

**VILLAGE OF FOX POINT
BOARD OF APPEALS MEETING
MINUTES AND DETERMINATION
WEDNESDAY, JANUARY 24, 2024**

A meeting of the Fox Point Board of Appeals was held in Schwemer Hall, 7200 N. Santa Monica Blvd., on Wednesday, January 24, 2024 at 5:00 p.m. Deputy Clerk-Treasurer Nathan Schafer called the meeting to order at 5:12 p.m. The Deputy Clerk-Treasurer took roll call. Those present included:

Nancy Filsinger, Chair
Mark Grady, Board Member (Acting Chair)
Thomas Dunst, Board Member
Scott Ratke, Board Member
Lucille Sells, Board Member Alternate 1 [Absent]
Julianna Javor, Board Member Alternate 2
Alan Polan, Board Member Alternate 3 [Recused/Absent]

Staff members also present were Village Attorney Eric Larson, Building Inspector Michael Rakow, and Deputy Clerk-Treasurer Nathan Schafer.

Notice of the meeting was provided to the North Shore Now, to all others as required by State open meetings laws, Village ordinances and posted on the official bulletin board and the village website.

Approval of Minutes of November 27, 2023 Meeting and the Findings of Fact, Decision and Order

Roll call vote:

Mark Grady, Board Member	Aye
Scott Ratke, Board Member	Aye
Julianna Javor (Alt. 2)	Aye

Motion by Board Member Scott Radtke to approve and seconded by Board Member Thomas Dunst. Without objection and by unanimous consent, the November 22, 2023 meeting minutes were approved.

Case 2023-12 (As Adjourned from November 22, 2023): 8566 N Regent Rd. The applicant is requesting a variance pertaining to Section 745-16 B (3), concerning the B Residence District with regard to the required setback of 10 feet which should be provided for every building. The applicant is proposing to install a two-car attached garage on the south side of the home within the side yard setback, six and a half to seven feet into the required 10-foot setback.

Open Case 2023-12 for Deliberation

Acting Chair Mark Grady reopened Case 2023-12 for deliberation with the Board members gave a brief synopsis that this case was adjourned because the applicant had to leave for work and wanted to be present to hear the deliberations.

Building Inspector Michael Rakow and Applicant/Appellant Elizabeth A. Casmer were

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present.

Because only three members that were present from the last meeting, Acting Chair Mark Grady asked Village Attorney Eric Larson if they had enough members present for a quorum to decide the case today. Village Attorney Eric Larson replied, we had hoped to have the same body and the same group of members. State law requires action only to be taken by a simple majority of a quorum, but our rules require four members for a quorum. He asked the body if they were comfortable proceeding as a body and that they had a chance to review the minutes, and render a decision.

Acting Chair Mark Grady asked the board, particularly, the members who were not present if they felt comfortable proceeding after reviewing the minutes. The members not present did not feel comfortable making a decision just based on the minutes. Village Attorney Eric Larson said that they would have to re-notice the case if they wanted to reopen testimony but they could use the recollection of those who were present, in addition to using the minutes. Board member Adam Bazelon asked the Village Attorney Eric Larson, if they had four members, could the person not in attendance abstain from voting and let the case be decided by the members present. Acting Chair Mark Grady asked Village Attorney Eric Larson what the alternatives were and could they adjourn it until March or have the applicant withdraw and re-apply. Village Attorney stated, he thought Board Member Adam Bazelon had a great idea because it lets it get done if it is granted or however those votes fall because three votes would be sufficient but he would want the applicant to agree.

Acting Chair Mark Grady asked the applicant, Elizabeth Casmer, if she would like to proceed in this fashion with three people from the last meeting and additional members who were not present but would be able to hear the deliberations of the body knowing that it takes three votes to approve the variance and anything less than that denies the variance. She asked what the benefit of her withdrawing her application would be. Acting Chair Mark Grady said that she would get before the regular board instead of the board of alternates that were present at the last meeting. Applicant Elizabeth Casmer said that she would like to move forward and proceed. Acting Chair Mark Grady asked Attorney Eric Larson if he is happy and we can proceed and how many votes would be taken. Village Attorney Eric Larson stated that we could pare down the group to the original three members and one additional from those not present. Board Member Adam Bazelon volunteered to hear the deliberations and Board Member Thomas Dunst and Chair Nancy Filsinger left the table for the remainder of the deliberations.

Acting Chair Mark Grady stated a recap for Board Member Adam Bazelon that it is a smaller house on North Regent Road and is already non-conforming with the 10-foot setback requirement because it pre-dates setback requirements and is estimated to already be three feet into the setback. The applicant is looking to expand from a single car garage to a two-car garage which would go another three to three and half feet further into the setback which would leave approximately three feet of setback. The house to the south of her where the garage would be expanded is also into the setback similar to hers because it also pre-dates the setback requirements. There were alternatives to move the garage forward that would also stay in the current setback but it would not be as nice. The applicant didn't like a tandem

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garage because it creates a problem with the space behind the garage and her outdoor living space.

Alternate Board Member Julianna Javor stated, we also discussed what constituted a hardship. Acting Chair Mark Grady stated, the question was really what made this property unique to require a variance. The house was already in the setback, so what is a few more feet, what difference does it make? On the other hand, you're already into the setback so you're going to make a problem worse. We are trying to preserve open space and open views and this puts two houses that already close together, even closer, which runs contrary to the general purpose of the setback requirements.

Village Attorney Eric Larson reviewed the standard for a variance and stated that their powers include the ability to authorize a variance that will not be contrary to the public interest. The property owner bears the burden of unnecessary hardship by demonstrating that strict compliance may prevent the property owner from using the property for a permitted purpose or would render the property owner unnecessary burdensome in conditions related to the property and were not created by the property owner.

Board Member Scott Radtke stated, when the house was built most people didn't have more than one car and it seems pretty impractical to have more than one car and be able to use this house. It seems impractical to have to move cars around but I am balancing it with having to go into the setback. How much harm is that going to cause to the public? They are already in the setback so I'm not sure it is going to be that great of harm, so it is a hardship.

Acting Chair Mark Grady stated, I can't say this lot is particularly unique because the next-door house is the same but these two lots must be fairly uncommon, both the size of the lots and the houses that they cannot be expanded without going into the setbacks further. In terms of public policy, it's obviously good for people in the village to renovate their homes but we must weigh that against houses being on top of each other.

Motion Case 2023-12

Board Member Scott Radtke made a motion to approve based on the uniqueness of the property and was seconded by Julianna Javor.

Roll call vote:

Scott Ratke, Board Member	Aye
Julianna Javor (Alt. 2)	Aye
Adam Bazelon, Board Member	Abstain
Mark Grady, Acting Chair	Aye

Motion carried by roll call vote, (3-0) with one abstention.

Alternate Board Member, Julianna left the table and Chair Nancy Filsinger and Board Member Thomas Dunst returned to the meeting.

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Case 2024-01 7700 N Club Circle. The applicant is requesting a special exception to install yard fencing in the front yard of a corner lot. The special exception request is made pursuant to 745-7 B.(3)(h)[1, 2 and 5], and 745-7 B.(3)(j) of the Fox Point Code.

Village of Fox Point Building Inspector Michael Rakow

Building Inspector Michael Rakow stated his name and was sworn in to provide testimony by the Village Deputy Clerk Treasurer.

Applicant/Appellant Terri & John Olin

Applicant/Appellant Terri Olin stated her name for the record and was sworn in to provide testimony by the Village Deputy Clerk Treasurer.

Building Inspector Michael Rakow-Testimony

Building Inspector Michael Rakow stated, the applicants are putting up a fence on a corner lot. Per the code on the westside it would be considered going into the front yard which is a violation of the code.

Chair Nancy Filsinger asked, which direction the front of the house faces. Building Inspector Michael Rakow stated, the front of the house faces the south.

Board Member Adam Bazelon asked, is an existing fence in the back. Building Inspector Michael Rakow stated, that he did not know.

Board member Thomas Dunst asked where is the proposed fence on this diagram. Building Inspector Michael Rakow stated, the dashed line with the X.

Board Member Adam Bazelon asked the building inspector to highlight the proposed fence and the Building Inspector Michael Rakow did so.

Village Attorney Eric Larson asked the Building Inspector to please draw that on the official file and show to the applicant. The applicant verified it was correct after reviewing the file. Village Attorney Eric Larson asked the Building Inspector to explain the items. Building Inspector Michael Rakow stated, the corner lot where the fence in question is on Lake Drive. If you follow the southwest corner of the house that is the cutoff line. The fence is actually to the west of that imaginary line, so that part is against the code.

Board Member Mark Grady asked if the proposed fence just extended to the north we wouldn't be here, they wouldn't need BOA permission. Building Inspector Michael Rakow stated, correct, there is a little step or jaunt that makes it necessary.

Chair Nancy Filsinger asked if there were any other questions for the Building Inspector. Hearing none, the testimony was closed at 5:45 pm.

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Applicant Terri Olin Testimony

Chair Nancy Filsinger asked, so why the jog, why not just straight back.

Applicant Terri Olin stated, I wish we could take a field trip. When you look at the yard on the Lake Drive side, it would be really weird to have this here. It doesn't make sense to cut off that little piece and then have this little 30 feet piece of fenced off nothing and then the woods. It doesn't make sense to cut off that little section of yard. Our neighbor behind us, their house faces Lake Drive and their fence goes all the way to Lake Drive. For aesthetic purposes, I thought about just following theirs. There is already a chain link fence separating the yards. Theirs goes along our back property.

Board Member Mark Grady asked, is the chain link fence on the north side of your property. Applicant Terri Olin stated, correct. It's been there before we ever bought the house. It would be weird to cut off half the yard if the fence was limited to there. It's not going to block any views; it's well back from Lake Drive and not the front corner.

Chair Nancy Filsinger asked, so there already is a chain link fence there and you're going to put another fence up. Applicant Terri Olin stated, we have to because that is their fence. Our chain link fence will go right along with theirs.

Chair Nancy Filsinger asked, is it going to be used for anything in particular. Applicant Terri Olin stated, we have to get a fence because we're putting a pool in so we need to have a fence, otherwise we would never get a fence.

Board Member Mark Grady stated, regarding special exceptions, our ordinance states its needs to be reasonably necessary to protect the safety of the people residing on the property. Why is that bump out necessary to protect the people of the property? Applicant Terri Olin stated, in order to fit other things in our backyard. My daughter just had twins, a swing set for them, that kind of thing, but we have to fence in the pool. It just makes sense. It doesn't make sense to cut off half of a property.

Chair Nancy Filsinger asked, how much extra is that bump out. Applicant Terri Olin stated, I don't know, I'm estimating 30 more feet.

Board Member Adam Bazelon asked, how high is the fence. Applicant Terri Olin stated, I think four feet, it's black with the slates in it. It'll be black to match theirs. I think it needs to be four feet.

Board Member Adam Bazelon asked, you stated something about the woods. Applicant Terri Olin stated, our house faces Club Circle or faces south, there is a section of woods that separates our yard before it hits Lake Drive.

Board Member Mark Grady stated, your application states that you would like to have the fence go to the 75-foot, zero-inch setback line on the Lake Drive side of our property. That's not what you are proposing is it? Applicant Terri Olin stated, I think so. That's the pool guy who wrote that. I think what he is saying is that it is 75 feet from the middle of Lake Drive.

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Board Member Mark Grady stated, but the neighbors' property is closer. Applicant Terri Olin stated, the neighbors is four feet from Lake Drive.

Board Member Adam Bazelon asked, can you read the standard while testimony is still open. Village Attorney Eric Larson, we have a series of code provisions that apply. Because this a corner lot, we have a provision we don't use very often and I'll start there. In an event a building is irregularly configured such as an L or V shaped structure or the building is located upon on a corner lot, irregularly shaped lot, or a lot which abuts one or more private or public roads, such that there are or appear to be multiple front side or rear sides of the structure, the determination of the front, rear or side areas, as well as the determination of any fencing shall be referred by the Building Inspector to the Board of Appeals. The Board of Appeals shall review the matter without the requirement of any appeal fee. The Board of Appeals shall treat the application as a special exception which shall specifically not be subject to the requirements applicable to zoning variances and shall proceed with accordance to subsection B3J, herein. The Board of Appeals shall consider the least obtrusive alternative and any other criteria as set forth in the provisions of this chapter which shall serve to balance the interests of the applicant and surrounding property owners. So that's where we start and that's to determine where the front yard is. The Building Inspector gave you his position on that, but ultimately, the code says it is for you to determine where the front is. Then when you go B3J, the applicable language says the Board of Appeals may grant the request for a special exception upon finding that the property owner has shown clear and convincing evidence to believe that the applicant has a legitimate need for a special exception and granting a special exception will not adversely affect the health, safety, or welfare of the community in the immediate area where located and will not impede the purpose, spirit, and intent of this section. It goes on further but that is the heart of it.

Village Attorney Eric Larson stated, Mr. Grady referred to a different standard that applies to fencing in the front yard. Board Member Mark Grady asked, if we determine that Club Circle is the front yard does that obviate the need to go further because it then becomes a side yard or a back yard. Village Attorney Eric Larson stated, yes, if it complies with the side yard requirement. If Lake Drive is the side, we have to determine if it complies with the requirement. Board Member Mark Grady stated, if we all agree that the front yard is the Club Circle side, and we have a side yard compliance, then a special exception is not required once we make those findings. Village Attorney Eric Larson stated, so I cut off some of the nuances. If we determine that is the front the board will treat it as a special exception. Then we get down to the J that I read. We don't get to H2, which is the protection and safety, which is the higher standard but we do get to J.

Board Member Adam Bazelon asked, you do have a driveway onto Lake Drive as well. Applicant Terri Olin stated, we do and it's past the driveway. Board Member Adam Bazelon asked, so the fence will come out just north of the driveway. Applicant Terri Olin stated, correct and then cut back to our house.

Board Member Adam Bazelon asked, so the threshold determination is if it a side yard, then the application is moot. Chair Nancy Filsinger stated, no it still is a special exception. Village Attorney Eric Larson stated, but it is a lower standard. Chair Nancy Filsinger asked if there were any more questions.

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Closing of Testimony: Case 2024-01

Without objection and by unanimous consent, Chair Nancy Filsinger closed testimony for Case 2024-01 at 6:00 p.m.

Motion: Case 2024-01

Motion by Board Member Mark Grady to change the front yard to the Club Circle side and the Lake Drive side is a side yard, seconded by Board Member Dunst.

Roll call vote:

Nancy Filsinger, Chair	Aye
Mark Grady, Board Member	Aye
Thomas Dunst, Board Member	Aye
Scott Ratke, Board Member	Aye
Adam Bazelon, Board Member	Aye

Motion carried by roll call vote, (5-0).

Motion to approve the special exception for the proposed fence by Board Member Mark Grady, and seconded by Board Member Adam Bazelon.

Roll call vote:

<i>Nancy Filsinger, Chair</i>	<i>Aye</i>
<i>Mark Grady, Board Member</i>	<i>Aye</i>
<i>Thomas Dunst, Board Member</i>	<i>Aye</i>
<i>Scott Ratke, Board Member</i>	<i>Aye</i>
<i>Adam Bazelon, Board Member</i>	<i>Aye</i>

Motion carried unanimously by roll call vote, (5-0).

Case 2024-02: 6500 N Lake Drive. The applicant is requesting a variance pertaining to Section 745-13 B. (3), concerning the A-1 Residence District with regard to the required setback of 15 feet which should be provided for every accessory structure, Section 756-34 B, concerning both the generator unit and HVAC unit setback requirements, and Section 745-7 A. (1), regarding setback requirements for accessory structures. The applicant is proposing to install a generator and HVAC on the north side of the home within the side yard setback.

Village of Fox Point Building Inspector Michael Rakow

Building Inspector Michael Rakow stated his name and was sworn in to provide testimony by the Village Deputy Clerk Treasurer.

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Building Inspector Michael Rakow stated the applicants have just built a new house. The air conditioner condenser units on the north side of the house, which are not there now, were going to be in the setback. They have removed them, but if approved, they would have the choice to put them approximately 5 feet into the setback.

Board Member Thomas Dunst asked if a generator is also proposed to be placed in the setback? Building Inspector Mike Rakow stated, yes, a generator and two AC condenser units. The applicant clarified the application is for the two AC units, a generator, and two heat pumps.

Board Member Mark Grady asked, regarding the 15-foot setback, is the house on the line? Building Inspector Mike Rakow stated, correct.

Board Member Thomas Dunst asked, so this greenish area is a hedge? Board Member Adam Bazelon replied, proposed. Board Member Thomas Dunst stated, proposed but there is a retaining wall there. Chair Nancy Filsinger asked, how high the retaining wall is? The applicant stated two and half feet.

Applicant/Appellant Mona Patel, PJ Morel with Johnsen Schmaling, Shane Johnson with Berenz Builders and Chad Schultz with Berenz Builders

Applicant/Appellant Mona & Pareg Patel, PJ Morel with Johnsen Schmaling, and Shane Johnson & Chad Schultz both of Berenz Builders stated their names for the record and were sworn in to provide testimony by the Village Deputy Clerk Treasurer.

Builder Chad Schultz, stated there was an existing house on this property that they razed. Johnson Schmaling designed the structure that they have on the property. It is 80% complete. They are at the point now where they have an extensive landscape plan that will retain the sound of these units that are sitting to the north, as well as the visual. Interstate Heating and Air is the HVAC company. These are the quietest units they have; they normally wouldn't go to that length. The reason they are located there is they have a small window and small mechanical room in this house. They are stuck with lengths and distances they can go with these and the distances they have to be apart. They are currently sitting 100 feet away from the nearest neighbor to the north. Applicant Mona Patel stated, the previous mechanicals were 80 feet away.

Board Member Mark Grady stated, they have two drawings, one drawing with the original house before it was razed. The other drawing shows the current and proposed construction. Where were the units on the prior house? Applicant Mona Patel stated, along that same north wall and the original house was within the setback.

Board Member Mark Grady asked, so the units were on the north side and within the 15-foot setback and house as well? Designer PJ Moral stated, the previous house was six feet in the setback. Applicant Mona Patel stated, six-foot three inches was within the setback was

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the previous home. Board Member Mark Grady stated, it was actually 8 and half feet in the setback? Applicant Mona Patel stated, they intentionally knew they'd sacrifice a little bit of the yard to make sure they'd follow the law.

Board Member Mark Grady asked, regarding the spacing between the units and the mechanical room, was there a technological reason that the units couldn't have been put somewhere else? Builder Chad Schultz stated, that's the challenge, the line sets them up for the distance for the mechanical room, the fresh air intakes, the exhausts, those all have specific distances they have to away from each unit, whether it's A/C, a heat pump, or generator. Those units are set so they can sit within the distance of the mechanical room. It's the physical units sitting outside but they feed into the mechanical room where all of the duct work starts. There is a lower level that is finished off. They don't have a lot of room to squeeze these in. Hence, the large system to operate the entire house.

Board Member Mark Grady asked, in the drawing there is a square open area on the southside of the house, he didn't know what that was, a patio? Builder Chad Schultz stated, a solid glass breezeway going from the garage to the house. Board Member Mark Grady asked, the reason they couldn't go there is? Builder Chad Schultz stated, they don't reach the mechanical room at that point. The mechanical room is on the northside of the house. Board Member Mark Grady asked, so the same reason for the southside of the house. Builder Chad Schultz stated, the distance is too far to get to the units.

Chair Nancy Filsinger asked, there is a two and half foot high retaining wall. How high are the condensers? Builder Chad Schultz stated, approximately two to three feet above grade. They have created a self-drainage system for this lot. A screen line of evergreens runs the length of retaining wall and hides everything from Lake Drive and the property to the north.

Board Member Scott Radtke asked, couldn't the generator have been farther to the east. Builder Chad Schultz stated, he has a window right there and has to stay 18 inches away from that and the door to the garage. Board Member Scott Radtke asked, and the heat pumps? Builder Chad Schultz stated, they have a lack of space with the floor joists and they need smaller ducts. Board Member Scott Radtke asked, which unit is the noisiest? Builder Chad Schultz stated, the condensers.

Board Member Adam Bazelon asked, so what happens if the Board doesn't grant your request? Applicant Mona Patel stated, that's why they sit at a hardship, because there is feasibly no place else to put the mechanicals. They've been there for a year. This was planned several years ago. They're trying to understand, what is the hardship for the neighbor? The mechanicals are farther away than they were before. So, the hardship is that they would not be able to have mechanicals in their home.

Chair Nancy Filsinger asked, so this was approved, knowing the mechanicals were here? Builder Chad Schultz stated, they started in 2021 when they razed the house.

Board Member Adam Bazelon stated, he feels like something is off in the timeline. How were they able to build if these items were not approved in the setback? Why is this just now coming to the Village's attention? Did someone complain? Did Rakow drive by? Builder

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Chad Schultz stated, they feel someone complained. Applicant Mona Patel stated, the neighbor to the north brought up the issue and the Village has told them several times it would not be an issue at all. They've communicated these are plans and intentions and to have a nice arborvitae hedge there to look aesthetic as your driving from Lake Drive.

Board Member Scott Ratke asked, could they heat and cool their house if this isn't done? Applicant Mona Patel stated, no.

Board Member Mark Grady asked, what is the distance from the southern side of the house to the lot line? Builder Shane Johnson stated, 19-feet and one-half inch. Board Member Mark Grady asked, so why wasn't the house physically moved four feet to the south? Builder Shane Johnson stated, that is the flow of the driveway traffic for the cars to get into the garage. Applicant Mona Patel stated, they have young drivers, the request was to be able to have a car turn around and not have to back out into Lake Drive. Their design was all approved so they didn't know it need to be moved and it never came up that they were encroaching into setback parameters and the original home was in the setbacks. They didn't go in to start building until everything was approved. Builder Chad Schultz stated, they had four beautiful Oak trees that they were trying to maintain but they are down to one. That could have been a potential reason when they designed the house but he did not know that answer.

Board Member Adam Bazelon stated, can the Board open up testimony for Rakow again, he had a question for him? Village Attorney Eric Larson stated, the hearing was still going, so it is a question, was the Board done with the applicants?

Board Member Mark Grady asked, they submitted plans and drawings to the appropriate bodies; were the AC units shown in the plans in the current locations? Shane Johnson stated, they were. Board Member Mark Grady asked, and the issue of them being in the setbacks did not come up? Shane Johnson stated, it did not.

Board Member Adam Bazelon stated, if that was the case, then he felt it's an error on the part of the Village. One of the standards is that it's a hardship not of the owners own making. So, he wanted to ask the Building Inspector if it was an appropriate time.

Chair Nancy Filsinger asked, anything else for the applicants? The Board opened up testimony to the Building Inspector.

Board Member Adam Bazelon asked the Building Inspector, was he able to shed any light on the procedural aspects to how this got to where it is without anyone bringing any attention to it? Building Inspector Mike Rakow stated, it goes to Building Board and the Building Board approved it. After Building Board, he goes through his process and issues a permit. Board Member Adam Bazelon asked, had he reviewed these plans before? Building Inspector Mike Rakow stated, yes. Board Member Adam Bazelon asked, did it show the generator, the AC, and the heat pumps in the location they are shown now? Building Inspector Mike Rakow stated, without looking at the building permit, cannot say, but the permits were on there, yes. The generator was installed without a permit. They got a double fee for that. Board Member Mark Grady asked, when you say double fee, you mean you issued them a

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permit for the generator but at a higher price after the fact? Building Inspector Mike Rakow stated, yes, because it was installed without a permit originally. Board Member Adam Bazelon asked the Building Inspector, so generator was installed without a permit but the other two you can't say for certain? Building Inspector Mike Rakow stated, he'd have to look at the building permit to say what was on there. He didn't know.

Board Member Mark Grady asked, did he know how it got to the Board of Appeals. Was it something that you noticed and realized it was something that needed a variance? A neighbor complained? Was it something else? Building Inspector Mike Rakow stated, there was a complaint. That's what transpired. Board Member Mark Grady asked, was the complaint specifically that these are in the setback? Building Inspector Mike Rakow stated, yes, it was brought to his attention. If it was on the plan, great. Still the code does state that they have to meet the setbacks. So even if he made a mistake, and again, he didn't know if he did, they still have to meet the code. Board Member Adam Bazelon stated, he thought it was a relevant factor, is it outcome determinative, he didn't know, but it was a relevant factor.

Attorney Brian Randall representing Elisabeth Elser of 6516 N Lake Drive

Attorney Brian Randall stated his name for the record and was sworn in to provide testimony by the Village Deputy Clerk Treasurer.

Attorney Brian Randall stated, he knew Attorney Larson was going to read to the various standards and were in the packet and he's read them once fully in this meeting already. However, one portion of subsection, 62.23 (7)(d) does merit emphasis. For an area variance, the applicant must demonstrate that strict compliance with the zoning ordinance would unreasonably prevent the property owner from using the property owner's property for a permitted purpose or would render conformity with the zoning ordinance unnecessarily burdensome. And later, it goes on to say, that in all circumstances the property owner bears the burden of proving that the unnecessary hardship is based on conditions unique to the property rather than considerations personal to the property owner and that the unnecessary hardship was not created by the property owner. There was some testimony before the Board this evening about what the hardship is to the neighboring property and that is not the statutory obligation. The standard is on the applicant and created by them. This is a brand-new home so there were various options on this property they had control of.

Attorney Brian Randall further stated, also, he'd like to point out the Village code on air conditioners and this was in the packet. 756-34 (b) specifically states, as exterior structures, where any unit of an air conditioner, or refrigerator system, or backup generator installation is located outside of the structure, said unit shall comply with setback requirements for accessory structures as set forth in Chapter 745, zoning. It continues to say, said location shall not, by noise or sight, be detrimental to adjoining properties. That was also in the packet and that is specifically what they are talking about which are generators, AC units, and heat pumps. He would provide the pictures and show what the site looks like today.

Attorney Brian Randall further stated, Chapter 745 (7) defines accessory structures and

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he didn't know that it was highlighted in the packet and he was not going to read all of that to the Board but (a) (2) of that but references that no accessory use or structure shall be permitted that by reason of noise, dust, odor, appearance or other objectionable factors creates a nuisance or a substantial adverse effect on the property value or reasonable enjoyment of the surrounding property.

Attorney Brian Randall further stated, and finally why they are here tonight, 745-15 A-3 residential district requires under B3 that a side yard setback is 20 feet but this property is under 100 feet so the 15-foot setback does apply. They see that the house is properly sited. The concern is all of the mechanicals that are in the positions they are.

Attorney Brian Randall submitted packets of photos and Village Attorney marked them as exhibits A through G. Village Attorney Eric Larson asked the applicant if she had any objections from the applicant and accepted them as part of the proceeding.

The board members reviewed the photos.

Board Member Adam Bazelon asked, if this was a perspective from his client's property looking south? Attorney Brian Randall stated, yes.

Board Member Adam Bazelon asked, what is the address again? Attorney Brian Randall stated, 6500 N Lake Drive is the applicant, 6516 is his client.

Attorney Brian Randall stated, Exhibit G is the aerial photograph from Milwaukee County GIS, depicting the home that was demolished, not the current one. Board Member Adam Bazelon stated, based on Exhibit G, there was inaccurate depiction of where the property was located so he understood what he was saying.

Attorney Brian Randall stated, just to go through those and explain their position and orient on these perspectives. The purpose of Exhibit A was to show what mature vegetation was there and what appropriate screening could be and where that home had been sited. It didn't show where the AC units were, he didn't know that information. They had testimony that maybe some existing AC units were over there but that would have been under prior Village codes and ordinances. The current code is very clear; mechanicals must be outside the setback area. They can see what mature vegetation had been there and the elevation of the property next to his client's property when they were level.

Attorney Brian Randall stated, Exhibit B is renderings of what they believe were presented to the Village and depicted the home as a modern, attractive design, but, if looking at the lower right corner, the north elevation, they see no mechanicals depicted on that plan. He did not have the actual building plans submitted. He did not have time to request them. He would ask that if the applicant is going to insist a mistake or error by the Village that those plans must be found and marked as exhibits to see if and when those mechanicals were depicted. On that rendering, no mechanicals are found.

Attorney Brian Randall stated, Exhibit C was taken in Fall of 2023. It shows that his client's fence is three and half feet tall, the little white picket fence. The retaining wall that was

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installed is three to four feet above that white picket fence. Suddenly, the property to the south is three feet higher now and the property to the north is now looking up at them. Also, within the same photo, Exhibit C, left to right, he believed to be the two heat pump units with the fans, on a concrete slab within the setback area. Also, two AC units on concrete slabs within the setback area. An electrical panel that sticks out four to five inches into the setback area. There are PVC pipes that, maybe they can testify to what those are. A gas meter, but they were not here to object to a gas meter. They believe that is customary and a mechanical that can be in certain areas, so he is not objecting to the gas meter. A large generator on a concrete slab towards the right also shown close-up in Exhibit D.

Attorney Brian Randall stated, Exhibit D and E were taken today at 9am. He can answer questions about the orientations, but they were taken from ground level, sitting in a vehicle taken from the property to the north looking up at them.

Attorney Brian Randall stated, Exhibit F is just a packet of more pictures taken from last Fall and today that he probably didn't need to include but they are representative and he talked about the aerial photograph.

Attorney Brian Randall stated, unfortunately, the house is built and they can't dispute that. Sometimes staff can make mistakes and he didn't know that has proven, but what is very clear are the codes that the Village has: that mechanicals, that can be obtrusive, such as these, should be outside of the setback area. They have very serious concerns whether the landscaping to a sufficient height at an appropriate screening will go in per the plans. A lot of site disturbance has gone on and a lot of vegetation that was there has been removed. So, there certainly must be safeguards if any variance were to be considered that robust landscaping and a date certain must be installed. They must also ask the representations on the quiet equipment be reviewed by a certified expert appointed by the Village so the mechanicals are in fact quiet and the quietest possible. Or if the record remains open, perhaps they could review the specification sheets but that wasn't presented; it was commented that they are the quiet kind.

Board Member Adam Bazelon asked, did his client take issue with the noise? Attorney Brian Randall stated, he didn't know that they've had a fair representation of the building in operation. It wasn't clear in testimony when they'd been turned on or to what extent. But the concern would be a noise making condition that close. He'd also go back to Exhibit G and note that his client's home is located where it is, their surveys show where it is, but the board should also think forward, which he thinks the Village has done, that, if and when his client's property is ever redeveloped it's going to have to have to come off the north property line for a new setback and the new structure might be closer to the south property line. It's a wholistic review that just because one property is under redevelopment today, doesn't mean that the next one might not be very close in the future. His client also uses her outdoor area and that's why he quoted the standard on accessory structures, that it does apply to use and enjoyment of the outdoor property. The aerial photo shows a driveway circle and that area can be used for entertainment opportunities, parties and things of that nature so it's not just the use of the indoor area but the outdoor area as well.

Attorney Brian Randall stated, he would ask the board to elicit more evidence on what a

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line set area is and why that is hardship and why longer lines cannot be run. He knows it's difficult to be in an after-the-fact variance position. He sat on the Wauwatosa Board of Zoning Appeals for 12 years and they did have these from time to time. But, to just declare that it would be more expensive or can't be done is probably not an acceptable answer. There might be more inquiry the Board could have on what a line set is and why the units need to be there; why the building couldn't have been built four feet to the south or why the units cannot be relocated to the east. Otherwise, have the applicant shoulder some of the burden of the impact on their use and enjoyment of the property. Maybe it needs to be in the glass atrium area that they would like to use or the driveway area to turn cars around as opposed to the neighbor bearing the brunt of the impasse. Again, he would ask that the board look for more evidence if it's going to accept the applicants' arguments this evening on what line sets are, what the spec sheets are for this equipment that are already within the setbacks and mark as exhibits the building plans that were submitted and presented to the Village to drill down, when this issue was known and by whom, because a variance is certainly the exception to the rule. The uniqueness here is in that it is a brand-new home that was designed within the last few years and built within the last two years. That is not a unique site condition. The home was placed where it is by the applicant, the design team, and the builders. Finally, he never argues precedent as a reason why the Board can do or not do something. In the records, just reviewing in the time he had: Case 2022-09, 7834 N Beach Drive, a side-yard setback application for a generator was denied by the Board as a financial hardship was not a sufficient reason. Case 2021-01, 7074 N Santa Monica, a side-yard setback application for a new garden shed; the Board also denied that.

Attorney Brian Randall stated, this is not a unique situation. People do get themselves into these tough spots. It's not his job to solve the issue for them. Relocating mechanicals, providing additional information on how they might operate if they are going to stay, and other scenarios should be presented by the applicant if a variance were going to be considered but based on the statutory criteria and your ordinances, he thinks the board has to deny this variance.

Board Member Scott Ratke asked, how is his client affected by not being able to enjoy their property. Aesthetics, is that the big one? And the noise? Attorney Brian Randall stated, he will represent that he knows that AC units make noise and there are two of them here. He knows that generators, when the power is out and maybe the applicant can testify to what the maintenance is and it has to run for to make those operate. So, noise will occur in the area and it's amplified by the units being doubled. Noise is protected by the ordinance which is why the setback must be honored for these types of accessory structures. And for the visual part of it all. There is an attractive home but mechanicals are sitting right in front. There can be small little bushes put in or there can be robust, tall bushes put in. That addresses the aesthetics but not the noise.

Board Member Scott Ratke asked, if bushes would solve the aesthetic for his client? Attorney Brian Randall stated, he thinks they would still have a strong concern over the noise because they still don't have information that discusses what these units generate for noise, how often they'll be running and they are within that setback area and they are not supposed to be.

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Board Member Adam Bazelon asked, can they consider landscaping? Attorney Brian Randall stated, evidence is what the Board could consider. He said earlier, even if it were approved there needs to be date certain. His understanding is there was a plan before the Board and it is very robust looking but they also saw a plan that didn't show any mechanicals and now they are there. Perhaps the board could adjourn and have a plan from a professional landscaping company filed and explained.

Board Member Adam Bazelon asked, if he knew when the mechanicals were installed? Attorney Brian Randall stated, he did not. It appears the photos in the Fall show they were there at that time but that is a question that could be answered by the builder.

Board Member Mark Grady asked, so someone could put up a six-foot fence along that wall in addition to vegetation perhaps? Attorney Brian Randall stated, if allowed by code, yes. He's not going to be an expert on the code. Board Member Mark Grady stated, as far as screening, a fence would function as well as screening. Both would have some effect on screening for noise going to the north. Attorney Brian Randall stated, it could, he's not a qualified witness but it could bounce, and the property has been raised up about four feet.

Board Member Mark Grady asked, is the reason why his client hired him is because she doesn't like the look of it and the potential sound of it? Attorney Brian Randall stated, he cannot divulge the reasons his client hired him but the reason they are here is that major mechanicals that generate noise and are not screened and within the setback area were not properly sited but this brand-new home could have accommodated them being sited properly. The concern is noise and visual, some of which could be mitigated but it's still within that setback area and the concern of his client is that if she does work it will have to be done according to code and setbacks and rules.

Board Member Mark Grady asked, was his client there or involved when this was heard at the building board or were you there or present when that was discussed? Attorney Brian Randall stated, he did not know if she was there or involved. He did not know if the Village noticed the surrounding properties but he was not involved and he was not there.

Village Attorney Eric Larson stated, he just wanted to say this to the Board; he has faced other rock-and-a-hard-place issues in other contexts. Sometimes, if they can't be resolved by the Board of Appeals, the conflict is still there. The conflict gets resolved by a code amendment. The code be amended in a number of ways that ensures that this home has HVAC and has the mechanicals they need to live in it. He is not saying that is going to happen, but it would still have noise and it would still have a visual aspect. So, he is wondering, what the neighbor to the north would be satisfied with. Politicians would have an interest in ensuring that those concerns were addressed. It might require screening, it might require fencing, it might require sound deadening and if these mechanicals were in a conforming location, this distance is not going to make the noise much different. He wanted to make the board aware that sometimes these issues get resolved outside of this setting.

Board Member Mark Grady asked the Village Attorney, if it is approved can they condition it on a fence at certain height being in at a certain date or landscaping being a certain height by a certain date, can we put conditions on that. Village Attorney Eric Larson stated,

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yes, they can.

Board Member Mark Grady asked Attorney Brian Randall, there was testimony and by the exhibits it seems consistent, that in the present setbacks, the location of the current AC units is further away than the previous homes. Attorney Brian Randall stated, he didn't have personal knowledge of where the demolished house's units were. Board Member Mark Grady asked, assuming that the testimony was correct, did he agree, disagree, or can't say? Attorney Brian Randall stated, number one, he can't say how many units the old house had. He is going to expect that looking at the aerial and side that it had one. It appears that if that AC unit if it were on the northside would have been closer to his client's house than the as-built ones today. The difference being, the as-built ones today, there are twice as many A/C units, there are two heat pumps, a generator, and whatever the PVC pipes do. There are literally structures in the setback as defined in the code, which is prohibited by code. Whether the old code allowed one AC unit for that house, he could do a deep dive or Attorney Larson could tell them what the codes were in 1930 or whenever that house was built but that's the kind of burden your placing on the objector looking at the facts and the law and the burden needs to be on the applicant to make their case. Maybe they are farther away but the exacerbation or the intensity of the encroachment is of concern.

Board Member Mark Grady stated, there is no dispute they are in the setback and previously, unless the law was different, they were within the setback. It's just a question of if they've met the standards for a variance. Attorney Brian Randall stated, he would like to add that regarding legal non-conforming use law, that's the whole point of codes being updated and enforced so that if the old house had non-conformity, and units within the setback that shouldn't have been there, when properties are redeveloped, they comply with the code. The code is 15 feet. It's a tough spot they're in but they hired the architect, the builder, they staked it and it looks like, based on Mr. Grady's questions, they had four feet on the other side and a driveway has nothing to do with where the house was sited. He loves trees too but those are not recognized legal standards in variance law.

Board Member Mark Grady stated, he is not sure his client's true objection is to where these are today. He asked to assume a scenario where this house if four feet to the south, she wouldn't be able to object at all. Board Member Adam Bazelon stated, she may have found them objectionable but now she has a recourse. He then gave the applicant time for rebuttal.

Applicant Mona Patel stated, her husband and her are both in healthcare and they are not experts in codes or building construction but they have an amazing team of experts to build their dream home in Fox Point. The reason why it looks unfinished is because it is not finished yet. They cannot live there yet. It is under construction. Plantings and trees cannot go there until the grading is complete. The neighbor to the north has been very involved regarding concerns about water in her yard. They never planned on having a retaining wall, hence the mandates and they've allocated hundreds of thousands of dollars into creating a property that contain its own water and not have any water intrusion into the property to the north. They put a massive retaining wall and the bluff with the Village's help to preserve the property. These were expenses they never planned when we decided to build the home. But they prioritized and that they were good to the neighbors to the north and the south so that's why the retaining wall is there. It's not even seeded or landscaped yet, it's an unfinished home. There is a

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landscape plan in place. The pipes that are apparently offensive will be painted. A lot of thought has gone into the aesthetics of this property and once it's finished it the mechanicals or obtrusive things will be hidden so you notice the home and not the mechanicals. She has been very involved from day one and we hired third party engineers to verify their site and drainage plans, and retaining walls. If they had known this two years ago, they would have made accommodations. They've never avoided following the rules and attempted to appease the neighbor to the north. It was never intentional by their builders, their architects, and never brought to them in the past two years. They will do what they can within our financial parameters to able to mitigate that. They are just having a hard time understanding moving mechanicals less than three feet how that will make a huge difference. They can get the Board the spec sheets on every single one of the units. They are best in class, quietest, highest energy rated units that they're putting in.

Board Member Scott Ratke asked the applicant, did they have a time frame when they were going to put in the landscaping. Applicant Mona Patel stated, that after they move in and get occupancy and find out that the grading is acceptable for the landscaping. It is also dependent on weather, so within a season or two. Scott Bayern is the landscaper. They have an entire master landscaping plan in place that started with the bluff four years ago. Board Member Scott Ratke asked the applicant, are they able to describe it? Applicant Mona Patel stated, the previous home was set very close to the bluff. They needed to move the new home closer to Lake Drive. The old home had arborvitaes but they were not able to build there. Their plan is to recreate tall arborvitaes along that north wall so the mechanicals cannot be seen. The mechanicals were never meant to be visible but with the lake on one side and very narrow setback on the other they decided not to put their mechanicals on Lake Drive. If they need to some sort of screening, they can but they were assured the arborvitaes would be close enough together that it creates a natural fencing and mitigates sound.

Builder Chad Schultz stated, they're at this point with the house that he feels if something were to have to be done, he doesn't feel after being in the industry for 33 years he could do much to move the mechanicals. With that being said, when the Spring thaw comes around, lhe is going to be finishing up a portion of the landscaping stuff that they have to do and potentially the hedge that is creating a challenge. He would ask that the Board do something with a decision so that he knows how he can proceed as the builder. These people have been waiting for two and half years to get into this house and sometime in early Spring he'd like to be able to gain occupancy and come out to do the final inspections.

Closing of Testimony: Case 2024-02

Without objection and by unanimous consent, Chair Nancy Filsinger closed testimony for Case 2024-02 at 7:17 p.m.

Recommendation by Village Attorney Eric Larson. This should be in writing and be brought back to the board. This could be very easily be challenged, no matter how the Board decides it. The Board needs to be sure that it has very carefully thought out the decision on this case. That's his recommendation. The Board could schedule a special meeting but he urged the Board to reduce this decision to writing.

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Board Member Adam Bazelon stated, this could very easily be the easiest case he has sat on. This was created by the landowners own doing. This is an open and shut case. The Board doesn't have any proof that the building board erred. If it did, that would be a motion to vacate the decision and reopen it and testimony could be presented immediately to a special medium. The Board has none of those facts in front of it but it does have the fact that the generator was not previously included. He is only one vote, but it is clear to him. The first presentation completely lacked candor in what was going on and it was asking for forgiveness instead of permission.

Board Member Mark Grady stated, the Board has a jury system because my take was different. One of the applicants stated that the building board had the plans in front of them. It's hard for him to imagine the building board approving any plans without any HVAC. It strikes him as surprising. He struggled with what the real issue is with the objection. He understands that visually, it's obnoxious and potentially noisy, but had they sited this correctly it wouldn't have made any difference. It's more of a gotcha moment when they wouldn't have had any basis for it if the whole thing had been moved three feet to the south. He had some questions to the objection and the strength of the objection. That still leaves the Board with a decision but he did not put a lot of credence in the objection because all the objection did was point out what was already known, that they are in the setback. He has two AC units sitting outside his kitchen and doesn't buy the noise objection. The generator is a different question, the Board has denied some generators and granted some. They admitted that for maintenance reasons and it had to run for 30 minutes a month, not that big of an issue.

Board Member Mark Grady stated, the Board has the issue; as Attorney Larson has pointed out, that if it denies the variance, it creates a risk to the Village of litigation. The applicant relied on the Village's processes to build this. Village Attorney Eric Larson stated, just to be clear, that risk is there whether the Board grants it or denies it. Board Member Mark Grady stated, if the Board grants the application, it has the theoretical risk of litigation from the neighbors. There is a risk from either side. Does the Board have the basis to grant a variance? Village Attorney Eric Larson stated, he thinks the hardest part of this standard is, it's state law. Years ago, it was not state law it was just case generated law, but state law has this phrase, in all circumstances, the property owner bears the burden of proving that unnecessary hardship is based on conditions unique to the property rather than considerations personal to the property owner and that the unnecessary hardship was not created by the property owner. One way or another, the Board is going to have to deal with that standard.

Board Member Scott Ratke asked Village Attorney Larson to restate the options on proceeding. Attorney Eric Larson stated, one option is to table this until the next meeting and direct him to prepare two decisions. One that grants the variance and one that denies it. The Board then comes back and may make changes, but either way, but it can make its decision then. Board Member Scott Ratke asked, if there are options other than that? Attorney Eric Larson stated, the Board can shorten that timeline and have a special meeting.

Board Member Thomas Dunst asked, can we ask for a plan? Village Attorney

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Eric Larson stated, yes, the Board can ask for a plan, the screening, the fence, a better explanation why the mechanicals cannot be moved. Explain why there are no options to reconfigure where the mechanicals are in the house and locate the mechanicals somewhere else outside the house somewhere else. Whatever the Board thinks it needs is an option. Board Member Scott Ratke asked, and request something from the objector that might be reasonable for them? Village Attorney Eric Larson stated, the Board could ask for that but the petitioner bears the burden of proof.

Chair Nancy Filsinger stated, she liked Attorney Larson's idea of the two options. Board Member Mark Grady stated, he thinks the Board is in consensus of a special meeting but it needs to decide is there something else it wants, evidence or additional testimony to make its decision. Board Member Adam Bazelon discussed needing more information about what happened. Board Member Adam Bazelon stated, he was prepared to vote. If the Village made a mistake, he thinks the applicant could move to reopen. He did not suggest holding off making a decision on that basis. Village Attorney Eric Larson stated, he held my tongue but he wanted to say that even if the Village made a mistake, it is still the property owner's responsibility to prepare plans that meet the code. Board Member Adam Bazelon stated, his thinking is that if the mechanicals were shown in the plan and the Village approved them, they'd have some kind of estoppel argument and that would sway his opinion. Board Member Mark Grady stated that it is in their application it says, the intended location of HVAC was indicated in the drawings originally submitted and approved by the building board. Board Member Scott Ratke stated, he'd rather wait for Attorney Larson to prepare options and wait. Board Member Thomas Dunst stated, he'd be inclined to wait for more information as well.

Chair Nancy Filsinger announced without objection that the hearing is reopened.

Motion by Mark Grady, seconded by Ratke to table the matter until 02/29/2024 at 5pm to continue our hearing.

Roll call vote:

<i>Nancy Filsinger, Chair</i>	<i>Aye</i>
<i>Mark Grady, Board Member</i>	<i>Aye</i>
<i>Thomas Dunst, Board Member</i>	<i>Aye</i>
<i>Scott Ratke, Board Member</i>	<i>Aye</i>
<i>Adam Bazelon, Board Member</i>	<i>Naye</i>

Motion carried by roll call vote, (4-1).

Adjourn

Without objection and by unanimous consent The Board adjourned at 7:43 p.m. by Board Member Adam Bazelon and seconded by Board Member Thomas Dunst.

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Respectfully Submitted,

A handwritten signature in black ink, consisting of a stylized 'N' and 'S' intertwined, enclosed within an oval shape.

Nathan Schafer
Village Deputy Clerk-Treasurer