

August 22, 2022

Proposed Findings of Fact and Proposed Interpretations

From: LuAnne Kozma and Ellis Boal, Co-representatives for:

LuAnne Kozma, Irene Fowle, Elisabeth Hicklen

Interpretation Requests to Hayes Township ZBA

Case filed September 27, 2021

Addresses of Petitioners/Requesters:

LuAnne Kozma, 9330 Woods Road, Charlevoix MI 49720

Irene Fowle and Elisabeth Hicklen, 9370 Woods Road, Charlevoix MI 49720

Anticipated project would take place at 10034 Anglers Cove

Property Owners: T. Scott and Debra Law

Property Address: 10034 Anglers Cove, Charlevoix MI 49720

Parcel Number: 007-132-005-25

Acreage of parcel: 9.1

Adjoining parcel 007-132-005-30

Residence straddles both parcels 007-132-005-25 and 007-132-005-30

Zoned: R-1 Low Density Residential

Water feature adjacent: Parcel is waterfront lot on Lake Charlevoix

Ordinary High Water Mark (OHWM) set by ordinance at: Vertical elevation set at 582.3 feet IGLE 1985. Definition follows state statute of Inland Lakes and Streams Act.

Description of anticipated project: There are two versions of the project already approved by the state and federal agencies.

1) The state agency approved a two-story, 90 x 60 foot boathouse that would straddle the

newly-created shoreline and new OHWM with the boathouse “annex” part of the building on uplands and the “boathouse main” part of the building on bottomlands, with the waters of Lake Charlevoix below it, with a 5,400 square foot, 2 foot-deep concrete pad at the bottom of the basin below the structure. Excavate a 120 foot by 90-foot boat basin out of the uplands. Dredge up to 200 cubic yards for maintenance. Excavate the uplands to create a 30 foot-wide cut through the Shoreland Protection Strip, going back 55 feet, leading to a 120-foot by 90-foot excavated boat basin. Out in Lake Charlevoix, dredge a 130-foot by 73-foot channel on the bottomlands. Seawalls would surround the vertical walls of the boat basin and channel. Rip rap would be placed on the outside entrance of the entrance channel. The use of the building would be for events and assembly on the upper story, and boat storage on the first story.

2) The federal agency approved the same two-story 90 x 60 foot boathouse that would straddle the newly-created shoreline and new OHWM with the boathouse “annex” part of the building on uplands and the new “boathouse main” part of the building on bottomlands, with the waters of Lake Charlevoix below it. Same 5,400 square foot, 2 foot-deep concrete pad at the bottom of the basin below the structure. Excavate a wider channel, 43-foot wide by 55 foot long and remove the uplands. Excavate a 120-foot by 90-foot boat basin out of the uplands. The channel and boat basin walls would be sloped sides. The stated use of the building is it would be for storage of boats below and above, despite the design and floor plan of the building being exactly the same as originally applied for, and as approved by EGLE.

Township permits received, history: Zoning permit for “attached boathouse” expired on July 8, 2021. No extension applied for. PC approval granted in November 2019 also expired one year after approval, per ZO § 5.03(9).

Current Township permit applications pending for the anticipated project?: None as far as petitioners know as of August 21, 2022

Other permits received by Laws:

1) Plans for project approved and permit issued by State of Michigan Department of Environment, Great Lakes and Energy on Dec 15, 2020 for a boat basin, channel and boathouse with event area on Main Floor.

2) Plans for project approved and permit issued by US Army Corps of Engineers on June 9, 2020. Laws signed the USACE permit on May 26, 2022. Latest site plan submitted to either agency depicts 43-foot wide channel through Shoreland Protection Strip, and “storage” as a modification to the “language” but design remains identical to EGLE permit plan. Condition place on USACE permit states:

Petitioners’ residences in relation to anticipated project: Kozma lives three parcels from the anticipated project owners’ property; Hicklen and Fowle live two parcels from the anticipated project owners’ property, along the same cove of Lake Charlevoix.

Interpretations Requested in Question form:

§ 2.02

Definitions of Shoreland Protection Strip, Ordinary High Water Mark, and Structure.

1. Is the Shoreland Protection Strip, by definition in the ordinance, uplands, not bottomlands?

Yes. The definition of Shoreland Protection Strip in Zoning Ordinance § 2.0 “a strip of land 50 feet in depth *landward* of the Ordinary High Water Mark” and the language in § 3.14(3) requiring Shoreland Protection Strip on every waterfront parcel which “shall include all of the land area located within 50 feet of the OHWM” as well as the definition of OHWM are unambiguous that the Shoreland Protection Strip is strictly *uplands* (*ie* shoreland), not bottomlands below the OHWM elevation, which is considered a part of the lake bottom.

2. Is the Ordinary High Water Mark for Lake Charlevoix a specific elevation of land, is the elevation codified in the Zoning Ordinance for Hayes Township, and is it also defined in the Ordinance in terms of physical characteristics on the land, using the same definition of the state statute “Inland Lakes and Streams Act?”

Yes, yes, yes and yes. The definition is both an elevation specified for Lake Charlevoix in Hayes Township, and also defined as a marking on the land based on physical characteristics that mark the diving line between uplands and bottomlands. Specifically it reads that “on Lake Charlevoix the OHWM shall be the legally established lake level of 582.3 IGLD 1985” as the elevation. Defined also in terms of its characteristics upon the land, it reads: “The one 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.”

Above the OHWM is uplands where the lake does not ordinarily reach, and the bottomlands are the areas that commonly receive persistent water action. Around the entire perimeter of the lake, the OHWM follows at that point in elevation around it.

3. Are artificial boat basins and channels considered “structures” according to the Zoning Ordinance definitions of “structure” and “erected”?

Yes: Artificially constructed boat basins and canals/channels are structures as defined in the ordinance: “anything constructed or erected, the use of which requires location on the ground or attachment to something having permanent location on or below the ground.” The definition of “erected” in ZO § 2.02 states “includes built, constructed, reconstructed, extended, enlargement, moved upon, or any physical operation on the premises intended or required for a building or structure. Excavation, fill, drainage, and general land improvements, shall be considered part of erection.” The massive excavation anticipated in this project would involve heavy earth-moving equipment and would result in built structures on a specific location on the ground, turning it into partially a basement of a two-story building and a structure with specific sides and location for boats to move through.

§ 3.14 Waterfront Regulations

4. Does the Zoning Ordinance Waterfront Regulations, § 3.14 subsections 1 through 5 and 8 protect the Shoreland Protection Strip (uplands) and prohibit excavation for an artificial boat basin or channel (or any excavation)?

Yes: The restrictions in the Shoreland Protection Strip specified in the Waterfront

Regulations sections prohibit the upland's removal, destruction and excavation. First the regulations require the land of the Shoreland Protection Strip to be on every waterfront lot and "shall include all of the land area located within 50 feet of the OHWM." "Shall" and "all" are unambiguous terms and means all of the uplands of the strip. It cannot be misinterpreted to mean any less than all, and it is required. 3.14(1) states the "waterways and lakes... of Hayes Township are invaluable assets to the economy and quality of life, and therefore must be preserved in a natural fashion." We interpret that to mean a natural shoreline and no damage to it. "Disturb" is not defined in the ordinance, but a dictionary definition is "change shape or position to move something so that it is not in its normal, expected or correct shape or position." "Excavating" is defined in the ordinance as "shall be the earth moving, filling or removal of earth, sand, stone, gravel, or dirt."

The 3.14(3) "Shoreland Protection Strip" section states the purpose of the strip of land is to protect the lake by preventing soil erosion and providing a filter for the removal of pesticides, fertilizers and other potential water pollutants. We interpret that to mean the land itself must be present in order to function as a filter. It cannot become the lake bottomlands.

3.14(3)(K) states "It is in violation of the zoning ordinance to alter or disturb the Shoreland Protection Strip except to remove dead trees or shrubs, remove invasive species, or for selective tripping of trees as permitted in (3)(I)." If altered or disturbed, corrective measures are required, including removing fill material that is not native to the Strip, replanting with native plants and requiring replanting in a natural planting pattern as exemplified by neighboring shorelines that have not been disturbed.

3.14(3)(H) states plainly that natural vegetation cover, including trees, shrubs or herbaceous plants shall be maintained on at least 80% of the lake or stream frontage within the Shoreland Protection Strip, which is the uplands. "The vegetation on the remaining twenty percent may be cleared for a single view corridor; or selective trees

removed to provide for a filtered view throughout the frontage, provided the cumulative total of the trees removed does not exceed the allowed twenty percent of the front. When trees are removed, root systems shall be left in place for shoreline stabilization.” This is clearly a requirement solely about 20% vegetation removal, with language that clearly indicates the 20% frontage that is cleared of vegetation has root systems in place and vegetation is only removed for views of the lake. The prohibition on tree root systems removal is an explicit prohibition on excavation of the land. Even something as small as a seasonal dock, or a small boat, when placed on the Shoreland Protection Strip, if it causes damage, the damage must be repaired.

Sections 3.14(3)(B) and 3.14(8) require and describe a review process whenever a waterfront property owner wants to construct or renovate a structure on a waterfront lot, that requires the establishment, restoration and/or maintenance of a Shoreland Protection Strip. The intent review process in (8) is to promote the gradual, systematic, and long-term restoration of the Shoreland Protection Strip, and to “ensure compliance with the waterfront regulations described in 3.14(1-5). There is nothing in the ordinance that allows the Shoreland Protection Strip’s destruction or removal.

3.14(4) is about “Docks and Boat Parking on Lake Charlevoix and Susan Lake.” Subsection (A) states “a maximum of one dock shall be permitted for each waterfront lot, except for properties upon which a marina is permitted by all of the following: the Hayes Township Zoning Ordinance” the state and federal agencies. However there is no section in the Ordinance as to which properties allows a marina. All waterfront properties are zoned R-1 or partly R-1. Section 4.05 does not list a marina as a permitted use or a use subject to a special use permit.

All of this adds up to very strong protection for the Shoreland Protection Strip and a strict

prohibition on excavation.

5. Regarding § 3.14(2) Setbacks: Does the Ordinary High Water Mark location change horizontally when a lake's configuration changes and uplands convert to bottomlands?

Yes: All other agencies with jurisdiction of Lake Charlevoix's waters agree that if an artificial channel or boat basin is created, that would remove the shoreland/uplands above the OHWM 583.3 feet IGLD 1985 on Lake Charlevoix and transform it into bottomlands by excavating to elevations below 582.3 feet IGLD 1985, the OHWM would be located around the perimeter of the new basin or channel. Excavation of a channel and/or basin contiguous with Lake Charlevoix expands the extent of the ordinary high waters of Lake Charlevoix throughout the entire channel and/or basin, and the new OHWM would follow the new shoreline contour. Accordingly construction of an artificial channel and basin would move the setback requirements for structures inland. Whenever uplands are turned to bottomlands, the OHWM location necessarily changes, by definition of the OHWM.

6. Were boathouses and bath houses allowed earlier in the Hayes Township's earlier ordinances and then prohibited?

Yes: Boathouses and bath houses were at first permitted in a 25-foot Green Belt Zone as specified in the first interim ordinance of 1973. In 1979 the ordinance adopted in 1974 was amended, intentionally removing boat houses and bath houses as permitted structures, changing it to "No building or structure, except docks or launch ramps, shall be erected closer than fifty (50) feet from the shoreline..." Through the various amendments in the last decades since the 1970s, the ordinances never re-permitted boat

houses or bath houses and still says “no structures” except for a few exceptions that do not disturb the shoreland, shall be within 100 feet from the OHWM of Lake Charlevoix and Lake Michigan and 80 feet for Susan Lake. Zoning Ordinance § 3.14(2)

7. Does bringing the waters of Lake Charlevoix or any lake in the township to a structure 100 foot inland violate the zoning ordinance requirement of a 100 foot setback for structures from a lake?

Yes: Since the OHWM would change with the construction of an artificial boat basin and/or canal bringing lake waters inland, placing a structure on or near the new shoreline would violate the 100 foot setback requirement in ZO §3.14(2) Setback Area Regulations.

3.14(8) and 5.04 WITHDRAWN.

9.01 “Zoning Administrator” states in part:

“It shall be unlawful for the Zoning Administrator to approve any plans or issue any Permits for the excavation or construction until such plans have been inspected in detail and found to conform to this Ordinance.”

...

“The Zoning Administrator shall under no circumstances be permitted to make changes to this Ordinance or to vary the terms of this Ordinance in carrying out the duties of Zoning Administrator.”

8. Question: Can the Zoning Administrator allow a commercial use in an R-1 residential zone?

No. Under no circumstances shall a ZA make changes or vary the terms of the ordinance to allow commercial use in a residential zone. A site plan for any building or structure is required containing specifics as listed in § 5.02 and 5.03 such as scale drawings, elevation drawings, and the existing and intended use of the lot and all structures, in order to ascertain whether the use is allowed in that zone.

9. Can “unwritten philosophy” or “consultation and compromise” ever guide the Zoning Administrator or Planning Commission in making decisions? Can the Zoning Ordinance be used as a bargaining chip?

No and No. Neither “unwritten philosophy” nor “consultation and compromise ... rather than the strict mandates” may ever guide the Zoning Administrator or Planning Commission, when making decisions.

9.02(5) Expiration of a Zoning Permit.

10. Question: Is there any other date from which a zoning permit shall expire except date of issuance?

No. The wording of this section makes no distinction for a permit that has been issued conditionally or without conditions. No other date begins the 12-month clock except the date of issuance. This same wording is present in the very first Hayes Township zoning ordinance and has been consistent through time.