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M E M O R A N D U M

TO: Rick Speck, Zoning Administrator
St. James Township

VIA EMAIL

FROM: Bryan E. Graham *BEG*

DATE: November 12, 2021

SUBJECT: Harbor views in the Marine Related District

You have asked me to address whether the current zoning regulations intended to protect the harbor views in the Marine Related District would likely survive a court challenge by a property owner. For the reasons stated in this memo and based on the specific facts of a particular situation, I believe there is a reasonable likelihood that those zoning regulations would not be upheld by a court.

Under the legal doctrine known as substantive due process to be valid a zoning regulation must meet the following two requirements: (1) the regulation must advance a legitimate governmental interest and (2) the regulation must advance this legitimate governmental interest in a reasonable manner. The preservation of harbor views would constitute a legitimate governmental interest. The real issue that must be analyzed is whether the current zoning regulations advance this legitimate governmental interest in a reasonable manner.

The analysis of the question you have posed must begin with the zoning regulations in the Marine Related District. Section 6.12.c of the zoning ordinance provides that new buildings can be built to a height of no more than 16 feet. This regulation would allow a new building located within the building envelope (in compliance with all required setbacks) to be built to a height of 16 feet throughout the entire building envelope. Therefore, an existing building located within the building envelope built to a height of 14 feet could be reconstructed or an addition built to the maximum 16 feet, even though the increased height of the building would by definition impair a view of the harbor. As another example, if a building was constructed within one half of the building envelope to a height of 16 feet, then this conforming building would be allowed to expand to the remaining portion of the building envelope to a height of 16 feet, although the addition would also impair a view of the harbor.

The issue of preserving the view of the harbor, however, deals with nonconforming structures. As an example, a structure may be nonconforming when it does not comply with required setbacks. A structure may also be nonconforming if it exceeds the 16 feet height requirement, even though the structure itself is located within the building envelope.

Article X of the zoning ordinance deals with nonconforming uses, lots and structures. There are two sections within this Article that have an impact on how nonconforming structures can be reconstructed or modified. Section 10.01 provides:

SECTION 10.01 – EXPANSION OF NONCONFORMING STRUCTURE OR USE

a) Structures that are nonconforming because they do not meet the dimensional requirements of this Ordinance [setback or height requirements] **may be** extended, **enlarged**, altered, remodeled or modernized even if the extent of the nonconformity is increased, **provided the degree of the nonconformity (the distance to the property line) is not increased, the other dimensional requirements of the District are satisfied**, and the alteration complies fully with the requirements of the Northwest Michigan Community Health Agency, and carries ZBA approval.

b) A legally existing, nonconforming use may be extended only throughout a building being used for a legally existing, nonconforming use at the adoption of this Ordinance, or any amendment thereto, or as provided for in Section 10.08 of this Ordinance. (Emphasis added.)

Section 10.08 provides:

SECTION 10.08 – REPLACEMENT OF NONCONFORMING BUILDINGS, STRUCTURES AND USES

a) A **legal nonconforming building or structure may be replaced** with the approval of the Planning Commission **even if the extent of the nonconformity is increased** provided as follows:

1) The **replacement building or structure does not exceed the general height, size, or scope of the existing building or structure**, and

2) The degree of the nonconformity is not increased (i.e. the distance to the property line is not further decreased when it does not currently meet the required setback).

b) In addition to the above requirements, an existing residential dwelling, residential accessory building, or retail shop located in the "MR" Marine Related District may be reconstructed with the approval of the Planning Commission subject to the following requirements:

1) The wall faces of all buildings adjacent to the street shall not be increased in width,

2) **There shall be no greater impairment of views to the Bay than already exists** for buildings and structures on the opposite side of the street and those using the street for driving and walking, and

3) There shall be no increase in the number of buildings, structures, dwelling units, or businesses. (Emphasis added.)

In certain factual situations, the regulations in these two sections are inconsistent. They also do not advance the legitimate governmental interest in preserving harbor views in a reasonable manner. An example will illustrate this legal problem.

Assume in this example that a structure is nonconforming because it does not meet a required setback. Assume further that the height of this nonconforming structure is 14 feet. Finally, assume the property owner desires to construct an addition to this nonconforming structure or replace this existing nonconforming structure within the building envelope to a height of 16 feet.

Under Section 10.01 a) this nonconforming structure would be permitted to be enlarged since the addition would be within the building envelope. Constructing the addition to a height of 16 feet does not increase the degree of the nonconformity, since the 14 feet height was not the reason for the nonconformity and a height of 16 feet is permitted within the district.

Under Section 10.08 a) 1) this same nonconforming structure can be replaced with another structure, but only if the new structure does not exceed the general height, size, or scope of the existing building or structure. In my example because the existing structure is 14 feet in height, the replacement structure can only be 14 feet in height under this regulation.

In addition, under Section 10.08 b) 2) the replacement structure can have no greater impairment of views to the Bay than already exists. Replacing a structure that is 14 feet in height with a structure that is 16 feet in height will by definition have a greater impairment of views to the harbor. Therefore, under this subsection the desired replacement of the nonconforming structure to a height of 16 feet would not be permitted.

The zoning regulations in Section 10.08 do not reasonably advance the legitimate governmental interest in preserving harbor views. Remember at the outset that the township has made a policy determination that harbor views can be adequately protected when a new building is 16 feet in height. Therefore, limiting the height of a replacement building to the height of an existing building does not advance the legitimate governmental interest when the existing building has a height of less than 16 feet. In other words, if the view of the harbor is adequately protected with a new building of 16 feet, then there can be no reasonable justification to limit the height of the replacement building to less than 16 feet, merely because the existing building was less than 16 feet.

If the township would like me to prepare an amendment to the zoning ordinance that complies with substantive due process requirements concerning the enlargement of nonconforming structures within the Marine Related District, please let me know.

In our conversation earlier this week you indicated that the specific facts that prompted your question was a residential use in the Marine Related District. You also indicated that this single-family dwelling structure complied with all required setbacks within the district. Therefore, based on these facts, you are not dealing with a nonconforming structure, since the dwelling complies with all required setbacks and is less than 16 feet in height. Rather, you are dealing with a nonconforming use of the property (a residential use not allowed in the Marine Related District).

The zoning ordinance does not deal directly with the enlargement of a conforming structure within which a nonconforming use is located. The closest regulation in the zoning ordinance is Section 10.01 b) which provides:

b) A legally existing, nonconforming use may be extended only throughout a building being used for a legally existing, nonconforming use at the adoption of this Ordinance, or any amendment thereto, or as provided for in Section 10.08 of this Ordinance.

This zoning regulation, however, does not address whether the building can be enlarged. The phrase “only throughout a building being used for a legally existing, nonconforming use at the adoption of this Ordinance” requires the legally existing nonconforming use to be in existence at the adoption of the zoning ordinance. The phrase does not require the building itself to be in existence at the adoption of the zoning ordinance.

I could not find any Michigan case law directly addressing this unique question. Clearly, allowing another single-family dwelling on the parcel would increase the residential use from one dwelling to two dwellings, thus expanding the extent of the nonconformity. However, increasing the square footage of the single dwelling does not increase the number of dwellings.

Again, an example may be helpful. A 2,000 square foot dwelling can constitute a single dwelling unit in the same way as a 1,000 square foot dwelling can constitute a single dwelling unit. In other words, the amount of square footage within the structure plays no role in defining the single-family dwelling land use. Under this analysis enlarging the square footage of the dwelling unit structure would not increase the nonconforming nature of the single-family dwelling land use. The same single-family dwelling land use would continue to exist, albeit in a larger structure.

While I did not find any Michigan case dealing with the enlargement of a single-family dwelling, the Michigan Court of Appeals in *Independence Township v Eghigian*, 161 Mich App 110, 115-116 (1987), used the same reasoning noted above when addressing the enlargement of a nonconforming use in the context of a commercial truck. The court stated:

Plaintiff also argues that, even if defendants' prior use is found to be lawful, defendants' purchase of a larger truck after the effective date of Ordinance 83 was an unlawful extension of the nonconforming use. Plaintiff points out that defendants' prior truck had three axles while the current truck has four axles and that the prior truck weighed 17,000 pounds with a weight capacity of 48,000 pounds while the current truck weighs 27,000 pounds with a 57,000-pound capacity.

MCL 125.286(2); MSA 5.2963(16)(2) provides in pertinent part:

The township board shall provide in a zoning ordinance for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon reasonable terms set forth in the zoning ordinance. In establishing terms for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses different classes of nonconforming uses may be established in the ordinance with different requirements applicable to each class.

In *Norton Shores v Carr*, 81 Mich App 715, 720; 265 NW2d 802 (1978), lv den 403 Mich 812 (1978), this Court stated:

"It is the law of Michigan that the continuation of a nonconforming use must be substantially of the same size and same essential nature as the use at the time of passage of a valid zoning ordinance." *Dearden v Detroit*, 70 Mich App 163, 169; 245 NW2d 700 (1976), *Township of White Lake v Lustig*, 10 Mich App 665, 674; 160 NW2d 353 (1968).

In *Long Island Court Home Owners Ass'n v Methner*, 74 Mich App 383, 387; 254 NW2d 57 (1977), this Court stated:

"A 'nonconforming use' comprehends the physical characteristics, dimensions, or location of a structure as well as the functional use thereof or of the premises on which it is located" (Footnotes omitted.) 82 Am Jur 2d, Zoning and Planning, § 178, p 685.

In the instant case, while the defendants' present truck has one more axle and weighs more, **it is substantially the same size as the former truck and serves the same purpose. Thus, we agree with the trial court that no unlawful extension occurred.** (Emphasis added.)

Therefore, in the event you receive an application to enlarge the single-family dwelling structure, that enlargement can be granted, provided the addition meets all required setbacks and that the addition is no more than 16 feet in height.

I realize that the information contained in this memo is complex. As a result, if there are questions, please do not hesitate to call me.

BEG

cc: Kathleen McNamara, Supervisor (via email)
Bob Tidmore, Planning Commission Chair (via email)