



DEXTER TOWNSHIP

ZONING BOARD OF APPEALS

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ZONING BOARD OF APPEALS MINUTES APPEAL OF DECISION OF DIRECTOR OF PLANNING AND ZONING Tuesday April 3, 2018

Members present: Chairperson Brook Smith, Vice-Chairperson Beth Filip, Secretary Jay Holland, James Drolett, and Tom Ehman. Absent: None

Also present: Zach Michels, Director of Planning and Zoning (DPZ), and Janis Miller, Recording Secretary.

- I. **Call to Order:** The meeting was called to order by Chairperson Smith at 6:00 p.m.
- II. **Pledge of Allegiance:** Chairperson Smith led the Pledge of Allegiance to the Flag.
- III. **Approval of Agenda:** Chairperson Smith added Election of Officers, Conflict of Interest Review, and suggested that the agenda be amended to allow the applicant presentation before the DPZ presentation.

Moved by Filip, seconded by Ehman, to add the Election of Officers, Conflict of Interest Review, and move Action Items 4: Applicant presentation to the top followed by Action Items 1, 2, and 3, and approve the agenda as amended. Motion carried.

- IV. **Election of Officers:**
Moved by Drolett, seconded by Ehman, to retain the current slate of officers (Chairperson, Smith; Vice-Chairperson, Filip; and Secretary, Holland) for the year 2018. Motion carried.

- V. **Public Comment – Non-Agenda Items:** None.

- VI. **Conflict of Interest Review:**
Chairperson Smith stated he had legally represented clients in the vicinity of the Bieske's. Currently he is not representing any of these clients nor does he have a relationship with any of the clients.

Sheri Pollesch stated she was going to bring this to the ZBA's attention but did not object to Mr. Smith being seated for (18-ZBA-837) Bieske.

Moved by Ehman, seconded by Drolett, to put on the record that Brook Smith does not have a conflict of interest in this case. Motion carried with Smith abstaining.

VII. Action Items:

Action Item: # 1
Petition Number: (18-ZBA-837) Bieske
Applicant Name(s): Donald and Nancy Bieske; Attorney Shari Pollesch
Property Tax ID: (D-04-02-401-019 & D-04-02-403-002)
Address: 9586 Winston, Pinckney, MI
Purpose of Request: To appeal the Director of Zoning and Planning's decision to deny approval of a zoning permit.

1. Applicant presentation:

Attorney Shari Pollesch on behalf of Donald and Nancy Bieske

1. The Zoning Administrators denial is separated into two categories: a) what he perceives as malfeasance on the part of Mr. Bieske in the past, and b) assessment of the current [rebuilding] plans and where they fit in the Zoning Ordinance.
2. Noted that Mr. Michels received a letter from the Township Engineer, OHM, which stated they do not have record of a final 2003 inspection.
3. Mr. Bieske's records were lost in the fire but there was Township confirmation that Mr. Sloan (previous zoning administrator) issued a final inspection and approval of the 12/12 pitch redesigned roof. [Certificate of zoning compliance was issued by Hamilton.]
4. Based on the above, the home was not illegally non-conforming.
5. It is arbitrary and capricious to revoke an approved permit 8 years later.
6. Mr. Bieske's father built the home in the late 1970's/early 1980's with the lakeside porch wrapped around to the north side of the house as part of the original home. If the porches were illegal, the Township never took action when the Township cited them for other violations.
7. September 2015 the Township looked at four posts that were installed near the house and confirmed with Mr. Bieske that there was no new construction.
8. DPZ Michels lot coverage calculations do not match the survey or the building plans. Mr. Bieske is not exceeding the 25% lot coverage.
9. The utility right-of-way cannot be built upon. Where in the Zoning Ordinance does it subtract the right-of-way from lot coverage? Mr. Bieske has "fee simple" title, there is not a sliver (for the right-of-way) carved out of their legal description. We cannot find any records that state the neighbors have a deeded access to that right-of-way.
10. A variance for the height (12/12 pitch) of the house is not needed. We understand DPZ Michels uses vertical structure to determine setbacks. The Township did not know the height of the house prior to the fire completely destroying the house.
11. Because the Bieskes are different than their neighbors should not be grounds for them not to rebuild their house.

2. Zoning Board of Appeals Q&A of applicant representative:

Filip: The legal standard presented causes issue with me. My understanding is the standard you set forth is that of a non-conforming use. This is not an issue of use, as we're not discussing commercial use or a change from Lake Residential use. Why was the "substantially same size" standard applied when on page ten of the brief it does state there was a three foot increase to the foundation? To me this is a dimensional variance issue to make this a legally non-conforming structure in 2003.

Ms. Pollesch: This is a residential property. It is zoned residential. The proposed structure will not change it from residential use, and it's not going to cause a previously non-conforming structure to be expanded. The footprint of the house will not change; the foundation will adjust three feet to accommodate the cantilever. We're not using any more of the property than was used by the original home.

Ehman: There should be no issue of use. No one is challenging their right to have a residence there.

Smith: The issue before us is whether or not there was a legally non-conforming structure on the property that can be rebuilt. There is no question about substantially conforming the use.

Ehman: In the calculations for the lot area, you list acquisitions from a court order, and you note something is pending. Is the something pending part of the calculations?

Ms. Pollesch: No. The Bieske's own lot one and a small piece of platted property. We've quiet titled to the portion of their lakefront that is adjacent the platted portion. The other piece is the Elm Grove outlot A, owned by the State of Michigan, which is not in the calculations.

Smith: When you calculate an additional eight hundred (800) square feet to the Bieske's lot, that is only the dry land between the east boundary of their property that is in section 2 and the waters of Portage Lake? It does not include anything into outlot A?

Ms. Pollesch: It does not include anything into Elm Grove sub-division. We did not quiet title to any bottom lands [in the lake]. The legal description used for our quiet title action was created between the surveyor and the title company.

Smith: Do you have any title work that indicates what the persons, against whom you brought the quiet title action, owned?

Ms. Pollesch: We did it based on title work.

Smith: You haven't submitted a title search or a title insurance policy that showed Broich's owning all of section two into the lake.

Ms. Pollesch: We did not pursue, when we filed our complaint, any bottom land or quiet title any bottom land. The legal description for our quiet title action was created between the surveyor and the title company.

Smith: You have said that you haven't quieted title to any bottom land, the legal description that is in the judgement, entered by Judge Connors, starts out in the middle of Portage Lake and heads to the shore, stopping when it gets to the shore. You have quieted title to a large chunk of bottom land in Portage Lake. You have not quieted title to any dry land because the legal description in the judgement ~~records~~ describes bottom land in the lake.

Ms. Pollesch: We had the surveyor create the legal description for just that portion. I do believe we have quiet title [to the dry land].

Smith: If you don't have the 800 square feet of dry land, do you still ~~need~~ meet the 25% lot coverage? What your materials say is that with the 800 square feet, you don't just barely meet the 25% requirement, even with your calculations.

Filip: My understanding is the lot is 13,068 square feet, page 11 in your brief. My understanding is you also included the 800 square feet, and then the right-of-way takes out 536 square feet. My understanding of the Ordinance is, when you look at the definition of "lot area", that is where the right-of-way is described as being excluded from the lot area. The total lot coverage, of the proposed structure, page 12, proposes 3,441 square feet. Recalculation shows lot size is 13,332 with 25% lot coverage being 3,333 square feet, which is 108 square feet over the 25% allowed. I'm also concerned with the height of the house.

Ms. Pollesch: My client submitted the documents that are in the brief that clearly shows height of 28 feet. My client did not submit documents that stated his house was only going to be 22.5 feet high.

Filip: I'd like to get an understanding of what was present in 2010. Was the lakeside porch there?

Ms. Pollesch: The lakeside porch has been there since the ~~19~~70's.

Filip: And the northeast porch (northern porch), on the lake side, was it there in 2010? The "L" porch on the street side, was that present in 2010?

Ms. Pollesch: That was present as a concrete patio.

Filip: No roof?

Ms. Pollesch: I don't know.

Filip: And then there were some posts added. Were those present in 2010?

Ms. Pollesch: I don't know. I do know that Mr. Sloan issued a document that said no new structure being built in September of 2015, and I know there was no action taken by the Township, against my client, for illegal porches. [Mr. Sloans employment with the Township ended in 2012.]

Smith: Due to a complaint, Mr. Sloan investigated the posts, took some pictures, and asked the homeowner about it, for which he received a reasonable explanation. How does that interact with the drawing your client submitted that doesn't show any of these things in 2010?

Ms. Pollesch: My client's drawing is for a roof. The 2010 proceeding is for the change in the pitch of his roof.

Smith: He was asked to submit, for site plan approval, scale drawings of his residence.

Ms. Pollesch: I don't know what the process was then. I do know my client submitted documents in order to get variances to change his roof pitch.

Smith: None of the things that are outside of this footprint in 2010 we now see depicted on the drawing that is the basis for this site plan approval.

Ms. Pollesch: Perhaps they are not, but I don't think it follows that they necessarily didn't exist. The ~~accessor~~ ~~assessor~~ was ~~accessing~~ ~~assessing~~ for them.

Ehman: The Township refused to give you a permit because the application didn't conform to the ordinance. Part of that is the lot coverage.

Ms. Pollesch: If there was a conditional ruling that said if we could meet lot coverage, then it would be granted. Then I could adjourn it, but I can't adjourn it because we're up against an April 20th deadline. In the prior application by my client, for variance [in 2017], the condition has been put on them to haul out hundreds of yards of fill which is cost prohibitive to the project. They cannot afford to remove elevation that was there lawfully when they purchased the property. The elevation was brought in, lawfully, when Mr. Bieske senior built his home in order to accommodate a septic system. The Township, and the County, was part of that process.

Holland: Did the appellant ever complete the storm water management plan in 2010?

Ms. Pollesch: Yes. The plan was approved by OHM. There was an email between Mr. Sloan and a gentleman from OHM, who's received the plan prior to the roof being constructed, and OHM said the plan would work.

Holland: He approved the plan, was the plan built?

Ms. Pollesch: The plan was built according to the plan.

Holland: I see they requested "as built". Were the "as built" submitted?

Ms. Pollesch: I don't know if they were submitted. I do know my client connected with the Township and said come out here and inspect.

Holland: I don't see where they were submitted, and I don't see where they were approved. With reference to the increase in square footage, noted in Exhibit D provided by you, on the 2008 and 2014 assessment documents, which additions or changes to the property were built after an application approval and acquisition of a zoning permit, and prior to the commencement of work? According to the accessors card, from 2002 to 2008, there was 207 square feet of platform deck added.

Ms. Pollesch: I believe they were all built appropriately with permits.

Holland: I don't see where that's been documented by you. You don't build a deck without a building permit. Were the final inspections done and certificates of occupancy issued?

Ms. Pollesch: If they were required, then I believe they were done.

Holland: To me this affects the footprint and square footage they are claiming to have. All those should show up at Chelsea Area Construction Agency.

Ms. Pollesch: I'm not conceding that when they show up on the assessment records is when they were constructed.

Holland: I see, according to the documents provided by you, and by my calculations, between 2002 & 2014 there is an additional 457 square feet added. Were those done legally with the appropriate zoning permits, variances, building permits and certificates of occupancy?

Ms. Pollesch: I believe they were. My client has told me they were.

Holland: In your packet, you provide a letter received from Mr. Hamilton, Dexter Township Zoning Officer, dated October 27, 2011, suggesting you may need a zoning and building permit.

Ms. Pollesch: That is relating to the 4x4 posts.

Holland: I don't see a response was provided to that letter.

Ms. Pollesch: I didn't know my clients at the time. I believe they responded by calling Mr. Sloan out and worked out whatever the issue was because there would have been a proceeding against my client for violating the Zoning Ordinance.

Drolett: In regards to the variance (smaller setbacks) that was granted to your client on July 6, 2017, what is the objection to the variance that was already granted?

Ms. Pollesch: The objection is to the conditions that the ZBA adopted, including a condition that they remove 4-5 feet of elevation on the property. This is cost prohibitive, and the insurance will not pay. My client went back to the drawing board, reduced the footprint of his house, so he could rebuild the exact same house. He had his designer redesign the plan so it would fit on the foundation that is there today.

Drolett: There is a reason that the berm needs to be removed because it was in the right-of-way and causing drainage issues.

3. Report from the Director of Planning & Zoning:

DPZ Michels summarized the staff report noting:

1. This is an appeal of the DPZ's decision to deny a zoning permit.
2. An appeal of decision is different than an appeal for a variance. In an appeal of decision, the applicant needs to convince this body that one of the decision criteria is true.
3. The applicant brought in plans in early January to rebuild the structure, relying on the legally non-conforming structure portions of the Zoning Ordinance, §19.04.
4. There is a three point test to approval (both in the staff report and the letter to the client): a) the previous structure, or portion of the structure, should be considered legally non-conforming, b) is the proposed structure consistent with the structure that was there before (does it represent an expansion of the foundation footprint, elevation profile, or the square footage), and c) has construction commenced within two years of the destruction. There are very few communities that are as generous as Dexter Township in regards to legally non-conforming structures.
5. The first task was to determine if the previous structure was legally non-conforming included: looking at the property file for 9586 Winston; consulting the accessor; consulting with Chelsea Area Construction Agency; and consulting with the Township Engineer, OHM. We determined it did not appear that this property has ever satisfied all the conditions of the variance (09-ZBA-719) Bieske, that it received for the upward expansion or for the zoning permit which came after that. The big issue was the final inspection of the storm water management plan by the Township's Engineer.
6. We do have record of the applicants submitting a storm water management plan, that is part of the file, and we do have record of them submitting \$500 for performance guarantee. We do agree there were two invoices submitted by OHM that the applicants paid.
7. There is nothing in the record after construction began, no emails between OHM and the Township/staff or invoices from OHM. There is no OHM record of final approvals.
8. We cannot find record of the many porches the applicants claim were there, which they are relying on for the lot coverage. As to the accessor's record, they are going to tax you on what is there, whether it is legally there or not.
9. There are only 3 building permits issued for this property since 2000, by the Chelsea Area Construction Agency.
10. The plans originally submitted, for the variance in 2009, did call for a two-story building, with a 12/12 pitch on the roof. This was first postponed because the plans weren't very good and postponed a second time because it did not meet all the criteria.
11. The applicants have said they are expanding the foundation by 3 feet, as well as vertical expansion. The applicants did receive a variance for the upward expansion.
12. The building is bigger. Looking at roof area, they are over the 25% lot coverage. There were no variances issued for it. It was built without any record of permits that we can find at the Township or the building authority.

13. If you're adding a second story, and your calculating square footage by gross floor area, that's a significant increase in gross floor area and would be inconsistent with the variances that were issued in 2009 for the vertical expansion.
14. I would argue it is not arbitrary and capricious as we spent a lot of time, three to four weeks, going through the record, consulting with the Township attorney and various other entities that were able to confirm our records and our understanding of the conditions and the process which existed. It is consistent of previous applications of the law.
15. It was not an abuse of discretion, as noted in the Zoning Ordinance, as it is the Zoning Administrators task to review and issue zoning permits when it complies (not authorized by the Township Board to issue zoning permits when it doesn't comply). The decision was based on a consistent interpretation of the Zoning Ordinance based on previous decisions of both the Zoning Administrator and the Zoning Board of Appeals.

4. Zoning Board of Appeals Q&A of Director of Planning and Zoning:

Filip: Assuming some of the structure was present, potentially not conforming structure, at the time of the 2010 review, and then in 2014 there was a signature that said it has been signed off on, why wasn't there a remedy at that time?

DPZ Michels: Historically, because of the staffing hours reviewing or inspecting property, and the general direction of township and staff at the time, we were very much blinders. Now when we open a file, we look through the whole thing. We can't hold a permit hostage if there is a violation somewhere else. If the structure was built the way it was supposed to, but there is some other violation, we still have to final what was there.

Filip: So there is no provision for you to go beyond the scope of the initial variance.

DPZ Michels: It was not the practice of the Township at the time.

Filip: Another issue that was raised tonight is the foundation footprint. My understanding is the language in the Zoning Ordinance uses those two words together. If I understand Attorney Pollesch's argument, the expansion of the foundation by the three feet is no more than what would have been measured from the surface of the house to the lot line. So, three feet does nothing more in terms of a measurement to the lot line.

DPZ Michels: The exclusion of access easement, or road easement, is found on page 2-7 in the Zoning Ordinance under Lot Coverage.

Filip: When I look at the drawings in the staff report (page 1-30 & 1-31), it looks like there is an alteration in the rear of the home. Page 1-30 is showing depiction without the roofline and page 1-31 is showing the extension of the roofline.

DPZ Michels: Page 1-30 is showing the foundation with the structure of the decks. Page 1-31 shows the roof.

Filip: The difference (page 1-28) in the new roofline and the older roofline (picture on page 1-56) shows the partial pergola. Do we know the difference, if any?

DPZ Michels: The proposal squares off the corner.

5. Applicant rebuttal: None.

Ms. Pollesch: His position is pretty consistent with the written report.

6. Open Public Hearing: 7:45 PM

DPZ Michels noted the receipt of two letters from neighbors and included them in the staff report.

Esther Gibb, 9620 Winston, Pinckney, MI

The Bieske property was flat when the Gibb's moved in 55 years ago. With the addition of dirt to the Bieske property, and change in topography, her property receives exceptional stormwater runoff from the Bieske property.

Kathy Lane, 9558 Winston, Pinckney, MI

The Bieske decks were added sometime after the Lane’s moved into the neighborhood in the early 1990’s. She also observed two large trucks of dirt hauled onto the Bieske property the summer of 2017.

7. Close Public Hearing: 7:50 PM

8. ZBA Deliberations:

Ehman: The Township claim of non-conformities appears to be: a) lot area, 2) building height, which is not anywhere near the lot lines, 3) does the front of the house extend into the front-yard waterbody, and 4) those things built within the confines of the property, were built without permits and therefore illegal.

DPZ Michels: Reminder, the description of the decision being appealed, and submittal materials, is “Zoning Permit denial for reconstruction”.

Drolett: All the issues mentioned by Ehman have been reviewed by the Zoning Board of Appeal. The applicant understood at that time he had some non-conformities for which he had to secure variances. We need to stick to the strict review whether we should over-rule the Director of Planning and Zoning’s decision.

9. Standards of Review:

(1) Arbitrary or Capricious 4.35(E)(1)	
Does the requested appeal of decision meet the following standard:	
<i>The original decision was arbitrary or capricious.</i>	
<u>ZBA Comments:</u> Holland – No, judging from the materials presented (both sides). Drolett – No, as DPZ Michels conducted extensive research and consulted with numerous people. Filip – No, evidence from both sides shows extensive records have been thoroughly reviewed. Smith – No, a great deal of thought and inquiry went into the DPZ’s decision.	<u>YES</u> <i>None</i> <u>NO</u> Drolett Holland Filip Smith Ehman
(2) Erroneous Findings of Fact 4.35(E)(2)	
Does the requested appeal of decision meet the following standard:	
<i>The original decision or action was based on an erroneous finding of material fact.</i>	
<u>ZBA Comments:</u> Drolett – I do not believe it was based on erroneous facts. Filip – The standards were properly applied and the calculations demonstrate that. Ehman – No, due to the fact the DPZ was bound by previous ZBA decisions on height. Smith – No, they are way off on their percentage of lot coverage, and clearly the facts show that this structure was not completed following the procedures set forth in our Ordinance (permits not pulled and finalized).	<u>YES</u> <i>None</i> <u>NO</u> Drolett Holland Filip Smith Ehman

(3) Abuse of Discretion 4.35(E)(3)	
Does the requested appeal of decision meet the following standard:	
<i>The original decision or action constituted an abuse of discretion.</i>	
<u>ZBA Comments:</u>	<u>YES</u>
Drolett – No. It is the job of the zoning administrator to review plans for issues to comply with the Zoning Ordinance, and he exercised due diligence in doing so.	None
Holland – No, as it is my perception is that DPZ Michels worked hard to compile and present extensive data to support the denial decision.	<u>NO</u>
Filip – No, as this is within the prevue <u>pervue</u> of what the DPZ does.	Drolett
Smith – Clearly the Director of Planning and Zoning was doing his job in analyzing the material before he reached a decision.	Holland Filip Smith Ehman

(4) Erroneous Interpretation 4.35(E)(4)	
Does the requested appeal of decision meet the following standard:	
<i>The original decision or action was based on an erroneous interpretation of this Ordinance or zoning law.</i>	
<u>ZBA Comments:</u>	<u>YES</u>
Drolett – Nothing presented tonight shows an erroneous interpretation of the Zoning Ordinance.	None
Holland – Agree.	
Filip – Agree.	<u>NO</u>
Smith – There is no indication that the DPZ inappropriately applied our Ordinance or zoning law. Substantial compliance with respect to use is not an issue here.	Drolett Holland Filip Smith Ehman

Moved by Drolett, seconded by Holland, based on the finding of fact by the ZBA, the petition to appeal the decision by the Director of Planning and Zoning is denied.

Roll Call Vote: Yeas – Drolett, Holland, Ehman, Filip, Smith; Nays – None; Absent – None; Abstain – None. Motion carried 5-0.

VIII. Public Comment: None.

IX. Approval of Meeting Minutes:

Moved by Filip, seconded by Drolett, to approve the minutes of the November 9, 2017 regular meeting as amended. Motion carried.

X. Concerns of Board Members, Director of Planning and Zoning, Recording Secretary: None.

XI. Adjournment

Chairperson Smith declared the meeting adjourned at 8:14 p.m.

Respectfully submitted,

Jay Holland, Secretary

Janis Miller, Recording Secretary