

**CITY OF CHARLEVOIX
ZONING BOARD OF APPEALS MINUTES
Wednesday, March 26, 2014 - 6:00 p.m.**

210 State Street, City Hall, 2nd Floor Council Chambers, Charlevoix, MI

(A) CALL TO ORDER

The meeting was called to order by Chair Withrow at 6:05 p.m.

(B) ROLL CALL/PLEDGE OF ALLEGIANCE

Members Present: Greg Bryan, Ann Gorney, Pat Miller, Art Nash, Greg Withrow

Members Absent: Gary Anderson (alt.)

Staff Present: City Planner Michael Spencer

(C) INQUIRY INTO POTENTIAL CONFLICTS OF INTEREST

None.

(D) APPROVAL OF AGENDA

The agenda was approved as presented.

(E) APPROVAL OF MINUTES

1. Motion to approve or amend the October 16, 2013 meeting minutes

Motion by Member Nash, second by Member Gorney, that the October 16, 2013 minutes be approved as presented. Motion approved by unanimous voice vote.

(F) NEW BUSINESS

1. Public Hearing for Project 2014-01 ZBA. Appeal of Zoning Administrator Decision at 300-304 E. Dixon Avenue

Applicant: Eldon Johnson

Subject Property: 306 E. Dixon

a. Staff Presentation

Chair Withrow stated that he would like to hear about "standing" with regard to Exhibit 3 provided to the Board by legal staff, which is included in the agenda packet. City Planner Mike Spencer stated that the plans displayed for the Board's review included the original permit #2850, and permit #3071. He did not believe that Mr. Johnson had standing nor did the complaints have any merit.

Assistant City Attorney Bryan Graham stated that he had written a memo to the Board, dated March 18th, regarding the issues before the Board. The first issue involves "legal standing." He stated that a person that appeals a decision to the ZBA must be a person who is aggrieved. Michigan courts have interpreted the word "aggrieved" to mean that the person has to show, allege, and prove special damages that are different than the citizenry at large. He stated that the City's Zoning Ordinance also addressed the idea of standing. Attorney Graham referenced an earlier appeal, 2011-03, in which the ZBA found that Mr. Johnson did not have standing on two issues and did have standing on one issue. That decision was appealed to the Charlevoix County Circuit Court and the Court upheld the decision of the ZBA, that Mr. Johnson did not have standing with regard to the pylons and the construction of the boathouse. An application for appeal to the Court of Appeals was subsequently denied. Attorney Graham stated that in 2011, the ZBA found that Mr. Johnson had standing on a side yard setback issue based on a physical crack located on Mr. Johnson's property. He clarified that the ZBA needs to consider whether Mr. Johnson has asserted facts that the ZBA find to be valid on "special damages." If this is the same general Zoning Ordinance violation, like the pylons or construction of the boathouse, then it is no different than what the citizenry would assert and the Circuit Court's decision upholding the original ZBA decision is binding on the ZBA. The only issue the ZBA may want to consider is the allegation that the increased traffic over the easement is somehow unique or different to Mr. Johnson than the citizenry at large. Attorney Graham reported that the easement goes across multiple properties.

Member Nash believes that Mr. Johnson is appealing the Zoning Administrator's decision not to take enforcement action on the "porte cochere", but then two other issues came up

regarding the building being a clubhouse/lodge and whether or not the Zoning Administrator's decision not to take any action with regard to lot coverage was proper. He questioned if each issue should be considered separately and Attorney Graham agreed that each issue in terms of standing should be considered separately.

Attorney Graham stated that Ms. Snyder raised the issue of res judicata. He explained that res judicata is a legal doctrine that basically states that once a decision is made on the merits, that issue is decided. Not only have they applied that doctrine in past cases, it has been appealed and upheld by Circuit Court.

b. Applicant Presentation (Johnson)

Chair Withrow reported that the ZBA would address the issue of standing on each matter.

Bridget Brown Powers, Attorney representing Mr. Johnson, stated that when Planner Spencer gave Mr. Johnson an enforcement decision, the City effectively waived the issue of standing. She asked how Mr. Johnson could request a decision, obtain a decision, and then be told that he cannot appeal the decision. Ms. Powers stated that Mr. Graham cited the *Miller Apple* case in his memo to the ZBA, which is unpublished and therefore not binding. Additionally, that case was more about competing restaurants. Ms. Powers cited the *Brown vs. East Lansing Zoning Board of Appeals* case, whereby the plaintiff's property was being adversely affected. Ms. Powers proceeded to read a few of the excerpts from the *Brown* case. Ms. Powers clarified that Mr. Johnson is not claiming that they are developing something different than what they are allowed to; rather, he is claiming that his property will be affected because he is right next door and he has an easement which goes across the lakefront portion of his property. It is not a case of Dixon Avenue getting more traffic; it is a case of Mr. Johnson's property having more traffic because of the easement. If the resulting structure is more of a clubhouse than a single family residence, then additional traffic and pedestrians will clearly affect Mr. Johnson's property. Ms. Powers also noted that in 2014 the value of Mr. Johnson's property dropped by \$210,700. She believes that the decrease in value is due to the increased traffic and ongoing construction, and reported that the property values along that stretch of Dixon Avenue are going down. Ms. Powers also noted that Mr. Johnson and six others have the prescriptive easement on their property, which is not applicable to the citizenry at large.

Ms. Powers stated that privacy of the Johnson family will also be adversely affected when they are at the waterfront. With a clubhouse next door, there will be people coming and going all the time from the boats and the clubhouse and the waterfront is going to get very busy. Chair Withrow asked for Ms. Powers' definition of an easement and Ms. Powers responded that it is a grant of a property interest for a certain purpose. Member Nash stated that the City does not have any control over the easement, and Ms. Powers responded that is exactly why that is distinguishable from the *Unger* case. She reported that in an older case, the Court of Appeals had indicated that increased traffic in the area was not enough of an issue to confer standing because that is a law enforcement issue. It does not affect the property, it affects the streets. In this instance the property is impacted, which makes it distinguishable from the *Unger* case. She believes that the *Brown* case judgment means that, if you have a property interest, an individual does not have to prove adverse impact, merely allege it.

Member Nash stated that he has not heard anything or read anything that establishes this residence as a "clubhouse." He asked that it not be called a clubhouse, as there is no proof that it is a clubhouse. Ms. Powers stated that she had used the definitions out of the new Zoning Ordinance to prove a point, but the definition was not significant to the analysis. The analysis should look at the definition of "residence." What is being built is not permissible in the R-1 zoning district.

Member Nash believes Ms. Powers claim is that, since Planner Spencer already issued a non-enforceable letter, the ZBA waives their right to determine standing. Member Nash stated he believes "standing" means "do you have standing to appeal this decision to the ZBA", and that Ms. Powers would have to prove that there were "special damages" as a result of Planner Spencer's letter. Ms. Powers responded that Planner Spencer made a decision via his letter, rather than stating that Mr. Johnson did not have standing in the matter. She believes that the letter in question waived standing at the next level.

Chair Withrow stated that he believes it is the ZBA's duty to establish standing. Attorney Graham agreed.

c. Response by subject property owner (Anderson)

Valerie Snyder, Attorney representing James Anderson, Patricia Anderson and APJ Properties, LLC, stated there is legal authority that standing can be raised at any time. Standing to request enforcement is different than standing for an appeal, which is what they are meeting on. The Zoning Enabling Act and the City's Ordinance state that "you have to be a person aggrieved in order to have standing." Ms. Snyder stated that this is the appropriate forum for that determination.

Ms. Snyder reported that the requirement to prove standing is that the person that is seeking to appeal "must allege and prove", so if someone is appealing on speculation, it does matter. A person cannot establish standing based on speculation of what the alleged damages would be. Special damages must relate to the alleged violation. Ms. Snyder stated that when Ms. Powers referenced a case where an additional rental unit was built, the court said that there was standing for the neighbor to contest. She believes that is different than what is being discussed at this meeting, which is the type of standing Mr. Johnson had in 2009 when permit #3071 was first issued. When Mr. Johnson contested the issuance of that permit, he came before the ZBA and he had standing at that point to challenge it based on conditions similar to what Ms. Powers is reciting from the other case. The standing they are talking about at this meeting have to relate to the alleged zoning violations: 1) the portico and whether or not there can be vehicular access through it; 2) whether or not this is a single family residence or something else; and 3) lot coverage. She stated that the ZBA did not hear proof of special damages related to any of the alleged violations.

Ms. Snyder stated that Attorney Graham's memo to the ZBA references the *Lansing Schools Education Association* case. This case states that a person bringing the appeal has to prove a special injury, right, or substantial interest that will be detrimentally effective in a manner different from the citizenry at large. The *Lansing Schools* case was not a zoning case. Ms. Snyder reported that when courts look at the issue of standing in the context of zoning, the test is not whether there are special damages as compared to the citizenry at large. When the courts talk about zoning standing, they look at whether or not there are damages that are suffered by the property owner that are not common to other similarly situated property owners. This is important because there are other similarly situated property owners. Ms. Snyder referenced a map that had been given to the ZBA members, showing eight other similarly situated property owners that would experience the same type of harm, if it exists. Mr. Johnson's alleged harm is not any different from the other property owners. That alone is enough to defeat standing. She stated that proof of increased traffic and of general economic or aesthetic loss are not sufficient to show special damages.

Ms. Snyder also addressed the decrease in property value that was brought up by Ms. Powers: in Ms. Powers' submission to the ZBA, she referenced that "the Johnson property has already decreased in value as a result of the APJ project", which is a reference to the project, not the zoning violations. Ms. Snyder stated that in 2014 the City assessed Mr. Johnson's property at \$836,500; assessed values are supposed to equate to

approximately 50% of true cash or fair market value. This equates to a true cash value of \$1,673,000. She also had a copy of an appraisal prepared by Walt Coyle for Mr. Johnson with an effective date of 12/31/10. This appraisal was done immediately before the Andersons started construction in January 2011 and showed a value of \$1,425,000. During this time, the fair market value of Mr. Johnson's property has increased by \$250,000.

Ms. Snyder then addressed claims of invasion of privacy. She noted that Mr. Anderson had combined three lots into one; before the combination, there were two property owners crossing Mr. Johnson's property in order to access theirs. This is no longer the situation and there will actually be a decrease in traffic and probably fewer privacy concerns.

Ms. Powers stated that standing can be waived, and she cited a couple of relevant cases. She stated that in the case she referred to earlier, the Circuit Court had ruled that an objection to standing was not made at the ZBA. The court indicated that if it wasn't waived at a lower level, the individual could not make that argument at a higher level. Ms. Powers reported that there were no relevant cases at the zoning enforcement level, resulting in no published or unpublished opinion on the matter. Ms. Powers stated that the lack of an opinion does not mean that the law is not what she stated. Additionally, the Circuit Court trial that Ms. Snyder referred to involved the prescriptive easement and had nothing to do with zoning. Ms. Powers also stated that, since the appraisal was not submitted to the ZBA as evidence, it could not be considered.

Ms. Powers stated that the ZBA must determine what is applicable to the standing argument and she briefly reviewed the three issues: 1) If the structure is determined to be a clubhouse, hotel or lodge will affect standing in this case, and personally affects Mr. Johnson with additional traffic coming and going through his property; 2) If the lot coverage is determined to be more than allowable, there will be water runoff issues onto Mr. Johnson's property. Mr. Johnson does not have proof of excessive lot coverage, because they need permission from the Andersons to access the lot. The Andersons have denied access, and Ms. Powers asked the City to use its enforcement power to hire a surveyor. Mr. Johnson will pay for the cost to survey the property; and 3) If a porte cochere is constructed, to be used people would need to go through Mr. Johnson's property via the easement.

Ms. Powers stated that the other eight property owners were all sued by Mr. Anderson with respect to the prescriptive easement in 2003. A number of those same people were involved with the zoning issue as well, but for many reasons a lot of those individuals decided not to proceed further with legal action. Ms. Powers stated that the Andersons are building a structure that is not allowed in an R-1 district. At this stage, there is significant construction traffic. The traffic issues will evolve from construction traffic to use traffic.

Chair Withrow stated that the ZBA had gone through these complaints and determined that the building complied with the requirements. Ms. Powers responded that, when permit #3071 was approved and upheld by the ZBA, the ZBA did not have all of the information: they didn't know that there were going to be dormitories and all of the amenities listed. Chair Withrow stated that this information had no effect on the Zoning Ordinance.

Member Nash stated it was brought up before that the aggrieved party is aggrieved only if they have alleged and proved that they have suffered special damages. As far as the ZBA is concerned, this is a single-family residence. Ms. Powers responded with reference to the *Brown* case, which indicates that proof is not required when the adverse effects are on the claimant's property.

d. Call for Public Comments

Mary Eveleigh read Attorney Graham's letter talking about standing and that the definition of

standing is "a party's right to make legal claim, or seek judicial enforcement of a duty or a right." She stated that Black's Law Dictionary states: "to have standing in a federal court, a plaintiff must show that the challenged conduct has caused the plaintiff an actual injury, that the interest sought to be protected is within the zone of interest meant to be regulated by the statutory or constitutional guarantee in question." Ms. Eveleigh's concern is enforcement of the zoning permit, and that if three lots were combined then there should have been a restating of the whole property. Chair Withrow stated that the Board is addressing the issue of standing. Ms. Eveleigh believes there is standing due to the lot changes.

Sally Winter stated she occupied two of the homes down from Mr. Anderson on Dixon. She reported that there has been a lot more traffic on the street, and that when she came up in the spring the road was torn apart. At one point, they were using her property for parking of trucks. Mr. Anderson asked her to sign an affidavit saying that was okay, but it was not okay with her. She stated that her property value has gone down as well, and she knows enough not to compare 2010 values to today's values. She feels this project is out of control, it is sad, and there is a lot going on that shouldn't.

e. ZBA Determination of Findings of Fact

Member Bryan asked Planner Spencer if, once the foundation is in, the setbacks will be checked. Planner Spencer responded affirmatively and stated lot coverage would also be checked.

Member Miller questioned if lot coverage includes all of the right-of-way, including the patio/breezeway and where the cars drive. Planner Spencer responded affirmatively.

Member Nash asked Attorney Graham if he had heard anything during the meeting to persuade him whether or not Mr. Johnson has standing in this matter. Attorney Graham responded that, ultimately, the decision regarding standing has to be made by the Board. Attorney Graham did address the legal issue raised as to whether there was a waiver of standing. Standing is a doctrine that applies to appeals. He stated that when Mr. Johnson made his request to Mr. Spencer alleging a violation of the Zoning Ordinance, that was not an appeal. Mr. Graham further clarified that this was the first opportunity for an appeal, and that standing has been properly raised as an issue.

Planner Spencer stated that the Zoning Enabling Act gives the Zoning Administrator very little discretion. When they get a complaint, they have to investigate it, review the matter and issue an opinion. If there is an appeal under the Act or City Ordinance, the ZBA looks at standing.

Member Miller stated that Mr. Anderson was probably within his legal rights, but the project makes her really sad, and it is enormous for Round Lake.

Chair Withrow stated that when there is construction going on for any kind of facility there is a lot more activity, but they cannot restrict people from the ability to use their property in conformance with the regulations and ordinances of Charlevoix. He believes that the easement is going to be damaged significantly more during construction than it will be later and he expects that Mr. Anderson will take care of any damage when the project is over. He stated that he had not heard anything indicating a significant difference between the alleged violation issues and standing.

Member Nash agreed with the Chair's comments and stated that he is hesitant to give Mr. Johnson standing on these matters, as that would create additional issues in the next two years. He had not heard proof of special damages.

Members Miller, Gorney and Bryan agreed that they had not heard proof of special damages.

Attorney Graham requested clarification: Regarding standing, does the Board feel the same on all three issues? He asked the Board to look at page 2, issue 2, on his memo. If the Board desires, it can adopt that motion and apply it to all three of the issues.

e. Motion

Motion by Member Bryan that the Board hereby dismisses Mr. Johnson's appeal concerning all three issues: (1) whether the Zoning Administrator's decision not to take enforcement action related to the allegation that the principal building being constructed is not a dwelling, but rather a clubhouse, lodge, indoor recreation facility or hotel/motel was proper because Mr. Johnson does not have legal standing to raise this issue; (2) that the Board dismisses Mr. Johnson's appeal concerning whether the Zoning Administrator's decision not to take enforcement action concerning lot coverage on the property was proper because Mr. Johnson does not have legal standing to raise this issue and, in the alternative, because Mr. Johnson has failed to present any evidence in the appeal to support his alleged Zoning Ordinance violation; and (3) that the Board hereby dismisses Mr. Johnson's appeal concerning whether the Zoning Administrator's decision not to take enforcement action over the use of the porte cochere was proper since the appeal on the issue was barred under the legal doctrine of res judicata.

Attorney Graham stated that the motion needed to be restated and asked for a short break. After a five-minute recess, the meeting reconvened.

Motion by Member Bryan, second by Member Nash to approve the motion as written: that the Board hereby dismisses Mr. Johnson's appeal concerning all three issues presented by the applicant, because Mr. Johnson does not have legal standing to raise these issues. This motion is based on the following findings of fact:

1. The Board finds that Mr. Johnson has not alleged and proven any special damages related to these issues that are different than the public at large.
2. The Board finds the issues raised in this appeal are the same type general zoning ordinance violations that were asserted in Case No. 2011-03 ZBA concerning enforcement decisions by the zoning administrator related to the construction of the boathouse and related to the placement of sheet pilings near the shoreline of Round Lake. In this prior case the Board found that Mr. Johnson did not have legal standing. The Board's decision was then affirmed on appeal by the Charlevoix County Circuit Court.

Yeas: Bryan, Gorney, Miller, Nash, Withrow
Nays: None

(G) CALL FOR GENERAL PUBLIC COMMENT

None.

(H) ADJOURNMENT

Motion by Member Miller, second by Member Gorney, that the meeting be adjourned. There were no objections and the meeting adjourned at 7:14 p.m.