



Hayes Township
Zoning Board of Appeals
Appeal or Interpretation
Application

GENERAL INFORMATION Zoning Administrator Phone (231) 647-6861

Name of Property Kim and Pat Fary; Christopher and Chelsea Mills; Darcy and
Owner(s) Catherine Phelps; JO Ellen and Jim Rudolph; Mike Taylor; Summer
LaVanway; Carol Umbr; Shelly Van Wart; and Kevin Willis
Mailing Address Fary: 10516 Seneca Avenue
City Charlevoix State Michigan Zip 49720
Telephone 231-439-9122 (Fary)

PROPERTY INFORMATION re: Pickleball storage LLC on First Notice
Property Tax Code Number: 15-007- 112-030-10 of Appeal

Legal Address 10855 Pincherry Road
Nearest Road Intersection Townline and Pincherry roads
Zone District A- Agricultural

Please type or print; fill in all blanks and return with \$935.00 fee payable to Hayes Township

Taken

Enclosed

APPEAL OR INTERPRETATION REQUESTED

Relief from the following Zoning Ordinance Section(s) or actions: ① Determinations and decisions
Hayes Township Zoning Ordinance may be found at hayestownshipmi.gov in letter dated June 16, 2025
Section(s): 8.03(5), 8.03(6), 8.05 and 8.11 to appellant
from Zoning

actions continued: ② failure to enforce automatic stay Administrator
of permit and construction and ③ failure to transmit 2A Ron Van Zee
Submit clearly the basis of the appeal or interpretation that is being requested along with all record of
documentation supporting the claim and/or request. action permit
the project:

See attached Second Notice of Appeals with
Exhibits.

** Multiple Appellants - see attached list for all signatures

Applicant Name, Address & Contact Information Kim Fary Applicant Signatures ** Kim Fary
231-439-10516 Seneca Ave.
9122 Kfgarden10@gmail.com Date 6/24/25

Property Owner N/A (Pickleball Property Owner Signature N/A
Storage's
permit is
involved) Date N/A

June 24, 2025

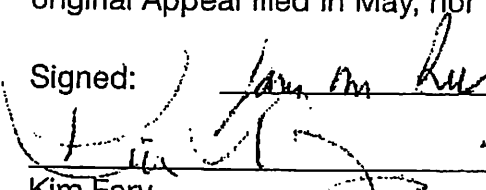
To Hayes Township Zoning Administrator and Zoning Board of Appeals:

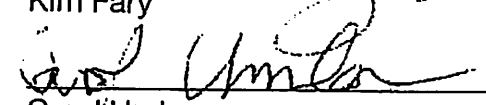
At the time we filed a Notice of Appeal, appealing the issuance of Zoning Permit # 25-04-06 given to Pickleball Storage [REDACTED] to the ZBA Chair on May 29, 2025, and to the Zoning Administrator via the Township Drop Off Box on May 30, 2025, we had authorized Jonathan Scheel to do so on our behalf. We met in person with Mr. Scheel on Tuesday, May 27, agreed to him acting on our behalf to sign the form accompanying our Notice of Appeal, and deliver all materials to Township officials. We signed the attached page authorizing him to do that.

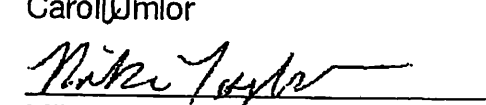
Today June 24 we are filing a NEW appeal, appealing the decisions and determinations by the Zoning Administrator, Ron Van Zee, as stated in his letter sent to us dated June 16, 2026, and his decision to not enforce the automatic Stay on the effectiveness of the Zoning Permit in §8.11, specifically neglecting to certify to the ZBA why the automatic Stay imposed by our Notice of Appeal should be lifted, illegally allowing the construction to continue without an effective permit. The Notice of Appeal triggers the automatic stay, not superfluous paperwork that only reiterated everything in our Notice. Signatures are not required for a Notice of Appeal.

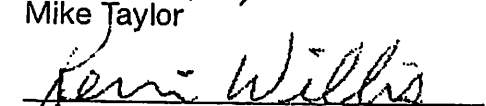
Below, by our signatures, we hereby make it absolutely clear that Jonathan Scheel was authorized to represent us from May 27 through June 23, 2025, including the paperwork delivered to the Township yesterday. We hereby now represent ourselves, and Jonathan Scheel is not our representative from today, June 24, forward, for the original Appeal filed in May, nor for the Appeal noticed and filed today.

Signed:

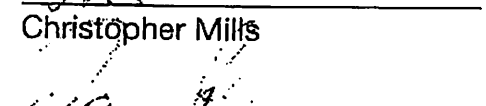

Kim Fary

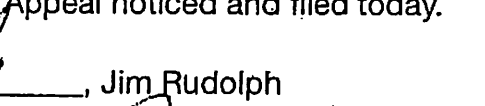

Carol Jmlor

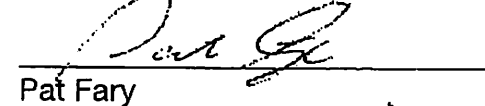

Mike Taylor

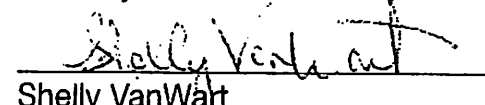

Kevin Willis

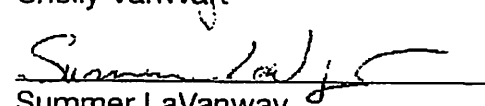

Christopher Mills

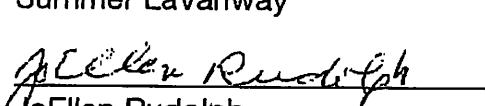

Darcy Phelps

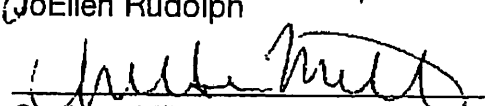

Jim Rudolph

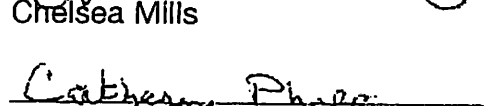

Pat Fary


Shelly VanWart


Summer LaVanway


JoEllen Rudolph


Chelsea Mills


Catherine Phelps

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

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 Major Douglas Sloan Road.
Charlevoix, MI 49720

231-549-6961

Zoning Administrators Signature



DATE RECEIVED 6-25-2025

CASE NO. 0225263

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.

To: Hayes Township Zoning Board of Appeals

Cc: Zoning Administrator Ron Van Zee

Second Notice of Appeal, filed: June 24, 2025

I. Appellants:

1. Kim and Pat Fary, 10516 Seneca Ave, Charlevoix MI 49720
2. Christopher and Chelsea Mills, 10529 Townline Road, Charlevoix MI 49720
3. Darcy and Catherine Phelps, 6168 Bay Shore Woods Dr, Charlevoix, MI 49720
4. JoEllen and Jim Rudolph, 9799 Townline Rd, Petoskey, MI 49770
5. Mike Taylor and Summer LaVanway, 10523 Spring St, Charlevoix, MI 49720
6. Carol Umlor, 6272 US 31 N, Charlevoix, MI 49720
7. Shelly VanWart, 6017 Charlevoix St, Charlevoix, MI 49720
8. Kevin Willis, 6095 Petoskey St, Charlevoix, MI 49720

Please note the memo and signatures attached to our "application," removing Jonathan Scheel as our authorized agent as of today, June 24, for our First Notice of Appeal filed on May 29-30. He is also not our agent for this new appeal.

II. A ZBA Hearing on this Second Notice of Appeals is Required Immediately.

The ZBA must independently act and meet on this second set of appeals, (the purpose of which is to challenge procedures used by the Zoning Administrator on the First Notice of Appeal) and our First Notice of Appeal, and not allow the Zoning Administrator to act as the ZBA.

III. We hereby file this (second) Notice of Appeal with the ZBA and Zoning Administrator on June 24, 2025. We appeal the following actions, requirements, decisions, and determinations made by Zoning Administrator Ron Van Zee:

A) Decisions and determinations as stated in the Zoning

Administrator's letter dated June 16, 2025 (received via US Mail by appellants on or about June 20) regarding an "application" we submitted. accompanying our first **Notice of Appeal** of Zoning Permit No. 25-04-06, issued to Pickleball Storage LLC on April 30, 2025 by Zoning Administrator Van Zee, that we filed on May 29 with the ZBA Chair, Township Clerk, and Township Supervisor, and on May 30 at the Township Hall for the Zoning Administrator, that:

- "The document received is a variance request form, not an appeal form."

- We used the wrong form, using a "Variance Application."
- "The proper appeal form needs to be sign by the appellant. Not only was the wrong form used, the appellants did not sign it."
- "Finds the application submitted is not complete and therefore cannot be forwarded [to] the Zoning Board of Appeals."
- "The form appears to be submitted by an agent on behalf of twelve people. None of the 9 people signed the form. There is no evidence submitted with the form that the alleged agent has authority to act on behalf of the twelve people."

B) Ron Van Zee's decision from June 1 to this day, to not "immediately transmit" to the zoning board of appeals all of the papers constituting the record upon which the action appealed from was taken." That is, he did not transmit his files upon which he made his zoning permit decision, to the ZBA, as soon as a Notice of Appeal is received. This clause to "immediately transmit" is MCL 125.3604(2). Zoning Ordinance §8.03(6) also states transmittal is mandatory. It does not refer to our Notice of Appeal, because that is done by appellants directly to the ZBA, as required by both §8.03(1) and again, MCL 125.3604(2). The "application," fee, and other materials have a different deadline of 30 days prior to the hearing date, as provided in §8.05, and is not "immediately" after the filing of the Notice of Appeal.

C) Ron Van Zee's decision to allow construction by Pickleball Storage LLC to continue under a Zoning Permit rendered "ineffective" by our First Notice of Appeal, without certifying to ZBA from June 1 to this day, to undo the automatic stay on construction and the effectiveness of the permit, that is triggered by our First Notice to Appeal, of the zoning permit, filed on May 29-30. This appeal in particular is joined by township official Jim Rudolph, who is on the Township Board of Review.

IV. "Application" attached to this Second Notice of Appeal

With this Notice of Appeal, although not required according to §8.05 until 30 days before a hearing, we also submit the attached "Appeal Application" with our signatures in a memo, since not all signatures can fit on the "Appeal Application." This is not an acknowledgment that signatures are required for a Notice of Appeal due 30 days after the action appealed.

V. Additional Materials submitted June 23 for First Notice of Appeal

ZBA received a copy of the materials we submitted yesterday, providing the materials Ron Van Zee claimed were missing in the "application." Attached as Exhibit 2.

VI. We specify the following grounds for our appeals in this Notice of Appeal filed June 24:

A) Zoning Administrator Van Zee violated the following parts of the Zoning Ordinance:

§ 8.03(5)

§ 8.03(6)

§ 8.05

§ 8.11

Which state:

SECTION 8.03 JURISDICTION

(5) An appeal may be made by any person, firm or corporation, or by any Officer, Department or Board of the Township. The appellant shall file with the Zoning Board of Appeals, on blanks or forms to be furnished by the Zoning Administrator, a notice of appeal specifying the grounds for the appeal.

(6) The Zoning Administrator shall transmit to the Zoning Board of Appeals all the papers constituting the record upon which the action appealed from was taken. The final decision of such appeal shall be in the form of a resolution either reversing, modifying or affirming, wholly or partly, the decision or determination appealed from. Reasons for the decision must be stated.

SECTION 8.05 APPLICATION REQUIREMENTS

The applicant shall submit seven (7) copies of a completed application, with associated fee, surveys, plans and data as required in **Article V: Site Plan Review**, or other information deemed reasonably necessary for making any informed decision on his or her appeal, not less than thirty (30) days prior to the date of the hearing.

SECTION 8.11 STAY

An appeal to the Zoning Board of Appeals and an appeal of a decision by the Zoning Board of Appeals to Circuit Court stays all proceedings of the action appealed from, including the effectiveness of any zoning permit issued, unless the Zoning Administrator certifies to the Zoning Board of Appeals after such appeal has been filed that a stay would cause imminent peril to life or property, in which case the proceedings shall not be stayed, unless ordered stayed by the Zoning Board of Appeals or the Circuit Court.

For reference, the Michigan Zoning Enabling Act, in MCL 125.3604(1), (2), and (3) provides:

125.3604 Zoning board of appeals; procedures

Sec. 604. (1) An appeal to the zoning board of appeals may be taken by a person aggrieved or by an officer, department, board, or bureau of this state or the local unit of government. In addition, a variance in the zoning ordinance may be applied for and granted under section 4 of the uniform condemnation procedures act, 1980 PA 87, MCL 213.54, and as provided under this act. The zoning board of appeals shall state the grounds of any determination made by the board.

(2) An appeal under this section shall be taken within such time as prescribed by the zoning board of appeals by general rule, by filing with the body or officer from whom the appeal is taken and with the zoning board of appeals a notice of appeal specifying the grounds for the appeal. The body or officer from whom the appeal is taken shall immediately transmit to the zoning board of appeals all of the papers constituting the record upon which the action appealed from was taken.

(3) An appeal to the zoning board of appeals stays all proceedings in furtherance of the action appealed. However, if the body or officer from whom the appeal is taken certifies to the zoning board of appeals after the notice of appeal is filed that, by reason of facts stated in the certificate, a stay would in the opinion of the body or officer cause imminent peril to life or property, proceedings may be stayed only by a restraining order issued by the zoning board of appeals or a circuit court.

B) How specifically the Zoning Administrator's Decisions and Determinations Violated the Hayes Township Zoning Ordinance and the Michigan Zoning Enabling Act (MZEA):

Who Gets What, and When, according to the ZO and the MZEA?

- , 30 days after decision being appealed Appellant files Notice of Appeal to ZBA and Zoning Administrator
- Automatic Stay is in place automatically upon the filing of Notice of Appeal
- ZA immediately transmits his files on the permit decision to the ZBA after receiving Notice of Appeal
- Application, copies, check, other materials are due from Appellants to Township 30 days before hearing date
- **The Determinations in the Letter:**

Zoning Ordinance § 8.03(5) states "the appellant shall file with the Zoning Board of Appeals on blanks," and then it continues, "or forms to be furnished by the Zoning Administrator" "a notice of appeal."

It does not say "on blanks and forms." Appellants are not "applicants." Appellants *appeal* and they shall do so on blanks. That is the proper reading of the ordinance.

There is no requirement of appellants to sign a Notice of Appeal. Notification could be an email.

The Michigan Zoning Enabling Act does not require signatures or forms to be submitted as a "Notice of Appeal" either. A notice is not an "application" or a "request." It is a notification by an appellant to the township, of an appeal that is "taken." The appellant notifies two entities: the ZBA and the body or official from whom the appeal is taken.

MCL 125.3604(1) makes that distinction clear when it says an appeal may be "taken" and "in addition, a variance in the zoning ordinance may be applied for." Subsection (2) states "An appeal under this section shall be taken within such time as prescribed by the zoning board of appeals by general rule, by filing with the body or officer from whom the appeal is taken and with the zoning board of appeals a notice of appeal specifying the grounds for the appeal."

The format, precise content, the requirement of an application, or signatures are not required for a Notice of Appeal. The only requirement is "grounds for the appeal" must be "specified."

The Michigan Courts support that a Notice of Appeal does not require "applications." The *Simon v City of Norton Shores* 2009 Court of Appeals decision held that no application is needed:

The circuit court also held that the City violated MCL 125.3604(2) by requiring plaintiffs to complete a form entitled "Variance Request" instead of allowing them to file a "notice of appeal," as the statute requires.

We filed the first Notice of Appeal on 18 "blank" pieces of paper, by 30 days after the permit decision, identified ourselves, provided our addresses, gave notice that we appeal the Zoning Administrator's decision permitting Pickleball Storage LLC to build a facility not allowed in the Ag Zone, listed facts, provided building and floor plans, and specified the grounds for the appeal in detail as to how specifically it violated the Zoning Ordinance's pertinent sections.

Despite the lack of any statutory requirements to use a form, and despite the unavailability of any "Appeal Form" on the township website, and with express language in the Zoning Ordinance that a Notice of Appeal shall be filed using "blanks," we also used the Township's Variance Application form, and modified it to indicate appeal, not variance. On the modified form, we repeated the information already given in the Notice to Appeal, and indicated Jonathan Scheel was our agent, to have one point of contact.

In addition to the above redundancy, on June 23, we filed an additional form, the Appeal Form, which required nothing more than the Variance Form already supplied. Not a thing was different. On the modified Variance Form we indicated this was an appeal, not a variance, we identified the Zoning decision we were appealing (permit to Pickleball Storage), the parcel number and address involved, the Ag zoning of the parcel, and the zoning ordinance sections that were violated by the issuance of the permit. We identified ourselves on the form and wrote "Appellants: (See attached appeal) Phelps, Taylor, LaVanway, Willis, Fary, Mills, VanWart, Umlor, and Rudolph" and the attached First Notice of Appeal contained our full names and contact information. The agent signed it and gave his contact information, as well. The accompanying check from two appellants was evidence enough that the agent was not acting without our authority. When we put our names on the First Notice of Appeal, we were informing you we appealed the Permit.

For the Zoning Administrator to ask for this same information to be provided to him all over again, but this time on a form titled "Appeal or Interpretation Application" was unreasonable and burdensome, and only served to slow-walk and, confuse the ZBA as to its statutory obligation to set a hearing date and hear our Appeal case.

Zoning Ordinance § 8.05 specifies "application requirements" to be filed not at the time of filing the Notice of Appeal, but rather "not less than thirty (30) days prior to the date of the hearing. This is a very important distinction. The requirements of seven copies of a "completed application, with associated fee, . . . or other information deemed reasonably necessary for making any informed decision on his or her appeal" was complied with. We provided 7 copies the \$935 fee at the time of filing our First Notice of Appeal specifying the grounds, way before any 30-days-prior to ZBA hearing date requirement. As can be seen in § 8.05, some of the requirements do not apply equally for variance applications, interpretation requests, or Notices of Appeal. For example "site plans as required in the Zoning Ordinance under Article 5" do not apply to a ZBA appeal of a letter by the Zoning Administrator. Those particular 'requirements' don't apply. They seem to apply only when site plans are part of the appeal, variance application, or interpretation request.

Finally, there is nothing in the Zoning Ordinance preventing any person from delivering the Notice of Appeal, other papers and check to the ZBA or to the Township Hall drop box, on our behalf. We could have asked anyone to do that physical task.

• **The ZA's Decision to not "immediately transmit" the ZA's files to the ZBA**

The MZEA and the Zoning Ordinance 8.03(6) require the Zoning Administrator to "immediately transmit" to the ZBA "all papers constituting the record upon which the action appealed from was taken." These laws are not about a Notice of Appeal, or any "application" accompanying a Notice of Appeal. They refer to the papers in the Zoning Administrator's files constituting the record of his permitting decision such as, the property owner's application for the permit, the zoning permit issued, any maps, surveys, site plans, communications, etc. He must transmit the *township's* record. The

purpose? To provide the evidence in the record so the ZBA can make a decision on a Notice of Appeal. The appellants' papers, our First Notice of Appeal, are *already* filed directly with both ZBA (the Chair was directly served in person on May 29), and the Zoning Administrator and does not have to be redundantly "forwarded." Sitting on his hands and blocking the process violates the statute and the Ordinance.

• **The ZA's Decision to not recognize the Automatic Stay imposed by §8.11**

Certification to the ZBA is the only authority in the Hayes Township Zoning Ordinance that the Zoning Administrator has, as provided in § 8.11 to "certif[y] to the zoning board of appeals after the notice of appeal is filed, that by reason stated in the certificate, a stay would in the opinion of the officer cause immediate peril to life or property." The automatic stay is also mandated by operation of law with the same wording in MCL 125.125.3604(3). The Courts back us up on that point.

That "automatic stays" including a stay on construction are "triggered" by a Notice of Appeal is supported by *Simon v City of Norton Shores*:

The [lower] court held the City could charge a fee for a ZBA hearing but that the ZBA violated MCL 125.3604(3) by not ordering a stay of construction during the appeal.

In *Simon*, the appellants were not prevented from being heard by ZBA, as Van Zee has done here, using illegal grounds for blocking our appeal to even get to the ZBA.

The *Pamela B. Johnson Trust v. Anderson* decision in 2014 also called the stay imposed by MCL125.3604(3) as "automatic" while an appeal to ZBA was pending (at Footnote 7 and accompanying text):

Contrary to plaintiff's arguments, the Anderson defendants did not have 11 months to begin construction between the issuance of permit 3071 and the effective date of the 2010 amendments because a statutory automatic stay was in effect for most of that period due to plaintiff's ZBA appeal.

And:

Although plaintiff has asserted that an automatic stay was not in effect due to an order of the trial court, the record shows that the order in question was entered *before* plaintiff's appeal to the ZBA relating to permit 3071. Indeed, as plaintiff's counsel conceded at oral argument, the order was entered in response to a motion filed by plaintiff even before the issuance of permit 3071. Obviously, on these facts, the trial court's order did not involve consideration of plaintiff's appeal to the ZBA on September 24, 2009, and it was this appeal which triggered the automatic stay provided for in MCL 125.3604(3). Thus, contrary to plaintiff's arguments, a stay was clearly in effect during the relevant time period.

The recent *Kozma v Law Court of Appeals* decision in 2024 also claimed that the stay that a Notice of Appeals triggers, as provided for in MCL 125.3604(3) is "automatic" and includes construction:

If the automatic-stay provision did not apply to construction, the Legislature would have essentially created a right without a remedy.

The Hayes Township Zoning Ordinance solidifies that Stay includes construction in §8.11: "an appeal [to ZBA] . . . stays all proceedings of the action appealed from, including the effectiveness of any zoning permit issued." A Zoning Permit is defined in the Ordinance as permitting construction.

VII. What the ZBA needs to do at the hearing(s)

According to Zoning Ordinance Section 8.04, the ZBA's powers, "the Zoning Board of Appeals may reverse or affirm wholly or partly, or may modify the order, requirement, decision or determination appeals from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the official or body from whom the appeal is taken."

We ask that the ZBA:

- 1) Find the facts listed below;
- 2) Reverse wholly the decisions by Ron Van Zee in his letter that Appellants' ZBA application was "incomplete" requiring an "Appeal Form" and signatures, when the modified "Variance Form" submitted on May 30 together with the First Notice of Appeal supplied the same exact information as the "Appeal Form" submitted on June 23; and the Zoning Ordinance and MZEA do not require signatures for a Notice of Appeal;
- 3) Confirm that the Zoning Administrator has not certified to the ZBA regarding the First Appeal that the automatic stay "would cause imminent peril to life or property";
- 4) Confirm that our First ZBA Notice of Appeal has been in effect since filing on May 29 and 30; and
- 5) Recognize and decide that the automatic Stay rendering the zoning permit issued to Pickleball Storage LLC as not "effective" due to operation of law in ZO § 8.11 and the Michigan Zoning Enabling Act, which means the Township is acting improperly by allowing the landowner to continue the construction.

Facts as we find them. We ask the ZBA to find the same:

1. Zoning Permit # 25-04-06 was issued by the Zoning Administrator Ron Van Zee on April 30, 2025 to Pickleball Storage LLC on parcel number 15-007-112-030-10 for the erection of a "new 138' x 81' Personal Storage Accessory Building as the principle use

on the parcel as allowed in section 3.05.8 of the Hayes Township Zoning Ordinance.” There is no mention of pickle ball courts on the Zoning Permit.

2. Appellants’ First Notice of Appeal was served in person on May 29, 2025 to the ZBA Chair, Janice Vedder-Whipple.

3. Appellants’ First Notice of Appeal was filed on May 30, 2025 to appeal Zoning Permit #25-04-6, on May 30, 2025 to the Township Hall, on blanks.

4. Appellants submitted a form accompanying the First Notice of Appeal using the Township’s “Variance Form,” modifying it and provided all the information requested in the Township’s Appeal Form.

5. After receiving Ron Van Zee’s letter of June 16, appellants submitted an Appeal Form on June 23 containing the same information as the original Variance Form, with signatures signed in May, showing evidence that they authorized Jonathan Scheel to act as agent for them.

6. With the filing of this Second Notice of Appeal, appealing Van Zee’s determinations in a letter and other actions, Appellants said they represented themselves, and removed Scheel as their agent as of June 24, for the First Notice of Appeal.

7. Appellant Jim Rudolph joined the First Notice of Appeal by email, and is an appellant in this Second Notice of Appeal.

8. The Zoning Administrator did not take action per § 8.11 certifying to the ZBA that the automatic stay “caused imminent peril to life or property” to reverse the automatic stay.

9. On June 16, 2025 the Zoning Administrator sent a letter outlining his decisions and determinations on the appellants’ “application.”

10. Section 8.03(1) gives the deadline for filing Notices of Appeal as 30 days of the date of decision. Appellants filed their Notice of Appeal on May 29 to ZBA, Clerk and Supervisor and May 30 to the Zoning Administrator.

11. Section 8.03(5) specifies that the appellant “shall file” a Notice of Appeal on “blanks.” Forms are only an option but not mandatory.

12. Section 8.05, Application Requirements, sets a different deadline— “30 days prior to the date of the hearing” — for submission of an “application,” associated fee, and any other materials, than the Notice of Appeal deadline. They are not the same deadline. 8.05 is tied to the ZBA hearing date. 8.03(1) is tied to the date of the action or decision being appealed.

VIII. SUMMARY

Ron Van Zee's actions are in violation of Zoning Ordinance sections 8.03(5), 8.03(6), 8.05 and 8.11. The Zoning Administrator has no authority to act for the ZBA or as the ZBA. The ZBA itself must act on our First Notice of Appeal and our Second Notice of Appeal. We directly noticed the ZBA as required by the Ordinance and the MZEA. Van Zee's actions ignoring the automatic stay on construction of the Pickleball Storage LLC building, triggered by the First Notice of Appeal violates §8.11. Notices of Appeal have a deadline of 30 days after the decision being appealed. Van Zee's decision that to file a Notice of Appeal must be on his "Appeal Form" violates the Ordinance which states it "shall" be on "blanks." Signatures are not required for a Notice to Appeal.

"Applications" and other materials submitted are not due until 30 days prior to the date of the ZBA hearing. The Appeal Form asked for no further information than what was provided in May in our First Notice Appeal with the accompanying "Variance Application" which we modified to provide all of the pertinent information. Evidence of our approval of Jonathan Scheel was our check for \$935. Van Zee's failure to "immediately transmit" his files on the zoning permit decision, violates MCL 125.3604(2) and has confused and interfered with the ZBA's obligations to hear our appeal in a public hearing. We "cured" the so-called defects in the "application" which was not due for 30 days prior to a hearing, on June 23. ZBA must recognize the two distinct deadlines for Notices of Appeals and "applications."

IX. EXHIBITS:

1. Letter by Ron Van Zee, Hayes Township Zoning Administrator, dated June 16, 2025.
2. Cover letter, Appeal Form with signatures, original signature page by Jonathan Scheel, submitted to the Township on June 23, 2025.
3. Memo with our signatures removing Jonathan Scheel as our authorized agent, as of today, June 24, 2025, and signing on to this Second Notice of Appeal.
4. Photos of building under construction by Pickleball Storage taken June 19, 2025.
5. ZBA First Notice of Appeal filed by Appellants on May 29-30, 2025, with Exhibit A, Zoning Permit # 25-04-6.
6. Three Michigan Court of Appeals cases citing MCL 125.3604(3) that a ZBA Notice of Appeal triggers an automatic stay which includes construction while a ZBA appeal is pending, and in *Simon*, that a form is not required for a Notice of Appeal to ZBA in MCL 125.3604(2):
 - *Simon v. City of Norton Shores*, No. 287119 (Mich. App. 9/29/2009), No. 287119. (Mich. App. Sep 29, 2009).
 - *Pamela B. Johnson Trust v. Anderson*, No. 315397, No. 316024 (Mich. App. Aug 19, 2014)
 - *LuAnne Kozma v Scott and Debra Law*, No. 363508, No. 364450 (Mich. App. Mar 14, 2024)

**OFFICE OF ZONING ADMINISTRATOR
09195 MAJOR DOUGLAS SLOAN ROAD
CHARLEVOIX, MICHIGAN 49720
231.547.6961
zoning@hayestownshipmi.gov**

June 16, 2025

To whom it may concern,

You are receiving this letter as a result of an application that was submitted to Hayes Township by way of the drop box in front of the township hall.

Jonathon Scheel submitted an application to Hayes Township Zoning Department indicating that he was an agent representing twelve people.

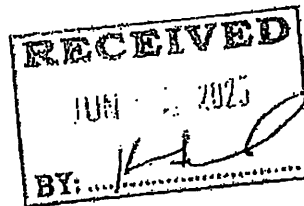
After review of the application by this department and Hayes Township legal counsel, the following represent the reasons this department finds the application submitted is not complete and therefore cannot be forwarded the Zoning Board of Appeals.

1. The document received is a variance request form, not an appeal form. Section 8.03 of the Hayes Township Zoning Ordinance provides that "the appellant shall file with the Zoning Board of Appeals, on blanks or forms to be furnished by the Zoning Administrator, a notice of appeal specifying the grounds for the appeal." The Hayes Township Appeal Form is available upon request at the Hayes Township Hall.
2. The proper appeal form needs to be signed by the appellant. Not only was the wrong form used, the appellants did not sign it.
3. The form appears to be submitted by an agent on behalf of twelve people. None of the 9 people signed the form. There is no evidence submitted with the form that the alleged agent has authority to act on behalf of the twelve people.

If you have any questions, please feel free to call the Zoning Department at (231) 547-6169 or email at zoning@hayestownshipmi.gov.

Ron VanZee, Hayes Township Zoning Administrator

June 23, 2025



Dear Mr. Van Zee,

I and my co-appellants received your letter that our "application" was incomplete, that a form was necessary, that the wrong form had no signatures, and we had "no evidence" that Jonathan Scheel was our agent. However, the check for \$935 from myself and my husband Pat Fary was evidence enough.

With this explanatory note, we also attach a copy of our signatures that authorized Jonathan Scheel to be our agent to file our Notice of Appeal which was delivered to the ZBA Chair personally on May 29 and to the Township's official drop box on May 30.

Take note that the Notice of Appeal must be filed "to the Zoning Board of Appeals" 30 days from the decision of you issuing the Zoning Permit. See Zoning Ordinance Section 8.03(1).

We dispute that a form is needed at all for an appeal, as Section 8.03(5), which you quoted yourself, provides that blanks "shall" be used, "or" forms. We chose to use blanks because your form is woefully inadequate. There's no "application" required in the MZEA.

In Section 8.05, a completely different deadline is specified for the remaining materials, 30 days prior to the date of a ZBA hearing. It is not required at the time deadline specified for a Notice of Appeal.

Furthermore, although we dispute an Appeal Form was required, we submit one, however, the Appeal Form asked absolutely nothing more than the Variance Form already did. There is essentially no different information asked for in either form.

We expect the Township to enforce the Stay on construction immediately.

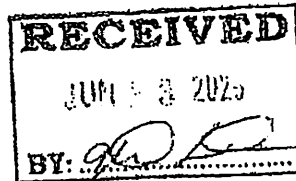
Sincerely,


Kim Fary

10156 Seneca St, Charlevoix MI 49720

10516


June 23, 2025



Dear Mr. Van Zee,

I and my co-appellants received your letter that our "application" was incomplete, that a form was necessary, that the wrong form had no signatures, and we had "no evidence" that Jonathan Scheel was our agent. However, the check for \$935 from myself and my husband Pat Fary was evidence enough.

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Furthermore, although we dispute an Appeal Form was required, we submit one, however, the Appeal Form asked absolutely nothing more than the Variance Form already did. There is essentially no different information asked for in either form.

We expect the Township to enforce the Stay on construction immediately.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "Kim Fary".

Kim Fary

10156 Seneca St, Charlevoix MI 49720

10516

Handwritten initials "PF" inside a small circle.



Supplement to Notice of Appeal Filed
May 29 with ZBA chair and May 30, 2025
Hayes Township
Zoning Board of Appeals with Zoning Administrator
Appeal or Interpretation Application via township drop box.

GENERAL INFORMATION Zoning Administrator Phone (231) 647-6861

Name of Property Kim and Pat Fary, Ellen and Jim Ruddleph, Kevin
Owner(s) Willis, Darcy and Catherine Phelps, Mike Taylor, Summer LaVanway
Shelly Van Wart, Carol Umlohn, Chris and Chelsea Mills
Mailing Address Fary: 101516 Seneca St
City Charlevoix State MI Zip 49720

Telephone 231-439-9122 (Fary)

All other addresses provided on Notice of Appeal.

PROPERTY INFORMATION of zoning permit we are appealing:

Property Tax Code Number: 15- 007- 112 - 030 - 10

Legal Address 10855 Pincherry Rd.

Nearest Road Intersection Townline and Pincherry roads

Zone District A (Agriculture)

Please type or print; fill in all blanks and return with \$935.00 fee payable to Hayes Township

Check # 5251 by Kim and Pat Fary submitted on May 30, 2025

APPEAL OR INTERPRETATION REQUESTED

Relief from the following Zoning Ordinance Section(s) or actions:

Hayes Township Zoning Ordinance may be found at hayestownshipmi.gov

Section(s): Appeal of zoning permit #25-04-06 issued to

Pickleball Storage LLC on April 30, 2025. 20 sections violated:

Submit clearly the basis of the appeal or interpretation that is being requested along with all documentation supporting the claim and/or request.

3.05.8

4.03

5.02.4

Our grounds for appeal of the decision to
issue the zoning permit are specified in detail

in our Notice of Appeal as submitted, with violations

in sections of zoning ordinance 3.05.8, 4.03, and 5.02.4

Applicant Name, Address & Contact Information 506 N Division
Petoskey MI

Applicant Signature Jonathan Scheel

Agent

Date

6-23-2025

231-342-9025, jszoning@

KIM PRIEBE-FARY

Property Owner N/A

Property Owner Signature N/A

6/23/25

Date

N/A

See attached signature
page of all appellants.

Jonathan
Scheel
as Agent
for
Appellants

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

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 Major Douglas Sloan Road.
Charlevoix, MI 49720

231-549-6961

Zoning Administrators Signature _____

DATE RECEIVED _____

CASE NO. _____

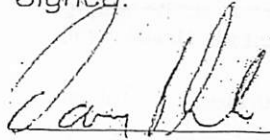
NOTE: The Township may need to inspect the layout of the building(s) and property to verify all application information. The signature of the applicant on this application authorizes the inspection of this property.

May 2025

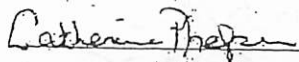
To Hayes Township:

We authorize Jonathan Scheel to act as our agent for our appeal to the Hayes Township Zoning Board of Appeals, May 28, 2025. Questions and correspondence should be directed to Jonathan Scheel at: Email: jszoning@gmail.com or Phone: 231-342-9025.

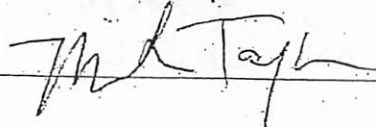
Signed:



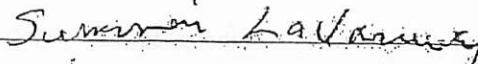
Darcy Phelps



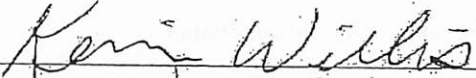
Catherine Phelps



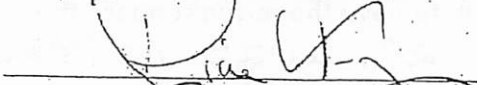
Mike Taylor



Summer LaVanway



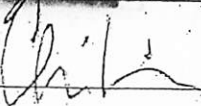
Kevin Willis



Kim Fary



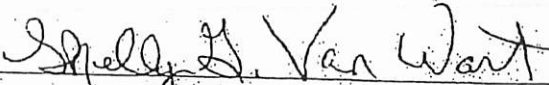
Pat Fary



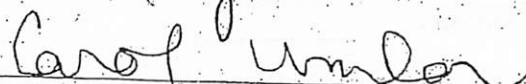
Christopher Mills



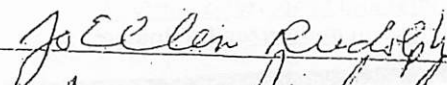
Chelsea Mills



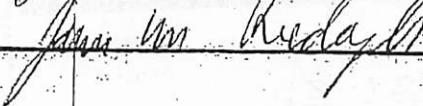
Shelly VanWart



Carol Umlor



JoEllen Rudolph



JAMES M. Rudolph

APPLICANT'S STATEMENT AND AUTHORIZATION

AGENT'S SIGNATURE

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.).

N/A

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.

APPEAL

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

Owner(s) Signature: N/A

Date: N/A

Applicant(s) Signature: [Signature]

Date: 5-29-25

AGENT FOR APPELLANTS, JONATHAN SCHEEL

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 APPEAL

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

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

SUBMITTED MAY 29, 2025 IN PERSON.

Application and fee can be sent to:

506-N Division Rd Petoskey

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

jszoning@gmail.com 231-3429025

231-549-6961

Zoning Administrator's Signature _____

DATE RECEIVED _____

CASE NO. _____

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 _____

PATRICK FARY 01-97
KIMBERLY PRIEBE-FARY
10516 SENECA STREET
CHARLEVOIX, MI 49720

5251
74-140724

5-27-25

Date

Pay to the
Order of

HAYES TOWNSHIP

NINE HUNDRED & THIRTY FIVE

\$ 935.00

00/100
Dollars



FIFTH THIRD BANK

For ZBA APPEAL

[Signature]

SECTION 8.03 JURISDICTION

1. Except for Planning Commission decisions concerning special use permits and Planned Unit Developments, an appeal concerning the administration of the provisions of this Ordinance may be taken to the Zoning Board of Appeals within the timeframe defined in the general rules and procedures adopted by the Zoning Board of Appeals. If such a timeframe is not specified, **appeals shall be filed within thirty (30) days of the decision of the official or body from which the appellant seeks relief.**
2. The ZBA may hear appeals made by any person who alleges he or she has been aggrieved by a decision of the official or body, except for Zoning Administrator decisions regarding enforcement of this Ordinance.
3. The ZBA may grant variances as provided for in **Section 8.07 Variances.**
4. The ZBA may also interpret the location of Zoning District boundaries and may interpret the provisions of this Ordinance.
5. An appeal may be made by any person, firm or corporation, or by any Officer, Department or Board of the Township. **The appellant shall file with the Zoning Board of Appeals, on blanks or forms to be furnished by the Zoning Administrator, a notice of appeal specifying the grounds for the appeal.**
6. The Zoning Administrator shall transmit to the Zoning Board of Appeals all the papers constituting the record upon which the action appealed from was taken. The final decision of such appeal shall be in the form of a resolution either reversing, modifying or affirming, wholly or partly, the decision or determination appealed from. Reasons for the decision must be stated.
7. Any person may appear and testify at the hearing either in person or by duly authorized agent or attorney.

SECTION 8.04 EXERCISING POWER

In exercising the above powers, the Zoning Board of Appeals may reverse or affirm wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the official or body from whom the appeal is taken.

SECTION 8.05 APPLICATION REQUIREMENTS

The applicant shall submit seven (7) copies of a completed application, with associated fee, surveys, plans and data as required in Article V: Site Plan Review, or other information deemed reasonably necessary for making any informed decision on his or her appeal, not less than thirty (30) days prior to the date of the hearing.

SECTION 8.06 NOTICE REQUIREMENTS FOR ZONING BOARD OF APPEALS PUBLIC HEARINGS

The notices for all public hearings before the Zoning Board of Appeals concerning appeals, interpretations, and variances shall comply with all of the following applicable provisions:

June 24, 2025

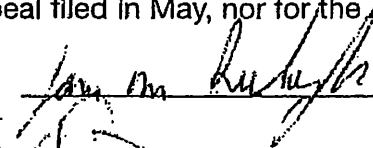
To Hayes Township Zoning Administrator and Zoning Board of Appeals:

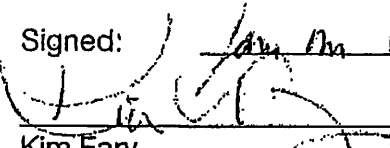
At the time we filed a Notice of Appeal, appealing the issuance of Zoning Permit # 25-04-06 given to Pickleball Storage LLC, according to MCL 125.3604(1) to the ZBA Chair on May 29, 2025, and to the Zoning Administrator via the Township Drop Off Box on May 30, 2025, we had authorized Jonathan Scheel to do so on our behalf. We met in person with Mr. Scheel on Tuesday, May 27, agreed to him acting on our behalf to sign the form accompanying our Notice of Appeal, and deliver all materials to Township officials. We signed the attached page authorizing him to do that.

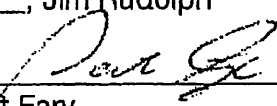
Today June 24 we are filing a NEW appeal, appealing the decisions and determinations by the Zoning Administrator, Ron Van Zee, as stated in his letter sent to us dated June 16, 2026, and his decision to not enforce the automatic Stay on the effectiveness of the Zoning Permit in §8.11, specifically neglecting to certify to the ZBA why the automatic Stay imposed by our Notice of Appeal should be lifted, illegally allowing the construction to continue without an effective permit. The Notice of Appeal triggers the automatic stay, not superfluous paperwork that only reiterated everything in our Notice. Signatures are not required for a Notice of Appeal.

Below, by our signatures, we hereby make it absolutely clear that Jonathan Scheel was authorized to represent us from May 27 through June 23, 2025, including the paperwork delivered to the Township yesterday. We hereby now represent ourselves, and Jonathan Scheel is not our representative from today, June 24, forward, for the original Appeal filed in May, nor for the Appeal noticed and filed today.

Signed:

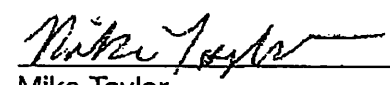

Jim Rudolph

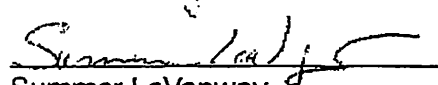

Kim Fary


Pat Fary

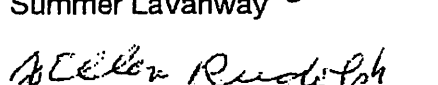

Carol Umrlor


Shelly VanWart

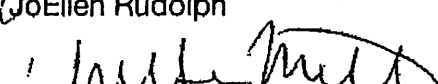

Mike Taylor


Summer LaVanway


Kevin Willis


JoEllen Rudolph

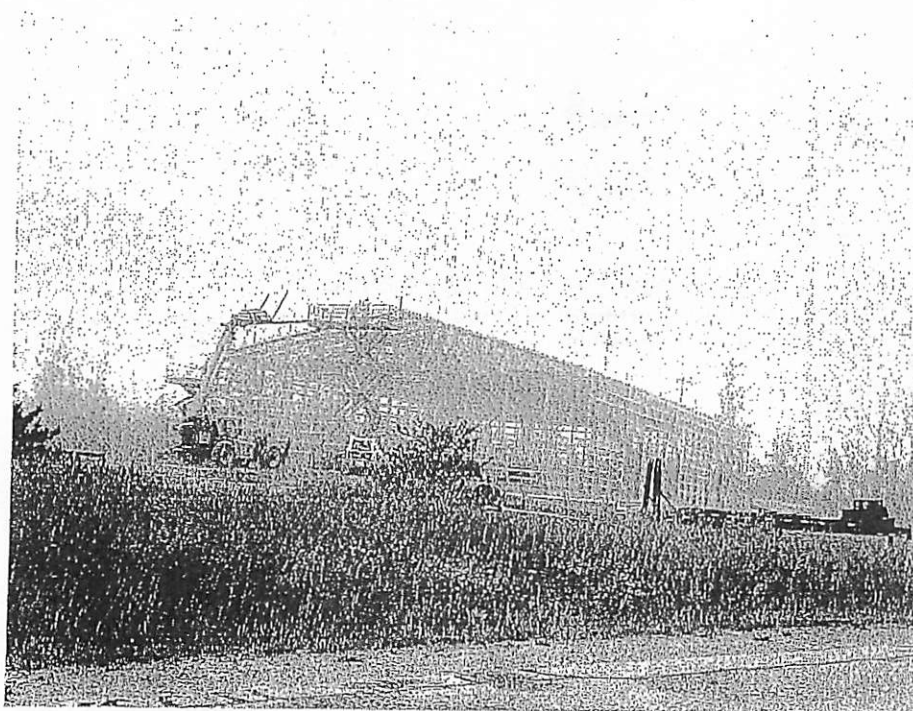

Christopher Mills


Chelsea Mills


Darcy Phelps


Catherine Phelps

Exhibit 4 - PHOTOS of construction of Pickleball Storage LLC building, taken on June 19, 2025, obtained by appellants





Hayes Township **APPEAL**
Zoning Variance Application
Zoning Administrator Phone (231) 647-6961

DATE: MAY 29, 2025

GENERAL INFORMATION

Name of Property Owner(s) PICKLEBALL STORAGE LLC

Mailing Address 10855 PINCHERRY RD.

City CHARLEVOIX State MI Zip

Telephone UNKNOWN

APPELLANTS: (SEE ATTACHED APPEAL) PHELPS, TAYLOR,
LAVANWAY, WILLIS, FARY, MILLS,
PROPERTY INFORMATION VANWART, UMLOR
AND RUDOLPH

Property Tax Code Number: 15-007- 112-030-10

Legal Address 10855 PINCHERRY RD

Nearest Road Intersection TOWNLINE AND PINCHERRY

Zone District AG

Please type or print; fill in all blanks and return with \$935.00 fee payable to Hayes Township

VARIANCE OR INTERPRETATION REQUESTED **APPEAL OF**
ZONING PERMIT # 25-04-06 ISSUED TO PICKLEBALL
Relief from the following Zoning Ordinance Section(s): **STORAGE LLC**
VIOLATION OF 3.05.8, 4.03, 5.02.4 ON
APRIL 30,
2025

Please review the online copy of the zoning ordinance for the exact section number.
charlevoixcounty.org/hayes.asp

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.

SEE
ATTACHED

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.

SEE ATTACHED APPEAL AND EXHIBITS A-I

N/A

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 231-647-6961 when the site is staked, but before construction begins. Mail completed application to: Zoning Administrator, 09195 Major Douglas Sloan Rd Charlevoix, MI. 49720. You may also contact the Zoning Administrator at zoning@hayestownshipmi.gov. For all waterfront properties a shoreline inspection is required.

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.

APPEAL

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

Applicant(s) Signature: [Signature] Date: 5-29-25

AGENT FOR APPELLANTS, JONATHAN SCHEEL

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 APPEAL

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

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

SUBMITTED MAY 29, 2025 IN PERSON.

Application and fee can be sent to:

506-N Division Rd Petoskey

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

~~jszoning@gmail.com~~

~~231-3429025~~

231-549-6961

Zoning Administrators Signature _____

DATE RECEIVED _____

CASE NO. _____

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

PATRICK FARY 01-97
KIMBERLY PRIEBE-FARY
10516 SENECA STREET
CHARLEVOIX, MI 49720

5251

5-27-25

Pay to the
Order of

HAYES TOWNSHIP

Date

NINE HUNDRED & THIRTY FIVE

\$ 935.00

00/100
Dollars



FIFTH THIRD BANK

For ZBA APPEAL

[Signature]

1-877-481-1401 1-800-701-2559 05351

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. **APPEAL OF ZONING PERMIT**
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 U11 JJ11 & .

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.

To the Hayes Township Zoning Board of Appeals

Appeal of Zoning Permit No. 25-04-06, issued to Pickleball Storage LLC on April 30, 2025 by Zoning Administrator Ron Van Zee

Date of appeal filed: May 29, 2025

Appellants' Names and Addresses

1. Darcy and Catherine Phelps, 6168 Bay Shore Woods Dr, Charlevoix, MI 49720
2. Mike Taylor and Summer LaVanway, 10523 Spring St, Charlevoix, MI 49720
3. Kevin Willis, 6095 Petoskey St, Charlevoix, MI 49720
4. Kim and Pat Fary, 10516 Seneca Ave, Charlevoix MI 49720
5. Christopher and Chelsea Mills, 10529 Townline Road, Charlevoix MI 49720
6. Shelly VanWart, 6017 Charlevoix St, Charlevoix, MI 49720
7. Carol Umlor, 6272 US 31 N, Charlevoix, MI 49720
8. JoEllen Rudolph, 9799 Townline Rd, Petoskey, MI 49770

We are filing an appeal for a Zoning Permit 25-04-06 issued 4/30/2025 to Pickleball Storage LLC located at 10855 Pincherry Road. We believe that the permit was issued in error and does not meet the standards of the Hayes Township Zoning Ordinance.

1. The majority of the building is pickleball courts, lounge and office space. None of these uses are uses allowed in the Agricultural Zone District.
2. The building does not meet the standards for Accessory Building as Principal Use in the ordinance because an indoor pickle ball court recreation facility is not an accessory to any permitted use in the Agricultural Zone District.
3. The Zoning Administrator did not properly assess the planned use of the building, as required in Section 5.02.4. "Pole barn" is not a use.

We submit this to the Zoning Board of Appeals as specified in the Zoning Ordinance Section 8.03.5 Jurisdiction. We have submitted 7 copies of the application packet to the Zoning Administrator, one copy to the Township Clerk, one copy to the Township ZBA Chair and one copy to The Township Supervisor. According to Section 8.03.6 the Zoning Administrator shall

transmit to the ZBA all the papers in the record documenting his actions to the ZBA members.

Included in our submission are copies of the completed application with supporting documents, and the \$935 fee. We have used the ZBA application available on the Township website, called "Zoning Variance Application" and filled in the required information for the appeal.

According to Zoning Ordinance Section 8.04, the ZBA's powers, "the Zoning Board of Appeals may reverse or affirm wholly or partly, or may modify the order, requirement, decision or determination appeals from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the official or body from whom the appeal is taken."

We ask the ZBA to reverse wholly the decision and make an order to revoke the permit and notify the owner in writing, for the reasons stated and discussed below.

Michigan Zoning Enabling Act (MCL 125.3604(3)) states:

"An appeal to the zoning board of appeals stays all proceedings in furtherance of the action appealed."

The Hayes Zoning Ordinance Section 8.11 states the same:

"An appeal to the Zoning Board of Appeals and an appeal of a decision by the Zoning Board of Appeals to Circuit Court stays all proceedings of the action appealed from, including the effectiveness of any zoning permit issued, unless the Zoning Administrator certifies to the Zoning Board of Appeals after such an appeal has been filed that a stay would cause imminent peril to life or property, in which case the proceedings shall not be stayed, unless ordered stayed by the Zoning Board of Appeals or the Circuit Court."

In light of the above two laws, we request that the ZBA, which during a ZBA case has "all the powers of the official...from whom the appeal is taken" to issue a Stop Work Order to Pickleball Storage LLC to stay all proceedings and construction at the site immediately upon receiving this Appeal of the Permit.

In addition, according to Section 9.02.6, the Zoning Administrator “shall have the power to revoke or cancel any Zoning Permit in case of failure or neglect to comply with the provisions of the Ordinances...The owner shall be notified of such revocation in writing.”

Facts as we find them. We ask the ZBA to find the same:

1. Zoning Permit # 25-04-06 was issued by the Zoning Administrator Ron Van Zee on April 30, 2025 to Pickleball Storage LLC on parcel number 15-007-112-030-10 for the erection of a “new 138’ x 81’ Personal Storage Accessory Building as the principle use on the parcel as allowed in section 3.05.8 of the Hayes Township Zoning Ordinance.” There is no mention of pickle ball courts on the Zoning Permit.
2. Parcel 15-007-112-030-10 is 16 acres and owned by Pickleball Storage LLC, W229 N2512 Duplainville Rd, Waukesha, WI 53186. Property address is 10855 Pincherry Road, Charlevoix MI in Hayes Township.
3. Parcel 15-007-112-030-10 is zoned in the Agricultural District (A) in Section 4.03 on the Zoning Map in the Zoning Ordinance. It is a vacant parcel.
4. Pickleball Storage LLC applied for a Building Permit from Charlevoix County Building Department and submitted detailed plans for the site and building construction, as well as soil permit and health department applications. The building permit was issued on May 14, 2025 for “pickleball courts and storage.” The permit indicates the building would be a 12,474 [square feet] total area.
5. A floor plan submitted to the Charlevoix County Building Department dated 2-12-25, shows the “Interior Layout” for the proposed building. The plan shows:
 - Two “Racketball” courts 1 and 2, measuring approximately 42’ x 80’ each for a total area of approximately 6,720 square feet.
 - One “Shop Storage Garage-Unoccupied” measuring approximately 53’8” x 80’ for a total area of approximately 4,266 square feet.
 - One “Lounge Room” approximately 20 feet by 40 feet or 800 square feet, in an attached structure to the main structure.

- A Mechanical Room and Bathroom in the same attached structure to the main structure.

6. The "racketball" courts are labeled "A3 Occupancy" which in International Construction Code is for Assembly Group A-3. The ICC Assembly Group A-3 "includes assembly uses intended for worship, recreation or amusement ... including but not limited to . . . indoor tennis courts without spectator seating."

7. The "Shop Storage Garage" is labeled as "S-2 Occupancy." It is unclear what type of storage the garage unit would be used for. The ICC indicates Storage Group S-2 occupancies "include, among others, buildings used for the storage of noncombustible materials" that have a "negligible amount of plastic trim, such as knobs, handles or film wrapping."

8. Based on the Floor Plan, the majority (approximately 6,720 out of 12,474 square feet or 54%) of the building, is dedicated to the recreational activity of pickle ball, not storage. If the lounge is taken into account for servicing the pickle ball activity, 7520 out of 12,474, the percentage for assembly is 60%. Pickleball players might need a lounge however, stored items in a garage do not.

9. On the Site Plan the "Lounge Room" attached structure is labeled an "Office" and is located at the front of the building facing Pincherry Road. The Site Plan and the Elevation Drawing makes the building appear commercial in nature.

10. The building fits the definition of "Club" in the ordinance. A "club" is not a permitted principal use, and is not an accessory to any of the permitted principal uses in the Agricultural District.

11. The Building Permit indicates the building will be air conditioned.

12. The Site Plans indicate that the building has three "wings" with separate dimensions. One "wing" has the dimensions "81'-0" x 138'-0" x 20'4" ICH." The other two wings have additional dimensions as attachments to the main structure. The Permit issued only permits the "wing" that is 81 x 138 feet and not the two other "wings."

13. Pickleball Storage LLC is a corporation formed on January 22, 2025 with the State of Michigan. There is no registered agent currently filed for the LLC.

14. The site plan shows 11 parking spaces which indicates expectations of numerous visitors implying storage of a single boat is not the intended main use.

Timeline of When Documents were Created and Decisions Made

Timeline	
Dates in 2025	Document or Action
January 22	Pickleball Storage LLC incorporates with State of Michigan
Feb 6	Performance Engineer's "Marriott Site Plan" reviewed by Owner. Owner identified as Rieth-Riley
Feb 12	Wick Building Plan Set created, including Floor plan, Elevations. 31 pages in all.
March 6	Performance Engineer's "Marriott Site Plan" and "Septic Plan" submitted to Zoning official; shows "basis of design" as "country club."
March 12	Performance Engineer's Marriott Site Plan says "Construction Set" on this date
March 26	Performance Engineer's Marriott Site Plan says "Revisions Per Zoning"
April 3	Warranty Deed recorded with Charlevoix County, conveying parcel from Rieth-Riley Construction to James R. Marriott
April 4	Quit Claim deed executed by James R. Marriott
April 7	Soil Erosion Permit applied for and signed by James R. Marriot and agent Keith Pinkelman. Estimate the project to start April 25.
April 9	Zoning Administrator's April Report reports "Received Zoning Application for 138x 81 accessory structure as the principle use at 18055 Pincherry rd. Waiting for additional information from applicant to proceed."
April 10	Quit Claim deed recorded by Charlevoix County Register of Deeds
April 15	Charlevoix County Building department received soil erosion fee from Lynnman Construction
April 30	Soil Erosion Permit issued by Charlevoix County
April 30	Water well permit issued by Health Department
April 30	Zoning Permit issued by Hayes Township's Zoning Administrator
May 1	Building Permit applied for by Lynnman Construction, signed by Thomas Flynn
May 5	Plan Review by Charlevoix Building Department signed by John Cochrane
May 14	Building Permit issued by County
May 19	Construction began, approximately

Analysis of Zoning Permit #25-04-06 as to Zoning Violations

We looked at Zoning Ordinance Sections: 1.02 Purpose, 2.02 Definitions, 3.04 Principal Uses, 3.05 Accessory Buildings, Zoning Map, 4.03 Agricultural District, 5.01. 5.02 and 5.03 Site Plan Review, 6 Special Use Permits, 7.01.14 Recreation Areas and Facilities, and 9.07.1 Nuisance Per Se.

In the Definitions sections we looked at these definitions:

Accessory Building or Structure: Any building or structure that is customarily incidental and subordinate to the use of the principal or main building or structure, or a structure which is intended to be supplemental to an allowed use to be added in the future; accessory structures shall include, but are not limited to, accessory buildings, personal freestanding television and radio reception antennas, satellite dishes and signs. An accessory structure attached to a main building or structure shall be considered part of the main structure.

Accessory Use: A use naturally and normally incidental and subordinate to the main use of the land or building.

Agriculture: The act or business of cultivating or using land and soils for the production of crops for the use of animals or humans and includes, but is not limited to, purposes related to agriculture, farming, dairying, pasturage, horticulture, floriculture, viticulture, and animal and poultry husbandry. Flower, vegetable or other gardens maintained only for the property owner(s) use and/or enjoyment are not considered agricultural.

Boat and/or Canoe Livery and Boat Yard: A place where boats and/or canoes are stored, rented, sold, repaired, docked and serviced.

Club: Buildings and facilities owned or operated by corporation, association, person or persons, for social, educational, or recreational purposes.

Dwelling Unit: A single unit building, or portion thereof, providing complete independent living facilities for one (1) family for residential purposes, including permanent provisions for living, sleeping, heating,

cooking, and sanitation. In no case shall a travel trailer, truck, bus, motor home, tent or other such portable structures be considered a dwelling unit.

Dwelling, Single-Family: A building or portion thereof, containing one (1) dwelling unit that is occupied by only one (1) family.

Family: An individual, a collective number of individuals related by blood, marriage, adoption, or legally established relationships such as guardianship or foster care, or a collective number of unrelated individuals whose relation is of a permanent and distinct domestic character who occupy a single dwelling and live as a single nonprofit housekeeping unit with single culinary facilities. A family, however, shall not include any society, club, fraternity, sorority, association, lodge or group of individuals, whether related or not, whose association or living arrangement is temporary or resort-seasonal in character or nature.

Farm: All of the contiguous neighboring or associated land operated as a single unit on which bona fide agriculture is carried on directly by the owner-operator, manager, or tenant-farmer by his own labor or with the assistance of members of his household or hired employees.

Garage-Private: A building used primarily for the storage of vehicles for the use of the occupants of a lot on which such building is located.

Garage-Public: A building, or part thereof, designed or used for equipping, servicing, repairing, hiring, storing, or parking motor vehicles. The term repairing does not include the rebuilding, dismantling or storage of wrecked or junked vehicles.

Home Business: A profession or occupation, or trade that is accessory to a principal residential use conducted within a dwelling or residential accessory building. Home businesses fall into two classifications defined below:

Home Occupations: A profession or occupation conducted within a dwelling, or an attached garage, which is clearly incidental and secondary to the use of the lot, or dwelling for residential purposes.

Home occupations are regulated by Section 3.15.1. **Cottage Industry:** An occupation or trade conducted within a detached residential accessory structure, which is clearly incidental and

secondary to the use of the lot, and dwelling for residential purposes. Cottage industries are regulated by Section 3.15.2.

Living Space: A conditioned space used for or intended for human occupancy.

Park: Properties and facilities owned or operated by any governmental agency, or owned or operated by any private agency, which are open to the general public for recreational purposes.

Principal Use: The main use to which the lot is devoted and the primary purpose for which the lot exists.

Recreational Unit: Means a vehicular-type unit, primarily designed as temporary living quarters for recreational camping or travel use, which either has its own motive power or is mounted on or drawn by another vehicle which is self-powered. Recreation unit shall include "Travel trailers", "Camping trailer", "Motor home", "Truck camper", "Slide-in-camper", and "Chassis-mount camper" as defined in Act 171 of the Public Acts 1970, as amended. A recreational vehicle is not a mobile home or manufactured home as defined under this ordinance or under Section 2 of the Mobile Home Commission Act.

Recreational Vehicle: see Recreational Unit.

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 specified in this Ordinance for that district.

Use: The lawful purpose of which land or premises, or a building thereon, is designed, arranged, or intended, or for which it is occupied, or maintained, let, or leased, according to this Ordinance.

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.

The permitted building has the majority (53%) of its indoor space to be used for assembly activity for recreation on two indoor pickle ball courts, and therefore should be considered as a pickleball recreational facility. The use of the "lounge" room as an accessory to the pickle ball activity adds more square footage making the facility 60% for pickleball and lounging. Instead, the Zoning Administrator considered the use of the building as only a "personal storage accessory building" without taking into account the much larger space dedicated to pickleball activity.

According to Section 5.02, "The Zoning Administrator shall require that all applications for Zoning Permits, which do not require a site plan, be accompanied by plans and specifications including a Plot Plan, drawn to scale, showing the following: . . . (4) The existing and intended use of the lot and all such structures upon it . . ." "Pole barn" is not a use, it is a type of structure.

Indoor multiple pickleball court facilities are not an accessory use or accessory building, according to the definitions in the ordinance, that is "naturally and normally incidental and subordinate to" any of the permitted uses on Agricultural Zoned property in Section 4.03 of the Zoning Ordinance. Unlike the residential and commercial Zoning districts in Hayes Township, the Agricultural District does not permit "parks, playgrounds, recreational areas and community centers" by right or by Special Use Permit.

The "lounge" is elsewhere in the plans labelled an "office." An office or lounge attached to a two-court pickleball indoor facility is also not an accessory use because neither is "naturally and normally incidental and subordinate to the principal use" of a single-family dwelling or any other permitted use on an Agriculturally zoned property.

While Section 3.05.8 allows for one "Accessory Building as a Principal Use" per lot if four requirements are met, meaning a stand-alone accessory building can be the only use of that parcel, it is not carte blanche to allow any kind of accessory building on any parcel regardless of zoning. It states:

Accessory Building as a Principal Use, except on small parcels

One (1) accessory building as a Principal Use shall be allowed per lot in all districts when all of the following are met:

- Parcel is at least one (1) acre in size.
- Parcel meets the lot area and width requirements specified Section 4.13, or is a nonconforming lot of record.
- Front and rear minimum setbacks shall be one hundred (100) feet; and side minimum setback shall be twenty-five (25).
- Accessory building maximum size and height shall comply with the provisions of the chart in Section 3.05.7.

This clause (Section 3.05.8) is commonly used or applied when a property owner builds, for example, a storage shed or workshop prior to building a single-family dwelling. The shed is the principal use until the single-family dwelling is built, and then it reverts to being an accessory use to the principal use.

“Accessory use” is defined in Section 2.02 as a “use naturally and normally incidental and subordinate to the main use of the land or building.”

Looking at the Agricultural Zoning section 4.03 and definition of Agriculture in 2.02, an “accessory use” or structure containing multiple pickle ball courts in an enclosed facility violates the Intent Section of the Agricultural District (Section 4.03.1) “The Agricultural District is designed to promote the use of wooded and rural areas of the Township in a manner that will retain the basic attractiveness of the natural resources and provide enjoyment for both visitors and the community at large. The primary intent of the District is to hold the rural Township areas for agriculture and forestry purposes and to allow some multiple uses of marginal farm-forest lands. Residential uses are considered secondary in this district.”

The Elevations drawing shows the building resembles a commercial or industrial building. An “office” and 11-car parking lot also has a commercial character. A multiple-court pickle ball enclosed indoor facility does fall under “Recreational Areas and Facilities” in Section 7.01.14,

which states “No such facilities shall have a commercial appearance or be of a commercial character.” Such facilities also are “subject to findings that the uses are compatible with the surrounding residential area.” This Site Specific Standard was to be applied in a Special Use Permit hearing.

Of the permitted principal uses in the Ag zoning, Section 4.03.2 subsections A through G, the permitted building is not a single family dwelling, a roadside stand, an agricultural warehouse or non-animal processing plant, a plant nursery or greenhouse, an antenna, or a home occupation conducted completely inside the residence. A multi-court pickleball indoor facility is not an accessory building or use “customarily incidental” to any of the permissible uses.

Evaluating the plans and the Definitions section of the Zoning Ordinance, we believe that the building is not for Agriculture or furthering or enhancing the purpose of Agriculture, is not a Boat Yard, not a Dwelling Unit, not a Farm, nor is it a Garage Private or Public as the storage does not indicate vehicles and the Ordinance does not specify that a boat is a vehicle. The property owner is a corporation, therefore it cannot be a Home Business in that it is not a Home Occupation conducted within a dwelling, and not a Cottage Industry. It is possibly “Living Space” because the pickleball areas would be air conditioned, according to the Building Plans, for “human occupancy” however the occupancy is not for “dwelling” but rather for assembly for playing pickleball. It is not clear if the building is open to the public, but a 11-car parking lot is an indication that it is not an accessory use for one single-family dwelling. The building or its contents are not a Recreational Vehicle.

Pickleball Storage LLC is a corporation, not a “family” as specifically prohibited in the Ordinance definition of family, that could occupy a Single-family dwelling or any accessory buildings to such a dwelling.

The definition of “Club” seems to fit this building: “Buildings and facilities owned or operated by corporation, association, person or persons, for social, educational, or recreational purposes.” A “club” is not an “accessory use” that is “naturally and normally incidental to” the permissible principal uses by right or special uses available in the Agricultural Zone (4.03). Only the General Commercial District, C-2 in Section 4.11 allows “Civic, social and fraternal organization facilities” and no zoning district allows “clubs” by right as clubs are defined in the Ordinance. The Agricultural district allows “golf courses and country

clubs” only by Special Use Permit. A building “accessory” to golf course or country club would also require a Special Use Permit. “Health clubs” and tennis courts are mentioned only in the Planned Unit Development section of the Ordinance. The Pickleball Storage LLC parcel is not a PUD. Therefore, we conclude that a Club cannot be an accessory use, therefore not permissible as an “accessory building as a principal use” under 3.05.8. We fail to see what a multi-court indoor pickleball facility would be accessory to, in the Hayes Township Zoning Ordinance.

Looking at other Ordinance sections, in 1.02, the purposes are to “encourage the use of lands in accordance with their character and adaptability and to limit the improper use of land; control sprawl and maintain rural character, control congestion on the public roads” 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.” We contend a pickleball facility in an Agriculture-zoned district goes against the purpose section because it does not maintain rural character of the Agricultural District.

Section 3.04 Principal Uses states: “No lot may contain more than one (1) principal structure or use, except where specifically provided for in this Ordinance. Upon determination by the Planning Commission, groups of apartment buildings, offices, retail business buildings, agricultural structures, or other similar groups of buildings may be considered principal structures or uses.” We do not see any reference in the Zoning Ordinance that determines that groups of “agricultural structures” may include a combination of indoor pickleball courts, lounges, offices, and garage storage as “principal uses.”

Consideration of some Zoning Cases

We looked at the following Michigan case law involving “accessory use” and “principal use”:

- Dezman v Charter Township of Bloomfield (2024)
- Groveland Township v Jennings (1981)
- Jostock v Mayfield Township (2024)

- Posa v Charter Township of Northville (2024)

We also looked at Saugatuck Dunes Coastal Alliance v Saugatuck Township (2022)

The Groveland Township v Jennings case is an older case, prior to the passage of the Michigan Zoning Enabling Act, however, it establishes some principles about accessory uses:

An "accessory use" is generally defined as a use "which is clearly incidental to and customarily found in connection with and located on the same zoning lot as is the principal use to which it is related."

The general nature of an accessory use hinges on the meaning of the definitional terms "customarily incidental".

The nature of an accessory use is something less than a primary permitted use is demonstrated by a characterization of accessory uses as 'dependent on' or 'pertaining to.'

In the recent Dezman v Charter Township of Bloomfield case, the courts concluded that a resident in a Residential zone could not keep backyard chickens in an accessory building or keep chickens because it was not "accessory use" to the residential zoning.

The Lerner v Bloomfield Township case concerned a resident who worked out of her residence. The court held that her home occupation was not a permissible "accessory use" under the ordinance and clarified that the term "customarily incidental" is not the same meaning as treating the words "customary" and "incidental" as separate things.

The Court wrote:

On appeal, the main thrust of plaintiff's argument is that her home occupation of psychotherapy and social work is a permissible "accessory use" under the zoning ordinance. The controlling section of the zoning ordinance defines "accessory use" as a use which is "customarily incidental" to any of the permitted principal uses. Plaintiff conceptualizes the term "accessory use" as having two separate prongs: customary and incidental. She then attempts to satisfy these two elements by demonstrating that (1) it is customary (usual practice) for social workers to practice from their homes

and (2) her practice is incidental (subordinate) to the principal use of the home as a residence.

We disagree and find that plaintiff's approach of separately proving that her use is "customary" and "incidental" is mistaken. Plaintiff's activity must be "customarily incident" to the residential use, not merely customary and incidental. The term "customarily" modifies "incident" in the ordinance and does not stand on its own. None of plaintiff's authorities for the proposition that her practice is customarily done in homes is relevant to her claim that it is "customarily incident" to her residential use. The term "incident" is pivotal here.

The Lerner case (from 1981) cites a 1964 Texas decision as an example of a case that established what constitutes "accessory uses," Hardy v Calhoun, which held that an outdoor tennis court is an accessory use for a residential property for the occupants to enjoy.

In contrast, Pickleball Storage LLC is not a family as defined in the zoning ordinance that can occupy a single family dwelling or its accessory building, does not have a residential property in the Township, and does not have a single-family dwelling on Agricultural property that could have an accessory building or use. The facility is a very large, enclosed building with multiple courts, multiple uses, air conditioning, and an office or lounge—very different than the outside tennis court on a residential lot for use by a family in the Texas case.

The Lerner decision pointed out that cases where uses were found to be "accessory" or found to not be "accessory" differed:

In the first group of cases, the use in question enhanced the principal use of the property, and accordingly was found to be "accessory". In the second group, the use did not enhance the principal use of the property, and was found not to be "accessory". Even the language of plaintiff's cases on this issue reinforce this conclusion. The cases refer to a use . . . which is "factually subordinate", "ancillary", or "auxiliary" to the principal use. All of these suggest that the accessory use must depend upon the principal use. Applying these standards, "incidental" use in plaintiff's case would have to be one which furthers her use of the property as a residence. Her social work activity does not. Therefore, we affirm the trial court's conclusion that plaintiff's practice does not qualify as an "accessory use" of her residence."

Our view is the multiple-pickleball-court building with added storage garage, and lounge/office similarly does not enhance the principal use of any of the potential permissible primary uses of Agriculturally-zoned land in Hayes Township, and therefore cannot qualify as “accessory use.” The fact that there is no other building on the property, but it is vacant agricultural land, also does not enhance that use. To use both pickleball and storage as an “accessory use” to nothing at all—but as a principal use despite its Agricultural Zoning—does not comply with Section 3.05.8 of the ordinance. For 3.05.8 to mean that it is a “wild card” that enables anything at all to qualify in any district is misinterpreting that part of the Zoning Ordinance. The principal uses of each district must still apply each for their own.

The Posa v Charter Township of Northville case was brought by residents on residential property living next to a golf course. The golf course owned a nearby parcel on which it wanted to build a maintenance building for the golf course as an “accessory use” to the course. The Court decided that the maintenance building was indeed an accessory use to the golf course clubhouse, ruling against the residents. This outcome is easy to see, as a golf-related maintenance building was “customarily incidental” to a golf course.

Why Appellants Are Aggrieved of the Permit Decision

According to the Saugatuck Dunes court decision, ZBA’s have the task to determine whether an appellant is an “aggrieved person” by the Zoning Administrator’s decision to issue a regular Zoning Permit under section 3.05.8 of the Ordinance, for purposes of an appeal under MCL 125.3604(1). (The Zoning Administrator does not have the power to determine whether a person is aggrieved). We appeal this Zoning Permit decision because we meet the following criteria set in the Saugatuck Dunes court decision:

1. We are participating in the challenged proceeding by bringing this proceeding to the ZBA with our written appeal.
2. Our “legally protected interest or protected personal, pecuniary, or property right” has been affected by the Township using the wrong permitting process for this project, creating a nuisance per se that we are

living next to. The project has already received a building permit and construction, land clearing and excavation began around May 19. The Hayes Township Zoning Ordinance Section 9.07.1 describes a nuisance per se as:

Any land, dwellings, buildings or structures, including tents and trailer coaches, used, erected, altered, razed or converted in violation of this Ordinance or in violation of any regulations, conditions, permits or other rights granted, adopted or issued pursuant to this Ordinance are hereby declared to be a nuisance per se.

3. The evidence that we already have special damages is the construction of the nuisance per se has already begun, without the proper permitting review and without any conditions the Township could have placed on property owner for such things as hours of operation, number of parking spaces, drainage on the site, or any required landscaping buffers. The current Zoning Permit issued addresses none of the standards used for granting a Special Use Permit. We were deprived of a fair process that is intended for special land uses that "require individual review and approval standards in order to safeguard the general health, safety, and welfare of the Township" as the Purpose of Special Use Permits is for, (Section 6.01). As adjacent (Phelps, Taylor, LaVanway, Willis, Fary, and Mills) and nearby property owners (Umlor and VanWart), we were not able to provide comment on the provisions of the Special Use Permit process that is designed "to prevent conflict with or impairment of the other uses or uses permitted by right of the district." (Section 6.02)

Additionally, Bay Shore residents have had disproportionate burdens due to the previous land use by H&D and Rieth-Riley mining operations for decades, in which industrial activity impacted our residential neighborhood. Since the 1980s, area residents litigated the mining operation. In recent years we sought future uses of the property compatible with our quiet residential neighborhood and compatible zoning to stabilize the neighborhood and restore peaceful enjoyment of our properties. For example, in 2022 we took part in a citizen petition drive requesting the Township review and revise the Future Land Use Map in the Master Plan, and to change the mining site parcels to residential use rather than industrial use. That effort led to the creation of an Advisory Focus Group, (that one of us sat on and many of us participated in), that

recommended a future use for the mined lands to be residential when mining was completed.

In Summary, we appeal to the ZBA to take the following actions:

1. Schedule and hold a ZBA public hearing as required by law to make all decisions, as a body, on our case.
2. During the hearing find appellants as “aggrieved persons.” As appellants we may add to our argument on this at the hearing or prior to it.
3. Find the facts as we have outlined above.
4. Conclude and decide that the Zoning Permit was issued in violation of the Zoning Ordinance because it did not comply with Section 3.05.8, “Accessory Use as Principal Use” because the parcel is zoned in the Agricultural District and according to Section 4.03 Agricultural Zoning, and the definition of “Club” in the ordinance, the building is a “club” owned by a corporation, and is not an accessory building or accessory use “customarily incidental to” any of the Permitted principal uses in 4.03.2 A through G. As a Club owned by a corporation, the project was subject to the Special Use Permit requirements of Article 6 of the Zoning Ordinance.
5. Using the powers of the ZBA as the zoning official from whom this appeal is taken, take the following enforcement actions:
 - Revoke the zoning permit wholly and notify the property owner in writing of the decision (Section 8.04)
 - Declare the building a Nuisance Per Se (Section 9.07.1) and;
 - Issue a Stop Work Order to the property owner (9.07.4)

EXHIBITS:

- A. Zoning Permit 25-04-06 to Pickleball Storage LLC
- B. Charlevoix County Parcel Map for parcel number 15-007-112-030-10
- C. Hayes Township Zoning Map from Zoning Ordinance

D. Registration for Pickleball Storage LLC and Quit Claim Deed of property owner

E. Pickleball Storage LLC Building Permit and Application

F. Site Plan by Performance Engineers. Plans including Floor Plan and Elevations by Wick Building.

G. International Construction Code sections on A3 and S2 types of building occupancies/structures

H. Photos of work at the site already underway taken on various dates in May 2025

I. Zoning Administrator Report, April 9, 2025

Court cases mentioned in our appeal are listed below but not attached. Available upon request.

Dezman v. Charter Twp. of Bloomfield, 360406 (Mich. App. Jun 27, 2024)

Hardy v. Calhoun, 383 S.W.2d 652 (Tex. Ct. App. 1964)

Groveland Twp. v. Jennings, 308 N.W.2d 259, 106 Mich.App. 504 (Mich. App. 1981)

Lerner v. Bloomfield Twp., 308 N.W.2d 701, 106 Mich.App. 809 (Mich. App. 1981)

Posa v Charter Township of Northville, Mich. App. April 18, 2024. No. 364349.

Saugatuck Dunes Coastal Alliance v Saugatuck Township, Mich. July 22, 2022. Nos. 160358-9.

A. Zoning Permit 25-04-06 to Pickleball
Storage LLC

HAYES TOWNSHIP

Zoning Permit

The permit must be visible from the highway frontage

*Any person willfully destroying this permit before the completion of this building
will be punished to the full extent of the law.*

Date 04/30/2025

Permit No. 25-04-06

ISSUED FOR THE ERECTION OF A

New 138'x81' Personal Storage Accessory Building as the principle use on the parcel as allowed in section 3.05,8 of

the Hayes Township Zoning Ordinance

Special Conditions

Location 10855 Pincherry rd. Charlevoix MI 49720

PIN 15-007-112-030-10

Owner Pickleball Storage LLC

Contractor

Lynnman Construction LLC

Ron VanZee
Zoning Administrator

STATE OF MICHIGAN
COURT OF APPEALS

TERRY SIMON and MARGARET SIMON,

Plaintiffs-Appellees,

v

CITY OF NORTON SHORES and CITY OF
NORTON SHORES ZONING BOARD OF
APPEALS,

Defendants-Appellants.

UNPUBLISHED
September 29, 2009

No. 287119
Muskegon Circuit Court
LC No. 07-045548-AA

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendants appeal by delayed leave granted the trial court's order reversing the decision of defendant Zoning Board of Appeals (ZBA) that allowed plaintiffs' neighbors to build a fence allegedly not in conformance with local ordinances. We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts and Proceedings

Plaintiffs live west of their adjacent neighbors, the Sipovics, and both have frontage on Mona Lake. The Sipovics wanted to construct a fence and applied for a building permit, submitting their plan to Richard Maher, Community Development Director for the City of Norton Shores, who also serves as the building and zoning administrator (though that is not his title). The relevant ordinances provide:

§ 2.281: [Defines "front yard" as] An open space extending the full width of the lot between the principal building and the front lot line, unoccupied and unobstructed from the ground upward, except as hereinafter specified.

§ 2.283: [Defines "side yard" as] An open, unoccupied space, situated between the side line of the principal building and the adjacent side line of the lot and extending from the front yard to the rear yard.

§ 4.102(1)(A) [establishing setbacks]: No structure may be built closer to a lake or stream than an adjacent principal structure, and where each adjoining parcel

has a principal structure then no closer than a straight line drawn from the front of each principal building, but in no case less than 50 feet from the high water mark of the shore

§ 4.103(1): The water side of the yard shall be considered the front yard.

§ 15.100(1)(B): Fences shall not exceed four feet (4') in height, except where otherwise permitted in this section

§ 15.100(2): Fences within a side or rear yard shall not exceed six feet (6') in height, measured from the surface of the ground, and shall not extend beyond the required minimum front yard.

§ 16.101(3): The Building and Zoning Administrator shall not vary, change, or grant exceptions to any terms of this Ordinance, or to any person making application under the requirements of this Ordinance.

Apparently, there is no definition of "required minimum front yard," though defendants assert that § 4.102(1)(A) provides the definition.

Maher granted the permit, sending Mr. Sipovic a letter dated July 7, 2007. Maher noted the definition of "front yard" in § 2.281, and then stated that "it was not the spirit or intent of the zoning ordinance to prohibit a fence as per your submittal, given the fact that your neighbor to the west could erect such a fence on their property being that it would be behind the minimum required set back and be in their side yard." The letter noted that approval was premised on an amendment to the proposed site plan: 12 feet of solid, six-foot fence instead of the proposed 24 feet of solid, six-foot fence.

When plaintiffs appealed this decision, arguing that the Sipovics put in four sections of solid, higher-than-four-feet fence instead of the two sections the permit allowed, the City made them complete a form for requesting a variance, and made them pay the \$150 fee assessed for variance hearings. A public hearing was held where the ZBA took testimony and then postponed its decision to consider the matter. The ZBA made its decision the next week, approving the permit for the reasons given in Maher's letter.

The debate between the parties is whether § 15.100(2), which allows six-foot fences only up to the "required minimum front yard," means fences may extend to the setback line as defined in § 4.102(1)(A) of the ordinances or whether they cannot extend into the front yard at all, as defined in § 2.281.

The circuit court stated its ruling as follows:

The language of the ordinance is clear and unambiguous, and provides that a six-foot fence shall not extend from a side yard into a front yard. The court is not required to give deference to a municipality's interpretation of an ordinance if the language of the ordinance is clear and unambiguous.

The court therefore concluded that, “the decision to grant the building permit was not a reasonable exercise of discretion, as neither the Building and Zoning Administrator, nor the ZBA, have the discretion to ignore the plain meaning of the ordinances.” The court said, “The decision of the ZBA as to the issuance of the building permit is reversed on this ground, and the building permit as previously issued is to be considered null and void.” By voiding the entire building permit, the court not only disallowed a six-foot high fence extending into a front yard (wherever that may begin); it also disallowed the four-foot high fence that goes from the end of the six-foot high fence down to the water’s edge.

The circuit court also held that the City violated MCL 125.3604(2) by requiring plaintiffs to complete a form entitled “Variance Request” instead of allowing them to file a “notice of appeal,” as the statute requires. The court held the City could charge a fee for a ZBA hearing but that the ZBA violated MCL 125.3604(3) by not ordering a stay of construction during the appeal. However, the court noted this did not affect the ZBA’s decision and the court declined to reverse on that ground alone. Finally, the court held that Maher could hold a combined position of Building and Zoning Administrator and Community Development Director under a single title. Plaintiffs’ other issues (the Sipovics began building before getting the permit; more than 12 feet of the fence is higher than four feet and more than 50 percent opaque; the site plan shows the six-foot fence terminating farther north than it actually does; the site plan itself is inaccurate) were not decided because they were moot under the court’s ruling.

II. Analysis

A circuit court reviews the decision of a zoning board of appeals to ensure that it:

- (a) Complies with the constitution and laws of the state.
- (b) Is based upon proper procedure.
- (c) Is supported by competent, material, and substantial evidence on the record.
- (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals. [MCL 125.3606(1).]

Legal questions, such as the interpretation of a township zoning ordinance, are reviewed de novo. *Yankee Springs Twp v Fox*, 264 Mich App 604, 605-606; 692 NW2d 728 (2004). The rules of statutory construction apply to ordinances. *Id.* at 608 (citations omitted). Therefore, when the language in an ordinance is clear and unambiguous, it must be enforced as written. *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995). When the language of the ordinance is ambiguous, the court may not substitute its judgment “by imposing what it considers to be the wisest version of the ordinance, but is confined to an analysis of the text of the ordinance and, in the face of ambiguity, a determination of what the legislative body that enacted the ordinance intended by the language in question.” *Macenas v Michiana*, 433 Mich 380, 396-397; 446 NW2d 102 (1989).

Defendants’ framing of the issue upon which delayed leave was granted implicates only the question raised by Maher’s explanation for granting the building permit, i.e., only the issue of where the front yard begins for the purpose of determining where the six-foot high fence must

stop. The circuit court's ruling (the ordinance clearly says that "a six-foot fence shall not extend from a side yard into a front yard") essentially read the words "required minimum" out of § 15.100(2). That section says, "Fences within a side or rear yard shall not exceed six feet (6') in height, measured from the surface of the ground, and shall not extend beyond the *required minimum* front yard" (emphasis added). A reviewing court's interpretation is flawed where "it fails to give meaning to all the words of the [ordinance]" because "courts must give effect to every word, phrase, and clause in [an ordinance] and avoid an interpretation that would render any part of the [ordinance] surplusage or nugatory." *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004) (quotation marks and citation omitted). Contrary to the circuit court's ruling, § 15.100(2) does not unambiguously completely prohibit a six-foot fence from extending into any part of the actual front yard. Where the fence may extend depends on how "required minimum front yard" is defined.

There is no definition of "required minimum front yard" in the ordinances. Maher considered other parts of the ordinance, and particularly § 4.102(1)(A), which provides that the closest a principal structure can be to the water is the point where it meets "a straight line drawn from the front of each principal building" on adjoining parcels. Defendants mark that as the beginning of the "required minimum front yard." That appears to be a reasonable interpretation of the statutory language. The circuit court erred in finding the language unambiguous and in construing the ordinance in a way that reads the words "required minimum" out of the language.

Because it decided the entire project was not valid, the circuit court did not address how much of the six-foot fence, if any, extended beyond the setback line, nor did it address plaintiffs' contention that some of the new fence exceeded six feet tall. A remand is necessary to allow the court to address these issues.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

No costs, a public question involved.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA B. JOHNSON TRUST, by ELDON E.
JOHNSON, Trustee,

UNPUBLISHED
August 19, 2014

Plaintiff-Appellant,

v

JAMES ANDERSON, PATRICIA ANDERSON,
APJ PROPERTIES, L.L.C., and CITY OF
CHARLEVOIX,

Nos. 315397, 316024
Charlevoix Circuit Court
LC No. 11-084523-CH

Defendants-Appellees.

Before: STEPHENS, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

These consolidated appeals involving a zoning dispute arise from the same lower court proceedings. In Docket No. 315397, plaintiff, Pamela B. Johnson Trust, by Eldon E. Johnson, Trustee, appeals as of right two orders granting summary disposition, the first granting summary disposition to defendant, city of Charlevoix ("the City"), and the second granting summary disposition to defendants, James Anderson, Patricia Anderson, and APJ Properties, L.L.C. ("the Anderson defendants"). In Docket No. 316024, plaintiff appeals as of right two orders granting attorney fees and costs, the first granting attorney fees and costs in favor of the City, and the second granting attorney fees and costs in favor of the Anderson defendants. For the reasons explained in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In 2007 the Charlevoix Zoning Administrator issued a zoning permit, permit 2850, to the Anderson defendants, authorizing construction of a single-family residence and an attached boathouse. Neighbors opposed to the Anderson defendants' project initiated an administrative appeal, which was dismissed as untimely, and also filed suit in Charlevoix Circuit Court, seeking declaratory and injunctive relief on the ground that the Anderson defendants' project would violate provisions of the City's zoning ordinance ("the Ordinance"). The trial court issued an order for superintending control and remanded the matter to the Charlevoix Zoning Board of Appeals ("the ZBA") to review the issuance of permit 2850, resulting in the ZBA's revocation of permit 2850 because certain features of the boathouse violated the Ordinance. An appeal to this

Court followed, and, emphasizing that the time for appeal to the ZBA had passed, this Court reversed the trial court's order remanding the matter to the ZBA. This Court remanded the case to the trial court, indicating that the ZBA's decision to revoke the Anderson defendants' permit must be vacated. *Camp v Charlevoix*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2010 (Docket No. 291473), unpub op at 3-4.¹

After the ZBA's revocation of permit 2850, but before issuance of this Court's opinion requiring that the revocation be vacated, the Anderson defendants modified their construction plans to comply with the ZBA's decision and they obtained another zoning permit for the same construction project, known as permit 3071. In continued opposition to the project, plaintiff filed an appeal to the ZBA regarding permit 3071, alleging numerous Ordinance violations. After conducting public hearings, on May 19, 2010, the ZBA ultimately upheld the issuance of permit 3071. Thereafter, on June 21, 2010, the City adopted amendments to the Ordinance, including changes to the requirements for boathouses. The amended Ordinance became effective on July 21, 2010.

On June 3, 2010, plaintiff filed an appeal to the trial court from the ZBA's decision regarding permit 3071. The appeal proved unsuccessful and, on November 11, 2010, the trial court entered an order affirming the ZBA's decision. During the course of that appeal, plaintiff did not argue that the 2010 amendments to the Ordinance should apply to the Anderson defendants' project.

In December of 2010, the Anderson defendants applied for, and received, a building permit to begin construction of the boathouse under zoning permit 3071. Construction on the Anderson defendants' project began in early January 2011, and they finished the first phase of construction in May 2011. At the same time, plaintiff's legal challenges to the project continued.

When the construction began in January 2011, plaintiff filed an ex parte motion to stay enforcement of permit 3071, which the trial court denied. Plaintiff then filed a new lawsuit claiming that the Anderson defendants' project overburdened an easement. In that action, plaintiff filed another ex parte motion for a temporary restraining order and a preliminary injunction, which the trial court denied.² Yet another ex parte motion for a temporary restraining order was denied in March of 2011. In May of 2011, plaintiff twice sought enforcement action

¹ On remand following this Court's decision, the trial court held that permit 2850 was null and void in light of the subsequent issuance of another zoning permit for the same project (known as permit 3071, which is discussed *infra*). We have since reversed the trial court's determination and again remanded for reinstatement of permit 2850. *Camp v Charlevoix*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2014 (Docket No. 306066).

² Ultimately, on remand following an appeal to this Court, the trial court found no cause of action against the Anderson defendants and dismissed plaintiff's suit, a decision which this Court affirmed. See *Pamela B Johnson Trust v Anderson*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2013 (Docket No. 309913); *Pamela B Johnson Trust v Anderson*, unpublished order of the Court of Appeals, issued February 11, 2014 (Docket No. 309913).

from the Zoning Administrator, claiming that the Anderson defendants' project violated provisions of the Ordinance. However, during these proceedings, plaintiff did not raise any argument regarding the applicability of the 2010 Ordinance amendments to the Anderson defendants' project.

Plaintiff first asserted the applicability of the 2010 amendments in a letter to the City's attorney dated June 27, 2011. On July 8, 2011, plaintiff sent a letter to the Zoning Administrator, arguing that the City should revoke permit 3071 because it did not comply with the 2010 amendments to the Ordinance. By this point in time, the Anderson defendants had, by their estimate, invested at least \$1.8 million in the construction project. The Zoning Administrator declined to take enforcement action, reasoning that plaintiff could have raised its arguments at a prior ZBA hearing. The ZBA upheld this decision, and the trial court affirmed the ZBA's determination.³ Following a stay mandated by plaintiff's ZBA appeal, the Anderson defendants resumed on-site construction in September 2011.

On December 2, 2011, plaintiff filed the present lawsuit asserting several claims against the Anderson defendants, including a nuisance claim and five counts relating to the Anderson defendants' alleged violation of the Ordinance, most of which were premised on the argument that the 2010 amendments to the Ordinance should apply to the Anderson defendants' project. On March 26, 2012, plaintiff amended the complaint to assert claims against the City as well, specifically, a takings claim and allegations of a denial of procedural and substantive due process. Plaintiff requested declaratory and injunctive relief and damages.

The Anderson defendants filed an answer denying liability and asserting numerous affirmative defenses, including laches, collateral estoppel, failure to join claims, equitable estoppel, and failure to state a claim. Likewise, the City filed an answer denying liability and asserting various affirmative defenses, including laches, governmental immunity, lack of a sufficient property interest to justify due process protection, and failure to state claims. Following the close of discovery, the Anderson defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), and the City filed a separate motion for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10).

After conducting a hearing, the trial court granted both summary disposition motions. With respect to the Anderson defendants' motion, relying on MCR 2.116(C)(10), the trial court concluded that all of plaintiff's claims were barred by the doctrine of laches, and that, in addition, collateral estoppel applied to bar relitigation of the Anderson defendants' compliance with setback/side yard requirements as well as prohibitions against residential use of the boathouse as described in the Ordinance. The trial court also granted summary disposition

³ This Court has denied leave to appeal the lower tribunal decisions upholding the Zoning Administrator's denials of plaintiff's requests for enforcement actions. See *Johnson v Charlevoix Zoning Bd of Appeals*, unpublished order of the Court of Appeals, entered February 15, 2013 (Docket No. 308618); *Johnson v Charlevoix Zoning Bd of Appeals*, unpublished order of the Court of Appeals, entered February 15, 2013 (Docket No. 309936).

regarding plaintiff's private nuisance claim under MCR 2.116(C)(8), concluding plaintiff had failed to state a claim on which relief could be granted.

Regarding the City's motion, the trial court determined that plaintiff had not shown a constitutionally protected property interest as required to establish a substantive or procedural due process violation, nor was the government conduct so arbitrary and capricious as to shock the conscience as required to support a substantive due process claim. The trial also concluded that the City's alleged acts or omissions could not be the proximate cause of plaintiff's damages because actual ownership and control of the property remained with the Anderson defendants, meaning that plaintiff had failed to state a claim in avoidance of governmental immunity. Finally, regarding plaintiff's takings claim, the trial court applied the balancing test set forth in *Penn Central Transp Co v New York*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978), concluding that plaintiff's claim must fail because plaintiff could not show interference with reasonable investment-backed expectations. On March 11, 2013, the trial court entered separate orders granting summary disposition to the Anderson defendants and to the City. Plaintiff then filed a claim of appeal from those orders (Docket No. 315397).

Meanwhile, the City and the Anderson defendants each moved for case evaluation sanctions, both seeking recovery of costs and attorney fees. The City's motion explained that the case evaluation panel had recommended a \$25,000 award against the City, which the City accepted but plaintiff rejected. Likewise, the Anderson defendants' motion explained that the case evaluation panel had recommended a \$75,000 award against the Anderson defendants, which the Anderson defendants accepted but plaintiff rejected. In response to both motions, plaintiff argued that the trial court should decline to award costs, pursuant to the "interest of justice" exception in MCR 2.403(O)(11).

Following a hearing, the trial court rejected plaintiff's contentions and entered separate orders awarding costs and attorney fees of \$26,491.16 to the City and \$49,511.66 to the Anderson defendants. Plaintiff then filed a claim of appeal from those orders (Docket No. 316024). Thereafter, this Court consolidated plaintiff's appeals.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Hackel v Macomb Co Comm*, 298 Mich App 311, 315; 826 NW2d 753 (2012). The present case implicates MCR 2.116(C)(7), (C)(8), and (C)(10). Under MCR 2.116(C)(7), we consider affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party, to determine whether the moving party is entitled to judgment as a matter of law. *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). In comparison, a motion under MCR 2.116(C)(8), tests the legal sufficiency of a claim. *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 425; 770 NW2d 105 (2009). Considering only the pleadings, and accepting all factual allegations as true, a motion under MCR 2.116(C)(8) should be granted "only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.*

“In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.” *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). “There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Where no genuine issue regarding any material fact exists, summary disposition is appropriate and the moving party is entitled to judgment as a matter of law. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

III. LACHES

On appeal, plaintiff first argues that the trial court erred in granting summary disposition based on a finding that plaintiff’s claims relating to the 2010 amendment of the Ordinance were barred by the doctrine of laches.⁴ A trial court’s application of equitable doctrines, such as laches, is reviewed de novo. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004) (citation omitted). Pursuant to this doctrine, because equity requires a plaintiff to exercise reasonable diligence in vindicating his or her rights, when a plaintiff fails to do so, a court may withhold relief on the ground that the plaintiff is chargeable with laches. *Knight v Northpointe Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013). Laches may bar recovery both at law and in equity. *Eberhard v Harper-Grace Hosps*, 179 Mich App 24, 37; 445 NW2d 469 (1989), citing *Kaminski v Wayne Co Bd of Auditors*, 287 Mich 62, 67; 282 NW 902 (1938). For laches to apply, there must be a passage of time involving an “unreasonable delay that results in circumstances that would render inequitable any grant of relief to the dilatory plaintiff.” *Yankee Springs Twp*, 264 Mich App at 612. Thus, in addition to the passage of time, a defendant asserting laches must demonstrate a lack of due diligence by the plaintiff and that the plaintiff’s delay resulted in prejudice to the defendant. *Id.* “It is the prejudice occasioned by the delay that justifies the application of laches.” *Knight*, 300 Mich App at 115. However, because an individual seeking equitable relief must do so with clean hands, a party with unclean hands may not assert the equitable defense of laches. *Attorney General v PowerPick Player’s Club of Mich, LLC*, 287 Mich App 13, 52; 783 NW2d 515 (2010).

In this case, the trial court properly found that the requirements for invoking laches were satisfied. There was a significant passage of time between the adoption of the 2010 amendments and plaintiff’s attempt to assert the applicability of the 2010 Ordinance. In particular, the

⁴ In relation to its arguments regarding the applicability of the doctrine of laches, plaintiff has also offered the cursory assertion that the Anderson defendants have also violated the 2009 version of the Ordinance in certain respects. Plaintiff has failed, however, to explain why the Anderson defendants’ alleged violation of the 2009 version of the Ordinance would render inapplicable the doctrine of laches. Because the issue is insufficiently briefed, we deem it abandoned and need not consider it. See *State Treasurer v Sprague*, 284 Mich App 235, 243; 772 NW2d 452 (2009). In any event, the majority of plaintiff’s claims which do implicate the 2009 Ordinance were barred by collateral estoppel as discussed *infra*.

Ordinance amendments were adopted on June 21, 2010 and became effective on July 21, 2010. Plaintiff first raised the argument that the Ordinance amendments applied to permit 3071 approximately one year later, in a June 27, 2011, letter to the City's attorney. Plaintiff then filed the current lawsuit nearly another six months later, on December 2, 2011. In total, plaintiff waited close to a year and half before initiating the present legal action.

During this passage of time, plaintiff failed to exercise due diligence in asserting its complaints under the 2010 Ordinance. That is, plaintiff possessed the requisite knowledge of the law and facts to enable it to bring suit long before it did so. Specifically, the amendments at issue became effective in July of 2010 at a meeting attended by plaintiff's counsel, and plaintiff, as an entity dealing with the municipality, is charged with knowledge of the Ordinance provisions. See *Hughes v Almene Twp*, 284 Mich App 50, 78; 771 NW2d 453 (2009). Plaintiff also had knowledge of the Anderson defendants' construction plans and the alleged violations of which it now complains. As early as 2007, when the first zoning permit, permit 2850, was issued, plaintiff complained about aspects of the project that are the focus of the present action, demonstrating plaintiff's knowledge of the building plans.⁵ Further, plaintiff owns property adjacent to the Anderson defendants' construction site and, as a result, was clearly aware of the construction that began in January of 2011 as evidenced by the multiple legal and administrative actions undertaken to stop construction. Knowing of the 2010 amendments and the Anderson defendants' construction plans, plaintiff then had ample opportunity over the course of many months, and in the context of numerous administrative and legal challenges, to raise the applicability of the 2010 amendments. Yet, plaintiff nevertheless failed to assert the applicability of the amendments to the project, waiting to raise the matter until June of 2011, after the Anderson defendants had completed the first phase of construction. On these undisputed facts, plaintiff failed to exercise due diligence in raising its current claims.⁶

In addition, plaintiff's delay in asserting the applicability of the 2010 Ordinance plainly prejudiced the Anderson defendants who undertook the first stage of construction between January of 2011 and May of 2011, expending, as a conservative estimate, approximately \$1.8 million dollars in the process. Even if plaintiff is correct that, of that \$1.8 million, "only" \$150,000 has thus far been expended on the construction of the boathouse, an expenditure of that magnitude would still constitute a showing of prejudice suffered by the Anderson defendants as a result of plaintiff's delay. In sum, the undisputed facts show that there has been a significant

⁵ For example, on May 15, 2007, and June 26, 2007, plaintiff wrote documents complaining about the size of the planned boathouse, even stating specific dimensions. In addition, plaintiff filed a lawsuit in 2007 alleging that the upper boathouse level was "all living area." By the admission of plaintiff's own counsel, the plans approved in permit 3071 were "99% the same" as the plans approved in permit 2850.

⁶ To the extent plaintiff suggests that it was not required to raise the applicability of the 2010 Ordinance because, according to plaintiff, permit 3071 expired on November 18, 2010, the provision of the ZBA by-law on which it relies applies only to variance decisions of the ZBA. Permit 3071 is not a variance decision of the ZBA. Thus, any argument based on the purported expiration of permit 3071 is without merit.

passage of time during which plaintiff failed to exercise due diligence and, as a result of which, the Anderson defendants suffered prejudice. Laches thus applies to bar plaintiff's claims, both legal and equitable, against the Anderson defendants, and, no material question of fact remaining, the trial court did not err in granting the Anderson defendants' motion for summary disposition on this basis.

In challenging this conclusion, plaintiff asserts on appeal that the Anderson defendants may not invoke the doctrine of laches because they have "unclean hands." See *PowerPick Player's Club of Mich, LLC*, 287 Mich App at 52. In particular, plaintiff alleges that the Anderson defendants could have begun construction of the boathouse before the effective date of the 2010 amendments of the Ordinance, and that the Anderson defendants were aware before beginning construction that the 2010 amendments had been adopted. Contrary to plaintiff's arguments, the Anderson defendants did not have 11 months to begin construction between the issuance of permit 3071 and the effective date of the 2010 amendments because a statutory automatic stay was in effect for most of that period due to plaintiff's ZBA appeal.⁷ See MCL 125.3604(3). Further, although the Anderson defendants are charged with knowledge of the 2010 amendments, see *Hughes*, 284 Mich App at 78, it does not follow that they were aware of the amendments' applicability to permit 3071, which was issued in 2009, long before the effective date of the 2010 amendments. See *Dingeman Advertising, Inc v Algoma Twp*, 393 Mich 89, 98; 223 NW2d 689 (1974) ("[T]he average holder of such a permit, even if he had notice of the change of ordinance, would not necessarily presume that the new ordinance applied to him."). Indeed, in this case, the Anderson defendants presented evidence that a City official orally advised them that permit 3071 would be governed by the Ordinance in effect at the time that the permit was issued and plaintiff has presented no evidence to contradict this assertion. Having obtained all the necessary building permits and oral assurances from a City official that the old Ordinance applied, the Anderson defendants reasonably proceeded on the well-founded belief that their project was governed by a prior version of the Ordinance. This conduct does not demonstrate that the Anderson defendants have "unclean hands" and they were not precluded from asserting the doctrine of laches.

IV. COLLATERAL ESTOPPEL

Plaintiff also argues on appeal that the trial court erred in concluding that collateral estoppel barred plaintiff's claims regarding the residential use of the boathouse and the alleged side yard and setback violations. Although the trial court relied on MCR 2.116(C)(10) in respect

⁷ Although plaintiff has asserted that an automatic stay was not in effect due to an order of the trial court, the record shows that the order in question was entered *before* plaintiff's appeal to the ZBA relating to permit 3071. Indeed, as plaintiff's counsel conceded at oral argument, the order was entered in response to a motion filed by plaintiff even before the issuance of permit 3071. Obviously, on these facts, the trial court's order did not involve consideration of plaintiff's appeal to the ZBA on September 24, 2009, and it was this appeal which triggered the automatic stay provided for in MCL 125.3604(3). Thus, contrary to plaintiff's arguments, a stay was clearly in effect during the relevant time period.

to this issue, summary disposition on the basis of collateral estoppel is properly granted under MCR 2.116(C)(7).⁸ *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 42; 620 NW2d 657 (2000). The application of the doctrine of collateral estoppel is a question of law that is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

“Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding.” *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). For the doctrine to apply, “(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel.” *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004). “A decision is final when all appeals have been exhausted or when the time available for an appeal has passed.” *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Mutuality of estoppel exists if the party asserting collateral estoppel would have been bound by the previous litigation if the judgment had gone against that party. *Monat*, 469 Mich at 684-685. Collateral estoppel also applies to administrative determinations, provided that they are adjudicatory in nature, there is a right to appeal, and the Legislature intended to make the decision final absent an appeal. *Nummer v Dep’t of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995).

In this case, the ZBA addressed and decided plaintiff’s complaints relating to the residential use of the boathouse and the side yard/setback requirements, and the ZBA’s decisions in this regard are unaffected by the 2010 amendments to the Ordinance. In particular, the ZBA’s decision on May 19, 2010 considered the alleged residential use of the boathouse, concluding that the challenged amenities in the boathouse were associated with the docking of a boat and thus permissible within the Ordinance definition of “boathouse.” Similarly, the ZBA addressed and decided the side yard/setback issue relating to plaintiff’s assertion that an eastern foundation wall is located in the side yard of the Anderson defendants’ property, impermissibly close to the boundary of plaintiff’s property. The ZBA resolved the issue, considering the same Ordinance provisions on which plaintiff now relies and concluding that the above ground wall complied with the Ordinance provisions, but that underground portions needed to be removed. Plaintiff later appealed the ZBA’s May 19, 2010 decision, and it was affirmed by the trial court.

Given the ZBA’s proceedings and ultimate decision on these issues, the requirements for establishing collateral estoppel are satisfied. Questions of fact essential to the judgment, i.e., the residential use of the boathouse and side yard/setback issues, were actually litigated and determined by a valid and final judgment in the ZBA in an action between the same parties. Plaintiff had a full and fair opportunity to litigate the issues in the ZBA, and appeals from the ZBA decision have been exhausted. Mutuality of estoppel exists because the Anderson

⁸ “An order granting summary disposition under the wrong court rule may be reviewed under the correct rule.” *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147; 624 NW2d 197 (2000) (citation omitted).

defendants would have been bound by the ZBA decision if it had gone against them. *Monat*, 469 Mich at 682-685. Further, the ZBA's administrative determination was adjudicatory in nature, plaintiff had a right to appeal (which was exercised), and the Legislature intended to make the decision final absent an appeal. Cf. *Nummer*, 448 Mich at 544 ("There is absolutely no legislative intent for this multiplicity of litigation."). Accordingly, the trial court properly determined that these claims are barred by collateral estoppel.

V. PRIVATE NUISANCE

Plaintiff also challenges the trial court's determination that summary disposition was appropriate under MCR 2.116(C)(8) because plaintiff failed to state a claim on which relief could be granted in regard to his allegations of private nuisance. By definition, a private nuisance refers to "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). In other words, "the gist of a private nuisance action is an interference with the occupation or use of land or an interference with servitudes relating to land." *Id.* at 303. An actor is liable for private nuisance involving a nontrespassory invasion of another's interest in the private use and enjoyment of land if:

(a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995) (citation omitted).]

In this case, plaintiff's complaint failed to allege that the Anderson defendants committed a nontrespassory invasion that was either (1) intentional and unreasonable or (2) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. In particular, count VI of plaintiff's first amended complaint alleged that the construction, height, and location of the boathouse on the Anderson defendants' property comprised a nuisance that would cause various types of harm or damage to plaintiff and to plaintiff's property. There were no factual allegations, however, that the purported invasion was intentional and unreasonable, or that it was unintentional and otherwise actionable.⁹ Thus, even

⁹ In a single sentence, plaintiff contends on appeal that it should be "entitled to amend its complaint to conform to the evidence." However, plaintiff does not elaborate on how it would amend its complaint so as to state a claim on which relief could be granted, and the record does not suggest that the Anderson defendants committed an intentional and unreasonable, or otherwise actionable invasion. On this record, amendment would be futile and an opportunity to amend was not required. See MCR 2.116(I)(5); *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004).

accepting plaintiff's allegations as true, it has failed to state a claim on which relief may be granted and summary disposition was appropriate under MCR 2.116(C)(8).¹⁰

VI. DUE PROCESS

Regarding the City's motion for summary disposition, plaintiff first asserts on appeal that the trial court erred in determining that plaintiff lacked a protected property interest for purposes of his substantive and procedural due process allegations against the City. In particular, plaintiff maintains that, as an adjacent property owner, he had a constitutionally protected interest in the City's enforcement of the Ordinance relative to the Anderson defendants' property. We disagree.

We review de novo constitutional issues and other questions of law. *Cummins v Robinson Twp*, 283 Mich App 677, 690; 770 NW2d 421 (2009). Likewise, the proper interpretation of statutes and ordinances is reviewed de novo. *Gmoser's Septic Serv, LLC v East Bay Charter Twp*, 299 Mich App 504, 509; 831 NW2d 881 (2013). Ordinances are interpreted in the same manner as statutes, meaning that clear and unambiguous language must be enforced as written. *Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 498; 597 NW2d 858 (1999).

Both the federal and state constitutions guarantee that a person may not be deprived of life, liberty, or property without due process of law. *In re Parole of Hill*, 298 Mich App 404, 412; 827 NW2d 407 (2012), citing US Const, Am XIV; Const 1963, art 1, § 17. Due process is defined similarly in both constitutions, and has been recognized as including substantive and procedural due process components. *Hanlon v Civil Serv Comm*, 253 Mich App 710, 722-723; 660 NW2d 74 (2002). The substantive component of due process protects against the arbitrary exercise of governmental power, while the procedural component requires constitutionally sufficient safeguards in proceedings to ensure the protection of life, liberty, and property interests. *Bonn v City of Brighton*, 495 Mich at 209 223-223; 848 NW2d 380 (2014). Whether substantive or procedural due process is implicated, the overarching touchstone of due process is "protection of the individual against arbitrary action of the government." *Wolff v McDonnell*, 418 US 539, 558; 94 S Ct 2963; 41 L Ed 2d 935 (1974); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008).

As an initial matter, a plaintiff claiming a deprivation of procedural or substantive due process must demonstrate the presence of a constitutionally-protected interest in life, liberty, or property. *Bonn*, 495 Mich at 225-226; *Mettler Walloon, LLC*, 281 Mich App at 209. If such an interest does not exist, due process affords the complainant no protection. *Bonn*, 495 Mich at 226. Relevant to the present dispute, the law clearly recognizes that a property owner has an interest in the use and possession of his or her real estate which is entitled to the protections of due process. *Id.* However, we are unaware of any Michigan cases that have considered whether

¹⁰ Having determined the trial court properly granted summary disposition regarding all claims against the Anderson defendants, we need not reach the Anderson defendants' unpreserved, alternative grounds for affirmance involving equitable estoppel and compulsory joinder.

a neighbor has constitutionally protected property rights relating to the enforcement of zoning ordinances on adjacent property which he does not own or use.

To assess whether such a property right exists, we begin with the well-recognized principle that property interests are not created by the federal Constitution, but rather derive from “existing rules or understandings that stem from an independent source such as state law-rules or understandings[.]” *Bd of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972). Because property interests are created by independent sources, the existence and dimensions of the claimed property interest must be determined by reference to the independent source, such as the particular statute or rule in question. See *id.*; *Cleveland Bd of Ed v Loudermill*, 470 US 532, 538; 105 S Ct 1487; 84 L Ed 2d 494 (1985). Neither a plaintiff’s abstract need for a benefit or his unilateral expectation of an interest gives rise to a property interest. *Roth*, 408 US at 577; *Hanlon*, 253 Mich App at 723. Instead, the claimant must possess a “legitimate claim of entitlement” or “a justifiable expectation.” *Hanlon*, 253 Mich App at 723; *Silver v Franklin Twp Bd of Zoning Appeals*, 966 F2d 1031, 1036 (CA 6, 1992). Such justifiable expectations and legitimate entitlements exist where there are “rules or mutually explicit understandings that support [a plaintiff’s] claim of entitlement to the benefit” *Perry v Sindermann*, 408 US 593, 601; 92 S Ct 2694; 33 L Ed 2d 570 (1972). However, there is “no protected property interest in the procedure itself.” *Richardson v Twp of Brady*, 218 F3d 508, 518 (CA 6, 2000). Further, if a governmental entity has discretion in its decision-making, a party challenging the decision lacks a legitimate claim of entitlement or a justifiable expectation in the outcome sufficient to create a protected property interest. *McClain v NorthWest Community Corrections Ctr Judicial Corrections Bd*, 440 F3d 320, 330 (CA 6, 2006); *Triomphe Investors v City of Northwood*, 49 F3d 198, 203 (CA 6, 1995).

In this case, plaintiff asserts that its claimed property interest arises from the City’s Ordinances and the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.* In particular, plaintiff characterizes the boathouse as a special use within the meaning of the 2010 Ordinance and asserts that, by requiring notice to neighbors, a hearing, and compatibility of special uses with adjacent property, the Michigan Zoning Enabling Act created a property right in the enforcement of the relevant Ordinance. Even accepting plaintiff’s characterization of the boathouse as a “special use,” we disagree with the assertion that the requirements of the Michigan Zoning Enabling Act give rise to a property right because the authority exercised by officials in regard to the granting of a request for a special use is wholly discretionary, and thus plaintiff lacks a legitimate claim of entitlement or a justifiable expectation in the outcome.

Specifically, pursuant to the Michigan Zoning Enabling Act, a legislative body has the option of providing for special land uses in a zoning district, which must be subject to the review and approval of an official as set forth in the zoning ordinance. MCL 125.3502(1). According to MCL 125.3502(4), “[t]he body or official designated to review and approve special land uses may deny, approve, or approve with conditions a request for special land use approval.” (emphasis added.) Through its use of the permissive term “may,” the statute makes plain that the power to grant special use requests is discretionary. See *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 740 NW2d 734 (2007) (“It is well settled that the statutory term ‘may’ is

permissive and therefore indicative of discretion.”)¹¹ Indeed, although plaintiff emphasizes the statutory provisions requiring notice to adjacent landowners and hearings on special uses, plaintiff ignores the language in these statutes underscoring the discretionary nature of the power involved in a special use decision. For instance, notice to adjacent landowners is required by MCL 125.3502(2), which provides that: “Upon receipt of an application for a special land use *which requires a discretionary decision*, the local unit of government shall provide notice of the request” (emphasis added). See also MCL 125.3103(2). Similarly, at the initiative of the official responsible for approving the special use or upon request, “a public hearing shall be held before a *discretionary decision* is made on the special land use request.” MCL 125.3502(3) (emphasis added). See also MCL 125.3504(4) (“Reasonable conditions *may* be required with the approval of a special land use, planned unit development, or other land uses or activities permitted by *discretionary decision*.”) ((emphasis added)).

As the above-cited provisions make clear, the procedural rules regarding notice and hearings did not give rise to a constitutionally protected property interest. That is, the City retained discretion in the granting or denial of special use request. In light of this discretion, plaintiff lacks a legitimate claim of entitlement or a justifiable expectation in the outcome of the City’s decision whether to authorize construction of the Anderson defendants’ boathouse. See *Triomphe Investors*, 49 F3d at 202-203 (a city code provision stating that “a special use permit may be granted” provided discretion to a city council to grant or deny a special use permit, thus defeating any argument that a party was entitled to a special use permit).¹² Hence, plaintiff does not have a protected property interest. *Id.* at 203-204. Because plaintiff cannot make the threshold showing that it has a protected property interest, it has failed to establish a procedural or substantive due process claim. *Stone*, 855 F2d at 172; *Mettler Walloon, LLC*, 281 Mich App at 209.

Similarly, plaintiff also frames the Anderson defendant’s project as a variance under the 2009 Ordinance, asserting that the notice and hearing requirements relating to review by the ZBA under the Michigan Enabling Act gave rise to a legitimate claim of entitlement and thus a property right. Accepting plaintiff’s contention that the procedures for granting a variance were required to be followed, plaintiff again has failed to establish that it had a legitimate claim of

¹¹ The City Ordinance in this case similarly provides for discretionary power to grant special use requests, stating: “Certain land use activities entitled ‘special uses’ *may* be authorized in the various zoning districts but only if adequate safeguards are provided to ensure the protection of the public health, safety and general welfare.” 2010 Charlevoix City Ordinance, § 5.261(1) (emphasis added).

¹² Based on recognition of the discretionary nature of zoning decisions, numerous courts have similarly rejected the existence of a property right in the enforcement of zoning provisions on a neighbor’s property. See, e.g., *Horne v Mayor & City Council of Baltimore*, 349 Fed App’x 835, 840 (CA 4, 2009); *Horton v City of Smithville*, 117 Fed App’x 345, 347-348 (CA 5, 2004); *Gagliardi v Village of Pawling*, 18 F3d 188, 192-193 (CA 2, 1994); *Anderson v Collins*, unpublished opinion of the United States District Court for the Eastern District of Kentucky, issued July 14, 1998 (Docket No. 2:96-CV-269).

entitlement or a justifiable expectation in the outcome because the ZBA's authority in relation to this issue of a variance was discretionary. "The zoning board of appeals *may* reverse or affirm, wholly or partly, or modify the order, requirement, decision, or determination and *may* issue or direct the issuance of a permit." MCL 125.3604(6) (emphasis added). See also MCL 125.3604(1), (7), (8), (9) (prescribing the ZBA's authority to grant variances, including, in subsection (7), the use of the permissive term "may"); MCL 125.3606(1)(d) (providing that on appeal from a ZBA decision, the circuit court shall review the record to ensure that the ZBA's decision, "[r]epresents the reasonable exercise of *discretion* granted by law to the" ZBA) (emphasis added). The term "may" indicates that the ZBA has discretion in deciding whether to uphold the issuance of a permit or grant a variance. *Triomphe Investors*, 49 F3d at 203; *In re Forfeiture of Bail Bond*, 276 Mich App at 492. Although plaintiff argues that the Ordinance contains standards or criteria that must be followed, the above-cited provisions reflect that the ZBA has sufficient discretion in making its determination such that plaintiff is not entitled to a particular outcome. Cf. *Triomphe Investors*, 49 F3d at 203 (noting that the use of the term "may" in a city code granted sufficient discretion to the city council to undercut any argument that the plaintiff had an entitlement to a special use permit once four factors listed in the code were satisfied). Accordingly, given the ZBA's discretion, plaintiff lacks a legitimate claim of entitlement or a justifiable expectation in a particular outcome, and thus cannot establish that it has a property interest for the purpose of a due process claim. *Id.* at 203-204. Because plaintiff cannot establish a property interest for purposes of its due process claims, the trial court properly granted summary disposition to the City on these issues.¹³ MCR 2.116(C)(10).

VII. TAKINGS CLAIM

Plaintiff next contends that the trial court erred in granting summary disposition as to its Fifth Amendment takings claim because a regulatory taking occurred that interfered with plaintiff's reasonable investment backed expectations. We disagree.

Our review of constitutional issues is de novo. *Cummins*, 283 Mich App at 690. Pursuant to the Fifth Amendment, private property shall not "be taken for public use, without just compensation." US Const, Am V; see also Const 1963, art 10, § 2. In the absence of a physical occupation of property, a taking may be found where a governmental regulation overburdens a

¹³ In regard to plaintiff's substantive due process claim, we note also that plaintiff failed to present any facts that indicated the City officials engaged in conduct so outrageous or arbitrary so as to shock the conscience. See *Mettler Walloon, LLC*, 281 Mich App at 197-198. Plaintiff's only assertion in this regard is that the Zoning Administrator failed to apply Michigan law regarding vested rights and instead discussed Montana law. Although, it may have been unnecessary for the Zoning Administrator to consult sources from other jurisdictions given that Michigan case law addresses the issue of vested rights, see, e.g., *City of Lansing v Dawley*, 247 Mich 394, 397; 225 NW 500 (1929), consideration of this source was, at most, incorrect or ill-advised, and it thus does not implicate substantive due process concerns. *Collins v City of Harker Hts, Texas*, 503 US 115, 129; 112 S Ct 1061; 117 L Ed 2d 261 (1992); *Mettler Walloon, LLC*, 281 Mich App at 206.

property interest. *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998) ("*K & K Constr, Inc I*"). Two relatively narrow categories of regulatory action are deemed *per se* takings for Fifth Amendment purposes. *Lingle v Chevron USA, Inc*, 544 US 528, 538; 125 S Ct 2074; 161 L Ed 2d 876 (2005). First, a permanent physical invasion of property, however minor, requires just compensation. *Id.* Second, a regulation that deprives an owner of all economically beneficial use of the property also constitutes a taking. *Id.*; *Cummins*, 283 Mich App at 707.

It is undisputed that, in the present case, the City has not physically occupied or invaded plaintiff's property, and plaintiff does not claim that it has been deprived of *all* economically beneficial use of its property. Thus, to establish a taking, plaintiff must satisfy the *Penn Central* balancing test. Under the *Penn Central* balancing test, a reviewing court engages in an ad hoc, factual inquiry focused on three factors: "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *K & K Constr, Inc I*, 456 Mich at 577, citing *Penn Central Transp Co*, 438 US at 124.

Under the first factor, to assess the character of the governmental action in this case, we "place the challenged regulatory action along a spectrum ranging from an actual[] physical taking on one extreme, to a far-reaching, ubiquitous governmental regulation that provides all property owners with an average reciprocity of advantage on the other." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 558; 705 NW2d 365 (2005) ("*K & K Constr, Inc II*"). Situating the City's conduct on this spectrum it is plain that nothing akin to a physical taking occurred in the present case as evidenced by plaintiff's continued retention and use of its property. Further, the contested permit was issued in relation to a broad, ubiquitous regulatory scheme that burdens and benefits all citizens of the City relatively equally. See *id.* at 559. Plaintiff has presented no evidence that similarly situated property owners were treated differently from plaintiff. Cf. *Cummins*, 283 Mich App at 720 (finding the first *Penn Central* factor weighed against finding a regulatory taking where a township enforced a building code equally to all similarly situated landowners). Thus, because the issuance of permit 3071 comprised a regulatory action under a comprehensive, broadly based regulatory scheme, and nothing akin to a physical invasion has occurred, this factor weighs heavily against finding a compensable regulatory taking.

The second *Penn Central* factor is the economic effect of the regulation on the property. While there is no set formula, this factor requires comparison of the value of the property removed by the regulation with the value of the property that remains. *K & K Constr, Inc I*, 456 Mich at 588. In this case, plaintiff presented an appraisal indicating that following the installation of the Anderson defendants' boathouse, the value of plaintiffs' property decreased from \$2,570,600 to \$1,670,600. This decrease in value, by itself, is insufficient to establish a compensable taking. *Penn Central*, 438 US at 131.¹⁴ On the contrary plaintiff's appraisal

¹⁴ Indeed, the analyses in *Penn Central* and *K & K Constr, Inc II* reflect that no regulatory taking occurred in cases involving a far greater diminution in property value than occurred here. See

reflects that the property retains significant value, and plaintiff may continue use of the property as a seasonal residence. Cf. *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 262-263; 792 NW2d 781 (2010) (finding plaintiff could not establish a taking where the land retained value and the plaintiff remained free to use the property). Therefore, although there is evidence that the value of plaintiff's property decreased to some extent, this factor by itself does not establish a compensable taking.

The final *Penn Central* factor is the extent by which the regulation has interfered with distinct, investment-backed expectations. A key consideration is whether the plaintiff had notice of the applicable regulatory regime. *K & K Constr, Inc II*, 267 Mich App at 555. In this case, plaintiff indisputably had notice of the Ordinance and the Zoning Administrator's authority to administer the Ordinance by issuing zoning permits. The record is devoid of evidence that plaintiff purchased its seasonal home with a reasonable expectation that the City would decline to authorize construction of a boathouse on adjoining properties.¹⁵ On the contrary, it would have been reasonable to assume when purchasing the property that a neighbor may wish to construct a boathouse, given the properties' location on a lake. Further, plaintiff does not assert that its property is used to make a profit; rather, the property is used as a seasonal residence. See *Cummins*, 283 Mich App at 721 (noting, in connection with the third *Penn Central* factor, that the "plaintiffs do not assert that their property is used to make a profit; rather, they use their property for residential purposes"). The property continues to be used for this purpose and it retains substantial value. All these things considered, there has been no interference with reasonable investment-backed expectations, and this factor weighs heavily against finding a compensable taking. Given that, on the undisputed facts, the *Penn Central* factors weigh heavily against a finding of a regulatory taking, the trial court properly granted summary disposition to the City regarding the taking claim.¹⁶

VIII. CASE EVALUATION SANCTIONS

Lastly, plaintiff challenges the trial court's award of case evaluation sanctions to both the Anderson defendants and the City. In particular, plaintiff argues that the trial court failed to apply the interest of justice exception under MCR 2.403(O)(11). We disagree.

Penn Central, 438 US at 131, and cases cited therein; *K & K Constr, Inc II*, 267 Mich App at 554, n 31, n 32, and cases cited therein.

¹⁵ In fact, much of plaintiff's complaint relies on the 2010 amendments of the Ordinance, which were adopted long after plaintiff bought its property, and thus could not have given rise to a reasonable investment-backed expectation when plaintiff purchased the property.

¹⁶ Having determined the trial court properly granted summary disposition regarding all claims against the City, we need not consider whether the trial court properly determined that the City was not a proximate cause of plaintiff's damages or the City's alternative, unpreserved grounds for affirmance, including whether the City deliberately engaged in improper acts, absolute governmental immunity from suit under 42 USC 1983 based on a lack of motivating custom or policy, res judicata, and laches.

Generally, the decision whether to award case evaluation sanctions under MCR 2.403(O) is reviewed de novo as a question of law. *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009). However, a trial court's determination whether to apply the interest of justice exception in MCR 2.403(O)(11) is reviewed for an abuse of discretion. *Harbour v Correctional Med Servs, Inc.*, 266 Mich App 452, 465; 702 NW2d 671 (2005). An abuse of discretion occurs when the trial court's decisions falls outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

Michigan follows the American rule regarding payment of attorney fees and costs, meaning that attorney fees are not recoverable from the losing party as costs except in those instances where they are expressly authorized by statute or court rule. *Haliw v Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005); MCL 600.2405(6). Case evaluation sanctions are expressly provided for in MCR 2.403(O)(1), which states that: "If a party has rejected [a case] evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." The term "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c). The case evaluation sanctions provided for in MCR 2.403(O)(1) are generally mandatory. See *Haliw v Sterling Hts (On Remand)*, 266 Mich App 444, 447; 702 NW2d 637 (2005).

However, "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." MCR 2.403(O)(11). Only "unusual circumstances" may be used to invoke the interest of justice exception, including, for example, cases where a legal issue of first impression or public interest is present, where the law is unsettled and substantial damages are at issue, where there is a significant financial disparity between the parties, where the effect on third persons may be significant, or where there is misconduct on the part of the prevailing party. *Harbour*, 266 Mich App at 466. When a trial court exercises its discretion under the interests of justice exception it must articulate the bases for its decision. *Haliw (On Remand)*, 266 Mich App at 447.

In this case, it is undisputed that plaintiff rejected the case evaluation awards, the Anderson defendants and the City accepted their respective case evaluations, and the orders granting summary disposition to defendants constitute judgments entered as a result of rulings on motions after the rejection of the case evaluation. Moreover, the verdicts were less favorable to plaintiff than the respective case evaluation awards. Accordingly, entry of case evaluation sanctions was required pursuant to MCR 2.403(O)(1).

In the trial court, plaintiff asserted the applicability of the interest of justice exception, and the trial court considered plaintiff's various arguments, including the assertion that the law in Michigan was not fully settled in regard to an adjacent property owner's rights. Cognizant of the competing concerns, the trial court determined that the case did not present unusual circumstances in which it would be appropriate to deny case evaluation sanctions. On the facts of this case, we discern no abuse of discretion in this regard.

Affirmed. Defendants being the prevailing party may tax costs pursuant to MCR 7.219.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

LUANNE KOZMA,

Plaintiff-Appellant,

v

SCOTT LAW and DEBRA LAW,

Defendants-Appellees.

UNPUBLISHED
March 14, 2024

Nos. 363508; 364450
Charlevoix Circuit Court
LC No. 2022-080527-CZ

Before: PATEL, P.J., and RICK and FEENEY, JJ.

PER CURIAM.

These consolidated appeals arise from a zoning dispute between the parties. The trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) and awarded them costs and attorney fees. In Docket No. 363508, plaintiff appeals as of right the trial court's order awarding costs and attorney fees to defendants, arguing that the trial court committed procedural error when it calculated the award.¹ In Docket No. 364450, plaintiff appeals by delayed leave granted the trial court's orders granting summary disposition and costs and attorney fees in favor of defendants and denying plaintiff's motion for reconsideration of that order, arguing that the trial court erred when it determined that plaintiff's claim was frivolous and that costs and attorney fees were warranted. On this record, the

¹ In Docket No. 363508, plaintiff also sought to appeal the trial court's August 5, 2022 order granting defendants' motion for summary disposition and for costs and attorney fees, as well as a September 22, 2022 order denying plaintiff's motion for reconsideration of that order. However, plaintiff's October 21, 2022 claim of appeal was untimely regarding those two orders. This Court dismissed plaintiff's appeal regarding those orders without prejudice. *Kozma v Law*, unpublished order of the Court of Appeals, entered November 29, 2022 (Docket No. 363508). Plaintiff then filed a delayed application for leave to appeal the trial court's summary disposition and reconsideration orders in Docket No. 364450. This Court granted the delayed application and consolidated that appeal with Docket No. 363508. *Kozma v Law*, unpublished order of the Court of Appeals, entered June 20, 2023 (Docket No. 364450).

trial court erred by determining that plaintiff's claim was frivolous, and thus erred by awarding attorney fees to defendants. Accordingly, in Docket No. 364450, we reverse the trial court's ruling that plaintiff's claim was frivolous, as well as the portion of the August 5, 2022 order awarding costs and attorney fees. We also reverse the October 4, 2022 order awarding costs and attorney fees to defendants in Docket No. 363508.

I. FACTUAL BACKGROUND

Plaintiff and defendants each own properties near one another on the shoreline of Lake Charlevoix in Hayes Township, Michigan.² Defendants planned to build various recreational facilities and several cabins on their property. As part of the construction, defendants proposed dredging a channel from Lake Charlevoix leading to a larger, dredged boat basin. A boathouse would have then sat upon the far end of the basin with slips to dock several boats. The boathouse space above the boat slips would have been an approximately 4,500-square-foot "event space," and would have been connected to the property's main residence by an outdoor walkway.

This case ultimately arises from plaintiff's attempt to prevent defendants from dredging the lakeshore and building the boathouse. Notably, along with the zoning matter at issue here, plaintiff was involved in a separate lawsuit against Hayes Township and several of its officials regarding defendant's boathouse plans and the proper interpretation of the Hayes Township zoning ordinance.³ A November 29, 2021 affidavit executed by the Hayes Township zoning administrator, and submitted to the trial court in the aforementioned lawsuit, sheds some light on the matter. According to the affidavit, only alterations made by defendants to a strip of land 50 feet inland from the lake's ordinary high-water mark, called the "shoreland protection strip," required zoning board approval. The zoning administrator attested that defendants did not need a permit to dredge along the lakefront because dredging activities were regulated exclusively by the Michigan Department of Environment, Great Lakes, and Energy (EGLE) and the United States Army Corps of Engineers.

In November 2019, the zoning authority approved a plan submitted by defendants concerning the shoreland protection strip. In July 2020, defendants submitted a zoning application for the boathouse. Within two days, the zoning administrator determined that defendants did not need to go through any in-depth zoning approval process because the boathouse was to be connected to the property's principal residence. The administrator thus granted defendants a permit to build the boathouse. It does not appear that defendants took any further action toward beginning the dredging and boathouse project until 2022.

Plaintiff treated the zoning administrator's affidavit as an official determination regarding the zoning authority's interpretation of the zoning ordinance and filed an appeal with the Hayes Township zoning board of appeals. Plaintiff argued that the zoning authority erred by treating

² This case was decided at the pleading stage before any discovery took place. The facts presented are drawn from the allegations made in plaintiff's original verified complaint and amended complaint, as well as documents plaintiff's verified complaint incorporated by reference.

³ *Kozma v Hayes Twp*, Charlevoix Circuit Court (LC No. 21-0604-27CZ).

defendants' proposed channel and basin and the proposed boathouse as separate projects requiring separate approval, rather than treating the entire thing as one project. According to plaintiff, defendants' proposal would violate a zoning ordinance prohibiting the construction of a structure at or below ground level within 100 feet of the lake's ordinary high-water mark. Plaintiff argued that the channel and basin would be built within 100 feet of the ordinary high-water mark, and moving the shoreline by dredging the channel and basin would necessarily extend the ordinary high-water mark further inland. Therefore, the boathouse would have sat within 100 feet of the ordinary high-water mark. Plaintiff asked the zoning board of appeals to find that channels, basins, and boathouses were structures prohibited by the zoning ordinance and that defendants' proposal, in particular, was prohibited by the zoning ordinance.

In early 2022, defendants applied for a permit from EGLE and the Army Corps of Engineers to dredge their proposed channel and basin. Sometime in late May 2022, plaintiff learned from the Army Corps of Engineers that defendants' permit was given preliminary approval. On May 25, 2022, plaintiff saw excavating equipment and dump trucks parked at defendants' property. On May 27, 2022, plaintiff saw more excavating equipment arrive on defendants' property. Later that day, plaintiff's counsel sent an e-mail to defendants' counsel asking for assurance that defendants were not beginning work on the project. Plaintiff's counsel warned that plaintiff would file for a temporary restraining order and a preliminary injunction if she did not get an assurance. Less than an hour later, defendants' counsel responded to the e-mail, stating that no excavation or construction work on the dredging and boathouse project were imminent. Despite the prompt response, plaintiff filed a verified complaint and motion for a temporary restraining order and a show-cause hearing on plaintiff's request for a preliminary injunction. Plaintiff sought to enjoin defendants from clearing any vegetation or excavating any land relating to the dredging and boathouse project until the zoning board of appeals decided plaintiff's appeal. On May 31, 2022, plaintiff withdrew her request for a temporary restraining order and a show-cause hearing, explaining that the temporary restraining order was unnecessary on the basis of the assurance from defendants' counsel that no construction was imminent.

On June 2, 2022, defendants' counsel sent an e-mail to plaintiff's counsel stating that defendants viewed plaintiff's claim as meritless. The e-mail further stated that if plaintiff voluntarily dismissed the case, defendants would provide plaintiff with "notice when the application for the final necessary permit is submitted." Plaintiff's counsel responded to the e-mail asking for further clarification that defendants were agreeing to delay work on the dredging and boathouse project until after plaintiff's appeal to the zoning board of appeals was decided. On June 3, 2022, plaintiff filed a motion to reinstate her request for a temporary restraining order and request for a show-cause hearing on a preliminary injunction on the basis of the lack of assurance that defendants were not beginning work on the dredging and boathouse project. On June 6, 2022, plaintiff filed a second motion to withdraw her request for a temporary restraining order because the parties agreed that defendants would not begin construction on the dredging and boathouse project until after applying for another permit, which would give plaintiff an opportunity to be heard by the zoning authority. On June 13, 2022, plaintiff filed an amended complaint that withdrew her request for a temporary restraining order and moved for a preliminary injunction prohibiting defendants from beginning work on the dredging and boathouse project. Plaintiff alleged that defendants' assurances were no longer credible because defendants flew a helicopter at a low altitude above plaintiff's property, which violated a 2019 agreement under which defendants would only fly their helicopters over their own property.

On July 5, 2022, defendants filed an answer to plaintiff's amended complaint, as well as a motion for summary disposition and for costs and attorney fees. Defendants argued that summary disposition under MCR 2.116(C)(8) was proper because there was no legal cause of action plaintiff could pursue related to any construction on defendants' property. They further contended that an award of costs and attorney fees was warranted because plaintiff filed a lawsuit that failed to state a valid claim. In response, plaintiff argued that she had a viable cause of action because, under MCL 125.3604(3), work on defendants' dredging and boathouse project was required to be stayed pending the outcome of plaintiff's appeal with the zoning board of appeals.

On August 5, 2022, the trial court held a hearing on defendants' motion for summary disposition and for costs and attorney fees. The court ultimately granted defendants' motion for summary disposition and for costs and attorney fees on the record. That same day, the court entered an order granting summary disposition in favor of defendants and awarding costs and attorney fees in an amount to be determined later. The order gave defendants seven days to submit an affidavit to establish costs and attorney fees. On August 15, 2022, the zoning board of appeals voted four-to-one to dismiss plaintiff's appeal to the board.⁴

On August 16, 2022, defendants filed a motion requesting \$40 in costs and \$10,500 in attorney fees. In support of the calculation of attorney fees, one of defendants' attorneys submitted an affidavit and invoice requesting \$4,500 in attorney fees, and another of defendants' attorneys submitted an affidavit and invoice requesting \$6,000 in attorney fees.

On August 24, 2022, plaintiff filed a response to defendants' motion for costs and attorney fees. Plaintiff argued that the trial court should not assess costs and attorney fees because defendants did not comply with the trial court's August 5, 2022 order requiring them to submit proofs within seven days. On August 24, 2022, plaintiff also filed a motion for reconsideration of the trial court's order granting defendants' request for costs and attorney fees. Plaintiff argued that the trial court had been misled by defendants. Plaintiff pointed out that at the August 5, 2022 hearing on defendants' motion for summary disposition, defendants told the court that they would not agree to any stay in construction because they were trying to complete a construction project by Christmas that would allow them to host a large family event. However, at the August 15, 2022 zoning board of appeals hearing, defendants represented that they had no plans to begin work on a boathouse.

On September 20, 2022, the trial court held a hearing on defendants' request for costs and attorney fees. Although the trial court did not grant a full hearing on plaintiff's motion for reconsideration, the trial court discussed its forthcoming opinion and order denying plaintiff's

⁴ The decision of the board of zoning appeals was not made part of the trial court record. However, the minutes from the August 15, 2022 meeting in which the board of zoning appeals made the decision is a public record. Additionally, it bears noting that after plaintiff's appeal was dismissed, the zoning board of appeals held another hearing on a petition from plaintiff and two other residents, asking the board to determine whether the Hayes Township zoning ordinance allows for the construction of channels and basins on the Lake Charlevoix shoreline. The board of zoning appeals voted four-to-one to interpret the zoning ordinance as prohibiting excavation of the Lake Charlevoix shoreline to install a channel or boat basin.

motion for reconsideration. The trial court stated that the automatic-stay statute was inapplicable to the facts of this case, so plaintiff had not pleaded any legal basis under which the trial court could have granted plaintiff equitable relief. The trial court stated that anything that happened during zoning board of appeals proceedings was irrelevant because the trial court was required to decide the motions on the basis of the facts that were before the court when the motions were decided. Regarding plaintiff's request that the court deny defendants' motion for costs and attorney fees on the basis of defendants' untimely filing, defendants stated that their proposed filing was completed within seven days, but defendants' counsel chose to send it to plaintiff to seek any response plaintiff had to the motion before filing it with the trial court. Plaintiff argued that defendants should not be awarded any costs or attorney fees because defendants' counsel did not move to extend the deadline for filing documents relating to the amount sought and did not contact plaintiff's counsel until after the deadline for filing a bill of costs had passed. The trial court found that defendants' neglect in filing the motion late was excusable, and turned to the calculation of attorney fees. The trial court ultimately concluded that it was reasonable to assess attorney fees for one attorney only and awarded attorney fees for 20 billable hours at \$300 an hour, the higher amount billed between defendants' two attorneys, and \$40 for motion-filing fees.

On September 21, 2022, the trial court entered an opinion and order denying plaintiff's motion for reconsideration. The trial court concluded that plaintiff's claim had no basis in law or fact. The trial court reasoned that defendants had no permit or pending application for a permit to build a boathouse, and plaintiff had no reason to suspect defendants were beginning construction on the dredging and boathouse project without seeking new permits. The trial court further reasoned that the automatic-stay statute was inapplicable in this case because the zoning authority had issued no permit and plaintiff, therefore, did not have a valid appeal to the zoning board of appeals. On October 4, 2022, the trial court entered an order awarding defendants \$6,000 in attorney fees and \$40 in costs.

II. ANALYSIS

In Docket No. 364450, plaintiff argues that the trial court erred when it determined that her claim was frivolous. Relatedly, in Docket No. 363508, plaintiff argues that the trial court erred by awarding attorney fees to defendants for duplicative and unnecessary work. We agree that plaintiff's claim was not frivolous, and that defendants were thus not entitled to attorney fees.

"This Court reviews a trial court's decision to award sanctions for submitting a frivolous filing for an abuse of discretion." *Hairston v Josh LKU*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 363030); slip op at 10. Because a trial court's finding regarding whether an action was frivolous involves a question of fact, this Court reviews those findings for clear error. *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 438-439; 830 NW2d 785 (2013). Additionally, this Court reviews the reasonableness of an award of attorney fees for an abuse of discretion. *Teran v Rittley*, 313 Mich App 197, 208; 882 NW2d 181 (2015). "We review a trial court's findings of fact underlying the award of attorney fees for clear error, and we review any underlying issues of law de novo." *Id.* "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 92; 662 NW2d 387 (2003). "This Court reviews de novo whether the trial court

properly interpreted and applied the statutes and court rules.” *Hairston*, ___ Mich App at ___; slip op at 11.

“Under Michigan law, a party that maintains a frivolous suit or asserts frivolous defenses is subject to sanctions under applicable statutes and court rules.” *BJ’s & Sons Constr Co Inc v Van Sickle*, 266 Mich App 400, 404; 700 NW2d 432 (2005). Under MCL 600.2591(1):

Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

Additionally, under MCL 600.2591(3):

(a) “Frivolous” means that at least 1 of the following conditions is met:

(i) The party’s primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true.

(iii) The party’s legal position was devoid of arguable legal merit.

The trial court determined that plaintiff’s claim was frivolous only on the basis that the claim was devoid of arguable legal merit under MCL 600.2591(3)(a)(iii). “The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted.” *Jerico Constr Inc v Quadrants Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). “Not every error in legal analysis constitutes a frivolous position.” *Id.* “The mere fact that [a] plaintiff did not ultimately prevail does not render the [claim] frivolous.” *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). “Instead, a claim is devoid of arguable legal merit if it is not sufficiently grounded in law or fact, such as when it violates basic, longstanding, and unmistakably evident precedent.” *Cove Creek Condo Ass’n v Vistal Land & Home Dev, LLC*, 330 Mich App 679, 711; 950 NW2d 502 (2019).

A trial court’s determination of frivolousness involves consideration of both the applicable law and the facts supporting a claim. *Hairston*, ___ Mich App at ___; slip op at 10-11. The trial court did not offer much rationale for why it determined that plaintiff’s claim was frivolous, and its full reasoning can only be discerned from piecing together several sources. When granting defendants’ motions for summary disposition and costs and attorney fees during the August 5, 2022 hearing, the trial court made a conclusory statement that summary disposition was appropriate because plaintiff could not state a valid claim for injunctive relief and a conclusory finding that plaintiff’s claim was frivolous. At the September 20, 2022 hearing on defendants’

award of costs and attorney fees, the trial court briefly summarized MCL 125.3604(3)⁵ and concluded that the statute did not form a basis for the trial court to order injunctive relief. In its September 21, 2022 opinion and order denying plaintiff's motion for reconsideration, the trial court essentially assumed that the automatic-stay provision of MCL 125.3604(3) only applies to a specific zoning permit sought by a landowner. According to the court, in the absence of a pending permit for the dredging and boathouse project or facts showing that defendants may begin the project without applying for required permits, MCL 125.3604(3) was simply inapplicable to plaintiff's claim.

On the basis of the trial court's stated rationale, it appears that the trial court interpreted MCL 125.3604(3) in isolation. Statutes must be interpreted as a whole, within the context of the statutory scheme. *Nyman v Thomson Reuters Holdings, Inc.*, 329 Mich App 539, 544; 942 NW2d 696 (2019). Neither this Court nor our Supreme Court has ever interpreted the automatic-stay provision of MCL 125.3604(3). In lieu of any official interpretation by Michigan's appellate courts, plaintiff offered a reasonable interpretation of the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.*, arguing that the automatic-stay provision of MCL 125.3604(3) applies to construction on a specific project when there is an appeal of a determination that no permit is required for the project. The two central questions are 1) whether an appeal of a determination made by a zoning authority that no permit is necessary for a project triggers the automatic-stay provision and 2) whether the automatic-stay provision prohibits work on a project until the zoning board of appeals has decided the appeal. Without deciding the proper interpretation of the statute, it can be concluded that plaintiff's claim had arguable legal merit because it was sufficiently grounded in law and fact.

The Michigan Zoning Enabling Act supports plaintiff's argument that an appeal of a determination that no permit is necessary for a project triggers the automatic-stay provision. Under MCL 125.3603(1), a zoning board of appeals "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." Citizens are permitted to appeal decisions made by a zoning authority, so long as the person is aggrieved by the decision. MCL 125.3604(1). The statute also indicates that an aggrieved person may challenge an interpretation of a zoning ordinance that involves a specific proposed project. Under MCL 125.3604(5):

If the zoning board of appeals receives a written request seeking an interpretation of the zoning ordinance or an appeal of an administrative decision, the zoning board of appeals shall conduct a public hearing on the request. Notice shall be given as required under section 103. However, *if the request does not*

⁵ MCL 125.3604(3) states: "An appeal to a zoning board of appeals stays all proceedings in furtherance of the action appealed. However, if the body or officer from whom the appeal is taken certifies to the zoning board of appeals after the notice of appeal is filed that, by reason of facts stated in the certificate, a stay would in the opinion of the body or officer cause imminent peril to life or property, proceedings may be stayed only by the restraining order issued by the zoning board of appeals or a circuit court."

involve a specific parcel of property, notice need only be published as provided in section 103(1) and given to the person making the request as provided in section 103(3). [Emphasis added.]

Under MCL 125.3103(1), a zoning board of appeals is only required to publish notice of a meeting “in a newspaper of general circulation in the local unit of government not less than 15 days before the date of the hearing.” MCL 125.3103(2) provides, in pertinent part, that “[n]otice required under this act shall be given as provided under subsection (3) to the owners of property that is the subject of the request.” MCL 125.3103(2) and (3) require that notice must be either personally delivered to the owner of the property that is the subject of the hearing or delivered by United States mail or a courier service no less than 15 days before the hearing. Regarding the hearing itself, MCL 125.3604(6) provides that “a party may appear personally or by agent or attorney.” Thus, the statute allows a person aggrieved by an interpretation of a zoning ordinance to challenge the interpretation as it applies to a specific project, and the statute gives due-process rights to the owner of the property that is the subject of the appeal. That framework reasonably supports the conclusion that an appeal of an interpretation of a zoning ordinance as it relates to a specific property is an “appeal to the zoning board of appeals” for purposes of MCL 125.3604(3), and the automatic-stay provision applies.

MCL 125.3604(3) provides, in pertinent part, that “[a]n appeal to the zoning board of appeals stays all proceedings in furtherance of the action appealed.” Whether construction is automatically stayed under the statute concerns the interpretation of what constitutes “proceedings in furtherance of the action appealed” under MCL 125.3604(3). The Michigan Zoning Enabling Act does not define the terms “proceedings,” “furtherance,” or “action.” See MCL 125.3102. Plaintiff argues that the terms should all be interpreted broadly to include a property owner’s commencement of work on the project that is the subject of the appeal. According to plaintiff, construction is a proceeding and that proceeding is in furtherance of the action appealed. That interpretation is within the range of several reasonable interpretations of the statute. Notably, the statute refers to an “action,” rather than a permit. This suggests that the term “action appealed” should be read broadly to mean that the action is the construction project, not the permitting process, and construction is stayed. On the other hand, consultation of a dictionary indicates that “proceeding” more typically connotes the conducting of official business,⁶ which could indicate that the Legislature intended to confine a stay to the processing of a permit by a zoning authority. There is also a more middle-of-the-road interpretation under which a property owner would be stayed from engaging in any official proceedings relating to the action appealed, which, in this case, would include applying for a dredging permit from EGLE and the Army Corps of Engineers.

Resolution of the underlying issue may prove to be a close question. However, plaintiff’s interpretation is at least arguably correct. If the automatic-stay provision did not apply to construction, the Legislature would have essentially created a right without a remedy. If a zoning administrator erroneously concluded that no permit was needed for a project, there would be no mechanism for stopping construction until after the zoning board of appeals decided the appeal.

⁶ See *Merriam-Webster’s Collegiate Dictionary* (13th ed) (defining “proceeding” as “legal action;” “an official record of things said or done”).

After an aggrieved person filed an appeal, a zoning board of appeals would have to schedule a hearing and provide at least 15 days' notice of the hearing before it could decide the appeal, potentially allowing time for irreparable harm to occur. Accordingly, enabling a zoning administrator to unilaterally allow construction on a project before an appeal was decided would subvert the purpose of the appeals process. Therefore, there is legal merit to plaintiff's contention that the automatic-stay provision applies to construction while an appeal regarding a determination relating to the project is pending. The facts of this case demonstrate how excluding construction from the statute's application would be problematic and contrary to the purpose of allowing an appeal. In this case, had defendants actually begun dredging, there would have been no means to prevent the irreparable destruction of a portion of the lakeshore. Importantly, the zoning board of appeals ultimately concluded that plaintiff's interpretation of the Hayes Township zoning ordinance was correct and that the ordinance prohibited dredging and the construction of boathouses on the shoreline. Under the circumstances, plaintiff's claim was sufficiently grounded in law.

Plaintiff's claim was also sufficiently grounded in fact to state a claim upon which relief could have been granted. Plaintiff alleged facts in her amended complaint, supported by evidence offered in her initial verified complaint, to plausibly support the contention that defendants planned to begin dredging the shoreline before the zoning board of appeals decided plaintiff's appeal. On December 3, 2021, plaintiff learned via an affidavit sworn by the Hayes Township zoning administrator that the administrator determined that no zoning approval was necessary for defendants to begin dredging the channel and basin. Plaintiff considered the affidavit to be a determination made by the zoning administrator and appealed that determination to the zoning board of appeals on December 20, 2021. Plaintiff's main contention was that the dredging and boathouse project had to be considered as one project, rather than the three separate projects the zoning administrator had considered in the proposal, and that the zoning ordinance prohibited defendants' proposed project in its entirety. In early 2022, while plaintiff's appeal was pending, defendants applied for a permit with EGLE and the Army Corps of Engineers to dredge their proposed channel and basin. Plaintiff attached to her verified complaint a March 28, 2022 e-mail written by the zoning administrator reaffirming his determination that the zoning authority could neither grant or deny permission to dredge along the shoreline. In the days before plaintiff filed her original complaint, plaintiff learned that defendants had preliminary approval from EGLE and the Army Corps of Engineers to dredge the channel and basin and plaintiff observed excavating equipment and dump trucks on defendants' property. On May 27, 2022, plaintiff filed her verified complaint seeking a temporary restraining order and preliminary injunction, and plaintiff's counsel e-mailed defendants' counsel the same day asking for an assurance that defendants were not beginning to dredge on the shoreline. Later that day, one of defendants' attorneys gave plaintiff an unequivocal assurance that "no construction or excavation work is imminent." However, the attorney's e-mail also stated that he would not be able to talk to defendants until the following week. On May 31, 2022, plaintiff filed a motion to withdraw her requests for a temporary restraining order and preliminary injunction, trusting the assurance offered by defendants' counsel.

After defendants' attorney consulted with defendants, defendants seemed to pull back from an explicit assurance that they would not begin dredging the channel and basin until after plaintiff's appeal to the zoning board of appeals was decided. In a June 2, 2022 e-mail, defendants proposed that, in exchange for plaintiff dismissing her claim, "we will commit to giving you notice when the application for the final necessary permit is submitted." Plaintiff's counsel replied to the e-

mail, stating that plaintiff did not know what defendants meant by “final necessary permit” and asking for a more explicit promise from defendants that they would not begin dredging until after the zoning board of appeals decided plaintiff’s appeal. On June 3, 2022, plaintiff filed a motion to reinstate her request for a temporary restraining order and preliminary injunction. Later that day, defendants told plaintiff that they were not beginning work on the dredging and boathouse project until after applying for additional permits, and plaintiff filed a second motion to withdraw her request for a temporary restraining order and preliminary injunction on June 6, 2022.

However, the agreement between plaintiff and defendants did not last long. Later in the day on June 6, 2022, a helicopter leaving defendants’ property flew at a low altitude over plaintiff’s property, which plaintiff interpreted as a provocation. Plaintiff viewed the intrusion of the helicopter as an intentional violation of a 2019 agreement under which defendants agreed that they would only fly helicopters over their own property. Plaintiff no longer found defendants’ assurances that they would not begin dredging on their property before applying for new permits credible. On June 13, 2022, plaintiff filed an amended complaint that sought a preliminary injunction, but not a temporary restraining order, prohibiting defendants from beginning work on the dredging and boathouse project until plaintiff’s appeal with the zoning board of appeals was decided. Plaintiff’s amended complaint recounted the history of the litigation regarding the various filings and communication between the parties. Plaintiff also alleged that, according to documentation plaintiff received from EGLE and the Army Corps of Engineers, defendants planned to excavate nearly 15,000 cubic yards of material along the lakefront. It was from that point when plaintiff filed her amended complaint that the trial court was required to assess whether plaintiff’s claim was sufficiently grounded in fact. *Jerico Constr. Inc.*, 257 Mich App at 36.

The trial court abused its discretion when it awarded costs and attorney fees because it committed legal and factual errors. The trial court decided defendants’ motion for summary disposition, brought under MCR 2.116(C)(8), on the basis that plaintiff could not state a claim upon which relief could be granted. When deciding a motion brought under MCR 2.116(C)(8), a court must decide the motion on the basis of the pleadings alone, accepting as true all factual allegations. *El-Khalil v Oakwood Healthcare Inc.*, 504 Mich 152, 160; 934 NW2d 665 (2019). A trial court may not assess credibility when deciding such a motion. *Johnson v Detroit Edison Co.*, 288 Mich App 688, 696; 795 NW2d 161 (2010). When plaintiff filed her amended complaint, the most pertinent of plaintiff’s allegations were that defendants were finalizing a dredging permit with EGLE and the Army Corps of Engineers and moving excavating equipment onto their property. These allegations were supported by evidence offered in plaintiff’s original verified complaint. At that stage of the litigation, plaintiff’s claim was not so implausible that no factual development could show that she was entitled to relief under the legal theory of her claim. In deciding plaintiff’s motion for reconsideration, the trial court reasoned that plaintiff had no factual basis to believe that defendants would begin work on the dredging and boathouse project without obtaining “required permits from the applicable governmental authorities.” The trial court’s reasoning was rooted in a factual error. When plaintiff filed her amended complaint, the zoning administrator maintained the position that only EGLE and the Army Corps of Engineers could permit dredging on the lakeshore, and defendants were finalizing a permit to dredge with those agencies. When plaintiff filed her amended complaint, defendants had only offered to notify plaintiff when they submitted applications for new permits. At least as it pertained to dredging, defendants did not have to apply for any additional permit to begin work. The trial court’s

assumption that defendants could not begin dredging until defendants applied for new permits and that plaintiff would have a chance to challenge any permit applications is clearly erroneous.

Further, the trial court effectively decided that plaintiff's claim lacked factual merit on the basis of an impermissible credibility determination. The trial court never reached the merits regarding whether a preliminary injunction was warranted in this case, which would have called upon the trial court to make factual findings. Nevertheless, the trial court considered as true the in-court statements of defendants' counsel, made long after plaintiff filed her amended complaint, that defendants were not planning to begin dredging along the shoreline or work on the proposed boathouse. When plaintiff filed her amended complaint, the finalization of defendants' dredging permit from EGLE and the Army Corps of Engineers was the only legal impediment left before defendants could begin dredging, aside from plaintiff's claim. To avoid being sanctioned by the court, the trial court essentially required plaintiff to accept defendants' ambiguous statements regarding permitting for their construction plans as proof that they would not begin dredging. Had the trial court reached the merits of plaintiff's claim for a preliminary injunction, it may have been justified in making a factual finding that defendants were not planning to imminently dredge along the shoreline, which in turn would have made a preliminary injunction inappropriate. However, at the time plaintiff filed her amended complaint, plaintiff presented a plausible claim on the basis of the allegations that defendants were finalizing a dredging permit, moving excavating equipment onto their property, and equivocating regarding their construction plans.

Under the circumstances, plaintiff's claim was not frivolous because it was sufficiently grounded in law and fact. The trial court clearly erred when it determined that plaintiff's claim had no arguable legal merit and that there was no factual basis for plaintiff's claim. Therefore, the trial court abused its discretion when it found that plaintiff's claim was frivolous and awarded defendants costs and attorney fees.⁷

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Sima G. Patel
/s/ Michelle M. Rick
/s/ Kathleen A. Feeney

⁷ Plaintiff also argues that the trial court abused its discretion by accepting defendants' untimely filing regarding the award of costs and attorney fees. Because we conclude that the trial court erred by concluding that plaintiff's claim was frivolous and by awarding attorney fees to defendants, we need not address the merits of this issue.