

CITY OF CHARLEVOIX
ZONING BOARD OF APPEALS MINUTES
Wednesday, September 18, 2019 - 6:00 p.m.
210 State Street, Charlevoix, MI

A) CALL TO ORDER

The meeting was called to order by Zoning Administrator Scheel at 6:00 p.m.

B) ROLL CALL/PLEDGE OF ALLEGIANCE

Chair: Richard Hodgson
Members Present: Shirley Gibson, Ann Gorney, Patricia Miller, Dennis Kusina
Absent: Timothy Kish
Staff Present: Jonathan Scheel, Zoning Administrator; Scott Howard, City Attorney

C) INQUIRY INTO POTENTIAL CONFLICTS OF INTEREST

Member Gibson stated that regarding Project 2019-05 (John and Jackie Coppens) she had a financial exchange 11 years ago; the home was her parents' house and she sold it to the applicants. City Attorney Howard stated that the fact that Member Gibson's family owned the home in the past does not constitute a financial interest in the property now.

Member Miller stated on Project 2019-05 (Delbert Terrill) her home was across the street from the applicant's home. She questioned whether she could express an opinion as a member of the public regarding the application and City Attorney Howard stated that she would need to sit in the audience and then speak from the podium during the appropriate time. Mr. Terrill stated that he would waive any issue with respect to his neighbor, and City Attorney Howard stated that Member Miller would get that opportunity as a member of the public, just not as a member of the Board.

D) APPROVAL OF AGENDA

Motion by Member Miller, second by Member Kusina to approve the agenda as presented. Motion passed by unanimous voice vote.

E) APPROVAL OF MINUTES

Minutes were approved by the Chairman as per policy.

F) OLD BUSINESS

G) NEW BUSINESS

1. Public Hearing for Applicant 2019-04 ZBA: Dimensional variance request from John Pearl Construction LTD – 607 State Street

a. Staff Presentation

Zoning Administrator Scheel stated that the applicants were proposing to demolish a front entry porch and construct a larger wrap around porch. At present the house is legal non-conforming; it is within about 6' from the side street and the applicant wants the front wrap around porch to match the existing house. He stated the applicant was asking for a 9' setback variance. The side street is not improved with a sidewalk so the feel of it is quite a distance at approximately 23' from pavement, but if the sidewalk were to go in, it would be about 6' from the existing residence if the porch was approved. Zoning Administrator Scheel stated that the property was a basic corner lot at 50' wide. He stated in standing at that corner and looking in all four directions one would notice that all homes are non-conforming including garages and porches that are too close. He stated that since 2010, there have been eight cases of dimensional variances in the R-2 district and of the eight, seven were approved and one was denied.

b. Applicant presentation (if requested)

c. Call for Public Comments

Lynette Grahams, Upright Street homeowner, stated that variances concern her because the ordinances are put in place for safety and aesthetics. She looked at that 5' from the road and she thought about coming up to that corner and having the appropriate visibility to turn left concerns her. She stated the area was a huge walking path for people down that street because there was no sidewalk. It concerned her that the people have gone to get variances for fences that would have bumped out into that visual and most were denied.

The public comment period was closed.

d. ZBA Determination of Findings of Fact

The Board proceeded to review each of the conditions as explained in the Staff Report related to the dimensional variance:

1. Extraordinary Circumstances. Member Miller stated that it was a non-conforming corner lot so it that had two 15' setbacks, both front and side. She stated she was a bit confused about the diagram and she questioned if the deck was just following the line of the house and coming straight out on the side yard. She thought the diagram showed that it was 27' from the pavement unless there was a sidewalk added. Chair Hodgson stated that it was a 100-year old house and it did not allow for the 15' setback requirement. The Board concurred that the request satisfies extraordinary circumstances.

2. Substantial Justice. Member Gorney referenced the reason expressed for the variance request and stated that she did not feel they should be granting variances because “someone wanted to make their home look better”. She stated it was a really busy intersection. No changes to the condition as written in the Staff Report.
3. Impact on the Surrounding Neighborhood. No changes to the condition as written in the Staff Report.
4. Public Safety and Welfare. Zoning Administrator Scheel stated that there was a section in the Zoning Ordinance that talks about corner lots and visual areas being a 15’ by 15’ triangle. He stated that even if this were to be approved and the road changed, or a sidewalk was put in “it would still meet that part of the ordinance”. He read aloud the “corner clearance” section of the Ordinance to the Board. Member Gorney referenced the public comments stated previously. Member Gibson stated that a future plan for widening roads with curbs, gutters, and sidewalks would cause walkers to be walking very close to the home. Member Miller stated that would happen anyway because the house was already there. Chair Hodgson stated that he liked adding the requirement that the porch remain open and not enclosed.
5. Not Self-Created. No changes to the condition as written in the Staff Report.

e. Motion

Motion by Member Kusina to approve Project 19-06-ZBA without conditions, based on specific Findings of Fact that prove the project does meet the review standards in 153.038 (F). Member Gorney seconded and amended the motion to provide the requirement that the porch remain open and not enclosed for reasons that were stated previously. Member Kusina agreed with the amendment to the motion.

Motion passed by roll call vote as follows:

Yeas: Gorney, Hodgson, Kusina

Nays: Gibson, Miller

2. Public Hearing for Applicant 2019-05 ZBA: Dimensional variance request from John and Jackie Coppens – 305 May Street

a. Staff Presentation

Zoning Administrator Scheel stated that this a corner lot and they are asking for a 9’ front side yard dimensional variance with the setback requirements as defined in Article IV, Section 5.27(2) of the Zoning Ordinance. The property is zoned residential R-2 with a 15’ front side yard setback. The applicants wish to construct a 24’ x 24’ accessory structure (garage) which will line up with the existing house.

Member Gibson questioned if the garage could be built within the setbacks without a variance and Zoning Administrator Scheel stated that they had received a letter from a citizen that showed how the garage could be built within the setbacks. He stated that the applicants were trying to maximize the yard for young children. He stated that there was a letter from Mr. Haggard and a sketch from Sherm Chamberlain showing how it could be built within the setbacks in their agenda packet.

b. Applicant presentation (if requested)

c. Call for Public Comments

None.

d. ZBA Determination of Findings of Fact

Member Gorney questioned the distance from the dotted line on the drawing to where they want the back of the garage and Zoning Administrator Scheel stated it was about 20’, without a variance it would be about 11’. If the proposed garage was moved back 9’ it would not need a variance. Member Miller questioned if the applicant would be willing to consider moving the location of the proposed garage and Zoning Administrator Scheel stated that the answer would be no as they would really like to have that 20’ section of back yard instead of 11’. Member Gorney questioned how they could justify the need for a variance if the garage could be built without a variance.

The Board proceeded to review each of the conditions as explained in the Staff Report related to the front side yard variance:

1. Extraordinary Circumstances. Member Gibson questioned if the Board should be concerned about the size of the back yard. She expressed that if you could build a garage without a variance “that’s the way it should be done” because once again the City has plans for all of our streets – widening the curb, gutter and sidewalk. Chair Hodgson stated that the language provided stated that: “The ZBA finds the standards are not met since there is potentially room within the building area on the parcel to build a garage within setbacks”. The Board concurred with the referenced language.
2. Substantial Justice. No changes to the condition as written in the Staff Report.
3. Impact on the Surrounding Neighborhood. Chair Hodgson stated that having a two-story garage that close to the road would have a negative impact on the look and feel of the surrounding neighborhood.
4. Public Safety and Welfare. Member Miller stated that she had a safety concern about having a 6’ driveway which was below a standard size. No changes to the condition as written in the Staff Report.

5. Not Self-Created. Member Miller stated she felt it was self-created because the garage could be added without a variance. Member Gorney stated that it could also be done without adding 3' to the roof.

e. Motion

Motion by Member Gorney, second by Member Gibson to deny Project 2019-05 ZBA based on specific Findings of Fact that prove the project does not meet the review standards.

Member Gorney commented that the applicant could propose an alternative plan that might need a variance. Zoning Administrator Scheel felt that would be sending the wrong message because the Board said numerous times during the meeting that the garage could be built with the existing setbacks.

Motion passed by roll call vote as follows:

Yeas: Gibson, Gorney, Hodgson, Kusina, Miller

Nays: None

Zoning Administrator Scheel stated that there was no need to go through the height variance request given the outcome of the first variance request.

3. Public Hearing for Applicant 2019-05 ZBA: Dimensional variance request from Delbert Terrill, Jr. – 117 Eaton Avenue

Member Miller left the dais at this time.

a. Staff Presentation

Zoning Administrator Scheel stated that this was a request to raise a 4' existing, non-conforming fence to 6'. It was non-conforming because it is 4' which was legal at the time and the Zoning Ordinance has since changed to 3'. He explained the history of the property, there were a couple of columns on the property that are within the public right-of-way by about 1' that was brought to the attention of the City in 2002 and the City granted a license for the two columns. At that same time, the applicant asked for a similar variance and it was denied. Included in this request is not only the 4' fence that exists but another 50' or so with a gate going back down the parcel to a couple of other stone columns on the lower plateau.

Member Gibson stated on page 6 in the agenda packet from the ZBA minutes from 2003 it read that "the Board agreed that in the past 12 years only two fence variances have been granted and one has been denied" and questioned if that was still the case. Zoning Administrator Scheel felt that is probably a true statement, but he only researched records back to 2010. Member Gibson stated that she noticed that the actual fence posts are 6'. Zoning Administrator Scheel stated "that's either legal, non-conforming or illegal" and he has not researched that well enough to know the status or addressed it with the owner at this point.

b. Applicant presentation (if requested)

Delbert Terrill stated that he was not going to take the fence 50' down the hill, all he was talking about was taking the 4' fencing he has now and adding them next to the pillars on the lower terrace to keep people and vehicles from intruding onto his lower terrace. He stated that over the years he has had people parking there and had a neighbor use his lower terrace to bring over 30 dump truck loads of dirt to fill in behind their hill. He stated that the hardship for him was economic because he would like to fill in spots that are insecure with the 4' fencing and the gate at the top of the hill which would be to protect the pavers that he was going to put in place. If he puts pavers in and the City's snow truck keeps plowing and backing up it would disrupt his pavers. He stated that a year ago he put in a new cement driveway and its been cracked by the City snow trucks. He stated that he noticed numerous 6' opaque fences in place while driving throughout the City. He referenced other issues with teenagers climbing onto his current fence and trash being thrown at the fence.

c. Call for Public Comments

Mr. Terrill's property caretaker described the current fence and he sees signs of people walking on the property. He stated that a 6' fence would prevent people from accessing the property and the fence being open would not block the view.

Don Exelby, Eaton Street neighbor, stated he had no problem with raising the fence from 4' to 6', and further explained his reasons for supporting the request, the history and unique circumstances of the property, and security concerns.

The public comment period was closed.

d. ZBA determination of Findings of Fact.

Member Gibson stated that there was no drawing in the packet about this fence and she just learned that the request was for a 6' fence on the bluff and below and nothing shows from where to where and the distance of the fence sections. Zoning Administrator Scheel stated that it would be the existing fence plus 8' of new fence and a gate.

The Board proceeded to review each of the conditions as explained in the Staff Report related to the dimensional variance:

1. Extraordinary Circumstances. Chair Hodgson stated that it would be difficult to argue that you couldn't just build a 3' fence and stay within the zoning requirements. Member Gorney stated that in her years on the Board they never had security as a reason for a variance. The Board concurred that the request did not satisfy extraordinary circumstances.

2. Substantial Justice. Member Gorney stated that the Staff Report indicated that: "it's not been proven that the extra height is necessary to enjoy the normal rights of a Charlevoix owner". The Board concurred that the request did not meet this standard.
3. Impact on the Surrounding Neighborhood. The language in the Staff Report related to this item was not updated for this project. Chair Hodgson stated that he would not find that the fence would have an impact on the surrounding neighborhood. Member Gorney stated that she was sure it would not have a negative impact on the surrounding neighborhood.
4. Public Safety and Welfare. Member Gorney stated that the higher fence would not affect public safety and welfare.
5. Not Self-Created. Chair Hodgson stated that requesting the higher fence than what is allowed is self-created.

e. Motion

Motion by Member Gorney, second by Member Gibson to deny Project 2019-05 ZBA based on specific Findings of Fact that prove the project does not meet the review standards specifically standards 1 and 2 about extraordinary circumstance and substantial justice as being concurrent with staff findings.

Motion passed by roll call vote as follows:

Yeas: Gibson, Gorney, Hodgson

Nays: Kusina

Member Miller rejoined the Board at the dais.

4. Public Hearing for Applicant 2018-06 ZBA: Administrative Challenge from Mary Eveleigh – 206 Dixon Avenue

a. Staff Presentation

City Attorney Howard stated that this was a unique circumstance for this body as the Board has been asked to determine whether or not to have a re-hearing on a particular decision that the Zoning Board of Appeals has already made. The re-hearing provision comes from Section 9 of the Board's By-Laws. He stated that once a ZBA decision is made it is final. The Section goes on to state: "The ZBA may grant a re-hearing under exceptional circumstances for any decision made by it". The By-Laws go on to define what exceptional circumstances are, "exceptional circumstances shall meet any of the following:

- Subparagraph a, the applicant who brought the matter before the ZBA made misrepresentations concerning a material issue which was relied upon by the ZBA in reaching a decision.
- Subparagraph b, there has been a material change in circumstances regarding the ZBA's Findings of Fact which occurred after the public hearing.
- Subparagraph c, the City Attorney by written opinion states that in the Attorney's professional opinion the decision made by the ZBA or the procedure used in the matter was clearly erroneous.

City Attorney Howard stated that subparagraph c does not apply because he has not issued a written opinion saying that there was some sort of erroneous decision or erroneous use of the procedures. He stated that first the ZBA needed to consider whether there are exceptional circumstances to grant a re-hearing and if the answer is no, then they were done with that particular item because the original ZBA decision stands. If the answer is yes, then the ZBA would go on to consider what the ZBA decided in the first place.

Chair Hodgson stated that there were procedural limits under Section 9.2. City Attorney Howard stated that the applicant needs to bring this request to the ZBA within 21 days of approval of the ZBA minutes of that particular meeting. He stated it was procedurally appropriate before the Board.

City Attorney Howard stated that at present all they would be considering was whether there were exceptional circumstances, facts that have arisen since the decision was made that justify re-consideration or if misrepresentations were made that justify re-consideration. He stated that those were the standards and they want to hear from the applicant and the public. Once they hear from the applicant and the public, the Board will then have additional discussion and then there would be a vote on whether or not there were exceptional circumstances. He stated that there is a process for a legal appeal of a Zoning Board of Appeals decision to circuit court.

b. Applicant presentation (if requested).

Jack Turner, Attorney representing the Eveleighs, stated with respect to the comments by the City Attorney, he did not understand the statement in the By-Laws necessarily to be an exclusive description of exceptional circumstances. He felt the Board had more latitude than what had been suggested to decide whether or not there were exceptional circumstances with respect to this particular request for re-hearing. He stated that he did send a memo to the City Attorney and he wanted to be sure it was circulated to the Board members because he did try to explain in writing what he thought were the exceptional circumstances. He stated in this case the question had to do with whether the building permit had been properly issued by the Zoning Administrator and he suggested in the memo that it had not been properly issued because the City Attorney back in 2003 had already determined that the property for the building permit was not a legal, non-conforming use and at that point it seemed to him that the requirement of the Zoning Ordinance based on that determination would have been for the Zoning Administrator to deny the application. If the person that applied for the building permit thought the denial was wrong there were other opportunities for that to be discussed and may be decided upon but he did not think that the Zoning Administrator had the authority to do anything other than to enforce the requirements of the Zoning Ordinance which in this case were to deny the building permit because this was not a legal, non-conforming use. He also thought that even the Zoning Board of Appeals wouldn't have the authority

to determine that this was a legal, non-conforming use because there's no latitude in the Zoning Ordinance about what a legal, non-conforming use is and the City Attorney again in 2003 had already determined that this wasn't a legal, non-conforming use. He stated that to the extent that the ZBA relied on the opinion of the City Attorney in 2003 to say that it was a legal, non-conforming use and his opinion was based on the idea that this was something that the City might be estopped from claiming that it was a legal, non-conforming use he felt that they would be putting words into the ordinance that were not there. The words that they were essentially implying into the ordinance would be the words that the attorney wrote about in his memo which had to do with whether there had been lapses that the applicant could have raised as a defense which goes way beyond the authority of the Zoning Board of Appeals.

Attorney Turner stated that to the extent that one of the exceptional circumstances (subparagraph b) discussed in the By-Laws and the problem with trying to apply that standard here if one were to go back and look at the minutes of the January meeting where the Board heard this matter there really weren't any Findings of Fact. He stated that there were no Findings of Fact in the minutes so it was impossible to go through the minutes and try to make an argument about whether or not there had been a material change in circumstances because there's no explanation of what the circumstances were. He stated that they have a decision of the Zoning Board of Appeals that essentially deprives the residents of constitutionally protected due process rights in that there's no Findings of Fact on which the decision was based so there's no way to come back and effectively ask for a re-hearing if you were going to follow the exact words of the By-Laws. He believed that the Board had the authority to go outside the exact words of the By-Laws and to find that there were exceptional circumstances here for the reasons that he had discussed.

c. Call for Public Comments

Mike Edwards, Attorney representing the property owners at 206 Dixon LLC (owned by the Andersons), wanted to re-state what Attorney Howard had indicated to the Board. The ZBA has already issued a final decision back on January 23, 2019, and at that point in time if the Eveleighs did not like the decision made they had some appellant rights to file an appeal in the circuit court. Attorney Edwards stated that they were only here because they had requested a motion for reconsideration under the Board By-Laws. He stated that he reviewed the Michigan Zoning Enabling Act which controls the powers and procedures of the ZBA and there isn't anything actually in the Statute that actually authorizes the ZBA to offer somebody an opportunity to reconsider a final decision. The Statute provides in Section 605: "All decisions of the ZBA shall be final and an aggrieved party may appeal to circuit court." He stated that even though it is in the ZBA's By-Laws he does not necessarily believe that the Board has the authority to have a motion for re-consideration in the By-Laws.

Attorney Edwards stated, "let's just assume for a moment that your By-Laws do allow you to have a motion for re-consideration and the Statute authorizes that and as Mr. Howard stated there's only three criteria". He stated that there were exceptional circumstances for a reason, they are exceptional. The first criteria would require the Eveleighs to present evidence that the applicant lied to this Board and based upon that lie or misrepresentation, the ZBA would have reached a different decision. He stated that not necessarily getting into the merits of what the original objections were to the applicants is that they had a whole string of objections to a building permit that the Building Administrator had issued to 206 Dixon LLC and they were all based upon not looking at this property as legal, non-conforming lot. He stated that the Zoning Administrator went through each and every one of the issues they had raised and explained why each issue did not apply. He stated that there were Findings of Fact and there were no lies or misrepresentations. He stated at that hearing he had brought a small packet with him that contained several letters and there was a letter dated May 3, 1996 by Jeffrey Wantress who was probably the City Attorney at that time that indicated that when they were talking about these illegal splits, approvals only needed to come to the City if they were in a platted subdivision. There was no requirement to get approval from the City if it was just metes and bounds description outside of a platted subdivision. The subject property is not part of a platted subdivision, so there was never a requirement for it to come to the City for approval. He referenced a letter dated January 20, 2003 by Maura Snapes who was an attorney and a title person; apparently the Eveleighs had come with concerns because they wanted a variance, they wanted to take down a deck or if they had to make it bigger and they had an illegal split when they purchased the property. He stated it was made very clear to them that there was no illegal split and at that time for about 20 years the City recognized lawful parcels of property, non-conforming but lawful. Based upon that determination, the ZBA at that time issued them a variance to build a deck that was too close to the boundary line so as of 2003 the Eveleighs weren't complaining that they own an illegal lot they were all on board with saying that they had a legal, non-conforming lot. He stated that shortly thereafter Brian Graham, City Attorney in 2003, issued an opinion that the City has been correct in labeling these properties as legal, non-conforming lots just the way that they have been taxed and assessed and the way they have been treated, the way variances have been granted the City would be hard pressed at this time to suggest that 35 years later that these are now illegal lots.

Attorney Edwards stated that the Eveleighs did not appeal the ZBA's decision to the circuit court, instead he thought that Ms. Eveleigh sent a letter or email requesting a re-hearing and he did not think that she indicated why she wanted a rehearing or list any of the three exceptional circumstances indicating that the procedure was wrong. He stated that the City Attorney has not indicated to the Board that somehow, they made a fairly erroneous error. He stated that Mr. Turner has not indicated how the Eveleighs have lied or misrepresented anything to the Board so option one is not an exceptional circumstance.

Attorney Edwards referenced subparagraph b and stated that the Andersons relied upon the ZBA's decision being final and they waited until the 21 days had passed to make sure that there was no appeal and they had given the okay to demolish the house and start building a new home so the home has been demolished based upon the reliance of the ZBA denying the Eveleighs the opportunity to object to the building permit that was granted.

Attorney Edwards stated that it was his understanding that initially when Ms. Eveleigh had indicated that she wanted a rehearing that she did not state why she wanted a rehearing, internally that request was denied. He stated that actually resulted in the Eveleighs suing the City, and the City has filed a response and answer, and in trying to work things out they allowed the Eveleighs the opportunity for a re-hearing to determine whether or not they meet the criteria for exceptional circumstances. He stated that if you looked at the criteria alone,

they do not meet the criteria, if you look outside the criteria, they don't meet the criteria. He stated that they did not appeal the decision. He felt it was the ZBA's duty and obligation and responsibility to find that there are no exceptional circumstances and deny them the opportunity to have a re-hearing. He believed that the facts and the staff findings support that decision and the City Attorney has not issued an opinion on that but it would be his educated guess that if he were sitting on the ZBA Board he would reach the same decision.

The public comment period was closed.

d. ZBA Determination of Findings of Fact.

City Attorney Howard read Section 9.1 aloud:

- "Subparagraph a, the applicant who brought the matter before the ZBA made misrepresentations concerning a material issue which was relied upon by the ZBA in reaching a decision.
- Subparagraph b, there has been a material change in circumstances regarding the ZBA's Findings of Fact which occurred after the public hearing.
- Subparagraph c, the City Attorney by written opinion states that in the Attorney's professional opinion the decision made by the ZBA or the procedure used in the matter was clearly erroneous."

City Attorney Howard stated that the applicants were the Eveleighs who are the neighboring property owners who were challenging the building permit issued by the Zoning Administrator for the neighboring property.

Chair Hodgson stated that the applicants were not claiming that any lies or misrepresentations were made by anybody, so they were down to the second criteria (subparagraph b) regarding material changes. He stated that at the public hearing each item was gone through and addressed, and he did not see a material change in circumstances and Members Gorney and Kusina agreed. Member Gibson stated that she was not at that meeting, but she questioned if there was any new evidence. Chair Hodgson stated that's not what the paragraph is asking about though it was addressing whether there had been a material change in circumstances. Member Gorney questioned if they had been presented with anything new, and Chair Hodgson stated it was his opinion that they had not been presented with anything new and Member Gorney agreed.

Chair Hodgson stated that they were saying that they did not find exceptional circumstances. Attorney Howard stated that is accurate if the Board believes that none of the three criteria have been met. Attorney Howard stated subparagraph c was not met because he has not issued a written opinion. He advised that if they agreed that those first two were not met someone would need to make a motion that "you find that the exceptional circumstances have not been presented and therefore the request for rehearing is denied".

Motion by Member Kusina, seconded by Member Gorney that the exceptional circumstances have not been met and therefore the request for rehearing is denied. Motion passed by roll call vote as follows:

Yeas: Gibson, Gorney, Hodgson, Miller, Kusina
Nays: None

Attorney Howard stated that ended the inquiry, therefore there will be no reconsideration.

G) CALL FOR GENERAL PUBLIC COMMENT

Lynette Grahams thanked the Board for what they do, it's a tough job and it is appreciated.

H) ADJOURNMENT

Motion by Member Miller, second by Member Gorney to adjourn the meeting. Motion passed by unanimous voice vote.

The meeting adjourned at 7:53 p.m.

Richard Hodgson, Chair

Joyce Golding/fgm, City Clerk