

**MINUTES OF THE CLAY TOWNSHIP ZONING BOARD OF APPEALS
HELD ON THURSDAY, SEPTEMBER 17, 2009 IN THE CLAY TOWNSHIP
MEETING HALL, 4710 PTE. TREMBLE ROAD, CLAY TOWNSHIP,
MICHIGAN 48001 AT 7:30 P.M.**

1. CALL TO ORDER:

Chairman Anthony Antkowiak called the meeting to Order at 7:30 p.m.

2. ROLL CALL:

PRESENT: Brian Treppa, Marianne Diss, John Chamberlain, John Makuch, Chairman Anthony Antkowiak

A quorum was established.

Also Present: Mike Kras, Township Building Supervisor; John McNamee, Township Attorney

3. APPROVAL/AMENDMENTS TO AGENDA:

None.

4. APPROVAL OF MINUTES OF AUGUST 20, 2009

Motion by Chamberlain, supported by Treppa to approve the Minutes of August 20, 2009 as submitted.

AYES: All NAYS: None

MOTION CARRIED.

5. ZONING BOARD OF APPEALS PREFACE

The Clay Township Zoning Board of Appeals (ZBA) primarily addresses practical difficulty based on lot size, location, shape, or contour and/or location of existing buildings. We are guided by Section 27.05 of Ordinance No. 126. There are five members on the ZBA. Three members constitute a quorum. Each appeal before the ZBA who have first a public hearing, at which time the Appellant will first present his or her case and then any public comment regarding that issue will follow. During this time, members of the Board may ask questions of clarification. If a particular point gets belabored, the Chairperson has the right to limit comments. When the public hearing is closed, the Board will move onto the deliberation phase of the particular request before us. If the Appellant should disagree with the Board's decision, he or she has the right to take it to the Circuit Court within 30 days of the decision. When your appeal hearing is concluded, you are welcome to leave or stay as you wish.

6. OLD BUSINESS:

2009-005 – Chris & Carla Orlando, Raymond & Darci Sankuer – Interpretation of Zoning Ordinance Regarding Fence At 7359 Flamingo

Chairman Antkowiak: Stated that last month we had the public hearing where the public provided us with a lot information. We chose at that time to postpone our deliberations until tonight. Before beginning deliberations, he requested Mr. McNamee share his letter with the ZBA and the information contained therein.

McNamee: He has several treatises on the zoning and also looked to see as to any particular case law that may be on point with respect to some of the issues that are before the ZBA today. There is no specific case on this particular issue, which didn't surprise him because these things tend to be very fact based. They tend to be handled at an administrative level and the appeals tend to go to Circuit Court and not necessarily published opinions from the Court of Appeals or the Supreme Court. Most of those cases that get decided at that level have to do with broader questions than a specific issue regarding a fence, the height of a fence, or a non-conforming use. He looked at the specific Ordinance and attempted to layout to the ZBA that the first issue that needs to be decided is the jurisdiction, i.e, what is the responsibility of the ZBA versus the responsibility of the Zoning Administrator. In our particular Ordinance, he thinks it is clear, based on the information he has reviewed, that this is a non-conforming structure. It did exist before the advent of our first zoning ordinance, Ordinance No. 89, which particularly dealt with these kind of fences in this location. It is a pre-existing non-conforming use. Therefore, the ZBA must look at that particular section to make a determination as to how that non-conforming use will be used into the future. Our current Zoning Ordinance, No. 126, provides that the Zoning Administrator has the responsibility for the enforcement and administration of the Zoning Ordinance. Questions that come before the ZBA are questions such as variances, interpretation, and the ZBA is also the appeal body if someone feels aggrieved by a decision of the Zoning Administrator. His review of this is that what has come before the ZBA is the decision by the Zoning Administrator to allow the issuance of a permit for the replacement of the non-conforming fence at 7359 Flamingo. This is not a use that was discontinued, this is a current use of a fence. The Zoning Administrator made the decision as stated in his communication of August 13, 2009 with 10 items listing his reasons for his decision. Essentially, he specifically relied upon Section 3.23(4)(c), which indicated that if a non-conforming structure, which would be the fence in this particular matter, contains a non-conforming use which is unsafe or unlawful due to a lack of repairs or maintenance as determined by the Zoning Administrator or Township Building Official may be restored to a safe condition. Our Zoning Ordinance specifically authorizes the Zoning Administrator to make that determination. That is the person who has the authority to make that determination. It also indicates that if it's going to be replaced, the cost should not exceed 40% of the existing structure as determined by the Township Assessor. The Township Assessor has the specific job of making that determination of whether it exceeds that 40%. Those two persons have that responsibility under our Zoning Ordinance. That decision can be reviewed by the ZBA as to whether or not it is correct under the Zoning Ordinance. Neither the Zoning Administrator nor the ZBA has the authority to go beyond the powers and the duties as prescribed in the Ordinance. It does contain discretionary items which allows for the Zoning Administrator to make certain interpretations or decisions and for the ZBA to review those decisions, which is why we're here. We don't have any specific provisions in our Zoning Ordinance that state the standards by which the ZBA will review a decision by a Zoning Administrator or Building Official. He doesn't believe he's seen that in any Zoning Ordinance that he's been involved in in over 32 years. The ZBA is basically serving in the same capacity as a Circuit Court would in some respects because if the ZBA makes a decision to grant a variance and an aggrieved party takes you to Circuit Court, the Circuit Court power to review your decision is spelled out in law. In this particular case, the ZBA is making that kind of review of the Zoning Administrator's decision. The ZBA is sitting in that kind of

capacity where it is going to review that decision and make a determination as to whether or not it was a correct decision. In reviewing a decision of a ZBA or Planning Commission, the Circuit Court has to adhere to certain principles of review. They give due deference of the decision of the administrative body, in this case the administrative official. And, you have to make a decision as to whether or not there is substantial evidence to support a decision, without substituting their judgment. The ZBA's responsibility is to see whether the decision was made within the confines of the Zoning Ordinance and whether there's information or evidence to support the decision that was made. You have to make a decision as to not whether you would specifically agree with that decision or would have done it otherwise, but whether there was a basis for which the Zoning Administrator who is charged with that responsibility made that call within the parameters of our Zoning Ordinance. In doing that, he feels you have to look at the rationale and decisions made by the Zoning Administrator and the evidence that he cites that supports that decision and then make a decision whether or not it's within the confines of our Zoning Ordinance and the authority that's granted to him. He wants to make very clear that this decision only applies to specifically non-conforming uses that pre-existed Zoning Ordinance No. 89 and in no way changes the impact or the rules that are in Zoning Ordinance No. 126. The law requires that if you have a use that pre-exists the Zoning Ordinance, it is permitted under certain circumstances and is allowed to continue under certain circumstances. So, it will not have an implication that somehow fences would be permissible irrespective of Zoning Ordinance No. 126. The ZBA's responsibility is to make the decision as to whether the decision was made within the confines of the Zoning Ordinance. If not, the ZBA can decide to reverse it or modify it and the reasons should be enunciated. The Appellant would then have a right to file an appeal to the Circuit Court.

Diss: Stated that if the ZBA broke down what a variance is, non-conforming variance, it's given to a property or structure temporarily and it is not to prolong the non-conformity. It is not to extend beyond the use of the structure when it no longer becomes functional or serviceable or becomes dangerous. They would hope that it would be replaced, the variance canceled and should it be replaced they would have to seek a new variance. She questioned Mr. McNamee as to whether she was confused in her interpretation?

McNamee: In this particular case there has not been a specific request for a variance. The appeal has to do with the issuance of the permit and the replacement of the fence that is a non-conforming use. This matter relates to the issuance of a permit and the decision by the Zoning Administrator to allow the replacement of the fence as a non-conforming use. It is not the granting of a variance in this case because it's a pre-existing, non-conforming use. They have not requested a variance in this case.

Makuch: We are really deciding whether the permit was valid or not?

McNamee: Yes.

Chairman Antkowiak: Based on the standards relating to the Ordinance.

McNamee: That's correct. This would be a little different circumstance than a variance because in a variance, you're acknowledging that it would be contrary to the existing requirements of the Zoning Ordinance but are requesting a variance because of practical hardship and those kind of things that are allowed for a variance. In this particular case, the issue is whether or not the fence is permissible as a non-conforming use, and whether or not the replacement of the fence was validly provided for and allowed by the Zoning Administrator.

Makuch: Questioned whether Mr. McNamee was also stating in his letter that the ZBA should follow the four standards that he listed that the Circuit Court would follow?

McNamee: More or less. There is nothing really specific in our Ordinance that says this is what you should look to. But, he provided those as guidance for making a decision.

Makuch: Questioned Mr. Kras as to whether he would have issued the permit if the Applicant also would have requested to run the fence along the canal and thus closing in the yard?

Kras: She wouldn't be allowed to do that because there was no fence there to begin with and that would increase the non-conformity.

Chamberlain: Questioned Mr. Kras as to whether the non-conformity was extended by the height of the fence.

Kras: No, a fence is a fence. Six foot fences are allowed in the back yard.

Chamberlain: Questioned Mr. Kras that if a fence is a fence, would a three foot plywood fence that met the 40% threshold have been acceptable.

Kras: It probably would have, if that's what she would have wanted to put in there. It was her choice.

Chamberlain: Stated he did some research of his own. These cases basically break down into two philosophies. The first philosophy is that a fence is a fence and is where you have a prior non-conforming use of some fence of some sort and it gets older and needs to be replaced or repaired. You take whatever what was there and you put something else there, it doesn't matter whether it's a living hedge, a solid wood fence, cyclone fence, the prior non-conforming use is a prior non-conforming use, a fence is a fence. The other philosophy is that there is a difference between the grandfathered non-conforming use and a variance granted by this body. And, a prior non-conforming use exists for as long as you can maintain that prior non-conforming use. When you can no longer safely maintain that to a point that it needs to be replaced, you must bring that property into compliance with the Ordinance. If we have a prior non-conforming use and we have a split rail fence, it's replaced with another complete structure like a cyclone fence or a 3 foot high plywood fence that goes all the way down the canal, to his opinion that becomes too subjective. He would like to see the interpretation be that the grandfathered prior non-conforming use basically ends when that structure becomes unsafe to remain a structure. After that 40% threshold is reached, you would have to replace it with a conforming structure. He would like to see the grandfathered non-conforming uses come to a close. Otherwise, we're going to find ourselves in this exact same position.

Makuch: Believes that would have to be put in the Ordinance.

Chairman Antkowiak: Stated the Ordinance already has non-conforming structures such as Section 223.2, which says if it's altered in any way, it increases its non-conformity and it should be abandoned or cut down.

Chamberlain: Or brought back to the ZBA for a variance.

Diss: That is exactly what she was trying to get across. Our intent was to bring all the non-conformities into compliance with the current Ordinance and not to prolong them.

Chamberlain: It depends on interpretation. He appreciates Mr. McNamee's guidance on how we interpret and review.

Makuch: In 1998, David Sterling was issued a fence replacement building permit and it was done. He feels there is some precedent. This can be argued until you're blue in the face.

Chamberlain: Stated that he agrees and that it could easily go either way. It's basically which philosophy you want to follow.

Chairman Antkowiak: He is looking at the words "replacement cost" and in talking with other people as to what they felt replacement cost would include, they felt that included in replacement cost would be materials needed and labor. Mr. Kras indicated in his letter that the 40% value of the existing structure was less than \$900.00 for materials. Ms Shumaker indicated that she has already paid \$2,300.00 for the fence that has been approved by the Township. He is confused as to which figure is correct and feels that is something else they need to consider.

Chamberlain: The Ordinance is pretty vague and gives a lot of discretion to the Zoning Administrator to decide what's within that 40% limit and what's not. His opinion is that part of the problem with the 40% is that it allows too many structures that we don't want to see. It seems to him that the 40% was designed to be a way to set a threshold for when the structure is no longer a grandfathered use because it's met its use for life and should be replaced and brought within the Zoning Ordinance.

Treppa: Section 323.4 states that they're allowed to.

Makuch: Feels that what they have to decide is whether we affirm or reverse the Building Inspector's decision.

Chairman Antkowiak: Feels that if they look at the standards that Mr. McNamee provided, we need to decide based on the four standards if what happened was contrary to the law. He doesn't know and doesn't have an answer. He questioned whether it was based on improper procedure and doesn't think so. He thinks the Zoning Administrator tried to do the appropriate procedure. However, there's the interpretation of what the words mean.

Chamberlain: The whole crux is how you interpret the law.

Chairman Antkowiak: It's a Catch 22.

Makuch: The other two standards are not supported by competent material or substantial evidence or abuse of discretion.

Chamberlain: He doesn't feel there is an abuse of discretion or that it was based on improper procedure. He feels that based on what he has heard, Mr. Kras's decision could be very well argued to be supported by competent material and substantial evidence on the record, he just thinks that it may be contrary to law depending on how you interpret the law.

Chairman Antkowiak: He stated that there is a caveat for the 40% and the other one that says if it's torn down or removed, it's gone and has to be replaced according to the standards of law. We have two sections that this refers to and it tells us to look at them and they are contrary.

Chamberlain: They are basically contrary to each other, which is why when he looks at them in tandem and he looks at them together, he sees the 40% split being a threshold for replacement and bringing within conformance with the previous Ordinance. But, he is also doing what Mr. McNamee advised against, which is substituting one judgment for another, substituting this body's judgment for that of Mr. Kras.

Makuch: But, if you look at the application it said contesting the issuance of the permit which is fine because prudent and proper procedures were not followed. They were followed.

Chairman Antkowiak: We were also instructed to follow or try to follow the intent of the Ordinance.

McNamee: Part of the rationale on the non-conforming use is if you have a non-conforming structure, such as a garage that is not built according to any kind of standards but that existed before it's allowed the permit. A fire occurs and it burns down. They can't say we're going to rebuild it based on what existed in 1922 when the garage was put in. If they replace the garage, they've lost that ability to build as it was. They have to build it in conformance with the statute. The spirit and intent of the Ordinance is what was intended in these circumstances. Although it may appear somewhat contradictory when you read the things under non-conforming, most of those provisions have developed over the course of time because of case decisions to kind of categorize certain things such as when a non-conforming structure is destroyed or abandoned versus when there is an attempt to maintain or replace it in its existing form which has been used in that form.

Diss: Questioned Mr. Kras as to what he considered the unsafe condition to be of the fence?

Kras: That was provided by the Applicants. Both Applicants had threatened the Township for several years about the condition of the fence and their children being hurt on the fence and that

they were going to sue the Township if we didn't do something. He finally made a decision that if that's what they want, that's what we're going to do.

Diss: Questioned whether all parties complained about the condition?

Kras: Not the person who had the fence, but the parties on each side complained about the fence. He has been here for 10 years and in reviewing files that started back in 1994, that issue has existed for at least 8 of those years.

Motion by Chamberlain, supported by Diss that the decision to issue the permit be reversed on the basis that it was contrary to law under the current Clay Township Ordinances because of the expansion of the non-conforming use was contrary to the Ordinance.

McNamee: Advised that they have to list specific facts and reasons as to what the expansion of the non-conforming is and articulate same or the Circuit Court will remand it back to the ZBA for clarification.

Motion by Chamberlain, supported by Diss amended that the decision to issue the permit be reversed on the basis that it was contrary to law under the current Clay Township Ordinances because of the expansion of the non-conforming use being the height of the fence, change of materials from wood and metal combination to all metal, and that the cost of the work exceeded 40% of the replacement cost based on materials and labor being reasonable construction costs for replacement.

Kras: The assessor does not include the labor in the cost of materials.

Chamberlain: Questioned whether that was in the Ordinance as it is the crux to this whole thing.

Kras: When she recites a value, the value of the fence is so much money as it sits.

Makuch: It's just the value of the fence.

Motion by Chamberlain, supported by Diss amended that the decision to issue the permit be reversed on the basis that it was contrary to law under the current Clay Township Ordinances because of the expansion of the non-conforming use being the height of the fence, change of materials from wood and metal combination to all metal, and based on the philosophy that a fence is not a fence and the non-conforming structure should be replaced with one of similar like kind and quality.

Makuch: Stated that he doesn't agree. He doesn't feel it's an expansion of a non-conforming use. He further stated that if you're going to extend that fence along the canal and box it in, they you are expanding the non-conforming use.

Treppa: Questioned why it would make a difference as to what materials were used?

Chamberlain: Stated that his problem is that it becomes too subjective. If you have a prior non-conforming use, you have a prior non-conforming use. If you replace that non-conforming use with another non-conforming use, you are outside of the current Ordinance and therefore you don't have to maintain it at a certain height.

Makuch: Questioned if you're going to make her take that fence down are you going to make Sankuer cut the tree down in his backyard? It's the same thing.

Chamberlain: That is not the question before us. It is how you want to define the non-conforming use and whether you want the non-conforming use to eventually come to an end and bring those properties into conformance with the Ordinance as written, or if you want to allow non-conforming uses to be grandfathered forever.

Diss: Stated it was always her understanding that a non-conformity was only temporary and at some point we would hope that all properties could be brought into conforming.

Kras: Stated that would never happen because the Ordinance changes every so many years and creates more non-conformities and allows some non-conformities to become conforming.

Treppa: What Mr. Kras made his decision with was 3.23(4)(c) that, under his discretion, is allowed to be improved due to it's unsafe condition.

Chamberlain: Stated that same section goes on to state when enlargement or structural alteration is necessary to allow compliance with health and safety laws. He is interpreting that to be an expansion of a non-conforming use.

Kras: The scope of the Ordinance was the health and safety law. It's on the very first page of the Ordinance.

Chairman Antkowiak restated motion by Chamberlain, supported by Diss amended that the decision to issue the permit be reversed on the basis that it was contrary to law under the current Clay Township Ordinances because of the expansion of the non-conforming use being the height of the fence, change of materials from wood and metal combination to all metal, and based on the philosophy that a fence is not a fence and the non-conforming structure should be replaced with one of similar like kind and quality.

R/C VOTE:

AYES: Chamberlain; Diss; Chairman Antkowiak

NAYS: Treppa; Makuch

MOTION CARRIED.

Chairman Antkowiak: Questioned Mr. McNamee as to what is the ZBA's next step in this matter?

McNamee: You've modified the decision of the Zoning Administrator. You have made your decision on this particular subject. The property owner now can comply with the decision or file an appeal to the Circuit Court challenging the decision or can decide to remove the fence completely or reconfigure it based on your decision as to the height and materials. Once she is provided of the signed Order stating the decision of the ZBA, she has 30 days to file an appeal.

Treppa: Is she going to be allowed to put up a wood fence and maintain it or will she not be allowed to put up any type of fence? That would be our next decision. Because the motion was made off of the materials, if she hires someone to put the fence up and it looks like it currently does and lasts another 20 years and we're back to where we are now.

Diss: Questioned whether Ms. Shumaker could come before the ZBA and ask for a variance now?

McNamee: She can.

Janet Shumaker: Why would I need a variance? I had a variance. I had fence, I bought a new fence. So, if you want the fence removed, that's okay, but then the old structure gets to come back because she had a fence.

Chairman Antkowiak: That's basically what we're saying.

Makuch: That was the basis of your motion and I didn't agree with it. So, if she pulls it out and decides to put in three foot split rail with chicken wire on it, we're back to where we were, and that should be fine.

Chamberlain: That was the non-conforming use.

Diss: We can't replace it now.

Treppa: How does that fall? We can't make her put it back, or how does that work?

McNamee: Well, that's your decision. You made the decision that the height and the materials must remain consistent. If she wishes to maintain that fence, she has to replace it with a like material and a like height. It's her decision as to whether she chooses to do it. If she does not to do it and takes the fence out, then it's abandoned.

Makuch: You also said that we have the ability to modify a decision.

McNamee: You modified the decision of the Zoning Administrator. You've made your decision on this particular subject. The property owner has the option to comply with your decision, she can file an appeal with the Circuit Court challenging your decision, or she can decide to remove the fence. She has 30 days from your written decision to file an appeal with the Circuit Court.

Makuch: Questioned Mr. McNamee that instead of having that fence run all the way down to the seawall, pull it back and enclose it across, like we have done in the past instead of replacing it, would that be acceptable to you?

McNamee: He would want to see some type of drawing and would have to see what it looks like.

Chairman Antkowiak: Questioned whether she would need a variance from the ZBA to do so?

Makuch: She wouldn't need a variance. If it's not in the 45 degree angle, she wouldn't need a variance.

Diss: Stated that would not have to be with the consent of the neighbors. It would be what she would like.

Chairman Antkowiak: We have made the decision and now have to decide whether we want to wait 30 days to see if there's an appeal filed and postpone our decision as to what to do with this fence.

Chamberlain: Stated he would hate to put it off, but it would give it some finality.

Chairman Antkowiak: And an opportunity to look at other options.

Motion by Chamberlain to postpone the direction to the homeowner awaiting the decision to appeal.

Kras: The appeal doesn't take place until after you approve the Minutes and now you're postponing what the decision is. So, any decision that you postpone, the appeal process wouldn't start until you completed the whole issue.

McNamee: No enforcement action would be taken until the appeal time has run.

Chairman Antkowiak: Stated his question is whether they have to approve Minutes before the Appellant can go to Circuit Court. We provide a form that has the information on it.

McNamee: As soon as you provide the written form, the appeal period starts to run. His understanding of the ZBA decision is that the fence has to be in conformance with the prior materials and height or it would have to be removed.

Makuch: Or replaced with something that conforms with the Zoning Ordinance.

Chairman Antkowiak: Again questioned Mr. McNamee as to whether the Minutes have to be approved before the appeal period begins to run or is the Order enough information?

McNamee: He believes that once the Appellant is provided with the written Order, the appeal period would begin. The Order doesn't have to be completed tonight, but can be prepared and signed at a later date and then provided to the Appellant.

Chamberlain: Stated that the decision, based on the motion, is that the fence would have to be taken down, reconstructed in like kind, quality, and height or a conforming fence to the current Zoning Ordinance.

Makuch: And, the Zoning Ordinance is 45 degree angle. He also asked that Building Administrator Kras visit the site and if anything on either adjacent property exceeds the 45 degree angle, it comes down. If we're going to enforce the rules, we're going to enforce the rules, trees, anything.

Chairman Antkowiak: Procedurally, we can't ask him to do that. That's not before us.

Makuch: He will ask him to do that himself.

Janet Shumaker: Stated she feels the ZBA needs to address the cost. She incurred a cost to get the permit. She will incur cost to take the fence down and replace the fence. She put her money in good faith to get the permit. In order to know whether to appeal or not, she will need to know how the ZBA intends to handle the cost because in her mind, she feels she is entitled to some restitution and some rebuilding. That has to be addressed before she knows how to appeal.

Chairman Antkowiak: Stated the ZBA, in good faith, have tried to interpret what has happened. As far as the cost, the ZBA has nothing to do with that.

McNamee: Stated that is not within the ZBA's jurisdiction.

7. REPORT OF PLANNING COMMISSION REPRESENTATIVE:

Antkowiak: Nothing to report.

8. OTHER MATTERS TO BE REVIEWED BY THE ZONING BOARD OF APPEALS:

a) Correspondence Received:

None.

b) Zoning Board of Appeals Members:

None.

9. PUBLIC COMMENTS

None.

10. ADJOURNMENT

Motion by Makuch, supported by Chamberlain to adjourn the meeting at 8:26 p.m.

AYES: All NAYS: None

MOTION CARRIED.

Respectfully submitted,

Christine Holcomb
Recording Secretary