraft. We would consider this a navigable Trib to Fall Creek.

Please let me know if you have any additional questions

We are committed to service excellence.

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

Kathi Kramasz

Phone: (920) 893-8531

Kathleen.kramasz@wisconsin.gov

From: Dessy Johnson <dessyjohnson@q.com>

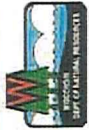
EXHIBIT

tabbles

B

Page 53

24K Hydrography Streams and Rivers - WDNR Surface Water Data Viewer



Legend

Notes

DISCLAIMER: The information shown on these maps has been obtained from various sources, and are of varying age, reliability and resolution. These maps are not intended to be used for navigation, nor are these maps an authoritative source of information about legal land ownership or public access. No warranty, expressed or implied, is made regarding accuracy, applicability for a particular use, completeness, or legality of the information depicted on this map. For more information, see the DNR Legal Notices web page: <http://dnr.wi.gov/legal/>

0.0 Miles

0 0.02

0

1: 990

NAD_1983_HARN_Wisconsin_TM

EXHIBIT

C

tabbles

Intermittent Stream - WDNR Surface Water Data Viewer



Legend

Notes

DISCLAIMER: The information shown on these maps has been obtained from various sources, and are of varying age, reliability and resolution. These maps are not intended to be used for navigation, nor are these maps an authoritative source of information about legal land ownership or public access. No warranty, expressed or implied, is made regarding accuracy, applicability for a particular use, completeness, or legality of the information depicted on this map. For more information, see the DNR Legal Notices web page: <http://dnr.wi.gov/legal/>

0.1 Miles

0 0.03

1: 1,980

NAD_1983_HARN_Wisconsin_TM

EXHIBIT

D

tabbles

Stream Natural Communities -- Cool-Cold Headwater - WDNR Surface Water Data Viewer



Legend

- Streams Natural Communities**
- All other values
 - Coldwater
 - Cool-Cold Headwater
 - Cool-Cold Mainstem
 - Cool-Warm Headwater
 - Cool-Warm Mainstem
 - Large River
 - Macroinvertebrate
 - No Classification
 - Warm Headwater
 - Warm Mainstem

Notes

DISCLAIMER: The information shown on these maps has been obtained from various sources, and are of varying age, reliability, and resolution. These maps are not intended to be used for navigation, nor are these maps an authoritative source of information about legal land ownership or public access. No warranty, expressed or implied, is made regarding accuracy, applicability for a particular use, completeness, or legality of the information depicted on this map. For more information, see the DNR Legal Notices web page: <http://dnr.wi.gov/legal/>

0.1 Miles

0.03

0

0.1



NAD_1983_HARN_Wisconsin_TM

1: 1,980

EXHIBIT

tabbles

F



tabbles®
EXHIBIT
F



6



EXHIBIT

tabbles*

G

Page 59

7



4



9



11



ESA Inquiry

Locate areas that may be impacted by Environmentally Sensitive Areas

Purpose:

Parcels within flood zones, the shoreland district, or that contain wetlands or hydric soils may require additional permitting for any development to occur. Presence of steep slopes and underlying zoning are also factors affecting permitting. The presence or absence of any of these factors indicated within this app are advisory only and will require further verification for any decision-making purposes. Contact Eau Claire County Planning and Development for details:

Eau Claire County Planning and Development
715-839-4741

Search:

The search box can be used to query by property address or parcel computer number.

Explore:

To quickly zoom to an area, hold down the Shift key while dragging a box with the left mouse button. Use the left mouse button to pan.

Terms of Use:

Accuracy and completeness of information on this website is not guaranteed. No warranty is expressed or implied. Use of this site constitutes acceptance of these [Terms of Use](#).

+
▼ 012110806000
X Q

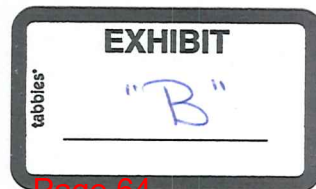
Parcel: 012110806000

This parcel appears to have indicators of Environmentally Sensitive Areas

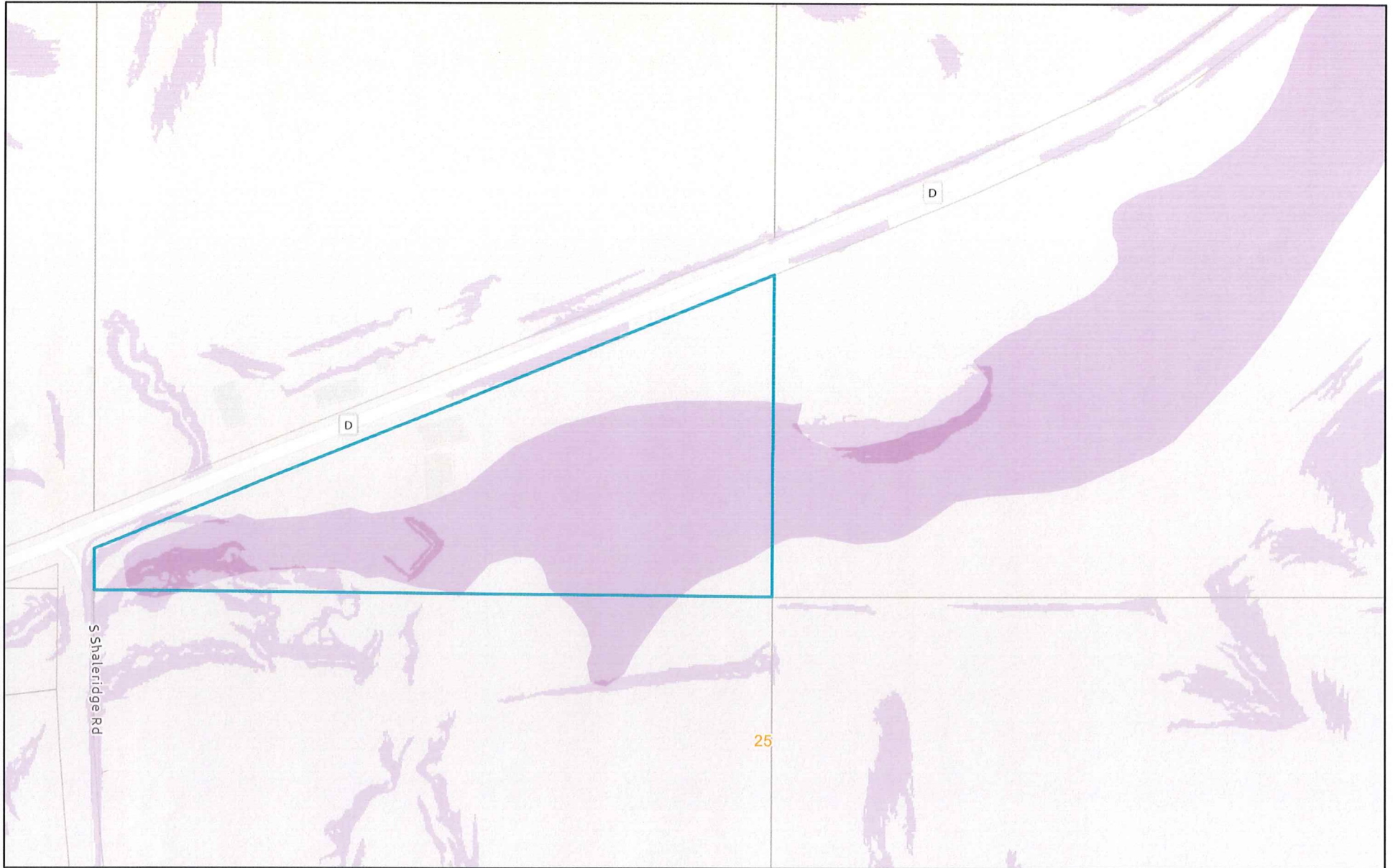
Parcel Computer Number: 012110806000
 Parcel PIN: 1801222608252100001
 FIRM Panel:
 Flood Zone: No
 Shoreland Zoning: No
 Hydric Soils: **Yes**
 Wetlands: No
 Steep Slopes: **Yes**

DISCLAIMER: Information presented may be incomplete or out of date.

[Zoom to](#)

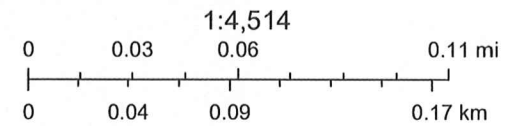


ESA Inquiry



10/31/2022, 1:06:00 PM

- County Boundary
- Steep Slopes
- Section
- Tax Parcel
- Hydric Soil



Esri Community Maps Contributors, © OpenStreetMap, Microsoft, Esri, HERE, Garmin, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, Eau Claire County, WI

MINUTES

Eau Claire County

• BOARD OF LAND USE APPEALS •

Date: Monday, May 23, 2022

Time: 5:30 p.m.

Location: Eau Claire County Courthouse, 721 Oxford Ave, Room 1277, Eau Claire, Wisconsin 54703

Members Present: Gary Gibson, Gary Eslinger, Randy Stutzman, Patrick Schaffer, Karen Meier-Tomesh

Members Absent:

Staff Present: Holly Weigand, Ben Bublitz, Rod Eslinger

1. Call to Order and confirmation of meeting notice

Chair Stutzman called the meeting to order at 5:30 p.m. and confirmed the meeting was properly noticed.

2. Public Comment (**15 minute maximum**)

None (Garby Gibson arrived 5:32 p.m.)

3. Public Hearings

- a. A variance request to reduce the minimum lot width requirement from 660 feet to 0 feet in the exclusive forestry district (F1). (Town of Lincoln) / Discussion – Action

Chairman Stutzman swore in Ben Bublitz, Land Use Manager for Eau Claire County Planning & Development, to provide background on the Variance request. Gary Gibson asked if there is an easement on the property. Ben Bublitz explained there is an easement on the property, though in the F1 district an easement doesn't count as road frontage or access. The Planning & Development department does not oversee easement/covenant.

Nathan Risberg spoke in favor. He purchased the land not knowing he needed a certain amount of road frontage; he assumed while doing title work they would catch an issue as such. The person he purchased the property from stated before he sold the property, he found out he did not have access to his own property and had to petition the neighbors to purchase it because he couldn't legally sell it without an easement. During the process of applying for a Building Permit they realized that he had no road frontage, and he was land locked, therefore he should have never been able to purchase the land.

No one spoke in opposition.

Ben Bublitz's staff summary: There are some hardships, but the final decision is up to the Board of Land Use Appeals. Chairman Stutzman asked Rod Eslinger (Director of Planning & Development) about provision on land locked parcels and previous cases. Rod stated that it aligns with the district road frontage requirements, though was not familiar on the particular case Chairman Stutzman asked about. The board deliberated the request.

ACTION: Motion by Karen Meier-Tomesh, to deny the Variance request based on finding in the staff report seconded by Patrick Schaffer. Motion carried 5-0-0.

- b. A variance request to reduce minimum required road right-of-way setback from 50 feet to 46 feet. (Town of Washington) / Discussion – Action

Chairman Stutzman swore in Ben Bublitz, Land Use Manager for Eau Claire County Planning & Development, to provide background on the Variance request. Ben Bublitz went over that the structure was approved by a

Condition Use Permit (structure over 1,200 sq. ft.). The Site Plan indicated the shed would be 84' from front property line. Conditional Use Permit was granted, and a Land Use Permit was still needed. Once that was applied for, Jared Grande, previous Land Use Manager went out to do a setback check. The property irons were not located, so a survey was needed to find property lines. Applicant and owner got a survey done, then Ben Bublitz went out to do a setback check and the slab was 4' too close.

Teresa Nanstad spoke in favor. Stated they applied for a Land Use Permit and had a Zoom meeting, so they thought it was approved. Jared Grande, previous Land Use Manager for Eau Claire County, went out to the property. She stated they are the last house on a dead-end road. They got a survey done after the cement was already poured. It was stated that the cement has in floor heat, the tubing is already in and do not want to move the slab.

Ronald Hicks spoke in favor. Ronald is a neighbor to the east of the property. He indicated that all lot lines are wrong, and the road is not where it is supposed to be. Ronald states that lot lines and setbacks don't matter to him, and he does not care.

Douglas Radke spoke in favor. Douglas is also a neighbor to the property. Douglas also spoke about the lot lines being wrong and says their lot line is on his property by 50 feet. He bought his house back in 1986 and his realtor told him about the lot line issue at the time.

No one spoke in opposition.

Ben Bublitz went over his staff summary which recommended denial. Gary Gibson asked who decided where to put the slab. Ben Bublitz answered the owners. Karen Meier-Tomesh asked if it is a platted subdivision. Ben Bublitz and Rod Eslinger answered that it is not a subdivision.

The board deliberated the request.

ACTION: Motion by Patrick Schaffer, to deny the Variance request based on finding in the staff report seconded by Gary Gibson. Motion carried 5-0-0.

Lee Nicolet was abrupt after the motion and expressed his frustrations. Lee Nicolet was asked to leave the meeting.

4. Review/Approval of December 13, 2021 Meeting Minutes / Discussion – Action

The board reviewed the December 13, 2021 Meeting Minutes.

ACTION: Motion by Karen Meier-Tomesh, seconded by Patrick Schaffer, to approve the December 13, 2021 Meeting Minutes as presented. Motion carried 5-0-0.

5. Adjourn

ACTION: Motion by Gary Gibson, seconded by Gary Eslinger, to adjourn the meeting. Motion carried 5-0-0. Meeting adjourned at 6:44 p.m.

Respectfully submitted,

Holly Weigand
Clerk, Board of Land Use Appeals