

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, May 19, 2010 - 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 Chairperson Withrow at 6:01 p.m.

B) ROLL CALL

Members Present: Gary Anderson, Richard Clem, June Cross, Mary Eveleigh, Greg Withrow and Alternate Larry Sullivan
Members Absent: Alternate Kim VanMeter-Sanderson
Staff Present: City Planner/Zoning Administrator Mike Spencer

C) INQUIRY INTO POTENTIAL CONFLICTS OF INTEREST

Member Eveleigh advised the Board she has a conflict of interest with the Anderson/Johnson appeal and wishes to be recused.

D) APPROVAL OF AGENDA

The Board reviewed the proposed agenda. No changes were made to the agenda.

E) APPROVAL OF MINUTES

1. Motion to approve or amend April 21, 2010 meeting minutes

The Board reviewed the April 21, 2010 minutes.

Chairman Withrow asked that the minutes be amended to correct a typo on the first line of page 1. The word "meting" is to be changed to "meeting". Member Sullivan asked that the word "surface" replace the word "paint" in the Captains Corner variance discussions. Chairman Withrow also asked that the last sentence in the first paragraph on page 2 be amended to read "The sign does reflect light."

Motion made by Member Eveleigh and seconded by Member Cross to approve the minutes of April 21, 2010 as amended. The motion was adopted by a unanimous voice vote.

F) CALL FOR PUBLIC COMMENT (Not related to agenda items) None

G) NEW BUSINESS None

Member Eveleigh left the dais and sat in the audience.
Chair Withrow designated Alternate Sullivan as a voting member.

H) OLD BUSINESS

1. Review of Project 2009-04ZBA Applicants Johnson, Saenger, Reis, Camp

Chairman Withrow reminded the Board that the public hearing is closed.

2. Staff Presentation

City Planner Spencer stated that even though the public comment period is closed, the Board may ask the applicant, the Andersons or their legal representatives any questions to clarify specific points. The Board

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should review each request and determine its findings. Issue A thru I are original issues raised by the applicants and were decided by the ZBA at their June 2009 meeting. The Board has the option to modify the 2009 findings, as the Board may have received new information on the items. The findings have been amended to reflect Zoning Permit #3071.

3. ZBA determination of findings of fact

The Board reviewed the proposed findings of fact. The second to the last sentence on page 3 was revised to read: "...and has a steep to moderate slope toward Round Lake." The Planner also amended the boat house's lot coverage and square footage to reflect Zoning Permit #3071.

- A. *Zoning Permit # 3071 violates Section 5.174 of the Zoning City of Charlevoix Zoning Ordinance, by granting a single zoning permit covering three separate lots of record, under separate ownership, and by authorizing the construction of a building over two separate lots of record. (Powers letter dated September 24, 2009- Exhibit 3)*

Member Sullivan asked for a clarification that the Andersons will be combining the three parcels. Chairman Withrow stated that the Board has consistently been told that it is the Andersons intent to combine the three lots prior to the construction.

Bridget Brown Powers stated that the request for interpretation refers to the proposed construction of a building over two separate lots. The letter also speaks about there being three separate lots.

Member Cross asked if there would be a single family home on each lot. The Andersons have three lots which will be combined prior to construction. There will be only one single family home on the newly created lot. City Planner Spencer stated that if the lots were not combined prior to construction, it would be violation of the Zoning Code.

The Board makes the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the Zoning Ordinance, which reads as follows:

Section 5.8 Lot Line: For the purpose of this chapter, a lot line is the boundary line between two (2) lots or the line between the properties of two (2) different owners.

Section 5.8 Lot of Record: A lot which is part of a subdivision, the map of which has been recorded in the office of the register of deeds of Charlevoix County, or a parcel of land described by metes and bounds, the description of which has been recorded in the office of the register of deeds of Charlevoix County.

Section 5.174 Lot Building Relationship: Hereafter, every building erected, altered or moved shall be located on a lot of record as defined herein, and except in the case of an approved multiple dwelling development, there shall be no more than one (1) principal building and its permitted accessory structures located on each lot in any residential district.

2. The applicants have not provided any evidence suggesting that the above Zoning Ordinance language has multiple meanings or is otherwise ambiguous when

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applied to the Andersons' property.

3. Because the language of the zoning ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons' property.

The Board finds that Zoning Permit #3071 does not violate Section 5.174 of the Zoning Ordinance based on the following facts:

- a. Section 5.174 of the Zoning Ordinance requires that every building erected, altered or moved shall be located on a lot of record as defined in the Zoning Ordinance.
- b. The requirement that there be a single lot of record on which the principal dwelling and accessory structures must be located only arises before the actual construction of these buildings and not at the time Zoning Permit #3071 was issued.
- c. The Andersons have consistently stated that they will combine all three parcels under the same title ownership before any construction is started on the property.
- d. In addition, all three parcels are under the same ownership, two parcels titled directly in the name of James and Patti Anderson and the third titled indirectly to Jim and Patti Anderson, through APJ Properties, LLC, which is owned exclusively by Jim and Patti Anderson. (Affidavit of ownership in Exhibit 2.)
- e. Because the Zoning Ordinance only requires a single lot of record before actual construction, and not at the time the zoning permit was issued, Zoning Permit #3071 was not issued in violation of Section 5.174.

The Board unanimously agreed upon the findings of fact interpretation as written.

- B. *Zoning Permit #3071 violates Section 5.5 of the City of Charlevoix Zoning Ordinance, by allowing an accessory building labeled as a "boat house" to support uses other than a use for the exclusive purpose of docking and storage of boats and other marine equipment. (Powers letter dated September 24, 2009- Exhibit 3)*

The 2009 finding has been amended to reflect the removal of the hot tub issue. Zoning Permit #3071 does not include a hot tub or the structure surrounding it.

The Board makes the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the Zoning Ordinance, which provisions read as follows:

Section 5.5(10): Boat house: An accessory building used for the exclusive docking and/or storage of boats and other recreational marine equipment; however excluding structures in the marine commercial district used for principal and accessory uses allowed in that district.

2. The applicants have not provided any evidence suggesting that the above Zoning Ordinance language has multiple meanings or is otherwise ambiguous when

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applied to the Andersons' property.

3. Because the language of the Zoning Ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons' property.

The Board finds that Zoning Permit #3071 does not violate Section 5.5 "boat house" of the Zoning Ordinance based on the following facts:

- a. Section 5.5(10) of the Zoning Ordinance requires that boat houses be used for the exclusive docking and/or storage of boats and other recreational marine equipment.
- b. The former and current City Planner have interpreted the definition of a boat house to include activities that are coincidental and associated with docking and the storage of boats and other recreational marine equipment. The ZBA agrees with this interpretation.
- c. Because the laundry facility and bathrooms may be associated with the docking of a boat, those activities are included within the definition of a boat house, as interpreted by former and current city staff. As a result, since the activities proposed fall within the definition of a boat house, the accessory structure will be used exclusively as a boat house. The garage portion of the accessory building is considered coincidental and associated with docking only when it is used for the storage of boats and other recreational marine equipment.
- d. The hot tub, and structure that once housed it, has been removed from the plans for Permit #3071; therefore the new plans do not violate the definition of "boat house."
- e. The portico/covered porch does not contain any proposed parking spaces as identified on drawing S1, and is not interpreted to be part of the boat house. The portico is considered part of the connection to the boat house and provides vehicular access through the connecting structure to the west portion of the property and associated parking spaces.

The Board unanimously agreed upon the findings of fact interpretation as written.

- C. *Zoning Permit # 3071 violates Section 5.32(8) of the City of Charlevoix Zoning Ordinance, by allowing a purported "boat house" that does not meet the Ordinance requirements for a detached accessory building. (Powers letter dated September 24, 2009- Exhibit 3)*

The Board reviewed the finding and the staff comments.

Member Cross questioned if boat houses were permitted to be built into the hill and she is uncomfortable with the proposed construction.

The Planner stated that the Code does not specify that a boat house can not be built into the hill.

The Board needs to determine if a boat house is permitted. The Board discussed the boat house, its size and other existing boat houses in the City. Chairman Withrow stated that the ZBA has previously discussed that the boat house is attached to the residence by the patio and that the definition of "ordinary high water mark" shall apply. The Board reviewed Section 5.7(7) Height of Building and the phrase

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“having its ground floor in a single horizontal plane”.

The Board makes the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the Zoning Ordinance, which provisions read as follows:

Section 5.5(10): Boat house: An accessory building used for the exclusive docking and/or storage of boats and other recreational marine equipment; however excluding structures in the marine commercial district used for principal and accessory uses allowed in that district.

Section 5.32(8): One (1) detached accessory building not more than sixteen (16) feet or one (1) story in height. A detached accessory building shall not be less than ten (10) feet from the principal building and shall not be closer to the side lot lines than the distance allowed for the principal building or the existing building line. An accessory building shall not be allowed in the front yard. The detached accessory building shall not be closer than six (6) feet to the rear lot line.

Section 5.7(7): Height of building: That building height for any structure or portion of a structure (having its ground floor in a single horizontal plane), is the vertical distance measured from the lowest elevation of the finished grade line of the ground around the structure to the highest point of the roof for flat roofs; to the deck line of mansard roofs; and to the mean height level between eaves and ridge for gable, hip and gambrel roofs. Intrusions below finished grade about the building for stair or window wells, courts or yards, designed in basements or cellars, to accommodate the minimum glazing area requirements of the BOCA/National Building Code shall not be considered when calculating building height. Building height for buildings having ground floors in two (2) or more horizontal planes at differing elevations may be calculated as if each ground floor plane area were a separate building.

Section 5.12(4): Yard, rear: The open space extending across the rear of a lot between a side lot line and being the required minimum horizontal distance between the rear lot line and the rear of the main building or any projections thereof. Along the Pine River Channel, Round Lake, Lake Michigan or Lake Charlevoix the rear lot line shall be the water mark of the Pine River Channel, Round Lake, Lake Michigan or Lake Charlevoix.

Section 5.176(1) and (2)

- (1) Authorized accessory buildings may be erected as part of the principal building or may be connected to the principal building by a roofed porch, patio, breezeway or similar structure or may be completely detached from the principal building.
- (2) Where an accessory building is attached to the side or front of a principal building, such accessory building shall be considered part of the principal building for purposes of determining yard dimensions.

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Section 5.198: Setback from waterbodies: Notwithstanding other provisions of this chapter, all principal uses located in the R-1 and R-4 districts shall have a setback of fifty (50) feet from the water mark of Lakes Michigan and Charlevoix and Round Lake, as well as the Pine River Channel Marine-Commercial district.

1. Except for Section 5.176(1), the applicants have not provided any evidence suggesting that the above Zoning Ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property.
2. Because the language of the Zoning Ordinance provisions, except for Section 5.176(1) are not ambiguous, the Board finds it is required to apply the plain meaning of those provisions to the Andersons' property.
3. Concerning Section 5.176(1), the Board finds that there is an ambiguity concerning how an authorized accessory building may be connected to the principal building for the purpose of determining whether an accessory building is an attached or detached accessory building. As a result, the Board finds that an interpretation of this provision is necessary.
4. The Board finds that the words "connected," "attached," "roofed porch," "patio," "breezeway" or "similar structure" are not defined in the Zoning Ordinance.
5. Because these terms are not defined, a dictionary can be used to provide the common meaning for those terms.
6. Webster's College Dictionary define these terms as follows:
attach: to fasten or affix; join; connect: to attach papers with a staple.
breezeway: an open-sided roofed passageway for connecting two buildings, as a house and garage.
connect: to join, link, or fasten together; unite.
patio: an area, usually paved, adjoining a house and used for outdoor lounging, dining, etc.; a courtyard, especially of a house, enclosed by low buildings or walls.
7. The Board finds that the rules of statutory construction apply when interpreting the zoning provisions. Specifically, when the Zoning Ordinance lists specific provisions and a general provision, then the general provision only includes the same class of items as stated in the specific provisions.
8. Finally, the Board finds that it can consider the past interpretations of city officials when applying the provision under consideration.

The Board finds that the proposed accessory building is an attached accessory building and that as a result Zoning Permit #3071 does not violate Section 5.32(8) of the Zoning Ordinance based on the following facts:

- a. The Board finds that the terms "connected" and "attached" are synonymous.
- b. The Board finds that Section 5.176(1) specifies the types of connections that make an accessory building an attached accessory building. These types of connections are by a roofed porch, patio, breezeway or similar structure.
- c. The proposed construction plans show that the single-family dwelling and the accessory building are to be joined in two different ways: (1) basement level 3 of the single-family dwelling is joined to the accessory

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- building through the proposed underground structures, and (2) the basement level 1 of the single-family dwelling is joined to the accessory building by a terrace.
- d. The Board finds that only one such connection is necessary for the accessory building to be an attached accessory building.
 - e. The Board further finds that an individual can physically walk from the single-family dwelling to the accessory building without walking outdoors, demonstrating that the two buildings are attached within the meaning of the Zoning Ordinance.
 - f. The ZBA concurs with the Staff interpretation that based on the photos presented at the public hearing that Section 5.176(1) includes as attached accessory buildings that are connected by patios in the same way that the proposed dwelling and the accessory building are connected by the terrace.
 - g. Since the Board finds that the boat house is not a detached accessory structure, the setback requirements from Round Lake of 50 feet and the setback requirements of 6 feet from the rear lot line do not apply and Section 5.32(8) was not violated.

The Board approved the recommendations for item C - as written, with Member Cross opposed.

- D. Zoning Permit #3071 violates Section 5.32(1) of the City of Charlevoix Zoning Ordinance, by allowing two buildings that qualify as dwellings on one lot. (Powers letter dated September 24, 2009- Exhibit 3)*

The Board reviewed the proposed findings of fact.

The Board makes the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the Zoning Ordinance, which provisions read as follows:

Section 5.32(1): One (1) single-family dwelling on each lot.
2. The applicants have not provided any evidence suggesting that the above Zoning Ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property.
3. Because the language of the Zoning Ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons' property.

The Board finds that Zoning Permit #3071 does not violate Section 5.32(1) of the Zoning Ordinance based on the following facts:

- a. The definition of dwelling is any building or portion thereof which is designed for or used exclusively for residential purposes containing one (1) or more dwelling units. (Section 5.6)
- b. The definition of single family dwelling is a detached building containing one (1) dwelling unit and designed for, or occupied by, only one (1)

- family. (Section 5.6)
- c. The definition of a multiple dwelling is a building or portion thereof containing two (2) or more dwelling units and designed for, or occupied as, the home of two (2) or more families independently of each other. (Section 5.6)
- d. The definition of a dwelling unit is a group of rooms located within a building and forming a single habitable unit with facilities which are used or intended for complete living facilities. (Section 5.6)
- e. The proposed floor plans of the boat house do not include sketches or labels for any kitchen facilities or bedrooms, which indicate the boat house will not be used exclusively for residential purposes and therefore does not meet the definition of a dwelling. (Section 5.6) Further, without a kitchen or bedroom, the boat house does not form a single habitable unit with facilities which are used or intended for complete living facilities. The boat house does not meet the definition of a dwelling, a dwelling unit, a single family dwelling, or a multi-family dwelling.
- f. Having a toilet, sink, washer and dryer within a boat house or accessory structure, does not prove that the structure is being used as a second dwelling unit unless the structure has a kitchen and bedroom(s).
- g. Historical interpretation of the Zoning Ordinance demonstrates that bathroom features, such as sinks and toilets, within accessory structures, have been allowed and do not create the existence of second dwelling units.

The Board unanimously agreed upon the findings of fact interpretation as written.

- E. *Zoning Permit #3071 violates Section 5.5 of the City of Charlevoix Zoning Ordinance, by allowing a purported "accessory" building that exceeds the size allowed under the Residential Code and that will be built on a different lot than half of the principal building. (Powers letter dated September 24, 2009- Exhibit 3)*

Chairman Withrow noted that the size of the boat house has been changed. City Planner Spencer advised the Board that the Charlevoix County Department of Building Inspection has advised him the size the boat house is not an issue as the boat house is attached to the principal structure. The Board reviewed the findings of fact.

The Board makes the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the Zoning Ordinance, which provisions read as follows:

Section 5.5: Accessory use: A use customarily incidental and subordinate to the principal use of the building and located on the same lot with such principal use or building.
2. The applicants have not provided any evidence suggesting that the above Zoning Ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property.
4. Because the language of the Zoning Ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons'

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property. (Exhibit 1)

The Board finds that Zoning Permit #3071 does not violate Section 5.5 of the Zoning Ordinance based on the following facts:

- a. Section 5.245 of the Zoning Ordinance states that “whenever any provision of this chapter imposes more restrictions than are imposed by State law or other ordinances of the City of Charlevoix, the provisions of this chapter shall govern. Where, however, the provisions of the State Building Code or any other ordinance or regulation of the City of Charlevoix impose more strict regulations than are imposed by this chapter, the provision of said state building code or other ordinances or regulations shall govern.”
- b. Residential Building Codes fall within the jurisdiction of the Charlevoix County Building and Safety Department.
- c. Nowhere in the City of Charlevoix Zoning Ordinance is there a requirement that accessory structures be less than 3000 square feet.
- d. The Residential Code in effect at the time Zoning Permit #3071 was issued on August 28, 2009 was the 2003 Residential Code. This Code defined “accessory structure” as follows: “In one- and two-family dwellings not more than three stories high with separate means of egress, a building, the use of which is incidental to that of the main building and which is located on the same lot.”
- e. Therefore, the Residential Code in effect when Permit #3071 was issued did not indicate that accessory structures have a maximum allowance of 3000 square feet. As a result, the current 3,000 square feet limitation of the Residential Code does not apply and there was no violation of Section 5.245 of the Zoning Ordinance when Zoning Permit #3071 was issued.

The Board unanimously agreed upon the findings of fact interpretation as written.

- F. Zoning Permit #3071 violates Section 5.176(1) of the City of Charlevoix Zoning Ordinance, by failing to properly address the nature of the underground tunnels between the primary residence and its purported “accessory.” (Powers letter dated September 24, 2009- Exhibit 3)*

Chairman Withrow stated this item is similar to letter C above. The Board reviewed the findings of fact.

The Board unanimously agreed to incorporate by reference its findings of fact under item C above.

- G. Zoning Permit #3071 violates Sections 5.5 and 5.190 of the City of Charlevoix Zoning Ordinance, by failing to recognize the need for adequate permanent access to the building on the lower half of the APJ Properties lot. (Powers letter dated September 24, 2009- Exhibit 3)*

The Board reviewed the proposed findings of fact.

The Board makes the following findings of fact concerning the Applicants’ requests for interpretation:

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1. The applicants have requested an interpretation of the following provisions of the Zoning Ordinance, which provisions read as follows:

Section 5.5: Adequate permanent access: A street or place having and along with its right-of-way, an easement or general common area which provides for the following: Residents personal vehicle movements and other non-motorized conveyance providing for safe maneuverability at an acceptable comfort level; parking; snow storage; protection of adjacent owners property, such as adjacent residents fences, stormwater, etc., emergency vehicles; moving vans; delivery vehicles; maintenance activities; related stormwater management and public utilities.

Section 5.190: Adequate permanent access shall be provided for all lots or parcels created within the City of Charlevoix in accord with the following standards:

| | | |
|-----|---|-------------------|
| (3) | Clusters units on places or as flag lots: | |
| | R/W Easement or | Travelled Surface |
| | General Common Area | |
| | 18' | 10' |

2. The applicants have not provided any evidence suggesting that the above Zoning Ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property.
3. Because the language of the Zoning Ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons' property.

The Board finds that Zoning Permit #3071 does not violate Sections 5.5 and 5.190 of the Zoning Ordinance based on the following facts:

- a. The definition of Adequate Permanent Access is a street or place having and along with its right-of-way, an easement or general common area which provides for the following: Residents personal vehicle movements and other non-motorized conveyance providing for safe maneuverability at an acceptable comfort level; parking; snow storage; protection of adjacent owners property, such as adjacent residents fences, stormwater, etc., emergency vehicles; moving vans; delivery vehicles; maintenance activities; related stormwater management and public utilities.
- b. Section 5.190 requires that adequate permanent access shall be provided for all lots or parcels created within the City of Charlevoix in accord with the standards cited above.
- c. The Andersons will have to conform to Section 5.242 and they have indicated on record that the three parcels will be combined prior to construction. Since the three parcels will be combined into one lot of record, or in the alternative, because the three parcels are intended to be occupied together (thus falling within the definition of a lot) adequate permanent access to the lot is provided via East Dixon Avenue which meets the minimum requirements of 5.190(3).
- d. Section 5.190 stipulates that adequate permanent access shall be

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provided to the lot. Section 5.190 does not require adequate permanent access to all portions of the lot.

The Board unanimously agreed upon the findings of fact interpretation as written.

- H. Zoning Permit #3071 violates Section 5.186 of the City of Charlevoix Zoning Ordinance, by allowing the creation of an artificial grade at a level substantially higher than the existing grade, where such artificial grade is being used to cover a substantial intrusion into the side yard. (Powers letter dated September 24, 2009-Exhibit 3)*

Chairman Withrow reminded the Board that this issue has been referred to the City Council to review. The ZBA, when they previously reviewed the case, were unable to find text in the Code that would restrict backfilling.

The City Planner stated that Staff was presented with new information at the hearing, which was not known and understood at the time permit #3071 was issued. The Planner reviewed Exhibit 11 - sketch 5, dated 1/7/10, submitted by Nick White of N.J. White & Associates with the Board. The sketch shows an underground encroachment into the side yard setback. This encroachment includes a second floating dock. The exhibits that were previously submitted had pictures of retaining walls, sheet piling, or structures that are needed to retain soil, prevent runoff and erosion. In the past, these items have not been required to meet setbacks. There is nothing in the drawings for the zoning permit application that suggests another bay in the boat house.

The Planner reviewed a sketch from the 2007 MDEQ review of the boat house with the Board (sketch is labeled as "upland boat well and boathouse, APJ Properties, 304 E Dixon Ave, Charlevoix, Michigan"). The sketch gives the impression that the east wall of the boat house was constructed with sheet piling. The drawing gives the impression that the sheet piling and the retaining walls to the east of boat house were needed to control the earth and prevent runoff. But another drawing shows that the sheet piling creates open space within the boat house where additional boats could be stored. When he looked at the application, Exhibit 3, sketch A-3 from Architects II dated 6/23/09 shows a dock. He assumed that the dock would be next to the boat. The Planner does not feel that either the Andersons nor Site Planning have meant to mislead us, but this is something that was misunderstood. If the Board wishes to consider it as underground structure and use the previous findings it is okay, Mr. Spencer advised the Board that he received a call from the Andersons' attorney who has advised him that if this an issue with the ZBA, they would be willing to remove the extra portion of the boat house. The removal underground structure will not change the footprint of the boat house. The Section 5.12 of the ordinance defines yard as an open space between a building and the adjoining lot lines from the ground upward. Mr. Spencer is not aware of other structures that are encroaching into the requirement setback. This is not grounds to revoke the permit.

It is the opinion of the Planner that there is a big difference between a retaining wall or sheet piling that is necessary to stabilize earth and prevent runoff, and the actual floor space or an additional bay of the boat house, even if it is below grade. He is not aware of any previous projects approved by the City where actual floor space was knowingly approved or allowed a structure to be placed within a side yard setback. One of the reasons we have setbacks, in addition to fire protection, is to provide an area for storm water drainage. If there is a solid structure underground that creates an impervious surface, this does not allow for drainage.

Member Clem asked that this item be considered separately. Members Withrow and Cross concurred.

Member Clem does not feel the ordinance intends to allow grade to be altered to allow a taller structure. He thinks the grade level to measure the boat house height should be lower than what was used.

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Assistant City Attorney Graham reminded the Board that issue H asks the Board to interpret Section 5.186. He asked the Board to review Section 5.186.

***5.186. Grades.** No premises shall be filled or graded so as to discharge surface runoff on abutting premises in such a manner that will cause inconvenience or damage to adjacent properties. When property is developed adjacent to existing properties previously developed, existing grades shall have priority.*

This section does not deal with height calculations, it deals with grades. There must be connection between the grade that may have been artificially created and a run off that in fact causes inconvenience or damage to adjacent properties. He asked the Board what evidence is there in the record that establishes that the grade will cause any run off that will cause damage to adjacent property.

Member Cross stated this project is very unusual. A large portion of the hill will be removed to accommodate the construction. She also voiced concern about possible storm run off. Assistant City Attorney Graham asked Member Cross what evidence has been placed into the record that the Board can use to base a finding on.

Chairman Withrow stated that there was evidence. It was brought up by the applicant, that if a non-permeable surface is extended into the 15' feet setback, it would lessen the area where storm water could seep into the ground.

Assistant City Attorney Graham reminded the Board that Section 5.186 does not deal with setbacks.

Member Anderson asked for clarification that Section 5.186 only deals with run off. The Assistant City Attorney concurred; the Board is dealing only with the interpretation of Section 5.186.

The Board asked for the width of the proposed boat house. Jim Anderson advised the Board that the boat house is 21' wide. The Board asked if surface water could flow into the lake and was advised by Staff that there is no provision in the Code that stated surface water could not run into the lake. City Planner Spencer advised the Board if there is a problem during construction and it impacts the neighbor's property then a violation will occur. He asked if anything has been submitted that proves that there will have a negative impact on the neighbor's property. The Planner stated that the issue is tied to grades, since the extra structure is created below ground; it will not allow the water to seep into the ground. Assistant City Attorney Graham stated that the intrusion allowed less seepage.

Chairman Withrow stated that there are three issues: A) run off; B) side yard setback and C) finished grade verses the height of the building. These issues all deal with this area. Presently, we are dealing with drainage, and there is nothing on the record to prove that there is a problem with drainage. Members Cross and Clem have a problem with the encroachment into the 15' setback.

Assistant City Attorney Graham does not see anything in the appellant's request that deals with setbacks, but the Board may act upon any issue you feel needs to be addressed.

City Planner Spencer asked the Board to look at item H of the Applicant's letter (Exhibit 3); the second part specifically states "where such artificial grade is being used to cover a substantial intrusion into the side yard."

Ms. Brown Powers stated that in her letter she had points set out as titles and under that there was a narrative that all of the issues are addressed in the letter under that provision. The entire letter is part of the appeal and the setback and the encroachment discussed under item H (Exhibit 3, page 11) is a part of the

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appeal.

The Planner agrees that the Board does need to address the setbacks and the issue of height, but it does not have to be under this section.

The Chairman asked that all comments from the audience be stopped. Public comment is closed.

Assistant City Attorney Graham suggested that as the Board has expressed a desire to address the setback and height issue, the Board can create sub-issue H.

The Board reviewed item H – Surface Water Run off. The Board reviewed the proposed findings outlined in the agenda packet. Both Members Clem and Cross agreed that there is no proof that there is a run off problem. Member Anderson asked the Board to look at item e:

The DEQ permit approval and issuance of a Soil Erosion and Sedimentation control permit by the Department of Building and Safety indicates that the State and County officials, who are professionally trained and qualified, feel the construction will not cause inconvenience or damage to neighboring properties.

Member Sullivan stated that given the evidence we have to approve it.

The Board amended the findings of fact.

The Board makes the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the Zoning Ordinance, which provisions read as follows: (Source: Exhibit 4)

Section 5.186 Grades: No premises shall be filled or graded so as to discharge surface runoff on abutting premises in such a manner that will cause inconvenience or damage to adjacent properties. When property is developed adjacent to existing properties previously developed, existing grades shall have priority.
2. The applicants have not provided any evidence suggesting that the above Zoning Ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property.
3. Because the language of the Zoning Ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons' property.

The Board finds that Zoning Permit #3071 does not violate Section 5.186 of the Zoning Ordinance based on the following facts:

- a. Section 5.186 states that no premises shall be filled or graded so as to discharge surface runoff on abutting premises in such a manner that will cause inconvenience or damage to adjacent properties. When property is developed adjacent to existing properties previously developed, existing grades shall have priority.

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- b. The DEQ permit approval and issuance of a Soil Erosion and Sedimentation control permit by the Department of Building and Safety indicates that the State and County officials, who are professionally trained and qualified, feel the construction will not cause inconvenience or damage to neighboring properties.
- c. The Anderson's representatives have indicated the use of barges or boats on the water would be used to remove the dredged materials, which will not impact adjacent properties or burden their use of the lower drive easement.
- d. The use of retention structures such as retaining walls and sheet pile anchors will prevent any discharge or runoff onto neighboring properties.
- e. Finally, the applicants have not presented any evidence to prove that there will in fact be discharge of surface runoff from the Anderson property onto the Johnson property in such a manner that will cause inconvenience or damage to the Johnson property. Rather, the concerns expressed are merely speculative in nature, which is not the standard in Section 5.186.

The Board approved the findings of fact for item H by the following voice vote.

Yeas: Members Anderson, Clem and Withrow

Nays: Members Cross and Sullivan

H-1. ZBA review of side yard setback issue

The Board reviewed the side yard setback requirements for the boat house.

City Planner Spencer stated that if the underground portion of the boat house is removed, it requires no changes to the plans and meets the ordinance.

Member Cross would like to see the 15' setback stand, for both above or below grade construction. Retaining walls are not included.

Chairman Withrow asked the Board to concur that a basement be considered the same as an above ground structure as it relates to setbacks. The Board discussed the statement. The Board asked Traver Wood to comment on other underground structures in the City.

Traver Wood gave the Board several examples of existing underground structures that encroach into setback areas. There are two examples on the record – the Beachouse and the Dunes. Both have structures that extend below grade into the front yard setback area. These are not R-1 projects, but they extend into the setback. The structures have impervious surfaces and are parking garages. The structure is 6-10 feet from the public sidewalk.

Member Sullivan voiced concern on allowing underground structures.

Chairman Withrow asked the Board to look at the ordinance and determine what's the right thing to do for the health and safety of the public. We need to stay as close to the ordinance as possible. The Board has discussed this issue before and he recalls that there wasn't any evidence that it was unacceptable and the issue was sent to the City Council.

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The Board of Appeals asked the City Council to amend the ordinance so that it addresses sub-surface buildings.

Chairman Withrow asked James Anderson if he was willing to remove the boat house section. Mr. Anderson advised the Board that it is not his intent to break any rules. If it is a misunderstanding and it is felt that the structure is against the rules, he will withdraw the section. He is not a rule breaker.

Chairman Withrow stated since Mr. Anderson has agreed to amend the Zoning Permit to eliminate any underground encroachments into the side yard setback, excluding placement of retaining or sea walls.

Member Cross voiced concern that the placement of the sheet piling might damage structures on Mr. Johnson's property and she asked the Zoning Permit applicant to address it.

James Anderson advised the Board that he is a Civil Engineer and he taught soil and foundation mechanics at Wayne State University for ten years. He has retained the best professionals to design the project to ensure that nothing will happen. The project is being carefully monitored to ensure that there is not damage.

City Planner Spencer pointed out that there are no structures near the proposed boat house. He also asked the Board to consider adding that there will be no structure within 15' of the side yard, excluding retaining walls and sheet piling. The City Planner advised the Board that the City Council will be holding a public hearing to amend the ordinance to eliminate the placement of a structure below ground.

The Board makes the following findings of fact concerning the Applicants' requests for interpretation:

- a. Section 5.12: Yard is defined as an open space at grade between a building and the adjoining lot lines, unoccupied and unobstructed by any portion of a structure from the ground upward, except as otherwise provided herein. In measuring a yard for the purpose of determining the width of a side yard, the depth of a front yard or the depth of the rear yard, the minimum horizontal distance between the lot line and any portion of any building shall be used.
- b. Section 5.12(5) defines side yard as a yard between the side lot line and the nearest side line of the building and extending from the rear line of the building to the front line of the building.
- c. Section 5.33(3) states that there shall be a side yard of not less than fifteen (15) feet on each side of any dwelling or accessory building.
- d. The Andersons have stated that the underground structures, excluding retaining walls and sheet pile, that encroach into the side yard setback will be eliminated. The ZBA finds that if the Andersons remove the underground structure, excluding retaining walls and sheet pile, the application will meet the sections referenced in a, b, and c of the zoning ordinance.

Motion made by Member Clem and seconded by Member Anderson that the Board adopt the findings of fact. Motion was adopted by unanimous voice vote.

The Board agreed to discuss structure height at the end.

- I. *Zoning Permit #3071 does not further the purposes of the R-1 Residential District. (Powers letter dated September 24, 2009- Exhibit 3)*

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The Board reviewed the items allowed in the R-1 zone district. Boat houses are permitted in the R-1 zone district. The Board reviewed the draft findings of fact with the hot tub reference being deleted.

Member Sullivan requested a short recess. The meeting was recessed at 7:32 p.m. Meeting reconvened at 7:40 p.m. with all members being present.

The Board makes the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the Zoning Ordinance, which provisions read as follows:

Article I, Section 5.1: This chapter is adopted pursuant to the authority conferred by Public Act 285, P.A. 1931, as amended of the State of Michigan, for the purpose of promoting and protecting the public health, safety, peace, comfort, convenience and general welfare of the inhabitants of the City of Charlevoix by protecting and conserving the character and social and economic stability of the residential, commercial, industrial, and other use areas, by securing the most appropriate use of land; preventing overcrowding of the land and undue congestion of population; providing adequate light, air and reasonable access; and facilitating adequate and economical provision of transportation, water, sewers, schools, recreation, and other public requirements.

Section 5.31 Purpose of R-1: The purpose of the regulations covering this district is to provide for a stable and sound low density residential environment with its appropriate neighborhood related utilities and services.

Section 5.6: District: A section or sections of the city for which the zoning regulations governing the use of buildings and premises, the height of buildings, the size of yards, and the intensity of use are uniform.
2. The applicants have not provided any evidence suggesting that the above Zoning Ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property.
3. Because the language of the Zoning Ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons' property. (Exhibit 1)

The Board finds that Zoning Permit #3071 does not violate Article 1, Section 5.1 and Section 5.31 of the Zoning Ordinance based on the following facts:

- a. The provisions of the Zoning Ordinance cited in this issue are merely statements of intent. They are not substantive provisions of the Zoning Ordinance that must be met, such as a setback requirement.
- b. The Zoning Ordinance specifies the uses permitted in the R-1 district and the dimensional requirements these uses must meet. The ZBA finds that a residential home and boat house are allowed uses in the R-1 district; therefore the application meets the intent and purpose of Article 1, Section 5.31. The plans indicate the home and boat house meet the dimensional requirements for the R-1 zoning district.

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Motion made by Member Cross seconded by Member Anderson that the Board finds that the project meets the requirements of the ordinance. Motion adopted unanimously

The Board agreed to review the structure height.

I-2. ZBA Review of Structure Height

Member Clem voiced concern how height is being measured. The ordinance requires that we use the lowest finished grade in measuring structure height. Finished grade is at the time the construction is completed.

City Planner Spencer reviewed the permit drawings with the Board. There is an existing slope on the property. The applicant is filling in an area near the shoreline to bring the boat house to 590.0. The existing seawall is at elevation 584.5. This will eliminate the need to cut out a large portion of the slope. The slope will be raised 5.5'. The Board needs to determine what the ordinance allows.

Member Clem does not feel it is the intent of the ordinance to allow an applicant to raise property elevations or grades.

Chairman Withrow reminded the Board that the Board has requested the Planning Commission and the City Council to look at amending the ordinance. The ordinance amendment has not been adopted. The Board needs to use finished grade.

Assistant City Attorney Graham said the Board is required to apply the plain meaning of the words. The ordinance plainly states that building height is measured from finished grade. The Board has an obligation to follow the ordinance language as clearly written.

The Board discussed the ordinance text and how it restricts height.

Motion made by Chairman Withrow and seconded by Member Cross that the boat house and the dimensions that exist at the finished grade meet the requirements of the ordinance. (Motion later rescinded.)

The Board reviewed the elevation drawings for the house. The Board reviewed the definition of structure height.

Height of Building: That building height for any structure or portion of a structure (having its ground floor in a single horizontal plane), is the vertical distance measured from the lowest elevation of the finished grade line of the ground around the structure to the highest point of the roof for flat roofs; to the deck line of mansard roofs; and to the mean height level between eaves and ridge for gable, hip and gambrel roofs. Intrusions below finished grade about the building for stair or window wells, courts or yards, designed in basements or cellars, to accommodate the minimum glazing area requirements of the BOCA/National Building Code shall not be considered when calculating building height. Building height for buildings having ground floors in two (2) or more horizontal planes at differing elevations may be calculated as if each ground floor plane area were a separate building.

Member Clem reviewed the south elevation with the Board. He feels that the building should be measured from basement level.

The Board reviewed the east elevation and the need for minimum glazing requirements. Assistant City Attorney Graham asked the Board to look and see if the residence has different horizontal planes. The board reviewed the south elevation of the house and the glazing of the buildings needed to meet BOCA Code.

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Member Sullivan reviewed the various basement levels. Basement levels 2 and 3 are located in one plane. Basement level 1 and the house are on another plane.

The Board asked Traver Wood to answer questions on the building. Mr. Wood was asked to comment on the considerations made by the designer and his intent to meet the height restrictions. Mr. Wood advised the Board that he worked closely with the architect on the issue. The intrusion below grade is allowed only to meet BOCA requirements. BOCA requires 8% glazing for the accessed floor area. The residence just meets the BOCA requirements. The glazing is not exceeded for more than 0.1%.

Chairman Withrow rescinded his motion.

Motion made by Member Anderson and seconded by Chairman Withrow that the boat house and the house meets the requirements of the ordinance.

Motions adopted by the following yea and nay vote:

Yea: Members Cross, Anderson, Withrow
Nay: Members Clem and Sullivan

Motion adopted.

Member Clem voiced concern that the boat house was too high. Member Sullivan feels that the boat house should be measured from the ordinary high water mark.

J. Petitioners claim Permit #3071 should be subject to Planning Commission review in accordance with Section 5.180. (Powers letter dated November 5, 2009-Exhibit 3

The Board reviewed request for Planning Commission review on large extractions.

Member Cross asked for clarification on how the excavation was going to take place and how the materials were planned to be removed. Chairman Withrow asked James Anderson to give the Board additional information.

James Anderson advised the Board that an environmental study has been done on the property. The dirt is clean. There are no pollutants and there is nothing that deals with wood processing on the property that exceeds the State minimums. It is their intent to use the materials to level a portion of the lower level. The majority of the site is at elevation 590. The materials will be trucked off the site and will be removed by trucks on Dixon Avenue. The excavations from the boat house might be removed by a barge. Mr. Anderson stated that his property has been used as a dumping site for dredging materials by others in the past.

Eldon Johnson approached the Board to clarify Mr. Anderson's statement. In 1999, sea walls and dredging took place along the shore. He granted permission for Mr. Cunningham to cross his property to remove dredged materials. Mr. Johnson claims that he has never dumped anything on Mr. Anderson's property.

Member Sullivan asked that item D be removed from the findings.

The Board makes the following findings of fact concerning the Applicants' requests for interpretation:

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1. The applicants have requested planning commission review of Permit #3071 in accordance with Section 5.180.

Section 5.180. Sand, Soil, Gravel Extraction: The removal of soil, sand, topsoil or other materials from the land is not permitted in any zone except under a temporary permit from the planning commission. Issuance of such a permit shall be based upon an application accompanied by a suitable agreement or bond guaranteeing that such removal will not cause stagnant water to collect; that no material shall be taken from any part of a lot within one hundred (100) feet of an adjacent lot line; and that the surface of the land, at the time of the expiration of said permit, will not be left in an unstable condition, unfit for the growing of turf or for other land uses permitted in the zone in which such removal occurs. The provisions of this section shall not be construed to prohibit normal excavations or grading incidental to the construction or alteration of buildings.

2. The applicants have not provided any evidence suggesting that the above Zoning Ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property. (Exhibit 7)
3. Because the language of the Zoning Ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions and Section 5.180 does not apply to Permit #3071 based on the findings of fact below.

The Board finds that Zoning Permit #3071 is not subject to Section 5.180 of the Zoning Ordinance based on the following facts:

- a. Section 5.180 has been part of the Zoning Ordinance since its first passage in 1978.
- b. Section 5.180 only applies to extraction of soil, sand and gravel for commercial or mining purposes in any zone within the City jurisdiction.
- c. The last sentence states that "this section shall not be construed to prohibit normal excavations or grading incidental to the construction or alteration of buildings." Therefore this language excludes Planning Commission review for any construction project in any zone that is not considered a commercial extraction or mining operation. The construction of a home and boat house is not a commercial extraction or mining operation and is considered a normal excavation and/or grading project necessary for construction of a building.

Motion made by Member Clem and seconded Member Sullivan to accept the finding of fact as amended. Motion was unanimously adopted.

- K. *Petitioners claim Permit #3071 should be subject to Section 5.32(10). (Powers letter dated November 5, 2009-Exhibit 3*

The Board reviewed the request to require parking for boat docks.

Member Cross asked that the Board ensure that there is parking available for individuals using the docks. The City Planner pointed out to the Board the location of the 11 parking spaces. The Code requires parking for boat docking spaces, but it does not require that a parking plan created. Parking plans are required for commercial developments.

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Motion made by Member Anderson and seconded by Member Clem that the Board approve option 1.

The Board makes the following findings of fact concerning the Applicant's request for interpretation:

1. The applicants have requested Planning Commission review of Permit #3071 in accordance with Section 5.32(10). Exhibit 7.

Section 5.32(10): (10) Recreational boat docks, boat launch ramps and piers are permitted as accessory structures subject to the regulations provided in this chapter and subject to any applicable federal and state regulations or laws, and providing further that for each one and one-half (1½) boat docking spaces in excess of two (2) spaces, there shall be provided one (1) on-site parking space accessible to the user of the docking space.
2. The applicants have not provided any evidence suggesting that the above Zoning Ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property. (Exhibit 7)
3. Because the language of the Zoning Ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions and Section 5.32(10) does not apply to Permit #3071 based on the findings of fact below.

The Board finds that zoning Permit #3071 complies with Section 5.32(10) of the Zoning Ordinance based on the following facts:

- a. Section 5.32(10) has been applied to Permit #3071 since 11 on site parking spaces have been delineated on drawing S1 in accordance with the requirements of 1 parking space each for 1 1/2 boat docking space or 26 lineal feet. (Section 5.5 Definition of boat docking space)

In addition, the Board finds that Article VI is not applicable based on the following facts:

- b. Article VI, Section 5.212(1) (Off Street Parking Requirements) states that "a plan of the proposed parking and loading areas shall be submitted for all new commercial, professional office, industrial, multiple family and mobile home parks."
- c. A parking plan has never been required for any residential project in an R-1 zone.
- d. Based on this precedent and the plain language in Article VI, Section 5.212(1), the Board finds that a parking plan is not required for Permit #3071.

Motion adopted by unanimous voice vote.

- L. *Petitioners claim Permit #3071 should be subject to a Landscaping Plan consistent with Section 5.201-5.210). (Powers letter dated November 5, 2009-Exhibit 3)*

The Board reviewed Staff's comment.

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The Board makes the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested Planning Commission review of Permit #3071 in accordance with Section 5.201-5.210. (Exhibit 7)

Section 2.201-5.210: *See Exhibit 1 pages 66-71 for exact language.*
2. The applicants have not provided any evidence suggesting that the above Zoning Ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property. (Exhibit 7)
3. Because the language of the Zoning Ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions and Sections 5.201-5.210 do not apply to Permit #3071 based on the findings of fact below.

The Board finds that Zoning Permit #3071 is not subject to Section 5.201-5.210 of the Zoning Ordinance based on the following facts:

- a. Section 5.202 (1) states "No site plan shall be approved under Chapter 51, section 5.188 of this Code, nor shall any site plan for a parking lot required by section 5.32(10) be approved, unless the site plan shall show landscaping consistent with the requirements of this section [5.201 through 5.210]."
- b. Section 5.10 defines a parking lot as "Parking Lot: A tract of land which is used for the parking of motor vehicles and is not accessory to any other use on the same or any other lot, and contains parking space for the general public or reserved for individuals by the hour, day, week or month."
- c. The Board finds that Permit #3071 was not subject to development plan review under 5.188 and only parking spaces were required, not a parking lot as defined by 5.10. Therefore zoning permit #3071 was not required to submit a landscaping plan consistent with Sections 5.201-5.210.

Motion made by Member Clem and seconded by Member Cross to adopt option 1, with item C to be removed. Motion was adopted by a unanimous voice vote.

5. Motion

Motion made by Member Clem and seconded by Member Anderson to uphold the issuance of Permit #3071 based on the findings of fact contained herein subject to the express condition that the Andersons remove the underground structure on the east side of the boat house (east boat well) within the 15 foot side yard setback, except for the retaining walls and sheet pile. Motion adopted by unanimous voice vote.

I) REQUESTS FOR NEXT MEETING=S AGENDA – None.

J) ADJOURNMENT

Motion made by Member Cross and seconded by Member Sullivan to adjourn. Motion was adopted.

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Meeting adjourned at 8:34 p.m.

Greg Withrow, Chairman

Linda Jo A. Weller, Recording Secretary

Carol A. Ochs, City Clerk