

## **Minutes of the Todd County Board of Adjustment Meeting**

**November 16<sup>th</sup>, 2023**

Completed by: Sue Bertrand P&Z Staff

Site visits completed by Adam Ossefoort and Rick Johnson on July 18<sup>th</sup> for the Klimek Site.

Meeting attended by board members: Chair Rick Johnson, Russ Vandenheuvel, Larry Bebus, Ken Hovet.

Staff members: Adam Ossefoort and Sue Bertrand

Other members of the public: Sign-in Sheet is available for viewing upon request.

Rick called the meeting to order at 6:00 p.m. The Pledge of Allegiance was recited. Each board member introduced themselves and Rick explained the process for those attending.

Motion to approve the agenda as presented by Ken seconded by Russ, voice vote, no dissent heard, motioned carried.

Russ motioned to have the October 30<sup>th</sup>, 2023 meeting minutes approved. Larry seconded the motion. Voice vote, no dissent heard. Motion carried.

### **AGENDA ITEM 1: Nicholas & Abigail Klimek – PID 15-0027100 – Leslie Township**

Request(s):

1. After-the-fact Variance request to reduce the ordinary-high-water-mark setback from 150' to 64' for the construction of a deck in Natural Environment Shoreland Zoning.
2. After-the-fact Variance request to reduce the ordinary-high-water-mark setback from 150' to 64' for the construction of a dwelling addition in Natural Environment Shoreland Zoning.
3. After-the-fact Variance request to increase the peak height limit from 18' to 26' for dwelling roof repair in Natural Environment Shoreland Zoning.

Nicholas & Abigail were present as the applicants.

Staff Findings: Adam stated we made no changes and had no additional information for the staff to present, but the Klimeks do have additional information for the board.

Rick asked for additional correspondence since the last meeting.

Adam stated we did have one e-mail from Josh Vortruba from our office and one from a Duey Klimek Construction in reference to the old building on the property. These may be viewed in full upon request at the Planning & Zoning Office.

Rick addressed the Klimeks and stated their Variance appeal had been tabled from the July meeting, and from what he recalled and from the minutes of that meeting, it is giving them another opportunity to present the facts and demonstrate that there is no alternative site, and asked them if they recalled that, as well, to which they responded yes. He went on to explain this is a dimensional, setback and what is really critical is he felt

they were not presenting the facts and data to support the claim that there is no alternative site. Specifically, he was interested in the gas pipeline's easement terms and conditions, because, all they could tell him at that time was there was a gas pipeline there, that is a practical difficulty. In answer to the board's questions as to what are the setbacks, a response was given that they don't know. They had contacted the gas pipeline company and the company did not respond. For that reason, Rick stated he felt they should have another opportunity, as it the applicant's responsibility to present the facts. He stated if you do not do that, the board has to deny it, lacking the facts. He invited the Klimeks to present their case.

Nick stated the paper that Abby had given the board, prior to the start of the meeting, confirms they were finally able to contact the gas company. That is an 8" transmission line that runs through there, and their setback is actually 75' in width.

Rick asked for clarification, meaning the easement is 75'?

Nick confirmed the easement strip is 75' wide, and the company had just gotten back to them this past Monday. He stated he also had Tad Berg come out and measure with him, the drain field and septic tank. He added, measuring the OHW of 150' plus the 37.5 feet off the centerline of the gas line for the easement plus the 20' we need off from the drain field, we still run into the problem of hitting one of the three spots. He stated they would be either within the 150' of the lake, or within the 37.5' easement to the gas line or too close to the drain field, if the cabin had been moved to the South where Adam was showing the green dot (on the overhead). He added, to be clear of everything, they would be hitting one of the three spots.

Rick stated what they just described, he would refer to as the buildable area. He asked if there was any possible way he could see, on this aerial, what the buildable area is, or were they saying there is none or is it zero?

Nick stated zero. There is none, because the way the 150' comes down, following the high-water mark, it comes to a pinch point where the gas line comes to the driveway. He added, about the only buildable spot they could do, is where Adam's green dot is on the top there, but it is still hitting one of the three spots of having a setback off the water, the gas line or the drain field. He stated the septic tank is just to the north of that, it is sitting the farthest north it could be from the off-set of the 150' setback and off of the property line.

Rick asked Adam to demonstrate with the GIS on the overhead, because what he sees now is, from the OHW and that point, it is 211' not less than 150'.

Adam stated he could attempt to do that, but it will not be anywhere near what a survey grade measurement would be. It is very rough, here in the moment.

Rick asked the Klimeks if they had anything here, for the record, to support their claim.

Nick stated there are flags out there, currently.

Rick stated this is what he has struggled with in this application and also what he struggled with back in the 2020 application, as he did go back and read that. Even though it is a different application and a slightly

different variance, he stated the reason it was denied is that there is no evidence to support that you couldn't meet all of these setbacks. Back then, the difficulty stated was the trees and the gas pipe-line and that is all they had to offer to support the practical difficulty.

Adam drew a line that represented somewhat of the lake setback area and approximately centered in the cut out of the trees to represent the gas-line placement.

Ken asked if the blue line represented the OHW and Adam explained it is, based on an elevation established by the DNR as the ordinary high. He added it's not super accurate, but that is what it is intended to represent.

Adam explained that the width of the right of way of that gas line is 75' in total, so 37.5' setback. Adam drew on the overhead the lake setback, the pipe line setback and a ten-foot setback for the approximate buildable area and asked if that was what Rick was looking for.

Rick confirmed it was exactly what he was looking for and how that contradicts Nick's statement.

Adam reminded the board it is not a survey.

Rick stated his other comment on this, is what's to prohibit them from building on the South side of the pipe line? He stated what he struggles with is Nick has a lot of land, and in the staff report it stated there is five and a half acres of dry upland, and pointed to an area on the map where he assumed it would be, stating also he is assuming everywhere else around that lake is wetlands and not buildable, even though there is nothing presented, for the record, to support and establish that. He went on, if he thinks you have five and a half acres of upland dry acres, he really struggles with the fact they have to be at 64 feet.

Russ asked for a measurement between the two setback lines to which Adam measured 72' or greater.

Rick asked Nick to explain how his comment can contradict what Adam has demonstrated with the GIS.

Nick stated they went out and measured at the edge of the oak trees, as oak trees don't grow in the OHW, he went out just past them and got to the water itself then measured 150' up on the property.

Rick asked if he could point out on the map where he was talking about, so Nick did.

Rick asked Nick if his line was consistent to what Adam had drawn.

Nick said it was a little off, and pointed how he had it figured, on the overhead.

Rick stated, for the record, the septic system isn't considered a practical difficulty, because if they have to, they, as the board, can insist that the septic system be moved to come into compliance. He added, never the less, the drain field lies in the NE corner.

Nick confirmed, running North and South, just on the south side of the tank.

Rick said he is seeing a lot, a lot of space, zero point six seven acres to build, according to Adam's drawing even though it is not a survey.

Rick asked where Nick's lines were for the pipeline.

Nick pointed the area on the map.

Rick stated again, he is seeing 0.67 acres and cannot see how Nick is stating zero space.

Nick offered, coming off of the high-water mark and coming off the gas line, the cabin length is 30 feet long we would be hitting the drain field on the North side.

Rick stated okay, the cabin is 30 feet, and asked Nick to show, with his hand, what he is talking about with hitting the drain field.

Nick showed on the overhead, and stated he came up with about 45'.

Rick asked Adam to measure the area pointed out and draw a line in that approximate area.

Rick addressed Nick and stated even if you measured 45', you still have space to put a cabin.

Nick agreed, that is correct.

Rick asked if he retracted his statement that he has zero space to build, like he said earlier.

Nick agreed, he would retract his statement.

Rick confirmed, stating because that is not correct and that is not true.

Nick stated they are not comfortable putting the cabin that close to the gas line. It raises a big concern.

Rick stated he is sure Nick has a lot of concerns with the location of the cabin, like "I'd rather have it here," thing, but those concerns and those preferences, how you want to design it, etc. those are all self-imposed. They are imposed by the applicants. That is not a practical difficulty that is unique to the land, when it is a self-imposed desire, just for the record, so they understand that.

Russ asked what the setback from pipeline was.

Adam clarified there is an easement of 75'. The easement has no setback. It is just 37.5' from the pipeline itself, on each side.

Rick clarified with a 75' easement, he still owns the land, but there can be no development within the easement, to which Russ made the analogy of: you could deer hunt over it but you can't dig a hole.

Rick added you would have to read the terms and conditions of the easement to know exactly what it is.

Russ addressed the Klimeks asking about the cabin that is on there, that they say they didn't change the footprint at all?

Nick stated no, they just went out, just because there was no load bearing in the middle, so they had to change the peak and push the load to the outside edge, is what he talked to the engineer about.

Russ asked if the engineer was another Klimek.

Nick stated the framer was his Uncle. Stated he went through Hilltop Lumber out of Garfield.

Rick stated he would like to make a comment on that, he stated in all due respect, Nicholas, the new structure they built, it was not an exact for exact rebuild of the footprint. It was expanded. He stated whether they took the existing cabin and expanded it or they tore the whole thing down and built a new one, it's still an expansion, and it's an expansion in the shoreland impact zone, which is prohibited by MN statute to remind the board members, and stated he wanted that to be part of the record. Rick continued, not only that, they had a one story before, that was under eighteen feet, and it appears, although he wasn't in the building, but it appears, it is a two story. Either that or they have one big great room. He stated they also expanded vertically and all of that, whether it's to the North or to the sky, it's an expansion and the board has to treat it as such, as an expansion. He explained any time they do expansions, and not replacing exact for exact, you now have to meet the new ordinance setback rules, which they did not meet. One can get a variance for that, but must prove a practical difficulty.

Russ asked, "So, the footprint is not the same?"

Rick stated it's larger, then added, not much.

Adam stated he saw larger by 78 sq. ft., then searched his notes for confirmation.

Ken stated he thought he saw that too.

Rick stated it's slightly larger, but not much.

Rick stated in his mind, the significant impact is going from a single story to a two story. It almost doubles it, he added, and in his mind, it is an expansion. He stated he really doesn't need to say any more than that.

Ken asked Adam to go back to the site map, and asked for the cabin to be pointed out by Nick.

Ken also asked about the dotted black line, if it is the driveway, to which Nick stated yes.

Russ asked one more question, they applied for a permit in 2020?

Nick stated yes.

Russ, and that was denied?

Nick stated yes, they wanted to enlarge the footprint.

Rick added they, then, asked for a variance, which was denied.

Russ asked to enlarge the footprint more, compared to what you just did?

Nick stated they wanted to expand square footage outward.

Russ asked Nick if he did that.

Nick stated no.

Russ stated okay.

Rick addressed Nick, and stated in all due respect, they did expand outward, albeit not significantly, but it wasn't exact for exact, so therefore, we call it an expansion.

Russ asked Nick if they used the same cement, or you knocked some of the cement out?

Nick stated no, they did not knock any of the cement out.

Russ stated, so you used the same cement pad?

Nick stated yes.

Russ asked Rick if Rick was saying they added on to the cement pad?

Rick stated he wasn't sure if it was cement or footings where they bumped it out.

Nick explained that was all footings and cement already, two courses of block, and footings already under the north side and under the structure itself.

Russ stated so the footprint did not change at all?

Abigail stated no.

Russ asked if that was what he was understanding and turned to Adam for confirmation.

Adam stated he had some photos for Russ.

Nick explained, above ground... so below ground, on the North side, there were two structures. When they were working on them, they were connected by one footing and frost wall if you want to call it that. That was below, right at dirt, but they had two separate structures on there. So, they didn't have anything in the middle of the two, so they were falling inward.

Adam showed the original photos of the cabin when they originally applied in 2020, and stated this would be the north end of the existing cabin, and that's what it looked like. Then, he showed another photo and stated that's what the north end looks like now.

Russ stated they connected the two.

Adam stated and squared them off.

Nick stated they had the same footing on the outside, but it was two structures sitting on one footing.

Rick interpreted the new structure, therefore, comes out to that addition on the right-hand side, that's where the new wall is on the new structure.

Nick stated from the door on the left it came outward four feet and it's still sitting on the footing and is attached to the door on the right.

Rick stated so you can see it is not exactly, and again, in Todd County, for non-conforming structures to allow replacements, it's got to be exact for exact. It's not exact but albeit it's very small it's four feet on that left side and it's filling in the gap. Now that's the footprint, that's the width and the length, but in addition to that there's a huge significant increase in the peak height, and asked Nick what the peak height was on the old cabin.

Nick stated he was not sure, he never measured it.

Adam stated he might have that.

Rick stated it's very clear it's single story and what's the peak height on the new cabin?

Nick stated twenty-six.

Rick stated it is very clear it is two stories. Rick continued the second story is what he was talking about. It isn't over those little bump outs, it's over the rest of it. He asked Adam if he was not correct, as it is not exact for exact. They went from one story to two stories.

Adam stated yes. If you were going to do the exact for exact replacement, by ordinance, said they would be allowed to go to an eighteen-foot peak height. Anything above that would require a variance.

Russ addressed Nick and asked when they applied for it in 2020, did they ask for the house to look like this, and referred to the current structure, or what did they ask for in 2020?

Nick answered to add on 500 sq. ft. to the South.

Rick confirmed they were going to do an addition to the South only, not bumping up.

Russ stated he remembered that.

Rick also added, they were denied, because there were no facts to support that they could not build on an alternate site. Rick continued, based on his discussion, what he just went through with Adam and talking to the applicants, to him that's still the case. They do have an alternate site. It may not be desirable or where they want it or what would be best, they wouldn't be able to re-use existing footings or anything else like that. He addressed the applicants and stated he does understand that, and he does get that.

Rick stated he had one more question, just more curious more than anything, this letter from Northern Natural Gas, it looks like they are going to amend their easement? Rick asked what the amendment was for and what are they doing?

Nick explained part of the easement was on the West side of the lake, and they are amending that off of it. Back in the day, they had that piece there, plus on the West side and there is nothing over there.

Russ asked what the reason was for not asking for a variance for what they did.

Nick stated originally, they were going to do exact for exact, then they started gutting out the cabin and all of a sudden, they had all these broken rafters and stuff. Then, with talking to the framer and he was talking to the engineer and the lumber yard, stated they all said they need to change the peak height. Nick stated he didn't think about it at that time.

Russ asked if they lived there full time.

Nick stated not yet.

Russ also asked while they were building, they didn't live there either?

Nick stated no.

Russ stated he thought maybe there could have been a permit if they could have done it ahead of time, because there is a little bit of change, in his opinion. But after-the-fact, he might put his foot in his mouth for saying it, but it's a little tougher to accept it after-the-fact, because there were minimal changes with the height, if you are the only one on the lake, he could almost go with the height, for himself. It is not that big of a deal. He stated, usually there are five or six board members at a meeting and to others it might be. For what it's worth.

Nick stated there is nobody else on the lake. The closest neighbor would be on the East side, who is Jim, and he can't even see through the trees to see the lake.



Rick asked for a moment just to go through his notes, before he closes the floor.

Rick stated there are other after-the-fact variance considerations that the board may consider, and because of that, he would like to ask them some questions relating to those other considerations, point blank.

Rick stated, based on all of the facts, including the prior variance appeals from 2020, and including everything they have talked about in 2020, all the questions they asked in 2020 and all of the answers, and not only that, and what we did in this second appeal for a variance, and stated he struggled there was a good faith attempt to comply with the ordinances, and asked them point blank if they acted in good-faith to the ordinances and why.

Nick stated they tried to act in good faith to it, but when it was unsafe, they had to switch the peak height, it had never crossed his mind to come in and ask for a variance for it. They were just trying to figure out the situation and get it under control.

Rick stated they are charged with knowledge of the law, for the record, and it is kind of that simple. He went on stating other considerations he wanted the board to think about when they vote on this. This expansion is within the shoreline impact zone and MN statutes are clear that there be no expansions in that zone. We may allow expansions outside that zone but we have to apply our criteria to meet it. He stated it's pretty point blank about that. The underlying law is to phase out non-conformities like what was there before and to prevent expansion. So, he addressed the board, and asked them to think about that in their votes.

Rick stated if no more questions, good, then they can put this case to rest, or close the case, or make a decision.

Ken asked if we should address all three requests separately or as one.

Rick stated he proposes, when going through the criteria questions, we are considering all three variances at the same time, so just keep that in mind, and if need be, address each individually in the comments.

Rick called for Criteria Questions individually by request.

<b>Criteria Question #1: Is the variance in harmony with the general purposes and intent of the official control?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>
Russ Vandenhuevel	No, it is within the shore impact zone.
Larry Bebus	No, agree with all and within the impact zone, after the fact, no real attempt to comply with anything.
Ken Hovet	No, it's an after the fact request and a significant reduction in setbacks.
Rick Johnson	No, the reasons being the purpose and the intent of the official control is to protect the quality of the surface water and the site view from the lake. He didn't believe that is being achieved with this significant variance. He also knows that the official control does not allow expansion of a legal non-conforming building

	especially within the seventy-five-foot impact zone. Also, with respect to the height limits, they are there to preserve the natural character on any body of water and being they are so close, he answered no.
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Majority response- No

<b>Criteria Question #2: Is the variance request consistent with the goals and policies of the comprehensive plan?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>
Russ Vandenhuevel	No.
Larry Bebus	No, pretty much the previous reasons.
Ken Hovet	No. The same.
Rick Johnson	No. The comprehensive plan provides guiding principles to protect the quality of the surface waters, and to develop in a common-sense manner. The variance of 44% to 57% he considers unreasonable, especially when it appears an alternate site exists.

Majority response-No

<b>Criteria Question #3: Is the property owner proposing to use the property in a reasonable manner not permitted by an official control?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>
Russ Vandenhuevel	No, again, because it is in the shore impact zone. There are more square feet in the shore impact zone.
Larry Bebus	No.
Ken Hovet	Yes, he just wants to live there, and that is a reasonable use.
Rick Johnson	No, for the exact same reasons as Russ articulated.

Majority response- No

<b>Criteria Question #4: Is the need for a variance due to the circumstances unique to the property not created by the landowner?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>
Russ Vandenhuevel	No, agreed it was created by the land owner.
Larry Bebus	No.
Ken Hovet	No.
Rick Johnson	No, because the need for the variance was created by the land owner, by building a dwelling without an approved variance. It is self-imposed, plus he wasn't able demonstrate there was no feasible alternative site.

Majority response- No.

<b>Criteria Question #5: Will the variance maintain the essential character of the locality?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>
Russ Vandenhuevel	Yes.
Larry Bebus	No, it will change the character of the locality with the height.
Ken Hovet	Yes, a larger building but essentially the same style, it's still a cabin and will be put to the same use.
Rick Johnson	Yes, even after considering the height and the closeness, because it is only one dwelling on a small lake.

Majority response- Yes

<b>Criteria Question #6: Does the need for the variance involve more than just economic considerations?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>
Russ Vandenhuevel	No.

Larry Bebus	No.
Ken Hovet	Yes.
Rick Johnson	No, the reason for the variance is self-imposed.

Majority response- No

<b>Criteria Question #7: Have safety and environmental concerns been adequately addressed?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>
Russ Vandenhuevel	Yes, with the rain gutters and not a big change.
Larry Bebus	Yes, for the gutters and dealing with P & Z and Josh having to go out and look at it.
Ken Hovet	No. Just plain too far into the setbacks.
Rick Johnson	No. The applicants did talk about and address future plans to add rain gutters, and Best Management vegetation. Because it is such a significant variance and extremely close to the water, simply stating- I plan to do rain gutters and I plan to plant vegetation, it does not give him enough support that what he is planning on doing is going to adequately mitigate the adverse effects of such a significant variance. Agreed they were great plans, but he is not real comfortable that convinces him.

Majority response- No

Summary of criteria question majority responses as follows:

#1	No
#2	No
#3	No
#4	No
#5	Yes
#6	No
#7	tie

After-the-Fact Variance Considerations

<b>After-the-Fact Question #1: Was there any attempt to comply with the applicable official controls?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>
Russ Vandenhuevel	No
Larry Bebus	No
Ken Hovet	No
Rick Johnson	No

Majority response- No

<b>After-the-Fact Question #2: Did the applicant make a substantial investment in the property before learning of the failure to comply with the applicable official controls?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>
Russ Vandenhuevel	Yes – same reasons
Larry Bebus	Yes – same reasons
Ken Hovet	Yes, the expansion was pretty much done before the variance was applied for.
Rick Johnson	Yes, same reasons as Russ.

Majority response- Yes

<b>After-the-Fact Question #3: Did the applicant complete the work before being informed of the violation of applicable official controls?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>

<b>After-the-Fact Question #3: Did the applicant complete the work before being informed of the violation of applicable official controls?</b>	
Russ Vandenhuevel	Yes
Larry Bebus	Yes
Ken Hovet	Yes
Rick Johnson	Yes, it's in the staff report, it was discovered in 2023, so I would have to believe it was after.

Majority response- Yes

<b>After-the-Fact Question #4: Are there similar structures in the area?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>
Russ Vandenhuevel	No
Larry Bebus	No
Ken Hovet	No
Rick Johnson	No, the only dwelling on a small lake.

Majority response- No

<b>After-the-Fact Question #5: Based on all of the facts, does it appear to the Board of Adjustment that the applicant acted in good faith?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>
Russ Vandenhuevel	No
Larry Bebus	No
Ken Hovet	No
Rick Johnson	No

Majority response- No

<b>After-the-Fact Question #6: Would the benefit to the county appear to be outweighed by the detriment the applicant would suffer if forced to remove the structure?</b>	
<b>Board Member</b>	<b>Vote and Comments</b>
Russ Vandenhuevel	No
Larry Bebus	No
Ken Hovet	No
Rick Johnson	No, I believe the applicant would suffer significant consequences if the variances were denied. But also think the harm to the County would not only be the protecting the quality of the surface water, but afraid this would set precedence for similar variance appeals of this nature. He stated he believes that would be adverse to the County because it would send an adverse message to the public. That you could do this and then just ask for a variance and be relieved. That is the primary concern about the adverse impact to the County.

Majority response- No

Majority response- Summary of criteria question majority responses as follows:

#1	No
#2	Yes
#3	Yes
#4	No
#5	No
#6	No

Larry made a motion to deny the variance appeals, seconded by Ken.

Rick requested a roll call vote for the motion to deny.

Board Member	Vote to the motion to deny the request
Russ Vandenhuevel	Yes
Larry Bebus	Yes
Ken Hovet	Yes
Rick Johnson	Yes

Motion carries unanimously to deny the appeal for a variance.

Adam informed Abigail and Nick they will get some follow up from us and we can talk about it tomorrow or next week, on what the next steps are.

Ken motioned to adjourn, seconded by Russ, voice vote, no dissent heard motion carried, meeting adjourned at 7:02 PM.