

Hayes Township, Charlevoix County  
Zoning Board of Appeals  
Kozma/Hicklen/Fowle Interpretation Hearing  
January 26, 2022 6:00 pm  
Hayes Township Hall  
9195 Major Douglas Sloan Road  
Charlevoix, Michigan 49720

<https://us02web.zoom.us/j/86416940442?pwd=ZmRNZCtvUFRnMmd0VWdFcHhMazJBZz09>

Meeting ID: 864 1694 0442

Passcode: 263101

+1 312 626 6799 US (Chicago)

## **AGENDA**

Call to Order

Pledge of Allegiance

Introduction of Zoning Board of Appeal (ZBA) Members

Approval of Agenda

Approval of January 11, 2022 Draft Minutes

Chair Declares Interpretation Hearing Open

Petitioner is recognized and presents interpretation request

Zoning Administrator response to interpretation request

ZBA Members report on-site inspections, if any

ZBA Members may have questions for clarification purpose with petitioner, Zoning Administrator and/or Township Attorney regarding petitioner's presentation/request, ZBA packet including correspondences received, Zoning Administrator response, and/or any additional questions

Open Public Comment

Public can ask the ZBA questions regarding the petitioner's presentation. The ZBA will attempt to obtain clarification. ALL comments/questions will be directed to the ZBA Chair. No discussion, questioning or answering shall take place between any two or more persons except between ZBA Members and whomever has the floor

Close Public Comment

ZBA Deliberation

Review Applicable Section(s) of the Hayes Township Zoning Ordinance

Review Finding of Facts

Motion by Roll Call (Motions dealing with an ordinance interpretation shall be stated with the following: list of exhibits presented by petitioner and/or Zoning Administrator; the "Finding of Facts" and the decision; which shall include the rationale and/or reason)

Chair Close Interpretation Hearing

New Business

Adjournment

Hayes Township  
Zoning Board of Appeals  
Organizational Meeting Minutes  
January 26, 2022  
09195 Major Douglas Sloan Road, Charlevoix, MI 49720

The January 26, 2022 Organizational Meeting of the Hayes Township Zoning Board of Appeals was called to order by Chairman Thomas Darnton at 7:00 pm. at the Hayes Township Hall, 09195 Major Douglas Sloan Road., Charlevoix, MI 49720.

BOARD MEMBERS PRESENT: Tom Darnton, Bob Jess, Frank Shepherd, Doug Kuebler and Roy Griffitts

BOARD MEMBERS ABSENT: Bruce Deckinga (Alternate)

ALSO PRESENT: Kristin Baranski (Recording Secretary)

PUBLIC PRESENT: Ellis Boal, LuAnne Kozma

**PLEDGE OF ALLEGIANCE:** Mr. Darnton (Chair) opened the meeting at 7:00 pm with the Pledge of Allegiance to the Flag.

**REVIEWED AGENDA:**

Mr. Kuebler made a motion, supported by Mr. Shepherd, to approve the agenda.

Yeas: Doug Kuebler, Tom Darnton, Frank Shepherd, Bob Jess, Roy Griffitts

Nays: None                    **Motion Carried**

Mr. Shepherd made a motion, with support from Mr. Jess, to nominate Tom Darnton as Chairman. The motion passed unanimously.

Yeas: Doug Kuebler, Frank Shepherd, Bob Jess, Roy Griffitts

Recused: Tom Darnton

Nays: None                    **Motion Carried**

Mr. Griffitts made a motion, with support from Doug Kuebler, to nominate Frank Shepherd as Vice-Chairman. The motion passed unanimously.

Yeas: Doug Kuebler Tom Darnton, Frank Shepherd, Bob Jess, Roy Griffitts

Recused: Frank Shepherd

Nays: None                    **Motion Carried**

Hayes Township  
Zoning Board of Appeals  
Organizational Meeting Minutes  
January 26, 2022  
09195 Major Douglas Sloan Road, Charlevoix, MI 49720

**PUBLIC COMMENT:**

Public comment opened and closed with no comment at 7:10pm.

**ADJOURNMENT:** Mr. Griffiths made a motion, supported by Mr. Shepherd, to adjourn at 7:12 p.m.

Yeas: Jim Rudolph, Tom Darnton, Frank Shepherd, Bob Jess, Roy Griffiths

Nays: None                    **Motion Carried**

Respectfully Submitted,

Kristin Baranski

Hayes Township Deputy Clerk/Recording Secretary

Exhibit 3

Kozma/Fowle  
ZBA Interpretation Requests and Appeals  
and  
Brief in Supportf

September 27, 2021

**Hayes Township Charlevoix County Michigan  
Zoning Board of Appeals  
Interpretation Request and Appeal**

LuAnne Kozma and Irene Fowle, Requesters-Appellants

Scott & Debra Law, Property Owners  
10034 Anglers Cove, Charlevoix, MI, 49720  
Near Lawvoix Lane  
PIN 15-007-132-005-25  
PC approval of shoreland basin-boat plan, November 19, 2019  
ZA permit # 20-07-01 for boathouse and covered walkway, July 8, 2020

\_\_\_\_\_/

**Interpretation Requests and Appeals  
and  
Brief in Support**

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Dated: September 27, 2021

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## **I. Issues**

- A. Interpretation request: “Unwritten philosophy,” and “consultation and compromise ... rather than the strict mandates” as guides for the Zoning Administrator and Planning Commission in administering ZO, under ZO Section 9.01.
- B. Interpretation request: Continuance of ZA permit for a boathouse-event facility in violation of expiration under ZO Sections 9.02(5) and 9.01.
- C. Interpretation request: Destruction of land within the Shoreland Protection Strip, under ZO Section 3.14.
- D. Interpretation request: Movability of horizontal setback and location of Ordinary High Water Mark due to human expansion of Lake Charlevoix, under ZO Section 2.02, 3.14(2).
- E. Interpretation: Waterfront Development Review process under 5.04 and 3.14(8) operates as “only layer” of review rather than “an added layer” to real site plan review by PC, denies due process to the public, and 3.14(8) (D) violates intent in 3.14(8)(A).
- F. Appeal: 9-14-21 PC consensus decision that: its decision on 11-19-19 of the 2019 submitted plans for boat basin and boathouse and destruction of shoreland protection strip land was proper under Sections 5.04 and 3.14, without site plan review; while the PC is aware of changed plans with a boathouse-events-dining facility over Lake Charlevoix submitted in 2020, despite dual principal uses, the rubberstamping of those plans in two days without Site Plan Review by the PC, that this was proper; and while the PC is aware of modified plans in 2021, PC's review of the 2021 modified plans before federal approval is not necessary and could be denied by PC later, in violation of ZO Sections 3.04, 3.14, and 5.03.
- G. Appeal: 9-13-21 ZA declaration concerning administration, issuance, and expiration of permit for structure within 100 feet of OHWM, without proper PC site plan review or required variances, in violation of prohibition of dual principal uses and dual docks on one lot, and in violation of PC condition. In violation of ZO Sections 2.02, 3.04, 3.14(2), 3.14(4)(A), 5.03(1), 5.03(4)(A), 5.03(4)(E), 9.01, 9.02(5).

## II. Introduction

LuAnne Kozma and Irene Fowle request the above interpretations, appeal the above decisions, and request a public ZBA hearing.<sup>1</sup>

As to the appeals, they are timely due to (a) the township officials' failure to disclose the actions publicly in minutes or agendas on the website,<sup>2</sup> even up till today, (b) the township's September 9 "Township Response to Shoreline Project" authored by leading township officials, (c) the Zoning Administrator ("ZA") actions concerning the administration of the Zoning Ordinance ("ZO") expressed on September 13 and (d) the Planning Commission's ("PC's") consensus decision of September 14 that it does not need to review modified plans until after the issuance of federal permit and its review solely of a landscaping plan destroying the Shoreland Protection Strip was proper.

By ordinance, the ZA permit has expired with the Laws having sought no renewal, so it is moot.

But if the ZBA determines (as it should not) that these actions are not moot, the approvals and permit would (a) improperly allow "unwritten philosophy" to guide planning and permitting decisions, (b) allow the PC to ignore the site plan review process under ZO Section 5.03, (c) end the ZO's protection of the 50-foot Shoreland Protection Strip and its 100-foot setback requirement for buildings, (d) end the walkability of the shoreline under *Glass v Goeckel*<sup>3</sup> and similar cases, (e) allow the ZA

<sup>1</sup> ZO Section 8.06

<sup>2</sup> <https://www.hayestownshipmi.gov/>

<sup>3</sup> 473 Mich 667 (2005)

to ignore that the project would be a commercial-scale event facility in a quiet R-1 district, and allow two principal uses on one lot.

Filing of this appeal stays all proceedings of the action appealed from, including the effectiveness of the zoning permit.<sup>4</sup>

Unless otherwise indicated, all dates below are in this year, 2021.

### **III. Appellants**

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.<sup>5</sup> Appellants Kozma and Fowle are part owners of shore property at 9300, 9330, and 9370 Woods Road respectively, near the Law property, 2-4 docks east of them. They are aggrieved by the detrimental ecological impacts of the basin-boathouse and shoreland removal on the lake and their own property, and on their activities including walking along the Ordinary High Water Mark.

### **IV. Appealability and timeliness**

For interpretations of the ZO, of course there are no deadlines.

For appeals, any action “concerning the administration” of the ZO is appealable to the ZBA.<sup>6</sup>

As to appeals, a 30-day deadline applies to such actions. Non-disclosure of the ZA’s 2020 boathouse building permit, and the PC’s minuted 2019 approval of the basin plan, prevented residents’ discovery of the township decisions.

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<sup>4</sup> ZO Section 8.11.

<sup>5</sup> ZO Section 8.03(2)

<sup>6</sup> ZO Section 8.03(1)

However at the meeting of the Trustee Board on September 13, the ZA announced a new decision, that the permit had not expired though according to the ZO it actually did expire in July 2021. He said in colloquy with Tip of the Mitt Watershed Council's ("TOTM's") Kacey Cook:

Cook: We notice that the permit has expired, and we are curious to know if the Applicant will be required to re-submit an application....

...

Van Zee: As of right now, *there's no permit*. ... Go back to the history of this township and pretty much any other township, they all have *kind of an unwritten philosophy* that as they are actively working on this that it continues. I've never seen a township that didn't have that, *where we automatically renew them [permits] at the end of the year.*<sup>7</sup>

The next day at a meeting of September 14, the PC consensed that it could modify its approval later in 2021, if the Laws' modified plans are not to its liking, stating:

Should the project be approved by all the appropriate agencies with the result that significant changes to the project result in the need that to amend the shoreline restoration plan, the matter may be taken up again.<sup>8</sup>

This is appealable. The PC has chosen to ignore its obligation to look at modified plans prior to federal approval, modifications that the Laws admit "are proposing a major modification" including the ripping out of even more land in the Shoreland Protection Strip. This contradicted what the Laws represented to the Corps when it presented the major modified plans on August 23:

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7 Starting at counter 1:23:23 of the township recording. Emphasis added.

8 Exhibit 1, PC meeting partial transcript, 9-14-21; emphasis added.

*This project was approved previously by Hayes Township, and a zoning permit has been issued.*<sup>9</sup>

But the modified plans have never been reviewed or approved by the PC. PC Chair Roy Griffitts added:

The conditional *permit* issued by Hayes Township expires *12 months from the date all conditions are satisfied*,.... Therefore the township zoning permit has not become *activated*. Since it has not activated it *cannot* have been expired.<sup>10</sup>

So which is it? There is no zoning permit? Or is there one but it automatically renewed without a fee? Or is there a permit which is unexpired due to failure of the permit to “activate”?

The ZO has no reference or definition to “activation.” Hopelessly confusing administrative actions invite this appeal.

Being in violation of the ZO's 12-month rule,<sup>11</sup> and of its absolute prohibition<sup>12</sup> of the “mak[ing] changes” or “vary[ing] the terms” of the ZO, the ZA’s assertions that he is treating the 2020 permit as ongoing with automatic renewals, is a new appealable action concerning ZO administration.

After Griffitts' prepared statement on September 14,<sup>13</sup> he called on other Commissioners to comment. One Commissioner spoke, saying “Strongly agree.” The remaining members did not dissent, indicating consensus.<sup>14</sup>

9 Exhibit 16, GL Ecosystems to Army Corps, 8-23-21

10 Exhibit 1, PC meeting partial transcript, 9-14-21; emphasis added.

11 ZO Section 9.02(5)

12 ZO Section 9.01

13 Exhibit 1, PC meeting partial transcript, 9-14-21; emphasis added.

14 State of Michigan, Open Meetings Act Handbook,

The state handbook for the Open Meetings Act says:

The OMA does not contain a “voting requirement” or any form of “formal voting requirement.” A “consensus building process” that equates to decision-making would fall under the act.

The PC consensus view echoed a website posting, put together by Van Zee and Griffiths,<sup>15</sup> a “Township Response to Shoreline Project” on September 9.<sup>16 17</sup> The Response was false in several respects, including that today “the permit is still in the application process” though the ZA issued it over a year ago and permits “shall” expire after a year.<sup>18</sup>

Had a resident in 2019 been able to uncover and read the November 2019 PC minutes, he or she would have been told falsely that the Shoreland Protection Subcommittee (“the Subcommittee”) had reported:

The Zoning Administrator *has determined* that the project *meets the requirements* for granting a zoning permit with the exception of a review of a Shore land Landscaping Plan. . . ,<sup>19</sup>

No ZA report or minuted evidence at the meeting supports this is true. Even so, the Subcommittee supported the basin-boathouse building plan. Though full site plan review documents were not in the PC’s packet, it accepted the Subcommittee’s recommendation with conditions. Then later the ZA violated one of them.

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[https://www.michigan.gov/documents/ag/OMA\\_handbook\\_287134\\_7.pdf](https://www.michigan.gov/documents/ag/OMA_handbook_287134_7.pdf) .

15 Counter 58:15 of the township recording Board meeting of September 13.

16 <https://www.hayestownshipmi.gov/township-response-to-shoreline-project/>

17 Exhibit 20, Hayes Township Response to Shoreline Project, 9-9-21

18 ZO Section 9.02(5)

19 Exhibit 14, PC meeting minutes, 11-19-19; emphasis added.

## **V. Recusal of ZBA member Griffitts**

PC Chair Griffitts is a ZBA member, with no more or less authority than other ZBA members.<sup>20</sup> Even so Appellants request his recusal, because otherwise he would be acting in judgment of his own decision, and his role in keeping Larry Sullivan's letter noted below – about boat docks and riprap – from the PC. Alternate ZBA member Paul Ivan should replace him.

Additionally, should it appear that any other ZBA member does business or hopes to do business with the Laws, that member should also disclose and self-recuse.

## **VI. “Unwritten philosophy” and “Compromise [vs] strict mandates”**

During his above-quoted remarks at the township Board meeting September 13, ZA Ron Van Zee asserted that an “unwritten philosophy” drove his decision “automatically” to rollover the permit expiration without requiring the usual ½-fee,<sup>21</sup>

In his remarks of September 14 defending the PC's 2019 approval of the basin, PC Chair Griffitts explained the origins of what he mistakenly called the ZO's “Shoreline Restoration Committee” (actually the “Shoreland Protection Subcommittee”)<sup>22</sup>:

The Shoreline Restoration Committee was formed as an amendment to the Zoning Ordinance, Section 3.14, which had not been successful in promoting the preservation and restoration of the shoreline of the lakes in our township. The Planning Commission realized that cooperation of the property owners was best achieved by a process in which *consultation and compromise was possible, rather than the strict mandates* of the earlier ordinance.<sup>23</sup>

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20 ZO Section 8.01(1)

21 <https://www.hayestownshipmi.gov/hayes-township-fee-schedule/>

22 ZO Section 3.14(8)(A)(iii), C

23 Exhibit 1, PC meeting partial transcript, 9-14-21; emphasis added.

The history of Hayes Township shoreland protection, discussed below, does not support this view.

Despite the ZA's supposed “unwritten philosophy” and the PC's rejection of “strict mandates,” the ZO itself prohibits the ZA from ever changing or varying the ZO.<sup>24</sup> It says the PC must comply with “all” provisions of the ZO unless waived in writing,<sup>25</sup> and says the Applicant “shall” act “in complete conformity” with PC site plan approval.<sup>26</sup> The PC may not approve a site plan without a finding that it complies with “all” ZO provisions.<sup>27</sup>

In other words the ZO is adamant that everyone must abide by it to the letter. But the ZA and PC see it differently, as a mere bargaining position, the township's opening in compromise negotiations.

## **VII. The timeline**

### **A. Background**

Twice in the last several years Appellant Kozma has walked from her home a quarter mile along the shore past the Law property shoreline.

This past July, two family neighbors, Jesse Dixon and Bud Borus, even nearer to the Laws than Kozma, did the same, walking on, or in the shallow water below, the edge of the Laws' shoreline while a security guard watched without objection as the Laws

24 ZO Section 9.01

25 ZO Section 5.03(5)(A)

26 ZO Section 5.03(7)

27 ZO Section 5.03(5)(A)

hosted a lawn party.

On or about August 13, 2019, the Laws applied for a zoning permit for a “boat basin” with a single-page conceptual plan depicting the basin, a channel cut through the Shoreland Protection Strip, and a 4-door boathouse over a third of the basin, as a separate structure from the existing residence,<sup>28</sup> 2-4 docks west of Fowle and Kozma.

On October 20, 2019, after a private site visit with his developer Bob Drost and new ZA Ron Van Zee, Scott Law wrote Van Zee a lengthy email describing his plans and his money, to which Van Zee responded the next day.

On October 28, 2019, two members of the Shoreland Protection Committee along with Van Zee met with Law's developer Drost on the Law property to review the site. With just two papers – a modified version of the conceptual plan and a plant inventory – the PC approved the basin plan on November 19, 2019. Though aware the boathouse would be an integral part of the project the PC did not demand to see plans for the building.

On July 6, 2020 the Laws submitted a zoning permit application for a “boathouse,” this time with detailed drawings and architectural plans, actually for an event/dining facility over the water, and a channel cutting through the Shoreland Protection Strip.

The ZA issued the permit after two days, without notifying the PC for a Site Plan Review, and without requiring the Laws to delete all but one dock from the boathouse.

28 Exhibit 2, Law boat basin permit application to Hayes Township, 8-13-19.

Eight days later, on July 16, 2020, the Laws filed a joint permit application with the Michigan Department of Environment, Great Lakes, and Energy (“EGLE”) and the Army Corps of Engineers.

## **B. Sullivan Letter to the Laws**

In August 2019 the ZA was Larry Sullivan. On 8-26-19 he wrote the Laws, with a cc to Roy Griffitts, chair of the PC.<sup>29</sup> He addressed four issues, including both the basin and boathouse.

The letter began with the observation that while his research would include files from similar projects in the past, he might agree or disagree with previous positions taken, and all decisions would be appealable to the ZBA. He expected there would also be review by the Subcommittee (part of the PC which Griffitts chaired), which would likely be determined by responses as to the four issues. Sullivan's responses to issues he raised were:

1. The horizontal location of the Ordinary High Water Mark (“OHWM”) before and after excavation. Sullivan cited conversations with an unnamed township attorney concerning a development of the Packer Family at the other end of the township (a basin built in the 1960s before the township had zoning). The attorney had opined that creation of a boat basin would not change the location of the OHWM “as determined by the State of Michigan” and would remain in the “same location” [along the original natural lake shoreline].
2. Riprap and sheet piling. “The Lake Charlevoix surface water is considered to be *held in the public trust* so the public could not be barred from entering into the basin.” The riprap and piling would be “considered to be a structure,” which would be allowed only if the Laws obtained a ZBA

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29 Exhibit 4, Sullivan to Law, 8-26-19.

variance.<sup>30</sup>

3. The boathouse itself. No variance needed, given that it would lie more than 100 feet from the OHWM located as described by the unnamed lawyer.
4. Boathouse docks. Per the ZO<sup>31</sup> the number of docks would be limited to 1, unless the Laws would be able to get a township marina permit.

The Laws chose not to appeal or apply to get a marina. Today the ZO continues to forbid a boathouse with multiple docks.

### **C. Sullivan-Van Zee Zoning Reports**

Sullivan's monthly written Zoning Reports typically covered permits, other zoning activity, land divisions, nuisance complaints, zoning violations, short term rental licenses, secretarial work, ZBA activities, and meetings attended.<sup>32</sup>

The August 2019 Report listed the four Law issues and noted ongoing research into the questions he posed, including “potential input” from the township attorney. His September 2019 Report said nothing about the Law property.<sup>33</sup>

Sullivan resigned as ZA and the township thanked him, effective Sunday 10-20-19. Van Zee stepped in the next day, on an interim basis.

The township has not posted Sullivan's October 2019 Report on the website. Nor has it posted any report of Van Zee since then up to today, save for one for October-November 2020. That one lists 5 permits, none of which was for the Law property.

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30 Emphasis added.

31 ZO Section 3.14(4)

32 Exhibit 5, Sullivan ZA report, August 2019.

33 Exhibit 6, Sullivan ZA report, September 2019.

Van Zee did write a ZA Report report covering 11-21-19 to 12-2-19,<sup>34</sup> though it is not on the website. Its mention of the Law property said simply “Presented request for shoreline alterations to PC on November 19, 2019, for property located at 10034 Anglers Cove.” Kozma was only able to obtain it as a page in the response to her FOIA request of August 19, for which the township charged her \$527, after two previous FOIA requests for Van Zee’s ZA reports yielded the answer “N/A.”

#### **D. The township website**

Hayes Township's website has pages dedicated to monthly ZA reports,<sup>35</sup> and to PC meetings<sup>36</sup> including PC agendas, packets, and minutes.

At the recent PC meeting of September 14 Griffiths stated:

The township website was and is maintained as a convenience for residents and it is not the location for the publication or storage of official documents in an official manner nor is it the official location for public access to those documents. Posting happens here on the [township] door and all files are kept here and people can come in here access them through an appointment with the clerk.<sup>37</sup>

His point is specious. The reason governments have websites is to facilitate transparency, not impede it. Local governments everywhere post official documents on their websites. Citizens justifiably expect the websites will be complete and reliable.

Until recent weeks when the basin-boathouse controversy gained publicity, the

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34 Exhibit 7, Van Zee ZA report, 11-21-19 to 12-2-19

35 <https://www.hayestownshipmi.gov/zoning-administrators-reports/>

36 <https://www.hayestownshipmi.gov/hayes-township-planning-commission-meeting-agendas-minutes/>

37 Exhibit 1, PC meeting partial transcript, 9-14-21

PC's page posted no packets or minutes for the 11-19-19 meeting or the next two.<sup>38</sup>

As to posting “on the door” of the township, the township actually has not posted ZA reports and approved meeting minutes there. It only posts a list of dates of regular meetings for the year. Even if the township practice in 2019-20 had been to post reports and minutes there – an unlikely fact – and even if a resident or landowner traveled to the hall to look, door access is closed in the summer, except for five hours a week during the day, and evening meetings.

#### **E. Subcommittee site visit**

Scott Law emailed Van Zee on Sunday October 20, 2019. Van Zee was to assume the ZA role the next day. On Saturday the two had met for a site visit at the Law property, privately along with Law's developer Bob Drost. The PC was not invited nor was then-ZA Sullivan. Probably the township did not charge for this site visit. The three toured the property. Law noted the enormous sums he had spent (“over a million dollars”) and repeatedly insisted on his privacy. Near the end his email said:

Our future plans include zip lines, horse barn for trail riding and therapeutic activity, a dining facility for guest and events, a winery facility, fly fishing lake and possible golf holes. All private use for friends, family, charity and local organization as we see fit!<sup>39</sup>

...

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

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38 Exhibit 8, Screen shot Hayes Township website, 8-13-21

39 Exclamation point in original

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

After hearing your plans and understanding better, not only what you are doing in other places, but also what your intentions are for this property, I would like to thank you for your service to the community. As we discussed Saturday, often times people are afraid of change they do not understand. Thank you for your letter explaining your long term goals ... but mostly for your willingness to share such an absolutely beautiful place, eventually with so much of the community. ... I will make sure the public is informed.<sup>40</sup>

The Subcommittee site visit was a week later, on 10-28-19, for which the Laws paid \$100.<sup>41</sup> It was accompanied by Drost and Van Zee but not Law. The Subcommittee members were Griffiths and PC member Marilyn Morehead.

The Subcommittee entered the site with an arm tied behind its back: the ZO required that the Subcommittee include:

a representative from Tip of the Mitt Watershed Council, the Lake Charlevoix Association, or a similar organization with technical expertise on aquatic ecosystem management.<sup>42</sup>

But TOTM wasn't there. Though previously it participated in a site visit – a minuted visit to a property on Boyne City Road on 1-9-19 and 1-11-19<sup>43</sup> – by letter of August 30 TOTM has confirmed it did not participate in the visit to the Law property or approval of the project.<sup>44</sup> Nor did any expert from Lake Charlevoix Association, Little Traverse Bay Bands of Odawa Indians (“LTBB”), or any other organization. Particularly the

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40 Exhibit 29, Law to Van Zee, 20-20-19

41 Exhibit 2

42 ZO Section 3.14(8)(C)((i)

43 Exhibit 10, Hayes Waterfront Development Review forms

44 Exhibit 9, McKay to Hayes Township, 8-30-21

Tribe has aquatic expertise and a water quality biologist on staff,<sup>45</sup> and it has written the Corps about the Law project.

With the exception of TOTM's list of flora species to be planted on completion, the Subcommittee had no expert input for the massive project, no minutes of its site review, and it did not use its evaluation checklist sheet to review the plan.

The Subcommittee had a second arm tied behind. The zoning application form which the Laws filled out on 8-13-19 (also available on the website<sup>46</sup>) included the following instruction:

The Zoning Administrator (ZA) is required to do onsite inspections to take *measurements, pictures*, etc. You will be required to *mark*, or *stake*, the location of all structures upon the parcel so the ZA may complete these tasks.<sup>47</sup>

Kozma's FOIA request of August 6 requested “photos taken during a site review by committee members.”<sup>48</sup> The FOIA response has confirmed that none exist.

What would the photos have shown? The “marks” and “stakes” delineating the basin. Probably the Laws put out no marks or stakes, which would explain why the ZA and Subcommittee took no photos. Whatever the reason, they defaulted.

Separately, on 8-20-20 EGLE did its own site visit on the Laws’ property for a state permit application, and did take photos.<sup>49</sup> Those photos show a *gravel* drive and

45 <https://ltbbodawa-nsn.gov/departments/natural-resources-department/environmental-services/#>

46 <http://www.hayestownshipmi.gov/wp-content/uploads/2019/09/zoning-permit-application-packet-2019.pdf>

47 Emphasis added

48 Exhibit 11, Kozma FOIA, 8-6-21, PC packet for 11-19-19

49 Exhibit 12, Rasmussen photos, Law property, 8-20-20

boat ramp leading down to the water's edge with runoff into the lake. This summer Kozma took her own photos<sup>50</sup> – both from her car on the road and a kayak in the water – which showed the drive with smooth *blacktop*, an impervious surface wider at some points than 6 feet.

An impervious surface wider than 6 feet to the shore, renovated since Van Zee was there, violates the ZO.<sup>51</sup> He has issued no citation.

#### **F. PC's approval of Law "plan" on November 19, 2019**

The agenda item for the PC 11-19-19 meeting, stated only "Shoreland subcommittee report and recommendation – Law property." No address was given. "Anglers Cove" was not stated.

No vigilant township resident could have discerned from the agenda that removal of 6311 cubic yards<sup>52</sup> of Lake Charlevoix's shoreland – including a 30 x 50 foot swath of Shoreland Protection Strip – would be on the table that day. No one could have understood there was a plan to move Lake Charlevoix waters 145 feet into the guarded Law property.

Griffitts, who had received the copy of Sullivan's letter intended for the PC, withheld it from the PC packet. Kozma FOIA'd the complete packet on August 6; the Sullivan letter was not in it.<sup>53</sup>

50 Exhibit 13, Kozma photos, Law driveway, summer 2021

51 ZO Section 3.14(3)(D)

52 978 cubic yards in the channel + 5,333 cubic yards in the basin, according to the Corps.

53 Exhibit 11, Kozma FOIA, 8-6-21, PC packet for 11-19-19

The packet contained only the one-page Subcommittee report, and two other pages: a “Shoreline Planting Schedule” dated 10-8-19 and revised 11-11-19, and a “Plant Inventory” dated 10-24-19 that were requested of Drost by the township. However the “Shoreland Planting Schedule” was the one-page conceptual plan with a list of plants added at the bottom. There were no photos or dimension measurements. There was nothing about information which developed later, about two stories, a dining facility, an event area, toilets, a kitchen, etc. The documents do not show the boathouse would even have a roof. They show it as a separate non-residential structure not connected to the residence, with a walking path over terrace paving similar to terraces around the residence.

The PC dealt only with the “*added* layer of review” under ZO Section 5.04, “Waterfront Development Review.” It did not conduct a Site Plan Review under ZO Section 5.03.

What 5.03 would have entailed is described below.

Looking just at 5.04, the PC meeting minutes<sup>54</sup> – not posted on the website until last month after Kozma obtained it via FOIA<sup>55</sup> – begin with the erroneous and misleading undated Subcommittee report in the packet:

- It did not report who went on the site visit other than Morehead and the Drost.
- It did not report that no expert participated.

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54 Exhibit 14, PC meeting minutes, 11-19-19

55 Exhibit 8, Screen shot Hayes Township website, 8-13-21

- It did not report the date of the visit.
- It did not utilize the Subcommittee’s checkoff form for site reviews.<sup>56</sup>
- It did not report on the Sullivan letter and its unappealed requirements.
- It said the ZA had supposedly “determined” the project “meets the requirements” for a permit except for a landscaping plan. But actually the minutes report Van Zee saying nothing about “determining” that requirements were “met.” Indeed, they could not have been met, with the variance and dock issues unsettled. In total, the minutes said only: “Ron Van Zee gave an oral report of all zoning activity in Hayes Township.”
- It said Drost “has sought input from Tip of the Mitt and the Subcommittee and has worked to meet the intent of our ordinance.” But as noted, TOTM had no input other than to recommend plantings.

The PC minutes show it did not demand that plans for the boathouse be presented, as it should have under ZO Section 5.03(4)(A) (“the Zoning Administrator shall introduce the application at the next [PC] meeting and place on the agenda for the following regular meeting.”)

The PC reviewed no evidence other than the above report. There was no consideration of destruction of the Shoreland Protection Strip, and no consideration of the re-located OHWM.

Instead it approved the project with conditions, one of which – “the current natural areas of the shoreline will be maintained as natural shoreline” – could not be met if there is a basin. Another condition – “the zoning permit will not be issued until the copies of the agency approvals are received” – the ZA later ignored.

56 Exhibit 10, Hayes Waterfront Development Review forms

The building plans which the Laws eventually submitted in 2020 proposed a project that would be commercial in nature, size, and use, for multitudes. This is a quiet R-1 low-density residential district. But multitudes would park cars, create sewage, and make noise. Under Section 5.03:

Required site plans give the Planning Commission an opportunity to review development proposals in a concise and consistent manner.<sup>57</sup>

Under 5.03(1)1(A) and (E), site plans are required for “all new uses and/or structures” with exceptions not relevant here, and for “any use requiring off-street parking....”

The PC should have considered the following but did not:

- A survey of the property prepared by a professional licensed surveyor.<sup>58</sup>
- Summary tables, cross-sections and/or floor plans<sup>59</sup>
- Elevation drawings.<sup>60</sup>
- Generalized soil analysis data.<sup>61</sup>
- Data about soil erosion, sedimentation, and stormwater runoff control.<sup>62</sup>
- Parking for the proposed uses.<sup>63</sup>
- Loading and unloading areas.<sup>64</sup>

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57 ZO Section 5.03(3)

58 ZO Section 5.03(3)(C)

59 ZO Section 5.03(3)(K)

60 ZO Section 5.03(3)(K)

61 ZO Section 5.03(3)(M)

62 ZO Section 5.03(3)(N)

63 ZO Section 3.23, 5.03(3)(D)

64 ZO Section 3.23, 5.03(3)(D)

- Volume of sewage for treatment.<sup>65</sup>
- Statements relative to the impact of the proposed development on ... noise, in a district required to be “relatively quiet.”<sup>66</sup>
- Statements relative to the impact of the proposed development on ... the scale of development in terms of the surrounding environment.<sup>67</sup>
- Statements about soil erosion, shoreline protection, wildlife habitat, air pollution, water pollution, and the surrounding environment.<sup>68</sup>
- “Where the applicant is dependent upon the grant of any variances by the Zoning Board of Appeals, said favorable action by the Zoning Board of Appeals shall be necessary before the site plan approval can be granted....”<sup>69</sup>
- The PC shall approve, or approve with conditions, an application for a site plan only upon a finding that the proposed site plan complies with “*all*” applicable provisions of this Ordinance and the standards listed below.<sup>70</sup>
- All elements of the site plan shall be designed so that there is a limited amount of change in the overall natural contours of the site and shall minimize reshaping in favor of designing the project to respect existing features of the site in relation to topography.<sup>71</sup>
- The landscape shall be preserved in its natural state, insofar as practical, by minimizing tree and soil removal, and by topographic modifications which result in smooth natural appearing slopes as opposed to abrupt changes in grade between the project and adjacent areas.<sup>72</sup>

On 11-25-19, ZA Van Zee wrote the Laws, advising of PC approval, with

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- 65 ZO Section 5.03(3)(P)(2)
  - 66 ZO Section 4.05(1), 5.03(3)(P)(3)
  - 67 ZO Section 5.03(3)(P)(3)
  - 68 ZO Section 5.03(3)(P) (3)
  - 69 ZO Section 5.03(4)(E)
  - 70 ZO Section 5.03(5)(A) (emphasis added).
  - 71 ZO Section 5.03(5)(A)(1)
  - 72 ZO Section 5.03(5)(A)(2)

conditions of, “your application for boat basin and shoreland improvements.”<sup>73</sup>

The Laws wrote the Army Corps of the Township approval last month, saying “it is significant that both EGLE and Hayes Township have reviewed this project in great depth.”<sup>74</sup> But as seen above, the “depth” was not “great.”

**G. The ZA issued the building permit after two days, on July 8, 2020**

On 4-15-20 the Laws prepared architectural drawings and elevations showing the commercial-size “event area”<sup>75</sup> and building facilities.<sup>76</sup> Elevations show only the front but not the sides,<sup>77</sup> so one cannot view the building height at different points along the sloped land surface. Toward the lakeward ends of the sides, the height likely exceeds the district's 30' maximum.<sup>78</sup> No variance has been sought.

On 6-26-20 the Laws prepared measured drawings and section diagrams of showing the OHWM moving into the basin.<sup>79</sup>

On 7-6-20 the Laws paid a fee of \$364.50, and filed an application (including the two sets of new documents) with the ZA for a permit for the building and covered walkway.<sup>80</sup>

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73 Exhibit 15, Van Zee to Laws, 11-25-19

74 Exhibit 16, GL Ecosystems to Army Corps, 8-23-21

75 Exhibit 3, Event Area, Poineau drawing, 4-15-20

76 Part of Exhibit 3, Law boathouse application, 7-6-20, and permit # 20-07-01, 7-8-20

77 Exhibit 3, Lakeside Elevation, Poineau drawing, 4-15-20.

78 ZO Section 4.13 note a

79 Part of Exhibit 3, Law boathouse application, 7-6-20, and permit # 20-07-01, 7-8-20

80 Part of Exhibit 3, Law boathouse application, 7-6-20, and permit # 20-07-01, 7-8-20

The new plans had morphed the project as originally seen by the PC. They called for insulation, six toilets, eight hand sinks, two showers, a large kitchen, two refrigerators, an event/dining area<sup>81</sup> of some 4500 square feet mostly over the water with 22 tall viewing windows, a storage closet of 110 square feet for tables and chairs, a fireplace with a tall masonry chimney, and a covered deck fronting the lake from which thrill-seeking kids would be tempted to dive into the water.

The building would rise 44½ feet not counting the chimney, over a 90' x 60' footprint, nearly all of it over the basin. An elevator and winding staircase would connect the two stories. The lower story would house docks for three large boats, several personal water craft, a shop, and locker room.

Though designed for crowds, the plans show no parking area, sewage facilities, septic tank, or drain field.

The packets presented did not include the topview “Project Overview + Section Guide,”<sup>82</sup> created four days earlier which identified and located Sections A to I, and showed the terraced “covered walk” as nearly 100 feet long.

Most of the above-listed Section 5.03 requirements were not mentioned in the application: a licensed survey, soil analysis data, parking, loading/unloading, sewage, noise information, variances, preservation of the natural landscape, etc.

Confronted with a massive amount of new information, the ZA acted just two

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<sup>81</sup> Exhibit 3, Event Area, Poineau drawing, 4-15-20

<sup>82</sup> Exhibit 17, Project Overview & Section Guide

days later. On July 8, 2020, he issued permit # 20-07-01<sup>83</sup>:

- despite not having presented it to the PC 30 days before its next meeting,<sup>84</sup>
- despite having done no site visit with stakes, photos, and measurements,
- despite the PC's previous insistence that Corps approval be “received” first,
- despite the unappealed ruling that multiple docks in the boathouse would be illegal,
- despite that the Laws had not applied for a variance for the riprap and pilings as they were seeking at the time,
- despite the architectural plans showing a large non-residential facility<sup>85</sup> with commercial-scale kitchen facilities and a massive event area,
- despite the necessary off-street parking requiring a Site Plan Review under Section 5.03,
- despite that the basin would destroy 30 feet of land across the Shoreland Protection Strip, and
- despite that the building would abut and be over the waters of Lake Charlevoix and below the re-located OHWM, as depicted in the cross-section drawings.

Despite his promise to Law to “make sure the public is informed” the ZA never posted the permit application or the permit on the website or at the door of the township hall. The only public discussions of it have been Kozma's non-agenda public comments on August 9 and at the meetings of September 13-14.

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83 Part of Exhibit 3, Law boathouse application, 7-6-20, and permit # 20-07-01, 7-8-20

84 ZO Section 5.03(4)(A)

85 Cf ZO Section 3.04

On July 16, 2020, the Laws filed a joint permit application to EGLE and the Corps<sup>86</sup> (about which more will be said below).

The Corps has not acted. EGLE granted a permit on 12-15-20.

By a letter to the Army Corps this last August 23, the Laws abandoned their original plans which called for 70' of steel sheet piling and 272 cubic yards of rock riprap.

#### **H. Revelation of the basin-boathouse project**

Kozma learned of the basin-boathouse project only in late July through a chance remark by a county building inspector in a phone conversation about her own property, in which he told her of the large marina being planned on the Law property in her neighborhood.

Alarmed, she began to gather evidence, contact EGLE and the Corps, write FOIA requests, communicate with neighbors and other residents, attend and speak at meetings, create a website<sup>87</sup> and social media page, erect road signs, write letters to newspaper editors, present a slide show during public comment on August 9, and organize people to attend the PC meeting of August 31. All of this has brought the issue effectively to public attention.

Fowle has heard talk and read emails about the project. But she has not visited Kozma's website and seen documents there. And even if she had seeing documents

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<sup>86</sup> Exhibit 18, Law permit application jointly to EGLE and Army Corps, 7-16-20

<sup>87</sup> <https://protectlakecharlevoixshoreland.org/>

there would not have been official township notice.

### **I. The Laws revise their plans again**

On August 23, citing pressure from TOTM and LTBB, in a letter to the Corps the Laws revised the plans of the previous year, revising “Section F” by widening the channel by 8 feet in further derogation of the Shoreland Protection Strip.<sup>88</sup>

### **J. Township response**

Responding to Kozma's organizing, Van Zee emailed Jonathan Friendly on August 11, misrepresenting TOTM:

This project had careful review from ... our Shoreline Review Committee that includes Tip of the Mitt to ensure proper steps were taken to protect the lake.<sup>89</sup>

The PC originally scheduled a meeting for August 17 but then backed it up to August 31.

That day a crowd assembled to hear of the controversy. Kozma was prepared to speak and had been allowed 15 minutes during public comments. But it was an overflow crowd. Instead of moving the meeting outside in the mild weather, the PC just canceled it claiming it would re-schedule after Labor Day in a larger venue.

When the meeting finally took place it was after Labor Day on September 14, when a smaller crowd could attend. It was in the same place.

Meanwhile the township posted a “Response” on the website,<sup>90</sup> authored by Van

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<sup>88</sup> Exhibit 16, GL Ecosystems to Army Corps, 8-23-21

<sup>89</sup> Exhibit 19, Van Zee to Friendly, 8-11-21

<sup>90</sup> Exhibit 20, Hayes Township Response to Shoreline Project, 9-9-21

Zee and Griffiths,<sup>91</sup>

All of this culminated in township declarations of “unwritten philosophy” and “compromise vs. strict mandates,” from which the Appellants now appeal.

## **VIII. Argument**

### **A. Interpretation: ZO Section 9.01, “unwritten philosophy,” and “compromise ... rather than the strict mandates”**

It takes but little imagination to see that treating the ZO like a bargaining chip will lead to havoc in township governance.

Currently the township is considering a deep, detailed, and costly re-examination and re-enactment of the entire Zoning Ordinance, only done once before in 2009 since the first enacted 1974 ordinance. But what is the point if officials can just compromise it away? Actions and views of the PC and ZA in this case contravene ZO Section 9.01 and the most elementary notions of due process.

### **B. Interpretation: ZO Sections 9.01, 9.02(5), and expiration**

Zoning permits “shall” expire after 12 months, unless substantial construction has started,<sup>92</sup> which it hasn't.

As seen at pp 4-5 of the historical ordinances noted below,<sup>93</sup> the 12-month expiration rule has been in effect since the township's very first zoning in 1973,

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91 Counter 58:15 of the township recording Board meeting of September 13.

92 ZO Section 9.02(5)

93 Exhibit 22, Compiled excerpts from historical versions of Hayes Township Zoning Ordinances, available at the Charlevoix County Planning Department

described in the next section. Like today<sup>94</sup> permits then (at the time called “certificates of approval”) “shall” expire after 12 months, but could be renewed by paying ½ the original fee if there have been no changes.

Accordingly the building permit expired this last July 8. The Laws could have renewed by writing a check for ½ of \$364.50. They didn't. But at the Board meeting of September 13 as above quoted, ZA Van Zee told the community, in effect, that under the “unwritten philosophy” doctrine the permit had rolled over and he had waived payment of the ½-fee, but at the same time “right now there's no permit.” Then as also previously noted, on September 14 with the support of the PC, Chair Griffitts told the crowd:

The Army Corps has been reviewing the application and has asked the Applicant [Laws] for additional information and amendments. It [the Corps] has not yet granted approval. Therefore the township zoning permit has not become activated. Since it has not activated it cannot have been expired.<sup>95</sup>

As noted, the ZO contains no definition of “activation” of a permit, and Section 9.01 strictly prohibits the ZA from making ZO changes. Varying the 12-month expiration date is a violation.

### **C. Interpretation: ZO Section 3.14, destruction of the Shoreland Protection Strip**

In *Glass v Goeckel*,<sup>96</sup> the famed beachwalking case, our Supreme Court held under the public trust doctrine that anyone who has access to the Great Lakes shoreline on property adjoining that of a shoreline landowner, may walk along the neighbor's

<sup>94</sup> <https://www.hayestownshipmi.gov/hayes-township-fee-schedule/>

<sup>95</sup> Exhibit 1, PC meeting partial transcript, 9-14-21

<sup>96</sup> 473 Mich 667 (2005)

property lakeward of the OHWM without consent of the neighbor. Plaintiff beachwalker Joan Glass “sought to enjoin the [landowner] defendants from interfering with her walking along the shoreline.” The Court agreed:

our public trust doctrine permits pedestrian use of our Great Lakes, up to and including the land below the ordinary high water mark. Therefore, plaintiff, like any member of the public, enjoys the right to walk along the shore of Lake Huron on land lakeward of the ordinary high water mark.

In most years the waterfront would be below the OHWM. So in most years Glass is privileged to walk on dry land provided she stays close to the water.

Though Lake Charlevoix is not a Great Lake, the public trust doctrine applies to it as well, as Sullivan explained in his 8-26-19 letter. The Laws' ownership of lake bottomland to the middle is only a *qualified* right. That is, they may not interfere with others' rights. In *Burt v Munger*<sup>97</sup> the rights were fishing rights, no different from walking rights. The Supreme Court struck down plaintiff riparians' plan to fill part of a small private lake in front of their own property, which would have diminished fishing rights of other riparians around the lake.

Contrary to *Glass* and *Burt*, the Laws' channel would remove the Shoreland Protection Strip, blocking Kozma, Fowle, Dixon, and Borus from walking the shoreline at or below the OHWM. Yes, they could circumambulate the channel and basin. But they would be stopped by the towering boathouse. They could not continue down the

<sup>97</sup> 314 Mich 659 (1946). See also *State v Lake St Clair Fishing & Shooting Club*, 127 Mich 580, 588 (1901) (cannot give “judicial sanction to practical selling out of the public waters, the streams of this state, for purposes of and fowling, to a favored few....”)

original shoreline without swimming the channel.

The intent of the township's Waterfront Regulations is ultimately to protect Lakes Charlevoix, Michigan and Susan, as well as the lakeshores that define and protect them:

Intent. The waterways and lakes in and adjacent to the *lands* of Hayes Township are invaluable assets to the economy and quality of life, and therefore must be preserved in a natural fashion to maintain health of these waterways as well as the natural beauty of Northern Michigan. Thus, owners of waterfront lots have an added responsibility regarding the preservation and protection of these natural resources, water quality and community scenic and recreational values.<sup>98</sup>

Protecting the land surrounding the lakeshore is paramount in the ordinance in its use of setback requirements from the shoreline for buildings and other structures, and by defining the Shoreland Protection Strip as *mandatory*:

Shoreland Protection Strip. A Shoreland Protection Strip *shall be required on all waterfront lots*. The shoreland protection strip *shall include all of the land area* located within fifty (50) feet of the Ordinary High Water Mark of a lake or a stream abutting or traversing the property in question. The purpose of the strip is to protect the lake by preventing soil erosion, providing a filter for the removal of pesticides, fertilizers and other potential water pollutants, and to maintain a visual barrier.<sup>99</sup>

In other words, the Shoreland Protection Strip must *be there* to do its filtration and protective functions.

In order to protect the land—including the complex soils and plant and animal communities that hold it together and provide the necessary filtration system for a healthy watershed—the vegetation on the land, too, is spelled out as protected.

The ordinance allows for vegetation removal of no more than 20% of a property

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<sup>98</sup> ZO Section 3.14(1) (emphasis added).

<sup>99</sup> ZO Section 3.14(3) (emphasis added).

owner's Shoreland Protection Strip for a corridor view or dispersed views, but even within the 20% section, “root systems shall be left in place for shoreline stabilization.”<sup>100</sup>

Damage must be repaired, new soils not brought in, and the land must be replantable:

It is in violation of the zoning ordinance to *alter or disturb* the Shoreland Protection Strip except to remove dead trees or shrubs, remove invasive species, or for selective trimming of trees as permitted in 3.14(3)(I) If altered or disturbed, the following corrective measures are required:

I. Any and all fill material placed within the Shoreland Protection Strip shall be removed. Only soils or rocks consistent with the composition of the pre-existing on-site soil and rocks shall be allowed when necessary for growth of new vegetation. Placement of beach sand is prohibited.

II. The Shoreland Protection Strip shall be replanted.”....<sup>101</sup>

Waterfront owners who damage the Shoreland Protection Strip while installing or removing seasonal docks are required to repair the land within 30 days.<sup>102</sup>

A 30 x 50-foot foot section excavated from the Shoreland Protection Strip deep enough for a channel, converting the land to water, certainly would “disturb” it (as well as the roots).

PC member Marilyn Morehead is a member of the Shoreland Protection Subcommittee, participated in the site visit at the Law property in 2019, and recommended the proposed project to the PC to approve the plan (and herself voted to approve). She stated by email of 7-23-21 to Kozma:

Any property owner of shoreline has the right to have 20% of that available for

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100 ZO Section 3.14(3)(H)

101 ZO Section 3.14(3)(K) (emphasis added).

102 ZO Section 3.14(4)(H)

walks, viewing areas. In other words, *not susceptible to the prohibitions outlined in the shoreline protection strip regulations* in the zoning ordinance.<sup>103</sup>

This interpretation amounts to an “unwritten philosophy” that waterfront property owners can do anything they want with a 20%-of-their-total-shoreline section of land within the Shoreland Protection Strip. If Morehead’s understanding of the ordinance were true, boathouses could be built directly on the current shoreline at the OHWM (if not wider than 20% of the owner's shoreline frontage) violating the waterfront building setbacks.<sup>104</sup>

The zoning regulations – all of them – apply to the entire Shoreland Protection Strip, not just 80% of it. Conflating and confusing the regulations allowing 20% of vegetation removal with *allowing 20% of land removal* violates the ordinance protecting *all of the land area* of the Shoreland Protection Strip.

The intent to protect the land itself is borne out in a historical review of the evolution of the Hayes Township Zoning Ordinance.<sup>105</sup> The first interim ordinance was passed in 1973, then adopted in 1974. The 1973 and 1974 ordinances had the following section:

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103 Exhibit 21, Morehead to Kozma, 7-23-21

104 ZO Section 3.14(2)

105 Exhibit 22, Compiled excerpts from historical versions of Hayes Township Zoning Ordinances, available at the Charlevoix County Planning Department

## Green Belt Zone Section 9.05

*All land* abutting on lakes, or streams shall be so improved as to maintain at least fifty percent (50 percent) of the natural vegetation along the water's edge and twenty-five (25) feet distant therefrom. Any dwelling shall be located at least fifty (50) feet from the water's edge at high water. A boat house or bath house, or combination, permitted at water's edge provided no more than twenty percent (20 percent) of shore frontage is so used. Side yard requirements apply.<sup>106</sup>

Amended in 1979, the Zoning Ordinance renamed the section, for the first time, the "Shoreland Protection Strip" which read:

No building or structure, except docks or launch ramps, shall be erected closer than fifty (50) feet from the shoreline at normal high water level of any lake, stream or creek within the township. In addition, *a strip of land* thirty-five (35) feet wide from the normal high water mark bordering the body of water *shall be maintained in trees and shrubs in their natural state*. Trees and shrubs may be pruned, however, to afford a view of the water.<sup>107</sup>

So the township used to expressly *allow boathouses* (and bath houses) on the shore and removed that language, *intentionally prohibiting* them. The Shoreland Protection Strip depth increased from 25 to 35 feet. Shoreland protection had become stronger, not weaker.

Continued amendments to the Zoning Ordinance further strengthened the Shoreland Projection Strip language. By 1989, it read in part that the *now 50-foot* deep strip

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106 Emphasis added.

107 Exhibit 22, Compiled excerpts from historical versions of Hayes Township Zoning Ordinances, available at the Charlevoix County Planning Department

shall be maintained in trees and shrubs in their natural state...*The vegetation and the soil* shall not be altered or disturbed within the shoreland protection strip, as herein described. Trees and shrubs may be pruned, however, to afford a view of the water.

(Emphasis added). The building setback doubled from 50 feet to 100 feet.

By 1999, the ordinance had Section 5.13 Lakefront Zoning which provided further rationale and intent of the need to protect the shoreland:

Waterfront property owners have a special obligation to their communities to help preserve the quality of the water. The rationale for a shoreland protection strip has been documented in Lakeland reports from the University of Michigan Biological Station at Douglas Lake. . . . As these reports point out, the deep roots of a shoreland protection strip, which includes some trees as well as low shrubbery, hold the silt and sediments carried by rain and other runoff, prevent erosion, and draw nutrients, produced by septic seepage, out of the soil before it reaches the lakes, streams or creeks. They also point out that shoreland protection strips can provide aesthetically pleasing wind and sound breaks, create a habitat for birds and wildlife and make property more attractive. Without such protection unwanted algae begins to appear along the shore bottom leading to a gradual change in the ecology of the lakes, streams or creeks, even creating undesirable habitat for sports fish.

That same year, then-ZA Ethel Knepp informed the State of Michigan of the township's opposition to the excavation of a proposed pond in the Shoreland Protection Strip in the Oyster Point Development, which illustrates the longevity of the township's strong commitment that shoreland itself be protected. She wrote:

The township's objection is based on the potential adverse effect any excavation, particularly between the residences and Lake Charlevoix, may have on lake quality. It is my understanding that the reasoning behind requiring setbacks from the lake, as well as shoreland protection strips, is to keep nutrients from reaching the lake. Therefore if a permit is issued to construct this 'pond' it will represent significant impacts on the public interest.<sup>108</sup>

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108 Exhibit 23, Knepp to DEQ, 8-2-99

In 2009, Hayes Township overhauled its entire Zoning Ordinance. The Shoreland Protection Strip was defined in the definitions section for the first time:

A strip of land fifty feet in depth from the maximum or maximum recorded (GLD) high water mark bordering the body of water, placed so as to be parallel to the body of water, *shall remain in the natural state.*<sup>109</sup>

The 2009 Waterfront Regulations section 3.14 added language that revised the preamble in a section called “Intent” and added the above-quoted clarifying words that the 50 foot Shoreland Protection Strip “*shall include all of the land*” within that 50 feet, as well as great detail as to why the land itself is protected, and the replanting requirement.

In 2018 the requirement was added that if a shore property owner damaged the Shoreland Protection Strip while installing or removing seasonal documents, the damage *shall be repaired* within 30 days.<sup>110</sup>

The PC's approval in 2019, renewed by consensus on September 14, 2021, to allow a property owner to carry out a major excavation project that would alter, disturb, render un-replantable, and haul away the Shoreland Protection Strip away from the lake, forever reconfigure the shoreline of Lake Charlevoix, not compel property owners to repair permanent damage, and allow *protected* land to be converted to “waters of the United States,” violates entirely the Waterfront Regulations and Shoreland Protection Strip sections of the ordinance and does the opposite of ordinance’s intent to protect “*all*

109 Emphasis added.

110 ZO Section 3.14(4)(H) (emphasis added).

*of the land*” comprising the shoreland 50 feet from the shoreline.

The Laws' “added responsibility” is to *preserve* the Shoreland Protection Strip, not to disembowel it.

**D. Interpretation: ZO Sections 2.02, 3.14(2), and movability of OHWM horizontal location**

As noted, in August 2019 then-ZA Sullivan wrote the Laws about several points, one of which considered the horizontal location of the OHWM after Lake Charlevoix would fill the basin. He concluded it would not move, based on an undated hearsay verbal opinion of an unnamed township attorney about statutory law not of the township but of the state. The attorney had been speaking of the Packer basin, a basin excavated on private Lake Charlevoix shoreline property in the 1960s or earlier, before the township had zoning.

As explained below, the hearsay attorney was wrong. And Sullivan noted he might disagree with previous township positions.

His letter was not included in the PC's packet on 11-19-19, so the PC could not take it into account.

Sullivan of course should have directed his OHWM question to the ZBA<sup>111</sup> not an attorney – particularly not one whose verbal opinion may have been misunderstood.

After all, as state law acknowledges<sup>112</sup> it would be *township* law which would control in this township, which has a definition of the OHWM location on Lake Charlevoix:

<sup>111</sup> ZO Section 8.06(1)

<sup>112</sup> MCL 324.30101(m)

Ordinary High Water Mark: The line between upland and bottomland that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the *character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil, and the vegetation*. On Lake Charlevoix the ordinary high water mark shall be the legally established lake level of 582.3 feet IGLD 1985, and on Lake Michigan the ordinary high water mark shall be the legally established lake level of 581.5 feet IGLD 1885.<sup>113</sup>

Accordingly Appellants herewith bring the OHWM question to the ZBA. We have searched and can find no ZBA precedent or statute or court precedent which upholds the hearsay verbal interpretation, which is directly contrary to the ZO wording.

Under parallel state and federal law, we find just the opposite of what the attorney said, that when the channel or basin alters the physical shoreline, the OHWM would move to the new shore along with the lake, the fish, public access, and Corps jurisdiction of US waters, creating a new line, new marks, and new physical characteristics.

Consider again *Glass v Goeckel*. In the course the 5-2 majority referred to then-MCL 324.30101(i), the state definition of OHWM for inland lakes. That definition, including its reference to “distinct” and “apparent” marks on the “line between upland and bottomland,” was identical to now re-codified 30101(m), except it did not have the new sentence at the end which the Legislature added a year later (about the effect on the OHWM of removal of a dam).

Of the state's OHWM definition *Glass* observed:

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<sup>113</sup> ZO Section 2.02; emphasis added.

This definition also parallels that employed by the federal government. See, e.g., 33 CFR 328.3(e).

Indeed it does, by its reference to distinct “marks,” consistent with the “physical characteristics” language of 33 CFR 328.3(e) (now as of April 2020 re-numbered 33 CFR 328.3(c)(7)):

Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by *physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris*, or other appropriate means that consider the characteristics of the surrounding areas.<sup>114</sup>

Appellants see no reason the ZBA should not find that the township ZO defines the OHWM any differently than this, as a line seen by observing visible physical marks that persist along the contours of the lake, due to the water’s contact with the land.

The *elevation* of the OHWM refers to its vertical distance, the height of high lake water in lakes Charlevoix and Michigan, above sea level as measured at Rimouski Québec. But of course the vertical height does not determine the horizontal location. The flow of the water does. When human-made disturbances such as sheet piling or riprap are placed, water hits these contact points, too, and the marks appear there as well as they appear on natural land.

The same interpretation would apply for inland lakes like Charlevoix if the matter were mistakenly considered under state law.<sup>115</sup> Notably, this statute acknowledges

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114 Emphasis added.

115 MCL 324.30101(m)

mobility of the OHWM location by virtue of human activity, such as removal of a dam.

Part 301 also recognizes that on payment of a fee the property owner can negotiate and come to a written agreement with the state on the horizontal location of the OHWM.<sup>116</sup> But the Laws have negotiated no written agreement and paid no fee. Nor could they now, given what is on their site plans: They agree with appellants that the OHWM location would extend *all the way* into the basin:

- The straight dotted horizontal line on Section C of their plans.<sup>117</sup> Under the dotted line, on the center right, in small lettering, the Laws wrote “O.H.W.M. – 581.5”. The line extends though the channel and basin all the way to the far end of the boathouse.
- The caption on the cross-section of the channel, Section F of their plans as revised on August 23,<sup>118</sup> in which plantings are shown “down to OHWM,” in other words saying again that when the channel is opened, the OHWM would move inland from the lake's original natural shoreline.

Likewise, on pages 11-12 of their joint application to EGLE and the Corps,<sup>119</sup> they identify “Boat House,” “Boat Well,” “Boathouse Basin,” and “Boathouse Main Building” as “structures constructed *below* the Ordinary High Water Mark.”

Reference to the changed horizontal location of the OHWM after the creation of an excavated basin can also be seen in public-record plans for the DeVos<sup>120</sup> and Packer<sup>121</sup> properties. Those applicants showed the OWHM moving into the created basins.

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116 MCL 324.30109

117 Exhibit 24, Drost Basin Section C, 6-26-20

118 Exhibit 16, GL Ecosystems to Army Corps, 8-23-21

119 Exhibit 18, Law permit application jointly to EGLE and Army Corps, 7-16-20

120 Exhibit 25, EGLE DeVos property documents, 5-31-12

121 Exhibit 26, EGLE Packer property documents, 10-22-18

Particularly for DeVos, EGLE noted sand “above the OHWM” and “peastone below” it, lying along the “beach area at the northeast corner of the basin.”

In another project in Grand Traverse County, EGLE viewed it the same way. On September 2 Neil Schock of EGLE's Water Resources Division (“WRD”) wrote in answer to a question from Kate Dahlstrom whether dredging inland in Long Lake would change the OHWM. He said:

It is the interpretation of the WRD that the OHWM would follow the new shoreline contour, although this is not clearly define[d] within Part 301 or its administrative rules.<sup>122</sup>

Under federal law, physical characteristics also determine the OHWM location. On August 24 April Champion, the Corps' Project Manager for the Law project, so stated in response to a question about their proposed basin:

Excavation of a channel and/or basin contiguous with Lake Charlevoix, thereby expands the extent of the ordinary high waters of Lake Charlevoix through the entire channel and/or basin.<sup>123</sup>

See also the Corps' Regulatory Guidance Letter, which notes vegetation, soil, sediment, scour, deposition, and water staining as among the physical characteristics which would mark the line on the banks and foundation wall around the channel and basin.<sup>124</sup> See also the Corps' view of extension of its jurisdiction into human-made canals.<sup>125</sup>

The bottom line: Everyone – the state, the federal government, and even the

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<sup>122</sup> Exhibit 27, Schock to Dahlstrom, 9-2-21

<sup>123</sup> Exhibit 28, Champion to Boal, 8-24-21

<sup>124</sup> <https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl05-05.pdf>

<sup>125</sup> [https://www.lre.usace.army.mil/Portals/69/docs/regulatory/PDFs/Navigable Waters\\_List\\_Sep2018%20.pdf](https://www.lre.usace.army.mil/Portals/69/docs/regulatory/PDFs/Navigable_Waters_List_Sep2018%20.pdf)

Laws' developers – says the OHWM moves into a created basin. The township's Zoning and Planning officials are the lone holdouts.

Finally, determination of OHWM location by physical marks and characteristics is true intuitively and materially. The Laws have no plans some day to close up the channel/basin and return the land to its former natural state. The proposed channel would rip out the existing shoreline and physical marks upon it, and the basin would provide new surfaces for the water to contact. They would likely last for hundreds of years. Our descendants and theirs would come to think of these water borders as "ordinary," when we, they, the ZA, members of the PC and ZBA, and the original shoreline are gone and long forgotten. There is no such thing as a “line” between water and water, what the hearsay lawyer contended.

**E. Interpretation: Waterfront Development Review process under 5.04 and 3.14(8) operates as “only layer” of review rather than “an added layer” to real site plan review by PC, denies due process to the public, and 3.14(8)(D) violates intent in 3.14(8)(A).**

In 2018, the ZO was amended to include the establishment of the Shoreland Protection Review Subcommittee ostensibly to “ensure compliance with the waterfront provisions” in a new Site Plan Review section.<sup>126</sup> This “added layer of review” “requires a Shoreland Landscaping Plan in most instances for the area within 100 feet of the OHWM” and site plan review only for new residential waterfront dwelling units.

Section 5.04 refers to the review process and approval criteria in 3.14(8), which

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126 ZO Section 5.04

says the intent is “to promote the gradual, systematic, and long-term restoration of the Shoreland Protection Strip.” “This added layer of review requires a Shoreland Landscaping Plan,” in 3.14(8)(B), which explains it “will address the conditions set forth in Section 3.14(1-5).”

A table in Section 3.14(8)(D) lists four types of projects that would “trigger” this added layer of review. Only one of them – new residential home or a major reconstruction, over 50% – triggers a Site Plan Review under 5.03. The “review process” for most triggering actions is simply a Shoreland Landscaping Plan, and administrative review by the ZA, with Section 5.02 “plot plan” data, but not a full site plan review.

The result is the lack of due process for major modifications to the Shoreland Protection Strip. It looks on the surface as though the township is requiring Planning Commission review but not really. There is a subcommittee, in Section 3.14(8)(C) consisting of two PC members plus

a representative from Tip of the Mitt Watershed Council, the Lake Charlevoix Association, or a similar organization with technical expertise on aquatic ecosystem management.

The subcommittee only gives input and guidance but has no authority to decide anything. The property owner doesn’t get a hearing nor does the public get the right to provide input. It look like the ZA has the final say based on some nebulous standards. What is the remedy if the property owner disagrees?

In effect 5.04 operates as a single layer of review, to a ZA administrative determination, without any public meeting or due process in the review.

It seems lakefront protection is important enough to require Site Plan Review under Article V.

Some triggering events might be mild modifications, and in the course of doing modifications, property owners act to restore the Shoreland Protection Strip. Plans as severe as we've seen with the Laws' proposal that would destroy the Shoreland Protection Strip by carving it out and removing it – a rather major modification – should have triggered a full Site Plan Review after a ZA examined the proposal.

Certainly in the case of the Laws' boat basin and boathouse 2019 materials, both the Shoreland Protection Committee and the PC ignored and/or didn't question any of the shoreland destruction issues or the excavation that would bring Lake Charlevoix's waters 145 feet inland, disfigure the shoreline and alter the OHWM. It seemed satisfied with the milquetoast landscaping plan about native plants in a few areas, while ignoring the elephant on the shore.

The review process outlined in ZO Section 3.1(8)(D) that allows such a lack of due process should be interpreted as violating the stated intent Section 3.14(8)(A), "the gradual, systematic, and long-term restoration of the Shoreland Protection Strip" by not triggering mandatory site plan review under 5.03 even with projects proposing to

massively harm the Shoreland Protection Strip.

**F. Appeal of PC's basin, boathouse, site plan, planting plan approvals in 2019 and 2021**

The Laws segmented their application into two, one application in 2019 and the second in 2020. Then in 2021 the Laws made “major” modifications, but has not shown them to the township.

As to 2019 and Section 5.03 review, without the required documents the PC ignored the issues of soil, parking, loading/unloading, sewage, noise, impact-on-surrounding-environment, lack-of-variance, limitation-of-natural-contours, and abrupt-changes-in-grade.

As to Section 5.04 review, the PC:

- Relied on the Subcommittee though it had no expert input, and its report contained errors noted above.
- Failed to consider whether destruction of the soil in a 30-foot-wide piece of Shoreland Protection Strip would obliterate protection of the ZO Section 3.14, that “all of the land area” be protected in the 50 feet above the OHWM.<sup>127</sup> – not just 80% of the land. Yes vegetation (but not roots) may be pruned or cleared in the 20% but the land itself may not be removed, in order for it to do its filtration work for the lake. Even *minor* damage is supposed to be repaired. Hauling away 978 cubic yards for the channel does just the opposite.
- Failed to consider the impacts of the destruction involved in excavating a 90' x 120' basin in the uplands so close to the lake, while even minor incursions like decks are carefully regulated, which was within the purview of the 100-foot setback area under review in Section 5.04 by the Subcommittee and ultimately the PC.

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<sup>127</sup> ZO Section 3.14(3), emphasis added.

- Failed to consider that the OHWM would move horizontally into the basin, rendering the boathouse's placement illegal.

As to review in 2021, at the short-circuited August 31 PC meeting Kozma handed out her hardcopy presentation to the PC before it canceled the meeting due to an overflow crowd. The handout showed that even the Laws considered the OHWM would move into the boat basin, and that the Army Corps agreed with that. It also showed the boathouse permit had expired without a renewal fee within the ZO's one-year period. Kozma also complained of the township's nondisclosures about the project.<sup>128</sup>

On September 3 via email, she sent the PC and ZA the Laws' actual major modified plans of August 23, calling for 8 more feet of destruction of the Shoreland Protection Strip for a wider channel. She also provided before-and-after photos of the Laws' citable-but-uncited gravel-to-blacktop renovation of the shore road after August 2020. She urged the PC and ZA to take up the matter again, cite the Laws for the road, and inform them of the permit expiration.<sup>129</sup>

On September 9 Van Zee and Griffiths posted a "Response" on the website contending "there is no further action the township can take." As seen this is not so, given that the Laws have made major modifications, involving destruction of even more Shoreland Protection Strip, since the PC and ZA acted, the proof of which Kozma provided in her email of September 3.

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128 Exhibit 30, Kozma handout to PC, 8-31-21

129 Exhibit 31, Kozma email to PC and ZA, 9-3-21

Even Griffiths agreed on September 14 this type of information could trigger re-review by the PC:

[O]nce the [PC] makes a required decision, it does not have the ability to go back and change that decision absent a compelling reason like incorrect information....<sup>130</sup>

At the September 14 PC meeting, during public comments resident Lucy Moore brought up the immensity of the proposed structure out over the lake's water and its primary use as a large event center and dining facility:

What my concern is ... the Laws come up with this proposal... can anyone just siphon off the lake and make a private pool? Call it the public domain, but actually have a pool and actually build a house over the pool . . . for this huge project that, as we know, the boathouse is just a guise, the marina is just a guise. It's not a boathouse. It's a party house. It's a conference, it's a corporate event center. There's a ballroom, there's [inaudible] bathrooms. It is absolutely beyond the pale.. . . I'm sorry but this is over the top. And I think you're going to be dealing with this for years to come.<sup>131</sup>

Ignoring these concerns the PC decided that the ZA's handling in 2020 of the zoning permit for a boathouse was proper and needed no site plan review by the PC, and that the permit was not expired. The PC was not interested in a massive building with a new principal use as an events-dining facility that would be built over the waters of Lake Charlevoix, in a residential zone.

The public had no due process over the local permitting of this facility that will impact Lake Charlevoix. The Planning Commission's required due diligence over site plan reviews was nowhere to be found. The PC had the opportunity in 2021 to right the

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130 Exhibit 1, PC meeting partial transcript, 9-14-21

131 Starting at counter 52:37 of the township recording.

wrongs of 2020 and 2019, and it decided on that day, not to.

**G. Appeal of ZA building permit**

- 1. The ZA should have denied the permit because the proposal violated ZO Section 3.14 by destroying land in the Shoreland Protection Strip.**

The ZA must uphold all parts of the ordinance and should have recognized, as former ZA Ethel Knepp did in 1999,<sup>132</sup> that the township does not allow the excavation and destruction of the Shoreland Protection Strip. The above reasons in Appellants' interpretation request regarding the Shoreland Protection Strip underlie this section of the appeal.

- 2. The ZA erred under ZO Section 3.14(2) in determining that the Ordinary High Water Mark would not move, allowing the placement of a boathouse structure over waters of Lake Charlevoix, violating the 100-foot setback requirement.**

As the ordinance would not allow a boathouse to be built at the waters edge, let alone out over Lake Charlevoix water, the ZA should have realized the ordinance, likewise, combined with the prohibition on Shoreland Protection Strip destruction, doesn't allow the lake to be brought inland to a boathouse.

To paraphrase and turn the Renaissance philosopher on his head, the Laws seek to move the mountain to Muhammad.<sup>133</sup> The OHWM would move, as explained in the above interpretation request.

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132 Exhibit 23, Knepp to DEQ, 8-2-99

133 [https://en.wiktionary.org/wiki/if\\_the\\_mountain\\_won%27t\\_come\\_to\\_Muhammad](https://en.wiktionary.org/wiki/if_the_mountain_won%27t_come_to_Muhammad)

**3. There is no “effective” date of a permit other than the issuance date actually on the permit.**

Griffitts argued on September 14:

The Zoning Administrator includes these conditions as part of the approval overall which is always contingent, and only becomes *effective* if all other regulatory agencies approve the plan.<sup>134</sup>

This is without basis in the ZO. As with “activation,” the ZO contains no reference to the “effective” date of a permit.

**4. The boathouse-event facility met at least two criteria requiring Site Plan Review under Section 5.03 in addition to “added layer” of Waterfront Development review under 5.04, and the township failed to conduct one.**

In 2020 the proposed building was a “new structure” under ZO Section 503.1(A), a massive one of commercial nature and scale, and a “use requiring off-street parking,” under ZO 5.03(1)(E), all circumstances requiring Site Plan Review. No Site Plan Review was done under 5.03. Nor did the Laws pay a fee for one.

**5. ZO Section 3.04 forbids more than one principal use on any lot.**

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.<sup>135</sup>

If the boathouse were truly only a boathouse it might be legitimately considered an accessory structure incidental to their residence on Anglers Cove. But an important

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<sup>134</sup> Exhibit 1, PC meeting partial transcript, 9-14-21

<sup>135</sup> ZO Section 3.04

purpose of the building, if not the primary purpose, is to host parties, meetings, and banquets, like a center for conventions or corporate retreats. It is on parcel # 007-132-005-25.

The Laws' residence straddles that lot and # 007-133-005-30. Section 3.04 accordingly forbids a convention center on # 007-132-005-25.

**6. The boathouse-event facility would violate R-1 low density residential zoning which prohibits such even with a special use permit had the Laws applied, but they didn't.**

Uses permitted in R-1 districts have to be “relatively quiet” in keeping with the Master Plan.<sup>136</sup> Without a special use permit, uses are limited to:

- A. Single family dwellings
- B. Parks, playgrounds, recreational areas and community centers
- C. Home occupations conducted completely inside the residence, subject to the provisions of Section 3.15 Home Businesses.
- D. Accessory buildings and uses customarily incidental to the above permitted uses.<sup>137</sup>

The basin-boathouse satisfies none of these, nor have the Laws claimed that they do.

Instead of “quiet,” an event center would bring sewage, cars and trucks, increased helicopter usage, and parking and safety issues on Anglers Cove, a narrow road off of Boyne City Road.

Nor did they apply for a special use permit and a public hearing. Had they applied,<sup>138</sup> their task would have been impossible. Special uses are

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136 ZO Section 4.05(1)

137 ZO Section 4.05(2)

138 ZO Section 6.01

recognized as possessing unique characteristics (relative to location, design, size, public infrastructure needs, and other similar characteristics), which require individual review and approval standards in order to safeguard the general health, safety, and welfare of the Township.<sup>139</sup>

In this case they would have had to prove the building would have been one of:

- A. Clustered residential development (Open Space Preservation Option), subject to the provisions of Section 7.01 Supplemental Site Development Standards.
- B. Public buildings and facilities.
- C. Places of worship and related religious buildings.
- D. Accessory buildings and uses customarily incidental to the above special approval uses.
- E. Cottage industries conducted outside the residence in the yard, garage or accessory structure, subject to the provisions of Section 3.15 Home Businesses.<sup>140</sup>

The building would be a big event/dining facility – 5400 square feet in the upper story. The 2020 plans were quite different than those of 2019. The project required thorough review, and in two days did not get it. A colossal failure – undoubtedly animated by the “unwritten philosophy” – depriving the community of due process.

- 7. **The project proposal was segmented into two parts, and changed drastically after first permit application, with the PC not giving proper review to the entire project and ZA issuing boathouse zoning permit in two days without presenting site plans to the PC.**

In 2019, the Laws submitted a single page conceptual plan showing a boathouse without details as to the vertical size of the structure, with a single purpose: storage of boats. The structure was presented as a detached building with a terrace paver walkway

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139 ZO Section 6.01

140 ZO Section 4.05(3)

between it and the residence. Two landscape designs submitted covered only the plantings.

Regardless of the inadequacies of the review of 2019, in a classic bait-and-switch the Laws applied for a permit for, and presented data for a completely different building and use in 2020 than previously applied for: a big event center with dining facility, kitchens, public bathrooms, and an elevator. On receipt of the new application and documents in July 2020, the ZA should have presented them to the PC for site plan review under 5.03. He did not. Without a site visit and articulating no standards, he issued the permit in two days, having the final say. The ZA issued the permit simply as a boathouse with covered walkway, and not as an event center/dining facility. The PC had no chance to weigh in. And the public had no due process.

Honoring the Laws' obsession with privacy, and perhaps remembering the promise to help him as a ZA, Van Zee kept the project under wraps till the news broke this summer. Together with the PC he continues to run interference for it today.

This cannot be. It is time to bring the project to heel.

## **IX. Conclusion**

Wherefore Appellants Kozma and Fowle ask the ZBA to hold that

- zoning permits always expire after a year unless renewed,
- land may not be destroyed within the Shoreland Protection Strip,
- the OHWM moves inland whenever the water moves inland, even if due to human activity,

- the 100-foot setback requirement from the OHWM does not permit construction of the boathouse on and over the water,
- excavation of Shoreland Protection Strip would violate its protection, and
- waterfront development review under ZO Section 5.04 and 3.14(8) prevents real review by the PC, denying due process; and that 3.14(8)(D) violates the intent of 3.14(8)(A),

and rescind:

- the PC's 11-19-19 approval of the Laws' shoreland landscaping plan and construction of a boat basin and channel, and
- the ZA 7-8-20 permit # 29-07-01,

and correct the declarations of September 13-14 that

- “unwritten philosophy,” and
- “consultation and compromise ... rather than the strict mandates”

may guide the hands of the PC and ZA.

Respectfully submitted,



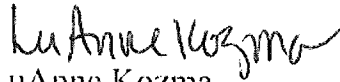
Ellis Boal

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LuAnne Kozma

9330 Woods Road

Charlevoix, MI 49720

231-547-2828

*luannekozma@gmail.com*

Dated: September 27, 2021

December 15, 2021

TO: All ZBA Members and Alternates, c/o ZBA Secretary Kristin Baranski  
(Township Clerk)

FROM: LuAnne Kozma, Representative for Requestors Elisabeth Hicklen, Irene Fowle and myself

RE: Supplemental information regarding Interpretation Requests submitted on September 27, 2021

By his letter of October 13, 2021 to each of you, Zoning Administrator Ron Van Zee provided a 52-page set of appeals/interpretation requests plus 31 exhibits.

The interpretation requests we submitted on September 27, 2021 (as part of a combined document that included two appeals) should have been heard timely, by the state statute (the Michigan Zoning Enabling Act) and the ZBA Rules of Procedure you all adopted on July 1, 2020 in township attorney Todd Millar's presence, within 45 days of our submission, that is, by November 11, 2021.

A ZBA Public Hearing on these requests are now untimely, but must be held nonetheless, as required by the statute. The statute also requires you to adopt rules of procedure by majority vote, thereby making it mandatory that you follow them, always by majority vote.

During the course of litigation with the township (*Kozma v Hayes Township*) that began October 29, which was after the last day the Township could have timely noticed the public for a public hearing, the Township reversed themselves on official statements made at the Board of Trustees Sept 13 meeting and the Planning Commission Sept 14 meeting, and even on the Township website, and now finally admitted that the zoning permit issued by Zoning Administrator Ron Van Zee on July 8, 2020 did expire, as per the ordinance, one year after its issuance. And that the the Planning Commission's approval for the boat basin and "plan" and "activities" also expired in 2020, one year after its decision of November 19, 2019.

Thereby making the two appeals moot.

Had the ZA and Planning Commission admitted these facts in September, as I and many other residents implored them to, none of this court litigation and township expense would have been made. As taxpayers, we are not happy

about this unnecessary costs to ourselves, to other taxpayers, and for the township increasing our burden as residents whose rights to go to the ZBA for interpretation requests went unheeded due to gamesmanship by the ZA and inaction by the ZBA Chair.

The delaying of the ZBA hearing was wrong and it cannot happen again.

To clarify and supplement the document submitted on September 27, we add the following information in this letter, below:

1. The entire document (including exhibits, affidavits and other correspondence) already submitted on September 27, 2021 is to be used, save for the following sections or words noted below that may be ignored.
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4. On page 1, the two appeals listed can be ignored.
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6. In the section “appealability and timeliness” references to this being an appeal can be ignored. Please note that for interpretation requests, persons can request one at any time. Importantly, the discussion in this section regarding statements the township made as to whether a permit is automatically renewed without a fee, or “is activated” differently than the issuance date, is relevant to the Interpretation Request, because these represent the ways in which the current administrator and Planning Commission have considered these administrative questions in the past, (even though they have now flip-flopped), so the section should be used by the ZBA in its fact-finding in order to properly and completely assess our interpretation request that begins on page 26, “Interpretation: ZO Sections 9.01, 9.02(5), and expiration. A ZBA determination on these parts of the ZO is very much needed, because township administration is confused enough about this section that it keeps changing its mind from month to month.
7. In the section titled “Recusal of ZBA member Griffiths” which includes discussion of other possible recusals and recusals generally, please read

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8. The Section on “Unwritten philosophy” and “Compromise [vs] strict mandates” is discussion that applies to interpretation requests A and B, regarding ZO sections 9.01 and 9.02(5).
9. The “Timeline” section that begins on page 8 is our Statement of Facts. In timeline fashion, we lay out what happened with this particular project and this particular parcel. It is very important to note that ZBA interpretation requests CAN be about a specific parcel and pending projects. This project is still pending before the Army Corps and new Township permits and approvals are yet to be issued/grant or denied. While some of the facts in the timeline have to do with decisions and statements made at the Sept 13 and 14 township board and planning commission meetings, they are still helpful to understand in the whole context of the pending project and what led us to question, research, analyze, and interpret for ourselves the ordinance sections that would apply to it, and which brought us to the ZBA to resolve and clarify.
10. The five interpretation requests that begin on page 26 are not changed. References to expired permits and approvals should be understood that the Township has now agreed that we were correct, they did expire. This should help in deciding on findings of fact necessary to make good ZBA decisions.
11. Our request on 3.14 and the Shoreland Protection Strip is crucial to clarify, as pursuant to new determinations by the ZA made on November 29, 2021, he will no longer require (as he did in 2019) the Laws to come before the Township to seek any kind of permission for ripping up and hauling away *7,152 cubic yards of shoreland* in the Shoreland Protection Strip and uplands within 100 feet of Lake Charlevoix. That’s a lot of truck loads of protected land. Mr. Van Zee has now determined there is “nothing” in the zoning ordinance regulating boat basins and channels. The argument and facts we bring to this interpretation request prove him wrong.
12. Similarly, our request on the Ordinary High Water Mark, on ZO Sections 2.02, 3.14(2) and the movability of the OHWM horizontal location also relates to the protection of the shoreland and is a critical decision we ask the ZBA to clarify.
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15.All exhibits should be used by the ZBA for fact-finding.

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Respectfully submitted,



LuAnne Kozma, Representative for Requestors  
9330 Woods Road  
Charlevoix, MI 49720

231-547-2828  
[luannekozma@gmail.com](mailto:luannekozma@gmail.com)

cc: Ellis Boal, Representative for Requestors  
Todd Millar, attorney for Hayes Township  
Harry Golski  
Elisabeth Hicklen  
Irene Fowle

HAYES TOWNSHIP  
09195 MAJOR DOUGLAS SLOAN ROAD  
CHARLEVOIX, MICHIGAN 49720

October 13, 2021

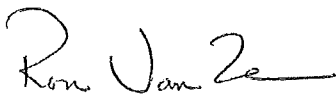
Zoning Board of Appeals Member/Alternate,

Enclosed you will find an application for appeal and interpretation to the Zoning Board of Appeals.

Currently this application is being contested in response to a lawsuit filed at local district court however, to make sure we follow our rules of procedure and requirements of the zoning ordinance, I am forwarding this information and moving forward with the publication requirements.

Because of the volume of information the applicant has submitted, I wanted to make sure you have adequate time for review. Our Township Attorney has advised that you do not discuss this case with anyone prior to the meeting.

The Chair of the Zoning Board of Appeals will be contacting you to potentially set a meeting date if one is required.

A handwritten signature in black ink, appearing to read "Ron VanZee". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ron VanZee

Hayes Township Zoning Administrator

December 15, 2021

TO: All ZBA Members and Alternates, c/o ZBA Secretary Kristin Baranski  
(Township Clerk)

FROM: LuAnne Kozma, Representative for Requestors Elisabeth Hicklen, Irene Fowle and myself

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