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Subject: Hayes Township: Location of OHWM

Date: August 31, 2021 at 12:06 PM

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EB

Bryan,

As perhaps you have heard LuAnne Kozma and I are involved in efforts to block construction of a large basin and boathouse at 10034 Anglers Cove, three docks to the west of us, a bit less than ¼-mile away, on the north shore of Lake Charlevoix in Hayes Township.

The property is owned by Scott and Debra Law. The attached plans call for the boathouse to have a concrete foundation, insulation, toilets, an elevator, winding staircase, 22 tall viewing windows, and a dominating chimney matching those in the main house, all within 100 feet of the re-located Ordinary High Water mark.

Our website description of the project is here: <https://protectlakecharlevoixshoreland.org/>.

Our letter of Friday to the Charlevoix Courier newspaper is here: <https://www.petoskeynews.com/story/opinion/2021/08/27/letter-troubled-hayes-townships-approach-toward-shoreline-project/5586118001/>

By several FOIA requests LuAnne obtained documents from the township, and she has one further FOIA pending.

EGLÉ issued a Part 301 permit on 12-15-20.

The current Zoning Administrator Ron Van Zee permitted the Laws' application on 7-8-20 after the Planning Commission approved the plan on 11-19-19.

The PC approval happened without the required participation of Tip of the Mitt Watershed Council, according to Jennifer McKay's attached letter of August 30, contrary to ZA Ron VZ's email assertion of August 11 that Tip of the Mitt was part of "careful review" of the project. Nor did any other expert organization participate, violating Zoning Ordinance Section 3.14(8)(C)(i).

Though the zoning permit is dated, it should not have been issued until all necessary statutory permits had been obtained or waived, which did not occur and may never occur in the case of the Army Corps. Ordinance Section 9.02(3).

The township published no notice of the Laws' address, application, permit, or minutes of the PC approval on its website or in emails. We learned of it only in late July, via a chance mention in conversation with the county about a separate issue, and then we received details only by FOIA documents.

Even if valid, zoning permits expire after 12 months. Ordinance Section 9.02(5).

The PC's Site Plan approval also expired after 365 days, unless the Laws had applied for an extension and the PC found good cause for it. Section 5.03(9). We know they did not apply because a copy of an application was not among the received FOIA documents.

The Laws could not have already begun construction, since the Army Corps has not acted. Accordingly the time periods have lapsed, and no appeal to the ZBA to stop the project is necessary or possible. Construction could not begin today even if the Army Corps acted now. If the Laws attempted to begin construction in the face of lapsed permits, the township would issue and serve a stop-work order and seek a TRO if necessary.

By letting both the permit and PC approval expire by July 8 of this year, it appears the Laws have formally abandoned the basin-boathouse project.

But I write in anticipation that the Laws might apply again using the same or similar plans. In early stages of the Laws' initial application, then-ZA Larry Sullivan wrote them on 8-26-19 (attached), saying in part:

My response to these questions are based in part upon my research of the files as to similar projects that have taken place. In some instances, I may agree with previous positions taken while in other cases my final determination may differ from decisions made in the past.

...

1. Current and future location of the Ordinary High Water Mark prior to and following the creation of the "Boat Basin". The Ordinary High Water Mark is an elevation that has been determined by the State of Michigan. Based on conversations that I have had with the Township Attorney in regard to a similar parcel of property that currently contains a boat basin resulted in the following position having been taken. The specific property that I am referring to is the parcel owned by the Packer Family which contains a breakwall extending into Lake Charlevoix with an excavated area on the upland portion of the property. With regard to this property, the Township Attorney opined that the construction of a breakwall and an upland excavation to create a boat basin would not change the location of the Ordinary High Water Mark (OHWM) as determined by the State of Michigan for the purposes of the Zoning Ordinance. In effect, for purposes of the Hayes Township Zoning Ordinance, the OHWM would continue to be at the same location following the creation of the boat basin as it is (was) prior to the creation of the boat basin.

I believe it is the unopposed township attorney's view as expressed in your first

I take it the unnamed township attorney was you or someone in your firm.

Puzzlingly, the ZA did not seek an interpretation of OHWM location from the ZBA under Section 8.06(1). The unattributed verbal opinion was the only authority cited.

(The letter made one determination adverse to the Laws, that the boathouse would be allowed only one dock, not the three which the plans show. They did not appeal to the ZBA.)

We have searched and can find no ZBA precedent or statute or court precedent which upholds the underlined interpretation, that the OHWM supposedly remains where it is after the lake has moved in and destroyed the original shoreline along with its physical marks and characteristics.

Under state and parallel federal law, we find just the opposite, that when the channel is opened the OHWM would move to the shoreline of the basin, creating new marks and physical characteristics there.

See particularly *Glass v Goeckel*, 473 Mich 667 (2005), the famed beachwalking case. In the course the 5-2 majority referred to then-MCL 324.30101(i), the state definition of OHWM for inland lakes. That definition, including its reference to "distinct" and "apparent" marks on the "line between upland and bottomland", was identical to now re-codified 30101(m), except it did not have the new sentence at the end which the Legislature added a year later (about the effect on the OHWM of removal of a dam).

Of the OHWM definition *Glass* observed:

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

Indeed it does, by its reference to distinct "marks," though not using the "physical characteristics" language of 33 CFR 328.3(e) (now as of April 2020 re-numbered 33 CFR 328.3(c)(7)):

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

We see no reason to think the ZBA would interpret the horizontal location of the OHWM under Section 2.02 differently than this, as a line on the land delineated by visible physical marks.

This brings me to wonder if the above verbal opinion may have been misunderstood or mis-remembered.

To view the OHWM movement visually in the Laws' project, see the graphics embedded below, which are also on the website.

As the PC knows, OHWM typically determines only a vertical distance, the height of high lake water above sea level measured at Rimouski Québec. But of course the vertical height cannot determine a horizontal location.

For an inland lake under Part 301, it is the Township Zoning Ordinance, not a state statute as was verbally cited, which determines the OHWM's horizontal location. MCL 324.30101(m).

Section 2.02 of the township ordinance defines OHWM horizontally by reference to persistent distinct physical characteristics including the configuration of the soil and vegetation.

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

These distinct characteristics would move immediately on opening the Laws' channel and basin to the lake.

The same definition would apply for inland lakes like Charlevoix if the matter were mistakenly considered under state law, Part 301, Inland Lakes and Streams. MCL 324.30101(m). Notably, this statute acknowledges mobility of the OHWM location by virtue of human activity, such as removal of a dam.

Part 301 also recognizes that on payment of a fee the property owner can negotiate and come to a written agreement with the state on the horizontal location of the OHWM. MCL 324.30109. But here there is no written agreement and no fee was paid.

Indeed, to the extent there is any writing, in two different drawings the Laws' plans say they agree that the OHWM location would extend all the way into the basin:

1. The straight dotted horizontal line on their Section C, attached, highlighted here with a red line. Under the dotted line, on the center right, in small lettering, the Laws wrote "O.H.W.M. -- 581.5". The line extends though the channel and basin *all the way to the far end of the boathouse*.
2. The caption on the cross-section of the channel, Section F as revised on August 23, attached, in which plantings are shown "down to OHWM," in other words saying again that when the channel is opened, the OHWM would move inland from the lake's original natural shoreline.

Interestingly, the verbal opinion (if described accurately) would be correct if this matter were considered under Part 326, Great Lakes

Submerged Logs Recovery. MCL 324.32601((f)). But logs are not involved in the Laws' project.

Physical characteristics also determine the horizontal location of the OHWM under federal law. See the attached 8-24-21 email from April Champion, the Army Corps' Project Manager for this project, so stating in response to a question about the Laws' proposed basin:

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

See also the Corps' Regulatory Guidance Letter, which notes vegetation, soil, sediment, scour, deposition, and water staining as among the physical characteristics which would mark the line on the banks and foundation wall around the channel and basin. <https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl05-05.pdf> See also the Corps's view of extension of its jurisdiction into human-made canals. https://www.ire.usace.army.mil/Portals/69/docs/regulatory/PDFs/Navigable_Waters_List_Sep2018%20.pdf

Determination of OHWM location by physical marks and characteristics is also true intuitively. The Laws have no plans some day to close up the channel/basin and return the land to its former natural state. The channel and basin would likely last for hundreds of years. Our descendants and theirs would come to think of these water borders as "ordinary," when we, you, the Laws, the ZA and members of the PC, and the original shoreline are all long forgotten.

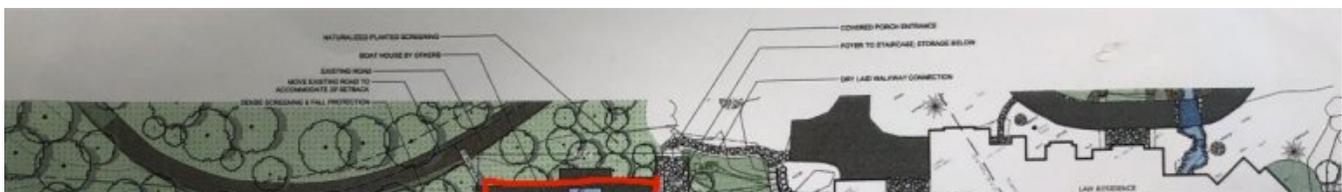
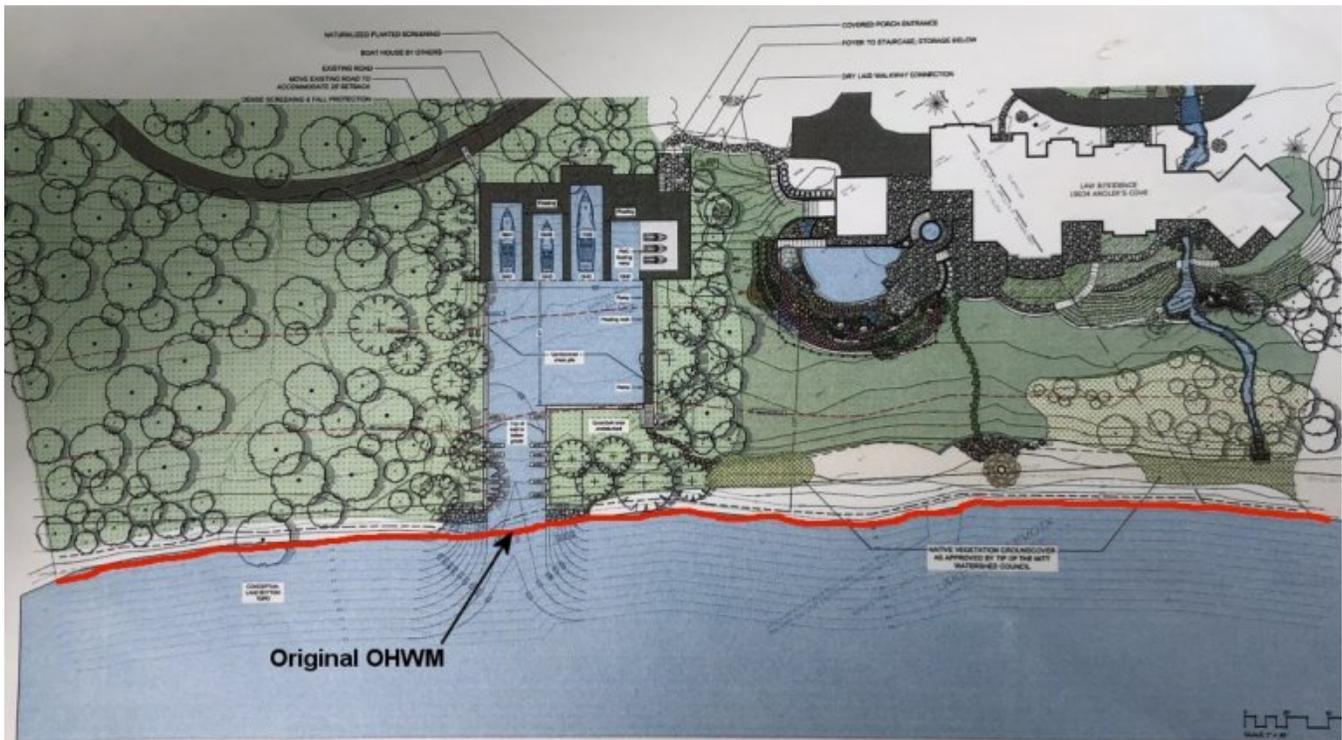
Accordingly Section 3.14(2) precludes this plan with a boathouse closer than 100 feet from the basin.

Please reconsider the verbal opinion above (if it indeed was your opinion), this time in writing, and advise the township. If there is some statute or court precedent about the horizontal location of the OHWM which we have overlooked, it would be of great interest to everyone, and could forestall unneeded controversy.

Thanks for your time.

Ellis

PS: There is a separate problem with the boathouse unrelated to the OHWM: It would be an "accessory" structure, unconnected to the principal structure by the terms of Section Sections 2.02 and 3.05(1); the 100-foot connecting covered "walkway" would not be a "breezeway" as that term is ordinarily contemplated by builders or architects, or by the ordinance drafters. In low-density residential R-1 districts like the Laws' (Section 4.13 Zoning Map), accessory structures may not lie closer to the waterfront than the principal structure. Section 3.05, table 7 note a. But the Laws' plan is for the boathouse to be much closer, indeed right on and over the water, and therefore in violation.

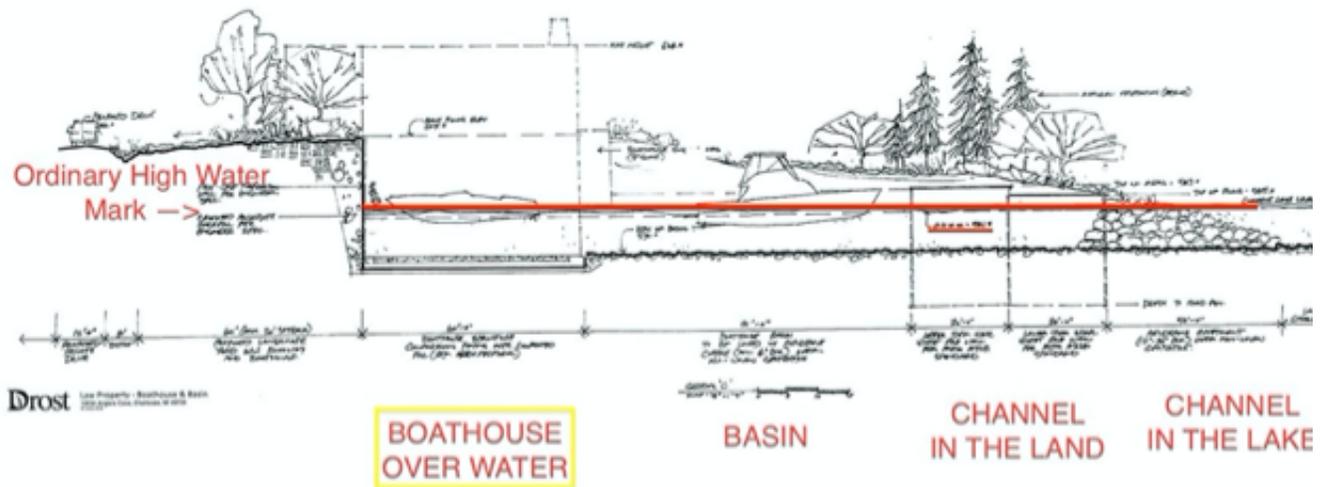




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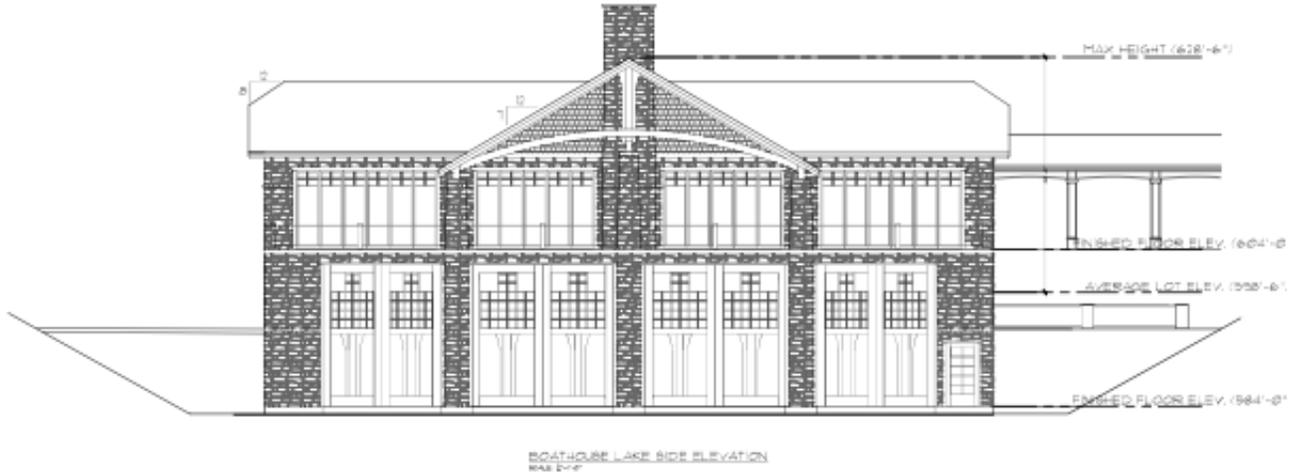


Drost Lee Property - Boathouse & Basin 2022/08/23/08:46:46 AM



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 Law - Boat House and Marina Basin
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