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**Whitewater Township Zoning Board of Appeals
Minutes of 04/23/09 Meeting**

Call to Order

Chairperson Millar called the meeting to order at 7:00 p.m. at Whitewater Township Hall, 5777 Vinton Road, Williamsburg, Michigan.

Roll Call

Members Present: T. Millar, Benak, Lake, Bowen, Halstead (alternate)
Members Absent: P. Miller (excused).
Also attending: Planning/Zoning Administrator Meyers, Recording Secretary Pulver, and 13 others.

Set/Adjust Agenda

The agenda was set as written.

Public Comment

None.

Approval of Minutes

Moved by Lake, seconded by Bowen, to approve the minutes of the 03/26/09 meeting. **Motion approved 5-0.**

Business Session

Public Hearing on Appeal #A1-09, Charles & Kathleen Gerwin; 13-110-021-00

The public hearing was opened at 7:05 p.m.

Millar stated this case was denied by the ZBA on 07/24/09. He questioned whether the ZBA has the authority to hear the matter again given the fact that a decision has been made on it. Millar asked if there is new information or if this was the same request that was addressed in July.

Zoning Administrator Report

Meyers stated new information was brought to her attention in January 2009 and provided her full report (attached to minutes). At the request of Chairperson Millar, Meyers contacted Township counsel and determined that two newer structures (pole barns) were built on the same road under an agreement entered into with the Township Board. Meyers stated that counsel informed her that case law supports not allowing a re-hearing by the ZBA unless the ordinance specifically speaks on the subject; however, if new evidence is brought forward it can be reconsidered. Meyers accepted the application based on new information presented as stated in her report.

Petitioner Presentation

Mr. and Mrs. Gerwin were present. Mrs. Gerwin stated they are on a 60 ft. lot without any storage. They will have to store items on their lot if it is housed within a building or not. Mrs. Gerwin stated it will look nicer with the items in a building and stated the neighbors are all in agreement.

Report on Site Visit

Lake visited site on 04/22/09 and noted the two structures the Township Board previously approved were quite large. Lake stated as long as the proposed buildings are aesthetically pleasing, they should be granted.

Correspondence

Millar read correspondence dated 03/23/09 from Lynn DeLong (attached to minutes). DeLong's letter suggested that 1) the ZBA does not have the authority to approve a use variance; and 2) that the ZBA has the authority to interpret a zoning ordinance, but not a Township Board decision.

Public Speaking in Favor of Appeal

Lee Brownell, 10196 Elk Lake Trail

- Request is not uncommon to the immediate neighborhood.
- All of the neighbors support the proposal.
- A structure is far more aesthetically pleasing than having recreational vehicles and equipment sitting outside.

Dick Bukowski, 10304 Elk Lake Trail

- Spoke in favor of application at the last meeting and provided a letter reiterating his support (attached to minutes).

Public Speaking in Opposition of Appeal

None.

Anyone in Attendance Who Wish to Speak on this Appeal

Cheryl Walton, P.O. Box 155, Williamsburg

- Spoke on behalf of Whitewater Watch, a local grassroots organization that has been in operation for approx. 2 1/2 years.
- Concerned about best interests of Township.
- An ordinance that prohibits accessory structures on lots without a primary residence should be repealed.
- People should not have to petition and pay for the application to build something they should have the right to build.

Millar closed the public hearing at 8:24 p.m.

Discussion on Appeal

Millar opened the discussion by stating he was concerned as to whether the ZBA has the authority to re-hear the appeal. The Zoning Ordinance does not address the issue. Millar stated Township counsel referred him to a 1979 case, Kethman v Osceola Twp. The Court of Appeals ruled that the ZBA did not have the inherent power to grant a re-hearing. Millar questioned whether the new information presented was enough to make a difference, and stated perhaps the Township Board is the entity with whom to enter into an agreement.

Lake stated the ZBA should be able to re-address this issue based on the new information provided. Bowen stated if the Township approved, new information doesn't change anything in the application. Bowen stated the ZBA interpreted the previous application accurately and could not speculate on the action of the Township Board.

Millar stated the same conclusion would be reached because the Ordinance clearly says you have to have a primary use established on the property.

Benak asked why this request should be denied if all of the neighbors are granted the ability to build accessory buildings and the Township Board entered into an agreement for another.

Halstead asked if the lots were sold for the sole purpose of putting septic systems and accessory structures on. He stated he believes that was the idea even though they are metes and bounds versus platted lots of record. The initial intent was for smaller summer cottages and now people are using them for full-time residences. He stated it is unfair to approve some and not others under the same or similar conditions. The ZBA is here to help the property owners do the right thing. He stated he feels it is connected with the septic system. It would be harder to put in a septic system than to add an accessory structure.

Millar stated he does not agree with the general principle that the ZBA is to do what is right by the residents. The ZBA is the judicial wing of the Township to interpret the Ordinance. It is the Planning Commission, Township Board and electorate's decision to make changes in the Ordinance if a provision is problematic. If ZBA members feel the Ordinance is unfair or not right, it does not have the authority--except in the few exceptions that the law allows--to make other decisions. The fact that there is no primary residence on this property is the issue. Perhaps exceptions do need to be made in certain areas, but that is not the task of the ZBA.

Millar stated that Township counsel provided information that case law supports not allowing a case to be re-heard by the ZBA unless the Ordinance specifically speaks on the subject. However, counsel did add if new evidence is brought forward it can be considered. The question is: is there new evidence that has been presented such that the July decision needs to be reconsidered.

Moved by Lake, seconded by Benak, to reconsider the application of the Gerwin's due to new information brought forward which includes the agreement entered into by the Township Board with other property owners and the other following factors:

- a. Both parcels and the existing easement were marketed, sold, and conveyed as a combined entity at closing.
- b. The easement connecting the parcels is 20 to 30 ft. wide and allows surface rights for ingress and egress.
- c. The easement requires upkeep and maintenance of the surface property.
- d. The easement contains subsurface rights for septic piping and other utilities.
- e. The easement contains the right to hypothecate it.
- f. The easement contains the right to convey it.
- g. The easement is attached to the property and runs in perpetuity.

Millar stated the easement was discussed quite extensively at the last hearing. The physical separation between the two properties was also discussed. Millar stated the ZBA members acknowledged that an easement wouldn't be enough because it would allow others to connect parcels of property that are separated by longer distances and paying for an easement across the property and then connecting it to add more buildings. Millar stated he did not believe there is new evidence that allows reconsideration. Bowen agreed and stated he did not see any difference from the last decision made. Bowen stated the job of the ZBA is to interpret the Ordinance, and the Ordinance is clear in this case--if there is no primary residence on the property, then an accessory structure is not allowed.

Lake asked why the Township Board made the agreement on the other property. No one present was aware of the reason.

Benak suggested common sense be used in this matter. The house is very close to the property.

Discussion

Mr. Bukowski from the public stated that what was discussed in July was that the properties were not contiguous and that was the basis for the denial of the ZBA; they are contiguous when the rights of the easement are considered.

Roll call vote to reconsider the application: Lake, yes; Halstead, yes; Millar, no; Bowen, no; Benak, yes. Motion carried 3-2.

Discussion on Approval of Request

Lake asked about stipulations on the appearance of the building project if it were approved. Meyers reiterated the four requirements from her report (see page 2).

Lynn DeLong from the audience stated that the ZBA does not have the power to grant a use variance, and this request is a use variance. The ZBA did not indicate that when the case was denied in 07/09; the law must be followed until it is changed.

Dick Bukowski from the audience stated the road is 1/2 mile long. There are 22 parcels on the same side of the road; 14 have an accessory structure on the metes and bounds lots and they are not just the last two since 1972.

Millar referenced the minutes from July. There was discussion regarding the fact that the situation was self-created. As ZBA member DeLong stated in July, use variances should be denied if the ZBA is not empowered to approve them in the first place. That is the same information that Meyers provided as confirmed by Township counsel. There are some proposed changes to the Zoning Ordinance that will clarify this. The ZBA discussed that accessory structures are not permitted on a lot where there is no house or a house would not be built. Lake made comments that the ZBA should be empowered to do this and that was the information available at the time.

Moved by Lake, seconded by Benak, to grant the variance request based on the following factors:

1. Accessory structures are a customary residential use and need.
2. The property cannot be used for its permitted use of a single family dwelling, as the septic field for the primary residence negates the ability for an additional home to be placed on the parcel.
3. The lots will be "combined" in that they are joined by utility lines (the septic system).
4. The situation is unique to the majority of lakefront property owners as the majority of these parcels were platted prior to zoning.
5. Granting the interpretation will not alter the essential character of the neighborhood as the structure will be architecturally consistent to the primary structure.
6. The problem is not self-created. The legal non-conforming lot of record (the primary parcel) was platted in 1912 before zoning was enacted in Whitewater Township.
7. The interpretation will not cause a substantial adverse effect upon adjacent properties as the structure will be architecturally consistent with the primary structure.

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8. The interpretation will relate only to the property under the control of the appellant.
 9. The interpretation will not jeopardize the preservation of a substantial right as the condition is common in the zoning district and the immediate neighborhood.
 10. The interpretation will not otherwise impair the public health, safety, comfort or general welfare of the residents of the Township.

With the following conditions:

1. The applicant shall provide the Township with a guarantee acceptable to Township counsel linking the two parcels together. Since the parcels cannot be joined legally into one tax number, the Township needs a guarantee that the two properties shall always be transferred together.
2. The accessory structure shall only be used as incidental storage for 10198 Elk Lake Trail.
3. There shall be no living quarters contained within.
4. If the accessory structure is used for any other purpose than incidental storage for 10198 Elk Lake Trail, the applicant and/or future owners agree to pay any Township expenses, including attorney fees to enforce bringing the parcel(s) into compliance.
5. The accessory structure shall be architecturally consistent with the primary residence.

Roll call vote: Halstead, yes; Millar, no; Bowen, no; Benak, yes; Lake, yes. Motion carried 3-2.

Public Hearing on Appeal #A2-09, Steve & Karen Trudell; 13-310-017-00 and 13-310-018-00

Millar opened the public hearing at 8:05 p.m.

Zoning Administrator Presentation

Zoning Administrator Meyers stated the applicant requests a variance from Article 12.11 to construct a new home that will require a lakeside setback of 40.3 ft. and a front yard setback of 10.06 ft. at its closest points. Meyers' report is attached to the minutes.

Millar asked about the shoreline and discussion ensued regarding the construction of the Elk Lake Dam and the differences in the shoreline and loss of beach area over the years.

Millar also asked if the Trudell's are tearing down the house prior to starting construction. Meyers indicated the current structure will have to come down before they can build the proposed structure based on how all the lots and neighboring lots are situated. Lots 17, 18, 19 and 20 are affected. A construction drawing has not yet been produced; the applicants wanted to be sure they could put a structure within the "bowtie" footprint before proceeding further on the request.

Petitioner Presentation

Mr. Trudell was present and stated he has rock at the lakefront. He stated no more land will be taken from the lake.

The builder, Tom Giusti, was also present and stated the proposed home will be approx. 3,000 sq. ft. total (2 stories) and will be in character with the neighborhood. He provided a preliminary color rendering of the home.

Report on Site Visit

Millar stated he visited the site and noted how large some of the homes are.

Halstead stated the proposal is about the only configuration they could possibly make that would fit with the dimensions from the lake to the road.

Bowen asked if the owner of the home that is for sale (under foreclosure) has stated any objections to the proposed home. No objections were noted.

Correspondence

None.

Public Speaking in Favor of the Appeal

None.

Public Speaking in Opposition of the Appeal

None.

Anyone in Attendance who Wish to Speak on this Appeal

None.

Millar closed the public hearing at 8:20 p.m.

Discussion on Appeal

Millar asked, if the "bowtie" building envelope is correct, could the property be used in a manner to comply with the setback requirements. Meyers stated the minimum building size could be met; however, the neighbors would probably not be happy with meeting the bare minimum.

Bowen stated a deviation may be granted for hardship reasons and referenced Sec. 12.12 Hardships, as applicable in this case.

Millar reviewed the 4 criteria and stated he would support granting the variance. The problem was not self-created. Encroachment by the water has made building a house on the true property line a practical difficulty. Granting the variance will not change the essential character of the area. The problem is not due to a unique situation not shared in common with the nearby property owners. It has been difficult over the years to try to get reasonably sized homes for people in the area given that the lots are very narrow and the lake is encroaching onto the buildable property. Bowen and Lake agreed.

Millar stated that the ZBA should also keep in mind Meyers' recommendations to combine the lots into one and to adhere to the minimum front yard and lakefront setbacks necessary to allow for the construction of the home.

Halstead moved, seconded by Lake, to approve the variance from Article 12.11 of the Zoning Ordinance to allow for a front yard setback of not less than 10.06 ft. and a lakefront setback of not less than 40.3 ft. for the construction of a new home with attached garage for Appeal #A2-09 on parcels 28-13-310-017-00 and 28-13-310-018-00 based on the following conclusions:

1. The original buildable portions of the platted lots of record have changed considerably since the Elk Lake Dam was installed.
2. Side yard setbacks can be met.

3. The home will have the appearance of meeting the front yard setback as it will sit no closer than 30 ft. from the edge of road.
4. The roadway is a local road and has low usage at the cul-de-sac.
5. Granting the variances will not alter the essential character of the neighborhood as the structure will be of consistent caliber as the general area.
6. The problem is not self-created. The legal lots of record were considerably more conforming prior to the construction of the Elk Lake Dam.
7. The variances will not cause a substantial adverse effect upon adjacent properties as the structure will conform to side yard setbacks. The proposed home will not alter site lines of the adjacent parcels either based on its location on the cul-de-sac.
8. The variance will not otherwise impair the public health, safety, comfort, or general welfare of the residents of the Township.

With the following conditions:

1. The two parcels shall be combined.
2. The actual placement of the home will be depicted on the site plan as submitted.

Roll call vote: Millar, yes; Bowen, yes; Benak, yes; Lake, yes; Halstead, yes. Motion carried 5-0.

Millar closed the hearing on this appeal at 8:30 p.m.

Zoning Administrator Report

Review Bylaws

Meyers presented draft Bylaws consistent with the new Zoning Enabling Act (attached to minutes). Meyers stated it is the Township Board's policy to approve bylaws of appointed boards and commissions. Bylaws as approved by the ZBA will be recommended for approval to the Planning Commission and Township Board

Millar asked if a secretary to the ZBA is necessary. No one currently signs the minutes; they are approved at a subsequent meeting. The Zoning Enabling Act does not require a secretary to the ZBA. Meyers will remove the secretary provision under Sec. 1.D.

Millar asked if the order in G. 3 and 4 should be changed. Meyers suggested the applicant should present their case first--as they are the one making the appeal--but also stated she has seen it done either way.

Millar asked if the 3-year term should be included for ZBA members. It is stated in the current Ordinance but not sure if it needs to be in Bylaws. Meyers will add.

Lake asked if the Township Board would unilaterally change and enact the Bylaws. Meyers stated the ZBA would be informed of proposed changes for review and be offered a chance for final comment.

Moved by Benak, seconded by Lake, to recommend approval of the Bylaws as amended. Motion approved 5-0.

Ordinance Comments

Meyers provided a memo entitled Ordinance Modification Consideration dated 04/14/09 and draft ZBA Ordinance language addressing the operation of the ZBA (see attached). Meyers reviewed the highlights of the draft.

Meyers stated there are some things that are unspoken in the current Ordinance, and the current Ordinance doesn't address use variances. The argument is that if the Township has granted a use variance in the past, then they have the right to do that. The question is: was it an interpretation or was it a use variance? This draft ordinance specifies that use variances cannot be granted and outlines the types of things that the ZBA could review. Specific criteria are included for each action.

Meyers stated it is not the job of the ZBA to develop this ordinance; however, she wanted them to have the opportunity to review and comment before it went to the Planning Commission for review.

Discussion

Millar likes the provision in 18.80 that the ZBA can refuse to grant a variance if there are other violations on the property.

Millar suggested including language in 18.90 from the statute (MCL 125.3606) regarding the 30-day appeal period after the decision is certified or minutes are approved. Discussion regarding using the certification form; signing of the certification triggered the appeal period. Meyers will include the statutory language.

This draft ordinance won't go before the Planning Commission until June or July. Meyers noted some minor typographical errors and invited further review and comments from the ZBA.

Millar adjourned the meeting at 8:40 p.m.

Respectfully submitted,

Patricia Pulver, Recording Secretary