



REGULAR MEETING OF THE BOARD OF APPEALS
CITY OF HUDSON
Wednesday, September 26, 2018

The Board of Appeals meeting was called to order by Chairman Neset at 5:02 p.m.

PRESENT. Breanne Berning, Nick Hallbeck, Mary Claire Potter, and Karen Neset.

ABSENT. Jon Huhn and Carah Koch.

OTHERS PRESENT. Jeff Warren, Jackie Ashford, Melvin Ashford, Ella Ashford, Hudson Ashford, David Ruesink, Kim Berry, Emily Sorenson, David Gray, and others present.

Discussion and possible action on July 10, 2018 meeting minutes. Motion by Potter, seconded by Hallbeck to approve the minutes of the July 10, 2018 Board of Appeals meeting. All ayes (4-0). Motion Carried.

Chairman Neset confirmed that the applicant would like to move forward with a quorum of four Board members. The applicant wished to proceed with four members.

Public Hearing on a variance application by Melvin and Jaclyn Ashford requesting a variance for construction of an accessory structure within the bluffline setback area (NR118.06(1)(f)(1) and City Code 255-18.A) at 1826 River Ridge Road, Appeal No. 240.

Chairman Neset read the public hearing notice and opened the public hearing.

David Gray reviewed the requested variance and site history. Gray stated that site planning included removal of the existing house, building of a new house and the construction of a swimming pool. Gray stated that the original house was a non-conforming structure and that NR118 would allow a principal building to be built in the exact footprint of the existing house. While a pool was not a principal structure, the City felt that a pool met the requirements of NR118.08(2)(a). Gray reviewed and elaborated on page 2 of the staff report which was the basis for evaluation that the City used to review the pool structure.

1. *The lot has an area of 7,000 square feet.*
Yes, the site is five and a half acres or more.
2. *The altered or reconstructed structure will be visually inconspicuous or will be rendered so through mitigation.*
The pool is below grade and a mitigation plan was submitted to render the required safety fencing inconspicuous. Gray stated that the City felt that a pool was more visually inconspicuous than a principal structure.
3. *The structure is altered or reconstructed in the same footprint as the pre-existing structure.*
Yes, the pool is situated in the footprint of the former home.
4. *The height of the altered structure complies with [45-feet]. The reconstructed structure may not be any taller than the pre-existing nonconforming structure.*



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Not applicable. The overall height will be the 4 foot safety fencing required to surround the pool by local ordinance.

5. *The color of the structure complies with [local zoning ordinance].*

Not applicable.

6. *The property owner submits a mitigation plan that complies with [NR 118.08(5)].*

A landscaping plan was provided by the builder.

7. *Private on-site wastewater treatment systems are brought into compliance with the requirements of [plumbing code].*

Not applicable. The pool does not require a wastewater treatment system.

8. *The foundation of the structure may not be replaced, improved or structurally altered [unless] the entire structure is more than 50 feet from the ordinary high water mark and is not located in a slope preservation zone.*

The previous structure was more than 50 feet from the ordinary high water mark and not located within the slope preservation zone.

9. *An erosion control plan and re-vegetation plan shall be submitted for approval.*

The builder submitted plans. The entire site will be landscaped and re-vegetated as part of the project. The erosion control measures have been in place during the duration of the project.

10. *There will be no filling and grading activities conducted during the alteration or reconstruction except for the minimum necessary to accomplish the alteration or reconstruction.*

The existing grades were native and maintained. The slope preservation zones were not disturbed. Excavation was the minimum necessary to build a pool.

11. *If the nonconforming principal [structure] is located in a slope preservation zone, it may be reconstruction only if Wisconsin construction site best management practices applicable to steeper sloped areas are implemented.*

Not applicable. Construction is not within the slope preservation zone.

Gray stated that because the proposed structure met the criteria listed above, the City felt it a suitable location. Gray continued to state that the applicant could have constructed the new home in the existing building footprint and the pool to the east of the house, but the pool construction in the existing house footprint would minimize erosion and was visually less conspicuous to the river.

Gray continued to review the site background including the issuance of the building permits and DNR challenge of the pool permit. Potter clarified that the City approved the permit. Gray confirmed that the DNR challenged the permit after the permit was approved and construction had begun. Gray confirmed that the City administers NR 118 code within the City limits. Gray stated that in hindsight he should have reached out to DNR and there has been challenges in the past few years on knowing who to call. Potter confirmed that the applicant followed all the proper procedures. Gray continued to



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review the site history including the issuance of a stop work order and recommendation to file a variance application.

Melvin Ashford, 10731 Hawthorn, Trail Woodbury, MN and variance applicant, stated that the property is unique. The property is only 5.25 acres with only 0.35 acres of buildable land due to bluff setbacks and slope setbacks. Ashford stated that a pool was an essential part of the building plans and was included from the start of planning. Ashford stated that they opted to bring the new house into compliance and build the pool in the existing house foundation. Ashford stated that he felt that the site layout reinforced the spirit of the code because an inground pool is better for the river view than a 35-foot house. Ashford continued to state that the pool cannot be viewed from neighboring properties and does not impact the character of the community. Ashford reiterated that he felt that the bluffline was improved and the betterment of the public interest was upheld with the pool being built instead of a new house on the bluff. Discussion was held regarding site location and that the property is on the old railroad.

Jackie Ashford, applicant, testified that the new house was specially designed to incorporate the pool and that the pool provides important family time.

David Ruesink, 1340 Front Street, provided some history on the property. Ruesink stated that the property is on an old railroad property which is 60-80 feet below the upper bluff and about 180-200 feet above the river. Ruesink stated that you cannot see the pool from the river. Ruesink continued to state that the previous house was up to the bluff edge, and that the property has been changed in a way that makes it less visible to the river.

Kim Berry, 1828 River Ridge Road, inquired upon how the pool would be drained. Ashford stated that water is recirculated and not drained. Gray stated that he spoke with the pool contractor prior to permit issuance to confirm that the pool system is winterized, and the water level is not drained.

Gray reviewed and elaborated on the criteria to be met for a variance on page 6 of the staff report.

I) *Denial of variance would result in hardship to the property owner due to physical characteristics of the site.*

Strict adherence to the requirements of City of Hudson Municipal Code § 255-18.A and Wisconsin Administrative Code NR 118.06(1)(f).1 would eliminate the possibility of constructing a pool on the site. (Pools are permissible in the St Croix Scenic Riverway and R-1 One-Family Residential Zoning Districts) All build-able areas on the site are already accounted for by the house, septic system, storm water infiltration areas, slope preservation zones, or bluffline setback areas. Gray stated that it was City staff's opinion that the pool's location was best and only location for the pool. Gray added that the existing foundation of the home was left in place below grade to minimize potential erosion.

II) *The conditions upon which a petition for a variance is based are unique to the property for which variation is being sought.*

The overall site is 5.25 acres while the build-able area, outside of setbacks and slope preservation zones, is relatively small at .35 acres.



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- III) *The petition for a variance is not based exclusively upon a desire to increase the value or income potential of the property.*

The property owner reports that the pool is used for recreation and physical therapy. Zoning regulation would prohibit the use of the pool for commercial purposes.

- IV) *The granting of the variance will not be detrimental to the public welfare or injurious to the other property or improvements in the neighborhood in which the property is located.*

The requested variances are not believed to be detrimental to adjacent properties or the public welfare. The applicant agreed to install a glass fencing and will be mitigated by landscaping so that it will not be visible from the river especially in fall and winter. The pool area is hidden by existing trees and plantings during the summer months.

The pool is approximately 216 feet horizontally and 108 feet vertically from the ordinary water mark of the St. Croix River.

The nearest neighboring structure is the pool located at 1820 River Ridge Road. All neighboring residences are 300 feet or further away.

- V) *The proposed variance will not jeopardize the spirit and general and specific purposes of the Zoning Code.*

The requested variances are not believed to undermine the spirit of the Zoning Code.

Gray confirmed that the Board had received and had a chance to read the Wisconsin DNR letter from Kay Lutze, Shoreland Policy Coordinator/NER Waterway and Wetland Field Supervisor, dated September 24, 2018 (attached at end of minutes). The Board agreed to admit the letter into the meeting record.

Gray stated that he had researched if the City's decision to issue a permit could be considered the applicant's hardship. Lynn Markham, UW-Extension Center for Land Use Education, provided Gray with a 2007 case in Menomonie, Wisconsin (attached at end of minutes). In the Menomonie case, a building inspector missed a setback violation for a duplex that was built, and an after-the-fact variance was applied for. The variance was granted based on the applicant's hardship from following the City's direction that their project was compliant. Dunn County Circuit Court and Wisconsin State Court of Appeals upheld the Board of Appeals decision in further appeals. Gray stated that he was letting the Board know that there was a court case where the city's error was the basis for hardship.

Hallbeck inquired upon the definition of principal structure and accessory structure. Gray reviewed the NR 118 definitions. Gray continued to state that in his experience the principal structure requirements are typically more restrictive than accessory structures. Neset confirmed that while reviewing NR118.08(2)(A) she did not read anything about accessory structures. Gray confirmed that the section does not address if an accessory structure can or cannot be build in the place of a principal structure.



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Discussion was held regarding the appeal process for a Board of Appeal decision and response to NR 118 to include in the Boards decision.

Motion by Potter, seconded by Hallbeck to close the hearing. All Ayes (4-0). Motion Carried.

Discussion and Possible Action on a variance application by Melvin and Jaclyn Ashford requesting a variance for construction of an accessory structure within the bluffline setback area (NR118.06(1)(f)(1) and City Code 255-18.A) at 1826 River Ridge Road, Appeal No. 240.

Discussion was held regarding hardship. Berning stated she believed that the applicant did not create the hardship. Berning continued to state that the site could be redeveloped differently from the start and they could have moved the pool. Hallbeck agreed that the property is unique. Hallbeck stated that the pool is within the previous house's foundation and that hardship was imposed by the City or DNR. Discussion was held regarding pools and real estate value. Berning stated that the applicant followed the proper steps and were not notified that there was a conflict. Potter agreed that the applicant followed all approvals and rules asked of them.

Motion by Berning, seconded by Potter to grant the requested variance for the construction of a pool structure, pool deck, and required fencing closer than 40 feet to the bluff line (NR 118.06(1)(f)(1) and City Code 255-18.A) at 1826 River Ridge Road based on the following findings:

I) *Denial of variance would result in hardship to the property owner due to physical characteristics of the site.*

The buildable site area is only 0.35 acres. All build-able areas on the site are already accounted for by the house, septic system, storm water infiltration areas, slope preservation zones, or bluffline setback areas. The applicant built the pool upon City approval and permit issuance. The City's decision to approve the site plan and issue permits for the pool resulted in hardship to the applicant.

II) *The conditions upon which a petition for a variance is based are unique to the property for which variation is being sought.*

The Board of Appeals found that the property is unique. The overall site is 5.25 acres while the build-able area, outside of setbacks and slope preservation zones, is relatively small at 0.35 acres. The reconstruction of a new house that meets NR 118 setback requirements is an improvement to the site by reducing the view from the river.

III) *The petition for a variance is not based exclusively upon a desire to increase the value or income potential of the property.*

There is no indication that the purpose of the requested variance is based upon value or income potential motivations. The Board agrees that the addition of a pool to the property does not necessarily increase the property value and in most cases reduces the value of the property.



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- IV) *The granting of the variance will not be detrimental to the public welfare or injurious to the other property or improvements in the neighborhood in which the property is located.*
The requested variances are not believed to be detrimental to adjacent properties or the public welfare. The pool area is hidden by existing trees and plantings during the summer months. Testimony has been given that due to surrounding trees, and distance above the St. Croix River that the pool cannot be seen from the river. Additionally, the pool itself is at grade level. The Board found that the site layout is a benefit to the public because the non-conforming house in the bluff setback was relocated and the new house is conforming.
- V) *The proposed variance will not jeopardize the spirit and general and specific purposes of the Zoning Code.*
The requested variance is not believed to undermine the spirit of the Zoning Code. The variance does not change the view from or disturb the use of the St. Croix River. The pool is in the same foundation as the previously acceptable foundation for a principal structure. The main foundation still exists to help with site grade and erosion control. The granting of the variance and site layout allowed for the further setback of the house from the river than it would be in the existing foundation. The Board finds that the safety considerations of the zoning code are still upheld with the construction of a safety fence.

The Board of Appeals reviewed the following criteria and do not believe the variance is not detrimental to the intent of NR 118.

Preservation of the scenic and recreational resources of the riverway, especially in regard to the view from and use of the river; the maintenance of safe and healthful conditions; the prevention of and control of water pollution, including sedimentation; the location of the site with respect to floodways, floodplains, slope preservation zones and blufflines; the erosion potential of the site based on degree and direction of slope, soil type and vegetative cover; potential impact on terrestrial and aquatic habitat; location of the site with respect to existing or future access roads; adequacy of proposed wastewater treatment; and compatibility with adjacent land uses.

The variance does not impact the view from the St. Croix Riverway or the use of the river. The pool safety itself is regulated by building code and permits. The prevention of water pollution, sedimentation, and erosion potential have been taken into consideration. The location of the site with respect to existing or future access roads is not applicable. Wastewater treatment for the variance is not necessary because the pool water is not drained.

Approval is granted based on testimony with the following conditions:

- Property owner shall use and maintain the pool in a manner that will not cause erosion.



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- All conditions run with the land and are binding upon the property owner and all heirs, successor, and assigns. The sale or transfer of all or any portion of the property does not relieve the original property owner from meeting any conditions.
- The required safety fencing for the pool shall be glass.

Ayes (4-0). Motion Carried.

COMMUNICATIONS AND ITEMS FOR FUTURE AGENDAS.

None.

ADJOURNMENT.

Motion by Hallbeck, seconded by Potter to adjourn at 6:10 p.m. All ayes (4-0). Motion Carried.

Respectfully submitted,
Emily Sorenson, Acting Secretary

DRAFT



September 24, 2018

City of Hudson
Board of Appeals
505 Third Street
Hudson, WI 54016

Dear Board Members:

The Department of Natural Resources has received the notice for the September 26, 2018 public hearing concerning the variance request submitted by Melvin Ashford. The variance request is to construct a pool, pool deck and fencing within the required 40' bluff line setback per NR 118.06(f).1. The proposed pool structure would be located as close as 21' from the bluff line.

As the Board reviews these variance requests, please keep in mind that the applicant has the burden of proving that their application meets all of the statutory requirements for the granting of a variance for each variance request. That is, the applicant must prove that they will suffer unnecessary hardship if the provisions in the county's shoreland zoning ordinance are literally enforced. The Wisconsin Supreme Court has made it clear that proof of unnecessary hardship by itself does not entitle an applicant to a variance. All of the statutory variance criteria must be satisfied in order to grant a variance. They are:

Unique physical limitations: The applicant must demonstrate that unique physical limitations (wetlands, steep slopes, streams, rock outcroppings) or special conditions of the property exist that prevent compliance with ordinance regulations. The physical limitations must be unique to the property in question and not generally shared by other properties in the area. When determining if compliance is prevented, the whole parcel must be considered. The applicant states that a pool could not be built in another location on the property but the board should be reminded that not all properties will have the required area available for the construction of a pool just because a pool is a permitted accessory structure within the district.

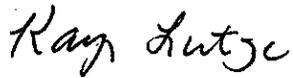
No harm to public interests: The applicant must demonstrate that variance will not result in harm or be contrary to public interests. The Board must consider the impacts of the proposed project as well as the cumulative impacts of similar projects on the interests of the neighbors, the community, and the general public. These interests are listed in the purpose statement of the ordinance and, for St. Croix Riverway zoning, include preservation of the scenic and recreational resources of the riverway, especially in regard to the view from and use of the river; the maintenance of safe and healthful conditions; the prevention of and control of water pollution, including sedimentation; the location of the site with respect to floodways, floodplains, slope preservation zones and blufflines; the erosion potential of the site based on degree and direction of slope, soil type and vegetative cover; potential impact on terrestrial and aquatic habitat; location of the site with respect to existing or future access roads; adequacy of proposed wastewater treatment; and compatibility with adjacent land uses.

Unnecessary hardship: The applicant must demonstrate that if the variance is not granted, an unnecessary hardship exists. The applicant may not claim unnecessary hardship because of conditions which are self-imposed or created by a prior owner (for example, building a home in compliance and then subsequently constructing a deck without a permit). Courts have also determined that economic or financial hardship does not justify a variance. When determining whether unnecessary hardship exists, the Board must consider the property as a

whole, rather than just a portion of the parcel. There is nothing in the application that states that they are unreasonably prevented from using the property or that compliance is unnecessarily burdensome. Not having a pool does not prevent the property owner from reasonably using the property as a whole.

It is the responsibility of the Board of Adjustment to assure that the statutory standards for the granting of a variance are met. The standards help to ensure protection of the public interest, including the preservation of water quality and fish and wildlife habitat along lakes and rivers. Wisconsin's navigable waterways are held in trust for all people to enjoy. The Department appreciates your commitment to the City of Hudson's water resources and protection of public interests for future generations.

Sincerely,

A handwritten signature in cursive script that reads "Kay Lutze".

Kay Lutze
Shoreland Policy Coordinator/NER Waterway and Wetland Field Supervisor



David Gray <dgray@ci.hudson.wi.us>

Considering a staff error when deciding on a variance

Markham, Lynn <Lynn.Markham@uwsp.edu>
To: "dgray@ci.hudson.wi.us" <dgray@ci.hudson.wi.us>

Wed, Sep 26, 2018 at 3:04 PM

Hi David,

I'll attach the slide I created which briefly summarizes this decision, and provides the cite.

Lynn

Lynn Markham

Land Use Specialist

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New case law

Unnecessary hardship

- For all variances: Hardship cannot be self-created or created by a prior owner
- Building inspector missed a setback violation for 2 duplexes
- The duplexes were built and the developer then applied for an after-the-fact variance, which the zoning board granted.
- The court noted there was ample evidence of external causes of the hardship and affirmed BOA's grant of a variance because the hardship of removing the duplexes was not solely self-created
- A zoning board may consider an error of local government staff when deciding whether to grant a variance.

Accent Developers, LLC v. City of Menomonie BOA and Timber Ridge Homes LLC, 2007 WI Court of Appeals

Court of Appeals of Wisconsin.

**ACCENT DEVELOPERS, LLC, Petitioner-Appellant, v. CITY OF MENOMONIE
BOARD OF ZONING APPEALS, Respondent-Respondent, TIMBER RIDGE
HOMES, LLC, Intervenor-Respondent.**

No. 2006AP1268.

Decided: February 27, 2007

Before CANE, C.J., HOOVER, P.J., and PETERSON, J. On behalf of the petitioner-appellant, the cause was submitted on the briefs of William G. Thiel, of Weld, Riley, Prens & Ricci, S.C. of Eau Claire. On behalf of the respondent-respondent, the cause was submitted on the brief of Michael J. Modl and Mitchell R. Olson of Axley Brynson, LLP of Madison. On behalf of the intervenor-respondent, the cause was submitted on the brief of Peter M. Reinhardt and Bridget M. Finke of Bakke Norman, S.C. of Menomonie.

Accent Developers, LLC appeals the City of Menomonie Board of Zoning Appeals grant of an area variance to Timber Ridge Homes, LLC. Accent argues the board erred as a matter of law in granting the variance because Timber Ridge's hardship was self-created and the evidence in the record does not support the board's decision. We disagree and affirm the Board's decision.

Background

¶ 2 Timber Ridge constructed two residential duplexes in the City of Menomonie. Timber Ridge mistakenly built part of each duplex within the front setback from the road right-of-way. James Dahl, the city building inspector, had approved the footings for the duplexes before the concrete footings were poured. However, the mistake was not discovered until after Timber Ridge completed the majority of the construction. Correction of the mistake would have cost Timber Ridge over \$100,000.¹ Therefore, Timber Ridge sought variances from the board that would permit the duplexes to remain despite the zoning ordinance violation.

¶ 3 On January 6, 2005, the Board of Zoning Appeals held a hearing on the variances. The board took evidence from Timber Ridge and all interested parties in attendance, including Accent, which owned adjacent lots. At the hearing, Timber Ridge through its agent testified it assumed based on other experiences that the building inspector would have let it know of any violations. Indeed, Dahl admitted he missed the setback violation. At the conclusion of the hearing, the board voted in favor of granting the variances and issued a resolution to that effect dated January 6, 2005.

¶ 4 Accent then filed a certiorari action with the Dunn County Circuit Court. On March 29, 2006, the court issued a written decision, affirming the board's decision granting the setback variances to Timber Ridge. Accent appeals the board's decision.

Discussion

¶ 5 When reviewing a board's grant of a variance, we "must accord a presumption of correctness and validity to a board of adjustment's decision." *State v. Outagamie County Bd. of Adj.*, 2001 WI 78, ¶ 25, 244 Wis.2d 613, 628 N.W.2d 376. We will not disturb the findings of such a board "if any reasonable view of the evidence sustains such findings." *State v. Waushara County Bd. of Adj.*, 2004 WI 56, ¶ 13, 271 Wis.2d 547, 679 N.W.2d 514.

¶ 6 A board of zoning appeals may grant a variance based on special conditions where a strict enforcement of the provisions would result in an unnecessary hardship. Wis. Stat. § 62.23(7)(e); *State ex rel. Ziervogel v. Washington County Bd. of Adj.*, 2004 WI 23, ¶ 7, 269 Wis.2d 549, 676 N.W.2d 401. Additionally, the hardship must be unique to the property and not self-created. *Ziervogel*, 269 Wis.2d 549, ¶¶ 7, 20, 676 N.W.2d 401.

¶ 7 In Outagamie County, our supreme court affirmed a variance stating “compliance with the strict letter of the . Ordinance would be unnecessarily burdensome under the circumstances of this case.” Outagamie County, 244 Wis.2d 613, ¶ 51, 628 N.W.2d 376. The court also concluded the hardship was unique to the property and not self-created to the extent that the homeowners built the home in reliance upon a building permit lawfully issued by the city. *Id.*, ¶ 53, 628 N.W.2d 376. The court noted the evidence supported the board's approval of the ordinance. In particular, the town building inspector had previously granted a building permit for a single-family home without advising the owners of the need for a floodplain zoning permit from the county, and without such a permit being obtained. *Id.*, ¶¶ 11-12, 628 N.W.2d 376.

¶ 8 We conclude Outagamie County's circumstances are analogous to the present case. Here, the board recognized Timber Ridge's hardship was not solely self-created. The record contains ample evidence and discussion of external causes of Timber Ridge's hardship. Admittedly, Timber Ridge's faulty measurements were a substantial cause of the duplexes construction within the front setback. However, the board recognized during its hearing that the City bore some responsibility because its building inspector inspected and approved the footings, and he did not detect the setback violation. At least one member of the board stated that the City might have some culpability for not discovering the violation before approving the inspection. Timber Ridge, through its agent, testified that it relied on the inspection and approval to continue the building process. The board concluded there would be an unreasonable hardship for Timber Ridge to demolish and rebuild the duplexes, the hardship was not solely self-created, and the hardship was unique to Timber Ridge's property. Therefore, the board properly granted the variances.

¶ 9 Accent argues it was inappropriate for the board to have considered the role its official played when evaluating the unnecessary hardship. To support its argument, Accent principally relies upon Willow Creek Ranch, LLC v. Town of Shelby, 2000 WI 56, 235 Wis.2d 409, 611 N.W.2d 693. The cases Accent relies upon hold a municipality cannot be estopped from enforcing its zoning laws based on the mistaken representations of its officers. *Id.*, ¶ 50, 611 N.W.2d 693. These cases do not hold a board may not consider the role its officials played in the zoning violation, when deciding whether to grant a variance. Therefore, we hold the board appropriately considered the role its official played in Timber Ridge's zoning violation.

¶ 10 Because there was a reasonable basis for the board to have concluded the hardship was not self-created and a strict enforcement of the ordinance would result in an unnecessary hardship, we affirm.

Judgment affirmed.

FOOTNOTES

1. Interestingly, at Timber Ridge's variance hearing, Accent did not request the zoning ordinances be enforced. Instead, Accent indicated to the board that “they did not want to put Timber Ridge Homes in a position of having to tear down the constructed duplexes.” Rather, Accent requested a similar variance be granted for its adjacent property. It is unclear from Accent's brief exactly what remedy it hopes to accomplish by this appeal.