



Fruitland Township Zoning Board of Appeals Minutes of February 23, 2009

CALLED TO ORDER: 7:07 p.m.

PLEDGE OF ALLEGIANCE

PRESENT: Chairman John Warner, Board members Gary Bole, Clarence Gaertner, Brian Lernowich, and Eileen Stoffan.

ALSO PRESENT: Zoning Administrator Sandel, Attorney Robert Eklund and eighteen (18) interested parties.

AGENDA:

Motion by Gary Bole, second from Clarence Gaertner, *ADOPTED*, to approve the February 23, 2009 Zoning Board of Appeals agenda.

5 AYES

MINUTES:

Motion by Eileen Stoffan, second from Gary Bole, *ADOPTED*, to approve the December 8, 2008 Zoning Board of Appeals meeting minutes.

5 AYES

Correspondence:

- Letter from Robert D. Eklund to Ross A. Leisman, Mika, Meyers, Beckett & Jones dated January 15, 2009, stating that Ms. Gardner has the right to appeal a decision of the Zoning Administrator.
- Robin and Peter Roberts, 5605 Murray Road- letter in support of zoning permit approval.
- Thomas Hook, 5631 Murray Road- Letter opposing zoning permit approval.
- Phil and Maryl Hook, 5627 Murray Road- Letter and photographs opposing zoning permit approval.
- Elizabeth B. Grein, 5780 Oak Tree Lane- opposing zoning permit approval.
- Irene Pierson, Sylvan Beach Resort Company- email addressed to Elizabeth Grein explaining the Zoning Board of Appeals process and jurisdiction for this application.
- Gail Donovan, 5629 Murray Road- letter opposing zoning permit approval.
- Kyle and Mike Esh, 5627 ½ Murray Road- email opposing zoning permit approval.
- Bonnie McColl, 6066 Murray Road- email opposing zoning permit approval.
- Elizabeth Gill, 5623 Murray Road- email supporting zoning permit approval.
- Cindy and Bill Trask, 5617 Murray Road- letter opposing zoning permit approval.

Chairman Warner explained the purpose and the function of the Zoning Board of Appeals.

Public Hearing:

5623 Murray Road

61-06-665-000-0010-00

Lee and Jane Gardner, applicants, request an appeal of the Zoning Administrator's decision to approve a zoning application on the basis of building height as submitted by Gerald S. and Elizabeth Gill, homeowners, according to the following article:

Article XIX, Section 19.07 A, which states that appeals to the Board of Zoning Appeals may be taken by any person aggrieved or by any officer, department or board of the Township, or bureau of the state or local unit of government. In addition, a variance in the zoning ordinance may be applied for and granted under section 4 of the uniform condemnation procedures act, 1980 PA 87, MCL 213.54, and as provided under this act. The zoning board of appeals shall state the grounds of any determination made by the board. Applications for appeals shall be filed within five (5) days after the date of the decision which is the basis of the appeal. The appellant must file with the Zoning Administrator a notice of appeal specifying the nature and grounds for the appeal. The Zoning Administrator shall transmit to the Board of Zoning Appeals all the papers constituting the record upon which the action appealed from was taken.

Public Hearing opened at 7:14 p.m.

Public Comment:

Chairman Warner stated that the public hearing tonight will be restricted to the issue of the height of the building only.

Board member Bole stated that he did not receive a variance checklist in his packet. Recording Secretary Dahl stated that she did not include the checklist as it applies to a variance request, and this appeal is not seeking a variance.

Zoning Administrator Sandel stated that the approval was given based on a thirty-five (35) foot height, which is an average of the eaves and the peak of the roof as measured to the ground (grade). At the site, there is now a basement and poured concrete walls, and appears to have been backfilled. The question was "Where did the 35 feet come from?" Zoning Administrator Sandel went back to the original survey which has elevations on existing homes and photographs to determine the grade of the former house. Once it came to his attention that the walls may not be at the same grade as the original house, he visited the site and found there to be a significant difference. Zoning Administrator Sandel contacted the architect, who agreed that it appeared to be high, and submitted a revised plan, which is the plan in question.

Chairman Warner asked Zoning Administrator Sandel if the revised plan shows 35 feet from the filled elevation. Zoning Administrator stated that the revised plan shows 35 feet from the original grade, and that the architect had to lower the distance between floors, and lower the peaked roof to a more flattened roof.

Ross Liesman, Mika, Meyers, Beckett & Jones, attorney for Lee and Jane Gardner, applicants, stated that the Gardner's had sent tabbed packets to all Zoning Board of Appeals members to be referred to during his presentation. At this time, Chairman Warner stated that the received packets contain information not pertaining to the appeal based on height only, which is the only matter to be discussed at this hearing. Ross Liesman discussed the following tabs:

- Ross Liesman stated that Tab #1 contains historical pictures submitted of the property at issue showing the natural grade of the original house.
- Tab #2 shows pictures from the Gardner's of the structure right before it was torn down.
- Tabs #6a and #6b show the original house with a super-imposed image of the approved structure.

- Tab #4 details setbacks in relation to 3.31 (E) Lake Michigan Shoreline Setbacks.

At this time, Chairman Warner reiterated that setbacks have no bearing on the appeal tonight, which is based on height.

Attorney Ross Liesman stated in response that the application filed by the Gardner's was to appeal all issues with respect to the zoning and building permits that have been granted. He also stated that if there was an issue with the timing, he feels that the Board has the authority to waive that and listen to the appeal as he believes the Gardner's did file a timely application.

- Ross Liesman stated that Tab #8, which shows the drawing submitted with the zoning application, details a structure with a basement fully below grade, which is not what is being built.
- Ross Liesman proposed that the survey shown at Tab #10 does not meet the Lake Michigan Shoreline Setbacks and therefore would be subject to Section 3.23 Non-Conforming Buildings, Structures, and Uses. He read from Section 3.23 (B) 1, which states "...and may be restored or rebuilt". Attorney Ross Liesman proposed that this language does not include "expanded" or "enlarged". He also states that the structure is not on the original foundation as there is a walkout in front of the current structure. Ross Liesman further proposed that the current structure also does not meet the criteria of 3.23 (B) 3.
- Tab #5 shows the proposed structure superimposed over the foundation of the original structure. He feels that this accurately shows that the proposed structure is an expansion.

Chairman Warner stated that when looking at the pictures under Tab #2, he feels that the cottage that was there originally was blocking the view of the lake from the Gardner's cottage anyways. Attorney Ross Liesman invited Chairman Warner to visit the site to verify the view. Chairman Warner stated that he has visited the site.

Attorney Ross Liesman stated that their plea to the Zoning Board of Appeals is to find the application that has been granted is an unlawful enlargement of a lawful nonconforming use, and that the approvals granted would be reversed, and that a new plan be submitted that is the same size as what was torn down, or they apply for a variance.

Ross Liesman read from Section 6.04a regarding the building height, which states "thirty-five (35) feet or 2 ½ stories". He also read Fruitland Township's definition of a story and half story from Article II, Section 2.19 Definitions-S, and Section 2.03 Definitions- Basement or Cellar. Mr. Liesman proposed that the drawing at Tab #5 the red line shows the preexisting grade of 596 and that more than half of the basement is above that grade, which means that it counts as a story. In addition, the top floor does not meet the requirements of a half-story, which would make the proposed structure 4 stories, not 2 ½ stories. Ross Liesman stated that Tab #11 illustrates that the proposed structure has "false gables" which are intended to decrease the calculated average roof height.

Ross Liesman also read from Section 3.07 (B) 4 which states that "on parcels contiguous to Lake Michigan, White Lake and Duck Lake, the highest point of any deck, including railings, shall not exceed 6' above the original grade" and 3.07 (C) which states "If such structures are permanently enclosed on any side or covered in any manner, they shall be considered a part of the main building". Mr. Liesman argues that the architectural features are in violation of these sections.

Jane Gardner, 5625 Murray Road- submitted handout for Zoning Board of Appeals members. Chairman Warner stated that it would be noted for the record, but many items on the handout do not apply to the appeal at hand. Mrs. Gardner stated that she is disappointed because she doesn't feel that the construction plans submitted match Fruitland Township's ordinances. She stated that they plan to rebuild their cottage and had considered adding a second story to their cottage to increase their view of the lake. If this plan is approved, their view will be further obstructed by a larger structure. Ms. Gardner stated that she liked the plan

submitted last summer better, as there would have been less obstruction of view. According to Mrs. Gardner, Tab #7 illustrates how the change in grade further obstructs their view. Jane Gardner questioned if the original cottage could be considered a “lawful” nonconforming use and submitted copies of old ordinances for ZBA review.

Lee Gardner, 5625 Murray Road- stated that in a discussion with the Zoning Administrator, he was told that the township tries to make nonconforming situations better. Mr. Gardner feels that by raising the grade and building a four-story structure, the project is not improving the conformance of the property.

Kyle Esh, 5627 ½ Murray Road- stated that she feels that all of her neighbors are upgrading and she has no plans to rebuild. She currently lives in a two-story home and suddenly feels like she is living in a basement. Mrs. Esh stated that she feels this process has damaged the relationship with her neighbors.

Betsy Grein, 5780 Oak Tree Lane- stated that she does not live in the Shoreline District, but she had to conform to the ordinances when building her home. Mrs. Grein stated that she would like to see the rules enforced and that it could set a dangerous precedence on the Lake Michigan shoreline.

Todd Hendricks, Rhoades McKee PC, attorney for Gerald S. and Elizabeth Gill stated that he supports the decision made by the Zoning Administrator and objects to the hearing due to the fact that Zoning Administrator Sandel’s decision was made in September of last year, and that the property owner to the north is barred from appeal at this time based on the Doctrine of Laches. Mr. Hendricks further suggests that the appeal violates the zoning ordinance, and that the scope of the hearing as noticed to the public has been exceeded. Attorney Todd Hendricks stated that as the neighbor pointed out, there was an administrative error in a height measurement, which was referenced to the Zoning Administrator, reviewed, and the plan was modified to correct that error.

Todd Hendricks stated that the Gill’s intent is to comply with the zoning ordinance, and that he feels with regards to the calculation of reach to gable and the height limitation, that they comply in all respects of the zoning ordinances.

Mr. Hendricks stated that according to the Zoning Enabling Act, a nonconforming use may be continued. He believes that Section 3.23 (B) 1 is right on point and that as the structure will be built on the same footings or foundation, the Gill’s project complies with this ordinance. There is not a height limitation or requirement in this language. He also argued that the proposed structure would not further restrict the view of the neighbors.

Chairman Warner asked Zoning Administrator Sandel if the structure now meets the requirement of 35 feet. Zoning Administrator Sandel verified that according to the plans, it does.

Zoning Administrator Sandel stated that he wanted to clarify several points. First, he does not agree that an administrative correction was made. The original zoning compliance called for 35 feet from the grade. The grade was changed, and the correction had to be made to meet the 35 feet based on the original grade. Second, according to the ordinance the footing has to be in exactly the same place as it was before. Although there is concrete slab in front of the basement, the structure is still in the same footing location. Third, due to the fact the structure is on the same footprint, Section 3.23 (B) 1 applies, which allows for building in the same location. Zoning Administrator Sandel stated that he did verify with the Zoning Board of Appeals in a previous hearing that the footprint is considered as three-dimensional. Last, Zoning Administrator Sandel stated that with regard to Section 6.04 (A) Building Height, which reads “35 feet or 2 ½ stories”, the key word is “or”. The proposed structure meets 35 feet.

Ross Liesman, attorney for Lee and Jane Gardner stated that under Section 2.01 “either or” is defined to apply singularly but not in combination, whereas “or” is defined to apply singularly or in any combination. He believes that the 2 ½ story is meant to be an additional restriction for the 35 feet.

Fruitland Township Attorney Robert Eklund stated that his interpretation is that either could apply.

Board member Stoffan stated that upon examining the drawings, she believes the lower level is more than 50% below grade.

Lee Gardner, 5625 Murray Road- stated that in the bottom drawing at tab #5, the red line is 596 (the grade). The top of the concrete wall is 601.5, and the finished first floor will be about 602. If you measure from the original grade of 596 to the basement floor, more is above ground than below ground. Chairman Warner and Mr. Gardner agree that this floor, according to the ordinance, is defined as a story.

Chairman Warner asked what the finished floor elevation is for the basement. Norman Dodds, architect, stated that it is 591, plus two inches.

Zoning Administrator Sandel explained the method he used for estimating the elevation.

Jane Gardner, 5625 Murray Road- stated that in pictures included in the packet given to the Zoning Board of Appeals members, one picture shows 3-4 steps, and the other picture shows 4-5 steps. There are more steps on the south side than there are on the north side.

Norman Dodds, architect for Gerald S. and Elizabeth Gill, stated that according to the evidence they have, and as Jane stated, the north side might actually be higher than the south side. However, at the time the house was moved, the grade had to be lowered on the south side, and it was higher underneath the deck.

Todd Hendricks, attorney for Gerald S. and Elizabeth Gill, reads from Section 2.19, the definition of a story, which states "... provided that portion shall be counted as a story only if over eighty percent (80 %) of its height is above grade". Therefore, it cannot be considered a story.

Ross Liesman, attorney for Lee and Jane Gardner stated that this definition should be taken in context with the definition for a basement.

Kyle Esh, 5627 ½ Murray Road- stated that last summer she was very concerned that things were going to happen because they would not be watched carefully. She was assured that everything would be watched very carefully. Now we are "splitting hairs" because the project was not carefully monitored.

Jane Gardner, 5625 Murray Road- directed the board to tab #6B, which shows the proposed structure outline in pink. This drawing shows some structure forward of the house, towards the lake. She believes this shows an increased obstruction of view due to the height and due to it extending closer towards the lake. Ms. Gardner also proposed that if the basement floor had been constructed per the zoning print, it would have been against code. Right now, the basement floor is only ½ a foot above the level that is permitted in terms of sea level. There were no dimensions on the print.

Public Hearing closed at 8:55 p.m.

Board Comments:

Chairman Warner reminded the board that the Gardner's are requesting an appeal of the Zoning Administrator's decision to approve a zoning application on the basis of building height as submitted by Gerald S. and Elizabeth Gill. The board must decide if the Zoning Administrator's decision was right or wrong, and if the application is thirty-five (35) feet as shown.

Fruitland Township Attorney Robert Eklund stated that he agrees with Chairman Warner's assessment.

Board member Lernowich stated that he has a couple of other issues, but not regarding the height.

Board member Bole stated that the basement is more than 50%, but it does meet the thirty-five (35) foot requirement.

Chairman Warner stated that Zoning Administrator Sandel is a surveyor by trade, so he trusts his decision.

Chairman Warner proposed to the board the following "Findings of Fact":

- Zoning Administrator Sandel was correct in basing the height from the previous grade.
- Based on the current drawing, the structure does meet 35' in elevation from the previous grade.
- The new structure will be built on the previous footprint.

The board agreed with the above listed "Findings of Fact".

Motion by Clarence Gaertner, second from Gary Bole, *ADOPTED*, to state for the record that the Zoning Board of Appeals supports the Zoning Administrator's decision based on the fact that the number of stories cannot be adequately obtained, but the thirty-five (35) foot dimension can be.

Roll Call: Lernowich – AYE, Stoffan – AYE, Gaertner – AYE, Bole – AYE, and WARNER – AYE.

5 AYES

Ross Liesman, attorney for Lee and Jane Gardner, asked for a point of clarification in regards to the height of the porch.

Attorney Robert Eklund asked Zoning Administrator Sandel if he addressed the porch issue when he made his decision regarding the height. Zoning Administrator Sandel stated that he informed the architect that the porch cannot be more that six (6) feet above grade.

Mr. Gill stated that the pergola is intended to provide shade to cool the home, but he would be willing to reduce the size of the pergola.

Chairman Warner stated that the issue of the height of the pergola will be addressed by Zoning Administrator Sandel and the architect, and does not need to be decided at this meeting.

The applicant(s) have up to 30 days to appeal in Circuit Court the decision of the Zoning Board of Appeals.

Motion by Brian Lernowich, second from Gary Bole, *ADOPTED* to adjourn the February 23, 2009 Zoning Board of Appeals meeting at 9:14 p.m.

5 AYES

Respectfully Submitted,

Rebecca Dahl
Recording Secretary