

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MANISTEE

J. ANDREW COOK and BARBARA
COOK,

Appellant,

v

ONEKAMA TOWNSHIP,
Appellee,

v

CATHERINE BRADFORD
Intervening Appellee.

Case No: 21-17456-AV
Hon. David A. Thompson

Richard Wilson (P29717)
Bradley A. Fowler (P74499)
Curtis L. Underwood (P83125)
Mika Meyers, PLC
Attorneys for Appellants
900 Monroe Avenue NW
Grand Rapids, MI 49503
(616) 632-8000

Thomas A. Grier (P45296)
The Running Wise Law Firm
Attorneys for Appellee
1501 Cass St., Ste. D/P.O. Box 686
Traverse City, MI 49685-0686
(231) 946-2700

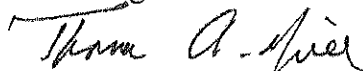
Armin Schleiffarth (P81763)
Armin Schleiffarth PC
Attorney for Intervening Appellees
4895 Main Street, Suite G
Onkama, MI 49675
(269) 921-0591

**ONEKAMA TOWNSHIP'S RESPONSE TO CATHERINE BRADFORD'S
MOTION TO INTERVENE**

Onkama Township responds to Catherine Bradford's Motion to Intervene based upon the reasoning in Onkama Township's Brief in Support of its Response which Brief is incorporated by reference into this Response.

Dated: March 23, 2022

Respectfully submitted,
The Running Wise Law Firm



Thomas A. Grier, Attorney for
Appellees Onkama Township

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.

Richard Wilson (P29717)
Bradley A. Fowler (P74499)
Curtis L. Underwood (P83125)
Mika Meyers, PLC
Attorneys for Appellants
900 Monroe Avenue NW
Grand Rapids, MI 49503
(616) 632-8000

Thomas A. Grier (P45296)
The Running Wise Law Firm
Attorneys for Appellee
1501 Cass St., Ste. D/P.O. Box 686
Traverse City, MI 49685-0686
(231) 946-2700

Armin Schleiffarth (P81763)
Armin Schleiffarth PC
Attorney for Intervening Appellees
4895 Main Street, Suite G
Onekama, MI 49675
(269) 921-0591

**ONEKAMA TOWNSHIP'S BRIEF IN SUPPORT OF ITS RESPONSE TO CATHERINE
BRADFORD'S MOTION TO INTERVENE**

Introduction and Summary

This matter began in May 2021 when the Onekama Township Zoning Board of Appeals ("ZBA") considered the Cook family's *first* request for 10 variances to build a home on their vacant lot on Portage Lake on Portage Point Drive ("PPD"). They proposed an 1,800 square-foot (60' by 30') home and a 32' x 24' detached (758 square foot) garage (2,568 square feet total).

The Cooks needed the variances because their platted Lot 5 consisted of just 8,000 square feet (100' deep by 80' wide), and the Township's Zoning Ordinance required 15,000 square-foot lot size minimums and a 100-foot width. The buildable area was made even smaller – about 6,000 square feet – because PPD (originally the platted “Avenue A”), as constructed, intruded well into the west side of the lot.

The Cooks' variance request for the 1,800 square-foot home (lakeward and east of PPD), and the 758 square-foot garage (west of PPD), drew strong neighborhood opposition at the ZBA's May 2021 hearing and the Cooks withdrew the request for the variances.

The Cooks' submitted a *second* design later that Summer that eliminated the 758-square foot detached garage west of PPD, and proposed a smaller (29'6" x 57' 9") 1,702 square-foot lakeside structure that included the garage on the first floor. This second design still required *five variances* and continued to draw neighborhood opposition. After a hearing in August 2021, the ZBA denied the Cooks' second request for variances.

In September 2021, the Cooks appealed the ZBA's denial of their second requests for variances to the Circuit Court, but thereafter, discussions began between the Township and the Cooks about trying to resolve the zoning conflict through a *settlement protocol* with the Township Board, which was now responsible for defending the appeal.

In early November 2021, the Cooks submitted a *third* design proposal (55' 6" x 27' 6") for a 1,529 square foot structure (that included the garage) and which also offered a 31' waterfront setback from Portage Lake as compared to the prior 20' setback of the second design. The waterfront setback was important for water quality issues. The third design required only *two variances*.

With the offer of the Cooks' third design, in December 2021, the Township Board established a Subcommittee to work with the Cooks toward a resolution. The Subcommittee conducted two public meetings in December, made adjustments to, and added environmental conditions to the Cooks' third design, and later recommended its approval to the Township Board, which scheduled a public hearing on the Cooks third design, on February 9, 2022.

Just prior to the public hearing, the Cooks submitted a *fourth* design, which at 56'7" x 25' 6") and 1,440 square feet was now *smaller and narrower* than the third design, and *substantially smaller* than either first 2,568 square foot design or the second 1,702 square-foot design, denied by the ZBA and subject to the Circuit Court appeal.

Because the fourth design incorporated the Subcommittee's environmental conditions and offered a smaller footprint than the third design, the Subcommittee recommended its approval and the Township Board, on March 17, 2022, approved a Consent Judgment, *incorporating the fourth design*. The Consent Judgment has been signed by the Township and the Cooks and has been submitted for entry to the Court.

At the February 9, 2022 public hearing, and at Township meetings since then, in March 2022, neighborhood opposition has continued against a home being built on the Cooks' lot. On or about March 3, 2022, a neighboring property owner Catherine Bradford, filed a Motion to Intervene in this case.

The Township is taking no position on whether Ms. Bradford has standing to intervene. And the Cooks may have their own position on that question.

What the Township does vigorously contest, however, would be any effort by Ms. Bradford to undue the settlement process that has led to the Consent Judgment. Ms. Bradford's Motion states or implies that she wants the Township to abandon that process and go back and defend the ZBA's

denial of the Cooks' second design proposal. Along this line, Ms. Bradford's Motion hopes this Court will (after *needless* attorney and Court effort), affirm the ZBA's denial of the Cooks second design and compel the Cooks to either appeal this Court's decision to the Court of Appeals, or force the Cooks to go back to the ZBA a third time. What her Motion ignores, moreover, is also the risk to the Township should this Court reverse the ZBA.

What should be clear is that such an outcome from Ms. Bradford's Motion *would be nonsensical and wasteful*. The Township and the Cooks have agreed upon a fourth design that is materially less intrusive than the second design. Ms. Bradford's Motion asks this Court to relitigate a *sterile* quest that could have *worse* implications than the settlement for *everyone* involved.

If Ms. Bradford is allowed to intervene, the focus should be on the particular terms and conditions of the Consent Judgment. Are they lawful and reasonable? And that could require a protocol where the Court sets a future hearing and a briefing schedule.

But should that occur, the Township is confident the terms of the Consent Judgment are lawful and reasonable. Catherine Bradford and other neighborhood opponents believe either 1) that *no house should be built* on the Cook property, or that it should be even *smaller* than the fourth design.

Neither claim is legally or factually sustainable. The Cooks' Lot 5 is a *legal non-conforming lot of record*. The Township's Zoning Ordinance, and general zoning law and practice, *allow* a single-family home on such a lot even where reasonable setback variances are required.

With respect to size, the Township's zoning requires at least 800 square feet of first floor living space for the Cooks' lot (not including the garage, porches, decks). The fourth design provides for about 980 – 1,000 square feet of living space, which the Township believes is a

reasonable adjustment given other homes along PPD and Portage Lake that have a *larger* footprint than the 1,440 square feet of the Cooks' fourth design.

In summary, while the Township takes no position on Ms. Bradford's standing to bring her Motion, the Township strongly challenges the objectives in her Motion and believes her intervention would ultimately be futile. Correlatively, the Township supports the process that led to the Consent Judgment, and the terms of the Consent Judgment, itself.

Background

A. The Cook Property

In 2005, J. Andrew and Barbara Cook ("Cooks") purchased Lot 5 of the Plat of Portage Point ("Plat") in Onekama Township ("Township") for \$330,000. By 2008, the Township valued the Cooks' vacant Lot 5 (or "property") at \$365,000. See property record cards, **Ex 1**. Lot 5 is a water-front parcel – on Portage Lake - that lies east of Portage Point Drive (or "PPD") just south of property owned by the historic Portage Point Inn. The Cook's Lot 5 is about 8,000 square feet in area (100 feet deep and about 80 feet wide) *as platted*. However, the Plat's "Avenue A" (now Portage Point Drive) was actually constructed *within* the Lot so that the Lot's workable depth (west to east) has been reduced to about 76 feet between the edge of the paved surface of Portage Point Drive and the shore of Portage Lake (where there is a seawall). The property remains 80-feet wide (north to south) pursuant to the original Plat. This is shown on the Thompson site plan drawing, **Ex 2**. This means that the workable area of Lot 5 is about 6,080 square feet. Ground level and aerial photos of the Cook property are attached as **Ex 3**. The property has remained vacant up until the current time and has otherwise been used for recreational access to Portage Lake by the Cooks since they purchased it.

Plans to Build a Single-family Home on Lot 5 and Zoning Requirements

In the Spring of 2021, the Cooks approached the Township about building a single -family home on their property. The Cooks' Lot 5 (like other properties located along the Portage Point Peninsula between Lake Michigan and Portage Lake) is located within the Township Zoning Ordinance's ("ZO") Resort Residential ("RR-3") zoning district. See Zoning Map, **Ex 4**.

There were zoning compliance challenges, at the outset, to build any home on the property. That is because Lot 5, even at its platted area of 8,000 square feet and 80-foot wide, did not meet the minimum lot area or lot width of the RR-3 district, respectively. Namely, ZO Section 4204 requires a minimum parcel size of 15,000 square feet also a 100-foot parcel width. See ZO Section 4204, **Ex 5**.

Because the Cook Parcel consists of Lot 5 of a recorded plat that pre-dated the Township's zoning ordinances, however, and because it has retained its own tax identification number –without being combined with other parcels or lots - the Cook Parcel consists of a Non-Conforming Parcel of Record and is subject to ZO Section 8003. D. of the Onkama Township Zoning Ordinance, which states:

If the non-conformance of the parcel is an unimproved "lot-of-record" which does not meet or exceed the required minimum square footage, a Land Use Permit may be issued providing the following conditions are met:

1. The proposed use is a permitted use in the land use district.
2. All required prerequisite permits, i.e. Health Department, County Road Commission, State Environment Department/EGLE, etc. have been obtained;
3. All setback requirements for the District can be met.

If not, a variance must be sought and granted by the Zoning Board of Appeals

See ZO Section 8003, **Ex 6**.

Setback Requirements

Despite the nonconformity of parcel size, ZO Section 8003. D. allows a land use permit for a single-family home (as a permitted use) provided the RR-3 and other *setbacks* can be obtained. If the setbacks cannot be obtained, a land use applicant can ask for one or more variances. The relevant setbacks for single-family structures in the RR-3 zoning district are as follows:

Front 25-foot setback (from the road ROW or property line).

Rear-25 feet

Side -10 feet.

Because the Lot has frontage on Portage Lake, ZO Section 1007 also requires a 40-foot *waterfront setback* from the water's edge for all structures, not including boat docks, stairs, decks, and patios. See **Ex 7**.¹

By application to the Cook property, this meant that their home had to be at least *40 feet from the shore* of Portage Lake per the waterfront setback, *10 feet from the side* lot boundaries north and south, and at least *25 feet from the rear lot line* (which became the west side of the property adjoining the road, i.e. Portage Point Drive). Moreover, where there is a road involved, the road-side setback (the rear of the Cook property) is taken from the right of way ("ROW") line, which in the case of PPD, goes 10 feet beyond the pavement into Cook property. This would reduce the workable depth of the Cook property from 76 feet to 66 feet. See **Ex 2**.

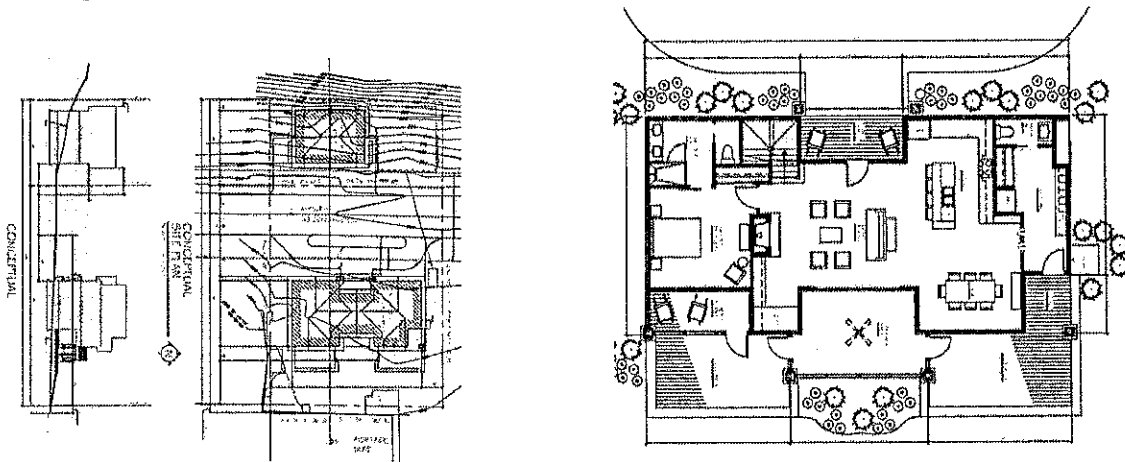
ZO Section 4204 requires that a home in the RR-3 district have a minimum floor area of 800 square feet with a minimum 20-foot width (exclusive of the garage, porches and breezeways).

¹ ZO Section 1028 further provides that no more than 35 percent of the property shall be covered by an *impervious* surface (structures, asphalt, etc.) where the property lies within 500 feet of Portage Lake. See **Ex 7**.

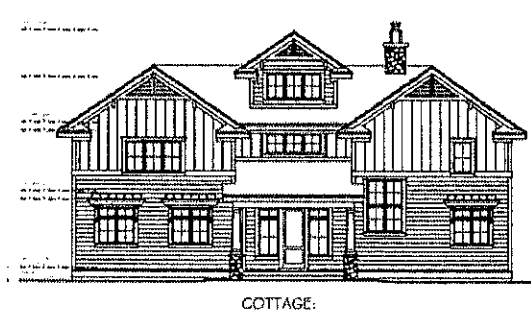
By application of the 25-foot rear setback from the PPD ROW and the 40-foot waterfront setback, within a 66-foot area, it is *impossible* to construct a home at least 20-feet wide and of 800 square feet of area on the Cook lot without setback variances.

Variance Request No. 1

In the Spring of 2021, the Cooks submitted their first request for a variance in order to build a home on Lot 5. See Affidavit of James R. Trout, Ex 8 and Zoning Administrator (“ZA”) Katie Mehl’s report, dated November 30, 2021, Ex 9. The Cook’s proposal under Variance No. 1 consisted of a home with an overall first-floor footprint of 60’ by 30’ or 1,800 square feet (with 1,609 square feet of actual first floor living space), and also included a large detached 24’ by 32” 768-square foot garage on the west side of Portage Point Drive (actually located within the platted location of the Plat’s original Avenue A)². The site plan and elevation of the Cooks’ Variance No. 1 design are inset below:



² The Cooks and the County Road Commission had proposed a license agreement whereby the Cooks would be able to construct the garage in the original platted location of Avenue A - given that Avenue A (now Portage Point Drive) had actually been constructed eastward into the interior of Lot 5.

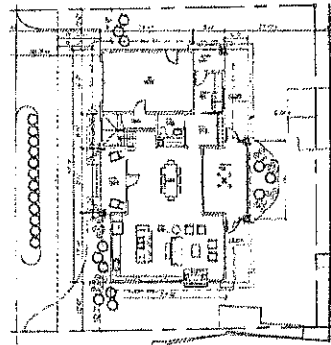
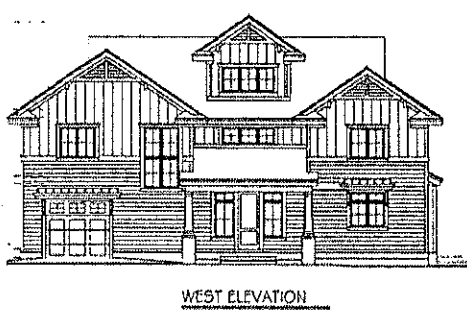


The Cooks Variance No. 1 called for a large home and garage on Lot 5 that required *10 variances* under the Township’s Zoning Ordinance. These variances included north/south side-yard setback variances for the home, a 20’ variance from the 40’ waterfront setback, substantial variances from the roadside setbacks for both the home and detached garage and others. There was also a variance needed from the 35 percent impervious surface requirement (for properties within 500 feet of Portage Lake) under ZO Section 1028: The home and garage would occupy 42 percent of the surface area. The dimensions of the Variance No. 1 home and garage proposal, and needed variances, were explained within ZA Katie Mehl’s report, **Ex 9**. Please see page 1 of the report.

Because of the size of both the home and garage, and traffic safety issues associated with the Cooks, Variance No.1, there was considerable opposition to it. Following a hearing in front of the Township Zoning Board of Appeals “ZBA”) on May 24, 2021, the Cooks voluntarily withdrew the Variance 1 application. A copy of the ZBA Minutes from May 24, 2021 are attached as **Ex 10**. Public correspondence opposing Variance No. 1 is included under **Ex 17**.

Variance Request No. 2

Following the withdrawal of Variance Request No. 1, the Cooks proposed a second design that now required *five variances*, as compared to the 10 variances requested in their prior proposal. One major distinction was the removal of the detached garage west of Portage Point Drive. The garage would now be integrated into the first floor of the proposed water- front home. A site plan and elevation of what became the Variance Request No. 2 is inset below:



The elevation drawing now shows the garage inserted into the north end of the structure's first floor. The Cooks' second proposal, nonetheless, still required five variances as explained in ZA Katie Mehl's report, Ex 9, page 5: 1) The home was still 20 feet from the edge of Portage Lake, requiring a 20-foot variance from the 40-foot waterfront setback, 2) the home was only 10 feet from the ROW of Portage Point Drive, although a 25-foot setback was required, 3) the home would be 8' 5" from the north lot line even though the side yard setback was 10 feet and 4) the home and garage contained 37 percent of impervious surface which was above the 35 percent limit.

From an overall mass standpoint, the second design was 32 feet wide at the north end of the structure and 29'6" wide at the south end with a length of 57' 9". Overall, it had a 1,702 square-foot footprint as compared to the 1,800 square-foot footprint of the first design.³ The 758- square foot detached garage west of PPD had also been eliminated.

On August 18, 2021, the ZBA denied the Cooks second request. The ZBA denied the variance request citing environmental concerns with the continuing 20-foot variance requested from the 40-foot waterfront setback. There were also continuing concerns about impervious surface coverage, and safety concerns related to vehicular and pedestrian traffic on Portage Point Drive. See Affidavit of Jim Trout, Ex 8 and the Minutes of the ZBA's August 18, 2021 hearing,

³ Note that the Township Zoning Ordinance measures floor area square footage of a principal structure exclusive of garages, breezeways, porches, patios and decks. For that reason, the actual living floor area will be less than the full size of the structure measured along the perimeter walls. For example, the Cooks' Request No. 1 included a 30' by 60' 1,800 square- foot structure based on its perimeter, but its living space was 1,609 square feet.

Ex 11. Public correspondence opposing the Cooks' second variance request is attached within Ex 17.

The Cooks Appeal the ZBA's Denial of Variance No. 2 to Circuit Court

On September 15, 2021, the Cooks appealed the ZBA's denial to the Manistee County Circuit.

The Cooks Offer a Third Design Prompting a Settlement Protocol

Subsequent to the Cooks appeal to Circuit Court, the Cooks approached the Township with a *third design*, dated November 10, 2021, which was smaller than the second design, under Variance Request No. 2, and that would require only two variances. See Mehl Report, Ex 9, pages 9 and 10.

The Cooks' submittal of this third design prompted discussion between the Township and the Cooks about working on a settlement in the context of the *consent judgment* process.⁴

The Cooks' Third Design

The Cooks third design has been referred to as **Submittal C** (or "SC"). For purposes of discussion, the Cooks first design (per Variance Request No.1) is referred to as **Submittal A** (or "SA"). The second design (per Variance Request No. 2) is referred to as **Submittal B** (or "SB").

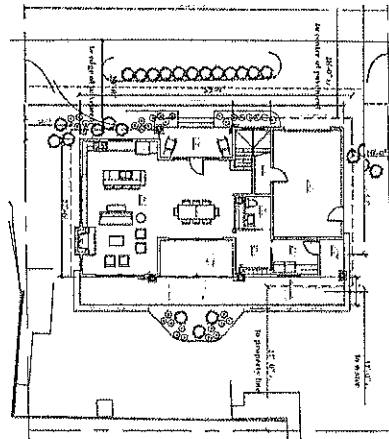
⁴ Under a consent judgment, the Township Board can resolve lawsuits, including appeals from a decision of the ZBA. The General Township Act at MCL 41.2(4) states:

(4) A suit, act, or proceeding, by or against a township, in its corporate capacity, shall be in the name of the township. The supervisor of each township shall be the agent for his or her township for the transaction of legal business, by whom a suit may be brought and defended, and upon whom process against the township shall be served. [Emphasis added]

The Michigan Zoning Enabling Act further grants the Township Board the authority to enter a consent judgment to resolve a zoning dispute. MCL 125.3202(5) states:

An amendment to conform a provision of the zoning ordinance to the decree of a court of competent jurisdiction as to any specific lands may be adopted by the legislative body and the notice of the adopted amendment published without referring the amendment to any other board or agency provided for under this act.

As compared to both Submittal A and Submittal B, Submittal C's home was narrower with a dimension of 27' 6" on the south side and 32 feet on the north side with a length of 55' 9". The footprint area had been reduced to about 1,529 square feet. By comparison, Submittal A's overall footprint was 2,568 square feet and Submittal B's footprint was 1,702 square feet. SC's site plan moved the dwelling further away from the edge of Portage Lake (31 feet as compared to 20 feet for SA and SB). This reduced the amount of the waterfront 40-foot variance from 20 feet to nine feet. The Cooks also offered, as a condition, a drainage system for the dwelling so that roof water, etc. is routed into a storage (French) drain to avoid run off into Portage Lake. The impervious surface had been reduced to 30 percent and was now compliant with the ZO Section 1028 limiting the impervious surface to no more than 35 percent. The **Submittal C** site plan is inset below. See larger drawing of SC within ZA Mehl's report, **Ex 9**, pages 9 -10. See Jim Trout Affidavit, **Ex 8**.



Township Board Subcommittee to consider the Cooks' Submittal C

After the Cooks proposed Submittal C, the Township Board, at its regular meeting on December 8, 2021, created a Subcommittee for the purposes of considering the Cooks' SC. The Subcommittee consisted of the Township Clerk Shelli Johnson, Township Trustee Al Taylor, the Township's Zoning Administrator Katie Mehl and the ZBA Chair Jim Trout. ZBA Chair Jim Trout

acted as the Chair of the Subcommittee. The first Subcommittee meeting to review the Cooks Submittal C occurred on December 14, 2021, the second meeting occurred on December 27, 2021, and the third meeting occurred on March 4, 2022. The Subcommittee meetings were open to the public and were generally attended by attorney Richard Wilson, representing the Cooks and attorney Kristyn Houle representing neighboring property owners, along PPD, opposed to the Cooks proposed home design, along with other members of the public. See Affidavit of Jim Trout, **Ex 8**.⁵

The Township Board Scheduled a Public Hearing on the Subcommittee's Draft 9

At its regular meeting on January 12, 2022, the Township Board scheduled a public hearing on the Subcommittee's Draft 9 for the Board's next regular meeting on February 9, 2022. See Board Minutes **Ex 14**. Under the ZEA, there is no requirement for a public hearing for a consent judgment under MCL 125.3202 (5). There is only a requirement that the Township publish notice of its adoption. Nonetheless, the Township Board scheduled the public hearing and provided for

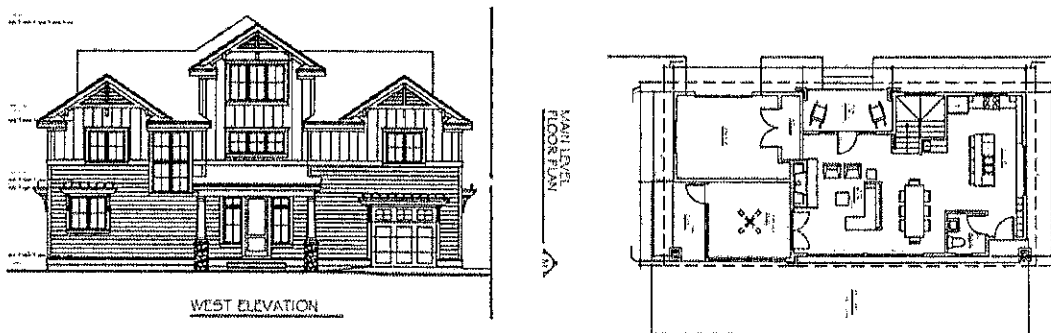
⁵ Subcommittee Chair Jim Trout noted that the Subcommittee's concerns, reflective of those of the ZBA, and of the public opposed to the home, were environmental / water protection from runoff, insufficient setbacks, parcel coverage by impervious surfaces, and threats to public safety due to the proximity to of the Cook's proposed home to PPD due to a greatly lessened rear (road-side) setback. **Id.**

Jim Trout explained that the Subcommittee aimed to address these concerns through 1) the installation of a berm on the waterfront side of the Cook property to prevent direct runoff into the waters of Portage Lake, 2) the installation of a French drain system to route runoff from the surfaces of the home, controlled by gutters, into a buried cistern, 3) all exterior ground surfaces would be constructed of permeable materials, 4) the garage was to be located to the *south* of the structure, to improve traffic site lines and traffic safety given the close confines of the surface of PPD to the home, 5) to maximize traffic site lines, all trees along PD were to be removed, 6) the water front setback was moved to be at least 30 feet from the edge of Portage Lake (coincident with the edge of the seawall), the side yard setbacks were to conform with the required 10- foot setbacks on the north and south sides of the property, and there were to be plant screenings on the neighboring property boundaries. See Jim Trout Affidavit, **Ex 8**. These requirements were ultimately incorporated into what the Subcommittee identified as the **Draft 9** proposal, **Ex 13**, which was approved at the December 27, 2021 Subcommittee meeting. Essentially, with the inclusion of items 1-9 (above) to what the Cooks proposed in site plan "C", Subcommittee members believed a reasonable compromise was reached and voted unanimously to accept the Cooks' SC (with additions) for recommendation, or Draft 9, to the Onekama Township Board. See **Ex 8** and **Ex 13**.

published and website 15-day notice of the hearing under the protocol at MCL 125.3103. The Township's published notice and documents on the website are attached as **Ex 15**.

The Cooks Submit a Fourth Proposal - Submittal D - Prior to the Public Hearing

Prior to the public hearing, the Cooks submitted a fourth proposal which was identified as **Submittal D**. See **Ex 16**. A ground floor plan and a west elevation, with a revised date of February 7, 2022 are inset below for the Cooks Submittal D:

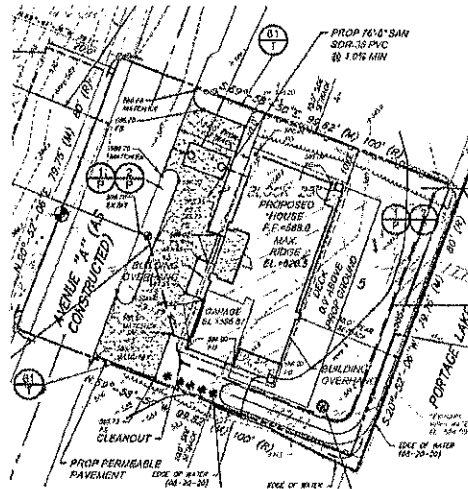


Submittal D now called for a *smaller and narrower home* than Submittal C. SD's footprint was now 1,440 square feet (56'7" x 25' 6") as opposed to SC's 1,529 square feet. SC included a 960 square-foot living area and a 345 square-foot garage (1,304 total sq ft). Submittal D's first floor living area was now 982 square feet and the garage was 235 square feet (1,217 total sq ft). A complete set of the Submittal D drawings is attached as **Ex 16**.

The Township Conducts the Public Hearing

Submittal D was the subject of public comment and Township Board consideration at the February 9, 2022 public hearing. The Minutes of the February 9, 2022 public hearing are attached as **Ex 17**. Public correspondence is also attached as **Ex 17**. At the conclusion of the public hearing, the Township Board referred the Cooks' SD back to the Subcommittee because the Subcommittee had previously considered the Cooks' SC, and not the Cooks' SD. The Cooks had also not yet prepared a formal survey for the whole property.

The Cooks later submitted a formal survey, dated February 22, 2022, prepared by licensed surveyor Pat Bentley, **Ex 18**. The survey did incorporate the various setbacks (waterfront, roadside and side yard) and the environmental features such as the waterfront berm and the French drain, required by the Subcommittee. **Id.** Part of the surveyed site plan is inset below:



The Township Board Approved a Consent Judgment Reflective of the Cooks’ Submittal D.

The Cooks - Submittal D – now consisting of both February 7, 2022 floor plan and elevations, and the February 22, 2022 Pat Bentley survey, were considered by, and recommended for approval (to the Township Board), by the Subcommittee at a meeting on March 4, 2022. See Jim Trout Affidavit, **Ex 8**. Thereafter, counsel for the Township and the Cooks drafted a formal Consent Judgment that incorporated SD and the prior terms of the Subcommittee’s Draft 9. The Township Board considered an initial draft of the Consent Judgment at its regular meeting on March 9, 2022, tabled a decision for a week to give the public an opportunity to review the draft Consent Judgment, and approved a final version at a meeting on March 17, 2022. The approved Consent Judgment is attached as **Ex 19**. See **Ex 8**.

Motion for Intervention

On or about March 3, 2022, Catherine Bradford, a neighbor who owns property south and

west of the Cooks' property filed a motion to intervene in the pending case under MCR 2.209.

The Township takes no position on whether or not Ms. Bradford has standing as an aggrieved party in this case, and the Cooks, in their response, have cited case law and argument on that question.

Intervenors Have no Authority to Upend a Settlement Process

What the Township will emphatically argue, however, is that, in the event Ms. Bradford is allowed to intervene, she should not be allowed to undue the foregoing settlement process that led to the Consent Judgment. This was discussed at some length in the Introduction and Summary.⁶

The Consent Judgment is Otherwise Lawful

Based upon the foregoing argument, if Ms. Bradford is allowed to intervene, she cannot force the Township and Cooks to re-litigate the appeal of the ZBA's denial of the Cooks' SB, but she would, instead, have to challenge the *terms and conditions* of the signed Consent Judgment.⁷

⁶ Through the settlement process, *the Cooks abandoned Submittal B and have offered Submittal D, instead*. By comparison, SD is now a *smaller* 1,440 square-foot structure as compared with SB's 1,702 square feet. SD, at about 25' 6" wide, is *narrower* than SB's 32' width at one end and 29' 6" at the other end. SD's impervious surface is now less than 30 percent, and compliant with ZO's 35 percent maximum. SB had a *larger* impervious surface at 37 percent. SD has a berm at the waterfront, a French Drain and gutter system, all intended to protect water quality. SB has none of those features. See ZA Mehl's report, Ex 9 and Subcommittee Chair Jim Trout's Affidavit, Ex 8.

City of Ferndale School District v Royal Oak Township School District No 8, 293 Mich 1, 11 (1940) emphasized that an intervenor should not be able to interrupt a settlement process and enters a case in its current posture:

Practically all the statutes upon the subject and all rulings of the court where not controlled by statute are to the effect that the intervenor must be diligent and not guilty of any unreasonable laches after knowledge of the suit, that he has no right to delay the original parties nor retard their trial, nor render nugatory any trial which has already begun, though it has not resulted in a judgment or other decision;

⁷ The Court's review of the Consent Judgment's terms should reflect the following standard: Recall that the ZEA, at MCL 125.3205 (5) permits the resolution of zoning disputes by consent judgment. Correlatively, the Township Board's authority to set the terms of the consent judgment should parallel the authority of the Township's ZBA to make the same decision in a variance decision. On appeal the ZBA's decision would be subject to MCR 7.122 (G) 1) which requires application of the standard under MCL 125.3606 set forth below:

- (1) Any party aggrieved by a decision of the zoning board of appeals may appeal to the circuit court for the county in which the property is located. The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:
 - (a) Complies with the constitution and laws of the state.

Permitting a Home on the Cooks' Nonconforming Lot 5 is Lawful

One argument against the Consent Judgment is that it should not have granted the Cooks the right to build *any* home, and to do so is unlawful. That argument is not tenable. The Cooks paid \$330,000 for Lot 5, an existing vacant platted lot of record, in 2005. The property record card in 2006 (the first tax year after the Cooks purchased Lot 5 in 2005) noted Lot 5 was a "Buildable Lot". See excerpt from the card, **Ex 1** below:

1998 Value Estimates for Local Table 1100.F-FORTAGE LAPE-AVERAGE

		* Factors *					
Lot	Frontage	Depth	Front	Depth	Rate	App. Portion	Value
EXCELLENT	80.00	6.00	1,0000	1,0000	3120	117	BUILDABLE LOT 325,100
* Actual Front Feet		6.00	Total Acres		Total Est. Land Value		325,100

ZO Section 8003 D., **Ex 6**, allows a land use permit for homes on lots of record, even though they are nonconforming, and allows for setback variances.⁸

(b) Is based upon proper procedure.

(c) Is supported by competent, material, and substantial evidence on the record.

(d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals.

Edw. C. Levy Co. v. Marine City Zoning Bd. of Appeals, 293 Mich.App. 333, 340 -341 (2011) explained the standard of review under MCL 125.3606 (1). The standard provides that there should be *deference* to the underlying body's determinations where there is substantial evidence in the record.

⁸ One Michigan case dealing with non-conforming lots was *Johnson v Robinson Township*, 420 Mich 115 (1984). That case did deny a property owner the right to build a home on a nonconforming lot, but the facts were distinguishable from the facts with the Cooks. In *Johnson*, a family had divided a larger parcel into three smaller parcels after the township's zoning ordinance required 100-foot minimum lot sizes. The court held that the family self-created their smaller lots and upheld a denial of permission to build a home on a substandard lot. That is not true with respect to the Cooks' Lot 5. It has always been a single platted lot that predated the ZO's adoption.

A 1995 Pennsylvania case, *Ruddy v. Lower Southhampton Township Zoning Hearing Board* (669 A.2d 1051), while not binding on a Michigan court, is nonetheless instructive. The facts in *Ruddy* are similar to the Cooks' Lot 5. Namely, in *Ruddy*, the variance applicants' property was a single lot of record lawfully created. The *Ruddy* parcel was 9,000 square feet and an ordinance change increased the minimum parcel size to 12,000 square feet requiring a lot area variance as well as setback variances to build a home there. The appellate court in *Ruddy* ruled that the property should be entitled to the area and setback variances to build a home, as otherwise there was no reasonable use of the property and emphasized that the property "was held in single and separate ownership prior to the adoption of the township's ordinance". By analogy, the Cooks' Lot 5 was lawful when platted and the Cooks have owned Lot 5 under single and separate ownership (i.e. the Cooks did not separate Lot 5 from another larger parcel). See **Ex 20**.

The Township's procedural treatment of the Consent Judgment process was correct.⁹

The Size of the Cooks' Home (Under SD) was Supported by Substantial Evidence

The other aspects of the Consent Judgment's SD design - are otherwise reasonable and supported by substantial evidence. And it is not injurious to Ms. Bradfords' property.

Note that the two variances granted by the Consent Judgment are the setbacks from Portage Point Drive and the waterfront. The *standard 10-foot side-yard setbacks remain* in place. There should be no direct impact on the Bradford property to the south. See the Pat Bentley survey, **Ex 18** and the Consent Judgment (integrating the conditions of the Subcommittee's "Draft 9"), **Ex 19** and **Ex 13**.

The size of the structure's first floor has been reduced from over 2,500 square feet under SA (**Ex 9**, page 1) and to just over 1,400 square feet under SD (**Ex 16**). SD's actual first floor living area is under 1,000 square feet as compared to the 800-square foot minimum of ZO Section 4204. SD's dwelling width is about 25 feet as compared to the minimum 20-foot width required. See **Ex 5** and **Ex 16**.

ZA Mehl's report, **Ex 9**, page 14 identified eight other properties with single family homes east of PPD. SD provides for a 1,440 square foot footprint. Four of the homes on those properties had a first- floor footprint *greater than 2,000 square feet*. These were 2,652 sq ft, 2,638 sq ft, 2,166 sq ft and 2,546 sq ft, respectively. **Id.**

Note that the *Ruddy* decision was discussed in Rathkopf's [The Law of Zoning and Planning](#) which is frequently cited for guidance by Michigan courts. See *Great Lakes Society v. Georgetown Township*, 281 Mich App 396, 761 NW2d 371, 382 (2008)

In short, based on the facts in Cook and akin to *Ruddy*, it would be *unlawful* to prohibit the Cooks from building a home on their Lot 5.

⁹ Procedurally, there are no notice or hearing procedures for a consent judgment other than post-adoption publication under MCL 125.3205(5). Nonetheless, the Township provided several Subcommittee meetings (open to the public) to review the settlement terms (where counsel on both sides was present) and noticed the settlement for a public hearing before the Township Board under the ZEA notice procedures of MCL 125.3103. See **Ex 8**, **Ex 14**, **Ex 15** and **Ex 17**.

The Cooks' SD does provide for a 2 and ½ story home, Ex 16, but Subcommittee Chair Jim Trout explained that ZO Section 1008 *allows* single family structures up to 2 and ½ stories and 35 feet high, Ex 7, and the Subcommittee believed it inappropriate to restrict the number of stories once the first-floor size and setbacks were determined, but notably SD's design did require the second floor to be *plum with* (and not to extend beyond) first-floor footprint. See Jim Trout Affidavit, Ex 8, paragraph 41. See Consent Judgment, Ex 19.

With respect to SD's impact on Ms. Bradford's view (or other neighbors') view of Portage Lake, note ZO Section 1007 B. which states: "Nothing in this Ordinance is intended to protect the view shed of any back parcel". Ex 7. This provision is also consistent with law that states that aesthetic interests alone are generally not sufficient to show a neighboring property has suffered special damages. *Olsen v Chikaming Township*, 325 MichApp 170, 183, 186 (2018).¹⁰

Conclusion

While the Township takes no position on Ms. Bradford's standing to bring her Motion, the Township strongly challenges the objectives in her Motion and believes her intervention would ultimately *be futile* for the reasons discussed. Correlatively, the Township supports the process that led to the Consent Judgment, and the terms of the Consent Judgment, itself.

Respectfully submitted,
The Running Wise Law Firm



Thomas A. Grier, Attorney for
Appellees Onekama Township

Dated: March 23, 2022

¹⁰ If property owners along Portage Point Drive desire to preserve certain viewsheds, there are private tools available such as restrictive covenants or conservation easements.