

Hayes Township Zoning Board of Appeals
Proposed Agenda, Feb 2, 2022
6:00 pm

1. Chair declares Hearing open.
2. Pledge of Allegiance
3. Introduction of Zoning Board of Appeals Members
4. Consideration and Adoption of Agenda
5. Continuation of Interpretation Hearing from January 26, 2022
 - A. Board review of applicable sections of Zoning Ordinance
 - B. Board review of facts and discussion
 - C. Consideration of motions addressing Petitioner's Requests
[The board reviews the facts as known and discussion takes place gathering findings of fact until a member puts forth a motion including the findings of fact. Voting shall be by roll call and shall be recorded.]
 - D. Adoption of Motion or Motions addressing Petitioners Requests
[Motions dealing with an ordinance interpretation shall be stated with the following parts:
 1. The list of exhibits which is the printed information presented by the applicant and/or the Zoning Administrator.
 2. The list of facts which is the information pertinent to making a decision structured as a "Finding of Fact" on the case.
 3. The conclusion, decision, of the Zoning Board of Appeals. This motion, or part of a motion, shall include the rationale and/or reason, for why the conclusion was made.]
6. Opening of Hearing on Petitioners Appeal, dated December 20, 2021.
 - A. Zoning Administrator introduces case and presents exhibits.
 - B. Petitioner is recognized and puts forth his/her case.
 - C. Board members report on their site inspections, if any.
 - D. Board members ask questions they have for the petitioner or agent.
 - E. Discussion may take place between the petitioner and board members.
 - F. Members of the public, present, may speak.

G. Any correspondence received about the variance, is read or has been included in member's packets.

H. Anyone can ask the board questions regarding the petitioner's presentation or speeches that were given. The board will attempt to obtain the answers. Answers will be directed to the board chair. No discussion, questioning or answering, shall take place between any two or more persons except between board members and whoever has the floor.

I. Close the public comment portion of the hearing. (At this point, all public participation on the issue ends).

J. The Board reviews applicable Sections of the Hayes Township Ordinance.

K. The Board reviews the facts as known and discussion takes place gathering findings of fact until a member puts forth a motion including the findings of fact. Voting shall be by roll call and shall be recorded.

[Motions dealing with an Appeal shall be stated with the following parts:

1. The list of exhibits which is the printed information presented by the applicant and/or the Zoning Administrator.

2. The list of facts which is the information pertinent to making a decision structured as a "Finding of Fact" on the case.

3. The conclusion, decision, of the Zoning Board of Appeals. This motion, or part of a motion, shall include the rationale and/or reason, for why the conclusion was made.

The rationale, reasons, shall at a minimum contain a review of the applicable

7. Adjourn

9330 Woods Road
Charlevoix, MI 49720
December 20, 2021

Zoning Board of Appeals
Hayes Township
9195 Douglas Sloan Road
Charlevoix, MI 49720

Re: Appellant LuAnne Kozma
Property owners Scott & Debra Law
Appeals ZA Determinations, 11-29-21
Tax code # 15-007-132-005-25

ZBA Members: Tom Darnton, Frank Shepard, Bob Jess, Roy Griffiths, Doug Kuebler
ZBA Alternate: Paul Ivan

ZBA Members:

Attached please find seven copies of an application for appeals including Bates-numbered exhibits, and brief in support, concerning the above ZA determinations. The matter involves a single proposed building and envelope.

You already have the originals of referred affidavits of Irene Fowle and myself, provided by letter of Ellis Boal of November 16, but included herewith are copies.

Also please find my check for \$700 payable to Hayes Township. Please process this matter under your 7-1-2020 rules, and advise as to scheduling and a hearing date.

Please call or write if there is any question. Thank you.

Sincerely,

LuAnne Kozma

LuAnne Kozma

c: Ellis Boal, 9330 Woods Road, Charlevoix, MI, 49720
Scott & Debra Law, 11460 N Meridian St, Carmel, IN 46032

Hayes Township
Zoning Variance Application
Zoning Administrator Phone (231) 547-6961

ZBA Appeal

GENERAL INFORMATION

Name of Property Owner(s) Appellant : Lu Anne Kozma
Mailing Address 9330 Woods Rd.
City Charlevoix State MI Zip 49720
Telephone 231-547-2828

PROPERTY INFORMATION

Re: Property owned by Scott & Debra Law
Property Tax Code Number: 15- 007- 133- 005 - 30
Legal Address 10034 Anglers Cove, Charlevoix
Nearest Road Intersection Boyne City Rd & Brown Rd.
Zone District R-1

Please type or print; fill in all blanks and return with \$700.00 fee payable to Hayes Township

Appeal

~~VARIANCE OR INTERPRETATION REQUESTED~~

Relief from the following Zoning Ordinance Section(s)

Section:

N/A See sections pertaining
Please review the online copy of the zoning ordinance for the exact section number.
charlevoixcounty.org/hayes.asp to Appeal as
described on
last page.

Submit an exact scaled drawing on the reverse side of this document or on a separate sheet of paper showing

- lot location (road names, lakeshore, streams, easements, rights-of-ways, unusual topographic features),
- lot dimensions,
- location and dimensions (including height) of existing and proposed structure(s),
- distance between structure(s) and front, rear, and sides lot lines,
- location of driveway giving distance to nearest side lot line,
- locations of well, septic tank and drain field,
- other structures and uses within 100 feet of the property.

Note: Applicant must supply exact maps, drawings, etc. in order to inform the Zoning Board of Appeals of the type of building or activity, and how it will look when desired construction is completed.

Parcel map attached.

Site Plans are in Exhibits, Exhibit L
at Bates #162.

NOTE: The Township must inspect the layout of the building and verify all application information. The signature of the applicant on this application authorizes the inspection of this property. Please call the Zoning Administrator, at 231-547-6961 when the site is staked, but before construction begins. Mail completed application to: Zoning Administrator, 09195 Old US 31 N, Charlevoix, MI. 49720. You may also contact the Zoning Administrator at zoning@hayestownshipmi.gov. Whenever your property has an improvement added, it is added to the Hayes Township Assessment Roll. The Hayes Township Assessor is notified of new zoning permits & will visit your property to assess the improvements. If you prefer to have an appointment vs the assessor coming to your home unannounced, you should contact the assessor to schedule an appointment. Assessor, 231-497-9361.

DESCRIBE REASON FOR REQUESTED VARIANCE,
INCLUDING EXACT SIZE AND TYPE OF VARIANCE NEEDED.

N/A

DESCRIBE THE PRACTICAL DIFFICULTY THAT EXISTS
What are the unique conditions of your situation)?

N/A

EFFECT ON APPLICANT IF VARIANCE IS DENIED

What specific problem(s) would be created to you, as applicant, if your request is not granted? What rights that others enjoy, will you be denied if this variance is denied?

N/A

EFFECT OF REQUESTED VARIANCE ON OTHER PROPERTIES

If your variance request is granted, what effect will it have on the area? Does your request represent a change in the types of uses permitted? Will it hamper access by emergency vehicles or personnel? Will it restrict light, air, or access to adjacent properties? Will it in any other way create problems or concerns to other properties in the area?

N/A

APPLICANT'S STATEMENT AND AUTHORIZATION

I understand that if the requested variance is granted, I am in no way relieved from all other applicable requirements of the Hayes Township Zoning Ordinance. It is also understood that any approval by the Zoning Board of Appeals involving site improvements, use, and/or construction does not relieve the applicant from obtaining other applicable authorizations (for example, site plan, building, health department, soil erosion, and engineering approval, etc.).

I authorize Hayes Township staff and Zoning Board of Appeals members to enter upon the subject property for purposes of making site inspections related to the project and request identified in this application.

I believe that all the above information in this Zoning Variance Application is accurate to my fullest knowledge.

Owner(s) Signature: N/A Date: _____

Applicant(s) Signature: LuAnne Kozma Date: 12/20/2021

Applicant must supply seven (7) copies of all required documents (1 original & 6 copies)

Property owners within 300 feet of this property will be notified by US mail of this variance request

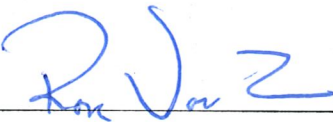
The general public will be notified of this variance request by publication in a local newspaper.

Application must be submitted by the first of the month to have the request heard the following month.

Application and fee can be sent to:

Zoning Administrator
Hayes Township
09195 Old US 31 N.
Charlevoix, MI 49720

231-549-6961

Zoning Administrator's Signature: 

DATE RECEIVED 12-20-21

CASE NO. 730

NOTE: The Township may need to inspect the layout of the building(s) and property to verify all application information. The signature of the applicant on this application authorizes the inspection of this property.

SECTION 8.07 VARIANCES

The ZBA may grant dimensional variances when the applicant demonstrates in the official record of the hearing that the strict enforcement of this Ordinance would result in practical difficulty. To establish practical difficulty, the applicant must establish all of the following:

1. The need for the requested variance is due to unique circumstances or physical conditions of the property involved that do not apply generally to other properties in the surrounding area and/or zoning district, such as narrowness, shallowness, shape, water, or topography and is not due to the applicant's personal or economic hardship.
2. The need for the requested variance is not the result of action of the property owner or previous property owners (self-created).
3. That strict compliance with regulations governing area, setback, frontage, height, bulk, density or other dimensional requirements will unreasonably prevent the property owner from using the property for any permitted purpose, or will render conformity with those regulations unnecessarily burdensome.
4. Whether granting the requested variance would do substantial justice to the applicant as well as to other property owners in the district, or whether granting a lesser variance than requested would give a substantial relief to the property owner and be more consistent with justice to other property owners.
5. That the requested variance will not cause an adverse impact on surrounding property, property values, or the use and enjoyment of property in the neighborhood or Zoning District.

SECTION 8.08 CONDITIONS OF APPROVAL

The ZBA may impose such conditions or limitations in granting a variance as deemed necessary to protect the character of the area, as provided for in section 9.03 of this Ordinance.

Zoning Board of Appeals Process - Additional Applicant Information

The purpose of the Hayes Township Zoning Ordinance is to promote the public health, safety and general welfare of the township. It encourages the use of lands in accordance with their character and adaptability and limits the improper use of land; controls sprawl and maintains rural character; controls congestion on the public roads; facilitates infrastructure and considers the character of each zoning district.

It is impossible to write the perfect ordinance that covers every conceivable use, configuration, size, water features, environmental aspects, terrain or non-conformities. Thus, the Zoning Board of Appeals was established by the Michigan Zoning Enabling Act for:

1. Interpretation of the zoning map.
2. Interpretation of the ordinance text.
3. Decisions made by the zoning administrator.
4. Decisions made for enforcement of zoning.
5. And, anything else referred to the appeals board or that the township ordinances indicate can be appealed to that board.

The Zoning Board of Appeals is made up of five Hayes Township residents who volunteer their time to serve their community. There are five members so that different perspectives are taken into account in an effort to be fair to the applicant. The Zoning Ordinance is law. The Zoning Board of Appeals has the responsibility to enforce the ordinance (the law) unless there are unique or special circumstances that may prevent the applicant from using his or her property if the strict compliance of the ordinance is required. A good example might be a highway that has a minimum speed limit. The law says the minimum speed limit is forty five miles per hour, but if the road is covered with ice, is it unreasonable for someone to go slower? The Zoning Board of Appeals is the board that considers all factors to decide if the zoning ordinance requirements are unreasonable for a specific use or property.

The process for interpretation, deliberation and decisions of the Zoning Board of Appeals is dictated by the State Zoning Enabling Act, is adopted as law by the township, and is incorporated in Article VIII of the Hayes Township Zoning Ordinance. Section 8.07 of the Zoning Ordinance outlines the five point criteria the board is required to use. Listed below are those five criteria with some further explanation:

- 1) The need for the requested variance is due to unique circumstances or physical conditions of the property involved that do not apply generally to other properties in the surrounding area and/or zoning district, such as narrowness, shallowness, shape, water or topography and is not due to the applicant's personal or economic hardship.

There are several properties in the township that do not meet the minimum requirements of the current zoning ordinance, or that have unique features, making it difficult to meet the yard setbacks. The board may only consider a hardship/unique circumstance as it relates to the physical conditions of the property. They cannot consider personal hardships.

- 2) The need for the requested variance is not the result of action of the property owner or previous property owners (self-created).

A self-created hardship is an action taken by an individual that causes their property or use to no longer meet the requirements of the zoning ordinance. A couple of examples might be: building too close to a property line or selling part of the property.

The Zoning Board of Appeals must always assume a buyer purchased the land knowing the property did or did not meet current zoning requirements.

- 3) That strict compliance with regulations governing area, setback, frontage, height, bulk, density or other dimensional requirements will unreasonably prevent the property owner from using the property for any permitted purpose, or will render conformity with those regulations unnecessarily burdensome.

A variance can only be granted for circumstances unique to the property as listed above. A variance cannot be granted for something unique to the property owner.

The Zoning Board of Appeals needs to figure out if there is a way to accomplish the same purpose without a variance. And, if denying the variance would prevent the owner from using the property for uses that are allowed by right within the zoning district.

- 4) Whether granting the requested variance would do substantial justice to the applicant as well as to other property owners in the district, or whether granting a lesser variance than requested would give a substantial relief to the property owner and be more consistent with justice to other property owners.

The zoning ordinance is not meant to take away all of an individual's property rights, however, when these regulations treat an applicant unfairly in relation to the unique aspect of the land or other properties in the vicinity, the Zoning Board of Appeals may look at relaxing the requirements of the ordinance. The Zoning Board of Appeals must first decide whether a lesser variance could accomplish the same or fair benefit. The Zoning Board of Appeals is required to stay as close to the zoning ordinance as possible.

- 5) That the requested variance will not cause an adverse impact on surrounding property, property values, or the use and enjoyment of property in the neighborhood or Zoning District.

The zoning ordinance was adopted to allow organized and planned development while protecting properties and uses of properties. The ordinance and the reasons for having the ordinance should be respected in an effort to protect.

The Zoning Board of Appeals must consider all five criteria, review the application and materials provided with the application, discuss information gathered at site visits, consider Zoning Administrator and applicant presentations, comments made from the public, written correspondence, and property history when determining the "findings of fact". The findings of fact are then discussed to make a determination as to whether a variance should be granted or not.

The Zoning Board of Appeals follows the process outlined below:

- The Chairperson declares the public hearing open.
- The Zoning Administrator introduces the case and presents exhibits.
- The Applicant(s) are recognized and either they, or their agent, are allowed to present the case. *It is important for the presenter to understand that only the facts of the case as they relate to the property can be considered. Please remember that the Zoning Board of Appeals cannot consider personal or economic hardships.*
- Board Members report on their site inspections, if any and ask questions they may have for the Applicant(s) or the Applicant's agent.
- Discussion may take place between the Applicant(s)/agent and Board Members.
- Members of the public are given opportunity to speak to the case during public comment portion of meeting.
- Any written correspondence received about the variance, is read or has been included in member packets.
- Anyone can ask the Board questions regarding the Applicant's presentation or speeches that were given. The Board will attempt to obtain answers. Answers and questions must be addressed to the chairperson. In order to maintain order and ensure that all questions and comments are considered, no discussion, questioning and answering, shall take place between any two or more persons except between Board Members and whoever has the floor. *During this portion of the meeting it is important that the board and the members of the audience conduct themselves in a professional, respectful manner.*
- **The Chairperson declares the public hearing closed. The Applicant(s), their agent, and the general public are asked to not interrupt or distract the Board in any way as they begin deliberations on the case.**
- The Board reviews applicable sections of the Hayes Township Ordinance.
- The Board reviews the facts as known and discussion takes place gathering findings of fact until a member puts forth a motion that includes the findings of fact. With support of that motion, voting shall be by roll call and shall be recorded.
- The hearing is over and the board may take up any further business it may have pending, prior to adjournment.

Again, it is important that all persons show respect for each other understanding that the applicant has a personal interest, and the Board has a responsibility to uphold the Ordinance.

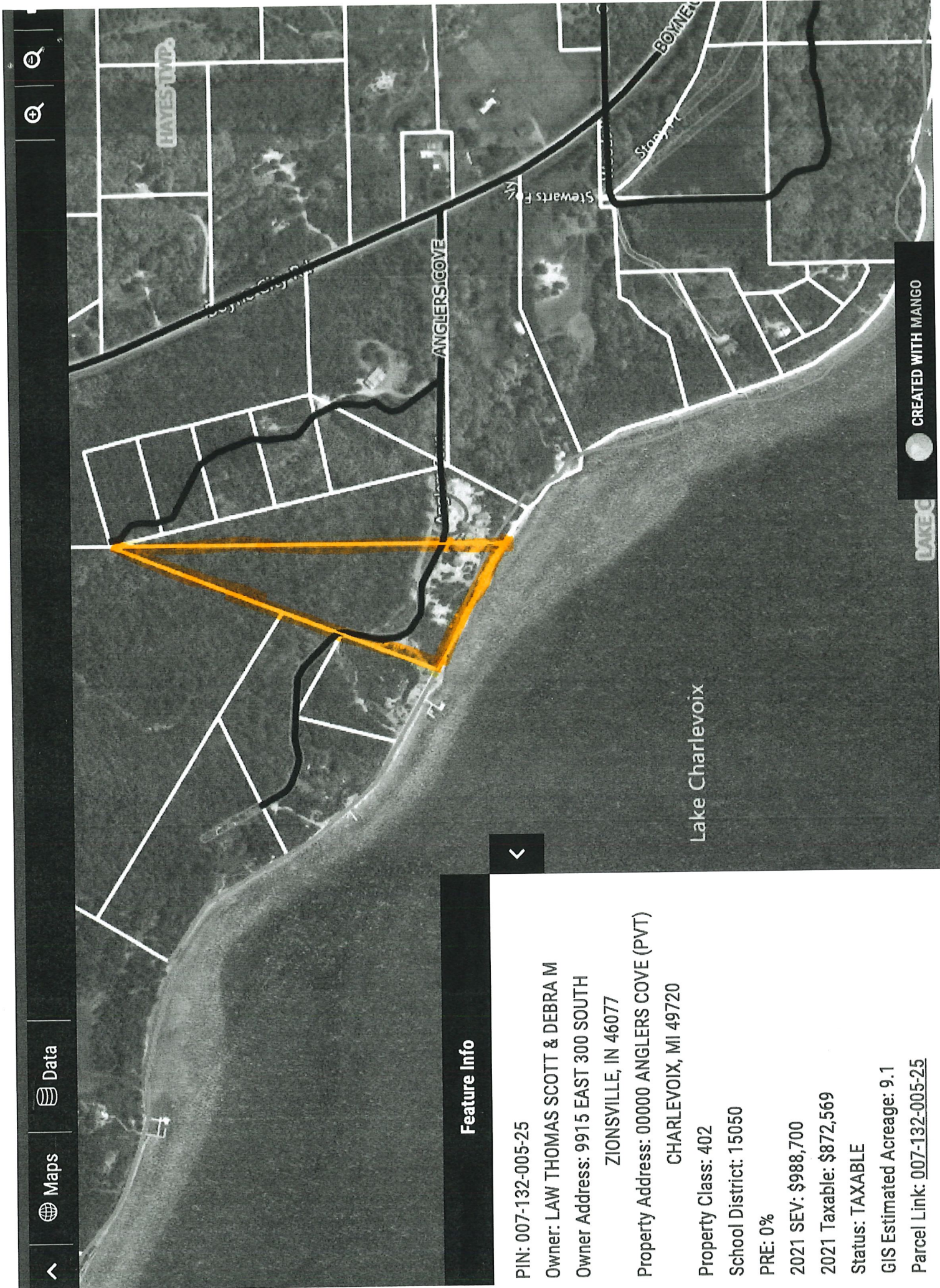
We encourage you to meet with the Zoning Administrator prior to the Zoning Board of Appeals meeting to answer any questions you may have about the meeting process. This can be done during the Zoning Administrators regular business hours, or 30 minutes prior to the scheduled meeting at the Hayes Township Hall.

Hayes Township
Office of Zoning Administrator
09195 Old US 31 N
Charlevoix, Michigan 49720
zoning@hayestownshipmi.gov

**Regular office hours are Mondays 8:00-12:00 and Wednesdays 12:00-4:00.
Please call if you would like to meet just prior to the meeting.**

See also:

- Appeal and Brief Section VI “Hayes Township Zoning Ordinance sections involved in this appeal,” pages 18-20.
- Appeal and Brief Section VI “Hayes township Zoning Ordinance sections involved in this appeal,” pages 21-22, for list of specific sections which apply.
- Maps are in Exhibits C, L, and T to the Appeal and Brief.



Feature Info

PIN: 007-132-005-25
Owner: LAW THOMAS SCOTT & DEBRA M
Owner Address: 9915 EAST 300 SOUTH
ZIONSVILLE, IN 46077
Property Address: 00000 ANGLERS COVE (PVT)
CHARLEVOIX, MI 49720
Property Class: 402
School District: 15050
PRE: 0%
2021 SEV: \$988,700
2021 Taxable: \$872,569
Status: TAXABLE
GIS Estimated Acreage: 9.1
Parcel Link: [007-132-005-25](#)

Hayes Township Charlevoix County Michigan
Zoning Board of Appeals

**Appeal of Determinations
by Hayes Township Zoning Administrator
Determined on November 29, 2021**

LuAnne Kozma, Appellant

Does the appeal involve a specific parcel of property? Yes
Parcel # 007-132-005-25 and adjoining parcel 007-133-005-30
10034 Anglers Cove, Charlevoix, MI 49720
Property owners: Scott and Debra Law

**Appeal of Zoning Administrator's
Determinations
And
Brief in Support**

LuAnne Kozma, for herself
9330 Woods Road
Charlevoix, MI 49720
231-547-2828
luannekozma@gmail.com

Ellis Boal, for Appellant
9330 Woods Road
Charlevoix, MI 49720
231-547-2626
ellisboal@voyager.net

Dated: December 20, 2021

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Citations

Court Decisions

Fox and Associates Inc v Hayes Township, 162 Mich App 647 (1987)
Hess v West Bloomfield Township 429 Mich 550 (1992)
Hoffman v Porter Township, Michigan COA Case # 319409 (04-21-15)
Nixon v. Webster Township, Michigan COA Case # 343505 (1-21-20)
Square Lake Hills Condominium Assn v Bloomfield Township 437 Mich 310
(1991)

Exhibits

- A. *Hoffman v Porter Township*, Michigan COA Case # 319409 (04-21-15)
- B. *Kozma v Hayes Township*, Charlevoix Circuit Court case # 21-0604-27CZ, Defendants' Reply Brief, December 3, 2021.
- C. Laws' Boat Basin permit application to Hayes Township, 2019.
- D. Sullivan letter to Law, 2019.
- E. Zoning Administrator Report, August 2019.
- F. Emails between Van Zee and Law, 2019.
- G. Planning Commission packet, November 19, 2019.
- H. Planning Commission meeting minutes, November 19, 2019.
- I. Van Zee to Laws, November 25, 2019.
- J. Compiled Excerpts of Historical Hayes Township Zoning Ordinances
- K. Laws' joint permit to EGLE and USACE
- L. Laws' boathouse zoning permit application and permit issued
- M. Champion to Boal, 2021.
- N. Schrock to Dahlstrom, 2021.

- O. *Fox and Associates Inc v Hayes Township*, 162 Mich App 647 (1987)
- P. Knepp to DEQ, 1999.
- Q. Ordinary High Water Mark, DeVos boathouse State permit documents
- R. Graham to Scheel, 2012.
- S. *Nixon v Webster Township*, Michigan COA Case # 343505 (1-21-20)
- T. Champion to Narten, 2021.

Federal Regulations

33 CFR 320.4(j)(2)

State Statutes

MCL 125.3603(1)

MCL 125.3603(2)

MCL 125.3604(1)

MCL 125.3604(3)

MCL 324.30101(a) and (w)

MCL 324.30102(1)(f)

MCL 324.30102(1)(g)

Websites

Hayes Township Zoning Ordinance, <https://www.hayestownshipmi.gov/zoning-ordinance/>

Hayes Township Zoning Permit Application Packet, <https://www.hayestownshipmi.gov/wp-content/uploads/2019/09/zoning-permit-application-packet-2019.pdf>

Affidavits of LuAnne Kozma, Irene Fowle

I. Authority and duty of ZBA to hear appeals of determinations by the Zoning Administrator

Separately from the ZBA's power to simply “interpret” the Zoning Ordinance (“ZO”), including interpretations involving a specific parcel, and separate from hearing appeals of “decisions” whereby permits are issued or denied, or other approvals and denials, the ZBA may consider and reverse “determinations” made by the Zoning Administrator or Planning Commission, prior to the issuance or denial of permits, the holding of hearings, review of site plans, or the seeking of variances, under the Hayes Township Zoning Ordinance §§ 8.02, 8.03(4) - (6) and the Michigan Zoning Enabling Act, which states:

“The zoning board of appeals shall hear and decide questions that arise in the administration of the zoning ordinance. ... *It shall hear and decide appeals from and review any administrative order, requirement, decision, or determination made by an administrative official or body charged with enforcement of a zoning ordinance adopted under this act.*¹

Appeals of determinations can be taken to the ZBA by “persons aggrieved” as well as officers of a local government.² For example, in *Hoffman v Porter Township* a planning commission chair appealed a determination of the deputy zoning administrator to the ZBA.³

“The concurring vote of a majority of the members of the zoning board of appeals

¹ MCL 125.3603(1). Emphasis added.

² MCL 125.3604(1).

³ Exhibit A - COA Case # 319409 (2015), unpublished.

is necessary to *reverse* an order, requirement, decision, *or determination of the administrative official* or body...”⁴

The statute and the ZO make no distinction between “final” determinations or other determinations.

II. Determinations appealed

On November 29, 2021, in the attached court affidavit,⁵ Hayes Township Supervisor *and* Zoning Administrator (“ZA”) Ron Van Zee made several sworn statements including historical context for the earlier zoning permit he issued for a “boathouse” and Planning Commission (“PC”) approval for a boat basin and channel, proposed by Scott and Debra Law for property they own on Lake Charlevoix. During litigation with Appellant, the Township finally admitted that both approvals expired a year after being issued/granted. ⁶

Van Zee’s statements included certain **determinations** in ¶¶ 4, 5, 16, 20 and 21 for how he handled the project in the past, and how he would handle the proposed project going forward. (The project as a single project is pending approval from a federal agency):

3. In August of 2019, Scott Law filled out a Zoning Permit Application for a boat basin. ...

⁴ MCL 125.3603(2). Emphasis added.

⁵ Exhibit B, *Kozma v Hayes Township*, Charlevoix Circuit Court case # 21-0604-27CZ, Affidavit by Ron Van Zee, November 29, 2021, at Bates # 16-19.

⁶ Exhibit B, Defendants’ Reply Brief, December 3, 2021, at Bates ## 11-14.

4. Although the "Site Plan Required" line is checked on the application, a site plan as defined in the Zoning Ordinance was not required for this construction.
5. There is nothing in the Hayes Township Zoning ordinance that regulates a boat basin or canal.
6. The boat basin or canal is regulated by EGLE and/or the Army Corp of Engineers.
7. Hayes Township determined in August of 2019 that no Zoning Permit was required from the Township regarding the boat basin or canal.
8. No zoning permit has been issued to Mr. and Mrs. Law as a result of the August 2019 Zoning Permit Application.
9. The Zoning Permit Application did, however, involve excavation within the Shoreland Protection Strip which is regulated in Section 3.14 of the Hayes Township Zoning Ordinance....
10. Section 3 .14(3) creates a shoreland protection strip located within fifty feet of the ordinary high water mark on Lake Charlevoix.
11. Section 3 .14(3) provides further regulations regarding any activity within that fifty-foot area.
15. On July 6, 2020, I received a Zoning Permit Application from the Laws for an attached boathouse....

16. The "Site Plan Required" line was checked on the application by the applicant and not me. A site plan was not required for the boathouse.
17. The Law property is zoned R-1 (Low Density Residential).
18. The Law property is used for a single-family residence which is a permitted use in the R-1 district per Section 4.05 of the Hayes Township Zoning Ordinance....
19. Pursuant to Section 3.05(1) of the Zoning Ordinance ... a building that is structurally connected to the principal building is considered part of the principal building and not subject to regulation as an accessory structure.
20. The boathouse is to be attached to the house making it part of the house and not an accessory structure.
21. The proposed boathouse did not require Planning Commission or site plan review pursuant to Section 5.03 of the Zoning Ordinance ... and is a permitted addition to the house that can be approved by the Zoning Administrator.

The determinations can be summed as follows:

- The project is two discrete projects—boathouse that requires a Zoning Permit from the ZA, and boat basin/channel that requires no Zoning Permit from the ZA, and no site plans for review for either.

- The affidavit asserts there is *nothing* in the ZO that regulates a basin or channel/canal—site plans and permits are not required. “Activity” in the Shoreland Protection Strip is regulated but review is relegated only to Shoreland “Landscaping” after destruction and removal of Shoreland is allowed by the state and federal agencies. Only the state and federal agencies can approve or disapprove basins and canals. The Township is in effect powerless over these excavations and can neither permit or deny their construction.
- The affidavit asserts o site plan is required for the boathouse, the boathouse is to be structurally connected as an addition to the residence and by virtue of that connection alone, is determined to be intended for residential use, is a permitted construction, and can be approved unilaterally by the ZA.

On December 3, 2021, the Township submitted a reply brief in *Kozma v Hayes Township* on behalf of the Township and Van Zee, to which the Van Zee Affidavit was attached, that speaks of the Affidavit at page 4 as a “determination”:

While it is likely true that if the Laws receive their permits from the Army Corps of Engineers and EGLE and come back to the Township for issuance of a zoning permit for the attached boathouse, Ron Van Zee would likely approve that given what he states in his Affidavit and his determination that [it] is compliant with the Zoning Ordinance.

Similarly, then-ZA Larry Sullivan's letter of August 2019 made a determination that the boathouse could have only one dock (unless the Laws might establish it as a marina). He added this determination was appealable: “In any case, all decisions made

by the Zoning Administrator may be appealed to the Hayes Township Zoning Board of Appeals.” The Laws did not appeal, nor did they seek a marina permit from the Township. But, they would need to reapply and new determinations still need to be made, or else the multiple docks will be a *nuisance per se*.

The point is that Van Zee through his attorney referred to his own affidavit as a “determination,” as indeed it is. Because the attorney represented the Township too, the Township itself has given its blessing. This means it is appealable to the ZBA.⁷ And by this appeal all acts in furtherance of it are stayed by Statute and Ordinance.⁸

To explain “determinations” further, a ZA may for example inform a property owner that it is his or her determination that the ordinance requires the owner to provide a site plan with specific data for a zoning permit for one part of the project, a variance for another part of the project, a special use permit for another part of the project, or perhaps a rezoning would be required. Administrative determinations are appealable by the property owner prior to seeking or obtaining permits, variances, rezonings, or other permissions. Other persons can also appeal those determinations. Some determinations might be that the project is not allowed at all.

III. Interpretations requested if ZA reverses determination

With this appeal to the ZBA, Appellant asks to reverse the ZA’s 2021 determinations that the Laws’ proposed boathouse/boat basin/boat channels/and event and dining facility—shall be treated as two separate projects—with only the boathouse *sans boat basin and channel* requiring a zoning permit, while the boat basin and channel

⁷ MCL 125.3603(1), (2); ZO §§ 8.02, 8.03(6), 8.04.

⁸ MCL 125.3604(3); ZO § 8.11.

is treated as a separate project not requiring a zoning permit from the ZA for excavation and construction, the approval for excavation and construction left only to other agencies, not the township, while only receiving minor review by the Planning Commission for landscaping on what remains after such drastic removal of the Shoreland Protection Strip.

This appeal cannot be mooted prior to the ZBA's own determination unless the ZA reverses himself on the fundamental determination that the project is two discrete projects, and the reversal is on all parts of his determinations, requiring the Laws to apply for the entire project at the same time, and requiring a zoning permit for the entire construction after detailed review of site plan and scale drawings for all constructions and excavations involving boat basin, channel and boathouse, and determining that the boathouse while attached to the residence does not qualify it as a residential use since the intended use inside the building is for hosting large, commercial events in a residential zone, and is not compliant with the ordinance.

The appeals of the ZA's determinations, only if completely changed by the Zoning Administrator⁹ as described above, shall be treated as a Request for Interpretation(s) as described below.

All determinations and decisions regarding this Appeal must be made the the ZBA in a public meeting, as required in the Hayes Township Rules of Procedure adopted July 1, 2020, and as required by state statute.

⁹ It would be improper for the Zoning Administrator to keep changing the determinations in an effort to moot Appellant's appeals. Mr. Van Zee has flip-flopped many times before.

IV. Appellant

Appellant Kozma is a year-round resident and registered voter in Hayes township, and a riparian part-owner of two waterfront properties at 9330 and 9300 Woods Road on Lake Charlevoix, on Anglers Cove near the Law property, 3 and 4 parcels east of, and within sight and sound of the proposed project. She is a “person aggrieved”¹⁰ of the ZA’s determination that the Laws’ proposed boat basin and channel are not regulated by the ordinance, and that the Township has “nothing” in its ordinance and is powerless against their construction. She disagrees with this determination and provides evidence in this appeal that the ZA’s determination violates the zoning ordinance. If the ZA’s new determination regarding the boat basin and channel/canal results in their construction without—or with—Township review or approval, it would create a nuisance *per se*¹¹ and cause unique harms to her, including detrimental ecological and economic impacts caused by the removal of protected shoreland on the lake so close to her conservation-easement protected property.

Similarly she is a “person aggrieved” by the ZA’s separate determination that the proposed “boathouse” is a permissible addition to the house by virtue of its structural connection, despite its intended use and that no site plan for this is required of the Laws for township zoning permitting going forward. She contends the process determined in 2021 by the ZA will allow a very large structure, plainly designed for holding large events and as a dining facility as part of an expansive resort development, to be constructed without proper zoning administration, depriving her of the due process such a non-residential facility requires. The ZA has determined the project “can be approved” but without review and proper determination of its actual intended use, which will create a nuisance *per se* that will harm Kozma’s quiet enjoyment of her own property.

¹⁰ MCL 125.3604(1).

¹¹ ZO § 3.01

V. Background of the pending project, specific parcel of property involved

Hayes property owners Scott and Debra Law first submitted a site plan and application for “boat basin” in August 2019 for their property at 10034 Anglers Cove, Parcel # 007-132-005-25. With it was a single page, “Boathouse Drawing Conceptual Design” for the “Law Cottage” dated 1-11-3019 [sic] showing an area with no walls or roof discernable, boats inside an inland marina near the house, and an artificial boat basin and artificial channel cut into the shoreland of Lake Charlevoix, including excavation of a 30 x 50 foot swath of Shoreland Protection Strip. The plan indicated “boathouse by others.” An outdoor walkway labeled “dry laid walkway connection” was depicted with paver stones like those around the residence, leading toward the Laws’ residence.¹²

Then-ZA Larry Sullivan reviewed the application and wrote to the Laws¹³ that month, answering four questions that he raised. (He did not give the public the answers in his Zoning Administrator’s report.)¹⁴ He informed the Laws he made determinations and “findings” that the boat basin and channel seawalls would require a variance from the ZBA, there were too many docks proposed and a “marina permit” would be needed, and the Shoreland Protection Committee would need to review the plans. The Laws never did seek a marina permit from the Township or a variance from the ZBA. Sullivan signed the application and indicated a site plan was required.

In a flawed process, the Township did not bring Tip of the Mitt Watershed Council member of the Hayes Township Shoreland Protection Subcommittee into an October

¹² Exhibit C, Laws’ Boat Basin application to Hayes Township, 2019.

¹³ Exhibit D, Larry Sullivan letter to Scott Law, August 26, 2019.

¹⁴ Exhibit E, Zoning Administrator Report August 2019.

2019 site visit, where newly-installed ZA Van Zee and the Laws' developer, Bob Drost, also met. No site review photographs or measurements of stakes in the ground were ever taken by Van Zee, as determined by Appellant in several Freedom of Information Act requests to the Township, although they were required by ordinance.¹⁵ The Shoreland Protection Subcommittee's site review meeting was not minuted or approved.

On or about October 19, 2019, Van Zee—while still only the township supervisor, not the ZA, visited Scott Law and with the Laws' project developer Bob Drost, went on a tour of his 400+ acres of contiguous properties. He learned of Law's "master plan" for developing the entire property as a large commercial development that would include, Law explained the next day in an email memorializing the visit:

One of the main goals of buying what is now over 400 acres was to allow people from our charitable foundation, our employees, family and friends the opportunity to benefit from this property and hopefully to allow families recovering from traumatic medical and health events to have opportunity to experience Michigan.¹⁶

...

Our future plans include zip lines, horse barn for trail riding and therapeutic activity, *a dining facility for guest and events*, a winery facility, fly fishing lake and possible golf holes. All private use for friends, family, charity and local organization as we see fit!

...

Please also let me know how we can help you as you take on this challenging [ZA] position....¹⁷

Van Zee responded the next day, his first day on the ZA job, saying:

¹⁵ ZO § 9.02(4).

¹⁶ Exhibit F, Scott Law and Ron Van Zee email exchange, October 2019. Bates ## 80-82.

¹⁷ Exhibit F, (Exclamation point in original, italics added.)

After hearing your plans and understanding better, not only what you are doing in other places, but also what your intentions are for this property, I would like to thank you for your service to the community. As we discussed Saturday, often times people are afraid of change they do not understand. Thank you for your letter explaining your long term goals ... but mostly for your willingness to share such an absolutely beautiful place, eventually with so much of the community. ...

I will make sure the public is informed.¹⁸

The “Subcommittee’s recommendations and report”¹⁹ was listed on the November 19, 2019 Planning Commission agenda. It had several key facts incorrect, including that: an application for a private basin *and boathouse* had been applied for, EGLE and USACE permits *had been already granted*, and *the ZA determined the project meets the requirements for granting a permit* except for review of the shoreland landscaping plan. Implicit in the last finding was that the ZA had told the PC that a permit was required for the project to begin.

Sullivan’s letter, cc’d to Planning Commissioner Roy Griffiths, was never shared with the entire Planning Commission and was not in the packet²⁰ for the November 2019 meeting. In addition to the Subcommittee report, the packet only contained two different Drost documents that were submitted to the township after the initial application, not the original conceptual plan attached to the application. What planning commissioners saw was a revised conceptual plan labeled “Shoreline Planting Schedule” that left off the words at the top: “boathouse by others” and “dry laid walkway connection.” The second document was simply a stylized color aerial photograph that didn’t show a building, boat basin or channel in the proposed location at all, just a listing of plants labeled “Shoreline

¹⁸ Exhibit F.

¹⁹ Exhibit G, Planning Commission Packet, November 19, 2019 at Bates #87.

²⁰ Exhibit G, at Bates ## 83-89.

Plant Inventory.” The other planning commissioners who were not on the subcommittee who did the site review and had the original conceptual plan, did not have a site plan before them to indicate that part of the plan was a boathouse. It looked like a marina in a boat basin (without walls or roof).

Despite all this and the misinformation, the project received approval, under instructions from Van Zee which are contrary to those of his 2021 affidavit:

The Zoning Administrator has determined that the project meets the requirements for granting a zoning permit with the exception of a review of a Shoreland Landscaping Plan, as the project will involve modifications to the shoreland protection strip. ... The Shoreland Protection Committee supports the approval of the proposed site plan.

...Matt Cunningham made the motion; with support from Marilyn Morehead, to accept the report and recommendation from the Shoreland Protection Subcommittee and approve the plan.²¹

ZA Van Zee sent the Laws a letter shortly after saying the PC “approved your application, with conditions, for *boat basin* and shoreland improvements.”²² The PC's site plan approval expired a year later per ZO § 5.03(9), admitted to by the ZA in his November 29, 2021 affidavit.

Eight months after the “boat basin” application, on July 6, 2020, the Laws applied

²¹ Exhibit H, Planning Commission meeting minutes, November 19, 2019. Emphasis added.

²² Exhibit I, Van Zee to Laws, November 25, 2019. Emphasis added.

for a zoning permit for the “boathouse.”²³ Again “site plan required” was checked. The application was signed by the ZA. Contrary to Van Zee’s Affidavit, scale drawings actually were required by ordinance²⁴ and this was repeated in the Township’s permit application instructions to provide a plot plan giving accurate dimensions on either a scale drawing or rough sketch. But, “drawings shall be required on all structures and shall contain the following information: 1. Existing and intended use of the structure; 2. Dimensions...including height...” The Laws provided these, as will be detailed below.

The ZA took just two days to issue the zoning permit for “Attached boathouse.”²⁵ No written zoning report was made informing the community of this permit issuance. No mention of the building’s intended use as an event and dining facility was made on the permit. No stakes in the ground, no photographs, no measurement, violating the ordinance.²⁶ Twelve months later, the permit expired according to the ordinance.²⁷

During litigation between the Appellant and the Township from October 29 through December 10, 2021, the Township reversed itself from its previous official positions stated at September 2021 meetings that extended the permits and/or denied that the permits had expired. The Township finally admitted that the Planning Commission’s approval in 2019 and the zoning permit issued to the Laws for the boathouse on July 11, 2020 are both expired and no longer valid.²⁸ These expired approvals are not being appealed.

²³ Exhibit L. Bates ## 150-166.

²⁴ ZO § 9.02(2).

²⁵ Exhibit L. Bates # 151.

²⁶ ZO § 9.02(4).

²⁷ ZO § 9.02(5).

²⁸ Exhibit B, Defendants Reply Brief, pp 1-4.

But the Laws' entire "boathouse," boat basin and channel project (including dredging in Lake Charlevoix) permit application is still pending with the US Army Corps of Engineers, the Michigan Department of Environment, Great Lakes and Energy (EGLE) has already issued a permit, and the ZA has newly determined there are now no Township requirements for the Laws to submit a new application or site plans to Hayes Township or obtain a Township zoning permit or any other permission or approvals—not even performance bonds—to construct and excavate the boat basin and channel portion of the overall project. The ZA is saying, in effect, the Township is *powerless* to require anything at all of the Laws for boat basin and channel, no need for any review, no need for any future decision making. The 2021 ZA determination is the township's final say in the matter on the boat basin and channel, unless the ZBA makes a determination to reverse it. Otherwise, once the federal and state permits are in, bulldozers will have free reign to construct the boat basin and canal/channel. The shoreland is now eminently endangered.

Likewise, in his 2021 Affidavit and brief to the Charlevoix County Circuit Court, the ZA and Township have stated the boathouse project is "compliant with the ordinance"²⁹ still, by virtue of its connection to the Laws' residence, making it a part of the house and that he would "likely approve"—without a site plan or any required drawings—after federal and state permits are obtained by the Laws.

VI. Hayes Township Zoning Ordinance sections involved in this appeal

Section 1.02 Purpose

Section 2.01 Rules of Construction

Subsections (1), (2), (3), (4), (5), (6), (8), and (9)

²⁹ Exhibit B. Bates ##14, 18.

Section 2.02 Definitions

Accessory Building or Structure
Accessory Use
Alteration
Basement
Boat and/or Canoe Livery and Boatyard
Buildable Area
Building
Building Envelope
Building Height
Erected
Excavating
Food Preparation Area
Grade, Natural
Impervious Surface
Lot, Waterfront
Natural State
Nuisance Factor
Off-Street Parking Lot
Ordinary High Water Mark
Principal Use
Setback
Shoreland Protection Strip
Site Plan
Special Use Permit
Structure
Structural Change or Alteration
Use
Variance
Zoning Permit

Section 3.01 The Effect of Zoning

Section 3.02 Nonconformities

Section 3.04 Principal Uses

Section 3.05 Accessory Buildings

Section 3.14 Waterfront Regulations

Section 4.05 Low Density Residential District (R-1)

Sections 5.01, 5.02, 5.03 and 5.04 Site Plan Review

Sections 6.01 and 6.02 Special Use Permits, Purpose and Uses Subject to Special Use Permits

Section 7.01.15(B) Resource Mining, Extraction and Fill
Sections 8.01 through 8.11 Zoning Board of Appeals
Section 9.01 Zoning Administrator
Section 9.02 Zoning Permit
Section 9.03 Conditions
Section 9.05 Fees
Section 9.06 Performance Guarantee
Section 9.07.1 Nuisance Per Se
Section 9.07.2 Inspection
Section 9.07.3 Penalties
Section 9.07.4 Stop Work Order
Section 9.08 Conflicting Regulations
Sections 10.01 and 10.02 Ordinance Adoption and Amendment, Public Hearing Requirements

VI. Argument

1. Boat basin and channel/canal

The ZA's determination on November 29, 2021 that there is "*nothing*" in the Hayes Township Zoning Ordinance regulating the construction of boat basins and canals/channels³⁰ is a new determination, a reversal of the determination the Township made in 2019, and completely false. This determination puts Lakes Charlevoix, Michigan and Susan and their shoreland at risk, is in violation of the Township's ordinance and indeed all of the Township's previous ordinances that since 1973 have protected the lake by protecting the shoreland around it.³¹

The ZA made additional determinations that he will make no further requirements of the Laws to apply for a zoning permit or provide *site plans* for the boat basin and

³⁰ Exhibit B, at Bates # 17.

³¹ Exhibit J, Compiled Excerpts of Historical Hayes Zoning Ordinances. (Exhibit 22 from September 27 Requests by Appellant).

channel going forward, nor will a *zoning permit* be required or issued for their construction.

However, numerous provisions in the ZO prohibit a boat basin and canal/channel within 100 feet of the Ordinary High Water Mark, prohibit the destruction of the Shoreland Protection Strip and any part of it, prevent excavation of fill, dirt, gravel and/or sand in an R-1 zone, and prohibit the *construction of anything* without a zoning permit. The proposal for a boathouse/dining and event facility is also dependent upon the construction of a boat basin and channel for its use and function as a boathouse (but not as a dining and event facility) and the multiple proposed constructions are sub-parts of a single development project. As such, the boathouse's *building envelope* includes the constructed, artificial boat basin and channel.

As discussed below, the following ZO sections provide language that regulate (and/or prohibit) boat basins and channels/canals:

1.02, 1.02(B)

2.02 (Several definitions, as described below)

3.01

3.14 (1)

3.14 (2) (A), (D)

3.14 (3) (A), (B), (C), (H), (I), (K)

3.14 (4)(E), (H)

3.14 (4)(H)

3.14 (5)

3.14 (8) (A)

3.14 (8) (B)(iii)

4.04(3)(H)

4.05

5.03(5)(A)(2)

5.04

9.01

9.02

9.07(1)

Section 2.02 Definitions that have relevance or pertain to boat basins and canals

The following definitions contain language that pertain to the construction of boat basins and channels (with some emphases added to mark appropriate parts):

Alterations: Any change, addition or modification in construction or type of use...”

Building Envelope: The area upon a lot where a principal building or structure and any attached or detached accessory structures are or are intended to be constructed. For a residential use, the *building envelope shall mean the area upon a lot, parcel, or site condominium unit where a dwelling and any accessory structures, including but not limited to garages, storage sheds and decks, are or are intended to be constructed.*

Dock: A temporary or permanent structure, built on or over the water, supported by pillars, pilings, floats, or other supporting devices.

Excavating: Excavating shall be the earth moving, filling or removal of earth, sand, stone, gravel, or dirt.

Lot, Waterfront: A lot having frontage directly on a lake, river, or stream. The portion adjacent to the water is considered the water frontage. The waterfront is considered the front lot line.

Natural State: An area where bedrock soil and vegetation is left undisturbed and void of structural improvements. An area that is untouched and undisturbed by

man. An area that is declared a natural state will remain as presently is, without improvements, mowing, removal of trees and shrubs or contouring, filling or removal of soil. Previous land use may show the effects of human uses such as fences, foundations, orchards, etc. These may be considered for inclusion as a natural state at the discretion of the planning commission if and only if there is no further use or improvement of these effects. If any of these previous effects are to be utilized they will not be considered as a natural state.

Ordinary High Water Mark: The line between upland and bottomland that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil, and the vegetation. On Lake Charlevoix the ordinary high water mark shall be the legally established lake level of 582.3 feet IGLD 1985, and on Lake Michigan the ordinary high water mark shall be the legally established lake level of 581.5 feet IGLD 1885.

Setback: *The minimum required horizontal distance from the applicable right-of-way line, easement, Ordinary High Water Mark or property line of a lot within which no buildings or structures may be placed, except as otherwise provided in this Ordinance.*

Shoreland Protection Strip: *A strip of land fifty feet in depth landward from the Ordinary High Water Mark, placed so as to be parallel to the body of water.*

Site Plan: The drawings and documents depicting and explaining all salient features of a proposed development so that it may be evaluated according to the procedures set forth in this ordinance, to determine if the proposed development meets the requirements of this Zoning Ordinance.

Special Use Permit: A permit grant with approval by the Township Planning Commission for a use of land in a district that does not conflict with any other permitted land use in the district when such a special use is as specified in this Ordinance for that district.

Structure: *Anything constructed or erected, the use of which requires location on the ground or attachment to something having permanent location on or below the ground.*

Zoning Permit: A zoning permit is written authority as issued by the Zoning Administrator on behalf of the Township *permitting the construction*, moving, exterior alteration *or use of* a building or *land* in conformity with the provisions of this Ordinance.

Sections prohibiting boat basins and channels in Shoreland Protection Strip

The definition of Shoreland Protection Strip in Section 2.02 is critical to understanding where it is and what can and cannot be done to it: “*A strip of land* fifty feet in depth *landward* from the Ordinary High Water Mark, placed so as to be parallel to the body of water.” (Emphases added). The 50 feet mark is not measured from the property owner’s lot line but from the Ordinary High Water Mark (OHWM). This also requires an understanding of what the OHWM is and how it operates.

The OHWM is not the same as how high or low the lake level is at at any point in time, or the levels that vary from year to year. Lake levels rise and fall constantly. But over time, they ordinarily go about as high as a certain point. The OHWM is the “line *between upland and bottomland* that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil, and the vegetation.”^{32 33} Once observed and determined as to what elevation that mark is, some lakes, like Lake Charlevoix, have been legally codified as a constant vertical elevation by local, state and/or federal law. Hayes Township legally codified it this way: "On Lake Charlevoix

³² ZO § 2.02, “Ordinary High Water Mark.”

³³ The Hayes Zoning Ordinance does not define “upland” or “bottomland.” MCL 324.30101 defines them as: “‘Bottomland’ means the land area of an inland lake or stream that lies below the ordinary high-water mark and that may or may not be covered by water” and “‘Upland’ means that land area that lies above the ordinary high-water mark.”

the ordinary high water mark shall be the legally established lake level of 582.3 feet IGLD 1985.” Any land above that elevation is upland, any land below it is bottomland.

Going back to the definition of Shoreland Protection Strip, the strip of land measured 50 feet landward from the OHWM, means the uplands are what’s being protected as “the strip.” Below the OHWM is not the Shoreland Protection Strip.

Section 3.14, “Waterfront Regulations,” prohibits the removal of the Shoreland Protection Strip —ie, uplands—in several subsections. Section 3.14(3) says “A Shoreland Protection strip shall be required on all waterfront lots. The Shoreland Protection Strip ***shall include all of the land area*** located within fifty (50) feet of the Ordinary High Water Mark of a lake or a stream abutting or traversing the property in question.” (Emphasis added). This is unambiguous. All of the land area means *all*, not just a portion. Not just the vegetation. All is all of the uplands.

Section 3.14(3)(H) states: “Natural vegetation cover, including trees, shrubs or herbaceous plants shall be maintained on at least eighty percent (80%) of the lake or stream frontage within the Shoreland Protection Strip... The vegetation on the *remaining* twenty percent (20%) may be cleared for a single view corridor, or selective trees removed to provide a filtered view throughout the frontage, provided the cumulative total of the trees removed do not exceed that allowed twenty percent (20%) of the frontage” (Emphasis added).³⁴ The subsection continues “When trees are removed, root systems shall be left in place for shoreline stabilization.” All of this, too, is unambiguous. Solely vegetation can be removed from 20% of the shoreland—but not

³⁴ The 20% mandate is repeated in bold typeface in ZO § 3.14(3)(A): “The Shoreland Protection Strip shall not be altered more than 20% under any condition, except to remove dead trees or shrubs, remove invasive species, or for selective trimming of trees as permitted in 3.14.3I.”

tree roots. Put another way, 80% must be naturally-vegetated land, and 20% can be "not natural" or non-vegetated/cleared land, but only with certain conditions for the purpose of views of the lake. The 20% of the Shoreland Protection Strip without natural vegetation is *remaining* in place. Not excavated and hauled away.

Section 1.02 states the purpose of the entire ZO is to “promote the public health, safety and general welfare,” “encourage the use of lands in accordance with their character... and limit the improper use of land,” and “consider the character of each district, its suitability for particular uses, the existing property values and natural resources, and the general and appropriate trend and character of land, building and population development.” The character of the Shoreland Protection Strip 50 feet from Lake Charlevoix’s OHWM—which is all residentially zoned—is maintained with specific ordinance language to restrict development to proper land use. Structural development—with a limited number of acceptable exceptions—here is “improper use.” The intent of the 50 feet of protected shoreland is to “protect the lake,” a long-established goal and purpose of the Hayes Township Zoning Ordinance going back decades.

This overall purpose is reiterated in Section 3.14(1), the Waterfront Regulations “intent” section: “The waterways and lakes in and adjacent to the lands of Hayes Township are invaluable assets to the economy and quality of life, and therefore *must be preserved in a natural fashion* to main health of these waterways as well as the natural beauty of Northern Michigan. Thus, the owners of waterfront lots have an added responsibility regarding *the preservation and protection* of these natural resources, water quality and community scenic and recreational values.” (Emphasis added). Construction of an artificial boat basin and channel is contrary to “preservation and protection” and contrary to the public interest.

Removal of the Shoreland Protection Strip is also in stark opposition to Section 3.14(8)(A): “It is the intent of the Waterfront Development Review process described below to promote the gradual, systematic, and *long-term restoration* of the Shoreland Protection Strip.” (Emphasis added).

Inside the mandatory *land* area 50 feet landward from the OHWM, permitted land use and activity does not include “boat basin” or “channel” just as it does not permit “boating,” for a very practical reason: you can’t boat on land, only on the lake over bottomlands (and bottomlands is not the Shoreland Protection Strip). Removal of the upland above the OHWM in order to “boat” would be a conversion (loss) of uplands to bottomlands, destroying the very purpose of the ordinance’s mandate to protect the Shoreland Protection Strip, which “is to protect the lake by preventing soil erosion, *providing a filter* for the removal of pesticides, fertilizers and other potential water pollutants, and to maintain a visual barrier.”³⁵ The land cannot filter anything if the land is not there at all. Only uplands can serve this function, not bottomlands.

Destruction of shoreland by removal and excavation is damage to the land, which is prohibited in Section 3.14(4)(H): “Any damage caused to the Shoreland Protection Strip during the process of installing or removing seasonal docks, shall be repaired within 30 days...” Destruction, removal and excavation are also prohibited by Section 3.14(3)(K): “It is in violation of the Zoning Ordinance to *alter or disturb* the Shoreland Protection Strip except to move dead trees or shrubs, remove invasive species, or for selective trimming of trees as permitted in 3.14.3I. If altered or disturbed, the following corrective measures are required...The Shoreland Protection Strip shall be replanted” and “Where native shoreline vegetation does not exist, a combination of native

³⁵ ZO § 3.14(3). Emphasis added.

vegetation shall be introduced in a naturalized planting pattern as exemplified by neighboring shorelines that have not been disturbed.”

The types of permitted alterations and disturbances are actions that do not harm or minimally harm the uplands. Excavation of shoreland is in the category of alterations or disturbances that cause severe—and in fact irreparable harm and obliteration—so it is not possible to consider removal and excavation as permitted types of alteration and disturbance.

Section 3.14(3)(C) says “*shoreline retaining* structures shall be permitted with appropriate agency approvals” but this should be construed to mean that the structures be used to *retain* or maintain the *existing* shoreline to stop erosion. This cannot be interpreted to mean they can be used in conjunction with activities prohibited in the ordinance such as excavation to remove Shoreland Protection Strip, which is protected from harm.

Even an *undocked boat*—which is not even a structure—is prohibited from disturbing the Shoreland Protection Strip.³⁶

Sections prohibiting construction/excavation without site plan and zoning permit

A principal purpose of zoning is to “encourage the use of lands in accordance with their character.”³⁷ Zoning permits are required for all activities, structures, and uses without which they are nuisances *per se*.³⁸

³⁶ ZO § 3.14(4)(E).

³⁷ ZO § 1.02(B).

³⁸ ZO § 3.01.

Section 3.01, the Effect of Zoning in subsection (1) states: “In order to carry out the intent of this Ordinance, no use or activity on a piece of land shall be allowed or maintained, no building or structure or part thereof shall be allowed to be used, constructed, remodeled, altered, or moved upon any property *unless it is in conformance with this Ordinance, and a zoning permit has been obtained*, except in the case of lawful nonconforming uses.” (Emphasis added). It is a violation of Section 3.01 to allow construction such as this without a zoning permit. The Zoning Permit definition is consistent with this section.

Section 9.01 prohibits the ZA from abusing his power to issue zoning permits without reviewing plans in detail:

The Zoning Administrator shall have the power to grant or deny Zoning Permits and to make inspections of buildings or premises necessary to carry out the duties in the enforcement of this Ordinance. *It shall be unlawful for the Zoning Administrator to approve any plans or issue any Permits for the excavation or construction until such plans have been inspected in detail and found to conform to this Ordinance.* The Zoning Administrator shall under no circumstances be permitted to make changes to this Ordinance or to vary the terms of this Ordinance...

A “site plan” is to have “drawings and documents depicting and explaining all salient features.”³⁹ All site plans require preservation of landscape in its “natural state insofar as practical”⁴⁰ where it “will remain as it presently is, *without* improvements, mowing, removal of trees and shrubs or contouring, filling or *removal of soil.*”⁴¹

³⁹ ZO § 2.02.

⁴⁰ ZO § 5.03(5)(A)(2).

⁴¹ ZO § 2.02. Emphasis added.

If there is no site plan, a performance bond cannot be required.⁴²

Waterfront Regulations require, within the Shoreland Protection Strip, a “waterfront development review” process as an “added layer of review”⁴³ and requires detailed inventories of existing vegetation and planned vegetation changes.⁴⁴ The inventories do not include planned earth changes, because such alterations are prohibited elsewhere in the ZO. Note, too, in this section that the detailed inventory of all structures within 100 feet of the OHWM similarly does not refer to what kinds of structures might be allowed or not allowed, because the ZO covers that in the setback provision.⁴⁵

Sections requiring structures to be setback 100 feet from OHWM

Implicit in the ZA's determination is that channels and basins are not “structures.” But by definition in the ordinance, “structure” is:

*Anything constructed or erected, the use of which requires location on the ground or attachment to something having permanent location on or below the ground.*⁴⁶

Certainly an artificial basin or channel is located “on the ground” and even “below the ground.” The Laws’ proposed boat basin and channel would require specific locations on the ground: adjacency to Lake Charlevoix, adjacency to each other, and to the proposed building/boathouse/dining and event facility.

⁴² ZO §§ 5.03(11), 9.06.

⁴³ ZO § 5.04.

⁴⁴ ZO § 3.14(8)(B)(iii).

⁴⁵ ZO § 3.14(2).

⁴⁶ ZO § 2.02.

But are they “constructed”? Yes. The ZA admits it in his Affidavit ¶ 4.⁴⁷ And correctly so. “Constructed” refers to something which is built, created, or given form by a plan. Artificial channels and basins, built with powerful earthmoving machinery fit easily. Michigan statute also describes them as “constructed.”⁴⁸

Section 3.14(2) Setback Area Regulations, does not mention boat basins, channels and canals in the list of exceptions permitted within the 100 foot setback, but that does not mean the regulations permit them. The language is “*no structures* (with the exception of a patio/deck, walkway, retaining wall, launching ramps and/or docking facilities including steps) shall be allowed within one hundred (100) feet of the Ordinary High Water Mark” for Lake Charlevoix. Importantly it does not say setback from the property lot line, but from the OHWM, the line demarcating the uplands from the bottomlands. Giving specific exceptions expressly limits the exceptions to just those particular structures. The exception language does not use a generic term followed by examples of the type. It does not say “with the exception of *structures such as* a patio/deck, walkway....”

Even if the list of specific exceptions above is interpreted to mean examples of like structures, using the statutory interpretation principle of *ejusdem generis*, (meaning

⁴⁷ Exhibit B, at Bates #17.

⁴⁸ MCL 324.30102(1)(f) states one *constructs* “an artificial canal, channel... pond, lake, or similar waterway where the purpose is ultimate connection with an existing inland lake or stream.” (At that point the construction is on uplands and the construction is a structure according to the Zoning Ordinance). MCL 324.30102(1)(g) defines the last step as “*connecting*” “any natural or artificially constructed waterway, canal, channel,.. pond, lake, or similar water with an existing inland lake or stream for navigation or any other purpose.” (It is at that point when the waters of Lake Charlevoix would fill the excavated upland that transforms the land from uplands to bottomlands.)

“of the same kind”), boat basins and canals do not fall within the same category of structures that are exceptions to the prohibition of “no structures” within the 100 foot setback. The exceptions specified are all small, on-grade land-based structures that do no or limited harm to the shoreland below them. A boat basin and channel are structures that require construction below grade (excavation) that by design do considerable harm to—actually loss of—the shoreland.⁴⁹ None of the exceptions converts uplands to bottomlands.

The intent of this section of the ordinance must be taken in the context of the ordinance as a whole, which includes the specific requirements additionally placed on the structures that are excepted. A deck is permitted but is limited to "one *at-grade* patio/deck, not to exceed two hundred (200) square feet may be located within the 100-ft. setback following review and approval by the Zoning Administrator to *ensure the structure will be installed in a manner which will cause the least negative environmental impact.*"⁵⁰ Walkways or stairs for water access shall be allowed, provided they do not exceed six feet in width, *are constructed in such a way that stormwater is slowed, take the most environmentally sensitive route* between each destination and are not constructed in such a way that they expand the deck beyond the two hundred (200) square foot maximum.⁵¹ Similarly, docks cannot damage the shoreland and if they do, the owner shall repair the damage within 30 days of being notified of the violation.⁵² Ramps are allowed in the Shoreland Protection strip, if they do not disturb and alter it,

⁴⁹ Boat basins and canals are more like septic systems and septic fields—excavated below grade—that would do harm to the lake, and these are prohibited by ZO § 3.14(3) (G).

⁵⁰ ZO § 3.14(2)(A). Emphasis added.

⁵¹ ZO § 3.14(3)(D). Emphasis added.

⁵² ZO § 3.14(4)(H).

and are not consisting of anything but “soils or rocks consistent with the composition of the pre-existing on-site soil and rocks.” “Any and all fill material placed within the Shoreland Protection Strip shall be removed.”⁵³

The ordinance requirement which is ignored by this ZA determination is the horizontal location of the OHWM. The vertical OHWM elevation is a constant, whereas the horizontal location or perimeter of the lake is the line between uplands and bottomlands. If land that was once upland is now bottomlands, the horizontal location of the OHWM moves with the earth changes. The very definition of OHWM is the line between upland and bottomlands.

Without a site plan, the horizontal location of the OHWM cannot be determined. Horizontal location of the OHWM is needed to assess compliance with protection of “all of the land” in the 50-foot Shoreland Protection Strip.

The horizontal location is also needed to measure the 100-foot structure setback.⁵⁴

In the Laws’ joint application to EGLE and US Army Corps⁵⁵, they indicate correctly which structures they propose to construct *below* the OHWM (as relocated by opening of the artificial channel): entrance channel landward of the OHWM [distinguishing it from the proposed dredged 130-foot channel in Lake Charlevoix’s natural bottomlands], boathouse basin center, boathouse basin sides, boathouse main building and boathouse annex.⁵⁶ Drost Landscaping scale drawings also correctly

⁵³ ZO § 3.14(3)(K)(I).

⁵⁴ ZO §§ 3.14(2); 5.04.

⁵⁵ Exhibit K, Laws’ Joint Permit Application to EGLE and USACE. July 21, 2020. Bates # 125-149.

⁵⁶ Exhibit K, at Bates ##146-147.

indicate how the OHWM would move into the constructed boat basin and channel.⁵⁷ Indeed, the US Army Corps acknowledged in emails to Appellant's counsel that "excavation of a channel and/or basin contiguous with Lake Charlevoix, thereby expands the extent of the ordinary high waters of Lake Charlevoix throughout the entire channel and/or basin."⁵⁸ Michigan EGLE said the same: "It is the interpretation of the WRD that the OHWM would follow the new shoreline contour, although this is not clearly define[d] within Part 301 or its administrative rules."⁵⁹

The Township cannot enforce the ordinance without knowing where the OHWM is, if it cannot correctly distinguish between uplands protected by the Shoreland Protection Strip provisions and bottomlands, and it cannot determine anything without a site plan and scale drawings.

Low-Density Residential R-2 Zone prohibits an excavation project of this scale

The character of the land and the existing natural resources define the waterfront properties in Low-Density Residential R-1 zoning under Section 4.05, where "the permitted uses are intended to provide for residential and related uses and those compatible with such, with the intent to keep residential areas relatively quiet and free from detrimental influences." Boat basins and channels are not permitted uses nor uses subject to special use permits. Nor are excavations that involve extraction of sand, gravel, dirt or fill. The Laws calculated in their joint application to the state and federal agencies that *7,152 cubic yards of shoreland* would be removed for the proposed

⁵⁷ Exhibit L, Laws' boathouse permit application to Hayes Township, July 6, 2020. "Section C" at Bates# 157.

⁵⁸ Exhibit M, Champion letter to Boal, August 24, 2021. Bates #167-169.

⁵⁹ Exhibit N, Schrock to Dahlstrom, September 2, 2021. Bates #170-172.

channel and boat basin.⁶⁰ Compared to the only residential zone, Rural Residential, where excavation for extractive earth materials is permitted by the Township, only excavation of less than 200 cubic yards is allowed without site plan review or a zoning permit.⁶¹

Sections treating boat basin, channel and boathouse as single project

The Laws's proposed boat basin and channel are not dependent on the boathouse structure, but the boathouse —only the boathouse use, not the dining and event facility use—does depend on the presence of the boat basin excavated under it and in front of it, and on the excavated channel that would connect the basin to the lake. That is, the boathouse's building envelope⁶² includes the accessory structures of basin and channel. Excavation of the basin and channel and excavation to create the boathouse are one and the same. Without constructing the entire envelope, the boathouse portion could not be *used* for boats. Section 9.02(1) states: "No building or structure subject to the provisions of this Ordinance shall hereafter be erected... used..nor shall any associated excavation or filing of land commence until a ...Zoning Permit has been issued." In other words, basin and channel excavation is not a separate permitted project that commences before a permit for the entire project. As such, the proposed channel and basin part of the *building envelope* violates the 100 foot setback requirement.

As the Laws' joint permit application to the state and federal agencies explains, after they would dredge the channel in Lake Charlevoix bottomlands (using the Shoreland Protection Strip as a staging area for the dredged spoils), the project construction sequence on-land would begin with digging out the basin and boathouse

⁶⁰ Exhibit K, at p.147.

⁶¹ ZO §§ 4.04(3)(H) and 7.01.15(B)

⁶² ZO § 2.02, "Building Envelope."

footprint areas:

Construct (dredge) proposed entrance channel in Lake Charlevoix from elevation 570.0 feet IGLD1985 inland to the OHWM (elevation 581.5 feet). Deposit spoils on shore, within footprint of future inland portion of the entrance channel, and truck away to remote upland repository. Then excavate inland basin and boathouse footprint areas, plus inland entrance channel except for a 25-foot wide "plug" sufficient to keep out Lake Charlevoix waters during construction of the boathouse structure. When inland areas are all satisfactorily completed, siphon water from Lake Charlevoix into newly completed basin. Lastly remove earthen "plug" allowing the newly filled basin to connect to Lake Charlevoix.⁶³

After the act of connecting, the waters of Lake Charlevoix would be expanded and the excavated basin and channel would become bottomlands of Lake Charlevoix.

The physical line between the uplands and bottomlands, the OHWM, would be changed and now be located along the perimeter of the channel and basin.

The two proposed constructions—of boathouse and basin/channel— are inseparable and constitute a single project. However, previously they were erroneously submitted to the Township separately as discrete projects. In contrast, the entire development project was applied for in its entirety to the state and federal agencies. EGLE and USACE would not conceivably consider them as separate “projects.” To not do the same with the Township would violate the ordinance at Section 9.02.

Previous boat basins in Hayes Township do not set precedent for allowing them

Three existing boat basins in Hayes Township pre-date the Laws’ proposal. The first was the Packer basin at 08112 Boyne City Road. It was originally constructed in the 1960s, prior to Hayes Township writing its first zoning ordinance in 1973, so it is a non-

⁶³ Exhibit K, p. 143.

conforming use.⁶⁴ Accordingly it does not set a precedent.

The second was the Oyster Bay (or Pointe) Condominium development built on the former Camp Charlevoix property. That excavated boat basin was allowed only as a result of a consent judgement in 1987⁶⁵ and so it, too, does not set a precedent. The Township vigorously fought the case trying to prevent funnel development and had the support of the Michigan Townships Association and Tip of the Mitt Watershed Council, both of which contributed money to the Township for the case. Since then, Michigan Supreme Court decisions reversed the *Fox* decision⁶⁶ and under the law today the Township would have won and the Oyster Bay boat basin would not exist. A subsequent request in 1999 to construct a “pond” within that development was nixed after the township Zoning Administrator wrote the State: “The Township’s objection is based on the potential adverse effect any excavation, particularly between the residences and Lake Charlevoix, may have on lake quality” and “the reasoning behind requiring setbacks from the lake, as well as shoreland protection strips is to keep nutrients from reaching the lake. Therefore if a permit is issued to construct this ‘pond’ it will represent significant impacts on the public interest.”⁶⁷

⁶⁴ ZO § 3.02.

⁶⁵ Exhibit O, *Fox and Associates Inc v Hayes Township*, 162 Mich App 647 (1987).

⁶⁶ *Fox Associates v Hayes Township* (1987) held under the then-enabling act (TRZA) that the township could only regulate land rights not water rights. Though the township's setback regulations are quoted in the dissent, setback was not at issue. What was at issue was regulation of docks, a water issue over which the Court said the township had no TRZA control. The precedential value of the decision evaporated when the Michigan Supreme Court overruled it in *Hess v West Bloomfield Township* 429 Mich 550 (1992) and *Square Lake Hills Condominium Assn v Bloomfield Township* 437 Mich 310 (1991). Which is to say Hayes Township should have won it legally but didn't, thereby being put in a poor bargaining position for the later consent judgment.

⁶⁷ Exhibit P, Knepp to DEQ, August 2, 1999. Bates #182-185.

The third was the DeVos property at 07480 Indian Trails, which does not conform to the 100 foot setback from the OHWM for both the boathouse and basin/channel. Applications filed by the property owners and the permits granted by state and federal agencies clearly show the OHWM would and did change horizontally to the new location inside the perimeter of the basin⁶⁸, making it a nuisance *per se* according to the ordinance.⁶⁹

The ZA at the time sought the township attorney's opinion on the "setback question."⁷⁰ The attorney responded "because you want to be sure that the new structures will all be located outside of the required setbacks, you need to know the point from which to begin measuring those setbacks." There were different definitions for setback and "lot line, front" than today's ordinance. "Setback" then was calculated from the "water feature" and a waterfront lot's front lot line was the "water frontage," while Section 3.14(B) set the Shoreland Protection Strip as measured from the "1985 IGLD high water mark." The attorney reasoned that the references to "legally established lake level of 582.3 feet IGLD 1995" meant the 100 foot setback must be measured from the *existing* OHWM before construction, and "not the shore of the newly created channel." Mistaking a fixed vertical elevation for a fixed horizontal location of OHWM was in error. Artificial channels and basins change everything—changing uplands to bottomlands and changing where the uplands and bottomlands meet in certain locations, changing the horizontal location of the OHWM. Compounding the error, the attorney did not even consider whether the channel and basin were structures or whether they

⁶⁸ Exhibit Q, Ordinary High Water Mark documents for Devos boathouse, May 31, 2012. From Hayes Township files obtained by Appellant via FOIA. Bates ## 186-196.

⁶⁹ ZO § 9.07.1.

⁷⁰ Exhibit R, Byran E, Graham to Jonathan Scheel, Hayes Township ZA, March 16, 20s12.

destroyed the Shoreland Protection Strip. The Township allowed the project. No ZBA decision was made regarding it.

A township attorney's opinion cannot substitute for a ZBA determination. The allowance of a nuisance *per se* by error does not set a precedent that negates the township zoning ordinance or permits the Township to keep making decisions that violate the ordinance in the same way.

2. "Boathouse"/Dining and Event Facility

As quoted previously, it is the ZA's determination that the "boathouse" is "compliant with the ordinance" and he "would likely approve" mainly by the reasoning that the attachment to the residence means, the boathouse serves residential uses too. A review of the ZA's past actions is instructive. In this particular case ¶ 15 of Van Zee's Affidavit states:

On July 6, 2020, I received a Zoning Permit Application from the Laws for an attached boathouse. See Exhibit 4.

But as can be seen, his Exhibit 4⁷¹ consists of a single page, filled-out application form with no scale drawings, site plan, or plot plan.

This exhibit was not truthful. The Laws did provide detailed site plans and scale drawings as indicated in the ordinance at Section 9.02 Zoning Permit, and communicated in the following instructions to zoning permit applicants:

"There shall be submitted with all applications for zoning permits one (1)

⁷¹ Exhibit B at Bates #43-44.

copy of a plot plan, giving accurate dimensions on *either a scale drawing or* a rough sketch. *Drawings shall be required on all structures* and shall contain the following information: 1) Existing and intended use of the structure; 2) Dimensions: include proposed building with dimensions (including height); lot or parcel dimensions, front, side, and rear yard distances to lot line or other structures.⁷²

The box was checked on the one-page application for “site plan required” and Van Zee signed it. (Van Zee’s Affidavit claimed the applicant checked the box, “and not me”). Since it was a structure, a rough sketch was not adequate, detailed scale drawings were required. Under the heading “Proposed Use of Property” the Laws’ application cited by the Affidavit says “boathouse attached” with the two words apparently in different handwriting. “Attached” is also in lighter ink similar to Van Zee’s signature and his other writings on the page. In any case, the Laws provided very detailed site plans and scale drawings just the same.

But attached to *what*? If the ZA reviewed solely the one page application, he couldn’t possibly know what the “boathouse” was attached to. Yet, the affidavit contends the building is “structurally connected” to and “part of the principal building.” Except that no “principal building” is identified.

The documents provided with the Laws’ application⁷³ contained 7 scale drawings by landscape architectural firm Drost Landscaping showing the dimensions and placement of the channel and boat basin. Four pages of large architectural drawings by architectural firm Andre Poineau Woodworker Inc. showed building elevations and floor

⁷² Hayes Township Zoning Permit Application Packet, contains instructions, <https://www.hayestownshipmi.gov/wp-content/uploads/2019/09/zoning-permit-application-packet-2019.pdf>

⁷³ Exhibit L. Bates ## 150-166.

plans to scale, depicting the use of the Main Floor (Figure 1)⁷⁴ as a dining and event facility with a large approximately 4,500 square foot area dominating the floor, with 22 large windows across the lakeside, and with luxury amenities in service to it for large groups: commercial kitchen and food serving area, elevator, fireplace, stairs, large storage closet for tables and chairs, men's and women's restrooms, and food serving area, along with outside decks, annex and covered entryway.

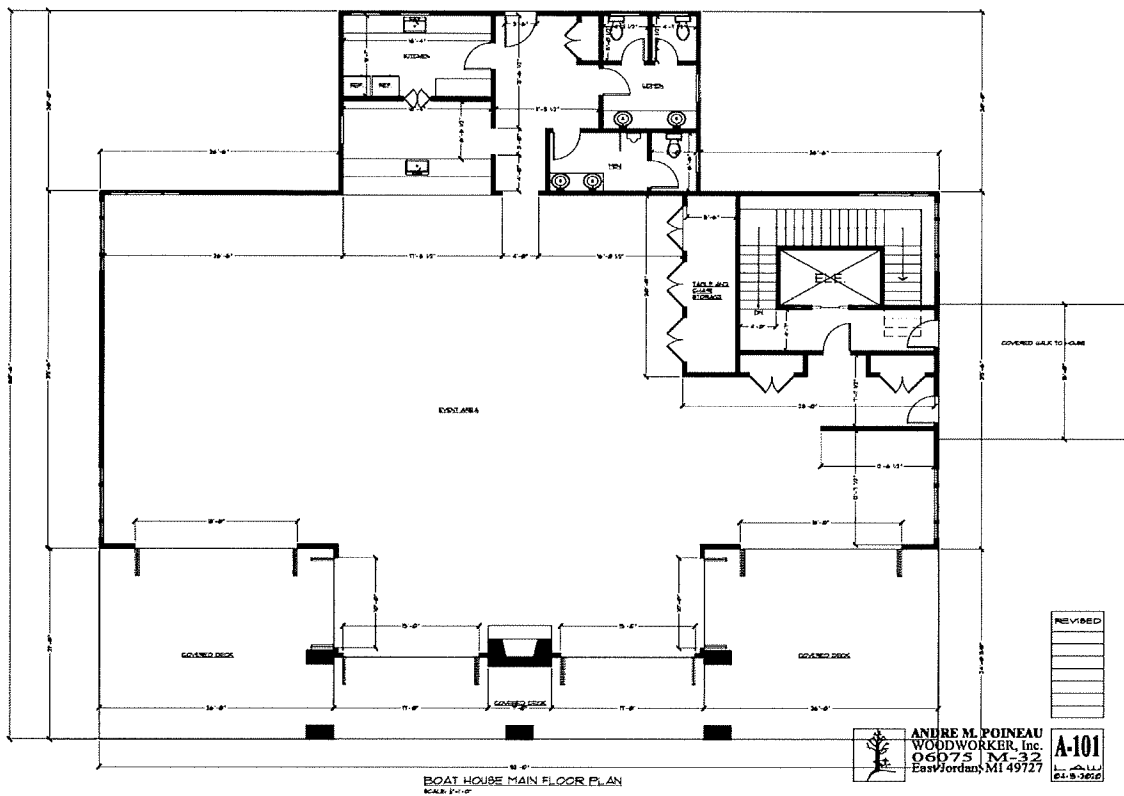


Figure 1, from Exhibit L, Bates # 164. (printed from uploaded Joint Permit, EGLE.)

The Lake Level floor plan (Figure 2) depicted the boat storage area and docks,

⁷⁴ Figures 1, 2, 3 and 4 are from Exhibit L but reproduced here for convenience.

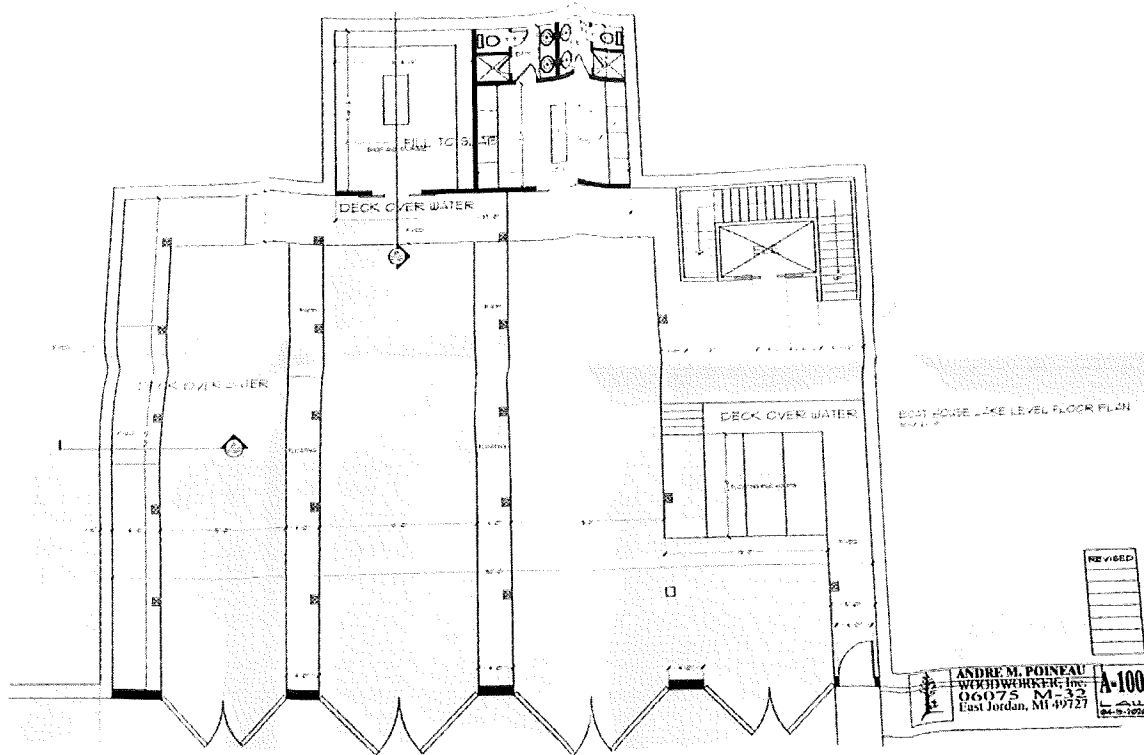


Figure 2, from Exhibit L, Bates # 163.

more bathrooms, a locker room and mechanical room, elevator and stairs. Another floor plan showed the footings designed to scale. A large lakeside elevation (Figure 3) showed the enormity of the two-story stone structure and its height, which is higher than allowed for an accessory building, and cathedral ceilings above the Main Floor. A scale drawing in color labeled “Boathouse Site Plan” (Figure 4) by Poineau showed the layout of the proposed development including the channel and boat basin with the boathouse attached to the residence with a covered walkway.

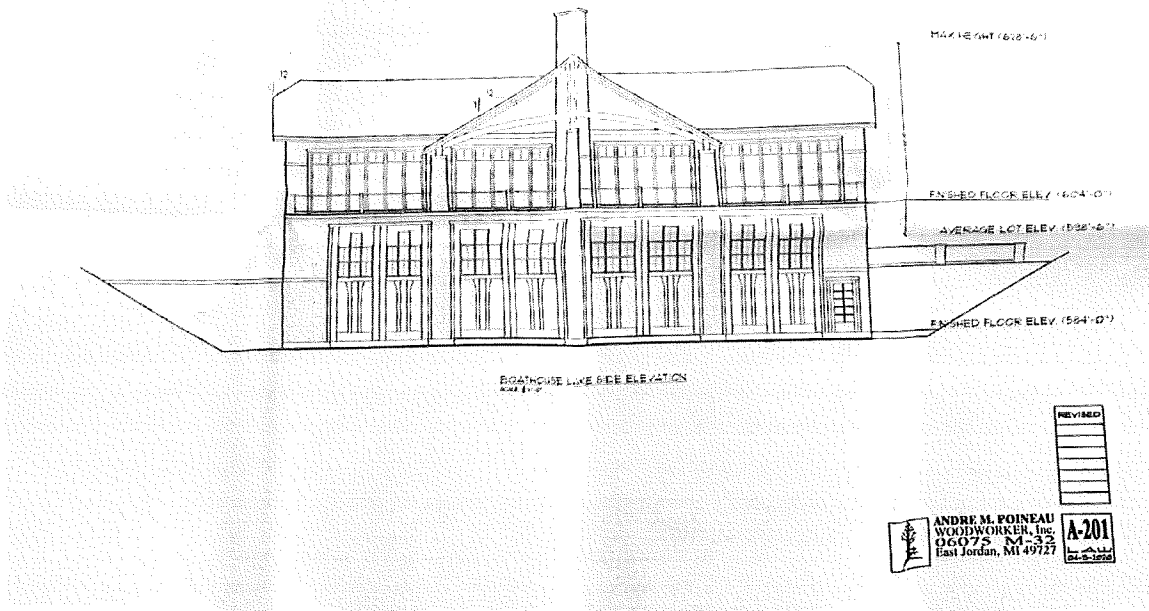


Figure 3, From Exhibit L, Bates # 166.

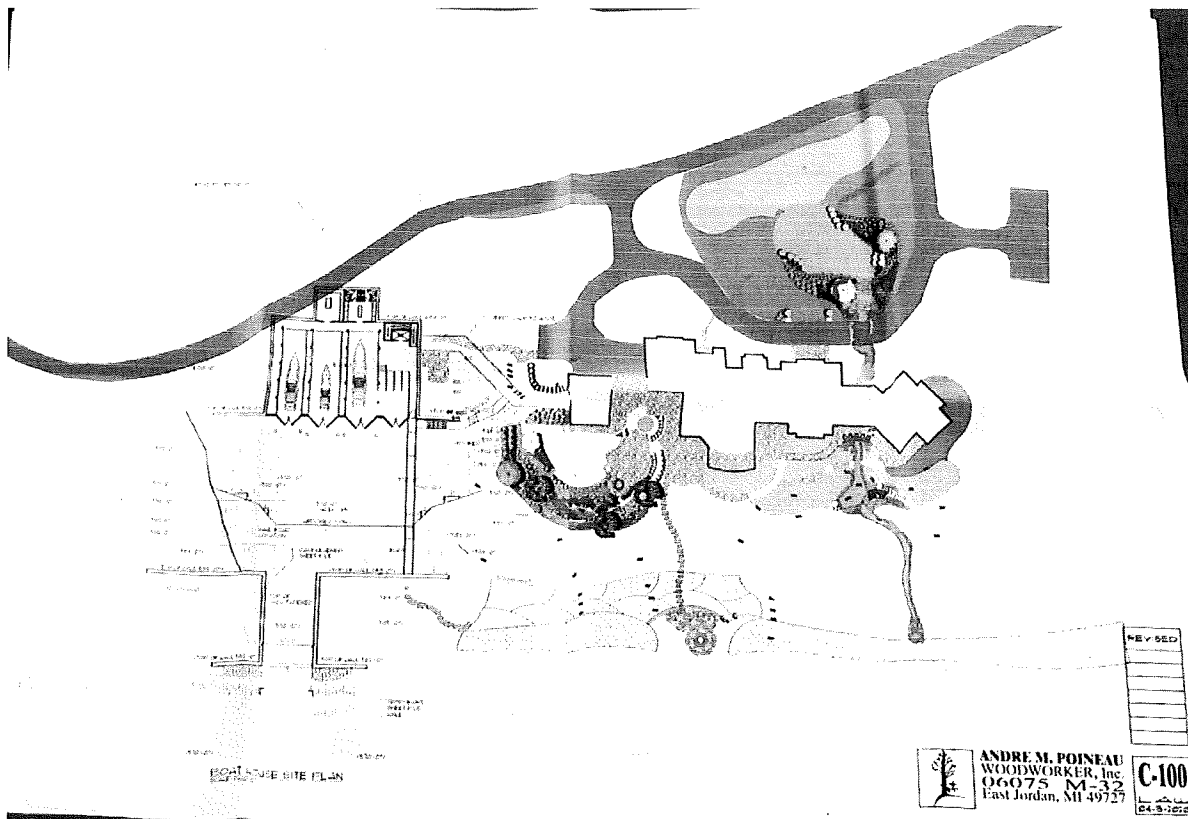


Figure 4 from Exhibit L, Bates # 162.

Van Zee had all these in front of him in July 2020 when he issued the zoning permit for “attached boathouse and covered walkway” in just two days’ time. The Planning Commission did not. To say, now, that he didn’t require site plans then, is false because the instructions clearly indicate that drawings were required for all structures. And it does not explain how he could possibly know that the plans called for a “covered walkway.” It also doesn’t give him any excuse for saying now in 2021, when he knows the actual, intended non-residential uses of the proposed building, as part of a 400+ acre commercial development contiguous to this facility, that the proposed uses of the building “are in compliance with” the Zoning Ordinance for a single family residence in zone R-1.

The estimated event area space of about 4,400 square feet,⁷⁵ depending on room set up, has enough room for 733 standing guests, or 550 people both standing and seated, or up to 366 people at round tables.⁷⁶ There are six toilets. At 100 people per toilet, a maximum number of guests would be about 600. By either measure, one can get an idea of the immense size of the Laws’ planned dining and event facility.

Putting a structure for large events *directly over the lake* is an extraordinary violation of the ordinance, which requires a 100-foot setback from the OHWM. The filtering role of a 50-foot mostly naturally-vegetated Shoreland Protection Strip, as well as the additional 50 feet setback, is to provide protection for the lake from the various activities and concerns associated with structures such as houses and other buildings. Anything that would go into Lake Charlevoix as a result of the event center, its structure and activities that go on inside, goes into the whole lake, completely defeating the

⁷⁵ Measurement is estimated from Poineau Main Floor plan for dining/event facility (Exhibit L at Bates # 164, counting only the area labeled “event area, as approximately 289 sq ft and outside covered decks as another 1522 sq ft for a total of 4,420 sq ft.

⁷⁶ <https://www.banquetttablespro.com/space-and-capacity-calculator>

purpose of the setback.

Compare the situation in the attached unpublished *Nixon v Webster Township* decision of the Michigan Court of Appeals last year,⁷⁷ when a landowner sought a ZBA interpretation that his “wedding barn” was within the use of “seasonal agri-tourism” allowed in Agricultural Districts in Webster Township. The ZBA held two public hearings where most community members expressed concerns regarding

noise, traffic, light pollution, waste, and safety issues related to wedding barns, as well as the potential disruptions to the rural character of the Agriculture District and the Township.⁷⁸

Noting that the Ordinance did not define “agri-tourism,” the ZBA relied on dictionaries and the Michigan Agricultural Tourism Advisory Commission’s definition to interpret that a wedding barn was not within that use, that is, weddings did not share characteristics with activities associated with seasonal agriculture such as hay rides, corn mazes, and pumpkin patches. The Court of Appeals agreed, concluding that wedding events are not associated with a particular agricultural product or harvest season. The Webster Township ZBA and Court of Appeals agreed weddings have concentrated traffic patterns, sounds that are not traditionally agricultural, and determined weddings “do not promote the rural character” of that district.

Similarly, the “boathouse” actual intended uses fly in the face of just boat storage for a single-family residence. None of the anticipated events that would be held in the Main Floor of the structure has anything to do with the sheltering, storage or

⁷⁷ Exhibit S, COA Case # 343505 (1-21-20).

⁷⁸ Slip opinion, p 2.

maintenance of boats.

The Laws' history of large, loud parties, noisy helicopters and fireworks, and a Jumbotron screen which lit up the Lake, in the “relatively quiet” R-1 district⁷⁹ – documented in the attached affidavits of Kozma and Fowle and in Scott Law's email of October 20, 2019⁸⁰ – which would all be institutionalized and magnified if the event building is allowed – is analogous to the issues associated with events to which community members testified in *Nixon*.

Allowing a commercial, non-residential use in an R-1 residential zone would be “spot zoning” condemned by the Ordinance.⁸¹

The Van Zee Affidavit also states the ZO “did not require Planning Commission or site plan review,” supposedly under ZO § 5.03. But any building has to have a permit, and the structure “shall be staked on the ground” first, before a permit can even be considered.⁸² If the building would entail any “new use” the owner must also produce a “site plan.”⁸³ The “site plan” is to have “drawings and documents depicting and explaining all salient features.”⁸⁴ If approved without a site plan, the building would be a nuisance *per se*.⁸⁵

⁷⁹ ZO § 4.05 (1).

⁸⁰ Exhibit F, Bates ## 79-82.

⁸¹ ZO § 10.01(1)(C)(5)(g).

⁸² ZO § 9.02(1) and (4).

⁸³ ZO § 5.03(1)(A).

⁸⁴ ZO § 2.02.

⁸⁵ ZO § 9.07.1.

Certainly for the Laws, an insulated event center to feed hundreds would be a “new use,” having nothing to do with residential use.

Finally, a “new use” unrelated to residency on a single lot is forbidden.⁸⁶

Army Corps regulations incidentally do not preempt those of the Township: “The primary responsibility for determining zoning and land use matters rests with state, local, and tribal governments.”⁸⁷

The Zoning Ordinance intentionally no longer permits boathouses, as a review of the history of the evolution of the Hayes zoning ordinance shows. The word “boathouse” is not defined in the ZO and appears nowhere in it. In the Township’s original ZO of 1973, though, “boathouses” and “bathhouses” *were* permitted on the shoreline. But in 1979 both terms were removed, and in a marked departure, replaced with “no buildings or structures” were allowed closer than 50 feet from the shore. The word “boathouse” never appeared again in ZO iterations, the shoreland protection strip grew in size as did the setback requirements, through time. ⁸⁸

A late breaking “revision” to the Laws’ “boathouse” plans, as indicated by recent communication from the Army Corps and accompanying documents, is an attempted disguise of the actual intended use by changing one label on the building’s Main Floor plans main room from “event area” to “STORAGE.”

⁸⁶ ZO § 3.04.

⁸⁷ 33 CFR 320.4(j)(2).

⁸⁸ Exhibit J, and see pages 98-100 and 103-106 for references to boathouse in 1973 and language that began in 1979 stating “no structures” within the setback.

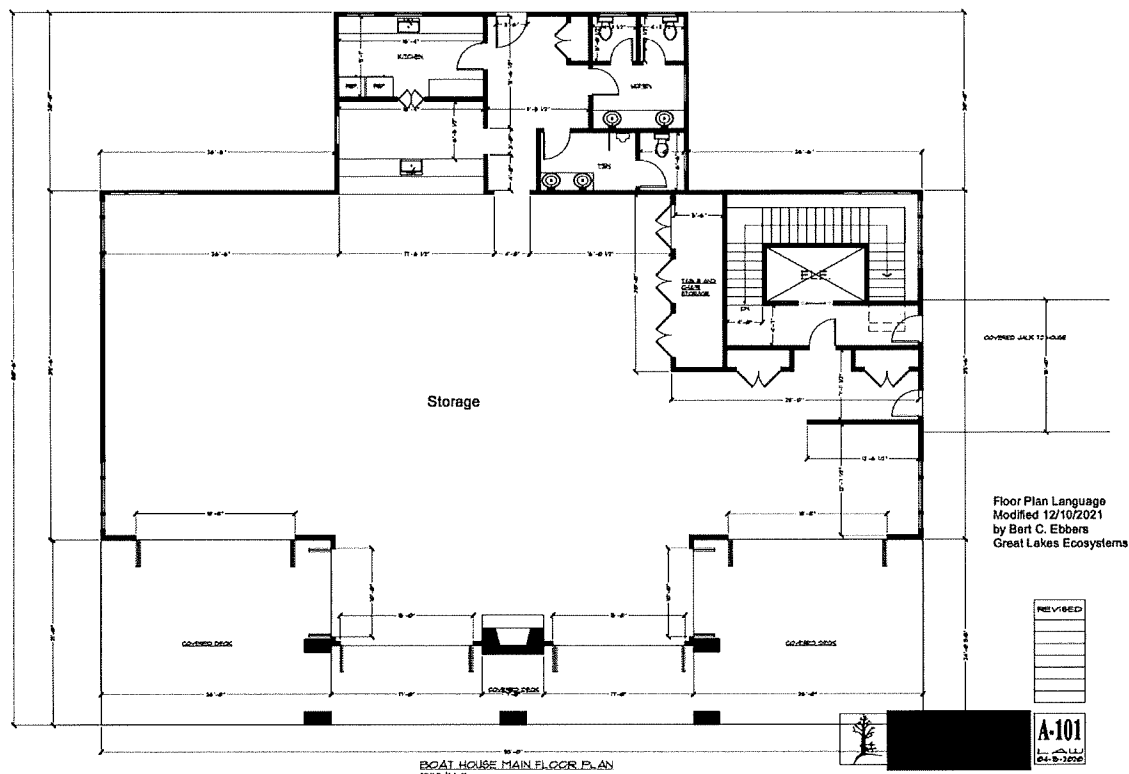


Figure 5—Only one word changed on “revised” plan: “Storage” instead of “Event Area” (From Exhibit T, Bates # 223).

The claimed change is not credible in any respect.⁸⁹ The building’s design is unchanged. Still there are the luxury amenities of large room with cathedral ceilings for events, and all the auxiliary rooms serving the main area’s function: commercial kitchen, food serving room between kitchen and event room, large storage closet for tables and chairs, men’s and women’s restrooms, elevator, fireplace, 22 tall windows looking out over the lake, and large outdoor covered decks. To build a huge, multi-million dollar,

⁸⁹ Exhibit T, Communication from April R. Champion, USACE, to Deborah Narten, December 15, 2021, with attachments.

stone structure designed by a renown architectural firm that designs and builds upscale, high-end residences, and to construct a second story for an oversized 4,500 square foot area for “storage” of a few canoes and kayaks doesn’t pass any kind of smell test. One could buy a brand new fleet of canoes every year more cheaply than build this expensive building and rip up the shoreland for their storage. Hauling canoes and kayaks up from floating docks through a building and up an elevator to put them in a fancy event room, is obviously not the intended use.

Besides, the large event area would be available for *events* during the boating season after (supposedly) removal of canoes and kayaks, providing its *actual intended use* for large events for employees and guests of the Laws. Large fleets of canoes and kayaks and their need for luxury storage buildings were not mentioned on the tour Van Zee took with Scott Law. But “dining facility for guest[s] and events” was. The design of the building and the amenities inside it attest to the truth that the intended use has not changed. The absurdity—and lack of candor—of it is astonishing and it should fool no one.

VI. Appeal to ZBA to reverse the ZA’s determinations

With this appeal to the ZBA, Appellant asks to reverse the ZA’s 2021 determinations that the Laws’ proposed boathouse/boat basin/boat channels/and event and dining facility—shall be treated as two separate projects—with only the boathouse *sans boat basin and channel* requiring a zoning permit, while the boat basin and channel is treated as a separate project not requiring a zoning permit from the ZA for excavation and construction, the approval for excavation and construction left only to other agencies, not the township which has “nothing” in its ordinance regulating boat basins and canals/channels, while only receiving minor review by the Planning Commission for

landscaping regarding the project's after-effects—on what remains after such drastic removal of 700 cubic yards of Shoreland Protection Strip.⁹⁰

If the ZBA does not reverse, it would allow a boat basin and channel to destroy Lake Charlevoix's protected shoreland and render the Shoreland Protection Strip requirements completely meaningless.

Also with this appeal to ZBA, Appellant asks to reverse the ZA's determinations that the proposal for "boathouse" is "compliant with the ordinance," can be approved by the ZA without anything more than one sheet of paper with the words "boathouse, attached," that the intended use of the project proposed is implied from the word "boathouse" to mean that is *its only intended use*, and that by virtue of its physical attachment to the principal residence, that this project is a residential use, when the ZA knows otherwise from the facts presented to him. He knows that the Laws have a "master plan"⁹¹ for this parcel and their entire 400-acres of contiguous property, including other waterfront parcels. An entire private resort is being planned on residentially-zoned property. This is a non-residential dining and event facility.

Proposed findings of fact:

1. The Laws' proposed plans for boathouse/dining and event facility designed over

⁹⁰ Exhibit K on page 146 indicates 703 cubic yards of Shoreland Protection Strip would be excavated for the 30 x 55 foot entrance channel leading from Lake Charlevoix to the boat basin. Exhibit K on page 146 indicates 3067 + 767, a total of 3,834 cubic yards would be excavated for the boat basin center and sides located in front of the boathouse, and on page 147 it indicates the portion of the boat basin located directly under the boathouse would require excavation of another 2300 cubic yards. Total excavated would be 7152 cubic yards within the 100 foot setback.

⁹¹ Exhibit F, on Bates # 81.

an excavated artificial boat basin and connected to an excavated artificial channel which would be connected to Lake Charlevoix, is a single project that must be treated as such in a single zoning application and detailed site plan review required for all parts of it. They are in one ‘building envelope.’ Site plans that have already been submitted to the Township (but with expired permissions) already depict it as one project, and the same, entire project plans were submitted to EGLE and USACE as a single project.

2. Boathouses (“attached” to something or not) are not permitted by Hayes Township ordinance and have not been since 1979, after the ordinance having at first expressly permitted them, replacing it with language that mandates that “no structures” are allowed within 100 feet from the waters of Lake Charlevoix and other lakes. ZO § 3.14(2)

3. The definition of Shoreland Protection Strip and ZO § 3.14 provide language that “all of the land area” measured 50 feet landward from the OHWM means the *uplands or* shoreland, not bottomlands.

4. The OHWM is the physical line between uplands and bottomlands. Therefore, a change in location of the uplands and bottomlands by construction of an artificial channel and boat basin changes the location of the OHWM. Excavation of a channel and/or basin contiguous with Lake Charlevoix expands the extent of the ordinary high waters of Lake Charlevoix throughout the entire channel and/or basin, and the new OHWM would follow the new shoreline contour. Accordingly construction of the artificial channel and basin would move the setback requirements inland.

5. The restrictions in the Shoreland Protection Strip prohibit the upland’s destruction and prohibits excavation and construction of boat basins and channels because it would

be a conversion of uplands to bottomlands, removing the Shoreland Strip itself and changing the OHWM. Conversion is prohibited because it would defeat the purpose of the uplands remaining in place to filter harmful substances from reaching the lake. The purpose of protecting the Shoreland Protection Strip from harm is to protect the lake from harm. ZO § 3.14

6. Artificially constructed boat basins and canals/channels are structures as defined in the ordinance: “anything constructed... requiring location on the ground.” ZO § 2.02

7. All construction requires zoning permits. ZO § 3.01

8. All parts of the Laws’ project requires construction and as such it is unlawful for the ZA to approve plans or issue a zoning permit for their construction until such plans have been inspected in detail and found to conform to the ordinance. (ZO § 9.01)

9. While “boat basin” and “canal” and “channel” do not appear in the ZO by name, they are not among the named exceptions of structures or activity that are allowed within a 100-foot setback from the Lake. Even if other “like” structures or activity are permitted, boat basins, canals and channels are not in the category of exceptions permitted within a 100-foot setback from Hayes Township lakes, because they do maximum damage, rather than minimal environmental impact as the exceptions do, and therefore are not permitted. ZO § 3.14(2)

10. The Laws’ architectural and landscape architectural scale drawings, already provided as required, depict on site plans the intended use of the “boathouse” structure to be solely an event and dining facility on the main floor, with other amenities for that purpose including kitchen and food serving rooms, mens and women’s rest rooms,

elevator, fireplace, outdoor decks, large windows for viewing the lake, and large storage closet for tables and chairs, and on a scale and size designed for hundreds of people, far beyond use by a single family residence. It is a commercial, non-residential use and not allowed in R-1.

11. A December 10, 2021 change (on page 223 of Appellant's exhibits) of a single word labeling a room on the Laws' main floor plan—but no changes in architectural design—from "Event Area" to "Storage" is not consistent with the building's unchanged design plans that show it is still intended for use as a dining and event facility on the Main Floor.

12. Site plans are required to show all existing and proposed/intended uses of the building or structure. ZO § 5.01

13. Applicants are expected to be truthful, make no false statements or misrepresentations in the application and site plans are to reflect accurately the intended use. ZO § 9.02(6)

14. Approving a boathouse for boathouse-use only and as a residential use only, while the site plans clearly depict a large commercial-scale building and a commercial, non-residential use for large events by hundreds of people, would create a nuisance *per se* in a residential R-1 zone. ZO § 9.07.1

15. Communication from the Laws to the ZA in 2019 (Exhibit F, Bates ## 79-82). indicate the Laws plan to build a dining facility for their guests and employees as part of a much bigger resort filled with resort amenities on their 400+ acres of contiguous property.

Signed, Lu Anne Kozma
12/20/21