

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, June 29, 2011 - 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 Chairman Withrow at 6:05 p.m.

B) ROLL CALL

Members Present: June Cross, Greg Withrow, Gary Anderson, and Richard Clem
Members Absent (excused): Larry Sullivan, Mary Eveleigh
Staff Present: City Planner Michael Spencer, Assistant City Attorney Bryan Graham

C) INQUIRY INTO POTENTIAL CONFLICTS OF INTEREST – None.

D) APPROVAL OF AGENDA

Recording Secretary Note: Chairman Withrow did not make a motion to approve the agenda; however, board members did not provide comments or opposition to the agenda as submitted.

E) APPROVAL OF MINUTES

1. Motion to approve or amend the May 18, 2011 meeting minutes.

Chairman Withrow tabled the approval of the May 18, 2011 minutes. The May 18, 2011 minutes are scheduled to be reviewed at the subsequent Board meeting in July, 2011. City Planner Spencer noted that staff has transcribed 20 minutes (approximately) of the May 18, 2011 meeting minutes, specifically the section(s) questioned by Member Eveleigh.

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

G) NEW BUSINESS

1. Public Hearing for Project 2011-03ZBA-Johnson appeal of Zoning Administrator's decisions of May 18, 2011 and June 2, 2011.
 - a. Staff Presentation

City Planner Spencer confirmed that the Board had reviewed their packets prior to the meeting. The City Planner stated to the Board that the meeting does not require the ZBA to interpret any provisions of the Zoning Ordinance; instead, the Board is reviewing the appeal of the Zoning Administrator's decision of May 18, 2011 and June 2, 2011. City Planner Spencer stated that the first appeal is in regard to the issue of standing; as outlined in memos from both Valerie Snyder (Anderson's attorney) and Assistant City Attorney Bryan Graham. The City Planner reviewed the available materials relative to the current Project appeal. City Planner Spencer asked the Assistant City Attorney to provide an overview of the appeals to the Board.

Chairman Withrow posed the question to Assistant City Attorney Bryan Graham; The first item the Board is going to discuss is the question of standing relative to the appeal, correct? Mr. Graham confirmed the Chairman's question and explained that the question of standing was raised by Ms. Snyder in her letter dated June 21, 2011. Mr. Graham explained that his memo is intended to give the Board and Staff a brief synopsis of what the law requires in order to bring an appeal to the ZBA. Mr. Graham stated that the person who is bringing the appeal to the Board must have what is called, legal standing. Mr. Graham explained that in order to have legal standing, the applicant must prove "special damages" that are unique

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES

Wednesday, June 29, 2011 - 6:00 p.m.

Page 2

or different from the public at large. Mr. Graham explained to the Board that they must decide whether or not Eldon Johnson has established an interest that differs from members of the general public. Mr. Graham went on to say that the issues before the Board related to enforcement of the Zoning Ordinance and need to show that Mr. Johnson is in a different situation than members of the general public. Mr. Graham stated that if the Board does not find Mr. Johnson to have legal standing then the appeal does not have to be heard by the Board.

Chairman Withrow asked Board members if they had any questions for Mr. Graham. Member Clem asked if Mr. Johnson's proximity to the subject property gives him legal standing. Mr. Graham stated that the proximity of the property alone is not enough to provide legal standing.

Member Cross asked Mr. Graham; If Mr. Anderson is supposed to be 15' away from the side yard property line, and now he is supposedly 12.5' into the 15' setback, why was she told that the project would not encroach into the side yard setback requirement? Mr. Graham responded by saying the merits of the project are not currently in question, only the matter of legal standing for appeal.

Chairman Withrow opened the meeting for public comment, specifically requesting to hear from Valerie Snyder (Anderson's attorney) and the Applicant (Johnson's legal counsel).

b. Presentation by Anderson (If requested).

Valerie Snyder, Attorney on behalf of James and Patricia Anderson and APJ Properties, 300-302-304 E. Dixon Avenue.

Ms. Snyder stated that APJ Properties are now the legal owner of the combined properties at 300, 302, and 304 E. Dixon Avenue. Ms. Snyder explained that she raised the issue of legal standing because she does not believe there to be legal standing for the Johnson's appeal. Ms. Snyder went on to say that to have legal standing you must be considered a "person aggrieved," and in order to be a person aggrieved the courts have said that you have to allege and prove special damages caused by the alleged zoning violation that are not in common with other similarly situated property owners. Ms. Snyder stated that Mr. Johnson needs to have harm different from the general public. Ms. Snyder explained that living within the 300' notice requirement of the property does not grant legal standing, a general increase in traffic volume does not grant legal standing, and a decrease in property value does not grant legal standing. Ms. Snyder stated that, unfortunately, there are more cases showing what does not grant standing as opposed to cases that show what does grant standing. Ms. Snyder stated that previous cases show that it is not enough to disagree with what is being built on your neighbor's property to grant standing. Ms. Snyder explained that there are two decisions being appealed to the Board, and that she would like the Board to consider them individually with regard to standing.

Ms. Snyder stated that the first decision being appealed is the May 18, 2011 decision involving the issue of side yard setbacks. Ms. Snyder stated that the only allegation she has seen from Mr. Johnson with regard to this issue is that Mr. Johnson has a crack on his property. Ms. Snyder explained that she has not seen any proof that the crack in Mr. Johnson's property was caused by the alleged zoning violation. Ms. Snyder stated that she is not aware of when the crack in the property occurred, or what caused the crack in the property, only that when the snow melted the crack was visible. Ms. Snyder explained that the crack is substantially smaller today than the day the crack was discovered and that she is unsure if natural freezing and thawing of the property caused the crack or the activity on the Anderson's property. Ms. Snyder stated that regardless of what caused the crack; Mr. Johnson must prove to the Board that the alleged zoning violation caused the crack in order to have standing as well as show that the crack has caused special damage also providing standing. Ms. Snyder added that regardless of how or why the crack appeared on Mr. Johnson's property, the Anderson's have offered to pay to have the crack repaired and the offer was declined by the Johnson's. Ms. Snyder explained that the Andersons are currently being

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, June 29, 2011 - 6:00 p.m.
Page 3

sued by the Johnsons and that the crack in the property is one of the issues in the case. Ms. Snyder explained to the Board that they need to decide whether or not one crack in the property is sufficient harm, and whether or not there is proof that the crack was caused by the alleged zoning violation. Ms. Snyder stated that she does not believe that Mr. Johnson can meet the burden needed to provide legal standing.

Chairman Withrow requested photo evidence of the crack in Mr. Johnson's property. Ms. Snyder provided photos (2 sets) of the crack in the property (Exhibit 15) to the Board. City Planner Spencer also displayed the photos on the screen for the audience.

Ms. Snyder stated that the 15' side yard setback issue is the first issue needed to be decided on by the Board. Ms. Snyder also stated that the crack in the Johnson's property is the only allegation of harm that she is aware of to date, with no proof of what caused the crack.

Ms. Snyder stated that the second decision being appealed may be and should be decided on separately. Ms. Snyder explained that the second decision occurred on June 2, 2011 and involved two separate issues; 1 – the first allegation is that the Anderson's are constructing their project in the wrong order by building the boathouse prior to building the home, 2 – the rear lot line has been moved southerly into the waters of Round Lake. Ms. Snyder stated that Mr. Johnson must show that he has been harmed by the alleged zoning violations, and prove that the harm was caused by the alleged zoning violations. Ms. Snyder stated that she believes there is no standing on either of the above issues and that the Board should dismiss the appeal in its entirety.

c. Presentation by Applicant (If requested).

Timothy Stoepker, Co-Council with Bridget Brown Powers representing Mr. and Mrs. Eldon Johnson, 200 Ottawa Northwest, Suite 1000, Grand Rapids, MI 49503 addressed the Board.

Mr. Stoepker stated that Ms. Bridget Brown Powers (Johnson's attorney) and Mr. Nick White are also present and available. Mr. Stoepker stated that he would like to address the Board on the issue of standing and explained that the Circuit Court has found standing for the Johnson on prior appeals previously heard by the Board. Mr. Stoepker stated that there is specific and special damage that arises from the claimed appeals. Mr. Stoepker explained that the first issue of standing stems from the building and structure that is being constructed in the side yard adjacent to the Johnson property. Mr. Stoepker stated that the boat house building and structure is the accessory use and is in clear violation of the side yard setback causing harm to the Johnson's property.

Chairman Withrow asked Mr. Stoepker if he was aware of the previous findings of the Board with regard to this project. Mr. Stoepker stated that he was aware of the findings and believes that circumstances have changed due to recent Zoning Ordinance changes. Chairman Withrow asked staff, specifically legal counsel; whether or not the Zoning Ordinance has changed since the previous findings and whether or not the changes would apply to the current appeal. Mr. Graham explained that the law states that the Zoning Ordinance in effect at the time of the decision controls. Mr. Graham also explained that the Staff approved the decision under the previous Zoning Ordinance and because the Anderson's relied on that decision they invested large sums of money into construction. Mr. Graham stated that the City is precluded from using the current Zoning Ordinance because of the detrimental reliance of the Anderson's.

Mr. Stoepker respectfully disagreed with Mr. Graham's above explanation. Mr. Stoepker passed out photos to Board members (Exhibit 16) and a survey (Exhibit 19) of the subject properties.

Chairman Withrow asked Staff if they had seen Exhibits 16 and 19 in the past, Staff answered, no. The Chairman asked Staff if they had the opportunity to compare the Exhibits in the past, Staff answered, no.

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES

Wednesday, June 29, 2011 - 6:00 p.m.

Page 4

Mr. Stoepker stated that Exhibit 19 identifies two specific things, one as depicted in the photo, and the other determined by a site examination and survey. Mr. Stoepker stated that as a consequence of the construction of the accessory structure, and its location within the side yard setback, two specific special damages have been incurred by the Johnson's property. Mr. Stoepker explained that the substantial cracking in the property came from the sea wall construction specifically.

Chairman Withrow asked Mr. Stoepker if he had an idea as to the depth of the cracks in the property. Mr. Stoepker stated that the locations of the cracks are identified on the survey. The Chairman explained that he was interested in the depth of the cracks. Mr. Stoepker stated that Mr. Johnson could speak to the depth of the cracks.

Mr. Stoepker stated that the Johnson property adjacent to the construction has settled 4" – 6" after the structure went in and is also noted on the survey. Mr. Stoepker stated that Mr. Johnson could speak to when the settling began to occur.

Chairman Withrow asked that Mr. Stoepker show the Board specifically where the settling occurred using the Exhibit 16, and Mr. Stoepker asked that Mr. Johnson assist the Board and also suggested that Mr. Johnson identify the cracks on the survey. Mr. Johnson provided the location of a nail on June 17, 2011 that has subsequently shifted approximately 0.41' and the elevation change on the property has been approximately 3.5" – 4". Mr. Johnson also noted that there is potential for soil failure and that there are several cracks on the property potentially due to the removal of tree root balls creating voids. Mr. Johnson stated that he first discovered the cracks on March 1, 2011 and that the cracks were approximately an inch and a half to two inches wide. Mr. Johnson suggested that the area of the property that is cracked may have to be excavated down to hardpan and compacted. Chairman Withrow asked Mr. Johnson if anyone knew the depth of the cracks, to which Mr. Johnson replied, no. Mr. Johnson stated that borings would have to be taken to determine the depth of the cracks.

Mr. Stoepker asked Mr. Johnson if the current property condition existed prior to construction, to which Mr. Johnson replied, no. Mr. Stoepker passed out another photo (Exhibit 22) to the Board. Mr. Stoepker pointed out the foundation and the wall of the boat house located in Exhibit 22 and also stated that the wall is above grade. Member Clem stated that Exhibit 22 shows a retaining wall, not a foundation. Mr. Stoepker stated that retaining walls have not been built and that the wall specifically tied into the foundation. Member Clem stated that every print he has looked at showed the wall as a retaining wall. Mr. Stoepker again stated that the wall was specifically tied into the foundation of the boat house. Member Clem noted that the retaining wall could be tied into the foundation of the boat house. Mr. Stoepker stated that City Planner Spencer's response email (Exhibit 3) to Ms. Brown Powers acknowledges that the retaining wall is part of the foundation.

Chairman Withrow addressed the Board and asked if any members required any further information prior to deciding on the issue of standing. The Board did not require any further information.

Member Clem made a motion to approve standing for the appeal, seconded by Member Anderson. Motion passed unanimously. The Chairman provided clarification to Ms. Snyder that the previous motion did approve standing for only the May 18, 2011 decision and not the June 2, 2011 decision.

Chairman Withrow asked Staff for clarification of the details regarding the appeal of the June 2, 2011 Zoning Administrator's decision. City Planner Spencer stated that the appeal involved the timeframe of construction (accessory structure built prior to primary) as well as the location of the rear lot line. Chairman Withrow asked Mr. Stoepker if he had any comments regarding the June 2, 2011 decision.

Mr. Stoepker stated that the accessory structure's construction has created the special damage as it relates to the neighboring property. Chairman Withrow noted that the issue at hand is the order of

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, June 29, 2011 - 6:00 p.m.
Page 5

construction not the damage that may have been caused during construction. Mr. Stoepker noted that it is the accessory structure itself that is being constructed that is causing the damage to the Johnson property. The Chairman asked Mr. Stoepker if anything would change if the accessory structure was constructed after the primary structure. Mr. Stoepker stated that based upon the engineering plans that would be required to be reviewed; the construction plans could potentially be different. Mr. Stoepker stated that the order of construction is in place to protect neighboring properties from damage. Mr. Stoepker explained that the order of construction has caused specific harm to the Johnsons because the accessory structure is the immediate neighboring structure to their property, in their view corridor, changes the water ward side of their property and was not previously permitted above the high water mark by adding land. Mr. Stoepker stated that the Johnsons are directly impacted by the accessory structure because they view it, and it should not be there other than the fact that it was permitted as an accessory structure to a principal structure that needs to be there today and no one else is impacted by the structure.

Member Anderson asked Staff if the building permit was approved for the entire project, to which Staff replied, yes. Member Anderson asked if there were any stipulations in the building code that prevented an accessory structure to be built prior to a primary structure. City Planner Spencer noted that the Board deals specifically with zoning permits and the County Building Department deals with building permits. The City Planner also noted that the zoning permit was issued for the primary and accessory structure at the same time. City Planner Spencer asked the Anderson's contractor if the County issued a permit for both the accessory structure and the home, to which the contractor replied, no, only the accessory structure had been permitted and that the home was still in the engineering phase. City Planner Spencer reiterated that, neither he nor the Board had jurisdiction over building permits. The City Planner noted that the Zoning Ordinance does not dictate whether or not the primary or accessory structure must be built first.

Mr. Stoepker stated that he believes that the language in the Zoning Ordinance is clear as to which structure needs to be built first; as specified in the definitions he has submitted (Exhibit 21). Mr. Stoepker went on to read from the language he submitted, specifically, accessory structure. Mr. Stoepker noted that there is no main building, and no guarantee by the applicant that a main building will be constructed. Mr. Stoepker stated that the boat house's size would not be allowed under the current ordinance and that the Johnsons are encumbered by a structure that would not be permitted. Chairman Withrow asked Mr. Stoepker to specify what specifically he was referring to in the Zoning Ordinance, to which Staff replied, the definition of an accessory structure.

Board members reviewed the section of the ordinance. Staff noted to the Board that the definition of accessory use has changed, however, the definition of accessory structure had not.

Mr. Stoepker read the definition of accessory use and noted that the definition required two things, one, that the principal use needs to exist because the accessory use has to be incidental and subordinate to the principal use and two, the accessory use needs to be located on the same lot as the principal use.

Chairman Withrow asked Mr. Stoepker if he had considered the fact that the lots had now been joined and that there is an existing residential house on the property to which a boat house is being built. Mr. Stoepker noted that the boat house was approved by the ZBA and contingent on the primary structure being in place with regard to height.

Assistant City Attorney Graham noted that the Board is beginning to argue the merits of the appeal rather than the issue of standing. Chairman Withrow asked Mr. Stoepker what was different from the Johnsons that is different from other members of the community, to which Mr. Stoepker replied that the Johnsons are the immediate next door neighbor impacted by an accessory use that could have the potential to be used other than the principal use because there is no principal use on the property. Mr. Stoepker went on to explain that the height of the boat house affects the Johnson's view corridor, which is not harm that will

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES

Wednesday, June 29, 2011 - 6:00 p.m.

Page 6

impact only the Johnson's, not the general public.

Chairman Withrow asked Staff if view corridors were noted anywhere in the Zoning Ordinance, to which Staff replied, no. Member Clem noted that the Board has heard view corridor discussions in the past, and asked Staff what the results of those discussions has been. Staff noted that a development may not be stopped on view corridor issues alone and upon completion, the boat house will be viewed by everyone on Round Lake.

Mr. Stoepker stated that the boat house directly impacts the Johnson's more than the general public. Member Clem asked Mr. Stoepker why the Johnson's were impacted more than anyone else, to which Mr. Stoepker replied, they are the immediate neighbor and uses that occur there would not otherwise occur without a principal use being built. Member Clem noted that Mr. Stoepker's answer still does not show what gives the Johnson's standing, to which Mr. Stoepker replied; the uses are specific to only the Johnsons.

Assistant City Attorney Graham noted that the issue being raised is the enforcement decision by the Zoning Administrator. Mr. Graham went on to say, the argument is not the existence of the accessory building, but the order in which the ZBA authorized building are being constructed and whether or not that order is causing harm to the Johnsons.

Mr. Stoepker stated that he is arguing the existence of the structure, because the structure should not exist today without the principal use being on the property. Chairman Withrow asked Mr. Stoepker why the existence of the structure was different to the Johnson's than anyone else. Mr. Stoepker asked co-counsel to approach (Bridget Brown Powers, 618 Howard Street, Petoskey, MI).

Ms. Powers stated that the reason for standing is obvious, and the reason is that, these parties are in litigation and the subject of that litigation is the boat house. Ms. Powers explained that the Johnson property is burdened by an easement and the easement is to the advantage of the Anderson's and APJ Properties. Ms. Powers went on to explain that she and her clients believe that the boat house is being unlawfully built. Ms. Powers noted that the issues above are in Circuit Court and there is an action pending. Ms. Powers stated that she believes the Andersons are trying to "race the clock" and make a detriment to the Johnsons by building out of order. Ms. Powers noted that the ordinance has changed since the zoning permit was issued and therefore, the Andersons cannot build the boat house without a principal ordinance. Ms. Powers stated that the original approved plans showed a residence that was to be demolished and that a new residence was to be built together with the "attached boat house." Ms. Powers noted that the detriment and damage to the Johnsons includes attorney fees, property damage, motions have to be filed, and use of easements. Ms. Powers noted that Circuit Court has ruled twice that the Johnsons have standing.

Mr. Stoepker noted that the structure in and of itself is a nuisance per se if it violates the Zoning Ordinance, and if so, the construction needs to be stopped and have the requisite standing to do so. Mr. Stoepker went on to say that the building exists next to their property which is not authorized by law unless the principal structure is there.

Chairman Withrow asked if a rebuttal was requested, to which Ms. Snyder replied, yes.

d. Rebuttal by Applicant (If requested).

Ms. Snyder stated that she believes the reason there is difficulty understanding the harm caused to the Johnsons if the boat house is built prior to the house is because there isn't any. Ms. Snyder stated that what we are hearing is that the Johnson's proximity is causing them harm; however, the courts have ruled that proximity is not enough to confirm standing. Ms. Snyder noted that the litigation she is involved in, in

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, June 29, 2011 - 6:00 p.m.
Page 7

Circuit Court, has to do with an easement not the boat house or order of construction. Ms. Snyder also noted that the Andersons are being sued by the Johnsons for overburdening an easement and trespassing not zoning issues or the boat house construction. Ms. Snyder noted that the Andersons are not building the boat house first because of time constraints, but because the engineers said that the boat house needed to be built first and then to work up hill. Ms. Snyder stated that the Circuit Court has not ruled on standing with regard to enforcement actions or decisions. Ms. Snyder noted that the plan that was approved by the ZBA was for the boat house and residence together and the order of construction was never specified. Ms. Snyder went on to say that if both the boat house and residence are not built, potential legal and zoning enforcement action could be taken to abate a nuisance. Ms. Snyder noted the two cases that were previously discussed with the Board by Mr. Johnson's counsel, and the fact that the language in the cases state that you cannot have a standalone accessory use on a lot without a contemplated principal residence. Ms. Snyder noted that one of the cases involved a standalone parking lot and the ordinance only allowed parking lots as an accessory use, the other case involved a property owner that wanted to build a garage on his property without any plans to build a residence. Ms. Snyder went on to say that the Board denied the request because no contemplated principal residential use was to be made of the property and that at this time they do not plan to use the lot as a residence. Ms. Snyder stated that on the issue of standing, there is no issue with the order of construction or the southerly lot line.

Assistant Attorney Graham noted that the Michigan Supreme Court has issued an opinion on the issue of standing, which tightened the requirements to establish standing from a legal perspective.

Chairman Withrow asked Mr. Graham to further explain his statement above. Mr. Graham stated that special damages must be shown and proved to establish standing.

Chairman Withrow closed the presentation portion of the meeting. The Chairman noted that he is a Civil Engineer and that the standard method of building is to start at the low end and move up. Chairman Withrow stated that he has heard nothing that would convince him that the Andersons are not planning on building a residence or that shows harm to the Johnsons different from any member of the public, including the rear lot line. Member Clem stated that he does not believe the Johnson's have standing any more so than other members of the public with regard to the second decision (June 2, 2011).

Chairman Withrow asked if the Board was prepared to make a motion relative to the question of standing on the second issue. City Planner Spencer noted that the Board could make a motion stating: The Zoning Board of Appeals finds that the applicants do not have standing to appeal the June 2, 2011 decision. Mr. Graham added: because they have not established special damages.

Member Clem motioned (using the above language from Staff), seconded by Member Anderson. Chairman Withrow requested a roll call voice vote. Motion passed unanimously.

Chairman Withrow explained that the standing issue has been finalized for both appeals. The Chairman went on to explain that the appeal of the decision of May 18, 2011 does have standing and the appeal of June 2, 2011 does not have standing.

e. Call for public comments

Mr. Stoepker stated that the initial issue needing determination by the Board is which version of the Zoning Ordinance should be used. Mr. Stoepker stated that he submitted a letter to the City Attorney stating that, under all case law the current ordinance should apply because the construction did not commence until January of 2011. Mr. Stoepker noted that a copy of the foundation permit (Exhibit 17) shows that the permit was applied for on December 27, 2010, issued for the boat house only on December 30, 2010, and construction did not begin until January of 2011. Mr. Stoepker noted that because the Andersons and APJ did not commence substantial construction until 2011, the current Zoning Ordinance should be

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, June 29, 2011 - 6:00 p.m.
Page 8

applied to the permit. Mr. Stoepker noted that the current ordinance has amendments that impact setback requirements and that even without the amendments the Andersons violate the side yard setback requirements. Mr. Stoepker noted in Exhibit 17, a letter dated June 27, 2011, addressed to Assistant City Attorney Graham that discusses the issue of vested rights and that the Andersons are bound by the current ordinance due to the fact that substantial construction was not started until January 2011. Mr. Stoepker stated that if the Andersons had started substantial construction prior to June 21, 2010 when the ordinance was amended, the former ordinance would apply. Mr. Stoepker noted that Exhibit 17 also contains cited cases pertaining to building permits issued under prior ordinances that had not commenced substantial construction and therefore were bound by the current ordinances. Mr. Stoepker stated that the Andersons are claiming to the Board that they are building a "lawful non-conforming structure." Mr. Stoepker went on to say that the current ordinance requires a special land use permit and no such permit has been acquired by the Andersons, and that a boat house can only be 2000 square feet while the current boat house is 4000 square feet.

Chairman Withrow stated that there is a decision before the Board as to what Zoning Ordinance should be applied to the Anderson's building permit. The Chairman addressed Ms. Snyder and inquired as to when she received the letter included in Exhibit 17; Ms. Snyder stated that she received the letter today (June 29, 2011) at 3:00pm. Assistant City Attorney Graham noted that the ZBA's previously recorded findings of fact (noted on page 67 of the packet). Mr. Graham also noted that the definitions of "yard" and "side yard" and Section 5.33(3) have not changed from the old to the new ordinance. Mr. Graham stated that the ZBA made a finding that the Andersons have stated that the underground structures, excluding retaining walls and sheet pile that encroach into the side yard setback will be eliminated. Mr. Graham went on to explain the ZBA finding that, if the Andersons remove the underground structure, excluding retaining walls and sheet pile the application will meet the sections referenced. Mr. Graham stated that if the ZBA finds that the underground structure will be above ground upon completion then there is a violation, if the structure will be below ground the structure will be in compliance. Mr. Graham again stated that the sections of the Zoning Ordinance used in the findings above have not changed, and therefore, their decision should not change.

Member Cross stated that she was told the Andersons would not come within 15' of the Johnsons property. City Planner Spencer noted that Member Cross's statement is correct and that the Andersons have removed that bay of the boat house. Member Cross stated that it did not matter whether there were structures above or below ground and that it may have caused the crack in the property. Chairman Withrow noted that when sheet pile is installed, sometimes cracks in the immediate area develop.

Mr. Stoepker noted that the cracking is the reason the ordinance has the set back rules. Chairman Withrow noted that there are numerous examples of sheet pile located directly on property lines throughout the city. Mr. Stoepker stated that although there may be examples of sheet pile located on property lines in the city, there have been no examples given to verify the statement. Mr. Stoepker noted that the definition of "set back" has changed when the ordinance was amended. Mr. Stoepker went on to read the amended definition of "set back." Mr. Stoepker noted that the amended ordinance was in place when the Andersons started construction, and that the amended ordinance binds the zoning decision. Mr. Stoepker noted that if the Andersons had started construction prior to the Zoning Ordinance being amended, and after the ZBA decisions, then the Andersons could argue that the older version of the ordinance would govern.

City Planner Spencer noted that the zoning permit for construction was issued approximately one year prior to the amendment of the definition for "set back," therefore, the amended definition does not apply to the zoning permit issued by the Zoning Administrator. The City Planner explained that the ZBA has jurisdiction over the Zoning Ordinance and decisions cannot be made by the Board based on what other courts have found on other projects. The City Planner went on to say that zoning does not dictate that the ordinance in effect when construction commences is the ordinance that applies to the permit, and that the

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, June 29, 2011 - 6:00 p.m.
Page 9

ordinance that applies to the permit is the ordinance in effect when the decision is made.

Chairman Withrow called for a brief adjournment. The Chairman called the meeting to order at 7:12pm.

Assistant Attorney Graham stated that there was a new definition of "set back" that was added to the Zoning Ordinance in June 2010; however, the Board must look at what regulations govern in the particular zoning district. Mr. Graham went over the regulations in the R-1 zoning district and noted that the term "set back" is not used in the regulations. Mr. Graham stated that regardless of a change in the definition in the term "set back" in 2010, the terminology that is used in the regulations of the ordinance refers to "yards" and the definition of "yards" has not changed from the old ordinance to the new ordinance. Mr. Graham noted that the applicable regulation to the permit is Section 5.33(3) and requires a "side yard" and the term "side yard" has not changed. Mr. Graham again noted that due to the definitions of "yard" and "side yard" remaining unchanged between ordinances, the ZBA findings and decisions should not change.

Mr. Stoepker asked Chairman Withrow if Mr. Graham was conceding that the new ordinance applied to the project, Mr. Graham stated that it did not make a difference which ordinance applied because the definitions of "yard" and "side yard" remained unchanged between ordinances.

Mr. Stoepker noted that he believes the project is a violation of both versions of the ordinance. Mr. Stoepker also noted that Mr. Graham stated to the court on November 11, 2010 that if you look at permit 2850 there has been no substantial construction and therefore, no vested interest, and there have been subsequent modifications to the City's Zoning Ordinance and that may or may not effect modifications to the zoning permit 2850. Mr. Stoepker noted that with Mr. Graham's statement to the court on November 11, 2010 the project is not valid under zoning permit 2850 and no variances have been issued for the non-conformities. Mr. Stoepker noted that regardless of what version of the ordinance is used to regulate, the project violates both.

Chairman Withrow asked Staff what the normal period that a zoning permit valid for, to which Staff replied, there is no stated timeframe for a zoning permit. Staff also noted that Mr. Stoepker recently referenced permit 2850, which was recently revoked by the ZBA, and the current operating permit is 3071.

Mr. Stoepker stated that the Court of Appeals recently ruled that permit 3071 is null and void because the procedure should not have been heard and the applicant has filed a motion with the Court that the permit the used to build remains permit 2850. Mr. Stoepker also stated that the Court threw out the Board's previous decision that the ZBA made saying the Board did not have jurisdiction.

Chairman Withrow requested that all parties remain on subject and clarify their arguments. Member Clem stated that the Board has determined there is no standing on the second issue, and the second issue does not need to be discussed any further. Chairman Withrow affirmed Member Clem's statement. Member Clem went on to say that the current discussion is in regard to side yard and the Board has already determined that the Johnsons have standing. Member Clem explained that the current discussion is in regard to whether or not the Zoning Administrator had the right to not act on the request submitted by the applicant. Assistant Attorney Graham affirmed Member Clem's statement and added that the Board needs to decide whether or not the Zoning Administrator acted correctly in his decision. City Planner Spencer noted that his decision to not act was based on the findings that the ZBA made, stating that the structure below ground including retaining walls and sheet piling, are not subject to the side yard requirement. Chairman Withrow requested that the counsel for the Johnsons concisely give their opinion on the subject at hand.

Mr. Stoepker read the Section 5.33 of the current ordinance, the definition of building, the definition of structure, and the definition of setback. Mr. Stoepker noted that the definition of grade and yard have not changed between ordinances, however, the definition of yard applies. Mr. Stoepker read the definition of

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, June 29, 2011 - 6:00 p.m.
Page 10

yard. Mr. Stoepker stated that a series of foundations and retaining walls have been constructed that constitute the building. Mr. Stoepker stated that the measurement is defined in the word grade, and went on to read the definition of grade. Mr. Stoepker stated that the findings that the City Planner made state that because they are placing fill on the portion of the wall within 15' of the Johnson's property it will bring that portion to grade. Mr. Stoepker noted that the ordinance states that you must look at the exterior wall of the boat house building to determine the grade at grade. Mr. Stoepker noted that the photos in Exhibit 22 show the grade substantially below grade. Chairman Withrow stated that the exterior wall Mr. Stoepker is describing is in fact a retaining wall and not an exterior wall. Mr. Stoepker read from the City Planner's letter (Exhibit 3) noting that support structures and sheet pilings for the boat house will be below grade upon completion and the fact that they are connected to the boat house foundation does not mean that they are an above grade structure. Mr. Stoepker notes that the above grade portion of the boat house is the interior portion, not the exterior portion.

Member Clem stated that the Board has discussed this particular issue prior and made the decision that it is not part of the structure of the boat house. Chairman Withrow affirmed Member Clem's statement.

Mr. Stoepker states that the City Planner is ignoring the definition of grade in Exhibit 3. Mr. Stoepker stated that he would like to have his architect address the Board.

Assistant City Attorney Graham stated that the Board has previously heard the argument provided by Mr. Stoepker and that it had been decided in court and by the Board that the structure did not violate the side yard requirement. Mr. Graham stated that it was inappropriate for the Board to reopen the prior finding and the Board is bound to their decision. Mr. Graham stated that the Board needs to decide only whether or not the portion of the structure in question will be above or below grade upon completion of construction.

Bridget Brown Powers requested to address the Board, to which the Chairman agreed. Ms. Powers stated that both previous appeals went to the Circuit Court. Ms. Powers noted that the Charlevoix County Court ruled that the ZBA's decision on permit 2850 be vacated. Ms. Powers noted that City Planner Spencer relied significantly on the decisions made by the Board when he issued permit 3071 and that in effect, by law, the ZBA did not make the decision for the permit and the permit does not exist. Ms. Powers stated that according to the Court of Appeals permit 3071 is vacated. Ms. Powers stated that because the Andersons did not have a vested interest before the Zoning Ordinance was amended they must abide by the current ordinance.

Chairman Withrow requested that Ms. Powers be more concise in her rebuttal and stated that the Board is most interested in how the previous court decisions will affect the decisions previously made by the Board.

Ms. Powers explained that Zoning Permit 2850 was administered by former City zoning staff in 2007 and was appealed in court, therefore remanding the issues to the ZBA for appeal. Ms. Powers explained that the ZBA revoked zoning permit 2850, which was appealed to Charlevoix County Circuit Court asking for a stay which was denied. Ms. Powers then stated that the City Planner then issued zoning permit 3071 using information and decisions based on permit 2850. Ms. Powers noted that Zoning Permit 2850 and subsequent appeals were sent to the Charlevoix County and Michigan Supreme Court and eventually back to the ZBA who revoked the permit on a minor issue. Ms. Powers noted that after permit 2850 was revoked by the ZBA the City Planner issued permit 3071 using information and determinations from the ZBA. Ms. Powers noted that the court vacated the Board's decision to revoke permit 2850, and because 3071 got its genesis from 2850, therefore 3071 are effectively null and void.

Chairman Withrow noted that after permit 2850 was revoked by the Board, each issue with regard to both 2850 and 3071 were addressed individually and in great detail by the Board. The Chairman stated to Ms. Powers that he is only interested in whether or not the Zoning Ordinance changed between issuance of

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, June 29, 2011 - 6:00 p.m.
Page 11

permits.

Ms. Powers stated that because construction did not commence until 2011, permit 3071 is bound by the current Zoning Ordinance which now includes a setback definition. Ms. Powers also stated that the permit has always been in violation of the Zoning Ordinance's definition of "yard." Ms. Powers explained that a more specific provision in the ordinance should prevail over a less specific one, and now the boat house requires a Special Use Permit.

Chairman Withrow requested that Ms. Snyder address the Board.

Ms. Snyder stated that in regard to Ms. Powers' allegation that permit 3071 does not exist because the record from permit 2850 was incorporated into 3071, is not a valid argument. Ms. Snyder stated that the Court of Appeals remanded the case back to the Circuit Court and the Circuit Court had not ordered that the ZBA vacate their decision on the permit. Ms. Snyder stated that the Johnsons could have raised the issue of which version of the Zoning Ordinance applies prior to today but there is nothing in their appeal that triggers the Board to make a decision on which ordinance applies. Ms. Snyder stated that the decision before the Board tonight is only whether or not the Andersons are building in compliance with their zoning permit.

Chairman Withrow requested to hear from staff regarding the previous Zoning Ordinance discussions.

Assistant City Attorney Graham stated that the Board has one issue before them and the issue is whether or not the structure violates the side yard requirement. Mr. Graham noted that permit 3071 was based on an application individual in and of itself even though it contained similar information to permit 2850. Mr. Graham explained that the Board's decision on permit 3071 was appealed to Circuit Court, and the Court affirmed the Board's decision. Mr. Graham noted that the Board's findings of fact regarding the side yard remain intact and the requirements have not changed.

City Planner Spencer noted that the ZBA revoked permit 2850 because there was a structure contained a hot tub and did not merit the description of a boat house. The City Planner noted that regardless of the permit number, the Board has previously decided that the portion of the boat house in question was below grade and in compliance with the Zoning Ordinance.

Member Clem stated that the only comments he is now requesting to hear are in regard to the appeal to the side yard requirements. Member Clem stated that in his opinion, the Andersons are proceeding with construction in accordance with permit 3071, which the Board approved. Member Clem stated that the Andersons are not encroaching on the side yard above grade and that was what the Board had requested from the beginning of the project, and unless there is evidence to be added showing that the Andersons are encroaching into the side yard above grade, Member Clem is inclined to make a motion to deny the appeal.

Chairman Withrow noted that it would be appropriate to hear from the architect (Nicholas White) relative to what Mr. White believes will be located in the side yard and how that might affect the Board's previous decisions.

Nicholas White, Architect, Petoskey, Michigan addressed the Board. Mr. White was requested to review the project engineering documents by Mr. Johnson and to review the current condition of the project. Mr. White noted that the survey (Exhibit 19) shows sheet piling and concrete abutments within the shaded area of the survey. Mr. White also noted that Exhibit 19 shows the top of the sheet piling is at 589.4' and the adjacent grade is at 583.69'. Mr. White noted that the photos (Exhibit 22) show the encroachment of the concrete foundation within the 15' side yard setback, which appears to be above grade but could be buried.

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, June 29, 2011 - 6:00 p.m.
Page 12

Chairman Withrow noted that Mr. White stated the concrete "appears to be above grade" and requested an explanation due to the fact that the Board is under the understanding that the concrete will be below grade. Mr. White explained that there is a 6' wall only 3' away from a property line. Chairman Withrow stated that the 6' wall is a retaining wall and not part of the structure. Mr. White noted that the retaining wall is part of the foundation. The Chairman noted that the retaining wall is not necessarily part of the foundation. Mr. White noted that the engineering drawings (Exhibit 20) show tie backs from the retaining wall to the foundation, and that his preference would be to have the tie backs located outside of the setback area or below grade. The Chairman asked Mr. White if he had visited the property, to which Mr. White responded, yes. The Chairman then asked Mr. White if he had visited the opposite side of the property, to which Mr. White responded, no. The Chairman explained that there is a sheet piling wall located directly on the property line on the opposite side of the property and that it is not an unusual situation. Mr. White noted that he agrees it is not an unusual situation to have sheet piling located directly on the property line and that he has designed between six and eight boat houses and understands the construction methods. Mr. White noted that Exhibit 20 shows that the sheet piling is integral to the foundation of the boat house and is part of the structure and is located above grade. Mr. White again noted that there is a 6' wall 3' from the Johnson property and there is no way it could possibly be below grade.

The Chairman asked for any further discussion from the public.

Ms. Snyder addressed the Board and noted that she has spoken with the project manager (Traver Wood) and explained the structures in Exhibit 20 including piling caps which are to be underground (permitted by the Board). Ms. Snyder noted that at present day the project is still under construction and once the project is completed, the area in contention will be finished grade. Ms. Snyder also noted that the Johnsons will see the retaining wall and stated that there are various examples of retaining walls in the area that are similar to the finished grade of the Andersons (Exhibit 18). Ms. Snyder showed the Board and audience Exhibit 18. Ms. Snyder noted the location survey she submitted (page 46 of the Board's packet) shows the construction progress to date, the survey was then laid over the site plan, shows the retaining wall (approved by the Board) and shows the as built wall which is outside of the 15' side yard setback. Ms. Snyder stated that the Andersons are building exactly what was approved by the Board and noted that an underground boat well has been removed from the site plans.

Mr. Stoepker stated that the site plan the Board received, reviewed, and approved did not show the tie backs and the integral relationship between the retaining wall and the foundation wall. Mr. Stoepker noted that if the tie backs are removed, the foundation wall underneath the boat house will collapse and therefore the retaining wall is part of the structure.

Chairman Withrow noted that there are many designs that could be used to keep the walls from failing to which Mr. Stoepker agreed. Mr. Stoepker noted that the Andersons could have moved the boat house back 15' and used the same design but elected not to do so.

City Planner Spencer stated that he fully acknowledges that the tie backs are part of the foundation, however, the tie backs will be below grade upon completion of construction and therefore not subject to side yard setbacks. Mr. Stoepker noted that the tie backs are the outer wall, to which the City Planner responded, the tie backs are not part of the outer wall. Mr. Stoepker noted that because the tiebacks are connected to the foundation wall, it in turn makes the sheet piling the actual outer wall of the boat house.

Chairman Withrow asked to hear public comments from members of the general public.

Bruce MacArthur, 427 Michigan Avenue, Charlevoix, Michigan addressed the Board. Mr. MacArthur noted that he has deeded his property twice to his neighbor to accommodate them and wishes that would be the

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, June 29, 2011 - 6:00 p.m.
Page 13

prevailing attitude with the current case.

Eugene Saenger, 690 Cedar Crest Lane Cincinnati, Ohio addressed the Board. Mr. Saenger noted that he owns a property on 210 E. Dixon Avenue Charlevoix, Michigan which has been in his family since 1924. Mr. Saenger noted that the tie backs are integral to the boat house due to its size. Mr. Saenger noted that the Andersons could have moved the boat house to a number of sites on his property and that Mr. Anderson stated that his property would be the "essence of Charlevoix." Mr. Saenger stated that the boat house will be 55' above the water level and potentially the largest boat house on Round Lake. Mr. Saenger noted that the City Manager, in the presence of City Planner Spencer, threatened to curtail a meeting with Mr. Saenger because Mr. Saenger continued to point out the easement from Mr. Anderson's western most lot to U.S. 31 across Mr. Blossom's property, still exists. Mr. Saenger stated that the City Manger told him that the easement does not still exist and if he continues to express that, then the meeting would be terminated. Mr. Saenger noted that the easement appears on all kinds of plans and surveys. Mr. Saenger maintains that the Board has been misinformed and ill advised by City Staff with regard to the Anderson's project. Mr. Saenger noted that during a City Council meeting, Assistant City Attorney Graham was asked by the Mayor of Charlevoix if the Zoning Ordinance was in conformance with the enabling statutes of the State of Michigan, Mr. Graham replied, mostly. Mr. Saenger noted that does not know exactly how existing grade is calculated within the current Zoning Ordinance. Mr. Saenger stated that if the Andersons were not constructing in the side yard, the cracks would not be on the Johnson's property. Mr. Saenger noted that he could have potentially been hurt by the cracks during a day when he was photographing the properties. Mr. Saenger noted that there is no way to tell what the finished grade will look like or how the water will run off upon completion. Mr. Saenger noted that there is an over burdening of an easement issue that should be addressed by the Andersons. Mr. Saenger noted that the Board has a difficult decision to make and that the attorneys have made good cases and that the Board's previous decisions have enabled the outsized structure to exist.

Jim Anderson, 300-304 E. Dixon Avenue, Charlevoix, Michigan addressed the Board. Mr. Anderson noted that the boat house does not sit on the sheet pilings, but instead sits on the concrete pilings which are supported by pilings independent from the sheet piling retaining walls. Mr. Anderson stated that the purpose of the anchors in the sheet piling is to anchor the two sheet pilings. Mr. Anderson stated that most sea walls on Round Lake have anchors, are underground, and follow the property line and are located within the 15' side yard setbacks.

Chairman Withrow asked for any further public comment and received no response. The Chairman closed the meeting to public comment

Chairman Withrow stated that the Board would discuss the appeals amongst themselves and may have questions for members of the audience and Staff. The Chairman stated that the tie backs to the sheet piling relative to the foundation is a main issue as are the piling caps relative to the foundation. Chairman Withrow noted that Mr. Anderson's statement that there are always tie backs to hold sheet piling was a very valid point. Member Clem noted that there are always tie backs on retaining walls.

Chairman Withrow addressed the Board and asked if any Members had issues with the tie backs on the sheet piling. Member Cross stated that her only issue was the encroachment of 15' setback and the potential issues that the neighboring property may have. The Chairman asked Member Cross if she was looking at what the Zoning Ordinance says or what the Board's previous decisions were, to which Member Cross replied, she was always against the project. The Chairman noted that Member Cross and the Board need to base their decisions on facts not desires and how they interpret the ordinance. The Chairman stated that to be fair to everyone, the Board must interpret the ordinance as best they can and make their decisions accordingly. Member Clem noted that the Board has previously made a decision on this project and now there are more details to consider than during previous meetings. Member Clem noted that he did not expect a retaining wall to be built without tie backs and he does not see an issue with

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, June 29, 2011 - 6:00 p.m.
Page 14

the tie backs being below grade. Member Clem stated that he has no issue with the Zoning Administrator's handling of the appeal of the decisions made previously by the ZBA. Member Anderson agreed with Member Clem's statements, and stated that his concern is with the final construction and whether or not the outer wall of the boat house is outside of the side yard setbacks. Member Anderson noted that the Board knew previously that there would be a retaining wall and that it had been approved previously by the Board. Member Cross stated that she did not know that the retaining wall would be on the neighboring property, to which Member Clem replied, the wall is not on the neighboring property but buried within the 15' side yard setback. Member Cross stated that structures should not be allowed within the side yard setback to which Chairman Withrow replied, there are retaining walls throughout the area that are within the 15' side yard setbacks and the walls are not considered a structure by definition in the ordinance. The Chairman noted that the side yard requirement applies to buildings and structures and that sheet piling is not considered a building or structure and can be within a side yard requirement. Chairman Withrow noted that the photos shown in Exhibit 18 show retaining walls on property lines. Member Cross noted that each project is looked at individually, and that the retaining wall is very close to the Johnsons property. Member Cross stated that she felt there should be no encroachment of any kind within the 15' side yard setback. Chairman Withrow stated that the Andersons are within their property with the structure being built and the retaining wall is also located on their property. Member Cross stated that the Andersons should not be allowed to come within 15' of the neighboring property, to which Chairman Withrow replied that the 15' side yard setback does not apply to retaining walls but to structures and buildings. Member Clem noted the difficulty of building on a sloped lot.

Assistant Attorney Graham addressed the Board. Mr. Graham stated that technically it is incorrect to say that retaining walls are not structures or buildings according to Section 5.12. Mr. Graham stated that a retaining wall is in fact a structure, but the definition of a yard is from the ground up and structures that are below ground are not subject to the setback requirements. Mr. Graham noted that the Board ruled previously that the retaining wall would in fact be below ground and not subject to the 15' side yard requirement.

Chairman Withrow asked Staff for assistance regarding the definition of structure, yard, and set back. The Chairman noted the fence in Exhibit 22 and the fact that the fence was more or less the property line. Chairman Withrow also noted that the retaining wall was not located on the property line, but on the Andersons property. The Chairman asked Staff if the finished grade at the property line will be below the property line, to which City Planner Spencer replied, to put it simply, the Johnsons are arguing that because the retaining wall will be above their property grade, the retaining wall should be subject to setback requirements. The City Planner also stated that the Andersons are arguing that because the 15' side yard will be below grade, and the exterior wall of the boat house is not in the 15' setback, the construction is consistent with the Board's previous decisions. Chairman Withrow asked Staff if grade is determined by the building edge or the property line, to which Staff replied, the exterior wall of the building. The Chairman noted that because the definition of grade is determined by the building edge and not the structure edge, the project is in compliance. The Chairman went on to say that if the definition of grade was determined by the structure edge, the sheet piling could be considered for the setback requirements.

f. ZBA determination of Findings of Fact

City Planner Spencer provided draft findings of fact for the Board to review. The City Planner noted that the findings are only in draft form and can be modified or deleted as the Board sees fit.

The Board reviewed the draft findings of fact. The Chairman noted that within the findings of fact language regarding the tie backs and their commonality among retaining wall features and the fact that they are below ground should be added. The Board agreed with the Chairman.

The Board agreed to add the following to findings of fact in the Decision and Order dated June 29, 2011:

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, June 29, 2011 - 6:00 p.m.
Page 15

Tiebacks are common features for retaining walls and will be below finished grade. Section 5.6 defines grade as “the finished surface of the ground adjacent to the exterior walls of the building.”

g. Motion

Member Anderson motioned to uphold the May 18 decision based on the findings of fact defined herein, seconded by Member Clem.

Chairman Withrow called for a roll call vote: Cross – No, Clem – Yes, Withrow – Yes, Anderson – Yes. Motion Carries.

H) OLD BUSINESS – None.

I) ADJOURNMENT

Chairman Withrow moved for adjournment, supported by Member Cross. The meeting was adjourned at 8:38 p.m.

Greg Withrow, Chairperson

Patrick Kilkenny, Recording Secretary

Carol A. Ochs, City Clerk