

CITY OF CHARLEVOIX
ZONING BOARD OF APPEALS MINUTES
Tuesday, December 1, 2015 - 6:00 p.m.
210 State Street, City Hall, 2nd Floor Council Chambers, Charlevoix, MI

A) CALL TO ORDER

The meeting was called to order by Chair Withrow at 6:00 p.m.

B) ROLL CALL/PLEDGE OF ALLEGIANCE

Members Present: Gary Anderson, Bob Bergmann, Greg Bryan, Greg Withrow
Members Absent: Ann Gorney, Pat Miller, Art Nash
City Attorney: Scott Howard
Staff Present: Interim City Planner-Zoning Administrator Zach Panoff

C) INQUIRY INTO POTENTIAL CONFLICTS OF INTEREST

None.

D) APPROVAL OF AGENDA

No changes.

E) NEW BUSINESS

1. Public Hearing for Project 2015-05 ZBA. Appeal of Zoning Permit #5112 at 304 E. Dixon Avenue.

a. Staff presentation.

Interim Planner Panoff presented background of the project and Zoning Permit #5112 at 304 E. Dixon Avenue and displayed a large map of what was approved by Permit #5112. He stated that the permit requested the addition of a third garage stall and covered porch on the front (north side) of the house, a new chimney/fireplace, and additional lot coverage in the form of driveways, walkways, a chimney, retaining walls and other landscaping features. The permit was approved on September 29, 2015 based on the fact that the proposed items met the setback and lot coverage requirements of the City's Zoning Ordinance.

Chair Withrow referenced page 98, 5.72, *Lot Coverage*, of the agenda packet noting the calculations for lot coverage were inverted. He stated that the calculations were correct, but the wording was wrong. Chair Withrow didn't understand a statement in the agenda packet that the original lot coverage was not in accordance with the original because that would indicate that the building was not in accordance with what was approved by the original building permit. Larry Feindt, Surveyor, stated that he had no involvement with the original permit or where the numbers came from. Interim Planner Panoff stated that he knew that former Planner/Zoning Administrator Mike Spencer measured the building to make sure that the foundations met the measurements that were submitted.

Mr. Spencer stated that Mr. Anderson's consultants might be able to explain this better: under the old permit #3071 there was a terrace area that was between the boathouse and the house, but since it was below grade and it was a terrace it didn't count toward coverage. Now, under the new Ordinance it counts toward coverage therefore, the numbers are different. Chair Withrow questioned if there was concern that the existing facility prior to this permit request isn't in compliance with the original permit and Mr. Spencer responded "no".

b. Applicant presentation (Saenger).

Eugene Saenger stated that property he owns is closer than 200' to the Anderson property. He stated that he had a residence at 204 Burns Street, prior to that he owned a residence at 210 E. Dixon. He stated that he has been asking the City to enforce the Zoning Ordinances since a public hearing prior to the permit #3071 appeal.

Chair Withrow questioned the basis for Mr. Saenger's standing for the appeal to warrant reviewing the entire case. Chair Withrow read a portion of page 84 of the agenda packet, "Section 604.1 of the Zoning Enabling Act provides that an appeal to the ZBA may be taken by a person aggrieved by a zoning decision; litigant must allege and prove a special injury or right or substantial interest that will be detrimentally affected in a manner different from the citizenry at large". He asked "why are you different from the citizenry at large relative to the special injury or right or substantial interest?" Mr. Saenger stated that he was different because he was 175' from the Anderson's property. He stated that given the 175' distance and that he had a prescriptive easement that was granted to the

Andersons/APJ Properties that runs through his property that is a burden to his property. He stated that he has never objected to Mr. Anderson's right to develop his property or to develop his boathouse within what is legally permissible. Mr. Saenger referenced a drawing depicting the location of the easement and he had another drawing which was prepared by Site Planning & Development which showed a second easement across the property of Sharon Blossom. He discussed the easement in 1998 with Mr. Withrow, and subsequent to that whenever he raised the subject of the easement with former City Manager Straebel he didn't want to hear from him. He stated that the easement was of unknown impact because Mr. Anderson has never given up that easement and he could enforce that easement across Blossom's property at any time. He referenced the easement that goes across his property and to the extent that this project fits within what is permitted by law, but to the extent that it doesn't, those infractions need to be abated.

Mr. Saenger stated that additionally there was the issue of parking. He referenced another drawing and a recent aerial photograph that showed the condition of the site and the City provided a drawing, in which they overlaid the parking spaces that were required under #3071 under the old Zoning Code. He suggested that Mr. Spencer could answer the question as to why parking spaces were no longer required for private docks under the new Zoning Code because that was not in the Planning Commission minutes when the subject of parking was discussed. Mr. Saenger stated that he had excessive traffic going across his easement to a project that he did not believe is in compliance with the permit that it was built under. He stated that he was located in proximity, he was not bound by Mercer Blvd., or over on Upright or Garfield so that's why he believed he had standing. He stated that the cases that were cited refer to people who are against competition, or they don't want to look at the project from across the lake, or they were outside the notification area for anything having to do with the subject property. He believed that he had standing to be heard. Additionally, he believed he had an obligation to request to be heard because if he ever takes this to court he has to have exhausted all his administrative remedies.

Chair Withrow asked for an interpretation from City Attorney Scott Howard. Attorney Howard stated that former City Attorney Graham's memo summarized the standard that the Board was working under succinctly: that the individual must allege and prove a special injury or right or substantial interest that will be detrimentally affected in a manner different from the citizenry at large. He questioned what special injury was being alleged here and how that impacted differently than the citizenry at large. He stated that the two things that he heard from the applicant are the proximity (175') away from his property and that there is a prescriptive easement that burdens his property. He stated that the Board has to ask "is there any evidence presented by the applicant that shows that those two interests have been detrimentally impacted in this case by the approval of this particular project." Proximity alone has been held by the courts "not to be enough", and City Attorney Howard stated that the interest has to be detrimentally impacted by the project and the Board needed some sort of evidence in order to agree that the applicant has standing to appeal. If the Board did not have evidence, the appropriate motion would be to deny the appeal based on a lack of standing. Mr. Saenger stated that he did not want to get into a contested battle with a member of the bar, but he has seen documents submitted by attorneys where they are representing their clients, and "this gentleman is representing his client which is the City of Charlevoix where they have taken things out of context and represented them as being fact". He stated "if I do not have standing before the Zoning Board of Appeals, no citizen in Charlevoix has standing for any administrative action almost 95% of the time". He stated that he was trying to enjoy his property, have quiet enjoyment over a private easement and he was not contesting Mr. Anderson's right to develop; he was just saying that "it needs to be only as permitted by the City's Ordinance."

c. Response by subject property owner (Anderson).

Valerie Snyder, Attorney representing Patty & Jim Anderson who are the property owners at 304 Dixon Avenue, the property for which permit #5112 was issued and reminded everyone that the focus is permit #5112. Permit #5112 authorized the third garage, the wrap around porch, a set of egress stairs and a new chimney. She stated that there has already been quite a bit of discussion about a prior permit and project, but those items were not the subject of the Zoning Administrator's decision brought to the Board and she did not believe that under the Zoning Enabling Act or the City's Code that the ZBA has authority at this time to deal with issues that don't stem from the Zoning Administrator's decision to issue permit #5112.

Ms. Snyder stated that standing has to be evaluated in the context of permit #5112 and when looking at the issue of standing the question needs to be not just Mr. Saenger impacted by the project unless it's the project as defined by permit #5112. She stated the question is the addition of the third car garage, the wraparound porch, the egress stairs or the new chimney going to do what Mr. Saenger claims, such as increased traffic on the easement. She

stated that proximity alone is not enough to establish standing. She stated that the alleged increase of traffic on the easement alone is not enough to establish special damages required for standing.

Ms. Snyder stated with regard to the traffic issue, Mr. Saenger was correct in that property to property boundary is approximately 175' – 180'. She stated that the reference to 300' was in her letter which she took directly from Mr. Saenger's appeal application; he checked a box on his application to explain how he had standing and he said "I am a property owner within 300 feet". She stated in her letter that Mr. Saenger's property is roughly 230' from the proposed construction area and she believed that statement to be correct because the proposed construction area is up on the upper level of the Anderson's property while Mr. Saenger's property is 30-35' lower and at least 175' to the east.

Ms. Snyder stated that she included in her response to the Board three (3) photographs on pages 101–103. She stated that page 101 showed the relative location of Mr. Saenger's property to the Anderson property (from County GIS mapping). The photograph on page 102 is taken on Dixon Avenue showing the garage currently under construction on the Anderson property. She stated on page 103 the photograph was taken from the easement area on Mr. Saenger's property back toward the Anderson home where the garage being constructed is not visible. She confined her comments to Mr. Saenger's standing and asked the Board to find that the requirements for standing have not been satisfied and that the Board should not proceed to hear the merits of his appeal.

Chair Withrow questioned if there was any additional traffic on the easement relative to the new permit. Ms. Snyder stated that she did not know how there could be additional traffic because right now construction is on the upper level and the property is being accessed from the upper level.

d. Call for public comments.

Mr. Saenger stated with regard to any increased traffic on the easement he believed that the Board could not really make that assessment by car count until the project is completed; this is one of the issues again with citation of cases, but "you have to look at a turkey farm vs. someone who is putting in a PUD". Mr. Saenger stated that the principal with the porch is the "tipping point" so whether or not he was 200' away the project continues to get bigger and bigger. He stated that the permit under discussion was issued improperly because the project was not in compliance when this permit was issued. He stated the project was too big, did not have required parking, etc. and permit #5112 and the construction of it was only the tipping point that "says at a certain point somebody has to stand up and say where is this going, is this permissible". Chair Withrow stated that he did not disagree with him, however this application for their evaluation solely is with respect to this new permit. Mr. Saenger said the permit was issued improperly because the project it was issued to is not in compliance.

e. ZBA determination of findings of fact.

Member Bryan stated that he did not think that they had brought any harm to the issue. Chair Withrow read the definition of standing again, and stated that this issue was specific to Permit #5112. Member Bergman stated that he was concerned about less space between the two properties than what the Zoning Ordinance states already, and he questioned if the new construction was going to move the Anderson property closer to Mr. Saenger's property. Chair Withrow said it did not. Chair Withrow stated that the Andersons bought the property with the easement in place.

f. Motion

Motion by Member Bryan, second by Member Bergmann that the Board hereby dismisses ZBA Appeal 2015-05 because the applicant does not have legal standing to file the appeal based on the following findings of fact:

1. The Board finds that the applicant has not alleged and proven any special damages related to this issue that are different other than the public at large;
2. The Board finds that the issue raised in this appeal are similar to those brought forth in previous appeals where parties with similar circumstances as the applicant were found not to have standings regarding alleged violations on the 304 East Dixon project;
3. Nothing new or unique has been put forth to alter these circumstances and influence previous decisions by the ZBA and the Charlevoix County Circuit Court.

Yeas: Anderson, Bergman, Bryan, Withrow
Nays: None
Absent: Gorney, Miller, Nash

Chair Withrow stated that he would ask staff to be very diligent in making sure that the original permit that was issued is complied to at this point because that was what was agreed to under the previous Zoning Ordinance.

2. Public Hearing for Project 2015-06 ZBA. Appeal of Zoning Permit #5112 at 304 E. Dixon Avenue.

a. Staff presentation.

Interim Planner Panoff stated that the staff comments were the same for this case as the previous one.

b. Applicant presentation (Johnson).

Mr. Timothy Stoker stated he was appearing on behalf of Eldon Johnson as Trustee of the Johnson Trust, in regard to Zoning Permit #5112. He stated that their application sets forth a number of positions with regard to the granting of Zoning Permit # 5112 which he felt bear on the issue of standing. Mr. Stoker said in order to put the application into context he wanted to identify the Johnson property in relationship to the APJ Property. He stated when the zoning permit #3071 was originally granted, 212 East Dixon was not part of the parcel and this parcel was developed under #3071. He stated that the entire time the Johnsons lived next door. He stated that what they have today is what is being built under #3071 and what's being proposed to be built – the proposed garage and the wrap around porch. He stated that the ability of APJ to add this on to their property is based upon the calculations of impervious surface totality of the property. The Zoning Ordinance as amended only allows 40% as impervious surface on the property including structures and other surface materials, so the ability to put the addition on this house is contingent upon what exists on the property to begin with. Mr. Stoker stated that these properties now constitute one parcel, 304 East Dixon, and he stated that APJ needed the land to cure an illegal conformity with this parcel and also to add this addition onto the house. He pointed to the land that he believed was already illegal because this land exceeded the impervious surface lot coverage which is 40% before the properties were joined. He said that Mr. Spencer recognized that and denied the application without doing the detailed calculations. APJ then merged the three or four parcels together to form 304 East Dixon.

Mr. Stoker noted the applicant asked the ZBA to determine and interpret the meaning and the purpose of lot coverage and impervious surface requirements of the Zoning Ordinance. He stated that the reason is because the material submitted by the City itself is in conflict. Chair Withrow raised a point of order that the ZBA does not make definitions, they do interpretations. Mr. Stoker stated that the ZBA had a right to interpret the Ordinance. He stated that their position was that the Zoning Administrator improperly interpreted and applied the Ordinance. The Ordinance as it relates to the City's engineer and APJ's engineer is confusing because they cannot agree on what is the nature of the impervious surface as it relates to lot coverage within the Ordinance. He stated they were asking the ZBA to interpret what lot coverage and impervious surface means under Section 5.72. He stated that they also asked the ZBA to reverse zoning permit #5112 and to void the same for the reason that the application does not comply with Sections 527 and 572 because they were over and above the impervious surface permitted by the City's Zoning Ordinance. Mr. Stoker also asked that the ZBA grant the Johnson Trust such other relief as is warranted based upon the non-conforming status of the APJ property. He stated "that they are not coming here with clean hands, this already violates the Ordinance and our evidence will show that".

Mr. Stoker stated that their standing was this: "This City adopted or amended the impervious Ordinance requirements of the Zoning Ordinance to limit impervious lot coverage to 40%". Mr. Stoker proceeded to quote from Exhibit B which includes a statement written by the former Zoning Administrator Mike Spencer to the City Council regarding the adoption of the Ordinance, "Our old Ordinance only covered lot coverage for buildings or structures, we changed the standard to include all impervious surfaces such as sidewalks and driveways. This was done to prevent excessive lot coverage with large amounts of hard space, encourage more green space and help reduce stormwater runoff problems especially to neighboring properties and runoff into the City streets. This is also a good way to limit excessive home sizes which may be out of character with the existing neighborhoods." Mr. Stoker stated that the Planning Commission minutes with regard to this same text note that "to encourage property owners to install paver systems that filter stormwater and that Planner Spencer is encountering issues with owners wanting to create huge spaces that were not calculated in lot coverage."

Mr. Stoker stated that this Ordinance was adopted for two primary purposes, 1) to make sure that water filtration was not excessive and damaging to the neighboring property and 2) to make sure whatever was constructed in the R-1 single family house lot was consistent with the neighborhood and consistent with the requirements of the Zoning Ordinance. He stated that in this case both of those purposes are being violated with the pending application before

the ZBA. Chair Withrow questioned if they had seen any excessive water runoff on the neighboring property and Mr. Stoker said that was irrelevant. Mr. Stoker said that the Ordinance provided that the mere fact that the impervious surface exceeded 40% is illegal and the reason for that is to prevent a property owner from being subject to the potential water runoff when it exceeds that which was the decision made by the City Council. Member Bryan stated that he had not seen anything in the material that indicated that it exceeded 40% and Mr. Stoker said that was because "your calculations don't show that, our calculations show it does exceed 40%". Mr. Stoker stated that they surveyed the property and they submitted those calculations today to the Board.

Mr. Stoker stated that the Michigan courts have construed that an aggrieved party must show special damages which are not common to other property owners similarly situated. He stated that the Johnsons were not a common property owner. They were not common to any other property within the R-1 District because they were the next door neighboring property and pursuant to the terms of the Ordinance were an intended beneficiary of the 40% impervious surface lot coverage standard. He stated that property two blocks away does not have the potential exposure to water runoff or land massing or over building on the property which the Johnsons had. He stated that the Johnsons also had a right from a special damage standpoint if what's being requested changes the intensification, nature and character of the property next to them and that can cause a special damage to them.

Mr. Stoker stated in *Brown v. East Lansing 109Mich688* (page 700), the courts specifically found that owners of non-adjointing properties were sufficiently aggrieved to challenge a decision allowing the construction of a duplex on a non-adjointing property based upon evidence that college occupants in the duplex might create noise and other disturbance observable from their property. Chair Withrow questioned if it was fair to say that Mr. Stoker's argument hinges on the fact that they built more than they could on the first permit. Mr. Stoker stated that was one reason and the second was that the additional structures under the new permit exacerbates that. Their position was the property was at 43% right now on lot coverage without the addition, and with the addition including the added lot they will be at 54%, so they were increasing the non-conformity. He stated that the other calculations did not include the pavers and stones because they did not have the information as to what was the nature of the material of those stones and pavers. He stated that they requested that information from the City and the City received the information two weeks ago. He stated that the pavers were not permeable which was not considered by the surveyor and engineer, either for APJ or the City. He stated they had contacted the manufacturer after they found out what the materials were and they were submitted in an affidavit by their civil engineer to the ZBA defining the nature of the stones and pavers. He stated that the stones were imbedded in concrete.

Mr. Stoker stated that they asked for the meeting to be delayed so they would have more time to get the pertinent information to the ZBA, but their request was denied. Member Bryan asked the Zoning Administrator that in taking the site right now with the combination of all the lots and the property, if they came in and made the application for what they have built on that property would there be any problem and Interim Planner Panoff stated that the lot coverage numbers were included in permit #5112. Member Bryan stated that if Mr. Anderson were to buy the old Saenger house next door he could add more to that structure and Interim Planner Panoff responded affirmatively. Mr. Stoker stated that his argument was that the Ordinance limits the coverage to 40% and the Andersons exceed 40% in his opinion. Member Bryan stated that the information he was given said that the lot coverage was not exceeded and Mr. Stoker stated that the information he was given actually disputes itself because the City Surveyor understates the size of the structures on the property compared to APJ's own surveyor by almost 1,000+ feet and they don't include any of these surfaces. Mr. Stoker stated that they "have an affidavit from an engineer, under oath, that says what the materials are" in the meeting packet.

Chair Withrow questioned whether "there were truly some different materials used now that were not considered in the surveys that were done by the Andersons and the City Surveyor that are impervious that should have been considered in the base calculations". Interim Planner Panoff responded no and that they saw the construction of the bottom area that was being discussed. Chair Withrow stated that Mr. Stoker talked about putting some pavers or stones inside of concrete and if that was true then they had an issue. Interim Planner Panoff stated that staff inspected the area being constructed and found that stones are laid on top of drain stones; there was no concrete bed or anything similar. Chair Withrow stated that photos showed drain tiles which looked reasonable. Ms. Snyder stated that it was not correct to say that these areas are excluded from coverage; she stated that they are included in coverage and were included in the permeable calculation because they are permeable. She stated that the total lot coverage was not limited to 40% under the Ordinance; they were limited to 40% impervious coverage and then another 20% of permeable coverage. She stated that everything that is on the site is calculated in coverage, there is

nothing that has been excluded. She stated it was either calculated in the impervious calculation or in the permeable calculation.

Mr. Traver Wood, resident of Charlevoix Township and Landscape Architect with Site Planning Development, stated that he could address the project and materials. He stated he had a long history with this project and a detailed history with surveys done years ago. Mr. Stoker pointed out the location of the pavers, flagstones, and boulders set in concrete on the materials displayed at the meeting. He stated that they asked for information from the City as to what was installed on the site and they got an email from the Zoning Administrator on November 20th saying "attached is what I received from them this week, they will also be in the packet". He stated that the Zoning Administrator did not have the materials sheets identifying the pavers and flagstones and how the rocks were installed on the property when he made his decision. In his opinion it was not referenced in any of the surveys done by either benchmark or the City's surveyor. He stated that the information was not part of the Zoning Administrator's decision making process. Mr. Stoker stated that their civil engineer at Williams & Woods, Jeff Brinks, stated that "I was asked to evaluate the following installations on the property at 304 East Dixon Avenue, Michigan for which are impervious for the purpose of the Charlevoix Zoning Ordinance. The uni-lock Brussels blocks, which are referenced in here, Eden Premium Flagstone and boulder retaining walls. I was also asked to determine whether these installations are permeable assuming that permeable is defined to mean of a material membrane allowing liquids or gases to pass through. To conduct the requested evaluations, I reviewed the following: the definition of impervious in Section 510 of the Ordinance, Section 572 which pertains to lot coverage, details provided by the owner of 304 E. Dixon showing the manner in which the pavers, flagstones, retaining walls were installed on the property including all materials used in the installation." Mr. Stoker stated that Mr. Brinks then looked at the product details for the Brussels block pavers and the Eden Premium Flagstones as provided by the manufacturer. Mr. Brinks stated in his report that after completing his review "each individual Brussels block paver is impervious as that term is used and defined in the Charlevoix Zoning Ordinance; I am aware that some manufacturers produce permeable pavers that do not substantially reduce or prevent the infiltration of stormwater, but such pavers were not used at 304 E. Dixon; the pavers installed at 304 E Dixon prevent the infiltration of stormwater. The individual slab of Eden Premium Flagstone is impervious as that term is used and defined in the Charlevoix Zoning Ordinance and prevents the infiltration of stormwater; in addition the joints between each individual paver of flagstone are not constructed with the intent to infiltrate stormwater and are impervious as that term is used and defined in the Charlevoix Zoning Ordinance meaning the entire area covered by pavers and flagstones is impervious. The boulders in the retaining walls are impervious as evidenced by the term as used and defined in the Charlevoix Zoning Ordinance. All the items determined to be impervious for purposes of the Charlevoix Zoning Ordinance also failed to qualify as permeable under the following definition or term of a material membrane allowing liquid or gases to pass through."

Mr. Wood stated that what they have here is a permeable surface. He stated that he wanted to show a 2-minute video to demonstrate the issue to the Board for them to make their own decision. He stated that the block itself is like any other paver in that water is going to run off of that block and the question was what happens between the blocks and what happens once it runs down between blocks. He stated that with the installation of the boulders or stone retaining walls he did not know where they would have found concrete because he knew that those walls were not installed with concrete. He stated that they were stacked boulders and depending on the height of the wall there was a prescribed depth of crushed aggregate on geotextile fabric as a foundation and there is a prescribed minimum of crushed clean aggregate backfill behind the boulders and that minimum could not be met because an engineer drew the drawing with the walls straight and the backfill straight behind it but the the cut slope and fill are not straight and even. He stated that there were hundreds and hundreds of tons of cleaned crushed aggregate underneath and behind those retaining walls. Mr. Wood ran the video for the Board and described what he was doing on the video at the project site.

Mr. Stoker read the definitions in the Ordinance of impervious lot coverage. Chair Withrow asked Mr. Stover to tell the ZBA why the property owner was aggrieved by the impervious surface and Mr. Stoker stated that the property owner was aggrieved because the application allows the property owner to exceed by structure and by coverage over 40%. Mr. Stover stated that in this case an interpretation that allows impervious surfaces to exceed 40% would apply to everything on the property. He stated that there was also the issue of massing on the property and Chair Withrow said that was not what the Board was discussing. Chair Withrow asked how the property owners had standing and Mr. Stoker stated that their client was the property owner immediately next door that is subject to the potential water runoff which is the intent of the Ordinance to protect the neighboring property. The City had done a bright line test in that they said 40% is the limit of structures and they have gone over that.

Chair Withrow stated that their position was that the Johnsons were next door and they believe that the material on the site is too great which presents a risk for them above and beyond what the Zoning Ordinance said of water runoff. Mr. Stoker agreed that was one issue, but in addition to that an interpretation that allows the lot coverage to go beyond 40% allows for massing which exceeds what is permitted in the Ordinance.

c. Response by subject property owner (Anderson).

Ms. Snyder noted in the video that the slope toward the Anderson's property was done intentionally to prevent any issues like those being addressed at the meeting. She stated there was case law that stated that the status as a neighboring property owner was not enough and the applicant still had to prove the special damages. She stated that what they were hearing about as special damages was the notion of runoff that Mr. Johnson is in the unique position of being the neighboring property owner and therefore more subject to runoff than anyone else. She stated that he has alleged that but not proven it. She stated that the video proves that he is not subject to runoff.

Ms. Snyder stated that rainwater from the Anderson's roof will be collected into underground tanks and then filtered into the groundwater. She stated that this project was designed to be more permeable than any other project. She stated that the Johnsons were not the only neighboring property owners as there were two other adjacent property owners to the west of the property. She stated that Mr. Johnson's situation was not unique therefore, it was not sufficient to declare standing under the law.

Ms. Snyder referenced a picture on display and asked the Board to look at how close the Johnson's house was to their neighbors, and there had been three houses on the Anderson property. She stated that the impervious surfaces removed from the 212 lot were actually more than the square footage that was approved by permit #5112. So the Andersons were actually decreasing the mass on that whole parcel.

Ms. Snyder stated that Section 572 states that when calculating lot coverage "the use of materials such as gravel or stone, pavers and similar permeable surfaces shall not be calculated in lot coverage". She stated that all three of the items the Johnsons were challenging - stone, pavers and boulders were specifically excluded from the calculation of lot coverage.

d. Call for public comments.

Eldon Johnson stated he had a residence at 306 Dixon Avenue and he owned the property since 1986. He stated that there was not an allowance for a boathouse in R-1 when they got their first permit. He stated that the City has been changing their ordinances constantly to keep up with the Andersons' needs and they have talked about permit #3071, a permit that they finally achieved and constructed under. He stated that the structure has been under construction since January 2, 2011. He questioned what is going on with this project and questioned if that was a single-family home and what did the City want the north side of Round Lake to look like. He stated that with the change in the Ordinance the City has given the Andersons 33% more building on that lot than what was approved in #3071. Mr. Johnson stated that he heard comments during the meeting that the Andersons could add property and continue to grow this into a massive structure. He stated that it had well over 40,000 sq. ft. of living and floor area, that's not single-family. He stated that the City has changed the use and the character of the entire neighborhood.

Mr. Johnson stated their concern was that they started with the two lots that were always a party to APJ and their whole project (the old Holly Martin properties), then APJ bought 212 Dixon, and in May of this year they combined the property at 212 Dixon into the overall property. He believed "that property had absolutely no right whatsoever to be allowed to be mixed in there and then go through our easement". Mr. Johnson stated that a prescriptive easement was only granted by use and that use in this particular case was from 1965 to 1985 by the previous owners and there was 5,000 sq. ft. with two small houses on it and a couple of docks. Member Bryan stated that there were three houses on the property previously and Mr. Johnson stated that 43,000 sq. ft. is not a house. He stated that the massive structure had no capability to be in that neighborhood. He stated that within a 5-year building period, the City had changed tremendously what can be built there as compared to the #3071 Zoning Permit and he believed that APJ was now taking the benefit of the 9,000 sq. ft. lot that was added which was never part of the easement and the City has granted APJ the ability to cover where his overage is.

Mr. Johnson stated that there has to be some determination as to what the City of Charlevoix should continue to look like. He stated that they have tried to keep it on a historic basis. He said that they bought the old Willis property and have lived there for 30 years. He stated that APJ was changing the character of the neighborhood and they owned five (5) other properties and they were going into this club and using that as an amenity for all the other off-site

houses. Chair Withrow stated that he did not know that to be true and he said there was no exact proof because no one was living in the home right now. Mr. Johnson stated that APJ had received an occupancy permit for the boathouse and they were using it. Chair Withrow said that no one was living in the boathouse because it was specifically excluded. Mr. Johnson stated that when APJ got their building permit, the Building Department called it 3,800 sq. ft. of living area. He said it was supposed to be exclusively set-up for boat storage and marine storage but it isn't. Chair Withrow stated that he had not been inside the boathouse and it was their understanding that it is for boat storage, associated marine items and also some platforms and a washer/dryer and it specifically excluded bedroom facilities.

Former Planner Mike Spencer stated that he had a lot of involvement in this project and he wanted to make some general statements about zoning and how zoning should evolve and change over time. He stated in the original Zoning Ordinance from 1941 it included that boathouses were a permitted use in a single-family residential zone. He stated that there had been a statement made that the boathouse was illegal to begin with and clearly it was allowable since 1941. He stated that Mr. Stoker made a comment that he denied the original permit because of coverage which certainly isn't true and in fact he stated in his letter that they could not determine coverage based on the resources available at the City. He stated he was not a surveyor and that's why they needed someone from outside the City to double check coverage and that was a recommendation he made to staff when he left the City and they found that it met coverage so they approved the permit.

Mr. Spencer stated that throughout this process staff has documented this project substantially. He stated before the pervious systems were installed staff went out and photographed. He thought there was at least 8" of aggregate stone underneath the pavers. He stated throughout this process staff triple checked this and they had evidence and pictures of it. When staff didn't have the ability to check things they would hire someone like the surveyor to check coverage in this case. Mr. Spencer stated that whether or not the project fits in the neighborhood is not something defined in the Ordinance. He stated that after the project was approved and construction started the City went through a series of amendments to address things like this and the current Ordinance was far more restrictive than what was in place at the time. He stated that throughout this process the applicants have said that the project does not meet the Ordinance, but they have not provided any proof on how it didn't and that has put the ZBA and staff in a precarious position because in order to overturn something the applicant would have to have evidence that it was violating the Ordinance and they just haven't seen that evidence.

Mr. Spencer stated that the City does not have a Zoning Ordinance that limits the size of structures and until the City adopts something like that there is the potential for somebody to buy and build larger properties. He stated that the Planning Commission decided to not put a limit on structure size and square footage for a residential, commercial or industrial property. The Planning Commission felt that the condition of adding the impervious surface requirement would help with the restrictions on the size of structures like the boathouse. Chair Withrow stated that the point Mr. Spencer had made was that it was not for the Zoning Board to determine what is not in the Zoning Ordinance; it's up to the Planning Commission to change the Ordinance to whatever they want it to be and the ZBA to interpret that information. Mr. Spencer stated that City Council would have to adopt any Ordinance changes.

Mary Eveleigh, 1st Ward, stated she was speaking for herself. She referenced a letter Mr. Spencer wrote to the Andersons on denial and it appeared that he was saying that the affidavit was not a legal document and there was a quick claim deed on a separate parcel. City Attorney Howard stated that it was a lawful way to transfer property and he explained the difference between a quick claim deed and a warranty deed.

e. ZBA determination of findings of fact.

Chair Withrow stated that the first order of discussion was the issue of standing and he summarized what was presented earlier in the meeting and based on what was presented he did not feel that they had any unusual circumstances. Members Bryan and Anderson commented that he summarized everything perfectly. Member Bergmann stated that he thought they needed to take a closer look at Mr. Johnson's complaint as he hadn't had a chance to read it since it was just presented to the ZBA that evening. He stated that perhaps they needed to get a quorum to actually go out and look at the property and test it ourselves "to make sure what's what up there before we can come to a yes or a no". He stated if what is on the site now is okay he questioned what was coming down the road next year. He believed that the ZBA needed those answers before they can make a decision.

Chair Withrow stated that the ZBA could not anticipate what was to come in the future; but they could look at the current situation and determine what was acceptable. Member Bergmann stated that he needed to go look at the property before he could cast his vote.

Chair Withrow stated that what they needed to consider was if there was a problem with runoff and the Zoning Ordinance tries to control that with lot coverage requirements. He stated that based on Member Bryan's observations, his engineering experience, and the video he saw he believed that the interpretation that the City and the Anderson's surveyors did shows that there is an appropriate coverage, that it doesn't exceed the coverage requirements. There is no evidence of substantial harm to anyone; he did not believe there was anything to have a standing on. Member Bergmann stated that he also heard conflicting information in that one set of papers it says the material is concrete and one says something else and he wanted to know what was under there for sure. Discussion followed regarding the specific materials of the pavers and the flow of the runoff.

Chair Withrow questioned who could speak to the coverage of the garage, porch and the pavers and how much square footage is that vs. the existing because he felt there was some confusion. Member Bergmann stated that the garage and other things being constructed were not permeable. Neil Holshoe, Surveyor for APJ, stated that he never computed the actual square footage of the proposed material, but it is all included in the overall square footage of his computations. He stated that he took the overall square footage of the property under consideration, the overall square footage of the existing building structure as well as the proposed features that they were requesting into his computations. Chair Withrow stated that the surveyor did not include pavers that the applicant is considering to be impervious surfaces and that is where the discrepancy is in the two different surveyor's calculations. Mr. Holshoe stated that it was his opinion that it was in the determination of what is permeable and impermeable paver blocks. Member Bergmann questioned if there was some sort of confirmation from the manufacturer of that product and Mr. Holshoe stated he did not research that. Member Bryan stated that the blocks were impermeable.

Chair Withrow said to be fair they needed to ask the Surveyor for the Johnsons to help them understand what portion of the APJ Surveyor's calculation was involved in the pavers. Lawrence Aubaugh, Williams & Works, said they did the survey for the calculations of the area. He stated that he was a surveyor and not a civil engineer so he could not offer an opinion on permeability. He stated the existing pavers made up about 4,000 sq. ft. He stated that if they were talking just about the additional garage and the porch that would add about 4.5% with the 39.5% from the other company. Member Bergmann stated that would take it to 43.5%. He stated that if you take the bricks out of the picture simply going with the addition of the porch and garage puts the lot coverage over 40% based on one calculation. Interim Planner Panoff stated that by the City's calculations that brings it up to 32% with the addition of the buildings.

Member Bergmann stated he wanted to look at the numbers and Interim Planner Panoff said the calculations were on page 37 of the packet.

The Board took a five-minute break.

Chair Withrow stated that he wanted to end discussion on this topic and get back to the question of standing.

f. Motion

Motion by Member Bryan, second by Member Anderson that the Board hereby dismisses ZBA Appeal # 2015-06 because the applicant does not have legal standing to file the appeal. This motion is based on the following findings of fact:

1. The Board finds that the applicant has not alleged and proven any special damages related to this issue that are different from the public at large;
2. The Board finds that the issues raised in this appeal are similar to those brought forth in previous appeals where the applicant was found not to have standing regarding alleged violations on the 304 East Dixon project; nothing new or unique has been put forth to alter those circumstances and influence previous decisions by the ZBA and Charlevoix County Circuit Court.

Yeas: Anderson, Bryan, Withrow
Nays: Bergmann
Absent: Gorney, Miller, Nash

(G) CALL FOR PUBLIC COMMENT ON NON-AGENDA ITEMS

None.

(H) ADJOURNMENT

Motion by Member Bergmann, second by Member Anderson to adjourn the meeting. Motion passed by unanimous voice vote.

The meeting adjourned at 8:18 p.m.

Greg Withrow, Chair

Joyce Golding/fgm, City Clerk