

CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES
Wednesday, September 14, 2011 - 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 Chairman Withrow at 6:00 p.m.

B) ROLL CALL

Members Present: Gary Anderson, Richard Clem, Mary Eveleigh, Larry Sullivan, and Greg Withrow
Members Absent (excused): None
Staff Present: City Planner Michael Spencer, Assistant City Attorney Bryan Graham

Alternate Member Sullivan was designated as a voting member.

C) INQUIRY INTO POTENTIAL CONFLICTS OF INTEREST

Mary Eveleigh advised the Board that per the ZBA Bylaws Section 4.2 she has a conflict of interest with Project 2011-05 ZBA as she lives within 300' of the project and she has a private interest. She asked the Board to excuse her.

D) APPROVAL OF AGENDA

The Agenda was approved as presented.

E) APPROVAL OF MINUTES

1. Motion to approve or amend the August 17, 2011.

Member Eveleigh asked that the last sentence of the second paragraph [page 1] under approving the May 18, 2011 minutes be removed. The City Planner agreed to remove the sentence.

Member Eveleigh also asked for a legal interpretation on whether the interpretation made by the Zoning Board of Appeals on May 18, 2011 was done per the Zoning Enabling Act. City Planner Spencer agreed to give the City Attorney authorization to prepare a written interpretation.

Motion made by Member Clem and seconded by Member Anderson to approve the August 17, 2011 minutes as amended. Motion adopted by unanimous voice vote.

Member Eveleigh left the dais.

F) NEW BUSINESS

1. Public Hearing for Project 2011-05 ZBA
 - a. Staff Presentation

Assistant City Attorney Bryan Graham asked the Board to review his September 7, 2011 memorandum. There are two issues that the Board needs to address.

- Does Mr. Johnson have the legal right to file this appeal?

In June 2011, Mr. Johnson filed an appeal of an administrative decision. The June 2011 appeal

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raised issues on zoning enforcement. The law requires that an applicant submit all the issues to be decided at one time. The law calls it doctrine of res judicata. It requires that all the issues be brought to the table at one time.

If the Board does not dismiss the appeal, the Board must consider a second issue.

- Does Mr. Johnson have legal standing to raise the appeal?

The Board needs to determine if Mr. Johnson has established any special damages and if he has not, then he does not have legal standing under the law to make the appeal.

b. Presentation by Applicant (If requested).

Chairman Withrow asked Mr. Johnson's counsel to restrict his comments as to why res judicata does not apply.

Timothy Stoepker representing Mr. Johnson addressed the Board. The appeal before the Board is in response to Zoning Permit #3071. The validity of Zoning Permit #3071 was not part of the decision making process by the Zoning Board of Appeals at its June 29, 2011 meeting. The Circuit Court did not determine until August 1, 2011 which Zoning Permit was in effect.

Mr. Stoepker gave the Board the following:

- 33rd Circuit Court Case No 07-821-21-CH Motion for Entry of Order
- Zoning Permit #2850 issued on March 26, 2007
- Zoning Board of Appeals Findings of Fact Case #09-03ZBA
- 33rd Circuit Court Case No 07-821-21-CH Order
- State of Michigan Court of Appeals Case No 291473
Norma Camp, Eugene Chardoul, Nan Ruth Chardoul, Eldon E Johnson, John Reis and Eugene Saenger, Jr vs City of Charlevoix, Gerry Harsch and Dianne Manore
- 33rd Circuit Court Case No 07-821-21-CH Decision and Order

On June 17, 2011, before the Board heard the appeal, the Anderson's attorney filed a motion in Circuit Court asking that Zoning Permit #2850 be reinstated. The request was based upon the Michigan Court of Appeals 2010 decision. At the time the Zoning Board of Appeals reviewed Case No 2011-03 ZBA, the Court had not determined what Zoning Permit and what Zoning Ordinance had jurisdiction. The Zoning Board of Appeals did not discuss what Zoning Permit was in effect and what ordinance was to be used for the Anderson's project construction.

Mr. Johnson's appeal, which was heard before the Board on June 29th, dealt only with the actual construction and the sequence of construction of the Anderson's project. The Board reviewed construction photos and determined if the construction violated the side yard setback requirements. The Board did not discuss vested rights. At that time, it was unknown what Zoning Permit the Andersons would use. The County had issued the Building Permit using Zoning Permit #3071. At the date of the Zoning Board of Appeals hearing, the Anderson's were claiming to the Circuit Court that they should be able to use Zoning Permit #2850. The Board's June appeal reviewed only the construction in the field.

After the hearing, the Anderson's filed a second motion with the Circuit Court asking it to reinstate Zoning Permit #2850. On August 1, 2011, the Circuit Court entered an order rejecting the Anderson's argument and stated that the Permit #2850 is null as the Anderson's chose to use another permit (Zoning Permit #3071). It was not determined until August 1st what Zoning Permit was in effect and what permit should

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be reviewed by the Zoning Board of Appeals. The Anderson's applied for a building permit in December 2010 using Zoning Permit #3071. The issue of what Zoning Permit that Andersons were using was up in the air in June, 2011.

Mr. Johnson's ZBA appeal was filed on August 5th after the Court had determined that Zoning Permit #2850 had been nullified. This appeal focuses on Zoning Permit #3071 and whether the Anderson's have vested rights to the zoning ordinance under Zoning Permit #3071. On June 29th the Board reviewed the encroachment into the mandatory 15 foot side yard setback, the building of the accessory building (boat house) prior to the building of the principal use and impact of the rear yard. The Board did not look at the zoning ordinance or the zoning permit.

Chairman Withrow asked if there was any difference between what was brought up on the original zoning permit and the subsequent zoning permit.

Mr. Stoepker stated that different ordinances were in place at the time Zoning Permit #2850 and Zoning Permit #3071 were approved. He is unable to guess the issues, as the Anderson's are unable to decide which Zoning Permit they wish to use. The Courts did not determine until August 1st that Zoning Permit #2850 was declared null and void and upheld that Zoning Permit #3071 was valid. It was not until Mr. Johnson received confirmation on what Zoning Permit was in place that he could ask for a review of the zoning ordinance as it related to Zoning Permit #3071.

The Zoning Board of Appeals June 2011 decision was only that the side yard setback had not been violated. The Board did not decide that the Anderson's had any vested rights or that the City or Johnsons are stopped on the issue. There haven't been any findings that determine that they have standing. The Zoning Board of Appeals at its June 29th meeting made no findings that the City can't enforce its ordinance. There was no decision made on the merits. The appeal focuses on Zoning Permit #3071. The Johnsons were unable to ask for a review of Zoning Permit #3071 until the Circuit Court had made its ruling. This case involves four parties – the City/Johnsons/Andersons/the Andersons' LLC. All parties must be present to have res judicata.

c. Presentation by Anderson (If requested).

Valerie Snyder representing the Anderson's spoke to the Board. The Applicant has claimed that their questions could not be raised at the June 29th hearing, as they did not know what permit the Anderson's were operating under is disingenuous at best. Zoning Permit #2850 was revoked by the Zoning Board of Appeals on June 24, 2009. The permit does not exist, so the Anderson's could not have been operating under this permit. The building permit references Zoning Permit #3071. The appeal letter dated May 31, 2011 references Zoning Permit # 3071, so there was no doubt that they (the Johnsons) knew what zoning permit was being used. Mr. Spencer's letter to Ms. Powers also refers to Zoning Permit #3071.

The Anderson's have never claimed to be operating under Zoning Permit #2850. Their motion was filed to protect the Anderson's rights. Both permits have been subject to endless attacks from the appellants. Due to the continued attacks upon Zoning Permit #3071, the Anderson's sought to protect Zoning Permit #2850. Judge Patjas disagreed and did not reinstate Zoning Permit #2850. Zoning Permit #2850 has not existed since June, 2009. The Anderson's have never asked to operate under Zoning Permit #2850. The August 1st Circuit Court decision has nothing to do with the ZBA June 29, 2011 proceedings. Mr. Stoepker's comments on res judicata are correct. Mr. Stoepker agreed that the issue was determined by its merits and that is all we need. Could the issue have been raised at the Board's June meeting? It did not come about until after the hearing. Ms. Snyder asks that the appeal be dismissed due to res judicata as outlined by the City's legal counsel.

City Planner Mike Spencer confirmed that the Anderson's have been operating and have always been

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operating under Zoning Permit #3071. The permit will be litigated for sometime to come. Zoning Permit #3071 was issued by Mr. Spencer and was upheld by the Zoning Board of Appeals and by the Circuit Court.

Chairman Withrow asked Mr. Graham if he had any questions or did the comments made at tonight's meeting change anything in Mr. Graham's opinion.

Bryan Graham informed the Board that having listened to the attorneys and being in attendance at the past Zoning Board of Appeals hearings, the discussion at the last hearing had nothing to do with the permit. The June appeal dealt with Mr. Spencer not taking enforcement action as it relates to the side yard issue. It was argued that the 2010 zoning setback amendment should be applied to the Zoning Permit #3071. At the time of the hearing, it was demonstrated to the Board that the definition of side yard which was the basis of the Board's prior decision, had not been changed in the 2010 amendment. Because of that finding, the Board upheld its earlier position. The Board did decide the issue upon the merits and it was based on an assertion that the 2010 amendments should be applied. It makes no difference what permit is being used, the 2010 amendments were in existence and everybody knew it. Arguments were made that the present construction did not comply with the current zoning amendments. The Johnsons had the ability to raise questions on the 2010 amendments. The Johnson's attorney talked about vested rights. Mr. Graham feels his opinion stands and the doctrine of res judicata still applies.

Chairman Withrow asked Mr. Graham to explain "vested rights". Mr. Graham advised the Board that if someone has a vested right under a zoning permit, they do not have to worry about subsequent amendments. The Johnson's appeal found that the Anderson's had to comply with the 2010 amendments. That is a flip side of saying they had vested right. If in fact a property owner has to comply with a zoning amendment that was enacted after they received their zoning permit then they do not have vested rights. If the property owner does not have to comply with a new amendment, they have vested rights. In the June appeal, it was argued that the Anderson's had to comply with the 2010 amendments. The issue was raised and only the retaining wall and side yard setback was discussed. The Johnsons could have raised questions on all the other zoning ordinance provisions that were changed.

Larry Sullivan asked if a party pulls a zoning permit but did not start construction right away, does the issuance of the zoning permit give them vested rights or is it only when there is a substantial expenditure of funds that determines that they don't have to comply with the regulations adopted after they received the zoning permit.

Mr. Graham stated Zoning Permit # 3017 had already been issued when the amendments were enacted in the summer of 2010. The Johnsons were aware of the proposed zoning amendments. The Johnsons should have raised the issue of whether or not the Anderson's had to comply with the new regulations in the fall of 2010, prior the start of construction. If they (the Johnsons) had asked Mr. Spencer if the Anderson's had to comply with the new regulations, Mr. Spencer would have advised them no. The Johnsons could have initiated an appeal to the Zoning Board of Appeals prior to the Anderson's starting construction. The Johnsons 2011 appeal gave them the opportunity to question if the 2010 amendments would apply to the Zoning Permit #3071. But their appeal referred to only the side yard requirements.

Mike Spencer reminded the Board that the appeal was filed thirteen months after the zoning amendments were made to the City Zoning Ordinance.

Chairman Withrow asked if there were any other comments from individuals who have already presented to the Board.

Valerie Snyder asked to point out that when an appeal was made, there is automatically a stay issued. In this case, Zoning Permit #3071 was issued on August 28, 2009; there was an automatic stay until the

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Zoning Board of Appeals made its decision in May 19, 2010. So there was a nine month period that the Anderson's were not permitted to do anything.

d. Rebuttal by Applicant (If requested).

Mr. Stoepker addressed the Board. When the Zoning Administrator issued Zoning Permit #3071, the Johnsons went to Circuit Court asking for the stay until it could be reviewed by the Zoning Board of Appeals. The Anderson's stated they wanted to start construction immediately. Prior to the issuance of Zoning Permit #3071, the Circuit Court issued an order stating that there would be no stay on the construction. The Anderson's told the Court that they would be prejudice if they were not able to start their retirement home immediately. There was no automatic stay. On May 19, 2010, the Johnsons once again asked for a stay from the Circuit Court to halt construction and the request was denied.

The Johnsons are not seeking to prolong litigation. The Anderson's counsel stated "that we would operate under whatever permit gives us vested rights". How are they (the Johnsons) supposed to guess what that would be? How are they supposed to argue Permit #3071 when the Andersons are seeking that the Court give Zoning Permit #2850 back to the Andersons? They waited to find out what Zoning Permit was in effect. The zoning ordinance has been amended twice since Zoning Permit #2850 was approved. The Andersons have appealed to the Court of Appeals to use Zoning Permit #2850. Before the Zoning Board of Appeals heard the appeal on June 29th, the Andersons had asked the Circuit Court to reinstate Zoning Permit #2850.

City Counsel has stated that it was up to the Johnsons to raise the issue of vested rights to the City or to seek enforcement. That's the job of the zoning enforcement officer. The ordinance says that the Zoning Enforcement Officer shall seek and abate a nuisance which is in violation of the zoning ordinance. Mr. Graham has told you that the mere issuance of a permit does not give you vested rights. Both Mr. Graham and the Anderson's counsel stated before the Court in November 2010 that there was an issue of vested rights in the zoning ordinance amendments. The Johnsons have every right to expect if there was an issue of vested rights, that Mr. Spencer wouldn't have written the letter to the Building Department authorizing the Anderson's building permit to be issued. It is his job to enforce the zoning ordinance. The Johnsons have been told there is res judicata. Shouldn't they have standing to raise the issue? The only persons who can raise the issue is the City, but the City failed to do so. The Johnsons are now violated because the zoning ordinance requires that a boat house have a special use permit and is limited to 2000 square feet. Mr. Spencer knew in November 2010 that there was a vested rights issue, not raised by the Johnsons but raised by the City Attorney and acknowledged by the Anderson's attorney. The City should have stepped in. Mr. Stoepker asked the Board to look at the status of construction. The boat house has not been built; only a dock, footings and foundations have been built. There is no prejudice by following the ordinance and making the Andersons go through the special use permit application process to see if they can build a boat house less than 2,000 square feet. The Andersons have their dock and sea wall. To say that the Johnsons failed to do something, when the zoning ordinance mandates that the Zoning Enforcement Officer do it and he failed to do so and tell the Johnsons that they do not have standing to do so is preposterous.

Chairman Withrow gave the Anderson's counsel an opportunity to make further comments.

Valerie Synder addressed the Board. She feels there is some confusion on which stay is being talked about. If an appeal is filed on an administrative decision, like the appeal filed by the Johnsons when Zoning Permit #3071 was issued, then there is an automatic stay under the Zoning Enabling Act. This has nothing to do with the Circuit Court. It is an automatic stay. This stay was in effect until May 19 2010. After the Zoning Board of Appeals made their decision, you can go to Circuit Court and the Circuit Court can issue a stay. We (the Andersons) have never been in court on the issue of a stay from the Zoning Administrator to the ZBA. The Johnsons asked that the City not issue Zoning Permit #3071, they wanted

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a stay of the administrative process of reviewing/issuing the zoning permit application. Judge Pajtas said no. The Judge authorized the City to go ahead and process the application. From that point, the process was normal.

Member Clem confirmed that the question before the Board is only res judicata. Chairman Withrow confirmed that that was issue before the Board. There has been a lot of discussion about stays and he asked that we only address the res judicata issue.

e. Call for public comment

Chairman Withrow asked if there were any public comments from the audience.

No comments were made.

f. Motion

Chairman Withrow asked the Board to determine how to proceed.

Member Clem asked Assistant City Attorney Graham if anything had been stated that changed his opinion on the matter. Mr. Graham said that his opinion has not changed.

Chairman Withrow reviewed that the Board discussed the new code sections at the last meeting. So there was an opportunity to discuss other issues at the meeting.

Member Clem confirmed that the Andersons are still operating under the same building permit that was in place at the last meeting.

Member Sullivan felt that Zoning Permit #3071 was still in place and those issues were brought up at the previous meeting.

Motion made by Member Clem and seconded by Member Anderson that for the reasons stated in the memo from Assistant City Attorney Bryan Graham dated September 7, 2011, which reasons are incorporated by reference in this motion, Case No. 2011-05 ZBA is hereby dismissed in its entirety, since this appeals is barred by the doctrine of res judicata.

Motion adopted by the following yea and nay votes:

Yeas: Members Withrow, Sullivan, Clem and Anderson

Nays: None

Motion adopted.

Member Sullivan asked if the previous zoning permit should be revoked. Mr. Spencer advised the Board that the previous zoning permit (Zoning Permit #2850) has been revoked by the Court.

G) OLD BUSINESS – None.

H) CALL FOR PUBLIC COMMENT (Not related to agenda items) – None.

I) ADJOURNMENT

Motion made by Member Clem and seconded by Member Sullivan that the meeting be adjourned.

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Motion adopted by unanimous voice vote.

The meeting was adjourned at 6:55 p.m.

Greg Withrow, Chairperson

Linda Jo Weller, Recording Secretary

Carol A. Ochs, City Clerk