

ENROLLED ORDINANCE 168-76

AMEND THE TEXT OF THE TOWN OF DELAFIELD ZONING 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 (ZT-1766)

WHEREAS, after proper notice was given, a public hearing was held and the subject matter of this Ordinance was approved by the Delafield Town Board on June 11, 2013, and

WHEREAS, the matter was referred to and considered by the Waukesha County Park and Planning Commission, which recommended approval and reported that recommendation to the Land Use, Parks and Environment Committee and the Waukesha County Board of Supervisors, as required by Section 60.61, Wis. Stats.

THE COUNTY BOARD OF SUPERVISORS OF THE COUNTY OF WAUKESHA ORDAINS that the text of the Town of Delafield Zoning Ordinance, adopted by the Town of Delafield July 20, 1998, is hereby amended to create Section 17.10(5.5) of the Town of Delafield Zoning Ordinance regarding modifications by special exception due to erroneously permitted work, more specifically described in the "Staff Report and Recommendation" on file in the office of the Waukesha County Department of Parks and Land Use and made a part of this Ordinance by reference ZT-1766, is hereby approved.

BE IT FURTHER ORDAINED that the Waukesha County Clerk shall file a certified copy of this Ordinance with the Town Clerk of Delafield.

BE IT FURTHER ORDAINED that this Ordinance shall be in full force and effect upon passage, approval and publication.

BE IT FURTHER ORDAINED that all Ordinances inconsistent with or in contravention of the provisions of this Ordinance are hereby repealed.

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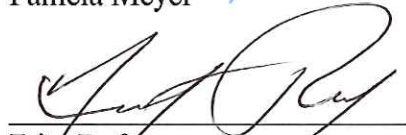
Presented by:  
Land Use, Parks, and Environment Committee


  
James A. Heinrich, Chair

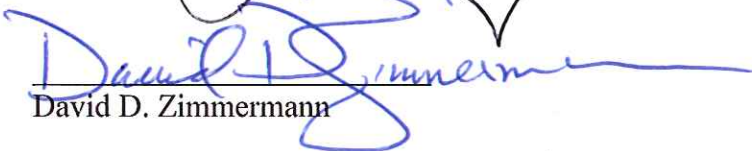
  
Jim Batzko

  
Walter Kolb

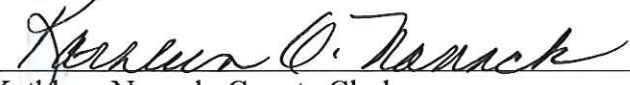
  
Pamela Meyer

  
Fritz Ruf

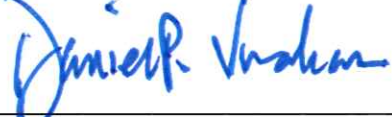
  
Thomas J. Schellinger

  
David D. Zimmermann

The foregoing legislation adopted by the County Board of Supervisors of Waukesha County, Wisconsin, was presented to the County Executive on:

Date: 1/28/2014,   
Kathleen Novack, County Clerk

The foregoing legislation adopted by the County Board of Supervisors of Waukesha County, Wisconsin, is hereby:

Approved:  \_\_\_\_\_  
Vetoed: \_\_\_\_\_  
Date: 1/30/14,   
Daniel P. Vrakas, County Executive

WAUKESHA COUNTY BOARD OF SUPERVISORS

C

V

DATE-01/28/14

(ORD) NUMBER-1680076

- 1 C. SLATTERY.....
- 3 R. MORRIS.....AYE
- 5 J. BRANDTJEN.....AYE
- 7 J. GRANT.....AYE
- 9 J. HEINRICH.....AYE
- 11 F. RUF.....AYE
- 13 P. DECKER.....AYE
- 15 W. KOLB.....AYE
- 17 D. PAULSON.....AYE
- 19 C. CUMMINGS.....AYE
- 21 W. ZABOROWSKI.....AYE
- 23 K. HAMMITT.....AYE
- 25 G. YERKE.....AYE

- 2 D. Zimmermann.....AYE
- 4 J. BATZKO.....AYE
- 6 J. JESKEWITZ.....
- 8 P. HAUKOHL.....AYE
- 10 D. SWAN.....AYE
- 12 P. WOLFF.....AYE
- 14 P. MEYER.....AYE
- 16 M. CROWLEY.....AYE
- 18 L. NELSON.....AYE
- 20 T. SCHELLINGER....AYE
- 22 P. JASKE.....AYE
- 24 D. DRAEGER.....AYE

TOTAL AYES-23

TOTAL NAYS-00

CARRIED\_\_\_\_\_

DEFEATED\_\_\_\_\_

UNANIMOUS X

TOTAL VOTES-23

**COMMISSION ACTION**

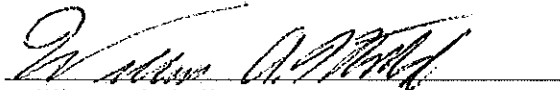
The Waukesha County Park and Planning Commission after giving consideration to the subject matter of the Ordinance to amend the Town of Delafield Zoning Code hereby recommends approval of (ZT-1766 Town of Delafield Board) in accordance with the attached "Staff Report and Recommendation".


**PARK AND PLANNING COMMISSION**

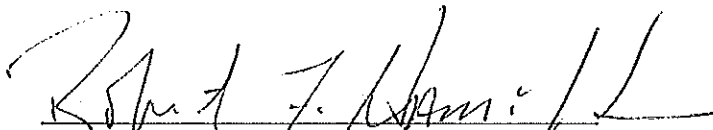
**December 12, 2013**

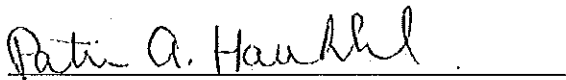
  
Robert Peregrine, Chairperson

Absent  
Jim Siepmann, Vice Chairperson

  
William Mitchell

  
Gary Goodchild

  
Robert Hamilton

  
Pat Haukohl

Absent  
Fritz Ruf

**WAUKESHA COUNTY DEPARTMENT OF PARKS AND LAND USE**  
**STAFF REPORT AND RECOMMENDATION**  
**TEXT AMENDMENT**

**FILE NO.:** ZT-1766

**DATE:** December 12, 2013

**PETITIONER:** Town of Delafield Board  
Town of Delafield Hall  
N14 W30782 Golf Road  
Delafield, WI. 53018

**NATURE OF REQUEST:**

Text amendments (Town Ordinance Number 2013-04) to create Section 17.10 (5.5) of the Town of Delafield Zoning Ordinance regarding modifications by special exception due to erroneously permitted work.

**PUBLIC HEARING DATE:**

June 11, 2013.

**PUBLIC REACTION:**

The Town conducted one public hearing on June 11, 2013 relative to three different sets of proposed text amendment ordinances, one of which is subject of this request. Comments from the public relative to the subject amendment included the following:

- One resident suggested that houses destroyed by fire should be able to be re-built.
- A resident felt that the ordinance would treat residents unequally relative to open space.
- A resident suggested that the Town change the specified open space requirements to bring all properties into compliance.
- A homeowner stated that the Building Inspector did not catch that her house was non-conforming and this is causing her and her family to lose tens of thousands of dollars in attempting to sell their home.

**TOWN PLAN COMMISSION:**

On March 19, 2013, the Town Plan Commission recommended that the Town Board hold a public hearing to consider the subject ordinance.

**TOWN BOARD ACTION:**

On June 25, 2013, the Town of Delafield Board voted to approve the proposed ordinance, as recommended by the Town Plan Commission.

**BACKGROUND AND SUMMARY OF CHANGES**

The Town of Delafield is proposing text amendments to the Town Zoning Code to provide for a special exception process that would be available to landowners that can clearly demonstrate that the Town Building Inspector or Zoning Administrator erred in issuing a permit for a certain specified activity. This ordinance amendment was precipitated by the Town's recognition that the former Town Building Inspector erred in his administration of the Town's open space zoning requirements for a number of years. Because of the complexity of this issue, the Planning and Zoning Staff and Waukesha County Corporation Counsel Staff recently met with the Town Zoning Administrator and Town Attorney to discuss the circumstances that precipitated the Ordinance and to discuss the subject zoning code amendment in detail.

As presented, the proposed special exception process would be available to those who own property and can demonstrate that permits were issued in error relative to yard, building height, area, setback, offset or open space requirements of the code. Although erroneously issued open space permits are believed to be the most wide-spread issue, the Town would like to have a process available if other dimensional standards are found in the past or future to have been violated and erroneously permitted by Town Staff. The Town's open space requirements were created during a re-write of the Town Code in 1998. Within the past few years, the Town became aware that, between 1998 and 2010, numerous building permits were issued by the former Town Building Inspector for properties where permitted improvements were authorized despite the fact that the Town's open space criteria were not complied with.

Although the exact method used by the former Building Inspector for reviewing the open space standards is not known, it is believed that incidental hard surfaces such as driveways, patios, etc. were not properly accounted for as home permits were issued.

Although the Town does not know exactly how many permits might have been issued in error, current Town staff has suggested that the issue is fairly widespread and that a review of one particular subdivision with 18 lots revealed that one-half of the subject subdivision properties were found to be out of compliance with the open space standards. The open space standards require a minimum amount of open space per property, and the zoning district requirements generally require between 75% and 95% of a lot's area to remain open or in green space. In essence, the regulations govern the maximum amount of impervious surface on a site.

The Town recognized that there was a need for improved administration of zoning matters and appointed the Town Engineer as the Town Zoning Administrator in 2010. At about the same time, some of the Town's zoning district open space standards were amended, which alleviated some of the problems that occurred as a result of the permits issued in error. The Town has continued to explore various options for how to address the erroneously permitted properties since that time. At present, the properties that were issued permits in error stand in violation of the Town Zoning Code. Town staff explained that this may cause difficulties for those wishing to sell or improve their properties in the future. In addition, the Town Attorney and Zoning Administrator explained that if the Town receives a violation complaint, they would have no choice but to pursue enforcement of the violation.

After considering other options, the Town ultimately chose to create a special exception process to attempt to provide some potential relief to affected residents. Special exceptions are slightly different from variances in that special exceptions do not have to adhere to the same rigid tests that variances must meet in order to be granted. A special exception is more of a special zoning approval. The proposed ordinance language is proposed to be inserted into the Conditional Use section of the Town code. While the State Statutes call for variances to be considered by Boards of Appeals, special exceptions can either be considered by a Board of Appeals or by the Town Plan Commission and Board.

Town staff clarified that the Town Board had a desire for the Plan Commission and Board to be involved in the exception process because the process is unique in that such applications are suggesting that a Town staff person erred in some way. If the Town finds consideration of such special exceptions to be problematic or burdensome for the Plan Commission and Board, Staff feels that the Town Board of Appeals could alternatively be written in to the Code as the review authority for such requests.

The Town has set forth fairly rigid standards whereby owners must demonstrate that their non-conforming condition was created, in part, by error on the part of the Town Building Inspector or Zoning Administrator. Petitioners must file a current plat of survey that depicts and computes the area of all hard surfaces, provides a detailed written description and the names of owners within 300'. The process would include a Plan Commission evidentiary hearing and the Plan Commission would make a recommendation to the Town Board. The Town Board would make the final decision. The basis for approval of such an exception is predicated on demonstration that the structure was constructed pursuant to a building or zoning permit issued in violation of the code and only after completion was the structure found to be in violation. The Town must also make a determination of no substantial detriment. The final

special exception determination would have to be recorded in the County Register of Deeds Office. The proposed ordinance specifies that the decision of the Town Board is not subject to the appeal of the Town Zoning Board of Appeals. Instead, an appeal regarding such a decision would need to be filed with the court system.

While the provided special exception process allows for improvements that were constructed in conflict with the code to remain, it does not allow for the replacement of such non-conforming improvements. Town staff explained that the Town felt that if improvements are voluntarily removed, the reconstructed improvements should comply with the Code. County Planning Staff expressed concern that a property owner of a home damaged by fire, a tornado or some other disaster would not be able to restore what had been lost. In such a case, a property owner would either have to remove some hard surfaces or seek a variance in order to re-build equivalent improvements. Planning Staff feels that the special exception process is appropriate but questions whether the Town may wish to expand the exception process further in the future to provide still more relief and allow for homes to be re-built to a similar size if destroyed by certain types of natural disasters.

The Planning and Zoning Division Staff expressed to Town Staff that they questioned whether an application fee requirement is appropriate, as the affected owners are already being burdened by expending time, effort and resources to make an application to resolve an issue has been created by an error on the part of a Town employee. The Planning and Zoning Division Staff believes that the Town should consider a very nominal fee or removing the fee requirement altogether.

Town staff explained that an across the board exception was discussed, but Town officials believe that deciphering which substandard properties were truly affected by erroneously permitted from those that may have independently violated the ordinance would be extremely difficult. The Town has also expressed that they value the open space regulations and did not want to undermine the entire system by more comprehensively revising the ordinance to loosen open space regulations for a multi-year time period.

**STAFF RECOMMENDATION:**

It is the opinion of the Planning and Zoning Division Staff that the proposed ordinance to amend the Town of Delafield Zoning Ordinance be **approved**, as presented. Staff feels that all people make mistakes and believes that the Town is showing appropriate leniency in providing a relief mechanism to residents that can prove that a staff error resulted in a property becoming non-conforming to the zoning code. Without such an available mechanism, many property owners within the Town could be subject to violation enforcement, for an issue that could have been prevented had the former Town Building Inspector properly administered open space provisions. In addition, affected property owners may not be able to sell their homes because of outstanding violations. Because of the length of time during which permits are believed to have been issued in error, there is likely no perfect fix for this situation, but such an exception process provides a valuable option to affected owners. Because property owners also still have the option to bypass the special exception process in favor of a Board of Adjustment variance request, staff feels that adequate relief remains accessible to those who wish to pursue a more permanent, higher level of protection for re-builds in the context of potential natural disasters, such as tornadoes or fire.

Respectfully submitted,

*Jason Fruth*

Jason Fruth  
Planning and Zoning Manager

Attachment: Town Ordinance 2013-04

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**

**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.