

FOR IMMEDIATE RELEASE

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**Resident Working to Protect Lake Charlevoix from Boathouse/
Dining/Event Facility and Excavation of Shoreland Sues Hayes
Township Zoning Board of Appeals for Erroneous Decision on
Ordinary High Water Mark**

**Township officials rewriting ordinance, gutting shoreland protections in
barefaced attempt to allow the project**

Charlevoix—A resident working to protect Lake Charlevoix from a proposed resort dining and event facility combined with a boathouse and a massive dredging of shoreland sued Hayes Township Zoning Board of Appeals in Charlevoix County Circuit Court last Thursday for the Board’s erroneous decision regarding the Ordinary High Water Mark.

The resident, LuAnne Kozma, is one of three waterfront property owners who in September 2021 filed a case with the township’s Zoning Board of Appeals to interpret waterfront regulations of the township zoning ordinance that protect the Shoreland Protection Strip on the lakes and streams in Hayes Township. One of them requires structures to be 100 feet away from the Ordinary High Water Mark. The proposed structure would be placed directly over the waters of Lake Charlevoix in a proposed artificial boat basin accessed by a proposed channel cut through the Shoreland Protection Strip.

The Ordinary High Water Mark or OHWM, is the line between uplands and bottomlands of a lake or stream. Hayes Township’s definition of the OHWM in the zoning ordinance follows the State of Michigan’s and federal government’s definitions of OHWM. When there are earth changes, regardless of how the earth changes occur, whether by natural erosion or accretion, or by human activity of excavating or filling, the OHWM’s horizontal location follows where the water goes, as Kozma explained to the ZBA.

Kozma had presented a detailed slide presentation at public hearings, with 45 exhibits documenting how other governmental agencies, organizations, OHWM experts, and the developers' own drawings, all supported the fact that the OHWM would change and follow the perimeters of artificial channels. The governmental agencies providing email comments included the US Army Corps of Engineers and State of Michigan's Water Resources Division, both of which have jurisdiction over the proposed project because the waters of Lake Charlevoix, an inland lake, would flow into the proposed human-made boat basin and channel and would enlarge the public trust waters, and the Little Traverse Bay Bands of Odawa Indians' DNR Director. The proposed elevation level of the basin/channel detailed in the project site plans show the new bottomlands would be excavated down 32 feet from the planned location of the proposed boathouse/dining/event facility, converting uplands to bottomlands.

The lawsuit points out that the Hayes Township ZBA decision inserts a clause that does not exist in the zoning ordinance, that the OHWM would not move in the case of an human-created boat basin/channel, but would "remain with the natural shoreline."

In another decision in the case, the Zoning Board of Appeals found in favor of the three residents, that the ordinance language prohibits excavation of the 50-foot Shoreland Protection Strip on all waterfront lots, thereby prohibiting the Law 'boathouse'/dining/event facility and boat basin and channel excavation project.

The Hayes Township Planning Commission has been rewriting the entire zoning ordinance since 2020, spending nearly \$20,000 on one consultant's rewrite, discarding it, and then copying a neighboring township's ordinance and rewriting it. The effort is spearheaded by Chair Roy Griffiths and Township Supervisor Ron Van Zee who is also the hired Zoning Administrator. Since it was revealed in September 2021, the draft zoning ordinance contains numerous changes that gut nearly all sections that strongly protect the shoreland. Some planning commissioners have stated at public meetings that in dealing with wealthy waterfront owners who "lawyer up," negotiation and compromise with them should be built into the ordinance itself.

The new *Kozma v Hayes Township Zoning Board of Appeals* lawsuit (case no. 22-0966-27CZ) is titled "Claim of Appeal Under MCR 7.122 of a ZBA Interpretation of the Location of the Ordinary High Water Mark and Structure Setbacks on the Creation of a Channel-Basin."

In a separate filing on October 24, Scott and Debra Law also filed suit against the Hayes Township ZBA claiming to appeal *the same OHWM decision that went in their favor*, as well as the 4-1 decision that upheld the zoning ordinance prohibits excavation of the shoreland protection strip. The Laws have said their 400+ acres are for a resort for their corporate employees at Zotec Partners, based in Carmel, Indiana, and their charitable foundation.

Statement by LuAnne Kozma:

“It’s unfortunate that this lawsuit even has to happen, because everywhere across the nation, the Ordinary High Water Mark is the dividing line between uplands and bottomlands. All governmental agencies understand this material reality, know where their jurisdictions begin and end, and understand the law, except Hayes Township. The Hayes Township zoning ordinance waterfront regulations and ‘natural features setback’ sections are considered one of the strongest in the state for protecting lakes by protecting the shoreland that follows the recommendations in *Protecting Michigan’s Inland Lakes: A Guide for Local Governments*, held up as a model for other communities by Michigan Lakes and Streams Association,” Kozma said, referring to the Michigan Lakes and Streams Association website which lists the Hayes Township ordinance as one of 14 model ordinances for natural features setbacks: <https://mymlsa.org/government-and-legal-issues/protecting-michigans-inland-lakes-a-toolkit-for-local-governments/>

Statement by LuAnne Kozma about the Laws’ separate claim of appeal:

“Scott and Debra Law are not aggrieved by the ZBA decision on the Ordinary High Water Mark because it went in their favor. All this time they have said publicly they would abide by the local laws. That obviously is not the case. Now the Township has to defend our current strong ordinance that protects the shore, while the Planning Commissioners and our Zoning Administrator are gutting that very language in an ordinance rewrite in a barefaced attempt to allow the Laws’ project.”

More Information

Protect Lake Charlevoix Shoreland, a 501c4 organization, has the court documents posted at: <https://protectlakecharlevoixshoreland.org/litigation-against-the-township/>

The ZBA interpretation case filed by Kozma, Hicklen and Fowle, including the slide show presentation, brief and 45 exhibits can be found at:

<https://protectlakecharlevoixshoreland.org/cases-before-the-zoning-board-of-appeals/>

The Hayes Township Planning Commission's year-long rewrite gutting the Shoreland protections of the zoning ordinance, and a summary of the proposed changes can be found at:

<https://protectlakecharlevoixshoreland.org/sample-page/>

Kozma's handout to the ZBA annotating the exhibits on the Ordinary High Water Mark is appended to this press release.

Hayes Township Zoning Ordinance:

<https://www.hayestownshipmi.gov/zoning-ordinance/>

The Laws' property is zoned R-1, low-density residential, where commercial uses are prohibited.

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The Ordinary High Water Mark (OHWM) Exhibits

Exhibit 18 (and K) - Laws' Joint Permit Application to USACE and EGLE: answers questions as which structures will be below the OHWM and the Laws reply: boathouse, boat basin, channel. Drost Landscape scale drawings show OHWM moving into basin

Exhibit 28 (and M) - USACE's April Champion email to Ellis Boal replies to his question: Boal: "Third, the Corps agrees with us that if the Laws excavate the channel and basin and open them so waters of Lake Charlevoix flow in, the OHWM would advance horizontally from its original location along the natural shore of the lake, to a new location determined by physical evidence along the sides and walls of the channel and basin."

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

Exhibit 27 (and N) - EGLE's Neil Shock email to Kate Dahlstrom, states: "It is the interpretation of the WRD [Water Resource Division] that the OHWM would follow the new shoreline contour, although this is not clearly define within Part 301 or its administrative rules."

Exhibit 25 (and Q) - DeVos boat basin plans from State of Michigan's database shows OHWM moving into basin

Exhibit 26 - Pre-ordinance Packer basin plans show OHWM moved into basin, at the time of modifications of existing seawall, an application Packers made in 2019

Exhibit 36 (and Y) - USACE's April Champion forwards her email to Ellis Boal regarding the OHWM (in Exhibit M) to Ron Van Zee at: zoning@hayestownshipmi.gov

Exhibit 39 (and EE) - Tip of the Mitt Watershed Council's Jennifer McKay's letter on OHWM states: "The OHWM and shoreline jurisdiction can move as the shoreline changes over time. The OHWM is not a static location... Most importantly, the OHWM can also change because of land use changes, such as excavation of a channel and/or basin...OHWM changes with land use and will follow the contour of the new shoreline...[W]hen the OHWM has changed location due to land use or other reason, the setback must occur from the new OHWM."

Exhibit 40 (and LL) - Guy Meadows, PhD, Michigan Tech University, Director, Marine Engineering Laboratory, who studies how OHWM moves on shorelines, states: I agree totally with the USACE definition of the OHWM and its movement across the beach and shoreline.

Exhibit 41 (and MM) - EGLE's Water Resource Division supervisor Joseph Haas email on OHWM states: "To be clear the OHWM on Lk Charlevoix – an inland lake is driven by the definition in the Inland Lakes and Streams Statue, Part 301. Not by the Part 325 Great Lakes Submerged Lands Act OHWM of Lake Michigan. . . . EGLEs regulatory position would be that

the lakes OHWM (similar to the Corps interpretation) follows the perimeter of the new excavated cut.”

Exhibit 45 (and RR) - Little Traverse Bay Band of Odawa Indians, Douglas Craven, Director of Natural Resources Department states:

“In the event of the removal of shoreline and inland dredging, water would move inland and create bottomlands over which were previously uplands. There would be an easily identifiable difference between the aquatic and terrestrial habitats due to the changes in soil composition, vegetation and the existence of water vs upland. Furthermore, a new “mark,” “impression” or clear physical change due to the consistent presence of water would be found in relative proximity to the water’s edge within the new basin. According to definitions provided by USACE and SOM, the OHWM would follow inland with dredging. Pragmatically, there cannot be public waters, like the newly created public waters proposed for [The Law project], without a corresponding OHWM. If the OHWM were to “remain in its original location” after dredging the shoreline, it would not meet the definition of an OHWM provided by USACE, SOM and the ZO. That erroneous interpretation of the OHWM would put it directly in the water, absent of corresponding shoreline or upland.

Additionally, LTBB has been able to confirm that a newly located OHWM would be the interpretation by USACE and SOM as USACE and Environment, Great Lakes, and Energy have concurred. It does not make sense for the ZO to adopt the exact definition of OHWM as the SOM but to interpret and enforce the OHWM differently. LTBB contends that Hayes Township adopted the same definition of the OHWM as SOM with the intention of interpreting the OHWM in precisely the same manner as SOM. Hayes Township ZO section 3.14 includes “Setback Area Regulations” that prohibit the placement of structures within 100 feet of the OHWM on Lake Charlevoix. Section 9.01 of the ZO also states, “the Zoning Administrator shall under no circumstances...vary the terms of this Ordinance in carrying out the duties of the Zoning Administrator.”