

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MANISTEE

J. ANDREW COOK and BARBARA COOK

Appellant,

Case No: 21-17456-AV

Hon. David A. Thompson

v

ONEKAMA TOWNSHIP,

Appellee,

v

CATHERINE BRADFORD,

Intervening Appellee.

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PROOF OF SERVICE

I hereby certify that on the date below, I served via first class mail, **INTRERVENING APPELLEE'S SSUPPLIEMENT IN SUPPORT of Motion to Intervene in Opposition to**

Entry of Consent Judgement with w/ Proof of Service, to Appellant and Appellee, through their attorneys at the addresses listed in the caption of this case.

I declare that the above statement is true to the best of my information, knowledge, and belief.

March 4, 2022


Armin Schleiffarth

STATE OF MICHIGAN

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J. ANDREW COOK and BARBARA
COOK,

Case No: 21-17456-AV

Appellant,

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ONEKAMA TOWNSHIP,

Appellee,

**SUPPLEMENTAL BRIEF IN SUPPORT
OF MOTION TO INTERVENE AND IN
OPPOSITION TO ENTRY OF
CONSENT JUDGMENT**

v

CATHERINE BRADFORD
Intervening Appellee.

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**SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO INTERVENE AND IN
OPPOSITION TO ENTRY OF CONSENT JUDGMENT**

INTRODUCTION

Proposed Intervening Appellee, Catherine Bradford, hereby submits this Supplemental Brief in Support of Motion to Intervene and in Opposition to entry of a proposed Consent Judgment

agreement reached between the Appellants, Andrew and Barbara Cook and Appellee, Onekama Township Board of Trustees.

On March 17, 2022, the Onekama Township Board of Trustees approved a Consent Judgment agreement reached with Appellants. (See attached proposed Consent Judgment - *published on the township's website* - **Exhibit 1**). This agreed-upon Consent Judgment, if approved by the Court, will dispose of the Appeal and allow the Cooks to build a large structure on the lot next to Mrs. Bradford's private beach as well as a septic field on Platted Avenue A – which is also adjacent to Mrs. Bradford's property. Approval of the Consent Judgment by this Court would nullify the ZBA decision denying the Cook's variance request to build next to Mrs. Bradford. The proposed Consent Judgment is further evidence that Onekama Township does not adequately represent Mrs. Bradford's interests and that she is an "aggrieved party" with standing to intervene in this appeal. Additionally, this brief includes Mrs. Bradford's arguments in opposition to entry of the proposed Consent Judgment in the event it is submitted to the Court prior to the Hearing on her Motion to Intervene.

ARGUMENT

Catherine Bradford filed her Motion to Intervene in this Appeal because she would suffer substantial and unique harm if the ZBA decision is overturned by the Court (See Motion to Intervene with Brief in Support). The ZBA's denial of the Appellants' variance request was favorable to Mrs. Bradford who owns a private beach next to the Cooks' proposed building site and upon which the Cooks' have numerous encroachments. Mrs. Bradford clearly has an interest related to the subject property as an aggrieved party, due to the Cooks' physical encroachments on her land, the close proximity of the proposed development to her quiet beach, and the expected decrease in her property value if the ZBA decision is overturned. She would suffer special

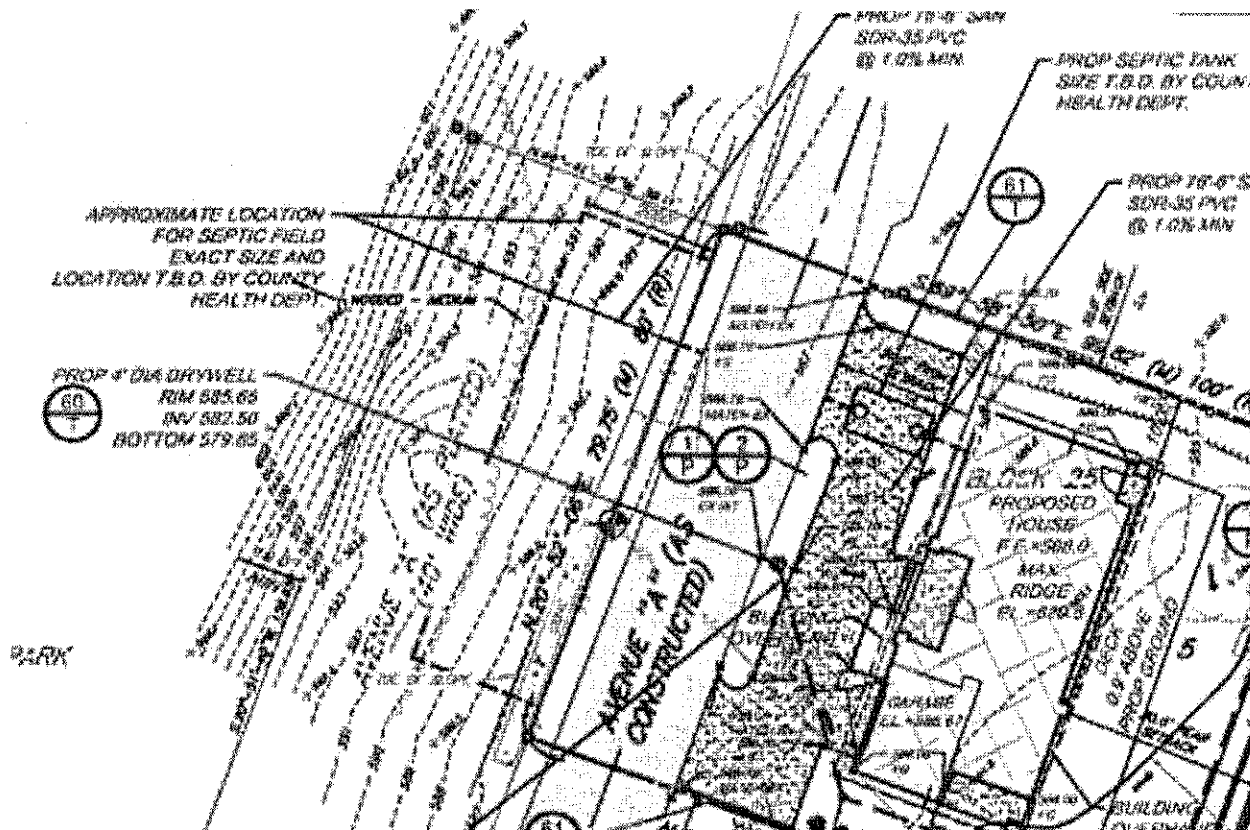
damages different than that of the general public due to the proposed physical use of her property (due to the encroachments) as part of the Cooks' development. *Olsen v Chikaming*, 325 Mich App 170 (2018). Even though the proposed Consent Judgment includes language that the berm along the sea wall be built within the Cooks' boundary lines, it does not change the impact on Mrs. Bradford's property interest. Encroachments onto one's property become magnified when the encroaching property owner significantly intensifies the use of their property – such as going from a beach access lot to a large 35-foot structure and approximately 2,000 square foot septic field. Mrs. Bradford's property *de facto* becomes a part of the new development regardless of the language used in a Consent Judgment. This is especially true with the Consent Judgment's Site Plan that depicts the septic field being built on platted Avenue A – which is directly adjacent to Mrs. Bradford's cottage property and on a road in which she has an interest. Disposition of the matter without Mrs. Bradford's involvement will impair or impede her ability to protect her property rights, and the Township Board is clearly not adequately representing her property rights, given the proposed Consent Judgment. The Cooks and the Township want this Court to enter a consent judgment that would nullify the ZBA decision and allow the Cooks to build a large structure on the beachfront lot AND expand the Cooks' proposed residential construction to include a septic field on Platted Avenue A – which is adjacent to Mrs. Bradford's cottage property and which she maintains and landscapes as part of her front yard.

A. The Court Should Not enter a Consent Judgment that includes a Site Plan for a Septic Field on a Platted Road that has not been Vacated or Abandoned.

The Consent Judgment states in pertinent part:

Appellees Land Use Permit and Appellant's construction of the Structure on the Property shall be in accordance with the Grading Plan and Residential Site Plan by Spicer Group dated February 22, 2022, attached hereto as Exhibit B (the "Site Plan") and the Structure shall be located where indicated on the Site Plan....(Page 2-3, proposed Consent Judgment, Ex B to Consent Judgment).

The Site Plan attached as Exhibit B to the Consent Judgment specifically depicts a septic field on Platted Avenue A. (See detail of Ex B, Septic Field, below).



Importantly, the Cooks did not include the proposed septic field as part of their Site Plan for the August 18, 2021 ZBA hearing. This is likely due to the fact that the ZBA indicated it would reject a site plan that included a structure on platted Avenue A – because the Cooks do not own the property. This hasn't changed – the Cooks do not own the property of their proposed septic field on platted Avenue A. That portion of the road has not been vacated nor abandoned. In fact, the lot owners in the plat have rights in the platted road, including Mrs. Bradford who owns property adjacent to the proposed location of the septic field, and considers the property a part of her front yard.

During the township subcommittee meetings on the proposed settlement agreements, the plan for a septic field on platted Avenue A was never presented as a part of any agreement nor was it presented as a discussion point for any of the public hearings. The last public hearing on the settlement negotiations was on February 9, 2022 and the final “Site Plan – Exhibit B” was approved as part of the Consent Judgment by the Township Board on March 17, 2022. Now, not only does the proposed Consent Judgment include a large structure (2 ½ story, 4 bedroom - 3 bath house) next to Mrs. Bradford’s private beach, it also includes a septic field which per Health Department regulations, must be 900 square feet with an additional 900 square feet reserve drain field, with a minimum 10 feet between fields for a 4-bedroom, 3-bath residence (approx. 2,060 square feet). (See attached **Exhibit 2**, C. Grobbel Report, attached as Exhibit G to Attorney Kristyn Houle’s Public Comment for August 18, 2021 ZBA Hearing). Further, this proposed septic field is directly adjacent to Mrs. Bradford’s cottage and comprises a part of her front yard that she maintains and landscapes, directly impacting her unique property rights.

Most importantly, the Cooks and the township are asking this Court to enter a Consent Judgment that essentially vacates a portion of Platted Avenue A without going through the Land Division Act. MCL 560.104. Even though platted Avenue A is not currently an improved roadway, lot owners in the plat continue to have property interests in the platted road, including Mrs. Bradford. The proposed septic field as depicted on Exhibit B is located on a platted road that has never been vacated by a Court and has not been abandoned by the Manistee County Road Commission. Even if, *arguendo*, the Road Commission abandons that section of platted Avenue A, the lot owners in the plat of Portage Point continue to have private rights in platted Avenue A. [See, *Rindone v Corey Community Church*, 335 Mich 311, 317 (1952), “A grantee of property in a platted subdivision acquires a private right entitling him to the use of the streets and ways laid

down on the plat regardless of whether there was a sufficient dedication and acceptance to create public rights.”Kirchen v Remenga, 291 Mich 94 (1939), “The purchaser of a property recorded in a plat receives both the interest described in the deed and the rights indicated in the plat.” Nelson v Roscommon Co Rd Comm, 117 Mich App 125, 132 (1982), “It is well-established that a purchaser of property in a recorded plat receives not only the interest described in the deed but also whatever rights are indicated in the plat.”]

The Cooks may argue that platted Avenue A is not improved and that they may obtain a license from the Road Commission to install the septic field. However, that does not change the fact that Mrs. Bradford as a lot owner in the plat has an interest in the road and also has an arguably superior interest in the area due to her decades-long maintenance of the area as part of her front yard. She has not given permission to build on the property, nor has any other lot owner in the plat. Further, a septic field would prevent potential future use of the property as an improved road because vehicles are not permitted to drive over a septic field. If the Court enters the Consent Judgment allowing the septic field it essentially grants a substantive property right to the Cooks on property the Cooks do not exclusively own in violation of the Land Division Act. The fact that the Township Board has agreed to the Consent Judgment clearly demonstrates that it is not adequately representing Mrs. Bradford’s interests, and is further evidence that she should be granted intervention in the Appeal. *D’Agostini v Roseville*, 396 Mich 185; 240 NW2d 252 (1976).

B. If Mrs. Bradford is Granted Intervention in this Appeal, the Court Should Not Enter a Consent Judgment Without Her Agreement.

MCL125.3606 gives the Circuit Court jurisdiction to hear appeals from a ZBA decision and the Court is limited in its review to the record on appeal. The court should not sit as “a super zoning board” and is not free to receive further evidence not heard by the ZBA. *Abrahamson v Wendell*, 256 NW 2d 613 (1977).

Unless all parties to the Appeal agree, the Court is not permitted to enter a Consent Judgment. If Mrs. Bradford is granted intervention and the Township and Cooks submit a Consent Judgment for approval without her agreement, they are essentially asking the Court to act as a super zoning board and to consider additional evidence (in the form of a new site plan) and to decide that the terms of the proposed Consent Judgment are reasonable and should replace the ZBA decision, despite opposition by Mrs. Bradford. This is contrary to Michigan law as it applies to the scope of review by a circuit court of a ZBA decision. [See *Abrahamson, supra, trial court is not to consider evidence not heard by board; Christine Bldg. Co. v City of Troy*, 116 NW2d 816 (1962), *Circuit court did not have authority, under the record, to pass on reasonableness of placing plaintiff's property in a certain category under the zoning ordinance; Muffeny v City of Southfield*, 148 NW 2d 235 (1967), *Court of Appeals does not sit as super zoning board and determine the desirability and need of commercial facilities on tract zoned residential.*]

Michigan case law dictates that once intervention is granted in an appeal of a ZBA decision, “a valid consent judgment requires the consent of **all** parties.” *Commodities Export Co. v City of Detroit*, 103 Mich App 205 (1981)(**emphasis added**). This makes sense since an intervening neighbor often has more at stake in the appeal than the Township – which is true in the case at bar. In a well-reasoned opinion and based upon substantial evidence on the record, the ZBA denied the Cooks’ variance request. Now, it appears the Township and the Cooks want this Court to decide on the reasonableness of a proposed consent judgment that fails to include all parties - asking the court to consider new evidence and replace the ZBA decision with its own. Unless *all* parties consent, it is not permitted under *Commodities Export Co. v City of Detroit*, 103 Mich App 205 (1981).

CONCLUSION

For the reasons stated above, and because Mrs. Bradford has filed a timely motion to intervene, has demonstrated that the Township will not adequately represent her interests and that she will be bound by the Court's decision, she should be granted intervention as a matter of right under MCR 2.209(A)(3). Alternatively, because the questions of fact and law that Mrs. Bradford is concerned with are the same as those presented in the Claim of Appeal, Mrs. Bradford has met the requirements under MCR 2.209(B)(2) and permissive intervention should be granted.

Finally, the Court is limited in its power to decide this appeal. If all parties agreed to a proposed Consent Judgment, the Court could enter it if the Court feels it is proper to do so. If the intervening party objects to the entry of the proposed Consent Judgment, the Consent Judgment cannot be entered regardless of its "reasonableness." (MCL 125.3606, *Commodities Exchange, supra*).

For the reasons stated above, and those outlined in her Motion to Intervene and Brief in Support, Mrs. Bradford requests that this Court grant her motion to intervene and that this Court decline to enter the proposed Consent Judgment and any other relief as justice so requires.

Respectfully submitted,

March 23, 2022

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