

**CITY OF CHARLEVOIX ZONING BOARD OF APPEALS MINUTES**  
**Wednesday, June 24, 2009 - 6:00 p.m.**  
210 State Street, City Hall, 2<sup>nd</sup> Floor Council Chambers, Charlevoix, MI

**A) CALL TO ORDER**

The meeting was called to order by Chairperson Withrow at 6:02 p.m.

**B) ROLL CALL**

Members Present: Gary Anderson, June Cross, Patricia Miller, Greg Withrow and Alternate Larry Sullivan  
Members Absent: Mary Eveleigh (recused at previous meeting) and Alternate Kim VanMeter-Sanderson  
Staff Present: City Planner/Zoning Administrator Mike Spencer  
City Manager Rob Straebel  
Assistant City Attorney Bryan Graham

Alternate Sullivan was designated as a voting Board member.

**C) INQUIRY INTO POTENTIAL CONFLICTS OF INTEREST – None.**

**D) APPROVAL OF AGENDA**

The Board approved the agenda as presented.

Member Sullivan asked the Board to consider placing a three minute time limit on public comments.  
Motion made by Member Cross and seconded by Member Miller to limit all public comments to three minutes per person. Motion was adopted unanimously by a voice vote.

**E) APPROVAL OF MINUTES**

1. Motion to approve or amend May 20, 2009 meeting minutes.

Planner Spencer advised the Board that the City has in the last 24 hours received requests asking for Exhibit 34 – May 20, 2009 draft minutes to be amended. Staff has reviewed the audio and where appropriate, made changes, not all the requested changes have been made. The Board reviewed the revised minutes.

Motion made by Member Cross and seconded by Member Anderson to approve the minutes of May 20, 2009 as amended. The motion was adopted by a unanimous vote.

**F) CALL FOR PUBLIC COMMENT (Not related to agenda items) - None**

**G) OLD BUSINESS**

1. Decision on request for interpretation and appeal of permit #2850, Project 09-03-ZBA. Applicant: Johnson, Camp, Saenger, and Reis.
  - a. Determination of voting members.

Alternate Sullivan was designated as a voting Board member.

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b. Staff presentation

Planner Spencer reviewed several issues with the Board. This is not a majority rule situation. All nine appeal items must be upheld. If the Board finds that one of the issues are not met, then Zoning Permit #2850 is revoked. The Board can not place conditions upon its approval. The Board is reviewing Zoning Permit #2850 under the zoning ordinance that was in effect at that time (March 2007). If they (Mr. Anderson) correct something or amend the zoning permit, they would have to reapply for a new zoning permit and the project would be reviewed under current zoning regulations. The public hearing has been held. The Zoning Board of Appeals must review the various exhibits presented [Exhibits 1-37] and make its decision. The Board's report has various options, but the Board must determine its findings of fact. Staff and the applicants' can answer any questions the Board may have.

The Board reviewed the various exhibits and Findings of Fact for Case #09-03ZBA.

### Site Conditions:

- The subject property is located at 300 and 304 E. Dixon Avenue.
- The property is bordered to the south by Round Lake and to the north by East Dixon Avenue. Permanent access to the subject property is provided by E. Dixon Avenue.
- The property is roughly 39,950 square feet in area and has an abrupt slope toward Round Lake of varying grades.
- Elevations range from 581.5 (the ordinary high water mark) to approximately 624 feet (lowest finished grade of home.) \*\*Elevations are approximate\*\*
- In addition, the lower level of the subject property has access by a permanent private easement.

### General Facts:

- This appeal and request for interpretation involved the issuance of Zoning Permit #2850.
- The subject property consists of three parcels. Two of the parcels are titled in the names of James and Patti Anderson with tax id numbers of 052-126-030-10 and 052-126-030-20. (300 E. Dixon) The third parcel is titled in the name of APJ Properties and has a tax id number of 052-126-029-00. (304 E. Dixon) At the time Zoning Permit #2850 was issued, James and Patti Anderson were the exclusive owners of APJ Properties, LLC.
- The subject property is zoned R-1 under the city zoning ordinance.
- Section 5.32(1) of the Zoning Ordinance permits one (1) single-family dwelling on each lot within the R-1 zoning district. (Exhibit 4)
- Section 5.176 of the Zoning Ordinance authorizes accessory buildings within the R-1 zoning district, provided the requirements of that section are met. (Exhibit 4)
- The Anderson's propose to construct pursuant to Zoning Permit #2850 a single-family dwelling and an accessory building. The single-family dwelling was proposed to be constructed into the slope on the upper elevation of the property. The accessory building was proposed to be constructed on the lower elevation of the property.
- The single-family dwelling was proposed to have a building footprint of approximately 7302 square feet, excluding the terrace, was proposed to have two stories, and was proposed to have a basement below ground consisting of three different levels.

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- The proposed accessory building labeled boathouse was proposed have a building footprint of approximately 3725 square feet in area and was proposed to include space for a boat house, bathroom, laundry facility, an open floor area at the basement 1 and 2 levels, and an area for the indoor parking of a motor vehicle (with large overhead doors on both sides).
- The proposed construction plans show that the single-family dwelling and the accessory building were to be joined in three different ways: (1) basement level 3 of the single-family dwelling are joined to the accessory building through the proposed underground structures, (2) basement level 2 of the single-family dwelling is joined to the accessory building by a breezeway, and (3) basement level 1 of the single-family dwelling is joined to the accessory building by a terrace. (Exhibit 9)
- The zoning permit application (#2850 See Exhibit 3) was submitted to the City Planning Office on January 22, 2007 by Site Planning Development, Inc. for a new home and boat house.
- The application was signed and therefore approved by the former Zoning Administrator and the former City Planner on March 26, 2007.
- Following that decision Eldon Johnson, owner of 306 Dixon Ave, filed an appeal and request for interpretation on May 15, 2007 with the City of Charlevoix Zoning Board of Appeals.
- The public hearing for this request was held on July 18, 2007, where the ZBA dismissed the case in its entirety because the appeal was not filed within thirty days of the decision by the Zoning Administrator. This is a requirement of the ZBA bylaws and was the recommendation of the Assistant City Attorney. The ZBA's decision to dismiss the earlier appeal and request for interpretation was appealed to the Charlevoix County Circuit Court. In this direct appeal, the Circuit Court affirmed the ZBA's decision. The applicants then filed an appeal of the Circuit Court's decision to the Michigan Court of Appeals. The Court of Appeals recently issued an order in which it declined to hear the applicants' direct appeal.
- However, in an independent, but factually related, case (07-821-21-CH) the Charlevoix County Circuit Court on March 24, 2009 entered an order remanding the merits of the applicants' original appeal concerning the issuance of Zoning Permit #2850 and the original request for an interpretation to the ZBA. The Judge ordered that the parties must file their appeal within 21 days from the date the Order was entered. The Order was entered on March 24, 2009 and the request for appeal and interpretation was submitted by Brown Powers PLLC on behalf of the applicants on April 9, 2009.
- The public hearing was scheduled for May 20, 2009 at 6PM and notice for the hearing was published in the Charlevoix Courier on April 29, 2009. Notice of the public hearing to property owners within 300 feet were noticed on May 4, 2009. Packets were provided to the ZBA and all parties on May 14, 2009.
- The ZBA held a public hearing on May 20, 2009.
- All public comments and all drawings, correspondence, and evidence of record received to date are included as exhibits to this report and have been considered by the ZBA.

**List of Sections of code requested to be interpreted:** (Source: Exhibit 2- Powers letter dated April 6)

Section 5.5(1) Definition of "accessory use."

Section 5.5(1a) Definition of "adequate permanent access."

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- Section 5.5(10) Definition of "boat house."
- Section 5.7(7) Definition of "Height of Building."
- Section 5.8(11) Definition of "lot line."
- Section 5.8 (13) Definition of "lot of record."
- Section 5.12(4) Definition of "Yard, rear."
- Section 5.32(1) States the One single-family dwelling on each lot allowed in R1.
- Section 5.32(8) Explains requirements for detached accessory buildings in an R1 Zone.
- Section 5.174 Lot Building Relationship.
- Section 5.176(1) Explains how accessory buildings may be connected or detached from the principal building.
- Section 5.186 Grades
- Section 5.190 Adequate Permanent Access
- Section 5.176(6) Explains an accessory building cannot occupy more than 30% of any rear yard.
- Section 5.198 Setback from water bodies.

The Board reviewed nine issues. The Board discussed each issue separately.

- A. Zoning Permit #2850 violates Section 5.174 of the Zoning City of Charlevoix Zoning Ordinance, by granting a single zoning permit covering three separate lots of record, under separate ownership, and by authorizing the construction of a building over two separate lots of record. (Source Exhibit 2 - Powers letter dated April 6)**

The Board reviewed Sections 5.8 (11), 5.8(13) and 5.174 of the zoning ordinance.

Member Cross voiced concerns that the project was massive and does not fit in the R-1 neighborhood. Chairman Withrow reminded the Board that the building is a single-family residence and presently complies with the required setback requirements. The Board will be looking to see if the development fits in with the character of the neighborhood in another section.

Member Sullivan voiced a concern that the Board was looking at three separate parcels. All three of the lots are non-conforming. Zoning Permit #2850 does not state that the lots will be combined. Planner Spencer reminded the Board that, per the zoning ordinance, if the lots were not combined, then there would be a zoning violation. Assistant Attorney Bryan Graham reminded the Board that Zoning Permit #2850 listed all three parcels.

Chairman Withrow asked the Board to consider option #2. The Board reviewed the findings of fact of the first appeal.

The Board makes the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the zoning ordinance, which provisions read as follows: (Source: Exhibit 4)

Section 5.8(11) Lot line: For the purpose of this chapter, a lot line is the boundary line between two (2) lots or the line between the properties of two (2) different owners.

Section 5.8(13) Lot of record: A lot which is part of a subdivision, the map of which has been recorded in the office of the Register of Deeds of Charlevoix County, or a parcel of land described by metes and bounds, the description of which has been recorded in the office of the Register of Deeds of Charlevoix County.

Section 5.174 Hereafter, every building erected, altered or moved shall be located on a lot of record as defined herein, and except in the case of an approved multiple dwelling development, there shall be no more than one (1) principal building and its permitted accessory structures located on each lot in any residential district.

2. The applicants have not provided any evidence suggesting that the above zoning ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property. (Exhibit 2)
3. Because the language of the Zoning Ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons' property. (Exhibit 1)

Regarding the appeal, motion made by Member Miller and seconded by Member Anderson that the Board finds that Zoning Permit #2850 does not violate Section 5.174 of the zoning ordinance based on the following facts:

- a. Section 5.174 of the zoning ordinance requires that every building erected, altered or moved shall be located on a lot of record as defined in the zoning ordinance. (Exhibits 4 and 9)
- b. The requirement that there be a single lot of record on which the principal dwelling and accessory structures must be located only arises before the actual construction of these buildings and not at the time Zoning Permit #2850 was issued. (Exhibit 9)
- c. The Andersons have consistently stated that they will combine all three parcels under the same title ownership before any construction is started on the property. (Exhibit 9)
- d. In addition, all three parcels are under the same ownership, two parcels titled directly in the name of James and Patti Anderson and the third titled indirectly to Jim and Patti Anderson, through APJ Properties, LLC, which is owned exclusively by Jim and Patti Anderson. (Exhibit 9)
- e. Because the zoning ordinance only requires a single lot of record before actual construction, and not at the time the zoning permit was issued, Zoning Permit #2850 was not issued in violation of Section 5.174.

The Board discussed the motion and the proposed findings of fact.

Member Sullivan asked verbiage be added that requires the lots be combined before the zoning permit is issued. Assistant City Attorney Graham reminded the Board that they are looking to see if the zoning ordinance requires the parcels to be combined before the zoning permit is issued. The option that the Board is considering states that the parcels do not have to be combined at the time the zoning permit is issued, but that the parcels shall be combined prior to receiving a building permit. If construction is started, and the lots have not been combined, then that would be a violation of the zoning ordinance.

The Board approved the motion by unanimous voice vote.

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The Zoning Board of Appeals reviewed the second issue.

**B. Zoning Permit # 2850 violates Section 5.5(10) of the City of Charlevoix Zoning Ordinance, by allowing an accessory building labeled as a “boat house” to support uses other than a use for the exclusive purpose of docking and storage of boats and other marine equipment. (Source: Exhibit 2 - Powers letter dated April 6)**

The Board reviewed the proposed findings of fact language and makes the following findings of fact concerning the Applicants’ requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the zoning ordinance, which provisions read as follows: (Source: Exhibit 4)

Section 5.5(10): Boat house: An accessory building used for the exclusive docking and/or storage of boats and other recreational marine equipment; however excluding structures in the marine commercial district used for principal and accessory uses allowed in that district.

2. The applicants have not provided any evidence suggesting that the above zoning ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons’ property. (Exhibit 2)
3. Because the language of the zoning ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons’ property. (Exhibit 1)

The Board discussed the options provided by Staff. Chairman Withrow asked the Board to look at option #1.

Planner Spencer reviewed Exhibit 22 and Exhibit 14 with the Board. Planner Spencer advised the Board that the item shown on the upper level boat house plan is not a raft, it is a hot tub.

Chairman Withrow asked James Anderson and Traver Wood for clarification on the proposed use of the structure. Mr. Anderson advised the Board that the breezeway connects the boat house with the residence. The breezeway is not part of the boat house. The garage and the windows above the garage connect to the basement levels and are considered a breezeway and a covered porch.

The Board reviewed the drawings. The Andersons’ state that the boat house is an attached accessory structure and that it is connected to the home and the garage/breezeway structure is not part of the boat house.

Traver Wood reviewed the drawings and the model (Exhibit 19) with the Board. The Board discussed whether the garage/breezeway was a part of the house or part of the boat house. Mr. Wood showed the Board the various structure configurations of the project. He advised the Board that if the boat house was not built, the structure as shown in Exhibit 19, page 3 of 7 could be built. The house, garage and breezeway can be built and comply with the zoning regulations. The garage and breezeway connects basement levels 2 and 3 to the boat house.

Ms. Schafer asked the Board if she could make a comment. Chairman Withrow stated that the public comment period has been closed. If needed, the Board will ask Ms. Schafer for any additional clarifications.

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The Board noted that the boat house includes several unusual items, i.e., bathrooms, laundry and the hot tub. It was agreed that the Board needs to determine if the garage/breezeway is part of the boat house.

The Board reviewed the floor plan drawings and the model.

Mr. Straebel stated that the garage/breezeway is attached to the boat house and to the house. The room with the hot tub shares a wall with the boat house so it is attached to the boat house from an aesthetic standpoint. The Board reviewed the drawings.

Assistant Attorney Graham reminded the Board that the ordinance talks about connections. It specifies how that connection can happen, either by a patio, roofed porch or breezeway. Are those structures (garage/breezeway) the connection or are they part of the boat house? The breezeway goes from the dwelling to the accessory building.

Member Anderson stated that a breezeway can be enclosed.

The Board discussed whether the breezeway was a part of the boat house or a part of the dwelling or if it can be considered the connecting structure between the house and boat house. The Board looked at both levels of the structure, the garage and the breezeway. Chairman Withrow stated that he did not feel the garage could be considered as part of the connecting structure.

Member Anderson questioned if the third basement level could be considered as the connection. The Board generally agreed that the third basement level was connected to the garage.

Member Sullivan asked if the connector could be three stories. Member Anderson stated that the patio can be considered as the connector. Chairman Withrow stated that after reviewing the model (Exhibit 19), from what you can see from the air and the sides, it gives the appearance that the garage/breezeway is part of the boat house. The tunnel, breezeway (arbor) and patio can be the connector. Member Sullivan agreed.

The Board reviewed the definition of a boat house - Section 5.5 (10). Chairman Withrow stated that a boat house is exclusively for docking and storage of boats. He does not have a problem with a bathroom or laundry in a boat house, but a hot tub is not an allowed use.

Member Miller voiced concerns about the large amount of undesignated areas in the boat house.

Member Sullivan reminded the Board that any boats placed in the boat house could have not only bedrooms and kitchen facilities, but they could have bathrooms and laundry rooms too.

The Board discussed whether bathrooms and laundry rooms were beyond the exclusive use of a boat house. Member Cross stated that she has a problem with the use.

Assistant Attorney Graham asked the Board to look at finding option #2. He understands that the Board is saying that bathrooms and laundry facilities are coincidental and associated with the facility and the Board is stating that the hot tub is not a coincidental use.

Chairman Withrow asked Staff to comment on the Dow boat house (located at 101 Prospect Street). Planner Spencer advised the Board that he was not familiar with the Dow home. Member Cross confirmed that the Dow boat house's living room is over the water and the bathrooms are over the land.

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Chairman Withrow asked the Board if the attached structure, which is 19.5' x 24' and known as Exhibit 23 and labeled as garage, is considered to be part of the boat house. The Board agreed by a 4-1 vote that the garage was a part of the boat house. Member Cross was the dissenting vote.

Chairman Withrow asked the Board to consider the hot tub. Chairman Withrow asked Planner Spencer to add that the hot tub as shown in Exhibit 22 is not coincidental and associated with recreation marine equipment.

Assistant City Attorney Graham asked the Board to look at option #2 (e) the former city planner has interpreted that to mean things not only exclusive but coincidental and associated with. We need to incorporate findings (e) and (f).

The Board moved item (e) and (f) in option #2 into option #1. Finding (e) is: Finally, the former city planner has interpreted the definition of a boat house to include activities that are coincidental and associated with docking and the storage of boats and other recreational marine equipment. (Exhibit 9) item (f) is: Therefore, because the laundry facility and bathroom are associated with the docking of a boat, those activities are included within the definition of a boat house, as interpreted by former city staff. As a result, since the activities proposed fall within the definition of a boat house, the accessory structure will be used exclusively as a boat house.

The Board reviewed the draft findings with the Planner. Finding (b) that discusses the restrooms was deleted. The other findings were renumbered.

Assistant City Attorney Graham reminded the Board that their findings must be logical. The zoning ordinance definition states that the use is to be exclusive. There are past staff practices and the interpretation of what is exclusive has been interpreted to mean things that are coincidental and associated. It is broader than that. The Board needs to consider the ordinance and interpretations that have been used in the past and plug in those attributes and decide whether they are coincidental and associated with the concept of a boat house or if the items are not coincidental and associated with the definition of a boat house and outside the definition of a boat house.

The Board continued their review of the findings.

Assistant City Attorney Graham advised the Board, that according to law, they can rely upon interpretations made by officials that are required to apply or administer the ordinance. That is what the finding are meant to do. The Board has a past interpretation of an ambiguous provision. Therefore you are applying past practices in the attempt to have consistencies in your application.

Chairman Withrow asked if the current City staff concurred that the proposed laundry facility and bathrooms were coincidental and associated items in the boat house. Planner Spencer stated that a bathroom and laundry facilities were items that would be allowed in a boat house. The Board agreed with the interpretation.

Ms. Powers advised the Board that under the Zoning Enabling Act and under the ordinance, the Zoning Board of Appeals is the body to interpret the ordinance, not staff.

Assistant City Attorney Graham advised the Board, according to case law, when you have an ambiguous ordinance, past interpretations made by officials charged with administration of the ordinance can be relied upon.

They continued their review of the proposed findings of fact. A finding was added that the hot tub as shown in Exhibit 22 is not coincidental and associated with docking and the storage of boats and other recreational marine equipment.

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The Chairman asked if the Board needed to review all the provisions. Assistant City Attorney Graham advised the Board that even if the Board finds one violation, it is important to review all of them as there is a potential that there will be an appeal to circuit court and the court is going to want to know the Board's thoughts on everything.

Member Anderson asked for a short recess. Chairman Withrow recessed the Board at 7:34 p.m. The Board reconvened at 7:39 p.m.

Chairman Withrow advised the Board that a question was raised by the audience, during the recess, on whether the Board considered the garage portion of the boat house as a coincidental and associated use to a boat house.

Member Anderson felt that the garage would be an allowed use as they could pull a boat into the garage. Member Sullivan stated that if boats are stored in the structure, then the garage is allowed. But if cars were stored in it, then the garage would not be allowed and a violation and an enforcement issue would be raised.

Assistant City Attorney Graham asked the Board to add a finding that addresses the garage issue.

Planner Spencer modified the findings to include: "The garage portion of the accessory building is considered coincidental and associated with docking only when it is used for the storage of boats and other recreational marine equipment.

Concerning the appeal, the Board agreed by consensus that the Board finds that Zoning Permit #2850 violates 5.5(10) of the zoning ordinance based on the following facts:

- a. Section 5.5(10) of the zoning ordinance requires that boat houses be used for the exclusive docking and/or storage of boats and other recreational marine equipment. (Exhibits 2 and 4)
- b. The former and current City Planner have interpreted the definition of a boat house to include activities that are coincidental and associated with docking and the storage of boats and other recreational marine equipment. (Exhibit 9) The ZBA agrees with this interpretation.
- c. The 19.5X 24 square foot structure labeled as garage on Exhibit 22 is considered to be part of the boat house.
- d. Therefore, because the laundry facility and bathroom are associated with the docking of a boat, those activities are included within the definition of a boat house, as interpreted by former city staff. As a result, since the activities proposed fall within the definition of a boat house, the accessory structure will be used exclusively as a boat house. The garage portion of the accessory building is considered coincidental and associated with docking only when it is used for the storage of boats and other recreational marine equipment.
- e. The hot tub as shown in Exhibit 22 is not coincidental and associated with docking and the storage of boats and other recreational marine equipment.
- f. Therefore, the proposed accessory building is not a boat house, as defined under the zoning ordinance.

The Board reviewed the third issue.

- C. Zoning Permit # 2850 violates Section 5.32(8) of the City of Charlevoix Zoning Ordinance, by allowing a purported "boat house" that does not meet the Ordinance requirements for a detached accessory building. (Source: Exhibit 2 - Powers letter dated April 6)**

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The Board reviewed the proposed findings of fact language and makes the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the zoning ordinance, which provisions read as follows: (Source: Exhibit 4)

Section 5.5(10): Boat house: An accessory building used for the exclusive docking and/or storage of boats and other recreational marine equipment; however excluding structures in the marine commercial district used for principal and accessory uses allowed in that district.

Section 5.32(8): One (1) detached accessory building not more than sixteen (16) feet or one (1) story in height. A detached accessory building shall not be less than ten (10) feet from the principal building and shall not be closer to the side lot lines than the distance allowed for the principal building or the existing building line. An accessory building shall not be allowed in the front yard. The detached accessory building shall be not closer than six (6) feet to the rear lot line.

Section 5.7(7): Height of building: That building height for any structure or portion of a structure (having its ground floor in a single horizontal plane), is the vertical distance measured from the lowest elevation of the finished grade line of the ground around the structure to the highest point of the roof for flat roofs; to the deck line of mansard roofs; and to the mean height level between eaves and ridge for gable, hip and gambrel roofs. Intrusions below finished grade about the building for stair or window wells, courts or yards, designed in basements or cellars, to accommodate the minimum glazing area requirements of the BOCA/National Building Code shall not be considered when calculating building height. Building height for buildings having ground floors in two (2) or more horizontal planes at differing elevations may be calculated as if each ground floor plane area were a separate building.

Section 5.12(4): Yard, rear: The open space extending across the rear of a lot between a side lot line and being the required minimum horizontal distance between the rear lot line and the rear of the main building or any projections thereof. Along the Pine River Channel, Round Lake, Lake Michigan or Lake Charlevoix the rear lot line shall be the water mark of the Pine River Channel, Round Lake, Lake Michigan or Lake Charlevoix.

Section 5.176(1) and (2)

- (1) Authorized accessory buildings may be erected as part of the principal building or may be connected to the principal building by a roofed porch, patio, breezeway or similar structure or may be completely detached from the principal building.
- (2) Where an accessory building is attached to the side or front of a principal building, such accessory building shall be considered part of the principal building for purposes of determining yard dimensions.

Section 5.198: Setback from water bodies: Notwithstanding other provisions of this chapter, all principal uses located in the R-1 and R-4 districts shall have a setback of fifty (50) feet from the water mark of Lakes Michigan and Charlevoix and Round Lake, as well as the Pine River Channel Marine-Commercial district.

2. Except for Section 5.176(1), the applicants have not provided any evidence suggesting that the above zoning ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property. (Exhibit 2)
3. Because the language of the zoning ordinance provisions, except for Section 5.176(1) are not ambiguous, the Board finds it is required to apply the plain meaning of those provisions to the Andersons' property. (Exhibit 1)
4. Concerning Section 5.176(1), the Board finds that there is an ambiguity concerning how an authorized accessory building may be connected to the principal building for the purpose of determining whether an accessory building is an attached or detached accessory building. As a result, the Board finds that an interpretation of this provision is necessary.
5. The Board finds that the words "connected," "attached," "roofed porch," "patio," "breezeway" or "similar structure" are not defined in the zoning ordinance. (Exhibit 4)
6. Because these terms are not defined, a dictionary can be used to provide the common meaning for those terms. (Exhibit 5.9)
7. *Webster's College Dictionary* define these terms as follows:  

attach:	to fasten or affix; join; connect: <i>to attach papers with a staple.</i>
breezeway:	an open-sided roofed passageway for connecting two buildings, as a house and garage.
connect:	to join, link, or fasten together; unite.
patio:	an area, usually paved, adjoining a house and used for outdoor lounging, dining, etc.; a courtyard, especially of a house, enclosed by low buildings or walls.
8. The Board finds that the rules of statutory construction apply when interpreting the zoning provisions. Specifically, when the zoning ordinance lists specific provisions and a general provision, then the general provision only includes the same class of items as stated in the specific provisions.
9. Finally, the Board finds that it can consider the past interpretations of city officials when applying the provision under consideration.

Assistant City Attorney Graham advised the Board under Section 5.176 (1) there is an ambiguity on how the things are connected. The other provisions are clear and have a plain meaning. The Board needs to review items 4-9 and determine how Section 5.176, which the Board has found to be ambiguous and needs interpretation.

The Board reviewed the proposed options. The Board agreed that the boat house is an attached accessory building. The Board agreed that there is not a violation of Section 5.32 (8) and reviewed the draft findings of fact. The Board amended item (c) to remove reference to basement level 3.

Member Sullivan asked if item (f) should be amended to reflect the ZBA interpreting the ordinance, rather than recognizing that Staff has interpreted the ordinance.

Assistant City Attorney Graham advised the Board that one of the rules of the law is that the Board can rely upon

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past interpretations made by city officials when applying the zoning ordinance.

Member Sullivan stated that the Board is not agreeing or disagreeing with what staff has done in the past. The Board is concurring with the decision that staff has made. He would like to see verbiage in the findings that the Board concurs with city staff's interpretations.

The Board amended the findings to read: "The ZBA concurs with the Staff interpretation at based on the photos presented at the public hearing (Exhibits 20 and 21) that Section 5.176(1) includes as attached accessory buildings that were connected by patios in the same way that the proposed dwelling and the accessory building are connected by the terrace."

Concerning the appeal, the Board agreed by consensus that it finds that the proposed accessory building is an attached accessory building and that as a result zoning permit #2850 does not violate Section 5.32(8) of the zoning ordinance based on the following facts:

- a. The Board finds that the terms "connected" and "attached" are synonymous.
- b. The Board finds that Section 5.176(1) specifies the types of connections that make an accessory building an attached accessory building. Those types of connections are by a roofed porch, patio, breezeway or similar structure.
- c. The proposed construction plans show that the single-family dwelling and the accessory building were to be joined in two different ways: (1) basement level 3 of the single-family dwelling is joined to the accessory building through the proposed underground structures, and (2) the basement level 1 of the single-family dwelling is joined to the accessory building by a terrace. (Exhibit 9)
- d. The Board finds that only one such connection is necessary for the accessory building to be an attached accessory building.
- e. The Board further finds that an individual can physically walk from the single-family dwelling to the accessory building without walking outdoors, demonstrating that the two buildings are attached within the meaning of the zoning ordinance.
- f. The ZBA concurs with the Staff interpretation that based on the photos presented at the public hearing (Exhibits 20 and 21) that Section 5.176(1) includes as attached accessory buildings that were connected by patios in the same way that the proposed dwelling and the accessory building are connected by the terrace.
- g. Since the Board finds that the boat house is not a detached accessory structure the setback requirements from Round Lake of 50 feet and the setback requirements of 6 feet from the rear lot line do not apply and Section 5.32(8) was not violated.

The Board reviewed the fourth issue.

**D. Zoning Permit # 2850 violates Section 5.32(1) of the City of Charlevoix Zoning Ordinance, by allowing two buildings that qualify as dwellings on one lot. (Source: Exhibit 2 - Powers letter dated April 6)**

The Board reviewed Section 5.32 (1) of the zoning ordinance and Staff's proposed findings. The Board is asked to determine if the boat house is a dwelling.

Members Anderson and Sullivan stated that as the boat house does not have a kitchen or any bedrooms, the boat house is not a dwelling. If the property should place one in at a later date, that would be a violation that staff would address.

The Board reviewed and made the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the zoning ordinance, which provisions read as follows: (Source: Exhibit 4)

Section 5.32(1): One (1) single-family dwelling on each lot.

2. The applicants have not provided any evidence suggesting that the above zoning ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property. (Exhibit 2)
3. Because the language of the zoning ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons' property. (Exhibit 1)

Concerning the appeal, the Board unanimously agreed that the Board finds that Zoning Permit #2850 does not violate Section 5.32(1) of the zoning ordinance based on the following facts:

- a. The definition of dwelling is any building or portion thereof which is designed for or used exclusively for residential purposes containing one (1) or more dwelling units. (Section 5.6(5))
- b. The definition of single family dwelling is a detached building containing one (1) dwelling unit and designed for, or occupied by, only one (1) family. (Section 5.6(6)).
- c. The definition of a multiple dwelling is a building or portion thereof containing two (2) or more dwelling units and designed for, or occupied as, the home of two (2) or more families independently of each other. (Section 5.6(7))
- d. The definition of a dwelling unit is a group of rooms located within a building and forming a single habitable unit with facilities which are used or intended for complete living facilities. (Section 5.6(8))
- e. The proposed plans floor plans of the boat house do not include sketches or labels for any kitchen facilities or bedrooms, which indicate the boat house, will not be used exclusively for residential purposes and therefore does not meet the definition of a dwelling. (Section 5.6(5)) Further, without a kitchen or bedroom, the boat house does not form a single habitable unit with facilities which are used or intended for complete living facilities. The boat house does not meet the definition of a dwelling, a dwelling unit, a single family dwelling, or a multi-family dwelling.
- f. Having a toilet, sink, washer and drier within a boat house or accessory structure, does not prove that the structure is being used as a second dwelling unit unless the structure has a kitchen and bedroom(s).
- g. Historical interpretation of the zoning ordinance demonstrates that bathroom features, such as sinks and toilets, within accessory structures, have been allowed and do not create the existence of second dwelling units.

The Board reviewed the fifth issue.

- E. Zoning Permit # 2850 violates Section 5.5(1) of the City of Charlevoix Zoning Ordinance, by allowing a purported "accessory" building that exceeds the size allowed under the Residential Code and that will be built on a different lot than half of the principal building. (Source: Exhibit 2 Powers letter dated April 6)**

Chairman Withrow asked for clarification on the 3,000 square foot requirement for an accessory building.

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Assistant City Attorney Graham has provided some information to the Board that gave them the definitions in the residential building code that was in effect in 2007 and the change in the code that took effect in 2008 (Exhibit 37). The reference to the 3,000 square foot limitation that is quoted in the applicant's letter, was not in effect when this permit was issued in 2007. The Board needs to judge the permit on the code that was in effect in 2007.

Member Anderson asked if there were any square foot requirement in 2007. Assistant City Attorney Graham referred the Board to option #2, finding (e) gives the Board the language that was in effect in 2007.

The Board reviewed the proposed findings of fact for the appeal.

Chairman Withrow asked if there are any requirements that the zoning ordinance comply with the residential zoning code or building code. Planner Spencer reviewed Section 5.245 of the zoning ordinance that states that if there is a provision in the zoning and in the building code, you use whichever item is more strict.

The Board amended the findings to include reference to Section 5.245 of the zoning ordinance and changed the findings to reflect that the permit did not violate Section 5.5 (1).

The Board unanimously agreed that the Board makes the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the zoning ordinance, which provisions read as follows: (Source: Exhibit 4)

Section 5.5(1): (1) Accessory use: A use customarily incidental and subordinate to the principal use of building and located on the same lot with such principal use or building.

2. The applicants have not provided any evidence suggesting that the above zoning ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property. (Exhibit 2)
3. Because the language of the zoning ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons' property. (Exhibit 1)

Concerning the proposal, the Board unanimously agreed that the Board finds that Zoning Permit #2850 does not violate Section 5.176 (1) of the zoning ordinance based on the following facts:

- a. Section 5.245 of the Zoning Ordinance states that "whenever any provision of this chapter imposes more restrictions than are imposed by State law or other ordinances of the City of Charlevoix, the provisions of this chapter shall govern. Where, however, the provisions of the State Building Code or any other ordinance or regulation of the City of Charlevoix impose more strict regulations than are imposed by this chapter, the provision of said state building code or other ordinances or regulations shall govern."
- b. Residential Building Codes fall within the jurisdiction of the Charlevoix County Building and Safety Department.
- c. Nowhere in the City of Charlevoix Zoning Ordinance is there a requirement that accessory structures be less than 3000 square feet.

- d. The Residential Code in effect at the time Zoning Permit #2850 was issued on March 26, 2007 was the 2003 Residential Code. This code defined "accessory structure" as follows: "In one- and two-family dwellings not more than three stories high with separate means of egress, a building, the use of which is incidental to that of the main building and which is located on the same lot."
- e. Therefore, the Residential Code in effect when Permit #2850 was issued did not indicate that accessory structures have a maximum allowance of 3000 square feet. As a result, the current 3,000 square feet limitation of the Residential Code does not apply and there was no violation of Section 5.245 of the zoning ordinance when Zoning Permit #2850 was issued.

The Board reviewed the sixth issue.

**F. Zoning Permit # 2850 violates Section 5.176(1) of the City of Charlevoix Zoning Ordinance, by failing to properly address the nature of the underground tunnels between the primary residence and its purported "accessory." (Source Exhibit 2 Powers letter dated April 6)**

Assistant City Attorney Graham advised the Board that issue F deals with the accessory building attachment issues, which were previously addressed in issue C, so basically all the Board has to do is incorporate its findings under issue C.

The Board concurred that its findings for issue C are to be used. The Board agreed by consensus that it finds that the proposed accessory building is an attached accessory building and that as a result Zoning Permit #2850 does not violate Section 5.176 (1) of the zoning ordinance.

The Board reviewed the seventh issue.

**G. Zoning Permit No. 2850 violates Sections 5.5(1a) and 5.190 of the City of Charlevoix Zoning Ordinance, by failing to recognize the need for adequate permanent access to the building on the lower half of the APJ Properties lot. (Source Exhibit 2 - Powers letter dated April 6)**

The Board reviewed the draft findings of fact and the definition of adequate permanent access and Section 5.190 of the ordinance.

Chairman Withrow noted that as the three lots have not been combined, the Board concluded earlier that a zoning permit can be issued with the understanding that the three lots would be combined prior to the issuance of the building permit. The Board looked at the second option and discussed the proposed findings.

Chairman Withrow questioned if the phrase "not each structure on the lot" needed to be a part of finding (d). The code requires that there should be adequate permanent access to the lot, not each structure.

Member Sullivan suggested that the verbiage be amended to remove the words "not each structure on the lot" and add a second sentence that reflect the verbiage of Section 5.190.

Planner Spencer advised the Board that if there is a life safety issue in the boat house, the Fire Department is able to access the boat house.

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Member Sullivan stated that the ordinance does not require access to the back yard; the code requires access to the property. A fire truck can access the front of the property.

The Board generally agreed to amend finding (d) to add a second sentence to read: "Section 5.190 does not require adequate permanent access to all portions of the lot." The Board also agreed to delete item (e)

Member Sullivan asked the Board to consider amending item (c) to reflect that the lots will be combined.

Assistant City Attorney Graham asked the Board to determine if it was required, at the time the zoning permit is issued, that the lots be combined. The Andersons' had the position that the lots did not have to be combined at the time of the permit was issued, but at the time of construction. If the Board looks at option #3, Mr. Graham feels this address Member Sullivan's concern. He asked the Board to review the item. The ordinance requires that there be a lot of record at the time a zoning permit is issued. If you look at the definition of "lot of record" it says a lot of record is a lot. So the concept of a lot of record is controlled by the definition of a lot in the ordinance. The definition does not talk about ownership. The definition talks in terms of land that is occupied or intended to be occupied by a development. The zoning permit (#2850) clearly identifies that all three parcels are the intended area for development. Under the definition of a lot, those three land areas are considered as the area intended for development and are considered as one lot under the ordinance.

The Board discussed Mr. Graham's comments.

Member Sullivan stated that he feels that all three of the lots are considered three separate lots of record. He asked for confirmation that once the three lots are combined, that the lots will remain one lot in the future and that the record reflect that the lots will be combined.

Assistant City Attorney Graham advised Mr. Sullivan that once the three non-conforming lots are combined, the lots will form a development. Once the development is a conforming area, any non-conformity that existed prior to the lots being combined, has been abandoned.

The Board unanimously agreed to adopt the revised findings outlined below:

The Board made the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the zoning ordinance, which provisions read as follows: (Source: Exhibit 4)

Section 5.5(1a): Adequate permanent access: A street or place having and along with its right-of-way, an easement or general common area which provides for the following: Residents personal vehicle movements and other non-motorized conveyance providing for safe maneuverability at an acceptable comfort level; parking; snow storage; protection of adjacent owners property, such as adjacent residents fences, storm water, etc., emergency vehicles; moving vans; delivery vehicles; maintenance activities; related storm water management and public utilities.

Section 5.190: Adequate permanent access shall be provided for all lots or parcels created within the City of Charlevoix in accord with the following standards:

(3) Clusters units on places or as flag lots:

<u>R/W Easement or General Common Area</u>	<u>Travelled Surface</u>
18'	10'

2. The applicants have not provided any evidence suggesting that the above zoning ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property. (Exhibit 2)
3. Because the language of the zoning ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons' property. (Exhibit 1)

Concerning the appeal, the Board finds that Zoning Permit #2850 does not violate Sections 5.5(1a) and 5.190 of the zoning ordinance based on the following facts:

- a. The definition of Adequate Permanent Access is a street or place having and along with its right-of-way, an easement or general common area which provides for the following: Residents personal vehicle movements and other non-motorized conveyance providing for safe maneuverability at an acceptable comfort level; parking; snow storage; protection of adjacent owners property, such as adjacent residents fences, stormwater, etc., emergency vehicles; moving vans; delivery vehicles; maintenance activities; related stormwater management and public utilities.
- b. Section 5.190 requires that adequate permanent access shall be provided for all lots or parcels created within the City of Charlevoix in accord with the following standards:

<u>R/W Easement or General Common Area</u>	<u>Travelled Surface</u>
18'	10'

- c. The Andersons will have to conform to Section 5.242 and they have indicated on record that the 3 parcels will be combined prior to construction. Since the three parcels will be combined into one lot of record, or in the alternative, because the three parcels are intended to be occupied together (thus falling within the definition of a lot) adequate permanent access to the lot is provided via East Dixon Avenue which meets the minimum requirements of 5.190(3).
- d. Section 5.190 stipulates that adequate permanent access shall be provided to the lot. Section 5.190 does not require adequate permanent access to all portions of the lot.

The Board reviewed the eighth issue.

- H. **Zoning Permit # 2850 violates Section 5.186 of the City of Charlevoix Zoning Ordinance, by allowing the creation of an artificial grade at a level substantially higher than the existing grade, where such artificial grade is being used to cover a substantial intrusion into the side yard. (Source Exhibit 2 Powers letter dated April 6)**

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The Board reviewed a letter provided by Site Planning (Exhibit 31). The letter states that the sheet piling and retaining walls do not have any connection to the boat house. The ground supports the sheet piling. The Board asked for a clarification.

Jim Anderson addressed the Board. He reviewed a DEQ drawing with the Board [The drawing is part of Exhibit 2 and labeled upland boat well and boathouse, APJ Properties, 304 E Dixon Avenue, Charlevoix, MI sheets 2 & 3 of 4.] There are columns that support the building. The sheet pilings keep the earth out of the boat well and Mr. Johnson's lot. The engineering drawings have not been completed.

Chairman Withrow discussed the drawings and the floating dock that is located outside of the structure with the Board.

Member Anderson considers the floating dock as part of a basement, as it is below ground.

City Planner Spencer stated that in the past, it has been interpreted that a permit was not required for a walkway, concrete structure or driveway; a permit is not required. He asked the Board to review Exhibit 30. If the boat house is removed, the pilings and floating docks can still be built. The sheet piling and the floating dock was not part of the zoning permit application, it is part of the DEQ application.

The Board asked Mr. Anderson if the floating dock was open to the air and water. Mr. Anderson confirmed that the dock was open to the air and water.

The Board discussed if the underground structures encroached into the side yard setback.

Chairman Withrow stated that a basement generally is directly below a building's outside walls. The City requires a building to be 15' from the lot line.

The Board discussed if a retaining wall had to adhere to setback requirements.

Member Sullivan voiced concern that if this type of construction was permitted, an excavation could be done over the entire lot, a massive structure could be built underground and a flat roof placed over it. Dirt could be placed on the roof and then additional construction could take place above ground with the walls being placed 15' from the side yard.

City Planner Spencer stated that usually the City deals with an existing hill and rocks or a retaining wall is built to protect the grade. This is self-created for the construction of the boat house. He is not aware of a similar situation.

Member Sullivan asked how building height was determined. The Planner advised that the height of a structure is determined from the lowest finished grade. Member Sullivan asked if the high water mark be considered the lowest finished grade. The Planner reviewed Exhibit 30's south elevation with the Board.

The high water mark is at elevation 581.5 and the created finished grade is at elevation 590.0. Per the ordinance, the finished grade is the point that the building height is measured.

The Board looked at the various grades around the boat house and the definition of structure height.

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Chairman Withrow and Member Sullivan concurred that given the ordinance language, the raising of the grade is permitted. The new grade has been established around the building, with the exception of the door that is located on the south side of the building that leads to the dock. Chairman Withrow asked how it meets the zoning ordinance requirements.

Assistant City Attorney Graham stated that if you look at the definition of building height, it allows for intrusions into the finished grade for stair or window wells, courts or yards, designed in basements or cellars, to accommodate the minimum glazing requirements of the BOCA Code and are not considered when calculating height. The door is an intrusion below finished grade.

Member Sullivan stated that it was his understanding that the BOCA building code's minimum glazing was only required for an exit from bedrooms. The language was first placed in the zoning ordinance to allow exits from lower level units.

Assistant City Attorney Graham asked the Board to review a memo from former City Planner Gerry Harsch, in which he explains the calculations of the height of the building and explains the intrusion below finished grade.

Chairman Withrow asked if the boat well intruded into the required side yard setback requirement.

Assistant City Attorney Graham stated that the ordinance does not define what a setback is. Past practice has been that structures have to comply with setback requirements. He asked the Board to review the definition of a "structure". It says a structure is anything constructed or erected, the use of which, requires location on the ground or attached to something having a permanent location on the ground. The definition talks about items on the ground, not under the ground.

Member Anderson stated that the Board, in the past, has used the structure's exterior walls located above to measure the yard setbacks. Chairman Withrow stated that in his years as a member of the Board he has not seen a structure like this. The definition is based on the basement being located directly under the exterior walls.

Mr. Anderson asked the Board to refer to photos of similar structures.

Mr. Wood stated that the City has addressed this issue in the past. The City Planning Commission and City Council approved similar projects; the Beachouse, Dunes and Fairport West are an example. The underground features intrude well into the setback requirement.

City Planner Spencer stated that the examples are multi-dwelling structure. The Board needs to determine if this should be allowed.

Member Cross feels that a basement needs to comply with setback requirements.

Chairman Withrow asked the Board to determine the purpose of a setback. Members Sullivan and Withrow agreed that the setbacks are created for fire, light and air (Section 5.1). Chairman Withrow asked if the underground intrusion interferes with the fire, light and air. He does not feel that the underground intrusion interferes with fire, light, air, ventilation and view.

Member Sullivan stated that historically the City has gone from the outer wall to the edge of the property to measure setbacks, overhangs are not included unless they extend more than two feet. The Board needs to determine what the "wall" is.

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City Planner Spencer agreed that the setback is traditionally measured from the wall.

Chairman Withrow agreed that Mr. Anderson has created a new grade and the building exterior is 15' from the boundary line, which meets the requirements of the side yard setback. A setback is established for fire protection, visibility and ventilation, none of which talks about underground. It bothers him that they are intruding into the side yard setback, the ordinance never considered this issue.

Member Anderson agreed that based upon what the ordinance states, it appears to be a legal setback.

The Board asked the City to look at this provision as it relates to underground structures.

Ms. Schafer asked to address the Board. She asked the Board to consider if the basis of the side yard setback is fire, light and water. If you consider fire, there could be an underground structure running right up to the property line and if the adjacent property also has an underground structure running right up to the property line and the two walls hit there is a severe fire problem. Fire from one draws to the other. That's part of the problem with the setback; the space is needed between the two separate buildings to access the fire.

Member Sullivan noted that the ordinance does not define "setback", but it does define "side yard" and "building". He asked the Board to look the definitions.

**Yard, side:** A yard between the side lot line and the nearest side of the building and extending from the rear line of the building to the front line of the building.

**Building:** Any structure designed or built for the support, shelter or protection of persons, animals, chattels or property of any kind.

Member Sullivan would like to address the definition of "building". If the underground area can be considered a building, it needs to meet the 15' side yard setback requirements.

Assistant City Attorney Graham asked the Board to look at the definition of "yard".

**Yard:** An open space at grade between a building and the adjoining lot lines, unoccupied and unobstructed by any portion of a structure from the ground upward, except as otherwise provided herein. In measuring a yard for the purpose of determining the width of a side yard, the depth of a front yard or the depth of the rear yard, the minimum horizontal distance between the lot line and any portion of any building shall be used.

Chairman Withrow feels we need to go back to the fundamental definition of how the ordinance defines "setback". He asked that the City Planning Commission review the issue.

The Board reviewed the issue H appeal question and the proposed findings of fact.

Member Cross does not approve the proposed underground intrusion.  
Member Sullivan stated that he also has an issue with the 15' setback.

Chairman Withrow asked Members Cross and Sullivan to explain their concerns to the Board.

Member Cross stated that in her experience as a member of the Planning Commission all underground structures had to meet the setback requirements.

Member Anderson stated that he knows of a few basements where part of the basement was below grade and covered by a concrete pad, but he is unfamiliar with the setbacks.

Member Sullivan stated that when he looks at the definition of a “building” rather than calling it a “structure”, he has concerns about the intrusion.

Chairman Withrow asked the Board to vote on if the creation of an artificial grade at a level substantially higher than the existing grade, where such artificial grade is being used to cover a substantial intrusion into the side yard is allowed. Is the Board in agreement that they can create an artificial grade? Are there any rules or requirements that says they can't do it?

Member Miller stated just because it has been done in the past, it doesn't make it right.

Member Anderson stated they do it to prevent runoff and bring the grade up to prevent water intrusions into the house.

Assistant City Attorney Graham asked the Board to read the definition of Section 5.186. The Board is being asked if the permit violates Section 5.186.

**5.186. Grades.** No premises shall be filled or graded so as to discharge surface runoff on abutting premises in such a manner that will cause inconvenience or damage to adjacent properties. When property is developed adjacent to existing properties previously developed, existing grades shall have priority.

The appeal is not dealing with a side yard encroachment issue, but it is dealing with whether you have an artificial grade that in fact will cause discharge surface runoff damage to adjacent properties.

City Planner Spencer stated that the appeal does state in the last part of the sentence for the Board to determine substantial intrusions into the side yard.

Chairman Withrow reviewed with the Board that we have established the grade, but can it cover a substantial intrusion into the side yard. An artificial grade can be created, but is it an intrusion into the side yard? The Board has reviewed the definition of a side yard and the purpose of a side yard setback, which is to keep open air space between the properties. Because they have covered that area, it seems that they have retained the open air space. The Board needs to go with what the ordinance says, not with what we think.

Ms Schafer asked the Board if the ordinance actually says that; they do not believe the ordinance says what the purpose of the setback is.

City Planner Spencer stated that the ordinance does not actually say what a setback is, but it is a common rule in any planning book for the purpose of a setback. Member Sullivan concurred that it is a common rule in development of zoning.

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Chairman Withrow asked the Board if it violates or complies with the ordinance. A voice vote was taken. Members Cross, Miller and Sullivan feel that it violates the ordinance; Members Anderson and Withrow feel it complies with the ordinance.

Chairman Withrow recessed the meeting at 9:14 p.m.  
Meeting was reconvened at 9:24 p.m.

The Board reviewed the zoning ordinance's definition of "yard" and "grade".

**Yard:** An open space at grade between a building and the adjoining lot lines, unoccupied and unobstructed by any portion of a structure from the ground upward, except as otherwise provided herein. In measuring a yard for the purpose of determining the width of a side yard, the depth of a front yard or the depth of the rear yard, the minimum horizontal distance between the lot line and any portion of any building shall be used.

**Grade:** The finished surface of the ground adjacent to the exterior walls of the building.

Member Miller stated that part of the intent of a setback is to have open space. The encroachment is not within the letter of the code. But upon review of the definitions, something under the ground does not have to comply.

Chairman Withrow feels the zoning ordinance does not contemplate this type of situation. But if you follow the exact words, which is what the Zoning Board has to do, it complies with the words in the ordinance.

Assistant City Attorney Graham stated that even if the Board feels that it is a bad policy to do what the ordinance says, the focus of the ZBA is not policy but look at the language of the ordinance.

Members Miller and Sullivan concurred, given the ordinance language, the encroachment is not a violation. But, they would like the Planning Commission to review the ordinance on this issue. The Board reviewed option #2 of the findings of fact.

Assistant City Attorney Graham added a finding - (h) Because the encroachment into the side yard setback will be below finished grade it is not subject to the side yard setback requirement.

Ms. Schafer wished to point out that in regard to Section 5.12 (2) this first sentence states that a general yard is an open space at grade. However, the second sentence does modify and provides a more specific definition for a side yard rather than just calling it a yard at grade. It says that in measuring a yard for the purpose of determining the width of a side yard, the minimum horizontal distance between the lot line and any portion of any building shall be used. For the purpose of measuring a side yard the Board should go with the more restrictive section outlined in second sentence of Section 5.12 (2).

Assistant City Attorney Graham wishes to note Ms. Schafer's objections, but in the definition of a side yard, the first words are "a yard". So the definition of yard is incorporated into the definition of a side yard.

The Board reviewed with Ms. Schafer the ordinance's definition of a yard in Section 5.12 (2). There are two sentences in the section. The first sentence is the general definition for a "yard", "A yard is an open space at grade between a building and the adjoining lot lines, unoccupied and unobstructed by any portion of a structure from the ground upward, except as otherwise provided herein." When it says "except as otherwise provided

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herein”, you have to consider the restrictions placed on that definition by the second sentence that says: “In measuring a yard for the purpose of determining the width of a side yard,...the minimum horizontal distance between the lot line and any portion of any building shall be used.” I think what we are saying here is that you have to look at, in interpreting statutory language you start with the general definition and if it says “except as otherwise provided herein” and is followed by a more limiting definition, you have to consider that limiting definition in terms of how to measure a side yard. It is very clear, that it does have to consider the minimum horizontal distance between the lot line and any portion of any building.

City Planner Spencer asked the Board to consider the word “building”. Does the Board consider the retaining walls and sheet piling a building?

Assistant City Attorney Graham disagreed. The words to be considered are “above ground”. Counsel’s analysis totally ignores the requirements of the definition that it be “at grade” and the phrase that you look at is “ground upward”. Therefore, to apply the definition you’re looking at the buildings and things that are at grade or from the ground upward. Under the rules of statutory construction, you have to interpret something, so all portions of the provision have meaning, as opposed to ignoring the portions of the language of the ordinance.

Chairman Withrow asked the Board to consider the purpose of a side yard setback. It is open space at grade or above.

Concerning the appeal, the Board makes the following findings of fact concerning the Applicants’ requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the zoning ordinance, which provisions read as follows: (Source: Exhibit 4)

Section 5.186 Grades: No premises shall be filled or graded so as to discharge surface runoff on abutting premises in such a manner that will cause inconvenience or damage to adjacent properties. When property is developed adjacent to existing properties previously developed, existing grades shall have priority.
2. The applicants have not provided any evidence suggesting that the above zoning ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons’ property. (Exhibit 2)
3. Because the language of the zoning ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons’ property. (Exhibit 1)

The Board finds that zoning permit #2850 does not violate Section 5.186 of the zoning ordinance based on the following facts:

Section 5.186 states that no premises shall be filled or graded so as to discharge surface runoff on abutting premises in such a manner that will cause inconvenience or damage to adjacent properties. When property is developed adjacent to existing properties previously developed, existing grades shall have priority.

- a. Section 5.12(2) Yard is defined as an open space at grade between a building and the adjoining lot lines, unoccupied and unobstructed by any portion of a structure from the ground upward, except as otherwise provided herein. In measuring a yard for the purpose of determining the width of a

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side yard, the depth of a front yard or the depth of the rear yard, the minimum horizontal distance between the lot line and any portion of any building shall be used.

- b. Section 5.12(5) defines side yard as a yard between the side lot line and the nearest side line of the building and extending from the rear line of the building to the front line of the building.
- c. Section 5.33(3) states that there shall be a side yard of not less than fifteen (15) feet on each side of any dwelling or accessory building.
- d. The DEQ permit approval and issuance of a Soil Erosion and Sedimentation control permit by the Department of Building and Safety indicates that the State and County officials, who are professionally trained and qualified, feel the construction will not cause inconvenience or damage to neighboring properties.
- e. The Anderson's representatives have indicated the use of barges or boats on the water would be used to remove the dredged materials, which will not impact adjacent properties or burden their use of the lower drive easement.
- f. The use of retention structures such as retaining walls and sheet pile anchors will prevent any discharge or runoff onto neighboring properties.
- g. Because the encroachment into the side yard setback will be below finished grade it is not subject to the side yard setback requirement.
- h. Finally, the applicants have not presented any evidence to prove that there will in fact be discharge of surface runoff from the Anderson property onto the Johnson property in such a manner that will cause inconvenience or damage to the Johnson property. Rather, the concerns expressed are merely speculative in nature, which is not the standard in Section 5.186.

The findings were adopted by a 4-1 voice vote with Member Cross voting no.

The Board reviewed the ninth appeal issue.

**I. Zoning Permit # 2850 does not further the purposes of the R-1 Residential District.  
(Source Exhibit 2 Powers letter dated April 6)**

The Board reviewed the request. The appeal asks if the permit furthers the purposes of the R-1 Residential District.

Assistant City Attorney Graham advised the Board that the provisions being cited in the application are basically intent provisions of the ordinance. They are not the regulations that must be met in order to obtain a permit. That's one of reasons the Board was given the third option to consider.

Chairman Withrow asked Ms. Schafer the purpose of the question.

Ms. Schafer asked the Board to consider the terms and conditions of the zoning permit. There still has to be some consideration of the overall purpose of the zoning district they are applying to build this structure, accessory building or whatever it is, in the R-1 residential zone. We have to take a look at the purposes of the R-1 residential zone and determine whether or not this particular plan, does in fact, meet the purposes of the R-1 residential zone. They are contending that based on all these problems, which at this point it sounds like the Board has agreed that in fact this can not be a boat house because of the other uses attached to it, it does not fit within the purposes of the R-1 residential zone.

Bridget Brown added that because the Board is allowing the artificial grade to stand as the finished grade and because you are not explaining the need for the grade and because of the attached accessory verses

the detached accessory use, this is really more like a commercial marine district because there are no side yards or rear yard. The height can be anything anybody wants, as long as they bring in fill. Section 5.144 specifically says in the marine commercial that there are no side yard or rear yard setbacks, so the marina commercial gives you the ability to build boat houses with no side yard setback.

Chairman Withrow stated that the Board just contradicted what you just told us. It isn't all one way. The Chairman asked the other side if they had a position on the issue.

Dan Barron advised the Board that there are fundamental misunderstandings in the zoning ordinance, how the zoning ordinance works and how it is applied. You have a statement of intent of the purposes of that zoning district and how that intent is to be implemented. It is implemented by specific standards, so you go back to the standards set forth in the R-1 zone district and ask if this proposal complies with the dimensional requirements and the other standards. If it does, it was the legislative intent of the City Council that in fact allowed the permitted use.

The Board reviewed the ordinance to determine if this is a permitted use. There is a residence with an attached structure that does not meet the definition of a boat house. But this determination has been made.

Assistant City Attorney Graham stated in terms of judging whether or not a zoning permit was properly issued, there is no legal requirement for the Board to comply with the intent of the ordinance. The intent of the ordinance is an umbrella that the City Council uses to determine what should be the specific regulations in the district. If the specific regulations are met, then obviously the use is permitted and if you have a well thought out ordinance, it should comply with that intent. There is nothing that says you have to meet the intent specifically to obtain the zoning permit. Otherwise, you look at the specific regulations that are included in the specific district.

Chairman Withrow asked Assistant City Attorney Graham if proposed option #3 was the specific way to state that. Assistant City Attorney Graham asked the Board to modify it, as the Board has found that the boat house provision had not met the requirements of the ordinance.

The Board reviewed Section 5.1 and 5.31 of the ordinance.

City Planner Spencer asked the Board to review an aerial map. The area adjacent to the Anderson property is all R-1. These are all homes and boat houses in the R-1 zone district. So clearly the historical intent of the ordinance has been to allow the construction of homes and boat houses.

Member Cross agreed, but she questioned the proposed 11 boat slips in the R-1 zone district and the parking spaces for the boat slips. She also voiced concern about the hill. No one knows what is in the hill.

Chairman Withrow advised that those items were not a concern at this time. There are engineering controls and site planning is suppose to take care of those issues.

Chairman Withrow asked if we had any requirements that deal with slips and parking. Assistant City Attorney Graham stated that that question has been asked and has not been raised on the appeal. If the Board wishes to raise the issue, it was not noticed. The Board will have to adjourn the meeting and notice everyone that the Board will be studying the issue. An issue can not be raised, unless both parties have an opportunity to prepare input for the discussion.

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City Planner Spencer asked the Board to look at the aerial photo. Assistant City Attorney Graham asked the Planner if there were any limitations in the ordinance on the number of boat slips that can be located in a R-1 zone district? City Planner Spencer advised that Board that the ordinance does not have a limitation, in fact some of the neighbors have more slips than what is being proposed. A parking space must be provided for every so many number of boat slips. The Board can discuss boat slips, but the Board can not interpret the section.

Ms. Brown asked to address the board. She stated that the question asks the Board to review the spirit and the intent of the R-1 zone district. Any boat houses that Mr. Spencer shows you from the aerial photograph that are pre-zoning are not relevant to your analysis.

Mr. Wood stated that the boat house is actually a replacement of a previous boat house that was there.

City Planner Spencer reminded the Board that the zoning ordinance does not prohibit boat houses; it does not prohibit big boat houses. Regardless, it makes no difference if the boat houses shown on the aerial are grandfathered or not. Clearly there is a large number of docks along the shoreline that may or may not have been built after the enactment of the zoning ordinance. It fits; there are homes, boat houses and docks with a number of slips.

The Board reviewed the aerial photo. Chairman Withrow asked if the site was to retain the same amount of dockage. Mr. Anderson advised that Board that the same docks that are there today will remain, the docks will be shifted, but the length is the same.

Member Sullivan stated that he agreed that this is the same dock. He also reminded the Board that is has determined that the boat house was an attached structure and that the Board earlier concluded that it did not qualify as a boat house because of the items placed in the boat house.

The Board reviewed the findings. Assistant City Attorney Graham asked the Board to modify that last sentence in option #3 to include "with the exception of the hot tub in the boat house". The Board concurred and added comment that the garage use is limited to boats and other marine related equipment.

The Board makes the following findings of fact concerning the Applicants' requests for interpretation:

1. The applicants have requested an interpretation of the following provisions of the zoning ordinance, which provisions read as follows: (Source: Exhibit 4)

Article I, Section 5.1: This chapter is adopted pursuant to the authority conferred by Public Act 285, P.A. 1931, as amended of the State of Michigan, for the purpose of promoting and protecting the public health, safety, peace, comfort, convenience and general welfare of the inhabitants of the City of Charlevoix by protecting and conserving the character and social and economic stability of the residential, commercial, industrial, and other use areas, by securing the most appropriate use of land; preventing overcrowding of the land and undue congestion of population; providing adequate light, air and reasonable access; and facilitating adequate and economical provision of transportation, water, sewers, schools, recreation, and other public requirements.

Section 5.31 Purpose of R1: The purpose of the regulations covering this district is to provide for a stable and sound low density residential environment with its appropriate neighborhood related utilities and services.

Section 5.6(2): District: A section or sections of the city for which the zoning regulations governing the use of buildings and premises, the height of buildings, the size of yards, and the intensity of use are uniform.

2. The applicants have not provided any evidence suggesting that the above zoning ordinance language has multiple meanings or is otherwise ambiguous when applied to the Andersons' property. (Exhibit 2)
3. Because the language of the zoning ordinance is not ambiguous, the Board finds it is required to apply the plain meaning of these provisions to the Andersons' property. (Exhibit 1)

Concerning the appeal, the Board finds that Zoning Permit #2850 does not violate Article 1, Section 5.1 and Section 5.31 of the zoning ordinance based on the following facts:

- a. The provisions of the zoning ordinance cited in this issue are merely statements of intent. They are not substantive provisions of the zoning ordinance that must be met, such as a setback requirement.
- b. The zoning ordinance specifies the uses permitted in the R-1 district and the dimensional requirements these uses must meet. Therefore, because the proposed is allowed in the R-1 district, except for the hot tub located in the proposed boat house and with the requirement that the garage area be used for the exclusive storage of boats and other marine related equipment, and otherwise meets all of the required dimensional regulations of the district, the Board finds that the proposed use complies with the intent of the R-1 district.

Member Sullivan asked staff to verify that the parking spaces for the dock spaces were in place.

The Board adopted the findings for appeal item I unanimously.

- c. Motion - Decision on issuance of Permit #2850

The Board reviewed and agreed to approve the findings of fact outlined by City Planner Spencer and the Board moves that based on all evidence of record, the findings of fact approved by the ZBA, and all public comments received, issuance of Zoning Permit #2850 is hereby revoked.

The Board reviewed placing a requirement that the three lots be combined before a zoning permit is issued.

Ms. Brown asked the Board to confirm their actions. The Board did not make a motion make on a couple of issues.

City Planner Spencer reminded the Board that votes were taken on the issues where there was controversy and disagreement among the Board. The Board was in agreement on the rest of the issues.

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The Board reviewed the final findings of fact as approved by the Board and attached to the minutes as Exhibit A. The Board reviewed the site conditions, general facts, the list of sections of the code requested to be interpreted, the requests for appeal.

Issue A - Section 5.174 – The Board finds that this section does not violate Section 5.174. Motion adopted by unanimous voice vote

Issue B – Section 5.5(10) and the standard statements. The Board finds that the zoning permit violates Section 5.5(10) of the zoning ordinance based on the following facts and is based on the boat house definition and that it is not a boat house. Motion adopted by unanimous voice vote.

Issue C – The Board reviewed the standard statements and definitions. The Board finds that that the accessory building and the zoning permit does not violate Section 5.32 (8) of the zoning ordinance and the Board's statements. Motion adopted by unanimous voice vote.

Issue D – The Board finds that the zoning permit does not violate section 5.32 (1) of the zoning ordinance, based on the following. Motion adopted by unanimous voice vote.

Issue E – The Board finds that it does not violate Section 5.5(1). Motion adopted by unanimous voice vote.

Issue G - The Board finds that Section 5.5 (1a) and 5.190 for the reasons as previously stated. Motion adopted by unanimous voice vote.

Issue H – The Board finds that the permit does not violate Section 5.186 of the zoning ordinance based on the following findings of fact. Motion adopted by a 4-1 voice vote, with Member Cross voting no.

Issue I – The Board finds that the permit does not violate Section 5.1 or Section 5.31 of the zoning ordinance based on the following. Motion adopted by unanimous voice vote.

Motion made by Member Cross and seconded by Member Miller that the Board moves that based on all evidence of record, the findings of fact approved by the Board, and all public comments received, issuance of Zoning Permit #2850 is hereby revoked.

Motion was adopted by the following yea and nay vote:

Yeas: Members Cross, Miller, Anderson and Withrow  
Nays: Member Sullivan

Motioned adopted.

Member Sullivan asked the Board if any action was needed on the three separate lots of records. Assistant City Attorney Graham stated that the joining of the lots is an administrative issue that needs to be addressed at the time a zoning permit is issued. If the applicant begins to build before the lots are combined then there is a violation of the zoning ordinance and construction can be stopped.

Chairman Withrow asked staff to have the Planning Commission review what constitutes an underground intrusion into the side yard setback or any yard setback requirement.

**H) CALL FOR PUBLIC COMMENT** - None.

**I) REQUESTS FOR NEXT MEETING'S AGENDA**

**J) ADJOURNMENT**

Motion made by Member Miller and seconded by Member Sullivan to adjourn. Motion was adopted by unanimous voice vote.

Meeting adjourned at 10:22 p.m.

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Greg Withrow                      Chairperson

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Linda Jo Weller                      Recording Secretary

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Carol A. Ochs                      City Clerk