

CHIKAMING TOWNSHIP ZONING BOARD OF APPEALS
Minutes of the May 18, 2021, Regular Meeting
APPROVED

ELECTRONIC MEETING VIA ZOOM, PER GOVERNOR WHITMER'S ORDER

The May 18, 2021, regular meeting of the Zoning Board of Appeals (held electronically) was called to order at 1:00 p.m. by Chairman (hereinafter Chair) Larry Anderson. Roll call of members attending electronically: Larry Anderson (from Sawyer), Doug Dow (from Harbert) Liz Rettig (from Chikaming Township, Harbert), Paul Rook (from Sawyer). 4 present - Quorum. Noted that Attorney Hilmer is also present along with many others attending via zoom. (45 participants at beginning of meeting)

Chair advises that the first order of business is to approve the April 20, 2021, minutes. Chair asks if the Board members have any corrections. Chair advises that Doug Dow has a few minor typographical corrections. Rettig reads them into the record from an e-mail received from Dow. No one else has any further comments on the minutes. **Dow makes a motion to approve the minutes as corrected; Rook seconds. Chair takes a roll call vote. Roll vote: Rook, Dow, Rettig, Anderson – 4 AYES. Minutes are approved as corrected.**

Case #1193- Cathy Zeiger, Rich Zeiger, and Shelly Zeiger in regard to 5692 West Warren Woods Road, Three Oaks. Property Code # 11-07-0025-0001-02-6; Applicants are asking for a reduction of lot area requirement in an AG-Agriculture District. Chikaming Township Zoning Ordinance #144, Section 4.02 requires 435,600 sq. ft. of lot area (10 acres) in an AG-Agriculture District.

Chair asks new Zoning Administrator (new ZA) Kelly Largent to speak on the background. Kelly gives a short version of this case: The Zeigers came to ZA Van Thornton for a land division which was not approved. They then appealed to the Township Board and the appeal was approved for the land division. Zoning cannot be cleared to complete the land division because the Zoning Ordinance has changed. In 2014 the Zeigers put their farm in a conservancy with the stipulation that they could remove 2 more parcels that were 2 acres in size. At that time Zoning Ordinance #87 allowed in an AG-District, removal of 1 – 3 parcels with a minimum size of 2 acres from a larger parcel as long as the remaining parcels retained 10 acres. Originally, they had a 160-acre farm and they did 1 split immediately (removing 2 acres leaving 158 acres. Of that 158 acres, they opted to set aside 2 more parcels from the conservancy at 2 acres in size meeting the Zoning Ordinance at that time. Subsequent to them putting everything into the conservancy the Zoning Ordinance changed in 2019. *[remove: The Zeigers would now like to exercise their right to pull the 2 acres out of the conservancy.] INSERT: “The Zeigers held 2 acres out of the conservancy, and want approval to now use the 2 acres, which was in compliance with the then ordinance and is now a variance from the required 10 acres under the new zoning ordinance.”]* However, with the change in the Zoning Ordinance that did not allow the removal of the 2-acre parcel. They went back to the Conservancy Agreement to request to remove more acreage to meet the 10-acre requirement but were told they could not remove more than 2 acres from the conservancy – what was agreed upon. Now they are in a position where they cannot do the split for zoning because the ability to create a 2-acre parcel has been removed in the new Zoning Ordinance. They are seeking a variance from the 10-acre requirement (new minimum lot size) to be able to pull 2 acres out for construction of their new home.

Chair asks Board members if they have any questions for ZA Thornton. None.

[MEMBER TOM GOLD FROM LAKESIDE IS NOW ABLE TO JOIN VIA ZOOM – 5 BOARD MEMBERS NOW PRESENT.]

Chair asks that applicant for comments. Applicant Rich Zeiger wishes to add to Kelly's comments: The original 2 acres was prior to putting the farm into conservancy. What we are looking at is a 27-acre lot in practice (an entire field). The house is on the corner we are asking to reduce the dimension and the same thing for the lot set aside for my brother. We are asking only for a variance for dimension. We are going to continue the operation of the farm.

Chair asks if someone in the Zeiger family will retain ownership of the 2-acre parcel in perpetuity? And what is currently in the conservation easement?

Zeiger responds: the homestead where ____ lives is not a part of that conservation easement (corner of Warren Woods and Flynn); my sister lives on Flynn and 2 acres that was removed prior to the easement (20 years ago); the corner lots of 2 acres each were set aside at the time of the easement; everything else is in the conservancy in perpetuity and nothing else could be developed and is required to be agricultural. We intend to continue our farming legacy which we have done for 132 years.

Chair asks if Board have questions for applicant. None.

Chair asks for letters and asks Rettig to read letter of May 18, 2021, of Rich Sullivan into record. Rettig does so. Letter in summary is in total support of the variance and asks the ZBA to encourage our township to adopt a "heritage clause" allowing agricultural families to parcel off an acre or two for families who are working a farm and wish to live on the property.

No other letters.

Chair opens public comments. None.

Chair goes to Board discussion. Chair starts first by stating this is a big ask under the current ordinance. Dow weighs in by stating that the current ordinance has very little to do with this situation except that it has created the problem we are in. Dow continues by stating overall he supports the 10-acre minimum for agricultural land. What the record makes clear, however, is that the Zeigers planned this well before the new ordinance was put into place. They simply did not execute. The argument is that this is not a self-created problem, but they did something good but failed to execute. The Township changed the Ordinance and did not retain a similar clause as the old allowing the family to split off 1 or 2 acres. I think it is reasonable that we look at this in the larger scale – keeping agricultural land, allowing families to stay on that land and would add the Zeigers have put the bulk of their land in a conservation easement that they will continue to farm. We are preserving agriculture, keeping families on their farm and granting a one-time variance based on very unique circumstance is reasonable and the right thing to do.

Gold agrees with everything Dow has said, but questions that there are two 2-acre parcels and only 1 variance is being asked for now? Will this come up again?

Applicant answers that yes, there is 1 other 2-acre parcel and our hope is that the township will address a heritage clause by the time the other parcel is ready so it would not come up as a variance. This other parcel is for Rich Zeiger's brother – if he ever wants to build.

Gold feels that both should have been asked for at this time. Gold addresses Attorney Hilmer and asks if the other parcel can be addressed now. Hilmer responds that either the ordinance would need to be

amended or when the time comes that they want to build, they would have to come before the ZBA and request a variance. It cannot be given at this meeting. Gold continues that he is in support and feels they got caught in the changing of the ordinance.

Rook goes on record that he is in agreement with allowing the variance.

Rettig goes on record that she abstained from commenting and voting when this issue came up at the Township Board meeting so she could vote at this ZBA meeting. Rettig is in support and feels that the hardship is that the ordinance got changed and the applicants had not yet executed the removal prior to the ordinance change.

Several attempts at a motion were made with the final:

DOW MAKES A MOTION THAT BASED UPON THE UNUSUAL CIRCUMSTANCES INVOLVED, THE PRESENCE OF A CONSERVATION EASEMENT WHICH THE APPLICANT PUT IN PLACE, AND THE INABILITY TO MAKE ANY CHANGES TO THE CONSERVATION EASEMENT, WE APPROVE THE VARIANCE FOR 1 2-ACRE PARCEL TO BE ALLOWED IN THE AGRICULTURAL ZONING DISTRICT. RETTIG SECONDS.

Chair goes through criteria:

Chair goes over criteria: (Page 194, Article 17, Zoning Ordinance)

- 1 Unique circumstances or conditions exist which apply to the land, structure or building involved and which are not applicable to other lands, structures, or buildings in the same zoning district. Yes – based on conservation easement and change of the Zoning Ordinance.
- 2 As result of the unique circumstances or conditions, strict compliance with the provisions of this ordinance would unreasonably prevent the use of the property for a permitted purpose, or be unnecessarily burdensome? Yes – based on same answers as #1.
- 3 The unique circumstances do not result from the actions of the applicant, including the knowing purchase of a property limited by existing non-conformities? Yes.
- 4 The variance requested is a minimum variance which will make possible the reasonable use of the land, building or structure? Yes
- 5 The granting of the variance will be in harmony with the spirit and intent of this Ordinance and will not be injurious to the neighborhood or otherwise detrimental to the public health, safety and welfare? Yes

Roll vote: Rook, Gold, Dow, Rettig, Anderson. All yes. VARIANCE IS APPROVED.

Chair moves to next matter:

Appeal: Michael, Susan and Hannah Levine, et al., concerning a building permit issued for new construction on a property at 13560 S. Easy Lane, Harbert, property code number 11-07-0009-0004-51-1. Applicants are appealing the Zoning Administrator's decision to issue a building permit which meets all Zoning Ordinance requirements in Section 4.02 of the Chikaming Township Zoning

Ordinance No. 144. Section 17.04(B)(2)(a) provides, in part, “the appeal shall be limited to determining, based upon the record, whether the administrative official breached a duty or discretion in carrying out this Ordinance.”

Chair asks applicants to limit their comments to 3 minutes each or perhaps a spokesperson can speak for all.

Dow interjects with a point of order: If we read the entirety of Section 17.04(B)(2)(a)

(A) we cannot look at anything other than the timeline leading up to the 12/28/20 approval of the site plan.

(B) Our Zoning Administrator (Van Thornton) approved the site plan, he did not issue a building permit. This was subsequently issued January 4, 2021, by our building official based upon approval of the site plan.

The question I am asking to our legal counsel, are we allowed to hear testimony beyond 12/28/20? (the date of the decision).

Hilmer responds: Based upon Section 17.04(B)(2)(a) you are not, you must look at the record as it existed at the time the permit was issued.

Dow: Permit was January 4, 2021. What I would submit is that this matter is as straight forward as examining the site plan and determining that the site plan conforms to the Zoning Ordinance. If the answer is yes, then determining that the building permit was issued correctly.

Hilmer: That is my opinion- yes.

Dow: We are allowed to look at the documents provided. We are allowed to look at the timeline up to January 4, 2021, and the question among the board: Does the site plan which was approved on 12/28/20 meet the Zoning Ordinance.

Gold interjects (speaking to Dow), the reason we are here today is because the community was not given access to the drawings (discussed at last meeting) and they wanted to voice their concerns.

Dow says he read the minutes and understands an appeal was granted based upon those facts, so we are hearing that appeal today. I have tried to outline the rules under which we can evaluate that appeal. If the site plan meets the criteria of the Zoning Ordinance, that is the key question whether the approval of the site plan was granted correctly. What happened subsequent to that is another situation and does not involve this appeal.

Rettig agrees. If the site plan meets and the building permit got issued based on that site plan, then we are supporting our zoning administrator. It’s either yes or no based on the facts we have.

Chair: Multiple applicants appealed the decision of Van Thornton (ZA) that he said they were too late to appeal. The Board said, you may appeal. We are here to hear that appeal, but Dow is saying that appeal is limited to things that happened up to January 4 – the date of building permit issuance. Dow says that is correct and continues with he has sought the opinion of Attorney Hilmer – who concurs. Dow continues that he realizes that there is community unrest based upon the Zoning Ordinance, but the forum to hear that is at the planning commission. Our task today: Given the Zoning Ordinance we have and the plans that were submitted, was the site plan done properly and does the final site plan conform to the Zoning Ordinance as it stands and was the building permit properly issued based on that.

Gold: There were things that happened subsequent to that date and we should hear what the community has to say.

Dow: I am open to listening to problems with the ordinance. This is not the forum. Much more importantly, if we violate our own rules, we are creating a liability for the township.

Gold: Let's hear them out. Chair agrees to listen to the applicants and public. Dow states formally that all members of the board need to discount anything after January 4, 2021. Dow seeks advise of Hilmer. Hilmer who states that this is a public hearing, and the Board is obligated to listen to the comments of the public then it is up to the Board to determine which of the comments are germane to the issue and which are not. The public is entitled to comment. Dow stands down.

Chair starts with Susan Levine who says that applicant is not subject to the 3-minute time limit – only public comment.

Susan Levine: 13627 Easy. Overview; multiple errors by ZA and breaches of duties

- 1) Classifying accessory structure as a building rather than a dwelling; which has multiple bedrooms and other dwelling rooms has 2,000 square feet; 50-foot rear yard setback when private septic; septic for 5 bedrooms not 7 – 8; accessory should be limited to 800 sq. ft.; must be 10 feet from other structures – only 8 feet from pool;
- 2) Not protecting neighbors from unreasonable negative impacts on their use/enjoyment of properties;
- 3) Issuing a building permit even though septic approval did not align with building plans; septic system under driveway;
- 4) Permitting a principal residence of 4,000 sq. feet. that is actually 5,726 sq. feet (50% of basement above grade); 2-1/2 story limit;
- 5) Failure to follow procedural protections under Ordinance; (approved plans were unavailable to view)
- 6) Failure to protect the environment as classified in the ordinance. (natural areas not preserved; character of neighborhood; lot was clear cut)

Ted Flint: 13660 Easy. His property is partially wetland. The issues with the septic field could lead to draining into wetlands – troubling. Neighbors have been active in getting wooded property set aside and this new property is not in harmony.

Meg Foster: 13570 Easy. Concerned that building is in violation (size/type not typical for neighborhood); damage control on accessory structure and pool – too large; house not typical for neighborhood – mostly cottages/wooded; this new is built out to maximum; owner clear cut trees; concerned on lot coverage, drainage and how it will affect adjoining wetlands; last owner put restrictions on lot.

John Lesch – does not wish to speak.

Mullin – pass

Scales – pass

Chris Ianuccelli (Sheeley) – talks about his own property (2,900 sq. feet) and being in compliance with setbacks and community; surprised at size of new house and septic restrictions not applied; community should be engaged in plans.

Zurick Esposito – 13574 Main. Concerns with process leading to issuance of building permit; project needed more review; public hearing needed; this structure needed special use approval; too close to edge;

taller than height restrictions, clear cutting of parcel; 50-foot setback for septic required, overbuilding of parcel; excessive character of plan; negative impact on adjoining homeowners.

Robin Falconio – 13387 Pine. House is now 10 feet from property line – though there were restrictions in place.

James Morrisette- 13432 Timberlane. Public notice necessary for development; ZA gave permits before public told what was being built; ZA erred in classifying accessory dwelling; neighbors should have a voice; dwelling too high; promotion of environment that is wooded per Zoning Ordinance – not done; property was clear cut – is this allowed? hard surfaces will push water onto neighbor's lot; alarmed at front yard septic field and part of septic under a driveway; require wetlands assessment; require replanting of trees.

Hannah Levine – 13570 Timberlane/13581 Easy. Breach of duties by ZA:

- 1) Maintain wooded environment/natural features – not done
- 2) Landscape not preserved; minimum removal of trees; guest house impacts neighbors; septic is in violation; lot was clear cut and levelled; water will become a problem; limestone driveway will stop drainage
- 3) Privacy to protect neighbors – no preservation; neighbor views impacted by pool and guest house; noise/traffic/light will impact neighbors; 8 feet between pool and guest house; buildings too long (over 150 feet); septic restrictions ignored; square footage over; basement above grade makes it 3 story; septic projects into driveway and in front yard; too close to water line
- 4) Out of line with character of other owners – protected by build out deeds, wooded areas – not adhered to.

Chair now moves to public comment:

Long 13770 Rea – upset by the cutting of trees on applicant's lot; part of Save Harbert Woods; interested in conservation minded families and protection of environment spending \$1.5 million; concerns with site drainage.

Chandler 7340 Linwood – in support of ordinances; were the ordinances protected or ignored.

Mary Kelly Heinz - feels that this build out is out of character, height, width, length, trees removed, and septic; the ZBA should impose conditions on this building; natural resources; neighboring homeowners.

Ellen Mrazek – 13361 Pine. Talks about when she built the property; ZBA should eject the building permit.

Arlene Berger – 13432 Pine. Urges the Board to remedy situation in any way possible.

With no other input from the public Chair closes Public Comment.

Chair calls upon **Attorney Mark Miller** to speak for applicant Hjelmaker. He brings to light that many people have different tastes than the applicant. Tries to respond to point made: (Architect Chris Brooks and Engineer Daryl Veldman have worked hard to comply with all Zoning Ordinance and will also answer any questions) No variance needed to be requested. Zoning Ordinance and Master Plan were adhered to. Despite neighborhood opposition and different tastes, are respectful of neighbors.

1. Has met all zoning requirements;

2. No variance needed;
3. No issues with drainage (100-year storm instead of 25-year storm study);
4. Property perked – not a wetland;
5. Health Department requirements will be met;
6. Trees – Builder felt for safety of building, trees needed to be cut; others should have bought lot if they wanted to save trees; construction will make things look bare; Arcadia Gardens will replant and landscape after construction to make beautiful;
7. Brooks worked with ZA – accessory structure meets township requirements – no kitchen;
8. Home is bigger than other homes in the area – size is allowed by ordinance – 3900 sq. feet with basement;
9. Pool – will be built as allowed by Zoning Ordinance.

Chris Brooks (Architect) – speaks answering other question about the accessory structure. The location if not in the front yard; set back of 10 feet has been met; set back from other structures met; floor area of principal structure is 1800 sq. feet; accessory structure is 1,004 (less than principal residence); only 1 accessory structure (3 are allowed); height 18 feet allowed – meets ordinance; basement is below 50% of grade; height from garage floor to top is 30’ which is maximum and meets ordinance; 2nd septic field (for future) is required in case the primary one fails. 15% of lot coverage only - zoning allows for 40%.

Daryl Veldman (water) – standards for runoff of Berrien County Drain Commission met for 100-year storm; raingarden will handle runoff.

Chair goes to Board Discussion.

Chair asks new ZA Kelly if we are in compliance with Zoning Ordinance. Kelly advises she was not part of the review in April and has no comments.

Gold asks Van what determines accessory structure vs. accessory dwelling unit. Van answers that an accessory structure may not have a kitchen which is defined as having a stove. Accessory dwelling unit is designed for elderly parents or children of adult age and only 1 is permitted per parcel and may have a kitchen. Gold seems that this is the heart of the matter whether it has a stove. If no stove, then this is an accessory structure.

Dow – It is clearly an accessory structure. An Accessory Dwelling Unit needs a special land use permit. What was approved is an accessory structure. As to the basement, we are obligated to look at the plan. This is a site under construction and the plan clearly shows that the basement is 50% below grade. It cannot be measured now. The plan that was approved is below grade and it meets the height requirements.

Chair reminds us that Mr. Brooks says that it is well below the lot coverage with many pervious surfaces. The main question and our task: Did the ZA breach his responsibility in granting permitting based upon the plans submitted. The one with the red marking dated 9/16/2020 and another one dated 12/11/21 (dimensional setback); both show that it conforms to the zoning requirements.

Rettig reminds us that this is what we can base our decision upon – the record – as instructed by Mr. Hilmer.

Gold brings up that site plan review is excluded for residential. Tom feels that the overall intent of Article 17 is the review and the impact on the neighborhood on placing a home of this size. This puts the Zoning

Administrator in a position of being an architectural review board. This is what we heard most from the neighborhood – before a site plan is approved it should guarantee how the structure will fit into the neighborhood and the township.

Dow answers that he feels that how this should be addressed is: Does it fit within the zoning guidelines. People have different opinions on what is a tasteful home and what is not. Comments have been made about clear cutting the property. I'm not a fan of cutting all trees – my opinion does not matter. Our ordinance does not prohibit clear cutting the property. The issue is: Did the property owner and builder violate the Zoning Ordinance? The answer is no. Plans were submitted, negotiations, plans were modified, final plans were approved. Beyond that point we cannot go in this appeal hearing. You are a builder. Did you solicit neighborhood input? Rettig comments to Tom as a builder asking if he gives notice to the neighbors, does he get comments about what he is going to build – as long as it meets the ordinance. Gold says that the intent of Article 17 puts a lot of responsibility on the ZA. Van answers that Article 17(B) (2) (a) specifically excludes a single-family residence from site plan review requirements. We do a basic site plan. Chair also comments that this is not a commercial building where a site plan review is required. Dow adds that there are a number of conditions which trigger a site plan including a special use permit which triggers a public hearing. We have to be strict in drawing the line, site plan approval 12/11/20; no obligation for public hearing; no obligation for full bore site plan review – that's how the ordinance reads.

Gold: I wanted to get that on the table for the public. None of the things you are asking for are required under the ordinance because this is a single-family residence. Whether or not there are issues with the Zoning Ordinance does not matter. We allow 3 accessory structures which means you can have 17,000 square feet of lot coverage. They have only covered 15% of the lot – they could have used 40%. While I don't think we should allow that many accessory structures, this is probably not the last one we will hear on this subject.

Dow: Our job is to interpret the ordinance, grant variance to the ordinance, but not rewrite the ordinance. If we see a problem, we should make a recommendation to the Planning Commission.

Chair makes a final statement to the participants that he hears all the passion and concerns, but our task today is to decide whether or not the ZA properly performed his duties or did he breach his duties in giving a building permit that does not comply with all of our Zoning Ordinances.

Dow makes a motion that is it the finding of the ZBA that the Zoning Administrator did not breach his duty and that this appeal is denied. Anderson seconds.

Roll vote: Rook: No

Rettig: Yes

Gold: Yes

Dow: Yes

Anderson: Yes.

Therefore, we are in agreement that the ZA did not breach his duty and was acting properly in issuing a building permit that met all of the zoning requirements.

Chair asks Hilmer if more public comment can be taken. Hilmer answers that public comment is closed.

Van Thornton (ZA) asks to speak and makes a clarification that the ZA approves the parcel and the proposed structure for compliance with the Zoning Ordinance; the actual permit is issued by the building official once he or she has received the zoning compliance report. Wanted to make sure the record reads as the building code requires.

Gold asks if Susan Levine can make another comment. Hilmer says that public comment is over, but the Board may ask a question to an individual.

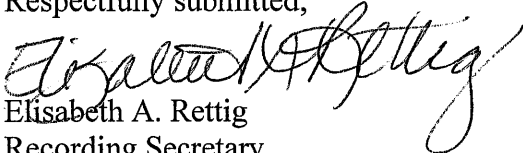
Chair advises Gold that he may ask a question to Susan Levine. Gold asks Levine if she understands that we are constrained by the law that we have to interpret and we are not open to changing the law. Levin answers that she understands but feels that many things were missed – Section 6.15(G)(4)(b)(4) which states that an accessory dwelling unit shall not have a kitchen. This kitchen issue cannot be what determines what's a building and what is a dwelling unit. Secondly, if we look at the height – 26 ½ feet if you subtract the 1st and 2nd floor from 26 ½ that leave 5.5 feet above grade. The basement is 9 feet which is more than ½. The septic is not allowed as a projection into the setback area and at the front of the house it is projecting into the 30-foot setback area. How can that be corrected? I totally disagree with the lot coverage number of 15%. Final comment – even if the members of the ZBA decide that this accessory structure is a building rather than a dwelling you have the capacity to consider the negative impacts on the neighbor's property on the environment and wetlands to limit the size. You are not using your powers sufficiently.

Dow points out that in Section 6.15 G 4(f): Accessory dwelling units in Accessory Structures. Accessory dwelling units shall be permitted in detached Accessory Structures ONLY if the detached accessory dwelling unit is constructed for the express purpose of occupancy by a member of the immediate family of the property owner such as a parent or child. In order to be approved for a Special Use permit, detached accessory dwelling unit shall meet all requirements of this Section (6.08 D) except that it may contain a kitchen.

Gold makes one final comment that it is up to the building inspection to make certain that the height of the building is per the plans. It is up to Ted and the Code Enforcement Officer. You have to wait for final grade.

With no further business to come before the meeting, the Chair declares the meeting adjourned at 3:31 p.m.

Respectfully submitted,


Elisabeth A. Rettig
Recording Secretary

Date Approved JUNE 15, 2021