

ORDINANCE NO. 2013-04AN ORDINANCE TO CREATE SECTION 17.10 (5.5)  
OF THE TOWN OF DELAFIELD ZONING ORDINANCE,  
REGARDING MODIFICATIONS BY SPECIAL EXCEPTION  
DUE TO ERRONEOUSLY PERMITTED WORK

WHEREAS, the Town of Delafield Plan Commission initiated consideration of a possible amendment to the Town of Delafield Zoning Code, to allow the Town Board the authority to grant special exceptions in limited circumstances, pursuant to the procedures described in Section 17.10(5)(B) *et seq.*, of the Town of Delafield Zoning Ordinance; and

WHEREAS, the Town Plan Commission has initiated this possible amendment out of a concern that has been raised by citizens who allege that the Town Building Inspector permitted construction on their lots in error, resulting in open space, as defined in Section 17.02 2. of the Town of Delafield Zoning Code, being less than the open space requirements of the Town of Delafield Zoning Code; and

WHEREAS, the Town Plan Commission has found that, in fairness, leniency should be granted to property owners to some extent, if the Town Building Inspector erred in granting a permit, but this concern is best addressed on a case by case basis to ensure that the facts alleged in each case are satisfactorily proven, and to determine the extent to which leniency should be granted, if at all; and

WHEREAS, the leniency in this ordinance is granted as a privilege, not as a right or out of obligation, as it remains the law and the Town's position that the Town is not equitably estopped or in any other manner restrained from enforcing the Town Zoning Ordinance even if violations arise out of work conducted pursuant to a permit issued by the Town or its agents; and

WHEREAS, the Town Plan Commission has prepared a draft ordinance in this regard in consultation with Town staff, and has referred its recommendation in this matter to the Town Board for consideration; and

WHEREAS, upon due notice as specified in Section 17.10(6) of the Town of Delafield Zoning Ordinance, the Town Board held a public hearing in this matter on June 11, 2013, pursuant to Section 17.10(5)(F) of the Town of Delafield Zoning Ordinance; and

WHEREAS, the Town Board of the Town of Delafield, having carefully reviewed the recommendation of the Plan Commission, having determined that all procedural

requirements and notice requirements have been satisfied, and having given the matter due consideration, and having based its determination on the effect of the zoning amendment on the health, safety and welfare of the community, and having given due consideration to the municipal problems involved as well as the impact on surrounding properties as to noise, dust, smoke and odor, hereby determines that the zoning amendment will not violate the spirit or intent of the Zoning Code for the Town of Delafield, will not be contrary to the public health, safety or general welfare of the Town of Delafield, will not be hazardous, harmful, noxious, offensive, or a nuisance by reason of noise, dust, smoke, odor or other similar factors and will not for any other reason cause a substantial adverse effect on the property values and general desirability of properties affected by these zoning amendments, and further finds that these amendments will be consistent with the Town of Delafield Comprehensive Plan.

NOW THEREFORE, The Town Board of the Town of Delafield, Waukesha County, Wisconsin, does hereby ordain as follows:

SECTION 1: Chapter 17 of the Town of Delafield Municipal Code entitled "Zoning Ordinance," Section 17.10 entitled "Administration and Enforcement," Section 17.10(5.5) entitled "Special Exception Due To Erroneously Permitted Work," to be inserted directly after Section 17.10(5) entitled "Amendments to Zoning Regulations or Map," is hereby created as follows:

**17.10 ADMINISTRATION AND ENFORCEMENT**

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**5.5 SPECIAL EXCEPTION DUE TO ERRONEOUSLY PERMITTED WORK**

The Town Board is authorized to grant a special exception to waive or modify any requirements of this Ordinance if, in the judgment of the Town Board, it would be inappropriate to apply literally the provisions of this Ordinance due to erroneously permitted work, to the extent deemed just and proper on a case-by-case basis after receiving and considering a recommendation from the Town of Delafield Plan Commission. The procedures and standards to be applied are as follows.

**A. Procedure s.**

**1. Petition.**

A party seeking a special exception shall file a petition with the Town Clerk. The petition shall include all of the following:

- a. Plat of Survey. A plat of survey, drawn to a reasonable scale and properly dimensioned, shall be prepared and certified by

a surveyor registered by the State. Such survey shall bear the date of the survey, which shall be within one year of the application for the special exception. The survey shall also show the following:

- (1) The boundaries of the property involved.
  - (2) The location of the centerline of any abutting streets.
  - (3) The ordinary high water line of any stream or lake on which the property abuts.
  - (4) The location on the property of any existing buildings, structures, hard surfaces, including the measured distances between such buildings and structures and the lot lines, and a chart indicating the area, measured in square feet, of each structure or hard surface.
  - (5) The location and grade of the existing driveways and parking areas.
  - (6) The nearest portion of such buildings and structures and the centerline of any abutting street.
  - (7) The nearest portion of such buildings and structures and the ordinary high water line of any abutting stream or lake.
  - (8) The proposed floor elevation of all existing buildings and structures in relation to the existing and/or established grade of any abutting streets and the ordinary high water line of any abutting stream or lake.
  - (9) The elevation and setback of any existing buildings or structures on adjacent parcels within 200 feet of any existing buildings, structures or additions.
- b. The names and addresses of the owners of all properties within 300 feet of the property involved.
  - c. A detailed written description of the existing development or use, and conditions for which the special exception is sought.
  - d. Any further information as required by the Town Staff, Town Plan Commission, or Town Board to facilitate the making of an evaluation of such request, such as, parking, traffic impact, landscaping treatment, drainage, sanitary sewer, erosion control and other factors as would be pertinent including the impact on public facilities.

2. **Fee.**

The petition shall be accompanied by a fee payment as set from time to time by the Town of Delafield Town Board to defray the cost of publication, notification, and holding a public hearing, administrative expenses and expenses of Board members. The Petitioner shall also pay reimbursement to the Town of Delafield for all costs incurred for legal, planning, engineering, and administrative work necessary to administer the application and oversee all procedures and activities related to the application.

3. **Plan Commission Evidentiary Hearing.**

The Town Plan Commission shall hold an evidentiary hearing upon receipt of such petition. All interested persons may be heard, in sworn oral testimony. Notice of such hearing shall be provided as described in 17.10(6) of this Ordinance, to the same extent as though this were consideration of a conditional use.

4. **Plan Commission Findings and Recommendation.**

As soon as practicable following the evidentiary hearing, the Town Plan Commission shall make written findings and a recommendation to the Town Board, regarding whether the petitioner has proved an adequate basis for granting a special exception, and if so, regarding any conditions that the Plan Commission recommends be included in any such grant of a special exception.

5. **Town Board Action.**

The Town Board shall review the recommendation of the Town Plan Commission, and make a decision in writing, of whether to grant, conditionally grant, or deny the requested special exception.

***B. Basis of Approval.***

An application for a special exception may be approved, denied, or approved with conditions. The Town Board shall consider the recommendation of the Town Plan Commission, but is not bound to follow the Town Plan Commission's recommendation. The Town Board may rely upon the sworn testimony received by the Town Plan Commission, or in its discretion the Town Board may take additional testimony from any witness(es) of their choosing. In order to approve or conditionally approve the special exception, the Town of Delafield Town Board must find that the applicant has demonstrated all of the following:

1. *Permit Error.* That the Petition seeks approval of a structure that was constructed pursuant to a building permit or zoning permit issued by

the Town of Delafield Building Inspector or Zoning Administrator, in accordance with the plans filed with the permit application and all conditions of the permit approval, and only after completing construction was the structure found to be in violation of the yard, building height, area, setback, offset, or open space requirements of this Ordinance.

2. *Preservation of Property Rights.* That the special exception is necessary for the preservation and enjoyment of substantial property rights possessed by the applicant.
3. *No Substantial Detriment.* That the special exception will not create substantial detriment to adjacent property or the general desirability of the Town of Delafield and its environs, and will not materially impair or be contrary to the purpose and spirit of this Ordinance, or the adopted Town of Delafield Comprehensive Plan, or the public interest.

C. Determination.

The action of the Town of Delafield Board shall be stated in writing, and shall include findings of facts setting forth the basis for the decision. If a special exception is granted, or is conditionally granted, it shall be subject to the written approval of the applicant, and upon such approval it shall be recorded at the office of the Waukesha County Register of Deeds. Such recorded document shall be in a form approved by the Town Attorney and shall include all of the following: (a) A description of the particular non-compliant conditions on the property that are allowed to remain; (b) all conditions imposed by the Town Board upon the grant of the special exception; (c) a statement that in the event a non-compliant structure or use is destroyed or otherwise removed from the property, either wholly or in part, for any reason, such non-compliant structure or portion thereof shall not be replaced; (d) a statement that the grant of a special exception under this Section 17.10(5.5) does not render the structure or use legal non-conforming, and no legal non-conforming rights shall apply. The decision of the Town of Delafield Town Board shall be final, and shall not be subject to appeal to the Zoning Board of Appeals.

SECTION 2: SEVERABILITY.

The several sections of this ordinance are declared to be severable. If any section or portion thereof shall be declared by a court of competent jurisdiction to be invalid, unlawful or unenforceable, such decision shall apply only to the specific section or portion thereof directly specified in the decision, and shall not affect the validity of any other provisions, sections or portions thereof of the ordinance. The remainder of the

ordinance shall remain in full force and effect. Any other ordinances whose terms are in conflict with the provisions of this ordinance are hereby repealed as to those terms that conflict.

SECTION 3: EFFECTIVE DATE.

This ordinance shall take effect immediately upon passage and posting or publication as provided by law.

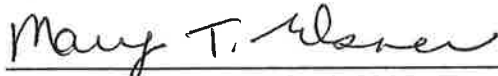
Dated this 25<sup>th</sup> day of June, 2013.

TOWN OF DELAFIELD



Paul L. Kanter, Town Chair

ATTEST:



Mary T. Elsner, CMC, WCMC, Town Clerk

Published and/or posted this 16<sup>th</sup> day of July, 2013.